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# INVESTIGATING PETROLEUM INDUSTRY OF INDIA WITH RESPECT TO ALLEGED COMPETITION LAW VIOLATIONS

*BY UJJAWAL SATSANGI & SOURAV CHANDAN PADHI*[1]

## Abstract

*Petroleum is a commodity of high volatility in lieu of economic values. Today, no nation can survive without energy and petroleum is the most important source of energy. Petroleum prices have always been a topic of discussion in everyday life of a common man. It affects not only the ordinary discussions of coffee shop but also the discussions of the centre politics at the parliament. But, Indian petroleum sector is alleged to have anti-competitive behaviours. It is argued that the state owned PSUs are not allowing the private players to survive in a free and open market. Now the moot question is that what kind of effect is such policy making on the competition and on the consumers. Competition is a boon to consumers, and regulation is helpful to the nation as a whole. The former helps the consumers directly by providing them quality products with multiple options, whereas the lattert helps in ensuring the reach of every citizen to every kind of resource. Both are different in nature. But the question is what is better for petroleum sector; Regulation or competition? This article will find the answer to it. It will also inspect the possibility of survival of private players in a state dominated market without hampering the consumer rights.*

> *"And while the law of competition may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department"*[2]

## I. Introduction

In 2009, India was the world's fourth largest consumer of crude oil and petroleum products after the United States, China and Japan, with product consumption growing by a remarkable 5.2% per annum in 2009, despite the effects of the global recession.[3] India is forecasted to become the world's third largest oil consumer by 2014, although per capita consumption rates are expected to remain well below OECD averages.[4] Given the growing significance of India as a crude consumer, it is important to

[1] Authors are 3rd and 4th Year B.B.A.-L.L.B. (H) students of NATIONAL LAW UNIVERSITY ODISHA, CUTTACK respectively.

[2] Andrew Carnegie, *Wealth* 148 N. AM. REV. 653, 655 (1889).

[3] INTERNATIONAL ENERGY AGENCY (2010), *Oil Market Report* 16 (February 11, 2010) *available at* http://omrpublic.iea.org/omrarchive/11feb10full.pdf.

[4] International Energy Agency, Tables: Reviewing Medium Term Horizon – December 2009, *available at* http://www.oilmarketreport.org/indexsubscribers.asp (last accessed on September 4, 2013).

understand and analyse the pricing, regulatory and investment dynamics at play in its downstream petroleum sector. These factors will to a large extent shape domestic supply and consumption patterns currently and into the future, which in turn will also largely determine the nature of India's involvement in global energy markets, especially refined product and crude markets. A country's economic growth is closely correlated to the energy demand. Consequently, the demand for oil and gas, which is one of the main sources of meeting energy requirements, is expected to increase further. The value of the Indian oil and gas sector is forecasted to grow from US$ 117,562.9 million in 2012 (estimated) to US$ 139,814.7 million by 2015[5]. In any economy the energy sector plays an important role, the growth of the economy largely depends on the energy sector. To a very great extent, this can be determined to be the cause of India's poor share in the world's oil and gas production and petroleum product consumption. Some of the biggest problems associated with the sector include excessive dependence on import of energy products and very little participation of private players in the sector.

In 1997 Government tried to deregulate the petroleum sector to certain extent. Moreover, the government has facilitated the entry of private players in the industry, in both upstream and downstream activities. Thus, deregulation of energy sector was supposedly a step forward to improve the Indian Petroleum Industry[6]. This has brought in more competition and increase in quality of service in the petroleum industry. Ultimately the consumers are the beneficiary of the policy, it has also led to improvement in technology used in petroleum industry also starting form refinery to selling products through retailers. But still, the petroleum sector is isolated from competition. Allegation of cartelisation, predatory pricing and unfair trade practices have become common. This article is a quest for searching the veracity present in the allegations and if they are true what can be done to remove such defects. The article will also analyse the role of petroleum regulation and its effect on competition and will try to find solutions of any defects, if present.

