



Competition Laws in India: An introduction and discussion on the changes proposed by the Amendment Bill of 2023.

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April 2023

Introduction to Competition Law:

The Black Law Dictionary defines Competition as an offer by an entity that is just as good as what else is out there and is an attractive buy. In simple words a win by defeating or establishing supremacy. However, it cannot be denied that competition encourages firms to innovate, improve quality and present their products/services at suitable prices. We also cannot overlook the concomitant worries that surface with competition viz., price fixing, collusion, abuse of market power, unfavourable mergers and acquisitions, etc. This gives rise to the need for laws governing and regulating competition in the market. The Competition Laws of India offer guidance for the regulation of the market by safeguarding the interests of consumers from anti-competitive behaviour in the market and ensuring freedom and liberty to trade in the market.

Anti-competitive practices can lead to higher prices, and products that do not justify the prices, reduce motivation for innovation, and ultimately, consumers are left with a minimum choice.

Further, the Competition laws prohibit false or misleading representations, offers, or advertisements, and ensure that consumers are not deceived by businesses that exploit their market power to their advantage and benefit unjustly.

Competition laws promote economic growth, and job creation in the market and help in creating a level playing field for businesses of all sizes.

Furthermore, by regulating mergers and acquisitions that may have adverse effects on competition, competition law can prevent the formation of monopolies and oligopolies that can harm consumers and businesses alike. The Competition Commission of India (CCI) evaluates the potential impact of mergers and acquisitions on competition and

approves or rejects them or imposes conditions, as may be appropriate, to ensure that competition is not harmed.

Objectives of the Competition Act, 2002:

The Competition Act, 2002 (the Act), governs competition in India. Amendments have been introduced over the years to strengthen the regulatory framework and enhance its effectiveness. CCI is the regulatory body established under the Act, responsible for ensuring the enforcement of the provisions of the Act. The CCI has the power to investigate and penalize anti-competitive practices and regulate mergers and acquisitions to ensure that they result in no unfair consequences to the competition in the market. The Act also outlines the rights and responsibilities of market players, including businesses, consumers, and the government, in promoting and maintaining fair competition in the Indian market. The Act also provides for the establishment of the Competition Appellate Tribunal (CAT) to hear appeals against the decisions of the CCI.

Past amendments to Competition Act, 2002:

Since its enactment in 2002, the Act has undergone several amendments to strengthen the regulatory framework and enhance its effectiveness. Some of the notable amendments to the act are:

- i) The Competition (Amendment) Act, 2007:** This amendment introduced the concept of 'Combinations,' which includes mergers, amalgamations, and acquisitions, and provided the CCI with the power to scrutinize combinations that have an adverse effect on competition.
- ii) The Competition (Amendment) Act, 2009:** This amendment strengthened the regulatory framework by providing the CCI with more powers to investigate and penalize anti-competitive practices. It also introduced the concept of 'Leniency' for businesses that cooperate with the CCI in its investigations.
- iii) The Competition (Amendment) Act, 2012:** This amendment introduced the concept of 'Individual Liability' for individuals involved in anti-competitive practices and provided for the establishment of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) to hear appeals against the decisions of the CCI.
- iv) The Competition (Amendment) Act, 2020:** This amendment further strengthened the regulatory framework by providing for the establishment of the Competition Law Review Committee (CLRC) to review the competition law in India and make recommendations for its improvement. It also introduced the concept of 'Green Channel,' which fast-tracks the approval process for certain categories of mergers and acquisitions that do not have an adverse effect on competition.

Brief Introduction to Competition Amendment Bill, 2022:

The Competition Amendment Bill 2022 was introduced in the Lok Sabha on February 28, 2022, with the aim of amending the Competition Act, 2002, which governs

competition law in India. The bill was passed by both houses of Parliament and received Presidential assent on August 1, 2022.

The Competition Amendment Bill 2022 introduces several significant changes to the existing competition law framework in India. The bill aims to strengthen the Competition Commission of India's (CCI) 's ability to regulate anti-competitive behaviour in the market and improve its functioning. The proposed changes cover a wide range of areas, from the composition and workings of the CCI to the rule-making powers of the government and the CCI.

The key features of the Competition Amendment Bill 2022 are as follows:

1. Introduction of Green Channel Clearance:

One of the most significant changes introduced by the Competition Amendment Bill 2022 is the introduction of Green Channel Clearance. This provision allows for a fast-track approval process for certain categories of mergers and acquisitions that are considered to be non-controversial.

