

NOTE ON THE COMPETITION (AMENDMENT) BILL, 2022

For ease of reference, this note is divided into three parts:

Part 1: An introduction to the Competition (Amendment) Bill, 2022 (“the Bill”);

Part 2: Brief description of the notable changes in the proposed Bill; and

Part 3: Comments on two peculiar features of the Bill

I. PART 1: INTRODUCTION TO THE BILL

The Competition (Amendment) Bill, 2022 (**“the Bill”**) was introduced in the lower house of the Indian Parliament on 5th August 2022 *“with a view to provide regulatory certainty and trust-based business environment.”*¹

The Bill proposes a slew of changes guided by more than a decade of competition law practice in India and observing global best practices and developments. Some of the notable changes proposed by the Bill are as follows:

- (i) Introduction of “Settlements” and “Commitments” for speedy disposal of antitrust cases;
- (ii) Incentives for disclosure of additional cartels;
- (iii) Increased individual liability for cartel participants;
- (iv) Widening the scope of section 3 of the Competition Act, 2002 (**“the Act”**);
- (v) Limitation period of 3 years for filing information with CCI;
- (vi) Depositing 25% of the penalty levied by CCI for filing an Appeal;
- (vii) Introduction of a “value of transaction” threshold for notifying acquisitions beyond a value of ₹ 2000 Crores (approx. \$ 250 million USD);
- (viii) New definition of “control” as “material influence”; and
- (ix) Reduced timelines for approval of deals;

All the aforesaid changes have been described briefly in **Part 2** of the note below.

In addition to the above changes, the Bill also proposes changes in the definition of the relevant market which is vital for competition assessments in both Antitrust and Combinations cases. Further, there are changes in the provision related to powers of the **Director General (“DG”)** [which is the investigative wing of the Competition Commission of India (“CCI”)]. Brief comments on both these changes have been made at the end of the note under **Part 3**.

¹ The Competition (Amendment) Bill, 2022; Statement of Objects and Reasons. A copy of the Bill is *available at*: http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/185_2022_LS_Eng.pdf. The Bill could not be passed during the Monsoon Session of the Indian Parliament and has now been referred to a parliamentary Standing Committee on Finance for examination and report within three months. Information *available at*: <http://loksabhadocs.nic.in/bull2mk/2022/17.08.22.pdf>.

II. PART 2: BRIEF DESCRIPTION OF THE NOTABLE CHANGES IN THE PROPOSED BILL

(i) Settlements and Commitments

The Bill introduces provisions whereby enterprises alleged of contravening antitrust provisions of the Act (except cartels) can settle the matter or offer commitments in place of contesting the allegations. These provisions will enable the parties to avoid litigation in antitrust cases (which is generally, a long-drawn process before reaching finality) as well as reduce the burden of the CCI. While the general process and principles governing such ‘settlements’ and ‘commitments’ have been laid down by the Bill, most of the details are sought to be worked out through regulations that will be framed by CCI. Some of the notable features of these settlements and commitments are:

◆ When can you apply?

An enterprise can make an offer for commitments any time after initiation of an enquiry against it under section 26(1) of the Act. On the other hand, an application for settlement can be made after the receipt of the report of the Director General i.e. after completion of investigation, but before the passing of an order stating contravention by the party.

◆ What will CCI consider?

It is stated that CCI will take into consideration the nature, gravity, and impact of the contraventions (also effectiveness of the proposed commitments) before accepting the offer for commitment or settlement.

◆ Whether any penalty will be levied?

Along with saving litigation costs and a finding of contravention (that hampers the image of a corporate), reduced fines are also used to attract parties to come forward and settle in mature jurisdictions. However, the Bill just states that CCI can agree to a proposal for settlement on payment of an amount or other terms which will be specified by additional regulations. Thus, it is expected that the additional regulations will shed clarity on this aspect.

For commitments, there is no mention of payment, but the terms and manner of implementation and monitoring shall be decided by additional regulations.

◆ Can CCI refuse the offer?

Yes, CCI has the discretion to reject an application for settlement or commitment.

◆ Can you appeal against the decision of CCI?

