



**Standing Committee Report Recommends Sweeping
Changes to the Indian Competition (Amendment) Bill, 2022**

The Competition (Amendment) Bill, 2022 (Bill)¹ was tabled before Lok Sabha, the lower house of the Indian Parliament on 5 August 2022. The Bill, which intends to introduce some wide-ranging changes to the Competition Act, 2002 (Competition Act), was sent to the Joint Parliamentary Standing Committee on Finance (Committee), seeking a report within 3 months.

After extensive consultations with various stakeholders, the Committee presented its report before both the houses of the Parliament on 13 December 2022. By way of its recommendations, the Report has suggested various meaningful suggestions to the Bill in an effort to create a balance between industry expectations and global best practices.

Set out below are some of the noteworthy changes proposed by the Committee, along with our take on them.

S No.	Subject Matter	Bill Provisions	Stakeholders' Key Concerns	Recommendations of the Committee	KCO Comment
1.	Deal Value Threshold (DVT)	The Bill proposes to introduce an additional threshold, over and above the asset and turnover based jurisdictional thresholds. This residuary jurisdiction would enable the CCI to review any transaction whose valuation (direct or indirect) is more than INR 2,000 crore (~ USD 245 million), and where either party to such proposed transaction has "substantial business operations in	<ul style="list-style-type: none"> Whether the <i>de minimis</i> exemption will override the DVT or not.² The ambiguity as to how deal value would be computed, especially for grey area transactions, and if it would include value attributed from global operations or just India operations (of the enterprise).³ Whether SBOI would entail physical presence of the enterprise in India or the presence of its user base (reflective of its market position) in India.⁴ 	<p>Committee recommended the following:</p> <ul style="list-style-type: none"> The proposed amendment should <u>explicitly state that the computation of deal value shall be clarified through regulations.</u> A <u>clarification that the "enterprise" in the proviso refers to the party that is being acquired,</u> to eliminate any ambiguity as to the local nexus requirement for applying the DVT. A <u>review of the deal value thresholds by the Central Government should be undertaken on a yearly basis (rather than</u> 	<p>While the Committee did not explicitly clarify the interplay between the <i>de minimis</i> exemption and the proposed DVT, the Ministry of Corporate Affairs (MCA) commented that the proposed DVT shall override the <i>de minimis</i> exemption.⁵ This clarification is helpful and apposite, given that the purpose of the DVT would be defeated if the <i>de minimis</i> exemption overrode its applicability.</p> <p>Further, while the Committee shared the industry's apprehensions regarding the</p>

¹ [Competition \(Amendment\) Bill, 2022.](#)

² ¶3.4(c)(iv), page 10.

³ ¶3.4(b), page 9 and ¶3.8(a), page 12.

⁴ ¶3.4(a), page 9.

⁵ ¶3.5, page 10.

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		<i>India (SBOI)".</i>		after every two years).	ambiguities around the computation of deal value and the scope of SBOI, it does not comment upon how these interpretational issues could be navigated. Instead, its recommendation is limited to explicitly stating (in the proposed Section 5(d) and its proviso) that subsequent regulations will clarify these aspects.
2.	Codification of the Standard for Control in Indian Competition Law	The proposed amendment has sought the meaning of control to be clarified to mean the <i>ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decision.</i>	<ul style="list-style-type: none"> • Test of control should not be material influence, but instead positive control.⁶ • Ambiguity as to what are the parameters for determining material influence.⁷ 	Noting that the CCI has already been using "material influence" as the standard of control in its decisional practice, the Committee suggested that the <u>CCI should pass regulations to unambiguously define as to what is meant by exercise of material influence.</u>	Since there is limited guidance available on what amounts to exercise of material influence, the Committee's recommendation for the same to be clarified by way of regulations is a welcome move. Whether the formalisation of material influence as a standard of control would result in the CCI expecting parties to use the same (rock-bottom) standard for assessment of notifiability of the transaction, particularly the

⁶ ¶3.16, page 18.

⁷ ¶3.14, page 17.

