

Jurisdictional Combat Between Competition Commission of India and Sectoral Regulators: A Critical Relook

The Article provides a brief overview of the legal framework for resolving jurisdictional conflicts between the Competition Commission of India (CCI) and sectoral regulators specifically the Telecom Regulatory Authority of India (TRAI) and evaluates the adequacy of the same through a critical lens.

Introduction

The CCI being the overall market regulator, plays a crucial role in eradicating anti-competitive practices, preventing market failures and protecting the interests of consumers and so fettering its powers can cause adverse effects on the market and economy. As CCI has powers to regulate competition across all sectors, its enforcement tends to overlap with the jurisdiction of other specific sectoral regulators like the Telecom Regulatory Authority of India (TRAI), which also aims to protect the interests of consumers of telecom sector and provide an environment for facilitating competition¹. Though the scope of CCI's power on competition matters is broader in scope as compared to TRAI, which is sector-specific, having generic² competition mandate, raises an alarming concern regarding the issue of conflicting/overlapping jurisdictions as TRAI attempts to flex its authority over CCI even on competition matters. The root cause for this lies in the ambiguities created by the legislative language used in the Competition Act 2002 and the Telecom Regulatory Authority of India Act, 1997 indicating their respective policy goals/objectives³ including consumer welfare and nearly similar competition mandates. Such overlapping is problematic as it results in “duplication of time, efforts and resources by both regulators on the same dispute which may result in conflicting decisions⁴” and “over-enforcement i.e. same entity being indicted at two forums”, “forum shopping by parties due to lack of clarity and



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¹ Telecom Regulatory Authority of India, 'History' < <https://traigov.in/about-us/history> >.

² Paridhi Poddar, 'Sectoral Regulation, Competition Law, and Jurisdictional Overlaps: Tracing the Most Viable Solution in the Indian Context' (Kluwer Competition Law Blog, 24 May 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/>.

³ Sayan Kumar Panda and Nikita Mohapatra, 'Decoding the Contours of CCI's Jurisdictional Quandary: A Comment on Star India Private Ltd and Ors v. Competition Commission of India' (2020) 5 ICLR 66.

⁴ Sahithya M & Abhik Chakraborty, 'Sectoral Regulator and Competition Commission: Envisaging a Movement from Turf War to Reconciliation' (2017) 11 NALSAR Stud L Rev 125.

uncertainty with respect to the costs and penalties imposable on violation, thereby affecting investor's investment choices⁵". Thus, it is crucial to address these overlapping conflicts and have clarity for which it is imperative to critically analyze the sufficiency of the existing framework, identify the gaps and provide an effective remedy/approach for the same.

Legislative Framework and Challenges

If an inter-regulatory issue between CCI and any sectoral regulator/TRAI is raised by a party during proceedings or taken up by the CCI suo motu, the consultation mechanism through referencing under Sections 21 (reference by statutory authority) and 21A (reference by CCI) of the Competition Act 2002, based on harmonious cooperation of both regulators, is followed. On receiving the reference, the concerned regulator and CCI exchange opinions/findings and thereafter proceed with the matter exercising jurisdiction. However, this option of referencing is discretionary and so in practice, it is not adhered to effectively as both regulators try to defend their own turf and not refer/consult the other, leading to situations needing judicial intervention. Thus, the said provisions can best be aids but not a complete solution. Recently, the CCI attempted to resolve the overlapping issue by proposing the Competition (Amendment) Bill 2022 which provides that the Commission may, for the purpose of discharging its duties or performing its functions under the Act, enter into any memorandum or arrangement with any statutory authority or department of Government. However, this proposed measure is not sufficient as it only increases the cooperation between the two regulators to harmoniously work together on a common dispute, in furtherance of the reference mechanism. In absence of a mandate (binding obligation), the MOUs will also not serve the purpose of resolving overlapping concerns.

Judicial Perspectives and the Bharti Airtel Decision

There is a catena of judgments with different views on this issue and the most relevant one which has modified the jurisprudence on it is the Apex Court's decision in **CCI v. BHARTI AIRTEL**⁶ [2018], wherein the Court propounded the sequencing approach. In Bharti Airtel, Reliance Jio Infocom Ltd. (RJIL) had filed a complaint before the TRAI contending violation of TRAI's Direction issued under Section 13 read with Section 11 of the TRAI Act which mandated service providers for providing interconnection. Thereafter RJIL also approached the CCI alleging that it was denied the points of interconnection by dominant players of telecom sector (Airtel, Vodafone and Idea) and this conduct amounted to violation of telecom regulations relating to license conditions or amounted to collusion by forming cartel/entering anti-competitive agreements with the intent of hindering RJIL's entry in the market, being violative of section 3 of the Competition Act. The Court while deciding on jurisdiction of regulators, pushed the CCI's jurisdiction to a later stage i.e., after TRAI returns its findings post adjudication of jurisdictional facts. Today, the Bharti Airtel decision holds a precedential value, but it has also led to ambiguities that can ultimately result in limiting the CCI's scope, in absence of further clarity on the following aspects: (i) Would CCI's jurisdiction activate only after TRAI concludes its proceedings even at appellate stages including final decisions of TDSAT and the Supreme Court? If so, that would delay and stifle the CCI's jurisdiction/powers for many years due to the time-consuming adjudication processes and pendency of cases before the said appellate forums; (ii) In absence of clarity on what a jurisdictional fact is in each case, the Bharti Airtel case may be misused by litigants; (iii) In

⁵ Ibid.

⁶ Competition Commission of India v. Bharti Airtel Limited and Others [2018] MANU/SC/1423/2018 (Supreme Court) < www.manupatra.com >.

Bharti Airtel, TRAI had to deal with regulatory non-compliance/violation through a procedural lens whereas the CCI had to deal with the issue of anti-competitive conduct of collusion/cartelization from the competition perspective and thus the approach of preferring TRAI over CCI for deciding jurisdictional facts first, has created more confusion as both regulators could have separately decided the different jurisdictional facts in their respective spheres without arriving at conflicting outcomes.

Strengthening the Legal Framework

The above discussion highlights the need for a stronger legal framework and putting forth a clear policy objective through legislative intervention which will remove the ambiguities from the statutes and the uncertainties resulting from the Bharti Airtel Decision. An efficient way to do that is by following the EU model and exclusively vesting the sole powers of competition regulation/enforcement in the CCI while discarding the competition mandates of TRAI and other sectoral regulators completely. Setting such clear demarcation will target the root problem of inter-regulatory conflicts. This proposal is in consideration of the fact that CCI can apply the law uniformly across all sectors, unlike other regulators which do not possess such level of expertise and knowledge to deal with complex matters of competition violation. Due to the complexities and technicalities of different sectors and the sector-specific knowledge and expertise required for the same, a mandate can also be imposed on sectoral regulators to participate/cooperate and assist CCI while investigating/adjudicating anti-competitive practices concerning their respective sectors. This can be done by establishing a mandatory consultation mechanism.

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