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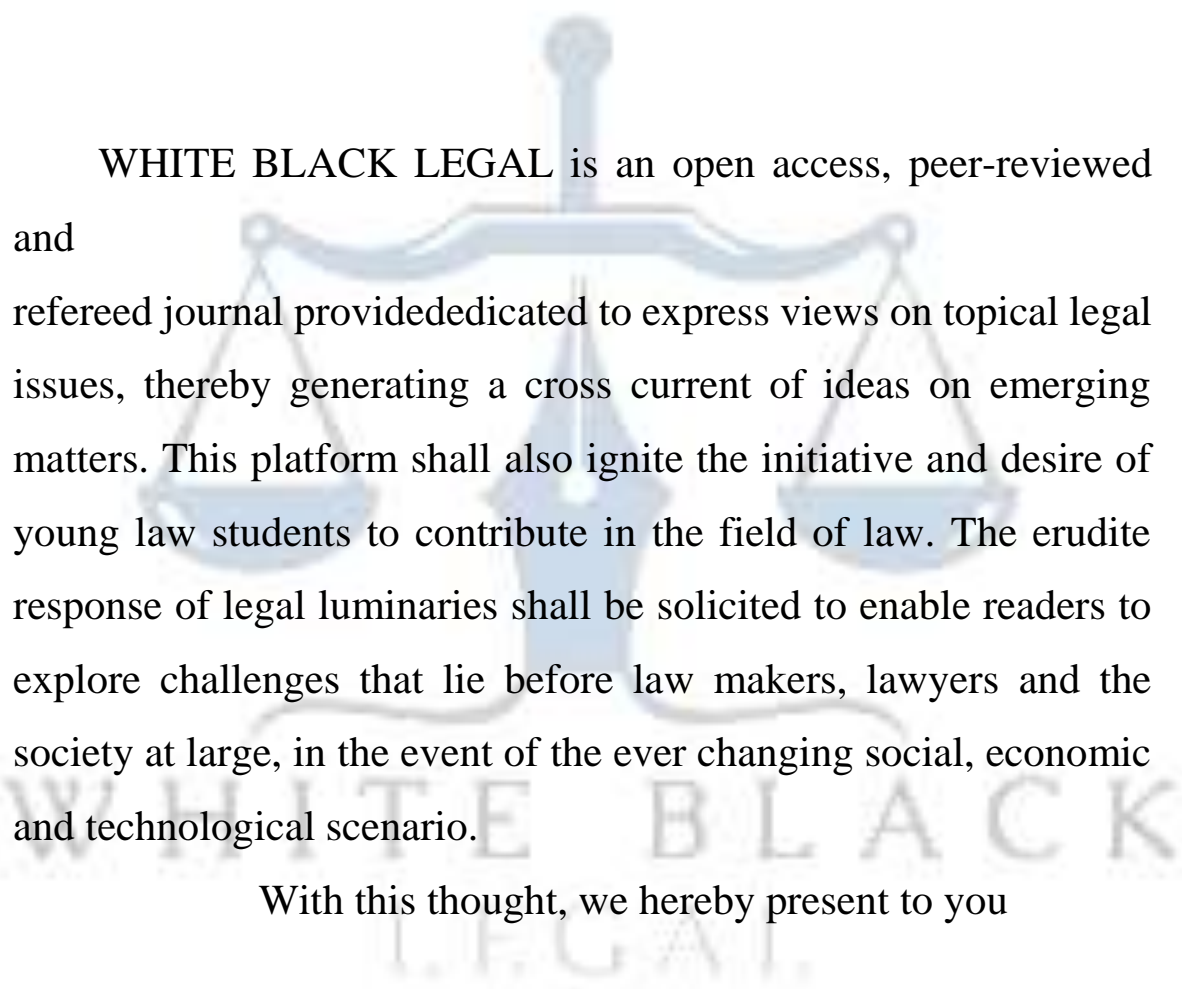


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With this thought, we hereby present to you

# **THE IMPACT OF COMPETITION LAW REFORMS** **ON INDIA'S ECONOMIC GROWTH AND** **DEVELOPMENT**

AUTHORED BY - RIYA YADAV & MAYUR SHRESTHA

## **ABSTRACT**

This paper discusses the impact of the 2023 Amendments to the Indian Competition Act 2002 on business entities. The amendments introduced new regulations such as commitments and settlements, deal value thresholds, and stricter enforcement for hub-and-spoke cartels. The Competition Commission of India (CCI) is responsible for implementing these amendments. The paper argues that the success of these amendments depends on how the CCI implements them. The CCI needs to adopt a balanced approach that fosters economic growth while also maintaining healthy competition in the market. Some of the amendments, such as commitments and settlements, are seen as business-friendly because they offer companies alternative ways to resolve disputes with the CCI. Other amendments, such as deal value thresholds, have been criticized for adding an unnecessary regulatory burden on businesses. The paper concludes that the ultimate impact of the 2023 Amendments will depend on how the CCI chooses to implement them. The CCI needs to find a way to balance the need for efficient regulation with the need to promote economic growth.

