

THE COMPETITION ACT, 2002 TO GET A FACELIFT

1. BACKGROUND

- 1.1. After a long wait, on August 05, 2022, the Central Government introduced the Competition (Amendment) Bill, 2022 ("**Bill**") amending the current provisions of the Competition Act, 2002 ("**Competition Act**") in the lower house of the Parliament i.e., the Lok Sabha. The Bill is a culmination of the amendments recommended by: (i) the Competition Law Review Committee in 2019; and (ii) public stakeholders' feedback on the draft Competition Amendment Bill, 2020, in early 2020, to *inter-alia* overhaul the merger control and antitrust provisions of the Competition Act. This is a laudatory development as upon passing, the Bill will update the Competition Act by providing it with more teeth and flexibility, in line with the changing economic and business reality. Some of the key proposed amendments of the Bill are set out in detail below.

2. KEY PROPOSED AMENDMENTS OF THE BILL

I. Merger control provisions:

A. Introduction of deal-value based thresholds

- 2.1. The Bill proposes to introduce a new criterion to determine whether any acquisition or merger will require mandatory notification to the Competition Commission of India ("**CCI**"), i.e., a 'deal value' threshold. As such, the CCI will now be able to review transactions where: (i) the global deal value is in excess of INR 2,000 crore (approximately USD 250 million¹); and (ii) either party has 'substantial business operations in India'; provided no exemption is available. The test to determine whether a party has 'substantial business operations in India' will be laid down in the regulations to be issued under the Competition Act. Further, it is unlikely that the small target exemption will be available for transactions notifiable under the 'deal value' threshold.
- 2.2. As such, the current framework prescribes only asset value and turnover based thresholds for mandatory notification to the CCI, hence, many transactions in the digital markets have escaped the CCI's scrutiny owing to the low turnover generated by the target company. The introduction of 'deal value' threshold is in line with the international best practices and will bring a number of such transactions involving 'asset lite' and 'low revenue' technology start-ups under the CCI's scrutiny.
- 2.3. However, in order to prevent benign transactions (especially in the traditional markets) from being caught under this criteria (as the proposed monetary threshold is fairly low), it is important that the regulations, in addition to laying down test to determine 'substantial business operations in India', also specify: (i) the sectors/industries to which it will apply; and (ii) methodology for computation of 'deal value' (especially for transactions which involve share swap).

B. Reduction in the timeline to approve a notifiable transaction

- 2.4. The Bill proposes to expedite the merger review timelines by reducing the timeline for 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). While this proposal appears to be a business-friendly approach and in line with the Government

¹ Converted at the rate of 1 USD = INR 80. Converted figures have been rounded off.

of India's motto of 'ease of doing business', it may increase the pressure on the CCI which in turn may result in an added burden on the parties. It is likely that the CCI will now only accept merger notifications that are complete and accurate to prevent issuance of any request for information which may result in longer timelines. Hence, the parties will now necessarily have to undertake pre-filing consultations with the CCI to ensure that the merger notifications are not invalidated.

C. Widening the scope of 'control'

- 2.5. The Bill proposes to widen the scope of control to the lowest standard of 'control', i.e., the ability to exercise 'material influence'. The existing framework defines 'control' as controlling the affairs or management of a company. Given the wide scope for interpretation, the CCI in its decisional practice had initially interpreted control as the ability to exercise 'decisive influence'. However, recently the CCI has adopted a more comprehensive definition of 'control', comprising *de facto* control,² *de jure* control³ and material influence. Thus, the proposal seeks to codify the prevailing practice and also bring certainty to the definition of 'control' under the Competition Act. Further, while the threshold for determining 'control' under the current framework is already lower than prescribed under the Companies Act, 2013 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (i.e., the takeover code), upon passing of the Bill, the disparity will increase further.
- 2.6. Additionally, it appears that the Bill does not propose to make any corresponding amendment to the 'control' limb of the definition of 'group'. Hence, this may have far reaching consequences for: (i) mapping of overlaps between parties for competition assessment; (ii) computing thresholds for determining notifiability to the CCI; and (iii) availability of the intra-group exemption.

