III. THE PARADOX BETWEEN SECTORAL REGULATION AND COMPETITION LAW: NEED OF EVOLVING A MODEL OF COOPERATION TO RESOLVE THE REGULATION/COMPETITION DICHOTOMY

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ABSTRACT

The constant rise in India of regulatory bodies overseeing economic reforms has resulted in multiple instances of jurisdictional overlay and inefficient results. This paper aims to analyse the inception of the proliferation of a sector-specific regime in India through a historical perspective. The article takes into account the challenging question concerning the relationship between sectoral regulations and competition law. It analyses the genesis of regulatory jurisprudence in the Indian context explaining the complementarities and contradictions of the same. Further, it elucidates how sectoral regulatory bodies circumscribe the role of the competition authority. In order to elaborate on the regulation/competition dichotomy, this article also takes into consideration two case laws, they are *Ericsson v. CCI* and *CCI v. Bharti Airtel and Ors*. Finally, the last section throws light on two internationally accepted models of the regulation/competition interface, specifically, the Exclusivity model and the Concurrent model; it describes their distinct features, the disadvantages they pose and suggests a novel way forward. Accordingly, the article proposes to expand the competition enforcement by adopting a "rule-making" approach in order to reduce the market-wide uncertainty, cost of litigation and reduce unexpected outcomes. The latter is founded on a hybrid-mutual-influence approach and intends to reduce the current inconsistencies existing between the regulatory and competition bodies in India.

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I. INTRODUCTION

"Victory comes from finding opportunities in problems."

As far as this article is concerned, both Competition law and Sectoral regulations are legal responses to economic problems, but the victory looks far-flung and remote. Economic regulation and competition policy are largely interdependent instruments of economic policy. However, they differ in aims and objectives resulting into an overlay problem. The then Chief Justice of the U.S. Supreme Court, Stephen G. Breyer, J. & Khan states, *"Antitrust is an alternative to regulation and where feasible, a better alternative"*[1] On the contrary, we have empirical studies and data in the field, which advocates the exclusivity of sectoral regulators like in the case of Australia.[2] The Australian Communications and Media Authority has formed the Digital Platform

[1]Breyer, S., *Regulation and Its Reforms,* (Harvard University Press 1984).
[2]OECD, 'OECD Reviews of Regulatory Reform: Australia 2010 Towards a Seamless National Economy' (2010) <https://read.oecd-ilibrary.org/governance/oecd-reviews-of-regulatory-reform-australia-2010_9789264067189-en#page3> accessed on 21 October 2021.

Regulators Forum (**"DG-REG"**) with the ACCC to ensure competition law enforcement and to conduct merger investigations and Ad Tech inquiries.[3] Thus, resulting in the following: (a) uncertainty regarding the choice of marketing regime; (b) an overlap of economic regulation and; (c) competition enforcement and jurisdictional a dichotomy between competition and regulation. This article offers a critical and detailed analysis of the relationship between competition and sector regulators in India also while keeping in mind various essential international developments.

A. Socialism in India:

Post-Independence from colonial rule, Indian political aspirations inspired by the doctrine of dirigisme (control of economic activity by the state) embarked upon a journey of devising a 'socialist mixed economy model' with the state in control over the economy. Socialism in India was also ingrained in the political movements founded prior to the Independence. And what we experienced post-independence was the Nehruvian socialist reconstruction of the economy with democratic means where state enjoyed the supreme regulatory powers over the complete economy of the nation.[4] This approach of regulating the economy brought several years of deep pervasive state interventions and regulations over a majority of socio-economic transactions. Moreover, the government exerted control over the exports and imports through licensing and quota regulations[5] (eliminating any foreign

[3]Louise Klamka, Andrew Low, Amelia Douglass and Michelle Xu, 'Australian Approach to Digital Market, Global Competition Review' (2022) <https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/key-developments-in-australia> accessed 5 January 2023.

[4]Bhambri, C. P. (n.d.). *Nehru And Socialist Movement In India (1920-47)* (Indian Political Science Association 2021).

[5] S. Chakravarthy, 'From MRTP to the Competition Act, in Round Table, Competition Policy and Law: Discussion'[2007] 19 Indian Inst. Mgmt. Bangalore Mgmt. Rev. 432, 438.

competition) which in turn was later complemented by the high tariff walls.[6]

Understandably, this led to a rise in inflation rate, a rise in fiscal deficit, and an increase in adverse balance of payments.[7] Thus, this series of events eventually marked the requirement for structural adjustment programme in 1991 where India embarked upon a path to market Liberalization.[8]

B. Unregulated to Regulated Economies: *Rise of Sectoral Regulators*

The adoption of the liberalization, privatization, and globalization ("**LPG"**) policy in 1991 proved to be a big step towards transforming the unregulated Indian economy into a regulated economy. Before 1991, public interest was served more through direct government involvement in most commercial transactions. Post 1991, in most sectors of the economy, the objective of protecting the public interest rested on laws governing competition and regulatory regimes.[9] The advent of liberalization, privatization, and globalization was accompanied by an increasingly receptive attitude towards the establishment of sectoral regulations and sectoral bodies to control various sectors and businesses coming up after the opening up of the economy. The necessity of formulating industry-specific governing statutes and governing bodies was to de-politicize the decision making at the central level and to ensure the independence, accountability and transparency

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[6]Singh, V. V. (n.d.). 'Regulatory management and reform in India – OECD' [2021] <https://www.oecd.org/gov/regulatory-policy/44925979.pdf> accessed 5 January 2023.

[7]Nayyar, Deepak. "India's Balance of Payments." (1982) 17(14/16) EPW http://www.jstor.org/stable/4370838 accessed 5 January 2023.

[8]Rahul Singh, "The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators" (2009) 8(1/3) WASH. U. GLOBAL STUD. L. REV. <https://openscholarship.wustl.edu/law_globalstudies/vol8/iss1/3> accessed 5 January 2023.

[9]Mehta, P., "Competition and Regulation in India, 2009 Leveraging Economic Growth Through Better Regulation OECD" (2009) <http://www.pradeepsmehta.com/pdf/Competition_and_Regulation_in_India2009_Leveraging_Economic_Growth_Through_Better_Regulation.pdf.> accesses 5 January 2023.

of the sector specific regulators. In order to restructure the market and to address such irregularities bodies like the Security Exchange Board of India (after 1992 Securities Scam),[10] Telecom Regulatory Authority of India, Competition Commission of India etc. were established. One of the first regulatory authorities in India, following the securities scandal was the Securities and Exchange Board of India under the SEBI Act, 1992.[11] But as a result of these above-mentioned irregularities in the system, it ostensibly led to the sudden proliferation of regulatory authorities causing frequent jurisdictional overlaps while dealing with the same aspects of technical, competition and commercial behaviour of sectors in the economy.