## **INTRODUCTION**

India is rapidly establishing itself as an increasingly significant hub for international investment. The Indian government has continuously worked to maintain a welcoming and less onerous business environment in an effort to maintain the momentum. In order to promote "ease of doing business in India," this involves lowering corporate tax rates, alleviating the liquidity issues faced by banks and non-banking financial companies (NBFCs), reforming the laws governing foreign direct investment (FDI), and relaxing compliance requirements.<sup>1</sup>

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<sup>1</sup> *Initiatives to boost domestic and foreign investments* (no date) Press Information Bureau. Available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1782353> (Accessed: 15 December 2024).



India's regulatory framework for competition was recently updated after more than ten years, bringing about significant changes that will affect business entities. A number of antitrust countries are still debating the modifications brought about by the 2023 Amendments to the Indian Competition Act 2002. There are a number of business-friendly changes in the 2023 Amendments, including commitments and settlements, accelerated merger review timelines, and the introduction of a leniency-plus regime. Other changes, like deal value thresholds, penalties on global turnover, and increased liability for hubs in "hub-and-spoke" cartels, are intended to achieve stricter enforcement and more regulatory oversight.

In order to ensure sure that competition enforcement does not impede "economic growth," as defined by the Preamble to the Act, the Competition Commission of India (CCI), the organization charged with fostering and preserving healthy markets that support the expansion exhibited by the Indian government<sup>2</sup>, must take a balanced stance. The effect of the Amendments on the Indian market is examined in this article. We specifically look at how the CCI adopted these tools and modified them to meet the needs of the Indian economy.

## **IMPACT OF THE 2023 AMENDMENTS**

### **I. COMMITMENTS AND SETTLEMENTS**

The establishment of obligations and resolution procedures for claims of anti-competitive vertical agreements and abuse of dominance is at the forefront of the 2023 Amendments. These do not apply to cartels, in contrast to other regions of the world.

Prior to the parties receiving the Director General's (DG) inquiry report, the CCI can now collect commitments for ongoing investigations. Businesses under investigation can resolve the CCI's initial concerns about competition with commitments rather than taking part in protracted inquiries. In a similar vein, a business can settle proceedings after receiving the DG Report but prior to the CCI issuing its final order by implementing a settlement mechanism. When a settlement is reached, the company consents to pay a sum that may be less than the highest fine the CCI might levy in that specific instance. Additionally, commitment and settlement orders absolve the company of any infringement findings; but, in the event of a settlement, the company may be subject to a compensatory damages action.

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<sup>2</sup> The Competition (Amendment) Act, 2023.



The implementation of commitments and settlements offers the CCI two main advantages:

It expedites market correction and saves time and money.

The CCI's limited resources are saved<sup>3</sup>- not just before the CCI but also during the appellate stage, which can take years to resolve, by using the preliminary assessment of a potential infringement to weed out cases that are unlikely to hurt the competition. Regarding market rectification, the CCI has emphasized the necessity of promptly putting remedial measures into place as soon as competitive harm is discovered.<sup>4</sup>

Businesses who feel they have compelling reasons to contest their lawsuits are not discouraged by commitments or settlements. These methods offer an additional choice to not challenge the DG Report's cost-benefit analysis or CCI's preliminary findings. In contrast to the directives that the CCI may make in its final ruling without consulting the firms, the businesses are able to offer more practically achievable corrective measures. Businesses can use these tools to determine the commercial significance of continuing to challenge the "alleged" anti-competitive behaviour. It might be wise to make promises and modify its behaviour in a way that is more acceptable to the CCI if it just leads to a technical infraction and does not provide businesses with any significant advantages. In a similar vein, settlements give companies another chance to reach a mutually acceptable result without engaging in protracted adversarial proceedings with the CCI.

For instance, the CCI provided comprehensive guidelines regarding the use and supply of spare parts by auto dealers in the Autoparts<sup>5</sup> case. There have been worries expressed about how these guidelines may affect drivers' safety.<sup>6</sup> Even though the CCI's order was issued more than nine years ago, the Supreme Court of India has halted its execution and has not yet rendered a decision.<sup>7</sup> Other jurisdictions' experience indicates that authorities have addressed competitive harm quickly by utilizing commitments and settlements in their own jurisdictions. For instance, the European Commission first believed that Gazprom had misused its power by trying to divide the natural gas markets in Europe. Gazprom pledged to eliminate contractual limitations on cross-border gas resale, ease gas flows to and from remote markets, set up a procedure that guarantees competitive gas prices, and stop using its dominance in the natural gas supply as

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<sup>3</sup> The Competition Act, 2002, § 26(2).

