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Analysing developments impacting business

AMENDMENTS TO THE (INDIAN) COMPETITION LAW FRAMEWORK GO LIVE

22 May 2023

Only a few days before the Competition Commission of India (CCI) celebrated its 14th Annual Day on 20 May 2023, the Ministry of Corporate Affairs (MCA) notified the enforcement of certain provisions of the Competition (Amendment) Act, 2023 (CAA 23), with effect from 18 May 2023. A detailed overview of the provisions of the CAA 23 along with our views are available [here](#), [here](#), and [here](#).

The enforcement of the provisions comes shortly after the appointment of Ms. Ravneet Kaur as the new Chairperson, CCI was made public. These developments have formally ushered in a fresh and long-awaited chapter in India's competition law framework; a chapter which promises to be characterised by robust enforcement action and M&A scrutiny.

A quick recap of a few noteworthy amendments that came into force on 18 May 2023.

1 **Amendment to key definitional provisions:**

- The definition of "relevant product market" now formally recognises supply-side substitutability as a consideration when delineating relevant markets.
- A definition of the term "party" has been introduced to refer to a broad set of stakeholders including consumers, trade associations, information providers, opposite parties, and persons or enterprises that may have been impleaded by the CCI to join proceedings.
- Ahead of the enforcement of the detailed framework for "settlements" and "commitments", the definition of the terms themselves have been notified.

2 **Expanding the scope of anti-competitive agreements:**

- With respect to anti-competitive horizontal agreements under Section 3(3), "hub-and-spoke cartels" have finally received statutory recognition. Now, any party that participates or intends to participate in an anti-competitive horizontal agreement may be found liable under Section 3(3) - irrespective of

whether the party is engaged in an identical or similar trade as the remaining participants.

- The phrase "exclusive supply agreement" under Section 3(4)(b) has been rechristened "exclusive dealing agreement" and the definition has been updated to expand its scope.
- Agreements between an enterprise and an end-consumer has been explicitly excluded from the scope of vertical agreements under Section 3(4).

3 Expanding the application of "meeting competition" defence:

- "Meeting competition" will now be available as a valid defence to justify the imposition of unfair and discriminatory conditions. Reliance on the defence was earlier restricted to cases involving imposition of discriminatory conditions alone.

4 Introduction of a limitation period and assessing harm to competition:

- A much-anticipated provision which sets a limitation period of 3 years for filing an information (i.e. complaint) has been enforced. Such limitation period will start from the date on which the cause of action actually arose, however, delays may be condoned if sufficient cause can be demonstrated.
- The factors to analyse whether an agreement has caused an appreciable adverse effect on competition (AAEC) in India have also been updated. Now, under Section 19(3)(d), the CCI shall give due regard not only to "benefits" to consumers but also "harm" caused to them.
- The factors to delineate relevant market have also been revised by the incorporation of certain geographic market considerations such as inclusion of costs associated with switching supply or demand to other areas.

5 Investigative powers of the Director General (DG):

- As reported earlier, the DG's powers of investigation have been strengthened significantly by the amendment. The DG, during its investigation, may now depose under oath in-house legal counsels, bankers, and auditors of parties under investigation. The DG may also call for information from any person other than a party and retain relevant documents for a period of at least 180 days.

6 Empowered to impose penalties:

- The CCI may now penalise parties which fail to comply with its orders passed under Sections 6, 43, 44 and 45 which deal with the power of the CCI to regulate combinations, and the power to impose penalties for failure to comply with the orders of the CCI or DG.
- The ceiling limit for penalties under Section 44, which is used to penalise parties for making false statements or for omission to furnish material

information, has been increased from INR 10 million (i.e. ~ USD 120,760) to INR 50 million (i.e. ~ USD 603,804).

7 **Penalty deposits:**

- Now, an appeal can be preferred against an order of the CCI before the National Company Law Appellate Tribunal (NCLAT) only after a mandatory deposit of 25% of the penalty imposed by the CCI.

8 **Miscellaneous provisions:**

- Apart from the above provisions, certain other amendments enforced through the notification are captured below:
 - Section 22: The right of the Chairperson, CCI to have a casting vote during proceedings has been removed.
 - Section 26(2A): The CCI now has the power to reject / dismiss cases which involve substantially the same facts and issues that have already been decided by the CCI in a previous order.
 - Section 35: Parties may call upon experts from the fields of economics, commerce, international trade or from any other discipline to provide an expert opinion and appear before the CCI in a case.
 - Section 53Q: In case of non-compliance with any of the orders of the NCLAT, the NCLAT can initiate contempt proceedings against the person under Section 53U.
 - Section 59A: Provides for compounding of any offence punishable under the Competition Act, 2002, excluding the offences punishable with imprisonment only or imprisonment with fine by the NCLAT or any other court.
 - Sections 63, 64 and 64A: Provide rule and regulation making power including on the new topics of deal value threshold, exemption to open market purchases, settlements, commitments, meaning of turnover and income for the purposes of calculating penalty, and leniency plus. Section 64A lays down the process of issuing regulations and involves various stages such as - publishing draft regulations for public comments, publishing a statement responding to such public comments and periodically reviewing such regulations.

Comment

While numerous provisions of the CAA 23 have been enforced, substantive amendments including the introduction of the frameworks for settlements, commitments, exemption to open market purchases, deal value threshold, penalty imposition based on global turnover, leniency plus, remain in the pipeline. All of these provisions' coming into force is predicated on regulations-based guidance, which could not have been initiated unless the attendant regulation making powers on these topics were put in force. Now that the CCI has the power to issue regulations on these specific topics, we anticipate that these provisions will be enforced in a staggered manner as and when the accompanying regulations are introduced by the CCI. Evidently, the Indian competition law regime is at

the cusp of a sea-change which arms the CCI and the DG with more powers and tools at its disposal than ever; it is imperative for India Inc. to do more than simply acquaint itself with the adjusted boundaries of the game.

- *Khaitan & Co Competition/Antitrust team*

For any queries please contact: editors@khaitanco.com

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