



## Standing Committee on Finance Presents Report on Competition (Amendment) Bill

The Government of India introduced the Competition (Amendment) Bill, 2022 (Bill) in the Indian Parliament on 5 August. This was subsequently referred to the Lok Sabha (lower house of the Parliament) and to the Parliamentary Standing Committee on Finance (Committee).

The Committee adopted its report on the Bill on 8 December.<sup>1</sup> This was presented to Parliament on 13 December.

The Committee discussed a number of issues and made several recommendations for amendments to the Bill,<sup>2</sup> including on matters which were not addressed in the Bill.<sup>3</sup> These recommendations are summarised below and will doubtless figure in any forthcoming debate on the Bill.

At the time of writing, it is on the cards that the Bill will be considered in the current Winter Session, scheduled to end on 29 December.

### Deal Value Threshold

The Bill provides for a “deal value threshold” under which any transaction with a deal value in excess of INR 2,000 crores (approx.

USD 242 million) and where either party has “substantial business operations in India” will have to be notified to the Competition Commission of India (CCI). The “value of transaction” is to include “every valuable consideration, whether direct or indirect, or deferred ...”.

In line with stakeholder views,<sup>4</sup> the Committee recommends that the provisions should apply only where *the party being acquired* (and not “either party”) has “substantial business operations in India”. It also expresses concerns that uncertainty about the calculation of deal value and the meaning of “direct, indirect and deferred consideration” could result in transactions unlikely to have adverse effects on competition being caught. It therefore recommends that the manner of calculation of deal value and the definition of “valuable consideration” be specified by regulations.

### Definition of Control

The Bill defines “control” in terms of “the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions” of the target.

### In this Issue

#### Standing Committee on Finance Presents Report on Competition (Amendment) Bill

- Deal Value Threshold
- Definition of Control
- Procedural Timelines for Merger Review
- Ability of Director General to Examine Legal Advisers on Oath
- Settlements and Commitments
- Hub and Spoke Cartels
- Requirement for a Judicial Member
- Intellectual Property Rights as a Defence to Abuse of Dominant Position
- Section 4 and an Effects-Based Test

<sup>1</sup> Standing Committee of Finance (2022-2023), 52<sup>nd</sup> Report, “The Competition (Amendment) Bill, 2022” ([http://164.100.47.193/lssccommittee/Finance/17\\_Finance\\_52.pdf](http://164.100.47.193/lssccommittee/Finance/17_Finance_52.pdf)).

<sup>2</sup> See our August briefing on the Competition (Amendment) Bill – A Modern Law for Modern Markets (<https://www.amsshardul.com/insight/competition-amendment-bill-a-modern-law-for-modern-markets/>).

<sup>3</sup> See our article on the key inclusions and omissions in the Bill (<https://www.amsshardul.com/insight/the-competition-amendment-bill-2022-key-inclusions-and-omissions/>).

<sup>4</sup> See our article on deal value thresholds (<https://www.mondaq.com/india/antitrust-eu-competition-1223600/deal-value-thresholds-#>).

The Committee observes that “*material influence*” is the “*lowest and weakest standard of control going by the UK standard*” and that it has been used by the CCI in actual practice over the last few years. It considers that “*material influence*” is now the settled standard but that it needs to be explicitly defined. It therefore recommends that “*material influence*” be specified by regulations.

### Procedural Timelines for Merger Review

The Bill provides for expedited timelines for merger review. It is proposed to reduce the 30 days given to the CCI to form a *prima facie* opinion to 20 days and the overall timeline to pass a final order from 210 days to 150 days.

The Committee agrees with the CCI and stakeholders that reducing the timelines could be burdensome for an already understaffed CCI and recommends that the existing timelines should remain.

### Ability of Director General to Examine Legal Advisers on Oath

The Bill provides that the Director General may examine on oath “*any of the officers and other employees and agents of the party being investigated*”. The term “*agent*” is defined to include “*legal advisers*”.

The Committee considers that allowing the Director General to examine legal advisers goes against attorney-client privilege and contravenes the Indian Evidence Act, 1872 and the Bar Council of India Rules which apply to external or independent advocates. This could leave the Competition Act open to challenge. It *strongly* recommends that it be clearly specified that nothing in the relevant section shall be in contravention of the Indian Evidence Act 1972 or any other Act that protects attorney-client privilege.