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					<i>de minimis</i> thresholds remains to be seen.
3.	Procedural Timelines	The Bill has sought to shorten the overall review period from 210 days to 150 days in addition to cutting down the 30 day period for the CCI to form its <i>prima facie</i> opinion to 20 calendar days.	<ul style="list-style-type: none"> The CCI requested for increased flexibility to allocate time to various stages of reviewing a transaction, so that it can regulate its procedure and prescribe timelines for intermediate stages, subject to an outer limit of 150 days.⁸ Various other stakeholders highlighted how the reduced timelines could lead to more requests for information being issued by the CCI (to pause the clock) and a heightened risk of invalidation of the notification form.⁹ 	Noting the grievances of various stakeholders, including the CCI, that reducing the timelines would lead to an enormous burden on an understaffed CCI, <u>it has been recommended that the timelines should not be changed.</u>	The CCI's track record in approving transactions in a timely manner is widely known. It appears that the Committee too recognised this uniform trend and that there was nothing broken here warranting a cure.
4.	Ability of Director General (DG) to depose legal advisors	The Bill has sought to include legal advisors within the ambit of an agent, thereby allowing the DG to depose such legal advisors.	Stakeholders argued that the proposed amendment would breach attorney client privilege which is protected by the Indian Evidence Act and judicial decisions. ¹⁰	Taking note of strong reservations from across all quarters in relation to allowing the DG to depose external legal advisors as agents and the same being violative of the universally recognized principle of attorney-client privilege, the Committee has recommended that <u>the amendment expressly clarify that the inclusion of such a provision should not be in violation of the</u>	The recommendation is welcome. If accepted, the clarification would allow the DG to depose in-house legal counsels as opposed to external legal advisors thereby honouring the sacrosanct attorney-client privilege.

⁸ ¶3.24, page 23.

⁹ ¶3.25, pages 23-24.

¹⁰ ¶3.31, pages 26-27.

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				<u>Indian Evidence Act, 1872 or any other statutory instrument that protects attorney-client privilege.</u> ¹¹	
5.	Framework for Settlement and Commitment (S&C)	Incorporation of a settlement and commitment mechanism will now allow the CCI to accept settlements and commitments from parties and close investigations quicker – rather than requiring the CCI to pass a final order on merits on each occasion.	<ul style="list-style-type: none"> Stakeholders highlighted several ambiguities around the S&C mechanism such as (i) whether an admission of guilt would be necessary; (ii) whether previous S&C orders would be considered as recidivism/aggravating circumstance; (iii) permissibility of follow-on damages/compensation proceedings; and (iv) whether the remedies would be limited to monetary penalties or also include behavioral remedies;¹² Inclusion of cartels within the scope of the S&C framework was proposed.¹³ Appeals to be allowed from orders passed by the CCI under the S&C framework.¹⁴ 	<p>Key recommendations in relation to the S&C framework are as follows:</p> <ul style="list-style-type: none"> <u>cartels to be included within the ambit of settlements;</u>¹⁵ to protect the S&C framework from third-party interference, <u>the requirement (on the CCI) to seek objections from third-parties should be discretionary and not mandatory;</u>¹⁶ <u>parties to be allowed to withdraw their application within 7 working days from the date of a S&C hearing;</u>¹⁷ <u>prima facie admission of guilt should not be admitted;</u>¹⁸ 	<p>The Committee's recommendation s seem to be contradictory to the extent that it has proposed no prima facie admission of guilt, while also recommending that compensation proceedings should be permitted. It is pertinent to note that the MCA has commented that compensation proceedings cannot arise out of S&C orders.²²</p> <p>Further, the inclusion of cartels within the settlement framework is welcome, since it will augment the CCI's anti-cartel enforcement through the lesser penalty regime.</p>

¹¹ ¶3.40, page 29.

¹² ¶3.48, page 35.

¹³ ¶3.46, page 33.

¹⁴ ¶3.48, page 35.

¹⁵ ¶3.53, page 38.

¹⁶ ¶3.53, pages 37-38.

¹⁷ ¶3.53, page 39.

¹⁸ ¶3.53, page 39.

²² ¶3.51, page 36.

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				<ul style="list-style-type: none"> no appeals to lie to the NCLAT from an S&C order;¹⁹ applicants should be allowed to apply to the CCI to reconsider an S&C order;²⁰ and compensation proceedings (for affected consumers) should be permitted through separate regulations;²¹ 	Lastly, while the Committee has recommended that the CCI allow parties to seek a review of its S&C orders, it has not considered how the review of such orders by the CCI itself might result in the violation of principles of natural justice. Further, it remains to be seen if an S&C order is a judicial order or an administrative one.
6.	Hub and Spoke Cartels	The Bill has sought to extend the applicability of cartel related provisions to an enterprise or an association of enterprises or a person or association of persons. Such an entity, not engaged in identical or similar trade, shall also be presumed to be part of the agreement if it actively	<ul style="list-style-type: none"> Stakeholders highlighted that the scope of "active participation" needs to be clarified.²³ 	To avoid interpretational ambiguity, the Committee has proposed incorporating " <i>if it is proved that such person intended to</i> ", to the proposed amendment. This will help clarify that parties not engaged in identical or similar trade, shall be presumed to be part of the agreement only if it is proved that such person intended to actively participate in furtherance of such an agreement.	The Committee's recommendation introduces the element of intent to hold accountable persons who actively facilitate cartels with an intent. This is likely to come in handy to unaware intermediaries whose platforms are used for collusion by rival entities.

