OVERLAPPING JURISDICTION OF REGULATORS IN INDIA: A NEVER ENDING BATTLE?

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ABSTRACT

In the regulation of transactions, in almost every jurisdiction in the world, several regulators operate concurrently to determine whether such transactions comply with the multitude of laws. India, being no exception to this rule, has a host of regulators that must grant approval to these transactions. This paper sets out to identify the various regulators in the Indian legal sphere such as Securities and Exchange Board of India (SEBI), Insurance Regulation and Development Authority (IRDA) etc. and critically analyse their overlapping jurisdiction. In light of the Financial Sector Legislative Reforms Committee, a nuanced research has been undertaken with regard to the often overlapping competence of SEBI and Competition Commission of India (CCI). This brings out the fundamental rationale behind the existence of a multitude of regulators – a sector wise expertise (telecom, electricity etc) vis-à-vis a overarching expertise in maintaining the integrity of the market for investors and commercial entities alike. Given that there has been widespread critique of India's complicated and often unnavigable regulatory landscape, the authors have further examined the legislative changes that have been made in the recent past to harmonise the statutes and other laws to usher in a regime of consistency in the applicable laws. Finally, the analysis contained in this paper seeks to offer a solution to the regulatory conundrum that has been considered a hindrance in attracting investment from both India and abroad across several sectors.

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I. INTRODUCTION

India adopted the Liberalisation, Privatisation and Globalisation (LPG) Policy in 1991 by opening up its economy to the world. A plethora of structural adjustments were made to regulate the newly opened economy. Market based economy was presumed to ensure efficiency in the economy by virtue of its consequence of optimum allocation of resources. There was an unanticipated shift from a government controlled closed economy to market controlled open economy. Various market reforms were imperative to make the move successful. This included sector specific regulators. Various pre-1991 laws were rendered futile. One of such laws was Monopolies and Restrictive Trade Practices Act, 1969[1]. It was unsuccessful in adapting to the changing economic environment in the country. A high level committee was established under the chairmanship of Shri S.V.S. Raghavan to evaluate the MRTP Act. It recommended a new law on competition, in line with the international developments in the area of antitrust law. Competition Act, 2002[2] was enacted to commensurate with the changing times. There was a jurisprudential shift from thwarting monopoly, restrictive and unfair trade practices to promotion of competition in the market and consumer welfare. The implementation of the same was stalled due to its provisions and rules, formed thereunder, being challenged on constitutional grounds.[3]

Post 1991, various sector specific regulators were brought in the picture. The first and the most important of them was Securities and Exchange Board of India[4] in 1992. And other regulators like Competition Commission of India, Telecom Regulatory Authority of India, etc were later established.

This article focusses on the overlapping of these regulators' jurisdiction, in particular SEBI's and CCI's jurisdiction. It attempts to clear the confusion on which of the two has to be given preference over the other in case of a conflict. It further delves into how they exercise control in the cases of creeping acquisitions. Before exploring this, it is imperative to comprehend the different regulators present in the economy and their scope of operation.

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[1] Hereinafter referred to as MRTP Act.

[2] No 12 of 2003.

[3] Brahm Dutt v Union of India, AIR 2005 SC 730.

[4] Hereinafter referred to as SEBI.

II. SECTOR SPECIFIC REGULATORS AND GENERAL ANTITRUST REGULATOR

SEBI

SEBI was established in accordance with Securities and Exchange Board of India Act, 1992. Its jurisdiction is limited to the securities market. Its objective is to "protect the interests of investors in securities and to regulate and promote the development of the securities market"[5]. Its powers were enhanced periodically to allow it to deal with the various scams that were unearthed. The Harshad Mehta scam[6], Ketan Parikh scam[7] etc showed lacunae in the law and, accordingly, SEBI was given more teeth to prosecute such happenings in the future.

Further, Section 32 of the Act provides that the act shall be applicable, in addition to any other law in force at a particular time.[8] Therefore, powers of SEBI co-exist with other regulators and cannot over-ride other regulators in the market. Several regulations have been framed under the SEBI Act for regulating different aspects of the securities market.