## *1. Petroleum and Natural Gas Regulation: A Boon or Bane*

Regulation is often spoken of as an identifiable and discrete mode of governmental activity, yet the term "regulation" has been defined in a number of ways.[7] One of the commentators has pointed to at

[5] Indian Brand Equity Foundation, Indian Oil & Gas Sector: Recent Development, Growth and Prospect 3 (January 2013) available at http://www.ibef.org/download/Oil-Gas-Sector-040213.pdf.
[6] UNI, Deregulate Oil Industry Immediately: Survey, (January 4, 1997) available at http://www.rediff.com/money/jul/04oil.htm
[7] Robert Baldwin, Martin Cave & Martin Lodge, Understanding Regulation: Theory, Strategy and Practice Pg. 3 (2d ed. 2012).

least five meanings of the term; another has pointed to important distinctions between usage in Europe and in the United States.[8] Definitions include at the most general level, the act of controlling, directing, or governing according to a rule, principle or system.[9] This includes any conscious ordering of activity, and so has always been of fundamental importance.[10] In India, regulatory framework both in infrastructure and the financial sector has developed in an ad-hoc mechanism as per the need basis.[11] There has been no central planning in development of the regulatory framework which is evident in the following discussion.[12]

Following a structural adjustment program in 1991, India embarked on the path of market liberalization.[13] To fulfil the lacuna created after the 1991 liberation, several sector-specific regulators have emerged on the Indian regulatory horizon.[14] The regulatory framework in the infrastructure sectors has developed autonomously within each infrastructure sector with very little co-ordination or cross-fertilisation of ideas across sectors.[15] In the light of regulatory reform another regulatory authority joined the league on March 31st, 2006 i.e. Petroleum and Natural Gas Regulatory Board (PNGRB).

Competition and regulation are two distinct objects. The integration of both of them, if not done properly, may result disastrous. There are several dimensions involved in the integration process of Competition Law and Regulation Law. First, the state of affairs, the interference of government, regulatory body and other edicts may affect the state of competition negatively. Secondly, the question is regarding the industries working in competitive market and regulated market. If the industries will be regulated then the key question will be, who is regulating and how it is getting regulated. The regulation though may bring positive effect in the equal sharing and utilisation of any resource, but it may affect the market competition adversely. Third and most important question is how completion law will apply in the regulated industries, the scope and extent of application and how to resolve the ambiguities that will arise in the course of time. Also, another important question will be resolving the overlapping jurisdiction on subjects.

[8] Tony Prosser, Law and the Regulators (1t ed. 1997), pg. 7.
[9] *Id.*
[10] *Id.*
[11] Vijay Kumar Singh, *Competition policy and financial regulations - case of a unified competition regulator* 34(7) EUR. COMP. L. REV., PP. 376-380 (2013).
[12] *Id.*
[13] Amit Bhaduri & Deepak Nayyar, The Intelligent Person's Guide To Liberalization , pg. 76 (1996).
[14] Rahul Singh, *The Teeter-Totter of Regulation and Competition: Balancing The Indian Competition Commission with Sectoral Regulators* 8 WASH. U. GLOBAL STUD. L. REV. 71, 73 (2009).
[15] The Secretariat for the Committee on Infrastructure, *Paper on Approach to Regulation of Infrastructure, Planning Commission, available at* http://infrastructure.gov.in/event_Regulation_Law_and_Policy_final.pdf.

*2. Sectoral Regulation and its Impact*

In a regulated market vast number of laws and regulations are enacted which flood the market. These regulations are applied in every sphere including local, regional, state or provincial, national and international. But, the result of such regulations is doubtful. The result may be positive or negative also. No analysis of competition policy in the modern economy is complete without considering the effects of regulations on competition.[16] Indeed, many economists argue that the effects on competition of anti-competitive regulations are greater than the effects of anti-competitive practices in the private sector, and there where there is a lack of competition in any industry, most often the fundamental cause being a government law that affects competition, for example, by restricting entry.[17] The roles of regulatory and competition authority can be complementary, but many of times the interference between the two results into tension. The work culture of both the practices is distinct and dissimilar. While sector-specific regulation seeks to identify a problem *ex ante* and creates administrative machinery to address behavioural issues before the problem arises, competition policy generally addresses the problem *ex post*, in the backdrop of market conditions.[18] Hence, these two mechanisms can work effectively and efficiently only through harmonise implementation method.