2. Increase in Threshold for Combination Review:

The Competition Amendment Bill 2022 has also increased the threshold for combination review. Earlier, only combinations with a combined asset value of Rs. 1,000 crore or more, or a combined turnover of Rs. 3,000 crore or more, were subject to review by the CCI. However, the Amendment Bill has increased these thresholds to Rs. 4,000 crore and Rs. 12,000 crore, respectively.

3. Provision for Appointment of Additional Members:

The Competition Amendment Bill 2022 has introduced a provision that allows for the appointment of additional members to the CCI. One of the significant changes proposed in the bill is the requirement for CCI members to have experience in technology. Additionally, those on the selection committee must also have knowledge of and experience in the field. The additional members can be appointed for a period of up to five years and can be reappointed for one more term.

4. Expansion of Definition of Cartels:

The Competition Amendment Bill 2022 has also expanded the definition of cartels. The bill has included "buyer's cartels" and "hub and spoke" agreements under the definition of cartels. This change is aimed at curbing anti-competitive practices and ensuring that businesses cannot collude to fix prices or restrict supply in any way.

5. Introduction of Penalty on Misleading Information:

The Competition Amendment Bill 2022 has introduced a penalty for providing misleading information to the CCI during the course of an investigation. The penalty can be up to one percent of the total turnover or the assets of the concerned party, whichever is higher.

6. Introduction of Settlement Mechanism:

The Competition Amendment Bill 2022 has introduced a settlement mechanism for cases of anti-competitive agreements and abuse of dominance. The settlement mechanism allows parties to settle cases with the CCI by admitting to the violation and paying a penalty.

7. Alteration in Rule Making Powers of the Government and CCI:

The bill also proposes to provide the government with certain additional rule-making powers. The central government will be allowed to issue notifications addressing the value of assets or turnover in case of mergers and acquisitions, the percentage of voting rights to determine "group" entities, and the criteria of combinations.

The CCI will also be given additional powers to frame regulations, including the manner of determination of substantial business operations in India, the form and fee for the notice for a combination, the time and manner for filing the notice of acquisition, the manner of determining turnover or income, and the amount of any penalty for any contravention of the provisions of the Act.

8. Modification in relevant market definition:

The Act provides a definition of "relevant market" under Section 2(r). According to the Act, a relevant market refers to a market comprising of a specific product or service and a geographic area in which it is sold. The definition of the relevant market is an essential element in assessing the impact of competition on market practices. The Competition Commission of India (CCI) determines the relevant market while examining anti-competitive agreements, abuse of dominant position, and mergers and acquisitions.

The definition of the relevant market is crucial in determining the dominant position of an enterprise in the market. The CCI considers an enterprise to be dominant if it has a significant share of the relevant market, which enables it to operate independently of market forces and consumers. Overall, the definition of the relevant market is an essential tool for analysing and regulating competition in India. It helps the CCI to identify anti-competitive practices and promotes a level playing field for enterprises operating in the market.

The Competition Commission of India (CCI) uses six factors to identify the relevant product market under the Competition Law prevailing in India. These factors are:

Physical characteristics and end-use of the product or service

- Consumer preferences
- Price
- Supply-side substitutability
- Geographical factors
- Regulatory factors

Overall, the six factors outlined above provide a comprehensive framework for identifying the relevant product market and are crucial in determining the competitive landscape of the market. The CCI uses these factors to identify the relevant product market while examining anti-competitive agreements, abuse of dominant position, and mergers and acquisitions.

The 2022 bill also modifies the definition of the "relevant product market" and "relevant geographic market" used by the CCI. The new definition of the "relevant product market" will look at substitutability on the supply side, in addition to the existing consumer perspective. The earlier definition only considered two products or services to be part of the same relevant market if it is regarded as interchangeable or substitutable by the consumer. The new definition considers two products as part of the same relevant market even if the production or supply of the two is regarded as interchangeable or substitutable by the supplier.

Two additional factors have been added to the existing six factors that CCI uses to identify the "relevant product market":

- a) Costs associated with switching demand or supply to other goods or services, and
- b) Categories of customers.

Two more factors have been added to the list of factors used by CCI to determine the "relevant geographic market":

- a) Characteristics of goods or nature of services, and
- b) Costs associated with switching supply or demand to other areas.

9. Transparency in the process of issuing regulations and guidelines:

The Bill proposes new sections that outline a transparent process for issuing regulations and guidelines. Before issuing any regulations, CCI will have to publish draft regulations and solicit public comments, and then publish a general statement that responds to the comments received.