TRAI

Telecom Regulatory Authority of India[9] was established in accordance with the Telecom Regulatory Act, 1997. The regulatory authority was established with an aim to protect the interests of the investors and the consumers, to regulate telecommunication industry in the country.[10] Section 38 of the Act provides that the provisions of the act shall be in addition to any act which devolves power on the Telegraph Authority to perform any role, function or authority.[11] Therefore, TRAI has a very specific role to play under the Act.

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[5] Long title of the SEBI Act, 1992.

[6] R. B. Jain, *The Craft of Political Graft in India: An Analysis of Major Scams*, INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 55, No. 4, Oct 1994.

[7] Id.

[8] Section 32 of SEBI Act, 1992.

[9] Hereinafter referred to as TRAI.

[10] Long title of the TRAI Act, 1997.

[11] Section 38 of TRAI Act, 1997.

IRDA

Insurance Regulation and Development Authority[12] was established as an autonomous body in accordance with the recommendations of the Malhotra Committee in 1999.[13] It was established under the IRDA Act, 1999 with an aim to regulate the insurance sector; to protect the interests of the investors and to promote the development of the insurance industry.[14] Section 28 of the Act provides that the IRDA, as a regulatory authority would co-exist with other regulatory authorities in the market.

CERC

Central Electricity Regulatory Commission[15] is the regulatory authority for the electricity sector. It was established in 2003 under the Electricity Act. It has been entrusted with the task of maintaining a competitive environment, preventing anti- competitive agreements, abuse of dominant position in the electricity sector.[16] This is in clear overlap with the jurisdiction of the Competition Commission of India which has been entrusted with the task of maintenance of competition in the market in addition to the promotion of consumer welfare in the market. To add to the confusion, section 174 of the act contains a *non-obstante* clause which gives the act an over-riding effect over any other legislation which is in derogation of the act. Further, Section 175 of the act specifies that the provisions of the Electricity Act shall be "in addition to, and not in derogation of any other law in force"[17].

Similar is the case with the Competition Act, 2002, which provides for a *non-obstante* clause under Section 60 of the Act in addition to a non- derogation clause under Section 62 of the Act.

Therefore, India follows a system of sector specific regulators which have been given powers to regulate that specific sector. This is in contrast to the Competition Act, 2002 which is a general antitrust legislation which aims to promote competition among all the sectors of the

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[12] Hereinafter referred to as IRDA.

[13] BSCAL, *Malhotra Committee Recommendations*, BUSINESS STANDARD, April 22, 1998. Available at: http://www.business-standard.com/article/specials/malhotra-committee-recommendations-198042201099_1.html

[14] Long title of the IRDA Act, 1999.

[15] Hereinafter referred to as CERC.

[16] Section 60 of the Electricity Act, 2003.

[17] Section 175 of the Electricity Act, 2003.

economy. Therefore, there is a considerable overlap between the jurisdiction of various regulators in the country, especially between the general antitrust watchdog and the specific sector regulators as exemplified above.

III. OVERLAP OF LEGISLATIONS

In the past there have been instances of overlap of the application of different legislations in a particular situation where both the legislations had a *'non- obstante clause'* in it. The courts in India have applied various principles in such cases, *inter alia*, including specific legislation prevails over general legislation[18], newer legislation prevails over older legislation[19] etc. The Hon'ble Supreme Court had opined that as a principle of interpretation, *lex specialis* prevails over a general legislation as the special legislation governs only the specific sector. The rationale behind the principle that newer legislation prevails over older legislation is that the legislature is assumed to aware of the existence of the laws and hence, a '*non-obstante clause*' in the latter enactment implies an intention on their part on the application of the latter legislation over the former.[20]

At the same time, it has been observed by the Hon'ble Supreme Court time and again, "that interpretation is best which makes the textual interpretation match the contextual".[21] When the aforementioned principles are not applicable, then a harmonious interpretation of the two legislations is looked for. CERC and CCI's jurisdiction overlaps to a considerable extent on, say for eg, anticompetitive agreements in the electricity sector. Does this mean that in the future in case of a dispute over appropriate forum for adjudication of a dispute, pertaining to anticompetitive agreement in the electricity sector, CCI's jurisdiction will be overridden by CERC. Is this not an inconsistency in the system of laws that a particular sector has its special watchdog while others have a general antitrust watchdog? A logical corollary would be having a sector specific competition regulator and a general competition regulator for the left space. But such a sector specific competition regulator would mean division of the present day CCI into SEBI, IRDA, RBI with their sector specific competition regulation powers and

