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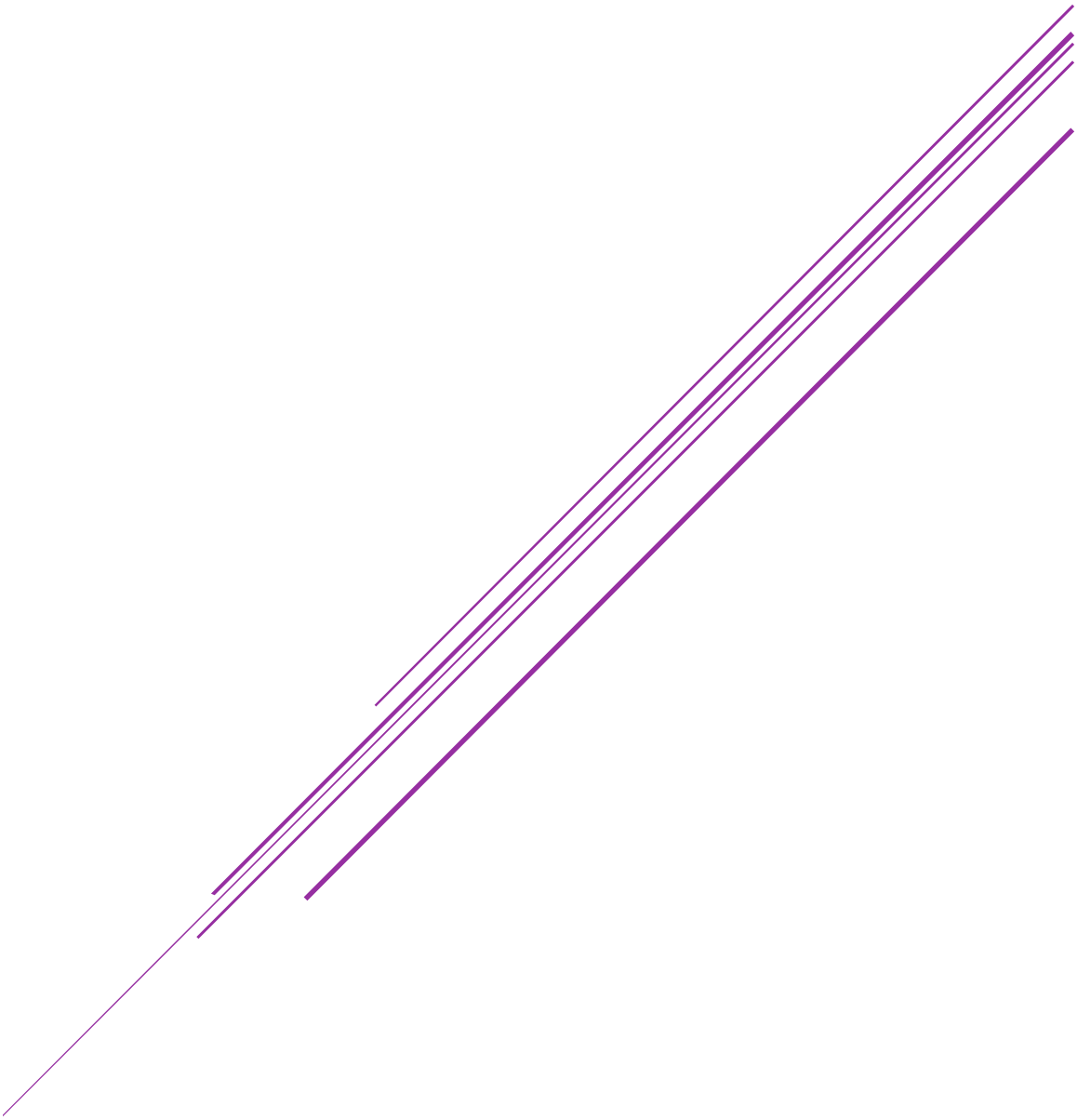
DRAFT COMPETITION AMENDMENT BILL, 2020- KEY INSIGHTS



Pursuant to Competition Law Review Committee Report submitted to the Ministry of Corporate Affairs in July 2019, the Competition (Amendment) Bill, 2020 **("Bill")** has been introduced to propose certain amendments in the Competition Act, 2002 ("**Act**").

The Bill has proposed some key changes in the Act including organizational structure, investigation procedure and combination laws. This Note highlights the changes proposed in the Bill with respect to substantive provisions of the Act.

