Section B

Articles

'Necessary and Sufficient' Test: Healthy Inter Regulatory Relationship – Part I

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There have been a number of studies, across the globe, about inter sector regulatory conflict. One such report was commissioned by the Competition Commission of India (CCI), in its early days, much before it got the powers to enforce the provisions of the competition law in India. This report is available on the website of CCI and it offers a good background of where the conflicts may arise in this inter sector regulatory space. The author attempts to find out if there can really be a harmonious working relationship amongst different regulators and comes up with a 'necessary but sufficient' rule as a litmus test for ensuring that such overlaps and conflicts do not arise. The essence of this test, as propounded in this write up, is that the regulator which finds it necessary to address the competition concerns and has the legal provisions, to deal with such an intent, in the statute by which it is established and governed, is the one which has jurisdiction in the matter. The immense experience of the author, at all the senior working slots of consequence, in CCI wherein he also represented CCI in the Forum of Indian Regulators(FOIR) as well as various international bodies such as the Intergovernmental Group of Experts (IGE) in Competition Law and Policy Branch of UNCTAD, has added a particular perspective to this written piece. This is a two part article. Part I is appearing here. Part II shall be published in one of the forthcoming issues of Competition Law Reporter.

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There is a huge literature available on what a sector regulator should do and what it should not do. Similarly, reams and reams of paper, earlier in the times of predominance of print media, and gigabytes and gigabytes of the cyberspace now, in the times of dominance of cyber media, have been devoted to what is the domain of an overarching competition regulator and which are the areas it should keep itself aloof from and let the sector regulator do the job.

Despite such holy homilies being available to all and sundry, the turf clash between the stock exchange regulator SEBI and the insurance regulator IRDA, a few years ago, is still fresh in public memory. This was a matter where executive nudging was needed to settle the differences between the insurance and stock exchange regulators which were creating a very unseemly atmosphere not very conducive for entire regulatory environment when every other day there is a demand for one regulator or the other - clamour for real estate regulator being the latest one- and rightly so in view of the opening up of the economy in different sectors.

To understand this relationship, let us begin with having a look at the duties of the Competition Commission of India (CCI). The duties of CCI, as enshrined in Section 18 of the Act, are to eliminate practices having adverse effect on competition, promote and sustain competition. This charter of duties indeed appears extra-ordinarily wide and expectedly, on the face of it, overlaps with the jurisdiction of the sector-specific regulators such as stock exchange, electricity, petroleum, telecom etc. In reality, wherever there is a mention of the word 'competition' in one form or the other, in the respective statutes of the sector regulators, there may be a perception of apparent overlap or conflict.

Some of the instances of such perceived over-lap of jurisdiction between the competition regulator and the various sector regulators are being provided below:

a. The Electricity, Act, 2003 (EA03) also mandates the electricity regulators to promote competition in the electricity sector. Section 60 of EA03 also goes to the extent of authorising the regulator to give 'directions' to deal with any market domination causing adverse effect on competition in electricity industry.

b. The Petroleum and Natural Gas Regulatory Board Act, 2006 includes provisions for promotion of competition in its sector. The PNGRB has, inter alia, an objective to promote competitive markets (the Preamble) and foster trade and competition among entities [Section 11(a)]

c. The Telecom Regulatory Authority of India Act, 1997 has an objective, inter alia, to ensure orderly development of telecom sector [Preamble]. Accordingly, one of the critical functions of the telecom regulator is to 'facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth is such services'. [Section 11(1) (h)].

Such perceived over-lap of jurisdiction may occasionally result in situations where both CCI and respective sector regulators may feel that they have jurisdiction to deal with an anti-competitive conduct in the sector. Recognising the expertise of the CCI in dealing with broad competition issues in various sectors of the economy and the expertise of different sector regulators in matters of details such as setting of tariffs and the operating conditions, the legislature has wisely

included Sections 21 and 21A in the Competition Act 2002 (the Act). The expectation was to clearly demarcate the jurisdiction of the CCI and various sector regulators. The CCI is expected to deal with overall competition issues and any matter needing competition analysis irrespective of the sector involved and refer the technical issues involved, if any, to the respective sector regulators under Section 21 A of the Act. Similarly, the sector regulators are expected to refer competition issues before them to CCI under Section 21 of the Act if the competition issues are involved.

