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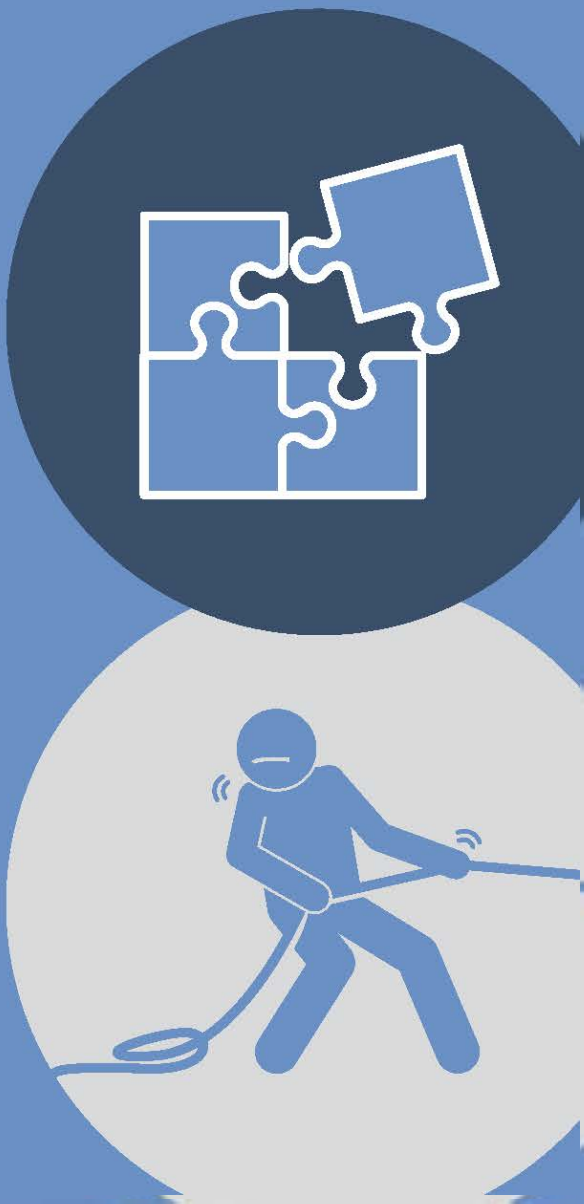
ANALYSIS

PARLIAMENTARY COMMITTEE ON FINANCE'S 52ND REPORT ON COMPETITION (AMENDMENT) BILL 2022

Saksham Malik | Bhoomika Agarwal



PARLIAMENTARY COMMITTEE ON FINANCE'S 52ND REPORT ON COMPETITION (AMENDMENT) BILL 2022

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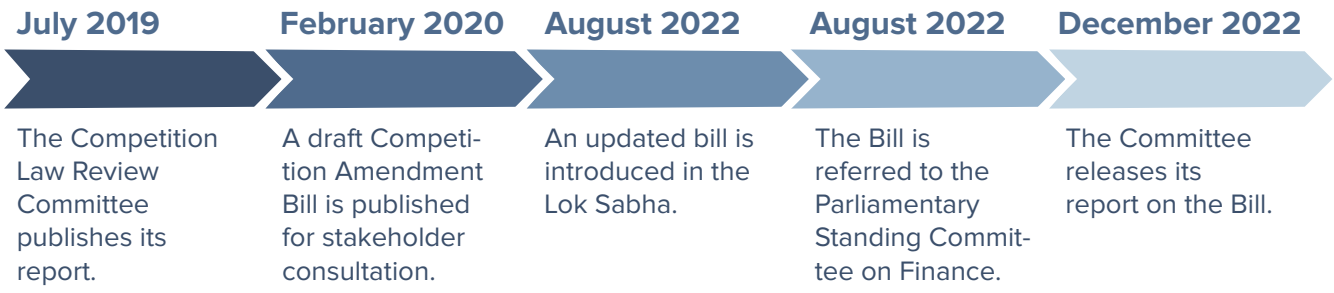
1. INTRODUCTION

