

Intersection between Competition Law and Sectoral Regulations: - An Analysis of the Telecom & Broadcasting, and Insurance Sectors

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I. INTRODUCTION

Before liberalisation in the early 1990s, the general consensus was that only State-owned Enterprises (SOEs) would look out for the welfare of the people. In the post-liberalization era, with a growing acceptance of capitalism and market mechanisms for the distribution of services, this notion has altered significantly. At the same time, different possibilities of market failures have led to the establishment of a plethora of regulatory authorities mandated to mitigate such failures.

One such authority, the Competition Commission of India (CCI) was established by the Competition Act of 2002. The CCI works to ensure that competition in the market is sustained. The ultimate goal of the Commission is to protect both consumer welfare and other producers from any dominant player in the market who could use its dominant position to its own benefit adversely impacting the consumer interests and killing competition in the market.

At the same time, recognizing the growing complexities in services provided, a number of sectoral regulators have been set up. These regulators are expected to develop a close understanding of the industry and the sector that they are operating in, allowing them to regulate the sectoral market with their niche expertise. They also have a common goal of protecting the consumers and the enterprises from any harmful and potentially unfair practices and upholding the competition.

Since all these regulating bodies are mandated to protect the competition, there has always been a possibility of overlapping roles between the sectoral regulators and the CCI. This paper aims to enquire about such overlap between the two sets of authorities and how it varies across different sectors. It looks specifically at the Insurance and Telecom sectors for this purpose. These sectors are chosen considering the differences in their composition (of the players in the market) as well as the nature of the products provided. The insurance sector has a healthy mix

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of public and private sector players, (with the life insurance subsector being dominated by the public sector- LIC), while the telecom sector is largely dominated by a few private players. The telecom sector is also a dynamic industry, with radical changes happening every few years (Competition Commission of India, 2021), while the insurance market is a relatively stable and well established one.

II. METHODOLOGY

The period studied for this paper is from July 2019 to December 2019. The study was originally intended to be focused on studying the orders, directions and regulations issued by the three regulators- the Competition Commission of India, the Telecom Regulatory Authority of India (TRAI) and the Insurance Regulatory and Development Authority of India (IRDA). However, the initial study reiterated that most of the work carried out by the sectoral regulators is on an ex-ante basis, and they do not deal as much with the area of competition through enforcement orders. Thus, the methodology was altered to look at the parent statutes along with the regulations, reports and even consultation papers that are released by the two sectoral regulators during this period. Since the CCI studies the nuances of competition in each of its orders, these orders are studied in detail.

III. ANALYSIS

a. Independence of these Regulators from the Industry – Whether Public and Private Companies are treated differently

The Monopolies and Restrictive Trade Practices Act (MRTP), 1969 carved out a specific exemption for public sector companies, on the possible basis that even if these companies do become monopolies, these monopolies will be used to enhance public good and will not be used to exploit the general public. This exemption has not been carried forward to the Competition Act, 2002 with the term enterprise being defined to cover a large variety of public and private players. The general consensus in the post-1990s liberal era is that private and public entities should all be treated on an equal footing and should be expected to compete with one another. It is expected that such competition will improve the quality of services, and control prices, ultimately leading to enhanced welfare for the consumer.

There however seems to be an additional fear of private players getting too big and strong and that adversely affecting the market. An analysis of the consultation paper ‘Tariff Issues of Telecom Services’ issued by the TRAI for instance expresses this concern specifically.

In the insurance sector studies have indicated that after liberalization and privatization, the monopoly of the public sector has been broken and there has been a greater influx of national and international players in the market. These players have put competitive pressure on the market which has led to innovation in the market (Pradhan et al 2016). These insurance companies are having to compete with the private companies, and thus have to be innovative. The policies laid down by the IRDA are equally applicable to both private and public sector companies with no clear discrimination between the two (Satish et al 2019).

