6 March 2020

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

Subject: Industry submission on the Draft Competition (Amendment) Bill, 2020

Dear Sir,

On behalf of the Asia Internet Coalition **("AIC")** and its members, I am writing to express our recommendations and share comments on the Draft Competition (Amendment) Bill, 2020. AIC is 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. 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 welcome the invitation to comment on the Competition (Amendment), Bill 2020 (***Draft Bill***) dated 12 February 2020, which was published by the Ministry of Corporate Affairs (***MCA***) on 20 February 2020. We understand that the Draft Bill has been issued in line with the Report dated 26 July 2019 (***Report***) prepared by the Competition Law Review Committee (***Committee***).

As responsible stakeholders in this process, we appreciate the ability to provide our inputs through this stakeholder consultation. We at AIC believe that there is great potential in the Draft Bill to transform and strengthen the competition law regime in India. As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request MCA to consider in preparing the Draft Bill for submission to the Parliament. This will ensure that the competition law works for consumers, businesses and the economy at large.

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)

COMMENTS AND RECOMMENDATIONS

A. OVERVIEW

The Draft Bill proposes to introduce several changes which shall have the effect of making the overall competition enforcement more efficient, thereby benefiting the market players, end consumer as well as the overall market, such as:

i. **Introduction of an intellectual property rights (IPR) based defence for the protection of IPR in abuse of dominance cases*:*** Similar to the protection available under Section 3(5) of the Competition Act, 2002 (***Competition Act***), a new Section 4(A) is proposed to be introduced to enable a dominant enterprise or group to impose reasonable conditions and restrictions to protect their IPR without being in breach of the Competition Act. This shall ensure that a correct balance is struck between sustaining the overall competition in the market *vis-à-vis* the effective protection of IPR.
ii. **Reduction in timelines for review of combinations by the CCI*:*** A critical proposal is the reduction in the time taken by the CCI to review combinations, from 210 to 180 days. This move will expedite the consummation of transactions, and significantly contribute to the ease of doing business in India.
iii. **Dilution of standstill obligations for certain transactions**: Another move that will enhance the ease of doing business in India, is the dilution of standstill obligations in the case of open offers or acquisition through a series of transactions on a regulated stock exchange, subject to certain conditions being satisfied. This shall enable acquirers to use the standstill obligations in the ordinary course of business to preserve the value of their acquisitions (amongst other things).
iv. **Public interest exemption from notifying transactions:** An important proposal is to enable the Central Government to specify criteria for exempting transactions from the obligation to notify, in public interest. The proposal is crucial in certain industries, such as the banking sector, where the Central Government's decision to merge the market players is driven by larger financial policy goals. The exemption enables the combinations to take place more expeditiously, and saves the CCI's time and resources.

Notwithstanding the above, the Draft Bill poses some pertinent issues which need to be urgently addressed. Please find below our comments on certain proposed amendments in the Draft Bill. We humbly request the MCA to consider our suggestions in preparing the Draft Bill for submission to the Parliament.

B. KEY ISSUES AND RECOMMENDATIONS

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

The Draft Bill introduces two new Sections 48A and 48B, enabling the parties to apply to settle the investigation initiated under Section 3(4) or Section 4 of the Act against them (after the receipt of the Director General's (***DG***) report but prior to a final order), or offer commitments to close such an investigation (after the *prima facie* order directing an investigation, but prior to the receipt of the DG Report). Therefore, the proposed settlement and commitment procedure will thus apply to cases of restrictive vertical agreements and abuse of dominant position but not to cartels

ISSUES AND OBSERVATIONS	SUGGESTIONS
I. The commitment mechanism is only available during the course of the investigation and prior to the DG Report being submitted. Given the confidential nature of investigation, the opposite parties that are investigated remain unaware of the exact nature of the investigation including the evidence that is collected against them. The timeline within which the commitment mechanism has been proposed to operate, expects the parties to speculate the nature of allegations, potential contravention and the evidence collected against them, and accordingly offer commitments. Therefore, in the absence of details of the investigation, the commitments offered by the parties may not be constructive and meaningful. **II.** Further, the settlement and commitment mechanism does not contain a provision for the *inter-se* settlement between the parties. For some cases, there should be a provision which allows the parties to settle and permits the informant to withdraw its complaint. **III.** The purpose behind the proposed settlement and commitment mechanism is to reduce the burden on the CCI, while simultaneously correcting anti-competitive behaviour in the market, without having to undertake full-fledged investigations. This can only be implemented successfully if there is sufficient clarity and scope to arrive at meaningful remedies. Presently, the proposed Draft Bill does not clarify whether the settlement and commitment mechanism is without prejudice, and this uncertainty can seriously undermine the utility of the mechanism.	**I.** **Wider period to offer commitments**: The timeline within which the commitment mechanism is operation should be wider. The provision should allow an opposite party to offer commitments prior to the CCI directing an investigation that is prior to the *prima facie* order being issued. Other, mature and advanced competition regulators also follow a wider timeline for the commitment process.[1] In fact, many competition law regimes do not have a fixed timeline for commitment discussions. This is because commitment decisions do not require extensive and long-lasting investigations but offer a relatively fast and flexible means to address antitrust concerns compared to full-fledged investigations. Further, the CCI or the DG as the case may be, should operate with greater visibility and transparency during the investigation stage to allow parties to structure their commitments in the best possible manner. **II.** ***Inter-se* settlement between the parties**: Where permissible, the settlement and commitment mechanism should allow the parties to settle the case *inter-se* prior to the CCI directing an investigation, thereby allowing the informant to withdraw the information filed, or make the option of settlement available to the party(ies) at a later stage as well (including when the commitment mechanism is available). This proposal is in consonance with the decision of the Bombay High Court in *Nhava Sheva International Container Terminal Private Limited v. The Union of India*[2] where the Informant was allowed to withdraw its information after the parties had amicably settled the dispute.

