SECTORAL REGULATOR AND COMPETITION COMMISSION: ENVISAGING A MOVEMENT FROM TURF WAR TO RECONCILIATION

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ABSTRACT

In the backdrop of the Government of India's efforts to simplify the process of doing business in the country, this paper becomes significant because a competition law and the Competition Commission of India ("CCI") play a key role in regulating business. In the last few years, CCI has played a pivotal role in ensuring the operation of markets in a fair and efficient manner imposing huge fines and undertaking suo moto investigations. However, along with the CCI, India has also witnessed the mushrooming of various regulatory agencies such as Telecom Regulatory Authority of India ("TRAI"), Petroleum and Natural Gas Regulatory Board ("PNGRB") and Central Electricity Regulatory Commission ("CERC") who are also responsible for ensuring fair competition in their respective sectors. This scenario has led to jurisdictional conflicts between sector specific regulators and the CCI in the domain of disputes related to competition law. These jurisdictional conflicts raise pertinent issues of duplication of time and efforts, forum shopping by market participants and dulling of investment climate amidst regulatory complications. This paper shall discuss such jurisdictional conflicts in general and focus in detail on

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two sectors, namely telecom and petroleum to extricate the loopholes in the current system of addressing regulatory overlaps in competition issues. Further, based on the international experience and the recommendations of Financial Sector Law Reforms Commission Report of 2013, the authors in this paper propose a collaborative model which addresses instances of regulatory overlap as well as seeks to inculcate cross-institutional collaboration between the sectoral regulators and CCI.

I. INTRODUCTION

A balance of payments crisis forced India to embrace liberalization in 1991 allowing the entry of private players into previously public sector dominated industries like petroleum, telecom etc.[1] However, free markets are more susceptible to a commonly known phenomenon called 'market failure'.[2] Market failures occur when free markets fail to operate efficiently due to real world problems like information asymmetries, externalities or public goods.[3] Further, market failures which lead to significant deviations from the competitive market due to deceptive collusive practices or certain firms exercising significant market power may call for government intervention to correct the failure through regulation and antitrust laws.[4] Thus, the potential fear of market failure created the need to regulate, even the apparently free

1 Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism worked?,* 16(3) JOURNAL OF ECONOMIC PERSPECTIVES 67 (2002).

2 *See* Francis M. Bator, *The Anatomy of Market Failure,* 72(3) THE QUARTERLY JOURNAL OF ECONOMICS 351, 352 (1958).

3 Janusz R. Mrozek, *Markey Failures and Efficiency in Principles Course,* 30(4) THE JOURNAL OF ECONOMIC EDUCATION 411 (1999).

4 *Id.*

market such that resources were allocated with a view to achieve economic efficiency.[5]

Such a market failure had occurred in India when a massive securities fraud was unearthed in 1992 and this incident gave birth to the first sector specific regulator in India, the Securities Exchange Board of India ("SEBI").[6] SEBI was set up with the power to regulate the securities market and impose penalty for market violations.[7] Following this trend, the government has set up various sector-specific regulators to correct the market imperfections and prevent market failures.[8] Some of these are TRAI (1997), CERC (1998) ("CERC"), Airports Economic Regulatory Authority (2009) etc. The functions of these regulators include granting licenses, deciding license fee, determining the number of players in the industry.[9]

Interestingly, often legislations creating these regulators by definition require them to meet the mandate of ensuring fair competition and promotion of consumer interest in their respective sectors.[10] For example Electricity Act, 2003, allows CERC to issue directions where a 'licensee abuses its dominant

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5 Relationship between regulators and Competition Authorities 7 (OECD Report, DAFFE/CLP(99)8, June 24, 1999).

6 *Securities Scam: The systematic Origins,* 27(36) ECONOMIC AND POLITICAL WEEKLY 1891, 1892 (1992) http://www.jstor.org/stable/4398839 (last visited June 23, 2015).

7 Murali Patibandla and Ramkanta Prusty, *East Asian Crisis as Result of Institutional Failures: Lessons for India,* 33(9) ECONOMIC AND POLITICAL WEEKLY 469, 471 (1998).

8 *See* Vijay Vis Singh, *Regulatory Management and Reform in India: Background Paper for OECD,* CUTS INTERNATIONAL, 1, 16 http://www.oecd.org/gov/regulatory-policy/44925979.pdf (last visited July 19, 2015).

9 *See* Petroleum and Natural Gas Regulatory Board Act, 2006, Section 11.

10 Harmonizing Regulatory Conflicts: Evolving a Co-operative Regime to address conflicts arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities 1, 3 (CUTS INTERNATIONAL AND INDIAN INSTITUTE OF CORPORATE AFFAIRS, New Delhi, July 2012).

position or enters into combination that has adverse effect on competition in the sector.'[11]

This becomes problematic because the CCI was created in 2002 "to promote and sustain competition in the market and to protect interest of consumers and competitors".[12] Apart from overlap of competition goals many decisions of the regulators such as decision on licensee fee, tariff or the number of players in the market may have direct implications on the competition in the sector.[13] Further, there are bound be overlaps as CCI and sector specific regulators were established at different periods of time and given the function to instil competition in their respective markets.[14]

This opens up the possibility of jurisdictional overlaps between both CCI and sector specific regulators when a dispute arises. In the Indian context such overlap is common between TRAI, CERC,[15] PGNRB and CCI.[16] Jurisdictional overlap is problematic for mainly three reasons. The most important consequence is that it leads to duplication of efforts when two

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11 The Electricity Act, 2003, Sections 23, 60.

12 The Competition Act, 2002, Preamble, § 3 prohibits anti-competitive agreements and § 4 prohibits abuse of dominant position in the market.

13 National Competition Policy and Economic Growth in India- Electricity Sector Study 1, 21 (NATHAN ECONOMIC CONSULTING INDIA PVT. LTD. AND CUTS INTERNATIONAL, October 9, 2013).

14 *See Competition and Regulatory Overlaps: The Case of India* (CUTS, IICA COUNTRY PAPER- INDIA) www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf (last visited July 19, 2015).

15 *Regulators ensure fair play, no 'great incoherence': CCI chief,* BUSINESS LINE, January 14, 2013, http://www.thehindubusinessline.com/industry-and-economy/regulators-ensure-fair-play-no-great-incoherence-cci-chief/article4307017.ece (last visited July 15, 2015).

16 *See* Samir R. Gandhi & Rahul Rai, *CCI and TRAI- Regulating in Harmony,* BUSINESS LINE, April 24, 2009 http://www.thehindubusinessline.com/todays-paper/tp-opinion/cci-and-trai-regulating-in-harmony/article1049961.ece (last visited June 7, 2015).

bodies invest time, effort and resources to adjudicate the same dispute.[17] Second, it creates an unclear investment environment for potential investors especially because the penalty imposed by CCI can be phenomenally higher than what regulators are allowed to impose.[18] Finally, lack of clarity can be used beneficially by existing players by indulging in forum shopping. Thus, there is a need to clarify jurisdictional limitation of CCI and sector-specific regulators.

This paper shall seek to highlight the constant turf war between regulators and CCI and seek to propose a workable solution to the existing jurisdictional conflicts by addressing the flaws of the current model. Part II shall introduce the readers to the difference in core competencies between regulators and competition agencies which gives scope for jurisdictional conflict. Part III shall seek to analyse the shortcomings of the current model in resolving this conflict as specified in the Competition Act, 2002 ('The Act').