Sector-specific regulations present distinct challenges in competition law and policy because although their broad goals and objectives are the same i.e., to achieve allocative efficiency and promotion of welfare,[12] however the legislative mandates through which broad goals are achieved are very condescending to each other. While sector-specific regulators focus on creating an administrative machinery to resolve behavioural issues before the problem (ex-ante), Competition authorities (Competition Act, 2002)[13] under section 3 & 4 of the act addresses the problem ex-post[14] (save for the area of merger control under section 5 & 6 of the act) and describes how the conduct should be, in the backdrop of macro-economic conditions. Therefore, we can

[10]Barua, Samir & Varma, Jayanth "Securities Scam Genesis, Mechanics and Impact' (1992) IIMA < https://journals.sagepub.com/doi/10.1177/0256090919930101> accessed 5 January 2023.
[11]Singh VV and Mitra S, "Regulatory Management and Reform in India - OECD" (2008) CUTS International <https://www.oecd.org/gov/regulatory-policy/44925979.pdf&gt> accessed 5 January 2023.
[12]*Brahm Dutt vs Union of India*, AIR 2005 SC 730.
[13]Competition Act 2002. (Competition Act)
[14]'Ex-post economic evaluation of competition policy enforcement: A review of the literature Fabienne Ilzkovitz and Adriaan Dierx DG Competition' (June 2015) < https://ec.europa.eu/competition/publications/reports/expost_evaluation_competition_policy_en.pdf> accessed 5 January 2023.

construe that competition law is majorly *reactive* whereas sectoral regulation is pro-active. Understandably, sector specific regulations and laws have blurred the distinction between ex-ante regulation and ex-post competition assessment, allowing many sectoral regulators to assume competition enforcement powers even in the absence of concrete provisions within their governing statutes.[15]

C. Broad Mandate Under Section 18 of the Competition Act, 2002

Section 18 of the Competition Act states that, "it shall be the duty of the Commission to eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India."[16] The duty casted upon the Commission under this section is extremely broad and can be traced in the preamble of the Competition Act, 2002.[17] The duty vested with the CCI, however, overlaps and sometimes falls short with the competition-related powers conferred on the sectoral regulators in the economy. This section was not drafted keeping in mind the existence of various provisions addressing the competition issues in various other sectoral regulations such as section 11(a) of the PNGRB Act, section 60 of the Electricity Act etc. Moreover, it brought every economic transaction in the Indian economy under the ambit of this section which resulted in a chaos of overlay.

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[15]Telecom Regulatory Authority of India, 'Regulatory Principles of Tariff Assessment' (Consultation Paper 3, 2017) <http://www.trai.gov.in/sites/default/files/Consultation_paper_03_17_feb_17_0.pdf> accessed 19 December 2017.>.

[16]Competition Act.

[17]Competition Act, preamble.

D. The Essence of Interface Between Commission and Sector Specific Regulator in India.

Section 60 of the act states that, the act will have an overriding effect over other legislations and will prevail above all other sector-specific statutes.[18] However, on the other hand, section 62[19] of the act declares that the act should be read in harmony with other statutes to avoid any scope of overlapping and conflicts.[20] Therefore, we can confer that, section 60 and 62 are paradoxical to each other in nature as section 60 administers supremacy of competition law wherein on the contrary, section 62 enunciates the principle of harmonious construction and complementarity between competition law and other sectoral-enactments leading to deep condescending legislative mandates between the two.

If the triumvirate of sections 18, 60, and 62 were not sufficiently puzzling, section 21 and 21 (A) makes it more puzzling by narrowing down the scope of inter-regulatory consultation and coordination under section 21[21] & 21 (A)[22] of the Competition Act. Section 21 and 21 (A) of the Act, describes the power of consultation and coordination between the competition regulatory body (CCI) and sector-specific regulator. Under the ambit of these two sections, both authorities are empowered to consult with each other and ask for views concerning competition, access to market, economy and technology whenever the need arises in the course of proceedings.[23] But these regulations are not mandatorily worded and are referential only when a

[18]Competition Act, s 60.
[19]Competition Act, s 62.
[20]*Star India P. Ltd. v. The Telecom Regulatory Authority*, 146 (2008) DLT 455.
[21]Competition Act, s 21.
[22]Competition Act, s 21(A).
[23]Mancini, J. "Data Portability, interoperability and Digital Platform Competition: OECD Background Paper" (2021) *SSRN Electronic Journal* <https://doi.org/10.2139/ssrn.3862299> accessed 5 January 2023.

potential or past decision of the CCI or a sectoral regulator contradicts the other's governing statute.[24] It eventually, narrows down the scope of inter-regulatory consultation and coordination. Thus, leading towards the central question of this paper that, whether competition authorities or sector regulators should handle competition enforcement in the sectors.

This article offers a critical analysis of the relationship between competition authorities and sector-specific regulators. The focus of the article is on first, determining whether competition authorities or industry specific sector regulators should handle competition enforcement in the sector. Second, whether competition authorities (CCI) can or should engage in access, economic or technical regulation in the sector.

This research paper is divided into several parts and is structured as follows; part I establishes the background of the issue, part II introduces us to the problem at hand and describes the proximity between sectoral regulations and competition. It puts forward important issues underpinning the relationship between competition law and sectoral regulation. It further elaborates the differences in the approach of competition law and sectoral regulation. This part also explains the issue between sectoral regulations and competition law through a case study based upon the celebrated judgment of *Competition Commission of India v. Bharti Airtel Limited and Ors.*[25] Part III builds upon part II and proposes various models of operation for smooth interface between sectoral regulations and competition law. It further puts forward descriptive and normative justifications granting Competition Commission primacy over the sectoral regulators. It also proposes certain amendments and reforms under sectoral regulations which are aimed towards the formulation of legislative mechanisms directing an industry specific

[24]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' 2018.
[25]*Competition Commission of India v Bharti Airtel Ltd*., AIR 2019 SC 113.

competition regulation approach. Finally, part III offers a set of conclusions and argues that Commission has a robust legislative mechanism which ensures the ultimate goal of public good and consumer welfare.

II. NO MAN'S LAND: INTERFACE BETWEEN COMPETITION AND SECTORAL REGULATIONS.

A. Juxtaposition of Competition Law and Sectoral Regulations

The roles and goals of competition policy and sectoral regulations are complementary to each other, internationally. However, the legislative mandates and mechanisms exercised by them to resolve issues are contradictory,[26] which restricts them from achieving their shared concerns of economic efficiency, consumer welfare, and the public good. In light of this paper, we would like to put forward the complementarities and contradictions between competition and sectoral regulations.

