

# THE CLASH OF JURISDICTION OF CCI AND TRAI: AN ANALYTICAL STUDY

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## I. INTRODUCTION

In the past, most of the developing countries were characterised by significant government involvement in their economies marked by dominance of large state-owned enterprises. Economic liberalisation process started in several such countries during the 1980s and 1990s and most of them adopted policies of deregulation, privatisation and trade liberalisation. Despite these developments, there are certain sectors, where for a variety of reasons competitive markets may not exist or yield desired results and it is because of these market failures in these sectors that some form of intervention is required.<sup>252</sup> Earlier, governments used to intervene to correct the market failures in these sectors. It was seen that the manner in which the governments intervened had proved to be unproductive and with this recognition there emerged a new form of economic governance characterised by the setting up of specialised agencies, seeking to ensure competitive outcomes by making decisions in a transparent, consultative and participatory manner. While in some sectors, government continues to perform the regulatory function, in others a specialized agency has been set up to perform the regulatory functions. Hence, in a country we may find the presence of both the forms of intervention.<sup>253</sup> India is a case, in point, where the sector regulators exist hand in hand with the general regulators.

Thus, there is a requirement of sector regulators because there are different sectors of the economy and public utility services which have different needs whose functions and limitations are different, which need specialised care. If there is only one authority, then the approach which it could take would be very objective and different sectors like these, especially those that interface with people ie the public cannot be dealt with, in such manner as that would ultimately be damaging to the public. Sector needs, as has been mentioned, are different from each other, the regulatory mechanism and the approach to handling of such matters should be different. If aviation and airport sector were to be treated just as the medical sector or the telecom sector be treated the effects would be disastrous as there would be clear chance of there being accidents that could result in a threat to life or on a more humorous note a huge congestion at the baggage collection area. For the smooth functioning of the different institutions devised for making life easier for the citizens of a country, there should be a regulatory authority which is adaptable and adept at handling the needs of one sector.

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<sup>252</sup> Dani Rodrik, 'Development Strategies For The Next Century' (*Harvard University*, August 2001)

<<http://www.eclac.cl/prensa/noticias/comunicados/6/7616/DaniRodrik29-08.pdf>> accessed 15 November 2012.; Dr Geeta Gauri, Competition Law and Government at

<<http://www.cci.gov.in/images/media/presentations/CompetitionLawAndGovernmentGeetaGouri.pdf>> accessed 17 September 2012.

<sup>253</sup> Maher M Dabbah, 'The Relationship Between Competition Authorities And Sector Regulators' (2011) 70 CLJ.

Sector regulators, therefore, prevent inefficient use of resources and protect consumers. They also provide the technical expertise necessary to determine access, maintain standards, ensure safety and determine tariffs, especially for merit goods. Their regulations are usually contemplated in natural monopolies, ie, when the characteristics of the market prevent competition sectors with universal service obligations.<sup>254</sup> In India, the sector regulators regulate the sectors of telecommunications, energy, transport, water, and financial sector; the sector-specific regulators being the Securities Exchange Board of India (SEBI), the Telecom Regulatory Authority of India, the Central Electricity Regulatory Commission, the Insurance Regulatory Development Authority and the Petroleum and Natural Gas Regulatory Board.

The Telecom Regulatory Authority of India (hereinafter TRAI) Act was enacted to deal with the advent of new telecommunications technology, recognizing the need to provide for adequate complaint resolution services for the millions of new consumers in the telecom market. This Act provides for setting up the TRAI to deal with consumer issues affecting consumers on a broad basis, and not individual disputes as provided for in s 14.<sup>255</sup> TRAI issues huge numbers of directives, regulations, and orders that deal with various subjects such as interconnection, service quality, and tariff. The various powers and functions of TRAI (Telecommunication Regulatory Authority of India) are that the authority recommends the timing and need for the introduction of a service provider which is new, ensures successful inter-connection and technical compatibility between various service providers, and suggests the conditions and terms on which license would be provided to a service provider.<sup>256</sup>

