

The Competition (Amendment) Bill, 2023: An analysis of key amendments and some unanswered questions

By April 3 2023, both houses of the Indian Parliament had passed the much-awaited Competition (Amendment) Bill, 2023 (**Amendment Bill**), without any debate, ushering in significant changes to the Competition Act, 2002 (**Act**).

The Amendment Bill will become law once it receives presidential assent and is notified in the gazette of India. We anticipate that the process will be completed in the next few weeks (if not days).

The work on future-proofing Indian competition law began almost five years ago. Here is a timeline of developments:

Date	Event
1 October 2018	The Competition Law Review Committee (CLRC) was constituted.
26 July 2019	The CLRC submitted its report to the Ministry of Corporate Affairs (MCA) after extensive stakeholder and industry consultation.
February 2020	MCA released the draft amendments to the Act, basis the recommendations of the CLRC (i.e., 2020 Bill)
July 2022	MCA released a further refined version of the amendments (i.e., 2022 Bill)
August 2022	The 2022 Bill (after lapsing on account of the adjournment of the Parliament) was referred to the Parliamentary Standing Committee on Finance (Standing Committee), which deliberated on the amendments and held some stakeholder consultations.
13 December 2022	The Standing Committee submitted its report with suggestions for further modification of the 2022 Bill.
February 2023	MCA released the current version of the Amendment Bill that has been passed by the Indian Parliament, after considering some of the changes proposed by the Standing Committee.

Our previous client alerts on the 2020 Bill and the 2022 Bill are accessible [here](#) and [here](#). The Amendment Bill aims to streamline legal provisions and incorporate the learnings

of the Competition Commission of India (**CCI**) from the past decade. Below are the key changes:

Enforcement

1. You can now offer commitments or settle a proceeding

The Amendment Bill proposes a mechanism for 'settlement' and 'commitment', allowing parties under investigation (for anti-competitive vertical restraints such as exclusive agreements or resale price maintenance, or contraventions related to the abuse of dominance) to offer commitments or settle the matter with the CCI.

▮ Timing of commitment / settlement:

i. Commitments: Parties may apply for commitment any time after the CCI orders an investigation, but before the Office of the Director General (the **DG**) completes its investigation and shares the investigation report with parties.

ii. Settlements: Parties may apply for settlement only after the parties have received the DG's investigation report, but before the CCI's final order is issued.

▮ Settlement / commitment will comprise the following:

A successful commitment/ settlement agreement may incorporate behavioral changes (including directing changes to such parties' contracts with their customers/ suppliers etc.). These will be continually monitored by the CCI. Additionally, in case of settlements, parties may also be required to pay a settlement amount to the CCI. While deciding on any commitment or settlement application, the CCI will consider the nature, gravity, and impact of the contravention.

▮ No appeal:

The CCI's order pertaining to any commitment or settlement application is not appealable by any party. The CCI will proceed with its investigation into the party's conduct, and pass its final order if it rejects a commitment / settlement proposal.

▮ Role of third parties in settlement / commitment:

While considering the settlement/ commitment proposal, the CCI is required to provide an opportunity



to the DG, as well as to third parties, to submit their objections and suggestions to the proposal. The Amendment Bill allows third parties to seek compensation (under Section 53N of the Act) for any loss or damage caused to them in cases where the CCI passes a settlement order.

▮ Consequences of incorrect disclosures and change in facts:

If a party fails to comply with the CCI's commitment/ settlement order, or if the party did not make full and true disclosure, or in case of a material change in facts, the CCI could revoke its commitment / settlement order (and 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 120,000 / EUR 110,000*)).

▮ The Amendment Bill's misses on recommendations of the Standing Committee:

The Amendment Bill has excluded anti-competitive horizontal agreements (i.e., cartels) from the settlement option, despite recommendations from stakeholders and the Standing Committee. Inclusion of cartels would have been a pragmatic move towards closure of proceedings for companies preferring to settle instead of litigating. The argument that 'cartels' have the benefit of leniency ignores the foundational difference between the method of initiating investigations (leniency) and an efficient mechanism for closure of litigation (settlements).