<sup>4</sup> *Mr Umar Javed v Google LLC and Another* (2022) 39 (CCI).

<sup>5</sup> *Shri Shamsher Kataria v Honda Sael Cars India Ltd & Ors* (2014) 3 (CCI).

<sup>6</sup> *Re Maruti Suzuki India Limited (MSIL) BQ Prime* (CCI 2017).

<sup>7</sup> *Nissan Motor India Private Limited and Ors v Competition Commission of India and Ors* (2017) 1 (CCI).

leverage.<sup>8</sup>

The CCI may need to be more accommodating when it comes to adopting realistic pledges and settlements if the settlements and commitments regime is to be successful. The CCI may consider:

- being open to considering novel remedies (as opposed to the traditional ‘cease and desist’) that businesses may suggest;
- implementing business-friendly timelines to comprehensively understand market harm and suggest effective remedies (particularly for global companies who may need to consider the multi-jurisdictional impact of remedies offered);
- adopting a business-friendly approach in deciding the settlement amount, which does not discourage businesses from avoiding adversarial proceedings and risking the imposition of a penalty that the CCI may impose.

## **II. DEAL VALUE THRESHOLD**

A transaction value-based criterion for notice of deals above a deal value of INR 20 billion, when the target has significant business operations in India, was added by the 2023 Amendments. The deal value barrier is sector-agnostic, however it was introduced in response to the growing number of acquisitions by major internet firms.<sup>9</sup> Competition authorities throughout the world, including in India, have taken notice of mergers like Facebook and Instagram, Facebook and WhatsApp, and others. This is due to the fact that large IT corporations' purchases of start-ups or businesses with lower asset values usually fail to meet conventional turnover-based requirements, which activate the CCI's merger control mechanism. The best method to broaden the CCI's net to include transactions where the value of the transactions does not match the target's assets and turnover seemed to be deal value thresholds.

The CCI's ultimate goals are to stop any actions that might significantly harm competition and to encourage and maintain it. To this end, the CCI has sufficient ex post powers. There is no evidence worldwide that the implementation of transaction size-based thresholds has prevented

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<sup>8</sup> Brussels, “Antitrust: Commission Imposes Binding Obligations on Gazprom to Enable Free Flow of Gas at Competitive Prices in Central and Eastern European Gas Markets” [2018] European Commission- Press Release.

<sup>9</sup> Clement J, “Topic: Google, Amazon, Meta, Apple, and Microsoft (GAMAM)” (*Statista*, August 31, 2023) <https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam/>.

possible harm to competition: in Germany, little extra alerts were submitted for evaluation,<sup>10</sup> furthermore, none of the extra notices in Austria were discovered to be related to digital acquisitions or to anti-competitive behaviour. The US Federal Trade Commission even approved the WhatsApp/Facebook combination.<sup>11</sup> and the European Commission.<sup>12</sup> Another common justification for implementing a transaction-based threshold is to avoid a "killer acquisition" in the digital industry.<sup>13</sup> It can be argued that this is a reasonable efficiency reasoning because data indicates that acquisitions in the digital sector usually result in the integration of the target's services into the acquirer's suite of services rather than "killing" the target's services.<sup>14</sup> For example, Facebook now offers a full range of social media services, including WhatsApp's communication capabilities as an add-on. Consequently, there is currently scant evidence that the implementation of a transaction-based barrier has a beneficial effect on preserving healthy competition.

For investments that were previously exempt because of a notably low asset value and goal turnover, a deal value threshold adds a new regulatory requirement. As a result, the standstill requirement outlined in the Act will apply to stated transactions, requiring the parties to wait for CCI's permission before concluding the deal. The CCI is well aware that the implementation of a deal value threshold may result in an increase in regulatory burden. The criterion of 'substantial business operation' would help ensure that transacting parties are not overburdened with unnecessary notifications and that only those transactions with significant economic links to India are caught by the threshold," said the former chairperson of the CCI.<sup>15</sup> Clear rules for triggering notifications below the deal value level are necessary to ensure regulatory confidence among transacting parties and to outweigh the regulatory burden. The SBO criteria, which are defined as any entity having more than 10% of (1) the number of users, consumers, or visitors; (2) the gross merchandise value; or (3) turnover in India, were

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<sup>10</sup> Paris OP, "Start-Ups, Killer Acquisitions and Merger Control" (Organisation for Economic Co-Operation and Development (OECD) 2020) <<https://doi.org/10.1787/dac52a99-en>> accessed December 15, 2024.

<sup>11</sup> Isaac M, "FTC Clears Facebook's WhatsApp Acquisition in the U.S." *Vox* (April 10, 2014) <<https://www.vox.com/2014/4/10/11625486/ftc-clears-facebooks-whatsapp-acquisition-in-the-us>> accessed December 15, 2024.

