

June, 2023 No.64

This issue covers the following topics:

India

INDIA – COMPETITION AMENDMENT ACT, 2023

Rashmi Grover

Vietnam

PERSONAL DATA PROCESSING IMPACT ASSESSMENT,
CROSS-BORDER TRANSFER IMPACT ASSESSMENT

Tran Thi Viet Nga

India

INDIA – COMPETITION AMENDMENT ACT, 2023

2002年に制定されたインドの競争法については数年前から改正の動きが見られたが、2023年4月により改定競争法がインド議会で承認され、インド大統領の同意を得て成立した。既に企業省から通達された条項については発効しており、残りの条項は官報に告示された時点で発効することになる。本稿では改正競争法の主要な改正点を概説する。

Introduction

Following the introduction of the Competition (Amendment) Bill, 2022 in August 2022 to amend the Competition Act, 2002 of India (“**Competition Act**”), the Competition (Amendment) Act, 2023 (“**CAA**”) was approved by the Parliament of India in April 2023 and received the assent of the President of India on 11 April 2023. The CAA introduces several key changes to the competition law regime in India. On 18 May 2023, the Ministry of Corporate Affairs notified certain provisions of the CAA. The remaining provisions will come into force upon their notification in the official gazette. The key provisions of the CAA are summarized below.

Key Provisions Notified

- 1. Hub-and-Spoke Cartels:** The provisions of the Competition Act relating to anti-competitive horizontal agreements have been expanded to include any entity that ‘participates or intends to participate in the furtherance of such agreements’. As such, the scope of a cartel has been widened to include all players who participate in or facilitate such activities, irrespective of whether the party is engaged in an identical or similar trade as the remaining participants. This will enable the Competition Commission of India (“**CCI**”) to also assess anti-competitive coordination taking place through hub and spoke arrangements (e.g., collusion through trade associations) under the cartel provisions of the Competition Act.
- 2. Limitation Period:** The CAA has introduced a limitation period of 3 years for filing of a complaint from the date the cause of action actually arose. However, the CCI has the discretion to take up such matters after the three year time period lapses, if it is satisfied that there was sufficient cause for the delay and its reasons are recorded in writing.
- 3. AAEC:** The factors to analyse whether an agreement has caused an appreciable adverse effect on competition (AAEC) in India have been updated under the CAA. Now, the CCI shall give due regard not only to “benefits” to consumers but also “harm” caused to them.
- 4. Powers of Director General (DG):** The DG’s powers have been significantly strengthened under the CAA. The DG Office is now empowered to retain documents, information, books, papers etc. seized by it for a period of

up to 360 days. During an investigation, DG is empowered to examine third parties and agents (such as in-house counsels or auditors) under oath as well as to seek assistance of police officers when conducting dawn raids. The parties under investigation are now statutorily required to preserve and protect relevant documents and offer any assistance required by the DG during the investigation.

5. Penalties: The Competition Act imposed certain penalties in the event any party to a combination either: (i) makes a materially false statement, or a makes a knowingly false statement; and (ii) omits or fails to state any material particular, which such party knows to be material. The maximum penalty for making false statements or for omission to furnish material information, has been increased by the CAA from INR 10 million to INR 50 million.

6. Mandatory Deposit for Appeals: The CAA has introduced the requirement of mandatory deposit for filing an appeal. It provides that an appeal can be preferred against an order of the CCI before the National Company Law Appellate Tribunal (NCLAT) only after 25% of the penalty imposed by the CCI has been deposited.

Key Provisions to be Notified

7. Deal Value Threshold: The Competition Act currently requires transactions involving parties with: (i) cumulative assets of more than INR 10 billion, or (ii) cumulative turnover of more than INR 30 billion, to obtain the prior approval of the CCI, unless any of the exemptions apply. The CAA has introduced a new deal value threshold and seeks to include combinations wherein the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds INR 20 billion. Such a transaction would now be a reportable transaction, requiring the prior approval of the CCI, subject to the condition that the party in question has substantial business operations in India. The introduction of the deal value threshold will allow the CCI to review a number of additional transactions which may otherwise fall below the current prescribed asset/turnover thresholds.

