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Competition Enforcement and Regulatory Alternatives – Note by India

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India

1. Introduction

1. The extant regulatory architecture in India came into being post liberalization of the Indian economy with markets assuming centrality in the new economic order. As markets replaced licensing as the instrument of resource allocation, independent regulatory agencies were created as parts of an institutional framework to prevent/ address 'market failures'. Economic regulation in India is thus viewed as an instrument of liberalization, whereby independent regulatory bodies are entrusted with the statutory mandate of sectoral governance in sectors perceived to be at greater risk of market failures such as telecommunications, electricity, oil & gas, insurance etc.

2. Unlike many countries, where the setting up independent regulators preceded the opening up of the market, in India, there was a reversal of sequence and independent statutory regulators came into being later. One of the principal reasons was that coming out of a command-and- control economy, attracting the private sector required a way for the state to credibly pre-commit to not behaving in a capricious way once the private entry has been made. The creation of independent regulatory institutions was a way for the state to credibly address the commitment problem.

3. To protect consumers and create conditions for orderly growth of the sector, sector regulators are typically responsible for laying down entry conditions, regulation of tariffs, terms of service, etc. In alignment with the larger policy direction of opening markets to competition, one common legislative mandate of the regulatory authorities in India has also been to promote competition and efficiency. For instance, The Telecom Regulatory Authority of India Act, 1997 provides for Telecom Regulatory Authority of India (TRAI) to, *inter alia*, 'facilitate competition and promote efficiency'. The Petroleum and Natural Gas Regulatory Board Act, 2006 provides for the oil and gas regulator to protect the interest of consumers by 'fostering fair trade and competition'. The Electricity Act, 2003 also mandates the electricity regulatory commissions to ensure that competition is maintained in the markets.

4. The Competition Commission of India (CCI) was created with the overarching, economy-wide and sector-agnostic mandate of promoting and sustaining competition in markets in India. The objectives of the competition law in India, viz. the Competition Act, 2002 (the Act), as enshrined in the Preamble to the Act, are (a) to prevent practices having adverse effect on competition; (b) to promote and sustain competition in markets; (c) to protect the interests of consumers; and (d) to ensure freedom of trade. Section 18 of the Competition Act, 2002 states that "*it shall be the duty of the Competition Commission of India to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*".

5. Evidently, the CCI and the sector regulators share the common purpose of fostering competition and fair play in markets and that of protecting consumer interest. The primary role of a sector regulator is to promulgate and implement rules/regulations *ex ante* to be adhered to by the regulated enterprises and it performs ongoing supervision of the sector. However, regulated sectors are not impervious to anti-competitive behaviour of market participants. The regulator's ability to bring about desired outcomes depends on the regulated entity's sensitivity to financial incentives in the form of tariffs, transfers, penalties, etc., that in turn is determined by the quality of regulation, and wherever one is

absent, the impact on competition outcomes are obvious. Second, the degree of competition introduced by the regulators in the design of the oligopolistic markets that they are mandated to steer, through their entry and other technical rules (access rules, tariffs, interconnection etc.) crucially determines the competition concerns that emerge from the behavior of the firms and the remit of competition law. Indian experience has shown that regulation is only one part of the reform story. Successful regulation requires complementary reforms, including the introduction of competition and encouraging wider private participation that deepens markets.

6. Regulations evolve with maturity of markets and at different phases of such evolution, markets may be exposed to varying degrees of antitrust risk. The CCI intervenes to remedy anti-competitive behaviour of enterprises *ex post*, under its enforcement mandate. Further, the CCI engages with businesses and with sector regulators, as part of its advocacy function, with a view to prevent antitrust infringement and to advocate pro-competition regulatory reforms. Thus, arguably, the roles of regulators and the CCI are envisaged to be complementary in nature, in their common pursuit of preserving competitive markets. The significant and inevitable overlap in their objectives and jurisdiction makes interaction between sector regulators and the CCI pivotal in ensuring a coherent and effectual regulatory architecture, while also creating room for tension and debate with respect to the appropriateness and effectiveness of regulation vis-à-vis antitrust enforcement, as is borne out by the short history of competition regime in the country.

