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AN ANALYSIS OF MAJOR PROVISIONS OF THE NEW COMPETITION AMENDMENT BILL, 2022

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ABSTRACT

The market space has been ever-evolving in this trade-centric world. Maintaining healthy competition without the involvement of unfair trade practices in the market is crucial for the development of society. But is the current competition law regime in India adequate? The Competition Bill has been passed in this context. This research paper tries to analyze the major provisions of the new Competition Amendment Bill. Some of these changes are definitional changes, changes in threshold level, changes in timelines, the inclusion of hub and spoke cartel, etc. Other changes are also discussed in this paper. It also tries to focus on the areas where improvements can be made. Thus, in this research paper, the author attempts to bring in suggestions by analyzing the major changes incorporated through the Competition Amendment Bill.

I. INTRODUCTION

Every legislation is passed with an objective that is aimed at maximizing social welfare, and the case is no different in the competition law regime. The Competition Act, 2002 was enacted to promote and sustain competition, protect the consumer's interests and ensure the freedom of trade in the market.⁶⁶² According to this Act, CCI is bundled with the responsibility to eliminate any practices that adversely affect the

competition in the market. Enterprises are neither allowed to abuse their dominant position nor are they allowed to enter into anti-competitive agreements, which can cause appreciable adverse effects on the competition. Enterprises and persons are also not allowed to enter into combinations that are likely to cause an appreciable adverse effect on the competition. The enactment of the Competition Act has led to the growth of the Indian markets significantly.⁶⁶³

However, with the passage of time, the concept of the market has also evolved to include internet-based companies and technological aspects. But the laws have yet to evolve to this extent to incorporate these required changes. The Ministry of Corporate Affairs established the Competition Law Review Committee in 2018 to ensure that the Competition Act is in line with India's economic fundamentals.⁶⁶⁴ The Committee noted during its deliberations that the current regulatory framework does not adequately cover certain market practices. The Committee issued its report⁶⁶⁵ in 2019 and proposed several amendments to the Act as well as changes to the regulatory structure dealing with market competition issues.

The Competition (Amendment) Bill was first published for public consultation in February 2020, and it was finally tabled before the Indian Parliament on August 5, 2022. The Bill represents a concerted effort to align competition law with the changing realities of business today. The Bill seeks to amend the procedural as well as the substantive aspects of the competition law in India.⁶⁶⁶

⁶⁶² The Competition Act, 2002, No. 12, Acts of Parliament, 2003(India).

⁶⁶³ Report of Competition Law Review Committee, Ministry of Corporate Affairs, July 2019.

⁶⁶⁴ "Government constitutes Competition Law Review Committee to review the Competition Act", Press Information Bureau, Ministry of Corporate Affairs, September 30, 2018.

⁶⁶⁵ Report of the Competition Law Review Committee, (July, 2019), Ministry of Corporate Affairs, Government of India, <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

⁶⁶⁶ Neelambara Sandeepan, *Competition Law 2.0- An analysis of the 2022 Competition Amendment Bill*, KLUWER COMPETITION LAW BLOG(15/10/2022, 10:02 a.m.), <http://competitionlawblog.kluwercompetitionlaw.com/2022/08/12/competition-law-2-0-an-analysis-of-the-2022-indian-competition-amendment-bill/>

II. MAJOR FEATURES OF THE BILL

A. Change in Definitions:

Many definitions in the Competition Act have undergone changes in the new Competition Amendment Bill, 2022.⁶⁶⁷ The changes incorporated are mostly encouraging. Firstly, there is a change in the definition of the term 'relevant market'. Earlier, the term relevant market⁶⁶⁸ has been used for both demand and supply-side substitutability. Under the amendment, it is included explicitly. The new definition additionally includes "products and services the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices."⁶⁶⁹ Secondly, the definition of a party is included in this Bill. The definition includes a consumer or an enterprise or an information provider or a consumer association or trade association, or the governments or statutory authorities, including persons and enterprises against whom proceedings are ongoing before the Commission.

Thirdly, the Bill adds new definitions for "control" and "group" for determining whether a transaction qualifies as a combination under the Act. The Bill redefines "group" as two or more enterprises in which one enterprise has the ability (directly or indirectly) to (i) exercise 26% (or such prescribed higher percentage) of the voting rights in the other enterprise; (ii) appoint more than 50% of the other enterprise's board of directors; or (iii) control the affairs or management of the other enterprise.⁶⁷⁰ In addition, the Bill defines "control" as the ability to

exert material influence over the management, affairs, or strategic commercial decisions of (i) one or more enterprises over another enterprise or group, singly or jointly; or (ii) one or more groups over another group or enterprise, singly or jointly.⁶⁷¹ Fourthly, the definition of tie-in agreements⁶⁷² and exclusive dealing agreements⁶⁷³ now includes services also apart from goods. Fifthly, the term enterprise has also undergone changes in the new amendment bill. From the sphere of definitions, these are the major changes that can be identified.

