CCI v. Sector Regulators: Navigating Jurisdictional Ambiguities for Effective Resolution

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Abstract: The intersection of competition law and sector regulations often leads to jurisdictional overlaps, blurring the line between antitrust and sector regulation. This article delves into the complex landscape of jurisdictional conflicts between the Competition Commission of India (CCI) and sector-specific regulators in India's regulatory framework. The paper meticulously examines the problems arising from these jurisdictional ambiguities, including forum shopping, legal uncertainty, and over-enforcement, which collectively harm consumer interests and undermine the efficiency of market regulation. The paper traces the roots of these conflicts to multiple sources, including ambiguous legislative provisions, inconsistent judicial interpretations, and the inherent challenges in delineating the boundaries between competition law and sector-specific regulations. In response to these challenges, the article proposes a multi-faceted approach to resolution. It advocates for enhanced cooperation between the CCI and sector regulators through mechanisms such as mandatory consultations, memorandums of understanding, and the establishment of dedicated working groups. The paper concludes by emphasizing the need for a harmonized approach that leverages the strengths of both the CCI and sector regulators to create a more coherent and effective regulatory framework in India.

Keywords: The Competition Act; Antitrust; CCI; Sector Regulators; Jurisdiction.

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1. *Introduction*

The Competition Act, 2002, repealed the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969. The MRTP Act dealt with concentration of economic power and monopolistic and restrictive trade practices. It was enacted with an object to curb these activities. The Act had no provisions for checking abuse of dominance or regulating mergers and acquisitions. The MRTP Act became outdated and ineffective in dealing with modern competitive issues, more so because of the liberalization of the Indian economy in the 1990s. The Competition Act was enacted, keeping in view the economic development of the country, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade. It introduced a more nuanced, dynamic, and effective framework for fostering competition.

The Competition Act exercises regulatory control over three broad kinds of activities of an enterprise, viz., anti-competitive agreements, abuse of dominant positions, and mergers and combinations. Section 3 prohibits any agreement in respect of production, supply, storage, etc. which is likely to cause an appreciable adverse effect on competition (AAEC). Sub-section 3 raises a presumption that any

horizontal agreement[1] resulting in price fixation, market sharing, bid rigging, or limiting production shall cause AAEC. Sub-section 4 prohibits vertical agreements[2] including tie-in-arrangements[3], exclusive dealing agreement, refusal to deal, etc. Section 4 of the Competition Act prohibits abuse of dominant position. An enterprise enjoying dominant position cannot impose unfair price or conditions in purchase or sale of goods and service. It cannot indulge in practices resulting in denial of market access or leverage its dominant position in one market to enter into other market. Section 5 defines a combination and section 6 states that no enterprise shall enter into a combination which is likely to cause AAEC.

The Competition Commission of India (CCI) was established under Section 18 of the Competition Act, 2002[4] with a duty to eliminate practices having Appreciable Adverse Effect on Competition (AAEC), promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India. The Commission has a responsibility to inquire into any alleged contravention of the provisions of the Competition Act. If the CCI finds out that an enterprise has violated any provisions of the Act, the CCI may impose penalty up to 10% of the average turnover for the

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[1] Horizontal agreements are agreements between enterprises or persons at the same level of the production chain. For example, agreements between two manufacturers or two retailers.

[2] Vertical agreements are agreements between enterprises or persons at different levels of the production chain. For example, agreements between a manufacturer and a distributor.

[3] An arrangement in which a manufacturer sells a product to a reseller only on condition that the reseller also buys another less popular product.

[4] See The Competition Act, 2002 (12 of 2003).

last three preceding financial years.[5] The CCI used to levy penalties based on global turnover of the enterprise. This led to inequitable outcomes against multi-national or big corporations. This continued till the Supreme Court in *Excel Crop Care* v. *CCI*[6] decided to read "turnover" as "relevant turnover", considering the position in foreign jurisdictions. The CCI also possesses the same powers that are vested in a Civil Court under the CPC[7].

Functioning as a watchdog for the market by safeguarding healthy competition and consumer welfare, several sector-specific regulators such as the Securities and Exchange Board of India (SEBI), established under the SEBI Act, 1992[8] and the Telecom Regulatory Authority of India (TRAI) established under the TRAI Act, 1997[9] derive similar authority from statutes as does the CCI. However, these institutions are evidently different in their aims and duties from the CCI for obvious reasons. In performing its functions, the CCI may encroach upon the jurisdiction of sector regulators, and their jurisdictions often overlap.

