Competition Amendment Bill

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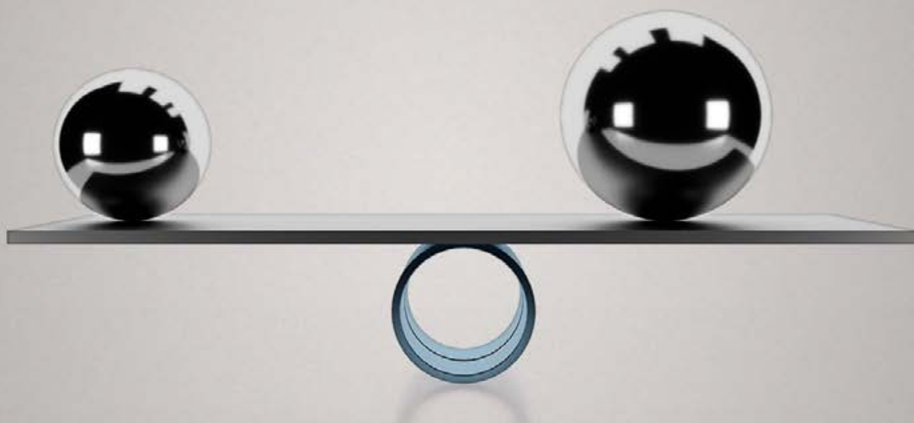


Competition (Amendment) Bill – New Challenges and Opportunities

On 3 April 2023, the Indian Parliament passed the Competition (Amendment) Bill, 2022 (*Bill*), which materially amends the current Competition Act, 2002 (*Competition Act*). The Bill as passed will now go to the President of India for her assent, after which the amendments will be enacted into law.

The Bill reflects proposals originally introduced by the Government in August 2022 together with some amendments made in February 2023 (*2023 Amendments*) following the report of the Parliamentary Standing Committee on Finance (*Committee*) on the Bill.

Some key changes introduced are set out below.

Introduction of Deal Value Thresholds

One of the most notable changes is the introduction of "*deal value*" thresholds, so that transactions: (a) with a deal value in excess of INR 2,000 crore (approx. USD 244 million); and (b) where the target enterprise has "*substantial business operations in India*", will require to be notified. Previously, the Competition Act only prescribed asset and turnover based thresholds for assessing whether a merger or acquisition requires notification to the Competition Commission of India (*CCI*) and if either test was met (and no other exemption was available) would a notification be required.

The move to include deal value thresholds stems from the CCI's inability to previously review a number of transactions in the digital and infrastructure spaces which were not reportable, as the assets and / or turnover value were below the jurisdictional thresholds.

The Bill further provides that the CCI shall issue regulations to prescribe the requirements for assessing whether an enterprise has "*substantial business operations in India*" to adapt to changing circumstances as well as different categories of transactions it may wish to capture. It will be important to see what yardstick is adopted by the CCI for assessing "*substantial business operations in India*" as, if the net is cast too wide, it may lead to a flood of additional transactions having to be notified to the CCI. Given that the deal value thresholds being introduced are fairly low, it also remains to be seen how the CCI will seek to define the deal value, especially since consideration of the transactions may be structured in multiple ways. Nevertheless, as a result of this important change, India will join a growing number of jurisdictions proposing to introduce deal value thresholds in their merger control framework.

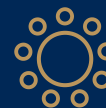
Expedited Merger Review Timelines

The Bill expedites the merger review timelines. It reduces the overall period of 210 calendar days for the CCI to arrive at a decision on a transaction to 150 calendar days, which shall not be extendable by the CCI. It has also reduced the timelines for almost all other steps in the review process (to accommodate the reduced overall timeline). Whilst this may result in quicker clearances, it could put considerable time pressure on the parties as well as the CCI and may even lead to more "*invalidations*" so that the CCI can restart the review clock. It also raises the question how amenable the CCI will be to grant parties extensions to file responses to information requests / clear defects going forward, given that the overall period of 150 days is fixed.

The shortened review timeline means that substantive pre-filing consultations and early engagement with the CCI case team will be critical for avoiding invalidations and other timing issues, especially on global deals where coordinating approval timelines across jurisdictions is critical.

Amendments to the Definition of "Control"

The definition of "*control*" in the Competition Act leaves a lot of room for the CCI to determine its scope. As a result, the standard of control has shifted over time. In its initial decisions, the CCI interpreted



control as the ability to exercise "*decisive influence*" over strategic commercial issues or the ability to cause a deadlock; more recently, it has stated that control is to be determined over a spectrum that ranges from *de jure* control on the one hand to "*material influence*" on the other. The Bill codifies the lowest standard of control, i.e., "*material influence*", without reference to the matrix of factors which need to be assessed in determining how this standard is satisfied.