1. *Two Conflicting Approaches:*

The initial distinction between regulation and competition law is based on the type of market failures they seek to address. Generally, competition policies are focused on ensuring the existence of fair competition, lower prices, consumer welfare, and protection[27] in the market by ensuring the non-existence of anti-competitive agreements,[28] market dominance,[29] and

[26]Anti-monopoly Law of the People's Republic of China 2022, s 33.
[27]Ashford, Nicholas & Ayers, Christine & Stone, R.F, "Using Regulation to Change the Market for Innovation" (2002) 9 Harvard Environ Law Rev < https://www.researchgate.net/publication/37592957_Using_Regulation_to_Change_the_Market_for_Innovation> accessed 5 January 2023.
[28]Competition Act.
[29]Ibid.

cartelization.[30] Competition policy relies upon its economy-wide approach to advocate consumer welfare, public interests, and ease of access to small businesses into the market. The above-mentioned aims and objectives of competition law are reflected in the preamble[31] and the provisions of the Competition Act.[32] Whereas, Sector-specific regulations create an administrative machinery that, makes changes in the market structure in order to address market failures.[33] Sector-specific regulations are based upon a very narrow perspective[34] restricted only towards a specific sector ensuring "what to do", "how to price products" and "barriers to entry" accompanied with "supply and quality of service." The application of sectoral regulations comes into the picture, only when independent nature of market mechanisms collapses and is replaced with direct control of the government over the level of production and pricing of the products.[35]

2. *Ex-ante versus Ex-post:*

The distinction between Competition regulations and sector-specific regulations is also based on the timings and frequency of their interventions. Sectoral regulations identify problems ex-ante whereas Competition

[30]Dunne, N., "Competition law and economic regulation: Making and managing markets" (2015) Cambridge University Press <http://dx.doi.org/10.1017/CBO9781107707481> accessed 21 October 2021.
[31]Competition Act, preamble.
[32]Competition Act, s 36(6).
[33]Richard A. Posner, "Theories of Economic Regulation", (2004) Working Paper, No. 41, Centre for Economic Analysis of Human Behaviour and Social Institutions. <https://www.nber.org/system/files/working_papers/w0041/w0041.pdf> accessed 22 October 2021.
[34]Pike, 'Working Party No. 2 on Competition and Regulation Independent Sector Regulators' (OECD, November 2021) <https://one.oecd.org/document/DAF/COMP/WP2(2019)3/en/pdf. > accessed 22 October 2021.
[35]Hewitt, G., 'Policy Roundtables Relationship between regulators and competition Authorities' (OECD1998) <https:<//www.oecd.org/competition/sectors/1920556.pdf.> accessed 30 November 2021.

regulations identifies problems ex-post (save for the area of merger control under section 5 & 6 of the act) in the backdrop of continuous market situations. Sectoral regulations by creating an administrative machinery try to address market failures in an ongoing manner or before the problem arises, which is generally known as "impact assessment". It primarily, focuses on examining the issues of technology & price, reducing the barriers to entry, and process in the industry regulated by it to limit the scope of friction and disbalance in the system. Sectoral regulators are committed towards taking necessary and proportionate actions where evidence exists and are directed towards potential infringement of the Regulations causing consumer harm. While Competition law identifies anti-competitive agreements ex-post in a sporadic fashion (competition agencies only intervenes when there exists cartelization or any anti-competitive agreement leading to abuse of dominance in the market). Understandably, competition agencies aim at protecting competition by preventing anticompetitive situations whereas sectoral regulators aim towards structuring the market in order to facilitate competition. According to Hüschelrath and Leheyda, ex-post evaluation (retrospective) is more relevant in competition policy as it is mainly used for the assessment of the decisions taken by the competition authorities and they can therefore contribute to improving the quality of these decisions which is the main output of competition agencies.[36] While ex-ante evaluations are considered to play a very minor role in the assessment of competition policy.[37] Ex-ante evaluation is only useful for short term evaluations of policy issues. But Competition policies (ex-post) identify problems only after they are committed and try to redress them retrospectively by imposing negative or reactive obligations that

[36]Hüschelrath, Kai and Leheyda, Nina, 'A Methodology for the Evaluation of Competition Policy" (2010).
[37]D Neven and H Zenger, "Ex-post Evaluation of Enforcement: A Principal-Agent Perspective" (2008) 156 De Economist 477.

do not preclude market competition.[38] Furthermore, the Competition authorities are not directed towards granting damages or compensation to the plaintiff as the remedy, rather they are focused on enforcing economy-wide duties (consumer welfare and unfair transfer of wealth)[39] that, among other goals seek to promote competition across all the sectors of the economy. Conclusively, we can infer that competition law has a very profound approach, while sectoral regulations follow a very schematic approach concerning competition enforcement.

3. *Discrete Goals and Objectives*

Their goals of sectoral regulators and competition authorities may not be always aligned because sectoral regulators also pursue other goals, such as equity, safety or public health.[40] As a result, in some cases, regulation is not required to correct market failures but to achieve goals that may be in conflict with or considered more important than competition. For instance, the goal of pharmaceuticals regulators will be the availability of drugs all around the state at minimal price consideration rather than whether there is competition in the sale of that drug.[41] Thus, the objectives of the sectoral regulators and competition authorities may not be always congruent with each other.[42]

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[38]Pierre Larrouche, 'Competition Law and Regulation in European Telecommunications' (2000) Hart 124.
[39]Hovenkamp, H. 'Federal antitrust policy the law of competition and its practice' (2020) 6 West Academic Publishing.
[40]OECD, 'Competition Enforcement and Regulatory Alternatives, OECD Competition Committee Discussion Paper' (2021) <http://oe.cd/cera. > accessed 5 January 2023.
[41]Dogan, S. and M. Lamley, "Antitrust Law and Regulatory Gaming" (2009) 87 Texas Law Review.
[42]'OECD Interactions between competition authorities and sector regulators, OECD Competition Policy Roundtable Background Note', (2022) <www.oecd.org/daf/competition/interactions-between-competition-authorities-and-sector-regulators-2022.pdf. > accessed 5 January 2023.

