

**THE STANDING COMMITTEE ON FINANCE MAKES RECOMMENDATION TO REFINE THE
COMPETITION (AMENDMENT) BILL**

1. BACKGROUND

1.1. On December 13, 2022, the Standing Committee on Finance (“**Committee**”) tabled its much-anticipated report on the Competition (Amendment) Bill, 2022 (“**Bill**”), before the Lok Sabha (the lower house of Parliament).¹ The Bill, which was introduced on August 05, 2022, was referred to the Committee for its review, on August 17, 2022.² Thereafter, the Committee invited suggestions from various stakeholders as well as the Competition Commission of India (“**CCI**”) and the Ministry of Corporate Affairs. The key recommendations proposed by the Committee are set out in detail below.

2. PROPOSED RECOMMENDATIONS OF THE COMMITTEE

I. Merger control provisions:

A. Deal-value thresholds

2.1. The Bill proposed introducing a new criterion for notifying a merger or acquisition to the CCI, i.e., a ‘deal value’ threshold (“**DVT**”).³ The Committee noted that the Bill does not provide any guidance in regard to the calculation of the ‘deal value’ and that this may potentially bring even benign transactions⁴ under the ambit of merger control provisions.

2.2. Thus, the Committee recommended that: (i) the CCI should clarify the methodology for computation of ‘deal value’ by way of regulations; (ii) the Bill should clearly specify that for evaluating ‘substantial business operations in India’ (i.e. local nexus), the relevant enterprise is the target enterprise; (iii) ‘local nexus’ condition should not be left to the CCI to decide by way of delegated legislation, and clarity must be provided in the statute itself to ensure predictability and certainty; and (iv) the threshold should be revised annually.

2.3. This is a laudatory step since the clarification regarding ‘local nexus’ condition and the methodology for computation of ‘deal value’ will ensure that transactions that are unlikely to cause an appreciable adverse effect on competition (“**AAEC**”) are not unduly caught under the DVT. Further, the recommendation to revise the threshold annually will ensure that the thresholds are dynamic and reflect the market realities. However, the Committee has not recommended any change in the Bill in relation to the sectoral applicability of the DVT and implicitly endorses a ‘one size fits all’ approach.

¹ Available at: https://164.100.47.193/lssccommittee/Finance/17_Finance_52.pdf.

² Our detailed analysis of the Bill is available at: https://induslaw.com/publications/pdf/alerts-2022/Infolex_Alert_Competition_Amendment_Bill_August_2022.pdf.

³ Transactions where: (i) the global deal value is in excess of INR 2,000 crore (approximately USD 250 million); and (ii) either party has ‘substantial business operations in India’.

⁴ Transactions that are unlikely to cause an appreciable adverse effect on competition in India.



B. Procedural timelines

- 2.4. In regard to the Bill's proposed reduction in the overall timeline for the CCI's: (i) formation of *prima facie* view, i.e., whether a transaction raises competition law concerns or not (from 30 working days to 20 calendar days); and (ii) formation of final view, i.e., approving/modifying/ disapproving a transaction (from 210 calendar days to 150 calendar days, extendable by 30 calendar days), the Committee, in concurrence with the CCI, recommended that the existing timelines should remain unchanged.
- 2.5. The Committee noted that reducing the timeline can be burdensome for the already understaffed CCI and will put it in an undesirable and onerous situation. Thus, the recommendation is a much-needed breather for the CCI and the notifying parties, as a shortened review timeline can increase pressure on the CCI to 'shoot first and ask questions later' which, in turn, may have resulted in an added burden on the parties and increased the risk of invalidation of filings.

C. Definition of 'control'

- 2.6. Given the shift in the CCI's interpretation of 'control' over time, from the ability to exercise 'decisive influence' to 'material influence', the Bill proposed to codify the lowest standard of 'control', i.e., the ability to exercise 'material influence'.
- 2.7. The Committee observed that material influence is now a settled standard and should be explicitly defined by way of regulations. Given that the CCI keeps moving the goalpost for which rights constitute 'control', framing regulations in this regard will provide clarity and certainty to the business community.

II. Anti-trust provisions:

A. Hub-and-spoke cartels

- 2.8. The Bill proposed to extend the scope of cartels by bringing hybrid anti-competitive agreements (such as hub and spoke cartels) within its ambit to enable the CCI to treat cartel facilitators at par with cartel participants. However, the Committee has recommended that only parties, having the intention to actively participate, should be held liable in a hub and spoke cartel. Thus, the recommendation will ensure that enterprises that unknowingly or unintentionally provide a platform for collusive conduct do not get unduly penalised.

