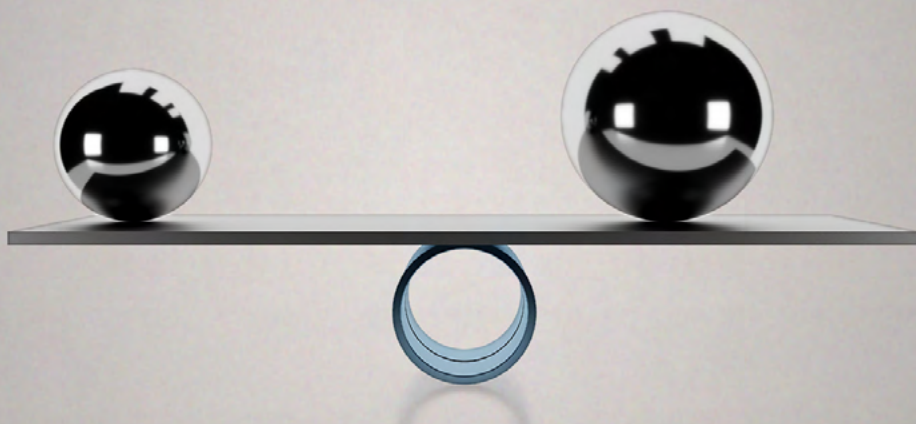


January 2024



Key Trends of 2023 and Looking Forward to 2024

2023 was an important year with sweeping amendments to the law, a change in guard at the Competition Commission of India (CCI) and its jurisdiction being tested multiple times. We look back at five key developments in 2023 and crystal ball gaze on five trends we expect in 2024.

Looking back at 2023

Revamping of the Competition Act

We saw the most significant changes to Indian competition law since its enforcement. On the merger control front, changes include: (a) the introduction of a deal value threshold (DVT) which is sector agnostic; (b) codification of the definition of control to the low “material influence” standard; (c) expedited merger review timelines; and (d) derogation of the standstill obligations for certain on-market purchases. On the enforcement front, changes include: (a) the introduction of a settlements and commitments framework; (b) enhanced penalties based on ‘global turnover’; (c) the recognition of hub and spoke cartels and facilitators of cartels; and (d) the introduction of a ‘leniency plus’ mechanism.

Some of these amendments (such as the inclusion of hub and spoke cartels) have already been notified. However, most of the other changes have still not come into effect and require the CCI to issue implementing regulations which are expected in early 2024.

A new Commission

A refreshed CCI now has full bench strength with the appointment of 4 new Members (including a new Chairperson) in 2023. Competition law in India could take an entirely new

direction with these appointments, with increased levels of scrutiny expected in both merger as well as enforcement cases.

Closer scrutiny of private equity deals / minority investments

The CCI kept a close watch on private equity investments and other minority share acquisitions and has moved away from its previous light-touch approach. Minority investments are increasingly being subject to remedies to ensure that the investor does not have influence on competing portfolio entities.

In terms of substantive analysis, the CCI is now requiring more detailed information on investor portfolio entities and the review can be intrusive. This trend is likely to continue and investors should expect a detailed examination if they are proposing to make competing minority investments in the same sector.

Increased scrutiny for green channel filings

The green channel route (which provides for deemed approval for transactions with no horizontal overlaps or vertical / complementary relationships) has proven to be a huge success, benefitting the CCI as well as investors. In 2023, green channel filings accounted for approximately one-third of all the notification filings made with the CCI (25 out of 80 filings).

The green channel filing is a “trust based” process with the CCI relying on the parties’ representations that the criteria to benefit from the green channel route are satisfied. In August, the CCI imposed its first ever penalty for incorrect disclosure regarding the green channel conditions. It emphasised that parties must observe utmost good faith while considering



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whether the conditions have been satisfied. This provides a clear signal to the market that investors must conduct rigorous due diligence to ensure that all the criteria for green channel approval are met. It also underscores the need to undertake substantive pre-filing consultations (PFCs), although these are non-binding, to ensure that the CCI agrees that the green channel route is available.

