

To,

13 February 2020

Shri Injeti Srinivas
Secretary
The Ministry of Corporate Affairs (MCA)
Government of India

Dear Sir,

Subject: AIC Submission on India's Competition Amendment Bill *[updated submission]*

On behalf of the Asia Internet Coalition (“**AIC**”) and its members, I am writing to express our recommendations and share comments on the Competition Amendment Bill. Headquartered in Singapore, AIC is an industry association comprised of leading internet and technology companies in the Asia Pacific region with a mission to promote the understanding and resolution of Internet and ICT policy issues in the region. Our current members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Verizon Media). AIC has also been engaging with the Government of India on key policies such as data protection, intermediary liability, and e-commerce, and in the past submitted recommendations and best practices to ensure that the industry voice is reflected in the regulatory approach.

We commend the Ministry of Corporate Affairs (hereinafter referred to as “**MCA**”) for constituting the Competition Law Review Committee (hereinafter referred to as “**CLRC**”) on 01 October 2018 to review and suggest suitable modifications to the Competition Act, 2002 (hereinafter referred to as “**Competition Act**”) and the rules and regulations framed thereunder, to keep this legislation up to date and in line with the needs of the growing and fast-changing economy.

As responsible stakeholders in this process, we appreciate the ability to provide our recommendations and urge the MCA for a stakeholder consultation. As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request MCA to consider.

Should you have any questions please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Importantly, we look forward to providing our inputs and recommendations and contribute to India's Competition Amendment Bill.

Sincerely,



Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

I. Background

1. The Asia Internet Coalition (hereinafter referred to as “**AIC**”) was established in 2010 as an industry association that promotes the understanding and resolution of Internet policy issues in the Asia Pacific region. AIC represents the internet industry and participates and promotes stakeholder dialogue between the public and private sectors, sharing best practises and ideas on internet technology and the digital economy. To this end, it seeks to comment on the proposed Competition Amendment Bill.
2. The Ministry of Corporate Affairs (hereinafter referred to as “**MCA**”) as a welcome move constituted the Competition Law Review Committee (hereinafter referred to as “**CLRC**”) on 01 October 2018 to review and suggest suitable modifications to the Competition Act, 2002 (hereinafter referred to as “**Competition Act**”) and the rules and regulations framed thereunder, to keep this legislation up to date and in line with the needs of the growing and fast-changing economy.
3. The key task of the CLRC was to make procedural and substantive suggestions to the Competition Act, which would effectively promote a robust competition regime.
4. Between November to December 2018, the MCA, keeping in mind the bearing of public consultation, called for suggestions and recommendations from various stakeholders, in order to improvise the provisions of the Competition Act and the rules and regulations framed thereunder.
5. The CLRC’s report was published by the MCA on 14 August 2019 (hereinafter referred to as “**CLRC Report**”). It is pertinent to note that the CLRC Report contains suggestions and recommendations for strengthening the existing legislation and competition regime.
6. It is understood that, the CLRC’s suggestions as contained in the CLRC Report are being codified into a Competition Bill, listed for information, consideration and passing in the 2020 Budget Session, which is expected to amend the current legislation and the structure and functioning of the Competition Commission of India (hereinafter referred to as “**CCI / Commission**”).

II. Public consultation process for the Competition Bill

7. It is of grave concern to the relevant stakeholders that after the publication of the CLRC Report on 14 August 2019, no suggestions, were called for from the stakeholders. Thus, reducing and almost nullifying the say of the stakeholders in the amendment of the Competition Act. More importantly, the Competition Bill which is likely to be tabled in the Budget Session of the Parliament has not been circulated for public consultation, thus also negating any chances of productive and healthy discussions on the same.
8. Not providing the Competition Bill to, and not inviting the suggestions of the relevant stakeholders, renders the earlier exercise of seeking comments on the proposed changes to the Competition Act absolutely infructuous.
9. We welcome the move to initiate a public consultation in the legislative process like the Personal Data Protection Bill, 2019 to ensure wider participation and an effective legislation. Similar process needs to be adopted for the Competition Bill as the amendments will have a significant impact on the functioning of the market economy in India. We therefore encourage the MCA to open the Bill for wider public consultation. This will ensure that effective and meaningful changes will be made to the Competition Act having a significant impact on the existing market dynamics.
10. In light of the above, we have taken into account the recommendations made in the CLRC Report, identified related issues with the recommendations, and accordingly provided our suggestions to the Competition Bill below:

A. Deal value Thresholds (“DVT”)

<Table 1>

CLRC Recommendations	Issues	Proposed changes
a. The CLRC Report recommends that there should be an enabling provision in the Competition Act, empowering the Government of India to	a. The CLRC Report mentions certain acquisitions which escaped the Commission’s review process. Unfortunately, there is no thorough	a. There has to be a comprehensive guidance on the computation of deal values which elaborate upon the inclusions and exclusions.