7. In the following sections, this note will provide an overview of the interaction between CCI and sector regulators, illustrate how antitrust proceedings can guide regulation using the case studies of the real estate and e-commerce sectors in India, discuss the judicial approach to the application of competition law and regulatory tools in regulated sectors with some case examples, and touch upon the recent developments with respect to the scope of consultation between the CCI and the sector regulators.

2. Interaction between the CCI and Sector Regulators

8. Like in many countries, legislative ambiguity/overlap/ omissions, interpretational biases, conflicting approaches to competition regulation and a lack of clear delineation of jurisdiction has resulted in some points of conflict in the emerging regulatory architecture between the sectoral and competition regulator. However, with effective coordination, each can play a distinct and non-conflicting role resulting in better overall economic regulation.

9. The Act has enabling provisions, sections 21 and 21A, which allow for mutual consultation between the Commission and the other statutory authorities. In cases relating to a regulated sector, the CCI may make a reference to the concerned regulator to obtain and consider its opinion before issuing an order. Concomitantly, the regulators may also seek the CCI's opinion during the course of their proceedings. The CCI does not have any direct role in design, implementation or removal of regulations.

10. In the last twelve years since the notification of the provisions of the Act relating to anti-competitive conduct, the Commission has received over 1100 antitrust cases. Several of these cases pertained to sectors regulated by sector regulators, including Banking and Finance, Electricity, Telecommunications, civil aviation, etc. Acknowledging the existence of regulatory oversight in these sectors as also to benefit from the expertise of the sector regulator, the Commission has engaged with sector regulators, when deemed

prudent. For instance, in a case¹ alleging abuse of dominant position by distribution companies in the electricity sector, considering the nature of issues involved, the Commission decided to seek the views of the Delhi Electricity Regulatory Commission (DERC). The DERC, in its communication to the CCI, stated that the CCI was the appropriate authority to examine matters pertaining to abuse of dominance whereas matters of tariffs and tariff related issues would be looked into by the DERC.

11. The Commission believes in a consultative and harmonious approach so that the goal of well-functioning markets can be achieved in conjunction with the sector regulator while leaving no room for confusion for the stakeholders. Non-discriminatory access issues/ neutrality issues may in some cases be checked by *ex-ante* regulations. Thus, in evaluating mergers and devising remedies, the Commission takes notes of the relevant regulations in order to see if some of the identified potential harms are addressed by them. For instance, the Commission, while assessing spectrum transactions in the telecom sector, noted the safeguards provided in the Spectrum Trading Guidelines of the Department of Telecommunications, which requires buyers of spectrum to comply with the prescribed spectrum caps declared from time to time. In the case of combination of Videocon d2h with Dish TV, the Commission sought comments from the telecom sector regulator TRAI. The Commission came to a conclusion that the potential competition concerns emanating from the transaction were largely addressed by extant regulations including TRAI Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulation, 2017 (“Interconnect Regulations”), Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order (“Tariff Order”) and Telecommunication (Broadcasting and Cable) Services, Standard of Quality of Services and Consumer Protection (Addressable Systems) Regulations 2017.²

12. The interaction between the CCI and sector regulators extends beyond the enforcement context. The Commission actively pursues its mandate of competition advocacy through the various means of market studies, workshops etc. in regulated sectors with particular emphasis on eliciting expert views of the sector regulator on matters relevant to competition and competition enforcement. Some such initiatives are summarized below:

