



Luthra and Luthra
LAW OFFICES INDIA

COMPETITION LAW NEWSLETTER

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**SPECIAL EDITION COVERING THE SALIENT
FEATURES OF THE COMPETITION
(AMENDMENT) ACT, 2023**



In this Special Edition of the Luthra and Luthra Law Offices India – ‘Competition Law Newsletter’, we discuss the salient features of the Competition (Amendment) Act, 2023 (**Amendment Act**) which has received the assent of the President on 11th April 2023. The Amendment Act clarifies that the effective date of these changes will be notified subsequently and that different provisions may come into force at different dates.

ANTITRUST ENFORCEMENT

Introduction of Settlements and Commitments

The Amendment Act introduces a settlement and commitment framework by inserting Section 48A and 48B to the Competition Act, 2002 (**Principal Act**) which will allow parties to put an end to the proceedings before the Competition Commission of India (**CCI**).

Settlements can be offered by a party against whom proceedings have been initiated after the Director General’s investigation report (**DG Report**) is received by the CCI but before a final decision is passed. Commitments can be offered at any time after an investigation has been initiated but before the DG report is placed before the CCI for its consideration. Settlements and commitments can be offered in both, anti-competitive vertical agreement, and in abuse of dominance cases.

Notably, despite the explicit recommendation of the Joint Parliamentary Committee on Finance in its 52nd Report, the Act does not extend the benefit of the settlement and commitment framework to “cartel cases”.

Further, post the parties submitting settlements/ commitments, all parties, including the Director General (**DG**) will be heard on the proposal to reach a consensus so that the CCI may issue a final order. This final order will not be appealable before the NCLAT. However, effected parties can make an application for compensation on the basis of settlement orders before the NCLAT.

While the substantive provisions have been included in the Amendment Act, the exact working of these mechanisms will depend on the associated regulations that are expected to follow.

The Amendment Act does not touch upon certain fundamental issues, such as (i) applicability to ongoing cases and investigations (ii) whether admission of guilt will be required (iii) the exact procedure to be adopted to arrive at the settlement amount / commitments to be made (iv) grounds on which the CCI can revoke a settlement/ commitment order and consequences of such revocation. We expect that these will be addressed through detailed rules/ regulations.

Penalty on Global Turnover

The Amendment Act empowers the CCI



under Section 27(b) to impose a penalty which may be up to 10% of 'global' turnover derived from all products and services of the parties as against 'relevant' turnover. This seems to be against the spirit of the May 2017 judgment of the Supreme Court of India, which settled the interpretation of the term 'turnover' confining it to "relevant turnover" as opposed to "total turnover".

The consequence of such an amendment is expected to encourage alternate dispute resolution methods such as commitments/ settlements/ leniency.

Introduction of Hub and Spoke cartels

The Amendment Act introduces a significant change with respect to cartels by bringing within its scope entities which are not engaged in identical or similar trade, including associations.

The Amendment Act permits the CCI to proceed against any entity which participates or intends to participate in facilitating a cartel.

Introduction of Leniency Plus Scheme and withdrawal of leniency

In a bid to encourage companies under investigation for one cartel, the Amendment Act provides that such companies may report other cartels that are not known to the CCI in exchange for lesser penalty being imposed in the new cartel which has been disclosed and

additional reduction in the existing proceedings.

Additionally, the Amendment Act provides that the parties will be at liberty to withdraw their leniency application, but the CCI and/ or DG has the power to make use of the information disclosed by the parties until the outcome of the proceedings.

Introduction of limitation period

The Amendment Act imposes a limitation period of 3 years on parties to file an information before the CCI from the date of contravention in case of violation of the Section 3 or 4 of the Act. It is to be noted that in case there is a delay in filing, the CCI can condone the same if it is satisfied with the justifications provided by the informant.

Pre deposit of penalty amount before NCLAT appeal

The Amendment Act mandates the parties to deposit 25% of the penalty amount imposed by the CCI as a condition to file an appeal before the NCLAT.

