28 December 2018

To
Shri Injeti Srinivas
Secretary, Ministry of Corporate Affairs (MCA)
Chairperson, Competition Law Review Committee
Government of India

Subject: Industry submission on the Competition Act to the Competition Law Review Committee under Ministry of Corporate Affairs

Dear Sir,

On behalf of the **Asia Internet Coalition (AIC) and its members**, I am writing to express our sincere gratitude to the Ministry of Corporate Affairs (MCA), Government of India, for the opportunity to submit comments on the Competition Act, 2002 ("**Competition Act**"). Headquartered in Singapore, AIC is an industry association comprised of leading internet and technology companies in the Asia Pacific region and with an objective to promote the understanding and resolution of Internet and ICT policy issues in the region. Our current members are AirBnB, Amazon, Apple, Expedia, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Oath).

The key provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position have been in operation for nearly 10 years. The Act is in need of an overhaul of its provisions to address evolving business practices and changing nature of technology . To address statutory limitations, we welcome this initiative by the Indian Government that has undertaken active measures and has established the Competition Law Review Committee ("**Committee**"). We commend MCAs efforts to review the Competition Act/Rules/Regulations in view of changing business environment and this discussion around the review of the Competition Act is timely and imperative. As responsible stakeholders in this process, we appreciate the ability to participate in the public consultation process and submit an industry wide view.

As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request MCA and Competition Law Review Committee to consider when reviewing the Competition Act. We are grateful to MCA for upholding a transparent and multi stakeholder discussion.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Importantly, we would also be happy to offer our inputs and insights on industry best practices, directly through meetings and discussions and contribute to the Committee's report.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Enclosure

Detailed comments and recommendations on the Competition Act

Given the implications of competition law in various aspects of business and consumer interest, AIC is tabling the following submission in relation to certain provisions of the Competition Act. In preparing this submission, AIC has reviewed the Competition Act, related regulations, decisions of the Competition Commission of India ("**Commission**") and the National Company Law Appellate Tribunal ("**Tribunal**") and its impact on various industry practices.

Areas of Reform (Section)	Recommendations
Definitions	
Section 2(f)- Consumer Section 2(o)- Price	The evolution of technology has led to change in business practices and platform for consumer interaction. The current definition of these two terms is limited in its scope to address such practices in high technology markets, such as multi-sided markets, or platform based markets. The Commission is trying to get a grip on how to address competition issues in such markets. However, the definition of "price" or "consumer" are archaic and do not necessarily apply to such markets. The Supreme Court of United States[1], has also recognised the difference between two-sided platforms and traditional markets. Therefore, these definitions should be revised to address the economic principles which govern the platform based markets. In recent decisions[2] the Commission has used a yardstick to define competition in multi-sided markets, however, such views should also be statutorily defined. This can be brought about by adding an explanation which provides for 'consideration' to be received through indirect methods.
Section 2(t)- Relevant product market	The current definition as it stands, defines relevant product market as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The definition defines to the relevant production market only from the perspective of substitutability from a consumer / demand side, and ignores the fact that suppliers may also switch production in the short term, without incurring significant costs or risks, which is equally important to consider when evaluating the substitutability between different products. The definition should be amended to include this aspect as well

[1] Ohio Et Al. V. American Express Co. Et Al., June 25, 2018.

[2] *In re Matrimony.com v Google LLC and Ors.,* Case Nos. 07 and 30 of 2012 (8 February 2018), please see- https://www.cci.gov.in/sites/default/files/07%20&%20%2030%20of%202012.pdf

	which will be in line with the practice followed in other jurisdictions while defining markets.[3] The ICN also considers supply side substitutability as an important factor when defining the relevant market.[4] In fact, the Commission has also considered supply side substitutability while defining markets, albeit in merger review decisions.[5] Accordingly, the factors under section 19(7) will need to be suitably amended to include the factors related to supply side substitutability. Additionally, given the nature of these markets, the "*small but significant non-transitory increase in price*" test used to determine markets may require replacement by the "*small but significant non-transitory decline in quality*" test, as this may be more appropriate as products are often provided without charge to customers, with consideration coming from a different side of the market.
Section 4, explanation (a)- dominant position	The Competition Act defines 'dominant position' as a position of strength, enjoyed by an enterprise, in the relevant market*, in India*, which enables it to (a) operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour. Even though the definition of relevant market is not restricted to India, the phrase 'in India' in the definition of 'dominant position' has, in the Commission's decisional practice, restricted the scope of the relevant market which may otherwise be broader. Therefore, it should be deleted from the definition.
Section 4, explanation (b)- predatory pricing	The current definition of predatory pricing does not take into account the fact that the principles governing competition in single-sided markets are distinct from the principles that govern multi-sided or platform markets.[6] It is recommended that the definition should be suitably amended to include 'price' that could be charged in mutli-sided market.
Agreements	
Section 19 (3) factors –nature of product/ market	The Commission's assessment of AAEC should be moulded in accordance with the nature of product/market being assessed. For instance, a mature market which has existed for some time, with standard technology and minimal brand innovation, is likely to be more susceptive to anti-competitive effects than a dynamic and technologically driven market, which faces a greater likelihood of disruptive innovation While it may be done in practice, there is no guidance in the