4. *Sectoral regulations delimit the scope of competition law?*

The predominant objectives of sectoral regulations being social sustainability, ecological sustainability, and collective good circumscribe the scope and application of competition enforcement.[43] In the case of the Electricity sector, the Rail sector or the Aviation sector the obligation towards the protection of the environment and sustainability can bar competition and encourage anti-competitive agreements.[44] The sectoral laws struggle in prioritising between the social duties and economic objectives enunciated in their governing statutes.[45] Moreover, the cross-border agreements entered by the government under the ambit of sectoral laws providing free services to the countries under the contract are also contemplated as practices discouraging economic efficiency and competition in the market.[46] In addition to it, the circumstances of fulfilling SDGs objectives, collective agreements related to environmental schemes, involving companies and other stakeholders can produce substantial benefits from an environmental perspective, while at the same time, they may have the potential to limit competition in the market.[47] For instance, in the Netherlands, an industry-wide agreement called "chicken for tomorrow" was initiated to improve the living standards of broiler chicken. In this agreement, the parties agreed to completely replace all regular chicken in the participating supermarkets with the new and more expensive product. The Dutch Competition Authority concluded that such agreements led to a reduction in consumer choice as these agreements removed certain products

[43]CECED (Case COMP IV.F.1/36.718) Commission Decision 2000/475/EC (2000) OJ L 187/47.
[44]*Energy Watchdog & Ors. V CERC & Ors*., Civil Appeal Nos. 5399-5400 of 2016.
[45]2015 (6) SCALE 706.
[46]"Guidelines on Cross Border Trade of Electricity, Ministry of Power, Government of India" (2018) Government if India Ministry of Power.
[47]G. Geoffrey, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics, Sustainability' (2013), 5, 316-337.

from the market categorizing them as low in animal welfare and thus, violated Article 101(1) of the EU Competition law.[48]

Sectoral regulations inevitably create an anti-competitive scenario because sectoral regulations are formulated taking into consideration the integration of technical, economic, access regulations and monopoly restrictive regulations (non-competitive consideration). Sectoral regulations aim to create an efficient operability of the concerned sector which eventually fails to address the competition issues.[49] While on the contrary, competition laws apply the mechanism elaborated under section 3 and section 4 of the Competition Act[50] which relies upon the per se rule and the rule of reason respectively to analyse any practice as anti-competitive in nature.

Accordingly, what we can infer from here is that sectoral regulations and competition legislations are very conflicting regimes, and since, they were enacted to majorly address different subject areas their contradictions overpower their complementarities. Therefore, extending the limits of sectoral regulations in pursuance of addressing industry-specific competition issues is only going to lead towards "conflict of laws"[51] and a bad precedent for those sectoral regulators who also tries to extend their jurisdictional limit even when

[48]JP van der and others, "Valuing Sustainability? the ACM's Analysis of 'Chicken for Tomorrow' under Art. 101(3)" (2018) KCLB. <http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/&gt>; accessed 6 January 2023.
[49]"Combating Anti-competitive Practices, *A Guide for Developing Economy Exporters,* International Trade Centre" <https://www.intracen.org/Combating-Anti-Competitive-Pracices/> accessed 12 November 2021.
[50]Breyer, S., *Regulation and Its Reforms,* (Harvard University Press 1984).
[51]Rheinstein, Max, Hay, Peter and Drobnig, Ulrich M. ″Conflict of laws″ (2018) Encyclopaedia Britannica <https://www.britannica.com/topic/conflict-of-laws.> accessed 28 November 2021.

their governing statutes are incapable of addressing competition matters.[52] The same was held true in the case of *Suo moto v. North Delhi Power Ltd. & BSES & Ors.,*[53] where the body authorized by the Electricity Act, 2003[54] tried to extend its jurisdiction in order to adjudicate a matter concerning anti-competitive agreements and cartelization.

Understandably now, it is simple to distinguish between competition law and sectoral regulation, but it may not be possible to delimit and classify every part of them in all stances – and, as a result, they may well create potential jurisdictional overlays and substantive conflicts (whether competition authorities or industry-specific sector regulator should handle competition enforcement in the sector). They may have common goals alongside contradictory enforcement and contradictory goals alongside common enforcement.[55], but in practice, it is very complex and if not resolved, leads to the following mentioned problems: -

- Creating market-wide uncertainty for businesses and investors.[56]
- Unclear roles and non-bifurcation of responsibilities and duties can encourage gamesmanship and forum shopping, leading to unethical gaining of litigation advantages.[57]

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[52] Pradeep S Mehta and Manish Agarwal, 'Time for a Functional Competition Policy and Law in India'(2006) CUTS International <http://www.cuts-international.org/pdf/compol.pdf> accessed 11 November 2021.

[53] *Ajitsingh Harnamsingh Gujral v State of Maharashtra*, MANU/CO/0077/2011.

[54] Electricity Act 2003. (Electricity Act).

[55] 'Enforcement experience in regulated sectors - International Competition Network Antitrust Enforcement in Regulated Sectors Working Group Subgroup' (2004) 2 ICN <https://centrocedec.files.wordpress.com/2015/07/enforcement-experience-in-regulated-sectors-2004.pdf> accessed 24 September 2021.

[56] Hellwig, M., *"*Competition Policy and Sector-specific Regulation for Network Industries*",* (2009) in Vives, X. (ed.), Competition Policy in the EU: Fifty Years on from the Treaty of Rome, OXFORD UNIVERSITY PRESS.

[57] Mullenix, Linda S., 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses' (2015). 66 Hasting L.J. 719 <https://ssrn.com/abstract=2485848> accessed on 4 November 2021.

- Judicial bodies are burdened due to unspecified approaches adopted by competition law and several industry-specific regulations.
- Effectiveness of policies reduces.
- Ultimately, the burden is shifted onto the consumers as the products will become costlier owing to the increased compliance/ litigation cost born by firms due to lack of delineation of jurisdictional role between sectoral regulators and competition authorities.[58]
- It restricts the market to grow and explore organically.[59]

This problem gets more exemplified by the labyrinth of mandates enunciated in the Competition Act, 2002. The bona fide approach of the competition act towards the economy, persuades it to cover every economic transaction in an economy under its ambit which advances to jurisdictional muddy waters.[60] Thus, there is a need of evolving a model of operation conceptualized upon the idea of balance of power.[61] The paper in contemplation of evolving a model of operation advances toward a case study based on the classical judgments by the Supreme Court of India, and other courts which currently serve as the law addressing the issue of jurisdictional overlap between competition authorities and industry specific sectoral

[58]Decker, C., 'Addressing Overlaps and Conflicts between Competition Authorities and Sectoral Regulators' (2013) <https://cutsccier.org/pdf/How_to_deal_with_the_overlaps_and_conflicts_between_competition_authority_sector_regulatorsChristopher-Decker.pptx> accessed 5 November 2021.

[59]Ian S Forrester, *'*Sector-Specific Price Regulation or Antitrust Regulation—A Plague on Both Your Houses?*'* in Claus-Dieter Ehlermann and Mel Marquis (eds); European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Hart Publishing 2008) 555.

[60]Nayar, Kanika*, '*Jurisdiction of the CCI: Navigating Through Muddy Waters - Anti-trust/Competition Law' (*Mondaq*, 28 April. 2015) <https://www.mondaq.com/india/antitrust-eu-competition-/392738/jurisdiction-of-the-cci-navigating-through-muddy-waters.> accessed 28 November 2021.

