

Draft Competition Commission (Amendment) Bill 2020: RSTV – Big Picture

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What's in the News?

- The Indian Government constituted the Competition Law Review Committee in 2018, with a view to update the Competition Act, 2002.
- The Committee submitted its report to the Government in 2019.
- Based on the recommendations made in the report, the Ministry of Corporate Affairs (MCA) has introduced a draft Competition (Amendment) Bill, 2020 to overhaul the Act.
- The notification of the Government invites comments from the public on the Draft Bill until 6 March 2020.
- The Draft Bill proposes certain significant amendments to the Act, including:
 - Imprisonment for non-compliance with directions of the Director General
 - Commitment and settlement procedure in non-cartel cases
 - More expeditious combination review process, and
 - Constitution of a Governing Board for non-adjudicatory functions.

What is the role of the Competition Commission of India?

- **Competition Commission of India (CCI)** is a statutory body of the Indian Government, which is responsible for enforcement of The Competition Act, 2002.
- **The primary objective** of the Competition Commission of India is to promote a competitive environment that is conducive to the free flow of trade, efficiency and innovation that brings more choices and better quality and prices of goods and services to consumers.
- The role of the CCI is to ensure the prevalence of a healthy, and fair competition in the market. It is also responsible for regulating any unfair activities which might have any effect on the competition of the market.

What is the need for the Competition Commission (amendment) Bill 2020?

- Competition laws are required to **ensure fair play and protection** for both the players who are providing the goods and services and for the consumers who are the recipients of the services.
- The Competition Commission of India has existed for more than ten years. During this period it has gathered information regarding the loopholes, weaknesses, procedural issues and mistakes in the Competition Act, 2002.
 - The amendment bill seeks to address such issues, and the amendments are based on the recommendations of the Competition Law Review Committee. It has also taken into account the considerations of the stakeholders.
- The amendments are focussed on facilitating the ease of doing business and lessening the burden of the CCI.

What are the key amendments being proposed?

- One of the key amendments being proposed in the Draft bill is to **strengthen the process of making regulations** within the Competition law.

- The regulations would be followed by open public comments and consultations.
- The formation of the **Governing Board** is intended to introduce some specialization into the CCI.
 - Currently, there are some issues which the CCI is not able to focus on. The bill intends to establish a Governing board (GB), which would be in a position to pay attention to various aspects which were unattended by CCI.
- The draft also proposes the inclusion of a **‘commitment and settlement’ clause** in the Competition Act.
 - The enabling clause will allow those found in contravention of the competition law to “commit” to correct their ways to avoid action even before the investigation is completed.
 - Even in cases where investigation is over, evidence has been found, and the adjudication process has started, the companies can still enter a settlement. The companies will have to pay a certain amount as fine and avoid legal proceedings after ensuring that any anti-competitive practice will be corrected.
- The Bill also includes an updated definition of the word **Cartels**. So far, the word was defined from the viewpoint of the sellers, now the Bill expands the definition of a cartel to include a buyer’s cartel as well.
 - This implies that even in cases of buyer’s cartel, the presumption of **Appreciable Adverse Effect on Competition (AAEC)** will apply to buyer’s cartel as well.
 - Practices in the market that restricts competition, prevents healthy contest, creating unfavorable environment is said to have AAEC.

Cartels

- Section 2(c) of the Competition Act, 2002 defines cartels: “An association of producers, sellers, distributors, traders or service providers who, by agreement themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of the services.”

What are some of the key issues that need to be addressed?

- **Ease of doing business:** The mergers and acquisitions which **would not have an adverse effect on the competition** of the market should have an easier passage through the Commission.
 - This has been addressed through the **“Green Channel”** which was implemented by the CCI.
 - It will facilitate mergers and acquisitions (“Combination”) in the country
 - The CCI characterizes the ‘green channel’ as an automatic system of approval for Combinations wherein the Combination is deemed to be approved upon filing the notice in the format prescribed
 - This system would significantly reduce the time and cost of transactions and thereby contributing towards ease of doing business in India.
- **Open market purchases:** Open market purchases present a dilemma for the buyer. The buyer cannot acquire the shares until the CCI approval, which might take some time, meanwhile, the opportunity for the acquisition of the shares might be lost.
 - The CCI has suggested amendments regarding the same which would allow the buyer to acquire the shares, and put it in an escrow account, provided he doesn’t exercise his voting rights related to the shares, before the final approval.

Who will be benefiting from the recommendations when they are implemented?

- The recommendations would benefit the middle range startups. The startups in the **digital economy** would be greatly benefited.
- Before this draft bill, if there was a merger whose assets and turnover were less than the threshold set by law, but the merger itself is a larger merger with huge valuation, it did not require filing in India.
 - There is now an enabling provision in the bill which suggests such mergers will also have to go through CCI in the future.

- Example: Facebook acquiring Whatsapp
- The amendments will also take action and place strict regulations on the parties engaged in cartels.
 - According to the amendments, a non-competing party which participates in a cartel with a view to facilitate it will also be punished.

What were the deliberations that took place?

- One of the most important topics discussed was how to bring about **certainty**. This will help people know about compliance requirements for mergers and acquisitions.
- **Penalty**: Previously there was uncertainty regarding how much penalty has to be levied as the laws were unclear and most of them were levied due to regulatory interventions.
 - The bill will provide clarification on the penalties to be levied and who would be adjudicating it.
 - The penalty should be proportionate and not inequitable, and the guidelines for the same should be discussed.
- **Abuse of dominance** is based on “**rule of reason**”: This principle of “Rule of reason” is usually practised in many competitive jurisdictions.
 - According to it, if there is a company which is dominating the market through its anti-competitive practices but at the same time contributing beneficially, the competition commission then will have to look at upsides and downsides.
 - If the activities which are beneficial in nature outweigh the adverse effects, then the competition commission will decide whether or not the practice should be prohibited.
 - But in the Indian **competition act**, dominance is usually treated as a violation which is contrary to other competition jurisdiction.

Way Forward:

- The judiciary needs to understand the role of the Competition Commission of India as an economic regulator. Going forward there should be a better understanding between them, which can be achieved through interaction.
- Economic tools can be introduced to determine the abuse of dominant positions. This will bring in certainty and certainty is the hallmark of the rule of law.
 - Example: Herfindahl-Hirschman Index measures the market concentration of an industry.
- The Government should also use public feedback to make decisions in the future.