The Competition Act 2002 ('the Act') was introduced with the objective of ensuring healthy market competition and protecting consumer interests. In 2019, the Competition Law Review Committee ('CLRC') was constituted to evaluate the Act and suggest changes to equip it to deal with evolving markets. In 2020, the Competition (Amendment) Bill, 2020 ('2020 Bill') on lines of the CLRC's suggestions was proposed. Recently, the Competition Amendment Bill, 2022 ('the Bill') was introduced in the Lok Sabha on August 5, 2022 and referred to the Parliamentary Standing Committee on Finance ('the Committee') on August 16, 2022. The Committee recently released its report ('the Report') on the Bill.



The Report has made substantial recommendations to the key provisions in the Bill. The report has done a commendable job of balancing the interests of all stakeholders. Specific concerns on different provisions voiced by stakeholders have been given due representation in the report irrespective of the Committee's stance on the same.

Over the past year, The Dialogue has been consistently undertaking initiatives aimed at the Bill and the Finance Committee's efforts. These include conducting research and organising roundtables. Our preliminary analysis report on the Bill traced the evolution of the changes proposed by the Bill and made important recommendations.

Recently, The Dialogue also organised a roundtable discussion 'Antitrust 2.0' on Competition Amendment Bill 2022 wherein key provisions including hub & spoke cartels, deal value threshold, settlements and commitments mechanism, and abuse of dominance were discussed. We are grateful to note that various concerns highlighted by The Dialogue have been taken note of and addressed in the report.

2. HUB & SPOKE CARTELS

The Bill had, in a notable move, accorded recognition to hub and spoke ('H&S') cartels under section 3(3) of the Act i.e. the provision on horizontal agreements. In the H & S cartel, an entity that is not directly a part of the cartel but has somehow played a part in furthering it is also held liable for the cartel. As per the clause, any entity who 'actively participated' will also be considered as a part of the cartel.

The 'active participation' criteria as proposed by the Bill was considered to be too wide and vague by the stakeholders and would have potentially ended up covering entities who neither had any knowledge of the existence of the cartel nor any intention to further its formation. A perfect instance of this would be a price-fixing agreement between third-party sellers selling their products through an e-commerce platform. The platform, though potentially lacking knowledge of such an agreement, still played an active role in the success of the cartel.

To avoid this anomaly, the Committee recommends that 'active participation' be substituted with 'intention to actively participate'. The amended clause as suggested by the Committee would read as following[3]:

"Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall be presumed to be part of the agreement under this sub-section ***if it is proved that such person intended to actively participate*** *in the furtherance of such agreement."*

The inclusion of the element of 'intention' is a welcome move and would now shift the onus to the Commission or the informant to show that an entity intended to facilitate the cartel. This is also in line with the CCI's decisional practice which has observed that mere passive participation may not constitute collusion. In the case of Samir Agrawal v. ANI Technologies Pvt. Ltd., the Commission observed that there needed to be an agreement or meeting of minds between the cab riders for an H&S cartel to have taken place.[4] In our opinion, this is a correct approach, especially in the case of algorithmic tacit collusions where for instance, riders with full knowledge that other riders using the same ride-booking platform are also being shown the same prices accede to the algorithmically determined prices by the platform. This is in contradiction to some of the major jurisdictions where awareness or passive participation has been the determining factor.[5]

3. ABUSE OF DOMINANCE

3.1 Effects based test

Neither the Act nor the Bill currently provides for an effect based test to assess the abuse of dominance under section 4 of the Act. Even though the Commission has often used the test in past cases, there has been no consistency due to the lack of an explicit mandate to conduct an effects based analysis. Under this test, a regulator looks at different factors like impact on consumers, innovation and competition before adjudicating a conduct as violative of the competition law. The Committee recommends changes to the wordings of section 4 to incorporate reference to the effects based analysis.[6] The recommended clause reads as:

"An enterprise or group shall incontravention of sub section (1), if it causes or likely to cause appreciable adverse effect on competition".

