CUTS' Comments on the Competition (Amendment) Bill, 2022

Submitted to the Parliament Standing Committee on Finance

At the outset, CUTS welcomes the Competition (Amendment) Bill, 2022, ('the Bill') in particular, the introduction of a framework for 'settlement' and 'commitment' in the law; improving the leniency framework; introduction of 'limitation'; introduction of deal value threshold for M&A notification; recognition of 'hub and spoke' cartels etc. All these are likely to reduce case load on the Competition Commission of India (CCI) as well as enhance ease of doing business.

There are, however, certain provisions of the Bill that may need reconsideration. There may also be certain additions, which have not been addressed in the Bill. CUTS submits the following comments on some of the provisions in the Bill, and also on the issues that have not been addressed in the Bill. These suggestions are meant to further improve the functioning of the competition regime in India. CUTS would also like to present the same in person before the Committee.

Comments on the select provisions of the Bill

1. **Definition of 'control' [Clause 6 of the Bill]**

The amendment with respect to the explanation of the term 'control' is fine. However, it could be better if some guidance in form of illustration could be given on what would constitute 'material influence'. The Competition Law Review Committee in paragraph 2.6 of its report also recommended that the subordinate legislation may list certain minority rights, the acquisition of which would not be considered to confer material influence and hence control. This was done to ensure that there exists legal certainty on what constitutes control.

Accordingly, the Committee may recommend the introduction of guidance on the interpretation of the term "material influence", by way of regulation, in the interest of maintaining the ease of doing business. This is particularly relevant given the current interpretation of "material influence" makes it difficult for parties to engage in even routine transactions in the absence of any guidance on the rights that constitute material influence.

Guidelines to interpret 'material influence' may be added

2. Appointment of DG by CCI [Clause 12 of the Bill]

The Bill seeks to change the existing mechanism of the Central Government responsible for the appointment of Director General (the investigative arm of the Competition Commission of India - CCI). The Bill proposes that the Commission will appoint the DG, with prior approval of the Central Government. This amendment could blur the line between investigative arm and (quasi) adjudication arm of the CCI, which in turn can disturb the existing checks and balance. The amendment goes against the intent of the legislature which has envisaged a separation of powers between the DG and CCI – as is evident in the power of the DG to conduct an independent unannounced search and seizure under Section 41 of the Act (after obtaining approval from the Chief Metropolitan Magistrate), without taking any approval from CCI.

This amendment could impact the arm's length functioning of DG and hence could compromise the independence of investigation. It may also be noted that the Bill empowers the DG with greater powers for seeking information.

It is, therefore, recommended that this provision should be reviewed and more expert insights invited. It would be better proposition if 'the Central Government appoints DG in consultation with the Commission'.

3. Introduction of Limitation [Clause 14 of the Bill]

The Bill proposes that the CCI shall not entertain an information (or reference) unless it is filed within three years from the date on which the cause of action has arisen.

While the introduction of 'limitation' is appreciated, the same may begin from the 'date of knowledge' with respect to 'anti-competitive agreements' instead from the 'date of cause of action'. A proviso can be added to make an exception for cartels. Because cartels are not only hard to detect and are most damaging to consumers, there is some sort of criminality also involved with this (limitations does not apply to criminal cases).

Consumers must be compensated for the harm done due to cartels even if the same operated more than three years ago. Exempting cartels from limitation will also keep the deterrence part intact, which is the main reason for exemplary fines in such cases.

Add a proviso to Clause 14 in order to exempt cartels from application of this clause.

4. Provisions to deal with regulatory overlap [Clauses 16 and 17 of the Bill]

The Clauses 16 and 17 of the Bill, by amending S.21 and S.21A of the Competition Act, 2002, seek to address an important, yet long pending, issue of jurisdictional overlap between sectoral regulators and CCI.

