cl!ent alert

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ahead of the curve

The Competition (Amendment) Bill, 2022: Reshaping India's Competition Law

The Government of India has introduced the Competition (Amendment) Bill, 2022 (***Bill***), in the Indian Parliament, proposing significant changes to the Competition Act, 2002 (***Act***). The Bill is largely based on the recommendations made by the Competition Law Review Committee, as well as the extensive public consultations held with various stakeholders in 2019.

In view of recent economic developments and the emergence of new business models over the past decade, the Bill aims to streamline legal provisions and incorporate the learnings of the Competition Commission of India (***CCI***) from the past decade. The Bill has reasonably implemented the solutions to various issues that had come up in practice during the past decade. While the ongoing session of the Parliament has been adjourned *sine die* on 8 August 2022, without the passage of this Bill, some of the key changes that you need to know are as follows:

Enforcement

1. Now you can offer commitments or settle a proceeding

The Bill proposes a new mechanism for 'settlement' and 'commitment', allowing parties under investigation (for contraventions related to anti-competitive vertical restraints such as exclusive agreement or resale price maintenance under Section 3(4), or the abuse of dominance under Section 4) to offer commitments in respect of the alleged contravention or settle the matter with the CCI. <u>These options would **not** be available in case of cartels and other anti-competitive agreements</u> between competitors (under Section 3(3)).

- **When can a party offer to commit/ settle:**

  i. <u>Commitments</u>: To be eligible, a party must apply for a commitment before the investigative wing of the CCI, and the Office of the Director General (the ***DG***) complete their investigation and provide their investigation report to the party.

  ii. <u>Settlements</u>: To be eligible, a party must apply for settlement only <u>after</u> the CCI has received the DG's investigation report, but <u>before</u> the CCI's final order is issued.

- **What does a commitment/ settlement entail:**

  A successful commitment/ settlement agreement may incorporate behavioural changes and mode of implementation that the party needs to follow. This will be continually monitored by the CCI. In case of a settlement, in addition to the above, the parties may also be required to pay some monetary penalties. While deciding on any commitment or settlement application, the CCI will consider the nature, gravity, and impact of the alleged contravention.

- **No appeal:**

  The CCI's orders pertaining to any commitment or settlement application (including rejection of a commitment or settlement) will not be appealable. In case the offered commitment or settlement proposal is rejected by the CCI, the DG shall proceed with its investigation into the party's conduct as per usual.

- **Consequences of incorrect disclosures and non-compliance:**

  If a party fails to comply with the CCI's commitment/ settlement order or if it comes to the CCI's notice that the party did not make full and complete disclosure or there is a material change in the facts, the CCI can revoke its commitment/ settlement order (which means the investigation will restart). The party shall also be liable to pay legal cost incurred by the CCI up to INR 10 million (*approx. USD 125,000 / EUR 123,000*).

- **Questions that remain:**

  Notably, where an application for settlement/ commitment is successful, it is unclear if eligible third parties can still seek compensation (under Section 53N) for loss or damage caused to them by the actions of parties under investigation. In any event, third party damages litigation has not taken off in India, except for a few pending matters before NCLAT (*i.e., the appellate tribunal*). There is also no statutory prescription that the CCI's settlement/ commitment order would be a summary order as opposed to a reasoned final order. This standard is best set statutorily to prevent litigation on the subject. Lastly, it is not clear if the party offering to commit/ settle will have to admit liability, i.e. it has contravened the law, as it is an important driver for the parties to avail settlement/ commitments.

2. Penalisation of 'hub and spoke' cartels, facilitators of such cartels

The Bill proposes statutory recognition to 'hub and spoke' anti-competitive arrangements/ cartels. This means that parties that may not be engaged in identical or similar trade, such as a facilitator, an intermediary or an agent shall nevertheless be *presumed* to be party to such agreements, if it appears that such parties have actively participated in or assisted with the pursuit of the objectives of such agreements. Previously, such instances were covered by a wide interpretation of the provisions on cartels/ anti-competitive agreements (Section 3(1)).

3. Aligning penalties for individuals in cartel cases with that of an enterprise

At present, individual penalties are calculated at 10% of the individual's average income recorded in the tax returns for the preceding three financial years. For anti-competitive horizontal agreements (cartels), the Bill now proposes a penalty of up to 10% per cent of the "*income*" of the concerned individual for every year of the continuance of the anti-competitive agreement. This would be in line with calculation of penalties for enterprises involved in anti-competitive horizontal agreements where the penalty is calculated for each year of continuance of the agreement and not just three preceding financial years.

4. Parties wishing to appeal CCI's order will have to be ready to pay more upfront

The Bill proposes to levy a mandatory 25% deposit on any person intending to appeal a CCI order before the NCLAT. Under the prevailing regime, the deposit amount is not specified, and as a matter of practice, the NCLAT (at its discretion) directs parties to deposit 10% of the penalty amount with a few exceptions, where larger deposits by parties (of 25%) were ordered.

Mergers

1. Introducing the deal value threshold

The Bill proposes to introduce a deal value threshold, wherein the value of any transaction – in connection with acquisition of any control, shares, voting rights or assets of an enterprise, or merger or amalgamation – exceeding INR 20 billion (approx. USD 251 million / EUR 247 million) worth of global deal value will now have to be notified, **provided** that the target enterprise in question has 'substantial business operations in India'.

