

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

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CCI And Telecom Sectoral Regulator: A Study of Relevance

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ABSTRACT

The telecommunication sector has been the fastest-growing market in India. From the unceasing growth that this industry has been witnessing in the last few years, it could be said to have accounted as a major component in the growth of the Indian Economy. However with the ever-expanding market size in this field, there has been introduction of many new players in the market, that has resulted in stiff competition among the operators. The fast-paced developments have also resulted in a number of challenges and complex issues in competition. To regulate these conflicts some of regulatory authorities have come forward, thus leading to a complex overlapping of jurisdictions.

This paper aims to analyse the evolution process of the sector from monopoly to privatisation. It will also highlight some of the recent bills and statutes which regulates the Telecom industry other than CCI. The paper also focuses on the evolving jurisdictional issue in competition policy with regard to the telecommunications sector in India and the proposition that has been structured and made effective by the Government of India and its various regulatory bodies. The paper has also attempted to explore the current conflicts with help of some relevant case laws.

Keywords: *Competition law, Industry players, Monopoly, Privatisation, Regulations, Regulator, Jurisdiction, Telecom sector.*

I. INTRODUCTION

The Telecom Sector in India, has emanated as one of the critical components of the economic growth in India. This growth has led to the overall socio-economic development of the country. This has been possible because of the correlation that exists between Telecom services and the internet on the rise of the GDP of a country. As per TRAI, the average wireless data usage per wireless data subscriber was 11GB per month in the Financial year 2020. India ranks second in terms of telecommunication subscription, internet subscribers, and app downloads.²

In general, the telecommunication sector is said to consist of companies that make

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² *Telecom Industry In India*, Indian Brand Equity Foundation (IBEF), (March 12, 2021, 9.30 p.m) www.ibef.org

communication possible on a global scale, either through phone or the Internet, with the aid of cables and airwaves - wire or wireless. The largest companies in this sector include telephone operators, satellite companies, cable companies, and Internet service providers.

In the last few years, the Indian telecommunication sector has transferred from a government monopoly to an oligopolistic market. The interplay, between the two authorities, telecommunications regulation, and competition policy, has become progressively, important in other countries as well in India. However the expansion of the Telecom industry has brought with itself a number of complexities that have involved various laws, and competition regulation is one among many laws. Here comes the active role of the Government who needs to intervene with the objective to intercept market failures, limit abuses of market power and improve economic efficiency.

Focusing on the role of Competition law it is evident that a successful competition policy management in the telecommunications sector could be a reactionary to obtaining lower prices, new and better services, substantial consumer choices, and also could lead to increased investment in the telecommunication market. The debate in the respective spheres of competition law and economic regulation has existed even before. In the Indian background, complaints filed against the Telecom occupant Airtel, Vodafone, and Idea by Reliance Jio before Telecom Regulatory Authority of India and Competition Commission of India has been a prime example of such conflicts.

II. EVOLUTION TO PRIVATISATION

The History of the Telecom Sector in India could be traced back to 1851, when the British Government laid down the first operational landlines in the then capital of India, Kolkata. 1911 the responsibility of Telecom operations was passed on to Director General of Postal and Telegraph (DGP&T) from PWD, from DGP&T to Department of Telecommunication (DoT), then from DoT to Department of Telecom Service (DTS), and finally landed in Bharat Sanchar Nigam Limited (BSNL). Around 1985, the Government separated the Department of Post and formed the Department of Telecommunications (“DoT”).

“As part of reforms exercise taken up by the government, it was set up two new public sector undertakings: Mahanagar Telephone Nigam Limited (“MTNL”) and Videsh Sanchar Nigam Limited (“VSNL”). MTNL looked after telecommunications operations in two mega cities, Mumbai and Delhi. VSNL provided international Telecom services in India. DoT continued to provide telecommunications operations in all regions other than Delhi and Mumbai. Telecommunication services were not treated to be a necessity that should be made available

to all people across all States in India but rather a luxury item for few select people”³.