In 2011, CUTS International came out with a detailed report[1], commissioned by the Ministry of Corporate Affairs, on the overlap-conflicts between sectoral regulators and competition authorities. According to the study:

> *"Both competition agencies and sector regulators have a common objective of promoting economic growth through pro-competitive regulation. Regulators often focus on preventing "excessive pricing" through regulation of tariffs, ensuring access to essential facilities and ensuring that barriers to entry are reduced which are also shared by competition authorities. Given their roles, it is therefore also necessary for governments to ensure that a "competition culture" encompasses the functions of both sector regulators and competition authorities.*

[1] Harmonising Regulatory Conflicts; 2011, CUTS International; http://callolcoca.com/wp-content/uploads/2012/11/Harmonising-Regulatory-Conflicts111.pdf

"Despite sharing a common goal, it needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Technical regulation is generally a structural issue, while competition enforcement qualifies as a behavioural issue. Thus, sector regulators are primarily responsible for structural and ex ante issues, while the competition authority looks into the behavioural and ex post issues.

"[I]n India, while the current framework rightly provides for consultations between two regulatory authorities, it is not adequate as the opinions of authorities in these matters are not binding. Furthermore, sectoral laws are highly inconsistent with one another in that while some clearly define the different roles to be played by both authorities, others have conferred powers on the sector regulator to look into competition matters.

"Much ground was covered in the 2007 amendments to the Competition Act. While the original law permitted reference to Competition Commission of India (CCI) by a sector regulator only when any party requested for it, now the regulator can refer suo motu as well. The amendments also inserted the requirement of recording reasons for disagreeing with CCI. Furthermore, in efforts to enhance mutual cooperation, Section 21A, a mirror image of Section 21, applicable to reference by CCI to sector regulators was also inserted. However a glaring loophole continues to remain in this framework because the opinions received from consultations under sections 21 and 21A are not binding.(emphasis added)

The Standing Committee on Finance (15th Lok Sabha) had also looked into this matter in detail while deliberating upon the Competition (Amendment) Bill, 2012[2]. The Bill sought to replace 'may' with 'shall' in Sections 21 and 21A of the Competition Act, 2002. The Committee, after taking into account evidences of various stakeholders, had made the following recommendation with respect to the issue of jurisdictional overlap in its Report:

79. The Committee note that the existing provision for consultation between statutory authorities and CCI in respect of matters falling within their respective jurisdiction is

[2] See pages 35 to 39 of the Eighty-Third Report of the Standing Committee on Finance (2013-14) on the Competition (Amendment) Bill, 2012; At: https://eparlib.nic.in/bitstream/123456789/64190/1/15_Finance_83.pdf#search=Competition%20(Amendment)%20Bill%202012

voluntary. The Bill proposes to amend Section 21 to make it mandatory for statutory authorities to make a reference to CCI if the decision taken or proposed to be taken by statutory authority is or would be contrary to any of the provisions of the Competition Act. Similarly, the Bill proposes to amend Section 21 A to make it mandatory for CCI to make a reference to a statutory authority if the decision taken or proposed to be taken by CCI is or would be contrary to any provision of the Act, whose implementation is entrusted to that statutory authority. The Bill also proposes to amend Section 27 to provide that the Commission shall give due regard to the opinion given by the statutory authority. While welcoming these amendments as steps to bring about synergy and coordination amongst different statutory/regulatory bodies, the Committee desire that it may also be statutorily mandated upon both CCI as well as other regulators to state categorically the reasons for disagreement whenever instances of divergence of opinion arise during the consultation process.

Therefore, it should be noted that the solution to the given issue lies in making the consultation framework binding on both sets of regulators, the CCI and the sector regulators. The present Bill falls short of creating such a framework. Hence, the provision may be reviewed by the Committee thoroughly.