The Standing Committee had recommended that the compulsory inclusion of third parties in the settlement/ commitment process would dampen enthusiasm and make the process contentious. It had also suggested that parties be allowed to withdraw the application for settlement/ commitment under certain circumstances.

▮ The question of admission of guilt:

After extensive deliberations, the Standing Committee had suggested that the ‘admission of guilt’ by a party agreeing to settle a matter/ offer commitments should not be mandated.

However, the Amendment Bill is silent on whether a party would be deemed guilty if it settles or commits. In case of settlement, third parties would be entitled to claim compensation. Parties considering entering a plea for settlement should be mindful of the possibility of follow-on claims for damages.

2. Penalisation of ‘hub and spoke’ cartels

The Amendment Bill specifically recognises ‘hub and spoke’ anti-competitive arrangements / cartels. Parties which may not be engaged in identical or similar trade, such as a facilitator, a platform, an intermediary, or an agent, shall be *presumed* to be party to such agreements, if it appears that such parties have participated in or intended to participate in furtherance of the objectives of such anti-competitive agreements.

Currently, such instances are covered by a wide interpretation of the provisions on anti-competitive agreements (Section 3(1)).

At first glance, it is unclear whether the ‘hub’ will be eligible for leniency. ‘Hub and spoke’ arrangements will also fall outside the scope of settlement / commitment provisions.

▮ What does this mean for trade associations and other intermediaries?

The standard of proof for establishing cartel arrangements is the preponderance of probability. The CCI’s own precedents on this point emphasise the high likelihood of adverse presumption where context

in communication is unclear. Trade associations and intermediaries need to remain vigilant and ensure clear communication.

3. CCI could now impose penalties based on global turnover of entities

This amendment has come as a surprise to all. The Amendment Bill has expanded the scope of turnover in the context of Section 27 of the Act (the fining provision for anti-competitive agreements and abuse of dominance) to global turnover, derived from all the products and services by a person or an enterprise (as opposed to its approach on penalising parties basis Indian turnover).

This move undoes the jurisprudence built over several years that culminated with the Supreme Court’s decision in the *Excel Crop Care* (AIR 2017 SC 2734) case, where the Supreme Court reasoned that the CCI has to be guided by the principle of proportionality while imposing penalty. Post *Excel Crop Care*, in most cases (though not all), the CCI has imposed penalties based on ‘relevant turnover’.

There are two far reaching implications of this change: (a) the CCI could theoretically fine the infringing party’s income/ turnover from products and services not covered under its anti-competitive conduct; and (b) companies with a global presence may be penalised more than companies with turnover limited to India signaling potential protectionism.

This provision strikes at the heart of the proportionality principle upheld by the Supreme Court, and it is likely to be the subject of judicial scrutiny in the future. There remains some hope if the statutorily mandated penalty guidelines to be issued by the CCI consider this concern.

4. Summoning and deposing legal advisors

The 2022 Bill included a provision allowing the DG to summon and depose, on oath, ‘legal advisors’ of parties under investigation. The Standing Committee concurred with the widespread criticism that this provision evoked. It had suggested that the provision in the 2022 Bill was contrary to the concept of legal privilege encapsulated under Sections 126 to 129 of the Indian Evidence Act, 1872, and the Bar Council of India

Rules. The Amendment Bill has limited the scope of this provision to 'persons employed as legal advisors' by parties under investigation.

Transactions / Mergers

1. Introducing the transaction value threshold

The Amendment Bill has introduced a transaction value threshold (i.e., a threshold based on value/ size/ consideration of a transaction), in addition to the existing asset and turnover criteria, for assessing the CCI notification requirement *vis-à-vis* M&A deals. The transaction value threshold is breached and a notification requirement is triggered if: (a) the value of any transaction - in connection with acquisition of any control, shares, voting rights or assets of an enterprise, or merger or amalgamation - exceeds INR 20 billion (*approx.* USD 240 million / EUR 220 million); and (b) the target enterprise in question (and not 'party to the transaction' as envisaged in the 2022 Bill) has 'substantial business operations in India'.

