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## Competition Law and Energy Sector: Interface, Dichotomies and Challenges

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## **Introduction**

India faces energy shortages. The Energy Sector is plagued with mounting commercial losses due to various inefficiencies, colossal commercial and technical losses and increasing subsidy burden on the states. These shortages have had a very detrimental effect on the overall economic growth of the country. In order to re-vitalize the sector and improve the techno-economic performance, the Government of India initiated the reform process in 1991.<sup>1</sup> Responding to the crisis, India embarked on a series of economic reforms. A number of changes were introduced in policies relating to industrial licensing, foreign investment, technology imports, government monopolies and ownership, financial sector etc. The main objective was to make the market driven by competitive forces, so that there are incentives for raising productivity, improving efficiency and reducing costs. The slow but steady implementation of the economic reform agenda has driven the growth of the country and market forces are now increasingly playing significant role.<sup>2</sup>

Even though private participation and competition in India's Energy Sector have been encouraged since the early 1990s, limited progress has been observed. Issues relating to industry structure, regulation and pricing that potentially impact competition in energy sub-sectors, i.e. electricity, oil & gas and coal, still confront India.

India's modern competition law, introduced by the Competition Act 2002 (Competition Act), has had a long and often troubled history. Although the Competition Act was enacted by the Indian Parliament and published in 2003, it has been dormant over a number of years and seen a piecemeal implementation including a challenge to the Supreme Court.

The Competition Act regulates two main categories of commercial behavior: agreements and abuse of market power.

Section 3 of the Competition Act prohibits two categories of agreements: horizontal agreements (between businesses at the same level in the supply chain such as two producers) and vertical

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<sup>1</sup> 'Competition Law and Competition Issues facing Energy Sector in India', Aurbindo Panda and Atul Patel, KIIT University, Available At < [https://www.researchgate.net/publication/228294622\\_Competition\\_Law\\_and\\_Competition\\_Issues\\_Affecting\\_the\\_Energy\\_Sector\\_in\\_India](https://www.researchgate.net/publication/228294622_Competition_Law_and_Competition_Issues_Affecting_the_Energy_Sector_in_India)> (Last Visited on 27<sup>th</sup> November, 2016)

<sup>2</sup> 'State of Competition in India: An Overview', Draft note by Planning Commission Working Group on Competition Policy, CUTS Centre for Competition, Investment & Economic Regulation ([www.cuts-ccier.org](http://www.cuts-ccier.org)), 26<sup>th</sup> July, 2006

agreements (between businesses at different levels in the supply chain such as a producer and distributor). The provisions are broadly analogous to the provisions on anticompetitive agreements under Article 101 of the Treaty on the Functioning of the European Union and section 1 of the Sherman Act in the U.S. The CCI has sufficiently wide jurisdiction to bring under its ambit agreements and arrangements taking place outside India, provided that they have an “appreciable adverse effect” (AAE) on competition in India.<sup>3</sup>

This paper analyses the pre-reform era and identifies the key concerns which led to the initiation of the reforms. It also analyses the likely impact of the major policy and regulatory initiatives that have been undertaken since 1991 including the provisions of the new enactments which have come into force eventually. The paper analyzes in brief the likely intersection of the Competition Law with Energy Sector in India and possible solutions emerging out of the present scenario.

### **Requirement of Competition Law Interface in Energy Sector**

The energy sector faces tremendous issues where the fault lines are deeper than actually visible. The energy sector continues to reel under the extreme pressure of the developing economy like India and ever increasing demand of various products which more often than not fall short of the actual supply in the market. The other problem facing this sector is lack of investments where the prospective investors fear from blocking their money in this sector. The main reason remains an extremely cautious attitude of the government and low rate of returns on investment as compared to the maturity period of such investment. This has led to or rather exaggerated the problem of lack of modern infrastructure equipped with latest technology which not only affects the interest of consumers but also evade any sort of dynamic and cut throat competition which the telecom sector has witnessed off late. Thus, after the change of guards at the Central level the govt. has taken a major ambitious and extravagant reform drive to support and encourage private participation as well as more positive inclusion policies of PSUs working in energy sector.

### **Key Reforms Undertaken and Prospective Challenges**

- **INDUSTRIAL POLICY**: Licensing has been abolished except in respect of few industries.

