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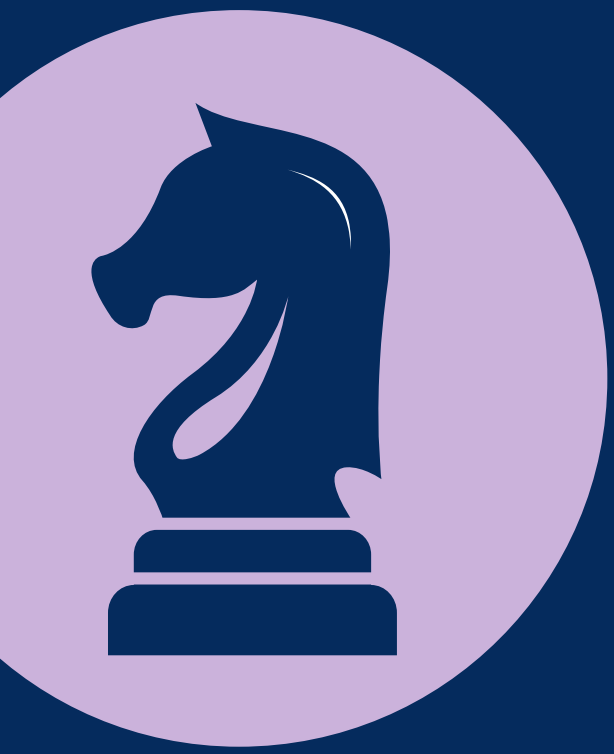
ANTITRUST 2.0

COMPETITION (AMENDMENT) BILL, 2022 AND OTHER CHANGES

Event Report



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Event Report: Antitrust 2.0 - Competition (Amendment) Bill, 2022 and other changes

The Dialogue organised a roundtable discussion on competition law 'Antitrust 2.0' on November 1, 2022, at The Imperial, New Delhi. The panellists were:

a. Ms. Nirupama Soundararajan, CEO at Pahle India Foundation
b. Dr. Assimakis Komninos, Competition Law Partner, White & Case LLP
c. Mr. Samir R. Gandhi, Partner at Axiom5 Law Chambers and Senior Advisor at AZB & Partners
d. Mr. Rahul Rai, Partner at Axiom5 Law Chambers and Senior Advisor at AZB & Partners

The moderators for the session were:

a. Mr. Kazim Rizvi, Founding Director, The Dialogue
b. Mr. Saksham Malik, Programme Manager, The Dialogue

1. Overview

The discussion revolved around three key themes: i) Changes pertaining to anti-competitive agreements, abuse of dominant position, and merger control in the Competition (Amendment) Bill, 2022 (the Bill); ii) ex-ante regulation and gatekeeping rules and; iii) Introduction of Commitments and Settlements mechanisms by the Bill.

The first session included discussions on the impact of the omission of Intellectual Property Rights (IPR) exemption under section 4, i.e. abuse of dominance in the Bill. Panellists agreed that the omission might potentially deter companies from taking the risk of innovation. The omission of effects-based tests to evaluate abuse of dominance cases from the 2022 Bill, the introduction of hub and spoke cartels and deal value thresholds were also discussed.

The second session started with the speakers' valuable insights on the EU's ex-ante Digital Markets Act (DMA) framework. They emphasised the trade-off between the inflexibility and uncertainty of the DMA. It was stated that the DMA's inflexible nature could lead to more regulatory certainty. The panel further deliberated the need for a similar kind of framework in the Indian context and concluded that any framework should be suited to the Indian market and policy realities.

Post-lunch, in the third session, the panellists discussed the nuances of the settlements and commitments mechanism introduced by the Bill. The panel agreed that it is a good move and could do with further clarity on aspects related to admission of guilt, timelines, and parties' choice to withdraw from a deal. The panel then moved on to a Q&A round where participants actively asked questions to different panellists.