[1] OECD (2016), Commitment Decision in antitrust cases, available at: https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf

[2] (Civil W.P. 14277 of 2018), dated 6 August 2019.

ISSUES AND OBSERVATIONS	SUGGESTIONS
IV. Additionally, there is no clarity if a compensation claim can be made if a party has opted for such a mechanism. Under the Draft Bill, settlement or commitment mechanism can be availed prior to a final order being passed by the CCI under section 27 or 28 of the Competition Act. In the event, this mechanism is availed successfully by the party(ies), there shall not be a final order of the CCI. Whilst the Draft Bill states that there cannot lie an appeal against any order passed by the CCI for settlement or commitment, it does not clarify whether a compensation claim can lie against a settlement or commitment order. As under the Competition Act, an application for compensation claim can be filed only against the final order of the CCI, the Draft Bill should clarify that there cannot be a compensation claim against a settlement or commitment order.	III. **Settlement and commitment mechanism should be without prejudice**: The Draft Bill should clarify that settlement and commitment mechanism is without prejudice. IV. **No compensation claim**: The Draft Bill should explicitly clarify that no compensation claims can lie against the party which has opted for a settlement or a commitment mechanism. Allowing compensation applications would defeat the purpose as a party would be discouraged from opting for this mechanism.

1.1. Specific Comments on Settlement Mechanism

Section 48A. (3) *The Commission may, after taking into consideration the nature, gravity and impact of the alleged contraventions, agree to the proposal for settlement, on payment of such sum by the applicant and/or on such other terms as may be determined by the Commission in accordance with the regulations made under this Act and specify the manner in which the settlement terms will be implemented and monitored in accordance with the regulations made under this Act. An application under sub-section (1) or any order by the Commission under this sub-section shall not be construed as admission of or findings on contravention of the provisions of the Act by the applicant or the Commission, as the case may be.*

Section 48A. (4) *If the Commission is of the opinion that the settlement offered under sub-section (1) is not appropriate in the circumstances or if the Commission and the party or parties concerned do not reach an agreement on the terms of the settlement within the time specified by regulations, it shall pass an order with reasons rejecting the settlement application and proceed with its inquiry under section 26 of the Act. Provided that an order of rejection under this sub-section shall not be relied upon by the Commission or the applicant in such subsequent inquiry under section 26 of the Act.*

Section 48A. (8) *Subject to the provisions of section 48C, once the Commission has passed an order under sub-section (3), no cause of action, including under Section 53N of the Act, shall arise from the same conduct of the party or parties who entered into a settlement with the Commission.*

Comments and recommendations:

While the introduction of a settlements mechanism is a welcome development and in line with the practice in more developed competition law regimes in the European Union and the US, the proposed amendment could be made more effective if the following issues are addressed:

- Further, a party offering settlements should be protected from any prejudice during a subsequent inquiry under Section 26 (should the settlement process fail). With prejudice settlements are unlikely to be attractive in the spheres of abuse of dominance or vertical restraints where the impacts of conduct are not always clear cut. And we would not expect parties under investigation to circumscribe their rights to a full CCI process and appeal for a with prejudice decision. Accordingly, we propose that any settlement be without explicit or implicit prejudice (i.e., no admission of contravention, no payment of penalty, and a requirement on CCI to make clear in any decision that the settlement does not constitute a finding of contravention).
- In the same vein, under the current structure, parties will be concerned that submitting settlement offers will impact their prospects in a case (in particular because the settlement can be rejected). This is primarily because the existence of the offer will be known to the entire Commission and this may prejudice or colour their perspective of the merits under a full procedure. We propose that settlement offers should be confidential to, and submitted to, a subset of the full Commission, who decides whether they are acceptable. That subset should be recused from further involvement in the case, in particular if the settlement does not go forward.
- Clarify whether the submission and/or acceptance of settlement would lead to a finding of contravention of CA02. Since parties will consider the reputational damage from an infringement finding before offering a settlement, it will be more effective if a settlement could be offered without a finding of contravention. This is especially important since the CCI has wide discretion in accepting or rejecting the parties' proposal and the CCI's order accepting or rejecting the proposal would be non-appealable.
- Clarify that once settlements are accepted by the CCI, no follow-on damages/ compensation applications can be filed against parties regarding the identified contravention(s) where settlements are accepted by the CCI. This would encourage parties to opt for settlements. One of the criteria to accept or reject settlements is the impact of alleged contravention and circumstances of the case. If the impact of a potential contravention is wide-ranging (that might lead to significant follow-on action), the CCI has the power to reject the settlement application. However, given that the aim of a settlement process is to avoid protracted litigation, the possibility of a follow-on claim should be barred.
- Further, a party offering settlements should be protected from any prejudice during a subsequent inquiry under Section 26 (should the settlement process fail). With prejudice settlement are unlikely to be attractive in the spheres of abuse of dominance or vertical restraints where the impacts of conduct are not always clear cut. And we would not expect parties under investigation to circumscribe their rights to a full CCI process and appeal for a with prejudice decision.

1.2. Specific Comments on Commitments Mechanism

Section 48B. (2) *An offer for commitments under sub-section (1) may be submitted at any time after an order under sub-section (1) of section 26 has been passed by the Commission but within such time prior to the receipt by the party of the report of the Director General under sub-section (4) of Section as may be specified in regulations made under this Act.*

Once a party which is being investigated intimates to the CCI its willingness to offer commitment, the Director General shall issue a report on preliminary findings within such time as may be established by the Commission. Such preliminary findings along with the records available with the DG shall be made available to the party offering commitments."

Comments and recommendations:

We welcome the proposal to provide parties the ability to offer commitments to avoid protracted investigations since this will benefit both the competition agency and the investigated party. However, the proposed amendment would require some modifications to be effective.

- The Draft Bill allows a party to offer a commitments proposal after the initiation order is issued but before receipt of DG's investigation report. Not allowing parties to offer commitments after submission of the DG's investigation report impedes the ability of the parties to weigh their options. This is because during the investigation by the DG, parties are not in a position to assess the outcome of the investigation or theories of harm (if any) that may be applied by the DG. Accordingly, any commitments offered at this stage are likely to be speculative. The possibility of a party offering commitments despite a potentially favorable report cannot be ruled out. Additionally, without a reasonable understanding of the DG's / CCI's concerns, parties will not be in a position to offer meaningful/comprehensive commitment terms. This could result in protracted negotiations with the CCI / outright rejection of terms of commitment offered by parties.
- The MCA may consider inserting a provision where the DG can furnish the preliminary findings of the investigation. This should give parties a sense about the alleged anti-competitive conduct and theories of harm applied by the DG. This would also enable the parties to offer a more directed commitment proposal to address specific concerns of the DG/CCI.

"Section 48B. (3) *The Commission may, after taking into consideration the nature, gravity and impact of the alleged contraventions and effectiveness of the proposed commitments, accept the commitments offered, without recording any finding of contravention, and specify the manner in which the commitments will be implemented and monitored along with any other terms as may be determined by the Commission in accordance with the regulations made under this Act."*

"Section 48B. (4) *If the Commission is of the opinion that the commitment offered under sub-section (1) is not appropriate in the circumstances or if the Commission and the party or parties concerned do not reach an agreement on the terms of the commitment within the time specified by regulations, it shall pass an order rejecting the commitment application and proceed with its inquiry under section 26 of the Act. Provided that an order of rejection under this sub-section*

shall not be relied upon by the Commission or the applicant in such subsequent inquiry under section 26 of the Act.

Comments and recommendations:

- Further, the provisions on commitments in the Draft Bill are also unclear on whether the CCI might make an infringement decision after accepting commitments. For the proposed amendment to be effective, it is essential that once commitments which are accepted by the CCI, no final finding of contravention should be made by the CCI. Commitment orders issued by the European Commission (**EC**) do not make an infringement finding and do not require an admission from the parties. The CLRC Report recorded this issue in its deliberation on commitments.
- Further, a party offering for commitments should be protected from any prejudice during a subsequent inquiry under Section 26 (should the commitments process fail).

"Section 48B. (8) *Subject to the provisions of section 48C, once the Commission has passed an order under sub-section (3), no cause of action, including under Section 53N of the Act, shall arise from the same conduct of the party or parties who entered into a commitments agreement with the Commission."*

Comments and recommendations:

- In line with our recommendations above on the settlements provisions in paragraph 4(b) , once the CCI has accepted commitments, no compensation applications should be filed against the parties. If the parties were to face claims for follow-on damages after submitting the commitments, it would disincentivise parties to come forward with an offer of commitments. The MCA must consider clarifying this expressly.

