

Parliament passes the Competition (Amendment) Bill, 2023

In a significant development, the Indian Parliament has passed the much-awaited Competition Amendment Bill, 2023 (“**Bill**”) on April 3, 2023. The Bill will now be placed before the President of India for her assent.

The Bill was first introduced in the Lok Sabha on August 5, 2022 and was referred to the Parliamentary Standing Committee on Finance (“**PSC Committee**”), which issued its [report](#) on December 13, 2022. The Bill is largely based on the recommendations made by the Competition Law Review Committee, the PSC Committee as well as the extensive public consultations held with various stakeholders in 2019.

The Bill proposes far-reaching amendments to the Indian competition law and aims to streamline legal provisions and integrate the learnings of the Competition Commission of India (“**CCI**”) over the past 14 (fourteen) years. It is designed to bring the law into sync with international best practices and changing economic reality, not least the growth of new technologies.

A summary of the key amendments proposed to the Competition Act, 2002 (“**Competition Act**”) is set out below:

Merger Control

- 1) **‘Deal Value’ thresholds:** Under the existing framework, only a transaction that crosses specified asset or turnover thresholds requires approval from the CCI. The Bill introduces an additional “deal value” criterion for assessing whether a transaction (merger and amalgamation) requires approval from the CCI. A transaction will now require approval of the CCI if: (a) the deal value exceeds INR 2,000,00,00,000 (Indian Rupees two thousand crores)¹; and (b) where the target enterprise has “*substantial business operations in India*”². The Bill defines “value of transaction” as including every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation.

¹ Approx. USD 253,000,000 (US Dollar two hundred fifty-three million).

² The CCI will issue regulations to prescribe the requirements for assessing whether an enterprise has “substantial business operations in India”.

- 2) **Reduced approval timelines:** The Bill reduces the statutory timeline for the CCI to form its *prima facie view*³ on a merger notification from 30 (thirty) working days to 30 (thirty) calendar days. Further, the overall timeline is also proposed to be reduced from 210 (two hundred ten) calendar days to 150 (one hundred fifty) calendar days.
- 3) **Standard of 'control' diluted:** The interpretation of the term 'control' forms one of the cornerstones of the merger control rules. The Competition Act defines the term 'control' to include, controlling the affairs or management of the target enterprise. The CCI by way of its decisional practice has clarified that control includes 'material influence' i.e., the lowest form of control in addition to *de facto* and *de jure* control. The CCI has interpreted material influence as the presence of factors that enable an entity to influence the affairs and management of another enterprise. These factors include majority shareholding, veto rights (attached to minority shareholding), board representation, contractual covenants etc. The Bill now codifies '*material influence*' as a standard for control.
- 4) **Waiver of standstill obligations⁴ for open market purchase:** Under the existing framework, the parties to a notifiable transaction are not permitted to acquire any shares prior to receiving CCI approval. The Bill dilutes the standstill obligations in case of an open offer and acquisition of convertible shares/securities on a stock exchange provided: (a) a merger notification is promptly filed with the CCI; and (b) the acquirer does not exercise any rights/ interest/ receives dividends in such shares/ securities.
- 5) **Enhanced penalties:**
 - a) Under the existing framework, where the parties make false statements or omit to disclose material facts in the merger notification, penalties between INR 50,00,000 (Indian Rupees fifty lakh)⁵ to INR 1,00,00,000 (Indian Rupees one crore)⁶ can be imposed by the CCI. The Bill proposes to increase the maximum penalty to INR 5,00,00,000 (Indian Rupees five crore)⁷.
 - b) A penalty for *gun jumping*⁸ can only be imposed in cases where parties have consummated a reportable transaction without notifying the CCI or, where they have closed a notified transaction before the CCI's approval. The Bill provides that the CCI can now impose penalties on parties in cases where they fail to provide the requisite information to the CCI for assessing whether a non-notified transaction requires CCI approval.

Enforcement

- 1) **Settlements and commitments mechanism:** The company facing an investigation before the CCI relating to abuse of dominant position and anti-competitive agreements (except cartels) can now apply to the CCI to settle their case or offer commitments in respect of the alleged contravention. While the commitments can be offered at any time before the investigation report is submitted by the Director General to the CCI, the settlements can be only offered after the investigation report is submitted, but before the issuance of the final order by the CCI. The CCI's order affirming settlements/commitments cannot be appealed before the appellate tribunal i.e., National Company Law Appellate

³ Per CCI's decisional practice, approximately 90% of merger notifications were cleared within 30 (thirty) working days (as the combinations raised no competition law concerns).

