

## A BRIEF STUDY ON THE COMPETITION (AMENDMENT) ACT, 2023

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### ABSTRACT

*The Competition (Amendment) Act 2023 marks a significant milestone in India's competition law regime, aiming to address the challenges and resolve the irregularities having persisted thus far as well as broaden the definitions of certain provisions to accommodate recent concepts in the ever-evolving landscape of market dynamics. The article sheds light on the enhanced powers of the Competition Commission of India (CCI) to investigate and impose penalties for widening the domain of agreements that can be supervised by the CCI. It also discusses the alternate resolution methodologies devised in the Act to capacitate for swifter remedies and conclusions. Ultimately, this article endeavors to provide a comprehensive analysis of the key provisions and implications of the Act, offering insights into its potential impact on competition enforcement and regulation in India, examining the various manners in which the Parliament has attempted to fine-tune the existing competition laws since their preliminary introduction in 2002 to bring it at par with global and digital markets.*

**Keywords:** Competition commission, Cartel, Merger, Acquisition, Combination, Agreement, Inquiry, Penalty.

### INTRODUCTION

Competition laws are crucial to regulating the competition amongst sellers so as to promote fair play in the course of said competition in a sustainable manner while keeping in mind, most importantly, the interests of the consumers. Establishing a well-crafted competition law is the equivalent of promoting the economic progress of every country.

The Competition Act, 2002 was initially enacted by the Parliament of India primarily for the establishment of a Competition Commission meant to prevent anti-competitive practices which would cause an appreciable adverse effect on the competition and encourage freedom of trade (subject to anti-competitive policies).<sup>1</sup>

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<sup>1</sup>The Competition Act, 2002

The Competition Act, 2002 was a replacement to the former legislation in place, i.e., the Monopolies and Restrictive Trade Practice Act, 1969 as the former Act was not at par with competition laws existing on an international basis. This occurred due to multiple factors including the continuum of obsolete laws, the vague and ambiguous nature of the offences that lacked penalties for indulging in anti-competitive conduct, the excessive government control of over-licensing that curtailed and inhibited the growth of the economy, the application of a per se rule to investigate matters leading to over-scrutinization, promotion of export of certain commodities and materials despite being a shortage within the country, the feature of voluntary disclosure of unfair trade practices by fellow competitors of vexatious nature, the inefficiency of the former MRTP Commission to timely assess competition matters leading to endless and unnecessary delay in pronouncement, lack of extra-territorial and concurrent jurisdiction and lastly, an overall view of critiquing dominance instead of the ‘abuse of dominance’, a gross error in interpretation of competition which was duly corrected in the current Act.

Since the enactment of the original Competition Act, 2002, it has now been amended thrice by way of the Competition (Amendment) Act, 2007, the Competition (Amendment) Act, 2009 and the latest, Competition (Amendment) Act, 2023. The assent of the Competition (Amendment) Act, 2023 clearly suggests that the Parliament is invested in constant upgradation of competition laws with the evolving status quo of markets, to discard outmoded portions of the legislation, actively rectifying the overlooked failures of the past.

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The Competition (Amendment) Act, 2023 received assent from the Hon’ble President of India on April 11, 2023 which significantly modifies the prevailing Competition Act, 2002 based on the recommendations of the Competition Law Review Committee set up in 2018<sup>2</sup>. The finalization of the bill after a period of 5 years since the inception of the Review Committee hints at the in-depth evaluation of the proposed amendments prior to their approval.

### **THE NEED FOR THE 2023 AMENDMENT**

It is undeniable that the gravest adversity that the Indian Judiciary System faces year after year is the mounting pile of cases caused, in most circumstances, due to frivolous delay.