## II. CLASH OF JURISDICTIONS: AN OVERVIEW

The Competition law of any country aims to establish an institution to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, inside the country in question as well as in the any other market connected therewith or incidental thereto. In India, the regulator for the same is the Competition Commission of India (hereinafter CCI) established under s 7 of the Competition Act. The CCI has jurisdiction that extends territorially too, due to the overreaching effects of anti-competitive activities of a domestic firm especially in cases of exports, competition rules are applied to the conduct of foreign enterprises occurring in a foreign state but affecting the domestic market of the applying state.<sup>257</sup> However, CCI's mandate corresponds to that of sector regulators like the TRAI and it highlights the economic benefits of fostering competition in each segment of the Indian market for goods and services.

<sup>254</sup> Amitabh Kumar, 'Relationship Between Competition Authority And Sectoral Regulators' (Lahore, 2006). <[http://www.competition-commission-india.nic.in/speeches\\_articles\\_presentations/9-PPT\\_Lahore\\_06.pdf](http://www.competition-commission-india.nic.in/speeches_articles_presentations/9-PPT_Lahore_06.pdf)> accessed 20 November 2012.

<sup>255</sup> Telecom Regulatory Authority of India Act 1997, s 14.

<sup>256</sup> Telecom Regulatory Authority of India Act 1997, s 11.

<sup>257</sup> Gauri Sachdev, 'Extra Territorial Jurisdiction of Competition Law in India' <<http://www.cci.gov.in/images/media/ResearchReports/Gaurireportjan12.pdf>> accessed 20 November 2012.



The CCI is the general regulator of competition in the Indian market. Its role is cut out and well defined in the Competition Act while the sector regulators have specific roles, regulating every aspect of the sector they regulate. TRAI, as has been explained above, regulates in issues like licensing. Their role ends there. Market regulators like the CCI are hence, different from the sector regulators like the TRAI whose role is to encourage the growth of the telecommunications sector in the country which will ensure that the country will play an important role in the emerging world information society. The TRAI has domain knowledge and addresses economic issues like the fixation of tariffs and the issue of licenses. The market regulator cuts across all sectors and looks at the behaviour of enterprises in the market. Their mandate is to foster competition and protect the markets from sundry anti-competitive practices. Therefore, the market regulator is an expert in its area with mostly ex-post functions, unlike sector regulators who are supposed to take ex-ante actions, in keeping with their objectives.<sup>258</sup>

The essence of the interface between the Commission and TRAI in India lies within sections 18<sup>259</sup>, 21<sup>260</sup>, 60<sup>261</sup>, and 62<sup>262</sup> of the Competition Act. These specific provisions contained within the Competition Act exemplify the possible tension. S 60 is the usual *non obstante* provision asserting the supremacy of the competition legislation within the domain of competition enforcement, and both ss 60 and 62 are couched in mandatory language, yet, ironically, s 62 declares that the competition legislation ought to work along with other enactments. S 21 of the Competition Act suggests that in any proceeding before a statutory authority, if such a need arises, the statutory authority may refer an issue to the Commission.<sup>263</sup> The Commission is, then, bound to deliver its opinion to the statutory binding upon the authority within a stipulated period of two months. Incidentally, however, this opinion is not binding upon the statutory authority under s 21(2). Moreover, s 21A<sup>264</sup> envisages the possibility of the Commission making a reference to a statutory authority. The TRAI Act itself specifically excludes, matters related to monopolistic, restrictive or unfair trade practices<sup>265</sup> that fall under the jurisdiction of the Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act) from the purview of TRAI,<sup>265</sup> which goes on to show that MRTP's substitution by the Competition Act has not been followed by a parallel amendment to the TRAI Act, which also creates confusion.

Most of the conflicts between TRAI and CCI arise in the regulation of combinations. The Competition Act defines combinations<sup>266</sup> as an acquisition of control, shares, voting rights or assets;

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<sup>258</sup> Rishi Raj and KG Narendranath, Interview with Ashok Chawla, 'CCI Complements Sectoral Regulators Like TRAI' *The Financial Express (India, 11 June 2012)* <<http://www.financialexpress.com/news/cci-complements-sectoral-regulators-like-trai/960425/0>> accessed 17 November 2012.