B. Commitments and settlements

- 2.9. In relation to the Bill's proposal for the introduction of commitments and settlements mechanism in antitrust cases, the Committee recommended that: (i) cartels should be included within the scope of the settlement mechanism; (ii) the obligation on the CCI to seek views from third parties should be discretionary and not mandatory; (iii) the parties should be allowed to: (a) withdraw their application for settlement or commitment within 7 working days from the date of the hearing; and (b) revisit the settlement/commitment before the CCI's final settlement order; and (iv) an appropriate compensation should be provided to the affected consumers.

2.10. Given that the Committee: (i) notes that “*prima facie*, admission of guilt should not be mandated” as well as (ii) recommends that compensation claims should be provided to the affected customers in settlement cases, it remains to be seen as to how these seemingly inconsistent propositions will be reconciled. Further, it is unclear as to how the proposed settlement mechanism in cartel cases will be harmonised with the existing leniency regime.

C. Effects-based test for abuse of dominant position stance

2.11. The Competition Act, 2002 (“**Competition Act**”) in its current form doesn’t expressly require an evaluation of the AAEC in relation to abuse of dominance. As such, the CCI’s decisional practice in this regard has been rather inconsistent and the CCI has carried out an ‘effects-based’ test in various cases. While the Bill does not include any provision for introducing an effects-based test for Section 4 of the Competition Act, however, based on the discussion with various stakeholders, the Committee has recommended that the CCI should undertake an ‘effects-based’ analysis in abuse of dominance cases under Section 4 of the Competition Act. The Committee noted that an ‘effects-based’ test will allow the CCI to take into consideration different factors, such as the impact on consumers, innovation, competition, etc. while determining abuse of dominance cases.

2.12. This recommendation thus seeks to ensure: (i) consistency in the CCI’s approach; and (ii) that the parties have enough tools at their disposal to defend their conduct.

D. IPR as defence of abuse of dominant position

2.13. Given that the Competition Act and the Bill currently do not provide any exemptions with regard to the allegations of abuse of dominance, the Committee has recommended extending the intellectual property rights (“**IPR**”) exemption provided under Section 3(5) of the Competition Act to abuse of dominance violations under Section 4 of the Competition Act. The recommendation is in line with the international best practices and will: (i) provide a shot in the arm to IPR holders; and (ii) reduce uncertainty regarding patent rights, which are undoubtedly a limited form of statutory monopoly.

III. Miscellaneous provisions:

A. Ability of the Director General to depose legal advisors

2.14. The Bill proposed to expand the Director General’s (“**DG**”) powers of investigation by, *inter alia*, empowering it to examine the agents of the company (such as legal advisors, bankers, and auditors of a company) in addition to officers, employers, etc. under investigation on oath. In this regard, the Committee observed that allowing the DG to examine legal advisors violates the attorney-client privilege in contravention of the provisions of the Indian Evidence Act, 1872 (“**Indian Evidence Act**”) and the rules of the Bar Council of India. As such, the Committee recommended that the relevant clauses in the Bill should clearly specify that nothing in the section will be in contravention of any statute protecting attorney-client privilege, including the Indian Evidence Act.

B. Requirement of a Judicial Member

2.15. The Bill does not provide any provision in relation to the mandatory appointment of a judicial member for the composition of the CCI.⁵ Given that the issue regarding the mandatory appointment of a judicial member by the Central Government is currently pending before the Supreme Court,⁶ the Committee while considering the suggestions of various stakeholders, deemed it appropriate to await the decision of the Supreme Court before giving any recommendation in this regard.

3. **INDUSLAW VIEW**

3.1. Given that competition law is an extremely important piece of legislation, any amendment in the existing law requires careful consideration and thoughtful deliberation. While one may quibble with issues in relation compensation claim certainty, the process followed by the Committee involving deep engagement with stakeholders to understand their concerns on the Bill and providing meaningful recommendations to fine tune the Bill is commendable.

3.2. As such, the recommendations of the Committee appear to be a step in the right direction as they reflect current market realities, avoid any unintended consequences, and are in line with the Government of India's motto of 'ease of doing business'. It is speculated that the Bill will likely come up for discussion in the Parliament during the budget session where it may undergo tweaks before passing into law.

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⁵ In, *Mahindra Electric Mobility Ltd. v. CCI & Another*, (2019) SCC Online (Del) 8032, the Delhi High Court ("DHC") held that it is imperative for the CCI to have a judicial member when issuing its final order. However, subsequently, in *CADD Systems & Services Ltd. v. CCI* (2019) SCC Online (Del) 9252, the DHC held that the order of CCI would not be held to be vitiated on this ground alone.

⁶ *Mahindra Electric Mobility Ltd. v. CCI*, SLP(C) No. 012310/2019.