Appointment of Director General and its powers

Currently, the power to appoint the DG vests with the Central Government. The Amendment Act empowers the CCI to appoint the DG subject to the approval of the Central Government. The



Amendment Act also expands the DG's investigation powers, including the power to summon agents (including bankers, auditors, and legal advisors) of the concerned enterprise and examine them under oath but limits this power by narrowing it down to the examination of in-house legal advisors only. So, in house legal advisors can also be summoned and their evidence be recorded.

Other changes

- The Amendment Act provides that the CCI shall have the discretion to reject any information, if the same is based on similar facts which have been dealt with by the CCI previously.
- The Amendment Act allows parties to call experts from the field of economics, commerce and trade or other similar background to provide their suggestions/ opinion to the CCI.
- The Amendment Act requires the CCI to publish guidelines regarding penalty to be imposed for contravention of any of the provisions of the Act. Further, the Amendment Act also requires the CCI to invite public comments before publishing any regulations.

MERGER CONTROL

Introduction of 'deal value' threshold

The Act introduces an additional 'deal

value' threshold whereby, any transaction breaching the deal value threshold of INR 2000 crores (approx. USD 240 million) would also require notification to the CCI, subject to the target entity having "*substantial business operations in India*". It remains to be seen how the rules/ regulations are framed clarifying the scope of substantial business operations.

The introduction of deal value thresholds finds its roots in various transactions having escaped the scrutiny of the CCI due to assets/ turnover below the threshold in India. We understand that similar thresholds have already been in place in various other jurisdictions such as USA, Germany, and Austria.

Dilution of standstill obligation in open market purchases

Under the framework of the Principal Act, any transaction undertaken on the stock market which breached the monetary thresholds was required to be notified to the CCI before consummation. In many cases, such a framework has led to a dilemma because such transactions are undertaken promptly by the acquirer without any disclosure to the public, given the price sensitivity involved. When such transactions are subjected to standstill obligations because of the framework under the Principal Act, they may render the same unviable. Thus, the standstill obligation under the Principal Act was almost always breached.



The Amendment Act dilutes the standstill obligation in acquisitions involving (a) an open offer; or (b) an acquisition of shares or securities on a stock exchange. Furthermore, the dilution is subject to (i) the parties notifying the CCI subsequently; (ii) the acquirer not exercising ownership or beneficial rights or voting rights or receiving dividends till the CCI approves such a transaction.

Shortening the merger approval timelines

The Amendment Act shortens the timeline for approving the transaction by the CCI from 210 days to 150 days from the date of receiving the notice from the parties in terms of Section 6(2) of the Principal Act. The Amendment Act further reduces the timeline of CCI to form its *prima facie* view from 30 working days to 30 calendar days. It may also be noted that in case the CCI does not issue an order within these timelines, a transaction is deemed to be approved.

Introduction of material influence under the definition of control

The Amendment Act formalizes the lowest threshold of control i.e., exercising *material influence*, in any manner over the management or affairs or strategic commercial/ financial decisions of an enterprise. Material influence - the lowest level of control - implies the presence of factors that give an enterprise/person the ability to influence the affairs and management of

the other enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, structural/ financial arrangements, etc.,

Extending the scope of penalty for violation under Section 44 and 45 of the Act

The Amendment Act seeks to enhance the penalty to be imposed on the parties for violating the provisions of Section 44 and 45 of the Principal Act for furnishing false and fabricated information or omitting any material information which is required to be furnished from INR 1 crore (approx. USD 120 thousand) to INR 5 crore (approx. USD 602 thousand).

This newsletter is only for general informational purposes, and nothing in this edition of newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact Mr. Rajiv K. Luthra/ Mr. G.R. Bhatia/ Mr. Arjun Nihal Singh, at the below mentioned coordinates. © Luthra & Luthra Law Offices India 2023. All rights reserved.

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