

# The Competition (Amendment) Bill, 2022: Legislative Comment

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## ARTICLE INFO

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## Abstract

This article focuses on the competition amendment bill, 2022. India has seen a considerable growth in its business environment in last 3 decades. Moreover, In India, we have seen a substantial increase in the trend of doing business or which we call 'startup culture' in line with the mission of *Atmanirbhar Bharat*. With significant and rapid increase in business, there is a need to re-look into the competitive regime of our country. This article tries to analyze the essence of the proposed Competition (Amendment) Bill, 2022 with respect to fast moving globalized world. The article highlights the positive as well as negative aspects of the competition amendment bill, 2022. The Competition Act, 2002 came into force with the primary objective of protection of rights and duties of the buyers, consumers, and the other market players in the market. The paper thoroughly discusses what are the new rules and laws that are needed to be made according to the present market scenario and what are the omissions that are not been included in the same.

The new amendment bill proposes a stable framework for the better governance of competitions in the business environment in India, where as it has lacuna in certain aspects which are certainly important to be discussed too. This article not only discusses the contents and proposed frameworks rather it discusses the need of the amendment bill in the present business environment. Using a fast-moving globalized world as an example, this article analyses the essence of the proposed Competition (Amendment) Bill, 2022. It highlights both its positive as well as negative aspects.

## INTRODUCTION

On 5<sup>th</sup> August 2022, the Competition (Amendment) Bill, 2022, was floored in the lower house of the parliament, i.e., Lok Sabha, which was further referred to the parliament's standing committee on finance on 17<sup>th</sup> August 2022 for further deliberation.

The main motive of the bill is to update and equip itself with the latest issues faced by the entities and individuals pertaining to the competitive environment in the market. Inspiration for most of the proposed amendments can be easily rooted back to the report submitted by the Competition Law Review Committee (CLRC) in 2019<sup>1</sup> & also to the draft of the (Amendment) bill published in 2020 for inviting suggestions and comments. After going through the proposed 2022

1. CLRC Report (n 15).

bill, we observe considerable changes and omissions compared to the last bill. There also are few key points which remain untouched.

We can see few healthy amendments which prima facie looks ahead in time but will help in creating a robust competitive business market in India. Few such amendments are proposed leniency plus regime, consideration of substantial business operation among others. But this looks like a missed opportunity where the legislature where the legislature could have introduced regulations related to protection of intellectual property in cases of abuse of dominance case because there still remains a gap between the statutory proposed provisions of the amendments and the actual market needs. With the boost of globalization and easy internet access, intellectual; property protection is a critical issue which has been missed by the drafting committee of the proposed 2022 bill. Hence, we will through this paper discuss not only the positive points of the amendments but also explain the striking omissions and their related consequences which the Indian Competitive business market might have to face in future.

## Key Positive Inclusions

The Competition Law in India came into act in 2002, for the regulation of the vast developing Indian market. With the dynamic changes in the technologies and constant development in the field of artificial Intelligence, the business model in India has seen a steady demand for the new laws in the sector. The last two decades of sheer growth in the business ecosystem of the country, have constantly demanded for the development of new law in the segment due to the changes in the business environment. Therefore, the competition amendment bill was introduced in front of the lower house of the parliament in order to calibrate the statutory provisions in accordance with the business ecosystem after two decades. It proposes to enable various leniency provisions that empowers and promotes mergers and acquisition. The bill brings in provisions regarding various aspects of the competition law.

### Threshold of Deal Value

The bill introduces a new threshold for the combinations that are to be forthcoming in the market. Threshold value refers to the thresholds beyond which if two companies are combining with each other than the approval of the CCI is required in order for the combination. The threshold value is in effect in order to prevent the Appreciable Adverse Effect on the relevant market. Earlier as per the provisions there are two types of deal value threshold named as Turnover threshold and asset threshold. As per the Act<sup>2</sup>, the transactional value was considered on the basis of turnover and asset which are two determinants by which the threshold value of the company is calculated. The turnover threshold value of the company merging should be less than 1000 cr and the asset threshold value should be less than 350 cr. However, the inclusion of a new threshold value proposed by the amendment bill 2022 lays down that if a company is carrying its “substantial business operation in India, “ the transactional threshold value will come into play.<sup>3</sup> It implies that for a company combining to have a transactional value exceeding 2000 cr has to take prior approval of the Competition Commission of India for the combination.

