

Legislative Brief

The Competition (Amendment) Bill, 2022

The Competition (Amendment) Bill, 2022 was introduced in Lok Sabha on August 5, 2022.

The Bill was referred to the Standing Committee on Finance on August 17, 2022.

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Highlights of the Bill

- ◆ The Bill seeks to amend the Competition Act, 2002, to regulate mergers and acquisitions based on the value of transactions. Deals with transaction value of more than Rs 2,000 crore will require CCI's approval. The Bill proposes to reduce the timeline for the CCI to pass an order on such transactions from 210 days to 150 days.
- ◆ The Bill expands the scope of entities that can be adjudged to be a part of anti-competitive agreements. Currently, enterprises or persons engaged in similar businesses can be held to be a part of anti-competitive agreements. The Bill expands this to also include enterprises or persons who are not engaged in similar businesses.
- ◆ The Bill provides a framework for settlement and commitment for faster resolution of investigations of anti-competitive agreements and abuse of dominant position.
- ◆ The Bill decriminalises certain offences under the Act by changing the nature of punishment from imposition of fine to civil penalties. These offences include failure to comply with orders of the CCI and directions of the Director General related to anti-competitive agreements and abuse of dominant position.

Key Issues and Analysis

- ◆ Acquisitions in the digital markets are valued based on data or certain business innovation of the company being acquired. Acquisition of such entities may not fall under the purview of traditional thresholds of assets or turnover to evaluate their impact on competition. The Bill proposes to evaluate such deals based on the value of transactions.
- ◆ The Bill expands the powers of the Director General for investigating contraventions under the Act. This includes the power to seek information and documents from legal advisers also. This may be at variance with the provisions of lawyer-client confidentiality under section 126 of the Indian Evidence Act, 1872.
- ◆ The Bill mandates depositing 25% of any amount levied by CCI prior to filing an appeal against a CCI order before the NCLAT. The question is whether specifying a mandatory deposit in the law is appropriate.
- ◆ The Act allows the use of intellectual property rights as a defence in cases of anti-competitive agreements. This defence is not available in cases involving abuse of dominant position. The Bill does not address this gap.

PART A: HIGHLIGHTS OF THE BILL

Context

The Competition Act, 2002 was enacted to promote and sustain competition in markets, protect the interest of consumers, and ensure freedom of trade for market participants.¹ It established the Competition Commission of India (CCI) to eliminate practices having adverse effect on market competition. Under the Act, enterprises are not allowed to enter into anti-competitive agreements which can cause an appreciable adverse effect on competition in India or abuse their dominant position. Persons and enterprises are also not allowed to enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Combinations are defined as the acquisition, merger or amalgamation of one or more enterprises. Combinations that meet certain thresholds based on their assets or turnover have to be notified for CCI's approval.

Since the Competition Act came into force, Indian markets have grown significantly.² There has also been changes in the way businesses operate with the emergence of digital internet based companies and new age markets involving technology.² In 2018, the Ministry of Corporate Affairs constituted the Competition Law Review Committee to ensure that the Competition Act is in line with India's economic fundamentals.³ In its deliberations, the Committee noted that certain market practices are not adequately covered by the current regulatory framework.² The Committee released its report in 2019 and suggested several amendments to the Act and changes in the regulatory structure dealing with matters of market competition. The Competition (Amendment) Bill, 2022, was introduced after reviewing the recommendations proposed by the Competition Law Review Committee. The Bill seeks to broaden the scope of anti-competitive agreements, provide for evaluation of combinations based on value of transactions, reduce the time limit for approval of combinations, and introduce settlement and commitment framework to reduce litigation.