In 2024, the CCI issued a show-cause notice to Muthoot Finance highlighting concerns over jurisdictional overlap between the CCI and the Securities and Exchange Board of India (SEBI)[10]. Muthoot filed complaints with the CCI and SEBI over debenture trustees' anti-competitive activities but did not reveal its SEBI complaint to the CCI,

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[5] See S. 27 of The Competition Act, 2002 (12 of 2003).
[6] (2017) 8 SCC 47.
[7] See Code of Civil Procedure, 1908 (5 of 1908).
[8] See The Securities and Exchange Board of India Act, 1992 (15 of 1992).
[9] The Telecom Regulatory Authority of India Act, 1997 (24 of 1997).
[10] See Pavan Burugula, CCI sends show-cause notice to Muthoot Finance for 'regulatory shopping', Moneycontrol (2024), available at https://www.moneycontrol.com/europe/?url=https://www.moneycontrol.com/news/business/cci-sends-show-cause-notice-to-muthoot-finance-for-regulatory-shopping-12574051.html (last visited September 5, 2024).

raising worries about forum shopping. The case demonstrates a jurisdictional dispute between the CCI's responsibility in resolving competition problems and SEBI's monitoring of debenture trustees. The Bombay High Court is currently deciding which regulator has jurisdiction.

There hardly exists any vivid demarcation of boundaries of sector regulators and the CCI. It is often noted that sector regulators apply rules ex-ante, while the CCI addresses issues ex-post.[11] This view has little practical value as there are cases that have required concurrent application of both regulation and competition. This jurisdictional conflict raises several problems, such as forum shopping, legal uncertainty, and over-enforcement. In this article, we will first discuss the problems arising due to such jurisdictional issues. Next, we will address the causes of these conflicting jurisdictions and analyze some important cases that have come before the courts. Lastly, we will present plausible solutions, keeping in mind how the relationship between regulation and antitrust is governed in other jurisdictions.

2. *Problems due to Overlapping Jurisdiction*

The convergence of competition law and sector regulations produces several problems. The major ones are forum shopping, legal uncertainty, and over-enforcement. These issues may lead to overburdening of courts, interference with the judicial process, creation of compliance challenges for a company and even disruption of business operations. These problems may also prove pernicious to the overall economy. A closer look at them is necessary.

2.1. *Forum Shopping*

[11] See CUTS INTERNATIONAL, 15th edition Newsletter, available at https://cuts-ccier.org/newsletter/spotlight-15.htm (last visited November 27, 2024).

In India, complaints regarding competition law issues can only be made to the CCI. The Commission's orders can only be challenged against the National Company Law Appellate Tribunal (NCLAT). A further appeal lay to the Supreme Court of India. Civil Courts and High Courts have no jurisdiction to hear competition matters. Similarly, the SEBI covers matters of the securities market, which include stock exchanges, mutual funds, substantial acquisition of securities, insider trading, etc. The Civil Courts have been barred from hearing such matters. An appeal can be made to the Securities Appellate Tribunal and, failing there, to the Supreme Court of India. Other regulators have been constituted in a similar fashion.

There are certain matters over which both the sector regulator and the CCI have a mandate to deal with. This raises the issue of forum shopping, the practice of choosing the court in which to bring an action based on a determination of which court is likely to provide the most favorable outcome[12]. It is discouraged in common law countries like the United States of America (USA) and the United Kingdom (UK). Indian courts have systematically categorized and condemned forum shopping as a practice that erodes judicial efficiency and fairness, reiterating its disrepute across multiple rulings. In Vijay Kumar Ghai v. State of W.B.[13], complaints were initiated in Delhi and Kolkata on nearly identical grounds. The Court elaborated on forum shopping, acknowledging its varied forms while underscoring its absence of statutory definition and relied on Merriam-Webster's definition. Supreme Court of India has consistently denounced the practice of forum shopping, emphasizing that litigants cannot be allowed the liberty to choose a forum solely for favourable outcomes. In the landmark Chetak Construction Ltd.

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[12] See Merriam-Webster, "*Forum shopping*" Merriam-Webster.com Legal Dictionary, available at https://www.merriam-webster.com/legal/forum%20shopping (last visited August 27, 2023).

[13] See *Vijay Kumar Ghai v. State of W.B.*, (2022) 7 SCC 124.

v. Om Prakash[14], the Court asserted that forum shopping undermines judicial integrity and must be dealt with firmly. Further, in Union of India v. Cipla Ltd.[15], the Court introduced the "functional test" to identify forum shopping, focusing on whether there exists functional similarity between proceedings in different courts or whether the litigant is attempting subterfuge. This test determines the legitimacy of forum selection.

Forum shopping brings several disadvantages. Many a times, the jurisdictional conflict between the CCI and sector regulators had to be settled by the High Courts. In doing so, the courts have to stay proceedings in one forum and favor it over the other. This may undermine the authority of the forum whose jurisdiction is so restricted. Forum shopping may also hamper the efficiency of the proceedings. If the CCI would have to investigate a matter in the domain of other sector regulators, it would require their technical expertise, assistance, and continued sharing of information and data. This would result in delays and increased expenses, hindering overall efficiency. A lack of decisional uniformity is also a recognized disadvantage of forum shopping.[16] The issue arises when there is a likelihood of different outcome from different forums. It may be unfair for the party (especially the defendant) if the plaintiff chooses a forum where the likely outcome would be more in its favor.

