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# **ANALYSIS OF THE COMPETITION (AMENDMENT) BILL, 2022 AND ITS EFFECTS ON MERGERS & ACQUISITIONS**

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## **ABSTRACT**

There has been a notable growth in the Indian markets in the last two decades creating a dynamic shift in the manner of operation of businesses. This economic development powered by emerging business models having competition as the undercurrent is regulated by the Competition Act, 2002. Keeping these recent developments in mind, the Government of India has suggested modifications to the Act in relation to the current business trends by introducing the Competition (Amendment) Bill, 2022. This article provides an overview and analysis of the proposed Bill and also points out its effects on mergers and acquisitions happening in the digital era.

**Keywords:** Anti-competitive agreements- Deal value thresholds- Appeals-Director-General-Penalty

Society in all periods, however dynamic they may be, has had trade as an important factor in its functioning. Over time, there were different mechanisms to regulate trade and commerce. Countries frame laws based on their principles, goals, and the market. Healthy competition is elementary for a sound economy in any country. When different businesses and sellers exist in the same market, they compete to achieve their business objectives and seek an edge over their competitors. The competition law aims to maintain market competition by regulating anti-competitive activities by Companies. In India, The Competition Act, 2002 acts as the principal legislation that governs the conduct of companies and protects the interests of the consumers.

The main objectives of the Competition Act, 2002 are to ensure freedom of trade, eliminate and prevent practices that have adverse effects on competition, promote and sustain competition in markets, and protect the interests of consumers. The Competition Commission of India is a statutory body established in 2009 under the Competition Act, 2002 to administer, implement and enforce the provisions of the Act. Digitalization and technological advancements acted as a pressing need for the amendment of the Competition Act, 2002 since the Act didn't cover this arena as India did not have a thriving digital economy back then.

Based on the recommendations of the Competition Law Review Committee ("CLRC") in 2019 and the Draft Competition (Amendment) Bill, 2020, the Competition (Amendment) Bill, 2022 was introduced in August 2022 in the Lok Sabha. The Bill was proposed with a view to provide regulatory certainty and a trust-based business environment<sup>1</sup>. The Bill couldn't be passed during the Monsoon Session of the Indian Parliament and has been referred to a Parliamentary Standing Committee on Finance for examination.

## **KEY FEATURES OF THE BILL:**

### **Supply-side substitutability in relevant product market:**

The definition of the relevant market is necessary to determine dominance under Section 4 of the Act. Relevant market under the Act is defined in terms of relevant product market which in turn considers the 'demand side substitutability' from the perspective of a customer. The Bill proposes to add a supply side substitutability as an alternate way to define the relevant product market. The "relevant product market" under the Act "*means a market comprising all those*

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<sup>1</sup> Clause 2, Competition (Amendment) Bill, 2022.

*products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”.*

The definition of supply-side substitution is understood to be adapted from the European Commission’s Notice<sup>2</sup> on the definition of the relevant market. As per the European Commission, “ *supply-side substitutability is likely to be of relevance in situations when companies market a wide range of qualities or grades of one product; even if for a given final customer or group of customers, the different qualities are not substitutable, the different qualities will be grouped into one product market provided that most of the suppliers are able to offer and sell the various quantities under the conditions of immediacy and absence of a significant increase in costs..*”

The Bill attempts to use supply-side substitutability as an additional method to define the relevant product market when the application of the same is conditional as given in the definition.

### **Widening the scope of Anti-competitive agreements:**

Any agreements that cause or are likely to cause an appreciable adverse effect on competition in India are called anti-competitive agreements and they are void. Appreciable adverse effect on competition is said to be caused when: it defines purchase or selling rates directly or indirectly; it Restricts the manufacture, supply, technological growth, or business provision of services; it results in bid-rigging or collusive bid-rigging.<sup>3</sup>

Conventionally, anti-competitive agreements are divided into vertical and horizontal anticompetitive agreements. Horizontal agreements are collusive agreements signed between undertakings or firms who are at the same stage of manufacture or supply chain. Vertical agreements are agreements signed between two or more enterprises or undertakings operating at different levels of production. Certain agreements which involve restrictive trade practices were found to be done by companies which did not have any horizontal agreement between them. In this case, the CCI had to penalize them generally under section 3(1) and not under section 3(3). The Bill empowers the CCI to proceed against any individual or enterprise that

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<sup>2</sup> European Commission’s Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997)

