

Competition Law Hotline

January 10, 2013

REVISITING THE COMPETITION ACT, 2002- INTRODUCTION OF THE NEW COMPETITION (AMENDMENT) BILL, 2012

The Central Government on December 10, 2012 moved a Competition (Amendment) Bill (“**Bill**”) in the Lok Sabha to amend the Competition Act, 2002 (“**Act**”). The Bill has to be passed by both houses of Parliament before it comes into force. The Union Cabinet had approved the Bill in October, 2012.¹ The proposal to amend the Act was moved by the Ministry of Corporate Affairs (“**Ministry**”), with a view to fine tune the provisions of the Act and to meet the present day needs in the field of competition, in light of the experiences gained in the actual working of the Competition Commission of India (“**CCI**”) over the last few years.²

Certain key amendments proposed under the Bill are specified in a tabular format herein below:-

1. KEY SUBSTANTIVE CHANGES PROPOSED BY THE BILL
A. Power given to Chairperson of the CCI to authorize dawn raids:

Present position under the Act	Proposed Position under the Bill
Section 41: Power of Director General to investigate contravention	
In the course of its investigation of any contravention of the Act, the Director General is empowered under Section 41(3) to conduct search and seizure operations in accordance with the provision of Section 240 (2) and 240 A of the Companies Act, 1956. These provisions mandate that prior to undertaking such an operation, an order from a Magistrate of relevant jurisdiction be obtained for this purpose.	In the course of its investigation of any contravention of the Act, the Director General continues to be empowered under Section 41(3) to conduct search and seizure operations. Authorization to conduct such an operation is to be obtained from the <i>Chairperson of the CCI</i> . References to the sections of the Companies Act have been removed.

ANALYSIS

The search and seizure powers under Section 41(3) of the Act granted to the Director General are akin to those granted to competition law authorities around the world, used to conduct ‘dawn raids’. Historically, dawn raids were conducted by the officials early in the morning in order to have an element of surprise on the person / entity being raided. This surprise element aids in preventing entities being raided from destroying, concealing or altering information that would otherwise provide the authorities with information that they might need in connection with their investigation. Dawn raids are resorted to especially in circumstances where evidence to prove a concerted action is lacking.

It may be noted that most Indian statutes that empower authorities to conduct search and search operations require the relevant officer empowered thereunder to obtain an order / warrant from the relevant Magistrate prior to conducting a search and seizure in the normal course.

The CCI has, so far in its investigation of contraventions of the Act, not used its search and seizure powers to obtain information. It could be said that the CCI is still in its infancy and has consequently not yet explored its powers under the Act. It may also be said that the reason why these powers have not been used is for want of adequate infrastructure for the CCI to conduct search and seizures or that the present Section 41(3) makes this process difficult with the Director General being required to obtain an order from the Magistrate of relevant jurisdiction. With the proposed amendment, the Director General will now only need to seek the approval of the Chairperson of the CCI to initiate such a process which simplifies and expedites the process and makes this tool a more lucrative one for the CCI.

Under the Bill, the Chairperson of the CCI is empowered to authorize the Director General to conduct such an operation only if the Director General has reason to believe that any person or enterprise to whom a notice has been issued to furnish information –

- § has omitted or failed to provide the information or documents ; or
- § would not provide the information or produce documents; or
- § would destroy, mutilate, alter, falsify or desecrate the information or documents useful for the investigation.

B. Collective Dominance

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Present position under the Act	Proposed Position under the Bill
Section 4(1): Abuse of Dominance	
No enterprise or group shall abuse its dominant position.	No enterprise or group " <i>jointly or singly</i> " shall abuse its dominant position.

ANALYSIS

Presently, Section 4 of the Act provides that no enterprise or group shall abuse its dominant position. The definition of group is restricted to entities under the same management or control. Therefore under the existing wording of Section 4, the collection of enterprises that do not form part of the '*group*' may not be considered to come within the scope of Section 4. The Bill by inserting the wording '*jointly or singly*' seeks to bring the group of independent and unrelated enterprises holding a dominant position within the scope of Section 4. Consequently even if enterprises are not dominant in their own individual capacity, if acting together brings about the effect of dominance, such enterprises may be subject to provisions and obligation of Section 4. The insertion of the words '*jointly or singly*' may amount to recognizing the concept of collective dominance in the Indian context as existing in other jurisdictions.