<sup>259</sup> Explanatory notes to the Competition Act 2002, s 18.

<sup>260</sup> Explanatory notes to the Competition Act 2002, s 21.

<sup>261</sup> Explanatory notes to the Competition Act 2002, s 60.

<sup>262</sup> Explanatory notes to the Competition Act 2002, s 62.

<sup>263</sup> Explanatory notes to the Competition Act 2002, s 2(w).

<sup>264</sup> Explanatory notes to the Competition Act 2002, s 21A.

<sup>265</sup> Telecom Regulatory Authority of India Act 1997, s 14.

<sup>266</sup> Competition Act 2002, s 5.

acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing business and mergers and amalgamations where the combining parties exceeds the thresholds set in the Act. Thus the idea is to pre-empt combinations that could potentially have appreciable adverse impact on competition in the relevant market in India. Since, it is an objective of the TRAI to form a transparent and fair policy environment that encourages fair competition, the conflict emerges. The issues related to mergers and acquisition (M&A) rules go to the Department of Telecommunications (DoT) because the TRAI doesn't have powers to deal with these.<sup>267</sup>

India's competition law prohibits anti-competitive agreements and the abuse of dominant position by enterprises, besides regulating "combinations". Under the licensing condition, the TRAI can decide how many licenses to give out but these cannot be based on a rule of the thumb estimate. If a merger of two telecom entities exceeds the threshold specified under the Competition Act, the CCI will obviously exude jurisdiction over it. This is because the market regulator ie the CCI is a generalist while the sector regulator, the TRAI is a specialist.

Business regulation is perhaps as old as business itself. While modern, liberalized economies have increasingly relied upon markets for allocation of resources, markets can also fail and lead to undesirable results.<sup>268</sup> These extreme possibilities have ensured that governments oscillate between the poles of regulation and competition in order to ensure that when the market fails, it does not crash land, but is instead provided with a suitable parachute. In India, regulation managing competition is implemented through sector-specific regulators and through the Commission.<sup>269</sup> These actors differ in their approaches to regulating business in the market and thus, neither can have exclusive jurisdiction since their jurisdiction complements one another.

## II. THE POSSIBILITY OF CONCURRENT JURISDICTIONS

The question of concurrent jurisdiction is raised when there are two different sets of courts or adjudicatory bodies or institutions exercising their powers in the same matter.<sup>270</sup> There are two situations that arise when this happens:

1. It creates confusion as to who will be the final decision making body and
2. Individuals subject to the jurisdiction are forced to question 'does one supersede the other?'<sup>271</sup>

<sup>267</sup> Rishi Raj and KG Narendranath (n 10).

<sup>268</sup> Cass R Sunstein, 'Free Markets And Social Justice' 3 (OUP 1997) 128.

<sup>269</sup> Rahul Singh, *The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators*, 8 Wash U Global Stud L Rev 71 (2009)

<sup>270</sup> Legal Information Institute, 'Concurrent Jurisdiction' <[http://www.law.cornell.edu/wex/concurrent\\_jurisdiction](http://www.law.cornell.edu/wex/concurrent_jurisdiction)> accessed 17 November 2012.

<sup>271</sup> Charles M Davis, 'Issues Re Concurrent Jurisdiction Over Maritime Workers' (*Workers Injury Law and Advocacy Group*, 5 November



The other is when there is no way of knowing whether one could supersede the other.<sup>272</sup> In the second case both must either come to an amicable settlement on such issues of jurisdiction.<sup>273</sup> This is what raises the question of concurrent jurisdiction. Concurrent jurisdiction could be taken as complementary or it could be taken as conflicting.<sup>274</sup> Basically it refers to two institutions of similar or non-similar nature, exercising valid control over the same sector, simultaneously. Questions of concurrent jurisdiction arise in international law, when there are two different courts of different jurisdiction, where the person is from a different country and has committed a crime in another country, the question of which country shall try him, becomes problematic.<sup>275</sup> The question becomes even more problematic, when the crime is only punishable in one country and not the other<sup>276</sup> or if the crime is punishable in both countries but the punishment differs.<sup>277</sup> The question in such situation is tough to decide. Though concurrent jurisdiction in the conventional sense is mostly dealt with in international law, it has its applications elsewhere as well.<sup>278</sup> The issues of concurrent jurisdiction arise in the cases of maritime law, banking law, investment and trade.<sup>279</sup>

