

**AN ANALYSIS OF THE COMPETITION (AMENDMENT) BILL, 2020 - IN THE  
LIGHT OF COVID-19 PANDEMIC AND AN INSIGHT TO SIGNIFICANT CASE  
LAWS OF 2020-2021**

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**ABSTRACT**

In this article, the author will throw light on the development of the competition law and discuss the important case laws of 2020 and 2021 all of which were decided amidst the coronavirus pandemic. This article further places emphasis on the Competition (Amendment) Bill, 2020 and contains an analysis of the various changes introduced in the bill. The article hence seeks to cover the most dynamic events in these 3 years, 2019, 2020, and 2021 related to competition law in India. The author will further shed light on how the approach of the competition commission of India has changed over the years while the basic aim of protecting the consumer's interest and promoting healthy competition stayed intact.

Keywords: market competition, appreciable adverse effect, cartelisation, dominant position, green channel, pandemic

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## **AN ANALYSIS OF THE COMPETITION (AMENDMENT) BILL, 2020 - IN THE LIGHT OF COVID 19 PANDEMIC AND AN INSIGHT TO SIGNIFICANT CASE LAWS OF 2020-2021**

### **INTRODUCTION**

With the introduction of the New Economic Policy on July 24, 1991, and India opening its economy to global markets, it became the need of the hour to formulate laws that would ensure fair play in the market. This marked the very emergence of the “Competition Act, 2002” India set foot into the world of market economies which took the help of legislative tools to foster market efficacy, captivate foreign investment, and boost up economic growth. The Act strives to avert practices with ‘appreciable adverse effect on competition’ and to promote healthy competition in markets where the consumers feel protected. Just like the Indian democracy, the competition act also seeks to promote public welfare.

### **THE COMPETITION (AMENDMENT) BILL, 2020**

The competition law underwent an extensive review process whilst the completion of a decade in 2019 to bring in momentous advances in its law regime. A decade-long implementation practice of the emerging competition regime in India brought certain inadequacies of the act to the foreground. The prevailing framework of the act fell short to address a few of the actual concerns and the review procedure was initiated to expand its scope and to implement the needed variations in its regulatory policies. Further, the composition of the Competition Commission of India (henceforth referred to as CCI) was also in question which was thoroughly evaluated in the review process. The Competition Law Review Committee (CLRC) was hence constituted by the Ministry of Corporate Affairs to enable the inception of a solid competition regime to propound substantive and procedural changes to the competition law of India. The CLRC after comprehensive research suggested numerous changes and add-ons be employed in the competition law regime which includes the following –

### **CHANGES IN THE BASIC STRUCTURE<sup>1</sup> –**

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<sup>1</sup> Eshvar Girish, competition (Amendment) Bill, 2020, Times Of India, (Sep.19, 2020, 02:24), [HTTPS://TIMESOFINDIA.INDIATIMES.COM/READERSBLOG/ESHVAR/COMPETITION-AMENDMENT-BILL-2020-26233/](https://timesofindia.indiatimes.com/readersblog/eshvar/competition-amendment-bill-2020-26233/)

The CLRC expressed that few structural changes need to be made by constituting a governing body that shall be accountable for carrying out quasi-legislative functions. This could be done by introducing a new Clause (1A) under Section 8 of the Competition Act. The body will comprise of a chairperson, six whole-time and six part-time members. The CLRC further promoted the idea of higher permissible delegation within the organisation by suggesting the insertion of Sub-Section 13A. Section 13A would encompass provisions that would vest power with both the CCI and the governing body to delegate their powers by an order in writing to the officers. Enthralled by the integrated agency model, the CLRC also proposed the merger of the office of the director-general (commonly referred to as DG) with the CCI to revamp administrative competence. Moreover, the CLRC fathoming the burden on the NCLAT to deal with appeals of all CCI cases which requires to be decided within a period of six months, proposed the constitution of a dedicated bench to address appeals from the CCI.

### **LEGISLATIVE ADVANCES**

The CLRC report further focused on legislative advances by seeking to introduced 'green channel' which would grant instinctive sanction of CCI for certain merger and acquisitions of companies and other combination cases where the appreciable adverse effect on competition is beyond the scope, hence eliminating the time-consuming course of approval by CCI.<sup>2</sup> As per the 2007 amendment of section 6(2) of the act, the parties need to undergo the mandatory notification process and the outcome of the process will be established only after a statutory period of 210 days. If the green channel gets implemented in the system, the statutory waiting period of 210 days could be waived off by the parties if they are fully eligible and they fulfil the requirement as listed in the green channel.

