

INTRODUCTION TO COMPETITION LAW

(Part 5- Regulatory Bodies and Coordination between
the Competition Commission and Sectoral Regulator)



भारतीय प्रतिस्पर्धा आयोग
Competition Commission of India

Preface

The Competition Commission of India (Commission) has been established under the Competition Act, 2002¹ (the Act) to prevent practices having adverse effect on competition, to promote and sustain competition in Indian markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. It is mandated, inter alia, to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. It, therefore, pursues its objectives through two sets of instruments, namely, advocacy and enforcement targeted at enterprises. These measures are complementary and are expected to promote and ensure thereby freedom of trade by enterprises and consumer welfare to achieve ‘fair competition for greater good’.

As a measure to promote competition advocacy, that is, to disseminate the message of competition law, promote competition culture and competition compliance, the Commission has proposed to maintain a panel of “Competition Resource Persons”, to organise competition advocacy programmes for groups of stakeholders to supplement its own efforts on competition advocacy. In order to provide training to the selected Resource Persons and to equip them with adequate knowledge of competition law, the present study material has been prepared. This material will be used as advocacy material by the Resource Persons for educating the different stakeholders. This study material has been prepared for the benefit of the following stakeholders:

- Consumers, and Consumer Associations
- Trade/ Industry Associations
- Government Bodies
- Regulatory Bodies
- Compliance Professionals and Associations of Compliance Professionals

The study material is divided into six parts. The first part provides an overview of the Competition Law. The fifth part (this document) addresses the competition issues with respect to Regulatory Bodies and the coordination between the Competition Commission and Sectoral Regulator. The other four parts contain information and understanding of the law from the perspective of the stakeholders. The first part is a general introduction, while the others are stakeholder specific.

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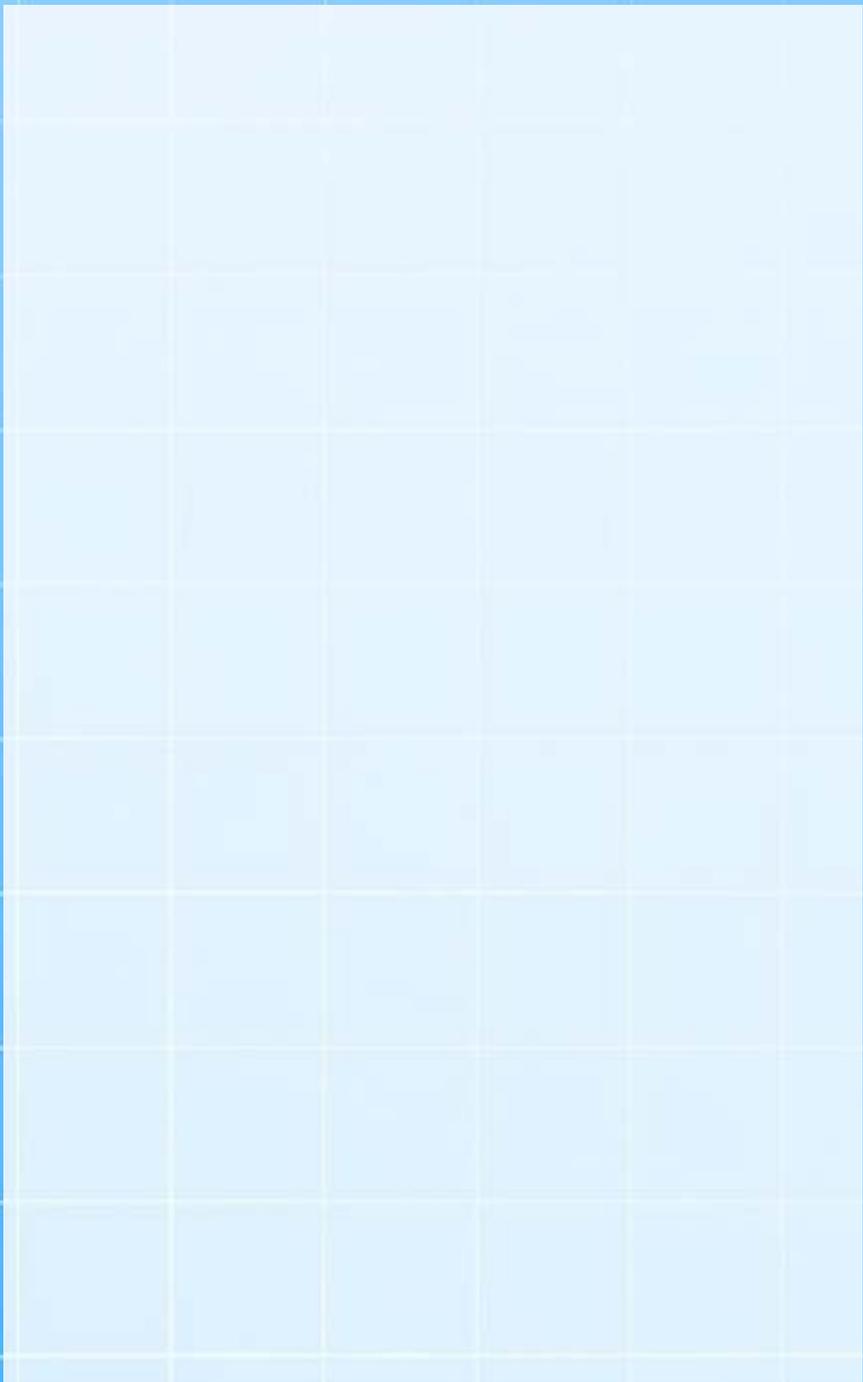
Disclaimer: This document is prepared for information purpose and should not be treated as legal view/ stand of CCI. Data used have been taken from various sources and should be verified by the user.