2. Introducing "effects-based approach"/ "objective justification" test in the assessment of abuse of dominance under Section 4 of the Competition Act

The current scheme of the Competition Act does not mandate establishing harm to competition as a substantial test for establishing infringement. The Report states that an effects-based test is not necessary as the Competition Act also includes exploitative conduct within the scope of the abuse of dominance.

ISSUES AND OBSERVATIONS	SUGGESTIONS
I. The Committee's observation that an effects-based approach is not necessary in the implementation of Section 4 of the Competition Act is at loggerheads with the very essence of the Competition Act. Perusal of the history and stated objectives of the Competition Act clarifies that its	**I. Legislative requirement for an effects based for unilateral conduct:** While regulating either exclusionary or exploitative

ISSUES AND OBSERVATIONS	SUGGESTIONS
intended purpose is to maintain market integrity. Penalizing conduct that has no adverse effect on the market flies on the face of its objectives. This also raises the risk that the actions of an enterprise that are merely calculated to respond to competitive constraints placed by the market will be caught within the ambit of Section 4 of the Act. The CCI also loses time and valuable resources in its attempt to investigate such false positives. Therefore, the legislative intent behind the Competition Act will be better served by incorporating an effects-based test within Section 4. **II.** The enhanced focus on ease of doing business requires a competition law regime which promotes efficiencies, innovation and technological growth for the benefit of the free market. Through an effects-based approach/objective justification test to cases under Section 4 of the Competition Act, there shall be a balance between the need to arrest competition distorting behaviour by enterprises, and the need to promote healthy competition. As is evident from the position in other jurisdictions, the concept of objective justification is intrinsically linked with the 'effects' based approach. Therefore, suggesting that an effects based test is unnecessary is antithetical to the growth of the economy, as concluding abuse of dominance of an enterprise where the effects based test is not satisfied or where there are objective justifications, will discourage businesses. **III.** An effects-based approach/objective justification test takes into consideration the nature of the industry and the market structure in which the firm operates. It also attempts to understand the economic rationale for such actions and their relevance in the context of the firm's current competitive strategy. Adoption of an 'effects' based approach would also be in line with the principles enunciated in the Raghavan Committee Report.	conduct, some threshold / effects test should be factored in while assessing whether certain conduct can amount to an infringement. This will also avoid consumer disputes or business disputes from being brought before the CCI as the competition law is meant to protect the process of competition and not any one competitor or consumer. Further, it will also allow the CCI to not investigate false positives, and in the process conserve its resources.

2.1. Specific Comments on Effects-based Approach in Abuse of Dominance Cases

"Section 4(2). *There shall be an abuse of dominant position under sub-section (1) if any of the following conduct of an enterprise or a group causes or is likely to cause an appreciable adverse effect on competition within India - ..."*

Comments and recommendations:

The CCI has thus far been inconsistent in application of an effects-test in abuse of dominance cases. Further, given the plain wording of Section 4, the CCI is not obliged to assess the objective/business justifications advanced in defense of allegedly abusive conduct. We believe that it is important to have an effects-based test in assessment of all abuse of dominance cases. This is because:

- The purpose of the Act (as stated in the Preamble) is "*to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India*."
- Section 18 of the Act (Duties of the Commission) provides that "*it is the duty of the CCI to "eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*."
- The Raghavan Committee, the legislative committee which devised the Act, made clear that "*The Competition Bill, 2001 seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India*."
- The CCI legal standard is not consistent with the European or American legal standard.
- The formulaic interpretation of Section 4 by the CCI in prior cases has led to errors and inconsistencies (for example, in the treatment of 'take or pay' clauses and 'minimum guarantee off-take' (**MGO**) clauses).
- Effects are critical in exploitative cases too, as recognized by courts in other jurisdictions. For example, in Case C-525/16, *MEO v GDA,* the ECJ confirmed that competitive detriment is a requirement in discriminatory pricing cases.
- An economics-focused approach to abuse of dominance cases serves several complementary goals: first, it limits a company's ability to find a way to achieve the same results by using alternative commercial practices. Second, an effects-based approach does not undermine procompetitive strategy, but takes into consideration a variety of effects that may distort competition or promote efficiencies and innovation in different circumstances. Therefore, an effects-based approach facilitates more consistent and predictable enforcement and adopting this framework would better facilitate deterrence, resulting in "higher quality" decisions. The CCI should seek to identify effects in antitrust cases to avoid form-based infringements that often lead to Type 2 errors by impugning procompetitive or efficiency enhancing conduct.

In this background, we submit that incorporating an effects-based test within Section 4 of CA02 is critical.

