

**INDIA AMENDS ITS COMPETITION LAW -THE COMPETITION  
(AMENDMENT) ACT, 2023 COMES INTO FORCE- PROMOTING EASE OF  
DOING BUISNESS**



Authored by **MM Sharma (Head -Competition Law & Policy) Vaish Associates Advocate** [E-mmsharma@vaishlaw.com](mailto:E-mmsharma@vaishlaw.com)

In a significant development , after the Lok Sabha ( Lower house of Indian Parliament ) passed the Competition (Amendment) Bill 2023 on 29.March 2023 , the Bill was passed by the Rajya Sabha ( upper house ) on 03 April ,2023 and after receiving the Presidential assent on 11 April 2023 , has been promulgated and notified in the Gazette of India as [The Competition \(Amendment\) Act, 2023](#) on 11th April, 2023 .

The major changes proposed in the Competition (Amendment ) Bill, 2023 ( “the Bill, 2023” )as passed by the Lok Sabha on 29.3.2023 [were summarized in my blog earlier , which can be viewed here](#) .

The key changes introduced by the Amendment Act, 2023 are again outlined and explained in some details as under:

### **Merger Control**

- 1. Introduction of deal value thresholds**– Deals with a transaction value of more than Rs 2,000 crore will require prior approval. Aimed to capture deals by the Big Tech digital platforms who do not hold significant assets or turnover in India. This is subject to the target having “substantial business operations” in India. This is an additional threshold prescribed over and above the existing asset and turnover based tests and, noticeably, is applicable across sectors of economy and not confined to the Digital markets, as was originally recommended in the CLRC Report, 2018. Moreover, what will constitute “substantial business operations” in India, will be notified by way of implementing regulations by the CCI, under Section 64 of the Act.
- 2. Reduction of time-limit for approvals of combinations (M&As)** from two hundred and ten days to one hundred and fifty days and for forming a prima facie opinion by

the Commission to issue a show cause notice to parties within fifteen days (from existing 30 days) for expeditious approval of combinations. Further, Competition Commission of India (CCI) has to form its above prima facie opinion, whether the proposed combination is likely to cause appreciable adverse effect on competition (AAEC) in India or not within 30 calendar days (as against 30 working days at present).

3. **Dilution of standard for “Control” from “decisive influence” to ‘material influence’** while assessing mergers & acquisitions. This codifies the existing decisional practice of the which evolved over a period of 11 years of regulation of combinations.
4. **Waiver of standstill obligations for open market purchases** – The existing “standstill obligations” in case of an open offer and acquisition of convertible shares/securities on a stock exchange is waived off provided: (a) a merger notification is promptly filed with the CCI; and (b) the acquirer does not exercise any ownership or beneficial rights/ interest/ receives dividends in such shares/ securities till the receipt of approval from CCI.
5. **Introduction of “Green channel” or deemed approval for certain categories of combination not likely to have AAEC-(New Section 6(4) of the Act)** – This was introduced by CCI suo motu even before the drafting of the Competition (Amendment ) Bill , 2020 , on the recommendations of the Competition Law Review Committee (CLRC) Report , 2018 by including in the Combination Regulations , 2011 and has now been formally included in the substantive law , the Act. Of course , the criteria for such “categories” of combinations will now have to be prescribed by the Central government by Rules to be framed under Section 63 (i) (ac) of the Act. For details on what categories of combination are eligible for Green channel or automatic approval please read my earlier blog [here](#) .
6. **Enhanced penalty for making false statement or suppressing material information related to proposed combination** – Under existing provision[1] any person being a party to a combination who either makes a false statement or omits to disclose any material information is liable to a penalty of minimum INR 50 lakhs (Five Million) and maximum INR 1 Crore ( Ten Million) . The maximum penalty has now been increased to INR 5 Crores ( Fifty Million) .

