
Competition (Amendment) Bill, 2023: Changes in light of the Finance Committee's Recommendations

POLICY BRIEF

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Introduction

On March 29th 2023, the Lok Sabha passed the Competition (Amendment) Bill, 2023 ('2023 Bill'). The **previous iteration of the Bill** was released in August 2022 ('2022 Bill'), following which it was referred to the Parliamentary Standing Committee on Finance ('the FC'). The FC released its report making notable recommendations to the Bill.

In line with the FC's recommendations, amendments to the 2022 Bill were introduced vide notice dated 07.02.2023. Thereafter, updated bill was introduced in the Parliament. In this piece, The Dialogue maps the FC's recommendations that form part of the final Bill passed in the Lok Sabha.¹ Furthermore, this Brief also maps those clauses that were not part of the original 2022 Bill or the FC's recommendations but are part of the final Bill passed on March 29. This Brief maps the passed amendments and does not provide an analysis of the amendments. The amendments are broadly mapped into 3 categories that are provided below.

1. FC's recommendations that form part of the 2023 Bill

1.1. Hub and Spoke cartels (H&S)

2022 Bill: It had introduced the concept of H&S cartels as part of amendments to Section 3 of the Act. It was stated that entities who actively participate in the H&S cartel will be covered. The Clause mentioned:

"Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section **if it actively participates** in the furtherance of such agreement."²

FC's recommendation: The entities who '**intended to actively participate**' in the furtherance of the agreement should only be covered within the scope of hub and spoke cartels.

2023 Bill: The amended clause now reads as follows: "Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section **if it participates or intends to participate** in the furtherance of such agreement."

The suggested amendment does not necessarily imply mandatory establishment of intent as a criteria for H&S cartels.

1.2. Local Nexus Criteria under the Deal Value Threshold (DVT)

The 2022 Bill had introduced a DVT along with a local nexus criteria. The Bill

¹ Competition (Amendment) Bill, 2023 available at: http://164.100.47.4/BillsTexts/LSBillTexts/Passed/Loksabha/185C/2023/LS_E3312023105854AM.pdf

² Cl. 4 of the Bill, amending S. 3(3) of the Act.

mentioned the criteria can apply to either of the parties to the transaction. It mentioned:

2022 Bill: “Provided that the enterprise which is **a party to the transaction** has such substantial business operations in India as may be specified by regulations.”³

FC’s recommendation: The local nexus test should apply only to the **‘the party whose control, shares, voting rights or assets have been acquired or are being acquired’**.

2023 Bill: “Provided that the enterprise which is **being acquired, taken control of, merged or amalgamated** has such substantial business operations in India as may be specified by regulations.”

The effect of the amendment to the Bill is that the local nexus test will not apply to both or either of the parties to the transaction, i.e., the acquirer and the target. Instead, the local nexus or ‘substantial business operations’ of only the target entity will be considered.

1.3. Timeline for *prima facie* opinion on combination

2022 Bill: The Bill proposed to reduce the timeline for the CCI to form a *prima facie* opinion from 30 days to 20 days.⁴

FC’s recommendation: The FC had recommended against this change as reducing timelines could prove burdensome for an already understaffed commission.

2023 Bill: The amendment clause takes FS’s recommendation into consideration and leaves the timeline unchanged to 30 days.

1.4. Powers of the DG

2022 Bill: Clause 26 of the Bill proposed to allow the Director General to examine legal advisers through the following definition of ‘agents’.⁵

“(a) “agent”, in relation to any person, means, any one acting or purporting to act for or on behalf of such person, and **includes the bankers and legal advisers of, and persons employed as auditors by, such person;**”

FC’s recommendation: The FC’s report recommended inserting a clause clarifying that nothing in the section shall be in contravention of the Indian Evidence Act 1872 or any other Act that protects attorney-client privilege.

2023 Bill: The amendment, while taking cognizance of the issue of attorney-client confidentiality, attempts to resolve the situation in a different way.

³ Cl. 6 of the Bill, amending S.5 of the Act.

⁴ Cl. 21 of the Bill, amending S. 29 of the Act.