### Settlements and Commitments

The Bill provides for the introduction of a settlements and commitments mechanism, allowing parties to apply to the CCI to settle/make commitments in cases of anti-

competitive vertical agreements and abuse of dominance. The mechanism will not, however, apply to cartel cases, which are separately covered by a leniency regime.

The Committee recommends that cartels should be included within the scope of settlements.

Reflecting concerns of interference by third parties, the Committee recommends that third parties should not have the right to be heard in settlement/commitment proceedings.

The Committee states that an admission of guilt should not be mandated in such proceedings. It therefore recommends that there should be an enabling provision to allow the applicant to apply to the CCI to revisit the settlement/commitment after the final order “*as one last opportunity*”. It also recommends that the applicant should have the ability to withdraw the application.

The Committee recommends that the bar to appeal a settlement/commitment order to the National Company Law Appellate Tribunal (NCLAT) should apply only to parties who agreed to the settlement/commitment proposal.

### Hub and Spoke Cartels

The Bill provides that an anti-competitive horizontal agreement involving entities which are not engaged in identical or similar trade will be caught by Section 3 of the Competition Act where the entity concerned “*actively participates*” in the furtherance of the agreement. The Bill thus seeks to include “*hub and spoke*” arrangements involving entities at different levels of the value chain.

The Committee notes that there is no clarity on the meaning of “*active participation*” which could potentially cover entities, such as online platforms, merely providing intermediation services in digital markets and industry associations and suchlike merely organising meetings without an anti-competitive agenda. It therefore recommends

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that an entity should only be liable where “it is proved that such person intended to actively participate”.

## Requirement for a Judicial Member

The Competition Act does not currently require that the CCI have a “judicial member” and the Bill contains no provision requiring such a member.

The Committee notes that the Delhi High Court has held that it is imperative for the CCI to have a judicial member when issuing its final orders. The Competition Law Review Committee has also recommended having a judicial member. However, since the matter is now *sub judice* in the Supreme Court of India, the suggestion to have a judicial member must await that court’s decision.

## Intellectual Property Rights as a Defence to Abuse of Dominant Position

Section 3(5) of the Competition Act currently provides that nothing in Section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions necessary to protect, intellectual property rights under specified Indian legislation. The Bill proposes to expand this to cover “any other law for the time being in force relating to the protection of other intellectual property rights”. Despite the recommendations of the Competition Law Review Committee, the Bill does not extend

this protection to cases of abuse of dominant position under Section 4 of the Competition Act.

The Committee recommends that this defence also be added to Section 4 of the Competition Act.

## Section 4 and an Effects-Based Test

Section 4 of the Competition Act does not currently contain an effects-based test, explicitly requiring an analysis of the actual effects of conduct in determining whether there is an abuse. The Competition Law Review Committee had noted that “effects” were built into some of the types of abuse under Section 4 and this allowed for an effects analysis where needed. It thus considered that no legislative amendment was needed. The Bill contains no general provision requiring the CCI to undertake an effects-based analysis in Section 4 cases.

The Committee recommends the introduction of such a general effects-based test, with an enterprise or group abusing its dominant position “if it causes or [is] likely to cause appreciable adverse effect on competition”. It also recommends amending Section 19(3) of the Competition Act, which specifies the factors to be considered in determining whether there is an appreciable adverse effect on competition, to cover conduct under Section 4.

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## COMPETITION LAW TEAM

### Pallavi Shroff

Managing Partner  
pallavi.shroff@AMSShardul.com

### John Handoll

National Practice Head - Competition Law  
john.handoll@AMSShardul.com

### Naval Satarawala Chopra

Partner  
naval.chopra@AMSShardul.com

### Shweta Shroff Chopra

Partner  
shweta.shroff@AMSShardul.com

### Harman Singh Sandhu

Partner  
harman.sandhu@AMSShardul.com

### Manika Brar

Partner  
manika.brar@AMSShardul.com

### Aparna Mehra

Partner  
aparna.mehra@AMSShardul.com

### Gauri Chhabra

Partner  
gauri.chhabra@AMSShardul.com

### Yaman Verma

Partner  
yaman.verma@AMSShardul.com

### Rohan Arora

Partner  
rohan.arora@AMSShardul.com

### Aman Singh Sethi

Partner  
aman.sethi@AMSShardul.com

### Nitika Dwivedi

Partner  
nitika.dwivedi@AMSShardul.com

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