2. Anti-competitive agreements, abuse of dominance and merger control

2.1. IPR Exemption

The Competition Law Review Committee (CLRC) had recommended that an IPR defence similar to the one in section 3(5) should be incorporated in section 4 as well. However, the 2022 Bill missed out on the same. The panellists agreed that such a defence should be extended to section 4. The panel presented its acceptance while acknowledging that there is a delicate balance between being an IPR holder benefiting from its fruits of labour and abusing its position of power. The Indian framework shall at least allow a

dominant entity holding a patent to explain to the Competition Commission of India (CCI/Commission) that what the entity is doing is necessary for the exploitation and protection of its patent and should, therefore not be held liable under Section 4 of the Competition Act, 2002 (the Act). They advised that the standing committee should discuss this issue in greater detail and resolve the conflict between IPR law and competition law.

The panel also stressed the significance of IPR rights in promoting innovation. It was stated that if someone creates something new, they should be given the ability to exploit that creation to the exclusion of everyone else for a predetermined period up until their patent stands valid. The reason behind this argument is to reward the risk-taking that the entrepreneur has engaged in. Once someone has secured IPR, by its very definition, it would lead to exclusion unless the IPR holder decides to licence it out. There is no fetter prescribed under IPR on the exploitation of rights that someone secures. The fetters that are present are all carved out expressly in very limited situations. Not recognizing this in Section 4, therefore, could open the door to diluting the rights recognized under IPR laws. Eventually, this will have a bearing on innovation and entrepreneurship, and it will hinder the risk-taking appetite that entrepreneurs may have. To prevent this, it is imperative that our legislatures subject this issue to further consideration and recognize the challenges associated with not having this exception built into the legislation.

2.2. Effects-based test under Section 4

A key omission in the proposed Bill can be seen with respect to Section 4 of the Act, i.e., abuse of dominant position. It was expected that an effects-based test will be introduced within the provision. Under this test, a regulator looks at different factors like impact on consumers, innovation, and the competition before adjudicating conduct as violative of the competition law. Currently, the Act does not explicitly recognise the effects-based test in Section 4. Even though the test has been applied in past cases by the CCI, it has been at the discretion of the CCI, which can potentially lead to uncertainty amongst market players.

The panel vouched for the significance of having an effects-based test. It mentioned that any successful business practice will have the impact of someone else's exclusion or loss and, *prima facie*, terming this exclusion as bad without looking at the effects of the practice on the competition could be detrimental. A business might end up being excluded from the market on account of various factors: a competitor's legitimate business practice, its own inefficiency, or a superior product being introduced. Thus, the regulator should first determine whether the loss is due to any of these reasons or the competitor's abuse of its position. However, unlike section 3 which specifies an 'appreciable adverse effect on competition' test (AAEC), section 4 does not explicitly require the regulator to adopt an effects-based test. The panel, while commenting on the uncertainty this can lead to, stated that the wording of Section 4 is such that the Commission has to necessarily engage in some sort of effect test. However, cases from the last five years indicate that the Commission, in roughly around 40% of cases, adopted the per se test and in the remainder, it has used the effects test thus leading to a lack of clarity.

The panel also stated that the international competition regime has moved towards an effects-based test. In India as well, moving from the MRTP Act to adopting Raghavan's committee report and the Competition Act, 2002 indicated a change in India's stance of viewing big as bad and instead, testing the conduct for its actual effects first. However, under the current enforcement regime, alleged abusive conduct of a 'dominant' entity is presumed to be anti-competitive rather than the entity being allowed to

demonstrate how their conduct is not resulting in the foreclosure of the market. Here, the jurisprudence in the EU was referred to, where the courts have imposed a special responsibility on the dominant entities to ensure that their actions do not lead to foreclosure, while also ensuring that the objective justifications provided by such entities are certainly looked into by the courts.

The panel further elaborated on the issue with the Act in not explicitly recognising a test for section 4 whereas various other substantive provisions have reference to a test. Section 3(4) allows the Commission to prohibit vertical restraints on a finding that they cause AAEC. Sections 5 and 6 on merger control allow the Commission to stop a transaction from taking place if it is likely to cause AAEC. Thus, they emphasised that solely section 4's analysis should not be left to the complete discretion of the regulators. The panel agreed that any amendment in the statute does not need to be prescriptive, however, there is a clear need for incorporation of an effects-based test under Section 4.

2.3. Hub and Spoke cartels

The 2022 Bill includes Hub & Spoke (H&S) cartels where an entity, though not part of the cartel but actively working to promote the cartel, will also be covered. H&S cartels will be subjected to a per se analysis where irrespective of its actual impact on competition in the market, the agreement will be presumed to be violating Section 3. The panel, while speaking on whether H&S cartels should be subjected to a per se test or a rule of reason test, stated that an H&S cartel unlike a traditional cartel that involves horizontal players, may involve parties that are vertically placed in a supply chain.