C. Definition of Turnover

Present position under the Act	Proposed Position under the Bill
Section 2(y): Definition of Turnover	
"Turnover" includes value of sale of goods or services;	"Turnover" includes value of sale of goods or services <i>"excluding the taxes, if any, levied on sale of such goods or provisions of services."</i>

ANALYSIS

The Bill proposes to amend definition of term Turnover to expressly exclude from its computation the taxes levied on sale of goods and services. The term 'Turnover' has been used in the Act for two main purposes -- (i) to determine financial thresholds for the purpose of notification of a 'combination' (ii) as a benchmark against which financial penalties may be imposed. Turnover may also be a determinate in analyzing whether an entity holds a position of dominance for the purposes of the Act. The proposed change in the definition appears to apply uniformly across all uses of the term "turnover" under the Act. It may be noted that the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**") already contained a provisions to aid in the calculation of turnover which stated that 'indirect taxes' must be excluded in the computation of turnover. The Bill does not define the term 'taxes'. However given that the proposed exclusion relates to taxes leviable on the *sale* of goods and services it may be presumed that these would be limited to specific indirect taxes such as excise duty, sales tax, entry tax, vat, service tax etc. This amendment is also in line with international norms which specifically exclude indirect taxes in the computation of turnover. However such exclusions are typically seen in merger control legislations³ to arrive at financial thresholds for determination of a notifiable transaction and not in determining penalty amounts⁴.

The definition of 'turnover' still continues to be ambiguous. For instance, for the purposes of Section 5 and 6 of the Act (relating to combinations), no clarity is provided as to how and for what period turnover is required to be calculated. Explanation to Section 5 of the Act clarifies that for the purposes of determining asset value, the book value of such assets as shown in the audited books of the accounts of the enterprise in the financial year immediately preceding the financial year of the combination must be taken. However no such express clarification has been provided in relating to the calculation of turnover. For e.g. Turnover as defined in the European context under Article 5 of the Merger Regulation means '*the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover*'. Of importance is the criteria 'derived from the ordinary activities of the enterprise'. The definition of 'turnover' under the Act fails to specify what turnover of an enterprise needs to be taken into consideration for determining the same.

D. Definition of term Group:

Present position under the Act	Proposed Position under the Bill
Section 5 (Explanation(b)(i)): Definition of Group	
"Group" means two or more enterprises which, directly or indirectly, are in a position to — (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise;	"Group" means two or more enterprises which, directly or indirectly, are in a position to — (i) exercise <i>fifty</i> per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise;

ANALYSIS

The definition of the term 'group' under the Act is a three prong test, namely (i) voting right test (ii) appointment of director test and/or (iii) control of management test. The concept of "group" is pivotal to Section 5 and 6 of the Act

(relating to combinations) as well as Section 4 (relating to abuse of dominance). The Central Government vide a notification dated March 4, 2011 increased the voting right test threshold under the definition of 'group' from 26% to 50%. One of the direct outcomes of the said notification was that even a 50:50 JV was deemed to fall within the definition of control. It is important to note that a 50:50 JV will continue to be within the scope of the definition of Control under the proposed amendment. The demand of industry bodies was to make the voting right threshold as 'more than 50%' following the criteria required under the other prongs of the definition. However the proposed provision has kept this threshold at '50% or more', which means that if the Bill is passed a 50:50 JV will continue to be within the scope of "group" definition under the Act

E. Different value or assets and turnover for class or classes of enterprise

Present position under the Act	Proposed Position under the Bill
Insertion of new Section 5A	
	The Central Government has been empowered to specify different value of assets and turnover for any class or classes of enterprises for the purposes of Section in consultation with the Commission.

ANALYSIS

The Bill proposes to introduce a new Section 5-A, enabling the Central Government to lay down, in consultation with the CCI, different thresholds of asset and turnover threshold for any class or classes of enterprises for the purposes of examining notifiable combinations keeping in mind industry specific requirements. The Bill by providing enabling provisions to have different value of assets and turnover for class or classes of enterprises provides further protection and shows CCI's inclination to grant exemptions and advantages depending on the industry and requirement of the market.

It is also important here to differentiate between the power of the Central Government under the proposed Section 5 A and that with Section 54 and 20 (3) of the Act. Section 54 of the Act inter alia gives power to the Central Government to exempt all enterprises belonging to any industry from the application of the Act if such exemption is necessary in the interest of security of the State or public interest; or an enterprise engaged in performance of sovereign functions or engaged in any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.