[61]The Editors of Encyclopaedia*. "*Balance of power*".* (*Encyclopaedia Britannica*, 22 May. 2020) <https://www.britannica.com/topic/balance-of-power.> accessed 28 November 2021.

regulators in India.

B. The Regulation/Competition Dichotomy: "Case-by-Case" Comprehensive Study

According to Lord Hewart, the then Chief Justice of England, "Justice must not only be done but must also be seen to be done."[62] The statement has now started to make more sense in the arena of markets and economy. Prior to the evolution of an unregulated system of economies and "open economies", justice, equity & public good were only in the influences and mercy of the "invisible hand" which governed the complete market.[63] But it somehow failed to convey the visual representation of justice done in the minds of people, leading towards necessitating the need for formulating a consumer good ensuring authority. Therefore, keeping in mind the need of the modern economy, most of the modern economies all around the world established competition enforcement authorities to regulate transactions and arrangements so that "consumer welfare" can be enforced without causing any undesirable results.[64] Plausibly, the evolution of economies caused the proliferation of regulatory authorities as well in the market which led to overlapping of each other's jurisdictional rights making the government oscillate between poles of regulation and competition.

Since competition law and other sectoral regulations in India are still in the process of advancement,[65] there are no easy answers, which can readily

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[62] *R v Sussex Justices*, [1924] 1 KB 256.
[63] Viner, J. 'The Intellectual History of Laissez Faire' 3 THE JOURNAL OF LAW & ECONOMICS. <http://www.jstor.org/stable/724811.> accessed 5 November 2021.
[64] Cass R. Sunstein, 'Free Markets and Social Justice' (1997).
[65]Khan, A., Prasad, D., 'Mapping the Journey of Competition Analysis in India: From Precedence to Evidence' Kluwer Competition Law Blog, <http://competitionlawblog.kluwercompetitionlaw.com/2018/10/05/mapping-journey-competition-analysis-india-precedence-evidence/>. accessed 28 November 2021.

be given to the question of whether competition authorities or sectoral regulations should regulate competition enforcement in India. Therefore, it necessitates a scholarly case-by-case study of judgments pronounced by the courts in this sphere of law for getting a fair understanding of the issue.

1. *Neeraj Malhotra v. North Delhi Power Ltd.*

In the case concerning *Neeraj Malhotra v. NDPL*,[66] allegation of abuse of market dominance in violation of sections 3(4) and 4 was asserted by CCI against three power distributors namely; BSES Rajdhani Power, BSES Yamuna Power and North Delhi Power Ltd (**"NDPL"**).[67] The responding parties in the present case relying upon sections 60 and 174 of the Electricity Act contended that only the Delhi Electricity Regulatory Commission had jurisdiction to deal with the issue concerning anti-competitive arrangement of electricity distribution companies. However, the Delhi Electricity Regulatory Commission in the present matter agreed to vide letter dated 30.09.2009 held that the allegations of anti-competitive conduct will fall under the jurisdiction of the CCI.

In addition to that, the court while relying upon the doctrine of "generia specialibus non deroant" which means general provisions will not abrogate special provisions observed that so far as competition issues are concerned the Competition Act, 2002 is a specific law and will supersede the provisions of the Electricity Act, 2003.

[66] *Shri Neeraj Malhotra, Advocate v. North Delhi Power Ltd. & Ors.*, case no 6/2009 .
[67] Electricity Act.

2. *WhatsApp Privacy Policy Case*

The WhatsApp privacy policy case of 2021[68] in which the CCI probed into the updated privacy policy of WhatsApp also raised issues challenging the jurisdiction of the CCI in matters concerning Big Data in absence of any data regulator in the country. In the present matter, CCI exercised its jurisdiction by relying upon sections 60 and 66 of the Act and held that the updated privacy policy of the WhatsApp which will lead to sharing of data with Facebook violates section 4 read with section 19 of the Act as WhatsApp is exerting its dominance in one market to enter another market. In response to this, WhatsApp and Facebook challenged the order of CCI in Delhi HC arguing that CCI has no jurisdiction in the matter as the matter is already pending before the Constitutional Court.[69] The division bench of Delhi HC in the present matter observed that the nature of disputes pending before the Supreme Court and CCI is very different and as there exists a prima facie case of abuse of dominance as per the DG's report, CCI is well within its jurisdictional power to take the cognizance of the matter.

3. *Ericsson Case*

In the case concerning, *Ericsson v. CCI*, Ericson[70] being a sole licensor in the technology of GSM (Global System for Mobile Communications) was alleged by the informant (Best IT World (India) Private Limited (iBall) for exercising the dominant position in the market in violation to section 4 of the competition act.[71] In response to it, Ericsson filed a petition in the Delhi High

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[68] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users,* Suo Moto Case No. 01 of 2021.
[69] *WhatsApp LLC v. Competition Commission of India,* W.P.(C) 4378/2021 & CM 13336/2021.
[70] *Telefonaktiebolaget LM Ericsson v. Competition Commission of India,* W.P.(C) 464/2014 & CM Nos. 911/2014 & 915/2014.
[71] Competition Act, s 4 (a).

Court challenging the jurisdiction of CCI over the matter. The major contention raised by Ericsson was that the CCI lacked jurisdiction because it was a patent dispute and accordingly should be adjudicated by the IP Authority Board solely. In response to it, CCI contended in front of the Delhi High Court that section 27 of the Patents Act (now omitted)[72] complemented the remedies provided under section 4 of the Competition Act in order to curb the anti-competitive practices. Thus, CCI has jurisdiction over this matter exclusively with respect to the analysis of whether Ericsson is exercising any *dominant position* in the relevant market or not?

The Delhi High Court made the following observations: -

- The statutes should not be dealt with in absolute isolation from one another.
- The spirit of every legislation is to protect the interest of consumers and economic efficiency.[73]
- The two laws may seem contradictory in a layman's eye, but they are formulated to protect common interests.[74]

The problem behind this case is not the outcome, but the act of CCI validating its jurisdiction in front of the High Court. Neither the Delhi High court nor the IP authority board under the Patents Act is designed to govern competition practices in the market. The Competition Commission of India

[72] The Patents Act 1970. (Patents Act)
[73] Sahithya Muralidhraran, "Ericsson v. Micromax – A Kick-Start to SEP-FRAND Antitrust Jurisprudence in India", (*Kluwer Competition Law Blog,* 2016) <http://competitionlawblog.kluwercompetitionlaw.com/2016/07/13/ericsson-v-micromax-a-kick-start-to-the-sep-frand-antitrust-jurisprudence-in-india/.> accessed 23 November 2021.
[74]Deepak Patel, "CCI and patent regulator can co-exist," (*Business Standard)*, <http://www.luthra.com/admin/article_images/Business-sandard-CCI-ptent.pdf.> accessed 28 November 2021.

was well within its jurisdiction under the purview of sections 3 and 4[75] of the Competition Act to deal with this matter solely. The Patents Act, 1970 does not cover the areas enunciated under sections 3 and 4 so therefore, the grounds on which the validity of CCI's jurisdiction is challenged is unreasonable. Understandably, these cases are only responsible for the rise in institutional degradation in our system of economy. The institutions rather than carrying out the functions for which they were instituted are occupied in activities rationalizing their existence to toss out their existential crises.