[3] 52nd Report of the Standing Committee on Finance, The Competition (Amendment) Bill, 2022 at p. 46 (hereinafter referred to as 'The Report').
[4] Case no. 37 of 2018.
[5] Case C- 74/14 Eturas and Others (inadvertent participation in a 'concerted practice').
[6] The Report at p. 58.

The committee also recommends changes to Section 19(3) of the Act which lays down some pro-competitive and anti-competitive factors that are to be looked into while assessing an anti-competitive agreement under section 3 of the Act.[7] As per the recommendation, the Commission would also be required to assess an alleged conduct of abuse of dominance on the basis of these factors. The suggested clause reads as follows:

"The commission shall, while determining whether an agreement or conduct has an appreciable adverse effect on competition under section 3 or section 4 of the Act (as applicable) have due regard to all or any of the following factors....."

The recommendations are in line with the industry's long-voiced demands to bring certainty and predictability to the provision. Both sections 3 and 5 on anti-competitive agreements and combinations respectively, mandated the Commission to undertake an appreciable adverse effects on competition (AAEC) test. The Committee's recommendation would harmonise section 4 with other substantive provisions of the Act. The recommendation also brings our legislation in par with other countries. In the EU, the effects based test was recognised by the European Court of Justice (ECJ) in Intel Corporation Inc. v. European Commission. Since the ECJ's decision, the courts as a standard practice look at the effects of the conduct first. In the U.S., it is an established practice to look at the effects of monopolisation and to assess if the practice results in the foreclosure of the market.[8]

3.2. IPR Exemption

The 2022 Bill does not extend the Intellectual Property Rights (IPR) exception to Section 4. Currently, the IPR exemption is only available to cases under Section 3. As per the exemption, any agreement that restrains the infringement of or imposes reasonable conditions to protect IP rights under Indian IP laws would be exempted from being considered as anti-competitive. The Committee recommends incorporation of an IPR exemption under section 4 i.e. abuse of dominance as well.[9]

Extension of the IPR exception to only section 3 led to an interpretation gap as the intent and assessment of certain parts of sections 3(4) and 4 are similar in nature. An entity, though protected under Section 3, would still be hesitant to launch innovative products in the market for the fear of being prosecuted for abuse of dominance under Section 4. Not only does the recommendation seek to harmonise sections 3 and 4 but would allow companies to innovate without the fear of being prosecuted. This is not only in line with the CLRC Committee Report and the 2020 Bill but also international jurisprudence that has evolved to recognise the IPR ownership of a dominant entity as a valid justification against alleged monopolisation.[10]

[7] The Report at p. 58.
[8] United States v. Microsoft Corp, 253 F 3d 34, 70 (DC Circuit 2001).
[9] The Report at p. 53, 54.
[10] Data General Corporation v. Grumman Systems Support Corporation 761 F. Supp. 185 (D. Mass. 1991); Also see Parke, Davis & Co. v. Probel, Case 24/67 EU:C:1968:11.

4. MERGER CONTROL

4.1. Deal Value Threshold

The Bill introduces a new merger control regime with deal value thresholds and a local nexus test. The new criteria had been proposed to address concerns around 'killer acquisitions' and would complement the current assets and turnover criteria. The Bill provides that transactions where the 'value of any transaction' exceeds Rs. 2000 crores (known as the deal value threshold or DVT) and where the party to the transaction has substantial business operations in India, such transaction would have to be notified to the CCI.[11]

It provides that the 'value of transaction' shall include 'every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation'. However, the 2022 Bill did not provide guidance on how the deal value is to be calculated and the 'meaning of direct, indirect and deferred considerations'. Uncertainty about these terms could potentially bring transactions that are unlikely to cause adverse effects on competition under the merger control mechanism. Further, the Bill did not mandate the CCI to specify clarity on these aspects through regulations.