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[18] Allahabad Bank v. Canara Bank, [2000] 2 SCR 110,

[19] KSL and Industries Ltd. v Arihant Threads Ltd., (2008) 9 SCC 763; Bank of India v Ketan Parekh, AIR 2008 SC 2361.

[20] Bank of India v Ketan Parekh, AIR 2008 SC 2361.

[21] Reserve Bank of India v Peerless General Finance and Investment Company Limited [1987] 2 SCR 1.

a general CCI which would scrutinise the remaining competition law issues only. The sector specific regulators may be adept at issues pertaining to the sector and not the antitrust law *per se*. This may further lead to a mockery of the competition law, *in toto* in case any inconsistency prevails in the adjudication of these regulators. A major problem would be the ranking of these regulators in scale of hierarchy for determining the binding value of their orders *inter se*.

The above extension of CERC example sound absurd but it seems probable after scrutinising the line of action of the Legislature by giving competition regulatory powers to the sector specific regulators. The recent addition to the list is Petroleum and Natural Gas Regulatory Board which was established under the 'Petroleum and Natural Gas Regulatory Board Act'[22] in 2006, post the enactment of the Competition Act, 2002. Further, the act has endowed the Board with a duty which has been worded in as general terms as possible, which can be interpreted to give the Board wide powers.

As of now, no conflict has arisen. It becomes problematic only when a conflict arises and this issue is worsened by the presence of the *non-obstante clause* in the various legislations, as noted above.

IV. SEBI v CCI

The emerging area of overlap, as explained above, has the potential to become a hotbed of disputes. Let's understand the dispute of overlapping of jurisdiction between two regulators, CCI and SEBI, in merger transactions and the consequences that follow.

SEBI and CCI are the two regulatory authorities whose approval is necessary for any merger or acquisition or amalgamation to fructify in India. CCI has wider jurisdiction as it can probe any combination[23] which took place outside India but has an appreciable adverse effect on competition in the relevant market in India.[24] A combination refers to any amalgamation, merger or an acquisition.[25] Relevant Market has been defined under Section 2(r) of the Competition Act, 2002 to comprise of relevant geographical market and relevant product

[22] 19 of 2006.

[23] Section 5 of the Competition Act, 2002.

[24] Section 32 of Competition Act, 2002; Dhanraj Pillay v M/s. Hockey India, 2013 CompLR 0543 (CCI).

[25] Section 5 of the Competition Act, 2002.

market. Relevant Geographical market refers to the area in which the conditions of competition are homogenous and distinct from a neighbouring area.[26] Relevant Product market refers to the market consisting of all the products or services which are considered to be substitutes of the product in issue.[27]

When to seek an approval?

CCI's Approval

Application has to be filed with the CCI only if one of the various thresholds given in Section 5 of the Competition Act is satisfied. If it is, then the application has to be filed within 30 days of the approval of the proposal relating to any combination by the Board of Directors or execution of any agreement to that effect.[28] Prior to 2007 amendment, it was voluntary on the part of the enterprise to disclose the combination to the CCI. Now it has been made mandatory under the Competition (Amendment) Act, 2007. The application has to be filed with the CCI in Form I or Form II as provided under Regulation 5 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011[29]. Form II needs to be filed only when the parties to the horizontal combination have a combined market share of 15% or more in the relevant market or the parties to a vertical combination have a combined market share of 25% or more in the relevant market. Most of the combination proposals have been cleared by CCI in Phase I investigation. The only exception so far has been the recent Sun Pharma-Ranbaxy deal in which CCI has ordered Phase II investigation as it was of a *prima facie* opinion that the same may have appreciable adverse effect on competition in the relevant market in India.[30]

Under the Combination Regulations, any acquisitions of shares or voting rights which leads to the acquisition of less than 25% of shares or voting rights in the acquired enterprise, directly or indirectly, provided that the acquisition was solely for the purposes of an

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[26] Section 2(s) of the Competition Act, 2002.