*"**Section 19(3)** The Commission shall, while determining whether an agreement referred to in section 3 or conduct of an enterprise or a group referred to in section 4 has an appreciable adverse effect on competition, have due regard to all or any of the following factors, namely:- . . ."*

Comments and recommendations:

- In line with our proposal above, Section 19(3) should be amended to include reference to Section 4 the CA02.

3. Merger Control- Additional Notification Thresholds

Under the Competition Act, the sole test of notifying a transaction can be found under Section 5 of the Competition Act, which lays down an asset and turnover based threshold.

The Draft Bill envisages to prescribe additional notifiability criteria by adding a proviso to Section 5 of the Competition Act. This will allow the Central Government to prescribe additional criteria under which a transaction will become notifiable, over and above the asset/turnover thresholds.

This provision directly addresses the observation in the Report that high value transactions in digital markets can escape merger control in jurisdictions, such as India, that relied on asset/turnover review thresholds. The Committee recommended empowering the Central Government through an enabling provision, to formulate additional criteria for notification of transactions to the CCI. Specifically, deal value thresholds (***DVT***) had been recommended in the Report as a possible additional threshold.

ISSUES AND OBSERVATIONS	SUGGESTIONS
I. The Committee recommended additional thresholds to address enforcement gap, especially in the context of certain large acquisitions that had previously escaped the CCI's review process. However, the lack of a detailed assessment as to how these transactions distorted the competitive landscape in India, which would necessitate an ex-ante review or whether the CCI would have blocked such transactions or directed remedies had those been notified, merits scrutiny. II. Therefore, it is necessary to assess the effects of the enforcement gap, because without such an assessment, any additional notification threshold may disproportionately and significantly increase compliance costs, reduce the ease of doing business in India	In the event, the Government wishes to introduce additional thresholds, we suggest the following steps must be considered: I. **In-depth study on additional notification criteria:** If the Government is still introducing additional criteria for notification of a transaction to the CCI, a comprehensive study should be conducted prior to the introduction of any additional thresholds. Clear and comprehensive guidance on the same should also be provided in the main legislation. II. **Comprehensive guidance in the Competition Act**: Any additional criteria for notification of transactions to the CCI should be clearly defined in the Competition Act. Formulation of such additional criteria (by the Government) in consultation with the CCI periodically makes such thresholds open-

ISSUES AND OBSERVATIONS	SUGGESTIONS
and not lead to any quantified gains to competitors or the consumers in India. III. In fact, specifically on DVT, the Organization for Economic Co-operation and Development (***OECD***)[3] has stated that, a DVT alone "*is unsuitable to determine whether a transaction will have an impact on a specific jurisdiction.*" The Report itself recognizes that there are "*practical and operational challenges"* in formulating the DVT. IV. Further, it is proposed that the additional thresholds shall be introduced through rules formulated by the Government. In the absence of any set guidance in the primary legislation, such a provision will create uncertainty in the market. Thus, it is imperative to identify and codify any framework for merger thresholds in the Competition Act.	ended, leading to uncertainty. Therefore, delegated legislations such as rules and regulations and / or notifications issued by the CCI and the Government, as the case maybe, should only supplement the provisions in the main legislation. As recognized by the International Competition Network (***ICN***), "*clarity and simplicity are essential features of well-functioning notification thresholds*".[4] Considering the increasing number of multi-jurisdictional transactions requiring notification, the parties to the transaction and the competition authorities would be better served by "*clear, understandable and easily administrable bright-line tests*".[5] There should also be appropriate guidance on included/excluded elements and the proper geographic allocation of sales and/or assets.[6] III. **Public consultation**: The determination of additional thresholds should be undertaken only after constructive engagement with the public and other stakeholders, since such amendments will have a direct and significant impact on the various stakeholders. Such deliberative processes ensure that the changes to the existing regime are practical and productive. This process is routinely employed by the Government and several industrial and regulatory bodies (including the CCI), such as: • On 12 Feb 2020, the Draft Arbitration Council of India (***ACI***) Rules were issued for public consultation.[7] • On 3 February 2020, the Securities and Exchange Board issued a Discussion Paper inviting comments on the proposed amendments to the

[3] OECD, Local Nexus and Jurisdictional Thresholds in Merger Control, paragraph 53, 27 July 2016, available at: https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf.

[4] ICN's Recommended Practices for Merger Notification and Review, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[5] *Ibid* at II(D)(Comment 1).

[6] *Ibid* at II(E)(Comment 3).