[3] EC Notice on the Definition of Relevant Market; also see the European Court of Justice decision in the *Continental Can* case.

[4] ICN Recommended Practices for Merger Analysis.

[5] Case No. C-2015/10/322, *JK Tyres/JK Asia.;* Case No. C-2013/07/126, *Mitsubishi/Hitachi;* Case No. C-2014/07/190, Holcim / Lafarge*;* Case. No. C-2015/02/246, *Ultratech / Jaiprakash;* Case No. 2016/10/444, *HP/Samsung.*

[6] Ohio Et Al. V. American Express Co. Et Al., June 25, 2018.

	Competition Act to aid the Commission's assessment. In fact, in other jurisdictions as well it is considered important to review the nature of markets / products in question, while examining effects of an agreement.[7] Therefore, it would be helpful to have this factor included under Section 19(3).
Section 19 (3) factors – Business/ objective justification	Even though the Commission has examined business / objective justifications to some extent[8], business / objective justifications are not a statutorily mandated consideration under Section 19(3) of the Competition Act. Under certain circumstances, legitimate business considerations drives the decision making in relation to agreements. Even in the assessment of vertical agreements, it becomes necessary to examine the business / objective justifications which determine the enterprise's conduct with its downstream / upstream partners. The importance of business / objective justifications while examining agreements has also been recognised in the Raghavan Committee Report[9] which stated that "*a distinction needs to be made between what could be called an illegal practice of price cartelisation… and a perfectly legitimate economic and business behaviour in responding to a situation in which a given competitor is placed in what could be described as a price leadership position. When a price leader alters price of his goods or services due to factors such as increase in the cost of inputs, raw materials or other related costs, most other competitors will have no choice, but to follow him though the extent could vary… To assume in each such case, an informal co-operation (or informal agreement), would be too harsh and would ignore a market place reality.*" Therefore, to ensure a more robust analysis of appreciable adverse effect on competition ("**AAEC**"), business / objective justifications should be included as factor under Section 19(3) of the Competition Act.
De minimis standard for vertical agreements	As practice dictates, vertical restrictions are unlikely to raise competition concerns if there is no market power. In light of this, several jurisdictions (including the EU) provide for "block exemptions" since vertical agreements entered into by enterprises below a specific market share threshold are unlikely to raise concerns. In the absence of such a guidance/exemption under the Competition Act, there is incongruity in the Commission's approach on this issue. The Commission has not

[7] EU Vertical Guidelines.

[8] *Himalaya International Ltd vs Himalaya Simplot Pvt Ltd*, Case No. 92 of 2013; *Shubham Sanitary Wares vs HSIL Limited*, Case No. 9 of 2015; *Ashish Ahuja vs Snapdeal.com*, Case No. 17 of 2014; *India Glycols Limited and Ors. v. Indian Sugar Mills Association and Ors*, Case No. 21 of 2018.

[9] Report of the High Level Committee on Competition Policy and Law.

