

## M&A IMPACT DUE TO CHANGES IN INDIA'S COMPETITION LAW

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The Indian parliament approved the Competition Amendment Act, 2023, (the “**Amendment Act**”) on April 11, 2023. The Amendment Act has also been published in the Official Gazette, although it is yet to come in force.

The main thrust of the Amendment Act is to counter the dominance of Big Tech, and it brings about weighty changes to the Competition Act, 2002 (the “**Act**”).

### Enhanced review of global transactions

The Amendment Act has amended Section 5 of the Act (which deals with combinations) by introducing the concept of deal value threshold (in addition to the asset and turnover (topline) based criteria) and, thus, expanded the review scope of the Competition Commission of India (the “**CCI**”). The Amendment Act now provides that any transaction related to the acquisition of control, shares, voting rights or assets of an enterprise, or merger or amalgamation having a value **exceeding INR 20 billion (approx. US\$ 245 million)** will require CCI approval if the enterprise being acquired, taken control of, merged or amalgamated has “substantial business operations” in India. It has been left to the CCI to define “substantial business operations.” This change will bring within the CCI’s ambit global deals of a value more than INR 20 billion if the target has “substantial business operations” in India. It is similar to the one made to Indian tax law in 2012 to bring to tax indirect transfers of shares of an Indian company by two foreign companies if the target had substantial assets in India.

The introduction of the deal value threshold for combinations is likely to bring under the CCI’s ambit ‘killer acquisitions’ that are especially prevalent in digital markets, like the acquisition of WhatsApp by Facebook. In the case of WhatsApp, the acquisition was made at around US\$ 19 billion in the US, and as the Indian leg of the deal was below the asset and turnover thresholds under the Act at the time, the acquisition was not vetted by the CCI although it had a considerable impact on the digital market.

In the technology world, foreign companies often have development centers or other revenue generating business operations in India, which are the backbone of the foreign parent. Although the on-paper value of these operations is low, they can be regarded as constituting “substantial business operations” in India. Global acquisitions of such businesses will now have to be vetted under the Act (as amended by the Amendment Act).

Further, this change will also impact industrial M&As involving the merger of large foreign conglomerates having factories or manufacturing facilities in India. Such mergers may also come under the ambit of the Act (as amended by the Amendment Act).

Furthermore, regulating combinations under the new deal value threshold may be detrimental to startups and may hinder investors from funding startups. This is because, generally, the trend is for early-stage investors to look for a quick exit to Big Tech or other

players and get a high return on investment, but with this provision, investors might have to go through the entire CCI approval process. Nevertheless, the “green channel” approval mechanism may provide relief in cases where the parties to the combination are not in the same business segment.

## Definition of “Control” limited

The Amendment Act has narrowed the definition of “control” in the explanation to Section 5 of the Act (which specifies the different criteria for a combination). While “control” previously meant the control over the management, affairs or strategic commercial decisions of another enterprise or group exerted by an enterprise(s) or group(s), the definition has been amended and **“control” is now defined as the ability to exercise “material influence,”** in any manner whatsoever, by an enterprise(s) or group(s) over the management, affairs or strategic commercial decisions of another enterprise or group.

While the term “material influence” has not been statutorily defined, the CCI’s view on the term can be gathered from its previous orders. In its order in the *UltraTech Cement Limited* case, the CCI held that “material influence” is the lowest level of control, and implies the presence of factors which give an enterprise an ability to influence affairs and management of another enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc. Further, in the case of *Meru Travel Solutions Private Limited v. ANI Technologies Private Limited and Ors.* (Case nos. 25-28 of 2017), the CCI observed that common shareholders, such as Softbank, despite being minority shareholders are “active investors” and, therefore, have the ability to materially influence Ola and Uber.

## Reduction of review time

The Amendment Act has shortened the review timeline for a proposed combination from the current 210 days to 150 days. The Amendment Act also states that the CCI is required to form its preliminary view on a transaction within 30 “calendar days,” as opposed to the current timeline of 30 “working days.” The proposed amendment is expected to significantly reduce the waiting period for the approval of combinations. Further, the Amendment Act exempts combinations from the foregoing waiting period altogether if the combinations either involves an open offer or an acquisition of shares or securities through a series of transactions on a regulated stock exchange. By exempting from the waiting period for the CCI’s approval the foregoing combinations, the Amendment Act enables time sensitive on-market stock purchases to be complete, and the acquirer, in these cases, will be allowed to acquire shares but cannot exercise any ownership or voting rights or receive dividends until the CCI approves the acquisition.

