

The Competition (Amendment) Bill, 2022

Why is an amendment to the already existing Indian Competition Act necessary?

G.S. BAJPAI
ANKIT SRIVASTAVA

The story so far: The Indian Competition Act was passed in 2002, but it came into effect only seven years later. The Competition Commission primarily pursues three issues of anti-competitive practices in the market: anti-competitive agreements, abuse of dominance and combinations. As the dynamics of the market changes rapidly due to technological advancements, artificial intelligence, and the increasing importance of factors other than price, amendments became necessary to sustain and promote market competition. The long-awaited Bill to amend the Competition Act, 2002, was finally tabled in the Lok Sabha recently.

What is the major change in dealing with new-age market combinations? Any acquisition, merger or amalgamation may constitute a combination. Section 5 currently says parties indulging in merger, acquisition, or amalgamation need to notify the Commission of the combination only on the basis of 'asset' or 'turnover'. The new Bill proposes to add a 'deal value' threshold. It will be mandatory to notify the Commission of any transaction with a deal value in excess of ₹2,000 crore and if either of the parties has 'substantial business operations in India'. The Commission shall frame regulations to prescribe the requirements for assessing whether an enterprise has 'substantial business operations in India'. This change will strengthen the Commission's review mechanism, particularly in the digital and infrastructure space, a majority of which were not reported earlier, as the asset or turnover values did not meet the jurisdictional thresholds.

When business entities are willing to execute a combination, they must inform the Commission. The Commission may approve or disapprove the combination, keeping in mind the appreciable adverse effect on competition that is likely to be caused. The Commission earlier had 210 days to approve

the combination, after which it is automatically approved. The new Bill seeks to accelerate the timeline from 210 working days to only 150 working days with a conservatory period of 30 days for extensions. This will speed up the clearance of combinations and increase the importance of pre-filing consultations with the Commission.

What is gun-jumping?

Parties should not go ahead with a combination prior to its approval. If the combining parties close a notified transaction before the approval, or have consummated a reportable transaction without bringing it to the Commission's knowledge, it is seen as gun-jumping. The penalty for gun-jumping was a total of 1% of the asset or turnover. This is now proposed to be 1% of the deal value.

What challenge do combining parties face in open market purchases?

There have been several gun-jumping cases owing to the combining parties' inability to defer the consummation of open market purchases. Many of them argue that acquisitions involving open market purchase of target shares must be completed quickly, lest the stock value and total consideration undergo a change. If parties wait for the Commission's clearance, the transaction may become unaffordable.

Similar to the European Union merger regulations, the present amendment Bill also proposes to exempt open market purchases and stock market transactions from the requirement to notify them to the Commission in advance. This is subject to the condition that the acquirer does not exercise voting or ownership rights until the transaction is approved and the same is notified to the Commission subsequently.

Does the amendment Bill address the issue of Hub-and-Spoke Cartels?

A Hub-and-Spoke arrangement is a kind of cartelisation in which vertically related players act as a hub and place horizontal restrictions on suppliers or retailers (spokes). Currently, the prohibition on

anti-competitive agreements only covers entities with similar trades that engage in anti-competitive practices. This ignores hub-and-spoke cartels operated at different levels of the vertical chain by distributors and suppliers. To combat this, the amendment broadens the scope of 'anti-competitive agreements' to catch entities that facilitate cartelisation even if they are not engaged in identical trade practices.

What is the amendment to the 'settlements' and 'commitments' mechanisms?

The new amendment proposes a framework for settlements and commitments for cases relating to vertical agreements and abuse of dominance. In the case of vertical agreements and abuse of dominance, the parties may apply for a 'commitment' before the Director General (DG) submits the report. 'Settlement' will be considered after the report is submitted and before the Commission decides. According to the amendment, the Commission's decision regarding commitment or settlement will not be appealable after hearing all stakeholders in the case. The Commission will come out with regulations regarding procedural aspects.

What are the other major amendments?

In the amendment Bill, a provision called 'Leniency Plus' allows the commission to give an additional waiver of penalties to an applicant who discloses the existence of another cartel in an unrelated market, provided the information enables the Commission to form a prima facie opinion about the existence of the cartel. Other noteworthy amendments include the appointment of the DG by the Commission rather than the Central government, giving the Commission greater control. According to the Bill, the DG has the power to conduct investigations, including raids. The Commission will only consider information filed within three years of the occurrence of the cause of action. As part of the Bill, penalties and penalty guidelines are proposed to be amended. For any false information filed, a penalty of five crore will be imposed, and for failure to comply with



the Commission directions, a penalty of ₹10 crore will be imposed. Additionally, the Commission will develop guidelines regarding the amount of penalties for various competition violations. For an appeal to be heard by the National Company Law Tribunal (NCLT) against the Commission's order, the party will have to deposit 25% of the penalty amount.

What next?

By implementing these amendments, the Commission should be better equipped to handle certain aspects of the new-age market and transform its functioning to be more robust. The proposed amendments are undoubtedly needed; however, these are heavily dependent on regulations that will be notified by the Commission later. These regulations will influence the proposals. Also, the government needs to recognise that market dynamics change constantly, so it is necessary to update laws regularly.

G. S. Bajpai is the Vice-Chancellor Rajiv Gandhi National University of Law, Punjab where Ankit Srivastava is Assistant Professor

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