### **ENFORCEMENT FUNCTIONS**

The CLRC attempted to suggest the mechanism of settlement and commitment in cases of non-cartel-conducts with an aim to resolve cases swiftly, where the parties would be at liberty to choose appropriate remedies leading to a possibility of win-win. Admission of guilt by the parties is a prerequisite for settlement but not commitment. Section 3 of the competition law restricts its ambit to two types of anti-competitive agreements namely, horizontal and vertical which relates to agreements of enterprises engaged in identical or similar trade of goods, and

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<sup>2</sup> Rachit Garg, Analysis of the Draft Competition Bill,2020,Ipleaders (Jan.18,2021), <https://blog.ipleaders.in/analysis-draft-competition-amendment-bill-2020/>

agreements of enterprises of diverse levels of production or dissimilar markets of production respectively. The CLRC brought to the notice of the ministry a third type of anti-competitive agreement namely, hub and spoke cartel which deals with a situation where a third-party passes sensitive data to two or more competitors which leads to collusion affecting market competition. The CLRC aimed at widening the scope of section 2 of the competition act pertaining to cartels to include the term 'buyers' insinuating the likelihood of buyers cartel and such buyers need to be penalised like any other party to a cartel.

### **FUNCTIONS OF MERGER**

A Merger indicates an agreement that strives to combine two subsisting companies into one new company. Section 5 of the competition law pertains to control but fails to determine the degree and standard of control exhibited by combinations. The CLRC, after comprehending the link between control and material influence (given in section 31(3) of the act) recommended establishing a 'material influence' standard to ascertain what implies 'control' and additionally proposed that the 'Material influence' may be notified via regulation.<sup>3</sup> Moreover, The Committee figured out that some categories of combinations, like transactions that are part and parcel of digital markets, fail to meet traditional asset thresholds, but succeed in affecting market competition. Complying with the same the CLRC suggested that in addition to the subsisting thresholds, deal value thresholds need to be introduced as far as such combinations are concerned.

### **ANALYSIS OF THE BILL**

- The CLRC report proposed the idea of instituting a governing body to perform quasi-legislative functions and also briefly mentioned the composition of members. But the mode of nomination of these members has not been enumerated leaving certain glaring gaps in the bill.
- The report alongside recommending the idea of a governing body suggested the delegation of powers of the CCI and the governing body, the rationale of which was to reduce the burden on the shoulders of the CCI. This would enhance the finer performance of duties by the authorities, increasing efficiency. But it is to be noted that

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<sup>3</sup> Shivam Tripathi, Introduction of competition (amendment), 2020: A revamping Indian Market, SCC Online, (may.6,2020), <https://www.scconline.com/blog/post/2020/05/06/introduction-of-competition-amendment-bill-2020-a-step-towards-revamping-indian-market/>

only administrative and executive functions can be delegated and not quasi-judicial functions.

- The introduction of the green channel in the system comes with many added advantages like minimum regulatory policies, which further lessens the time and cost of transactions, providing a vehement route for the permission for combinations. Self-declaration complying with the Form1 notice is the primary step the parties require to undertake to avail the benefit of the green channel and if the CCI feels that the same has not been done appropriately, it can terminate the agreement instantly. Hence this mechanism acts as a guardian for the protection of the law.
- The system of settlement and commitment would encourage quicker disposal of cases, allowing CCI to focus on fresh matters. Yet, clarity is absent on certain facets such as can the settlement and commitment apply to subsisting cases, whether the settlement would be with prejudice and commitment would be without prejudice, etc. These queries should be addressed to bring clarity. Moreover, neither this mechanism contains any provision by the means of which parties can withdraw their proceedings nor does the CCI have the power to revoke the proceedings if needed.
- The CLRC recommended empowering the CCI to make sector-specific thresholds based on various norms which would act as a stepping stone towards capturing transactions in the digital market. But digital market is very dynamic in nature making it problematic to exercise this effectively. There might be various repercussions to this like increased compliance costs for businesses, increased technicalities, etc which would hamper the ease of running the business.