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<sup>2</sup>Veritas Legal, ‘Competition Amendment Act, 2023’ (The Legal 500, 27 April 2023  
<<https://www.legal500.com/developments/thought-leadership/competition-amendment-act/>>

Tribunals and other regulatory bodies are no strangers to this unfortunate state of affairs. The stated timeline for approval of combinations as specified in Section 6 (2A) of the Competition Act, 2002 is 210 days. This prolonged duration for combination approval goes against the ethos of the ‘ease of doing business’, an index published by the World Bank as per which India ranked in the 63<sup>rd</sup> position amongst 190 countries in the year 2020<sup>3</sup>. Recognizing the requirement for an effortless process in antitrust matters specific to combination filings, the recommendations of the Competition Law Review Committee offered the idea of *Green Channel Route* to fast track the disposal of the types of merger and acquisition cases that would be readily approved and would lead to no appreciable adverse effect on the competition.<sup>4</sup>

It was observed through CCI Annual Reports that the pending competition law appeals are on the rise in NCLAT, due to twofold factors: increasing number of cases and slower disposal of appeals by NCLAT.<sup>5</sup> To mitigate the pendency of competition law appeals, the Competition Law Review Committee suggested the creation of a dedicated bench in NCLAT for deliberating appeals under the Competition Act<sup>6</sup>.

With businesses expanding at an exponential rate, the focus of the amendment has been to expand the scope of the Competition Commission as well as to inspect significant deals for corporate restructuring being carried out. This is evident from the change in analysis of deal value threshold conditions from the value of asset/turnover to the value of transactions related to merger, acquisition, or amalgamation beyond ₹2000 crores to be reported. The concept of ‘material influence’ has also been added to the definition of the term ‘control’ to acknowledge the ability to impact representation of the board and special/negative rights, clarifying any remnant ambiguity.

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<sup>3</sup> World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC BY 3.0 IGO, Pg. 4

<sup>4</sup> Apurv Umredkar (Samvad Partners), ‘Green Channel Route: Resolving the Impediment and Procedural Infirmities’ (Kluwer Competition Law Blog, 28 June 2021)  
<<https://competitionlawblog.kluwercompetitionlaw.com/2021/06/28/green-channel-route-resolving-the-impediment-and-procedural-infirmities/>>

<sup>5</sup> Navdeep Singh Suhag, Aniket Sarvate, and Abhishek Raj, ‘Analysis of NCLAT’s Functioning as Competition Law Appellate Tribunal’ (2022) 2 CCIJOCLP  
<<https://ccijournal.in/index.php/ccijoelp/article/download/36/36/206>> doi: 10.54425/ccijoelp.v2.36

<sup>6</sup> Ministry of Corporate Affairs, ‘Report of the Competition Law Review Committee submitted to Union Finance and Corporate Affairs Minister’ *Press Information Bureau* (New Delhi, 14 August 2019)  
<<https://pib.gov.in/newsite/PrintRelease.aspx?relid=192629>>

The Competition Act, 2002 had a narrow construction by way of its language that did not accommodate for 'hub and spoke' agreements under the definition of 'cartels', allowing illegal agreements of the mentioned type and their participants to escape accountability. The CCI first encountered this issue in *Samir Agrawal v. ANI Technologies Pvt. Ltd*<sup>7</sup> over the alleged collusion among drivers through the cab aggregator platforms Ola and Uber, leading to the dismissal of the case due to an inaccurate understanding of algorithm utilization for collusion. However, with the advent of the latest amendment, the Commission now possesses a larger ambit for cartelization even between non-identical trade upon discovery of their active participation.

Observing the principle of '*Vigilantibus Non Dormientibus Jura Subveniunt*', the Competition (Amendment) Act, 2023 has categorically appended the limitation period up to three years, prompting plaintiffs to be agile in invoking their legal rights while alleviating the delay caused in competition matters due to lack of substantial evidence owing to the maturity of the matter.

On a brief study of the target areas of the competition amendments, it can be understood that an extensive effort has been made to tackle urgent competition-related problems on which the Act was previously silent or ambiguous.

### **MAJOR CHANGES ADMINISTERED TO THE 2002 ACT**

The amendments proposed in the Competition (Amendment) Act, 2023 have partially come into effect from 18 May 2023 and authorization of these overdue crucial changes will revolutionize the Competition scenario post its complete implementation.