4. *CCI v. Bharati Airtel & Ors.*

The Hon'ble Supreme Court of India in this case[76] finally, showed a middle path to resolve a long-debated issue of jurisdictional conflict between Competition authorities and sectoral regulators drawing reference from two U.S Supreme Court judgments namely, Credit Suisse Case[77] and the Verizon Communications case.[78] The facts of this case revolve around an agreement for POI's ("Point of Interconnections") between Reliance Jio Infocomm Limited (RJIL) and Airtel, Idea, and Vodafone for smooth interconnections.[79] RJIL through various letters filed to TRAI alleged that the augmentation of point of interconnections were not adequate for smooth functioning. In response to RJIL's allegation, the other parties (Bharati Airtel, Idea, and Vodafone) contended that the augmentation of POI's as specified in the agreement is sufficient and that the real cause of the lack of smooth interconnectivity is due to RJIL's free data/call service. TRAI after taking necessary steps, recommended that Airtel is in non-compliance with the terms

[75] Competition Act, s 4.
[76] *Competition Commission of India v Bharti Airtel Ltd*., AIR 2019 SC 113.
[77] *Credit Suisse Sec. (USA) LLC v Billing* [551 U.S. 264].
[78] *Law Offices of Curtis v. Trinko* [540 US 398].
[79] Telecom Regulatory Authority of India Act 1997, s 13 r/w s 11(1) (b)(i), (ii), (iii), (iv) and (v).

and conditions of license and denial of interconnection to RJIL appears to be with an ulterior motive to stifle competition and is anti-consumer.

Furthermore, the CCI, acting on information filed by Reliance Jio Infocomm Limited (RJIL) took cognizance of the matter under Section 19(1) of the Competition Act, 2002,[80] ordered the Director General, CCI to investigate the alleged cartelization by Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited and the Cellular Operators Association of India. It was alleged that OP (Opposing parties) had cartelized to deny Jio entry into the telecom sector by not providing it adequate Points of Interconnection resulting in call failures between Jio and other networks. The commission held that there exists a prima facie contravention of section 3 (3) of the competition act, as the Respondent service providers have entered into an agreement with Cellular Operators Association of India (COAI), forming an anti-competitive agreement, a cartel to deny POI's to RJIL.

The Bombay High Court in response to the writ petitions filed by Incumbent Dominant Operators IDO and COAI, ordered that CCI lacked jurisdiction under section 19 of the competition act, as the matter falls within the exclusive jurisdiction of another sectoral regulatory body namely, TRAI, and the CCI could exercise its jurisdiction only after the proceedings under the TRAI have concluded.[81] The Supreme Court also upheld the decision of the Bombay High Court recognizing the specialized nature of TRAI as a regulator and held that TRAI is better suited to decide such cases.

If we exhaustively, analyse this issue in relation to the above-

[80] Competition Act, s 19 (1).
[81] G. Geoffrey, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics, Sustainability' (2013), 5, 316-337.

mentioned judgment, there subsist certain blurred lines[82] concerning the jurisdictional interface between the competition authority and sectoral regulators; First, there are some sectoral regulators which do carry broad declarations pertaining to competition enforcement, but there are many legislations which do not mandate competition enforcement. Such judgments substantiate bad precedents as they promote sectoral regulators to expand their horizon of competition enforcement without having any legislative backing in their governing statutes. Second, such legislation have blurred the distinction between ex-ante regulation and ex-post competition assessment, allowing for potential conflicts between these regulators and the CCI. Third, it should be recognized that the primary matter of grievance reported by the informant (**"RJIL"**) in the above case, primarily, relates to cartelization and anti-competitive behaviour, amounting to violations under section 3 of the act. In this regard, it must be noted that none of the areas covered Under Section 3 of the Act are covered by TRAI in its mandate as a sector regulator for TSP. TRAI is incapable of arriving at a determination as to whether ITO's have entered into an anti-competitive agreement to deny PIO's to RJIL under section 3 of the act. Thus, it is only within the mandate of the CCI to adjudicate matters pertaining to cartelization and anti-competitive conduct.

It should also be noted that there are no easy answers, which can readily provide a solution to these blurred lines. As the economy matures, competition concerns will become more important for two reasons. First, a sophisticated economy will have far more products, enterprises, and geographical markets.[83] As new markets grow and deepen, the sheer

[82] AZB & Partners, "Role of CCI in Regulated Sectors: Overlapping Jurisdictions", (*AZB Partners & Solicitors)* <https://www.azbpartners.com/bank/role-of-cci-in-regulated-sectors-overlapping-jurisdictions/.> accessed 25 November 2021.

[83] Levitt, T. "The globalization of Markets" (2014). HARVARD BUSINESS REVIEW <https://hbr.org/1983/05/the-globalization-of-markets.> accessed 15 November 2021.

magnitude of activity in competition law goes up. Second, competitive pressures are limited in an unsophisticated market as there is a slow pace of creative destruction. As the economy gains complexity, there is greater competitive pressure. When it becomes harder for firms to make profits, there is a greater temptation to resort to anti-competitive practices of various kinds. Parallelly, as the CCI's advocacy efforts bear fruit and more people learn about the importance of free and fair markets and the approach shifts from complaints to genuine information, stakeholders will bring more cases of anti-competitive action to the CCI's attention. For these reasons, the salience of competition law and the magnitude of the CCI's activity must go up.[84]

Therefore, we need to look forward to some new evolving models of operations creating a balance of power between competition authorities and sectoral regulators. The determination of the model primarily depends upon various factors: experience, practical application, institutional culture, choices made by politicians and policymakers.[85] To put this discussion forward, the next section of this article reviews various models of operation along with various practices adopted by countries internationally: exclusivity model, concurrency model, etc. in order to identify, which model suits Indian institutional and demographic framework the best.

