

Competition Law Hotline

May 05, 2023

THE COMPETITION (AMENDMENT) ACT, 2023

BACKGROUND

After being passed by both the Lok Sabha and Rajya Sabha on March 29, 2023 and April 3, 2023 respectively, the Competition (Amendment) Bill, 2023 received the President's assent on April 11, 2023 to become the Competition (Amendment) Act, 2023 ("**Amendment Act**"). The Amendment Act proposes significant amendments to the Competition Act, 2002 ("**Act**").

As a brief background, the Competition (Amendment) Bill was tabled in the Parliament in August 2022 ("**2022 Bill**") which was referred to a Joint Parliamentary Standing Committee on Finance ("**Parliamentary Committee**") for analysis, review and consultation with stakeholders. The Parliamentary Committee undertook consultation with stakeholders and put forth various recommendations for the amendments to the 2022 Bill, and thereafter presented them before the Lok Sabha on December 13, 2022 through its report ("**Report**"). Upon consideration of the Report, the Ministry of Corporate Affairs ("**MCA**") introduced modifications to the 2022 Bill on February 8, 2023 to bring out the Competition (Amendment) Bill, 2023.

The Amendment Act shall come into force on the date notified by the Central Government in the Official Gazette.

The Amendment Act has introduced changes to the merger control regime, provisions on behavioral issues as well as the enforcement framework under the Act.

Key Amended Provisions – The key changes introduced by the Amendment Act have been summarised in the section below.

- Deal Value Threshold** – Under Section 5 on 'Combinations' under the Act, the Amendment Act has proposed a new deal value threshold which states that any transaction in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation, the deal value of which exceeds INR 2,000 crore **and** if such enterprise (i.e. the one being acquired / merged / amalgamated) has "substantial business operations in India"¹, will require an approval from the Competition Commission of India ("**CCI**"). The CCI shall in due course issue regulations to determine the modalities to determine what will constitute 'substantial business operations in India'.

As per the Amendment Act, it is also pertinent to note that even if a 'de minimis exemption' is available, a transaction may be notifiable to the CCI if the deal value thresholds are met.

For the purpose of this clause, value of the transaction shall include every valuable consideration (whether direct or indirect) including any deferred consideration.

From the submissions made to the Parliamentary Committee², the Ministry of Corporate Affairs clarified that the deal value threshold was mainly meant for digital and new-age markets, where though the target entities may have minimal assets and turnover, they may possess significant potential in terms of data, technology, innovation, etc. However, as per the Amendment Act, this amendment has not been restricted to any particular sector.

Lastly, the penalty under Section 43A of the Act for non-furnishing of information on combinations has been amended as per the Amendment Act and may be at least 1% of the higher of assets, total turnover or the deal value.

- "Material Influence" as the determining factor for "control"**

The current framework defines "control" to include controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise".³

As per the FAQs of the CCI,⁴ the ability to control the management and affairs of an enterprise may be inferred from the extent of shareholding and/or statutory rights associated with the shareholding and/or contractual rights such as veto rights, consultation rights, participation in management and affairs. However, special rights/veto rights are not the only basis for inferring the ability to manage/control the affairs of an enterprise and there can be other sources of control as well, viz., status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc. In competition law practice, control is considered a matter of degree. However, all degrees and forms of control nonetheless constitute control.

Over the years, as per the decisional practice of the CCI, it has interpreted 'control' to include 'material influence'. Material influence implies the presence of factors that give an enterprise/person the ability to influence the affairs and management of the other enterprise such as an investor's board representation, special rights that it can exercise, negative rights that it may have, etc.

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As per the Amendment Act and in line with the decisional practice of the CCI, the definition of 'control' has been amended to now formally mean the ability to exercise 'material influence' over the management or affairs or strategic commercial decisions of an entity or a group of entities⁵.

In case an indicative list to determine 'material influence' is included in the regulations to be issued by the CCI, it will streamline the approach adopted by CCI to determine the control in relation to a target entity and help resolve ambiguity in respect thereof.

3. Changes in Procedural Timelines

The Amendment Act has provided for multiple changes in the procedural timelines and curtailed the timelines under the current framework to facilitate faster approval of transactions.

