

Changes to the Competition Act – a catalyst for the Indian economy?

Toshit Shandilya

AZB & Partners, Delhi
toshit.shandilya@azbpartners.com

Deepanshu Poddar

AZB & Partners, Delhi
deepanshu.poddar@azbpartners.com

Introduction

India is increasingly becoming a key jurisdiction for foreign investment. To keep the momentum going, the Indian government has consistently attempted to keep the business environment friendly and less burdensome. This includes: a reduction in corporate tax rates; easing the liquidity problems of non-banking financial corporations (NBFCs) and banks; foreign direct investment (FDI) policy reforms; and easing compliance norms – all with the aim of promoting ‘ease of doing business in India’.¹

1 *Initiatives to boost domestic and foreign investments* (Ministry of Commerce & Industry), see [https://pib.gov.in/PressReleasePage.aspx?PRID=1782353#:~:text=These%20include%20reduction%20in%20Corporate,Programme%20\(PMP\)%2C%20Schemes%20for](https://pib.gov.in/PressReleasePage.aspx?PRID=1782353#:~:text=These%20include%20reduction%20in%20Corporate,Programme%20(PMP)%2C%20Schemes%20for), accessed 16 October 2023.

After more than a decade, India's competition law has recently been amended, bringing about key changes that will impact businesses. The 2023 Amendments² to the Indian Competition Act 2002 (the Act) introduce changes that several antitrust jurisdictions are still considering. The 2023 Amendments are a mixed bag of changes: several are business friendly – such as commitments and settlements, expedited merger review timelines and introducing a leniency-plus regime – while others aim to achieve greater regulatory oversight and stricter enforcement, such as deal value thresholds, penalties on global turnover and increased liability for hubs in 'hub-and-spoke' cartels.

The Competition Commission of India (CCI), the body entrusted with the responsibility to nurture and maintain well-functioning markets that facilitate the growth manifested by the Indian government,³ must adopt a balanced approach to ensure that competition enforcement does not get in the way of 'economic growth' as envisaged under the Preamble to the Act.⁴ This article examines the impact of the 2023 Amendments on the Indian market. In particular, we examine the CCI's approach in adopting these tools and tailoring it according to the requirements of the Indian economy.

Impact of the 2023 Amendments

Commitments and settlements

At the forefront of the 2023 Amendments is the introduction of commitments and settlement mechanisms for allegations of anti-competitive vertical agreements and abuse of dominance. Unlike other parts of the world, these do not extend to cartels.

The CCI is now empowered to accept commitments for ongoing investigations before the Director General's (DG's) investigation report (DG Report) is shared with the parties. Through commitments, businesses under investigation can address the preliminary competition concerns raised by the CCI instead of participating in drawn-out investigations. Similarly, the introduction of a settlement process allows a business to settle proceedings after receipt of the DG Report but before the CCI issues its final order. In case of settlements, the business agrees to pay a settlement

2 The Competition (Amendment) Act 2023. See [https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20\(Amendment\)%20Act,%202023.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20(Amendment)%20Act,%202023.pdf), accessed 16 October 2023.

3 The Preamble to the Act states that the objectives of the CCI are to be fulfilled keeping in mind the 'economic development' of the country. See Sangeeta Verma, 'A Competition Law for Shaping the Future of the Indian Economy: Competition Commission of India 2.0' (*Competition Policy International*, 14 May 2023). See www.pymnts.com/cpi_posts/a-competition-law-for-shaping-the-future-of-the-indian-economy-competition-commission-of-india-2-0/.

4 *Ibid.*

amount (as decided by the CCI), which can be less than the maximum penalty that the CCI may impose in that particular case. Settlement and commitment orders also exonerate the business from any infringement finding; however, in case of settlements, the business can face action for compensatory damages.

The introduction of commitments and settlements present two key benefits to the CCI: it saves time and resources, and results in faster market correction.