## Definition of “relevant product market” expanded

The Amendment Act has expanded the definition of “relevant product market” to include all those products or services whose production or supply is regarded as interchangeable or

substitutable by suppliers on account of the ease of switching production between products or services in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. The existing definition of “relevant product market” only includes products or services that are regarded as interchangeable or substitutable by the consumers (which is also included in the new definition). The inclusion of the supplier’s perspective will help to address the issues that may arise from changing market conditions and technological advancements.

## **Settlements permitted**

One of the most significant changes brought to the Act is the introduction of provisions allowing parties to offer settlements and voluntarily undertake certain commitments. The Amendment Act empowers the CCI to close inquiry proceedings before the final decision is issued after duly considering the nature, gravity and impact of the contraventions, if the enterprise: (i) offers to settle, by making a monetary payment; or (ii) makes a commitment, which may be structural or behavioral in nature.

## **Penalties on global turnover**

So far, the penalties for anti-competitive activities were decided as a percentage of the erring entities’ “relevant” turnover, but with the Amendment Act, the penalties will be computed on the basis of the “**global turnover**,” which will result in higher penalties for global multi-product companies. There has long existed a debate on the definition of “turnover,” which India’s Supreme Court has interpreted to mean “relevant turnover” for the determination of penalties. However, with the clarification that “turnover” means “global turnover,” there will no longer be interpretational issues while computing penalties for anti-competitive activities.

The consideration of global turnover for penalties may lead to unfair and punitive outcomes as a multinational entity might have a lower stake in the Indian market than in other foreign markets. This can also lead to discrimination between enterprises who commit a similar contravention but are penalized differently depending on the size of their business.

## **Penalty for false statements or omissions pertaining to a combination**

The Amendment Act has increased the maximum penalty levied on a party to a combination for making false statements or omitting to submit material information from INR 10 million (approx. US\$122,270) to INR 50 million (approx. US\$611,355).

## **DG’s powers extended**

The Amendment Act expands the investigation powers of the Director General (the “**DG**”). The DG is now allowed to seek and retain information and documents from legal advisors for up to 360 days. Apart from summoning and examining a company's officers, employees, etc., the Amendment Act also allows the DG to examine “agents,” which include auditors, bankers, legal advisors, etc., on oath, in relation to the affairs of any party under investigation. The

summoning of documents by the DG from legal professionals may infringe the lawyer-client privilege under Section 126 of the Evidence Act.

## **High deposit needed to appeal**

To file an appeal against a CCI order, the appellant will now mandatorily have to deposit 25% of the amount stipulated in the order. Without such a deposit, the appeal will not be considered before the National Company Law Appellate Tribunal. This will serve to discourage frivolous appeals and will improve the efficiency of the appellate process by encouraging appeals in genuine cases. However, this can also have a negative effect on a large business pursuing an acquisition as its working capital or acquisition capital can get blocked. Moreover, it will also deter genuine parties who may not be in the position to make the deposit. Instead, the extent of the deposit should have been kept fluid, to be decided by the CCI on a case-by-case basis.

## **Expansion of cartel activities and related changes**

A new addition is the expansion of the scope of cartels to include “hub and spoke” arrangements. The Amendment Act gives power to the CCI to investigate any person/ entity that participates or intends to facilitate a horizontal agreement or cartel, even if such person/entity does not engage in an identical or similar trade, but essentially acts as an intermediary.

The Amendment Act has empowered the CCI to grant an additional lesser penalty to a cartel which facilitates the disclosure of vital information about another undisclosed cartel.

The Amendment Act has introduced a limitation period of 3 years to file a complaint with the CCI. However, the CCI is empowered to condone delays if it is satisfied by the reason for the delay. Further, the Amendment Act also allows the CCI to reject any complaint, if it is based on similar facts and issues addressed in a previous order issued by the CCI.