The existing Act provided for a period of 210 (two hundred and ten) days from the date of notification to the CCI for a combination to come into effect. A key change in the timeline as per the Amendment Act is that this period has now been reduced to 150 (one hundred and fifty) days⁶.

Further, as per the Amendment Act, the CCI is now required to form a prima facie opinion⁷ on a combination within 30 (thirty) calendar days and in the event that the CCI does not form a prima facie opinion within the above timelines, the combination shall be deemed to have approved and no separate order shall be required to be passed by the CCI. The CCI may accept suo motu modifications or propose modifications before forming a prima facie opinion.

The above Amendments provide deal certainty and expedite the approval process.

4. Implementation of Open Offer / purchases of shares from the open market

The Amendment Act permits implementation of (a) an open offer; or (b) an acquisition of shares or securities, through a series of transactions on a regulated stock exchange forming part of a combination prior to the approval by CCI, if (i) the notice of the acquisition is filed with the CCI in the manner set out in the Act, and (ii) the acquirer, in the aforesaid case, shall not exercise any ownership or beneficial rights or voting rights or receive dividends / any other distributions, till the CCI approves such acquisition⁸. The detailed regulations reflecting the procedure and conditions is awaited.

5. Inclusion of Limitation Period

As per the Amendment Act⁹, a period of limitation of 3 (three) years from the date on which cause of action has arisen has been introduced to entertain any information or reference in respect of an inquiry on any alleged contravention under Section 3 and 4 of the Act. The CCI has the power to condone any delay in case of a sufficient cause for not filing of such information or reference in the period mentioned above with the rationale for condonation recorded.

6. Modifications

As per the Amendment Act¹⁰, in case a combination is likely to have an appreciable adverse effect on competition, it shall issue a statement of objections to the parties and direct the parties to explain why such combination should be allowed to take effect. The parties to the combination or the CCI (suo motu) may propose modifications in the manner set out in the Amendment Act.

7. Penalty to be imposed based on the Global Turnover

The Amendment Act provides that the penalties for anti-competitive agreements and abuse of dominant position would be imposed on all parties to such agreement or the party that has abused its dominant position, based on the global turnover derived from all products and services by such person or an enterprise.¹¹

This is a paradigm change as multinational conglomerates would be exposed to a much larger penalty.

Currently, as held by the Supreme Court in Excel Crop Care Ltd. v. CCI¹² ("Order"), penalty was levied on a party on its "relevant turnover" in case of anti-competitive conduct. This amendment overrides the principles set out in the Order.

Further, in case of an anti-competitive agreement entered into by a cartel, penalty shall be imposed on each producer, seller, distributor trader, service provider included in the cartel and shall be levied a penalty as set out in the Amendment Act for each year of continuance of such agreement.

8. Settlement and commitment framework

Any enterprise against whom any inquiry has been initiated in cases of abuse of dominance or anti-competitive agreements, may avail a settlement or commitment mechanism.¹³

An enterprise against whom an inquiry has been initiated for abuse of dominant position or anti-competitive agreements may choose to submit an application for settlement to the CCI with the prescribed fees. The application for settlement must be submitted after the enterprise has received the Director General's report under Section 26(3), but prior to an order passed by the CCI under the Act. The exact timeline and modalities shall be specified by regulations. The CCI shall subsequently consider the nature, gravity and impact of the contraventions and may then agree to the proposal for settlement, subject to terms and manner of implementation of settlement and monitoring or payment of such amounts by the applicant as specified by regulations. On the other hand, the CCI may reject the application for settlement if it is of the opinion that settlement in that particular matter is not appropriate or if the CCI and the party concerned do not reach an agreement on settlement. In such a case, the CCI would proceed with its inquiry.

A similar procedure has been set out for commitments as well, where enterprises may apply to offer commitments to the CCI in relation to an inquiry on abuse of dominant position or vertical anti-competitive agreements after the CCI has directed the Director General to investigate based on a prima facie opinion, but before the Director General sends their report to the parties concerned. In addition to the nature, gravity and impact of the alleged contraventions, the CCI may also consider the effectiveness of the proposed commitments, before accepting or rejecting the commitments.