⁵ Cl. 26 of the Bill, amending S. 41 of the Act.

The 2023 Amendment amends the definition of 'agent' to the following:

"(a) "agent", in relation to any person, means, any one acting or purporting to act for or on behalf of such person, and ***includes the bankers, and persons employed as auditors and legal advisers, by such person;***".

The amendment could in effect exclude external counsels from the ambit of the DG's investigation power. However, it appears that in-house counsels can still be examined by the DG.

1.5. Awarding compensation on basis of settlement orders

The 2023 Amendment now allows settlement orders to be the basis for compensation claims. The same was not a part of the 2022 Bill.

2022 Bill: The clause proposed by the 2022 Bill did not refer to compensation on settlement orders. The clause read as follows:⁶

"S. 53N(1): that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, ***or the orders of the Supreme Court in an appeal against the findings of the Appellate Tribunal under section 53T*** and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise."

(2) Every application made under sub-section (1) shall be accompanied by the findings of the Commission ***or Appellate Tribunal or the Supreme Court***, if any, and also be accompanied with such fees as may be prescribed."

FC's recommendation: An amendment to section 53N of the Act to allow third parties to file compensation claims based on the settlement order. The FC had suggested the following drafting change to section 53N:

"S. 53N(1) ...that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or ***an order for settlement passed under section 48A*** or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise."

⁶Cl. 40 of the Bill, amending S. 53N of the Act.

(2) Every application made under sub-section (1) shall be accompanied by the findings of the Commission **or an order for settlement**, if any, and also be accompanied with such fees as may be prescribed."

2023 Bill: The amended clause allows compensation claims from a settlement order. The proposed amendment reads as follows:

"S. 53N(1). Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, **or the orders of the Supreme Court in an appeal against the findings of the Appellate Tribunal under section 53T or an order for settlement passed under section 48A** and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise **or as a result of order of settlement passed by the Commission.**"

(2) Every application made under sub-section (1) shall be accompanied by the findings of the Commission or Appellate Tribunal or the Supreme Court **or an order for settlement**, if any, and also be accompanied with such fees as may be prescribed."

2. FC's recommendations that are not a part of 2023 Bill

The FC had made certain key recommendations pertaining to abuse of dominant position, merger control and the S&C mechanism. However, none of these recommendations have led to any changes in the Bill. These recommendations of the FC are mentioned below.

2.1. Merger Control

2.1.1. Timeline for approval of combination

2022 Bill: The Bill proposed to reduce the timeline for the CCI to pass an order on the application for approval of combinations from 210 days to 150 days. The clause read as follows:⁷

"for the words "two hundred and ten days", the words "one hundred and fifty days" shall be substituted".

⁷Cl. 7 of the Bill, amending S.6(2A) of the Act.

FC's recommendation: The FC opined that reducing the timeline can be burdensome for an already understaffed commission and had thus recommended against this amendment.

However, the FC's concern does not find place in the new amendment bill. The timelines for combination, therefore, will be reduced to 150 days.

2.1.2. Manner of calculating DVT

2022 Bill: The Bill provided that transactions where 'value of any transaction' exceeds 2000 crores and where the party to the transaction has substantial business operations in India, such transaction would have to be notified to the CCI. However, the Bill was silent on the manner of calculation of the DVT. The clause read as:⁸

"(d) value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore "

FC's recommendation: The FC acknowledged that the Bill's silence on how the deal value is to be calculated could potentially lead to uncertainty. Therefore, the FC recommended the following amendment to the original clause:

"(d) value of any transaction, **manner of calculation of which shall be determined by regulations**, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore."

2.1.3. Meaning of 'Value of Transaction'

2022 Bill: The Bill provided limited guidance on what constituted value of transaction. The clause read as:⁹

"'value of transaction' includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation "

FC's recommendations: The FC recommended that further clarity to the clause should be brought in through regulations. The suggested clause read as follows:

"'value of transaction' includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation **as may be specified by regulations** "

⁸Cl. 6 of the Bill, amending S.5(c) of the Act.

