Competition Matters

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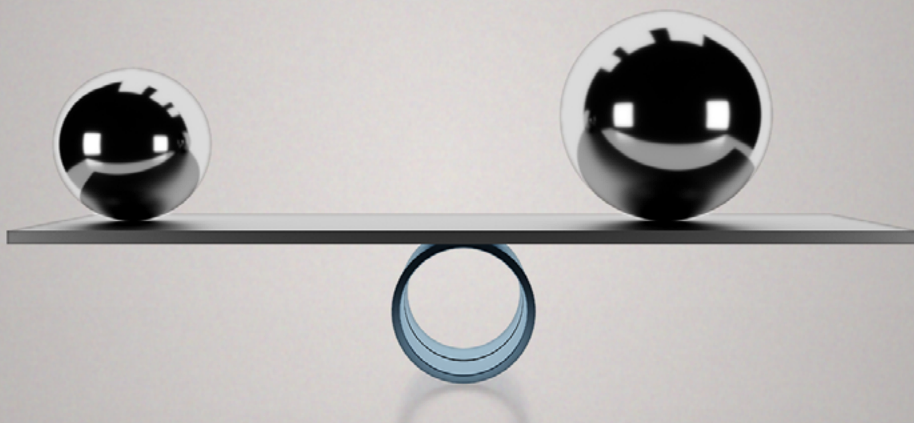


Competition Amendment Bill – A Modern Law for Modern Markets

The Government of India introduced the Competition (Amendment) Bill (*Bill*). This is a highly anticipated development that follows the circulation of a Draft Bill in February 2020, which was prepared following a detailed review of the existing legislation by the high level Competition Law Review Committee (*CLRC*) in 2019.

Several significant amendments are proposed. Some key changes are set out below.

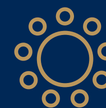
Introduction of deal value thresholds

One of the most notable changes is the introduction of "deal value" thresholds for assessing whether a merger or acquisition qualifies as a "combination" and requires notification to the Competition Commission of India (*CCI*). Currently, the Competition Act, 2002 (*Competition Act*) only prescribes asset and turnover based thresholds and if either test is met (and no other exemption is available) a notification will be required. The Bill proposes the introduction of an additional "deal value" threshold, so that transactions: (a) with a deal value in excess of INR 2,000 crore (approx. USD 252 million); and (b) where either party has "*substantial business operations in India*", will require to be notified in India (assuming no exemption is available). 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.

This proposal to include deal value thresholds stems from the CCI's inability to review a number of transactions in the digital and infrastructure space which were not reportable, as the assets and / or turnover value were below the jurisdictional thresholds. 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 proposed deal value thresholds 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 seeks to expedite the merger review timelines across the board. Currently, the CCI has 30 working days to arrive at its *prima facie* view on whether a transaction raises competition concerns or not - this has now been reduced to 20 calendar days. It is also proposed to reduce the overall period of 210 calendar days for the CCI to arrive at a decision on a transaction to 150 calendar days, extendable by a maximum of 30 calendar days for any extensions sought by the parties / additional information provided. The Bill has additionally reduced the timelines for almost all other steps in the review process (to accommodate the reduced overall timeline). Whilst this may result in quicker clearance, it could put considerable time pressure on the parties as well as the CCI and may even lead to more "invalidations" so 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 RFIs / clear defects going forward, given the maximum extension of 30 calendar days to the overall timelines. 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 defining 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 has codified 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. We hope that the CCI will provide further guidance through its FAQs and / or include clear criteria for the assessment of control in the regulations.

Derogation of standstill obligations for open market purchases

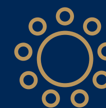
The merger control regime in India is suspensory in nature, and no notifiable transaction / step of a transaction can be consummated prior to the CCI's approval. In the past, this suspensory regime has created hurdles for transactions involving open market purchases / stock market acquisitions. As such 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 proposes 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; <u>and</u> (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 proposes 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 presently has the power to penalise parties a maximum of 1 percent of the total assets or turnover of the combination, whichever is higher. The Bill proposes that, in line with the proposed introduction of deal value thresholds, the CCI can penalise up to 1 percent 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. While the details on the working of these mechanisms will be fleshed out through regulations, this new mechanism is 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 treat facilitators at par with the actual cartelists, irrespective of the level of their involvement or their intentions. 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 seeks to further strengthen 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; however, 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 use the admission of guilt by the party. The Bill also proposes formally to introduce 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.

Clarifying the "meeting of competition" defence for abuse of dominance

The Bill remedies a concern long raised 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 proposes to extend 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 practice in other jurisdictions.

Appointment and expansion of powers of the DG

The DG, who heads the CCI's investigative arm, is currently appointed by Central Government. The Bill proposes 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.

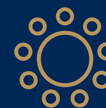
Limitation period of filing an information / reference

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 be also 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 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 127,000) to INR 5 crore (approx. USD 634,000). 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 1,270,000).



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The Bill also specifies the range of penalties to be visited 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 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 for 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

The long overdue proposed amendments, are a mixed bag. Whilst certain amendments 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 proposals. 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. We will watch this space closely and keep you posted!

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