To overcome these concerns, the Committee has recommended an amendment to the DVT clause clarifying that the manner of calculation of value of transaction and elaboration on what constitutes value of transaction should be provided through regulations.[12] The recommendation would bring much needed clarity and certainty to the Bill. This is also in consonance with the international scenario where Germany and Austria jointly issued a guidance note to provide detailed clarity on the manner in which these thresholds are to be calculated.[13]

The Committee also recommends that the proposed deal value threshold should be assessed after every year to account for inflation and fluctuations in exchange rate of rupee or foreign currencies. The recommendation is especially significant in the context of digital markets which are prone to disruptions.[14]

4.2. Local nexus test

The 2022 Bill provides that transactions with a value of more than Rs. 2000 crores are to be notified to the CCI, provided that the *'enterprise which is a party of the transaction has such substantial business operations in India as may be specified by regulations'*.[15] The clause could be interpreted to mean that the substantial business operations in India of i) both the acquirer and the target or ii) either the acquirer or the target needs to be established.

[11] Clause 44 of the 2022 Bill, adding section 64(2) to the Act.
[12] The Report at p. 15, 16.
[13] Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), (July 2018), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2
[14] The Report at p. 15.
[15] Clause 6 of the 2022 Bill, adding section 5(d) to the Act.

Applying the criteria to only the acquirer would result in bringing those transactions within the CCI's ambit where an established domestic acquirer acquires a foreign entity with insignificant business operations in India, despite the fact the transaction is not likely to cause appreciable adverse effect on competition in India. This would bring global M&As with negligible impact on Indian market conditions to be covered within the threshold. Further, requiring the establishment of local nexus of both target and acquired would mean that transactions involving acquisitions of significant domestic players by large foreign entities would not come under the purview of the threshold.

To avoid such instances, the Committee recommends a new proviso limiting the applicability of the local nexus test to the 'party being acquired'.[16] The proviso reads as follows:

"Provided that the party whose control, shares, voting rights or assets ***have been acquired or are being acquired*** *has such substantial business operations in India as may be specified by regulations."*

The Committee's recommendation addresses the above discussed interpretation gap and would limit the CCI's jurisdiction to only those combinations that would have a substantial effect on competition in India. This is further in line with the law in jurisdictions like Germany and Austria[17] where the local nexus test is applicable only on the target entity.

4.3. Control

The Bill has proposed an amendment to the definition of 'control' to include the 'material influence' standard.[18] However, the Bill did not explain what comprises material influence. The CLRC recommended the introduction of 'material influence' criteria for the determination of control and noted that the details of what may constitute 'material influence' may be provided in subordinate legislation.[19] The 2020 Bill also proposed the insertion of material influence standard.

The Committee recommends an amendment to the existing clause to clarify that elaboration on the definition of material influence should be specified by further regulations. The move would bring clarity and certainty to the provision.[20]

However, it was anticipated that the Committee would propose a higher standard of influence, i.e., 'decisive influence' instead of 'material influence'. This would have been in line with the international best practice where major jurisdictions like the EU have adopted the 'decisive influence' criteria. Article 3 of the EU merger regulation defines control to include decisive influence instead of material influence.

[16] The Report at p. 15.
[17] Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), (July 2018), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2
[18] Clause 6 of the 2022 Bill, amending section 5 Explanation (a) to the Act.
[19] Ministry of Corporate Affairs, Report of Competition Law Review Committee, July 2019, at 117.
[20] The Report at p. 20.

4.4. Procedural Timelines

The Bill proposed to reduce the timeline for the CCI to pass an order on the application for approval of combinations from 210 days to 150 days and the timeline to form a prima facie opinion from 30 days to 20 days to promote ease of doing business. While the CLRC Report was silent on the issue, the 2020 Bill also proposed a similar amendment.

However, the Committee recommends that the current timelines should remain unchanged. The committee notes that the reduced timelines would lead to an increased administrative burden on the CCI.[21]

The move to reduced timelines could have been progressive in nature. The reduced timelines would help in promoting ease of doing business in India without imposing an administrative burden on the Commission. In addition to the timelines proposed by the Bill, the Commission would have the power to give an additional thirty days if a party to the combination needs more time to provide pertinent information or fix errors in the combination notification. Additionally, pre-filing consultation and the green channel route would also considerably reduce the time needed for approval, enabling the Commission to speed up the entire process.

