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Analysing developments impacting business

INDIAN COMPETITION AMENDMENT BILL RECEIVES PRESIDENTIAL ASSENT

12 April 2023 [Background](#)

The (Indian) Competition Act, 2002 (Act), was enforced in a staggered manner between 2009 and 2011. Ever since, while the subordinate regulations were amended from time to time, the Act itself remained unamended.

In 2019, on the tenth anniversary of the enforcement of the Act, a process of review was initiated, following the report of the Competition Law Review Committee. After an enduring four-year long period of deliberation, the Competition (Amendment) Bill, 2023 (CAB23) has now received assent from the President of India after it was cleared by the Indian Parliament in the last few weeks.

A few significant events preceding the passing of the CAB23 are outlined below.

- The Competition (Amendment) Bill, 2022 (CAB22) was tabled before the Lower House of the Indian Parliament on 5 August 2022. Our detailed comment on the CAB22 is [here](#).
- The Joint Parliamentary Standing Committee on Finance (Standing Committee) was directed to consult stakeholders and provide its recommendations. Our observations on the recommendations of the Standing Committee are discussed [here](#).
- Weaving in the recommendations of the Standing Committee, the Ministry of Corporate Affairs, Government of India (MCA) modified the CAB22 on 8 February 2023. We discussed these additions to the CAB22 [here](#).
- The updated CAB22 (now CAB23) was unanimously passed by the Lower House of the Indian Parliament on 29 March 2023 and then by the Upper House of the Indian Parliament on 3 April 2023. The CAB23 received the assent of the Hon'ble President of India on 11 April 2023 to become the Competition (Amendment) Act, 2023 (Amendment Act).

[Major Highlights](#)

The key changes brought about by the Amendment Act are captured below.

A. *Merger Control*

- Introduction of deal value threshold: A new threshold has been introduced for the notification of transactions. Parties will now have to notify a transaction to the Competition Commission of India (CCI) if the deal value of the transaction is more than INR 2,000 crore (~ USD 245 million) and the target has "substantial business operations in India" (SBOI). The qualifications for SBOI will be clarified by regulations to be issued by the CCI after stakeholder consultation.

Implications: More deals will attract CCI scrutiny, particularly in transactions where valuations are substantial. India may take inspiration from Austria and Germany, both of which have drawn up guidelines to illustrate what could qualify as "significant domestic operations".

- Codification of the standard for control: The definition of the term "control" under the Act has been formally lowered to "material influence". Accordingly, amongst other control conferring rights, the ability to exercise material influence over another entity is now seen as the ability to exercise control.

Implications: Minority transactions with rights short of "decisive influence" could attract merger review. More entities may be classified as group entities of the merging parties.

- Merger control review period shortened: The overall review period has been shortened from 210 calendar days to 150 calendar days. Further, the "Phase I" review period has been shortened from 30 working days to 30 calendar days. Pertinently, 99% of all merger filings secure approvals in Phase I.

Implications: Higher expectation that transacting parties will file comprehensive notifications and greater emphasis on the pre filing consultation process, in the absence of which, parties can expect more information requests and / or risk notification invalidation.

- Derogation for open market purchases: Open market purchases can now be done prior to the receipt of CCI approval, so long as, (i) the parties seek the CCI's approval for the acquisition within a time which is to be specified by the CCI¹, and (ii) the ownership / beneficial rights associated with the shares are exercised only post receipt of the CCI's approval.

Implications: Empowers parties to structure transactions which include an on-market purchase limb without risking gun-jumping.

B. Behavioural

- Introduction of settlements and commitments: A settlement and commitment mechanism has been introduced to close investigations quickly for violations relating to vertical agreements and abuse of dominance. Pertinently, compensation claims will be permitted further to settlement orders. Interestingly, cartels remain outside the purview of the settlement and commitment framework.

Implications: Will likely encourage parties to resolve proceedings quickly and also allow for market corrections provided the attendant regulations render certainty on the advantages of early closure. We expect that all pending cases before the CCI, where final orders have not been issued, may avail the settlement mechanism.

¹ To be specified by relevant subordinate legislation.

- Non-competitors brought into the scope of cartel: Non-rival firms who either “participated” in a cartel or “intended to participate” in a cartel can also be penalised for cartelisation.

Implications: Formal recognition to hub and spoke cartels. Common intermediaries will need to exercise caution in their dealings with rival firms.

- Penalty to be calculated on “global turnover derived from all products and services”: While calculating penalties under the Amendment Act, the “global turnover” generated from a multitude of products and services (irrespective of limited infringing products / services or location) can be considered by the CCI.

Implications: This insertion dilutes the standard of computing the quantum of fines based on relevant turnover which is relatable to the infringing conduct. In the absence of fining guidelines, there is a risk of higher penalties. This may lead to potentially higher penalty risks, but the CCI is likely to come up with fining guidelines soon in terms of the requirement under the Amendment Act.

- Introduction of “leniency plus”: The CCI can now grant additional leniency to an existing leniency applicant in lieu of “true and vital” disclosures vis-a-vis a separate undisclosed cartel.

Implications: The objective is to encourage additional cartel disclosures by granting incentives to the disclosing party. May result in disclosure of more cartels in related or different businesses in on-going cartel investigations.

- Powers of the Director General (DG) increased: The DG, during its investigation, is now allowed to depose under oath in-house legal counsels, bankers and auditors of parties under investigation.

Implications: Greater summoning powers granted to the DG. However, external legal counsels cannot be deposed to protect attorney-client privilege.

C. Other significant amendments

- A limitation period of 3 years has been introduced for filing an information before the CCI for any violation of the amended Act, including cartels. However, the CCI is empowered to condone delays.
- The office of the DG will be subsumed within the CCI and the CCI is now empowered to appoint the DG as opposed to the existing position where the appointment is made by the Central Government.
- An appeal can be preferred against an order of the CCI before the National Company Law Appellate Tribunal only after the deposit of 25% of the penalty imposed by the CCI.

Comment:

While the Amendment Act received Presidential assent on 11 April 2023, the provisions will come into force as and when the Central Government notifies the date of enforcement in the Official Gazette.

For the “deal value threshold” and other provisions which require additional clarity from subordinate legislations, it is likely that the Central Government will enforce such provisions

only once appropriate stakeholder consultations are complete and the regulations are published. However, we expect that the remaining self-sufficient provisions will be notified by the Central Government very soon.

Overall, the Amendment Act visibly aims to tackle new challenges with a set of new tools – some which have been *time-tested* and some which are still in their *trial* phase. We expect that with suitable guidance, the *Competition Act 2.0* will usher in an era of a stronger regime characterized by intensified enforcement and increased compliance.

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