CLRC Recommendations	Issues	Proposed changes
<p>formulate a necessary threshold including a DVT in the merger control framework of the Competition Act.</p>	<p>assessment regarding how these transactions have negatively impacted competition.</p> <p>b. Even though the CLRC Report records the concern that there is an enforcement gap regarding the ability of the Commission to review deals in digital markets to assess their anti-competitiveness under the present merger control regime, the CLRC Report fails to recognize the enforcement gap which needs a DVT to bring such deals under the Commission’s scrutiny, and such apprehensions are only based on assumption.</p> <p>c. In order to identify the enforcement gap, the CLRC Report has done a study of deals with high values, which escaped scrutiny by the Commission under the present thresholds. However, the assessment fails to investigate the:</p> <ul style="list-style-type: none"> ● impact of such deals in the Indian market to necessitate a pre-merger review; and ● evaluate whether the Commission would have blocked such deals or directed remedies, had they 	<p>b. Guidance in this regard maybe taken from the competition regimes in other countries. For example, German and Austrian competition authorities have issued a joint guidance¹ on the computation of deal value.</p> <p>c. DVT should incorporate an effective local nexus:</p> <ul style="list-style-type: none"> ● If there is no local nexus condition attached to the DVT, a large number of transactions may have to be notified to the Commission without any reasonable requirement for such an assessment to take place in India. ● Resultantly such notified transactions (a) will unnecessarily put significant burden on the resources of the Commission; (b) cost the parties in terms of money and time (c) discourage entities from doing business in India. <p>d. In view of the above, and recommendations by International Competition Network and Organization for Economic Co-operation and Development’s</p>

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CLRC Recommendations	Issues	Proposed changes
	<p>been brought to its notice.</p> <p>d. Short(er) / short-form notification form of transactions caught under DVT</p>	<p>(OECD)², the DVT has to incorporate a meaningful and effective local nexus. This can be achieved by (a) a foreign-to-foreign exemption; or (b) incorporating a target turnover/presence criteria into the transaction size threshold.</p> <p>e. Acquisition of control or some form of competitively significant influence is not a pre-requisite of notifiability to the Commission. The introduction of a DVT in the absence of such a pre-requisite could result in unintended consequences and exacerbate the risk of false positives. Thus, If a DVT is to be introduced and implemented, the Government of India should consider if it is essential to introduce, in parallel, the acquisition of control or, a change in control test, as a pre-requisite for notifiability to the Commission.</p> <p>f. At present, the CCI applies a diluted standard of control. In certain decisions, the CCI has also indicated that a minority shareholding</p>

² OECD, Local Nexus and Jurisdictional Thresholds in Merger Control, July 2016, Paragraph 86- 92 available at: [https://one.oecd.org/document/DAF/COMP/WP3\(2016\)4/REV1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf)

CLRC Recommendations	Issues	Proposed changes
		<p>along with a board seat and certain AVRs can amount to control. Given this diluted standard, transactions involving insignificant or minor shareholdings are notified to the CCI. Therefore, while introducing DVT, it is important to include a recommendation on streamlining the CCI's test for control with global standards, particularly the EU's.</p> <p>g. Under the current architecture of Indian merger control, a transaction may be notified in Form I (short form) / Form II (long form) – both of which place a tremendous burden on notifying parties to provide detailed market-facing and corporate information. To ease CCI's assessment of transactions caught under DVT, particularly in the event acquisition of control is not introduced as an additional standard, it would be helpful to introduce a short(er) notification form. This will ease CCI's assessment to the extent that it only receives relevant information on</p>

CLRC Recommendations	Issues	Proposed changes
		the transacting parties and state of competition in the relevant market. Any additional information can then be sought via a follow-on request (which is standard practice).

B. Scope of Settlement and Commitment mechanism relating to Sections 3(4) and 4 of the Competition Act

<Table 2>

CLRC Recommendations	Issues	Proposed changes
<p>a. The Competition Act should be amended to enable the Commission to accept settlement proposals and pass settlement orders subject to conditions, including a settlement amount. In terms of timing for settlement, the Committee has suggested that settlement should be allowed after the receipt of the Report of the Director General (hereinafter referred to as “DG”), and prior to the CCI’s final order.</p> <p>b. The Competition Act should be amended to empower the CCI to pass commitment decisions. In terms of timing, the Committee</p>	<p>a. The commitment mechanism is only available till the investigation process is complete.</p> <p>b. Once the DG Report is submitted, the parties are not permitted to offer commitments.</p> <p>c. Given that the investigation is carried out on a confidential basis, the parties which being subject to investigation are not aware of the exact nature of the investigation including the evidence being collected against them. Such a mechanism expects the parties to speculate the nature of allegations, potential</p>	<p>a. It is suggested that the provision as inserted in the Competition Act, should be broad enough to allow:</p> <p>(i) the parties to settle the cases before the CCI directs an investigation so that an informant can withdraw its complaint, or make the option of settlement available at later stage as well (including when the commitment mechanism is available); and</p> <p>(ii) allow the commitment mechanism to be available at different stages of an inquiry on a case-to-case basis.</p> <p>b. We are cognizant of the fact that the Bill is not</p>