The preliminary assessment of a potential infringement allows the CCI to filter out cases which are not likely to cause harm to the competition, saving its scarce resources⁵ – not only before the CCI but equally during the appellate stage, which can take several years to conclude. In terms of market correction, the CCI has emphasised the need for quickly implementing corrective measures once competition harm is identified.⁶

Settlements and commitment do not deter businesses from contesting their cases where they believe they have strong justifications. These mechanisms provide an added optionality to not contest CCI's preliminary finding or the DG Report (as the case may be) based on a cost-benefit analysis. The businesses can provide more practically feasible remedial measures as compared to the directions that the CCI may issue in its final order without any discussion with the business. These mechanisms allow businesses to assess how commercially important it is to continue to contest the 'alleged' anti-competitive conduct. If the conduct merely results in a technical violation and does not accrue any substantial benefit to businesses, it may be prudent to offer commitments and tweak its conduct in a manner which is more acceptable to the CCI. Similarly, settlements provide businesses with an additional opportunity to avoid long-lasting adversarial proceedings with the CCI/complainants, instead arriving at a commonly agreed decision.

For example, in the *Autoparts*⁷ case, the CCI issued extensive directions (later upheld by the appellate tribunal) in relation to supply and use of spare parts by automotive dealers. Concerns were raised regarding these directions having a negative impact on safety of car owners.⁸ The Supreme Court of India has stayed the enforcement of CCI's order and is yet to decide the case, even though more than

5 Section 26(2) of the Act allows the CCI to close a matter if it is of the opinion that there is no prima facie case made out.

6 *Mr Umar Javeed and Others v Google LLC and Another (Smartphones)*, Case No 39 of 2018, see www.cci.gov.in/antitrust/orders/details/1070/0 ; CCI Fairplay, Volume-42 July September 2022, 8, see www.cci.gov.in/advocacy/publications/fair-play/details/48/0, accessed 16 October 2023.

7 *Shri Shamsheer Kataria v Honda Sael Cars India Ltd & Ors*, Case No 3 of 2011, available at www.cci.gov.in/antitrust/orders/details/750/0 .

8 Payaswini Upadhyay, 'Supreme Court Grants Relief To Nissan, Ford And Toyota In Antitrust Violation Case' (BQ Prime, 7 February 2017), see www.bqprime.com/business/supreme-court-grants-relief-to-nissan-ford-and-toyota-in-antitrust-violation-case.

nine years have passed since the CCI's order.⁹ Experience from other jurisdictions suggests that authorities have used effectively commitments and settlements in their jurisdictions to address competition harm in an expedient way. For example, in *Gazprom*, the European Commission's preliminary view was that Gazprom abused a dominant position by pursuing partitioning the European natural gas markets. Gazprom committed to remove contractual restrictions on cross-border resale of gas; facilitate gas flows to and from isolated markets; structure a process ensuring competitive gas prices; and cease leveraging dominance in the supply of natural gas.¹⁰

For the settlements and commitments regime to be successful, the CCI may need to extend flexibility in accepting commitments and settlements that are pragmatic. The CCI may consider:

- being open to considering novel remedies (as opposed to the traditional 'cease and desist') that businesses may suggest;
- implementing business-friendly timelines to comprehensively understand market harm and suggest effective remedies (particularly for global companies who may need to consider the multi-jurisdictional impact of remedies offered);
- adopting a business-friendly approach in deciding the settlement amount, which does not discourage businesses from avoiding adversarial proceedings and risking the imposition of a penalty that the CCI may impose.

Deal value threshold

The 2023 Amendments have introduced a transaction value-based threshold for notification of transactions exceeding a deal value of INR 20 billion (around US\$244 million), where the target has substantial business operations (SBO) in India. The deal value threshold has been brought in with the increasing number of acquisitions by large digital companies in mind, yet the provision is sector-agnostic.¹¹ Mergers such as Facebook–Instagram, Facebook–WhatsApp and so on have drawn the attention of competition regulators across the globe, including India. This is because acquisitions of start-ups/companies with less asset value by big tech companies do not typically satisfy traditional turnover-based thresholds, which trigger the merger control mechanism of the CCI. Where the value of

9 *Nissan Motor India Private Limited and Ors v Competition Commission of India and Ors*, Civil Appeal No 951 of 2017

10 *Gazprom* (COMP/AT.39.816), Commission press release IP/18/3921.