Eventually, our Competition Act also provides for harmonisation of work between the regulatory authorities and the CCI to an extent. Section 21 suggests that in any proceeding before a statutory authority, if such a need arises, the statutory authority[19] may refer an issue to the Commission.[20] The Commission is then bound to deliver its opinion to the statutory authority within a stipulated period of two months.[21] Incidentally, however, this opinion is not binding upon the statutory authority. A reciprocal provision was also enacted in 2007, where the Competition commission can take opinions from the regulatory authorities.[22] The essence behind these two sections is to promote harmony and to

[16] Allan Fels, *Competition and Regulation* COMPETITION LAW TODAY 195 (2007).
[17] *Id.*
[18] *Supra* note 12.
[19] Competition Act, 2002 §2 ( w)
[20] Competition Act, 2002 §21(1)
[21] Competition Act, 2002 §21(2)
[22] Competition Act, 2002 §21A
(1)Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:
Provided that the Commission, may, *suo motu*, make such a reference to the statutory authority.
(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory

bring a set of cooperation between different sectoral regulators and CCI. But the fact that the opinion of the regulator or the CCI remains unbinding and the objective of every regulator and CCI is different from each other creates hindrance. For example, the objective of SEBI is to promote interest of the investors,[23] whereas the objective of CCI is to promote the interest of consumer.[24] The decisions of every organisation are nothing but a reflection of the aims and objectives of it. Hence, in this case, the decision of SEBI will not change merely on the advice of CCI, even if a blatant violation of competition law would be taking place.

The most common industries where competition law interacts with sector or industry specific laws are in the network industries involving access to network facilities sometimes considered as essential facilities or interconnection, monopoly pricing, anticompetitive agreements and merger control.[25] Due to this overlapping nature of both the mechanisms the objective sought to achieve gets difficult to achieve. The idealist model of harmonising effect is impractical to achieve unless and unless a pan-enforcement or coordination body is created. As it is said, *more the mouth, more the saying*, similarly more the number of authorities, more number of opinions will come. Plato has registered in his philosophy of simplifying the system. As per him, keep the system simpler, rest will be followed as conclusion.[26] Countries like Australia, UK etc. went to the similar lines and tried to convert their system in a simpler form.

*3. Sectoral Regulation and Foreign Jurisdiction Model*

The principles of Community competition law do not merely promote competition between the companies.[27] They also serve to liberalize and integrate markets, to challenge the existence and extension of monopolies, as well as their behaviour, and to question restrictions on freedom to provide services and freedom of establishment.[28] Actually, regulation is a vital weapon for dealing market failures and market power control. Regulation has the power to alter the market situation. On the other

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authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

[23] Preamble ,SEBI Act, 1992

[24] Preamble Competition Act, 2002

[25] Warrick Smith & David Gray, *Regulatory institution for Utilities and Competition, International experience* 27 World Bank Paper (1988).

[26] Plato, Republic 34 (G.M.A. Grube *rev.* 2d ed. 1992).

[27] John Temple Lang, *European Competition Policy and Regulation: Differences, Overlaps and Constraints* in Antitrust and Regulation in the EU and US – Legal and Economic Prospective (François Lévêque & Howard Shelanski eds. 2009).