**Settlement & Commitment Enforcement Mechanism:** Due to the rising delay in adjudication of competition matters, the Competition (Amendment) Act, 2023 has introduced Section 48A and Section 48B which refer to Settlement and Commitment respectively in cases of abuse of dominance or anti-competitive agreements. The settlement as a means of the alternate solution has been instituted into the Act for competition matters now as well. To avail of the option of settlement, the party being inquired has to submit an application for settlement on receiving the report formed by the Director General under Section 26(3). The Competition Commission of India may consequently accept or reject the proposal of

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<sup>7</sup>2018 SCC ONLINE CCI 86

settlement upon consideration of the nature, gravity and impact of the alleged contravention subject to the terms and manner of implementation of settlement and monitoring<sup>8</sup>, based on the appropriate method of resolution for the matter in question. Commitment entails offering a commitment by the enterprise concerned vis-à-vis the inquiry through a process identical to that for settlement.

*Penalty:* Under Section 48C of the Amendment in case the applicant does not obey CCI's order concerning settlement/commitment, makes incomplete and/or false disclosures, or commits material change in facts, not only will CCI's order be henceforth withdrawn but may also lead the applicant to be liable for paying legal penalty up to ₹1 crore and re-initiate the inquiry.

While the settlement and commitment mechanism will certainly prove to act as a boon for the CCI in faster disposal of complaints and avoid delay, the enterprises involved in inquiry need to tread carefully and satisfactorily decide to commence with this path of resolution as it could hold said enterprises liable; a decree these enterprises would be forced to accept as the decisions of such settlements or commitments are not subject to appeal.

**Reduction in Approval Timeline:** The Act originally recommended a maximum timeline of 210 days as per Section 6(2A) which has now been remarkably reduced to 150 days, meaning that if the Commission has lagged in taking action on notification made the party to the Commission of the concerning combination, then the combination will be deemed to have been approved.

This reduction in approval timeline also includes the new system of "Green Channel", introduced under Section 6(4) of the Act, which is an automated approval scheme for a certain category of merger, acquisitions and combinations considered harmless, bypassing the 30 days working period in the ordinary course of legal proceeding. To allow the process to be quick and hassle-free for the parties as well as the Commission, the enterprises involved need not mention market share, market share, etc.<sup>9</sup>

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<sup>8</sup>Ibid

<sup>9</sup>Jayshree Navin Chandra and Naman Dutt, 'Green Channel Route: Automatic Approval of Combinations under the Competition Regime of India' (*LiveLaw*, 20 May 2023) <<https://www.livelaw.in/law-firms/law-firm-articles-/green-channel-route-competition-commission-of-india-acquisition-merger-zeus-law-229150?infinitemscroll=1>>

For the self-assessment of the applicability of Green Channel to the particular merger/acquisition/combination, the newly drafted Schedule III envisages the criteria for the same for utmost clarity, which has been laid down as follows:

- The parties should not be operating within the same relevant market or line of production;
- The parties should be non-competing enterprises operating on different stages of production involved in the same relevant market;
- The parties should not be involved in businesses complementary to each other.

On fulfillment of the above criteria, the parties need to submit the amended version of Form I containing the Green Channel section as well as the declarations present under amended Schedule IV confirming that neither the combination will lead to horizontal, vertical, or complementary overlaps nor cause an appreciable adverse effect on its relevant market simultaneously ensuring that the information provided by the parties are true and to the best of their knowledge, along with the prescribed fee of ₹20,00,000 as per the 2011 Regulations, on the successful receipt of which the CCI will service an acknowledgment paper, ratifying the deemed approval which would be considered as an order by CCI as per Section 31(1).<sup>10</sup>

Keeping aside the obvious and multifold advantages of the Green Channel system, it also has a few advantages. Firstly, the restrictive nature of the criteria formulated would provide mergers/acquisitions/combinations with minimal overlapping to filter through the wide-toothed approval process. Secondly, the concept of complementary overlap has nowhere been directly or indirectly defined in the Act, leading to uncertainty and confusion. Thirdly, due to the lack of relevancy of a timeline in the Green Channel system, if a deal fails to fulfill all the criteria in actuality but has misconstrued the certainty of its approval and finalized the deal, the concerned parties would be held guilty of contravening Section 44 of the Competition Act, discouraging the use of this new route, thus exhausting its very purpose.