B. Change in Timelines

According to the Competition Act, mergers and acquisitions that are required to be notified cannot be implemented without the CCI's approval. As per the current provisions, combinations will only be effective if CCI issues an order in this regard or after 210 days have passed from the date the notice was given to CCI regarding the combination.⁶⁷⁴ The Bill proposes to further reduce the latter amount, and the period for approval of combinations is now stated to be reduced from 210 days to 150 days, which may be extended by 30 days if a party to the combination requests additional time from the CCI to provide any relevant information or remove any defects that may be present in the notice.⁶⁷⁵ This is a fast-tracked mechanism adopted under the new Bill.

C. Inclusion of Hub and Spoke Cartel

The Competition Act's definition of cartel now includes the Hub and Spoke cartels. The current version of the Competition Act excludes horizontal agreements facilitated by entities that are not engaged in identical or similar trade. As a result, this statutory recognition

⁶⁶⁷ The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁶⁸ s. 2(t), The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

⁶⁶⁹ The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁷⁰ S. 6, The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁷¹ S. 6(c), The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁷² The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁷³ The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁷⁴ Section 6 (2A), The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

⁶⁷⁵ Section 7 (b), The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

imposes the same level of liability on horizontal agreement facilitators, such as trade associations, as well as vertically related enterprises, such as suppliers, distributors, and so on.⁶⁷⁶

D. Change in the Threshold level

Combinations are defined in the Act as the acquisition, merger, or amalgamation of one or more businesses that meet certain asset or turnover thresholds.⁶⁷⁷ Combinations that meet these criteria must seek CCI approval. The Bill proposes to add an additional threshold of the transaction value for notification and scrutiny of combinations. Transactions worth more than Rs 2,000 crore must be notified for CCI approval, according to the provision. Every valuable consideration, whether direct, indirect, or deferred, for any acquisition, merger, or amalgamation is proposed to be included in the transaction's value. This situation has undergone a change in the new Amendment Bill.

Acquisitions in the digital markets are increasingly being valued based on data or specific business innovations of the company being acquired (target). The target in such transactions may not have a large asset base and may be in a business where products/services are given away for free or generate insignificant revenue. While such transactions may have an impact on market competition, the CCI currently lacks the legal framework to evaluate them if they do not meet the specified asset or turnover criteria.

Certain countries have relied on assessing the transaction value of such transactions to determine their impact on market competition. Under German competition law, acquisitions are

regulated if the deal value exceeds 400 million euros, subject to certain other criteria.⁶⁷⁸

The Competition Law Review Committee (2019) recommended that a deal value threshold be included in the Competition Act, 2002 for merger notification. The Standing Committee on Commerce (2022) stated that broadening the scope of merger scrutiny was required to prevent e-commerce companies from engaging in anti-competitive transactions.⁶⁷⁹

E. Change in the Professional Sphere and Governance Mechanism

The Bill expands the Director General's powers to investigate contraventions of the Act. This includes the authority to request information and documents from legal counsel. This may contradict section 126 of the Indian Evidence Act of 1872⁶⁸⁰ which deal with the provisions of lawyer-client confidentiality. The most notable absence from the 2022 bill is the framework for a governing board, which was introduced in the 2020 Bill. The board was given extensive powers and was touted to be a major reform to the governance mechanism of the CCI. However, policy analysts have recommended either removing the governing board or introducing safeguards to maintain transparency in its functioning to protect the CCI's independence and accountability. The change to not introduce the board is an encouraging one. However, it would be prudent to introduce other measures that can mitigate the concerns the board was expected to tackle i.e., reducing the CCI's workload and establishing a cohesive mechanism to develop India's competition policy.

The 2022 Bill expands the rule-making power of the central government and the regulation-

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<http://competitionlawblog.kluwercompetitionlaw.com/2022/08/12/competition-law-2-0-an-analysis-of-the-2022-indian-competition-amendment-bill/>

⁶⁷⁷ Section 5, The Competition Act, 2002, No. 12, Acts of Parliament, 2003(India).