For instance, a manufacturer may insist distributors to engage in an anti-competitive conduct. This would not amount to collusion. The Act has also subjected similar kinds of agreements such as one pertaining to Resale Price Management where a manufacturer insists that distributors maintain a certain price, to a rule of reason test under Section 3(4). To overcome such contradiction, it was suggested that the Bill should at least have an empowering clause that allows the Commission to distinguish between collusion and imposition of will. It was also pointed out that cartels always entail some element of intentional collusion, however, the same does not hold true for digital markets where the agreements are often new and multi-dimensional. Thus, it was suggested that an enabling provision be included which will allow the Commission to study the agreement first.

2.4. Merger Control

The Bill introduces a new merger control regime with deal value thresholds and a local nexus test. The panel started the discussion with concerns about 'killer acquisitions' that potentially prompted the legislature to complement the current assets and turnover criteria with the deal value threshold. For example, a food delivery platform with insignificant assets or turnover, but huge potential for innovation might pose a threat to the incumbent, and the incumbent may simply buy out the food delivery player.

The panel averred that creating a new threshold, or creating new rules, brings about its own degree of uncertainty in the market. Thus, before bringing in any new rules, there should be clarity on the need for the same. Before bringing the deal value threshold, it needs to be assessed if there are so many killer acquisitions that they warrant a new threshold. Between 2009 and 2011, the CCI worked with industries to assuage concerns and ensure that merger control would not end up becoming one more level of regulation. However, the recent developments in merger control have led to a debate on the possibility of

overregulation. If the deal value threshold is implemented, it is necessary that the scope, manner of implementation, and other relevant nuances of the threshold, including the local nexus test, are clarified by policymakers.

3. Ex-ante regulations

The panel shed light on the EU's DMA which came into force on November 1, 2022. The Act contains certain prescriptive do's and don'ts that would be applicable to certain companies that are identified as 'gatekeepers'. The rules would apply ex-ante, unlike competition law that applies ex-post facto. Another point of distinction between competition law and ex-ante regulation is that the latter does not require defining relevant market and effects analysis. The rules would apply irrespective of the prohibited conduct's effect on the competition and consumers. Under the DMA, a company would not get an opportunity to show the regulator why a certain practice shall not be barred. Any non-compliance will be followed by huge fines and can even lead to the breaking up of companies or the prohibition of a potential M&A in case of systematic non-compliance. Thus, the DMA is inflexible as compared to the law in jurisdictions like Germany and U.K. which is comparatively flexible.

Speaking on the need for ex-ante regulations in the Indian context, the panel agreed that the DMA can not be looked at as a golden standard for competition law. They provided the example of self-preferencing which in the past has been interpreted by the European Courts as both pro-competitive and anti-competitive depending on the circumstances of the case. However, the DMA totally prohibits self-preferencing by the identified gatekeepers. In the panel's opinion, either India can build its regulations from the examples of other jurisdictions or can develop its own regulations based on its own enforcement and maybe re-evaluate what is needed after a few years. The panel stated that any regulation should be based on Indian market realities and should not be replicated from other jurisdictions.

However, it accentuated the need to ensure that any ex-ante regulation that India brings is in harmony with the rules in other international jurisdictions to ensure harmonisation. As a part of a global system, national interests should be balanced with international relations. Imposing stringent regulations on foreign entities doing business in India would lead to a quid pro quo situation where Indian businesses operating outside India can possibly face similar stringent rules. They also stressed not creating a regulatory arbitrage for different entities, especially on the basis of size or capital. In contradiction to differentiated regulation which might enable smaller businesses, discriminatory regulation that targets solely big players should be avoided as the same could be a disservice to the smaller businesses who wish to grow. As an endnote, the panel insisted that the Indian markets are constantly evolving and thus, any regulation should be made with a certain level of flexibility that would allow for changes suited to the market needs.