In addition, there is a proposal to notify CCI if the transactional amount crosses Rs. 2000 crore in cases where either party has ‘Substantial business operation’ in India. It has been proposed that the yardsticks to check the entity whether it qualifies under the definition of ‘substantial business operation’ or not shall be give by CCI. The intention behind this is to bring the business mostly dealing primarily in Intellectual Property regarding issues to also bring within the ambit of this act as they do not meet the traditional requirements and hence do not meet jurisdictional thresholds.<sup>4</sup>

### Anti-competitive Agreements

The proposed bill will be able to deal with Hub and spoke cartelization. The Indian business market has always remained very dynamic and

2 Competition Act 2002, Sec 5

3 Bundeskartellamt/BWB, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, para 11 [Hereinafter, BWB]

4 European Parliament, ‘Challenges for Competition Policy in a Digitalized Economy’, (July 2015) 60.

opportunistic, with many potential consumers. Parties join each other in order to stay effective in the market with a substantial growth of new players in the market every day. The agreement between parties are welcomed until and unless it causes an appreciable adverse effect (AAEC) on the business environment.<sup>5</sup> To tackle these agreements and effects on the market the Competition Act in Section 3 of the provision lays down the provisions for Anti-Competitive agreement.<sup>6</sup> The act gives certain criteria that needs to be fulfilled for declaring an agreement as an anti-competitive agreement. These are as follows:

- Indirectly or directly regulating the buying or selling prices.
- The agreement leading to the collusive binding in a direct or indirect way.
- Controlling the production, market, services and supply of the goods.

The act provides the statutes for providing the anti-competitive agreement and to the person, satisfying all the criteria provided in the statute. However, the competition amendment bill 2022 gives the proposal regarding the amendment of the same. It proposes that active participation in furtherance of the agreement can lead to the presumption to be a part of the agreement if the entity or person involved are not engaged in the same business. It covers a larger ambit than the present provision in the act.

### **Introduction of Settlement and Commitment Provisions**

In the existing act, we see that CCI has been given powers to inquire, investigate upon on the any transaction if it qualifies under either Sec 3 or Sec 4 of the act i.e., anti-competitive agreements or abuse of dominant position. But the bill proposes for a new approach of either settlement or commitment. Settlement means the accused party can offer to

pay some penalty for the wrong done before the CCI declares conviction but after Director general has made his report. Commitment, on other hand is a promise made by the convicted party after CCI declares conviction regarding entity's structural and behavioral changes in the future. These methods have been introduced as a mode of resolution in cases of dispute relating to either vertical agreements or abuse of dominant position.

But at the same time, the bill states that the decision regarding these by CCI shall not be appealable before any further authority, if taken after considering points for and of all the stakeholders involved.<sup>7</sup> This aspect can be criticized considering the quasi- judicial decision-making body but on the other hand we need to also consider that all the stakeholder's part has been truly heard and then a reasonable decision has been made. If further appeals will be allowed, then the whole purpose behind introducing new methods for resolution will be defeated and it would also add to the burden on the judiciary.<sup>8</sup>

### **Regulation of Open Market Purchase**

Open market purchase is being regulated by the CCI in the current act. Open market purchase primarily means that buying shares by the order placed by an insider to purchase shares from the open market in or close to the market price, in accordance with all the rules and regulations set forth by the securities and exchange commission (SEC).<sup>9</sup> In the present act, the party initiating the open market purchase has to take prior approval from the CCI to initiate the same in the market. This makes it very onerous for the parties to inform before the purchase as it leads to the increase in the price as well as it holds

5 Rajat Sethi and Simran Dhir, "Anti-Competitive Agreements Under the Competition Act, 2002" Vol. 24, No. 2 *National Law School of India Review*, 32-49 (2013)

6 Aditya Bhattacharjea, "India's Competition Policy: An Assessment" Vol. 38, No. 34 *Economic and Political Weekly* 23-29 (2003).