As such, while the intention appears to be to provide clarity, there may remain continued ambiguity in the scope of material influence and how it is to be interpreted in different circumstances.

Derogation of Standstill Obligations for Open Market Purchases

In the past, the CCI's suspensory merger control regime has created hurdles for transactions involving open market purchases / stock market acquisitions. As such acquisitions must be undertaken instantaneously and without prior disclosure to the public and, given the price sensitivity, the requirements to notify the CCI and defer consummation till approval could render the transaction unviable. Recognising these difficulties, the Bill introduces a derogation from the standstill obligations for open market purchases and other transactions undertaken on stock exchanges. The derogation is subject to: (a) the parties filing a notification form subsequently (after undertaking the purchase) within such time as prescribed by the CCI through regulations; and (b) the acquirer not exercising ownership or beneficial rights or interest in such securities, including exercising voting rights and receipt of dividends (unless otherwise prescribed by the CCI through regulations) until the CCI approves the transaction. The introduction of the derogation is a welcome change as previously there had been several gun jumping cases owing to the parties' inability to defer the consummation of open market purchases. Much will depend on the regulations to be specified by the CCI but the derogation should provide some degree of relief to stakeholders involved in stock market purchases.

Expanded Scope of Gun Jumping Provisions

Several key updates are proposed to the gun jumping provisions under the merger control framework. Currently, a penalty for gun jumping can only be imposed in cases where parties have consummated a reportable transaction without notifying the CCI or, where they have closed a notified transaction before the CCI's approval. The Bill provides that the CCI may also impose such penalties in cases where parties fail to provide the requisite information requested by the CCI while examining whether a non-notified transaction was in fact reportable. It may be questioned whether this addition is necessary, as the CCI in any event has separate powers to penalise entities for not furnishing information requested / providing incomplete information. Additionally, the CCI previously had the power to penalise parties a maximum of 1% of the total assets or turnover of the combination, whichever is higher. The Bill provides that, in line with the proposed introduction of deal value thresholds, the CCI can penalise up to 1% of the deal value.

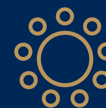
Introduction of a Framework for Settlements and Commitments

Another long-awaited development is 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 cases. The mechanism will not be available in cartel cases (which are separately covered by a leniency regime). Commitments will be considered between the commencement of an investigation and its completion (marked by the issuance of the Director General's (*DG*) Investigation Report), whereas Settlements will be considered after the Investigation Report is submitted, but before a final order is issued by the CCI. The complainant, the DG, as well as the party in question will be heard on this proposal and the final order of the CCI adopting the settlement or commitment will not be appealable. Further, reflecting the 2023 Amendments, the Bill introduces a provision to allow follow-on damages actions against enterprises that have entered into settlements; this may have a dissuasive effect.

While the details on the working of these mechanisms will be fleshed out through regulations, they are likely to have a major impact on the way cases are addressed before the CCI. It should be noted that the proposed amendments are silent on a number of issues including: (a) their applicability to existing as well as new cases; (b) whether there is a requirement for admission of liability; (c) the modalities of how settlements / commitments will be arrived at and adjudicated; (d) the basis for arriving at settlement amounts; and (e) the market testing of remedies (particularly given that such orders are not appealable). We hope that these will be addressed through the regulations and guidance notes.

Hub and Spoke Cartels

Anti-competitive horizontal agreements involving entities which are not engaged in identical or similar trade will also be caught under the Competition Act. This provision has been introduced to create a statutory basis to fix liability on facilitators of cartels (such as trade associations or consultants) as well as hub-and-spoke cartels being operated through suppliers or distributors at different levels of the vertical chain. Such anti-competitive agreements will also be presumed to cause an appreciable adverse effect on competition and the onus will be on the parties to demonstrate otherwise. With this amendment, it appears that the CCI will be able to treat facilitators at par with the actual cartelists, if they had participated or intended to participate in the cartel (this is an update from the Bill's original position, following concerns expressed by the Committee on the



initial proposal). What remains to be seen is the impact this would have on follow-on compensation / damages claims and whether such facilitators will also face claims from aggrieved plaintiffs.

Updates to the Leniency Regime

The CCI has had much success with its Leniency Regime and an increasing number of cartel cases are now adjudicated on the basis of leniency applications. The Bill further strengthens the regime by increasing the disincentives for failing to cooperate till the completion of proceedings and / or provide vital disclosures. The CCI can consider these failings as reasons to reject a marker and, consequently, the full amount of the penalty will be levied on the non-cooperating party. The amendment will also allow a party to withdraw a marker. Although the DG and CCI will be entitled to use the information provided by a withdrawing party for the purposes of the investigation and final determination, they will not be able to rely on the admission of guilt by the party.