2.1. Telecom Sector

13. The CCI conducted a ‘Market Study on the Telecom Sector in India’ in 2020, with an objective to better understand the unfolding competition dynamics in the sector, and to identify impediments to competition, if any. The key findings of the study related to parameters of competition, vertical integration, infrastructure sharing, unbundling, traffic management, spectrum acquisition, and collection of data among other issues affecting competition. As an extension to the Market Study, the CCI recently organised a ‘Workshop on Competition Issues in the Telecom Sector in India’ as an attempt to bring all stakeholders together on a platform, including the Department of Telecommunications (DOT), to reflect on the evolving telecom landscape in the country and deliberate on issues that are relevant for regulation and competition law enforcement. This, in a way, was also a first-of-its-kind forum for inter-regulatory exchange of views in the telecom sector, which

¹ Case No 06 of 2009, Shri Neeraj Malhotra V. North Delhi Power Ltd & Ors, dated 11th May 2011, available at https://www.cci.gov.in/sites/default/files/NeerajVsBSESMainOrder3050511_0.pdf

² Combination Registration No.C-2017-12-463, dated 4th May 2017, available at https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2017-12-463%20%28for%20uploading%29.pdf

was deemed critical to keep regulatory efforts ahead of the curve in the face of ever-changing market conditions and business practices.

14. The enabling regulatory levers and mechanisms that are catalysts for growth and efficiencies and competition challenges to the eco system were the focus of the Study and the Workshop. In the Workshop and the study report, the CCI stressed on the need for a harmonious and robust regulatory environment in the telecommunication sector and to strengthen cooperation amongst DOT, TRAI and the CCI.

15. The CCI has also previously engaged in consultation on several matters in the telecom sector with the sector regulator TRAI. For instance, TRAI released a consultation paper on ‘Tariff Issues of Telecom Services’ on 17th December 2019 and the opinion of the CCI was sought in this regard. The consultation process aimed to deliberate over the methodology that could be devised to fix floor price for data and voice services as well as bundled offers. The CCI, in its response, mentioned that setting of floor price for mobile services could have a detrimental effect on market competition. The Commission noted that such regulatory measures bring in inefficiencies in the long run and that setting a floor price would raise price barrier for new subscribers putting digital services out of their reach. It was recommended that the situation of ailing telecom companies warranted policy intervention other than tariff fixation of telecom retail prices, for instance, tax cutting in licensing, spectrum usage charges, etc.

2.2. Pharmaceutical Sector

16. Out of pocket expenditure is a major component of the total health expenditure in India. Expenditure on pharmaceuticals is quite a substantial component of this OOPE constituting, according to some estimates, almost 40%. With the financial burden of pharmaceutical expenditure falling on households, access to affordable medicines is of paramount importance. While the sector is heavily regulated and affordability has received policy focus in the form of price control over essential medicines, the enforcement experience of the CCI in this sector has shown that certain inherent features of pharmaceutical markets coupled with a set of industry practices in the sector do not allow markets to work effectively and healthy competition to drive the market outcomes in the form of low prices and reliable quality. In this backdrop, the Commission conducted a technical workshop on “Competition Issues in the Healthcare and Pharmaceutical Sector” in 2018. A Policy Note³ was subsequently issued documenting the issues raised and recommendations made by stakeholders who participated in the Workshop.

17. Among the issues highlighted in the Note were the alleged unreasonably high trade margins in pharmaceutical products. This was pointed out to be a fall out of drug manufacturers offering high margins as incentives to traders for pushing their drugs as well as muted competition between traders owing to the tight control of trade associations over the drug distribution system in the country. Subsequently, the National Pharmaceutical Pricing Authority (NPPA), in its notification dated 25.02.2019, brought 42 anti-cancer drugs under trade margin rationalization. The NPPA notification⁴ referred to the CCI Policy

³ Available at https://www.cci.gov.in/sites/default/files/POLICY_NOTE.pdf

⁴ Available at <http://www.nppaindia.nic.in/wp-content/uploads/2019/03/Notification-25.02.2019-Final.pdf>

Note attributing unreasonably high trade margins to the high drug prices in India. The Note also brought out issues such as proliferation of branded generics, lack of uniformity in application of the quality standards in a federal regulatory set up and the vertical arrangements in healthcare services. Currently, a market study is underway to empirically examine a subset of these issues which have a bearing on price competition in the pharmaceutical market in India.