Concurrent jurisdiction also arises when there is an overlap.<sup>280</sup> The overlap is due to a sector having two or more different aspects.<sup>281</sup> In most cases concurrent jurisdiction issues relating to sector matters arise in cases which relate to competition policy and law as there is great need to compete and get the better of others so there are great number of violations of competition policy and law.<sup>282</sup> When these violations take place in a certain sector which has its own regulatory authority, then a tussle ensues between the regulatory body which deals with competition policy and law and the adjudicatory body which deals with the specific issues that arise out of that sector.<sup>283</sup>

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2010)<<http://davismarine.com/articles/Maritime%20Injuries%20Concurrent%20Jurisdiction%20Issues.pdf>> accessed 16 November 2012.

<sup>272</sup> *ibid.*

<sup>273</sup> *ibid.*

<sup>274</sup> Oscar Solera, 'Complementary Jurisdiction And International Criminal Justice' (2002) 84 Rev Int Croix-Rouge <<http://www.icrc.org/eng/assets/files/other/145-172-solera.pdf>> accessed 20 November 2012.

<sup>275</sup> *ibid.*

<sup>276</sup> — 'Concurrent Jurisdiction Planning, Guidelines, And Application' <[http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/ccj\\_planning.pdf](http://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/ccj_planning.pdf)> accessed 18 November 2012.

<sup>277</sup> Director of Public Prosecutions, 'Interim Guidelines on the Handling of Cases where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas', <[http://www.cps.gov.uk/consultations/concurrent\\_jurisdiction\\_consultation.pdf](http://www.cps.gov.uk/consultations/concurrent_jurisdiction_consultation.pdf)> accessed 11 November 2012.

<sup>278</sup> Rod Rostan, 'Power Of The Prosecutor In Initiating Investigation', <<http://www.icclr.law.ubc.ca/site%20map/icc/poweroftheprosecutor.pdf>> accessed 12 November 2012.

<sup>279</sup> TT Mboweni, 'Central Banking, Competition and Concurrent Jurisdiction', *Annual Competition Conference* (2011) <<http://www.bis.org/review/r010418c.pdf>> accessed 12 November 2012.

<sup>280</sup> — *Concurrent jurisdiction in the Banking Sector*, <<http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Dec-01-Newsletter.pdf>> accessed 12 November 2012.

<sup>281</sup> *ibid.*

<sup>282</sup> *Facilitating Cooperation between Regulatory Agencies – Memorandums of Understanding and Cooperation Protocols* <<http://www.ictregulationtoolkit.org/en/PracticeNote.3274.html>> accessed 1 November 2012.

<sup>283</sup> Competition Commission South Africa, *Defining the Interface Between Sectoral Regulation and Competition Enforcement in Regulated Sectors: The South African Experience*, <<http://www.oecd.org/gov/regulatorypolicy/44942587.pdf>> accessed 2 November 2012.

The fact is, ideally, the question of overlap should not arise as the adjudicatory bodies which deal with that sector are more than competent to deal with issues arising in that sector.<sup>284</sup> However, when the institution from a certain sector violates a certain law that falls within the domain of another adjudicatory body altogether, it creates a lot of confusion.<sup>285</sup> This is where the boundaries of jurisdictions are blurred and the question of prevailing and superseding jurisdiction arises.<sup>286</sup> Whether the adjudicatory body which deals with a certain type of law should prevail or body specifically made to govern the sector that the offending institution belongs to will prevail arises.<sup>287</sup>