The Bill also formally introduces a "*leniency plus*" mechanism, allowing an enterprise that files for leniency in relation to one cartel and also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartels. This confirms recent CCI practice in granting leniency plus.

Clarifying the "Meeting of Competition" Defence for Abuse of Dominance

The Bill remedies a long-raised concern on the "*meeting of competition*" defence for a dominant enterprise which so far only applies to discriminatory but not unfair conditions or prices. The Bill extends this defence to cover unfair conditions or prices adopted to meet competition. At first blush, this will help dominant enterprises who have taken a cautionary approach and lost out to smaller competitors. However, it will need to be carefully implemented as there is limited jurisprudence from the CCI. In such situations, the CCI usually looks at practices in other jurisdictions.

Appointment and Expansion of Powers of the DG

The DG, who heads the CCI's investigative arm, is presently appointed by the Government. The Bill provides that the CCI will appoint the DG. This means that the CCI will now have greater control over the DG, who up to now has been acting at 'arm's length' from the CCI. The DG will also have greater powers for seeking information, including from third parties about the affairs of entities under investigation. There is now a positive obligation on parties under investigation to preserve and protect relevant documents and offer all assistance required by the DG. The Bill also details the powers of the DG to conduct investigations (including search and seizure operations (dawn raids)) which are currently contained in the Companies legislation.

Limitation Period of Filing an Information / Reference

The CCI will no longer entertain any information / reference (complaint) which has been filed beyond three years from the date the cause of action first arose (though, in certain cases, where suitably justified, it may condone a delay). This will mean that both private parties as well as government bodies will need to act swiftly to bring alleged anti-competitive agreements or abuse of dominance to the attention of the CCI. This appears to be prospective in nature. It is not clear if this will impact decisions whether to investigate cases that have already been filed. Separately, in a positive development, the CCI will also be barred from entertaining cases involving substantially the same facts and issues that it has already decided upon; parties (including interveners) will need to distinguish their cause of action from prior decisional practice at the threshold stage itself.

Enhanced Penalties and Penalty Guidelines

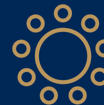
The Bill empowers the CCI to levy penalty on the basis of the global turnover of enterprises found to have contravened competition law. Currently, penalties are calculated on the basis of "*relevant turnover*" which excludes turnover of products and services which do not relate to the contravention. This is a significant development which will impact enterprises with global operations. It may incentivise firms to adopt the Settlements and Commitments mechanism rather than suffer enhanced penalties.

The Bill also increases the penalties for providing false information or failing to furnish material information in relation to a combination from the current INR 1 crore (approx. USD 122,000) to INR 5 crore (approx. USD 610,000). Separately, where there is a failure to notify a reportable transaction or respond to a notice from the CCI as to why a transaction was not notified, the CCI has the power to impose a penalty of up to 1% of the total turnover or assets or value of the transaction.

Further, persons failing to comply with the CCI's directions or orders on previous instances of non-compliance and / or providing false information and documents, will be liable to a maximum penalty of INR 10 crore (approx. USD 1,221,000).

The Bill further specifies the range of penalties to be imposed upon office bearers and persons in charge of contraventions committed by companies (this provides legislative sanctity for the CCI's practice of penalising these individuals at the same percentage of income / turnover as the contravening company).

In an important and welcome change, the CCI will also be required to publish guidelines on the appropriate amount of penalties for contravention of the Competition Act. The CCI will be required to consider these guidelines in imposing penalties under certain



provisions of the Competition Act and give reasons for any divergence.

25% deposit on penalty for appeals

The Bill provides that appeals before the National Company Law Appellate Tribunal (*NCLAT*) against CCI orders will require a 25% deposit of any penalty amount as a condition for the appeal being entertained. While not required, the NCLAT has so far granted interim relief on penalties subject to the appellant depositing 10% of the penalty amount by way of an interest-bearing fixed deposit with the NCLAT's registry. While modalities for this deposit will be formulated, this will increase the costs related to filing appeals.

Conclusion

These long overdue changes to the Competition Act are a mixed bag. Whilst certain changes are business friendly and consistent with the Government's "*ease of doing business*" mission, others may raise more questions / uncertainty in their implementation (for current as well as prospective cases). A lot will also depend on the regulations to be issued by the CCI to flesh out many of these broad provisions. Having said that, the requirement for the CCI to invite public comments on these regulations prior to their implementation is a welcome move and goes a long way towards increasing transparency.

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