D. Recognition of the 'green channel' provision

- 2.7. In August 2019, the CCI, by way of an amendment to the regulations (issued under the Competition Act) introduced a green channel route for transactions that do not involve any form of overlaps (i.e., horizontal, vertical, or complementary) between the activities of the parties and such transactions qualified for a fast-track approval process. These transactions were granted a 'deemed approval' on the date of filing a simplified merger notification along with the prescribed declaration with the CCI. The Bill proposes to codify this mechanism in the Competition Act itself and further empower the CCI to bring additional types of transactions within the ambit of the green channel route. This is a welcome step as it will enable the parties to non-problematic mergers and acquisitions to obtain faster approvals.

E. Exemption from standstill obligations in certain cases

- 2.8. The merger control regime in India is suspensory in nature and prescribes a standstill obligation, whereby the parties to a transaction are not permitted to consummate any part of a transaction till receipt of the CCI's approval. Recognising that such a blanket prohibition is onerous, the Bill proposes to exempt transactions involving open market purchases and other transactions on a regulated stock exchange from the standstill obligations of the merger control regime provided: (i) the transaction has been timely notified to the CCI; and (ii) the acquirer does not exercise any ownership/ beneficial rights/interest in such shares or securities. Thus, the proposal, in line with the Government of India's motto of 'ease of doing business', seeks to dilute the standstill obligations on listed companies in order to ease their regulatory burden.

² Whereby an enterprise exercises less than majority of the voting rights but in practice, controls more than half of the votes cast at a meeting.

³ Exercising controlling interest in another enterprise, whereby an enterprise exercises 50% or more shareholding/voting rights of another enterprise.

F. Extending the ambit of gun-jumping provisions

- 2.9. Given that the current framework prescribes only asset value and turnover based thresholds for notification of a transaction, the CCI has the power to penalise the parties up to 1% of the total assets or turnover, whichever is higher, for gun-jumping (i.e., consummating a notifiable transaction (in full/part) without prior approval of the CCI or until the lapse of 210 days from the date of notification). In line with the proposed introduction of the deal value thresholds, the Bill proposes to empower the CCI to penalise the parties up to 1% of the 'deal value' of the transaction.

II. Anti-trust provisions:

A. Hub-and-spoke cartels

- 2.10. Under the current framework, only horizontal anti-competitive agreements (i.e., agreements between competitors) are presumed to have an appreciable adverse effect on competition. Recognising that all anti-competitive agreements may not fall within the current pigeon-hole provisions of the Competition Act, the Bill proposes to extend the scope of cartels by bringing hybrid anti-competitive agreements (such as, hub and spoke cartels) within their ambit. This will enable the CCI to treat cartel facilitators at par with cartel participants. The explicit recognition of such hybrid arrangements is in line with the international best practices and will bring more teeth to the anti-trust regime in India.

B. Commitments and settlements

- 2.11. The Bill proposes to introduce a mechanism for commitments and settlements, enabling the parties to apply to the CCI to propose commitments or settlements in anti-trust cases (except in cartel cases). As such, the parties can propose commitments at any time after an investigation has been initiated but before the CCI's investigative arm i.e., Director General's ("DG") investigation report is issued, whereas settlements can be offered after the DG's investigation report is issued but before the CCI issues its final decision.
- 2.12. The Bill provides that the CCI ought to give the complainant, the DG, the applicant as well as third parties an opportunity to submit their objections/ suggestions on the commitment or settlement proposal before passing a final order adopting such proposal, which will not be appealable before the appellate tribunal. Further, the order accepting commitments or settlements can be revoked if the applicant does not make full and true disclosures, or if there has been a material change in the facts. While the Bill provides that procedural details in relation to conducting the commitments or settlements will be laid down in the regulations to be issued under the Competition Act, it is desirable that such regulations also provide clarity on issues *inter-alia*, such as admission of liability for availing commitment or settlement, etc.
- 2.13. These amendments are a welcome change, which will: (i) ensure swift correction of anti-competitive behaviour and practices in the market; (ii) spare willing and legally compliant companies to face the rigours of an extensive CCI investigation; and (iii) ease the pressure on the CCI's resources.

C. Enhancing the leniency regime

- 2.14. The Bill proposes to introduce a 'leniency plus' policy, by allowing a leniency applicant in one cartel to disclose a cartel in a separate market and avail reduction of additional lesser penalty for the cartel already being investigated. Further, in order to ensure that a leniency applicant continues to co-operate with the CCI, the Bill proposes that in case a leniency applicant: (i) fails to comply with the conditions of lesser penalty; or (ii) provides false evidence; or (iii) fails to disclose vital information, the CCI shall be free to impose the full amount of penalty on such non-cooperating applicant.
- 2.15. The Bill also seeks to cure a prevailing lacuna in the Competition Act by allowing parties to withdraw leniency applications. Even though the CCI would not be able to use the admission of any wrongdoing

by the withdrawing leniency applicant, it could use the information provided by such applicant as part of its investigation.