Regulators are expected to behave independently and objectively in their activities, but there have been concerns about how this independence can be ensured. There are concerns that members of regulatory bodies could benefit from favouring certain companies (Kumar 2018). Since regulatory entities are an extension of the government the risks of the regulator siding with public companies are perceived to be higher.

All three of the acts that have set up these regulators (The Competition Act, 2002, The TRAI act, 1999 and The IRDA Act, 1997) have all got self-contained provisions to try to prevent any sort of incentives that would coerce the regulators to be biased towards any specific players. The IRDA for instance has a bar on future employment with the Government or with Insurers for a period of two years after serving tenure in the regulator. Similar provisions exist for the TRAI and the CCI as well.

b. Focus on Competition – Does industry and the nature of services matter?

The telecom industry is dynamic with new technology challenging the existing infrastructure every few years. Additionally, this industry in India is among the fastest-growing in the world because of the exponential increase in the user base. Accordingly, the TRAI has to constantly engage with the market and the developments to ensure that individual players are prevented from capitalizing on their market strength to become dominant, whether capitalizing on their existing market bases or through first-mover advantages. The tussle between the telecom operators (Reliance Jio, Bharati Airtel and Vodafone) also emphasizes this dilemma (Parsheera 2021) about how new entrants could capitalize on providing new technology since they do not

have to make a transition from older infrastructure, whereas old players could use their existing infrastructure to their benefit. Both these sets of players having their own advantages do not cancel out to create better competition, rather it creates a situation where both sets of players have the potential to be dangerously anti-competitive. Given this environment, the TRAI is constantly engaging with stakeholders through consultation papers. The insurance sector is currently seeing neither such dynamism in its product, nor such dominance by a few players in the industry. Consequently, IRDA has issued relatively fewer consultation papers to engage with stakeholders, only related to certain niche areas.

The TRAI acknowledges the constantly evolving nature of the market both in terms of the nature of services, and technological change, along with the structure of the market and the nature of the major players in the said market. For instance, in the consultation paper titled ‘Consultation Paper on Tariff Issues of Telecom Services’ while speaking about setting up a floor price, the TRAI emphasizes the market structure, with three dominant players arguing for the floor price being set. It argues for both the pro and cons of a floor price like mechanism. This discussion would fall squarely under the purview of the economic laws related to competition that the competition authority deals with. However, the sectoral regulators are the forward-looking entity, while will study the specific industry market and its nuances. Therefore, it may be best posed to put in place the regulations that can prevent anti-competitive activity.

In the same consultation paper, the TRAI has also made a distinction between voice services and data services while determining whether a floor price should be set. Voice services are considered essential, and therefore setting a floor price for them has been considered to be more detrimental to the cause of consumer welfare, than better competition could be helpful.

At the same time, in a consultation paper called ‘Consultation Paper on Review of Scope of Infrastructure Providers Category-I (IP-I)Registration’ advocates for infrastructure sharing. Such an arrangement was expected to encourage anti-competitive practices in the past. Because of changes in the way the industry operates (with a separation in infrastructure sharing and services sharing) this fear is now lost. Since TRAI appreciates these changes in the nature of the industry it is able to make these decisions. The CCI or any other regulator who is not as closely linked to the sector may have accepted such activities being anti-competitive as an existing precedent and may have taken decisions accordingly, or it may have to make a reference to the sectoral regulator.

c. Coordination between the authorities

A number of the CCI orders make reference² to the sectoral regulators to look at the nuances of the sector. The Commission takes the opinion of those regulators (for instance in the studied period the commission reach out to IRDA before it gave its views) before giving its response. In a number of orders during the period, it was also noted that the Commission refers to various reports issued by sectoral regulators, and specifically shares orders with them when considered necessary. One such order was related to the widely discussed NSE Colocation case. Here, while there was definite anti-competitive behaviour by some parties the CCI believed it important to wait for SEBI's investigations, before it could comment on the specific role played by the party in question.³

Such coordination if happening in both directions, with the sectoral regulators making references to the CCI would be beneficial for solving competition-related matters that also involve specific sector nuances. It would involve leveraging the strengths of both sets of authorities.

d. Engaging with Stakeholders

The sectoral regulators are in close consultation with the stakeholders in the sector. This is particularly true for the more dynamic of the two sectoral regulators which was studied, TRAI. A number of pain points could be brought to the notice of the regulator only through this process.