2.2. *Legal Uncertainty*

A market player may get approval for an action from a regulatory body, which may subsequently be found to have an adverse effect on the market by the competition regime. It also raises the question of mandate and authority as to whether the competition regulator

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[14] See *Chetak Construction Ltd. v. Om Prakash*, (1998) 4 SCC 577.

[15] See *Union of India v. Cipla Ltd.*, (2017) 5 SCC 262.

[16] See Markus Petsche, *What's Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L L. 1005 (2011).

would supersede sector regulators. One can find inconsistencies in several CCI decisions. There have been instances where CCI has allowed an appeal before it and, on some occasions, in similar appeals/matters, has directed the pursuit of a remedy in other forums.[17] These decisions, in the absence of any defined procedure, raise legal uncertainty. Legal uncertainty may increase disputes and litigations, create compliance challenges for a company, disrupt business operations, and deter investments.

2.3. *Over-enforcement*

Simultaneous proceedings before different regulators may result in over-enforcement. It is quite possible that a firm will be indicted on both forums. In *CCI* v. *Bharti Airtel*[18] (discussed later in detail), the TRAI recommended the imposition of a penalty on *Airtel*. A complaint was also raised before the CCI. The CCI launched its own investigation against *Airtel* even though a fine had already been recommended by the TRAI. Fortunately, the Supreme Court stayed the investigation pending further determinations by the TRAI. This kind of over-enforcement would be pernicious not only to the firm but also to the overall economy. In 2021-22, telecom companies recorded 4.17 lakh crores of debt. In such a situation, over-enforcement is likely to have a chilling effect on the market.

3. *Causes of the Conflict*

Multiple reasons can be cited for the jurisdictional conflicts between the regulators and the CCI. The conflict may be caused by the

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[17] See *Subhash Yadav v. Force Motor Ltd. & Ors,* Competition Commission of India Case No. 32 of 2012 (Ocobert. 5, 2012) where the CCI rejected the complaint holding that is not the correct forum for addressing consumer grievances. However, in *Belaire Owner's Association* v. *DLF Limited*, Competition Commission of India Case No. 19 of 2010 (August. 12, 2011) the CCI acted on consumer complaints.

[18] See *The CCI v. Bharti Airtel* (2019) 2 SCC 521.

legislative framework, regulatory design, or judicial precedents. Legislative provisions such as the 'non-obstante clause'[19] and 'exclusion of jurisdiction of civil court' often create many difficulties. The opinion of the courts in different cases has also created legal uncertainties. Interpretation of statutes rests in the hands of the judiciary, and judicial decisions have played a key role in shaping this conflict.

3.1. *Ambiguous Legislative Provisions*

Ambiguities have arisen from the provisions of the Competition Act. Section 60 states that the provisions of the Act shall have an overriding effect over other enactments. On the other hand, section 62 states that the provisions of this Act are in addition to and not in derogation of the provisions of any other law. The Electricity Act has also been conferred with an overriding effect[20]. Similarly, the SEBI has been given the power to agree to a settlement in administrative and civil proceedings proposed by the person against whom the proceeding was initiated[21]. This power is given notwithstanding any other law in force. If there is an offense covered by both the Competition Act and the SEBI Act, the SEBI may agree to a settlement, and the CCI may continue with its own proceedings. This would eventually result in a jurisdictional conflict and the statutes would only aid it since they give overriding effects to the regulating bodies. Thus, the provisions of the Act itself become the foremost instance of legislative ambiguity.

Other statutes that were enacted for specific sectors also included the 'promotion of competition' in their objectives. Section 11 of the

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[19] A non-obstante clause is a legislative device seeking to confer overriding effect upon a particular provision over other conflicting provisions of the same law or any other laws.

[20] See S. 174, The Electricity Act, 2003 (36 of 2003).

[21] See S. 15JB, The Securities and Exchange Board of India Act, 1992 (15 of 1992).

Petroleum and Natural Gas Regulatory Board Act[22] enumerates the functions of the PNGRB. These functions, inter alia, include protecting the interest of consumers by fostering competition and regulating access to common carriers or contract carriers to ensure fair trade and competition amongst entities. This Act also borrows the concept of 'restrictive trade practices' from the erstwhile MRTP Act, 1969. Restrictive trade practices are those practices which may prevent, distort, or restrict competition in any manner and in particular by obstructing the flow of capital or resources into the stream of production, or by manipulating prices or conditions of delivery or affecting the flow of supplies in the market in such manner as to impose on the consumers unjustified costs or restrictions[23].

