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The Competition (Amendment) Bill, 2012

On 10 December 2012, the Government introduced the Competition (Amendment) Bill, 2012 (the Bill) for amending the Competition Act, 2002 (the Act). The Bill seeks to amend some of the substantive as well as procedural provisions under the Act.

A summary of the key changes proposed in the Bill is as follows:

- **Definition of turnover (section 2(y))**

It is proposed to be amended to exclude the taxes levied on sale of goods or provision of services. Turnover is used in the Act primarily for determining thresholds for combination and for imposition of penalties.

- **Explanation relating to prohibited vertical anti-competitive agreements amended to specifically provide for agreements relating to provision of services under section 3(4) of the Act**

This is a clarificatory amendment to include instances of anti-competitive agreements relating to provision of services such as tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance.

- **Intellectual property rights related exception to anti- competitive agreements**

Provisions relating to anti-competitive agreements so far are not to restrict the right of any person to restrain infringements or impose reasonable conditions for protecting rights conferred only under the named six intellectual property legislations under section 3(5) of the Act. An additional generic provision to also cover “any other law for the time being in force relating to the protection of other intellectual property rights” is now proposed. This will broad base the coverage of intellectual property laws.

- **Abuse of dominant position, by an enterprise or group**

A clarificatory amendment is proposed by specifically mentioning “singly or jointly” in section 4(1) of the Act to prohibit abuse of its dominant position by an enterprise or group, either singly or jointly.

- **Definition of 'group' for purposes of a combination**

Monetary thresholds for a combination to be covered by the Act under section 5 have been prescribed with reference to the *assets* or *turnover* of the enterprise(s) and/or of the Group. Explanation (b)(i) to section 5 of the Act *inter alia* provides that to be considered a ‘group’, two or more enterprises, directly or indirectly, must be in a position to exercise 26% or more of the voting rights in the other enterprise. By way of the proposed amendment, the ‘26% or more’ criteria is proposed to be changed to ‘50% or more’. This proposal will also align the definition of ‘group’ to the exemption¹ which had earlier been granted to a 'group' exercising less than 50% voting rights in other enterprises, from the applicability of section 5 of the Act.

- **Different thresholds for different classes of enterprises**

An enabling section *viz.* section 5A of the Act, is proposed to confer upon the Central Government the power to notify, in consultation with Competition Commission of India (CCI), different value of assets and turnover for any class or classes of enterprise for the purposes of determining combinations under the Act.

- **Appointment of Members of Commission**

The procedure for selection and appointment of members of CCI is proposed to be altered to include the Chairperson of the CCI in the Selection Committee for selecting the Members.

- **Mandatory reference by statutory authority to CCI and *vice versa***

It is proposed to make it mandatory for a statutory authority to refer the matter to CCI where an issue arises that any decision of such authority may be contrary to the Act. Likewise, it is proposed to be made mandatory for CCI to refer the matter to the authority where an issue arises that any decision of the CCI may be contrary to any Act whose implementation is entrusted to such authority.

- **CCI to issue inquiry orders only after hearing the concerned parties; provision for appeal to Competition Appellate Tribunal**

The inquiry procedure in relation to anti-competitive agreements and abuse of dominant position set out in section 26(7) and (8) of the Act is proposed to be amended to provide that in cases where CCI proposes to cause further investigation or inquiry into a matter, such a decision shall be taken by CCI after hearing the concerned parties. By an amendment to section 53A(1) of the

¹ Notification no. S.O. 481(E) dated March 4, 2011 issued by the Ministry of Corporate Affairs.

Act, such a decision made by CCI regarding a further inquiry is proposed to be appealable to Competition Appellate Tribunal.

- **Opportunity of hearing before imposition of penalty**

Prior to imposition of penalty by the CCI, it is proposed under section 27(b) of the Act that an opportunity to be heard be provided to the party liable for penalty.

- **Period for CCI's approval to combinations**

Under section 31(11) of the Act, it is proposed to reduce the period from 210 days to 180 days within which the CCI has to approve/seek modification of/pass orders in relation to a combination notified under the Act. Consequential amendment is proposed in section 31(12) of the Act to exclude extension of time granted at the parties request. Under the Act, if CCI does not pass an order within the prescribed period, it constitutes a deemed approval to the combination.

- **Power of Director General to search and seize**

An amendment to section 41 of the Act is proposed which seeks to confer wider powers of search, seizure, entering places and recording statements on oath upon the Director General to facilitate investigations so long as the Director General has reason to believe that the person concerned has omitted or failed or would omit or fail or would destroy, mutilate, alter, etc. the information or documents. Such powers are proposed to be exercisable with the prior permission of the Chairperson of CCI as compared to the need for permission of the Chief Metropolitan Magistrate/CCI, as the case may be, at present. The time period for which any documents or information seized can be retained by the Director General is now left to the Director General's discretion and the earlier period of six months for returning the documents is no longer specifically mentioned in the amended provisions.

Please note that the above is only a summary of the proposed Bill which is yet to be passed by the Parliament. The full text of the Bill will have to be considered for any decisions/ actions.

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