[27] Section 2(t) of the Competition Act, 2002.

[28] Section 6(2) of the Competition Act, 2002. In the case of Thomas Cook (India) Ltd acquiring stake in Sterling Hotel Resorts India) Ltd, Combination Registration No. C-2014/02/153.

[29] Hereinafter referred to as Combination Regulations, 2011.

[30] Vidya Krishnan, *Sun Pharma-Ra.nbaxy deal in CCI crosshairs*, LIVEMINT, July 29, 2014. Available at: http://www.livemint.com/Companies/PwftvxqaZ0vojwb8GzWEdK/Sun-PharmaRanbaxy-deal-in-CCI-crosshairs.html?utm_source=copy

investment and did not result in any acquisition of 'control'[31], has been exempted from filing a merger notification with the CCI.[32]

SEBI's Approval

Approval has to be sought from SEBI, under the SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 2011[33]. Here, the trigger point is acquisition of 25% or more shares or voting rights in the target company by the acquirer individually or with persons acting in concert.[34] If the threshold is reached, then a public announcement of an open offer has to be made by the acquirer to the shareholders of the acquired company.[35] Such public announcement has to be made on the date of acquisition of shares or voting rights or control over the acquired company.[36] Such an announcement has to be conveyed to the stock exchanges on which the shares of the acquired company have been listed and such information shall be disseminated subsequently by them.[37]

Further, a draft of the offer letter has to be filed with SEBI by the acquirer enterprise as provided under Regulation 16 of the SAST Regulations. This is required to determine the offer price.

The acquirer is required to complete the acquisition under the agreements signed, in furtherance of the same, within a period of twenty six weeks from the expiry of the offer period.[38] The term 'offer period' has been defined under Section 2(p) of the SAST Regulation to mean the period from the date an agreement to acquire shares of the target company was

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[31] As defined in Explanation to Section 5 of the Competition Act, 2002.

[32] Regulation 4 of the Combination Regulations.

[33] Hereinafter referred to as SAST Regulations.

[34] Section 3 of the SAST Regulations.

[35] Section 3,4, 5(1) of the SAST Regulations.

[36] Section 13(1) of the SAST Regulations.

[37] Section 14(1) of the SAST Regulations; Umakanth Varottil, *Investment Agreements In India: Is There An "Option"?*, NUJS LAW REVIEW, Vol. 4, 2011.

[38] Section 22(3) of the SAST Regulations; Jithesh Tilak, *Regulating M&As An Insight Into Competition Laws in India,* INTERNATIONAL BUSINESS LAWYER, 2004.

entered into, to the completion of the transaction, as envisaged under the agreement, by payment of consideration to the shareholders who have availed the open offer.[39]

The timeline of public announcement in different kinds of acquisition is different but all of them have to comply with the twenty six month period condition as aforementioned.

V. PENALTIES

To comprehend which regulator has to be given preference over the other, it is important to be cognizant of the consequences in case of a breach of the provisions, i.e. the penalties that can be imposed by the respective regulators. Penalties under the Competition Act are usually levied as a percentage of the turnover of the enterprise. 'Turnover' has been defined in a manner to include the value of sale of goods and services.[40] This has led to an ambiguity as the definition does not specify whether it is the relevant turnover or the total turnover on which the enterprise has to be penalised.

In *Musique Diffusion Francaise SA v. Commission*[41], the European Court of Justice held that turnover and its proportion are the basis on which penalty is imposed.[42] The term 'turnover' means the turnover of the enterprise w.r.t. the relevant product and not the total turnover.[43] In *Belaire Owner's Association v. DLF Ltd*[44], penalty of 7 % was imposed on the total turnover of the group and not just on the turnover of the relevant product market which it was found to be abusing its dominance in.[45] In *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*[46], a fine of 5% of the average turnover was imposed on NSE for abusing its dominant position.[47] The Court had, further, held that neither § 2(y) nor § 27(b) of the Act of India provide scope for interpretation of the term 'turnover' to mean turnover of the relevant product.