No, the Bill states that for settlements and commitments, decision by CCI— either to accept or reject— will be non-appealable.

(ii) Informing more cartels, etc.

To encourage more voluntary disclosures of cartels, the Bill provides that an applicant for lesser penalty (under section 46 of the Act) can disclose additional cartel(s) and gain more reduction in penalty for the cartel for which it made the original application.

Also, the Bill has made changes whereby an application filed for lesser penalty can be withdrawn by the applicant. The DG and CCI, however, will still be able to use the evidence submitted by such applicant except for his admission.

(iii) Individual liability

The Bill specifies the maximum amount of monetary penalties (i.e. 10% of the average income of the last three preceding financial years) that may be imposed on individuals as being jointly liable with the companies who contravene any of the provisions related to competition law.

However, the Bill has incorporated higher penalties for individuals in charge of or responsible for companies found engaged in cartels. These individuals can be penalised with an amount up to 10% of their income for each year of the continuance of the cartel.

(iv) Widening the scope of section 3 of the Act

The provisions dealing with horizontal [section 3(3) of the Act] and vertical [section 3(4) of the Act] anti-competitive agreements are proposed to be amended by the Bill to include those parties and agreements which could not be covered within the fold of these provisions. While the proposed change will expressly widen the scope of section 3 of the Act, in practice the CCI was already including such parties and agreements under the operative provision of the section i.e. section 3(1) of the Act.

(v) Limitation period

The Bill has introduced a limitation period of three years (from the arising of the cause of the action) for filing Information before the CCI for alleged contraventions of sections 3 and 4 of the Act. As the Act has been operational for more than a decade now, this change appears appropriate.

(vi) Deposits for filing an appeal

The Bill prescribes that for filing appeals against the decision of CCI whereby monetary penalty has been levied, 25% of the amount of such monetary penalty will be required to be deposited as a pre-condition to filing such appeal.

(vii) Deal Value threshold

In addition to the present mandate of seeking approval of the CCI for combinations (including acquisitions, mergers, and amalgamations) beyond certain thresholds of assets and turnovers, the Bill introduces a new threshold where deals valuing more than INR 2,000 crore (approx. \$ 250 million USD) will require approval before consummation. This ‘deal value’ threshold may be able to capture acquisitions, especially those in digital market, which do not qualify the existing thresholds but might have an impact on competition in the market. However, as a balancing act, it has also been mentioned that for transactions breaching this ‘deal value’ threshold, the target enterprise should have ‘*such substantial business operations in India as may be specified by regulations*’. These changes in the Bill are in line with the developments taking place globally in this arena.

(viii) Control as ‘Material Influence’

The Bill seeks amendment of the definition of “control” (for Combinations/M&A matters) by including “the ability to exercise material influence” over management or affairs or strategic commercial decisions by an enterprise. However, what would amount to “material influence” or what would be described as a “strategic commercial decision” will become clear during application of the provision.

(ix) Revised Timelines

The Bill has materially altered the timelines with respect to the provisions of merger control. For instance, the existing timeline of 210 days for passing of an order by the CCI has been reduced to 150 days. Also, the timelines included in the procedure for investigations has been reduced.

III. PART 3: COMMENTS ON TWO PECULIAR FEATURES OF THE BILL

(i) Supply-side substitutability in the “Relevant Market”

The Bill contains changes aimed at clearly capturing relevant market in those antitrust or combinations cases where the suppliers can switch between different products, services, or geographies, also known as “supply-side substitutability”. This will enable the parties as well as CCI more flexibility in defining the relevant market by considering the ability of producers or service providers to switch to new products/services. However, certain qualifiers like the ability of firms to market the new products in ‘short term’, ‘without incurring significant additional costs or risks’, and ‘in response to small and permanent changes in relative prices’ will be subject to interpretation of CCI.