III. MODEL OF COOPERATION AND THE WAY FORWARD

It should be noted at the outset that there is no perfect model based on exact science. Consequently, it becomes very necessary to have a dynamic

[84] Ministry of Corporate Affairs. (n.d.). *Report of the Competition Law Review Committee.*, <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.> accessed 14 November 2021.
[85] Dabbah, M. M. 'The Relationship Between Competition Authorities and Sector Regulators'. (2011) 70(1) Camb La J. < https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/relationship-between-competition-authorities-and-sector-regulators/1E3B8CD329DA1972E33E302438B9C3BD#access-block> accessed 15 November 2021.

approach while determining the model of operation. As we are currently, in the midst of a transition from depending solely on competition enforcement to also adopting sectoral regulation, we are missing out on the "hybrid approach" which could also be adopted, keeping in mind the institutional framework and history of competition law in India. But it is impossible to adopt such an approach before comparing it with the pre-existing exclusivity model and concurrency model. Therefore, this section of the article, tries to advocate the expansion of the competition enforcement by adopting a participatory "Rule Making" approach,[86] correspondingly at the same time putting forward some legal and economical arguments in derogation of the pre-existing models, namely, the Exclusivity model & Concurrency model of the interface between competition and sectoral regulations leading to the age-old issue of jurisdictional overlaps.

1. *The Fallbacks of Exclusivity Model*

The exclusivity model is a model in which competition enforcement authorities are the sole authorities to handle competition enforcement in all sectors in an exclusive manner. Indian Competitional regime has somewhat adopted this approach and has explicitly failed in order to evolve a system of harmonious cooperation between competition law and sectoral regulation. Moreover, it has raised a cornucopia of issues like lack of organic growth of the market,[87] ultimate burden on consumers,[88] and reduction in the

[86] Chopra, R. '*Competition and Consumer Protection in the 21st Century*' (Washington, D.C. 20580, 2018).
[87] Ian S Forrester, *'Sector-Specific Price Regulation or Antitrust Regulation—A Plague on Both Your Houses?' in Claus-Dieter Ehlermann and Mel Marquis (eds*); '*European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*' (Hart Publishing 2008).
[88] Richard A. Posner, "Theories of Economic Regulation", (2004) Working Paper, No. 41, Centre for Economic Analysis of Human Behaviour and Social Institutions. <https://www.nber.org/system/files/working_papers/w0041/w0041.pdf> accessed 22 October 2021.

effectiveness of the policies.[89] As these above-mentioned issues are primarily dealt in the previous section of the article, this section would mostly include limitations of the exclusivity model on the basis of economy-wide approach and its international application.

Australia was one of the few countries to adopt this approach for creating a smooth interface between sectoral regulations and competition enforcement by establishing a body named the Australian Competition and Consumer Commission (**"ACCC"**).[90] However, this scheme led to an extreme complex structure of bureaucracy, devouring the competition body to attain the goals for which it was established.[91] The possible disadvantages of this model include: -

- Lack of technical expertise in the industry-specific sector on the part of the competition authority.
- Lengthy and typical competition enforcement procedures which will lead towards creating a burden on the judiciary.
- Adoption of 'rule of reason'[92] approach shall result into lack of specialization of the body.[93]

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[89] Larouche, P., 'Competition Law And Regulation In European Telecommunications' (2001), 20(1), Yearb. Eur. Law <Https://Academic.Oup.Com/Yel/Article-Abstract/20/1/585/1725967> Accessed 21 November 2021.
[90] Int'l Competition Network, *Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 3: Interrelations between Antitrust and Regulatory Authorities, Report to the Third ICN Annual Conference, Seoul*, April 2004.
[91] Ibid 5.
[92] Hon. Richard D. Cudahy & Alan Devlin, 'Anticompetitive Effect', (2010) 95 MINN. L. REV < HTTPS://SCHOLARSHIP.LAW.UMN.EDU/MLR/430/> accessed 15 November 2021, See also Maurice E. Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 42 U.C. DAVIS L. REV. 1375 < https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5_stucke.pdf > accessed 15 November 2021.
[93] Leegin Creative Leather Products, Inc. v PSKS, Inc. [2007] 551 U.S. 877, 917

- This approach involves a high cost of litigation and enforcement.[94]

The isolative approach of competition law fails to protect the public interest and other important social objectives because it is empowered with regulations concerned with protecting competition and not facilitating competition.[95] This model of operation, in turn, creates a risk of instrumentalization, politicisation and bureaucratization of competition law.[96]

2. *The Fallbacks of Concurrency Model*

Building an institutional framework by combining the goals and objectives of two bodies is a very complex task to carry out. Internationally, there are wide variety of concurrency models available for assistance, but the existence of 'dilemma' in choosing, which regulatory body to be favoured in the concurrency model still persists. The doubt regarding favouring competition enforcement or regulatory bodies widens the scope of implications of the limitations of both bodies. As a result, the attraction towards adopting for concurrency model should always be looked in light of the difficulties which it may give rise to, like it did in Mexico and Germany in matters pertaining to the Telecommunications industry.[97] For instance, in Mexico, the Telecommunication Laws 1995 relies on per se approach for matters pertaining to the prohibition of cross-subsidising and discrimination,[98]

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[94] American Bar Association, "*Section on Antitrust Law, Controlling Costs of Antitrust Enforcement and Litigation*" (2012), <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.authcheckdam.pdf.> accessed 23 November 2021.

[95] Trade Practices Act 1974, Part III A.

[96] Spencer Weber Waller., Prosecution by Regulation: The Changing Nature of Antitrust Enforcement, (1998) 77 OR. L. REV. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=144149> accessed 23 November 2021.

[97] Mullenix, Linda S., 'Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses' (2015). 66 Hasting L.J. 719 <https://ssrn.com/abstract=2485848> accessed on 4 November 2021.

[98] The Federal Telecommunications & Broadcasting Laws 1995, Article 120.

whereas, the Mexican Competition law does not treat cross-subsidising and discrimination as per se offences but rather adopts rule of reason approach to assess the matter which in turn leads to difficulties.[99] The Concurrency model includes the following limitations: (a) Jurisdictional overlap and duplication of work;[100] (b) Dominance of non-competitive consideration in the sectoral regulations; (c) Differences in goals and objectives of both the regulations; and (d) lack of regulation on organized cooperation. In the practical application of the model of concurrency, the regulator may struggle in terms of prioritizing or even reconciling between the contrasting duties and objectives laid down in their governing statutes. The simple and obvious fact that sectoral regulations are not competition authorities should also be acknowledged. The efficiency and legitimacy of the body under this model is also under scrutiny because this model of cooperation violates the legal doctrine of "separation of powers".