For the moment, to explore the finer nuisances, in this write up, let us limit ourselves to the discussion on the electricity regulator and its comparison with the mandate of CCI. In this particular context of perceived overlap between the jurisdiction of electricity regulator and CCI, it is extremely significant to note the opinion of the Hon'ble Delhi Electricity Regulatory Commission (DERC). This opinion of DERC has been recorded by CCI in its order in case of *Neeraj Malhotra vs North Delhi Power Limited and Ors.* [CCI Case No. 6 of 2009]. As extracted by CCI in its aforementioned order, the DERC, in its communication to CCI, has said

> *". . . matters relating to electricity tariff have to be decided as per the provisions of Electricity Act, 2003, and DERC Regulations. Accordingly CCI may not be appropriate forum to deal with such issue. However specific issues alluded to by the Petitioner accusing the Discoms of abuse of their dominant position may be looked into by the CCI in terms of Competition Act 2002"* (Paragraph 12.1 of the order).

The above opinion of DERC succinctly sums up the basic essence of relationship between sector regulators and CCI. The litmus test for resolving any apparent conflict should be that where the provisions given in the respective statutes, by themselves, are 'necessary and sufficient', to deal with any matter involving competition issues, such as 'anti-competitive conduct', 'abuse of dominant position' or 'regulation of combinations', that particular regulator should deal with that matter even if it involves general underlying philosophy of competition. If both the conditions are not met, it is an indication that the other regulator has to be consulted and the first regulator cannot decide the matter on its own. If taken as a litmus test for resolving any situations where matters involving competition or tariff and allied matters, having a potential conflict, land up before one regulator, this test shall ensure that there is no conflict.

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Where the provisions in the respective statutes, though necessary, are not sufficient to make a competitive analysis of the conduct, the same should be referred to the competition agency for an

extensive and in-depth competitive analysis of the conduct. For instance, Section 60 of EA03 provides the electricity regulatory commissions with an authority to give 'directions' where market domination is resulting in adverse effect on competition in the electricity sector. For a ready reference, the Section 60 of the EA 03 is being reproduced below:

> "Section 60 (Market domination):
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> The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry."

However, while giving powers to the appropriate commissions (read State ERCs and CERC) to issue directions, this Section in EA03 does not provide the legislative framework for determination of relevant market, dominant position, and abuse thereof for effective adjudication of the issue. It implies that, by itself and only within the provisions of the EA03, the electricity regulator cannot adjudicate an issue of abuse of dominant position. Such situations clearly indicate the need to involve the other overarching regulator, i.e. CCI in Indian context, in such matters.

Similarly, some competition issues may need looking into the issues arising out from tariff settings and allied matters. For this, the provisions are not provided in the Competition Act 2002. With the result, for tariff related issues, one has to perforce look into the Electricity Act, 2003. Even if a matter comes before CCI which calls for going into issues relating to tariff setting etc. for which provisions are not given in the Act, it may not be appropriate for the CCI to start examining those issues and import the related provisions from the Electricity Act, 2003. These are the matters where, the expertise of the electricity regulator should be sought. This principle of domain demarcation, if kept in mind, may ensure that there is hardly any conflict.

In simple terms, the 'necessary and sufficient' test for healthy inter sector regulator relationship can be stated as under:

> *The jurisdiction belongs to the regulator whose statute is 'necessary and sufficient' to inquire into and finally adjudicate the issue without having to import the provisions of the other's statute.*

If and when a situation arises that either regulator does not find the statutory provisions in the respective statutes 'necessary and sufficient', it should invoke Sections 21 or 21A of the Act to tap on the expertise of the other regulator as the case may be. The necessary corollary of this 'necessary and sufficient' rule is that where applying the competition norms is only necessary but the statutory provisions in the respective statutes are not sufficient to enforce them, that regulator should leave it to the regulator (may be CCI , in this case) whose statute has all the provisions to deal with the situation. Similarly, at times, the overall competition regulator, CCI, may feel that it is 'necessary' to enforce competition culture in any particular sector but may not have the detailed provisions to deal with issues it is looking at. In that event, it should leave that part of the determination of the issue which needs delving into the detailed provisions of EA 03 to the electricity sector regulator. As things stand today, chances of CCI finding erring market players in different sectors are quite high. Till date, it had to look into the issues relating to stock exchange, electricity, aviation, telecom and broadcasting, petroleum, banking, insurance and many other sectors. Many of these sectors are

already regulated and having their own regulators. Thus, the need of continuously looking at the dividing line between competition and sector regulators is more with CCI. This is obvious as, nearly on a daily basis, it will be called upon to deal with matters relating to other sectors having their own sector regulators. Wherever, there is need to get into specifics of adjudicating some issues which require a direct reference to the provisions of the EA 03, the CCI should definitely benefit from the expertise of the sector regulator. Similar reciprocal conduct is expected from the electricity sector regulator as well. Both these expected reciprocal reference mechanisms are amply facilitated by the provisions of Section 21 and 21 A of the CA 02.