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<p>suggests that these be allowed after an order directing an investigation has been directed by the CCI (through a <i>prima facie</i> order under section 26(1) of the Competition Act) but prior to the DG Report being issued.</p>	<p>contravention and the evidence collected against them.</p> <p>d. In the absence of details of the investigation, the commitments offered by the parties may not be constructive and meaningful.</p>	<p>available publicly. Therefore it is difficult to ascertain the precise formulation for the Settlements / Commitments mechanism. That said, assuming that the Bill sticks largely to the recommendations of the Competition Law Review Committee (CLRC), we would urge the MCA to clarify the following points on Settlements and Commitments:</p> <p>Settlements:</p> <ul style="list-style-type: none"> • <i>Scope:</i> As per the CLRC Report, settlements may be offered by the parties and the CCI will have the power to issue settlement orders including monetary and non-monetary conditions on the party offering a settlement. • <i>Timeframe:</i> Settlements to the CCI can be offered any time from the time of issuance of CCI's initiation order under Section 26(1) of the Competition Act until the issuance of CCI's final order. • <i>Negotiations with CCI:</i> The CCI may choose to accept or reject settlements offered by parties to the investigation. However, there should be guidelines identifying circumstances in which

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		<p>settlements offered by parties can be rejected. The CCI should also be required to record reasons in writing for rejecting proposed settlements. CCI's decisions to reject proposed settlements should also be appealable.</p> <ul style="list-style-type: none"> • AIC would further request for clarity on whether settlement would constitute finding of liability (which would have implications for follow-on damages actions). <p>Commitments:</p> <ul style="list-style-type: none"> • <i>Finding / admission of contravention:</i> The CLRC Report is silent on whether acceptance of commitments will be without actual finding or admission of contravention, or whether such orders would be appealable. Much like in the EU, our recommendation would be to explicitly clarify that commitments are offered without a finding of contravention or admission of contravention of Indian competition law. • <i>Negotiations with CCI:</i> The CCI may choose to accept or reject such commitments offered by parties to the investigation. However, there should be guidelines identifying

CLRC Recommendations	Issues	Proposed changes
		<p>circumstances in which commitments offered by parties can be rejected. The CCI should also be required to record reasons in writing for rejecting proposed commitments. CCI's decisions to reject proposed commitments should also be appealable.</p> <ul style="list-style-type: none"> • <u>Scope:</u> Commitments offered by parties can be structural or behavioural or a combination of both. • <u>Timeframe:</u> Commitments to the CCI can be offered any time from the time of issuance of CCI's initiation order under Section 26(1) of the Competition Act until the issuance of the DG's report. • <u>Time limit for scope of review:</u> The Report also recommends that the CCI would have the power to review its acceptance of commitments in certain circumstances including non-compliance of commitments or furnishing of incomplete or misleading information. However, there should be time limit (for example, 2 years) on CCI's ability to revisit terms of an accepted commitment.

C. Merger of the DG office with the CCI

<Table 3>

CLRC Recommendations	Issues	Proposed changes
<p>a. The CLRC Report has suggested the adoption of an integrated agency model where the DG's office should be integrated with the CCI, keeping in mind best practices including the functional autonomy of the DG and an internal division of investigation and adjudication functions</p>	<p>a. An amalgamation of the DG office with the CCI, will compromise of the investigative and adjudicatory functions of the DG and the CCI respectively, reduce transparency, and is more than likely to give rise to several litigations. This in turn will further constrain the DG office and CCI's limited time and resources.</p>	<p>a. To ensure a fair, unbiased and independent investigation, the DG office should be a completely autonomous body.</p> <p>b. In order to improve the investigative process, the office of the DG should also be provisioned with more economists and other such experts required on a case to case basis, depending on the markets involved.</p>

D. Requiring CCI to frame charges after issuance of the investigation report

Currently, once the comments to the DG's report have been filed, the CCI invites the parties for a hearing. This significantly impairs the parties' right to defence since they remain unaware of CCI's concerns. The CLRC Report recommends that the CCI should frame a statement of charges and issue it in the form of a show cause notice to the parties, *after* the parties have submitted their objections to the DG's report, the CCI should frame a statement of charges and issue it in the form of a show cause notice to the parties.

III. Conclusion

In conclusion, Asia Internet Coalition believes that further consideration and multi-sector consultation is required in relation to the above-mentioned recommendations in order to ensure that the proposed amendments do not curtail rights of various industry stakeholder and compromise on establishing an effective competition regime.

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