#### **Antitrust enforcement –**

7. **Section 3(3) -Horizontal anti-competitive agreements including cartels – Widening the net to include “facilitators” or “hubs” i.e. other than direct competitors in cartels and anti-competitive agreements, even nonparticipants.** This is a new provision to include facilitators of formation of anti-competitive agreement or cartels between direct competitors (“spokes”) though they may not have participated or even themselves not be in the same line of

business[2] provided the intention to participate in such “agreement”[3] is apparent (or they are found participating in such “agreement”). This is a major change and must be noted by all as it marks the beginning of acknowledgment of proving mens rea[4] in cartel investigations, which, till now, was being avoided by CCI since cartels are still in the nature of **civil offence** in India. Notwithstanding, this new proviso, meant for **hubs and spoke cartels**, is still in the nature of a deemed presumption of causing appreciable adverse effect on competition (AAEC) like cartels, which presumption, being different than the per se rule, remains rebuttable. **Noticeably, this might include algorithmic driven anti-competitive arrangements in the digital markets if AI are found to have been used intentionally to facilitate exchange of sensitive data leading to price fixation etc.**

8. **Section 3(4) – Widening the net to include agreements other than vertical anti-competitive agreements between manufacturers and dealers.** Now all kinds of business agreements, not even restricted to those between enterprises or persons, are vulnerable to scrutiny if they are likely to cause AAEC . This will include clauses such as MFN or non-compete clauses and/or parity clauses, used by online travel agents[5] for hotels/air tickets bookings etc. and will include AI driven arrangements which may cause AAEC.
9. **Section 3(4)- Excluding agreements between enterprise and end consumer.** This will avoid unnecessary complaints by home buyers against non-dominant real estate builders and developers in CCI , a trend seen in the early days of enforcement after the DLF Case in 2011. You may like to read about the [impact of competition law on the Indian real estate sector -An analysis of CCI order against DLF in 2011 in my old blog of 2012 .](#)
10. **Penalties to be imposed on “Global “Turnover – Explanation 2 to Section 27 –** “Turnover” means global turnover derived from all the products and services -This is perhaps the most retrograde step in the new Act which will send shockwave to all Indian multi product conglomerates including the Big Tech MNCs operating in India. In direct antithesis to the celebrated judgment of the Supreme Court in the Excel Crop case [6]which had restricted the meaning of the term “turnover” used in Section 27(b) against “total” turnover to “relevant “turnover derived from the products or services under investigation, in line with global best practices and the doctrine of proportionality, the Parliament, as if to nullify the import of the said Judgment , has changed this key provision during the passage of the Bill in Lok Sabha . This means that enterprises found guilty of violation of the provisions of the Competition Act, 2002 (Act) , can now be penalized up to ten percent of not only their total turnover derived from revenue generated from sale of all products and services within India but also from all over the globe. Interestingly, the concept of penalties on global turnover is alien to competition regimes in all matured and advanced jurisdictions such as European Union and USA, where strict regulations for restricting it to “relevant” turnover based upon on fair principles of proportionality exist.

- 11. Introduction of limitation for filing Information or reference to CCI on any anti-competitive agreement or market conduct of a dominant enterprise** – The Act now prescribes a time limit of 3 years of accrual of cause of action within which any person can approach CCI by an Information under Section 19 (1) of the Act. This is aimed to avoid filing of delayed or vexatious cases before CCI. The delay can however be condoned by CCI in genuine cases.
- 12. Streamlining the procedure for inquiry into Antitrust cases initiated under Section 19 of the Act** – The new Act has corrected some discrepancies such as “grey area “ cases[7] in the stages of investigation by the Director General (DG)/inquiry by CCI noticed during the past 14 years of Antitrust enforcement in India by suitably revamping Section 26 of the Act.
- 13. Introduction of Settlements and Commitments** – This is in sync with similar provisions on Antitrust enforcement in EU, USA and other advanced jurisdictions on the subject. It has been introduced after prolonged deliberations and on demands of the industry to reduce unnecessary litigation in the appellate tribunal and the Supreme Court and is an important step towards ease of doing business. For details please read my [earlier blog on](#) the Pros and Cons of the Competition Amendment Bill , 2022 published in The Financial Express on 10 September 2022 [here](#) . The CCI’s decision on settlements / commitments will not be appealable.
- 14. Further, now the parties whose settlements are accepted by CCI under Section 48A may have to pay compensation to the victims** of their anti-competitive agreement or unilateral conduct of abuse of dominance as the case may be under the mended Section 53N of the Act. This is due to voluntary admission of guilt by such parties after the conclusion of investigation by the DG but before the passing of final order by CCI.
- 15. Enhancing scope of leniency for busting cartels -Introduction of “leniency plus** “– This is again in sync with similar provisions on Antitrust enforcement in EU, USA and other advanced jurisdictions on the subject. This will encourage members of cartels under investigation to disclose **other cartels** and obtain waiver of penalties for such cartels in advance. This was again, a change necessitated from past experience of CCI in enforcement of cartel cases. Further, it is also allowing parties to withdraw their leniency applications, which right does not exist at present.