7 Ashu Bhargav, 'Settlements and Commitments in the Indian Competition Regime: Construing Practicality' (IndiaCorpLaw 29 March, 2020) accessed on 02 October 2022.

8 Arjun Nihal Singh, 'The Need For Settlements And Commitments Under The Competition Act, 2002' (Mondaq, 16 January, 2020) accessed 01 October 2022.

9 Anisha Chand and Anmol Awasthi, "Open Market Purchases – India Plans to Dilute Standstill Obligation" *Competition Law International* 1-7 (2020).

the risk of public disclosure. The amendment bill 2022 proposes to give relaxation to the same. It puts forward the rule regarding the timeline of the purchase. Unlike the previous rule, the bill relaxes the timeline of notification and proposes to notify the CCI after the completion of the purchase. Nevertheless, the acquirer will have no rights and interests on the same. That implies the acquirer will not be able to exercise any of his ownership on the purchased securities until the CCI ratifies. As the present act has some potential market threat in the market the amendment will help in overcoming the same as the risk of price shooting and public disclosing would be negligible and the open market purchase would be quite uncomplicated and unchallenging.

### ***Proposal of Leniency Plus regime***

The main intent of the bill is to ensure that CCI becomes competent enough with all the methods and functions so that no dispute regarding competition in the market is outside the scope of its inquiry or investigation. Hence, the bill proposes a unique method to check for any cartelization in the existing market. The regime of Leniency plus says that proposed penalty on any party can be decreased if it discloses any relevant information regarding any existing or proposed cartel in the market other than under investigation. Suppose the CCI is able to collect any information with this method. In that case, CCI will be able to proactively monitor competition and dismiss & penalize any sort of cartelization in the market.

### ***Relevant Product Market***

Section 2(t) of the Act<sup>10</sup> lays down the definition of relevant product market. It speaks out regarding the product, services which can be interchanged by the consumer in respect to their characteristics, use and prices.

The amendment bill 2022 proposes the statute in respect of some larger intent. It puts forward rules regarding the production of the product too. The present act gives regulation regarding the product while the amendment bill primarily focuses on the production or supply of the product and services substituted by suppliers.

## **THE SUPPOSED 'GAP'**

Despite many pro-active proposed amendments, there still seem to be relevant points left untouched. There still is a 'gap' between actual market position or the level of advancement achieved in the market and the level of scrutiny or investigation which CCI will be in position to do even after the proposed bill is passed and amendments are accordingly made in the act. Here are few of the points or 'gap' which could have been mentioned in order to make the act more appropriate regarding the current market dynamics:

### ***Regulations in Respect of Intellectual Property Rights Holders***

The present Competition Act of 2002 has given for the protection of Intellectual property rights holders in case of their agreement governed under sec 3 of the act, i.e., Anti-competitive agreements but lacks for any such provision when it comes to the mix of abuse of dominant position. Sec 4 of the present Act gives for definition of abuse of dominant position in the relevant product market. There are many points to be taken in consideration in order to determine the dominant position of any entity but most common and one of the trusted element is market share and, in case of Intellectual Property holders we often observe creation of exclusive monopoly, ultimately leading to gain in market power through market share but this should not be deemed to be the 'abuse' and here is what was missing in the 2002 Act and continues to not find place in the list of proposed amendment bill of 2022.

Hence, similar to regulation in respect to vertical agreements in the case of intellectual property right cases, there should be statutory protection and regulations mentioned in the act for IP rights holders in cases relating to abuse of dominance as due to present stance of the legislature, the IP right holders have been left in the mix which can be harassed easily anytime.

### ***Definition of 'Control'***

There is no settled definition of 'control' as per the Indian Competition Act, 2002 and has been an ever evolving one in the Indian business arena. The Takeover Code, 2011 tries to define the term but

<sup>10</sup> Competition Act, Sec 2(t)

its limitations clubbed with the broad developing interpretations could yet finally settle the definition for any consideration. The Competition Commission of India through its judgements tried to lay down a basic framework of 'control' which broadly explains any active influence over the affairs and management of an enterprise by one or more enterprises.

