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C&M Alert: THE COMPETITION (AMENDMENT) BILL, 2020

Ten years of enforcement of the Competition Act, 2002 (**Act**) necessitated a re-look drawing “*from past experience and to prepare for future challenges in the enforcement of competition law framework in India.*” Recognising this, the Ministry of Corporate Affairs (**MCA**) set up the Competition Law Review Committee (**CLRC**) in October 2018. The CLRC was “*tasked with the responsibility to review and recommend a robust competition law framework in India*” and “*suggest changes in both the substantive and procedural aspects of the law.*”¹

The CLRC submitted its report to the MCA in August 2019 (**CLRC Report**). Based on the CLRC Report the MCA has proposed amendments to the Act. The draft Competition (Amendment) Bill, 2020 (**Draft Amendment Bill**) was released on 20 February 2020 and comments are invited from the public. The comments can be submitted [online](#) by 6 March 2020.

This alert provides an overview of the Draft Amendment Bill and also discusses the implications of a few key amendments.

I. OVERVIEW OF THE PROPOSED AMENDMENTS

A large number of amendments have been suggested to the Act. These can broadly be classified into four heads which are discussed in detail below:

- i. amendments to the governing structure of the Competition Commission of India (**CCI**);
- ii. amendments to the procedure followed during inquiries and investigations conducted by the CCI and the office of the Director General, CCI (**DG**);
- iii. amendments to Section 3 (anti-competitive agreements) and Section 4 (abuse of dominance); and
- iv. amendments to the merger control regime.

¹ The reason for its constitution and its responsibilities were lucidly recognized by the Competition Law Review Committee in its [report](#) at page 4.

Amendments to Regulatory Structure

- Establishment of a Governing Board.
- Segregation of administrative and rule making powers of the CCI from the decision-making powers; former powers to vest in the Governing Board.
- The CCI to have the power to appoint the DG.

Procedural Amendments

- The CCI may not inquire into conduct under Sections 3 or 4, if such conduct or a substantially similar conduct has been previously decided.
- Provision for show cause notice and opportunity to be heard if CCI finds contravention where the DG did not recommend contravention.
- The DG granted power to call experts to assist in investigations.
- Leniency applicants permitted to withdraw applications.
- "Leniency plus" regime introduced.
- Penalty on individuals capped at 10% of average income.
- Introduction of settlements and commitments.
- Appeals to NCLAT only upon deposit of $\leq 25\%$ of penalty imposed by the CCI.
- The DG obligated to return materials provided by parties within 180 days.
- The DG granted power to depose third parties not under investigation, with approval of the CCI.
- Obligation on Governing Board to invite comments on regulations.
- Obligation on the CCI to issue guidance on imposition of penalty.

Enforcement Amendments

- 'Enterprise' to include all legal entities; explicit inclusion of economic activities.
- Determination of relevant product market to account for supply side substitutability (*current definition only mentions demand-side substitutability*).
- Scope of cartels (Section 3(3)(a)) broadened to include buyer cartels and hub and spoke arrangements.
- Section 3(4) broadened to include all agreements which are not horizontal in nature.
- Amendments in the explanation to Section 3(4) to bring clarity to the illustrative list of vertical agreements.
- IPR exemption to apply to conduct under Section 4 (abuse of dominance) (*currently, this exemption is limited to anti-competitive agreements*).
- Clarification of, and addition to, factors to be taken into account for determination of (i) appreciable adverse effect on competition (**AAEC**), (ii) relevant product market and (iii) relevant geographic market.
- *Meet the competitors defense* under Section 4(2)(a)(i) widened to include both price and conditions.

Amendments to Merger Control

- Ambit of 'control' and 'group' widened.
- Deemed approval timeline reduced to 150 days (+30 days to respond to notice and clear defects).
- CCI and Central Government given the power to specify new thresholds for notification and exemptions to notification.
- Amendment to timelines applicable for inquiries into combinations by the CCI.
- Modifications offered by parties permitted in instances of combinations resulting in AAEC.
- Parties permitted to acquire shares by way of an open offer prior to obtaining CCI's approval.
- Legislative basis provided for green channel approval, *de minimis* notification, other exemptions; and removal of time limit within which notification must be filed.

II. IMPLICATIONS OF CERTAIN KEY AMENDMENTS

1. PROTECTION TO HOLDERS OF INTELLECTUAL PROPERTY RIGHTS (IPR)

In line with the recommendations of the CLRC, the Draft Amendment Bill, by insertion of Clause 4A and omission of section 3(5) of the Act, seeks to widen protection offered to holders of IPR.

The exemption for IPR holders is currently restricted to anti-competitive agreements. As per Clause 4A, the right of a holder of IPR (under legislation relating to IPR in India) to (i) restrain any infringement and (ii) to impose reasonable conditions, as may be necessary for protecting their rights, will be unaffected by Section 3 (which deals with anti-competitive agreements) and Section 4 (which deals in abuse of dominant position).

This amendment, brings the much-needed parity between the treatment of anti-competitive agreements and abuse of dominant position.