The sectoral regulators have been set up to protect the interests of consumers and promote the orderly growth of the markets and the sectors they are operating in. This is reflected in the preamble to their parent statutes as well. The entire purpose of setting up these regulators is to have an entity which is close to the industry and has the capacity to appreciate the nuances of the respective sectors and to engage with the relevant stakeholders. When regulators do so

² For instance, in the 'Case 12 of 2019', Indian Chemical Council v. General Insurance Corporation of India, the CCI makes a reference to IRDA on whether certain conduct is anti competitive before passing its order.

³ In Case no 47 of 2018, Advocate Jitesh Mishra and NSE of India Limited the CCI has decided that it must for the competition of the investigation by SEBI before passing its order on the matter

through their consultative mechanisms (and through other mechanism, including those of grievances) they may be better equipped to design robust polices for their respective sectors.

IV. CONCLUSION

All the authorities considered in this report the CCI, the TRAI and the IRDA are actively taking steps to increase the welfare of consumers. The study reiterates the specific nature of the roles of the authorities, with the sectoral regulators having a forward-looking approach, using their expertise of the sectors to predict future instances where competition could be adversely affected and taking necessary steps to protect it. The Competition Commission of the other hand usually takes action as a result of grievances being raised by parties. While it is the expert body in the area of competition, and will be best suited to respond to any issues that come up related to it, it may need the assistance of the sectoral regulators, while looking at the specific sectors. For instance, the competition authority is well aware that it needs to look at the nuances of a dominant presence in a particular market, in order to establish anti-competitive activity. But it may have to reach out to the specific regulator to figure out what such specific product-market would be and how it would be separate from another product market.

TRAI for instance is cognizant of the fact that private players, particularly those who become very large are the most likely to be anti-competitive in the market. They seem to have fewer of these concerns when there are large public players or a large no of players in the market. The effect of a few large players on competition has been demonstrated, and is definitely likely to worsen as the market goes closer to a monopoly. This is currently a relevant fear, particularly in the telecom industry.

When the product is also as dynamic and everchanging as it is in telecom, the risk of players being uncompetitive is higher. Therefore only a regulator close to the industry will be informed enough to be able to take the requisite steps to prevent the situation from getting too. This is indicated in the TRAI's specific role in being active in seeking out potentially anti-competitive behaviour and taking the steps to prevent it. A sector with less dynamism may have well formed rules, and any anti-competitive activity will be a result of economic changes, that fall under the domain of the CCI.

Both the sectoral regulators and the competition authority have their role to ensure that competition (and ultimately consumer welfare is protected). The sectoral regulator creates an

environment for the same, while the Competition Regulator monitors it. Closer coordination between the two authorities, while keeping in mind the nature of the market that they operate in, could be beneficial for the market and for consumers.

Bibliography and References

Legal Sources:

1. The Competition Act, 2002
2. The Telecom Regulatory Authority of India Act, 1997
3. The Insurance Regulatory and Development Act, 1999
4. The Monopolies and Restricted Trade, 1969

Other Sources:

- Gairola, V., 2016. A Comparative Study of Public and Private Life Insurance Companies in Post Liberalization Era. *IJMBSPrint) International Journal of Management and Business. Studies*, 6(4), pp.39-43.
- Kathuria, V., 2018. Conflict between Regulation and Competition Law in the Indian Telecom Sector. *Economic & Political Weekly*, 53(38), p.39.
- Parsheera, S., 2018. Challenges of competition and regulation in the telecom sector. *Economic & Political Weekly*, 53(38), pp.45-52.
- Ray, S., Thakur, V. and Bandyopadhyay, K., 2020. India's insurance sector: challenges and opportunities.
- Satish, K., 2019. The Dynamics of General Insurance Sector in India-Growth and Performance Perspective. *International Journal of Engineering and Advanced Technology (IJEAT)*, 9.
- The Competition Commission of India, 2021. Market Study On The Telecom Sector In India. 22 January 2021