This issue assumes importance as cases pertaining to such jurisdictional conflicts are on rise in higher courts. Newer laws and regulators are also on cards, e.g. data protection law and data protection authority. Such regulatory conundrum poses a hindrance in ease of doing business. Moreover, the direct harm from these conflicts is that consumer interest is overlooked, which should be the most important consideration. Sector regulators in India have the power to penalise the commercial entities, but not award compensation to the investor or consumer.

Such jurisdictional conflicts arise due to interpretations of the legislative provisions of the parent statute. These provisions have authorised the sector regulators to protect consumer interest and promote competition, but not curb anticompetitive practices. However, CCI is required to do both and ensure a level playing field, in addition to curbing anticompetitive practices in any sector. The matter becomes more complex when the parent statute adopts ‘non-obstante clause’ –

a standard practice – that gives the law overriding effect over any other legislation (e.g. the Electricity Act).

Further, even in the case of appeals, each sector in India has a different appellate body, unlike, say, in Britain where the Competition Appellate Tribunal is the common appellate body for competition and all utility sector regulators.

The following paragraphs in a recent article[3] put this matter into perspective:

> *"A change in approach is, thus, needed. In many countries, both the competition authority and some sector regulators are in one body. In a large country like India, replacing multiple regulators with a unified regulator is not an option. Also, these specialised regulators bring in a holistic understanding of particular sectors. So, the approach should rather become more cooperative and collaborative.*
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> *The European model follows mandatory consultation between competition authorities and sector regulators. In Mauritius, South Africa and few other countries, the sector regulators and competition authorities have to enter into memoranda of understanding (MoUs) to harmonise their jurisdictional powers. Analysis of competition issues in the market – collusion, predatory pricing, market power, etc – should be left in the hands of CCI. The sectoral regulators do not have the resources and appropriate tools to deal with competition issues in the market.*
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> *This model would also ensure non-duplicity of competition enforcement, legal certainty and promote the integrity of CCI. Sector regulators should be rather involved with forecasted technical regulations and structural issues, such as tariffs, third-party access, safety standards and entry-exit conditions. This collaborative model will prevent forum-shopping and deter players from circumventing rules to abuse market dominance. A forum can also be established for regular exchange of ideas between CCI and other regulators.*

[3] Kelkar, V and Mehta, P S; "Whose jurisdiction is it anyway? India desperately needs a regulatory overhaul"; Economic Times, Aug 10, 2022. At: https://economictimes.indiatimes.com/opinion/et-commentary/whose-jurisdiction-is-it-anyway-india-desperately-needs-a-regulatory-overhaul/articleshow/93486382.cms

A close functioning relationship between the competition authority and sector regulators is a reform needed for a better regulatory landscape. This would facilitate ease of doing business, increased investments and economic growth."

In light of the aforesaid, the provisions (Clauses 16 and 17) may be relooked and a proper solution by taking into account experts' views may be offered, which include making consultation framework between CCI and sector regulators mandatory. The word 'may' in the said provisions can be substituted by the word 'shall', and the appeal with respect to competition-related matters from the sector regulators should go to the National Company Law Appellate Tribunal (NCLAT), where appeals from CCI are entertained. (CUTS is, however, of the view that the COMPAT should be revived to entertain appeals on competition and matters arising from orders of sectoral regulators.)

Few proposals to be added as new provisions in the Bill

5. Collective Dominance

The concept of collective/joint abuse of dominance may need to be covered under the Competition Act. There had been an attempt in the past to amend the Act to include the concept of "collective dominance", which was found to be the case while investigating the onion 'cartel' in India few years ago which was an implicit cartel following price parallelism rather than an explicit cartel. A dominant position may be held collectively when two or more legally independent undertakings are linked in such a way that they adopt a common policy on the market (e.g. price parallelism).

Collective abuse of dominance has an explicit legal backing in the EU, as Article 102 (earlier 82) of the EC Treaty has been used by the European and national competition authorities to address collective abuse of dominance.