[28] *Vlaamse Televisie Maatschappij NV v Commission of the European Communities*, [1999] ECR-II 2329; *See* also *Corbeau*, Case C320/91 [1993] ECR I-2533; *See* also *Entreprenorforeningens Affalds/Miljosektion (FFAD) v Kobenhavns Kommune*, [2000] ECR I-3743; *See* also *Regie des Telegraphes et des Telephones v SA GB-INNO-BM*, [1991] ECR I-5941, 5980-81.

hand, competition law maintains existing competition, it neither create competition nor it can remove the defects or failures of an existing market. Since, such irregularities can be removed only and only by regulatory means. In developing countries where the utilisation of resources and development of market is the primary issue, regulation can play a pivotal role whereas countries where market has already developed and nurtured competition can come into picture for taking the best out of it. This changing requirement was detected by different countries across the world.

Institution building is not an easy task. It is comprehensive and exhaustive. Practically it is very difficult to replace or abolish established institutions.[29] The problem between the regulators and competitive authorities is the same. Though a wide range of models are available, but since, not much work has been done in this area, the models of other nations can't be relied upon. Every country has its own way. They all are trying to curb out this problem to the extend they could. Australia has a Competition Authority supporting model, whereas UK provides more powers to the sectoral bodies.[30] Historically there is no evidence that categorically establishes the consultant of regulatory body.[31] Despite of the fact, in UK itself, where the competitive powers implemented by the sectoral regulations, by September 2005 no infringement decisions were made.[32] Hence, it is very difficult to rely upon any one of them. The ideal model has to be *sui generis*. As Friedrich Hayek, a Nobel Prize-winning economist, has suggested, the most significant advantage of the free market is its ability to make use of decentralized, individual knowledge of day-to-day affairs in life.[33] An old military teaching is that the best intelligence can be obtain from the people living or present at the location. Since, it is the private companies and individuals in between of all the mash. Therefore, the best option to solve this problem can be sought by the private individuals rather than legislatives. No matter how powerful an economic regulator is, it cannot possibly replicate the mélange of information accessible to individuals.[34]

A private enforcement of regulation and competitive reform will bring deterrence among the public, and more enterprises will incline to follow it. Private enforcement would bring people closer to

[29] Int'l Competition Network, Antitrust Enforcement In Regulated Sectors Working Group, Subgroup 2: Interrelations Between Antitrust And Regulatory Authorities, Report To The Fourth Icn Annual Conference, pg. 9 (June 2004).
[30] Dep't Of Trade & Indus. & H.M. Treasury, *Concurrent Competition Powers In Sectoral Regulation,* pg. 20 (2006).
[31] *Supra* note 27 at 4-6.
[32] *Supra* note 28 at 28.
[33] Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).
[34] William C. Taylor & Polly Labarre, Mavericks At Work: Why The Most Original Minds In Business Win 67 (2007).

competition law, creating stakeholders in Indian economic growth and competitiveness.[35] Indeed, private enforcement remains the bulwark of U.S. antitrust law, with private actions constituting around ninety percent of antitrust cases.[36] But such an arrangement will not bring any major reform in the sector. Such arrangement will only provide a *locus standi* to the private individuals. It does not necessarily constitute any special allurement to initiate action.[37] But coupled with the possibility of damages, it confers upon a potential plaintiff an incentive to sue.[38]

Such an arrangement possesses very low possibility of damage to the guilty party. Since there is a very low possibility of detection, compensatory damages only mean that if an enterprise is caught violating competition legislation, the enterprise would have to restore the victim to its position prior to the infringement.[39] Exemplary damages are necessary for a proper enforcement.

On the basis of the above analysis, we can conclude that there could be three type of enforcement – (1) Sectoral Regulators act as a supplement to Competition Authorities; (2) Competition Authority acts as a pan-authority *and* (3) Both work in harmony.