Annexure 1 – CCI Orders

Order No	Section no	Industry	Parties Involved	Brief Summary
Case 12 of 2019	26(2)	Insurance	Indian Chemical Council and General Insurance Corporation of India	On account of certain changes in the calculation of premium for fire reinsurance, GIC would be charge premium multiple times on existing premiums. The same has been considered to have been without reasonable justification The CCI has made a reference to the IRDAI for this issue. IRDAI has said that the same is not anti competitive and has made references to certain writ petitions filed with the high court which were also dismissed,
Case 13 of 2019	26(2)	Insurance	M/S Laxmi Polymers and Oriental India Company Limited	The complainant has held that the insurance company has abused its dominant position in the market. Here the Competition Commission has had to determine what the relevant market is, to establish presence of dominant position. The CCI has considered fire Insurance market under General Insurance for this purpose. Based on the market share (8.6%) the commission has established that the same is not abuse of market position

Annexure 2 – TRAI Papers

Type of Paper	Topic	Date	Summary of Competition Related Area	Analysis
Pre- Consultation Paper	Enabling Unbundling of Different Layers Through Differential Licensing	9/12/2019	The Paper keeps in mind the requirement to maintain appropriate competition to serve the needs of the consumer. The policy also aims towards reducing the regulatory burden to attract more consumers and attract customers. The capital-intensive nature of the industry and the specific technology used in the industry is discussed	In this paper the regulator has considered the innovations in technology, while suggesting the unbundling, and inviting consultations for the same. The regulator is anticipating that such a move may attract more players and positively affect competition
Consultation Paper	Consultation Paper on Tariff Issues of Telecom Services	17/12/2019	The paper considers the changes in Market Composition and Competition while proposing new tariff policy. The paper argues for the requirement of market interventions like floor prices, given the intense pricing pressure in the market. The paper recognizes that this industry is capital intensive because of which the potential negative effects of a price floor will be seen less. The Race to Bottom situation has also been acknowledged by the paper. The unsustainability of low-price tariffs has also been acknowledged. There is also an analysis of floor prices set in other countries	The paper anticipates the effect of low pricing on other market players and therefore discusses the possibility of introducing a floor price to increase competitiveness. This is done keeping in mind the nature of the service as well as nature of the industry. The fact that there are arguments both for and against for the floor price hold merit has formed the basis of the consultation paper.
Consultation Paper	Consultation Paper on Transparency in Publishing of Tariff Offers	27/11/2019	The paper says that increasing transparency in the services provided to consumers is essential to boost competition. It acknowledges how machine learning is leading to collusion between service providers after they learn consumer behaviours	This paper foresees the negative effects of not having transparency on consumer and sets out to understand how to correct the same. In doing so an understanding of the sector must be realised.
Consultation Paper	Consultation Paper on Review of Interconnection Usage Charges	8/11/2019	No focus on competition	NA
Consultation Paper	Consultation Paper on Review of Scope of Infrastructure Providers Category-I (IP-I)Registration	16/08/2019	The paper talks about infrastructure sharing. In the past the same was considered to be anti-competitive since it could lead to collusions etc. These concerns are not valid anymore, since competition in services is independent from competition in markets	Here the regulator has to consider the current status of the industry while determining whether their actions will have anti-competitive impacts
Consultation Paper	Consultation Paper on Interoperability of Set Top Box	11/11/2019	The paper talks about open non-proprietary architecture of set top boxes, that allows sharing	The paper anticipates that such an action would increase competitiveness
Consultation Paper	Consultation Paper on Tariff related issues for Broadcasting and Cable services	16/08/2019	The paper talks about creation of bouquets and bundles of channels, and their pricing of the same	Here the regulator has to consider whether the formation of such bundles is affecting the competition among