It shall give specific instances of jurisdictional conflict between CCI and two regulators namely TRAI and PNGRB. The authors have used these two regulators because their interaction with CCI highlights different shortcomings of the approach taken by CCI in case of overlap. Further, seeking to fill the gaps in the Indian approach, in Part IV, the authors have sought to draw on international experience in dealing with jurisdictional

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17 *See* Hemant Singh & Radha Naruka, *Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflict,* SOCIAL SCIENCE RESEARCH NETWORK 1, 35 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252530 (last visited May 18, 2015).

18 *See generally* Apoorva & Shreeja Sen, *CCI has recovered less than 10% of penalties imposed by it: Ashok Chawla,* MINT, November 20, 2014, http://www.livemint.com/Politics/hBj3ys7T2spmbkViUhkc2J/CCI-has-recovered-less-than-10-of-penalties-imposed-by-it.html (last visited July 25, 2015).

conflicts between Competition and Regulatory agencies. Finally, borrowing from the international experience the authors in Part V shall suggest the model that would be best suited to the Indian context. This part also makes the central argument of the paper that resolving the conflict requires a concurrent approach involving both bodies with a clearly defined structure of co-operation and institutional collaboration.

II. CONFLICT BETWEEN REGULATORS AND COMPETITION AGENCIES: DIFFERENCE OF MEANS AND GOALS

An appreciation of jurisdictional conflict between both bodies would require an understanding of their divergence with respect to their goals and approach towards achieving these goals. In contrast to competition agencies that have the sole mandate of maintaining standards of competition and protecting consumer interest in the market, regulators have a wide variety of goals. Their goals can be categorized under four heads namely access, economic, technical and competition regulation.[19] Access regulations concern non-discriminatory access to necessary inputs and infrastructure; economic regulations ensure measures to control monopoly pricing in the interest of consumers.[20] Competition regulations seek to curb the anti-competitive behaviour of firms and technical regulation includes aspect such as safety and environmental protection concerns.[21]

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19 *See Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 8.

20 *Id.*

21 *Id.*

Thus, regulators may have other policy goals which might not be shared by competition agencies e.g. protection of environment.[22] While it has been widely agreed that technical regulations must remain with the regulators, there is substantial scope for overlap in respect of the other three functions which have a competition angle to it.[23]

Further, though they share the common goal of ensuring efficient market functioning, their methods differ vastly. Regulators follow an *ex ante* approach of regulation by framing detailed policies which are necessary to promote competition and players are required to abide by these regulations.[24] On the other hand competition agencies (except merger cases) adopt an *ex post* approach of holding players liable for distorting competition.[25] Additionally, sector specific regulators focus on behavioural remedies such as regulation of prices for subsequent years which require constant monitoring; while competition agencies focus mostly on structural remedies like striking down the unfair condition, penalty etc. which does not need future monitoring.[26]

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22 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 9.

23 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 32 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

24 *See* Conference Report, Third ICN Annual Conference, Antitrust Enforcement in Regulated Sectors Working Group (April 2004, Seoul) http://www.internationalcompetitionnetwork.org/uploads/library/doc377.pdf (last visited July 1, 2015).

25 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

26 Best Practices for defining respective competencies and settling cases, which involve joint action by Competition Authorities and Regulatory Bodies, UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Report on its 7th session, October 31-November 2, 2006, 1, 4, TD/B/COM.2 /CLP/44/Rev.2 (August 17, 2006).

This difference of approach in the means and the goals between both bodies has posed the question worldwide, as to who is competent to exercise jurisdiction regarding the competition issues arising in the regulated sector.[27] Proponents of sector specific regulators argue that the sector specific knowledge of the regulator makes them more suitable even while dealing with competition issues.[28] However, the core area of knowledge of competition agencies is competition enforcement and their institutional culture in dealing with competition issues makes them more appropriate to exercise jurisdiction in case of an overlap.[29] In the subsequent sections this paper shall seek to highlight the overtly simplistic manner in which The Act has sought to deal with these overlaps leaving it to the bodies to decide on the specificities. Further, it shall demonstrate the problem of the current approach by illustrating CCI's approach in claims overlapping with the competence of TRAI and PNGRB.

III. ANALYSIS OF CONFLICT BETWEEN CCI AND SECTORAL REGULATORS

The authors shall at the outset point out the theoretical flaws of the reference mechanism proposed by the Act. They shall then proceed to give two practical examples of how these flaws have played out in practice when

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27 *See generally Competition and Sectoral Regulation Interference* (CUTS Centre for Competition, Investment & Economic Regulation, Briefing Paper No. 5, 2003).

28 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 8.

29 *Id.*

CCI has dealt with cases involving overlap with jurisdiction of TRAI and PNGRB.

A. The Act's Perspective to Resolving Jurisdictional Conflict

The CCI can *suo moto* or on application exercise jurisdiction in matters of abuse of dominance, anti-competitive agreements and combinations.[30] Section 21 prescribes a mechanism of reference to CCI from the statutory authority in case the decisions on an issue before it might be contrary to the provision of the Act.[31] Similarly, Section 21A allows the CCI to make a reference to statutory authorities under similar circumstances.[32] In both cases the body to which reference has been made has to give its opinion within 60 days of reference and the referring body shall consider it while deciding the issue.[33]

At the outset it is pertinent to note that there were two options available to the policy framers. First, they could have granted exclusive jurisdiction in all cases of overlap to only one body. Second, co-operation could have been ensured between both bodies which were involved in case of overlap. The framers of The Act chose the latter but while doing so failed to define the details of this co-operative arrangement.[34] Leaving the finer details

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30 Competition Act, 2002, Section 19-20.

31 Competition Act, 2002, Section 21.

32 Competition Act, 2002, Section 21A.

33 Competition Act, 2002, Section 21(2)-22(2).

34 *See* Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 35 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015) (The author points out that Planning Commission

ambiguous has led to failure to co-operate in case of overlap as seen from the sporadic use of Sections 21 and 21A.[35]

This is because making the reference depends on the satisfaction of the body hearing the dispute that there is a potential for overlap with sector regulations. In this regard, the Madras High Court accepted the viewpoint that making a reference under Section 21 is qualified by use of the word 'may' and therefore is not mandatory.[36] Further, Section 62 of the Act provides that provisions of the Act shall only be in addition to and not in derogation of any law in force.[37]Interestingly, Section 62 is irreconcilable with Section 60 of The Act which is a non-obstante providing for supremacy of competition law with respect to competition enforcement.[38] This confusion only adds to the existing ambiguity while resolving instances of overlap.

Additionally, often regulators or CCI do not want to let go of their jurisdiction. There have been instances when both CCI and sectorial regulators have out-rightly rejected the contention for reference without assigning any

in 2006 reviewed major approaches to resolving this conflict and recommended concurrent framework of mutual co-operation between competition commission and sector specific regulators).

35 *See* Reliance Infrastructure Ltd. v. Maharashtra Electricity Commission, (2013) ELR APTEL (Del.) 661, ¶ 27 (The state electricity regulator had made a reference to Competition Commission in this case to delineate relevant market and assess abuse of dominance).

36 Vikash Trading Company v. Designated Authority, Directorate General of Anti-Dumping and allied duties, Ministry of Commerce and Industry, (2013) 1 MLJ (Mad.) 907, ¶ 33 (The court here rejected the contention that the Designated Authority ought to have referred the matter to Competition Commission of India due to the wording of the provision).

37 *See Id.*

38 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 7 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

cogent reasons regarding the absence of any overlap.[39] Finally, even if external pressure forces them to seek a reference, the adoption of the opinion is entirely at their discretion.[40] These flaws make the reference mechanism toothless as against what was contemplated by the Act.