5. SETTLEMENTS & COMMITMENTS

The Bill proposes the inclusion of a commitments and settlements framework in the Act. It permits a party undergoing an investigation by the CCI to move an application for settlement or voluntarily undertake certain commitments. Subject to this, the CCI shall close the investigation if it deems fit, thereby also rendering it the discretion to act upon such matter. This inclusion of a comprehensive settlement mechanism is broadly in line with the CLRC's recommendation, and the 2020 Bill. The Committee has, however, recommended a few key changes to the proposed provision to bring more nuance to the provision. For instance, the Committee has recommended extending the scope of settlements to cartels as well.[22] Other key recommendations are:

5.1. Third-party consultation

The 2022 Bill proposes to allow the CCI to seek objections and suggestions from third parties on settlement/commitment applications. However, this would include disclosure of a party's confidential documents and submissions to external parties which might prove detrimental to a party's interests. Both the CLRC Report and the 2020 Bill did not provide for the same.

The Committee has recommended removing this clause. This is a welcome move as it would avoid interference by third parties and help in maintaining the confidentiality of the matter. It recommends that if objections are to be invited, they should be discretionary and not mandatory.[23]

[21] The Report at p. 25.
[22] The Report at p. 38.
[23] The Report at p. 37, 38.

In the EU, the settlement procedure does not provide for a third-party consultation. The European Commission can only consult the Advisory Committee that comprises competition authorities of member states. Rather, to preserve the confidentiality of the documents, even the complainant is excluded from accessing settlement submissions.[24] Whereas, in regards to commitment procedure, the regulations allow the European Commission to publish a concise summary of the case and the main content of the commitments or of the proposed course of action and invite third parties to submit their observations. However, even in this case, the regulations specify that any publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.[25]

5.2. Ability to withdraw application

The current Bill is silent on the ability of a party to withdraw the application once it is filed or even after the CCI has passed an order on the same. The Committee recommends the insertion of a provision allowing the applicant to withdraw the settlement or commitment application within 7 working days from the date of the hearing. The laudatory move will allow considerable flexibility to the parties.[26]

During the pendency of an application, a material change in circumstances might occur thus making it burdensome for a party to move ahead with the settlement or commitment process. The recommendation would allow the parties to withdraw the application in such cases. This is also in line with the ethos of the Act as evident from the current leniency regime which allows parties to withdraw their applications without any prejudice.

5.3. Compensation claims & Admission of Guilt

The Bill lacked clarity on whether or not an admission of guilt is required while making a settlement or commitment application. In an important development, the Committee has recommended that admission of guilt should not be mandated.[27] However, it has also recommended an amendment to section 53N of the Act to allow third parties to file compensation claims based on the settlement order.[28] This could potentially imply that a settlement order would result in the admission of guilt on the party's behalf. An issue as important as admission of guilt which could affect the success of the whole mechanism should be unambiguously defined in the Act.

[24] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel, (July 2008) available at: cases https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex-%3A52008XC0702%2801%29
[25] EC Regulation No. 1/2003, Article 27, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001
[26] The Report at p. 38.
[27] The Report at p. 39.
[28] The Report at p. 42.

6. POWER OF DIRECTOR GENERAL TO DEPOSE LEGAL ADVISORS

The 2022 Bill proposed an amendment to section 41 of the Act that sought to confer the Director General ('DG') with the power to examine on oath the legal advisors (defined under the term 'agents') of the parties.[29] While the 2020 Bill had proposed the same[30]; the CLRC Report did not address this issue.

The proposed clause was considered as a concerning issue, considering that legal advisors are bound by the attorney-client privilege. Section 126 of the Indian Evidence Act 1872, which provides for the scope of privilege attached to professional communication between legal advisors and clients, prohibits lawyers from disclosing any correspondence they may have had with a client and from revealing the details of any documents they may have in their possession as part of their work for the client.