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<sup>3</sup> ‘India turns up the heat on Cartel enforcement with first fines in India’, Suzanne Rab, King & Spalding Energy News Letter, April 2002, Available At < <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/April/article8.html>> (Last Visited on 26<sup>th</sup> November, 2016)

- **PUBLIC SECTOR**: Monopoly of public sector industries, except those where security and strategic concerns still dominate (arms and ammunition, atomic energy, rail transport etc), has been abolished. Price preference for public sector has been discontinued, but purchase preference continues.
- **SMALL SCALE INDUSTRIES**: Policy of reservation and preferential treatment for small-scale industries continues, but a large number of items have been removed from reserved category.
- **PRICE CONTROL**: Price and quantity controls for a number of commodities have been relaxed.
- **IMPORT LICENSING**: List of restricted consumer goods has been pruned, number of canalized items has been reduced and import of some restrictive items has been liberalized. Tariffs have been reduced in a phased manner. India has done away with quantitative restriction regime, as a result of WTO commitments.
- **FOREIGN INVESTMENT**: Foreign direct investment, foreign technology agreements and compulsory licensing have been liberalized. Cap on foreign holdings has been increased in a number of sectors.
- **FINANCIAL SECTOR**: The financial sector has been gradually de-regulated. Entry of domestic and private foreign banks has been permitted. Domestic financial institutions have been allowed to enter conventional banking activities.
- **EXIT POLICIES**: Exit was and is difficult for Indian industry because of the labour and bankruptcy laws. Legislation has been enacted for a new insolvency law. The Industrial Disputes Act, 1947, which protects the interests of labour, is being examined to provide for easier exit for industry.
- **GOVT. DEREGULATION OF PRICES**: The decision of the Cabinet of Central Government to allow the petroleum prices to be governed by market forces rather than the government regulations was also one such major reform step taken in order to promote

private participation where the players can increase or decrease prices suiting to existing market situation thereby enabling more fierce competition.

- **STATE MONOPOLIES AND PRIVATIZATION:** In civil aviation, competition has been allowed. Power sector is being unbundled and independent regulatory authorities have been set up. Competition has been permitted in the area of telecommunications.<sup>4</sup>

It is important to note that after going through these reforms in Energy Sector under various products, each sector has subsequently seen stiff and rapid increase in competition which has alarmed the cautious mindset in government corridors to come up with the sectoral regulations in different product markets viz. Electricity, Petroleum, Coal, Gas etc. and paved way for emergence of regulators in the broader genome of energy aspect in India.

### **Regulation & Competition: Complementary or Contradictory**

Any commercial market whenever seeks to enhance public private participation has to be careful towards the fact that such promotion should not a cause of divergence from any law in short of long span of time because development without discipline is neither advisable nor tenable. Thus, when Energy sector which is distributed in many sub-products market like Oil, Gas, Electricity, Coal etc. decided to go for a reform drive, the government immediately envisaged the idea of individual market regulators which would regulate the activities of the companies whether PSU or Private, within the broader set of policies as formulated by the Parliament in form of law.

At this juncture, it becomes imperative for the researcher to discuss the notion of regulation and whether it complements competition or contradicts competition?

Regulation is often understood to be an identifiable mode of stamp of government's authority to govern the commercial activities for keeping them in sync with larger public interest rather than completely based on private interest. "Regulation" can be explained as the act of controlling, directing, or governing according to a rule, principle or system. This includes any conscious

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<sup>4</sup> 'State of Competition in India: An Overview', Draft note by Planning Commission Working Group on Competition Policy, CUTS Centre for Competition, Investment & Economic Regulation ([www.cuts-ccier.org](http://www.cuts-ccier.org)), 26<sup>th</sup> July, 2006

ordering of activity, and so has always been of fundamental importance.<sup>5</sup> In India, regulatory framework in various sectors is an ad-hoc mechanism which acts as per the need basis without a well sketched central planning or policy oriented approach and rather is based on triggering mechanism. That is one of the reasons why we see threshold limits in various sectors in order to attract the jurisdiction of regulators.<sup>6</sup>