[7] https://pib.gov.in/newsite/PrintRelease.aspx?relid=199268

ISSUES AND OBSERVATIONS	SUGGESTIONS
	Securities and Exchange Board of India (Substantial Acquisition of shares and takeovers) Regulations 2011.[8] • On 17 December 2019, the Telecom Regulatory Authority of India issued a consultation paper on 'Tariff Issues of Telecom Services' inviting comments from the stakeholders.[9] • On 14 August 2018, the Ministry of Electronics and Information Technology invited comments on the Draft Personal Data Protection Bill.[10] IV. **Comprehensive guidance on DVT**: The guidance around any additional thresholds must be structured clearly and comprehensively. Illustratively, in the event, DVT is part of the additional criteria for notification of transactions, the following needs to be considered: • **How to compute the deal value**: There has to be a comprehensive guidance on the computation of deal value detailing inclusions and exclusions. The German and Austrian competition authorities have, for instance, issued joint guidance[11] on the computation of deal value which covers various issues such as calculation of the value of consideration in cash, securities and asset swap transactions, details on when the target is considered to have substantial domestic operations, etc. • **Local nexus requirement**: As proposed in the Report, the DVT should be structured in a manner so as to have a clearly defined local nexus requirement. This is also reflective of jurisdictions which have adopted DVT (for example: Germany and Austria which have adopted a DVT with a local nexus

[8] https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=4&ssid=38&smid=35

[9] https://main.trai.gov.in/sites/default/files/PR_No.10of2020_0.pdf

[10] https://meity.gov.in/content/feedback-draft-personal-data-protection-bill

[11] https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2

ISSUES AND OBSERVATIONS	SUGGESTIONS
	requirement). In the absence of a local nexus requirement within the DVT, CCI may have to assess deals without any plausible need for such an assessment to take place in India. The ICN and OECD also recommend this. A local nexus test could also be achieved through introducing (a) a foreign-to-foreign exemption, and (b) target turnover / presence criteria which is covered under the *de minimis* exemption. • **Control as a trigger for notification**: DVT should not be applicable to all types of acquisitions. Unlike the German and Austrian merger control regimes, acquisition of control or some form of competitively significant influence is not a pre-requisite to notifiability in India. The introduction of a DVT in the absence of such a pre-requisite could result in the CCI being overwhelmed by transactions with no impact on the market and exacerbate the risk of false positives. it is therefore necessary to introduce, in parallel, the acquisition of control or, a change in control test, as a pre-requisite to notifiability in India if a DVT is to be introduced.

4. Merger Control – *De Minimis* Thresholds

International best practices demonstrate that competition authorities usually assert jurisdiction only over those mergers that have a material nexus with their jurisdiction.[12]

Section 54(a) of the Competition Act empowers the Central Government to issue exemptions. Through a separate notification in 2011, the Government notified the *de minimis* target based exemption which has been revised by subsequent notifications passed in 2016 and 2017. Such thresholds have adequately identified the material nexus for transactions in India.

In line with the recommendations in the Report, the Draft Bill seeks to codify these *de minimis* thresholds. The Draft Bill envisages a proviso to be added to Section 5 codifying the *de minimis* target based exemption. It states that the Government in consultation with the CCI may prescribe the value of turnover and assets

[12] ICN's Recommended Practices for Merger Notification and Review, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

ISSUES AND OBSERVATIONS	SUGGESTIONS
I. The Draft Bill while incorporating the target-based exemption, fails to provide any guidance in this regard. The absence of a comprehensive guidance around the *de minimis* target based exemption may create uncertainty for business enterprises.	I. **Clearly defined guidance in the Competition Act**: The thresholds, which determine if a transaction is eligible for availing an exemption from notification to the CCI should be defined clearly before being incorporated into the Act. Illustratively, the framework as identified in the Government notifications could be codified in the main legislation. It is also important that there is flexibility to modify these thresholds periodically to make these relevant with the changing landscape. For this purpose, rules could then be formed by the Government to suitably adjust these thresholds. Such a mechanism would ensure a balance between certainty for industry and flexibility for the government. II. **Local nexus requirement**: Target-based exemptions are aimed to establish a local nexus requirement. Till date, the *de minimis* thresholds, as defined by the Government have provided appropriate material nexus. Any target-based exemptions which will be codified should follow the same principles**.** III. **Public consultation**: **Public consultation**: Changes to the asset and turnover thresholds should be undertaken only after public and stakeholder consultations because these will have a direct and significant impact on various stakeholders.

5. Scope of DG's power

The Draft Bill proposes to introduce new sub-sections under Section 41 of the Competition Act which, amongst other things, allows the person to be imprisoned for a term not extending six months or a fine of INR 1 crore or both if he fails without reasonable cause or refuses to: (i) provide the DG with a document, paper, etc. in his possession; or (ii) appear personally before the DG; or (iii) answer any question during examination on oath; or (iv) sign the notes on examination on oath.