Section 20 (3) of the Act gives power to the Central Government to enhance or reduce the value of assets or the value of turnover on the basis of the wholesale price index or fluctuation in exchange rate of rupee or foreign currencies, only for the purposes of Section 5 of the Act every 2 years.

2. PROPOSED PROCEDURAL AND OTHER CHANGES BY THE BILL:

A. Provision of service included in the definition of vertical arrangement:

Present position under the Act	Proposed Position under the Bill
Section 3(4): Vertical Agreements	
Explanation defining various types of vertical arrangements including tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal, resale price maintenance only refer to agreements for sale of goods.	Explanation defining various types of vertical arrangements including tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal, re-sale price maintenance refer to agreements for sale of goods and provisions of services.

This Bill seeks to correct the anomaly in the definition of vertical arrangements. Section 3 (4) already deals with the provision of services; however the definition of vertical arrangements doesn't include the provision of service. The Bill proposes to include the provision of service within the definition of vertical arrangements.

B. Expansion of the scope of protection grated to IPR laws :

Present position under the Act	Proposed Position under the Bill
Section 3(5): Intellectual Property Rights exception	
The exception to anti-competitive agreements to give effect to rights protected pursuant to intellectual property legislations was limited to the legislations referred to under Section 3(5) of the Act.	The exception to anti-competitive agreements to give effect to rights protected pursuant to intellectual property legislations was extended to the legislations referred to under Section 3(5) of the Act and " <i>any other law for the time being in force relating to the protection of other intellectual property rights.</i> "

The Bill proposes to significantly broaden the scope of Section 3 (5) of the Act by excluding all the legislations listed under Section 3 (5) including any other law in force relating to the protection of intellectual property rights from the scope of the Section 3 of the Act relating to anti-competitive agreements. This enactment would protect the arrangements entered into by enterprises to protect intellectual property rights granted under foreign legislations as well as Indian IPR legislation.

C. Mandatory reference by the CCI and Statutory authorities:

Present position under the Act	Proposed Position under the Bill

Section 21 and 21 A: Reference by the statutory authority and Commission

Where in the course of proceedings before a statutory authority, an issue is raised by a party that a decision of the said statutory authority, is contrary to the provision of the Act, such statutory authority may make a reference to the CCI in respect of such issue.	Where in the course of proceedings before a statutory authority, <i>an issue arises</i> that a decision of the said statutory authority, is contrary to the provision of the Act, such statutory authority <i>shall</i> make a reference to the CCI in respect of such issue.
Where in the course of proceedings before the CCI, an issue is raised by a party that a decision of the CCI, is contrary to the provision of another statute, the CCI may make a reference to the statutory authority entrusted with the implementation of such statute in respect of such issue.	Where in the course of proceedings before the CCI, <i>an issue arises</i> that a decision of the CCI, is contrary to the provision of another statute, the CCI <i>shall</i> make a reference to the statutory authority entrusted with the implementation of such statute in respect of such issue.

The Central Government in an attempt to balance the interests of the sectoral regulators and the CCI, by virtue of this Bill proposes to make it mandatory for statutory authorities to refer matters to CCI if the decision taken by a statutory authority raises any competition issue, and vice-versa to concerned regulators by CCI, on matters relating to those regulators. As per the Bill only the reference of the issue is mandatory. The mandatory requirement is restricted to referral of the matter, There is no provision in the Bill, making the funding of the authority referred t, as binding on the other authority or the parties involved.

D. Fair Hearing

Present position under the Act	Proposed Position under the Bill
Section 26 (7) and 26 (8): Provisions on Fair Hearing	
Section 26 (7) pertains to orders wherein CCI considering the objections and suggestions is of the view that further investigation is required, it may direct the Director General or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.	Section 26 (7) pertains to orders wherein CCI considering the objections and suggestions is of the view that further investigation is required, it may direct the Director General or itself proceed with further inquiry in the matter in accordance with the provisions of this Act, <i>and make appropriate orders thereon after hearing the concerned parties</i> ".
Section 26 (8) of the Act deals with such kinds of Orders passed by CCI directing further inquiry when contravention of the provisions of the Act is recommended in the report of the Director General.	Section 26 (8) of the Act deals with such kinds of Orders passed by CCI directing further inquiry when contravention of the provisions of the Act is recommended in the report of the Director General " <i>and make appropriate orders thereon after hearing the concerned parties.</i> "

Presently the Act does not contain any provision to close a case if the Director-General's report recognizes a contravention of the Act. On receiving information, the CCI directs the DG to initiate an investigation and submit a report within a specified period of time. Thereafter on the basis of report submitted by the DG, the CCI starts hearing the case. Only after completing the hearing proceedings, the CCI passes a final order as it deems fit. However, nowhere does the Act empower the CCI to close a case if the DG has found a contravention in its report. The proposed amendment seeks to plug this loophole by providing an enabling power to the CCI to pass an appropriate order under Section 26 (7) and (8) including closure of a case.