B. Practical Application of Section 21 Vis-à-Vis Jurisdiction of TRAI and PNGRB

1. TRAI and CCI: A Progressing Turf War

Co-operation is pivotal in the telecom sector due to the need for different network providers to use each other's cables and tower networks through imposition of interconnectivity charges. Interestingly, it has been observed that in a free market private players do not co-operate with each other, charge competitors exorbitant interconnectivity charges and engage in predatory pricing to discourage new entrants.[41] It is against this background that co-operation and competition was sought to be enforced externally through the creation of a regulator i.e. TRAI.

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[39] *See, e.g.*, Association of Power Producers v. NTPC Ltd., Unreported Judgments, Petition No. 125/MP/2011, Central Electricity Regulatory Commission, ¶ 31; Jyoti Swaroop Arora v. Tulip Infratech Ltd., (2015) CompLR 109 (CCI), ¶ 249.

[40] Rahul Singh, *The Teeter-Totter of regulation and Competition: Why Indian Competition Authority must trump Sectoral Regulators,* 1, 5, (December 15, 2007) http://www.cci.gov.in/images/media/completed/interface_sr_ca_20080508112129.pdf (last visited July 10, 2015); *But c.f.* Reliance Infrastructure Ltd. v. Maharashtra Electricity Commission, (2013) ELR APTEL (Del.) 661.

[41] Ashok V. Desai, INDIA'S TELECOMMUNICATIONS INDUSTRY: HISTORY, ANALYSIS, DIAGNOSIS 51 (2006).

The TRAI Act, 1997 empowers the regulator to make suggestions to the Department of Telecom regarding the quality of the service, interest of the new entrants, licensing policy, spectrum allocation and measures to facilitate competition and efficiency in the sector.[42] It also has the power to call for information and conduct investigation and issue directions to any service provider.[43] Further, as per the TRAI Act, the members and head of the authority are to be experts in telecommunication, finance, management but are not expected to be knowledgeable in competition law.[44]

Overlap between the goals and means of TRAI and CCI have been observed in various areas. Illustratively, under Section 11, of the TRAI Act, the regulator is empowered to make recommendations regarding the need for new service providers, spectrum allocation terms and condition of licenses to service providers, which has a direct impact on the intensity of competition. Recently, the CCI has criticized the TRAI's unilateral recommendations to the Department of Telecom regarding review of license terms and capping of number of access providers and has requested discussion on the issue as it has competition implications.[45] Further, the issue of monopoly pricing and tariff fixation by TRAI is problematic.

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42 Telecom Regulatory Authority of India Act, 1997, Section 11.

43 *Id.* Section 12

44 Telecom Regulatory Authority of India Act, 1997, Section 4.

45 Harsimran Singh, *TRAI and CCI fighting the turf war,* THE ECONOMIC TIMES, 18 July 2007, http://articles.economictimes.indiatimes.com/2007-07-18/news/28461865_1_consultation-paper-number-portability-trai-chairman (last seem on December 8, 2014).

Keeping the consumer in mind, TRAI may fix extremely low tariffs. Although it will benefit the consumers in the short run, in the long run it will create a barrier on new entrants and hamper better competition in the market.[46] Finally, in cases of merger control, TRAI recommends that at any point of time the total number of service providers should not be less than four or the merged entity's market share exceeds 40%.[47] However, the CCI while reviewing a merger does not have any such bar and will disallow a merger only if it feels that the merged company will cause an appreciable adverse effect on competition.[48]

Interestingly, the proviso defining the jurisdiction of Telecom Dispute Settlement Appellate Tribunal (the adjudicatory arm of TRAI) ('TDSAT') states that "nothing in this provision will apply to any dispute subject to jurisdiction of Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP")."[49] The MRTP Act was repealed and the Competition Commission was put in its place through the Competition Act, 2002, but the corresponding amendment was not made in the TRAI Act to replace the words 'MRTP' with 'The Competition Act'. This lack of corresponding amendments in the TRAI

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46 Hemant Singh & Radha Naruka, *Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflict,* SOCIAL SCIENCE RESEARCH NETWORK 1, 35 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252530(last visited May 18, 2015).

47 *See* Samir R. Gandhi & Rahul Rai, *CCI and TRAI- Regulating in Harmony,* BUSINESS LINE, April 24, 2009 http://www.thehindubusinessline.com/todays-paper/tp-opinion/cci-and-trai-regulating-in-harmony/article1049961.ece (last visited June 7, 2015).

48 *Id.*

49 Telecom Regulatory Authority of India Act, 1997, § 14- Provided that nothing in this clause shall apply in respect of matters relating to - *"The monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969."*

Act has created a grey area regarding the jurisdictional limitations between TDSAT and CCI during overlapping disputes.

This legislative ambiguity has given room for interpretation and the CCI and TDSAT have answered these questions differently. In *Sea T.V Ltd.* v. *Star India Ltd.* the petitioner in TDSAT challenged the actions of Star Network as being in violation of TRAI Act and Interconnectivity Regulations issued by TRAI.[50] The Respondent opposed the jurisdiction of the commission relying on the proviso to Section 14 of TRAI Act arguing that the matter was about monopolistic practices. This led to a conflict between the TRAI and the now defunct MRTP Commission. The court took a very simplistic view that the present claim was about violation of regulation and not any anti-competitive practice.

It held that the MRTP Commission cannot adjudicate a dispute based on the rights and liabilities arising out of TRAI Act or Regulations even if it incidentally involves the subject of monopoly and restrictive practices.[51] Such a broad view of the TDSAT's jurisdiction would exclude practically every case from the ambit of MRTP Act because it would be always connected to some Guideline or Regulation issues by TRAI. This decision could be justified because TRAI is a special legislation it should always be prioritized over general legislations like the Competition Act, 2002. Moreover, TRAI consists of experts in the field of telecom and markets and it should be entitled to

50 Sea T.V Network Ltd. v. Star India Pvt. Ltd., (2006) 2 CompLJ (Telecom DSAT) 487, ¶ 10 (Telecom Dispute Settlement & Appellate Tribunal).

51 *Id.* ¶14

decide even when disputes have certain competition angle to it, considering that the proviso to Section 14 has not been amended yet to include CCI.[52]

Contrarily, the CCI has expressed an opposite view in *Consumer Online Foundation* v. *Tata Sky Ltd.* where the Dish TV operators were alleged to have intentionally agreed to prevent interoperability of set top boxes with other DTH operators.[53] This created hardship for the consumer to switch from one service provider to another. On a challenge to its jurisdiction, the Commission held that even though TRAI is the special regulator, competition in the market is within the exclusive jurisdiction of CCI.[54]

TRAI had recommended an up gradation of technology in set top boxes as well as adopting the regulations for interoperability.[55]The Commission in fact referred to these regulations on inter-operability of set top box and found that these guidelines were not enforced by service providers.[56] This view of the Commission would indicate that even if there is a trace of competition issues in the telecom sector on the basis of non-compliance of TRAI regulations the Commission has the exclusive jurisdiction over competition issues.

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52 *See* Hemant Singh & RadhaNaruka, *supra* note 16, 6.

53 Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶2, Competition Commission of India (March 24, 2011).

54 *Id.* ¶ 27.

55 Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶12, Competition Commission of India (March 24, 2011).

56 *Id.*

In the same case, the Commission was put in a precarious position when it was asked to decide two technical issues. The first issue was that whether providing for interoperability among set top boxes among different DTH providers was technologically and commercially feasible. The second issue was that whether the agreement between DTH operators to mutually abstain from providing such interoperability signalled towards anti-competitive practices.[57] The Commission dismissed the complainant's case and avoided any comment on telecom technology.