Specific provisions of CA02 signal towards the primacy accorded to CCI in matters of competition enforcement. Section 60 of CA02 is the *non obstante* provision asserting the supremacy of competition legislation within the domain of competition enforcement. Section 21 of CA02 further mandates the CCI to give its views upon any conduct that may violate the provisions of CA02 upon reference by a statutory authority.

Section 18 of CA02 entrusts the Commission with an overarching duty of sustaining competition in the market. As a corollary, the amplitude of this duty entails that the CCI is vested with a comprehensive, overall vantage point in the economy. Such a broad, sweeping vantage point is unavailable to any sector specific regulator.

In this connection, we may have a support of the report titled "*The Teeter-Totter of Regulation and Competition: Why Indian Competition Authority Must Trump Sectoral Regulators*", as available on the website of CCI. The report has tried to demarcate the distinction between the roles of the Competition Authority and the Sector-specific regulator. The distinction drawn in the different roles of the competition regulator and sector regulators, in this report, is being reproduced below:

Roles of Sector Regulator and the Competition Commission

Sector specific Regulator	**Competition Authority**
Tells businesses "what to do" and "how to price products"	Tells businesses "what not to do"
Focuses upon specific sectors of the economy	Focuses upon the entire economy and functioning of the market
Ex ante – addresses behavioural issues before problem arises	Ex post (except merger review)
Focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare	Focus upon consumer welfare and unfair transfer of wealth from consumers to firms with market power
Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry and opening up the market to effective competition	Competition legislation is usually more appropriate for affecting conduct and maintaining competition

From the above comparison, it is evident that the role of sector specific regulators is overlapping but quite distinct. Unlike the sector specific regulators, competition authority takes a holistic perspective of the economy and addresses competition issues after the problem has arisen or there are apprehensions and/or allegations of an adverse effect on competition.

In this connection, the CCI has opined in the case of *Neeraj Malhotra (supra)* that, "The mandate of Commission is to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Sectoral regulators have necessary technical expertise to determine access, maintain standard, ensure safety and determine tariff. They set rule of game i.e entry conditions, technical details, tariff, safety standards and have direct control on prices, quantity and quality. Thus sectoral regulators focus on the dynamics of specific sectors, whereas the CCI has a holistic approach and focuses on functioning of the markets through increasing efficiency though competition. In fact their roles are complementary and to each other and share the objective of obtaining maximum benefit for the consumers." (Paragraph12.3)

Therefore, CCI may not go into the technicalities of the electricity sector, for instance, determining tariffs or setting technical standards for delivery. However, the primary issues relating to sale and purchase of electricity and the competitive dynamics arising there from, being purely competition issues need the attention of CCI.

The sector regulator , even if it wants to inquire into an allegation of 'abuse of dominant position', for lack of adjudicating , investigating of penalising statutory framework, will be handicapped in inquiring and penalizing, if found guilty, an enterprise alleged to be indulging in an ' abuse of dominant position'. Once any regulator does not have a mandate to punish the wrong doer, as a necessary corollary, it does not have a mandate to inquire into it either. Initiating an inquiry into an area not specifically provided for in the statute and then exonerating the enterprise or person alleged to be abusing its dominant position, by importing provisions of another statute, the mandate over administration of which has all together been given to a different regulator, casts a long shadow on the conduct of the regulator if not from the point of view of intent, then certainly from the point of view of understanding of inter sector regulation harmony.

Section 60 of the EA03 empowers the electricity regulatory commissions to deal with market domination. The electricity regulatory commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.