### *4. RIL v. OMCs[40] – Prospective of Private Players*

The background facts on which the complainant has raised the complaint is the 1997 notification of government that waived the administered price mechanism method for determine prices of petroleum products. The dispute had its origin in RIL losing a tender for supply of aviation fuel to Air India which was won by a cartel of Oil Marketing Companies (OMC). Afterwards, a complaint was registered with the CCI against three companies to probe allegations of cartelization and abuse of dominant position. While the proceeding were taking place, IOC went on to question the CCI's authority as sector regulator stating that the adjudicatory power vested instead with the Petroleum and Natural Gas Regulatory Body. The amendment of 2002 provided private companies to apply for authorization to market transportation fuels. Subsequently, the matter was brought before the Delhi High Court by the OMCs and the High court ordered in favour of the OMCs. The issues raised petroleum board are – a. to direct the OMCs to cease and desist from indulging in 'predatory pricing of transportation fuels and follow the published policy of the government; b. To direct for respondents to cease and desist from cartelization in respect of marketing of petroleum products and particularly the

[35] European Commission, *Annex to the Green Paper: Damages Actions for Breach of EC Antitrust Rules* (Commission Staff Working Paper, 2005) *available at* http://eur-lex.europa.eu/ RECH_naturel.do (Last visited September 4, 2013).
[36] Clifford A. Jones, *Private Enforcement Of Antitrust Law In The EU, UK and USA*, pg. 16 (1999).
[37] Rahul Singh, *Supra* note 12 at 97.
[38] Steven Shavell, Foundations Of Economic Analysis Of Law 39 (2004).
[39] European Commission, *Supra* note 33 at 34.
[40] Oil Marketing Companies

transportation fuels and direct the respondents to sell indigenously produced crude oil at prices determined by market forces; c. Prohibit the respondents from indulging in any type of restrictive trade practice/ unfair trade practice and from any monopolistic practice or cartelization in the sale of petroleum products; and d. Levy penalty on the respondents for the loss suffered by the complainants. The complaint clearly mentioned about the violation of the provisions of the competition Act 2002. The above mentioned practices were anti-competitive in nature as it deterred the entry of private players, restricted the scope of innovation and up-gradation in technology, better quality of service could not be ensured for customers, it increased the risk of adulteration and reduction of quality of products. These in short defeated the very purpose and motive behind economic reform that was brought in the sector. As government offered subsidies and rebate to the Public sector OMCs over the pricing of diesel, kerosene and LPG, so that these products are available at a affordable price to consumers. But these subsidies are used alternatively by PSU OMCs for cross subsiding other products like ATF. This practice of cross subsidising is unfair trade practice and restricted under the Act. These PSU OMCs have a greater base in retail outlets, it makes it difficult for private players to compete them and reaching a large consumer base. The OMCs are also provided with administrative support for establishment of retail outlets by the Government so this makes it an unfair practice followed by these companies.

The board held that allegation of restrictive trade practices, unfair trade practices, cartelization, collusion and monopolistic behaviours on the part of respondents have no basis. Anti- competitive outcomes that have emerged as a result of the pricing policies of PSU OMCs are not their own making, but have been an unintended consequence of pricing policies thrust upon them by the government. Therefore, charges of cartelization and collusion have no basis. It held that the pricing policies of the government have resulted in loss of market shares for the private retailers. Even if a monopolistic situation has emerged as an unintended consequence, in order to establish monopolistic behaviour through collusion, cartelization, predatory pricing etc. the complaints will have to establish that the respondents raised fuel prices beyond what a competitive market would have allowed. Clearly this is not the case. In fact prices continue to remain below the guidance level set by UOI. Therefore to establish that the respondents engaged in anti-competitive behaviour, the pecuniary advantage accruing from such action will have to be established. So the board did not find merit in the issue raised by complainant that PSU OMCs indulged in monopolistic or anti-competitive behaviour. As the board had been established to protect the consumer interests, as the complainants had sought for an interpretation this section enforce price fixation. It was of the view that prices will veer towards optimal levels of the most efficient producer. Market should be allowed their optimal levels. The complainants were asked to pay penalty.

According to the authors this order is not in adherence to the competition law that is prevalent in India. As the APM method of pricing was waived out in 2002 so as to encourage more number of private players to participate and level playing was created by the government for all entities. But the present action by public sector oil marketing companies is an abuse of their dominant position as they have tried to lower the price of aviation turbine fuel (ATF) for creating a monopoly over the market. By this action of OMCs the private players are unable to compete with them this is violation of section 4 of the Act. They are indulged in predatory pricing of the products which result in violation of the above mentioned provisions. The three Public sector OMCs are the only entity involved in retail petroleum business throughout the country. The government has been subsidizing certain product sold by them, this has resulted the firms in cross subsidizing the ATF and selling it a lower price than the market value.

