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2023 Amendments to Indian Competition Law: Bringing Down The Hammer on Anti-competitive Conduct (Part 2)

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The Competition (Amendment) Act, 2023 (***Amendment***) received Presidential assent on 11 April 2023, after it was passed by both houses of the Indian Parliament. The Amendment will take effect once the Central Government notifies its various provisions in the Gazette of India, possibly in a phased manner. Amendments that are to be clarified through regulations issued by the Competition Commission of India (***CCI***) will only be effective once such regulations are published.

The Amendment brings in significant and far-reaching changes to rein in anti-competitive and abusive conduct in the market. While some of these changes have been discussed and refined over the past 5 years, others are last-minute additions that have taken everyone by surprise.

In the second part of a two-part series (Part 1 is available here), we discuss key changes made by the Amendment to provisions relating to anti-competitive conduct and abuse of dominance under the Competition Act, 2002 (***Act***), along with their implications on businesses. Part 1 addressed amendments relating to the merger control regime in India, and its implication on M&A.

Commitment and settlement mechanism

The Amendment introduces a mechanism for 'settlement' and 'commitment', allowing parties under investigation (for an abuse of dominant position or anti-competitive vertical restraints) to offer commitments or settle the matter with the CCI. Importantly, a party may opt to offer commitments to close an investigation any time after the commencement of the investigation but before the Office of Director General **(*DG*)** completes its investigation and shares the investigation report with parties; whereas a party may opt to settle the matter with the CCI any time after the DG has shared the findings of its investigation with parties, but before the CCI passes its final order in the matter.

While settlement and commitment agreements may include behavioural or structural changes (such as changes to parties' contracts with their customers/suppliers), a settlement agreement may additionally involve payment of a settlement amount. Parties will also have the opportunity to negotiate the terms of settlement/commitment agreements with the CCI.

This change aligns the Act with developed competition regimes such as the European Union, the United Kingdom and Singapore.

A significant departure from the recommendations (available here) of the Parliamentary Standing Committee on Finance (***Standing Committee***) is the exclusion of cartels from the settlement option. The inclusion of cartels would have been a pragmatic move towards the 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 (i.e., leniency) and an efficient mechanism for closure of litigation (i.e., settlements).

The Standing Committee had also suggested that 'admission of guilt' should not be mandated for a party agreeing to settle/offer commitments. An admission of guilt *inter alia* may debar parties from participating in public tenders or be regarded as an aggravating factor against them in future litigation. While the Amendment is silent on whether a party would be deemed guilty if it settles or commits, regulations to be framed by the CCI (after public consultation) may bring some clarity on this question.

Crucially, any order of the CCI on commitment/settlement applications is not appealable by any party, despite various stakeholders having concerns about the viability of the settlement/commitment mechanism without a right of appeal.

In case of settlements, third parties would be entitled to claim compensation for any loss or damage caused to them. Parties considering a plea for settlement should be mindful of the possibility of follow-on claims for damages.

The CCI is required to consider objections and suggestions raised by the DG and third parties while deciding on settlement/commitment proposals. The Amendment does not pay heed to the Standing Committee's recommendation that the participation of third parties should not be mandatory and be left to the CCI's discretion. The compulsory inclusion of third parties in the settlement/commitment process will make the process as contentious as ordinary proceedings before the CCI.

Penalising 'hub and spoke' cartels

The Amendment specifically recognises 'hub and spoke' cartels. This provision aims to capture collusive anti-competitive agreements between parties which are not engaged in the same or similar businesses, such as a facilitator, platform, intermediary, or an agent (i.e., the 'hub') on one hand, and one or more competitors (i.e., the 'spokes') on the other hand.