3. Competition Enforcement Guiding Regulation: Real Estate and E-commerce

18. Antitrust enforcement with its case-by-case rule of reason assessment is often considered the preferred route over blunt regulatory instruments in addressing business conduct related concerns in many sectors. Nevertheless, there may be instances where a complete regulatory vacuum allows such industry practices to flourish that attenuate competition and harm consumers but do not neatly fall in the categories of anti-competitive agreements or abuse of dominance which could be remedied by the competition law. In such cases, sector-wide regulation providing a well-defined framework of do's and don'ts may be a more desirable and judicious way to safeguard consumer interest.

19. In India, the Real Estate sector proved to be a case in point. The sector suffered from a regulatory void and remained largely unregulated with absence of adequate consumer protection. Based on its understanding of the issues facing the sector during the course of antitrust proceedings, the CCI deemed it appropriate to recommend the need for its regulation. Subsequently, the Parliament of India enacted the Real Estate Regulation and Development Act (RERA), 2016.

20. In *Case No. 59 of 2011*⁵, *Shri Jyoti Swaroop Arora vs M/s Tulip Infratech Ltd. & Others*, the Informant alleged that various enterprises engaged in real estate development business had an arrangement/understanding amongst themselves which was evident from the similarities and common points in their agreements with buyers which were exploitative in terms of having one-sided, arbitrary and unfair clauses. After investigation and hearing the parties, the Commission in its order observed that there was no evidence of collusion between the parties even though the same was in no way suggestive of any intrinsic fairness of the impugned clauses. A largely unregulated real estate sector with a lot of competition on the face of it had ironically left the consumer with no real choice and all developers had one sided exploitative contract agreements leaving the consumer hapless. The Commission noted that the conduct of builders in non-disclosure of all the terms and conditions of sale to the prospective buyers at the stage of booking of apartments and taking the booking amount from interested buyers without disclosing the final terms and conditions of the sale agreement to be executed at a later stage, was plain exploitative. It was further observed that in the garb of 'industry practices', the builders created a situation where the consumers were left to fend for themselves. The Commission, being conscious of the prevalence of such exploitative conduct and unfair terms being imposed by the builders, noted that the sector suffered from inertia generated due to lack of competitive pressure.

21. The Commission further observed that when the markets are not functioning or distortions are created through collusive or exclusionary/ exploitative conduct or practices, it is incumbent upon the Commission to take appropriate measures in exercise of its enforcement, regulatory and advocacy remit. However, in the instant case, it was observed that there appears to be no market pressure, which can prod the participants to improve

⁵ Case No. 59 of 2011, *Shri Jyoti Swaroop Arora V. M/s Tulip Infratech Ltd. & Others*, dated 3rd February 2015, available at https://cci.gov.in/sites/default/files/592011_0.pdf.

their services, unlike in normal competitive markets. The Commission also noted that in recent times, the self-regulatory standards in the sector had shown a decline and felt the need for external regulation to supplement self-regulation. The Commission was of the firm opinion that the issues raised by the Informant were not only pertinent but needed to be addressed by the policy makers through appropriate legislative tools in tandem with the self-regulatory role played by the builders' association.

22. Though the Consumer Protection Act, 1986 was available as a forum to the buyers in the real estate market, the recourse was only curative and was not adequate to address all the concerns of buyers and promoters in the sector. With these concerns in the backdrop, the legislature acknowledged the regulatory vacuum in the real estate sector and consequent need for its regulation through the Real Estate (Regulation and Development) Act, 2016. The Act *inter alia* provides for the establishment of the Real Estate Regulatory Authority for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector.