<sup>12</sup> EU Merger Regulations, 2004, Reg. 39.

<sup>13</sup> Barik S, "Competition (Amendment) Bill Passed in Lok Sabha: How It Affects Big Tech" *The Indian Express* (March 31, 2023) <<https://indianexpress.com/article/explained/explained-law/competition-amendment-bill-passed-lok-sabha-effects-bigtech-8529781/>> accessed December 15, 2024.

<sup>14</sup> Competition corporate-body. C-G for, "Competition Policy for the Digital Era" (*Publications Office of the EU*, May 20, 2019) <<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>> accessed December 15, 2024.

<sup>15</sup> Competition Commission of India, 42 CCI Fairplay 8-10 (2019).



established in draft regulations that the regulator made available for consultation.<sup>16</sup> The number of transactions reported to the CCI is expected to rise as a result of these low-level criteria. The SBO criteria may be able to provide more clarification after stakeholder engagements, ensuring that deal value threshold-based notifications only identify transactions that can potentially have anti-competitive impacts and do not overload the CCI with technical notices.

## **HUB AND SPOKE CARTELS**

The definition of cartels has been broadened by the 2023 Amendments to explicitly include non-competing enterprises as long as they are involved in or plan to be involved in the cartel. One category of companies that could be directly impacted by this shift is digital platforms that offer services to rival businesses. If digital platforms allow information exchange among their service receivers, they may now be regarded as a component of a cartel.

Determining whether specific vertical agreements—such as exclusive agreements or restrictions on retailer pricing—should be regarded as hub-and-spoke cartels or vertical limitations may prove challenging for competition regulators. Essentially, it may be assumed that digital platforms engage in price fixing and market allocation since they need to maintain resale prices or provide exclusivity, respectively. The CCI takes a per se approach for cartels, even though claims of vertical constraint are evaluated using the "rule of reason," which involves weighing pro-competitive outcomes. Online digital platforms will probably face an increased burden of compliance as a result.

Therefore, it seems sense to think about using this strategy only in cases when there is evidence of cooperation and a technical "meeting of the criteria." In light of the hefty fines, it would be beneficial for companies if the CCI published comprehensive rules and best practices for platform markets to prevent regulatory ambiguity and inform platform companies of the potential for cartel violations to be discovered against them. Digital platforms should also be aware of their conduct and market behavior while interacting with several rival businesses.

## **III. EXPEDITED MERGER REVIEW TIMELINES**

The CCI now has 150 calendar days instead of the previous 210 days to make a decision on a transaction. The combination shall be "deemed" accepted if the CCI does not issue an order

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<sup>16</sup> Draft Combination Regulations (CCI), 2023, Reg. 1.

within these timeframes. In addition, it was challenging to finish stock market transactions without facing gun-jumping fines due to the suspensory merger control regime in place. The 2023 Amendment permits a deviation from standstill commitments for (1) an open offer or (2) the purchase of shares or securities through a sequence of transactions on a regulated stock exchange, acknowledging transactional impracticality. Although the accelerated timetables are a good thing, the CCI officials might find the shorter timelines burdensome. Making good use of the pre-filing consultations would be one method to achieve a compromise between shortened schedules and providing officers at the regulator with adequate review time. In order to speed up the formal review process and reduce the number of follow-up information requests, parties may attempt to hold meaningful pre-filing consultations with the CCI and utilize that process to address any expected issues raised by the CCI during review.

## CONCLUSION

In the World Bank's "ease of doing business" rating, the Indian government is eager to make India a prominent jurisdiction.<sup>17</sup> The goal of the 2023 Amendments similarly appears to be to make conducting business easier while preserving strong competition in the market.

The key is implementation: the CCI's enforcement priorities will ultimately determine the 2023 Amendments' actual impact. An economy's ability to grow is hampered by regulatory ambiguity and overzealous oversight. Although corporations are less willing to invest in jurisdictions with a higher regulatory burden and longer compliance deadlines, it is true that strong market competition accelerates economic growth by boosting the productive and allocative efficiency of firms. While preserving healthy competition in the market, the 2023 Amendments give the CCI the resources it needs to encourage business in India and lessen regulatory burdens. How the CCI will reconcile efficient regulation with economic expansion is still up in the air.

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<sup>17</sup> TIMESOFINDIA.COM, "Ease of Doing Business Will Ultimately Lead to Ease of Living: PM Modi" *Times Of India* (November 19, 2018) <<https://timesofindia.indiatimes.com/business/india-business/ease-of-doing-business-will-ultimately-lead-to-ease-of-living-pm-modi/articleshow/66695623.cms>> accessed December 15, 2024.

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