⁹Cl. 6 of the Bill, amending clause (d) of the Explanation to S.5 of the Act.

2.1.4. Definition of 'Material Influence'

2022 Bill: The Bill proposed an amendment to the definition of 'control' to include the 'material influence' standard. The clause read as follows:¹⁰

"(a) "control" means the **ability to exercise material influence**, in any manner whatsoever, over the management or affairs or strategic commercial decisions "

FC's recommendation: The FC suggested that the clarity on what constitutes 'material influence' should be provided through further regulations. The suggested clause read as follows:

"(a) "control" means the **ability to exercise material influence, as maybe specified by regulations**, in any manner whatsoever, over the management or affairs or strategic commercial decisions "

2.2. Settlements and Commitments

2.2.1. Third Party Consultation

2022 Bill: The 2022 Bill proposed to allow the CCI to seek objections and suggestions from third parties on settlement commitment applications. The clause on settlement read as follows:¹¹

"(4) While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any."

The clause on commitment read as follows¹²:

"(4) While considering the proposal for commitment, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any."

FC's recommendation: Third-party consultation mechanisms could lead to significant interference by the third parties and compromise the secrecy of the matter. Thus, the Committee recommended that the inclusion of the 'any other party' in the clause must be removed and if the CCI is to seek objection from third parties, such an obligation must not be mandatory but discretionary. The suggested clause read as follows:

"S.48A (4). While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, or the Director General to submit their objections and suggestions, if any.

¹⁰Cl. 6 of the Bill, amending clause (a) of the Explanation to S.5 of the Act.

¹¹Cl. 35 of the Bill, inserting cl. 48A to the Act.

¹²Cl. 35 of the Bill, inserting cl. 48B to the Act.

S.48B (4). While considering the proposal for commitment, the Commission shall provide an opportunity to the party concerned, or the Director General to submit their objections and suggestions, if any.”

2.2.2. Withdrawal of application

2022 Bill: The Bill did not provide a choice to the parties to withdraw from the settlement commitment process.

FC’s recommendation: The FC opined that a party shall have the ability to withdraw the settlement or commitment application. It recommended the insertion of a proviso allowing the applicant to withdraw the application within 7 working days from the date of the hearing. However, the FC suggested a drafting change to clause 48A (settlement) only and not for clause 48B (commitment). The suggested clause read as follows:

“48A (2)...Provided that the applicant under sub-section (1) shall have the **right to withdraw the application within 7 working days from the date of the hearing.** In the event of withdrawal of the application, the Commission shall proceed with its inquiry under Section 26 of the Act, without any prejudice to the settlement offered.”

2.2.3. Inclusion of cartels

2022 Bill: The Bill proposed that the settlement mechanism would be allowed in cases pertaining to vertical agreements and abuse of dominance. The clause read as follows:¹³

“48A. (1) Any enterprise, against whom any inquiry has been initiated under sub-section (1) of section 26 **for contravention of sub section 4 of section 3 or section 4,** may, for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified by regulations.”

FC’s recommendation: The FC recommended that the same be extended to horizontal agreements including cartels as well. The suggested clause read as follows:

“48A. (1) Any enterprise, against whom any inquiry has been initiated under sub-section (1) of section 26 **for contravention of sub section 3 or sub section 4 of section 3 or section 4,** may, for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified by regulations.”

¹³Cl. 35 of the Bill, inserting cl. 48A to the Act.

2.2.4. Admission of guilt

2022 Bill: The Bill was silent on whether an application for a settlement commitment procedure would imply admission of guilt on behalf of the party.

FC's recommendation: The FC recommended that an application for settlement or commitment, prima facie, shall not mandate admission of guilt.

2.2.5. Revisiting final order

2022 Bill: The Bill does not provide the parties with an option to revisit the terms of the settlement commitment order consequent to the passage of the final order.

FC's recommendation: The FC recommended that there should be an enabling provision to allow the applicant to apply to the CCI to revisit the settlement commitment after the order of the final settlement by the CCI.