We have to begin the discussion on these two terms i.e. 'Competition' and 'Regulation' with an established concept that both of them have different aims and objects and therefore their synchronization in a single unit is not only complicated but a tricky exercise as the adverse effects may even lead to disasters. Firstly the control over the state of affairs, interference by the regulators and strict vigil over the transactions may end up adversely affecting the competition as a direct consequence. Secondly, the criteria for market behavior also significantly lies over the nature of regulation which means who regulates whom and how? The answer is that regulation may adhere to the principle of equal distribution of resources and profits but on the other hand may ill-effect the competition in the market as even the undeserving or let's say less deserving starts getting the same share which an otherwise competitive firm is getting. Such actions more often than not, squeeze out the motivation of remaining competitive in market and further lead to the chances of creating highly regulated mediocre market. Lastly, the most interesting point which is to be addressed is, the convergence of the actions associated with competition to that of the actions which are pre-established part of other regulations. It means that large part of this debate depends on the nature of dealings done by competition authorities with different sectoral regulators and the scope of their convergence and divergence on certain aspects of any policy. This essentially points out the situation which ponders upon the base that whether CCI should act as regulator of regulators or should it allow the regulators a free hand on regulations by restricting itself to mere isolated facts of competition policy.<sup>7</sup>

### **Emergence of CCI as Regulator of Regulators**

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,

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<sup>5</sup> Understanding Regulation: Theory, Strategy and Practice, Robert Baldwin, Martin Cave & Martin Lodge, Pg. 3 (2d ed. 2012)

<sup>6</sup> Competition policy and financial regulations - case of a unified competition regulator, Vijay Kumar Singh, 34(7) EUR. COMP. L. REV., PP. 376-380 (2013)

<sup>7</sup> The Teeter-Totter of Regulation and Competition: Balancing The Indian Competition Commission with Sectoral Regulators, Rahul Singh, 8 WASH. U. GLOBAL STUD. L. REV. 71, 73 (2009)

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.<sup>8</sup> 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.<sup>9</sup> 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. Hence, these two mechanisms can work effectively and efficiently only through harmonize implementation method. Eventually, our Competition Act also provides for harmonization 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 may refer an issue to the Commission. The Commission is then bound to deliver its opinion to the statutory authority within a stipulated period of two months.<sup>10</sup> 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.<sup>11</sup> The essence behind these two sections is to promote harmony and to 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.

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<sup>8</sup> Competition and Regulation, Allan Fels, Competition Law Today 195 (2007)

<sup>9</sup> Investigating Petroleum Industry Of India With Respect To Alleged Competition Law Violations, Ujjawal Satsangi and Sourav Chandan Padh, Competition Law Cirque, Issue 1, 2015, Available At <http://www.nlujodhpur.ac.in/downloads/clawcerque1.pdf> (Last Visited on 23rd November, 2016)

<sup>10</sup> Competition Act, 2002, Section 21(1)

<sup>11</sup> Competition Act, 2002 Section 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 authority, and thereafter give its findings recording reasons therefore on the issues referred to in the said opinion.

## **Specific Issues Encountered by CCI across Energy Sector**

The biggest problem which the CCI as a watchdog of fair competition encounters remains the approach of addressing the problems with a well planned strategy and cooperation of other bodies within government. Hence basically the problems are not just associated with violation of the provisions of the competition law but even logistical, jurisdictional and Anti- Competitive in nature.

### **I. Jurisdictional Issues**

Actually, regulation is a vital weapon for dealing market failures and market power control. Regulation has the power to alter the market situation whereas the aspect of competition law aims at maintaining fair competition which neither creates competition nor aims to wipe out the competition. Institution building is not an easy task. It is comprehensive and exhaustive. Practically it is very difficult to replace or abolish established institutions. The problem between the regulators and competitive authorities is the same.<sup>12</sup>

Thus, the major battle begins with the approach of regulators towards each other. The competition authorities more often than not found themselves in entanglement with other regulator rather than focusing on actual problem. Here the approach taken by other countries like USA, UK may be emphasized upon by few scholars. This means that different models have been proposed till today to solve this problem some of which could be: (1) Sectoral Regulators act as a supplement to Competition Authorities; (2) Competition Authority acts as a pan-authority and (3) Both work in harmony.

The policy approach which has been taken by India points out to the third model of harmony but effectively everything else like law, enforcement mechanism, consultation, sanctioning powers etc. are present apart from harmonious prosecution of cases. This is just like having no sugar cake, hard to imagine and even harder to execute.