Similarly, one of the objectives behind the Electricity Act[24] is the promotion of competition. The Act has a non-obstante clause too. The confusion of jurisdiction between the Delhi Electricity Regulatory Commission (DERC) and the CCI was seen in *Shri Neeraj Malhotra v. North Delhi Power Ltd*[25]. The electricity distribution companies (Discoms) alleged that only DERC has jurisdiction to deal with the issues relating to the anti-competitive behavior of electricity distribution companies. A conflict was imminent, but the DERC showed willingness to leave the anti-competitive issues for the CCI and the clash was averted.

In the new amendment to the Competition Act, 2002, the Government of India has accorded statutory recognition to 'hub and spokes cartels' by amending Section 3(3) of the Act, as suggested by the

[22] See The Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006).
[23] See S. 2(o), The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).
[24] See The Electricity Act, 2003 (36 of 2003).
[25] See *Neeraj Malhotra v. North Delhi Power Limited*, 2011 SCC OnLine CCI 20.

Competition Law Review Committee (CLRC)[26], to protect against collusion between a common agency (hub) and other participants involved in similar or identical trades (spokes). Notably, now any party involved in or planning to engage in an anti-competitive horizontal agreement can be held liable under Section 3(3), even if it is not engaged in the same or similar business as the other participants. Since the CCI previously had trouble showing cooperation between parties due to their separate trades, the proposed amendment has further broadened the CCI's jurisdictional reach, which can potentially evoke contentions in cross-jurisdictional cases across statutes and statutory forums.

3.2. *Judicial Decisions*

The writ courts had to step in very often to settle jurisdictional disputes between regulators and the CCI. The mandate given to them by their parent statute may overlap at times. If either of them is unwilling to let the other decide a particular dispute, things become uncertain. There is no defined law on what would happen in such scenario and whose jurisdiction would be superior. The courts have attempted to fill the voids created by the legislature. Despite numerous attempts, the controversy regarding the CCI's jurisdiction continues, largely due to the lack of a distinct pattern in judicial decisions and the differing ratios of these decisions. It may be said that the judiciary has been successful in settling the dispute of the CCI with a few regulators, but no general rule or guideline has been provided.

The *CCI v. Bharti Airtel*[27] is at the forefront of these decisions. In July 2016, Reliance Jio Infocomm Limited made a complaint before the TRAI against the incumbents namely Airtel, Vodafone, and Idea for

[26] See Ministry of Corporate Affairs, Government of India, Report of Competition Law Review Committee (2019) (Chapter 4, Para 3.2).
[27] See *The CCI v. Bharti Airtel* (cited in note 7).

denying Point of Interconnections (PoIs). RJIL was an entrant in the telecom market. The TRAI recommended that the Department of Telecom impose a penalty on the incumbents for violating various regulations. In December 2016, Reliance approached the CCI against the incumbents. It filed a case under section 19(1)(a) alleging the violation of section 3 of the Competition Act, 2002. The incumbents approached the Bombay High Court with the prayer that the investigation be quashed. The High Court acceded to the demands. The reasoning adopted by the High Court was that unless the clauses of the interconnection agreements, and the rights and obligations of the parties are defined clearly by the authority under the TRAI Act, the Commission would not be in a position to decide on such allegations. On appeal, the Supreme Court upheld this order. The Apex Court concluded that the matter pertains to the telecom sector, and the TRAI is more competent in dealing with the jurisdictional aspects in the first instance. Once TRAI furnishes its findings, which lead to the *prima facie* conclusion of anti-competitive agreements, the CCI can then be involved.

In the *Monsanto Holdings*[28] case, the payment of royalty fees was the subject matter of the dispute. Monsanto, a Fortune 500 company, had developed a second-generation technology cotton seed that was resistant to a certain pest. This particular technology, i.e., BT-II, was patented under the Patents Act, 1970 and was licensed to Mahyco Monsanto Biotech (India) Pvt. Ltd. Several seed producers in India receive sublicenses from MMBL for the BT-II technology. MMBL charged consideration for sub-licensing BT-II technology to Indian seed manufacturers in two parts, a non-refundable fee paid upfront and a recurring fee, known as the "trait fee", which is based on the maximum retail price ("MRP") fixed for the BT-II seeds sold to farmers/buyers by the Indian seed manufacturers. The CCI held that

[28] See *Monsanto Holdings (P) Ltd v. CCI,* 2020 SCC OnLine Del 598.

prima facie Monsanto's conduct violated the provisions of sections 3(4) and 4(2)(a)(i) of the Competition Act by charging the "trait fee", imposing "terms and conditions" on businesses seeking to utilize its "patented" method for procuring cotton seeds and further, abusing its dominant position in the cotton seed market by charging unfairly excessive prices for its patented technology. Thus, the CCI ordered the Director General (DG) to investigate the matter under Section 26(1) of the Act.