	specified threshold of market power which would cause concern, and usage of terms such as "sufficient" economic power;[10] and "significant" market power to cause an AAEC adds to the confusion.[11] To ensure certainty and consistency in business conduct of enterprises and in the Commission's approach, market share thresholds should be specified in the Competition Act.
Dominance	
Effect of harm of abusive conduct	The underlying objective of the Competition Act is to prevent anti-competitive effects and harm to consumers. Therefore, for an allegation of abuse of dominance under Section 4 of the Competition Act to prevail, the Commission must establish harm to competition or consumers. Accordingly, section 4 should be suitably amended to reflect this aspect.
Objective justification	Similar to agreements, even though "objective justification" has been recognised for certain alleged abusive conduct[12], there is no provision in the Competition Act which would justify the conduct prohibited under Section 4(2) of the Competition Act. To align the best practices in other jurisdictions, the defence of objective justification should be introduced in the Competition Act. This would allow the Commission to evaluate the economic and business considerations behind certain conduct which would otherwise appear abusive. More than agreements, such an amendment should be introduced under section 4, since unlike cases involving agreements, Section 4, as it is currently on the books, does not require the adverse effect of any abusive conduct to be established.
Defence of meeting the competition	Currently, the Competition Act provides for the defence of "meeting competition" as an explanation to Section 4(2) (a) of the Competition Act. However, the text suggests that it is only limited to allegations against "discriminatory" conditions or "discriminatory" prices. The section should be amended to make this defence available against allegations of "unfair" conditions and "unfair" price as well.
Scope of leveraging	Leveraging is prohibited under Section 4(2)(e) of the Competition Act if a dominant enterprise "*uses its dominant position in one relevant market to enter into, or protect, other relevant market*". The section needs to make it clear that the markets in question should be related markets. In the absence of such a clarification, the provision is susceptible to misuse, as

[10] *Shri Sonam Sharma v. Apple Inc. & Ors.*, Case No. 24 of 2011.

[11] *Automobile Dealers Association v. Global Automobiles Limited and Pooja Expo India Private Limited*, Case No. 33 of 2011.

[12] DLF Limited v. Competition Commission of India and Others, dated 19 May 2014 (Appeal No. 20 of 2011), at paragraphs 56 and 69; Schott Glass India Pvt. Ltd. v. Competition Commission of India & Another (Appeal No. 91 of 2012, 2 April 2014). This order has been challenged before the Supreme Court of India.

	entry into any market by a dominant enterprise could be labelled leveraging if, for example, it generates revenues in one market and uses these to subsidize entry into a second market.
Merger Control	
Section 5, explanation (a)- Control	Even though the Competition Act defines 'control', the definition does not provide any guidance on what rights may constitute control which has largely developed through the Commission's decisional practice. In its combination orders, the Commission has identified certain categories of rights that may be construed to confer "control", apart from interpreting control as '*the ability to exercise decisive influence over the management or affairs and strategic commercial decisions*' of a target enterprise, whether such decisive influence is being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants.[13] However, the definition of control is still far from clear since in a recent decision, the Commission also interpreted '*material influence*' rather than '*decisive influence*' to constitute control.[14] Due to the wide scope of the definition in the Competition Act, the Commission's interpretation of control may also include certain standalone minority investor protection rights. To provide more clarity to parties, and to align the approach with other jurisdictions, the definition of control may be amended to clarify that control should include *decisive influence* over the management or affairs and *strategic* commercial decisions of a company and that minority protection rights would not amount to control.
Section 5, explanation (b)- Group	On 4 March 2016, the MCA through a notification increased the requirement of voting rights from 26% to 50%, for a period of 5 years.[15] This was in line with the practice in European Union as well which require voting rights of a group in an enterprise to be 50% or more, in order for that enterprise to fall within the group. [16] However, the definition of "group" in the Competition Act, has not been amended to reflect this change. Accordingly, the Competition Act should be amended to specify the increase in threshold for the voting rights test.
Review timelines	Section 6(2A) of the Competition Act provides that a combination can be consummated only after the Commission has approved the transaction, or till 210 days have expired from the date of notification, whichever is earlier.

[13] Case No. C-2012/03/47, *Independent Media Trust/Network 18.*

[14] Case No. C-2015/02/246, *Ultratech/Century.*

[15] Please see- https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf.

[16] EC Regulation on the control of concentration between undertakings (***EUMR***), Article 5(4).

