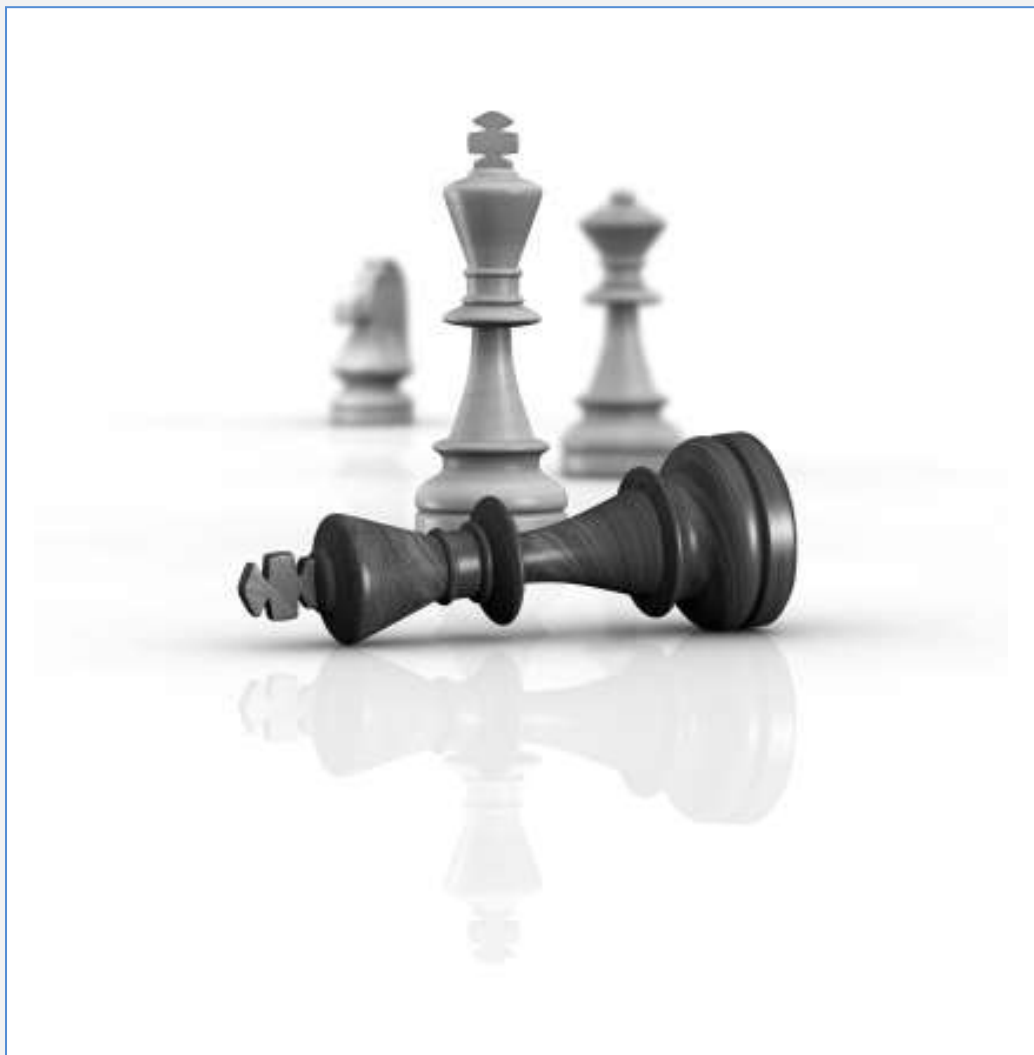


**INTRODUCTION OF THE COMPETITION
(AMENDMENT) BILL, 2012 IN INDIA:
SALIENT FEATURES AND THE IMPLICATIONS THEREOF**



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The Competition Act of India (“Act”) was enacted in 2002 as a result of India’s pursuit of globalization and liberalization of the economy. Introduction of the Act was a key step in India’s march towards facing competition – both from within the country and from international players.

The Act is not intended to prohibit competition in the market. What the Act primarily seeks to regulate, are the practices that have an adverse effect on competition in the market(s) in India. In addition, the Act intends to promote and sustain competition in markets, protect consumer interests, and ensure freedom of trade in the market(s) in India.

At the heart of the Act are various activities that will be prohibited as being anti-competitive. The activities comprise:

- (a) Anti-competitive arrangements;
- (b) Abuse of dominant position; and
- (c) Mergers and acquisitions that have an appreciable adverse effect on competition in India.

The Act also provides for the establishment of the Competition Commission of India (“CCI”), which would function as a market regulator for preventing and regulating anti-competitive practices in the country, as well as a Competition Appellate Tribunal (“COMPAT”) which is a quasi-judicial body established to hear and dispose of appeals against any direction issued, or decision made by the CCI.