Monsanto challenged this order of the CCI before the Delhi High Court on the grounds that the CCI does not have jurisdiction to examine the issues raised as they relate to the exercise of rights granted under the Patents Act. It had also contended that the decision in *Micromax/Ericsson*[29] case had been overruled by the *Bharti Airtel* decision[30]. In the *Ericsson* case, the Delhi High Court held that unless there is irreconcilable repugnancy between the Competition Act and the Patents Act, the jurisdiction of the CCI to entertain complaints in respect of patent rights is not ousted. While rejecting the contention that *Ericsson* is overruled by *Bharti Airtel*, the court observed that the role of Controller of Patents is materially different from TRAI with the latter's functions being more perverse. The court made an interesting observation about the Supreme Court's decision in *Bharti Airtel* case. The court noted that the said decision is not an authority of the proposition that wherever there is a statutory regulator, the complaint must be first brought before it and the CCI's jurisdiction depends on the findings of the regulator. Apparently, this interpretation is not in much consonance with what was decided by the Supreme Court. The opinion of the court hampered the chances of the Bharti Airtel decision becoming a general rule.

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[29] See *Ericsson v. Competition Commission of India*, WP(C) 464/2014, DHC.

[30] See T*he CCI v. Bharti Airtel* (cited in note 7).

In *Amir Khan Productions Private v. Union of India*[31], the Bombay High Court held that the Competition Commission is competent to decide its jurisdiction given the factual situation of the case. The petitioner had challenged the show cause notices issued by the CCI. The petitioner contended that the Commission had no jurisdiction to initiate any conducted proceedings with respect to films, for which the provisions of the Copyright Act, 1957 contain exhaustive provisions. A similar argument was raised in the *Monsanto Holding* case[32]. Sections 84, 85(7), and 140 of the Patents Act have provisions on compulsory licensing, revocation for non-working, and restrictive agreements. Even though there existed exhaustive provisions in other statutes to curb abuse of dominance and anti-competitive practices, the courts have not abrogated the jurisdiction of the CCI. On the contention that the Copyright Board is the only authority to decide whether the terms of a license between a copyright owner and a radio broadcaster are reasonable, the Court in *Super Cassettes Industries Ltd. v. Union of India*[33] held that the powers of the Commission are different in their governing aspects and areas under section 3 and 4 of the Competition Act are not covered under the Copyright Act.

While it may seem that courts tend to protect the jurisdiction of the CCI, decisions to the contrary have also been made. In a case before Delhi High Court[34], the Court stayed proceedings of the CCI into the alleged anti-competitive practices of Indian Oil Corporation Ltd (IOCL), Hindustan Petroleum Corporation Ltd (HPCL) and Bharat Petroleum Corporation Ltd (BPCL) in relation to the pricing of petrol by them on a plea by the oil companies. Whenever there is a question

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[31] See *Amir Khan Productions Private v. Union of India*, 2010 SCC OnLine Bom 1226.

[32] See *Monsanto Holdings (P) Ltd. v. CCI* (cited in note 16).

[33] See *Super Cassettes Industries Ltd v. Union of India*, WP (C) 1263/2005, DHC.

[34] See *Reliance Industries Ltd v. Indian Oil Corporation Ltd. & Ors*, WP (C) No 8211 of 2010, DHC.

of CCI's jurisdiction involved, the courts show a propensity towards putting a stay on the Commission's investigation.

The Delhi High Court (DHC) recently delivered a judgment in the case of *ICAI v. CCI*[35]. ICAI (Institute of Chartered Accountants of India) impugned an order of the CCI in which the Commission had directed the DG to investigate the matter relating to the Continuing Professional Education (CPE) program being conducted by ICAI. This program gives credit hours to the Chartered Accountants and is exclusively conducted by the ICAI. The allegation against the ICAI is that it is abusing its dominant position as a "Regulator" to create a monopoly in the service of providing CPE seminars, clearly violating Sec. 4(1) of the Competition Act. The court stated in the judgment that *the statutory authority, which is vested with the regulatory powers can alone exercise such powers. The Competition Act does not contemplate the CCI to act as an appellate court or a grievance redressal forum against such decisions, which are taken by other regulators, in exercise of their statutory powers and are not interfaced with trade or commerce. A statutory body may in course of its functions, also make decisions which involve trade and commerce*[36]. The court found that there is no separate learning activity, which is prescribed and is interchangeable with the CPE program conducted by ICAI. The Court noted that CCI's authority is limited to market regulation; it does not extend to resolving any complaint against arbitrary behavior by any governmental entity[37] and since, there is no market for organizing CPE seminars, workshops or conferences, the court stated that *the decision of ICAI to frame the CPE Program for maintenance of professional standards cannot be considered as abuse of its dominant position*[38]. The court held this decision not

[35] See *ICAI v. Competition Commission of India*, 2023 SCC OnLine Del 3422.
[36] *Id*. at para 57.
[37] See *Id*. at para 66.
[38] See *Id*. at para 65.

amenable to review by the CCI[39]. This is an unprecedented decision which strengthens the functioning of sector regulators and further draws the lines between CCI's jurisdictions and sector regulators. However, a lack of clarity still exists in the interpretations of aspects of economic activity, enterprise and market in the courts.