10. Other proposed changes:

- The Bill proposes several other changes, including a three-year limitation period for complaints, after which CCI will not entertain any complaint unless there are valid reasons given by the parties.
- Parties under investigation can now call upon experts from various fields, including economics, commerce, international trade, or any other discipline, for their opinion in relation to a case before the Commission. Previously, only officers of the company or chartered accountants or legal practitioners could appear.
- The bill also proposes to give the Director General more investigative powers to carry out an investigation, such as demanding all records of a company under investigation, examining company officials under oath, obtaining assistance from the police, and requesting seizure of information.

Competition (Amendment) Bill, 2023:

Competition (Amendment) Bill 2023 is the latest amendment to the Competition Act 2002, which was introduced by the Ministry of Corporate Affairs in the Lok Sabha on 7th February 2023. The Bill received the assent of the President of India on 12th April, 2023. The Bill aims to further strengthen the competition regime in India and promote fair competition in the market.

Other than few proposed changes that are already mentioned in the analysis of the 2022 Bill, The Competition (Amendment) Bill, 2023 includes the following important changes:

1. Mergers and Acquisitions are reviewed by the CCI:

The 2023 Bill has proposed that if the value of a merger or acquisition is greater than ₹2000 Crores, it will require CCI approval, provided the party being acquired or amalgamated has significant business operations in India. This is a departure from the previous requirement, where only assets or turnover exceeding a certain threshold needed to be notified to the CCI. The new deal value threshold will cover cases of "killer acquisitions" where large companies acquire struggling start-up companies, as seen in Facebook's acquisition of WhatsApp and Instagram. The deal value threshold will be reviewed and updated periodically by the government based on various factors.

As of April 2023, the Competition Act in India has been amended several times, with the latest amendments made in 2022. The amendments have revised the thresholds for notifying mergers and acquisitions to the CCI.

The existing threshold for mergers and acquisitions as per the Competition Act 2022, which is currently applicable, is as follows:

- ✓ For a merger or acquisition involving enterprises with assets of over INR 5000 crores (\$671 million) in India or turnover of over INR 15000 crores (\$2 billion) in India, a mandatory notification to the CCI is required.
- ✓ For a merger or acquisition involving enterprises with assets between INR 1000 crores (\$134 million) and INR 5000 crores (\$671 million) or turnover between INR 3000 crores (\$403 million) and INR 15000 crores (\$2 billion) in India, a notification to the CCI is required if the combined market share of the enterprises exceeds 25% in the relevant market in India.
- ✓ For a merger or acquisition involving enterprises with assets less than INR 1000 crores (\$134 million) or turnover less than INR 3000 crores (\$403 million) in India, no notification to the CCI is required.

2. Reduces the time limit for the assessment of combinations by the CCI:

As per the Competition Act 2002, the time limit for the assessment of combinations by the CCI was 210 calendar days from the date of filing the notice of the combination with the CCI.

However, the Competition Amendment Act 2022 amended this time limit to 150 “working” days from the date of filing the notice of the combination with the CCI, as mentioned in my previous response. But the 2023 Bill has reduced the time limit for the assessment of combinations by the CCI from 150 “working” days to 150 “calendar” days.

The 150-day time limit is applicable to both cases where the combination is deemed to have been approved by the CCI (in cases where the CCI does not raise any objections within the 150-day time limit) and cases where the CCI requires modifications or conditions to be imposed on the combination (in cases where the CCI raises objections within the 150-day time limit).

It is important to note that in exceptional circumstances, as per the 2023 Bill, the CCI may extend the 150-day time limit by up to 30 calendar days, subject to reasons to be recorded in writing. The 2022 Bill had sought to reduce the timeline within which the CCI would have to form a prima facie opinion on the likelihood of a combination causing appreciable adverse effect on competition from 30 working days to 20 calendar days. However, the CCI must inform the parties to the combination of the extension of the time limit and the reasons for the same. Within 30 calendar days, the CCI needs to form its initial opinion, failing which the combination is deemed approved.

If the CCI identifies an appreciable adverse effect on competition, it will state its objections and direct the parties to explain why such a combination should be allowed. The parties may propose modifications to address the competition concerns, which the CCI may approve or reject. If the proposed modifications are rejected, the combination will not be allowed, or the CCI can propose a scheme for the parties to implement to address the concerns.

3. Section 3 of The Competition Act, 2002 broadened:

Section 3 of the Act deals with anti-competitive agreements. It prohibits any agreement between enterprises, including cartels, which causes or is likely to cause an appreciable adverse effect on competition within India. Such agreements may relate to price-fixing, bid-rigging, market-sharing, or limiting the production or supply of goods or services.