11 As per reports, Google, Amazon, Facebook, Microsoft and Apple combined have reportedly made over 400 acquisitions globally in the last decade. See *Unlocking digital competition* (Digital Competition Expert Panel (UK), March 2019), 94. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

transactions does not tally with the value of the target's assets and its turnover, deal value thresholds appeared to be the most appropriate way to widen the CCI's net to catch such transactions.

The ultimate purpose of the CCI is to prevent any practice causing appreciable adverse effect to the competition and to promote and sustain competition, for which the CCI is also adequately armed with *ex post* powers. Globally, there is limited evidence to show that the introduction of transaction size-based thresholds have avoided potential competition harm: in Germany, insignificant additional notifications were made for review,¹² and in Austria, none of the additional notifications were found to be anti-competitive or in relation to digital acquisitions.¹³ Even the Whatsapp/Facebook merger was cleared by the US Federal Trade Commission¹⁴ and the European Commission.¹⁵ The prevention of a 'killer acquisition' in the digital sector is also often cited as the objective behind introducing a transaction-based threshold.¹⁶ However, evidence suggests that acquisitions in the digital sector typically result in integration of the target's services into the acquirer's suite of services rather than 'killing' the target's services, which can be argued as a plausible efficiency rationale.¹⁷ For instance, Whatsapp's communication services have been added as a complementary service to the full suite of social media services offered by Facebook. Therefore, as of now, there is very little evidence of a positive impact of introduction of transaction-based threshold on maintaining healthy competition.

A deal value threshold creates an additional regulatory requirement for investments which were earlier exempt due to a significantly low value of assets and turnover of the target. Consequently, said transactions will be covered by the standstill obligation provided in the Act, requiring parties to the transaction to wait for CCI's approval before closing the transaction. The CCI is well aware of

12 *Start-ups, killer acquisitions and merger control – Note by Germany*, (Organisation for Economic Co-operation and Development (OECD), 11 June 2020), para 16-17. See www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Start-ups_killer_acquisitions_and_merger_control.pdf?__blob=publicationFile&v=3.

13 *Annual Report on Competition Policy Developments in Austria – 2021* (OECD, 7 March 2023), para 47–50. See [https://one.oecd.org/document/DAF/COMP/AR\(2022\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2022)2/en/pdf).

14 Mike Isaac, 'FTC Clears Facebook's WhatsApp Acquisition in the U.S.' (*Vox*, 10 April 2014). See www.vox.com/2014/4/10/11625486/ftc-clears-facebooks-whatsapp-acquisition-in-the-us.

15 'Commission approves acquisition of WhatsApp by Facebook' (European Commission, 3 October 2014). See https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.

16 'Competition (Amendment) Bill 2023: Big Tech firms' "killer" acquisitions on radar' (*Moneycontrol*, 14 April 2023). See www.moneycontrol.com/news/trends/legal/competition-amendment-bill-2023-big-tech-firms-killer-acquisitions-on-radar-10412281.html.

17 Crémer, Jacques, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era*, (European Commission, 2019), 117. See <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

the possible increase in regulatory burden due to the introduction of a deal value threshold. The previous chairperson of the CCI commented that the criterion of ‘substantial business operation’ would assist in ensuring that transacting parties are not overburdened with unnecessary notifications, and that only those transactions with significant economic links to India are caught by the threshold.¹⁸ To outweigh the regulatory burden, it is important for there to be clear guidelines for triggering notifications under the deal value threshold to ensure regulatory certainty among transacting parties. The regulator published draft regulations for consultation in which it laid down the SBO criteria as any entity having more than ten per cent of (1) number of users/consumers/visitors; (2) gross merchandise value; or (3) turnover in India.¹⁹ These criteria are set at a low level and are likely to increase the volume of transactions notified to the CCI. Following stakeholder consultations, it is possible for the SBO criteria to bring in additional clarity that ensures deal value threshold-based notifications do not overburden the CCI with technical notifications, catching only those transactions that may potentially have anti-competitive effects.