Inclusion of hub and spoke arrangement:

a. A proviso to Section 3(3) has been inserted which seeks to increase the scope of agreement by including *enterprises which though not engage in identical or similar trade, but act in furtherance of any such anti-competitive agreement*. This proposed amendment would cover enterprises facilitating the operation of cartel too.

b. By way of this proposed amendment, the jurisdiction of the CCI would extend to hub and spoke arrangement. Although, it may be argued that a participant who was not in the same or identical trade (horizontal arrangement) but act in furtherance of the said arrangement by virtue of a hub and spoke arrangement may still be caught under Section 3(1) of the Act (the omnibus clause).

c. As such, the Bill lends clarity on the inclusion of hub and spoke issues and thereby exposing them to fines which are imposed on cartel participants (10% or turnover of each year of the continuance of the cartel or three times the profit) as opposed to non- cartel offenses (10% of the average turnover of the last three years).

d. Earlier, if the hub and spoke arrangement were covered under Section 3(1), the penalty would have been limited to cases of non-cartel offences, however, with this amendment, the penalty for cartel offenses would be squarely applicable to hub and spoke arrangement.

e. One of the common methods in which cartels arrangements practically operated was when each of the cartel participants-imposed resale price maintenance covenants on its downstream players, thus keeping a check on the final price to consumers. This is the one of the primary reasons why vertical agreements having resale price maintenance covenants were

frowned upon. Now, by virtue of the Bill, such arrangements which are adopted in furtherance of a cartel by the upstream players may also be caught in the proviso of the Bill.

f. Thus, the companies and their channel partners must adopt competition law compliance manual and scrupulously follow the same to avoid the liability under the Act.

g. The takeaway of this proposed amendment would be that companies would have to ensure that not only their employees and personnel but even the channel partners are well trained on the competition law principles. This assumes significance considering that the Bill provides for settlement and commitment option which is not available for cartel offenses.

Inclusion of buyer cartels:

Cartel of buyers is sought to be included by the Bill under the revised definition of "cartel". Presently, buyer cartels are not covered in the definition of cartels, thus is presently absent from rigors of the substantive provision of Section 3(3). This proposed amendment seeks to rectify the lacunae and bring into account, buyer cartels too.

Leniency plus regime:

a. The Bill provides that the CCI will now allow withdrawal of lesser penalty application. However, the same would not preclude the DG to use the evidences submitted by such entity in the lesser penalty application.

b. Further, the Bill proposes to adopt a leniency plus regime. During investigation, the enterprise will have an option to file a leniency application in reference of any other cartel which enables the CCI to form a prima facie opinion for investigation under Section 26(1) of the Act. For such disclosure, the CCI can grant additional leniency in respect of cartel already under investigation.

c. Practically, the enterprise always had to deal with a marker system and if their marker is not suitable to them, they may not get immunity since such enterprise would not add value to the investigation since all the facts and evidence would already be in the possession of the DG which would have been given by previous marker enterprises of DG would

unearthed through investigation. Thus, the enterprises would be faced with a unique situation wherein such enterprises although have admitted to being in a cartel, would not get immunity due to the concept of "added value".

d. However, by virtue of this regime, the enterprises can not only obtain immunity for the investigation for the present cartel but also a separate cartel if they give information on the second / subsequent cartel as well.

Revision of the definition of resale price maintenance

a. RPM has been frowned upon internationally as competition law violation. It was in fact a hard-core restriction in some countries till a few years back. In India. RPM has always been put in the rule of reason test, as opposed to a per se violation from the very beginning.

b. As such, the Bill seeks to clarify the definition of RPM by stating that both direct and / or indirect restriction would be covered under the definition of RPM. It would be interesting to see the interpretation of an indirect restriction.

Revision in the AAEC analysis

a. The factors under Section 19 for inquiry into agreements are proposed to be amended by the Bill. Some key changes include, AAEC would also be assessed also qua *'harm'* caused to consumers along with consumer benefit. It was always deliberated in enforcement proceedings that violations, if any, has to be assessed from the perspective of harm caused to consumers, competitors and general market as such.

b. Leading commentators have noted that since the market analysis should not be done in vacuum and harm analysis is a sine qua non in every competition law investigation. While, in EU too, theory of harm is not a prerequisite, it is always adopted as a best practice.

c. Similarly, the scope of foreclosure of market has been increased by omitting *'by hindering entry into the market'* which necessarily implies that AAEC would only be looked at from market entry perspective, but market access perspective too. This stance is similar to Section 4(2)(c) of the Act [denial of market access in any manner] where the word used is "access" as opposed to being limited "entry analysis". Thus, if an

agreement ensures that the other players in the market (both in upstream and downstream market) do not have access to key inputs etc. by virtue of the said agreement, the Bill will cover that analysis too under Section 19 of the Act.

d. Further, supply side substitutability has been added as factor to determine relevant market. On similar lines, the factors to determine 'relevant geographic market' and 'relevant product market' are expanded to include supply side substitutability factors and including "any other factor as may be specified by regulations". The Governing Body may therefore include additional factors by bringing regulation in this respect.

e. Further, switching costs (costs associated with switching supply/demand to other areas) has been included as a factor for determining both relevant product market and geographic market.

IPR exemption for abuse of dominance investigation

a. The IPR exemption which was provided under Section 3 of the Act (provision relating to anti-competitive agreement) is now proposed to be extended to Section 4 (abuse of dominance) too.

b. The CCI and Courts have taken a view till now that the IPR exemption is not applicable to abuse of dominance cases since Section 4 did not have the defense on the lines mentioned under Section 3(5) of the Act. The proposed amendment seeks to address the issue.

c. As such, it would be interesting to note the practical application of this IPR defense in abuse of dominance case since the IPR defense under Section 3(5) for anti-competitive agreements has rarely been accepted by the CCI and Courts in India. The probable rationale for the same is that the wordings of the exception point to imposing reasonable conditions for protecting the IPR rights, as opposed to exploitation of the IPR rights.