Transactions involving a consideration exceeding INR 20 billion will have to be notified to the CCI even if the target meets the de minimis exemption (although the proposed statutory language is unclear on this point since it does not acknowledge the *de minimis* exemption, which is issued and extended by the Ministry of Corporate Affairs every 5 years).

The 'value of transaction' includes every valuable consideration, whether direct or indirect or deferred. The meaning of 'substantial business operations' remains unclear and the CCI will issue regulations to determine the scope of such substantial business operations.

2. The Bill aims to align the highly debated definition of "control" with the CCI's decisional practice

The new definition of "control" proposes the "material influence" standard that has been elucidated by the CCI in its merger control decisions. At present, the definition of control is circular and vague, when it referred to "control over management and affairs of one or more enterprises".

3. Deemed approval at the prima facie stage

The Bill proposes that if the CCI does not form its *prima facie* opinion (Phase I) within a 20-calendar day period, then the transaction shall be deemed to have been approved and no separate CCI order is required. At present, if the transaction is not approved within the outer time limit of 210 calendar days, then the transaction is deemed to be approved. This change is a consequential one and puts the CCI's merger review on a level playing field with the likes of HSR's initial waiting period.

4. Shorter period for merger review – is it a step to improve ease-of-doing business?

The Act currently provides for a timeline of 210 calendar days for a combination to come into effect, from the day on which the notice has been given to the CCI or the day on which the CCI has passed orders under Section 31. This timeline will be reduced to 150 calendar days.

The CCI will form a *prima facie* view on the transactions within 20 calendar days, as opposed to the current 30 working days. Most cases before the CCI are resolved in the current phase I period of 30 working days (excluding the time taken by the parties to respond to CCI's queries). Even so, in the past three years, the CCI on an average has been disposing off merger notifications within 17-18 working days[1]. The CCI's timelines for closure of merger cases is one of the best, when compared to other (counterpart) agencies.

The proposed timeline revision will make it burdensome for the CCI as well as parties to comply with the stricter timelines. Certain practical challenges with the proposed 20-calendar day timeline for phase I review are as follows:

i. Parties often require more time to respond to the CCI and the 30 working day timeline is a comfortable and definite one for deal planning, given that there are other approvals that parties must seek in any case from agencies such as the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) or regulatory agencies for certain sectors that take longer than 30 working days.

ii. The Bill also seeks to cap the maximum voluntary extension that parties can avail to respond to CCI's queries to 30 calendar days. Capping the maximum extension period to 30 calendar days, along with

1 As per the annual report of CCI for 2020-2021, the average working days for disposal were 18, 18 and 17 respectively in 2018-19,19-20 and 20-21.

imposing a phase I review period of 20 calendar days to complete the deal review, would mean that: (a) parties would be forced to work under accelerated timelines, and (b) case teams would have little patience for defects and this may result in more "pull and refile" or "invalidation" scenarios.

iii. To avoid the above consequences, parties have to get comfortable with the idea of undertaking mandatory "pre-filing" consultation/ "state of play" meeting in each case. Since there is no statutory timeline attached to pre-filing consultations, the CCI can invest more time in working with the parties to perfect the application. This can add to the timelines as there is no certainty regarding the completion of the process.

This one proposed change adversely impacts the current flexibility and integrity of the process in the presentation of each case to the CCI. We therefore believe that this proposed change merits a relook.

5. Enabling time-sensitive market purchases on the stock exchange – providing impetus to listed securities transactions

The Bill thus proposes to exempt notification of combinations if the combination involves:

i. A series of transactions on a regulated stock exchange from coming into effect if the notice of acquisition is filed with the CCI within such time as may be specified by regulations, or

ii. if the acquirer does not exercise any ownership or beneficial rights.

This will enable time sensitive market-related purchases. The Bill further enables the CCI to make regulations towards the much-needed derogation principle for on market purchases or open offers on stock exchanges. The statutory condition will be that the acquirer exercises no ownership or beneficial rights in the securities it has acquired and that a notice is presented to the CCI within the time prescribed by the CCI's regulations. This suggests that a post facto notification is possible for such acquisitions and allows acquirers to exercise their legitimate right towards opportunistic purchases on the stock exchange, balanced with the need for CCI's approval in some cases, and necessarily without worrying about deal sensitivity/ confidentiality concerns.

6. Penalty for material non-disclosure to increase

Where a party to a combination does not disclose full and complete particulars or discloses false particulars in a notifiable combination under the Act, the Bill proposes to increase the upper limit for applicable penalties from INR 10 million (approx. USD 125,000 / EUR 123,000) to INR 50 million (approx. USD 625,000 / EUR 615,000).

Miscellaneous changes

It is noteworthy that the Bill proposes a few other interesting changes such as:

i. Leniency plus provisions that enable a participant in a cartel (also a leniency applicant) during the investigation of the first cartel, to disclose the existence of a second cartel not previously known to the CCI and to get benefit of lesser penalties for both cartels;

ii. Streamlining the definition of "relevant product market" with the newer realities of doing business, adding new factors to assess harm to competition, etc.

iii. The omission of the Chairperson's casting vote, which was never used and had little significance in an adjudicatory setting.

iv. The Bill also proposes to allow for the appointment of the Director General by the CCI, with prior Central Government approval.

v. Further, the Bill proposes predictability in the application of penalties, by requiring the CCI to publish penalty guidelines for contraventions under the Act.

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