Jurisdictional turf battles continue

In several cases, the CCI's jurisdiction was challenged with varying degrees of success. The Supreme Court rejected the argument that the Competition Act, 2002 (*Competition Act*) did not cover statutory monopolies formed to further the objectives of the Constitution of India. The Supreme Court clarified that, if an enterprise is not explicitly excluded from the scope of the Competition Act, it will not be inclined to accept any implicit exclusions.

Separately, the Delhi High Court held that the CCI does not have jurisdiction to examine issues relating to abuse of dominance arising from the licensing of patents. It held that such disputes should be examined exclusively under the Patents Act, 1970 which is a specialised statute to govern such disputes.

In another case, the Delhi High Court held that if a statutory body is performing activities relating to its statutory duties as a regulator, the CCI does not have the jurisdiction to examine such activities.

Looking into the future

With a new Commission in place and a new-look Competition Act on the way, 2024 should be an interesting year for Indian competition law. We have set out below our predictions on five key trends to expect.

Increase in the number of merger filings

With the Competition (Amendment) Act, 2023 (*Amendment Act*) introducing DVT, we expect a significant increase in the number of merger filings. DVT was originally envisaged to capture transactions in the digital sector that fell between the cracks. However, in its current draft form, the new regime will also capture infrastructure projects, transactions in other sectors and even follow-on / anti-dilution investments in start-ups. We hope the CCI will increase the resources required to process these filings speedily, while also having the bandwidth to review transactions that do require additional scrutiny.

Revamped enforcement framework

The final regulations on settlements and commitments are expected soon. We have high hopes that this new mechanism (which applies to abuse of dominance and vertical agreements cases, but not cartels) will enable speedier market correction. The CCI will also be able to settle business disputes masquerading as competition law cases. Further, the introduction of a 'leniency plus' regime should facilitate the detection of more cartels by the CCI, which could lead to an increase in the number of follow-on damage claims.

For these mechanisms to work efficiently, however, the CCI must refrain from over-correcting to an extent that leads to chilling competition or imposing corrective measures that are impractical to implement. Similarly, while the Amendment Act allows the CCI to levy penalties based on global turnover, a disproportionate use of such power will likely result in increased litigation instead of leading parties to use the settlements and commitments options.

Spotlight on the digital sector

The digital sector will continue to be a priority, both for enforcement as well as merger control cases. On the enforcement front, several important investigations into big tech companies (including Google, Apple and various large e-commerce platforms) may conclude. On the merger control front, with the introduction of DVT, there will be an increase in the number of filings in the digital sector.

The Report of the Committee on the Digital Competition Act may be issued and potentially specific legislation regulating competition in this sector may be introduced. The CCI will also launch a market study on artificial intelligence, staying ahead of the global curve (as it did with blockchain).

Extended timelines?

Whilst the Amendment Act contemplates a shorter formal review period for combinations, we expect lengthy overall timelines to continue. The new tighter timelines could lead to increased "invalidations" (resetting the review clock to 'Day 0' on account of some defect in the filings) or longer PFCs to allow for a detailed informal review prior to starting the formal review clock. We also expect continued delays on the enforcement side, given the backlog of cases (at both the CCI and appellate authority levels), the Director General's office being short-staffed and the CCI's additional workload



relating to anti-profiteering cases under the Goods and Services Tax.

Continued scrutiny of gun jumping cases and more behavioural remedies

We expect the CCI to continue to adopt a hard line on gun-jumping cases. The uncertainty around the application of the new DVT regime and conditions for derogation for certain on-market purchases may result in inadvertent gun-jumping by parties, leading to the initiation of more cases (with penalties now also based on the value of the transaction). Further, the maximum penalty amount for false / incomplete information

in a merger case has also been increased and the CCI has shown that it takes such cases seriously. We are hopeful that early cases in these areas are educational and clarificatory rather than punitive.

Finally, the CCI has proved its mettle in crafting detailed behavioural remedies and addressing new theories of harm in several combination decisions. We expect an increase in the number of decisions involving detailed behavioural remedies, including in private equity transactions. This will require greater planning in relation to proposed transactions, to allow for the possibility of remedies.

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