The Competition (Amendment) Bill, 2012 had sought to include the concept of joint or collective dominance in the ambit. The Standing Committee on Finance (15th Lok Sabha) had looked into

this matter in detail and had recommended in its favour.[4] The recommendation, however, could not be taken up as the Bill lapsed due to dissolution of the 15th Lok Sabha. The Committee had made the following recommendation:

> *41. The Committee note that the Bill proposes to amend Section 4(1) of the Competition Act, 2002 to provide that no enterprise or group 'jointly or singly' shall abuse its dominant position. However, corresponding/consequential changes in Section 4(2), Explanation(a) in Section 4 and Section 19(4) have not been proposed. On being pointed out, the Ministry have furnished divergent views on amending Section 4. Initially, the Ministry agreed to amend the aforesaid explanation, however, subsequently held the view that addition of words 'jointly or singly' in Explanation(a) below Section 4 was not necessary as the proposed amendment in Section 4(1) does not alter the ingredients of the concept of 'dominant position'. The Committee would expect the Ministry to reconcile this divergent position and bring in suitable amendments in the above Section so that there are no ambiguities in the proposed legislation. It is expected that the above amendments will help the CCI in dealing effectively with "collective dominance" cases, especially when firms operate in oligopolistic markets, interacting in a manner resulting in unusually higher prices and profits to the detriment of consumers.*

Amend Section 4 of the Competition Act to include the concept of collective/joint abuse of dominance. S.4(1) and (2) could be amended by adding underlined phrases, as follows:

4. (1) No enterprise or group, alone or jointly with other enterprise or group, shall abuse its dominant position. (2) There shall be an abuse of dominant position under subsection (1), if an enterprise or a group, alone or jointly with other enterprise or group.-- …

[4] See pages 18 to 23 of the Eighty-Third Report of the Standing Committee on Finance (2013-14) on the Competition (Amendment) Bill, 2012; At: https://eparlib.nic.in/bitstream/123456789/64190/1/15_Finance_83.pdf#search=Competition%20(Amendment)%20Bill%202012

6. Reviving COMPAT

In May 2017, the Competition Appellate Tribunal was dissolved and its mandate was bestowed upon the National Company Law Appellate Tribunal (NCLAT). The experience *qua* resolution of appeals from CCI has not been satisfactory in the last 5 years or so. Earlier, COMPAT was also the appellate authority for the Airports Economic Regulatory Authority.

Therefore, the Committee may like to deliberate deeply on the question of reviving COMPAT and also empowering it to hear appeals from all sector regulators.

7. Expanding competition advocacy by including National Competition Policy

World over there is a growing trend in economic concentration, which has been further aggravated with the advent of digital economy (platform economy, data economy). The side effects of this growing concentration on jobs and income of the people is resulting in erosion of the public trust in the competition regimes (and also in the globalisation process), which seems to be failing in checking such concentration.

In the words of noted competition policy expert, Frederic Jenny[5]: *"Competition law enforcement seems to be unresponsive to the perceived injustice of the results of the competitive market system and does not seem to decrease the rising economic inequality which is the foundation of the sense of unfairness. If anything, the actions of competition authorities to promote more competition seem to promote more inequality and unfairness. As a result, economic competition law enforcement comes under criticism from populists both on the right and on the left."*[6]

How to deal with the growing economic concentration and the public fallout because of this? Certainly it would NOT be advisable to go back to the philosophy of the past regime – the Monopolies and Restrictive Trade Practices Act, 1969, which was enacted to ensure that the operation of the economic system does not result in the concentration of economic power in hands of few, to provide for the control of monopolies, and so on.

[5] Chairman of the Committee on Competition Law and Policy, OECD, Paris (since 1994), among many other past and present key positions held worldwide. He also heads the International Advisory Board of the CUTS Centre for Competition, Investment and Economic Regulation (CUTS CCIER).
[6] CPI Antitrust Chronicle, October 2018; www.competitionpolicyinternational.com

It is submitted that the present competition law and its enforcement is more likely to be inadequate to deal with growing economic concentration, and would certainly require much wider competition policy tools. Adhering to competition principles in national and state policies – such as Industrial Policy (including IP Policy), Trade Policy, Data Protection Policy, ICT/Digital Communication Policy etc. – is more likely to counter the menace of growing concentration.