In light of the experiences gained in its operation and the working of the CCI, the Government of India, in June 2011, constituted an Expert Committee to examine and suggest modifications to the Act. The amendments, approved by the Cabinet in October, are aimed at fine-tuning the regulations to bring rules on par with the prevailing scenario and in light of the experiences gained over the past years. Accordingly, on 7 December 2012, the Central Government introduced the Competition (Amendment) Bill, 2012 in the Lower House (Lok Sabha) (the “Bill”). Typically, a bill has to be passed by both the Houses (Lok Sabha and the Rajya Sabha) before it is sent to the President for his assent, pursuant to which, it becomes law.

This Article intends to set forth some of the salient features of the Bill, as suggested by the Expert Committee, which seek to amend the existing provisions of the Act.

1. Definition of “turnover” under Section 2(y)

Section 2(y) of the Act provides for the definition of “turnover”. The Bill seeks to exclude the taxes levied on sale of goods or provision of services from the definition of turnover. This definition of “turnover” is primarily used for determining thresholds for combinations and for imposition of penalties.

2. Inclusion of provision of “services” under explanation to Section 3(4)

It has been proposed that the *explanation* to Section 3(4) of the Act (which deals with vertical agreements) should be amended to cover the element of “services” being provided as well. The term “services” has been defined

under Section 2(u) of the Act and the same is also incorporated under Section 3(4) of the Act, yet the element relating to the provision of “services” was absent from the *explanation* to Section 3(4) of the Act.

Thus, for instance, an “exclusive supply agreement” was previously explained as including “*any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any foods other than those of the seller or any other person*”, it is being proposed to be amended as including “*any agreement restricting in any manner the purchaser **of goods or recipient of services** in the course of his trade from acquiring or otherwise dealing in any foods other than those of the seller or any other person*”.

In addition to “exclusive supply agreement(s)”, the *explanation* to Section 3(4) also provides for scenarios such as tie-in arrangements, exclusive distribution agreements, refusal to deal, resale price maintenance etc., and the proposed amendment (i.e. inclusion of service element) shall apply equally to scenarios under Section 3(4).

3. Inclusion of “collective dominance” aspect under Section 4(1)

It has been proposed that Section 4(1) be amended with the inclusion of the words “joint or singly”. Accordingly, the proposed revision of the verbiage of Section 4(1) would be:

*“No enterprise or group, **jointly or singly**, shall abuse its dominant position”.*

There has been a lot of discussion as to how this amendment to Section 4(1) would strengthen the position of the CCI and will introduce a new concept that is in line with the position under Article 82 of the EC Treaty. One line of argument is that the opening words of Article 82 of EC Treaty and Section 4 of the Act, as it presently stands, are divergent, in as much as, Article 82 begins with the phrase “*any abuse by one or more undertakings of a dominant position*” and it was this phrase “one or more undertakings” which was used by Court of First Instance in *Italian Flat Glass case*¹ to hold that “there is nothing in principle to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market.” This marked the birth of the concept of “collective dominance” in Europe.

However, Section 4 of the Act aims at “an enterprise” or “group”. Section 4(1) presently reads “[N]o enterprise or group shall abuse its dominant position”. There is nothing in the definition of enterprise under Section 2(h) or in the provisions of Section 4 to suggest that two or more independent entities can be clubbed together to constitute collective dominance.

Having said that, however, in the *DTH case*² in 2011, the dissenting member had opined that an ‘enterprise’ has been defined in Section 2(h) of

¹ Judgment of the Court of First Instance (First Chamber) of 10 March 1992. - Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities – EUR-Lex-61989A0068

² Consumer Online Foundation v Tata Sky Ltd & Ors, Case No. 2/2009, Order dated 24.03.2011 (Dissenting)

the Act as including a ‘person’. A ‘[P]erson’ has been defined under Section 2(l) as including ‘as association persons ... whether incorporated or not ...’ and thus, the respondents in that case would together constitute an ‘unincorporated association of persons’, thereby making them an “enterprise” for the purposes of Section 4(1) of the Act.

Thus, it seems that even without the clarification as proffered in the Bill, there may have been an interpretation of the various provisions of the Act which would have covered the element of “collective dominance” under Section 4(1) of the Act.

4. Change in threshold levels under Section 5

The *explanation* to Section 5(b)(i), which provides for a definition of a “group” for the purposes of regulation of “combinations” under the Act, is being proposed to be amended by increasing the threshold levels therein.

Explanation (b) to Section 5 currently provides that a “group means two or more enterprises which, directly or indirectly, are in a position to -

- (i) exercise twenty six percent or more of the voting rights in the other enterprise; or*
- (ii) appoint more than fifty percent of the members of the board of directors in the other enterprise; or*
- (iii) control the management or affairs of the other enterprise”.*

What the Bill seeks to amend is the threshold of twenty six percent as prescribed under the *explanation* to Section 5(b)(i) above, to **fifty percent**.