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[39] Section 2(p) of the SAST Regulations.

[40] Section 2(y) of the Competition Act, 2002.

[41] 1983 ECR 1825.

[42] *Id.*

[43] *Id.*

[44] [2011] 104 CLA 398.

[45] Id, ¶ 13.6.

[46] 2011 Comp LR 0129 (CCI).

[47] Id, ¶ 42.3.

Failure to do so may result in imposition of a hefty fine. Thomas Cook (India) Ltd was fined to the tune of INR 1 crore for engaging in various purchase activities before securing CCI's approval.[48] In this case, the CCI had later approved the proposed combination but it was penalised for carrying out the activities before obtaining its approval.

Further, the Commission may order that the combination shall not take effect if it is of the opinion that the proposed combination will have or is likely to have appreciable adverse effect on competition in the relevant market in India.[49] The consequence of the same is that the enterprise will be dealt with as if the combination never existed and shall be penalised by the concerned regulatory authority in accordance with the statute that it has contravened.

Failure to comply with the SEBI guidelines may result in several detrimental consequences. It may include divestment of shares acquired in contravention of the regulations[50], transfer of shares or any amount raised by a directed sale of shares to the Investor Protection and Education Fund[51], declaring null and void any transfer of shares acquired in contravention of the regulation[52], debarring an accused from accessing capital markets or dealing in the securities market.

Therefore, both SEBI and CCI can impose harsh penalties. The penalties that can be imposed by CCI, is harsher as under the Competition Act, the combination can be declared to be void. But such penalties are leviable due to an inadvertence on the part of the acquirer or the target company, as required by the particular set of facts under the aforementioned laws, in informing the regulators. Now consider a situation where the transaction triggers approval from CCI and SEBI. SEBI has given its approval whereby it has to complete the transaction within the period of twenty six months from the date of entering into the agreement. But CCI's approval is still awaited as it has got two hundred and ten days to get back on any

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[48] PTI, *CCI imposes fine on Thomas Cook, Sterling Holidays*, THE HINDU, June 29, 2014. Available at: http://www.thehindu.com/business/Industry/cci-imposes-fine-on-thomas-cook-sterling-holidays/article6158129.ece

[49] Section 31 of the Competition Act, 2002.

[50] Section 32(1)(a) of SAST Regulations, 2011.

[51] Id, Section 32(1)(b).

[52] Id, Section 32 (1) (c).

application notification.[53] The time can be stalled when it asks for additional information to ascertain appreciable adverse effect of the agreement on competition. If the acquirer goes forth with the agreement, it will be penalised by CCI for gun jumping as the transaction was implemented before the approval was granted by the CCI. This is irrespective of their opinion on the appreciable adverse effect on competition.[54] CCI has penalised the enterprises in various cases like Thomas Cook Insurance Services (India) Ltd's acquisition of Sterling Holiday Resorts (India) Limited[55], Jet Airways (India) Limited - Etihad Airways PJSC merger[56], where they did not notify the CCI about their transaction, under the belief that they were exempted under the target exemption.[57] It is interesting to note that CCI approved both the transactions in Phase I, after notification was filed before it. On the other hand, if it waits for CCI approval and does not comply with the obligations under the agreement in a timely manner, it will become time barred[58] and it will have to go over the deal all over again. This is one probable situation that may arise under the timeline of different laws applicable to such deals.

In such a case, the acquirer is in a fix as he can neither go forth with the agreement nor maintain *status quo*. What should the acquirer do which would minimise the damage suffered by him at the costs of the multiple sector approval regime in India. Keeping in mind the applicable penalty provisions of both the regulators, SEBI's penalty seems to be causing lesser damage. Therefore, CCI's approval cannot be overlooked over SEBI. But there is another side to this story. The imposition of penalty by any regulator on a company listed on the stock exchange will affect the price of its stocks on the market, thereby, adversely affecting the deal, *in toto*.

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[53] S. 6 of the Competition Act, 2002.

[54] Shweta Shroff Chopra, Sangeetha Mugunthan, *Merger control in India: overview*, PRACTICAL LAW, June 2014.