The Amendment Bill clarifies that the *de minimis* exemption shall **not** apply where transaction value threshold is applicable. Therefore, transactions involving a consideration exceeding INR 20 billion (*approx.* USD 240 million / EUR 220 million) will have to be notified to the CCI even if the target meets the *de minimis* exemption.

The 'value of transaction' includes every valuable consideration, whether direct or indirect or deferred. The CCI will issue regulations to determine the scope of 'substantial business operations' of the target in India.

The Amendment Bill states that the CCI will frame regulations for determining 'substantial business operations in India'. The CCI is yet to release the draft regulations. In the event, the Amendment Bill is notified (i.e., the law comes into force), without the corresponding regulations, then one can expect a flurry of precautionary notifications to the CCI.

The Amendment Bill does not specify if the threshold is restricted to digital and new-age markets. This may result in the CCI reviewing notifications from a variety of sectors unless regulations limit its scope.



Some initial questions:

We expect teething issues in the interpretation of transaction value threshold. Once the Amendment Bill is notified, we expect the CCI to receive at least the following queries:

Whether the CCI expects notifications basis the global transaction value as opposed to India specific transaction value.

The private equity industry may ask whether the transaction value in a transaction with multiple investors would be determined basis the investment amount of an investor or whether this determination would depend on the size of the investment round or the inter-connection of the investments.

Would Schedule I exemptions (i.e., transaction type specific exemptions that allow parties to avoid a filing in certain cases) apply to deals where transaction value thresholds are breached?

2. Aligning 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 decisions. The present definition of control is circular and vague (it refers to 'control over affairs and management of one or more enterprises').

We believe that the CCI may consider identifying a limited set of rights (similar to veto rights identified as rights conferring control in the European Commission's Consolidated Jurisdictional Notice) that would amount to material influence and trigger a notification.

3. Timelines for approval: deemed approval at the *prima facie* stage; and shorter overall time period for assessing notifications

▮ **Shorter approval timelines:**

i. Phase I / *prima facie* approval:

The Amendment Bill states that if the CCI does not form its *prima facie* opinion (Phase I) within a 30-calendar-day period, then the transaction shall be deemed to have been approved. 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.

i. Phase II / cases requiring in-depth inquiry:

Final approval (for complex cases including those that may move to a Phase II review) has been reduced from 210 days to 150 days.

On an average, the CCI has taken 100 calendar days (i.e., just over three months) to approve transactions where a remedy was necessitated (*the above time period is an average of time taken to approve deals basis voluntary remedies in Phase I and those where the CCI conducted an in-depth investigation in Phase II*). Currently, the Act provides the CCI almost six months to conduct an in-depth investigation in cases where it believes there exists an appreciable adverse effect on competition, and an additional period of almost three months for the parties and the CCI to negotiate remedies. The Amendment Bill has truncated these time periods to almost two months for the CCI to conduct an in-depth inquiry and to about two months for the parties and the CCI to negotiate remedies.

The proposed changes in the Amendment Bill are intended to grant deal certainty and shorten approval timelines. Unfortunately, they are likely to prolong transaction timelines add uncertainty.

Parties must prepare for prolonged pre-filing consultations. These are intended to be informal, as per the CCI's Combination Regulations, but, with the Amendment Bill, it would be advisable to use the consultative process to allow the case officers additional time to consider submissions.

It is also fair to expect more requests for information (and associated clock stops) while overburdened case officers perform the administrative function of writing the fairly detailed reports that they are expected to file with the CCI before recommending the transaction for approval.

Some notifications will be 'invalidated' (which loosely translates to a pull and refile situation) where the parties need more time, or in complex fact scenarios. The clock will restart upon the submission of the revised filing.

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

The Amendment Bill dispenses prior approval requirement for combinations involving a series of transactions on a regulated stock exchange, if:

- i. the notice of acquisition is filed with the CCI within such time as may be specified by regulations, and
- ii. the acquirer does not exercise any ownership or beneficial rights or interest, until CCI's approval is received.

