

## ERGO

*Analysing developments impacting business*

### COMPETITION AMENDMENT BILL, 2023: MORE THAN JUST A FACELIFT OF THE 2022 BILL

9 February 2023

On 8 February 2023, the Ministry of Corporate Affairs, Government of India (**MCA**), proposed amendments to the Competition (Amendment) Bill, 2022 (**CAB22**), which was tabled in the Indian Parliament in August 2022 to bring progressive improvements to the Competition Act, 2002 (**Competition Act**). The key features of CAB22 are discussed [here](#). CAB22 was referred to the Joint Parliamentary Standing Committee on Finance (**Standing Committee**) which carried out detailed consultation with various stakeholders and suggested amendments (discussed [here](#)).

Upon consideration of the recommendations of the Standing Committee, the MCA has now brought additional amendments to CAB22 to bring out Competition (Amendment) Bill, 2023 (**CAB23**). CAB23 is slated for discussion in the ongoing Budget Session of the Indian Parliament.

Discussed below are the top five key changes that are now proposed by the MCA:

#### **Merger Control**

- (i) **'Substantial business operations in India' test for Deal Value threshold for merger notifications limited to Target entities**

CAB22 had proposed a new 'Deal Value' threshold (**DVT**) under which any transaction having a deal value of more than INR 2,000 crore (approx. USD 242 million) would require an approval from the CCI if the parties to the transaction had substantial business operations in India. CAB23 limits this requirement of substantial business operations in India to the target entity (and not the acquirer).

**Comment:** The proposed change is a welcome step and factors in the recommendation of the Standing Committee. Under CAB22, it was not clear whether either or both the acquirer and the target were required to have substantial business operations in India. This could have meant that a purchaser with a large India presence making an offshore acquisition of an entity with no local nexus in India would have to take prior approval from the CCI. Similarly, an acquisition by an offshore purchaser of an entity having substantial business operations in India may not have required a CCI approval. CAB23 addresses this ambiguity by rightly clarifying that it is the target that needs to have substantial business operations in India regardless of the purchaser's India presence.

**(ii) 30 calendar day period for the CCI to form its prima facie opinion on combinations from the proposed period of 20 calendar days**

CAB22 had sought to reduce the timeline within which the CCI would have to form a *prima facie* opinion on the likelihood of a combination causing appreciable adverse effect on competition (*Phase I review*) from 30 working days to 20 calendar days. CAB23 now proposes to grant the CCI 30 calendar days to form its *prima facie* opinion in place of the present 30 working day period. Separately, the outer timeline of 150 days for overall review (including *Phase II*) as proposed in CAB22 remains as is.

**Comment:** While the timeline is still being reduced from the present 30 working day period to a 30 calendar day period, this is a welcome move as it aims to reduce the burden on an already understaffed CCI. The outer time frame (inclusive of Phase II) to 150 days should be by and large achievable given the CCI's extensive experience in tackling complex merger control cases within reasonable time periods and in view of the limited number of cases that have sailed into a Phase II proceedings.

**Behavioural**

**(iii) Penalty to be calculated on 'global turnover derived from all products and services'**

Under the Competition Act, monetary penalty for anticompetitive conduct is to be computed based on, *inter alia*, the 'turnover' of the parties. CAB23 clarifies that turnover will mean global turnover of the infringing parties. The proposed clarification materially alters this position to render 'global turnover derived from all products and services' as the basis for calculation of penalty.

**Comment:** Introduction of this proposed amendment is almost a *wild card entry* as this construct was neither a part of CAB22 nor was it recommended by the Standing Committee. For large conglomerates with diverse businesses, a breach of competition laws by a small business division in India could mean massive penalty exposure. The proposed amendment stands at loggerheads with the Supreme Court's judgment in *Excel Crop Care*<sup>7</sup> which held that only the turnover derived from the business in which the contravention has been found would be the relevant turnover for calculation of penalty.

**(iv) 'Intention to participate' in a cartel by a non-competitor would also amount to cartelisation:**

The Competition Act does not explicitly recognize hub and spoke cartels. CAB22 had proposed widening the ambit of Section 3(3) of the Competition Act (which prohibits cartels) to include such non-competitors within its ambit who 'actively participate' in the cartel. Accordingly, non-competitors who act as a 'hub' to coordinate cartel activities amongst various competitors could also be penalized for cartelisation. CAB23 widens the scope further to include even such non-market participants who may not have participated in the cartel activities in reality but merely had 'intended to participate'.

**Comment:** The Standing Committee had recommended to find non-competitors in breach only in scenarios where it is proved that such person intended to actively participate in furtherance of an agreement. This recommendation has not only been disregarded but the scope of the provision has been expanded to even charge non-competitor market participants who *intended* to participate. It appears that the proposed change is to align with the cartel provisions which also frown upon the intent

to cartelise by rival firms. Therefore, it seems that the facilitators / hubs will be tested on the same standards applicable to competitors.

**(v) 'Compensation claims' allowed after 'Settlement' orders**

CAB22 had proposed to introduce Section 48A for a settlement mechanism for a charged party to engage in settlement negotiations with the CCI after the Director General (**DG**) had submitted its investigation report. Separately, Section 53N of the Competition Act allows aggrieved parties to approach the appellate tribunal to recover compensation for damages suffered. While CAB22 did not explicitly allow aggrieved parties to file compensation claims after settlement orders by the CCI, the CAB23, in line with the suggestions of the Standing Committee, clarifies that such claims will be allowed.

**Comment:** While the recent amendment to Section 53N is in line with the principles of equity and justice (since it provides for restitution of a victim of anticompetitive conduct), it could dissuade a party from approaching the CCI for settlement negotiations. A settlement application would now essentially mean an admission of guilt by the charged party which could lead to reputational loss in addition to substantial pecuniary loss.

**(vi) 'Powers of DG**

CAB22 had proposed that the DG would be granted powers to examine 'agents' (which would include legal advisors, bankers, and auditors of a company) on oath. CAB23 proposes to restrict the applicability of the said provision to the legal advisors employed by the parties to the investigation.

**Comment:** The clarification is a welcome move as it has taken note of strong reservations from across all quarters on allowing the DG to depose external legal advisors as agents, which could have been violative of the recognized principle of attorney-client privilege.

**Conclusion:**

The modification to render 'global turnover' as the premise for calculation of penalty has certainly been a surprising move - it has found entry without a consultative process and also seeks to override the principles enshrined in the Supreme Court's decision in *Excel Crop Care*.

Further, some of the recommendations made by the Standing Committee relating to the deposit of 25% of the penalty amount for filing of a statutory appeal and using intellectual property rights as a defense in abuse of dominance proceedings have not been accepted in the CAB23. It is expected that the revised amendment would be tabled in the Parliament in the current Budget Session for debate which could pave way for the amendments to the Competition Act to be effective by this summer.

- *Khaitan Competition/ Antitrust Team*

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)

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<sup>1</sup> Excel Crop Care Limited v. Competition Commission of India and another, (2017) 8 SCC 47.