In the same case, the CCI had advanced an argument from a different jurisdiction, relying on the case of *Ordem dos Técnicos Oficiais de Contas(OTOC) v. Autoridade da Concorrência* of the Court of the Justice of the European Union where a certain regulation was published by the OTOC[40], which stated that the OTOC shall provide two types of training i.e., the "institutional training" which could only be provided by OTOC, and the "professional training" which could be provided by higher education establishments and bodies authorized by law to provide training and bodies registered with OTOC. The Second Chamber held that the regulation which puts into place a system of compulsory training for Chartered Accountants, in order to guarantee the quality of services offered by them constitutes a restriction on competition. The DHC had some reservations about the OTOC decision and pointed out that OTOC was not the only authorized institution to provide training. Consequently, the OTOC precedent failed as in this case ICAI was the only institution providing verified instruction. The organized program and its accompanying activities were solely managed by ICAI. There was no other body offering professional training for obtaining the Chartered Accountant designation or for the ongoing education program, which was critical.

Furthermore, the Hon'ble Supreme Court proceeded with a different approach with regard to Public Sector Undertakings (PSUs) and their market dominance in *Coal India Ltd. v. Competition Commission of*

[39] See *Id*. at para 71.
[40] See *Id*. at para 72.

India[41]. The court ruled that the claim that the Coal Mines (Nationalization) Act and the Competition Act cannot be harmonized is unfounded[42]. It stated that the Competition Act applies to CIL and its affiliates and that the CCI is empowered to take legal action against them for misuse of a dominant position. The Court acknowledged that while the appellants' actions could be challenged through judicial review or before alternative forums such as the Controller of Coal, the availability of such remedies does not preclude a party from approaching the Competition Commission of India (CCI) for alleged violations of applicable laws[43]. Moreover, on the point of jurisdiction, the Hon'ble Court held that Section 19(4) gives the CCI the authority to consider "all" or "any" of the considerations when determining whether an organization has a dominating position. According to Section 19(4)(g), a "monopoly" or "dominant position" gained as a consequence of the Statute, by virtue of being a Government Company, a Public Sector Undertaking, or otherwise, is to be considered a significant factor. This shows that rather than excluding governmental entities like government companies, public sector undertakings, or bodies acquired under statutes from the Act's scope, the legislators clearly intended to include those entities within the Act.

There are visible inconsistencies in the decisions of the courts. In one place, the CCI has been given the liberty to decide its jurisdictions, but on other occasions, its actions have been severely restricted. There is irregularity in the stand of the CCI itself. For instance, the CCI acted against DLF[44] on a complaint by the allottees of an apartment built by it even though National Consumer Dispute Resolution Commission

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[41] See *Coal India Ltd. v. Competition Commission of India*, 2023 SCC OnLine SC 740.
[42] See *Id*. at para 127.
[43] See *Id*. at para 121.
[44] See *Belaire Owner's Association* v. *DLF Limited*, Competition Commission of India Case No. 19 of 2010 (August. 12, 2011).

had decided a number of disputes on the same issue.[45] The CCI itself in another case held that consumers have other adequate remedy and the real estate regulatory authority would look into the broader issues and concern of the market.[46] In several other cases, the CCI has closed the complaint that was filed before it for not being the appropriate forum for such disputes. In *Subhash Yadav v. Force Motor* Ltd.[47], the CCI closed the complaint on account of there being another statute that deals with the subject matter. Also, in the case of *Shri Anand Prakash Agarwal v. Dakshin Haryana Bijli Vitran*[48], concerning the fixation of the fuel cost surcharge adjustment ("FSA") component, the CCI chose to dismiss the information and directed the informant to file the matter with the relevant state and/or central electricity regulator under the Electricity Act. The CCI noted that FSA charges are computed and levied by electricity distribution companies and any tariff-related complaint would be addressed by the appropriate body under the Electricity Act. Numerous instances like these can be found, and the judiciary is not to be blamed for perpetuating this conundrum. Courts can interpret the laws, but they cannot take the work of lawmaking.

4. *Towards Collegiality*

The need to resolve jurisdictional issues arises when there is coextensive application of regulation and competition law. While the

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[45] See *DLF* v. *Kamal Sood*, (First Appeal No. 557 of 2003); *Lalit Kumar Gupta & Ors.* v. *DLF Universal Ltd.* (First Appeal No. 88 of 1999 and 345 of 2001); *Emaar MGF Land Ltd.* v. *Karnail Singh*, I.A. No. 3876 of 2014; *Sanjay Goyal* v. *Unitech Ltd*. (Consumer Complaint No. 344 of 2012).