1990, the Telecom sector which was controlled by the Government of India, liberalized and allowed the private sector to provide Value Added Service (“VAS”), like paging services. By 1994, the National Telecom Policy was formulated that recognised that existing government was insufficient and private sector participation was required to bridge the resource gap. The National Telecom Policy 1999, issued for separation of policy and licensing functions of DoT from its service functions. This led the Government in year the 2000, to corporatize the operation wing of DoT, and renamed it as “Bharat Sanchar Nigam Limited”(BSNL). In 2002, the monopoly of VSNL also came to an end after which Government provided the license to selected operators to provide basic and cellular services in India.

III. EXISTING REGULATORY FRAMEWORK IN INDIA

- **The National Telecom Policy:**

The National Telecom Policy announced by the Government in 1994, had objectives like meeting the demand for telephone, providing world-class services at a fair price, along with universal availability of Telecom services to all villages. The most crucial aspect of this National policy was that it recognised that the necessary sources for achieving the objectives could not be provided by the Government alone and that investment by the private sector to fill the gap was indispensable.

Consequently, the Government took initiatives to encourage the participation of the private players in different phases. This included value-added services such as Paging Services, Cellular Telephone Services(CMTS), and Fixed Telephone Services (FTS).

However, the outcome was not as expected and unsatisfactory, because the entry of private players was slower than what was anticipated by the NTP 1994⁴. The actual reason was that the revenues realized by these projects fell short and the operator were unable to arrange finance for their project

The government after this failure recognised that if these issues were not mended could adversely affect further development of the sector, and looked forward to framing new policies for this sector. Currently, the NTP policy of 1999 is shaping the developments and its aim

³ Kapil Kumar, Kapil Kumar, *Evolution of Telecom Sector in India*, Volume 13, International Journal Of Engineering Research And Development (IJERD), pg.1, 2, (2017), <http://www.ijerd.com/paper/vol13-issue9/Version-4/A130940104.pdf>

⁴COMPETITION POLICY IN TELECOMMUNICATIONS: THE CASE OF INDIA, INTERNATIONAL TELECOMMUNICATION UNION, Pg 5, 7 (2002), <https://www.itu.int/osg/spu/ni/competition/casestudies/india/India>.

objectives are as follows:

- a. To create a balance and providing services in uncovered areas like rural areas as well in city areas that could meet the needs of the country's economy.
- b. Transforming the telecommunication sector into a competitive market to open opportunities for all types of players.
- c. Creating a convergence of IT, Media, Telecom, and consumer electronics that could project India to become an IT superpower.

- **TRAI:**

Established in January 1997, (TRAI) Telecommunication Regulatory Authority of India was established as an autonomous body vested with quasi-judicial powers set to regulate telecommunication services in India. After the TRAI Act was amended in 2000 the adjudicating power of TRAI was vested with Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

The two principle functions of TRAI are recommendatory and mandatory. The essential mandatory functions include fixing tariffs, securing compliance with terms and conditions of the licenses, ensuring the standards of quality of services to be provided by the service providers. Recommendatory functions of TRAI are either *suo motu* or on the request of the government. The government is bound to provide any information asked by TRAI that can help it to make a recommendation. Recommendatory functions of TRAI includes, the introduction of service providers, recommending the terms and conditions of the licensees that would be provided to the service providers.

The amendment of the TRAI Act 2000, reinforced the recommendatory functions of TRAI. Before this amendment, the recommendatory power of TRAI was not binding on the government but after the amendment, the recommendations of TRAI were formalised.

The Telecom Disputes Settlement and Appellate Tribunal (TDSAT), is vested with the power to settle the dispute between a licensor and a licensee or between two or more service providers and between the service providers and a group of consumers. The adjudicating power strictly excludes "the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969." ⁵ TDSAT has the power to hear and dispose of appeals against any decision of

⁵COMPETITION POLICY IN TELECOMMUNICATIONS:THE CASE OF INDIA, INTERNATIONAL

TRAI. Appeals against the decision of TDSAT could be appealed in Supreme Court⁶.