[55] Combination Registration No. C-2014/02/153. Available at: http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-02-153R.pdf

[56] Combination Registration No. C-2013/05/122. Available at: http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/Order%20191213.pdf

[57] Section 5 of the Competition Act.

[58] Section 22(3) of the SAST Regulations.

The intention has always been to reconcile the difference, if any, that exists in the timeline of notification and approval. With such an intention, the time period for the CCI to revert with its order on any combination notification, has been proposed to be reduced from two hundred and ten days to one hundred and eighty days[59] in the Competition (Amendment) Bill 2012[60] which was introduced in the Parliament in 2012 has now lapsed due to dissolution of the Parliament. [61]

This was one hypothetical situation that was discussed, now let's analyse the take of these regulators on creeping acquisitions.

[59] S. 13 of the Competition (Amendment) Bill 2012.

[60] Bill No. 136 of 2012.

[61] The Competition (Amendment) Bill, 2012, PRS Legislative Research. Available at: http://www.prsindia.org/billtrack/the-competition-amendment-bill-2012-2571/

VI. CO-OPERATION INSTEAD OF CONFLICT: THE WAY FORWARD

Financial Sector Legislative Reforms Committee Report[62] made by the Ministry of Finance, Government of India, identifies the same complications due to the multiplicity of regulators in India. Several aspects of the same transaction are spread over several regulators' jurisdictions without any of them analysing the full picture. Another aspect of this multiplicity is that consumer protection, the most important concern of any person associated with the market, is forgotten. Every financial regulator in India, by way of its parent statute, has been given the power to penalize the company or market intermediary, but not award compensation to the investor/consumer. The FSLRC Report envisages a "twin peak" approach- that there be one financial regulator to regulate transactions and another parallel regulator concerned solely with investor protection and compensation.[63]

In the event that replacing the multiple regulators with a single authority is unfeasible (as it might be in the Indian landscape today), an approach that allows co-operation and co-ordination is the next best alternative. The most patent conflict in jurisdictions is perhaps between SEBI and CCI- both being financial regulators with no particular sectoral mandate. The jurisdiction of the two often overlaps as any transaction involving securities will have an effect on market forces and vice versa. The study and analysis below highlights the jurisdictional overlap and how the co-operation and co-ordination apporach is the best way forward.

VII. OVERLAPPING JURISDICTIONS: SEBI AND CCI

SEBI and CCI have often engaged in regulating transactions that have an adverse impact on the market or on investor protection. There is however one fundamental difference between SEBI's understanding and that of CCI is that the reasons for the regulation of such staggered transactions. While SEBI is more concerned with investor protection; CCI concerns itself more with the effect of such acquisitions on the market forces.

SEBI's Understanding

Under the SAST Regulation issued by SEBI, any acquisition of shares by an acquirer already holding 25% or more of the voting rights such that the acquisition amounts to 5% or more of the voting rights would trigger Open Offer Obligations.[64] The rationale behind the same is

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[62] Infra at 71. Hereinafter "FSLRC Report".

[63] FSLRC Report, at 131-133.

[64] Regulation 3(2) of the SAST Regulation.

that when an exit option must be provided in the event of an *en masse* acquisition, the same should also be provided in the event of a gradual acquisition of control of the Company with a larger view to protect investor interests.[65] In addition to open offer obligations, there are also varied disclosure norms that have to be complied with.

Computing Threshold Limits

Clarifying the computation of threshold limits in relevant to the regulation, the SEBI issued an Informal Guidance to Akash Optifibre Limited ("AOL") in 2012.[66] The central issue therein was that the promoter held 30.05% of the shares (of a total of 14,29,24,871 shares, 4,29,49,225 were held by the promoter). Thereafter, there were changes in the shareholding pattern due to conversion of fully compulsorily convertible debentures into equity shares and an open market purchase of 65,46,224shares. SEBI then clarified that the calculation shall be made on a denominator as it exists on the relevant date that the acquisition is being made. As on the date that the FCCBs were converted to equity shares, the same would directly be attributed to the total shareholding of the company and the percentage would be on the new number of shares. After a computation is made on every stage of the acquisition, each of these percentages would be added to examine the creeping acquisition in the limit.