8. Expedited Approval Timelines: Under the current provisions of the Competition Act, a combination will be effective only after the CCI issues an order in this regard, or after 210 days have passed since the date the notice of the combination was submitted to the CCI. The CAA proposes to reduce the review timeline from 210 days to 150 days, following which the combination will be deemed approved. The CAA also proposes that the CCI is required to form its preliminary view on a transaction within 20 calendar days (as opposed to the current 30 working days).

9. Penalties: Under the Competition Act, a failure to notify the CCI of the combination may result in the CCI imposing a penalty of up to 1% of the assets or turnover (whichever is higher) of the combination. The CAA modifies this provision, and now any party to a combination who fails to make the requisite notification to the CCI or submit the relevant information in response to an inquiry into the combination initiated by the CCI may be liable to pay a penalty of up to 1% of the total turnover, assets, or transaction value of such a combination, whichever is higher.

10. Definition of Control: The Competition Act defines control as ‘control over the affairs or management by one or more enterprises over another enterprise or group’ for the purpose of classification of combinations. The CAA modifies the definition of control to ‘the ability to exercise material influence over the management, affairs, or strategic commercial decisions’. The CAA does not expand on the term ‘material influence’ but it is likely that CCI would issue some guidance in this regard.

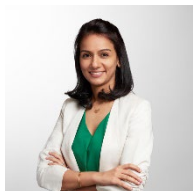
11. Settlements and Commitments: The CAA has proposed a new settlement and commitment mechanism for cases involving anti-competitive vertical agreements and abuse of dominance. The settlement and commitment process will not be applicable for cartel cases. In effect a settlement can be offered after the investigation report has been issued by the Office of the Director General (the DG) and before the CCI passes its final order in the matter. The CAA also permits parties to propose a voluntary commitment after the CCI forms a prima facie opinion on the matter but before the DG issues its investigation report. The final order adopting the commitment or settlement would not be subject to any appeal.

Conclusion

Overall, the amendments proposed under the CAA are a positive step towards meeting the needs of the new age

market and introducing global best practices. Substantive amendments such as deal value thresholds, settlement and commitment related provisions and leniency plus regime are yet to be notified and it is expected that the CCI would issue clear rules and guidance as to applicability and procedure of such amendments at the time of notification. In the meantime, companies operating in India or proposing to enter into transactions with Indian companies must take note of and familiarize themselves with these amendments.

[Author]



Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

rashmi_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.

Vietnam

PERSONAL DATA PROCESSING IMPACT ASSESSMENT, CROSS-BORDER TRANSFER IMPACT ASSESSMENT

2023 年 4 月 17 日付個人データ保護政令第 13/2023/ND-CP 号は間もなく今年 7 月 1 日より施行される。本政令は、日系企業にも様々な義務を生じさせることになる。特に、個人データ処理影響評価及びベトナム人の個人データの越境移転に関する影響評価の作成義務は、多くの日系企業が対象となりうる。本稿では、これらの義務が生じる条件及び影響評価書類の作成方法について紹介する。

Backgrounds

The long-awaited new Decree No. 13/2023/ND-CP (“**PDPD**”) on personal data protection has been issued by the Vietnamese government on April 17, 2023 and will take effect from July 1, 2023. The PDPD includes 4 Chapters, 44 Articles prescribing personal data protection, and responsibilities pertaining to protection of personal data of relevant agencies, organizations and individuals. Among other provisions such as an obligation to obtain consent from personal data subject, obligation to issue regulations to protect personal data and assign specialized departments/individuals to protect the data, the PDPD also focuses on the obligation to prepare personal data processing impact assessment (“**PDP Impact Assessment**”) and cross-border transfer impact assessment. We will delve deeper into the obligation on preparation of such impact assessments, which would require organizations and individuals to make more effort to meet the requirements on managing personal data under the PDPD.

Personal data processing impact assessment

The PDPD provides new definitions regarding Personal Data Controller (an organization or individual that decides the purposes and means of processing personal data), the Personal Data Controller cum Processor (an organization or individual who simultaneously determines the purposes, means and directly processes the personal data), and Personal Data Processor (an organization or individual that performs data processing on behalf of the Personal Data Controller, through a contract or an agreement with the Personal Data Controller).