The Competition (Amendment) Bill, 2022 (***2022 Bill***) presumed a party's involvement in anti-competitive conduct only if it 'actively' participated in the furtherance of such an anti-competitive agreement. It was argued by stakeholders that the vagaries associated with interpreting 'active' participation may implicate trade associations and online platforms for the mere provision of a platform to industry participants (without intending to participate in the collusive activity). The wording in the Amendment states that 'hubs' shall be presumed to have contravened Section 3(3) of the Act for *either* participation *or* an intention to participate in a cartel.

'Hub and spoke' arrangements will also fall outside the scope of the settlement/commitment mechanism. What remains unclear from the Amendment, however, is whether the 'hub' will be eligible for leniency.

Computation of penalties

This change has come as a surprise to all – the Amendment expands the scope of turnover in the context of penalties that may be imposed for anti-competitive agreements and abuse of dominance to global turnover derived from all products and services provided by a person or an enterprise. Notably, this change did not feature in the 2022 Bill and was not examined by the Standing Committee either.

This move undoes the Supreme Court's seminal decision in *Excel Crop Care (AIR 2017 SC 2734*), where it reasoned that the CCI must be guided by the principle of proportionality while imposing a penalty. At present, 'relevant turnover' is calculated based on the market that the anti-competitive conduct affects, i.e., the affected products and services in India. 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 penalise 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 present largely in India, signalling potential protectionism. The CCI may address these concerns through the statutorily mandated penalty guidelines that will be framed in due course (though we don't expect this to be an immediate priority for the CCI), which may possibly draw inspiration from the fining practices of developed competition law jurisdictions.

Only time will tell whether the penalty guidelines to be issued by the CCI address concerns regarding this provision, or whether this amendment will hold up in judicial scrutiny against the proportionality principle promulgated by the Supreme Court.

'Leniency Plus' programme

The Amendment introduces a 'leniency plus' provision that enables a cartel participant (who is also a leniency applicant), to disclose the existence of a second cartel not previously known to the CCI and get the benefit of lesser penalties for both cartels. This change brings added incentive to cartel participants to proactively disclose the existence of other cartels to the CCI, allowing the CCI to not only discover a greater number of cartels but also fast-track their investigation.

Summoning and deposing legal advisors

The 2022 Bill included a provision that allowed the DG to summon and depose, on oath, 'legal advisors' of parties under investigation. The Standing Committee, concurring with the widespread criticism that this provision evoked, suggested that this provision was contrary to the concept of attorney-client privilege encapsulated under the Indian Evidence Act, 1872 and the Bar Council of India Rules. The Amendment has now limited the scope of this provision to 'persons employed as legal advisors' by parties under investigation.

Other notable changes

- ***3-year limitation period for filing complaints***: The Amendment has introduced a limitation period for approaching the CCI, which bars the CCI from entertaining a complaint where the cause of action is more than 3 years old. The CCI may accept information/reference filed after 3 years from the cause of action, if it is satisfied that there was sufficient cause for the delay and after recording its reasons for condonation of delay. The Act does not presently prescribe a limitation period for filing complaints.
- ***Power to call expert witness***: The Act does not allow the parties to an investigation to call an expert witness. In practice, parties to an investigation usually file reports/opinions of experts (such as economists) along with their legal submissions to support their claims. The Amendment now recognizes the right of a party to independently call an expert from the fields of economics, commerce, international trade, or any other discipline.
- ***Appeal against CCI's order set to become an expensive affair*:** The Amendment requires parties intending to appeal a penalty imposed by the CCI before the NCLAT to mandatorily deposit 25% of the penalty imposed. 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%).
- ***'Meeting competition' defence*:** The Amendment clarifies that a 'condition or price' which may be imposed by a dominant entity to 'meet the competition' will not be seen as an imposition of 'unfair or discriminatory' condition or price, in relation to the purchase or sale of goods/services. Previously this defence was limited to discriminatory conditions or prices (excluding unfair conditions or prices).

This entry was posted on Thursday, May 4th, 2023 at 11:30 am and is filed under Competition Commission of India, Competition enforcement, Competition policy, India
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