Further amending Section 29(1), upon the Commission's prima facie view that the combination will or has caused appreciable adverse effects and investigation is required, the parties involved now have a time of only 15 days to respond as to why such investigation should not be conducted in place of the former timeline of 30 days upon service of notice.<sup>11</sup>

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<sup>10</sup>Ibid

<sup>11</sup>Ibid

This means that not only will the Commission need to be robust in its functioning for inquiring or rejecting objectionable combinations but the parties themselves will have to be rapid in forming their response to discourage investigation.

**Deal Value Threshold:** Combinations, which are defined under Section 5 of the Act, were earlier reported on the basis of the value of the asset/turnover. However, as per the new amendment, deals in which the enterprises involved have “substantial business operations in India” and the value of any transaction made towards the deal exceed ₹2000 crores must be notified to the Competition Commission of India for seeking approval.<sup>12</sup>

There are no exact criteria defined to ascertain which enterprises would fall under these substantial businesses having operations in India. While the Ministry of Corporate Affairs has specified that this threshold is majorly intended for nascent digital markets (as they may have sizeable prospects with respect to technology, innovation, data, etc. despite having nominal assets). Accordingly, the test/criteria clearly elucidate upon the ambit of substantial business operations to curb open-mindedness.

*Penalty:* Non-compliance with notification of deals that cross the threshold will be penalized with at least 1% of total turnover, higher assets, or deal value.

**Inclusion of ‘Material Influence’ in the definition of ‘Control’:** Explanation (a) of Section 5 of the Act defines control as controlling the affairs or management by one or more enterprises/groups, either jointly or singly, over another enterprise or group.

Material influence refers to the capacity of an enterprise/person to affect the affairs/management of third-party enterprises through their expertise and status by influencing board representation, financial settings, structural positioning, etc. Material influence, can, thus, enable the enterprise/person to reign control and cause change to any extent. Hence. Material influence has been added to the definition of control.

The issue in implementation might arise in ascertaining the material influence in control to the subjected entity due to lack of any particular criteria, an ambiguity is similar to the one with deal value threshold. Nevertheless, this broadening of definition imposes accountability on those who would have otherwise escaped from the liability of affecting control.

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<sup>12</sup>Aniruddha Majumdar, Khyati Dalal, Aparna Gaur, Ratnadeep Roychowdhury and Gowree Gokhale, ‘The Competition (Amendment) Act, 2023’ (Nishith Desai Associates, 5 May 2023) <<https://www.nishithdesai.com/NewsDetails/9599>>

**Introduction of Hub and Spoke Cartels:** Hub and Spoke cartels are restrictions on the horizontal level (e.g.: suppliers) that form the “spokes” implemented through vertically-involved enterprises that act as a mutual “hub” (e.g.: common manufacturer).<sup>13</sup> Through the collusion of multistorey hierarchy, the hub, existing on another level, controls enterprises placed across the same horizontal arrangement.

The Act previously covered agreements between entities/persons/associations of persons engaged in similar trade within the definition of cartels in Section 2(c) and further elaborated in Section 3(3). However, it has since been realized that collusion or anti-competitive agreements can occur across different horizontal or vertical levels as well. Subsequently, the Act now recognizes even entities/persons/associations of persons engaged in dissimilar trades will be held liable for anti-competitive agreements if they have shown active participation or intend to participate in the furtherance of such cartelization.

Further, each and every enterprise shall be individually penalized for every year of continuously participating in anti-competitive agreements despite existing in the relevant matter on a horizontal or vertical level. There were several concerns raised on the improper implication of even those enterprises which offer platforms for communication, conceding which the Parliament recommended the exclusion of the latter part pertaining to intention to participate. Regrettably, the Parliament’s recommendation has been disregarded<sup>14</sup> which may lead to significant cases of wrongful implication in the future. The only uncertain scope of hope on further amendment of this amendment is through judicial precedents upon the Commission’s discretion.