The amendment also expands the list of statutes with respect to which IPR protection is available under the Act. The proposed amendments include a residual provision in Clause 4A(1)(g) covering any other law relating to the protection of intellectual property rights that may be in force. Currently, the protection is limited to IPRs granted under five statutes listed in Section 3(5).

C&M Comment: *Absence of requirement to determine effects under Section 4*

Absence of a specific obligation on the CCI under Section 4 to adopt an effect-based approach while determining an abuse of dominant position, still leaves much to be desired. The CLRC, in this regard, observed that, *“the CCI has interpreted Section 4(2) keeping in mind that one of the key aims of the Act is to prevent practices which adversely affect competition in India. It has therefore, wherever appropriate, analyses the effects of alleged abusive conduct by dominant parties before passing orders regarding such conduct”* and that *“it may not be necessary to undertake an effects analysis in all kinds of abuse e.g. exploitative abuses.”*² These observations of the CLRC seem misplaced for the following reasons.

- *Firstly*, an analysis of effects in cases of abuse of dominance by the CCI reveals unpredictability in assessment.³ This creates ambiguity and prevents businesses from conducting meaningful self-assessment of their business practices.
- *Secondly*, the CLRC failed to appreciate that exploitative abuses much like exclusionary ones would require an effect-based assessment, and creates a specious distinction between the two. In fact, the CCI has itself followed an effect-based approach in cases where exploitative conduct was alleged.

² CLRC Report at para 4.11 and 4.12, page 108

³ While dealing with unfair terms and conditions in B2B Contracts, the CCI in *INSA v. ONGC*, [Case 01 of 2018](#) and *Next Radio Limited v. Prasar Bharti*, [Case No. 29 of 2016 and 19 of 2017](#), adopted an effect-based approach. This is in contrast with *GHCL Limited v. Coal India*, [Case No. 08 of 2014](#) and *FIA v. Adani Gas Limited* [Case No. 71 of 2012](#), where for similar allegations the CCI failed to use the effects based approach. Similarly, while dealing with contravention under Section 4(2)(c) i.e, exclusionary abuse the CCI in *House of Diagnostics LLP v. Esaote S.p.A. & Others*, [Case No. 09 of 2016](#) failed apply an effects based approach while applying it in *XYZ v. REC Power Distribution Company Ltd.*, [Case 33 of 2014](#).



- *Thirdly*, the CLRC Report notes that regulatory authorities in other jurisdictions viz., European Union, Brazil, United States, Australia, Canada and Singapore have adopted rule of reason to analyse effects of abuse of dominant position conduct.

The Draft Amendment Bill by failing to recognise the above, precipitates the errors made by the CLRC and forgoes the opportunity to bring much needed uniformity and clarity in the legal framework.

2. COMMITMENTS AND SETTLEMENTS

In the interest of speedier resolution of cases of anti-competitive conduct and conservation of investigational resources, additional enforcement mechanisms of settlement and commitments have been introduced in the Draft Amendment Bill, in line with the recommendations of the CLRC Report.

Insertion of Clause 48A, allows parties to propose for settlement of the proceeding initiated in respect of *alleged contraventions of Section 3(4) (vertical restrains) and Section 4 (abuse of dominant position)*. As per the proposed amendments, the CCI can revoke an order of settlement or commitment in case of non-compliance; and can impose penalty of up to INR 1 (one) crore or c.USD 140k.

A brief overview of the recommended provisions is provided below:

[With prejudice] Settlements (*Section 48A*)

- On an application moved by a person against whom an inquiry has been initiated.
- At any stage after submission of report by the DG but prior to passing of the final order by the CCI .
- The CCI has the option to accept or reject an offer for settlement.
- The CCI may require party(ies) to deposit fines while permitting settlement.
- No appeal lies against an order permitting or rejecting an application for settlement.

[Without prejudice] Commitments (*Section 48B*)

- On an application moved by a person against whom inquiry has been initiated.
- After passing of an order directing investigation, but within specified time frame, prior to receipt of investigation report of the DG.
- The CCI has the option to accept or reject an offer for commitments.
- Provision suggests that no monetary payment would be required.
- No appeal lies against an order permitting or rejecting an application for commitments.

C&M Comments - Insertion of Clause 48A and 48B is indeed a laudable move, but the Draft Amendment Bill fall short on a few aspects.

- The proposed amendments do not clarify how settlement and commitments would apply to existing cases.
- The CLRC Report envisaged commitments to be *without prejudice*, however, the Draft Amendment Bill does not provide for this. The Draft Amendment Bill only seems to suggest that no monetary payment would be required before approving a commitment. Given the centrality of these aspects to the success of the regime, these should be clearly specified in the provision itself.
- The proposed amendments set out a time period for making an offer for commitments to the CCI. The CLRC Report simply contemplated parties to offer commitments prior to submission of the DG's investigation report. If the time period stipulated by the CCI is insufficient, it may not allow parties to fully weigh their options and offer a commitment.
- The proposed amendments fail to permit withdrawal of an information by the informant. The proposed amendments also do not clarify whether an agreement between an informant and investigated party(ies) can be taken into account by the CCI to close the case. Notably, such settlements between the parties have on numerous occasions lead to requests for withdrawal of information/termination of the inquiry, before the CCI⁴ and various High Courts.⁵
- Inclusion of a separate provision permitting informants/complainants to withdraw information, and explicitly recognising the CCI's power to take an arrangement between the informant and investigated party would go a long way in achieving the objectives of the provisions.
- Absence of a right to appeal from orders permitting settlements and commitments deprives an affected party of its right to redressal. Given that a writ petition may lie against such orders, the intended purpose of speedy disposal may not be achieved by removing the right to appeal.