In the above background, it is curious to see how the Hon'ble Maharashtra Electricity Regulatory Commission (MERC) adjudicated the issue of 'abuse of dominant position', in its Case No. 161/2011[1](available on its website). The primary question was two enterprises were alleged to have abused their respective dominant positions by, *inter alia,* non-grant/delaying of open-access in their respective networks to the

1 http://www.mercindia.org.in/pdf/Order%2058%2042/Final%20Order%20-%20Case%20No%20%20161%20of%202011.pdf

Petitioner therein. In this case, the MERC decided the issue first by determining the 'the relevant market' and 'dominant position' of the Respondents therein by importing provisions from the CA02 including, *inter alia,* Section 19 of CA02. The provisions of the EA 03, by themselves, were not sufficient to deal with the issue under discussion. Therefore, if there was a 'necessary and sufficiency test', at that time, it was not met in the facts and circumstances of the case.

The MERC found the Respondents enjoying a dominant position in the respective relevant markets. While determining whether there existed an abuse of dominant position, the MERC had access to letters written by the Respondents about the eligibility of Petitioner for open access and the financial implications of granting thereof for the Respondents therein.

However, instead of taking note of the said communications as prima facie evidence of abuse of dominant position by the Respondents therein, the MERC chose to concentrate, in its entire discussion on abuse, on digging deeper into the issue whether the said letter was admissible or not, consequently ruling against the Petitioner and not agreeing with the allegations of abuse of dominant position.

There is no discussion in the said order of MERC about the conduct of the Respondents being potentially violative of Section 4 of CA02. Instead, the entire focus is on whether sending the letter is an abuse or not. This case points towards the pitfalls of any sector regulator taking upon itself the burden of doing what the competition regulator should be doing. 'Bite not more than you can chew' is an old adage. Perhaps, it applies even today in appropriate situations.

How analysis of abuse of dominant position can be done without even a single mention of various types of abuses within Section 4 of the CA02 is unclear. It is a simple unresolved curiosity if MERC would also have imposed a penalty under Section 27 of the Act if the abuse of dominant position was Actually found by it. As the MERC chose to utilise Section 19 of CA02 to analyse the dominant position of the respondents, would it also have appropriated the authority provided under Section 27 of CA02, to CCI, to penalise the Respondents if an abuse of dominant position was established in this particular matter, is a question without easy answers.

Where it is acknowledged that the sector regulators should have primacy while dealing with technical issues in their respective sectors, it should also be acknowledged that any adjudication based on the provision of the CA02- especially the operative provisions of Section 3, 4, 5 & 6- can be dealt with by CCI only. Competitive analysis of any conduct is based on expertise which is best available with the competition agency. Playing the role of the competition agency by a sector regulator involves significant risks as demonstrated herein.

Another reason why only CCI should be entrusted with competitive analysis of a conduct is the presence of dedicated investigation machinery available with it. The MERC, in the above said case, could not have passed a prima facie order requiring for deeper investigation before forming its view primarily due to the lack of investigation machinery as available with CCI. The MERC conducts public hearing while adjudicating an issue. It is questionable whether the general public while attending the hearing can contribute appreciably towards the technical concepts like determination of relevant market, dominant position, or abuse thereof.

The MERC has been entrusted with a duty to involve the stakeholders while

determining tariffs and subsidies. However, a general reading of the orders of MERC reveals that the MERC may have been deciding the issues before it without comprehensively dealing with the concerns of the stakeholders ,may be, on account of lack of matching resources.

The CCI has been dealing with cases from the electricity sectors [See *Neeraj Malhotra*(supra) and *Anila Gupta* v. *BEST Undertaking* CCI Case No. 6 of 2010]. In addition, world over the competition regulators have even gone to the extent of enforcing divestiture of undertakings held to be abusing dominant position in the electricity sector [See COMP/ 39.388 *German Electricity balancing Markets* Commitments Decision [2009] OJ C 36/9].

The CCI has been established to prohibit anti-competitive practices, promote competition in all sectors of the economy as an umbrella regulator. The critical nature of the electricity sector entails that the effect of anti-competitive conduct in the electricity sector is felt across every sector in the economy. Electricity being essential and irreplaceable commodity, the consumers (commercial and residential) suffer from the effect of the abusive conduct. In the circumstances, it is the responsibility of the competition regulator to be vigilant of its role in maintaining the competitive equilibrium in the market place. It has to be vigilant for using the reference mechanism provided under the Act but it should also not shy away from Acting on issues which affect the overall competition landscape irrespective of the sector they arise from. If used with empathy, the 'necessary and sufficient' test can lead to better relationships amongst regulators.