Ambit of meeting competition defense: enlarged

a. Presently, the meeting competition law defense is only applicable for discriminatory prices / condition cases as opposed to unfair pricing case. This is in line with EU judgements wherein it has been held that meeting competition law defense is not applicable in predatory pricing cases, which by its inherent logic, the same stance should be applicable for excessive pricing cases. This aspect that

meeting competition defense is not applicable for unfair pricing cases was also debated in Rajya Sabha prior to adoption of the said provision in the Act.

b. *Per contra,* this Bill seeks to remove the reference to the word "discriminatory" which would, in effect, imply that meeting competition is applicable to unfair pricing cases too. Thus, a new player who may wish to sell its goods / services at a promotional rate may be faced with a situation that the dominant player may lower its rates to match the new player, and thus, impeding an effective entry into the market of the said new player.

Settlement and Commitment

a. The newly proposed Section 48A of the draft bill would allow settlement in respect of any investigation initiated under Section 26(1) of the Act. The application for settlement may be filed before any order under Section 27 or 28 after which the Commission may allow the settlement after assessing the nature of contravention and its impact.

b. Further, under the proposed Section 48B, the party after an order under Section 26(1) of the Act but before the DG report, may offer for commitments, which the CCI may assess and allow after considering the gravity and impact of contravention. The Commission can also specify the manner in which such commitments may be implemented.

c. It must be kept in mind that the option of settlement and commitment would only be available to parties for a violation of Section 3(4) [anti competitive vertical agreements] and Section 4 [abuse of dominance] cases and not cartel offenses.

Sectoral assets / turnover for merger analysis

a. Under the proviso to Section 5(c) of the Act, the Central government in consultation with CCI can propose certain revisions on asset, turnover or any other conditions for certain industries in public interest, upon fulfillment of which, any acquisition, merger or amalgamation would be *deemed* to be combination under Section 5 of the Act. This, in turn, would precipitate the requirement of filing a notification under Section 6 of the Act before the CCI for approval.

b. This amendment has been in discussions for quite some time since it was widely debated that some transactions, especially

in digital or pharmaceutical markets, may not meet the asset / turnover thresholds provided under the Act (as amended from time to time) and hence do not need to be scrutinized by the CCI under the merger control provisions under Section 5 and 6 of the Act read with the Combination Regulations. However, such transactions have a chance to leave a lasting negative effect on the market which can only be rectified under an ex post facto analysis under Section 3 of Section 4 of the Act.

c. Considering the same, it was felt that for some sectors, revised thresholds must be set so as to ensure that the said transaction may be reviewed under an *ex ante* analysis and ensure that proper behavioral and / or structural commitments are put in place, if required, so as to ensure that the market conditions do not get distorted in the first place.

d. Thus, the Bill seeks to address the issue. However, practically, it would be interesting as to criterion that shall be adopted by the CCI / Central Government to specify a sectoral asset / turnover threshold, especially in regulated industries.

Definition of control

a. The definition of "control" for Section 5 has been amended to include a materiality influence test, as opposed to any influence as it exists presently. The Bill may be required to amended to include only decisive influence rather than adopting a material influence threshold.

b. Also, this definition of control would have an effect on the definition of group, which in turn would have an effect on abuse of dominance analysis since it extends to enterprise and its group and the definition of group under Section 4 is same as that of Section 5&6 (merger control provisions).

Open offer window

a. An open offer window has been created whereby the parties can consummate an open offer on completion of certain prescribed conditions mentioned therein viz: (1) the CCI is notified of the acquisition within such time and in such manner as maybe specified; (2) the shares or convertible securities, as may be applicable, are maintained in such manner as may be specified; and (3) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting

rights and receipt of dividends or any other distributions, till the Commission approves such acquisition.".

b. If these conditions are fulfilled, the penalty of gun jumping would not be leviable on the parties.

Application of principle of res judicata

a. The draft bill proposes a clause which states that CCI would not inquire into agreements referred to in section 3 or into conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in a previous information which has already been decided by the CCI in previous orders.

b. This provision seeks to ensure that similar information(s) are not filed which requires CCI to intervene, however it fails to ignore that market dynamics and state of competition keep on changing and evolving.

c. For example, in 2014, the CCI took the view that online and offline market are not two different market but form a part of the same relevant market and that online and offline are two different modes of distribution. Conversely, in 2019-2020, the CCI has taken a *prima facie* view that online market is different market in itself. Thus, the CCI, based on the market dynamics and evidence on record, has adopted a different approach than earlier. This flexibility should be there since competition proceedings are proceedings in *rem* and there is no *lis* which is decided between the parties, hence the principle of res judicata or a version thereof, which seems to have been incorporated by way of the draft amendment may need a relook. Several commentators and jurist have also noted that markets continue to evolve and hence, the analysis also change, and the competition law authorities should not be circumscribed by their previous orders since the market conditions keep on changing.

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