

Competition Law Update: Government Introduces Draft Bill to Overhaul Indian Competition Act

With a view to update the Competition Act, 2002 (Act) and associated regulations, the Indian Government constituted the Competition Law Review Committee (Committee) in October 2018. The Committee submitted its report (Report) to the Government on 14 August 2019.

Based on the recommendations made in the Report, the Ministry of Corporate Affairs (MCA) has introduced a draft Competition (Amendment) Bill, 2020 (Draft Bill) to overhaul the Act. The notification of the Government invites comments from the public on the Draft Bill until 6 March 2020.

The Draft Bill proposes certain significant amendments to the Act, including: (a) imprisonment for non-compliance with directions of the Director General (DG); (b) commitment and settlement procedure in non-cartel cases; (c) more expeditious combination review process; and (d) constitution of a Governing Board for non-adjudicatory functions.

Following is a snapshot of some of the key amendments proposed by the Draft Bill:

1. Combinations (merger review)

- a) Statutory deadline reduced to 150 calendar days: The statutory combination review timeline of 210 days will be reduced to 150 calendar days, with a provision of additional 30 days in case of defective form filing or additional time sought by parties to respond to the CCI queries.
- b) Prima facie view timeline reduced from 30 to 20 calendar days: All Phase I approvals will now take up to 20 calendar days for approval, subject to clock-stops.
- c) Green channel invalidation deadline: There will be a statutory deadline of one year (from the date of consummation of the combination) to invalidate deemed approvals, including green channels. This will address the concern that green channel approvals lacked finality and indefinitely bore of the risk of being invalidated.
- d) New criteria to trigger combination filings: The Government can now introduce new criteria (not based on turnover or value of assets) to trigger a combination filing. This will address situations where certain high-value deals could escape the CCI review due to certain high-value companies not meeting turnover/ asset - based thresholds (e.g., in the services and digital sectors).
- e) Open offers and stock exchange purchases can be consummated without waiting for the CCI approval. Post consummation filing will be allowed as long as the acquirer exercises no rights in the target until the CCI approval.

2. DG given powers to impose criminal sanctions

A person may be imprisoned for up to six months and/ or fined up to INR 1 crore if he, without reasonable cause, fails to produce any information requested by the DG, or personally appear before the DG, or sign his deposition notes. This power to impose such criminal sanctions is proposed to be made available to the DG without a requirement to involve a Chief Metropolitan Magistrate.

For any further questions or advise on competition law in India, please feel free to reach out to our competition law partner at vivek.agarwal@dumeds.com

3. Introduction of settlement and commitment procedure

Parties under investigation for abuse of dominance or entering into an anti-competitive non-horizontal agreement will now have an option to settle the case with the CCI. A settlement application will have to be made after the DG has submitted the investigation report to the CCI and before the CCI has passed the final order. An application to offer commitments can also be made by the parties before the DG completes the investigation. The order of the CCI accepting or rejecting the commitment or settlement application will not be appealable.

4. Changes relating to anti-competitive agreements

- a) Buyer cartels will now be explicitly covered.
- b) Companies facilitating or otherwise furthering a cartel now covered: An enterprise will now be presumed to be part of a horizontal agreement if it actively participates in furtherance of the agreement, irrespective of whether it competes with other parties or not. With this amendment, hubs in a hub and spoke cartel can be penalised. This will also cover certain situations faced by the CCI, for example, in the pharmaceutical sector, where pharmaceutical companies acted in furtherance of a horizontal agreement among chemists and druggists.
- c) All agreements between enterprises covered: Section 3(4), which was earlier applicable to only vertical agreements, will now apply to all non-horizontal agreements. This will clarify that the scope of Section 3(1) is not limited to only two types of agreements, horizontal and vertical, and covers all agreements between enterprises.
- d) Withdrawal of leniency application: A leniency applicant will now be able to withdraw its leniency application. But, the DG and CCI will be able to use the evidence submitted in the application.
- e) Leniency plus: The CCI will be empowered to grant additional leniency to an enterprise if it discloses a second cartel in the first cartel proceedings where he is already a leniency applicant.

5. Organisational Changes

- a) Governing Board: A Governing Board will be constituted with 13 members (seven CCI whole-time members, two Government representatives (one from the Ministry of Finance and another from the Ministry of Corporate Affairs) and four other part-time members to be appointed by the Central Government). The functions of the Governing Board will be non-adjudicatory and will include, making CCI regulations, entering into MOUs, promoting competition advocacy and assisting in developing a national competition policy.
- b) DG will be appointed by the CCI and not the Central Government. This may be a step towards merging the DG office with the CCI. However, the challenge would be to protect the functional autonomy of the DG as was intended by the original legislation.
- c) CCI Panels: For adjudication, the Chairperson will have the power to appoint panels of three whole-time members.

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