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Workable Model for Resolving Jurisdictional Issues Between the Patent and Competition Authorities

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I N T R O D U C T I O N

There have been upswing cases of conflict of jurisdiction between the Competition Commission of India and sector specific regulators over the past years which has enthralled the judicial intervention by the writ courts. The CCI has been effectively implementing its chief provisions relating to the prohibition of anticompetitive agreements, abuse of dominant position and that of regulation of mergers and acquisitions. It has been noted that there has been no major issues with regards to the speed of regulation of merger and acquisitions by the CCI but the enforcement of the provisions relating to anticompetitive agreements and abuse of dominant position have been blemished with recurrent challenges on grounds of sectoral overlaps or forum shopping between the CCI and Sector specific regulators (Controller of Patents, Copyright Boards, financial securities and insurance, electricity, telecom & petroleum sectors). The tussle between the CCI and other sector-specific regulators have raised serious jurisdictional concerns. Although, these regulators have common goals, but their means of achieving their ends are different which causes disruption. The higher judiciary have thereby played a momentous role in resolving the conflict of jurisdiction.

Jurisdictional Issues Between the Competition and Patent Authorities

The cardinal challenge against the jurisdiction of the CCI has been upraised by parties holding the Intellectual Property Rights in view of Section 3(5) of the Competition Act, 2002 which grants the protection to the monopoly created by statutes relating to the patents, copyrights to protect one's IPR rights. The protection is however constrained by the reasonableness of the stipulations which may be foisted by the IPR holders on their licensees and this provision allows CCI the authority to test whether the conditions obtruded by the IPR holder while granting the license are reasonable and not unduly restrictive of competition. Aside from this specific provision regarding agreements between the IPR holders and their licensees, there is no safeguard for the possible abuse of dominant position by the IPR holders under Section 4 of the Act if any of the prohibited effects are visible in the market.

CASE: Ericsson v Competition Commission of India

In this case, Ericsson confronted the jurisdiction of the CCI to order investigation into contentions of abuse of dominance with respect to licensing Standard Essential Patents (SEPs). It was being argued by the Ericsson that the Patents Act, being a subsequent special enactment, incorporated provisions to adequately redress the grievances of any party concerning to reasonable royalty rates. The Delhi High Court was already occupied with the issue in infringement proceedings, thus debarring the CCI from investigating the same. Nonetheless, the Delhi High Court sustained the jurisdiction of the CCI stating that the remedies under the Patents Act are materially divergent from those under the Competition Act. The remedies are also not mutually exclusive i.e., exercising one does not take away the right of a licensee to approach the other forum.

Resolving The Jurisdictional Intersection Between Patent and Competition Authorities

The statutory provisions (Section-21 & 21A) as set out in the Competition Act aims to evade any confrontation between the CCI and the sector specific regulators by providing that if during the course of proceeding before a sector specific regulator, any competition matter is upraised then the regulator may make a reference to CCI and the CCI shall be bound to consider the same and provide its opinion within 60 days of the receipt of such reference and the regulator shall consider the CCI's opinion whilst deciding the main issue pending before it. Correspondingly, in the course of proceeding before the CCI, any matter that requires an expert knowledge or opinion from any statutory authority or sector specific regulator, then CCI may also make a reference to such sector specific regulator and the said regulator shall also consider and provide his expert opinion on the issue within 60 days to the CCI. The opinion of the sector regulator shall be considered whilst deciding the competition issues.

CASE: Competition Commission of India v/s Bharti Airtel Limited and Others

In this case, the Supreme Court resolved the jurisdictional conflict between the CCI and Telecom Regulatory Authority of India and the interplay of roles of the two regulators. The background of this case is as follows:

The Reliance Jio Infocomm Limited (RJIL) filed an application under Section 19(1) of the Competition Act, 2002, alleging abuse of dominant position and cartelization by Bharti Airtel, Idea Cellular Limited, Vodafone India Limited (the Incumbent Dominant Operator-IDOs) and the Cellular Operators Association of India (COAI) for the infringement of Section-3 and Section-4 of the Act. RJIL alleged that the cartel restricted it to enter into the telecom market by

denying the sufficient number of Point of Interconnection (PoI) to it. Further, RJIL filed an application before TRAI to monitor the conduct of IDOs and COAI.

CCI's order (directing investigation under Section 26(1) of the Act) on the above application was challenged before the Bombay High Court which held that the CCI had no jurisdiction in the matters of telecom sector as in the instant case, the matter was also referred to TRAI which is technically well equipped to deal with the said issue. Aggrieved by the impugned order of the High Court, CCI and RJIL challenged it before the Supreme Court by way of special leave petition.

The Apex Court dismissed the appeals filed by the CCI & RJIL and upheld the decision of the Bombay High Court has deftly resolved the long debated scuffle for predominance between the overarching fair market watchdog, the CCI and the sector specific regulators, the Telecom Regulatory Authority of India (in this case) by deferring scrutiny into any possible coordination or collusion between the existing telecom players through the platform of COAI or otherwise by CCI. Further, the Court whilst upholding its previous judgement in the SAIL case on the nature of the CCI prima facie order under Section 26(1) of the Act, for the first time, made a demarcation between examination of competition issues by the CCI in a sector having a statutory regulator and a sector without one. The Court adduced the need for use of Section 21A of the Act, which makes it obligatory for the CCI to procure opinion of the sector regulator on sector specific issues first. This way, the Court eventually showed a middle way to sort out the long-debated jurisdictional conflict issue between the CCI and sector regulators. By invoking the doctrine of harmonious construction, the court has maintained an equilibrium by giving TRAI the authority to determine the rights and obligations of the parties first, and then if it apprehends the existence of anti-competitive act, evokes the jurisdiction of CCI.

While concluding the case, the Supreme Court followed the existing jurisprudence of the USA (Credit Suisse & Verizon Communication Case).

For A Methodical Functioning of the Statutory Bodies and Avoiding Multiplicity of the Suits, Following Issues must be Addressed:

- In the matters relating to both the Competition Act and Patents Act (where there is an overlap for such a matter to be decided by the CCI or sectoral regulator), it has to be deduced foremost- whether the CCI should hear the case in the first hand or the sectoral regulator?

Example- In the United Kingdom, Office of Fair Trading (OFT) and the regulatory sectors work together to take the best possible measures to decide whether to follow the Competition Act or opt for other sectoral statutes whereby

they follow the cooperative approach in finding out the best possible outcome.

- The degree to which the CCI can encroach in the matters concerning patent rights
 - Corresponding to Section-3(5) of the Competition Act, an exception for IPR in Section-4 also requires to be formulated to put off courts from drawing hypothetical conclusions that any company in possession of a patent is bound to abuse its privileged position
 - There is a need to strike a proper symmetry between the contracts concerning patents and their impact on competition
 - As the CCI is not sector based body and has jurisdiction that covers all the industries, thus, the jurisdictional facts first need to be decided by the authorities under their special Act and then must be addressed by the CCI if referred by the sector specific regulators (Competition Commission of India v/s Bharti Airtel Limited and Others)
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