Thus, the model of concurrency though successful in the UK, may not work in a developing country like India where hierarchical institutional framework restricts the govt bodies and regulators to cooperate with each other. Since the functional/financial independence and accountability of sectoral regulators in India is not possible because of political interests of the policymakers it is very difficult to adopt the model of concurrency.[101]

3. *The Way Forward: Expanding the competition Enforcement by "Rule Making"*

[99] The Federal Law of Economic Competition 1993, Article 56.
[100] Patents Act.
[101] CUTS International, 'Harmonising Regulatory Conflicts: Evolving a Cooperative Regime to Address Conflicts Arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities' (Indian Institute of Corporate Affairs 2012) 7 <http://oldwebsite.iica.in/images/Harmonising%20Regulatory%20Conflicts.pdf> accessed 19 November 2021.

Taking into consideration, prior efforts made in this area for determining the "balance of power" between Competition law and Sectoral Regulations, we might take a step back, and try to devise an alternative mechanism through which pro-competitive laws can operate in a better way.[102] This approach of expanding the competition enforcement draws our attention towards an idea of "mutual influence" between regulation and competition enforcement. The idea of mutual influence refers to evolving an expert rule-making authority agency for major sectors of the economy, for example (Telecommunications, Energy, Transport, Information Technology, etc.) to guide Competition Commission of India to deal with issues needing sophisticated understanding and dynamics. This would promote rapid use of new ideas and developments in every sector to advance more clarity and certainty, like what happened in the "post-Chicago case"[103]. And would exhaust the debate of jurisdictional overlays between competition authorities and sectoral regulators because only the Competition Commission of India under this mechanism will be entrusted to have jurisdiction governed by Industry-specific competition rules provided by Rule Making (Expert Agency) for every sector. These expert agencies consisting of economists, scholars of particular sectors and policymakers would assist the competition authority by formulating industry-specific competition rules. The practical application of this approach can be attributed to the Congress in the US, where they also sought to create a structure that was both rigorous and vigorous,[104]

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[102] AZB & Partners, "Role of CCI in Regulated Sectors: Overlapping Jurisdictions", (*AZB Partners & Solicitors)* <https://www.azbpartners.com/bank/role-of-cci-in-regulated-sectors-overlapping-jurisdictions/.> accessed 25 November 2021.

[103] Yoo, Christopher S., "The Post-Chicago Antitrust Revolution: A Retrospective" (2020) PENN LAW. 2237. <https://scholarship.law.upenn.edu/faculty_scholarship/2237> accessed 26 November 2021.

[104] C. Scott Hemphill, 'An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition' (2009) 109(4) COLUM. L. REV. < https://www.jstor.org/stable/40380388> accessed 26 November 2021.

where the law would develop not just through judicial courts but also through an expert agency.

Several commentators have also advocated the expansion of competition enforcement through rulemaking. For example, Tim Wu advocates the need of instituting more regulation in the competition system,[105] for example as "using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws.[106] Similarly, the OECD[107] also proposed certain recommendations for evolving coordination between different regulators, which suggested the agency to adoption of more informed decisions on competition and regulatory issues.

This approach can be modalized through bringing in two strategic actions designed to stimulate the competition enforcements: (1) Making certain industry-specific competition amendments in the governing sectorial statutes to bring more industry-specific competitional clarity and certainty. This would reduce the burden on judicial bodies which is attributed solely to the generalised character of the competition act. (2) Establishing a Rule Making (Expert-agency) in each sector.

This approach would maximize the advantages enjoyed by competition authorities and sectoral regulators as it addresses the limitations

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[105] Tim Wu, Antitrust via Rulemaking: Competition Catalysts' (2017) 16 COLORADO TECHNOLOGY LAW JOURNAL < https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf> accessed 26 November 2021.

[106] U.S. DEP'T OF JUSTICE, 'Division Update, Spring, (2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/cartels-beware> accessed 26 November 2021.

[107] Directorate for Financial and Enterprise Affairs COMPETITION COMMITTEE, 'Annual Report on Competition Policy Developments in Spain' (2017) < https://one.oecd.org/document/DAF/COMP/AR(2019)15/en/pdf.> accessed 26 November 2021.

of both. It would lead towards, evolving a risk-based and principle-based regulations and most importantly, as the rules proposed for adjudicating sector-specific competition matter will be readily available in comparison to legislation. It would reduce the litigation and enforcement cost; Reduce ambiguity around what the law is,[108] enhancing the predictability; Reduce opacity and certain undemocratic features of the current approach, enhancing transpiration and participation.[109]

IV. CONCLUSION

The aim of this Article was to analyse the paradox between sectoral regulations and the competition authority in India in contemplation to evolve a model of operation to resolve the regulation/competition dichotomy. The seemingly disruptive interface between the competition authority and sectoral regulation is attributed to the contrasting legislative mandates the two exert to achieve somewhat, complementary goals and objectives.

The article investigated the socialist structure of the Indian economy responsible for the proliferation of sectoral regulators in the economy post 1990's (evolution into unregulated economies). It further scrutinized the interface between sector specific regulators and competition authority in pursuance to analyse, how do sector-specific regulations circumscribe the scope of competition law in the Indian context. Descriptively, the article chooses "rule making" approach as the best model to expand the enforcement of competition law in comparison to the exclusivity and concurrency model, as it stands out as a very practical and pragmatic approach to managing the

[108] *FCC v Fox Television* [2012] 567 U.S. 239, 253.
[109] Harry First & Spencer Weber Waller, 'Antitrust' s Demographic Deficit' (2013) 81 FORDHAM L. REV. 2543 < https://ir.lawnet.fordham.edu/flr/vol81/iss5> accessed 26 November 2021.
[109] *FCC v Fox Television* [2012] 567 U.S. 239, 253.

interface between competition enforcement sectoral regulation. The article also explained, no model is the best model in todays' dynamic economic environment. Therefore, the choice of model of operation needs to be sensitive to experience, practical application, institutional culture, choices made by politicians and policymakers.

Normatively, the article brought forward that the "rule making" approach and establishment of "Rule Making Expert Agency" for competition matters for every sector is the best model to expand the competition law enforcement and to reduce the overlapping of jurisdiction between CCI & industry-specific regulators. It also suggested that by making amendments to the sections of industry-specific statutes dealing with fair competition and market regulation can seek more clarity and reduce the chances of conflicts. For instance, the USA has suggested every industry specific regulator to define the "relevant market" narrowly enough so that competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable.[110] Similarly, we can also bring such changes to resolve our issues. Moreover, the article also suggested that for any model of operation to work, competition authorities and sector-specific regulators must conduct themselves in a prospective and constructive manner showing flexibility when working together, and perhaps have an accommodative approach towards one another, because the way they conduct each other will have a decisive impact over ensuring the existence of public good, economic efficiency and consumer welfare.

[110] FCC *Pricing Flexibility Order* (1999), 14 FCC Red 14221, paragraph 71.