- **Communications Convergence Bill 2000:**

Communication Convergence Bill, 2000 is a regulatory framework that was brought with the intention of bringing the legal regulations of all forms of communication together with the internet and other advanced communication media under one big umbrella. The legislation bill was drafted along the lines of amendment of the U.S Telecommunications Act 1996 and Malaysia's 1998 Multimedia Act. Most importantly the Convergence Bill 2001, sought to establish the Communication Commission of India or CCI that would facilitate and regulate all issues relating to transit and content of communications. In short, it could be said that the Communication Commission of India was set to take up the charge of TRAI.

The bill proposed a set of new "convergent" Licenses for services:

- a. that provided or owned web infrastructure facilities such as earth station, cable footing, towers, posts, ducts, and pits used in combination with other communication infrastructure, and other distribution efficiencies.
- b. providing networking services: that includes bandwidth services, fixed links, and mobile links;
- c. providing application services consisting of public switched telephony, public cellular telephony, global mobile personal communication by satellite, internet protocol telephony, radio paging services, public mobile radio trunking services, public switched data services and broadcasting (radio or television service excluding continued);⁷
- d. providing services: such as satellite transmission, or subscription broadcasting,
- e. terrestrial radio broadcasting;
- f. Services that required value-added network applications like Internet services and unified messaging services.

- **Competition Law:**

Competition Act, 2002 was enacted to introduce measures for easing the competitive environment. The Act mostly tries to govern three areas of competition which are anticompetitive agreements, abuse of dominance and, combinations among corporate ventures.

TELECOMMUNICATION_UNION, Pg 5, 9 (2021), <https://www.itu.int/osg/spu/ni/competition/casestudies/india/India>.

⁶ *Id.* at 3

⁷ *Id.* at 4

The Competition Commission of India is a quasi-judicial body established under the Competition Act. It is formed for advocating competition and preventing practices that could have an appreciable adverse effect on the competition of India, and also ensures the freedom of trade, protect the interest of the consumers.

Clause 3 aims to prohibit enterprise, an association of enterprise, and persons from undertaking any agreement with respect to production, supply, distribution, storage, acquisition, control of goods, or provisions of services that could have an appreciable adverse effect on competition.

Clause 4 prohibits enterprise from abusing its dominant position. **Clause 19** empowers the Commission to inquire into the anti-competitive agreements either on its terms, *suo-motu*, or on the complaints made by any trade association or consumer. It can also take up investigation on the reference made by Central Government, State Government or any statutory authorities.⁸

IV. OVERLAPPING OF VARIOUS LEGISLATIVE JURISDICTION

The Competition Commission of India has been vested with broad powers under section 18 that provides power to the commission to “eliminate practices having an 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”⁹. **This provision of CCI meets with powers given to other sectoral regulators who have been granted competition-related functions.** These regulations could have been granted before the enactment of the competition act.

It could be observed that both competition and regulation are based on the objective to promote the efficient working of the market. Regulation is made with the purpose to fix various kinds of market shortfalls, warranting safety and quality of products and services and, assuring **consumer interest** along with advancing common interest such as redistribution. In contrast decree of competition law, also tries to restrict the negative effects of business power that could affect **consumer welfare**. Thus **there is an overlapping of jurisdiction** and powers on the aspect to regulate the exercise of market powers to prevent market failures.

If we take, for example, the **Telecom Regulatory Authority of India Act, 1997 (TRAI Act)** whose mandates rules the Telecom Regulatory Authority of India (‘TRAI’), directs the body to take measures that would “facilitate competition” and “promote efficiency” in the operation of telecommunication services. Similarly, **Electricity Act, 2003** empowers the **Central Electricity Regulatory Commission** to “issue direction” to a licensee if it “enters into any

⁸ *Id.* at 5

⁹ Competition Act 2002, § 18, No. 12, Acts of Parliament, 2003(India)

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”¹⁰ Hence such laws have dimmed the distinction between the regulations and provisions in the competition act, that have caused many sectoral regulators to consider competition enforcement powers even though there is no clear presence of such provision in the statute.

V. COMPLICATIONS ARISING OUT OF OVERLAPPING JURISDICTION

It can be rightly said that sectoral regulators and competition authorities have the same goal of protecting consumer interest, however, they both have different legislative provisions and stance which leads to a different outcome.