ISSUES AND OBSERVATIONS	SUGGESTIONS
I. Through the proposed amendment, the DG's power has been significantly expanded. Such	I. **Deletion of criminal liability in the proposed Section 41(8)**: We recommend that the proposed

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expansion may not be necessary as the existing provisions are sufficient to impose criminal sanctions. Sections 42 and 43 of the Competition Act already provide for criminal liability and imposition of a fine on persons failing to comply with the directions of the CCI and the DG respectively. In light of this, there is no requirement for an additional criminal liability to be imposed, as is sought to be done through the proposed amendment. **II.** Further, in order to protect the rights of the parties and to protect the provisions from judicial review, it is essential to codify the rights of the party subject to a DG investigation. This has the effect of balancing the powers of investigation *vis-à-vis* the right to defence of an opposite party. Further, the scope of DG's powers to conduct such in-depth investigations needs to be scrutinized and suitably limited. This is because the DG always has the recourse of issuing notice to the parties to seek information or examine them on oath by issuing summons.	criminal liability in Section 41(8) should be deleted as the existing provisions of the Competition Act, already provide for criminal sanctions. In any event imposition of criminal liability should be the last resort. Notwithstanding, amended provisions should first attach liability in the form of monetary penalty and if there is repeated failure to comply with directions, only then should criminal liability be attached, as is the current scheme of the Competition Act. Additionally, any imposition of criminal liability, must require a warrant from the Chief Metropolitan Magistrate as provided for under Section 42 of the Competition Act. II. **Right to cross examination**: Currently, the right to cross examination is provided under Regulation 41 of the Competition Commission of India (General Regulations), 2009, which is a delegated legislation. In line with the several judicial precedents which recognize the party's right to seek cross examination,[13] the draft Bill should explicitly codify the right to cross examine the person whose statement is recorded by the DG under the proposed Section 41(6). III. **Codification of the rights of parties during dawn raids conducted by the DG under the amended Section 41**: It is suggested that the amendments should also provide the rights of the parties being subject to dawn raids by the DG, such as: • The parties may insist on the presence of their legal representatives during all

[13] *Forech India Limited v. Competition Commission of India & Anr*, 2016 SCC OnLine Del 5379; Cadila *Healthcare Limited v. Competition Commission of India*, 2018 SCC Online Del 11229.

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	the processes of the dawn raid, that is, search of the premises, etc. • The parties may request the DG and its officers to become acquainted with the subject matter of the proceedings and rationale for the conduct of inspection. • The parties may insist on being present during the inspection and communicate with the officers of the DG, in order to explain the content of the documents collected during the dawn raid. • The documents which are to be treated as legally privileged such as professional and confidential communications with legal advisors, may be requested to be specifically marked and separated from the materials collected during the dawn raid. • The parties may request for copies of the minutes of the dawn raid from the officers of the DG.

6. Appointment of DG

While the office of the DG has not been merged with the CCI as proposed in the CLRC Report, appointment of the DG by the CCI may take away some functional autonomy of the DG. The Raghavan Committee Report had recognised that the prosecutorial wing should be separated from the investigative wing. The CLRC Report itself recognised that although an integrated agency model may provide greater expertise in adjudication, it may also mean a higher chance of confirmation bias by CCI (as an adjudicating authority). Accordingly, we believe that the proposed amendment is likely to affect the independence of the investigation process.

Given that the Draft Bill and the CLRC Report clarify that the CCI and the office of the DG would maintain functional autonomy, we disagree with the proposed amendment. Accordingly, we submit that the power to appoint the DG continues to vest with the Government.

7. Alternative thresholds for combinations:

The proposed amendment to Section 5 of the CA02 contains an enabling provision that empowers the Government to introduce “necessary” thresholds. This could include a deal-value/market-share based threshold to catch those transactions that have a significant economic link to India.

Comments and recommendations:

We submit that the proposed enabling provision under Section 5 is too broad and gives the Government unfettered power and discretion to set thresholds without any guidance.

- The International Competition Network (ICN) recommends that merger notification thresholds should be clear, objectively quantifiable, based on material that is readily accessible to the parties and have a material nexus to the reviewing jurisdiction. The current proposition in the Draft Bill provides no clarity on how the thresholds would be set and provides too much discretion with the CCI to devise parameters for deciding such alternative thresholds. We also can't rule out the possibility of the thresholds being changed frequently to "catch" different categories of transactions.
- It is proposed that the thresholds for notification should be part of the CA02 itself. Jurisdictions like Germany and Austria that introduced alternative thresholds based on transaction value also included them in the principal legislation. Although the value of the thresholds may vary with time due to economic and/or policy considerations, the criteria applied cannot be uncertain.
- We submit that the existing assets and/or turnover based thresholds are adequate to determine notifiability of combinations as these are objectively quantifiable and determinable. Further, there is no enforcement gap identified which would necessitate introduction of alternative thresholds. At a minimum, any change in thresholds should require sufficient public notice and possible safeguards to prevent frequent shifts.
- In addition, the proposed amendment to definition of "control" under CA02 widens the test to "material influence", in any manner whatsoever, over the management or affairs or strategic commercial decisions by one or more enterprise/group over another. This is a lower standard than the decisive influence standard applied internationally, for example, the European Commission, Germany etc.
- The proposed amendment to change the control standard to "material influence" may unduly decelerate transactions where there is no concentration of business strategies or structural changes. Control is one of the three alternative elements to determine whether an enterprise is part of a "group" under the CA02. Accordingly, lowering the standard of control would expand the number of enterprises that come within the scope of a group. This may lead to uncertainty on applicability of the merger thresholds and exemptions, assessment of overlaps by the CCI etc.