[46] See *Jyoti Swaroop Arora* v. *M/s Tulip Infratech Limited & Ors.*, Competition Commission of India Case No. 59 of 2011 (February 03, 2015) at para 357.

[47] See *Subhash Yadav v. Force Motor Ltd. & Ors,* Competition Commission of India Case No. 32 of 2012 (Ocobert. 5, 2012).

[48] See *Shri Anand Parkash Agarwal v. Dakshin Haryana Bijli Vitran Nigam* (cited in note 14).

purpose and modus operandi of the sector regulators and the Commission may be different at times, the ultimate purpose that they serve is consumer welfare. Bearing that in mind, some suggestions are being made.

4.1. *Enhancing Cooperation*

The first and most obvious solution to this conflict is cooperation. Co-operation would disincentivize forum shopping for market players. The expertise of a sector-specific regulator would help with better analysis of cases. The sharing of information between the CCI and sector regulators would speed up the investigation of the CCI. Co-operation can be achieved in various ways, legally and institutionally.

4.1.1. *Mandatory Consultation*

One way to ensure cooperation is to incorporate the idea into the statute. For instance, the French regulator for communications, Arcep, is required to report to the Autorité de la Concurrence any abuses of dominant position or other anti-competitive acts taking place in the sectors Arcep regulates. Similarly, the Autorité de la Concurrence must inform Arcep of every referral under the regulator's purview[49].

Sections 21 and 21A of the Competition Act partially incorporate this suggestion. Under section 21, a statutory authority may make a reference to the CCI in cases where its decision would be contrary to the provisions of the Competition Act. Section 21A gives the CCI an option to refer the case to a statutory authority if the CCI's actions or decisions would be contrary to the provisions of the Act whose

[49] See OECD, *Interactions between Competition Authorities and Sector Regulators OECD Competition Policy Roundtable Background Note* (2022), available at https://www.oecd.org/daf/competition/interactions-between-competition-authorities-and-sector-regulators-2022.pdf (last visited August 21, 2023).

implementation is entrusted to the statutory authority. This opinion is not binding on the CCI. The consultation is also at the discretion of the CCI. Clearly, these provisions have not proved very useful as evident from the cases. If consultation were to be made mandatory, one's opinion would be more likely to be followed by another's. Moreover, it would help in achieving better results as specialized sectors are more apt to deal with issues in their respective fields. In the latest amendment to these sections, merely 'provisions of this Act' is substituted with 'provision of the Act'[50]. This would bring provisions of other Acts for reference, but the problem still remains.

The CCI may face issues in complying with timelines in practical implementation of this suggestion. The CCI follows a strict time schedule for compliances. However, only few cases result in jurisdictional overlap. Identifying these cases would be easy since one of the parties would almost always argue that a proceeding in respect of the matter is already ongoing before another forum. Once the CCI identifies these cases, it can consult the other forum. In sections 21 and 21A, a timeline of sixty day has been prescribed for giving the opinion. The time may be reduced for mandatory consultations if the CCI faces difficulty in meeting its timelines.

4.1.2. *Memorandum of Understandings*

In several jurisdictions, the competition authority has signed a Memorandum of Understanding (MoU) with sector regulators. These agreements set out in detail the framework for cooperation. This does not mean that it will be followed but it shows willingness and seriousness to cooperate. The Competition Commission of South Africa has signed MoUs with 14 sector-specific regulators[51]. In 2021,

[50] See The Competition (Amendment) Act, 2023 (9 of 2023).

[51] See OECD, *Independent Sector Regulators – Note by South Africa* (2019), available at https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)22/en/pdf (last visited August 18, 2023).

the Egyptian competition authority signed an MoU with NTRA (telecommunication regulator) to form a joint executive committee to promote competition in the market[52]. In Iceland, the competition authority (ICA) and the telecommunication authority (PTA) have a long-standing cooperation agreement to avoid duplication, increase effectiveness, and promote legal certainty and transparency[53].

There are multiple benefits of MoUs. They can be more detailed than legislation, they spell out in detail the methods and framework for cooperation rather than a general call to cooperate. They are entered into by the authorities themselves, who have expertise and experience in the market. As a result, MoUs are more relevant. They can also help in clarifying mandates when there is legal uncertainty and where legislative provisions come short in explaining the authority.

4.1.3. *Working Groups*

Establishing a working group would facilitate communication and discussion to reach a shared understanding. Working groups may designate an official as a point of contact. Many a time, cooperation is hampered by confusion as to whom to communicate. When there is a point of contact, at least the entry door will be visible. A working group may also bring the competition authority in close contact with sector regulators.

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[52] See National Telecom Regulatory, *Authority NTRA and ECA Sign a Memorandum of Understanding to Enhance Free Competition Practices in Egypt's Telecom Market* (2021), available at https://www.tra.gov.eg/en/ntra-and-eca-sign-a-memorandum-of-understanding-to-enhance-free-competition-practices-in-egypts-telecom-market-2/ (last visited August 17, 2023).