The the 15th Lok Sabha Standing Committee deliberating upon the Competition (Amendment) Bill, 2012 had discussed about the National Competition Policy, and had made the following observations[7]:

> *8. The Committee have been informed that the National Competition Policy to promote Competition Culture amongst all the stakeholders and to promote transparency, is under consideration. On being asked as to how this policy is going to have impact on the Competition Act or the amendments now proposed, the Ministry of Corporate Affairs in their written reply stated that:- ―there is no incompatibility between the proposed policy and the provisions of the Competition Act or amendments thereunder which are now under consideration. The proposed national policy essentially deals with objects like Competition impact assessment and appraisal of competitiveness within existing Departmental regulations which do not find place in the legislation.*
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> *9. The Committee note that the need for National Competition Policy was first highlighted in the 11th Five Year Plan Policy Document. The Committee also note that Section 49 of the Competition Act also envisages a policy on competition. The draft National Competition Policy was submitted by a Committee constituted for the purpose initially in July, 2011 and finally in February, 2012. Thereafter, the draft was given a final shape in the Ministry of Corporate Affairs and is presently under reference to Committee of Secretaries constituted under the Chairmanship of Cabinet Secretary. The Committee would expect that the Government would finalise the National Competition*

[7] See Page 10-11 of the of the Eighty-Third Report of the Standing Committee on Finance (2013-14) on the Competition (Amendment) Bill, 2012; At: https://eparlib.nic.in/bitstream/123456789/64190/1/15_Finance_83.pdf#search=Competition%20(Amendment)%20Bill%202012

Policy expeditiously keeping in view both the general and specific observations/recommendations of the Committee on the subject.

While the present Bill, vide Clause 36, seeks to include competition culture in S.49 of the Act, it may not be sufficient in ensuring competition culture mere via competition advocacy. A whole-of-government approach is mooted to inform various departments and agencies of the Central and State Governments, which a National Competition Policy can facilitate.

The Committee, therefore, may like to take this opportunity to legalise a mechanism to operationalize National Competition Policy.

(1) The Committee may like to recommend adoption of a National Competition Policy;

(2) To include implementation of National Competition Policy Section 49 of the Act, which can be amended as follows:

"National Competition Policy Council and Competition Advocacy

49. (1) There shall be a National Competition Policy Council headed by Chairman and consisting of not more than five eminent experts in the field of law, economics, trade including competition policy.

(2) There shall be an Advisory Committee to National Competition Policy Council comprising of upto 35 members representing economic and infrastructural ministries, Consumer Affairs and Law, state governments, consumer organisations, media and academia to be rotated on periodical basis.

(3) There shall be a properly resourced secretariat to assist the National Competition Policy Council headed by a Director General and supported by such number of full time and part time members and experts having sound knowledge and experience in the fields of law, economics, competition policy, trade and business law.

(4) The Union Government and State Government, as the case may be, in formulating a policy (including of review of laws) or any other related matter, may make reference to the National Competition Policy Council for its opinion on possible effect of such policy or law on

competition; and on receipt of such reference, the National Competition Policy Council shall, within sixty days of making such reference, give its report to the Central Government or the State Government, as the case may be, which may thereafter take further action to accept it or not with a speaking order.

(5) The report of the National Competition Policy Council on such matters should be placed before the Parliament annually with an Action Taken Report.

(6) The National Competition Policy Council shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues."

8. Market monitoring mechanism

The Committee may, further, like to recommend a legally mandated "market monitoring mechanism" within CCI, with a priority to closely monitor highly concentrated markets and/or those markets that are of utmost importance for general public.

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