We propose that the definition of control is amended to incorporate the test of decisive influence.

8. Separate hearing on penalty

"Section 27. - ...(g) *(after first proviso) ……*

Provided further that the Commission shall give the party an opportunity to be heard before passing any order under this section."

Comments and recommendations:

We welcome that the Draft Bill requires the CCI to mandatorily issue guidance on calculation of penalties. However, the Draft Bill does not contain any provisions on providing for a separate hearing for imposition of penalties.

In the interest of transparency, CA02 should also be amended to incorporate a provision providing the opportunity of a separate hearing for penalty or any other order under Section 27 that the CCI may pass. This would give an opportunity to parties to make arguments for mitigation or discuss a remedies proposal if the CCI has decided to impose a penalty or issue remedies.

9. Dedicated bench to hear competition cases at NCLAT

"Section 53A (1) *The National Company Law Appellate Tribunal constituted under section 410 of the companies Act, 2013 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purpose of this Act and the said appellate Tribunal shall constitute a Bench to hear appeal under the Act which shall –*"

Comments and recommendations:

- The CLRC Report recommended introducing a specialised bench in the NCLAT for hearing appeals under the CA02 for expeditious disposal of appeals. The current system has at least two benches at NCLAT that hear cases under multiple legislations. The Draft Bill does not contain provisions incorporating this recommendation of the CLRC Report.
- It is submitted that the Government itself has recognised that the NCLAT is overburdened with appeals from various legislations and has been trying to introduce additional members to expeditiously adjudicate competition appeals. Section 53(B)(5) of the CA02 itself provides that appeals filed before the appellate tribunal under the CA02 shall be dealt with as expeditiously as possible and an endeavour shall be made to dispose of appeals within six months from date of receipt. Further, given the CA02 is a complex economics-based law, a specialised bench will be able to issue better reasoned decisions. In any case, prior to the enactment of amendments made by Finance Act, 2017, the Competition Appellate Tribunal (COMPAT) was a dedicated appellate forum to hear appeals under CA02. For these reasons, we believe that constituting a specialised competition bench is imperative.

10. Admission of appeals at NCLAT subject to part penalty

Proviso to Section 53B (2) of the Draft Bill suggests that in cases where the CCI has imposed monetary penalties, an appeal against the CCI's decision to the NCLAT would be admitted subject to depositing 25% (or lower) of penalty amount.

Comments and recommendations:

Depositing a part of the penalty amount has been the NCLAT's practice in any case but it has had discretion both in terms of its application as well as the quantum of the deposit. A legislative requirement to deposit a part of penalty takes away the NCLAT's discretion and may prove to be onerous in certain cases where penalties are imposed on individuals, trade associations, small enterprises, etc. We submit that the MCA should reconsider this proposed amendment since the NCLAT is in any case empowered to ask for depositing a part of penalty amount and therefore, there is no need for a prescriptive legislative change.

11. Other Suggestions

- The Draft Bill proposes to introduce a new section 4A. We understand that under Section 4 A(2) the reference should be to Section 4 instead of Section 3 of the Competition Act.
- The Draft Bill proposes to amend Section 36 of the Competition Act. In Section 36(2) for the words "*this Act"*, the words "*sub-section (4) of Section 22*" shall be substituted. We understand that it should be "*sub-section (3) of Section 22".*
- Keeping in mind best practices and the functional autonomy of the DG based on the principle of separation of powers, there should be an internal division of the executive (investigation) and judicial (adjudication) functions. This is to ensure a fair and independent investigation is possible, and towards this goal it is necessary that the DG's office is independent of the CCI. Accordingly, the DG should not be appointed by the CCI and all required steps should be taken to preserve the independence of the investigative process and strengthen the office of the DG with economists, analysts, competition law experts, etc.
- Regular and constructive public consultation should be called for any proposed changes to the Competition Act and related rules and regulations thereunder, for example, any change to the thresholds specified under the Competition Act. Public consultation ensures that the opinions of relevant stakeholders are factored in and there is a dialogue between them and the Government/CCI. Such deliberation ensures that effective and meaningful changes are made to the competition regime.
- The Competition Act does not provide for a pre-penalty notice and/or an opportunity of hearing to the parties on whom the penalty is being imposed. Therefore, in line with the principles of natural justice, it is essential that the Draft Bill provides for a notice to be given to the parties along with an opportunity of hearing prior to imposition of penalty.

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