The latest amendment to Section 3 was made in 2022 through the Competition Amendment Act. The amendment introduced a de minimis threshold for anti-competitive agreements, below which such agreements will not be considered anti-competitive. The threshold is set at 1% of the turnover of each enterprise or 15 Crores, whichever is lower, in the relevant market.

The amendment aims to ensure that only those anti-competitive agreements that have a significant impact on competition are investigated and penalized by the CCI. It also reduces the compliance burden on enterprises by exempting them from reporting agreements that fall below the de minimis threshold.

However, it is important to note that the de minimis threshold does not apply to hardcore cartels or agreements that involve horizontal price-fixing, market-

sharing, or output limitations. Such agreements are still considered per se illegal and can attract penalties under Section 27 of the Act.

Section 3 on anti-competitive agreements has been broadened to cover hub-and-spoke cartels. Entities not engaged in identical or similar trade are now presumed to be part of an anti-competitive agreement if they participate in its furtherance. This includes parties that facilitate collusion, such as consultants or trade associations. Additionally, the phrase "exclusive supply agreement" has been replaced with "exclusive dealing agreement" to cover exclusive agreements on the selling side.

Anti-competitive conduct like "tie-in arrangement," "refusal to deal," "resale price maintenance," and "exclusive distribution agreement" have also been redefined to cover goods and services, and not just goods. Indirect restrictions are now included in the definition of "resale price maintenance."

It is said that the appreciable adverse effect on competition in India (AAEC) occurs when certain practices restrict competition. AAEC can take three forms: Anti-competitive agreement, Abuse of dominance and Combinations. Specifically, Section 19(3) of the Act states that the Competition Commission of India shall take into consideration all or any of the following factors in determining whether an agreement has an appreciable adverse effect on competition under Section 3.

Two AAEC factors used by the CCI have been modified to widen the scope, including "foreclosure of competition by hindering entry into the market" to "foreclosure of competition" and "accrual of benefits" to "accrual of benefits or harm."

4. Additions to penalties in Competition law:

The Competition Amendment Bill 2023 introduces changes to penalties in competition law. The Bill allows the CCI to impose a penalty of up to 10% of the average income or turnover for the last three preceding financial years for anti-competitive agreements and abuse of dominant position. The penalty will be based on global turnover rather than just domestic turnover. In addition, the maximum penalty for combination misrepresentation has increased from ₹1 crore to ₹5 Crores.

The proposed amendment could have significant implications for large conglomerates with diverse business operations, as a breach of competition laws by a small division in India could result in massive penalty exposure based on the conglomerate's global turnover. This proposal conflicts with the Supreme Court's judgment in *Excel Crop Care*¹, which held that only the turnover derived from the business in which the contravention has been found should be considered for the calculation of penalties. Overall, this proposed amendment is unexpected and could have significant implications for businesses operating in India.

¹ *Excel Crop Care Ltd. v. Competition Commission of India*, (2017) 8 SCC 47

5. A new settlements framework and changes to how appeals work:

The Bill introduces a new settlements framework that allows entities to propose a settlement or commitments for alleged contraventions. If accepted, this framework can provide an incentive for companies to settle with CCI rather than go to court. Finally, the appellate tribunal will not entertain an appeal unless the company deposits 25% of the penalty imposed by CCI, which is expected to prompt companies to scrutinize their decision to appeal.

6. Change in the composition and functioning of the Competition Commission of India:

Previously, the members of the selection committee did not have the expertise of technology as a requirement at all, rather, knowledge and experience of international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy was considered sufficient to be a part of the selection committee.

The 2023 Bill makes the following requisites mandatory:

- a. Members of the selection committee must now have knowledge of and experience in technology, and CCI members must have experience in the field of technology.
- b. If the Commission believes that further investigation is needed, it can direct the Director General to conduct further investigations and submit a supplementary report. Additionally, the Chairperson and Members of the Commission cannot be employed by any enterprise that is or has been a party to a CCI proceeding for two years after leaving office.
- c. The bill also allows CCI to enter into a memorandum of arrangement with other government departments or statutory bodies. Statutory authorities may now make a reference to the Commission on any issue related to promoting the objectives of the Act.
- d. CCI may also make a reference to another statutory authority on issues involving provisions of an Act whose implementation is entrusted to that statutory authority.

7. Changes to the role and responsibilities of the Director General:

Presently, the CCI can appoint the Director General with prior approval of the Central Government, which is a change from the earlier provision where the power solely rested with the Central Government. The earlier provision had been criticized for giving too much power to the CCI, which could potentially make it biased.