3. NEW THRESHOLDS FOR MERGER NOTIFICATION

The Draft Amendment Bill will empower the CCI and Central Government to define new thresholds for merger notification by introducing a proviso to Section 5.

The new thresholds will now enable the CCI to notify sector specific thresholds based on deal value or size of transaction or any other criterion.

⁴ The CCI has in *Prime Mag. Subscription Services Pvt. Ltd. v. Wiley India Pvt. Ltd.*, [Case No. 07 of 2016](#); *Thiruvananthapuram Entertainment Network (P) Ltd. v. Star India Pvt. Ltd.*, [Case No. 13 of 2017](#) ; and *Sarv Prakash Developers v. Phantom Films*, [Case No. 65 of 2017](#) refused to permit withdrawal of information by the informant, even when made before the *prima facie* stage. Similarly in *Shri Yogesh Ganeshlaji Somani v. Zee Turner Ltd. & Ors.*, [Case No. 31 of 2011](#) the informant's request for withdrawal after submission of report by the DG was rejected.

⁵ The Bombay (*Nhava Sheva International Container v. Union of India*, Writ Petition Nos. 14277 of 2018), Madras (*Tamil Nadu Film Exhibitors Association v. Competition Commission of India and Ors.*, Writ Appeal Nos. 1086 and 1087 of 2013) and Delhi High Courts (*Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India* W.P. (C) 8379 of 2015) have been faced with situations where informant and investigated party have settled their claims. In all these cases, the High Court have directed the CCI not to continue with the investigation.

The amendment appears to be in furtherance of the CLRC's recommendation to capture transactions in the digital market. The CLRC had raised concerns around the "regulatory gaps [which] fail to account for acquisition of small innovative companies by large digital companies."⁶

C&M Comment: *The introduction of new thresholds may increase regulatory burden*

Introduction of new thresholds based on deal value or other criterion will certainly increase regulatory burden as well as compliance costs for businesses. It is necessary that the introduction of objective thresholds or criterion is preceded by a detailed economic and legal assessment of the necessity of such thresholds, and stakeholders' consultation.

4. CHANGE IN THE STRUCTURE OF THE CCI – CREATION OF GOVERNING BOARD

The CLRC Report examined the regulatory design under the Act in great detail. It recognised that the CCI is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory functions. To strengthen the democratic legitimacy and accountability of the CCI, as well as to ensure separation of executive and adjudicatory functions, it recommended the creation of a governing body.⁷

The Draft Amendment Bill, in line with the CLRC Report, has proposed constitution of a Governing Board. The Governing Board, as per Clause 8 (1A) would comprise of members of the CCI, Secretary of Department of Economic Affairs, Ministry of Finance or his nominee (who would also be considered *ex-officio* part-time member) and four Part-time Members to be appointed by the Central Government.

As per Clause 18(1A) the Governing Board is in-charge of general superintendence, direction and management of the affairs of the CCI. It will also exercise the powers to issue regulations under the Act. In a welcome move, it has been made obligatory on the Governing Board to publish all regulations for public comments.⁸ This would bring predictability and transparency in the process of making regulations.

The Governing Board will also have the power to enter into any memoranda and arrangements. The advocacy functions have also been transferred to the Governing Board. Rid of these additional powers, the CCI will be able to discharge adjudicatory functions in a focused manner. The Draft Amendment Bill also includes a reference to the National Competition Policy which has been conspicuous in its absence from the legal framework.

⁶ CLRC Report at paragraph 2.18, page 158.

⁷ CLRC Report at paragraph 2.1. to 2.6, page 20 and 21.

⁸ Clause 64A

C&M Comment: *Welcome move which would benefit from a few recommendations*

The creation of the Governing Board is a welcome move. Shorn of the functions divested to the Governing Board, the CCI will exercise only adjudicatory functions. This, as noted by the CLRC, will ensure separation of powers, bring about robust governance and democratic legitimacy to the CCI. However, we note that there is no guidance on how the Central Government will nominate the Part-time Members to the Governing Board. To ensure legitimacy and independence, the Part-time Members of the Governing Board, should be appointed by the Central Government based on recommendations of the selection committee constituted under Section 9. Section 9 should accordingly be amended to include Chairperson, Whole-time Members and Part-time Members.

We will send a more detailed analysis on other aspects of the Draft Amendment Bill over the next few days.

We also solicit comments that you have, if any, to competitionlaw@chandhiok.com. We will be submitting our comments on the Draft Amendment Bill, and would be happy to incorporate to it your comments and suggestions.



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