### **COMPETITION LAW AND 2020**

2020 would be an unforgettable year for the whole world as the havoc it created turned lives upside down. The whole world was endangered by the covid pandemic which made it completely dysfunctional. But without fixating on that the corporate world picked up every piece right from where they left it to overcome this convoluted conundrum. In February 2020, The MCA invited public comments for the 2019 amendment bill achieving a milestone in the competition law jurisprudence in the country.

Few landmark judgments were delivered amidst this pandemic which brought new dimensions of competition law. Some of them are as follows-

1. **Samir Agrawal v Competition Commission of India & Ors**<sup>4</sup> –

This is the cartelisation case of the renowned cab aggregators – Ola and Uber. The petitioner brought forward the allegation that the cab aggregators apparatus of the "hub" of the app platforms facilitated a cartel, followed by price-fixing amid the cab drivers (spokes) related to each platform. The NCLAT upheld the decision of the CCI which dismissed these baseless allegations against cab aggregators and their respective drivers. The NCLAT further clarified that the petitioner lacked the locus to file such a petition without any proof of legal injury caused due to its running. On appeal, the Honourable Supreme Court also appreciated the previous two judgments but established that the proceedings under the act are in rem, which affects public at large.

2. **Harshita Chawla v. WhatsApp and Facebook**<sup>5</sup> –

In this digital era where online payment is the way to effective completion of tasks, the petitioner in August 2020 alleged that WhatsApp abused its dominant position and wide-spread customer base to pre-install the payment app for WhatsApp called 'WhatsApp pay' and embedded it with the messenger app. WhatsApp was a part and parcel of the over the top (better known as OTT) messaging apps via smartphones in the country whereas WhatsApp pay is a promising part of the market for UPI enabled Digital Payments Apps in India. After investigation, the CCI concluded on August 2020 that there was no abuse of dominant position by WhatsApp since the customers had the sole liberty to decide in favor or against installing WhatsApp pay. With renowned and mighty competitors like Amazon pay, Phone pay, PayTM, and others in the market, it cannot be contemplated that WhatsApp Pay will get a significant market share purely based on of its pre-installation. Further, WhatsApp pay obtained regulatory sanction in February 2020 and its clear-cut demeanour is yet to manifest in the competitive market.

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<sup>4</sup> Samir Agrawal v Competition Commission of India & Ors, (2021) 3 SCC 136

<sup>5</sup> Harshita Chawla v. WhatsApp and Facebook, 2020 SCC OnLine CCI 32

3. **Industrial and automotive bearings v. ABC bearing ltd**<sup>6</sup> –

Deciding penalties for anti-competitive activities of parties is yet another forte of the CCI. As per section 27(b) of the competition act, penalty exceeding 10% of the annual turnover of the preceding three financial years of a concern cannot be imposed. The COMPAT previously has observed that the imposition of penalty is as per the discretion of the CCI. Nonetheless, the CCI is bound to take into account the aggregating or mitigating circumstances and exercise this discretion judicially with utmost precision and lucidity. In the present case due to lack of evidence and considering the present circumstance, the CCI did not impose a penalty on the party and left them with a cease-and-desist order warning them to never indulge in anti-competitive activities henceforth. The CCI further observed that the ends of justice would be met if the parties cease such cartel behaviour by abstaining from indulging in such activities. The CCI considered the fact that, the year in which the case is to be decided is 2020 – where the whole world is fighting a pandemic and decided not to penalise the party. Such a decision was taken also due to lack evidence to prove that the party indulged in anti-competitive activities.

**COMPETITION LAW AND 2021**

The pandemic which started in 2019 is still prevalent in many countries even in 2021. India is also going through a hard time but the nation cannot stop functioning, accepting the fate. After various changes in the competition regime, the problems the nation is facing is getting more complex and technical. The CCI passed numerous noteworthy cases by the second half of 2021. There were some enforcement cases and some merger control cases.