Significant Proposal in virtue of the advent of Digitization:

The Digital Competition Act:

The Digital Competition Act is an important component of the new Competition Amendment Bill 2023 in India. The Act aims to regulate the digital economy by addressing issues related to anti-competitive practices, abuse of dominance, and mergers and acquisitions that may negatively impact competition in the digital marketplace.

The Act also includes provisions aimed at promoting innovation and competition in the digital space, including measures to support start-ups and other small players. For example, the Act proposes the creation of a Digital Innovation Fund, which will provide financial support to innovative new companies in the digital space.

The new Digital Competition Act, which is currently under review by the India Committee on Digital Competition Law (CDCL), could have a significant impact on the digital economy in India. The Act is aimed at promoting competition and ensuring a level playing field for all players in the digital space, from start-ups to large corporations.

The CDCL has been tasked with reviewing and recommending changes to the Act, which covers a wide range of issues, including anti-competitive behavior, data privacy, and consumer protection. The Act is also expected to address issues related to the concentration of power in the hands of a few dominant players in the digital space, which has been a growing concern in India.

One of the key provisions of the Act is the establishment of a new regulator, the Digital Markets Commission (DMC), which will be responsible for enforcing the provisions of the Act and ensuring that digital markets are open, transparent, and competitive. The DMC will have the power to investigate and penalize companies that engage in anti-competitive behaviour, and to impose fines and other sanctions if necessary. The DMU will also be tasked with monitoring the conduct of digital platforms and regulating their operations to prevent market distortion and ensure a level playing field for all players.

One of the key objectives of the Digital Competition Act is to prevent the dominance of a few players in the digital marketplace. It seeks to ensure that smaller players have equal opportunities to compete and grow in the digital ecosystem. The Act proposes to introduce new criteria for assessing market power in the digital sector, taking into account factors such as network effects, data advantage, and access to capital.

The Digital Competition Act is also significant in the context of the growing concerns around data privacy and protection. The Act proposes to establish a Data Protection Authority (DPA) to oversee the collection, processing, and use of personal data by digital platforms. The DPA will have the power to investigate and take action against any violations of data protection regulations.

Overall, the new Digital Competition Act has the potential to significantly impact the digital economy in India, promoting competition and ensuring a level playing field for all players in the market. By establishing a new regulator and introducing measures aimed at promoting innovation and competition, the Act could help to create a more dynamic

and competitive digital ecosystem in India, benefiting consumers, businesses, and the broader economy.

In conclusion, the Digital Competition Act is an essential component of the Competition Amendment Bill 2023, which aims to promote fair competition and prevent anti-competitive practices in the digital marketplace. The Act seeks to regulate the digital economy, prevent market distortion, and ensure a level playing field for all players. It is an important step towards creating a more transparent and competitive digital ecosystem in India.

The Way Forward:

The changes proposed by the Amendment Bill are expected to bring about significant changes to the regulatory framework governing competition law in India. These changes are aimed at promoting fair competition, protecting the interests of consumers, and preventing anti-competitive practices. With the rapid growth of the Indian economy and the increasing importance of the digital economy, it is essential to have a robust and effective competition law framework to ensure a fair functioning of the market, beneficial to all players within.

The Bill seeks to streamline the merger control process, introduce new settlement and leniency mechanisms, and empower the CCI to investigate cartels independently. The proposed amendments are expected to reduce the burden on the CCI, expedite the process of adjudication, and enhance the efficiency of the competition regime in India.

However, at the same time, the decision to make "global turnover" the basis for penalty calculation could be perceived as unexpected mainly because it contradicts the values upheld by the Supreme Court's Excel Crop Care ruling. The extended scope of cartel prosecution is yet another element of surprise that may be found in the proposed amendment. The new measure expands the definition of cartelization to include hybrid anti-competitive agreements. This makes it possible for the CCI to treat active cartel participants and facilitators equally. Additionally, the amendment adds elements of "mens rea" to cartel prosecution, meaning that if someone "intends to participate" in a cartel, they may be penalized. Moreover, failure to file a leniency application or merely knowing of a cartel without knowing whether it is legal should not be taken as evidence of "intention to participate."

It is true that while creating legislation, legislators frequently have the best of intentions. Like in this instance, the legislator's main motivation for enacting the additional rules may be to discourage huge firms from engaging in anti-competitive behaviour. The possible effects of such policies on firms and the economy as a whole must be carefully considered, though. The 2023 Bill may be equally beneficial for the economy as it can be attacking. It is yet to be seen as to what will be its impact on all its stakeholders.