[53] See OECD, *Roundtable on Changes in Institutional Design of Competition Authorities - Note by Iceland* (2014), available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)94&doclanguage=en (last visited August 18, 2023).

In the UK, the Digital Regulation Cooperation Forum (DRCF) was established by the CMA (Competition and Market Authority) to foster greater cooperation between the CMA, the Information Commissioner's Office (ICO) and the Office of Communications (Ofcom). In India, we also have the Forum of Indian Regulators (FOIR). It has 38 members including the CCI. The forum conducts regular meetings of the members. It is not pertinent to discuss its achievements. However, it is safe to assume that its efforts on jurisdictional issues, if any made, have been fruitless. There is a need to revamp and strengthen this forum. Steps should be taken to make harmonious coordination between the CCI and other regulators possible.

4.2. *Achieving Consumer Welfare*

When a party has approached a sector regulator, the Commission must wait for the regulator's findings. If there is no repugnancy in its decision and the consumer welfare has been accounted for, there is no need for the Commission to step in. This can be better understood with reference to two foreign cases - the *Trinko case*[54] in the USA and the *Deutsch Telekom case*[55] in the EU. In the Trinko case, the incumbent Verizon was accused of not providing necessary interconnections. The rival local exchange carriers (LECs) complained to the regulators, who subsequently imposed penalties on Verizon. LECs brought the case under antitrust laws. Their action failed, and the court found that the existence of a shared provision under regulation militates against the respondent's claim under antitrust law. In the Deutsch Telekom case, the CJEU held that the practice of Deutsch Telekom was abusive even though it was approved by the regulator. It was a case of margin squeeze and the retail price of the services offered by the company

[54] See *Verizon v. Trinko*, 540 US 398 (2004).

[55] See Case C-280/08 P, Deutsche Telekom AG v. European Commission, ECR 2010 I-09555.

was approved by the German national regulatory authority (RegTP). These two decisions may seem contradictory, but they are not. In the Trinko case, the regulatory authority took care of consumer welfare, but it failed to do so in the Deutsch Telekom case.

4.3. *Empowering a Higher Authority*

As there is no defined hierarchy between sector regulators and the CCI, a higher authority may also be conferred the power to decide jurisdictional issues whose decisions would be binding on both. This would prevent litigation in courts. This would also discourage forum shopping as the question of jurisdiction will be decided unambiguously at the threshold. In the UK, the Competition Appeal Tribunal decides cases involving competition or economic regulatory issues. The current functions of the tribunal include hearing and deciding appeals on the merits in respect of decisions made under the Competition Act 1998 by the Competition and Markets Authority ("the CMA") and the regulators in the telecommunications, electricity, gas, water, railways, air traffic services, payment systems, healthcare services and financial services sectors[56]. In India, the National Company Law Appellate Tribunal (NCLAT) hears appeals against the orders of the CCI and sector regulators. It may be conferred the exclusive power to decide the jurisdictional dispute at the outset with a binding decision. Instead of approaching High Courts, the parties would go to the NCLAT which is less burdened and would decide the dispute in a time bound manner.

5. *Conclusion*

There are several market regulators in India, including the CCI. However, the CCI is different from other regulators in many respects.

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[56] See Competition Appeal Tribunal, 'About the Tribunal | Competition Appeal Tribunal', available at https://www.catribunal.org.uk/about (last visited August 27, 2023).

It is better equipped with competition enforcement tools. The CCI possesses the power to inquire into any anti-competitive activity and may order the DG to conduct an investigation. The CCI can investigate any combination that is likely to cause an adverse effect on competition. It has also been conferred the power to enter into any memorandum or arrangement with any statutory authority or department of Government or any agency of any foreign country[57]. It is not sector-specific, and it is a stand-alone agency with responsibilities for promoting and enforcing competition in all sectors.

Since the CCI has a duty to eliminate anti-competitive practices in all sectors, it often encroaches upon the jurisdiction of other sector regulators. These jurisdictional conflicts result in litigation before the courts. Legal contentions brought by the CCI, or the sector regulator challenging jurisdiction can slow down or even derail cases. The lack of clarity in the roles and mandates of competition authorities and sector regulators can be due to inefficient legal framework, varied judicial decisions and incapable regulatory design. As a result, it is imperative that the writ courts step in to solve the conflict and that their decisions continue to shape this controversy. In addition, as shown by the international experience, the interaction between sector and competition regulators can be managed through institutional approaches such as a Memorandum of Understanding and establishing working groups. In the end, to reach such a goal, consistency between the actions of the CCI and of sector regulators must be ensured for more pro-competitive sector regulation.

[57] See The Competition Act at Section 18 (cited in note 1).