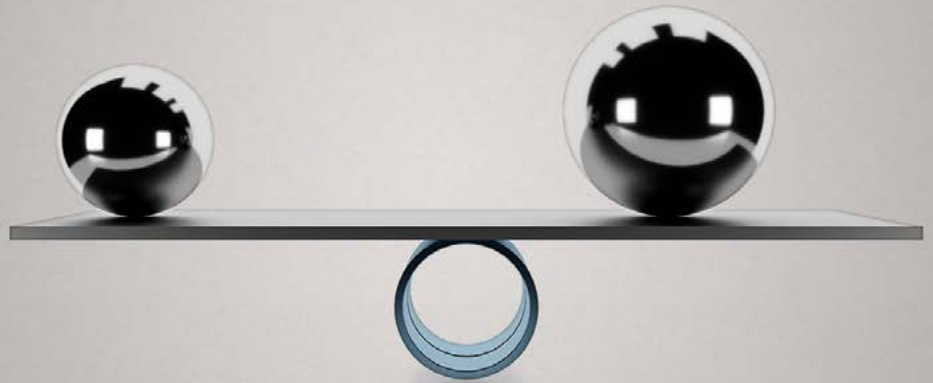


20 May 2023



Competition (Amendment) Act, 2023 – Certain Provisions Notified

In April 2023, the Indian Parliament passed the Competition (Amendment) Act, 2023 (*Amendment Act*), which materially amends the Competition Act, 2002 (*Competition Act*).¹ The Amendment Act received Presidential assent on 11 April 2023 and, on 18 May, the Government of India brought several provisions of the Amendment Act into force.

This briefing covers some of the key changes that have just been notified.

Hub and Spoke Cartels

Anti-competitive horizontal agreements involving entities which are not engaged in identical or similar trade are now caught under the Competition Act. Facilitators of cartels (such as trade associations or consultants) as well as participants in hub-and-spoke cartels being operated through suppliers or distributors at different levels of the vertical chain will now be liable for breach. The Competition Commission of India (*CCI*) will now be able to treat them at par with the actual cartelists, if they had participated or intended to participate in the cartel.

Clarifying the “Meeting of Competition” Defence for Abuse of Dominance

The Amendment Act remedies a long-raised concern on the “*meeting of competition*” defence for a dominant enterprise which formerly applied only to discriminatory but not unfair conditions or prices. This defence now extends to cover unfair or discriminatory conditions or prices adopted to meet competition.

Expansion of Powers of the Director General

The Director General (*DG*) now has greater powers to seek 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 Amendment Act also details the powers of the *DG* to conduct investigations (including search and seizure operations (dawn raids)) which were previously 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, it may condone a delay). This means that 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 and it is not clear if this will impact decisions whether to investigate cases that have already been filed. Separately, the *CCI* will be barred from entertaining cases involving substantially the same facts and issues that it has already decided upon; parties will need to distinguish their cause of action from prior decisional practice at the threshold stage itself.

Enhanced Penalties

The penalty for providing false information or failing to furnish material information in relation to a combination is increased

¹ A detailed briefing on the key changes made in the Amendment Act is available at <https://www.amsshardul.com/insight/indian-competition-amendment-bill-new-challenges-and-opportunities/>.



Competition Amendment Act

from the current INR 1 crore (approx. USD 120,000) to INR 5 crore (approx. USD 600,000). 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 1,200,000).

25% deposit on penalty for appeals

Appeals before the National Company Law Appellate Tribunal (NCLAT) against CCI orders will now 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. This will increase the costs related to filing appeals.

Transparency in making regulations

The CCI is expected to publish draft regulations on its website and invite public comments. The CCI will be required to publish its response to these public comments prior to issuing the regulations. However, the CCI can dispense with this requirement in cases of urgent public interest.

Conclusion

Several provisions that are likely to impact business are yet to be notified. On the merger control front, these include the introduction of deal value thresholds, expedited merger review timelines, the expanded scope of gun jumping provisions and a derogation from standstill provisions for open market purchases. On the enforcement front, these include the introduction of a framework for settlement and commitments, updates to the leniency regime and penalties based on the global turnover of offending enterprises.

That said, this is an important first step towards implementing key changes to the existing competition law regime. These changes pave the way for the CCI to begin the process of public consultation on regulations which will hopefully provide clarity on the implementation of the remaining amendments.

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