Type of Paper	Topic	Date	Summary of Competition Related Area	Analysis
				broadcasters, since this reduces capacity with DPOs
Recommendation	Recommendations On Platform Services offered by DTH Operators	13/11/2019	No focus on competition	NA
Recommendation	Recommendations on Review of Terms and Conditions for registration of Other Service Providers (OSPs)	21/10/2019	No focus on competition	NA
Recommendation	Recommendations On KYC of DTH Set Top Boxes	24/10/2019	No focus on competition	NA
Recommendation	Recommendations On Entry Level Net worth requirement of Multi-system Operators in Cable TV services	22/07/2019	No focus on competition	NA
Recommendation	Recommendations on Licensing framework for Audio Conferencing/ Audiotex/ Voice Mail Services	24/12/2019	No focus on competition	NA
Recommendation	Recommendations on Allotment of spectrum to Indian Railways for Public Safety and Security services	25/10/2019	Network Slicing and its effect on competition mentioned at one point of the paper	The above response was received from a stakeholder in the industry and was possible only because of stakeholder consultation having been conducted
Recommendation	Recommendations On Auction of Spectrum in 700 MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz, 2500 MHz, 3300-3400 MHz, 3400-3600 MHz Bands	08/07/2019	The number of players in the sector and the competition has been noted at one point in the player	The specifics of the sector have determined the decisions that the regulator will take
Regulation	Telecommunication Mobile Number Portability Per Port Transaction Charge and Dipping Charge (Second Amendment) Regulations, 2019(04 Of 2019)	8/11/2019	Among other Matters, Stakeholder consultation has recommended the expansion of mobile no portability services to both the existing mobile no portability service providers, to allow both telecom service providers and consumers more choice	This matter of the requirement of competition in this area is brought to the attention of the regulator only through the consultation process
Regulation	The Telecommunication (Broadcasting and Cable) Services Register Of Interconnection Agreements And All Such Other Matters Regulations, 2019	30/10/2019	Among other matters, stakeholder consultation was carried out to determine whether a register should be maintained of interconnection agreements, While some stakeholders have argued that this information is confidential, others have argued	Keeping other goals in mind along with competition the regulator has decided to maintain such register. The requirement of the same has been gauged from stakeholder consultation

Type of Paper	Topic	Date	Summary of Competition Related Area	Analysis
			that the same is necessary for promoting fair competition	
Regulation	The Telecommunication Interconnection Usage Charges (Fifteenth Amendment) Regulations, 2019	17/12/2019	The paper argues for the requirement of interconnectivity in maintaining competition and improving consumers access to services. The consultative process is being questioned as illegal by some stakeholders.	The Regulator has stated that its very purpose includes ensuring adequate levels of competition in the market. The regulator has to study the current market, and how players are exploiting it to their benefit (traffic asymmetry in this case, to reach a conclusion about how

Annexure 3 – IRDA Papers

Type of Paper	Topic	Date	Summary of Competition Related Area	Analysis
Exposure Draft	Comments Of The Stakeholders On Draft IRDAI (Third Party Administrators- Health Services (Amendment) Regulations, 2019	9/07/2019	The rationale for regulation permitting the consumer to be able to choose from among third party administrators for health services	Understanding the possibility of collusion amongst consumers has led to the IRDAI amending this regulation
Exposure Draft	Exposure Draft - Revisiting the product structure for Motor Own Damage	25/11/2019	No Competition Focus	NA
Exposure Draft	Exposure Draft on Guidelines on Wellness and Preventive Features/Benefits	7/11/2019	No Competition Focus	NA
Exposure Draft	Exposure Draft of IRDAI (Insurance Surveyors and Loss assessors) (Amendment	31/10/2019	No Competition Focus	NA