<sup>3</sup> Clause 4, Competition (Amendment) Bill, 2022.

tends to facilitate cartels. Any party facilitating an anti-competitive horizontal agreement was also proposed to be included under anti-competitive agreements. The following provision was proposed to be inserted as under:

*"Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it actively participates in the furtherance of such agreement."*

The Bill clearly expands the scope of cartels to include a hub and spoke arrangement used by entities. However, the bill does not define a hub and spoke. Anticompetitive agreements that are neither completely horizontal nor vertical come under the hub and spoke cartels. The analogy is of a wheel which has a hub and spokes, where the entities at the same level of the production chain are considered as the spokes of the wheel, and the entity which is either a common supplier or retailer is the hub of the wheel, therefore making the agreement the rim of the wheel. The proposed amendment labels the hub and spoke arrangements as horizontal agreements. The Director-General would have to prove the horizontal agreement between the spokes and further has to prove the participation or facilitation of the hub in it.

### **Leniency and decreased penalty:**

The bill intends to help the CCI effectively scrutinize cartel formations and penalize them by proposing lesser penalties for those parties under investigation for cartelization who disclose information about cartels other than the ones under investigation. However, the scope of this leniency provision is not completely clear.

The proposed provision reads as follows:

*"The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, than leviable under this Act or the rules or the regulations made under*

*this Act*”<sup>4</sup>

### **Settlement and commitments:**

According to the proposed Bill, the CCI can get into a settlement agreement with an entity which is alleged of violating the Act. On the other hand, the party can also give proposal for settlement<sup>5</sup> based on which the inquiry initiated can be taken forward. This provision would have been complete had the Bill defined the terms “settlement” and ‘commitment’.<sup>5</sup>

### **Mandatory pre-deposit for Appeal:**

Previously, the Appellate Authority had been vested with the power to decide the amount of pre-deposit to be made by the Appellant. This would be done after considering the merits of the case and the financial capacity of the Appellant. This Bill gives no such discretion to the appellate body.

The provision<sup>6</sup> reads as follows:

*"Provided further that no Appeal by a person, who is required to pay any amount in terms of an order of the Commission, shall be entertained by the Appellate Tribunal unless the appellant has deposited twenty-five per cent. of that amount in the manner as directed by the Appellate Tribunal."*

In the case of Director, ESI Health care v. Maruti Suzuki India Ltd<sup>7</sup>., the Hon’ble Supreme Court has observed that if the condition of pre-deposit is fixed by a statute before filing an Appeal, such condition needs to be satisfied.

If the required pre-deposit of 25% of the penalty is not made at the time of filing of an Appeal, it would be liable to be rejected. The Bill also does not talk about the status of the deposit in case of successful Appeals.

### **Power of CCI over the Office of Director-General**

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<sup>4</sup> Clause 33, Competition (Amendment) Bill, 2022

<sup>5</sup> Clause 35, Competition (Amendment) Bill, 2022

<sup>6</sup> Clause 53B(2), Competition (Amendment) Bill, 2022

<sup>7</sup> 2022 LiveLaw (SC) 453

The Bill proposes to integrate the office of the Director-General with that of the CCI. The CCI is proposed to be equipped with the power over appointment, appraisal, and human resources in the office of the Director-General. Earlier, this was under the ambit of the Central Government.<sup>8</sup> Analogous to the US and the EU, the Bill seeks to adopt an integrated agency approach aiming to increase administrative efficiency. It is also pertinent to note that this integration has the threat of confirmation bias in the investigation process.

### **Powers of Director-General:**

Section 41(2) of the Act gives the Director-General the powers of a Civil Court for certain matters and in case of non-compliance, a penalty can be imposed under section 43 of the Act. The provision to give specified powers further under section 41(3) complicates the investigation procedure by giving two sets of powers, general and specific. In addition to this, the specific powers provided by the Bill do not confer any penalty for non-compliance

The Bill also aims to amend section 41 of the Act<sup>9</sup> to give the Director-General the power to examine agents of a party to a case including legal advisors to such party. This provision infringes the attorney-client privilege as given under sections 126 to 129 of the Indian Evidence Act, 1872. This provision would also violate the provisions of the Advocates Act, 1961.

### **Effect on mergers and acquisitions:**

The Bill seeks to amend the definition of “control” for combinations/M&As by including “the ability to exercise material influence” over the management of affairs or strategic commercial decisions by an enterprise. The definition for both the terms was not given.

