

Kluwer Competition Law Blog

Competition Law 2.0 – An analysis of the 2022 Indian Competition Amendment Bill

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The Competition (Amendment) Bill ('**Bill**') was first published for public consultation in February 2020 and it is only on 5 August 2022 that it has finally been tabled before the Indian Parliament. The Bill is a concerted effort to harmonize competition law with the evolving realities of businesses today. The Bill proposes to amend both substantive and procedural aspects of competition law. We discuss the top ten, key amendments proposed in the section below.

Merger Control

Deal Value Threshold – Introduction of the 'deal value' threshold is one of the major proposals in the Bill. The current notifiability thresholds under the Competition Act, 2002 ('**Competition Act**') are based on the asset and turnover of the parties to the transaction. It was noticed that certain transaction which have the ability to impact competition in the market, especially in the digital economy, were able to avoid scrutiny under the current regime as their asset and turnover value did not breach the notifiability test. The deal value based threshold aims to remedy this position. According to the 'deal value' based thresholds, any acquisition or merger that exceeds a global deal value of INR 2000 crores (approx. USD 252 million), will require an approval from the Competition Commission of India ('**CCI**'), subject to either party having substantial business operations in India. In the present form, there are several open-ended issues which would require clarification by way of subsequent regulations from the CCI. The phrase 'substantial business operations in India' has not been defined in the Bill and will require detailed guidance to bring objectivity and certainty for businesses.

Another imminent challenge is the manner in which 'deal value' will be calculated for the purposes of notifiability as the same can have many forms which can be both current and deferred. In addition, the Bill does not clarify whether the deal value threshold applies only to digital market transactions or all transactions in general. In the absence of such clarity, the deal value threshold can open flood gates for notices filed out of abundant caution given the steep penalty implications for gun-jumping and non-notification of transactions under the Competition Act.

Expedited Review Timelines – The Bill proposes a reduction in the review timeline from the existing 210 days to 150 days, extendable for another 30 days. Further, the Bill also proposes a sharp reduction in the existing timeline of 30 days, to 20 days, for the CCI to provide its *prima facie* view on a combination. This proposal is likely to increase pre-notification consultations with the CCI and the parties will now have to ensure that the notice is as comprehensive as possible to avoid risking invalidation of the notice.

Exemption for Stock Market Purchases – The Bill has introduced a new provision which allows stock market purchases to be exempted from the standstill obligations under the Competition Act. In the past, stock market purchases made as part of a series of transactions, were held to be subject to the standstill obligations which created hurdles for businesses and resulted in gum-jumping penalties. The proposed amendment allows the acquirer to file a subsequent notice for the stock market purchases however, prevents the acquirer from exercising any rights in such shares until receipt of CCI approval.

Increased penalty for making omissions or false statements – The penalty for omitting to supply information or making false statements has been increased from INR 1 crore to INR 5 crore.

Behavioural Provisions

Hub & spoke cartel – The definition of cartel under the Competition Act now recognizes hub and spoke cartels. The present construct of the Competition Act does not include horizontal agreements which have been facilitated through entities which are not engaged in identical or similar trade. As such, this statutory recognition attributes the same extent of liability on facilitators of horizontal agreements such as trade associations etc., and vertically related enterprises such as suppliers, distributors etc., as the horizontally related cartel participants.

Settlement and commitments – The Bill has introduced a mechanism for settlement and voluntary commitments by parties under investigation by the CCI, for anti-competitive vertical agreements and abuse of dominance. The stage of investigation is critical while deciding to offer commitments or entering into a settlement. While commitments can be offered from the initiation upto anytime before conclusion of an investigation by the office of the Director General ('DG'), settlements on the other hand can be offered upon completion of the investigation but before a final order has been passed by the CCI. The Bill at present does not clarify the modalities for applicability and operation of the settlement and commitments regime.

Introduction of a limitation period – So far, there has not been any time limitation on filing of

information before the CCI. The Bill has now introduced a limitation period of 3 years from the date on which the cause of action arose, for filing an information. The CCI has the power to condone the delay upon showing sufficient cause. It must be noted that there is no time limitation on *suo moto*.

Leniency plus regime – The Bill bolsters the leniency regime and introduces the leniency plus mechanism which incentivizes parties who have already applied for leniency for their participation in one cartel, to disclose the existence of another cartel by offering penalty reduction for both, existing as well as the newly exposed cartel. This is especially beneficial for companies operating in multiple markets which may have exposure to more than one cartel.

Withdrawal of leniency application – Leniency applicants can now withdraw their application for seeking reduction in penalty, however, the information provided to the CCI / DG until that point may still be used for the purposes of the investigation and identification of violation of the Competition Act. Admission of guilt made by the withdrawing party cannot however, be used by the CCI/DG for their investigation. This provides some relief to the parties, especially in cases where a leniency application has been made in haste or under duress.

Expansion in DG's powers – The DG will now possess greater power to seek information including information from third parties in the course of an investigation. Additionally, the Bill allows the DG to summon 'agents' of an enterprise and record their statements under oath, in addition to summoning and examining the officers of an enterprise. The term 'agent' is very expansive and includes bankers, auditors and legal advisors of a party. It remains to be seen whether it also includes external legal counsel.

Conclusion

The Bill is a welcome move as a whole and will modernize the competition law regime in India. Nevertheless, for the amendments to be implemented successfully, the CCI will be required to come out with detailed guidelines and regulations. Given the stricter review timelines for merger control, introduction of deal value threshold and enhanced penalties for omissions, the CCI's approval in the future must be a headline item while structuring transactions and drafting deal documents. Similarly, the changes proposed to the leniency regime and introduction of settlements and commitments, would require well thought out litigation strategies for behavioural cases. It remains to be seen the final shape and form the amendments take.

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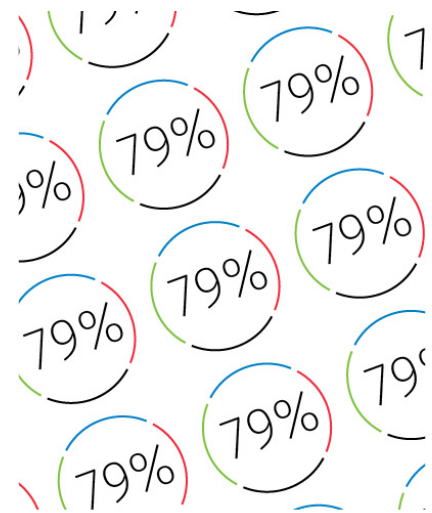
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