Hub-and-spoke cartels

The 2023 Amendments have expanded the definition of cartels to specifically include non-competing entities provided they participate or intend to participate in the cartel. Digital platforms that provide services to competing enterprises are one class of businesses that may directly be impacted by this change. Digital platforms may now be considered as part of a cartel if they facilitate sharing of information between its service recipients.

Competition authorities may find it difficult to determine whether certain vertical agreements (eg exclusivity agreements or limits on retailer pricing) should be considered a hub-and-spoke cartel, or vertical restraints.²⁰ In essence, digital platforms can be presumed to be indulging in market allocation and price fixing on account of requiring exclusivity or resale price maintenance, respectively. While allegations of vertical restraint are assessed on a ‘rule of reason’ basis that involves the CCI balancing pro-competitive effects, the CCI adopts a *per se* approach for cartels. This is likely to create an additional compliance burden for online digital platforms.

18 *CCI Fairplay*, Volume 42, July-September 2022, 8. Available at www.cci.gov.in/advocacy/publications/fair-play/details/48/0, accessed 16 October 2023.

19 Draft Combination Regulations (CCI). See www.cci.gov.in/images/stakeholderstopticsconsultations/en/draft-combinations-regulations1693891636.pdf, accessed 16 October 2023.

20 *Background Note: Latin American and Caribbean Competition Forum – Session III: Practical Approaches to Assessing Digital Platform Markets for Competition Law Enforcement* (OECD, 5 August 2019), 24. See [https://one.oecd.org/document/DAF/COMP/LACF\(2019\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2019)4/en/pdf).

It's therefore worth considering adopting this approach only when there is an element of collusion – and to a technical 'meeting of the criteria'.²¹ Given significant fines, it would help increase certainty for businesses were the CCI to release detailed guidelines and best practices for platform markets to avoid regulatory uncertainty and educate platform companies about the possibility of finding cartel violations against them. Equally, digital platforms should be mindful of their market behaviour and conduct when dealing with multiple competing enterprises.

Penalty on global turnover

The 2023 Amendments empower the CCI to impose penalties based on global turnover derived from *all* products and services by a person or an enterprise, regardless of the scope of the infringing product/service. This is a departure from the existing computation of penalty based on 'relevant' Indian turnover of the enterprise. In 2017, the Supreme Court of India clarified that for a multi-product company, only the revenues generated from the allegedly infringing product or service should be considered when determining the quantum of penalty by the CCI, and the penalty cannot be imposed on the opposite party's *entire* turnover.²² However, in recent cases involving digital markets, the CCI imposed penalties on the company's total (*albeit* Indian) turnover,²³ holding that 'restricting revenue to just one segment would not appropriately capture the interdependent and integrated nature of the ecosystem wherein one product/ service reinforces multiple other products/ services'.²⁴

With the 2023 Amendments, the CCI can impose a penalty on the company's entire global turnover even if the infringement relates to only a small section of the company's business in India. These expanded powers of the CCI may create a situation where global companies are penalised disproportionately highly compared to their domestic counterparts. For instance, if X and Y both compete in the same market and have been found to have similarly violated the provisions of the Act, the CCI may charge X a higher penalty because it is a global conglomerate, while charging Y a substantially lower penalty because it is a standalone company

21 *Ibid.*

22 *Excel Crop Care Ltd v CCI & Ors (Excel Crop)*, 2017 8 SCC 47.