This will enable time sensitive market-related purchases. The Amendment Bill 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 imposed requires the acquirer in such transactions to file a notification within a prescribed time (to be introduced via regulations), and receive the CCI's approval before exercising ownership or beneficial rights or interest over the securities it has acquired. A post facto notification is possible for such acquisitions allowing acquirers to exercise their legitimate right towards opportunistic purchases on the stock exchange, balanced with the need for CCI's approval.

5. Definition of turnover

Turnover is a key criterion for determining the applicability of the *de minimis* exemption and the jurisdictional thresholds.

At present, the Act defines ‘turnover’ to include value of goods or services. In practice, basis the guidance received from the CCI’s precedents and its FAQs, turnover is interpreted as the value of revenue from operations as per the latest financial statements. In addition to this, certain precedents of the CCI require the parties to ensure that the value of turnover includes export income and intra-group sales (which can be excluded only in certain limited circumstances).

The Amendment Bill has defined turnover to be determined basis the last available audited accounts and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or customers located outside India. In essence, the turnover in India will purely focus on sales made to third parties in India.

It remains to be seen how the CCI interprets ‘turnover’, since the proposed definition is at variance with some of its decisional practice.

6. Increasing the penalty for material non-disclosure

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 Amendment Bill proposes to increase the upper limit for applicable penalties from INR 10 million (approx. USD 120,000 / EUR 110,000) to INR 50 million (approx. USD 600,000 / EUR 550,000).

Miscellaneous changes

The Amendment Bill other interesting changes:

Enforcement

- i. At present, penalties for individuals are calculated at 10% of their average income recorded in the tax returns for the preceding three financial years. For cartels, the Amendment Bill now proposes a penalty of up to 10% of the income of the concerned individual



for every year of the continuance of the cartel. This would be in line with calculation of penalties for enterprises involved in such cartels where the penalty is calculated for each year of continuance of the cartel and not just three preceding financial years.

- ii. The Amendment 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. However, as a matter of practice, the NCLAT (at its discretion) directs parties to deposit 10% of the penalty amount, and in certain cases, has ordered larger deposits by parties (of 25%).
- iii. The Amendment Bill introduces ‘leniency plus’ provisions that enable a participant in a cartel (who is also a leniency applicant), during the investigation of such cartel, to disclose the existence of a second cartel not previously known to the CCI and get the benefit of lesser penalties for both cartels.
- iv. The Amendment Bill streamlines the definition of ‘relevant product market’ with newer realities of doing business, and adds new factors to assess harm to competition.

Transactions / Mergers

- v. At present, public financial institutions, foreign portfolio investors, banks and Category I alternative investment funds are required to file a post facto notification (i.e., Form III notification) – within seven

days of the trigger event – for the purposes of share subscription, financing facility or an acquisition pursuant to any covenant of a loan agreement or investment agreement. Only a handful of Form III notifications have been filed with the CCI, and the provision was largely interpreted as an exemption for the identified category of acquirers. The CLRC's report also echoed this view. The MCA has considered these recommendations and has done away with the Form III for the identified categories of acquirers.

- vi. Currently, a party is said to have jumped the gun and consummated a transaction without having the CCI's approval the deal was consummated before approaching the CCI; or if any aspect of the deal was consummated while the transaction was under review of the CCI. The Amendment Bill has introduced another dimension to gun-jumping proceedings, applicable if a party to an inquiry under Section 20(1) of the Act (the provision empowering the CCI to

investigate transactions that are not notified to it) does not submit information sought by the CCI.

- vii. The maximum penalty that could be imposed for gun-jumping will now be the higher of 1% of the total turnover or assets of the parties to the transaction, or the transaction value.

More notable changes

- viii. Omission of the Chairperson's casting vote, which was never used and had little significance in an adjudicatory setting.
- ix. The Amendment Bill allows for the appointment of the Director General by the CCI, with prior approval of the Central Government.
- x. The Amendment Bill requires the CCI to publish penalty guidelines for contraventions under the Act.

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