### **II. Dilemma in Structural Design**

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<sup>12</sup> 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)



Another obstacle in this sector leading to obscure functioning of the Regulators including CCI is the logjam in the mindset of policy makers of the government. The policies after 1991 suggest that though government wanted to liberalize the markets to attract stable and dynamic market with quality of products and service, the ultra- cautious approach have time and again pegged the system back to square one. The National Policies in all sub-sectors of Energy Market be it electricity, coal, Oil & Gas and even the upcoming renewable energy sector have projected the confused picture where the government is found in a fix to whether go for complete deregulation or phased deregulation or to have close grip control over this strategically important sector for the country. For example in the electricity sector, although the generation segment has been completely de-licensed and major clearances (except environmental and safety) streamlined, the input market with regard to price and availability of fuels inputs (such as coal and natural gas) continues to be closely administered by the Government. This creates distortions in the market.<sup>13</sup>

### **III. Lack of Level Playing Field**

It is also argued that the Government's policies in the oil and gas sectors continue to favour PSUs, thereby leading to an effective denial of market access. These policies vary from putting entry barriers to trade and transact in the market to the aspects of price fixation and profit realization which tends to disenchant private sector from freely maneuvering in the area despite tremendous and so far untapped market potential though barring off-late ventures by Reliance Industries, Tata and Adani Group.

### **IV. Anti-Competitive Activities**

It is a great area of concern for CCI mainly because other problems are not in sole control of competition authorities and may require the cooperation of external factors but here the fault lines within the Competition Act or rather the enforcement process of competition provisions come into question. The broader areas of anti-competitive activities pertain to but not limited to following heads:

#### a) Abuse of Dominance

In the energy sector, there have been some instances that indicate that PSUs are probably abusing their dominant position. For instance, Coal India Limited, taking advantage of its dominant

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<sup>13</sup> Competition in Energy Sector, The Energy and Resources Institute. [Project Report No. 2005RP30], New Delhi, June 2007, Available At < [http://www.cci.gov.in/sites/default/files/5teri\\_20080508111155.pdf](http://www.cci.gov.in/sites/default/files/5teri_20080508111155.pdf)> (Last Visited on 29<sup>th</sup> November, 2016)

position in a supply constrained environment, currently offers coal at ‘first come first serve’ basis through the e-booking system. Further, core consumers in the power, cement and steel sectors have often complained against the Coal India Limited for unilateral increase in prices, limited transparency/ justification in price determination process, lack of complaint redressal and inadequate coordination.<sup>14</sup> Same goes without saying to Oil & Gas and other sub-sectors of Energy sector in India.

#### b) Cartelization

Another problem is curbing a cartel which is one of the highest enforcement priorities of any competition law authority. Cartels across most jurisdictions are referred as one of the significant anti-competitive activity which causes severe damage to rival competitors. Thus the main task of any enforcement agency remains the detection of cartels which leads to subsequent punishment of the involved parties in a show deterrent effect. This task gets even more difficult in the complex energy sector of India where less players, huge resources, public benefit and vested interests of various parties play a constant but mutually contradictory role. Cartelization in suppliers has been the norm in public procurement and is the root cause for corruption in procurement staff of which the latter is only a symptom. Unfortunately public procurement policy has so far been confined to the symptomatic treatment of the problem ignoring the root cause and is a case of apparent misplaced priorities.

#### **Probable Solutions**

The researcher suggests that the problems highlighted above are not new or not known. Much water has flown under the bridge in last few years where the government has undertaken the task of tackling all the above issues on different platforms with different intensity. This is also an understood fact that being a crucial and strategic sector for the sustainable development of the country, it is always going to be the case that the cautious approach of the government will be present. But what can be done is to brainstorming to present new solutions to well known and existing problems and a mixed attitude of caution with aggression by the government in tackling the miscreants in the sector. Therefore, the researcher tends to present few solutions in a systematic order of presentation of the above mentioned problems.

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<sup>14</sup> Competition in Energy Sector, The Energy and Resources Institute. [Project Report No. 2005RP30], New Delhi, June 2007, Available At < [http://www.cci.gov.in/sites/default/files/5teri\\_20080508111155.pdf](http://www.cci.gov.in/sites/default/files/5teri_20080508111155.pdf)> (Last Visited on 29<sup>th</sup> November, 2016)

## **I. Jurisdictional Issues**

Currently, there exists no formal understanding/ relationship between the CCI and energy regulator(s) on respective jurisdiction on competition issues. To resolve this interface issue, it is suggested to introduce a collaborative approach as has been adopted in South Africa, Brazil and the United Kingdom. Accordingly, the existing legislative framework would have to be suitably amended. For enabling effective competition in the energy sector, it is imperative to not only streamline the regulatory design and coordination mechanism but also ensure that competitive activities are appropriately monitored and timely interventions considered.<sup>15</sup> The researcher proposes to form sectoral coordination committee which would consist of one member from each sub-sector along with CCI official to tackle problem at the root cause i.e. at the stage of policy formulation alone rather than going for separate inspection of the same policy by different market regulators.