The detailed procedure for the settlement and commitment mechanisms will be prescribed through regulations.

The decisions of the CCI in respect of the aforesaid settlement or commitment shall not be appealable.

In either case, if (i) the applicant fails to comply with the CCI's order regarding settlement or commitments, (ii) the applicant made false or incomplete disclosures, or (iii) there is a material change in the facts, the CCI's order will stand revoked and withdrawn.¹⁴ The applicant may be liable to pay legal costs up to INR 1 crore and the inquiry regarding abuse of dominant position or anti-competitive agreement may be initiated or restored.

The settlement and commitment framework should help in reducing litigation and resolving complaints at a faster pace and with more flexibility. However, the Amendment Act clarifies that compensation may also be awarded in cases of settlement, which would add to the potential liability of entities looking to avail of the settlement mechanism.

9. Hub and Spoke Cartels

With respect to anti-competitive agreements involving cartels, currently the Act only covers agreements between entities or persons or associations of persons engaged in identical or similar trade of goods or provision of services.¹⁵ Further, proof of a cartel arrangement is dependent on the presence of collusion at the horizontal or vertical levels. As a result, arrangements where a common agent (hub) controls other players situated in the same horizontal level (spokes), with the hub itself being at a separate level. Hub and spoke arrangements make it difficult to establish collusion between the spokes and hence, are not easily covered within the scope of cartels. Resultantly, there were demands for hub and spoke cartels to also be covered within the ambit of the Act.

The 2022 Bill provided that "an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it actively participates in the furtherance of such agreement." (emphasis added). FICCI and ASSOCHAM had raised concerns on the vagueness of the wording, arguing that this may inadvertently cover e-commerce platforms and industry associations which may provide a platform to entities for communications generally, but which the entities then use for collusion. This would cover cases where, for e.g., industry associations call a meeting of their members, but the members misuse the meeting for cartelising. The association may end up being implicated for cartelization despite no intention of playing any part in such cartel.

The Ministry of Corporate Affairs had commented that (a) industry associations have been observed to provide a platform where parties reach agreements to fix prices or allocate markets; and (b) in any case, the presumption was rebuttable. Nevertheless, the Parliamentary Committee agreed that the current wording was not clear and recommended that the proviso should only cover entities which are proven to have intended to actively participate in the furtherance of such agreement.

The Amendment Act, however, now reads "Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such

agreement."¹⁶ Hence, the Amendment Act appears to have disregarded the Parliamentary Committee's recommendation and included both participation (active participation not being required) and the intent to participate in such agreements. Hence, the lack of clarity flagged by the Parliamentary Committee (as well as FICCI and ASSOCHAM) continues to exist.

10. Power to impose lesser penalty

The CCI may, where it is satisfied that any member in a cartel alleged to have violated the provisions of Section 3 of the Act, makes full, true and vital disclosure (including in respect of another undisclosed cartel), the CCI is empowered to grant a lesser penalty on such member of the cartel subject to the terms and conditions set out in the Amendment Act¹⁷. The Amendment Act also sets out the process to withdraw the aforesaid application. However, in such a case the CCI / Director General may use the information in the withdrawn application of the member of the cartel for the purposes of investigation, except the admissions by such applicant.

11. Decriminalisation of certain offences

The Amendment Act has replaced several fines with civil penalties, decriminalizing certain offences like failure to comply with CCI's orders or certain directions of the Director General.

The decriminalization of offences is an ongoing exercise by the Government of India to improve ease of doing business, with the pending Jan Vishwas (Amendment of Provisions) Bill, 2022 also proposing to decriminalize offences under a variety of statutes. The replacement of fines with civil penalties is, therefore, a welcome move since financial penalties can act as effective disincentives, while avoiding the severity of criminal liability at the same time.