The proposed amendment will align the definition of 'group' to the exemption³ which had earlier been granted to a 'group' exercising less than fifty percent voting rights in other enterprises, from the applicability of Section 5 of the Act.

5. Incorporation of a new Section 5(A)

The Bill seeks to introduce a new enabling section –viz. Section 5(A) under the Act which is supposed to confer upon the Central Government, the power to notify, in consultation with the CCI, different value of assets and turnover for any class or classes of enterprise for the purposes of determining combinations under the Act. The intent behind this proposed new section is to enable the Government and the CCI to set different thresholds for different industry segments.

Introduction of such a provision may establish a low bar for M&A deals and may result in a preponderance of transactions falling under the auspices of the competition regulator. Although this is a dynamic concept, the Expert Committee was of the opinion that as the CCI gained more experience with merger filings, there could be a situation where instead of going through the legislative route, the thresholds could be left to the CCI which could do it through the regulations – which would be less administratively challenging.

³ Notification no. S.O. 481(E) dated 4 March 2011, issued by the Ministry of Corporate Affairs

6. Mandatory reference by statutory authority and vice versa (Section 21)

The Bill seeks to make it mandatory for a statutory authority to refer the matter to the CCI, where an issue arises that any decision of such statutory authority may be contrary to the Act. Likewise, it is proposed to be made mandatory for CCI to refer any matter to the concerned statutory authority where an issue arises that any decision of the CCI may be contrary to any act, whose implementation is entrusted to such statutory authority.

With the proposed amendment, the Bill seeks to ward off conflicts between various regulatory authorities and the CCI and the restrict forum shopping. The proposed amendment is likely to establish a more transparent legal environment and broaden the CCI's jurisdiction over all market sectors.

7. CCI to issue inquiry orders and impose penalties only after hearing the concerned parties (Sections 26 and 27)

The Bill seeks to amend the inquiry procedure in relation to anti-competitive agreements and abuse of dominance as set out under Section 26(7) and (8) of the Act by providing that in cases where the CCI proposes to cause further investigation or inquiry into a matter, such decision shall be taken by the CCI only after hearing the concerned parties.

The Bill also proposes that under Section 27(b) of the Act, an opportunity to be heard is accorded to the party liable for a penalty. The proposed

amendments to Sections 26 and 27 of the Act seem to be with the intent of lowering the procedural objections that are routinely taken up against the CCI's decisions with the COMPAT.

8. Period for CCI's approval to combinations (Section 31(11))

The Act currently prescribes for a period of 210 days within which, the CCI has to pass an order in relation to a "combination", failing which, the combination shall be deemed to have been approved.

The Bill seeks to propose a reduction in the period from 210 days to 180 days within which the CCI has to approve / seek modification of / pass orders in relation to a combination notified under the Act. A consequential amendment is proposed under Section 31(12) of the act to exclude extension of time granted at the parties' request.

9. Director General's power of search and seizure (Section 41)

The Act currently allows for dawn raids, but requires the CCI to seek authorization from the courts after it has conclusive evidence of a violation of the competition laws in India. As a result, there have not been any dawn raids in India by the CCI.

An amendment to Section 41 of the Act is proposed which seeks to confer wider powers of search, seizure, entering places and recording statements on oath, upon the Director General, to facilitate investigations, so long as the Director General has reason to believe that the person concerned has omitted or failed, or would omit or fail or would destroy, mutilate, alter

etc, the information and/or documents pertinent to the investigation. Such powers of the Director General are proposed to be exercisable with the prior permission of the Chairman, CCI.

The proposed amendment will thus, facilitate the CCI in investigating cartels, as it will enable the regulator to act independently and effeciently, since the CCI Chairman is proposed to take over the responsibility of authorizing such tactics.

This is a brief synopsis of the proposed amendments to the Competition Act and the same is subject to change as and when the Competition (Amendment) Act comes into force.

The firm has a team of lawyers with knowledge and experience in this area, and who are able to help analyse the clients' competition law queries, conduct competition compliance audits as well as draft competition law compliance manuals for the clients' internal purposes.

About the author

Piyush Gupta is a partner at Kochhar & Co. and heads the competition advisory practice group of the firm.

Piyush has close to ten years' of trans-national experience in the competition law regimes across India and Singapore. Piyush is well-versed with the complexities of this relatively new entrant in the Indian legal arena and has drafted the competition law compliance manuals and guidelines for companies across various industries. Piyush has also conducted competition law compliance audits for various corporates, in addition to providing training and holding workshops on identification of issues pertaining to competition laws for the purposes of various companies' in-house legal counsels, as well as for various operational personnel, such that competition law issues can be highlighted and dealt with on an immediate basis. In this regard, you may contact Piyush Gupta at +91.124.454.5222 or email him at piyush.gupta@kochhar.com.

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