1. The Competition Act 2002 can be accessed at <http://www.cci.gov.in/competition-act>

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Regulatory Bodies and Coordination between the Competition Commission and Sectoral Regulator

1. Regulatory Framework in India

Before the opening up of the economy, economic activity was mainly dominated by the government-owned companies. Apart from economic activities government also controlled, most of the factors that determine the level of competition in the economy, such as entry, price, scale, location, etc. For example, telecommunication services, oil exploration, drilling, refining and marketing were a government monopoly. Other sectors such as banking and electricity were also dominated by government undertakings. This situation did not call for independent regulators as government was generally believed to be acting in the interest of the public. However, the pattern changed significantly with new economic reforms which changed the manner in which business was conducted. As a result of these the need of having sectoral regulators became apparent.³

This led to setting up of many sectoral regulators. The telecommunications regulator, the Telecom Regulatory Authority of India (TRAI), was set up in 1997, Petroleum and Natural Gas Regulatory Board (PNGRB) in 2006, Airports Economic Regulatory Authority (AERA) was established in 2008, Securities and Exchange Board of India (SEBI) was set up in 1992, Central Electricity Regulatory Commission (CERC) was constituted in 1998, etc. While these regulatory bodies were being set up to tackle various issues emanating from actual and anticipated private player behaviour and other structural issues, the same concerns were also felt about the competition arena. This led to the setting up of the Competition Commission of India. The history of competition in India is discussed in detail in part one of this document.

Both sectoral regulators and the competition authority have objectives which converge. Both of them aim to improve economic performance by preventing market power and avoiding inefficient regulations. Despite sharing common objectives, they have different goals and have different legislative mandates. They may also approach the same issue with different perspectives. The sector specific regulators are primarily concerned with attenuating the effects of market power whereas CCI basically focuses on reducing such power. The former typically impose and monitor various behavioural conditions whereas the latter is more likely to opt for structural remedies. In simple terms, competition regulator tells the incumbents what they should do whereas sectoral regulators tell them what to do. The regulatory interface problem is centred on the degree to which sectors being opened up to greater competition should also be subject to general competition laws and how and by whom such laws are to be administered.⁴ So there exist overlaps and complementarities between the sector-specific regulators and competition authority. This is discussed in detail in the following sections.

3. http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf

4. <http://oldwebsite.iica.in/images/Harmonising%20Regulatory%20Conflicts.pdf>

2. Regulatory Overlap

It is important to note that these institutions were established at different times and there are bound to be overlaps in their objectives. Further, each regulator was set up with different legislative mandates and as a result of which their perspective and approach towards competition matters may also be different. Some sector regulators were also given the responsibility to instil competition in the areas under their ambit, an objective which was later given to the competition authority, when eventually established. Some sectoral laws which were enacted after the Competition Act, 2002, also bestow sectoral regulators some competition enforcing functions. These include the Petroleum and Natural Gas Regulatory Board (PNGRB) Act, 2006, Electricity Act, 2003 etc. Since, competition enforcement is a mandate of CCI, a scenario of overlapping jurisdictions has been created.⁵ Some examples of overlapping provisions with Competition Act, 2002 in the respective Acts are as follows:

Examples of Overlapping Provisions

1. PNGRB Act, 2006

The oil and natural gas sectors are regulated by the PNGRB, which was established under the PNGRB Act, 2006. The Act gives power to the PNGRB regulator to issue directions and levy penalty in case of restrictive trade practices.⁶ Here, the restrictive trade practices is defined as “a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular” as per the PNGRB Act.