⁶⁷⁸ Act against Restraints of Competition, www.gesetze-im-internet.de

⁶⁷⁹ The Competition(Amendment) Bill, 2022, PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/the-competition-amendment-bill-2022#_edn4

⁶⁸⁰ Section126, The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872(India).

making power of the CCI, including new mandates. A new provision empowering the CCI to issue guidance documents has also been introduced. While these changes are expected to enable the relevant authorities to comprehensively cover nuances of competition law and policy, they still require measures to ensure transparency. The Bill makes an effort towards this by delineating a public consultation process. The process is limited to the regulation-making power of the CCI, allowing the Commission's guidance-making and the centre's rule-making powers to be exercised with notable opacity. Further, it carves out an exception to follow the public consultation process when the CCI is required to make or amend regulations urgently in the public interest. The scope of the term is unclear and empowers the CCI to avoid an extensive public consultation process. The exception needs to be either removed or explained clearly.

F. Quicker Resolution of Antitrust Issues

The CCI may initiate legal action under the provisions of the Competition Act for the following reasons: Anti-competitive Agreements, Abuse of a dominant position, which includes terms that are discriminatory when purchasing or selling goods or services, limiting the amount of goods or services produced, engaging in actions that obstruct market access. The Bill broadens the CCI's role to include the authority to not only initiate legal action but also to conclude inquiry procedures in such cases if the complaining party presents a resolution in the form of a payment or a pledge.

G. Merger Control

Merger control refers to the process of reviewing proposed transactions under Competition law. Section 5 and Section 6 of the Competition Act, 2002 primarily deal with the same. As already mentioned, the Bill seeks to bring in a deal value jurisdictional threshold of Rs. 2000 crores. The 2020 Bill included the

suggestion to empower the Centre by notifying the additional threshold level in the context of public interest. The Bill also makes the appreciable move to ensure that a local nexus is present in the transaction that is being notified to the CCI. This has been suggested by various stakeholders in the past. The Bill also tries to clarify the terms control and turnover. The move can be considered a positive one. However, this cannot be limited to mean just material influence. In previous instances, material interest has been considered the lowest form of control by the CCI. This is followed by *de jure/ de facto* control which widened the scope of 'control' extensively. The Bill also includes provisions which have the ability to facilitate the ease of doing business in India. i.e., explaining the term 'other agreement' post which a transaction is to be notified before the CCI and flexibility in the time provided to notify a transaction before the Commission and reducing the period between notifying the Commission and the combination coming into effect, from 210 days to 150 days. These moves are likely to be received well by industry stakeholders, seeking to engage in inter and intra-group cooperation restructuring in the country.⁶⁸¹

H. Procedure before the CCI

The Bill prescribes a limitation period of 3 years to file the information.⁶⁸² The Bill also allows calling experts from different fields. Anti-trust lawyers are often limited in their knowledge concerning international trade and economics. Hence, economists and additional consulting firms are hired for this purpose. This move would allow anti-trust lawyers and parties to ensure that experts directly appear before the CCI and provide cogent reasoning for their analysis. The move would also ensure that the CCI is able to make correct

⁶⁸¹ Preliminary Analysis, Competition (Amendment) Bill, 202: Key Changes, Evolution and Analysis, THE DIALOGUE, <https://thediologue.co/wp-content/uploads/2022/08/The-Dialogue-Competition-Amendment-Bill-2022-Analysis.pdf>.

⁶⁸² The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

determinations in cases after being provided an analysis from multiple perspectives and experts.

I. Other Changes:

The Act also provides for penalties to be paid if any party to a combination: (i) makes a materially false or knowingly false statement; or (ii) omits or fails to state any material particular, which such party knows to be material. The penalty payable by such party under the Act shall be determined by the Commission and shall not be less than Rs. 50 lakhs but may extend to Rs. 1 crore⁶⁸³, but the Bill has now increased the upper threshold of this amount to Rs. 5 crores.⁶⁸⁴

The merger-control regime in India also imposes a standstill obligation on the parties to a notifiable transaction, and failure to make the required notifications to the CCI under the Act can result in a penalty of up to 1% of the combination's assets or turnover (whichever is greater).⁶⁸⁵ The Bill modifies this provision of law, and now any party to a combination who fails to provide the required notice to the CCI or submit the relevant information in response to an inquiry into the combination initiated by the CCI may be liable to pay a penalty of up to 1% of the total turnover, assets, or transaction value of such a combination.