¹⁹ ¶3.53, pages 40, 42.

²⁰ ¶3.53, page 39.

²¹ ¶3.53, page 39.

²³ ¶3.55, page 43.

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		participates in furtherance of such agreement.			
7.	Requirement of a judicial member	Issue not directly addressed but the Committee has referred to Clause 9 of the Bill which has proposed introducing "technology" in Section 8(2) of the Competition Act.	<ul style="list-style-type: none"> Stakeholders proposed having a majority of judicial members in the CCI, in light of the Delhi High Court's judgement in <i>Mahindra Electric v. the CCI</i>.²⁴ 	Given that the decision of the Delhi High Court in <i>Mahindra Electric v. the CCI</i> is sub-judice before the Supreme Court of India, the <u>Committee considered it appropriate to await its outcome.</u>	Re: judicial member, while some may call this a missed opportunity, it is fair to say that the Committee has adopted a safe approach given that the issue is pending before the country's top court. That said, a recommendation to have a member who has background in technology is worthwhile in view of the rising enforcement in the tech sector.
8.	IPR as defense of abuse of dominant position	Issue not directly addressed but the Committee has referred to Clause 5 of the Bill.	<ul style="list-style-type: none"> Stakeholders proposed carving out a specific IPR defense for abuse of dominance.²⁵ 	Fearing that in the absence of an explicit IPR related exemption for abuse of dominance, the CCI would not allow a dominant entity to provide for reasonable protection of its IPR, the <u>Committee has recommended the carving out of IPR related exemption for abuse of dominance cases.</u>	By extending IPR related exemptions to Section 4, the Committee has attempted to ensure consistency with the rights of an IPR holder. Notably, the IPR defence is at present only available as a safe harbour under vertical restraint provisions.
9.	Effects-Based Test	Issue not addressed	<ul style="list-style-type: none"> Stakeholders proposed an effects based test to be introduced to 	Noting inconsistency in	It appears that the Committee

²⁴ ¶3.62-3.63, pages 47-48.

²⁵ ¶3.69, page 50.

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			Section 4 of the Competition Act. ²⁶	applying an effects-based test in abuse of dominance cases under Section 4, the Committee has recommended that the effects-based test should be incorporated within the legislative framework of Section 4 and Section 19(3) of the Competition Act. ²⁷	has adopted a pro-business view. Consistency and predictability are no doubt two vital pillars in rendering judicial certainty, however, an effects-based test will mean higher burden of proof on the CCI to sustain a case of abuse of dominance, which in any case are hard to prove.

CONCLUDING REMARKS:

Within a condensed timeline of 3 months, the Committee has indeed achieved a lot by addressing several issues and gaps in the Bill. However, several key issues such as merging of the office of the DG within the CCI and possible repercussions on DG's autonomy in investigation, the mandatory pre-deposit of 25% penalty amount with the appellate tribunal as a prerequisite to filing of the statutory appeal, remain unanswered. Similarly, in relation to the S&C framework, while it is laudable that cartels too have now been recommended to be eligible for settlement, the possibility of the S&C order being revoked due to a "*change in material facts*" still eludes the Committee's recommendation. Further, while the Bill has introduced a 3-year limitation period for filing an information (complaint) under the Competition Act, it is unclear whether the limitation period shall run from the date of initiation of the alleged anti-competitive behaviour or from the conclusion of the alleged anti-competitive behaviour. The report of the Committee has now been tabled before both the houses of the Parliament and it is expected that the Bill will be taken up in the upcoming Budget Session of the Parliament. Whichever direction the Bill heads, the Bill and the recommendations of the Committee will help fine-tune the Bill making it more robust and transparent.

- Sagardeep Rathi (Partner), Anisha Chand (Partner), Nilav Banerjee (Associate) and Rishabh Vohra (Associate)

For any queries please contact: competition.alert@khaitanco.com

²⁶ ¶3.77, page 56.
²⁷ ¶3.80, pages 57-58.

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