23. Last year, the Commission successfully completed a Market study on e-commerce that was conducted to develop a better understanding of the novel competition issues that were emerging with the growing importance of digital platform-centric commerce. Bargaining power imbalance and information asymmetry between platforms and their business users underpinned most of the emerging issues in e-commerce. These infirmities were viewed to be more effectively addressed through non-enforcement tools. Under its advocacy mandate, the Commission urged the e-commerce platforms to put in place a set of self-regulatory measures over certain areas such as search ranking, collection/use/sharing of data, user review mechanism, revision in contract terms and discount policy. Going forward, some of these self-regulation suggestions that have emerged from the market study may take shape of formal regulations as the draft e-commerce policy has taken cognisance of the areas of concern pointed in the market study.

4. Application of Competition Law and Regulatory Tools: The Judicial Approach

24. The concurrent jurisdiction of the CCI and sector regulators has been a major source of litigation between parties, which have time and again pursued judicial intervention. The judiciary has upheld the jurisdiction of CCI on competition issues in a number of cases in sectors having other instruments of regulatory oversight. In 2014, the Delhi High Court left it to the CCI (instead of the Central Electricity Regulatory Commission) to decide whether the Maharashtra State Power Generation Company (Mahagenco) had abused its dominance by refusing to provide open access to the other independent power producers. In March 2016, the Delhi High Court refused to stop a CCI inquiry⁶ against Ericsson in a case of Standard Essential Patents on the ground of pendency of civil suits for patent infringements against the Informants, viz. Intex and Micromax. In yet another alleged abuse of dominance case⁷ pertaining to technology licensing against Mahyco Monsanto Biotech (India) Pvt. Ltd (MMBL), the jurisdiction of the CCI was challenged. The Delhi High Court observed that there was no irreconcilable repugnancy or conflict between the Competition Act and the

⁶Case No. 50 of 2013, dated 12th November 2013, available at https://www.cci.gov.in/sites/default/files/502013_0.pdf?download=1

⁷ Reference Case No. 2 of 2015 & Case No. 107 of 2015, dated 10th February, available at https://www.cci.gov.in/sites/default/files/Ref%2002-2015%20and%20107-2015%20-26%281%29%20order_10.02.2015.pdf.

Patents Act and therefore the jurisdiction of the CCI to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded.

25. In 2018, the apex court, i.e., the Supreme Court of India pronounced a judgement on the issue of jurisdiction of the CCI in a case pertaining to the telecom sector, which is also governed by the sector regulator, TRAI. In this case⁸, the CCI, acting on an information filed by telecom player, RJio, ordered the Director General to investigate against the alleged cartelisation by incumbent telecom operators in denying points of interconnection to the new entrant RJio. The investigation order was challenged by the telecom operators at the Bombay High Court on ground of jurisdiction. The Bombay High Court by an order dated September 21, 2017 held that the powers of CCI are not sufficient to deal with technical aspects associated with the telecom sector, which solely arise out of the TRAI Act and remained regulated. The CCI and RJio preferred an appeal before the Supreme Court.

26. The Supreme Court, *vide* its ruling dated 5th December, 2018, held that TRAI's functions include: (i) ensuring technical compatibility and effective inter-relationship between different service providers; (ii) ensuring compliance of license conditions by all service providers; and (iii) settlement of disputes between service providers. The SC noted that "[Jio's] disputes in this case touches upon these aspects". Moreover, it was noted that Jio itself had also specifically approached the TRAI for settlement of these disputes. The SC also noted that the specific purposes of the TRAI Act and Competition Act have to be kept in mind before deciding on jurisdiction; while CCI has the sole jurisdiction to address allegations of anti-competitive agreements, and investigating against cartels, a comity has to be maintained between CCI and TRAI's roles in the present case. The CCI's jurisdiction is not ousted insofar as the telecom sector is concerned but only pushed to a later stage, **only in limited** cases where a technical determination is pending before a sectoral regulator.