In the AOL guidance, SEBI concluded that there was an acquisition in three instances of 0.21%, 3.03% and 1.28% each; therefore, there was a total acquisition of 4.52% in total. The romoters were then advised that they could acquire another 0.48% stake in the company without triggering obligations under the SAST Regulation. This represents an computation of the gross acquisition.

Understanding SEBI's sphere of jurisdiction

Any acquisition of shares, irrespective of the value of the transaction will be subject to SEBI's jurisdiction, so long as the relevant percentages mentioned in the regulations are breached. The SAST Regulation, although applying only to public companies does not make any other qualifications with regard to its application. There is no qualification as to the value of the deal or the turnover of the Company.

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[65] *Public M&As in India: SAST Regulation Dissected A detailed analysis of Securities and Exchange Board of India*, NISHITH DESAI & ASSOCIATES. Available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Public%20M%26As%20in%20India%20-%20Takeover%20Code%20Dissected.pdf

[66] SEBI document number CFD/DCR/TO/OW/25627/2012.

CCI's understanding

Under Section 6(1) of the Competition Act,[67] certain transactions have an adverse impact on the market and are void. Further elucidated in the Combination regulations, more specifically in regulation 4,[68] certain transactions that do not have an adverse impact on the market are exempt from the rule.

The CCI also recognizes that the adverse impact on the market can happen only if the person acquiring the shares already has a significant stake in the company. Therefore, any shareholder with less than 25% shareholding is incapable of affecting market forces. However, if a person acquires shares above the 25% would have to report the same to the CCI. As per the earlier norm, an acquisition of even 1% over the 25% threshold would be actionable.

However, CCI has amended the Competition Act in 2013 whereby Section 1A of the Schedule to the Act would reflect that certain acquisitions over the threshold would be exempt from the reporting requirement. Pursuant to the newly inserted Section 1A-[69]

1. Any share acquisition over the threshold but less than 5% (in terms of voting rights or number of shares) need not be reported.
2. This exemption is not available if either before or after such acquisition the acquirer holds 50% or more of the shares.

In essence, an acquisition of 5% or less after the initial 25% would be exempt from CCI approval compared to the more stringent norm earlier. The manner of computation under the Competition Act is still unclear however, experts claim that CCI is likely to adopt SEBI's manner of computation of gross percentages.

VIII. UNDERSTANDING THE UPPER THRESHOLDS

Prior to the Amendments made by CCI, there was approval to be sought from the regulator even though SEBI had no such stipulation. The only upper threshold recognized by SEBI is

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[67] *Competition Act- An overview*, NISHITH DESAI & ASSOCIATES. Available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/The_Competition_Act_Overview.pdf.

[68] Relaxation under Combination Regulations, Available at http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Regulatory%20alerts/2013/RA-03-2013.pdf.

[69] Ashish Sinha, *CCI eases compliance needs for M&A deals*, THE FINANCIAL EXPRESS, April 6, 2013. Available at: http://www.financialexpress.com/news/cci-eases-compliance-needs-for-m-a-deals/1098432.

that of Minimum public shareholding of 25%.[70] Therefore, if the obligations under the SAST Regulation are met; (in terms of disclosure, or open offers), an acquisition of upto 75% can be made. However, if an acquirer, either acting solo or in concert with other entities crosses the 50% threshold, CCI approval will have to be sough even for the smallest proportion of shareholding to be acquired.

As per the understanding today with regard to CCI and SEBI approval the flowing is the scheme:

PERCENTAGE OF SHARES TO BE PURCHASED	**SEBI**	**CCI**
Acquisition resulting in control of less than 25% voting rights/quantum of shares	No approval or obligations	No approval or obligations
Acquisition of 5% or less of shares over 25% threshold	No approval or obligations	No approval or obligations
Acquisition of more than 5% over 25% threshold limit	Open offer and disclosure obligations triggered	Notice to be filed after payment of fees (INR 50,000)
Acquisition of 5% or less over 25% threshold but amounting to less than 50% of the total (pre or post transaction)	No approval required	Notice to be filed after payment of fees (INR 50,000)
Acquisition of 5% or less	Prohibited under the	Transaction possible only for

[70] SEBO Order in the matter of Monotype India limited, Document number WTM/PS/22/CFD/JULY/2014.

over the 75% threshold	Minimum Public Shareholding norms	a private company.