In the case of Tamil Nadu Progressive Consumer<sup>288</sup> before the Telecom Dispute Settlement Appellate Authority (TDSAT), the case of the respondents was that the matter is pending consideration before the Competition Commission and as such the TRAI has no jurisdiction. The learned counsel appearing on behalf of the respondents urged that as the petitioner is a stakeholder, it can take part in the consultative process having regard to the directions of the Competition Commission and that the TDSAT should not interfere in the matter. Also, having regard to s 21 of the Competition Act, this Tribunal may also seek for expert evidence. The Court however held that

*"...the conditions of license are laid down under S. 4 of the Indian Telegraph Act. It is a special statute. TRAI Act is also a special statute. We do not mean to say that the Competition Act is not a special statute. It is. But it is well settled that where the provisions of two special statutes are in conflict, one which deals with the subject matter should prevail over the other."<sup>289</sup> Moreover, the Competition Commission, in its order has merely come to the conclusion that there is no violation of Sec. 3 or 4 of the Competition Act. It has also mentioned that "... the sector regulators are fully seized with the matter and at this stage, there is no competition angle involved." The Competition Commission may choose to wait indefinitely till the Regulators, who have been procrastinating a decision over this issue for a long time, but the same cannot be expected of this Tribunal."*

In the case of Consumer Online Foundation v. Tata Sky Ltd. & Other Parties,<sup>290</sup> Dish TV submitted that the CCI could not claim jurisdiction over this matter as the TRAI and the TDSAT were already vested with the jurisdiction and responsibility to govern and regulate the telecommunication industry covering telecom, broadcasting and cable TV service. The CCI held that any matter that raises competition concerns would fall within the purview of the Comp. Act enabling CCI to exercise its jurisdiction.

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<sup>284</sup> Cornelius Dube, *Competition Authorities And Sector Regulators: What Is The Best Operational Framework?* <<http://www.cuts-international.org/pdf/Viewpointpaper-CompAuthoritiesSecRegulators.pdf>> accessed 12 November 2012.

<sup>285</sup> Rostan (n 286).

<sup>286</sup> *ibid.*

<sup>287</sup> *Facilitating Cooperation between Regulating Agencies* (n 290).

<sup>288</sup> *Tamil Nadu Progressive Consumer v Ministry of Information* (2010) 60 C.

<sup>289</sup> *Ashoka Marketing Ltd v Punjab National Bank* [1990] 4 SCC 406 [41] para 59.

<sup>290</sup> *Consumer Online Foundation v Tata Sky Ltd and Other Parties* [Case 2/2009].



Thus, to remove the dispute, one can expect a clear separation of competition enforcement functions from technical functions. However, in matters such as these, there is no single framework or model to completely address the issue of conflict of jurisdictions between the competition authorities and the sector regulator. More than one model or framework may be employed within a country to address this issue. Concurrent jurisdiction is one such framework wherein, while in one sector, the competition authority may have statutory powers for some aspects of regulation, in another sector, the sector regulator and the competition authority may exercise concurrent jurisdiction in order to reconcile the issue of jurisdictional conflict of the CCI. S 21<sup>291</sup> already provides reconciliation for the issue of jurisdictional conflict, which the Government can consider making mandatory for the CCI and the concerned sector specific regulator to respond to the requests from each other to give their opinion under the reference mechanism, on the competition issue at hand within the timeline stipulated in the Act. In the event that the regulators fail to reach a consensus, the Government may reserve the power to make a final decision in national interest.

### III. CONCLUDING REMARKS

The conflict of jurisdiction between the CCI and a sector regulator like the TRAI is a controversy that has generated a lot of public interest. It was even reported that the government was considering 'clipping the wings' of the CCI.<sup>292</sup> If the government goes ahead with any such plans, it would be a serious setback to an institution which has the power to bring the true benefits of the market economy to the consumers in India.<sup>293</sup> The researcher explored the concept of concurrent jurisdiction in this article. As far as overlapping of the jurisdictions is concerned, the requirement is to create systems to ensure cooperation between the CCI and other sectoral regulators. Both, the CCI and the TRAI have their areas of expertise and both cannot replace each other. It may also be noted that the objectives of the CCI and the sector regulators are complementary. The sector regulators promote socio-economic benefits as their objective, while, the CCI's objective is to promote and sustain competition in the market in order to protect the interest of the consumer. This exudes any reason why the sector regulators cannot have concurrent jurisdiction with the CCI if the specifics of their jurisdiction is clearly defined and are mutually respected by the regulators. The much hyped turf war is non-existent because the turfs on which the CCI and the sector regulators play are broadly different with only slight overlaps.