It held that even if interoperability was possible, the complainant could not show that there was an agreement between the DTH operators to mutually avoid providing interoperability demonstrating an anti-competitive practice.[58] The helpless commission distanced itself from taking any decision on feasibility of the interoperability on the ground that those recommendations of TRAI were yet to be adopted. This case could have been better decided if both bodies were on board sharing their expertise.

2. Conflict of jurisdiction between CCI and PNGRB

Another instance of the implication of legislative ambiguity on interaction between regulators is that of CCI and the Petroleum and Natural Gas Regulatory Board ('PNGRB'). The Petroleum and Natural Gas Regulatory Board Act, 2006 established the Petroleum and Natural Gas Regulatory Board

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[57] Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, at 75, Competition Commission of India (March 24, 2011), *available at* http://www.cci.gov.in/menu/MainOrderConsumer250411.pdf (last visited June 23, 2015).

[58] *Id.* at 109.

to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum products and natural gas.[59] The functions of the Board include regulating access to common carriers[60] or access to common gas distribution networks[61] while fostering fair trade and competition among the entities.

The PGNRB Act provides for civil penalties in cases of violations of the directions of the Board not exceeding one crore rupees.[62] However, if the complaint is on restrictive trade practices[63], the amount of the civil penalties may be multiplied by five times of the unfair gains made by the entity or rupees ten crores, whichever is higher. It is interesting to note that the PNGRB Act, 2006 has used the same definition of "restrictive trade practices" as given in the Monopolies and Restrictive Trade Practices Act.[64] The Competition Act, 2002 has repealed the Monopolies and Restrictive Trade Practices Act and created a special legislation for dealing with competition issues. However, in spite there being a gap of four years between the Competition Act that was passed in 2002 and the PNGRB Act passed in 2006, it is quite astonishing to notice the legislature's failure in reconciling both the acts.

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59 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 1(4).

60 *See* Petroleum and Natural Gas Regulatory Board Act, 2006, Sections 2(j), 11(e)(i).

61 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 11(e)(iii).

62 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 28.

63 Petroleum and Natural Gas Regulatory Board Act, 2006, §2(zi) (This section defined restrictive trade practice. It means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular).

64 *See* The Monopolies and Restrictive Trade Practices Act, 1969, § 2(o).

As the Board has been entrusted with the responsibility to promote competition policies, there have been increasing jurisdictional conflicts with the Competition Commission in the cases where the complaints are based on anti-competitive practices in the petroleum, oil and natural gas sector. The Competition Commission's decisions, though inconsistent, do lean towards ceding the jurisdiction to the regulatory authority.

In *Shri Awadh Singh v. Petroleum and Natural Gas Regulatory Board*[65] it was alleged that the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2013 issued by the PNGRB encouraged anti-competitive practices. The CCI noted that the PNGRB Act gave powers to the Board to issue the said regulations as a form of subordinate legislation and thus, the commission did not have the jurisdiction to hear the matter.[66]

In *Faridabad Industries Association v. Adani Gas,*[67] the CCI held that that the issue of compliance with the regulations framed by the PNGRB was beyond its scope.[68] However, the Commission did go into the allegation whether the gas prices were being fixed arbitrarily under the Gas Supply Agreement albeit holding against the complainant. Through this case, the CCI

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65 Shri AwadhBihari Singhv.Petroleum and Natural Gas Regulatory Board, Case No. 75 of 2013,MANU/CO/0002/2014, Competition Commission of India (January 2, 2014) .

66 *Id.* ¶ 4.

67 Faridabad Industries Associationv.Adani Gas Limited, Case No. 71 of 2012, MANU/CO/0063/2014, Competition Commission of India (July 3, 2014).

68 *Id.* ¶ 102.

has carefully tried to demarcate competition issues from other issues concerning the oil and gas sector, although a strict demarcation is not possible.

The CCI has often faced cases where the Fuel Supply Agreement is called into question for anti-competitive practices and abuse of dominance. In the *Gujarat Textile Processing v. Gujarat Gas Company,*[69] the allegation was that the opposing party was abusing its dominant position by imposing unilateral, unreasonable and arbitrary conditions in the supply of gas under the Gas Supply Agreements. The Commission sought an opinion of the PNGRB but the latter threw the ball back in the CCI's court by stating that it can adjudicate on the matter after considering relevant regulations.[70]

The CCI, while acknowledging its powers to punish for abuse of dominance noted that the Agreements in question are in the purview of the PNGRB Act and since the latter is a specific provision and empowered the regulator to constantly monitor the price and take corrective measures.[71] Thus, the CCI exempted itself from giving any remedy in this case by asking the complainant to pursue remedy before PNGRB. However in *Notice for Acquisition of Equity* case and *Tata Power Distribution v. GAIL,*[72] the CCI discussed the PNGRB regulations and on that basis adjudicated the absence

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69 Gujarat Textile Processors Association, Surat, Gujaratv.Gujarat Gas Company Ltd., Ahmedabad, Gujarat, Case No. 50 of 2011, MANU/CO/0114/2011, Competition Commission of India (December 12, 2011).

70 *Id.* ¶ 15.

71 *Id.* ¶ 22.

72 TATA Power Delhi Distribution Limitedv.M/s. GAIL (India) Limited, Case No. 94 of 2013, MANU/CO/0038/2014, Competition Commission of India (March 11, 2014).

of abusive conduct of the respondent due to their compliance with the regulations and allowed the losing party to approach the regulator for remedy.[73]

Few years ago, three public sector enterprises had approached the Delhi High Court challenging the jurisdiction of the CCI[74] with regard to cases pertaining to the oil and petroleum sector.[75] Reliance had filed a complaint before the CCI alleging that the State Public Sector Enterprises had formed a cartel in the market for supply of aviation fuel to Air India.[76] The High Court, interestingly, disallowed the CCI from hearing the issue as an order on this issue had already been passed by the PNGRB. It is pertinent to note that the PNGRB does not have exclusive jurisdiction on the matter and any dispute involving competition concerns is also under the jurisdiction of CCI. This order begs the question that if a complaint is filed before both the Sectoral regulator and the CCI, whether the passing of an order on the issue by one of them bars the other body from exercising jurisdiction.

The above cases show that that the CCI has never taken a consistent approach to cases where overlap of jurisdiction can occur, sometimes seeking reference, in others refusing to step into domain of PNGRB. Further, another complicated issue that arises is whether the jurisdiction of one body is precluded if another parallel authority passes an order on the same matter. The

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73 *Id.* ¶¶ 12-14.

74 Nikhil Kanekal, Sangeeta Singh &UtpalBhaskar, *Competition watchdog faces fresh challenge to jurisdiction*, MINT HT MEDIA, January 23, 2011.

75 M/s Royal Energy Ltd. v.M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd. and M/s Hindustan Petroleum Corporation Ltd (2012) CompLR 563 (CCI).

76 *See RIL moves CCI against public companies Aviation Turbine Fuel Cartel,* THE ECONOMIC TIMES, July 15, 2010.

confused approach of CCI with respect to PNGRB is in contrast to its activist stand taken with respect to overlap with TRAI.

The case study of CCI's overlapping cases with TRAI and PNGRB illustrate the different approaches that CCI has taken towards overlap in different sectors. Thus, there is an increasing need to clarify this confusion and outline the structural relationship between the regulatory bodies such as TRAI, PNGRB and Competition Commission. With a view to clarify this confusion the next section shall seek to map out the different approaches taken internationally to highlight the key takeaway points that could be used in the Indian Context.