IX. UNDERSTANDING COMPETING JURISDICTIONS

While there has never been a direct conflict between the understanding of CCI and SEBI, the only deal so far that has required clarification from both on the same transaction is the Jet-Etihad one. Herein, the acquirer, Etihad Airways, based in Abu Dhabi has sought to purchase a 24% stake in Jet Airways, based in India.[71] While the threshold is such that there need not be approval sought from either regulator, there was concern that the acquisition was being made by 'persons acting in concert'- essentially that the current promoter group led by Naresh Goyal was acting in concert with the acquirer group, Etihad. The Central Government then sought clarification from both SEBI and CCI regarding the notion of control in their respective regulations. The central concern here was that effective control of the board of Jet was being transferred to Etihad given that the latter could appoint 3 directors to the 12 numbered directorial board of Etihad. There was also considerable discourse that the norms in the Share Purchase Agreement and the Corporate Co-operation Agreement. After amendments proposed by both regulators were made, the transaction was allowed to proceed.[72]

From the current regulatory scenario in India, it becomes patent that various regulators are at par as long as they function within the sphere of their own competence. If there is need for regulatory approval from multiple agencies, the Government, and more FIPB are reluctant to grant exemptions.

[71] *Jet-Etihad deal: Sebi seeking further clarity from CCI, finance and civil aviation ministries*, BUSINESS TODAY, March 12, 2014. Available at: http://businesstoday.intoday.in/story/jet-etihad-deal-in-sebi-air-pocket/1/204196.html

[72] Kanika Chaudhary & Nidhi Singh, *Skies over Control*, LUTHRA & LUTHRA LAW OFFICES. Available at: http://www.luthra.com/admin/article_images/Skies-under-Control.pdf

X. CONCLUSION

India has adopted multi sector regulator system in which there are multiple regulators for different sectors which have different jurisdiction. The multiplicity of regulators is a more comprehensive method of understanding each sector and aspect of a deal. Allocating the jurisdiction of different sectors to different regulators leads to a holistic coverage of that particular sector. At the same time, this entails securing approvals from different sectors if such sectors' jurisdiction is invoked in a particular transaction. This, further, entails increased amount to be spent in obtaining the approval in addition to an increase in the time required for securing such an approval. However, this also makes the Indian market more inaccessible to an investor, especially those that have no knowledge of the Indian framework. The multiplicity of approvals makes the process expensive for most players. Financial Sector Legislative Regulation Committee was chaired by Justice B.N. Srikrishna and it had submitted its report in March 2013.[73] It had suggested super regulator for India. To this, Raghuram Rajan had replied:

> "if it ain't broke, don't fix it!"[74]

The timeline for approval from different regulators is also different, making the financing of a transaction further difficult. For eg: If SEBI has given approval and CCI's approval is awaited, then the company cannot go forward with any transaction in pursuance of the combination, thereby, entailing penalties on account of delay. On the other hand, if it goes forward with the transaction, then CCI may take an action on account of taking a step forward without securing the requisite approval from CCI. A co-operation between the regulators as has been evidenced with regard to creeping acquisitions makes the regulatory framework easier to manoeuvre without there being an outcry for a unified regulator. Another step for the seamless integration of the regulatory system is a co-ordinated set of fines whereby exemptions be granted to market players if another regulatory agency is the cause for delay. This measure would ease the already slow capital market process in India and thereby, 'Make in India', the flagship programme of Modi Sarkar a success.

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[73] FINANCIAL SECTOR LEGISLATIVE REFORMS COMMITTEE, Ministry of Finance, Government of India. Available at: http://finmin.nic.in/fslrc/fslrc_index.asp

[74] Raghuram Rajan, *Financial Sector Legislative Reforms Committee Report (FSLRC) – what to do and when?,* Available at: http://www.rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=900

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