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<sup>291</sup> Competition Act 2002, s 21.

<sup>292</sup> Business World, Interview with Ashok Chawla, 'They Will Have To Comply', <<http://www.businessworld.in/en/storypage/-/bw/they-will-have-to-comply/424420.37483/page/0>> accessed 22 November 2012.

<sup>293</sup> *ibid*; 'Harmonising Regulatory Conflicts: Evolving a Cooperative Regime to Address Conflicts Arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities' *A Study for the Indian Institute of Corporate Affairs*, New Delhi, <[http://cuts-ccier.org/pdf/Harmonising\\_Regulatory\\_Conflicts.pdf](http://cuts-ccier.org/pdf/Harmonising_Regulatory_Conflicts.pdf)> accessed 24 November 2012.

Regulation of an industry has three primary dimensions;

- a. technical,
- b. economic and
- c. competition<sup>294</sup>

These three elements have to be distributed between the sectoral regulators and competition authority. These elements have to be distributed between the CCI and TRAI in the telecom sector to achieve coherence in the regulatory environment as has been done in many countries. For instance, the Australian Competition and Consumer Commission covers access regulation, regulation of prices of public utilities and a variety of other regulatory tasks while the state regulators undertake technical and economic regulatory responsibilities.<sup>295</sup>

In India, the Competition Act itself restricts the role of the CCI to competition issues by stating that “the CCI will intend; “...to prevent practices having adverse effect on the competition, to promote and sustain competition in the markets, to protect the interest of the consumers and to ensure freedom of trade”,<sup>296</sup> which would leave the sector regulators free in the technical and economic regulation of their respective industries.

With the establishment of the CCI, the earlier unregulated area of competition is now governed and thus, in case neither the CCI nor TRAI over steps their jurisdiction, unless, as provided by the law, they can rest assured that concurrent jurisdictions is very much a successful possibility. The CCI is intended to only fill regulatory loopholes vis-à-vis competition and therefore, the concurrent jurisdiction will create systems to ensure cooperation between the CCI and other the sectoral regulators and cooperation will make sure that the activities of the regulators is well synchronized, thereby ensuring best use of their respective resources.

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<sup>294</sup> Clash of Regulators, <<http://www.competitionlawindia.com/>> accessed 17 November 2012.

<sup>295</sup> Ishita Gupta, 'Interface between Competition and Sector Regulators - Resolution of The Clash of Regulators' <<http://www.cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf>> accessed 17 November 2012; Shameek Sen, 'About Us' <[http://jtbl.org/uploads/Compilation\\_of\\_Feedback\\_sent\\_to\\_Ministry\\_on\\_DNTP.pdf](http://jtbl.org/uploads/Compilation_of_Feedback_sent_to_Ministry_on_DNTP.pdf)> accessed 23 November 2012.

<sup>296</sup> Competition Act 2002, preamble.



The Competition Act provides for consultation between the CCI and other statutory authorities, i.e., the sector regulators here, by way of reference in case of a conflict arising due to different prioritization of their respective goals by the CCI and TRAI. It is for this reason that Government may also consider creating 'regulator's forum' (as has been done in some other countries) which would allow the CCI and sector authorities to work in close cooperation and coordinate their action. This would also allow the regulators to achieve policy coherence while simultaneously getting sensitized to competition law.<sup>297</sup> The importance of competition in any industry cannot be denied, and thus, even though certain sensitive sectors may require temporary exceptions, however, a complete exclusion of any sector from the CCI's jurisdiction would be a disaster resulting in defrauding the Indian consumers of the benefit of an efficient industry.

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<sup>297</sup> *Harmonising Regulatory Conflicts* (n 301).