



Highlights of the Competition (Amendment) Bill, 2022

August 2022

The Competition (Amendment) Bill, 2022 (the **Bill**) that was introduced in the Parliament on 5 August 2022 seeks to make some major changes to the Competition Act, 2002. In the Statement of Objects and Reasons of the Bill, the Finance Minister has stated that the changes have been found necessary after considering the recommendations of the Competition Law Review Committee (that had earlier been set up by the government), the experience gained by the working of the Competition Commission of India (the **CCI**) so far, and after undertaking public consultations. The Statement notes that the changes seek to “provide regulatory certainty and trust-based business environment”.

Accordingly, in mergers, the proposed amendments will compress the available timelines for review by the CCI. In enforcement activities, these are expected to provide for early finalization of proceedings and enhanced guidance to the parties.

Given below is a summary of the highlights of the 2022 Amendment Bill.

A. Merger control

(a) **Introduction of the deal value threshold:**

In an important addition to the purely numerical assets and turnover based jurisdictional thresholds that the Indian merger control regime currently provides for, a new threshold is proposed to be introduced which will work off the “value of any transaction”. The proposed amendment provides that if the value of any transaction involving an acquisition of control, shares, or voting rights exceeds INR 20 billion (approx. USD 252 million), it would be required to be notified to the CCI provided that either party to the transaction has “substantial business operations in India”. This amendment is seemingly targeted towards deals in the technology space where companies having low assets and turnover (and therefore

escaping the traditional tests) enter into large deal value M&A activity. The proposed amendment provides for an “India nexus” but does not clarify how substantial business operations in India ought to be interpreted – this is expected by way of a subsequent clarification – and indeed whether the value of the transaction is the value attributable to the India operations or to the overall global transaction.

(b) **Definition of control:** The definition of control has been proposed to be amended to the lowest standard of control i.e. the ability to exercise “material influence” over the affairs and management or strategic commercial decisions of an enterprise. Whilst currently as well through its decisional practice, the CCI had significantly diluted the scope of the term “control” as compared to the more stringent “decisive influence” test adopted in say the European Union, the proposed amendment at least now offers clarity on what the test is.

(c) **Acquisitions resulting from open offers, etc.:** The standstill obligations under the Indian merger control regime would not apply to market purchases and other transactions undertaken on the stock exchanges provided that the notification is filed with the CCI within such time and manner as prescribed by the CCI and the acquirer does not exercise any ownership, beneficial rights or interest in the target until the transaction is approved by the CCI.

(d) **Definition of turnover:** The proposed amendment provides greater clarity with respect to computation of turnover. It now expressly provides that turnover should exclude intra-group sales and indirect taxes as well as any ‘trade discounts’. This was largely the practice based on informal clarifications issued by the CCI from time to time. The one major change which is proposed to the computation of turnover in India is the exclusion of ‘all amounts generated through assets or business from customers outside India’. The current practice was to include even such export turnover as part an entity’s turnover in India and the amendment once implemented will have a significant impact on the manner of computation of turnover for export focussed sectors such as pharmaceuticals and technology.

(e) **Increase in maximum penalty for making false statements or omission of material information:** The maximum penalty for doing so (in merger cases) has been increased from INR 10 million to INR 50 million. There have been increasing instances of parties being penalised for making false statements and omission of material facts in merger filings (the prime examples being Amazon and CPPIB) and the CCI seemingly wants to put in place a higher deterrent to mitigate the possibility of such misleading disclosures in the future.

(f) **Procedural timelines:** Amongst others, the overall time period of a deemed approval is proposed to be reduced from 210 days to 150 days (which can be

extended by a maximum of 30 days) and the time period for the CCI to form a prima facie view for a Phase 1 clearance has been reduced substantially from the current timeline of 30 working days to just 20 calendar days.

B. Enforcement

- (a) **Settlement and commitment:** A major overhaul provides that a settlement can be offered by the parties to an anti-competitive vertical agreement and / or abuse of dominance. Such a settlement can be offered after the investigation report has been issued by the Office of the Director General (the **DG**) and before the CCI passes its final order in the matter. The bill also permits parties to propose a voluntary commitment after the CCI forms a prima facie opinion on the matter but before the DG issues its investigation report. Currently there are no enabling provisions which allow parties to offer such voluntary commitments or settlements. These provisions will substantially assist the CCI's record on enforcement and recovery of penalties and help focus its resources on the more important cartel investigations.
- (b) **Hub and spoke cartels:** Entities which are not engaged in identical or similar trade could also be expressly caught under the ambit of anti-competitive horizontal agreements if they actively participate in the furtherance of such agreements.

- (c) **Limitation for filing of an information / reference:** An information or a reference to the CCI can be filed only within three years from the date on which the cause of action has arisen. Currently there is no express period of limitation for the CCI to take cognizance of such cases.
- (d) **Dismissal of repeat cases at prima facie level:** The CCI may dismiss a case at the prima facie level if the case presents the "same or substantially the same facts and issues" as dealt with by the CCI previously. Whilst the CCI has exercised this power in the past as well, this simply provides a statutory backing to the ability of the CCI to do so.
- (e) **Leniency plus:** A further reduction in penalty could be provided to a cartel participant if it discloses details regarding another cartel.
- (f) **Penalty deposit for appeals:** Appeals from the CCI orders before the appellate tribunal will only be entertained once 25% of the penalty (as imposed by the CCI) is deposited by the parties. Currently, the discretion on the quantum of the deposit is with the appellate tribunal and they have typically asked for deposit of 10% of the penalty in the past.
- (g) **Guidelines on penalty:** The CCI will be required to publish guidelines on the appropriate amount of penalties for contraventions under the Competition Act. It is further proposed that the CCI may specify by regulation the method for computing turnover for the purpose of determining penalty.

C. Other

Supply side substitutability: This is now proposed to be directly included for determining the relevant product market. Currently, only demand side substitutability is a factor in determining the relevant product market.

This material is for general information only and is not intended to provide legal advice.

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