



CLIENT ALERT

February 26, 2020



The Competition Amendment Bill, 2020

The draft Competition (Amendment) Bill, 2020 (**Bill**) attempts to bring in certain significant changes to the Competition Act, 2002 (as amended) (**Act**) to streamline the legal provisions and to incorporate the learnings of the Competition Commission of India (**CCI**) from the last decade. The proposed amendments are largely based on the recommendations made by the Competition Law Review Committee after extensive consultation with various stakeholders. Some of the key proposed changes are as follows:

Enforcement

- 1. Definition of 'Cartel'** – The definition of 'cartel' is proposed to be amended to expressly include *buyers' cartels* (i.e., a cartel where buyers agree on what they would pay for goods and/or services) and *hub and spoke cartels* (i.e., indirect information exchange through a vertically related supplier/distributor/retailer as against information exchange between direct competitors).
- 2. Widening the Scope of Section 3(4)** – The Bill proposes to widen the scope of Section

3(4) of the Act by including the term "any other agreement" to expressly cover arrangements which may not fit within the strict categorization of either a horizontal or a vertical agreement. This is particularly relevant in the context of digital markets wherein there may be unanticipated linkages and innovative arrangements that may not fall strictly within the existing classification of agreements envisaged under the present construct of Section 3 of the Act. The Bill also proposes to revise the definition and scope of certain types of vertical agreements such as tie-in arrangements, exclusive supply arrangements and resale price maintenance to accommodate novel vertical arrangements such as online selective distribution, online sales bans, minimum advertised prices (MAP), dual pricing, etc.

- 3. Extension of IPR Safe Harbour to Dominance Cases** – At present, the Act provides a safe harbour if anti-competitive restrictions are imposed to protect any registered (or in the process of being registered) intellectual property right (**IPR**) in India. However, such

an IPR safe harbour is not available in case of abuse of dominance cases. Given that there was no reasonable basis for such a distinction, the Bill now proposes to allow IPR safe harbour in all cases of enforcement actions (i.e., not just in respect of anti-competitive agreements but also in respect of abusive practices of a dominant enterprise).

4. **Leniency Plus** – A ‘leniency plus’ regime is proposed to be introduced (i.e., offering further reduction in penalties to a leniency applicant for its activities in one market if it is the first to disclose anti-competitive practices / cartel in another market). This would further encourage whistle-blowers to come forward and disclose anti-competitive conduct to the CCI.
5. **Settlement Mechanism** – The Bill has come out with a new mechanism for settlement and commitments by investigated persons / entities for contraventions related to vertical agreements and abuse of dominance. However, this mechanism would not be available in case of cartels.

Merger Control

6. **Introduction of Size of the Transaction Test?** – The Bill proposes to enable the Government, in consultation with the CCI, to introduce novel criteria for triggering the requirement of making a merger filing in India in addition to the existing merger filing thresholds. Such a measure is intended to allow the CCI jurisdiction to review transactions involving non-conventional businesses such as M&A involving big data and innovation-driven digital markets by introducing more suitable merger filing thresholds such as deal size thresholds.
7. **The Control Conundrum** – The Bill proposes to clarify that the test for assessing control would be based on the ability to exercise ‘material influence’ over the management and affairs or strategic commercial decisions.
8. **Relaxation for On-Market Purchases** – The Bill introduces a delayed filing regime for on

market purchases and open offers as long as the acquirer does not exercise any ownership / beneficial rights or interest in the acquired securities including voting rights, receipt of dividends, or any other distributions until the CCI approves such acquisition. The CCI would prescribe the manner and the timeline of such a merger filing separately. Interestingly, this amendment was proposed to be introduced by the CCI through an amendment to its regulations (which does not require the Parliament’s approval) and the process of consultation with stakeholders was already completed. Now, since it has been included as part of the Bill, investors may have to wait for a while until the Bill is passed by the Parliament after the completion of the consultation process for the entire Bill.

9. **Reduction in Review Timelines** – The Bill also proposes to expedite and streamline various timelines and processes that are applicable to the CCI’s merger control approval. The Bill, very significantly, proposes to reduce the time available with the CCI to form its *prima facie* opinion as to whether a combination has caused or is likely to cause an appreciable adverse effect on competition from the existing 30 working days to 20 calendar days from the receipt of the filing. The Bill also proposes to reduce the statutory ‘deemed’ approval timeline by a month to 150 calendar days (plus additional 30 calendar days to clear any defects) from the existing 210 days from the date of making the merger filing. The timelines and the process for modifications / remedy discussions too have been streamlined / shortened.