**ENFORCEMENT**

- In the case of Re: M/s International Subscription Agency v Federation of Publishers' and Booksellers' Associations in India,<sup>7</sup> the CCI after looking into the DG's investigation reports held the FPBAI guilty for indulging in anti-competitive activities as per section 3(3) of the competition act. The Good Offices Committee (GOC) which was established by the FPBAI, issued orders to the different e-resources and print

<sup>6</sup> Industrial and automotive bearings v. ABC bearing ltd, Suo Motu Case No. 05 of 2017

<sup>7</sup> Re: M/s International Subscription Agency v Federation of Publishers' and Booksellers' Associations in India, Case No. 33/2019

journals, forbidding them from granting a discount on publisher's prices by insinuating threat of expulsion from the FPBAI. The CCI discovered that the FPBAI by its act of establishing the GOC undertook to control and limit the supply of books and issued a discount control policy which strictly makes the act anti-competitive and further imposed a penalty of Rs 2,00,000 on FPBAI and Rs 1,00,000 on all office bearers involved and passed an order to cease and desist from indulging in such activities henceforth.

- The CCI closed the 2015 Suo-moto cartelisation case of domestic airlines namely Indigo, Jet Airways, Go Air, Air India, and Spice Jet.<sup>8</sup> In 2015, a secretariat of the Lok Sabha wrote a letter to the CCI demanding an investigation through the DG to find if the airlines acted in a collusive manner. The DG conducted the investigation and the CCI adhered to its findings that the airlines had fluctuating market shares and resorted to dynamic pricing and new players could easily get into the market, all of which prompted the CCI in concluding that the airlines did not indulge in anti-competitive activities.

### **MERGER CONTROL**

- On January 8, 2021, the CCI permitted the 100% acquisition of equity share capital of Columbia Asia Hospitals Private Limited by Manipal Health Enterprises Private Limited.<sup>9</sup> The CCI after perusal of all documents discovered that the joint market share of both the parties was negligible in terms of the number of beds or other specialty offered by them and the market was already filled with players and the proposed transaction in the present case will not adversely affect competition. In the light of these observations, the CCI concluded that this vertical linkage will not raise any foreclosure concerns in the country.
- For the same reason of insignificant market share and the presence of strong players in the market, the CCI permitted the acquisition of Max Life by Axis Group. 12.9% of

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<sup>8</sup> Re: Alleged Cartelization in the Airlines Industry, Suo Motu Case No. 03 of 2015

<sup>9</sup> Manipal hospital completes acquisition of Columbia Asia, The Hindu (30<sup>th</sup> April, 2021), <https://www.thehindu.com/business/industry/manipal-hospitals-completes-acquisition-of-columbia-asia/article34450049.ece#>



equity share capital where being acquired by Axis Group and the same posed no threat upon the competitive market<sup>10</sup>.

- The idea of the green channel was introduced in the competition amendment bill 2020 and the CCI under this very own green channel approved the acquisition of Dodla Dairy by the International Finance Corporation after realising that there is no type of complementary overlaps between the activities of these two parties. There were many more cases like Reliance Retail acquiring certain businesses of the Future group<sup>11</sup>, Black stone acquiring certain business of Prestige group<sup>12</sup> all of which was permitted, as a threat on competition was not posed by any of them.

## **CONCLUSION**

The ongoing pandemic did not hamper the working of the nation and the development of laws. With the ever-dynamic market competitions, the competition laws of India have evolved radically, tenacious on promoting fair and healthy competition while penalising the one's bringing in hindrances. Even though the world paused with the inception of the Coronavirus, it emerged stronger from it, determined to get back to the busy life. The competition law regime underwent some major changes with the introduction of the amendment bill in 2019, and with all the cases it dealt with in 2020 and 2021.

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<sup>10</sup> K.R. Srivats, CCI nods for Axis bank stake buy in Max life insurance, The Hindu (21<sup>st</sup> January, 2021), <https://www.thehindubusinessline.com/money-and-banking/cci-nod-for-axis-bank-stake-buy-in-max-life-insurance/article33623670.ece>

<sup>11</sup> Sagar Malvia, Reliance acquires future group's retail business, Economic times (29<sup>th</sup> August, 2021), <https://retail.economictimes.indiatimes.com/news/industry/reliance-retail-acquires-retail-wholesale-logistics-and-warehousing-biz-of-future-group/77825289>

<sup>12</sup> Sobia Khan and Kailash Babur, Blackstone, Prestige Group finalise terms for Rs 11,000-crore realty deal, Economic times (10<sup>th</sup> November, 2020), <https://economictimes.indiatimes.com/industry/services/property/-construction/blackstone-and-prestige-finalise-1-5-billion-deal/articleshow/79136938.cms?from=mdr>