However, any party providing a notice stating it is void ab initio to the CCI shall be granted a grace period of 30 days from the date of notification by the CCI to this effect, and no action shall be taken by the CCI until the expiry of this 30-day period.⁶⁸⁶

These amendments will undoubtedly have a significant impact on the Indian merger-control

regime, bringing transactions previously excluded from the Act because they did not meet the required turnover or asset thresholds, as has been commonly seen in technology-related transactions. While some of the amendments are certainly welcome changes for businesses, we must wait for parliamentary approval of the Bill and the CCI regulations enacted in response to better understand what this means for India's merger-control regime.⁶⁸⁷

III. SUGGESTIONS

Even though the Amendment Bill seeks to enhance upon the current competition regime, a lot more can be done to improve the scenario. Some of the suggestions in this regard are as follows:

The Act forbids the use of Intellectual Property Rights (IPR) as a defence in cases of abuse of dominant position.⁶⁸⁸ This void is not addressed by the Bill. IPR holders are entitled to certain benefits as a result of their creation or investment. Trademarks, copyrights, and patents are examples of these. The holder of an IPR has a temporary right to prevent others from profiting from their creation or investment. This could result in the form of monopoly or economic exclusivity. In cases of anti-competitive agreements, the Act allows the use of IPR such as copyrights, patents, and designs as a defence. This defence, however, is not available in cases of abuse of a dominant position.

The Act forbids any business or group from abusing its dominant position. Abuse of dominant position includes: (i) discriminatory terms/price in the purchase or sale of goods or services, (ii) limiting or restricting the production of goods or services, or (iii) engaging in

⁶⁸³ Section 44, The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

⁶⁸⁴ Section 31, The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁸⁵ Section 43A, The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

⁶⁸⁶ Section 30, The Competition (Amendment) Bill, 2022, No. 185, Bills of Parliament, 2003 (India).

⁶⁸⁷ Ashima Obhan and Suchi Dutta, India: The Competition Amendment Bill, 2022- a study on the amended law of combinations, MONDAQ, <https://www.mondaq.com/india/antitrust-eu-competition-/1220368/the-competition-amendment-bill-2022-a-study-on-the-amended-law-of-combinations->

⁶⁸⁸ The Competition Amendment Bill, 2022, PRS LEGISLATIVE RESEARCH (last visited on Jan 7, 2022), <https://prsindia.org/billtrack/the-competition-amendment-bill-2022>

practices that result in market access denial. The Competition Law Review Committee has suggested that in cases involving abuse of dominant position, a defence allowing for the protection of IPR be provided. It has been noted that the creation of exclusivity through IPR laws does not always imply the ability to exercise market power. When determining whether an IPR holder has abused his dominant position, a balance must be struck between free competition and the rights of the entity holding the IPR.

The Bill requires appellants to deposit 25% of the amount due under any CCI order in the manner specified by the National Company Law Appellate Tribunal (NCLAT). The NCLAT will not consider the person's appeal unless this amount is deposited. Another pertinent question is thus whether including a mandatory deposit in the law for appealing against CCI orders is appropriate.

Another issue is with regard to disclosing information to authorities. The Bill expands the Director General's powers to investigate violations of the Act. This includes the authority to request information and documents from legal counsel. This may contradict the provisions of lawyer-client confidentiality under Section 126 of the Indian Evidence Act of 1872.⁶⁸⁹

The Bill requires all officers, employees, and agents of a party under investigation to turn over all relevant information and documents to the Director General. The term 'agents' in the Act includes bankers and legal counsel for the party being investigated. The Indian Evidence Act forbids any barrister, attorney, pleader, or vakil from disclosing any professional communication without the consent of his client. Legal advisors are exempt from disclosing certain information under the Companies Act of 2013.⁶⁹⁰

These are some of the areas which can be worked upon in the Amendment Bill

IV. CONCLUSION

On a comprehensive note, the Bill is a positive step that will modernize India's competition law regime. It fixes various nuances involved in the 2020 Bill. It ensures a better landscape for the antitrust regime in the country. It tried to bridge away the gap, which evolved with the incorporation of new-age technology. However, as already mentioned, the Bill has the potential to improve in some areas. Also, in order for the amendments to be implemented successfully, the CCI will need to issue detailed guidelines and regulations. Given the tighter review timelines for merger control, the introduction of a deal value threshold, and increased penalties for omissions, CCI approval must be a top priority when structuring transactions and drafting deal documents in the future. Similarly, the proposed changes to the leniency regime and the introduction of settlements and commitments would necessitate well-thought-out litigation strategies for behavioural cases. Even though multiple expert analysis of the Amendment is available, the real practical application of the same is yet to be witnessed.

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⁶⁸⁹ *Id.*

⁶⁹⁰ Preliminary Analysis, Competition(Amendment) Bill, 202: Key Changes, Evolution and Analysis, THE DIALOGUE, <https://thedialogue.co/wp->

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