23 *Federation of Hotel & Restaurant Associations of India (FHRAI) and another v MakeMyTrip India Pvt Ltd (MMT) and others with Rubtub Solutions Pvt Ltd v MakeMyTrip India Pvt Ltd (MMT) and others (MMT)*, Case No 14 of 2019 and 1 of 2020, available at www.cci.gov.in/antitrust/orders/details/1069/0; *MMT, Smartphones (n.6); XYZ (Confidential) v Alphabet Inc and Others*, (14 of 2021) *Match Group, Inc v Alphabet Inc and Others*, (35 of 2021) *Alliance of Digital India Foundation v Alphabet Inc and Others*, Case No 07 of 2020 with 14 of 2021 with 35 of 2021, available at www.cci.gov.in/antitrust/orders/details/1072/0.

24 *MMT (Ibid)*, para 319.

with operations only in India. Ironically, this may create an imbalance between competitors operating in the same market.

While the change has been brought in to create increased deterrence for deep-pocketed global enterprises to refrain from indulging in anti-competitive conduct, the possibility of disproportionate penalties may require additional risk assessment by global companies before setting up shop in India.²⁵ To provide regulatory certainty and consistency, the CCI may consider clarifying in its yet-to-be-released ‘penalty guidelines’ that penalties based on global turnover would be invoked only in exceptional cases of serious infringements. Further, the CCI may also clarify that it will continue to abide by the principle of proportionality while imposing a penalty, as laid down by the Supreme Court.²⁶

Expedited merger review timelines

The overall period for the CCI to arrive at a decision on a transaction has been reduced from 210 days to 150 calendar days. If the CCI does not issue an order within these timelines, the combination will be ‘deemed’ approved. The existing suspensory merger control regime also made it difficult to complete stock market purchases without incurring gun-jumping fines. Recognising transactional impracticality, the 2023 Amendment allows derogation from standstill obligations for (1) an open offer, or (2) an acquisition of shares or securities, through a series of transactions on a regulated stock exchange.

The expedited timelines are a welcome change, but the shorter timelines may be burdensome for the CCI officials. One way of striking a balance between truncated timelines and giving officers at the regulator sufficient review time would be by making effective use of the pre-filing consultations. Parties may seek to engage with the CCI in substantive pre-filing consultations and use that process to address likely concerns of the CCI that would come up during review, thus expediting the formal review process and limiting the number of follow up requests for information.

25 S N Thyagarajan, ‘Penalty on global turnover for anti-trust violations may not be a deterrent to MNCs, say lawyers’ (*Moneycontrol*, 28 April 2023). See www.moneycontrol.com/news/business/penalty-on-global-turnover-for-anti-trust-violations-may-not-be-a-deterrent-to-mncs-say-lawyers-10497401.html.

26 *Excel Crop*, (n 22).

Conclusion

The Indian government is keen to secure India as a key jurisdiction in the World Bank's 'ease of doing business' index.²⁷ Improving ease of doing business while maintaining healthy competition in the market also seems to be the mantra behind the 2023 Amendments.

Implementation is the key: the actual impact of the 2023 Amendments will ultimately depend on the enforcement priorities the CCI carves out for itself. Regulatory uncertainty and excessive regulatory oversight are impediments for the growth of an economy. While it is true that healthy competition in the market results in faster economic growth (by increasing the productive and allocative efficiency of firms),²⁸ firms are less likely to invest in jurisdictions with a higher regulatory burden and longer compliance timelines. The 2023 Amendments provide the CCI with the necessary tools to promote business in India and reduce the regulatory burden, while maintaining healthy competition in the market. It remains to be seen how the CCI will strike a balance between effective regulation and economic growth.

27 'Ease of doing business will ultimately lead to ease of living: PM Modi' (*The Times of India*, 19 November 2018), see <https://timesofindia.indiatimes.com/business/india-business/ease-of-doing-business-will-ultimately-lead-to-ease-of-living-pm-modi/articleshow/66695623.cms>.

28 *Factsheet on How Competition Policy Affects Macro-Economic Outcomes*, (OECD, 2014), 2–3. See <https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf>.