Secondly, the Bill defines “relevant product market” through substitution of either demand side or supply side. The definition of supply side substitution is taken from the European Commission’s Notice on the definition of relevant market published in the year 1997.² However, the said Notice is itself

² Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN)

being evaluated.³ In fact, on July 12, 2021, the Staff Working Document of the Evaluation of the Notice (SWD) published on this subject clarified that:⁴

“The Notice explains that supply-side substitution may be taken into account when defining markets, where its effects are equivalent to demand substitution in terms of immediacy and effectiveness. The EU Courts have explicitly confirmed this principle by finding that ‘[a]lthough, from an economic point of view, demand substitutability constitutes the most immediate and effective assessment criterion in relation to the suppliers of a given product [...], supply-side substitutability may also be taken into account in defining the relevant market with regard to operations in which that substitutability has effects equivalent to demand substitutability in terms of immediacy and effectiveness’ and that **‘[s]ubstitutability must therefore be looked at not only from the supply side but also from the demand side, which remains, in principle, the most effective assessment criterion’.**”

Further, on the suggestion of “some representatives of the business community, including in particular those active in digital products... that the Commission should start to consider supply substitution to the same extent as demand substitution”,⁵ SWD states that:⁶

“...such view appears to conflict with best practices derived from the Commission’s practice, from case-law of the EU Courts, which sets out binding principles derived from economic theory, and from international consensus among competition authorities.”

Thus, it can be said that while the Bill seeks to provide more tools for defining relevant markets, it remains to be seen how the CCI uses them during its analysis.

(ii) Powers of the DG

The Bill specifies powers of the Director General (DG) with regards to calling of information, documents, other records, *etc.* and custody of the same; summoning persons and examining them on oath. It also specifies the procedure for conducting search and seizure operations by the DG when there are reasonable grounds to believe that certain information or documents may be destroyed, altered, falsified or secreted.

The DG is already vested with all the above-mentioned powers. As regards the powers for calling information and examining persons on oath, section 41(2) of the present Act gives the DG the powers

³ Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law, *available at*: https://competition-policy.ec.europa.eu/public-consultations/2020-market-definition-notice_en#evaluation-results

⁴ COMMISSION STAFF WORKING DOCUMENT EVALUATION of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, *available at*: https://competition-policy.ec.europa.eu/system/files/2021-07/evaluation_market-definition-notice_en.pdf

⁵ *Ibid.*

⁶ *Ibid.*



of a Civil Court for these matters and in case of non-compliance of this provision, penalty can be imposed under section 43 of the Act. However, the specification of these powers in the Bill under section 41(3) of the Act (which are without prejudice to the present powers under section 41(2) of the Act) complicates the procedure for investigation where two sets of powers (one general and another specific is provided).

For example, the Bill specifies that for examining any person other than an officer, other employee or agent of a party under investigation, the DG will have to seek previous approval of the CCI. On the other hand, there is already a general power vested with the DG by virtue of clause (2) whereby it can “summon and enforce the attendance of **any person**”. To further complicate matters, while the general power is backed by sanction of penalty under section 43 of the Act, the specific powers provided by the Bill do not have any penalty for non-compliance. Therefore, it is unclear, whether the DG will summon persons and examine them on oath under section 41(2) or under section 41(3)?

Therefore, the only meaningful change brought by the Bill is with regard to reading the powers of the DG for conducting search and seizure operations from within the Competition Act itself rather than referring to some other legislation. This is also expressed in the suggestions made by the Competition Law Review Committee in this regard.⁷

⁷ Report of the Competition Law Review Committee (July, 2019), Ministry of Corporate Affairs, Government of India, is *available at*: <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

For any queries, please reach out to our team at Spice Route Legal:



Mathew Chacko
mathew@spiceroutelegal.com



Praveen Raju
praveen@spiceroutelegal.com



Ankita Hariramani
ankita.hariramani@spiceroutelegal.com



Anku Sharma
anku.sharma@spiceroutelegal.com



Aadya Misra
aadya.misra@spiceroutelegal.com



Renuka Abraham
renuka.abraham@spiceroutelegal.com



Nikhil Joseph
nikhil.joseph@spiceroutelegal.com



Janhavi Joshi
janhavi.joshi@spiceroutelegal.com



Sanskriti Shrivastava
sanskriti.shrivastava@spiceroutelegal.com