E. Opportunity of hearing prior to imposition of penalty

Present position under the Act	Proposed Position under the Bill
Section 27(b) and (g) Orders by Commission after inquiry into agreements or abuse of dominant position	
The penalty that may be imposed by the Commission after inquiry with respect to any agreement referred in Section 3 of the Act or an enterprise dominant under Section 4 could not be more than three times of the profit for each year of continuance of such agreement or ten percent of the turnover and pass other orders or direction as it may deem fit.	There has been insertion of proviso after Section 27 (b) and (g) whereby prior to imposing penalty under Section 27(b) and passing orders or directions under Section 27(g) opportunity of hearing would be granted to the party(s).

The criteria for determination of fine by CCI have lately been a cause of concern; the proposed amendment is only a step to bring transparency in the process of imposing penalty. The Act generally provides that the penalty must not exceed the maximum of three times the profit or 10% of turnover of each year of infringement, whichever is higher. In the Cement Cartel case, CCI had imposed a penalty of 0.5 times the profits for 2009-10. In other cases, CCI had imposed fines that were varying percentages of turnover without giving any reason for the variation. The proposed amendment will allow the affected party an opportunity of being heard before the CCI on the extent of penalty that CCI

can impose.

F. Stand still period reduced from 210 days to 180 days:

Present position under the Act	Proposed position under the Bill
Section 31(11) and 31(12) Orders of Commission	
The time-period to pass an order or issue directions with respect to combinations is 210, or else the same would be deemed approved.	The time-period to pass an order or issue directions with respect to combinations has been reduced to “ <i>one eighty days</i> ” however, the extension period has been extended to “ <i>one-eighty days</i> ”.
The time-period for extension with respect to approval of combinations is “ninety working days”.	

Under the provisions of the Act, with respect to combinations, the CCI is required to pass an order or direction within a period of 210 days or else the same would be deemed to be approved. The said duration is proposed to be reduced to 180 days. The Bill, however, does not provide for the corresponding amendment to Section 6 (2A), which states that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the CCI or orders have been passed under Section 31 of the Act. This appears a drafting oversight and needs to be corrected.

G. Scope of appealable order expanded:

Present position under the Act	Proposed position under the Bill
Issues to be heard by Competition Appellate Tribunal (“COMPAT”)	Section 53 A (1) (a)
The section lists out provisions of the Act with respect to which orders passed thereunder could be appealed before COMPAT. In relation to Section 26 of the Act, only provisions pertaining to sub-sections (2) and (6) wherein if the CCI is of the prima facie view that no cases exists, it could close the matter or if it agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, only such orders could be appealed.	<p>The proposed Bill has increased the kind of orders which may be appealed in relation to enquiry conducted under Section 26. In addition to sub-sections (2) and (6) of Section 26, sub-sections (7) and (8) of Section 26 have also been added.</p> <p>Section 26 (7) pertains to orders wherein CCI considering the objections and suggestions is of the view that further investigation is required, it may direct the Director General or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.</p> <p>Section 26 (8) of the Act deals with such kinds of Orders passed by CCI directing further inquiry when contravention of the provisions of the Act is recommended in the report of the Director General.</p> <p>Both the above mentioned orders can be appealed before COMPAT.</p>

In view of the amendments proposed under Section 26 (7) and 26 (8), The Bill also expands the scope of appealable order to COMPAT.

CONCLUSION

In our view, the Bill is a step in right direction by the Central Government to bring the competition law regime in our country at par with that of other jurisdictions. However, the Bill still fails to address certain key issues under the Act and has primarily looked into the procedural aspects. A lot of concepts such as treatment of joint ventures, leniency policy etc. under the Act still remain unclear and require more clarity.

- Payel Chatterjee, Shashank Gautam & Simone Reis

1 <http://pib.nic.in/newsite/erelease.aspx?relid=88148>

2 *Ibid.*

3 Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (98/C 66/04)

4 Article 17 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No

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