- 2.16. While the leniency regime in India has seen considerable success, the proposed amendments will bolster the regime further and allow the CCI to unearth multiple cartels and enable it to save time and resources expended on cartel investigations. Further, the introduction of 'leniency plus' policy is in line with the international best practices and will act as an added incentive for the companies to make vital disclosures.

III. Miscellaneous provisions:

A. Appointment process and widening the powers of the DG

- 2.17. Under the current framework, the power of appointment of the DG is with the Central Government. The Bill proposes to empower the CCI to appoint the DG with the prior approval of the Central Government. Therefore, the CCI will not have an unfettered right to appoint the DG owing to a checks and balances mechanism in place.

- 2.18. Further, the Bill proposes to expand the DG's powers of investigation by empowering it to: (i) 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; (ii) seek information from third parties about the affairs of company under investigation; and (iii) retain all information and documents requisitioned by it during an investigation, for up to 360 days.

B. Introduction of a limitation period and principle of *res-judicata*

- 2.19. While the current framework does not prescribe any limitation period for filing of an information or reference, the Bill proposes to introduce a limitation period of three years from the date of cause of action for filing of information or reference with the CCI, in relation to anti-trust violations. Further, in line with the principle of *res-judicata* followed by various civil courts in the country, the Bill proposes to empower the CCI to reject an information if it is based on same or similar facts and issues addressed in a previous order issued by the CCI. As such, the introduction of a limitation period will motivate the complainants to take prompt action against anti-competitive conducts. It will also provide some respite to companies who cease/ correct their anti-competitive conducts by providing some safeguard for their past conducts.

C. Enhancing penalty amount and introduction of penalty guidelines

- 2.20. The Bill proposes to enhance the penalty for furnishing false information or failing to furnish material information in relation to transactions requiring the CCI's approval from INR 1 crore (approximately USD 125,000⁴) to INR 5 crore (approximately USD 625,000⁵). Further, the Bill mandates the CCI to publish guidelines in relation to the appropriate amount of penalty to be levied for contravention of provisions of the Competition Act. As such, the publication of penalty guidelines will ensure that the penalties levied by the CCI are proportionate to the gravity of the infringement and will further increase certainty for the stakeholders on the computation of penalties.

D. Deposit of partial penalty amount before the appellate tribunal

- 2.21. The Bill mandates the National Company Law Appellate Tribunals ("NCLAT"), the appellate tribunal for competition law matters, to only entertain an appeal by an erring company upon deposit of 25% of the penalty amount. Currently, the NCLAT, as a matter of practice, requires the appellant to deposit 10% of penalty amount with the NCLAT registry. While the amendment aims to dissuade the parties

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from seeking frivolous adjournments before the NCLAT, the requirement for partial deposit of the penalty amount may lead to an unintended consequence especially for smaller companies as they may indulge in dilatory tactics by approaching various high courts in administrative proceedings instead of approaching the NCLAT on merits of the case.

3. **INDUSLAW VIEW**

- 3.1. Given that the Competition Act has been in force for over 10 years, the proposed amendments are a welcome change to keep the provisions up to date with the current market realities. Even though the objective of these amendments is to ensure a business-friendly approach and in line with the Government of India's motto of 'ease of doing business', the exact mechanism for implementation of certain amendments (such as, deal value thresholds, commitments and settlements, etc.) remain uncertain. The smooth implementation of these amendments will depend on the regulations issued by the CCI in due course to iron out the details.
- 3.2. As such, the proposal to amend the Competition Act has been in pipeline for a few years now and the Bill has been introduced this year in the lower house of the Parliament. Given that the monsoon session of the Parliament has come to an early close on August 08, 2022, without the Bill being passed, the last mile remains to be traversed. We will now have to wait and watch for the Bill to be debated upon and passed in the winter session of the Parliament. This may be a blessing in disguise as it will allow the Parliament an opportunity to understand the feedback of industry and lawyers on the Bill and finetune it to ensure a smooth transition once it comes into force.

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