	Further, the Combination Regulations provide that Phase I of the review process "shall" take 30 working days. Additionally, the review periods are also subject to various 'exclusions' (some of which are specifically provided under the Competition Act[17], and others which have emerged from CCI practice[18]). In practice, the review timelines are not adhered to in complex transactions where review can take up to 10 months or longer. This causes uncertainty for transactions which are multi-jurisdictional and have a definitive closing date. Accordingly, the amendments may be proposed to the review timelines: • The overall time period may be reduced from 210 days to [180] days. Other jurisdictions also follow a shorter timeline subject to certain exclusions and conditions (Australia - 90 calendar days; Canada – 60 calendar days[19]; China – 180 calendar days; Germany- 150 calendar days; US – 90 calendar days[20]). The ICN has also recommended a short timeline for reviewing transactions[21]; and • To reduce the Commission's discretion in excluding the time period and to align the practice in other jurisdictions[22], it should be specified that only the time exclusions provided under the Competition Act are to be considered (and other exclusions introduced through practice and amendment of the Combination Regulations will not be permitted). This amendment is also important because any exclusions not provided under the Competition Act (even if they are introduced through the Combination Regulations) could be challenged as being *ultra vires* the Competition Act.

[17] The Competition Act provides that the period of 60 days under Section 31(6) and Section 31(8) of the Competition Act i.e. the time spent on deciding on remedies would be excluded.

[18] The CCI has introduced various 'exclusions' by amending the Combination Regulations (Regulations 9(2), 14(2A), 19(2), 25(1A)).

[19] Canada has an initial waiting period of 30 calendar days, and a secondary waiting period of 30 calendar days from the date of full compliance of an information request.

[20] US has an initial waiting period of 60 calendar days, and a secondary waiting period of 30 calendar days from the date of certification of substantial compliance.

[21] ICN recommended practices state that "*merger transactions are almost always time sensitive, and the completion of merger reviews by relevant competition agencies is often a condition to closing either by operation of law or contract. Delay in the completion of such reviews may give rise to a number of risks. Delay may jeopardize the consummation of the transaction itself due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delay may also have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty. In addition, it defers the realization of any efficiencies arising from the transaction. Merger reviews should therefore be completed within a reasonable time frame*".

[22] EC Implementation Regulations, Article 9.

Procedural Reforms	
Commission's power to review and recall its decisions	When the Competition Act was first enacted, Section 37[23] allowed the Commission to review its own orders. However, in 2007 this section was omitted. Even then, parties approached the Commission to review its decision based on the reasoning in the Google Case[24] where the High Court of Delhi recorded the importance and contours of such a power. However, limited remedy was available to the parties due the absence of such a power in the Competition Act. The power to review has been further restricted by the High Court of Delhi in the *Cadila*[25] case where the court specifically noted that "*cardinal rule of interpretation is that the power of review is expressly granted.*" Given the serious implications of investigations on enterprises, and complaints before the Commission which have no competition law relevance and are more in the nature of consumer law issues or other areas of law, the Commission's power to review its decisions should be re-instated, subject to adequate safeguards regarding the scope of the review.
Power to grant interim relief by the Commission	Under Section 33, the Competition Act allows the Commission to grant interim relief in cases where there is a threat that the violation of the Competition Act may continue during the stage of investigation. The Supreme Court in *Competition Commission of India* v. *Steel Authority of India Limited*,[26] has set a higher standard of "satisfaction" than required for a *prima facie* view order. The section should be amended to clarify that a relief under Section 33 will be granted only after a *prima face* order has been passed by the Commission under Section 26 (1) and a separate hearing should be undertaken giving the opportunity to both the parties to present their arguments.
Quantum of penalty	Despite the Supreme Court having ruled in the *Excel Crop Care*[27] that while calculating the penalty, the turnover to be considered should be "relevant turnover" and not "total turnover", there are still no guidelines issued by the Commission on the factors to be taken into account while calculating the penalty. The Competition Act should formulate clear and specific guidelines on the factors to be considered when deciding the quantum of penalty which currently is developing on a case by case basis.
Penalty on individuals	The Commission is increasingly penalizing responsible individuals

[23] Omitted by the Competition (Amendment) Act, 2007

[24] LPA No.733/2014, Delhi High Court (27 April 2015).

[25] LPA No.160/2018, Delhi High Court (12 September 2018).

[26] *Competition Commission of India* v. *Steel Authority of India Limited,* 2010 (10) SCC 744 at paragraph 117.