### **Miscellaneous provisions**

1. **Section 2 (t) -Widening the definition of “relevant product market “**– to include supply side substitutability.
2. **Section 2(ka)- Defining a “party” before the CCI** to include a consumer and an information provider, another welcome step based on the enforcement experience.

3. **Section 16- Appointment of DG by the CCI, with prior approval of the Central Government.**
4. **Section 35 (2) -Allowing parties to call expert witnesses to depose before the CCI and provide expert opinion during the inquiry hearings before the CCI .**
5. **Section 41 – Enhanced and well codified powers of DG to investigate, now independent powers not linked to the Companies Act, 2013 as before.**
6. **Section 53 B- mandatory pre deposit of 25% penalty as condition precedent to admission of appeal for hearing before the NCLAT.**
7. **Section 64B- enjoying upon CCI to publish non-binding guidelines on the provisions of the Act, including guidelines on quantum of appropriate amount of penalty .**
8. **Section 59A- Compounding of any offence punishable under the Act, excluding the offences punishable with imprisonment only or imprisonment with fine<sup>[8]</sup> , by the NCLAT or any other Court where any proceeding related to such offence is pending.**

**COMMENTS:** *The Amendment Act, 2023 seeks to bring in the awaited changes in the existing law with a view to plug certain loopholes and enhance the ease of doing business by providing regulatory certainty for achieving fair play and competition in markets. The Amendment seeks to fine tune some legal and procedural anomalies experienced during the last 14 years of enforcement of competition law in India. The introduction of forward-looking measures such as commitments and settlements and compounding of offences and further fast-tracking merger approval processes and widening of the scope of law to include hub and spoke cartels and possible AI driven collusions are welcome steps which bring the Indian law further in sync with those existing in jurisdiction like USA and EU with a matured and settled jurisprudence on the subject. However, the last-minute change with regards to the global turnover for computation of penalty marks a retrograde step which goes against the current ethos of ease of doing business in India, introduced apparently to rein in Global Big Tech digital gatekeepers in the digital markets.*

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[1] Section 44 of the Act

[2] Identical or similar trade

[3] Read “understanding”

[4] Means” intention” and “knowledge” used in criminal law jurisprudence to connote culpability in an offence.

[5] Like [Make My Trip /Oyo case](#) decided by CCI in October 2022.

[6] Excel Crop Care Limited v. Competition Commission of India & Anr., Civil Appeal No. 2480 of 2014 decided on 08.05.2017.

[7] There was a lacuna under the existing scheme of Section 26 of the Act whereby there was no provision under Section 26 for closure of case by CCI where it disagreed with the DG investigation report finding violation of the provisions of the Act after hearing all parties during the post investigation inquiry under Section 26(8) of the Act. For example of one such case, please refer to <https://www.competitionlawyer.in/cci->

exonerates-rdca-of-anti-competitive-conduct-in-pharmaceutical-market-disagrees-  
again-with-findings-of-the-dg/  
[8] Refer to Section 42 (3) of the Act

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