Key Features

- **Regulation of combinations based on transaction value:** The Act prohibits any person or enterprise from entering into a combination which may cause an appreciable adverse effect on competition. Combinations imply mergers, acquisitions, or amalgamation of enterprises. The prohibition applies to transactions where parties involved have: (i) cumulative assets of more than Rs 1,000 crore, or (ii) cumulative turnover of more than Rs 3,000 crore, subject to certain other conditions. The Bill expands the definition of combinations to include transactions with a value above Rs 2,000 crore.
- **Time limit for approval of combinations:** The Act requires the CCI to pass an order on an application for approval of combinations within 210 days. The Bill reduces this time limit to 150 days.
- **Definition of control for classification of combinations:** For classification of combinations, the Act defines control as control over the affairs or management by one or more enterprises over another enterprise or group. The Bill modifies the definition of control as the ability to exercise material influence over the management, affairs, or strategic commercial decisions.
- **Anti-competitive agreements:** Under the Act, anti-competitive agreements include any agreement related to production, supply, storage, or control of goods or services, which can cause an appreciable adverse effect on competition in India. Any agreement between enterprises or persons, engaged in identical or similar businesses, will have such adverse effect on competition if it meets certain criteria. These include: (i) directly or indirectly determining purchase or sale prices, (ii) controlling production, supply, markets, or provision of services, or (iii) directly or indirectly leading to collusive bidding. The Bill adds that enterprises or persons not engaged in identical or similar businesses shall be presumed to be part of such agreements, if they actively participate in the furtherance of such agreements.
- **Settlement and Commitment in anti-competitive proceedings:** Under the Act, CCI may initiate proceedings against enterprises on grounds of: (i) entering into anti-competitive agreements, or (ii) abuse of dominant position. Abuse of dominant position includes: (i) discriminatory conditions in the purchase or sale of goods or services, (ii) restricting production of goods or services, or (iii) indulging in practices leading to the denial of market access. The Bill permits CCI to close inquiry proceedings if the enterprise offers: (i) settlement (may involve payment), or (ii) commitments (may be structural or behavioural in nature). The manner and implementation of the framework of settlement and commitment may be specified by CCI through regulations.
- **Decriminalisation of certain offences:** The Bill changes the nature of punishment for certain offences from imposition of fine to penalty. These offences include failure to comply with orders of CCI and directions of Director General with regard to anti-competitive agreements and abuse of dominant position.

PART B: KEY ISSUES AND ANALYSIS

Evaluating deal value for regulation of combinations

Under the Act, combinations are defined as the acquisition, merger, or amalgamation of one or more enterprises if they meet certain thresholds based on their assets or turnover. Combinations meeting these thresholds have to seek CCI's approval. The Bill seeks to add an additional threshold of deal value of transactions for the notification and scrutiny of combinations. According to the provision, transactions with a value of more than Rs 2,000 crore will have to be notified for CCI's approval. Value of transaction is proposed to include every valuable consideration, whether direct, indirect, or deferred for any acquisition, merger, or amalgamation.

Of late, acquisitions in the digital markets, are valued based on data or certain business innovation of the company being acquired (target).² In such transactions, the target may not have a large asset base and may be in a line of business where products/services are given free or generate insignificant revenue.² For instance, Facebook acquired the messaging platform WhatsApp in 2014 for approximately USD 19 billion.⁴ Between January to June in 2014, WhatsApp's revenue was USD 15 million and it reported a net loss of USD 233 million.⁵ While such transactions may have an impact on market competition, the CCI currently lacks the legal framework to evaluate them if they do not meet the stipulated criteria based on assets or turnover.

Certain countries have relied on evaluating the deal value of such transactions in order to assess their impact on market competition. In the US, premerger notifications have to be filed if a transaction is valued over USD 200 million and does not attract any exemptions.⁶ For transactions valued between USD 50 million and USD 200 million, premerger notifications have to be filed if it meets certain other thresholds. According to the Austrian Federal Cartel Act, 2005, if the value of a merger transaction is greater than 200 million euro, it has to be notified to the Federal Competition Authority.⁷ Under the German competition law, there is a deal value threshold of 400 million euro for regulation of acquisitions, subject to certain other criteria.^{8,2}

The Competition Law Review Committee (2019) had recommended the inclusion of a deal value threshold for merger notification under the Competition Act, 2002.² The Standing Committee on Commerce (2022) had observed that widening the ambit of merger scrutiny was needed to prohibit e-marketplace companies from engaging in anti-competitive transactions.⁹

Director General's powers may be incompatible with Indian Evidence Act

The Bill expands the powers of the Director General for investigating contraventions under the Act. This includes the power to seek information and documents from legal advisers also. This may be at variance with the provisions of lawyer-client confidentiality under Section 126 of the Indian Evidence Act, 1872.¹⁰

The Bill specifies that all officers, employees, and agents of a party under investigation, shall produce all information and documents related to the party to the Director General. Under the Act, the term 'agents' includes bankers and legal advisers of the party being investigated. Under the Indian Evidence Act, no barrister, attorney, pleader, or vakil is permitted to disclose any professional communication without his client's consent. Under the Companies Act, 2013, legal advisors are exempt from disclosing certain information.¹¹ This includes any privileged communication with the legal advisor.

Whether specifying deposit for appeals in the law is appropriate

The Bill requires the appellants to deposit 25% of the amount that is to be paid under any order passed by the CCI, in a manner as specified by the National Company Law Appellate Tribunal (NCLAT). Unless this amount is deposited, the person's appeal will not be considered by the NCLAT. The question is whether specifying a mandatory deposit, for appealing against CCI's orders, in the law is appropriate.