IV. INTERNATIONAL EXPERIENCE IN ADDRESSING CONFLICT OF JURISDICTION

International Experience reveals that countries have broadly implemented two approaches to harmonize conflict between sectoral regulator and competition agencies. The first approach has been to entrust only one body with the exclusive jurisdiction to deal with overlapping issues. The second approach has recognized the need for both bodies to have concurrent jurisdiction in overlapping cases.

A. Exclusive Jurisdiction Model

The essence of this model lies in the fact that it provides power to only one body i.e. either regulator or competition agency to circumvent the problem

of overlapping jurisdiction powers.[77]The implementation of this model has been done worldwide in two ways. Firstly, competition enforcement in the sector can be exclusively allocated to the concerned sector regulators in addition to technical, economic and access regulation.[78] Secondly, certain aspects of economic and access regulation along with competition enforcement can be vested solely with the competition agencies leaving the sector regulator to undertake only technical regulation.[79]Even though the model can be broadly implemented in the above mentioned ways, many countries have implemented the essential characteristics of this model with varying effect.

Australia provides an excellent illustration of the implementation of this model. It has sought to give the sole mandate in dealing with overlapping cases to its competition agency called the Australian Competition and Consumer Commission. In addition to the competition function, it has transferred some aspects of access and economic regulations from sectoral regulators to the Australian Competition and Consumer Commission.[80]Thus, its functions range from competition enforcement to setting terms for

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77 Best Practices for Defining Respective Competencies and Settling of Cases which involve joint action of competition authorities and Regulatory Bodies, November 14-18, 2005, *United Nationals Conference on Trade and Development,* ¶ 7, TD/RBP/CONF.6/13, TD/B/COM.2/CLP/44/Rev.1 (September 15, 2005).

78 *Cooperation for Competition: The Role and Functions of a Competition Authority and Sectoral Regulatory Agencies* 12 (Department of Justice Office for Fair Competition, OFC Policy Paper No. 1, July 2013).

79 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 23,TD/RBP/CONF.7/L.7 (August 30, 2010).

80 *Cooperation for Competition: The Role and Functions of a Competition Authority and Sectoral Regulatory Agencies* 21 (Department of Justice Office for Fair Competition, OFC Policy Paper No. 1, July 2013).

licensing conditions or fixing prices in select sectors such as gas and electricity.[81]

There are inherent advantages of this approach because it reduces the potential of regulatory capture to which sector specific regulatory bodies are more susceptible as against a national competition authority.[82]Regulatory capture encompasses a situation where the regulator instead of acting in public interest advances the commercial interest of specific companies that dominate the industry due to corruption or interest group lobbying.[83]Further it is often seen that sector specific regulators get involved in complex technicalities of their respective sectors, thus ignoring the competition issues involved.[84] Finally, this model will ensure competition is enforced in a uniform and consistent manner by single body across sectors while saving time, money and duplication of effort.

On the contrary, the disadvantage of conferring exclusive mandate to competition agencies is twofold. First, there is lack of sector specific knowledge on the part of competition agency and in such overlapping cases it would constantly have to seek assistance of the knowledge of the regulator.[85]

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81 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

82 *Id.* 3.

83 Jean-Jacques Laffont and Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 (4) THE QUARTERLY JOURNAL OF ECONOMICS 1089-1127 (November 1991).

84 *See* Maher M. Dabbah, *The Relationship between competition authorities and sector regulators,* 70(1) THE CAMBRIDGE LAW JOURNAL 113, 119 (March 2011).

85 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 188.

Second, taking up this responsibility may lead to dilution of their primary competition functions when they get embroiled in complex regulatory processes. For instance concerns have arisen in New Zealand where there are no industry specific regulators but the sole mandate lies with Commerce Commission.[86] The competition law framed by it is very generic in nature and this has often caused ambiguity due to lack of clarity on industry specific issues like interconnection and pricing.[87]

Another manner of enforcing the exclusivity model is by giving the power to enforce competition concerns to the industry specific regulator apart from the economic, access and technical regulation they already handle. Countries like Kenya entrust the regulator with the exclusive mandate of enforcing competition in the sector.[88]Although it may seem like doing away with the powers of one body i.e. competition agency would be more convenient than reducing the powers of multiple regulators, this option too suffers from disadvantages.

Firstly, the lack of knowledge of regulator with respect to complex competition matters may lead to an over simplified analysis of competition disputes in the sector. Secondly, the presence of multiple regulators may create a non-uniform threshold for the enforcement of competition law in different sectors across the country. Thirdly, this approach leaves room for cross-

86 *Id.* 215.

87 Rakesh Basant, *Interface between sector-specific Regulatory bodies and Competition Agencies: A case of the Indian Telecom Sector,* INDIA INFRASTRUCTURE REPORT 63, 66 (2001).

88 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

sectorial conflict between different regulators when faced with overlapping competition issues which is detrimental to the economic health of the country. Fourthly, overburdening them with competition concerns will cause them to deflect from other regulatory/statutory obligations.[89] Keeping the advantages and disadvantages of this model in mind, the authors will now proceed to examine a second scenario where the competition agencies work in coordination with the regulators for the enforcement of competition law.

B. Concurrency Model

As stated above regulation performed by any regulator consists of access, economic, technical and competition regulation in the sector.[90] The economic and access regulation of a particular sector has a close nexus with competition issues and this makes it difficult to draw watertight compartmentalization of the functions of regulators and competition agencies. For instance, TRAI's act of fixing tariff rates (economic regulation) has direct impact on the intensity of competition in the sector.[91]

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89 For instance in UK, the Office of the Gas and Electricity Market (OFGEM) itself has commented that there is a risk of marginalizing competition law as it has a lot of social and environmental concerns to deal with as well. *See* Report of the House of Lord Select Committee on "UK Economic Regulators" (2007), available at http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf. And the Memorandum produced by British Energy (February 2007) towards the Report, available at http://www.british-energy.com/documents/Hofl_SCR_0207.pdf (last visited August 31, 2015).

90 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 10,TD/RBP/CONF.7/L.7 (August 30, 2010).

91 *See Competition Laws and Telecom war-fare,* 3 PSA COMMERCIAL LAW BULLETIN (January 2010), available athttp://psalegal.com/upload/publication/assocFile/CommercialLawBulletin-IssueIII.pdf (last visited on August 10, 2015).

As the particular sectorial regulator does not have the expertise over competition issues and vice versa, it is important to have a system of coordination between the two which will amplify the advantages of both bodies. Thus, this model aims to combine the best of both bodies and put them to use in overlapping issues. By this approach, the sector specific regulator can be ably guided by the competition agencies to enforce competition law. On the other hand, the competition agencies will also get help from the sectorial regulators to navigate the complex technicalities of a particular sector.

However, this model is not free from problems. One of the major drawbacks is the problem of overlapping jurisdiction. If both the regulator and the competition body have the mandate over competition matters, naturally there will be disputes as to who will adjudicate on an overlapping issue. In Part III, we have already shown how these problems come to the fore in India with respect to the telecom and petroleum sector. Thus, any concurrent model will have to keep the above shortcomings in mind. Some of the countries which follow a concurrent model but with varying degrees/structure of cooperation include UK, US, Netherlands South Korea, Brazil, Turkey, Argentina, Mexico, Zambia, Finland, South Africa and Ireland. Hereafter, we will examine the different ways in which this model has been adopted in these countries.