2. Electricity Act, 2003

Under the Electricity Act, 2003 SERCs and CERC have the mandate to ensure fair competition in the electricity sector. Section 60 of the Electricity Act gives SERCs and CERC powers to take corrective action if a licensee or a generating company enters into an anticompetitive agreement, abuses its dominant position or enters into a combination which causes an adverse effect on competition in electricity industry. Also section 174 of the Electricity Act, 2003 gives overriding power to itself.

As seen above, there are areas of overlaps between the competition authority and the sector regulators. Overlaps are expected to either give rise to ambiguities resulting in stakeholders, regulated companies and consumers as they struggle to know which regulator is best suitable to deal with their grievances. Regulatory overlap can also give rise to, forum shopping,⁷ delays and multiplicity of proceedings resulting in conflicting views of two regulators.

3. Important Cases of Regulatory Overlap

CCI and PNGRB

5. http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf

6. As per section 11 and 28 of the PNGRB ACT

7. Forum shopping is the informal name given to the practice adopted by some litigants to have their legal case heard in the court thought most likely to provide a favourable judgment.

Reliance Industries Ltd alleged that its rivals Indian Oil Corporation Ltd (IOCL), Bharat Petroleum Corporation Ltd (BPCL) and Hindustan Petroleum Corporation Ltd (HPCL) formed a cartel for the supply of aviation fuel for Air India. However, during the course of the investigation of the case by CCI, the three companies namely IOCL, BPCL and HPCL filed a suit in the Delhi High Court challenging CCI's jurisdiction by claiming that the matter fell under the jurisdiction of the PNGRB, the sector regulator. The High Court gave an interim order that CCI did not have jurisdiction over the matter despite the fact that the Petroleum and Natural Gas Regulatory Board (PNGRB) Act did not give the sector regulator exclusive jurisdiction on the matter. At present, the appeal has been filed with the High Court and the Court has put a stay order on the Commission's proceeding.

CCI and Delhi State Electricity Regulatory Commission

CCI issued notices against three power distributors; BSES Rajdhani Power, BSES Yamuna Power and North Delhi Power Ltd after if found them guilty of abusing their dominant positions by imposing unfair and discriminatory conditions. However, the Delhi Electricity Regulatory Commission, the state electricity regulator objected to CCI's intervention claiming that such matters falls under its jurisdiction as per the powers vested in them by the Electricity Act, 2003.⁸

4. Complementarities of Regulatory Bodies

In the overall scheme of regulatory landscape cooperation among regulatory bodies may ensure an outcome where various regulatory agencies are complementary for the overall growth of economy and consumer welfare. These are as follows

1. Sectoral regulators are best suited for laying down standards for ensuring quantity and quality of products. Thus, their focus is on what to do and how to do while CCI's focus is on curbing anti-competitive activities of enterprises.⁹
2. Sectoral regulators regulate specific sectors with an "Ex ante" approach i.e. they address issues before they occur. CCI on the other hand primarily addresses behavioural issues after problem arises.
3. Sectoral regulators' emphasis is on organised development of a sector that would ensure consumer welfare. CCI on the other hand ensures consumer welfare by ensuring that market players do not abuse their market power or

8. As per section 60 of the Electricity Act, 2003

9. Enterprise (see section 2(h) of the Act: "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

collude.

4. Section 60 of the Competition Act is a non obstante clause asserting the supremacy of competition legislation within the domain of competition enforcement.
5. At the same time, cooperation of various regulatory agencies with CCI can be beneficial for both consumers and economy. The spirit of complementarity is also envisaged in the Section 62 of the Competition Act. Section 62 of the Competition Act declares that competition legislation ought to work along with other enactments.
6. A platform for consultation is provided for under Sections 21 and 21A of the Competition Act. Under these provisions, both CCI and the sector regulators may cooperate when it comes to dealing with issues that appear to have an impact on the jurisdiction of the other. If a sector regulator is handling a case and it turns out that there is a possibility of the decision to be taken infringing the Competition Act, the sector regulator may refer the matter to CCI for its opinion. CCI is obliged to give its opinion within sixty days.
7. In a similar fashion, if CCI is investigating a case and it is pointed out that there is a possibility of the decision being contrary to the provision of the law entrusted to a sector regulator, then CCI may make a reference to the sector regulator, asking for its opinion and input into the matter. However, opinions from both the sector regulator and CCI will not be binding.

Thus, “complementarity and not conflict” is the spirit of the regulatory landscape of the India.

Further Suggested Readings

OECD (1998). “Relationship between Regulators and Competition Authorities”
Retrieved from <https://www.oecd.org/competition/sectors/1920556.pdf>

CUTS. “Competition and Regulatory Overlaps: The Case of India”, Retrieved from
http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf

Other Resource Persons’ Material

Part 1: Basic Introduction

Part 2: Consumer Associations

Part 3: Trade/Industry Associations

Part 4: Public Procurement – Government and Public Sector Enterprise

Part 6: Competition Compliance Programme

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