It could be assumed that while competition authorities involve when there is a **failure in the market mechanism** whereas sectoral regulators **interfere to achieve certain statutory outcomes**.

In brief, **competition law seeks to protect competition by checking anti-competitive practices** but **sectoral regulations** aims to promote competition by **bringing in structural changes**. The existence of such divergences can imply that compliance with regulation may not necessarily save firms from competition scrutiny, thus resulting in market uncertainty and increasing their exposure to potential liability¹¹

In the case **Vodafone India Ltd. Vs Competition Commission of India**¹², the Bombay High Court rejected the CCI’s jurisdiction to investigate cartelisation by Telecom companies as alleged by Reliance Jio. On September 21st, 2017, Bombay High Court ruled that CCI had no jurisdiction to rule contract contradiction or policies of the Telecom sector, which was regulated by TRAI¹³. It was held that only Telecom regulator TRAI had exclusive jurisdiction to try this matter. “This was so held even when the TRAI only has a generic competition mandate under the TRAI Act, which itself excludes matters falling under the Monopolies and Restrictive Trade Policies Act, 1970 (the act preceding the Competition Act) from the dispute-settlement jurisdiction of the TRAI.”¹⁴

¹⁰ Electricity Act 2003, § 60, No.36, Acts of Parliament, 2003, (India)

¹¹ Paridhi Poddar, *Sectoral Regulation, Competition Law and Jurisdictional Overlaps: Tracing The Most Viable Solution In the Indian Context*, Kluwer Competition Law Blog, (20th March 2021, 8.00 p.m) http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/#_ftnref

¹² WRIT PETITION NO. 8594 OF 2017

¹³ Priyanka Mittal, *Supreme Court dismisses CCI’s Plea For Probe against Airtel, Idea, Vodafone, LiveMint*, (20.03.2021, 7.00p.m) <https://www.livemint.com>

¹⁴ *Id.* at 10

VI. ANALYSIS OF SOME RECENT DEVELOPMENTS IN TELECOM SECTOR AND ROLE OF CCI

The Telecom sector has enjoyed monopolies and has since been facing stiff competition from other players in the market. In the last few decade, the sector has witnessed much, nevertheless, it has driven the economy of India to a great extent contributing significantly to its development.

One of the most prominent discussed cases about the merging of the Telecom sector and competition law, was the:

- *Bharti Airtel vs Reliance Jio case*¹⁵.

Facts:

In this case, a complaint was filed by Bharti Airtel against Reliance Jio. Bharti Airtel alleged that Reliance Jio which had entered the market in September 2016, had through its free services provided to the consumers was engaging in **predatory pricing that was violative of section 4(2)(a)(ii) of the Competition Act**.

Contentions By the Parties:

Bharti Airtel alleged that there were several consumer services and offers provided by Reliance Jio (also known as Jio) to its consumers after it entered into the market. This included “ Jio Welcome Offer” “under which data, voice, video and a full bouquet of applications were granted free of cost to the purchasers from a time-frame commencing on 5 September 2016 until 31 December 2016”¹⁶. Another offer named “Happy New Year” was launched at the commencement of the new year. Through this offer the customer could receive unlimited data, message and voice call till 31st March 2017, which would be free without charging the volume of network or data usage. Bharti Airtel contended that providing these free services provided by Reliance Jio indeed amounted to “predatory pricing”.

Now, the practice of predatory pricing is prohibited under **section 4(2)(a)(ii)** of the Act and, to be liable under this provision the entity must be in a “**dominant position**”¹⁷ practising such act in a “**relevant market**”. To determine whether Jio operated in “relevant market” or not,

¹⁵ COMPETITION COMMISSION OF INDIA, Case No. 03 of 2017

¹⁶ Varun Kannan, *Competition Law Issues in the Indian Telecom Sector: Analysis of Recent Developments*, IndiaCorp Law, (20.03.2021, 8.30p.m) <https://indiacorplaw.in/2019/07/competition-law-issues-indian-telecom-sector-analysis-recent-developments.html>

¹⁷ “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour;

CCI held that the relevant market would be “provision of wireless telecommunication services to end-users in each of the 22 circles in India”¹⁸

Finding By CCI:

CCI noted that Reliance Jio does not own a **market share of not more than 7 percent in every of the 22 Telecom circles** and the market comprises of different players like Vodafone, Idea, Tata, MTNL, etc. who had equal capabilities on financial and technical grounds. Moreover, concerning the **dominant position** the consumers were not dependent on a single service provider and there were sufficient choices left to the consumers to choose between any of the service providers.