In the United Kingdom, the Competition Act 1998 (Concurrency) Regulations, 2004 laid down the working framework for relationship between

sectoral regulators and Office of Fair Trading ("OFT").[92] The structure provided for the OFT and the sectoral regulator to agree on which would be the appropriate forum and against this decision of OFT/regulator the aggrieved party could approach the Competition Appellate Tribunal.[93] However, in practice it was found that the regulations were ineffective as the OFT would often refrain from exercising jurisdiction in regulated sectors instead of actively making an effort to consult with the concerned sectoral regulator. This had resulted in only two competition violations decided by the sectoral regulators from the inception of the concurrency regulations.[94]

The first violation decided by the Office for Gas and Electricity Market ("Ofgem") was with respect to the abuse of dominance by *National Grid* in the market for provision and maintenance of domestic sized gas meters.[95] The second violation was found by the Office of Rail Regulation ('ORR') *vis-à-vis* the conduct of *English Scottish Railway Limited* in concluding contracts whose terms had the effect of excluding competitors from the market.[96] The ORR in this case considered the OFT Guidelines on market definition, assessment of market power while delineating the relevant market and dominance of the enterprise.[97] Thus, there were some reservations about the efficient

92 The Competition Act 1998 (Concurrency) Regulations 2004.
93 *Id.* Regulation 5.
94 House of Lords, Select Committee on Regulators, 1st Report Session 2006-07 UK Economic Regulators, Volume I: Report 68 (2007).
95 Case CA98/STG/06, Investigation into National Grid, Decision of the Gas and Electricity Market Authority (2001).
96 English Welsh and Scottish Railway Ltd., Decision of the Office of Rail Regulation (2006).
97 English Welsh and Scottish Railway Ltd., Decision of the Office of Rail Regulation, ¶ 207 (2006).

functioning of the concurrency system envisaged which was one of the factors for reforming the concurrency regime.[98]

In 2014 a renewed working arrangement between the regulators and the Competition and Market authority ("CMA") was established through the Competition Act 1998 (Concurrency) Regulations 2014. As per the Regulation, if a regulator or the CMA believes that they have concurrent jurisdiction over a case, then such a competent body should inform the other competent regulators in writing if it intends to exercise its powers.[99]

After notifying the other competent body/bodies, all such competent regulators have to reach an agreement to decide who is to exercise jurisdiction on the matter and which regulators will have advisory role in the same.[100] If the bodies fail to reach an agreement within a reasonable time, then the CMA will determine which competent body has the mandate.[101] There is also a provision for transferring the dispute from one competent regulator to another.[102] Nevertheless, if the CMA feels that it is best suited to adjudicate on the issue, then, it can transfer the case from the concerned regulator to itself.

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98 *See* House of Lords, Select Committee on Regulators, 1st Report Session 2006-07 UK Economic Regulators, Volume I: Report 68 (2007) (This report raises questions about the assiduousness of the regulator in investigating competition issues, for example the Competition Appellate Tribunal set aside Office of Water's decision in the Albion Water and Aquavitae case and in spite of this decision Office of Water was resistant to making the changes required by the appellate order).

99 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(1).

100 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(2).

101 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 5(1).

102 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 7.

In the process, it has to hold consultations with the said regulator and also inform all the stakeholders involved that it is taking up such a dispute.[103]

This framework effectively takes care of the problems mentioned above which may be associated with the concurrent model. The system provides overarching powers to the competition agency, thus, recognizing its expertise on the matter. To further co-operation, a Concurrency Working Party was also formed by the regulators and the Office of Fair Trading with the objective to create an atmosphere of collaboration and consistency in approach toward competition law.[104]

In 2015, CMA published its first report on concurrency highlighting the increased use of market studies/investigations into the regulated sectors and progress on MOUs and information sharing between CMA and regulators.[105] Further, there has been satisfactory co-operation in the case allocation between CMA and Regulators, where based on the Concurrency guidelines the regulators have taken responsibility of 5[106] out of 6 overlapping cases seeking support of CMA's complementary skills.[107] The 2016 Concurrency Report echoes similar patterns of co-operation in line with the

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103 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 8.

104 John McInnes, *Concurrent Exercise of Competition Powers by the Sectoral Regulators: Is It time for a more radical change of approach?* COMPETITION LAW 37, 40 (2012).

105 Annual Report on Concurrency, Competition & Markets Authority, CMA43, 9 (2015).

106 *See* Annual Report on Concurrency, Competition & Markets Authority, CMA43, 14 (2015) (These 6 cases include: ORR's investigation into suspected infringements of prohibition in connection with the carriage of freight; Ofwat's investigations into abuse of dominance by Bristol Water and Angilian Water Company; Ofcom's investigation into the suspected infringement on prohibition of abuse of dominance by Royal Mail and anti-competitive agreement by the Football Association Premier League; CMA's investigation into the health services sector for anti-competitive agreements).

107 *Id.* 9.

concurrency guideline whereby two new disputes were agreed to be decided and investigated by the sectoral regulators namely Ofgem and Financial Conduct Authority.[108]

In the United States, antitrust agencies namely the Federal Trade Commission ("FTC") and the Antitrust division of Department of Justice ("DOJ") constantly share jurisdictions with many sector specific regulators such as the Federal Communications Commission ("FCC") and Federal Energy Regulatory Commission ("FERC"). With respect to antitrust disputes the sole body for enforcement is competition agencies i.e. FTC and DOJ. However, the antitrust courts have developed a principle of 'primary jurisdiction' to stay cases of overlap pending before the initial agency. The application of this principle is on a case by case basis depending on the disputes at hand, value of the regulators' expertise and knowledge regarding competition laws in the specific sector and is used to stay the proceeding pending resolution of overlap by federal court.[109]

However, this system is not completely efficient. For instance, the Supreme Court of the United States in the case of *Verizon v Trinko* was asked to decide whether DOJ or the FCC had the jurisdiction to determine anti-competitive conduct *vis-à-vis* access to network. The court refused to allow intervention of the antitrust bodies because it felt that the dispute was the

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108 Annual Report on Concurrency 2016, Competition & Markets Authority, CMA54, 3 (2016).

109 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 266.

mandate of the FCC.[110] The court reached this decision as it felt that there was already an existing regulatory structure designed to deter competitive harm as enforced by the FCC, leaving little space for DOJ to hear the dispute.[111]

Prior to the case reaching the Supreme Court, the same complaint regarding anti-trust was filed before both the DOJ and the FCC.[112] This shows that jurisdictional conflicts on this issue of overlap can arise in the US because under the present collaborative mechanism, determination of jurisdiction is at the discretion of the Court which is hearing the matter. Similarly, in the electricity sector, both the DOJ and the FERC arrived at different conclusions while deciding on whether the merger between two Electricity Companies namely Exelon Corp. and Public Service Enterprise Group was anti-competitive.[113] This is despite the fact that the FERC had adopted the merger guidelines issued by the antitrust agencies in 1996.[114]

Despite these shortfalls, the United States has developed efficient informal mechanisms to garner co-operation and create a cross-institutional culture between both bodies. The first initiative involves the establishment of many inter-agency working groups to ensure informal co-operation between both regulators and competition agencies. In various instances the FTC staffs

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110 *Verizon Communications Inc. v Law Offices of Curtisv Trinko,* LLP 540 U.S. 682, (2004).

111 Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The case of margin squeeze abuses in the Telecommunications Sector,* 1 JOURNAL OF COMPETITION LAW AND ECONOMICS 355, 417 (2005).