The Committee's recommendation addresses these concerns by proposing to insert a clause clarifying that nothing in the section shall be in contravention of the Indian Evidence Act, 1872 or any other Act that protects attorney-client privilege.[31] This is a commendatory move and would help in protecting the attorney-client privilege.

7. REQUIREMENT OF A JUDICIAL MEMBER

In the past few years, the issue of requiring the presence of a judicial member, especially when adjudicatory orders are passed by the CCI, has become a controversial topic, leading to multiple litigations. As has already been clarified by the Delhi High Court in 2019, the absence of a judicial member in the CCI does not invalidate the adjudicatory orders passed by it until such time a judicial member is assigned by the government.[32] The court relied on section 15 of the Act, which, inter alia, states that no act or proceeding of the CCI would be invalid merely by reason of any vacancy or any defect in the constitution of the CCI.

This judgement came as a clarification to another Delhi High Court judgement of 2018 where it had directed the government to ensure the presence and participation of a judicial member at all times when adjudicatory orders, especially final orders, are passed by the CCI.[33] In 2019, Delhi High Court judge Sangita Dhingra was appointed as a member of the CCI for a period of five years.[34]

Both the 2022 Bill and 2020 Bill did not address this issue. The CLRC Report noted that 'necessary action' may be considered by the Central Government with regard to the appointment of a judicial member.[35]

[29] Clause 26 of the 2022 Bill, amending section 41 to the Act.
[30] Clause 34 of the 2020 Bill, amending section 41 to the Act.
[31] The Report at p. 29.
[32] CADD Systems and Services Private Limited v. Competition Commission of India [Writ Petition (Civil) No 6661 of 2019)].
[33] Mahindra & Mahindra Ltd. & Ors. v. Competition Commission of India & Anr. (W.P. (C) 11467/2018).
[34] *Delhi High Court judge Sangita Dhingra Sehgal appointed CCI member*, The Hindu (2019), https://www.thehindu.com/news/national/delhi-high-court-judge-appointed-cci-member/article29955987.ece .
[35] Ministry of Corporate Affairs, Report of Competition Law Review Committee, July 2019, at 37.

It is notable that the Competition Act, 2002, originally mandated the requirement of a judicial member. The provision was subsequently omitted by an amendment. Section 22 of the Act originally read as follows:[36]

"... (3) Every Bench shall consist of at least one Judicial Member.

Explanation.—For the purposes of this subsection, "Judicial Member" means a Member who is, or has been, or is qualified to be, a Judge of a High Court..."

The Committee has acknowledged that the Delhi High Court and the CLRC Report recommended the presence of a judicial member on the CCI board.[37] However, the Committee has shown restraint in not recommending the same as the issue is currently sub judice before the Supreme Court. The restraint exercised by the Committee is appreciated.

8. CONCLUSION

The report is a laudable and progressive step for the competition framework of the country. The recommendations are a call for clarity and reasoned analysis in the Indian competition landscape. The recommendations, if incorporated in the Bill, will ensure protection of innovation, nuanced analysis by the CCI as well as enhance compliance with competition law in the country. The Dialogue is grateful to the committee for acknowledging and addressing the concerns that have been highlighted by us and the competition community at large.

However, there is still scope for further clarity, especially pertaining to settlements and commitments and the definition of 'control'. The recommendation to allow third parties to file for compensation claims on the basis of a settlement order also needs to be reconsidered in light of its potential implications for the parties involved. Furthermore, deliberations on whether 'decisive influence' would be a more appropriate threshold in the definition of 'control' are required.

[36] Competition Act 2002 available at https://www.mca.gov.in/Ministry/actsbills/pdf/The_competition_Act_2002.pdf;
Also see Standing Committee on Home Affairs, 93rd Report on Competition Bill, 2001, available at http://164.100.47.5/rs/book2/reports/home_aff/93rdreport.htm
[37] CThe Report at p. 50.

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