

Proposed Amendments to India's Competition Law: An Update

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On February 12, 2020, India's Ministry of Corporate Affairs (MCA) published a draft Competition (Amendment) Bill, 2020 (Bill) to the Competition Act, 2002, as amended (Act). The Bill's key amendments, if adopted, would (i) enhance the Competition Commission of India's (CCI) accountability, (ii) expedite the closure of enforcement cases, and (iii) address under-enforcement in merger control, with the potential of adding a deal value threshold.

As of the current date the Bill is pending consideration by the Indian Parliament, with significant delays arising out of the COVID-19 pandemic. However, stakeholders are hopeful that the Bill will be deliberated upon during the upcoming parliamentary sessions.¹

Against this backdrop, set out below is an overview of the significant amendments proposed by the Bill.

Structural Changes

Formation of a Governing Board to Enhance the CCI's Accountability

The Bill proposes the formation of a 10-member "Governing Board." These members would be appointed by the Central Government (i.e., executive branch of the Government of India). The Governing Board will have supervisory powers over the CCI and have the power to make certain regulations.

The introduction of the Governing Board is expected to reduce the CCI's administrative load and increase its accountability. While the amendment is welcome, stakeholders have cited concerns with the Bill's construct:

- the Bill does not clearly define the scope of the Governing Board's supervisory powers; and
- the Bill does not prescribe criteria for the appointment of certain members to the Governing Board.

It remains to be seen if appropriate mechanisms to address these concerns will be incorporated into the Bill pursuant to parliamentary deliberations.

Substantive Amendments

Introduction of "Settlements" and "Commitments" For Speedy Disposals

Currently, the Act does not allow the CCI to settle complaints; as a result, the CCI effectively has to decide every complaint before it on the merits. The Bill introduces two dispute resolution mechanisms, namely settlements and commitments, to alleviate this issue.

As envisioned in the Bill, the first mechanism (i.e., settlements) would allow a party to apply for closure of the CCI's proceedings after the Director General (DG) (i.e., the CCI's investigative wing) has submitted its report to the CCI but prior to the CCI's final finding. The second mechanism (i.e., commitments) may be applied for after initiation of the DG's investigation but before submission of the DG's investigation report to the CCI. Both mechanisms would be available where the subject matter of the

¹ The next round of Parliamentary sessions in India are scheduled to begin in the last week of November 2021.

investigation is either anticompetitive vertical agreements or abuse of dominant position, but not cartelisation.

The settlement procedure, if adopted, aims to enhance early closing of investigations. Therefore, the framework should be designed to encourage participation by the parties being investigated. To that end, as drafted, the proposed framework in the Bill poses the following challenges:

- an order of settlement and commitment is non-appealable and may be revoked by the CCI. However, the Bill does not clarify the (i) circumstance of such revocation or (ii) provide a limitation period beyond which the order cannot be revoked. To introduce finality and certainty, a limitation period should be introduced in the Act;
- the Bill does not clarify whether parties that have successfully secured an order of settlement or commitment can be proceeded against in a “compensation” or damages proceeding; and
- the framework does not specify the impact of a party’s admission if a settlement or commitment proposal is rejected by the CCI.

Prescribing New Thresholds For Merger Notifications

Currently, the Indian merger control thresholds are based on the value of global and Indian assets or turnover of the transacting parties. Highly valued targets in the digital sector may not have a significant asset base or generate significant turnover. Instead, their valuations come from access to large customer bases and data / intellectual property. Consequently, these transactions are not notifiable in India.

The Bill empowers the Central Government to provide new merger control thresholds; and, there is a distinct possibility that the Central Government may introduce a “deal value” threshold. Corporate stakeholders and the Indian competition bar have recommended that the Central Government should exercise caution when introducing deal value thresholds to ensure that such thresholds do not add to the regulatory burden of start-ups and that only those transactions having significant economic links to India are caught by any new thresholds.

Procedural Amendments

Penalty Deposits to Enhance Recovery

Certain CCI orders (e.g., penalty orders in cases of abuse of dominant position and anticompetitive agreements) can be appealed before the National Company Law Appellate Tribunal (NCLAT). Under the Bill, the right to appeal such orders will be conditional upon the payment of a “penalty deposit” determined by the CCI. However, the amount cannot exceed twenty-five percent of the total penalty amount. The amendment is designed to enhance the predictability of penalty recovery and reduce frivolous appeals.

Because the Act gives the CCI the power to impose significant fines,² a twenty-five percent penalty deposit could prove onerous for appealing parties. Further, the Bill does not clarify certain practical aspects concerning penalty deposits. For instance, if the appeal is lost, will accrued interest be adjusted against the penalty levied? Conversely, if the appeal is successful, will the party be entitled to receive the interest accrued on the penalty deposit?

² Under Section 27 of the Act, the CCI may impose a penalty of up to 10% of the average turnover for the last three preceding financial years, on an enterprise that has entered anticompetitive agreements or engaged in abuse of dominance. For cartels, the CCI may impose a penalty for each year of the continuance of the cartel of up to three times the cartel member’s profit or 10% of the turnover for each year of the continuance of such agreement, whichever is higher.

Reduction in Merger Control Timelines

The Bill proposes the reduction of the merger control timelines from the existing 210 calendar days to 150 calendar days. Interestingly, the amendment does not allow the CCI any flexibility to extend the timelines based on the complexity of the transaction under review. This could impact the CCI's ability to assess transactions meaningfully and may result in the CCI passing more conditional (as opposed to unconditional) approvals as a reaction to the approval time limitation. Reduction of timelines is a step in the right direction by the Bill as definitive and reasonable waiting periods allow parties to close transactions in a timely fashion.

Conclusion

The proposed adoption of internationally recognized mechanisms and introduction of tools to enhance the review of potentially underenforced markets in the Bill strongly evidence the Indian competition regime's forward-looking approach. Further, the amendments, if adopted, are well-positioned to meet their objective of enhancing the CCI's accountability, increasing case disposal rates and tackling potential under-enforcement in dynamic sectors.



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