Issue of cartelization contended by the complainant was struck down by the board. But according to the author the background fact and circumstances are clearly visible that there was cartel operating among the three public sector OMCs. As the price quoted while bidding for tenders for supplier ATF to AirIndia, all the three OMCs had quoted similar prices. This action makes it clear that there is cartel operating among the OMCs. As under section 3 of the competition act that prohibit any horizontal agreements among the producers engaged in engaged in identical or similar trade of goods or provision of services. This action of the OMCs is in clear violation of the section 3 of the Act. It also prohibits for any agreement that determines the price of the goods.

According to the authors the CCI should have been allowed to have a free rein in matters regarding anti-competitive behaviour instead of the petroleum board being given the jurisdiction over the matter. This has led an order i.e. in clear violation of the provision of the Competition Act. As the matter involved substantial question relating to Anti-trust laws. Therefore by referring the matter to CCI would have been justified as it has better understanding in competition Act and relating to questions involved in the matter. Authors are of the view that the sectoral regulators are expert in the sector specific issues but where are when an anti-trust issues are being raised by the complainants then CCI should be referred as they have wider, deeper and its understanding of anti-trust concepts far more clear than a sectoral regulator. As competition act is specific legislation and pertains to specific situation and conditions and specific law always prevails over general legislations. However, Indian courts should allow CCI to be the primary regulator whose jurisdiction should not be excluded. The Competition Commission has been provided with a legal framework to determine competition issues.

In this regard, it has been vested with powers to undertake inquiries, summon and enforce the attendance of any person and examine him under oath, require the discovery and production of documents, receive evidence on affidavit, issue commissions for the examination of witnesses or documents, requisition any public record or document , call upon such experts from the field of economics, commerce, accountancy, international trade or from any other discipline.

## II. SUGGESTION AND CONCLUSION

The article tried to analyse the on-going tussle between the sectoral regulators and CCI. Different objectives are the key problem for different treatment of the same issue. It is quite clear that foreign models are of no help. Also, the moot point is that India is still a growing market and it needs its resources to be regulated wisely so as to provide maximum benefits to maximum people. It is true that petroleum prices play a vital role in the life of each and every human being. Petroleum prices are of such volatile nature that a hike in it may result into dissolution of the government even. Hence, allowing petroleum prices to be determined on the basis of market forces will affect the consumers adversely. It will go against the very objective of the act.

But, it is also true that the reimbursement policy of the government is arbitrary in nature. Providing reimbursement only to PSUs and not to private companies is actually prohibiting the private players to think twice before entering into the field. This reimbursement is actually anti-competitive. Ironically, the preamble of the PNGRB Act states that '*to promote competitive markets'*. But, the on-going tussle of jurisdiction over the petrol pricing case between RIL and OMCs is delaying the answer. If a sectoral reform will be brought into picture, where all the sectoral regulators, including CCI, will be asked to work under a common head i.e. Market and Economic Development Authority then the harmony that is required will be achieved. The different objectives of the bodies should be comprehended into one. The problem of multiple institute and necessity of development of new will be permanently terminated and a single full-fledged cross-sector regulator will take place of it. Competition should be kept in the heart of it and the provisions should be made in the interest of both consumers and investors. In the similar fashion, the authority shall be gifted with its own tribunal. The tribunal will hear all the cases irrespective of their sector and it should be adjudicated by a three member panel consist of a market and economics expert, a sector area expert and a competition area expert. The three judges with their different area expertise will do justice for the consumers, investors and other interested parties. Competition shall be developed, but not on the basis of the hue and cry of the general public, and that is why a regulatory application shall act as a complimentary measure to competition law.