## **II. Dilemma in Structural Design**

The researcher here believes that some steps have been taken by the government in recent years to tackle this area where the market has now been opened for more private players by easing out the norms of doing business under Make In India campaign or even but suggestions laid down by Cabinet Committees like example of de-regulation of prices of Petrol and Diesel. It is advised that though researcher does not recommend complete deregulation of energy sector, the entry barriers can be relaxed specially the aspects of availability of finance and infrastructure where more community players can be involved so that more players can lead to less market concentration which is an effective and old school practice in economics.

## **III. Lack of Level Playing Field**

The researcher believes that this problem is based the policy attitude of the government therefore, the creation neutral policy, liberalized attitude of the government and sectoral coordination alone may provide solution to this problem.

## **IV. Anti-Competitive Activities**

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<sup>15</sup> Competition in Energy Sector, The Energy and Resources Institute. [Project Report No. 2005RP30], New Delhi, June 2007, Available At < [http://www.cci.gov.in/sites/default/files/5teri\\_20080508111155.pdf](http://www.cci.gov.in/sites/default/files/5teri_20080508111155.pdf)> (Last Visited on 29<sup>th</sup> November, 2016)

Here the major role of CCI seems to be the accurate enforcement of the provisions of the Competition Act and establishing information corridors for advertising the desired path for a transaction to be undertaken may provide solution.

a) Abuse of Dominance

In India, sector regulators do not have the power to implement the Competition Act, 2002, the only legislation that comprehensively deals with competition issues. In fact, sector regulatory laws such as telecom and airports clearly define the jurisdiction of the CCI to deal with competition abuses, with an exception in electricity regulatory laws. This is an example of the policy incoherence that we have in abundance in India. Be that as it may, this makes it imperative that CCI should be called upon to deal with competition issues in all regulated sectors if competition is to be enhanced. However, for the effective handling of cases, it is also imperative that sector regulators should assist CCI in coming up with an informed position.<sup>16</sup>

b) Cartelization

The researcher does not intend to point out suggestion but instead would like to attract the attention to the fact that CCI has already begun crackdown over cartelization issues whereby in the year 2012 itself CCI issued first ever such order in which 48 liquid petroleum gas (LPG) cylinder makers were fined 1.65 billion rupees (approximately USD 33 million/EUR 25 million) for bid rigging during tenders invited by Indian Oil Corporation (Indian Oil).<sup>17</sup>

Thus, the researcher believes that positive steps have been taken at various fronts by the government and sectoral regulator like CCI to weed out the existing problems for a smooth and sustainable development of the country but the time for baby steps have far gone and giant strides are needed to address this problem which includes passing of Public Procurement Bill as one the measures.

## Conclusion

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<sup>16</sup> Enough Room for CCI in Regulated Sectors, Pradeep S Mehta, The Financial Express, October 28, 2011, Available At < <http://www.financialexpress.com/archive/enough-room-for-cci-in-regulated-sectors/866257/>> (Last Visited on 01<sup>st</sup> December, 2016)

<sup>17</sup> 'India turns up the heat on Cartel enforcement with first fines in India', Suzanne Rab, King & Spalding Energy News Letter, April 2002, Available At < <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/April/article8.html>> (Last Visited on 26<sup>th</sup> November, 2016)

While the competition authority should be given room to ensure that the Competition Act, 2002, is fully enforced, there is also active room for sector regulators to play their part, which makes cooperation imperative. There is no basis for conflicts and turf wars as the field is big enough for both sets of regulators. The Competition Act has already provided room for such cooperation, given that under sections 21 and 21A of the Act, both CCI and the sector regulators are required to cooperate when it comes to dealing with issues that appear to have an impact on the jurisdiction of the other. Alas, the same is optional and, therefore, ineffective. To this, one can add the peculiar Indian dimensions of egos, and batch years of the retired bureaucrats who are heading the two bodies a situation very peculiar to India. This was evident in the fight between Irda and Sebi in the Ulips case.

On the other hand, CCI also has to improve upon its investigation and adjudication mechanism where CCI is urged to issue guidance on the CCI's finding methodology. This would promote transparency and predictability of its decision-making and also add to its credibility as a new enforcement agency.