27. Thus, to avoid inconsistent and conflicting outcomes and to ensure a comity between regulators, the apex court's judgement conferred a sequential jurisdiction to the sector regulator and the CCI (in that order) **only** in such cases where the conduct entails a technical matter requiring determination by the sector regulator and where the sector regulator is already seized of the grievance/ dispute which is also facing the competition authority. Since the technical matter and the competition matter were intertwined such that the latter would arise only if the technical issue was settled, the apex court in such very limited cases pronounced a sequential jurisdiction.

28. The aforesaid apex court order was again agitated upon in a latter case in the Delhi High Court by Monsanto Holdings Pvt. Ltd. and Ors. (*supra*). In that case it was contended on behalf of the petitioners that in view of the decision of the Supreme Court in Bharti Airtel Ltd. (*supra*) it would be essential for the specialised regulator – in this case, the Controller of Patents– to first determine whether the agreements (sub-licenses) entered into by MMBL are an abuse of its rights under the Patents Act before the CCI could proceed further with the information or the reference filed with it. It was contended that since issues relate to patents, the same

⁸ CCI vs Bharti Airtel Limited & Others (Civil Appeal No(s). 11843 of 2018 (Arising out of SLP (case) no. 35574 of 2017), dated 5th December, 2018

would be best debated before the Controller. In the order of the High Court dated May 20, 2020 the specificities of the Bharti judgement were elucidated and it was observed:

“...The decision of the Supreme Court in Bharti Airtel Ltd. (supra) is certainly not an authority for the proposition that wherever there is a statutory regulator, the complaint must be first brought before the Regulator and examination of a complaint by the CCI is contingent on the findings of the Regulator.”

.... “this Court finds no reason to interfere with the impugned order. It is also relevant to note that an order passed by the CCI under Section 26(1) of the Competition Act is an administrative order and, therefore, unless it is found that the same is arbitrary, unreasonable and fails the wednesbury test, no interference would be warranted.”

29. The above discussion shows that in many markets the issues regarding the jurisdiction of competition authorities and other regulatory instruments may keep on arising from time to time and the parties seeking judicial intervention may have to settle with a concurrency model given the divergent court rulings and the specificities of the issues. There is no such finality or overarching jurisprudence yet that can guide these conflicts by a clear and unambiguous rule. Given the nascency of competition law, jurisprudence on these issues will develop and going forward it is expected that competition law remedies will become an essential part of the regulatory toolkit governing markets that have multiple regulatory oversight.

5. Recent Developments

30. The Ministry of Corporate Affairs, Government of India constituted the Competition Law Review Committee (CLRC) to comprehensively review and recommend changes to the competition law framework in India. The Committee, in its report submitted in 2019, has recommended widening of the scope of mutual consultation between sector regulators and the CCI by making necessary amendments to the Act. Presently, mutual reference to CCI/statutory authority lies only when a decision of CCI or an authority in the course of a proceeding may contradict with the other’s governing statute. The Committee recommended that revisions may be made to sections 21 and 21A of the Act, so that the CCI and sectoral regulators may make a reference whenever an issue of competition law or other relevant matter is raised before each other, and not only in respect of a proceeding. Further, as per their recommendation, such reference should be allowed even in the absence of any contradiction or conflict between the ambit of CCI and the sectoral regulators.

6. Conclusion

31. For competition and regulation to play their essential and complementary roles in making markets work, there needs to be close cooperation and consultation between regulators and the Commission. While overlapping jurisdiction between institutions cannot be eliminated, it ought to be harmonized through regulatory comity and improved lines of communication. The key is to ensure that there is consistency and continuity in the approach towards competition and regulation to avoid any unintended and undesirable conflicts and to provide a stable and predictable regulatory environment to the industry and well-functioning markets to the consumers.