Although it was significant, that Reliance Jio after its entry had acquired more market share than Bharti Airtel and Vodafone -Idea, but increased market share could not be conclusive proof to determine Reliance Jio’s “**dominant position**”, as **high market share could only be said one of the many factors taken into account while determining** abuse dominant position as stated under **Section 19(4)**.

- ***Competition Commission of India vs Bharti Airtel***¹⁹

After the order of the CCI in the above dispute, a complaint was filed by Reliance Jio against Bharti Airtel, Vodafone, and Idea alleging that these above-mentioned Telecom operators were engaged in cartelisation, and practised other anticompetitive practises.

On this CCI submitted that it had ordered for an investigation by Director-General under section 26(1) of the Act. This was quashed by the Bombay High Court, as the Court held that **TRAI being the sectoral regulator had initial jurisdiction over the matter and CCI could take action only after the proceeding under TRAI has been concluded**.

Before the Supreme Court,

Contentions on behalf of Appellants:

The issue pending before CCI was **whether there existed any anti-competitive agreement** that existed between the Respondents to prevent the entry of Reliance Jio. This practise was prohibited under **section 3(3)(b) of the Competition Act**.²⁰ Whereas the issue pending before TRAI was **concerning the violation in terms of the license agreement, other**

¹⁸ Varun Kannan, *Competition Law Issues in the Indian Telecom Sector: Analysis of Recent Developments*, IndiaCorp Law, <https://indiacorplaw.in/2019/07/competition-law-issues-indian-telecom-sector-analysis-recent-developments.html>

¹⁹ CIVIL APPEAL NO(S). 11843 OF 2018 (ARISING OUT OF SLP (C) NO. 35574 OF 2017)

²⁰ THE COMPETITION ACT, 2002, § 3(3)(b): limits or controls production, supply, markets, technical development, investment or provision of services;

interconnection regulations, and the quality of service regulations. Hence it was argued, that CCI would have jurisdiction in determining whether there existed any anti-competitive agreements and possible violation of **Section 3**.

Contentions on behalf of the Respondents were:

That only TRAI had all the jurisdiction in such matters regulating Telecom Operators as it was a sectoral regulator.

Court held: The Court rejected the contentions of the respondents. With regard to **Section 60**, of the Competition Act, the court held that CCI shall have jurisdiction over this issue but it can be exercised only after TRAI has rendered its decision. Through this judgement, Court harmonised the objectives of the Competition Act 2002 and TRAI on the other hand.

The 2018 Supreme Court judgement in **CCI v. Bharti Airtel** was decisive in resolving the jurisdictional conflicts between sectoral regulator TRAI and the CCI, and in outlining the distinctions between the two. The Court had explained that the ‘CCI is not a sector-based body but has the jurisdiction across which transcends sectoral boundaries, thereby covering all the industries.’²¹

VII. ANALYSIS

If we analyse the judgement, we can observe that there exists a jurisdictional struggle between the regulatory body and competition law. To understand this conflict it is very important to demarcate the jurisdictional issue of both statutes. In the present case, TRAI is a sectoral Regulation and Competition law is a general law and the objectives of both the statutes are different. **The Regulation may be more focused on fixing different types of market failures, ensuring safety and quality of products and services, assuring consumer interest, and facilitating public interest like redistribution whereas a competition law is aimed to prohibit the negative effects on consumer welfare, that can result from the increasing market power of the enterprises.** Thus the overlap of powers can occur in terms of regulating market failures and prevent any dominance of market power.