4. Settlements and Commitments Mechanism (S&C)

The 2022 Bill suggests a settlement and commitment mechanism which would allow the parties to negotiate a deal with the Commission thus saving time and resources for all the stakeholders involved. All the panellists unanimously agreed that it is a significant step and would bring Indian antitrust in line with international principles. It affirmed the need for S&C in light of the high caseload and burdened adjudication machinery which can impact the growth of businesses involved in competition law cases. S&C would allow for more certainty as businesses could get an opportunity beforehand to recognise the

possible consequences of their action and accordingly correct their behaviour. As per the panel, this becomes significant as many times, a company might not have a foul intent but may rather end up excluding others as a consequence of unpredictable development of markets. Panellists agreed that S&C would 'foster a better relationship between the industry and regulator'.

Moving on to the Bill's silence on the admission of guilt, the panel stressed on the difference between settlement and commitment in international parlance where the former usually indicates admission of guilt and the latter does not. It emphasised that the issue of admission of guilt is a substantive legal position and thus should not be delegated to regulators, rather, the Parliament shall itself legislate on it.

It was pointed out that the Act allows third parties that are affected by the anti-competitive conduct to file for compensation claims. An admission of guilt under S&C would allow this provision to come into action thus exposing enterprises to numerous third-party claims. This could deter the enterprises and might prove to be a hurdle in the success of S&C. Thus, a question as important as this should be decided in the Act itself.

5. Q&A session

The audience posed questions on different themes to the panellists. Some of the questions asked pertained to the adequacy of the proposed deal value threshold, third-party consultation in the S&C mechanism, and choice of withdrawal in this proposed mechanism.

On the proposed deal value threshold criteria, it was suggested that an empirical study could be conducted to look at past M&As and the average deal values that have occurred sector-wise. This data should be compared with the deals that have come under scrutiny by the CCI in the past to determine whether the proposed Rs. 2000 crore threshold is low or high. Panellists also averred that 40 percent of the exits happen through IPOs and, strategic M&As comprise only a small section. Killer acquisitions comprise a miniscule portion of the M&As currently. Targeting them specifically could have the unintended consequence of forcing PEs and VCs looking at meaningful exit opportunities to shift their investments to other countries.

With regard to the question pertaining to S&C, the panellists agreed that introducing a third-party consultation system was a good practical legislative device. Our regulators are staffed with experts. However, they face certain challenges in terms of capacity and analysing the ever-changing technology landscape. Opening the proposed settlement terms once they have reached some degree of finality to third-party comments is to benefit from the world's understanding of whether the commitments or settlement terms would address the antitrust harm.

However, panellists voiced concern over the lack of provision for appeal in the Bill. If a deal is going to affect the people at large then it cannot be a bilateral solution that a company enters into with the regulator. It was proposed that either the deal should be subjected to judicial review or there needs to be a robust process of public consultation and market testing. On giving the choice of withdrawal to parties, the panellists advised that it should be dealt with in the Act itself instead of being left to delegated legislation.

6. Key Recommendations

- An extensive stakeholder consultation pertaining to the Bill should be undertaken and suggested recommendations should be incorporated into the current Bill.
- IPR exemption should be extended to section 4 in the interest of protecting innovation and harmonising Sections 3 and 4 of the Act.
- The Bill should explicitly incorporate an effects-based test under section 4 of the Act to bring more certainty to the CCI's decisional practice.
- Rule of reason analysis should be applied to the hub and spoke cartels. The Bill could potentially have an empowering clause that allows the Commission to distinguish between collusion and imposition of will. Furthermore, an enabling clause that allows the Commission to study the agreement and evaluate the possible effects of the same should also be considered.
- In the context of merger control, the meaning and scope of the deal value thresholds and the local nexus test should be defined in the Act itself rather than delegating it to another body. Evaluation of the proposed threshold of Rs. 2000 crore could also be considered.
- With regards to ex-ante regulation, the Indian landscape should be careful while considering the DMA as a model. Certain concerns with the DMA need to be kept in mind. For example, as the DMA is applied ex-ante, it can be quite inflexible by not allowing stakeholders to account for efficiencies. While international harmonisation of the legal frameworks should be given due thought, India should consider developing its own regulations suited to its ground realities and give itself a period of 4-5 years for evaluation.
- Under the settlement and commitment mechanism, the admission of guilt and choice of withdrawal are substantive legal issues and therefore should not be delegated to regulators, rather, the Parliament shall itself legislate on it.

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