Other Key Changes

10. **Clarifications on Individual Liability** – The Bill proposes to specifically cap the penalty amount for individuals who were in charge of the conduct of business of the contravening company and the director, manager and the secretary who consented/connived to or were negligent towards the contravention of the

Act. The Bill also proposes to include the term ‘income’ along with turnover for calculating penalty for proprietorships and individuals. The Bill, however, shies away from introducing the concept of ‘relevant turnover’ expressly in the law, in spite of the Supreme Court’s judgment.

11. **Additional Criminal Sanctions** – Whilst the Act at present provides criminal sanctions only for the non-compliance with the CCI’s orders, the Bill proposes additional criminal sanctions in the event a person fails, without reasonable cause, or, refuses to comply with the orders of the investigative wing of the CCI, i.e., the Office of the Director General (DG), to: (a) produce any information; or (b) personally appear; or (c) sign deposition notes. In such cases, the person may be imprisoned and / or fined (with an additional daily fine for continuing non-compliance) or both.
12. **Deposit of Penalty Prior to Appeal** – In an unfavourable move for companies who may receive a penalty from the CCI, the Bill proposes to allow them to exercise their right to appeal only after they deposit equal to or more than 25% of the penalty amount. Considering that the CCI’s penalties mostly run in millions of rupees, requiring penalised companies to deposit such large amounts without letting them exhaust the due process of law may not go down very well with the stakeholders.
13. **Establishment of Governing Board** – In light of the recent judgment of the Delhi High Court in respect of the CCI’s administrative and decision-making powers and its composition, the Bill proposes to make structural changes to the current framework of the CCI by introducing a “Governing Board”. The Bill proposes to segregate the CCI’s administrative and rule-making powers from the adjudicatory powers and former powers to vest in the Governing Board.
14. **Guidance on Issues** – The Bill provides for a specific provision mandating the CCI to publish guidance on the Act or the rules and regulations framed thereunder. It specifically mandates

the CCI to issue guidance on the appropriate amount of penalty for contraventions under the Act.

CAM Comment:

The Bill has been introduced in the Parliament shortly after the release of the report of the Competition Law Review Committee. Most of the proposed amendments are a significant step in the right direction in aligning the law with global best practices and also the learnings of the CCI from the past decade. These changes would bring in significant clarity in the substantive law and efficiency in the implementation procedure.

However, there are a few changes that the Government may want to reconsider. These include the proposed reduction in timelines for merger reviews. At present, the CCI delivers its *prima facie* order well within 30 working days. In fact, timelines for merger review at the CCI have been generally exemplary and this fact is well acknowledged, even internationally. To reduce the timelines to 20 calendar days, would leave the case teams no choice but to issue formal notices for further information with clock stops, a practice that is currently limited to complex cases or incomplete notifications only. The proposed change may superficially appeal to some stakeholders but in the long run, would not benefit industry.

As regards the ‘green channel’, the CCI has already put this in place through an amendment to its regulations in August 2019. Therefore, the Bill may be reworded to have enabling provisions. Similarly, the proposed liberalisation of notification for on-market purchase of shares has already been put to public comment by the CCI late last year. Therefore, the Bill may be simplified with an enabling provision for the CCI to specify the details for such liberalisation.

The CCI’s various decisions on ‘control’ will be formalised with a revised definition that sets the standard at the ability to ‘materially influence’ the management or affairs or strategic commercial decisions of the target.

The enabling provision to introduce a deal value threshold of a deal value threshold would be a welcome change, although aspects like local nexus and staggered consideration will have to be thought out and accounted for. It would also be worthwhile to study the progress of such thresholds in jurisdictions where they were introduced in the recent past, such as Germany and Austria.

On the enforcement side, the scope of cartel enforcement has been increased; and protection of intellectual property is a potential defence to

abuse of dominance, as opposed to it currently being a defence available only in cases involving anti-competitive vertical restraints and other agreements.

The proposed changes to the leniency regime should also result in making the option more attractive for informants against cartels.

The Government has invited comments on the Bill and stakeholders have the opportunity to provide their views until 6 March 2020.

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