In the case of *Telefonaktiebolaget LM Ericsson v. CCI*,²² the Delhi High Court held that the remedies provided under **section 27** of the Competition Act for abuse of dominant position are materially different from the remedies provided in the Patents Act, in **section 84**. That the scope

²¹ Neha Sinha, *CCI vs. SEBI: Overlapping Jurisdiction of CCI and a Sectoral Regulator*, IndiaCorp Law, (21.03.2021, 9.00p.m) <https://indiacorplaw.in/2021/02/cci-v-sebi-overlapping-jurisdiction-of-cci-and-a-sectoral-regulator.html>,

²² (W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014)

of CCI enquiry is limited to the abuse the of dominant position by Ericsson and accordingly CCI can issue orders.²³ Thus through this order, Delhi High Court clearly stated “merely because certain relief sought by Micromax and Intex before CCI are also available in proceedings under the Patents Act also does not exclude the subject matter of the complaints from the scope of the Competition Act.”²⁴

Even in the case of *Re: Brickwork Ratings India Pvt. Ltd. and CRISIL Ltd. and Others*,²⁵ the National Highway Authority, invited tenders from various Credit Rating Agencies. The Informant Brickwork Ratings alleged that CRISIL Ltd. India Ratings and Research Pvt. Ltd., CARE Ratings Ltd., and ICRA Ltd. (known as opposite parties), who had submitted their price quotes for the tender were engaged in cartelisation and other anti-competitive practises. Since CRA’s comes under the regulation of SEBI, CCI had invited submissions from SEBI. To this SEBI and other informants alleged that only SEBI as a market regulator had jurisdiction and not CCI. To this, a bench of CCI chairman and other members, said “...the Commission notes that though regulation of CRAs may be the subject-matter domain of SEBI, examining any anti-competitive conduct on the part of CRAs falls within the jurisdiction of the Commission.”²⁶

VIII. CONCLUSION

There is no shadow of a doubt that the telecommunication industry has become an integral aspect not only of the country’s growth but also has a massive influence on every individual. In addition, the global pandemic has increased its worth even more. CCI has been acting as a watchdog keeping a vigil on the market to keep a check on the abuse of power and dominance. However, the Competition Laws being a novice in the legal scenario has to face stiff competition from other regulatory authorities.

The impact of the Internet has increased the need for access creating a necessity to regulate various approaches of competition both at notational and international standards. Through this

²³ The said orders were passed pursuant to information filed by Micromax Informatics Ltd. and Intex Technologies (India) Ltd alleging abuse of dominance by Ericsson with its large portfolio of Standard Essential Patents (hereinafter referred to as 'SEPs') and demanding heavy royalties. Ericsson has on the other hand claimed that its patents have been infringed by Micromax and Intex. The information filed by Micromax and Intex led the CCI to pass the aforesaid impugned orders directing the Director General, CCI, to investigate the matter regarding the violation of the provisions of the Competition Act.

²⁴ Lucy Rana and Tulip De, *India: Telefonaktiebolaget LM Ericsson v. Competition Commission Of India*, Mondaq, (20.03.2021, 5.00p.m) <https://www.mondaq.com/india/antitrust-eu-competition-/480324/telefonaktiebolaget-lm-ericsson-v-competition-commission-of-india>

²⁵ COMPETITION COMMISSION OF INDIA, Case No. 47 of 2019

²⁶ *SEBI and Competition Commission at Loggerheads on Jurisdiction over Credit Ratings Agencies*, Money-Life, (20.03.2021, 7.00p.m) <https://www.moneylife.in/article/sebi-and-competition-commission-at-loggerheads-on-jurisdiction-over-credit-ratings-agencies/62638.html>

paper, it is quite evident that any statutory body established for operating in an exclusive sector, (here, TRAI) will always give rise to conflicts with other bodies like CCI, whose jurisdiction is not limited to any particular sector. Though, **Section 62** of the Competition Act distinctly lays down the pretension of the Act, to be not in discord with other statutory regulations. This convergence is a serious issue and it is hoped that more clear mandates and regulations would be evolved in the future that would provide clearly demarcate about the ambit of jurisdiction of CCI.

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