⁴ The Indian merger control regime is suspensory in nature and hence, the parties cannot consummate a notifiable transaction, in full or in part, prior to the CCI approval i.e., parties need to comply with standstill obligations.

⁵ Approx. USD 60,000 (US Dollar sixty thousand).

⁶ Approx. USD 120,000 (US Dollar one hundred twenty thousand).

⁷ Approx. USD 640,000 (US Dollar six hundred forty thousand).

⁸ As per the existing framework, the CCI has the power to penalise parties a maximum of 1% of the total assets or turnover of the combination, whichever is higher. The Bill provides that the CCI can also penalize parties up to 1% of the deal value.

Tribunal (“NCLAT”). Further, the Bill allows that the aggrieved party can file for a compensation claim against the contravening enterprise in case of ‘settlements’⁹.

2) **Leniency plus:** An enterprise who is a leniency applicant in 1 (one) cartel and helps in discovering a new/separate cartel, to receive an additional reduction in penalty for both the existing and the newly revealed cartel.

3) **Scope of anti-competitive agreement extended**

a) Under the existing framework, only the cartel agreement between competitors (i.e., engaged in similar trade) is presumed to have an appreciable adverse effect on competition (“AAEC”) in India. The Bill now extends this presumption to a facilitator of the cartel as well as hub-and-spoke cartels¹⁰ if it participates or intends to participate in the cartel agreement.

b) The Competition Act prohibits anti-competitive agreements between enterprises at the same level of the production chain (horizontal) or at different levels of the production chain (vertical). The CCI can now investigate agreements that do not fall within either category.

4) **Penalty on global turnover and penalty guidelines:**

a) Under the existing framework, while computing penalty, the CCI takes into consideration the turnover of the enterprise accruing from infringing products/ services (i.e., the relevant turnover)¹¹. The Bill empowers the CCI to impose a penalty on a company’s global turnover i.e., accounting for all its products or services (rather than relevant turnover). The said amendment goes against the principles laid down by the Supreme Court in *Excel Crop v. CCI*¹².

b) The CCI will also be required to publish guideline on parameters used by it to determine the appropriate quantum of penalties that can be imposed on the infringing party.

5) **Limitation period:** The Bill allows the CCI to only entertain information (complaint) that has been filed within 3 (three) years from the date the cause of action first arose. However, the CCI has the power to condone delay.

6) **Deposit of penalty amount:** Appeals before the NCLAT against CCI orders will require a 25% deposit of the penalty amount as a condition precedent for the appeal being entertained.

⁹ Section 53N of the Competition Act allows aggrieved/ affected parties to approach the appellate tribunal i.e., NCLAT, to recover compensation for damages suffered due to anti-competitive practice of the enterprise(s).

¹⁰ Cartels being operated through suppliers or distributors at different levels of the vertical chain.

¹¹ This principle of ‘relevant turnover’ was laid down by the Supreme Court in *Excel Crop v. CCI* (2017) 8 SCC 47).

¹² (2017) 8 SCC 47.

Competition Practice

Since the inception of the Indian competition regime, JSA has been a one-stop shop for all types of competition and anti-trust-related matters. As such, the team's in-depth understanding of the competition law, coupled with its commercially focused litigation skills has been the cornerstone on which it deals with matters relating to cartelisation (including leniency), abuse of dominance, vertical agreements, and dawn raid before the Competition Commission of India and appellate courts. The team regularly advises clients on general competition law issues arising from day-to-day business strategies and conducts competition compliance training for clients. Given the team's continued involvement with the regulator, coupled with its balanced and practical approach to competition law, it has been instrumental in shaping the competition law jurisprudence in India.

Over the years, the team has developed a reputation of not only being well regarded by its peers but also for having developed a good working relationship with the regulatory authorities. As such our lawyers have been involved in drafting statutory regulations and have represented the Indian competition law fraternity at various competition law seminars, workshops, and advocacy & public awareness programs across the world. The team's expertise (including team members) has been widely recognised by various leading international rankings and publications including Chambers and Partners, Who's Who Legal, Global Competition Review, Benchmark Litigation, Asialaw, and the Legal 500.

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11 Ranked Lawyers



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2 Ranked Lawyers



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