12. Other amendments

1. The Amendment Act allows the CCI to not inquire into an anti-competitive agreement or abuse of dominant, if the same is based on same/similar facts and issues decided in a previous order issued by the CCI.
2. The Amendment Act requires CCI to make regulations in light of certain amendments in the Amendment Act such as determination of substantial business operations in India, form and fee for notice of combinations etc. The Amendment Act also lays down a process for the CCI to make regulations under the Act and states that the CCI should ensure transparency while making regulations under the Act by inviting public comments and providing a statement of response to such public comments before / along with publishing regulations.
3. The Amendment Act also permits CCI to issue any guidelines including guidelines regarding the appropriate amount of penalty to be levied for any contravention of the Act.
4. The Amendment Act has now defined turnover and set out certain exclusions such as intra-group sales, indirect taxes, trade discounts etc., as certified by the statutory auditor.
5. The Amendment Act allows parties to call upon experts from the fields of economics, commerce, international trade or from any other discipline to provide their expert opinion before CCI in connection with any matter related to a case.
6. Penalty for making false statement or omission to furnish material information has been increased from INR 1 crore to INR 5 crores.
7. As per the Amendment Act, the Director General shall now be appointed by the CCI with a prior approval of the Central Government as against the erstwhile power being vested with the Central Government.
8. The Amendment Act has set out certain restrictions on the employment of the chairperson and other members of the CCI once they cease to hold office.

9. Increase in the powers of the Director General to investigate contraventions: The Amendment Act has set out increased powers with the Director General (i) to requisition any information, documents, books or papers from any party, (ii) to retain information, documents, books, records, papers, etc. requisitioned by the director General during the investigation for up to a period of 180 (one hundred and eighty) days which may be further increased by a period of 180 (one hundred and eighty) days, (iii) examine on oath any of the officers, employees, agents of a party being investigated and any other person (subject to an approval from the CCI), (iv) powers, procedures and conditions for search and seizures of information, documents, books, , records, papers etc.
10. Second and/or casting vote in case of an equality of votes has been done away with.
11. As per the Amendment Act a deposit of 25% (twenty five percent) of the penalty imposed by the CCI needs to be paid by a person, in order to file an appeal before National Company Law Appellate Tribunal.
12. The Amendment Act also provides for compounding of certain offences by the National Company Law Appellate Tribunal.

TAKEAWAYS

In the absence of detailed regulations on a preliminary perusal of the Amendment Act, it seems that the way more transactions shall be caught under the merger control purview with the introduction of the deal value threshold and the change in the definition of control and shall need notification.

The Amendment Act has made considerable changes to the Act, some of which have been welcomed by the stakeholders such as prima facie opinion for transactions, the settlement and commitment procedure, faster resolution and reduced timeline to complete the proceedings.

On the other hand, provisions such as those on inclusion of global turnover are contrary to existing jurisprudence, and may result in a disproportionate burden on stakeholders.

With these amendments, mergers and acquisitions in India will have to be analysed in greater detail and will need to be proceeded with caution, in order to avoid liability.

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You can direct your queries or comments to the authors

¹Section 5(d) of the Act, as amended through the Amendment Act.

²See [https://prsindia.org/files/bills_acts/bills_parliament/2022/SC%20Report_Competition%20\(A\)%20Bill,%202022.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2022/SC%20Report_Competition%20(A)%20Bill,%202022.pdf).

³Explanation (a) to Section 5 of the Act.

⁴See <https://www.cci.gov.in/combination/faqs>.

⁵Explanation (a) to Section 5 of the Act, as amended through the Amendment Act.

⁶Section 6(b) of the Act, as amended through the Amendment Act.

⁷Section 29(1B) of the Act, as amended through the Amendment Act.

⁸Section 6A of the Act, as amended through the Amendment Act.

⁹Section 19 of the Act, as amended through the Amendment Act.

¹⁰Section 29A of the Act, as amended through the Amendment Act.

¹¹Explanation 2 to Section 27 of the Act, as amended through the Amendment Act.

¹²(2017) 8 SCC 47.

¹³Sections 48A and 48B of the Act, as amended through the Amendment Act.

¹⁴Section 48C of the Act, as amended through the Amendment Act.

¹⁵Section 3(3) of the Act.

¹⁶Proviso to Section 3(3)(d) of the Act.

¹⁷Section 46 of the Act as amended by the Amendment Act.

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