**Calculation of penalty upon Global Turnover:** Earlier, the penalties imposed under Section 27 of the Act were based upon the relevant turnover of enterprise, which came to be seen as domestic turnover, a precedent established in *Excel Crop Care Ltd. v. The Competition Commission of India*<sup>15</sup>. Cut to the present, the penalties can also be imposed on global turnover derived from products and services. This amendment may lead to higher penalties and also enable the Commission to recover legal expenses.<sup>16</sup>

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<sup>13</sup>Manika Brar, ‘Hub-and-spoke cartels: The Next “Big Thing”’ (Shardul Amarchand Mangaldas, 3 April 2023) <<https://www.amsshardul.com/insight/hub-and-spoke-cartels-the-next-big-thing/>>

<sup>14</sup>Ministry of Corporate Affairs, Report of the Competition Law Review Committee (Cm, 2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>>

<sup>15</sup>2017 SCC ONLINE SC 609

<sup>16</sup>Shruti Manchanda, ‘Analysis of the Competition (Amendment) Act, 2023’ (*Mondaq*, 1 June 2023)



**Validating Open Market Purchases:** As per former conduct, the parties were obligated to notify if purchasing on the stock market crossed the threshold stated in Section 5 before carrying out such a deal. On implementation of the amendment, these obligations on open offer and acquisition of convertible shares on a stock exchange have been diluted, given that the CCI is duly notified first and the acquirer does not utilize ownership rights/interest or accepts dividends of such shares/securities till the willing approval of Commission as per Section 6(2A).<sup>17</sup>

**Laying Down the Limitation Period:** Through the Amendment Act, a limitation period of 3 years has been introduced to adjudicate over any inquiry under Section 3 or 4 of the Act, barring the filing of a competition case beyond the prescribed limit. The CCI retains the power of condonation of delay in accordance with Section 36(2) which vests the Commission with the same powers as Civil Court. This is a negative provision added that will have a positive effect on the judicial administration of the Commission, invigorating parties to be proactive over their legal rights.

**Modifications under Section 29:** If the Commission is of the opinion that the combination has or will have an appreciable adverse effect, the Commission will service a statement of objections and invite the parties to reason out the approval of the combination as per the recent amendments.

This would be viewed as a welcome move by the enterprises as it would allow them a fair opportunity to pitch their combination and depict how the combination may encourage healthy competition to the Commission instead of a possible hasty rejection, resulting in the ultimate satisfaction of both the Commission and the enterprises involved.

**Leniency in Penalties:** The last notable amendment to the Competition Act is the abrogation of the criminal nature of numerous offences and replacing them with civil penalties instead. For e.g.: the punishment of imprisonment of 3 years under Section 53Q for contravention of an order of the Appellate Tribunal has now been substantially reduced to contempt of court. Similarly, the Commission may impose a lesser penalty on any member of a cartel who

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<[<sup>17</sup>M.M. Sharma, 'India Amends Its Competition Law – The Competition \(Amendment\) Act, 2023, Comes into Force- Promoting the Ease of Doing Business' \(\*Lexology\*, 18 April 2023\)](https://www.mondaq.com/india/cartels-monopolies/1323672/analysis-of-the-competition-amendment-act-2023#:~:text=The%20Amendment%20Act%2C%202023%2C%20empowers,the%20competition%20in%20the%20market.></a></p></div><div data-bbox=)

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violated the provisions of Section 3 and goes on to make true and total disclosure even with respect to another unknown cartel subject to terms and conditions enlisted in the Competition (Amendment) Act, 2023.<sup>18</sup>

Such punitive reform reinforces the idea of the existence of law is not merely to inflict pain upon the miscreants but simply to illuminate the permitted and prohibited actions as per subsisting law and for society to mold its conduct accordingly. Not every permitted action may be well-intended and not every prohibited action may be a reasonable restriction, but the provision of an amendment like the Competition (Amendment) Act, 2023 portrays that the existing society inspires policymaking and not vice versa.

## CONCLUSION

The Competition (Amendment) Act, 2023 is a holistic effort to address and correct the prevailing loopholes in Competition Law in India to bring Indian competition law at par with various digital economies. The promulgation of Acts of such nature aids the upliftment of India's Ease of Doing Business, especially providing a lifeline to smaller businesses looking to expand, paving the way for a paradigm shift from India's image as a service-based economy to a business economy. On the contrary, the attempt of clearing the fog of ambiguity has diminished but not terminated the mystery revolving around competition terminology which could have been capped by framing well-defined laws. However, with supplementary direction from the Commission and a decisive interpretation of statutes will guide the Competition landscape to favorable outcome for domestic enterprises as well as international enterprises bootstrapping to enter the rising Indian economy.

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<sup>18</sup>Ibid