112 *Id.*

113 See Proposed Final Judgment in *U.S. v. Exelon Corp. and Public Service Enterprise Group, Inc.*, available athttp://www.usdoj.gov/atr/cases/f216700/216784.htm

114 See Merger Policy Statement, FERC Order No. 592 (December 18, 1996), available at http://www.ferc.gov/industries/electric/gen-info/mergers/rm96-6.pdf

have prepared reports[115] where they have applied their competition knowledge to assess the competition impact of a specific proposed regulatory decision e.g. methods to determine allocation of airport landing space.[116]

Further, constant staff transfers between both bodies create an interdependent environment for resolving potential overlaps. For example there have been instances where there has been exchange of economic staff or when Chief of Staff of FTC has been transferred to FCC as a commissioner and later elevated to the post of FCC Chairman.[117] In respect of certain sectors especially energy sector, more channels for avoiding isolated decisions is provided by allowing competition agencies to appear before sector specific regulators in regard to proceedings before them.[118] This allows the FTC to offer their insights on competition angle of a dispute.

Dutch competition policy is based on the notion of prohibition rather than abuse of the system and the principle authority for competition enforcement is the National Competition Authority ("NMa"). The competition rules are applied by NMa across all sectors irrespective of whether there is a regulator. The government on the Secretariat's submission has set up

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115 *See* Federal Trade Commission Act, 1914, 15 U.S.C., § 6 (This provides the power to co-operate with other agencies and gather information and prepare reports for assistance with investigation).

116 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 30 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

117 Press Release, FCC Commissioner Mignon L. Clyburn announces Staff Change, News Media Information 2020/ 418-0500 (April 17, 2015), available at https://www.fcc.gov/document/fcc-commissioner-mignon-l-clyburn-announces-staff-changes (last visited August 15, 2015).

118 *See* Deep water Port Act, 1974, § 7(a); Outer Continental Shelf Lands Amendment At, 1978, §205(b).

chambers within the competition authority for sectorial regulation.[119] In some other cases like Office of Transport, instead of having NMa supervise it, it has been set up as a separate chamber of NMa. A chamber model allows highly specialized technical knowledge related to sectors to exist within the structure of competition authority which focuses on broad issues of improving competition.[120]

In Canada, the Canadian Radio-television and Telecommunications Commission ("CRTC"), decided in the *Review of Regulatory Framework case*, that it would not encroach upon the domain of competition law.[121] This decision brought about a call to reconcile the issue of jurisdictional overlap between the CRTC and the Competition Bureau. In 1999, they issued a joint statement detailing the structure of collaboration that they would undertake to prevent such future disputes.[122] After 1999, the competition bureau has signed multiple Memorandums of Understanding including those with the Radio and Telecommunication regulator and Ontario Securities Exchange Commission defining binding structures to address information exchange, knowledge and transfer of staff between different regulators.[123]

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119 *See Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 189.

120 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 24,TD/RBP/CONF.7/L.7 (August 30, 2010).

121 Review of Regulatory Framework, Telecom Decision CRTC 94-19, Canadian Radio and Telecommunications Commission (16 September 1994), available at http://www.crtc.gc.ca/eng/archive/1994/dt94-19.htm.

122 *See* Neil Campbell & Mark Opanishov, *Untangling the Web of the Canadian Telecommunications and Competition Regimes*, 30 INT'L BUS. LAW. 305 (2002).

123 *See* Memorandum of Understanding for Co-operation, Co-ordination and Information sharing, October 22, 2013, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03643.html (last

In Ireland, there exists a cooperation agreement between the competition agency and the sectorial regulator. By virtue of this agreement, the mechanism of mandatory consultation exists if a regulator decides to adjudicate a matter which was already before another agency.[124] Further, in South Africa, the Competition Act entrusts a responsibility on the Competition Commission to enter into agreements with different regulators so as to devise a concurrent methodology in order to ensure a uniform threshold of enforcement of competition law.[125]

In the telecom sector, such an agreement has been negotiated with the regulator and the Memorandum of Understanding specifies co-operation regarding merger transactions, steps for exercise of concurrent jurisdiction including notifying the regulator and discussing how the complaint should be managed under the agreement.[126] Further, it also seeks to constitute a joint working group consisting of members from both bodies for institutional

visited on August 15, 2015); Press Release, Ontario Securities Commission and Competition Bureau Sign Memorandum of Understanding, November 25, 2014, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03847.html (last visited on August 31, 2015).

124 Harmonizing Regulatory Conflicts: Evolving a Co-operative Regime to address conflicts arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities 1, 15 (CUTS INTERNATIONAL AND INDIAN INSTITUTE OF CORPORATE AFFAIRS, New Delhi, July 2012)

125 *See* Competition Act, 1998, Section 3(1A): *'In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct Further, The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).'*

126 Memorandum of Agreement entered into between the Competition Commission of South Africa and the Independent Communications Authority of South Africa, ¶ 2-3, September 20, 2002, available at http://www.compcom.co.za/wp-content/uploads/2014/09/ICASA.pdf (last visited on August 20, 2015).

exchange of expertise to advice on a policy level.[127]Turkey imposes a statutory obligation on its Competition Board to consider the regulator's opinion while dealing with competition matters in the telecommunications sector.[128]In Zambia, a Competition Commission's representative acts as an ex-officio member of the boards of different regulators which helps him/her to provide technical inputs relating to competition law.[129]

A common thread that runs across the concurrency model adopted by various countries analysed above are first, these countries have sought to allay confusion by clearly defining the structure of co-operation between both bodies either by giving notice, playing advisory role or appearing in proceeding before the regulator. Second, countries have taken efforts to implement this model of co-operation by promoting an institutional culture between both bodies either through staff transfers, Memorandum of Understandings, Interagency periodic meetings. The authors believe that these two distinct characteristics highlighted by the various models analysed should be evaluated in the context of India ensuring that there are suitable modifications to suit the Indian legal landscape.

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127 *Id.* ¶ 4.

128 Electronic Communications Law No. 5809, November 11, 2008, § 6(1)(b) imposes duty to take the opinion of Competition Authority on the issues regarding the breach of competition in electronic communications sector and § 7(2) specifies that the Competition Board while taking decision shall take into consideration primarily the Regulators view and regulatory procedures of the Authority.

129 Voluntary Peer Review of Competition Law and Policy, Zambia, United Nations Conference on Trade and Development, 1, 15, UNCTAD/DITC/CLP/2012/1 (OVERVIEW) Zambia (2012).

V. SOLUTION FOR RESOLVING THE CONFLICT IN THE INDIAN PERSPECTIVE

In India, as mentioned above, the reference mechanism is toothless and rarely used, thereby diluting the atmosphere of co-operation intended by the framers. This loophole has been exploited by both the competition commission and the regulators to unilaterally take action thereby diluting the atmosphere of cooperation intended by the legislation. Apart from duplication of work it also gives scope to parties for forum shopping and the resulting confusion creates a bad climate for investment in India. Therefore, to address these concerns it is imperative that a structured and well-defined model of co-operation is laid down by the law. Further, to ensure successful implementation of this model it is essential to take measures that garner a culture of institutional co-operation between both bodies which is visibly absent in India.

With respect to the exclusivity model, the authors feel that it should be shunned as the disadvantages of the model outweigh the advantages. If the competition commission is designated as the sole body to take charge of enforcement of competition issues in regulated sectors, the issue of lack of knowledge of the technicalities of a particular sector emerge.[130] Further, it is not practically feasible to abruptly reduce the enforcement power, staff strength and authority of multiple sectoral regulators.