The proposed bill tries to add the phrase of participation in 'strategic commercial decisions', in addition to requirement of influence over management and affairs of the company to prove control in order to determine whether any adverse appreciable effect on competition is caused by any proposed combination or not. But the issue which remains unsolved is the ambiguity and non-definition of boundary of the proposed phrase. Just adding another phrase without defining that in the context of the purpose will not do any good. We now, through interpretations in various judgements, conclude the determination of phrase 'affairs and management' but once again adding a new phrase and just leaving it open with the opinion that it shall be developed through judicial pronouncements only will only have detrimental effect and would lead to the ambiguity. The mention of definition or explanation will also help the entities to understand the intention of the legislature which could guide them to plan their conduct in the market.

### **Reduction in time limit for approval of combination**

As per the present act of 2002, the time for approval of any combination by the Competition Commission of India (CCI) is total of 210 days. This includes 30 days of stage I investigation i.e., preliminary inquiry with respect to the proposed combination and a further period of 180 days i.e., stage II investigation i.e., advance investigation or inquiry to check for the impact of AAEC in Indian market.

The new proposed amendment bill of 2022 tries to reduce the whole duration of investigation by CCI from 210 days to 150 days (exclusive of 30 days for conservatory period). There is procedural limitation with this reduction in time period. We do understand that the reduction has been proposed in order to make sure that there is a fast-track

procedure of determination of AAEC so that the proposed combination can be brought into force at the earliest but the essence of the investigation to be done by CCI i.e., to check the impact of AAEC in the relevant product market will be defeated.

This has been derived due to number of reasons like increase in case load on the Competition Commission of India due to expansion of its jurisdiction to admit cases relating to Company law and insolvency & bankruptcy, less time for the expert to go through the submitted documents and decisions might miss crucial points. Also, since there is a visible prolonged vacancy at CCI that hasn't been filled for long due to statutory and procedural limitations, it will be very impractical to reduce the time of investigation by CCI.

### **Necessary Inclusion of 'judicial' Member**

We need to understand that CCI is a quasi-judicial body meaning it is entitled with a duty to give judicial pronouncements. As per the present regime, there is a requirement of a specialized panelist from every possible domain in order to have a balance approach in investigation but the law yet does not mandate the presence of a 'judicial' member.

Here, it is very important to understand the difference between a subject expert in 'law' and that of a 'judicial' member. As per the present law, anyone with experience over 15 years in any subject can qualify to be a panelist for investigation in CCI, including subject matter expert of 'law'. But there is a difference between a specialized person in 'law' and 'jurist'. A jurist is someone who has experience of the judicial process followed in a court of law. The presence of 'jurist' has been advocated by Delhi High Court in case of Mahindra Electric Mobility Limited & Anr. vs. CCI and Anr. This shall ensure that no cases are in contravention with the basic principles of law like principle of natural justice, Audi alteram partem and rule of law.<sup>11</sup>

## **CONCLUSION**

It is an unsaid fact that the main motive behind proposing this current amendment bill is to ensure that the competition regime of the country

<sup>11</sup> F.A. Hayek, Law, Legislation and Liberty, (1<sup>st</sup> Edn Routledge, 2013).

becomes competent enough with respect to the fast-moving trends in the business world, and is also able to counter the modern problems with modern solutions. The article mentions the key inclusions which shall cause a positive impact in the competitive regime in future but also mentions the missing elements which are still lacking in the bill.

By the introduction of latest ways of resolution like settlement and commitment & leniency plus regime the CCI shall be move empowered to ensure a healthy competitive business environment as compared to now. But at the same time, there are few missing links like no regulation for vertical agreements in case of Intellectual property right holders, the non-compulsion of judicial members

which leaves the business regime in India in huge danger of any prospective scam which may occur in future. Also, the reduction in time of CCI for investigation truly looks to be an impractical one considering lack of resources to counter the increasing number of cases CCI is being approached for on a daily basis. In order to ensure effectiveness of CCI in its investigation with respect to the Appreciable adverse effect on competition (AAEC), we need to ensure sufficient time with the tribunal to judge the proposed combination from all aspects before delivering any judgement. Otherwise, the provision of settlement and commitment, if or when clubbed with the reduction of time of investigation, can turn into a disaster anytime soon.