[27] *Excel Crop Care Limited v. Competition Commission of India & Anr*. Civil Appeal 2480 of 2014, along with Civil Appeal 53-55 of 2014, and Civil Appeal 2922 of 2014 (8 May 2017).

	and office bearers under Section 48 of the Competition Act for their involvement in breaches by their companies/associations. In fact, there have been a number of cases in the last few years where the CCI has imposed penalties on office bearers who were responsible for running the affairs of the entity and actively participated in giving effect to the anti-competitive decision or practice. However, the CCI has not followed a consistent approach when penalising the individuals. In some cases, even though the DG has investigated the individuals and has collected evidence of their alleged complicity, the CCI has only held the company to be liable. To follow a consistent approach, it is recommended that the power to impose penalties under Section 48 of the Competition Act (on individuals) should not be extended to violations of the abuse of dominance provisions under Section 4 of the Competition Act given that, unlike cartel offences, the offences under Section 4 of the Competition Act are ordinarily not driven by individual officers from sales or marketing teams.
Enforcement Policy	
Clarity on interpretation of Section 32 on local nexus of anti-competitive conduct	Section 32 of the Competition Act gives the Commission the power p to inquire and pass adequate orders for arrangements outside India having an AAEC in India. The scope of Section 32 is wide in its ambit as it transcends the nationality/place of incorporation of an entity and is also not limited by the place where an anti-competitive agreement has taken place. Therefore, if two Indian entities or a foreign and an Indian entity enter into an agreement outside India in respect of production, supply, distribution, storage, acquisition of goods or provisions of services that can cause an AAEC in India, the Commission is empowered to pass appropriate orders. Similarly, if an enterprise although incorporated outside India is abusing its dominant position in the Indian market, Commission can inquire and take appropriate actions against it. However, in instances where the Commission is proceedings under Section and ordering an investigation it should clearly set out in its *prima facie* order the basis of anti-competitive conduct taking place outside India resulting in an AAEC in India. It is proposed that Section 32 should be amended to make this a mandatory requirement to avoid investigations becoming a fishing or roving exercises which may be based on pure speculation or limited or not impact in India.
Administrative settlement of cases	The Competition Act does not provide for settlement of cases or for fast track procedures. Even in cases where parties have settled the dispute, the Commission's position is that it is empowered to continue with the proceedings under the Competition Act. The Commission's consistent position in this regard has been that the proceedings initiated before it are *in*

	rem, i.e. the proceedings affect the market as a whole and are not initiated against any specific party.[28] Further, the Commission has held that there is no provision under the Competition Act which permits withdrawal of information by parties. However, the Commission may in some cases consider cooperation by parties during the investigation as a mitigating factor in the imposition of penalties. Even though the Commission does not have a procedure for settlement of cases, the parties have the option to settle the dispute at the appellate stage. [29] Jurisdictions with mature competition law regimes have an option for the resolution of antitrust matters through commitment decisions or other similar forms of resolution, including negotiated agreements. This allows the enterprises to avoid a finding of guilt, and the associated fines and compensation claims, by modifying the alleged anti-competitive conduct. The Commission should devise a procedure for settlement/withdrawal of complaints or for offering commitments to modify the conduct.
Advance ruling	To promote the ease of doing business, the Competition Act should include a procedure to allow parties to notify and seek approval for agreements which they are unsure about. Such a procedure will aid in the parties in providing clarity and certainty to their conduct and save the cost, time and effort of the Commission in investigation any potential anti-competitive conduct.
Advocacy Efforts	
Market studies	As stated above, due to the fast-evolving nature of the digitals markets, the Commission is grappling with applying the principles of competition law under changing market dynamics. To keep itself updated on these changes the Commission should conduct regular market studies including engagement with relevant stakeholders to understand the intricacies of growing markets, sectors, etc. The Commission has made some progress in this direction and should continue with efforts in building these studies in the law to develop a mature competition jurisdiction.
Commission *vis-a-vis* Sectoral regulators	The Commission is the only regulatory body to address and adjudicate on competition law issues in India. Further, the Competition Act allows the Commission to make voluntary reference to statutory authorities. However, recently, the jurisprudence of the Commission has

[28] *Velankani Electronic Private Limited v Intel Corporation*, Case No. 16 of 2018 (19 November 2018).

[29] *Tata Power Delhi Distribution v CCI and another*, Competition Appeal (AT) No, 1 of 2018 (24 August 2018).

	given rise to issues with respect to concurrent jurisdiction of few other sectoral regulators in the field of telecom, intellectual property, and insurance. The Supreme Court has also recently ruled that the Commission has concurrent jurisdiction over companies that are also regulated by a sectoral regulator, but placed restrictions on the exercise of that jurisdiction. To ensure that there is specific guidance from all relevant regulators, and there are no concurrent opinions, the reference should be made mandatory in addition to greater engagement between the Commission and the sectoral regulators.