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[130] *See* Maher M. Dabbah, *The Relationship between competition authorities and sector regulators,* 70(1) THE CAMBRIDGE LAW JOURNAL 113, 119 (March 2011).

Similarly, if the competition commission's role is reduced in regulated markets, there will be an apprehension regarding the correct application of the competition policy by the regulators whose members are not always experts in the field of antitrust law. Moreover, there will also be risk of a non-uniform standard of application of competition law in the country if different sectors are entrusted with the task of enforcing competition law. Therefore, in order to extract the advantages, expertise and knowledge of the sector specific regulator and the competition commission, the authors feel that a concurrent model will be the most apt for India. Finally, the legislative intent in passing Sections 21 and 21A of the Competition Act, 2002 prescribing a reference mechanism signals the intention of the framers to adopt a concurrent model as compared to the exclusive jurisdiction model.[131]

The authors propose a concurrent model based on two foundations which will be rooted in the international best practices discussed above and the Financial Sector Law Reforms Commission Report of 2013 ('FSLRC Report').[132] Firstly, there should be a well-defined mechanism of cooperation between the regulators and the commission which will settle cases of overlap, forum shopping and the disputes between the two bodies. Secondly, there should be an apparatus to harvest institutional collaboration at the time of drafting regulations and policies as well as at the stage of adjudication. This will ensure a harmonious and symbiotic relationship between the two agencies.

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131 Competition Act, 2002, Section 21-21A.

132 GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

A. The Structure of Co-operation between CCI and Sectoral Regulators

This model will focus on the need to have a detailed working relationship between the regulators and the competition commission. The quantity of conflicts between the two bodies is directly proportional to the extent of ambiguity of the wording of the legislature. Therefore, the authors suggest the following mechanism to overcome the problem of overlap. If a matter comes before the competition commission and if one of the parties is a player in any of the sectors regulated by sectoral regulator, then the commission must inform the concerned sector regulator.[133]

For example, if Vodafone is one of the parties before the Commission, the latter must inform TRAI that it is hearing the dispute regarding a player regulated by it. Similarly, if there is a case before the regulator which has competition implications then the competition commission should take the lead and issue a notice to the regulator to resolve the issue of overlap of jurisdiction. This procedure of notice will address the confusion in the present reference mechanism which depends on the referrer's opinion of overlap.

After the issue of notice, there should be an internal meeting between the two bodies to decide jurisdictional aspect of the case and who is better suited to adjudicate the dispute.[134] If an agreement cannot be reached, the Competition Appellate Tribunal should have the mandate to decide which body should hear the case or if a joint bench with representatives from both

133 *Id.* ¶ 5.9.
134 *See* The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(2).

institutions would be necessary. This suggestion is based on the success of the United Kingdom Concurrency Regulations discussed above.[135] Further, there would be no question of forum shopping because once it is decided which body is to exercise jurisdiction, the other body will not have a chance to adjudicate upon the matter. This would avoid a situation where CCI would refuse to comment on TRAI Regulations alleging them to be technical issues.

FSLRC Report deals with reforms in the financial sector, but it comments on the interaction between financial sector regulators and competition commission.[136] Thus, the model proposed by this report is equally relevant in the context of conflict between CCI and any industry specific regulator. This report suggests that CCI should submit a report reviewing the draft regulations of industry specific regulators highlighting the potential competition implications.[137] The regulator must consider the recommendation and it must give valid reasons when it decides to deviate from the recommendation.[138]

Further, if the commission feels that the regulator through its policy actions has caused a 'negative effect' for competition in the industry, the Commission can submit a report in this regard and the regulator should consider it and respond to it.[139] If it fails to respond within a reasonable time

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135 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 5(1).

136 GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

137 *Id.* ¶ 5.9

138 *Id.*

139 *Id.*

the commission can issue binding directions to neutralise the negative effect caused in the regulated market.[140] Even, though this model is not directly relevant to jurisdictional conflict, the authors feel that it would create much needed balance between the two bodies by involving them together right from the stage of formulating the policy.

B. Institutional Collaboration between CCI and Sectoral Regulators

The second foundation of our model will be built on an institutional collaboration between the regulators and the Commission. To promote an exchange of information and technical expertise on a regular basis, it is required that there should be a working party group similar to the one adopted in the United Kingdom, where the regulators and the commission have periodic meetings to discuss overlapping issues so that both sides can benefit from a thorough discussion on overlapping issues.

This interaction could be an important aspect of the competition advocacy function of CCI which includes training professionals on competition issues.[141] Similarly, the commission will gain valuable technical knowledge about the sector from the regulators. Such a working party group can also organise workshops together to better understand the interlinking issues between the sector regulation and competition law. Such efforts have worked in countries like UK, Canada, USA because both sides have tried to

[140] Draft Law on Indian Financial Code, 2013, Section 134.
[141] The Competition Act, 2002, Section 49.

maintain cordial relationships through regular periodic meetings and staff transfers.[142]

The authors also feel that the Act should be amended to include a provision which mandates that the CCI has MOUs with the sector regulators which will promote a harmonious relationship. This is evident in many countries like UK, Finland, Ireland and South Africa. MOU's have the advantage that both bodies can freely tailor the ambit of co-operation policy regarding investigation, adjudication and institutional collaboration. Even the FSLRC report has a provision which emphasises on the need for such MOUs.[143]

Further, even the planning commission in its Working Group on Competition Policy made pertinent suggestions to promote this institutional culture by coordinated staff transfers on deputation basis as well as sharing of experts by both bodies.[144] Similar policy of staff transfers is followed in United States, Australia and Zambia amongst others and has garnered a co-operative culture between both institutions. This suggestion is important in the context of India where we have witnessed turf war between regulators and CCI regarding policy formulation and adjudication of overlapping disputes. Thus, a clear delineation of co-operation and collaborative culture may usher a sea

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142 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008.

143 Draft Law on Indian Financial Code, 2013, Section 138.

144 Chapter VII, Report of the Working Group on Competition Policy, Planning Commission, Government of India, February 2007, 43.

change from the current turf war to a collaborative environment where competition law is enforced by both bodies.

VI. CONCLUSION

Worldwide policy makers have been faced with questions over enforcement of competition law in regulated sectors. While regulators and competition agencies share their own strengths and weaknesses, legislative ambiguity has rendered the reference mechanism under the Act dormant. The confusion has given way to different responses by CCI while handling overlapping cases of different sectors. With regard to PNGRB, the CCI has mostly passed the buck, while with respect to TRAI it has sought to retain jurisdiction. This disturbing trend ought to be replaced by certainty and collaborative environment.

Global experience reveals two important elements of a successful policy to resolve jurisdictional conflict. First is defining the contours of co-operation between bodies. In this vein, India must adopt the model of issuing notice by the interested regulator in overlapping instances to resolve within themselves or in cases of failure by the COMPAT, regarding who is better suited to exercise jurisdiction. Second defining feature is the institutional collaboration that can reduce the potential of a turf war between regulators and CCI. This could be done through various mechanisms including regular staff transfers, entering into Memorandum of Understanding, and having regular Working Party Meeting between both sides etc.

For harvesting the full benefit of this co-operation, India must adopt a combination of these measures and ensure they are implemented effectively. The authors believe that these two measures would usher not only better administration of competition law in regulated sectors, but also eventually extend to co-operation in framing regulatory policies, similar to the model envisaged by the FSLRC Report. An example would be TRAI cooperating with CCI while deciding the spectrum allocation or the number of players suitable for the market. Co-operation at policy level can have a great impact of reducing the number of jurisdictional challenges and regulatory showdowns by ensuring co-operation at the very nascent stage of policy making.