One of the principal changes that the Bill strives to bring is that of Section 5 of the Competition Act, 2002 relating to the mergers and acquisitions (“M&As”) of enterprises. The Act gives that M&As that cross the thresholds specified in the Act are categorized as ‘combinations’. Due to this, many substantial transactions have escaped CCI’s assessment as the parties did not cross the applicable thresholds. To preclude this, the Bill has introduced *Deal value thresholds*<sup>10</sup>. According to it, those transactions with a deal value of more than INR 2000 crores (or) USD 250 Mn and those transactions where either party has ‘substantial business operation in India’

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<sup>8</sup> Clause 16, Competition Act, 2002.

<sup>9</sup> Clause 19, Competition (Amendment) Bill, 2022

<sup>10</sup> Clause 6, Competition (Amendment) Bill, 2022

will have to notify and obtain the prior approval of the CCI. The definition of 'substantial business operation in India' will be specified through appropriate regulations.

The analysis of the anti-competitive activities by e-commerce firms recently has acted as the reason for the amendment to this provision. Earlier in 2022, the CCI had summoned online food delivery platforms Swiggy and Zomato, taxi service providers Ola and Uber, and other e-commerce including Flipkart, Oyo etc. and warned them about monopoly and anti-competitive practices. The report on e-commerce in India, by India Brand Equity Foundation predicts the country's e-commerce market to reach \$350Bn by 2030, becoming the largest in the world. It is indispensable to align the provisions of the Bill in nexus with the paradigm shift in the way businesses operate after the pandemic.

The Bill does not suggest any changes to be made for the De minimis exemption or small target exemption. This exempts transactions which are less than INR 350 crores or if the turnover is less than INR 1000 crores from notifying the authorities under the Act. The recent acquisition of INOX by PVR gave them significant combined market power. It did not require the prior approval of the CCI since it came under the limits of de minimis exemption. The acquisition of WhatsApp by Facebook, Myntra by Flipkart, and Free charge by Snapdeal also took the benefit of de minimis exemption. This makes it evident that asset and turnover-based thresholds may not fully capture the significance of combination in the digital sector for competition.

### **Reduction in timelines for combinations:**

The Bill seeks to amend sections 6, and 29 and to insert section 29A with the objective to reduce the timelines for assessing the notices filed for combination. The existing timeline of 210 days for passing an order by the CCI has been reduced to 150 days<sup>11</sup>.

With the deficit of qualified manpower in the CCI, this provision would impose a heavy burden on the existing hands. It is necessary to parallelly increase the required manpower to bring the intention behind this proposed provision to fruition.

### **SHORTCOMINGS OF THE BILL:**

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<sup>11</sup> Clause 7, Competition (Amendment) Bill, 2022.

**Non-inclusion of a judicial member:**

In the case of Mahindra Electric Mobility Limited and another v. CCI & another<sup>12</sup>., the Delhi High Court gave that the presence of a judicial member is necessary when the CCI passes an adjudicatory order. The presence of a judicial member who is equipped with knowledge and experience would have aided in the speedy disposal of cases.

**Need for a designated appellate authority:**

The Act gave for the establishment of the Competition Appellate Tribunal as a special appellate authority for resolving cases under the Act. Later, in 2017, the authority to hear cases of Appeal under the Act was given to the National Company Law Appellate Tribunal (NCLAT). The NCLAT also hears Appeals from few other acts thus reducing its efficiency to adjudicate cases promptly. To solve this issue, the Competition Law Review Committee recommended a designated Bench of NCLAT to hear Appeals under the Act specifically. This recommendation would reduce the backlog of Appeals under the Act pending before NCLAT.

**Need for protection of Intellectual Property in Abuse of Dominance:**

The Act provides protection to IP holders while inquiring into vertical agreements and not to abuse of dominance cases. Addressing this gap, the CLRC recommended including Intellectual Property in abuse of dominance cases in the Act which has not made its way to the Bill.

**CONCLUSION:**

The Bill acts as a good attempt to fit the Competition Act in line with the current needs of the society keeping in mind the advancements that are happening in trade and commerce. It needs to give more clarity on certain terms and remove the ambiguity around them. After a sound evaluation of the standing committee on finance, the recommendations given by it must be carefully analyzed and incorporated into the amended act.

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<sup>12</sup> W.P. (C) 11467/2018, CM APPL. 44376-44378/2018