2.3. Abuse of dominant position

2.3.1. IPR Exemption

2022 Bill: The Bill did not extend the Intellectual Property Rights (IPR) exception to Section 4. Currently, the IPR exemption is only available to cases under Section 3. As per the exemption, any agreement that restrains the infringement of or imposes reasonable conditions to protect IP rights under Indian IP laws would be exempted from being considered as anti-competitive.

FC's recommendation: The FC, in line with the CLRC report, recommended that the exemption should be extended to section 4 i.e. abuse of dominance cases as well. The FC recommended inserting clause (3) to section 4 of the Act, which says:

"Nothing contained in this section shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under

(a) the Copyright Act, 1957 (14 of 1957)

(b) the Patents Act ...

(g) any other law for the time being in force relating to the protection of other intellectual property rights (37 of 2000) "

2.3.2. Effects based test

2022 Bill: The Bill did not include an effects-based test under section 4 of the Act. Under this test, a regulator looks at different factors like impact on consumers, innovation and competition before adjudicating a conduct as violative of the competition law.

FC's recommendation: The FC recommends insertion of a provision mandating the Commission to undertake an effects-based test u/s 4 of the Act. The suggested clause read as follows:

"An enterprise or group shall in contravention of sub section (1), if it causes or likely to cause appreciable adverse effect on competition".

Amendments to Section 19(3) of the Act was also suggested:

"The commission shall, while determining whether an agreement or conduct has an appreciable adverse effect on competition under section 3 or section 4 of the Act (as applicable) have due regard to all or any of the following factors....."

3. Amendments outside the recommendations of the FC

While the FC did not make any recommendations on the issues below, a few changes to the 2022 Bill have still been made. These include the following.

3.1. Revision of value of transaction

Original Clause: The Bill proposed that the '**value of transaction**', similar to value of turnover, be revised after every two years by the Central Governments. The clause read as follows:¹⁴

"Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, *notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover* **or the value of transaction**, for the purposes of that section.

2023 Bill: The Bill seek to change the clause to the following:

"... *by notification, enhance or reduce by notification, **or keep at the same level**, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, **or such factors that in its opinion are relevant in this matter**, the value of assets or the value of turnover or value of transaction*

3.2. Penalty u/s 27 of the Competition Act, 2002

2022 Bill: Currently, the penalty is determined on the basis of turnover. However, the Bill proposed to include **income** as one of the criteria for determining the penalty too. The clause read as follows:¹⁵

¹⁴ Cl. 15 of the Bill, amending S.20 of the Act.

¹⁵ Cl. 20 of the Bill, amending S.27 of the Act.

“(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the **turnover or income**, as the case may be :

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its **turnover or income**, as the case may be, for each year of the continuance of such agreement, whichever is higher.

Explanation. For the purposes of this clause, the expression **turnover or income** , as the case may be, shall be determined in such a manner as may be specified by regulations.”

2023 Bill: Now, the bill seeks to include an Explanation to section 27(3) which would define ‘turnover’ as **‘global turnover derived from all the products and services by a person or an enterprise’**.

3.3. Additional period for removing defects or furnishing information on merger notices

2022 Bill: The Bill had proposed that the Commission could allow an additional period of thirty days to a party to the combination to rectify errors. The clause read as follows:¹⁶

“Provided that in case the party to the combination requests for additional time to furnish relevant information or remove defects to the notice filed under sub-section (2), the Commission may, by order, grant additional time which shall not be more than thirty days for furnishing relevant information or removing defects, as the case may be.”

2023 Bill: The Bill omits this clause.

¹⁶Cl. 7 of the Bill, amending S.6 (2A) of the Act.

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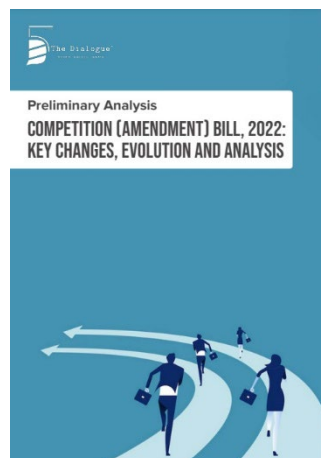
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