Under the Competition Act, appeals against orders passed by the CCI may be filed with the NCLAT. At present, NCLAT has discretion in deciding the amount of penalty that has to be deposited while an appeal is heard. This may be decided based on a variety of factors such as the gravity of the conduct under question and the size of the business. NCLAT has, in several instances, asked the appellant to deposit 10% of the penalty imposed by CCI as part of the order.^{12,13,14} On doing so, the imposition of penalty is held in abeyance while the case is being heard. Note that appeals made to the Securities Appellate Tribunal involves no such mandatory deposit requirements under the Securities and Exchange Board of India Act, 1992.¹⁵

One of the reasons for specifying a mandatory deposit of penalty in order to be able to file appeals could be to discourage frivolous appeals. Note that between 2011-12 and 2017-18, Rs 13,524 crore was imposed as penalty by the CCI against which only Rs 121 crore was realised.¹⁶ According to the CCI, the low rate of recovery was due to several of its orders being appealed before the NCLAT and Supreme Court or challenged before the High Court.² Under the Income Tax Act, 1961, the Income Tax Appellate Tribunal may pass a stay order if the appellant has deposited at least 20% of his tax liabilities (including tax, interest, fee, and penalty).^{17,18} Under the Consumer Protection Act, 2019, appeals against the orders of the District Consumer Disputes Redressal Commission, the State Consumer Disputes Redressal Commission, and the National Consumer Disputes

Bill: Clause
6 (B)

Act: Section
5

Bill: Clause
26 (b)

Act: Section
41

Bill: Clause
39

Act: Section
53 (B)

Redressal Commission can be filed before their respective appellate authorities on the deposit of 50% of the amount which is payable under such orders.¹⁹

IPR is not allowed as defence in cases of abuse of dominant position

The Act does not allow the use of Intellectual Property Rights (IPR) as a defence in cases of abuse of dominant position. The Bill does not address this gap.

IPR allow their holders to derive certain benefits from their creation or investment. These include trademarks, copyrights, or patents. The IPR holder has a temporary right to exclude others from benefitting from their creation or investment.² This could create a form of monopoly or a degree of economic exclusivity.² The Act allows the use of IPR including copyrights, patents, and designs as a defence in cases of anti-competitive agreements. However, it does not allow this defence in cases of abuse of dominant position. The Act bars any enterprise or group to abuse its dominant position. Abuse of dominant position includes: (i) discriminatory condition/price in purchase or sale of goods or services, (ii) limiting or restricting production of goods or services, or (iii) indulging in practices resulting in denial of market access.

The Competition Law Review Committee has recommended that in cases involving the abuse of dominant position, a defence allowing for protecting IPR may be provided. It had noted that creation of exclusivity, through IPR laws, may not necessarily establish the ability to exercise market power.² While deciding whether an IPR holder has abused his dominant position, there needs to be a balance between upholding free competition and the rights of the entity holding the IPR.²

1. [The Competition Act, 2002](#).
2. [Report of Competition Law Review Committee](#), Ministry of Corporate Affairs, July 2019.
3. [“Government constitutes Competition Law Review Committee to review the Competition Act”](#), Press Information Bureau, Ministry of Corporate Affairs, September 30, 2018.
4. [“Facebook to Acquire WhatsApp”](#), Meta Investor Relations, February 19, 2014.
5. [Interim Condensed Financial Statements as of June 30, 2014](#), WhatsApp Inc., Securities Exchange Commission, as accessed on September 27, 2022.
6. [“Steps for Determining Whether an HSR Filing is Required”](#), Federal Trade Commission, as accessed on September 27, 2022.
7. [Federal Cartel Act 2005](#), as amended effective 10 September 2021.
8. [Act against Restraints of Competition](#).
9. [Report no. 172, Standing Committee on Commerce: “Promotion and Regulation of E-Commerce in India”](#), Rajya Sabha, July 21, 2022.
10. Section 126, [The Indian Evidence Act, 1872](#).
11. Section 227, [The Companies Act, 2013](#).
12. [Competition Appeal \(AT\) No. 23 of 2018](#), Interglobe Aviation Ltd. (Indigo Airlines) versus Competition Commission of India & Ors., National Company Law Appellate Tribunal, May 10, 2018.
13. [Competition Appeal \(AT\) No. 02 & 04 of 2019](#), Divine Savior Pvt. Ltd. & Anr. Vs Competition Commission of India & Ors., National Company Law Appellate Tribunal, January 1, 2019.
14. [Competition Appeal \(AT\) No.78 of 2019](#), Jaiprakash Associates Ltd. Versus Competition Commission of India & Anr., National Company Law Appellate Tribunal, November 7, 2019.
15. Section 15T, [The Securities and Exchange Board of India Act, 1992](#).
16. [Annual Report](#), 2017-18, Competition Commission of India.
17. [Section 254](#), Income Tax Act, 1961.
18. [Appeal to the Income Tax Appellate Tribunal](#), Income Tax Department.
19. Sections 41, 51, and 67, [The Consumer Protection Act, 2019](#).

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