The PDP Impact Assessment, in all cases, shall be prepared and stored by the Personal Data Controller, Personal Data Controller cum Processor, or additionally by Personal Data Processor (in the circumstances that such Personal Data Processor has entered into a contract with the Personal Data Controller) after the commencement of processing of personal data (“**processing**” of personal data includes the collection, recording, analysis, storage, disclosure, access, copying, transmission, etc. of personal data). The expansive definition of processing of personal data implies that the processing of personal data may be carried out on a daily basis at each company and each company may require compliance with the obligation. The PDP Impact Assessment is required to be available for inspection by the Ministry of Public Security and be submitted to the Ministry of Public Security - Department of Cybersecurity and Hi-tech Crime Prevention (“**A05**”) within 60 days from the date of commencement of personal data processing.

The PDP Impact Assessment under the PDPD appears to be similar to the data protection impact assessment in the EU General Data Protection Regulation (GDPR), whereas under GDPR it is only required where the risk of data processing is high. However, there is no such limitation included under the PDPD.

The content of the PDP Impact Assessment of the Personal Data Controller, the Controller cum Processor, and Personal Data Processor is slightly different. To elaborate:

- (i) Contents of the PDP Impact Assessment of the Personal Data Controller, the Controller cum Processor include:
 - Information and contact details of the Personal Data Controller, the Personal Data Controller cum Processor;
 - Full name and contact details of the organization or individual in charge of the personal data protection; of the Personal Data Controller, the Personal Data Controller cum Processor;

- The objectives of the personal data processing;
 - The type of processed personal data;
 - Organization, individual receiving personal data, including organization, individual abroad;
 - Cases of transfer of personal data abroad;
 - Personal data processing time; Estimated time to delete or destroy personal data (if any);
 - Describing the personal data protection measures applied;
 - Assessing the impact of the processing of personal data; potential unwanted consequences, damage, measures to reduce or eliminate such risk, harm;
- (ii) Contents of the dossier of the PDP Impact Assessment of the Personal Data Processor include:
- Information and contact details of the Personal Data Processor;
 - Full name and contact details of the organization assigned or individual in charge of the personal data processing of the Personal Data Processor;
 - Describing the processing activities, the type of processed personal data under the contract with the Personal Data Controller;
 - Personal data processing time; Estimated time to delete or destroy personal data (if any);
 - Cases of transfer of personal data abroad;
 - Generally describing the personal data protection measures applied;
 - Assessing the impact of the processing of personal data; potential unwanted consequences, damage, measures to reduce or eliminate such risk, harm;

Cross-border transfer impact assessment

Under the PDPD, besides the PDP Impact Assessment, an independent impact assessment is also required for cross-border transfer of personal data and is applicable to any transferor of personal data, which includes not only Personal Data Controller, the Controller cum Processor or Personal Data Processor, but also any third party (any other organizations or individuals allowed to process personal data) (collectively, “**Transferor**”). The cross-border transfer of personal data means the act of transferring personal data of Vietnamese citizens outside the territory of Vietnam using cyberspace, electronic devices, equipment or other forms, or using a place outside the territory of Vietnam to process personal data. Therefore, if a Japanese company in Vietnam uses a cloud service to store the personal data of Vietnamese employees on a server outside Vietnam, or if a Japanese parent company uses a computer outside Vietnam to process the personal data of Vietnamese employees of a Vietnamese subsidiary by accessing the subsidiary’s server located in Vietnam, the act of accessing and viewing such personal data of Vietnamese employees may also be considered to be a cross-border transfer. On the other hand, according to the above definition, overseas transfer of personal data of individuals other than Vietnamese citizens does not fall under "cross-border transfer", so processing of personal data of Japanese employees based in Vietnam on the parent company's server is not subject to such regulation.

Same as the PDP Impact Assessment, the Transferor is required to prepare and store a cross-border transfer impact assessment and submit it to the competent authority (A05) within 60 days from the date of commencement of processing of the personal data.

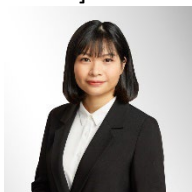
A personal data cross-border transfer impact assessment includes the following contents:

- Information and contact details of the Transferor transferring the data and the party receiving personal data of Vietnamese citizens;
- Full name and contact details of the organization or individual in charge of the data transfer party related to the transfer and receiving of personal data of Vietnamese citizens;
- Describing and explaining the objectives of the personal data processing activities of Vietnamese citizens after being transferred abroad;
- Describing and clarifying the type of personal data transferred abroad;
- Describing and clearly stating compliance with regulations on personal data protection contained in the PDPD, detailing the personal data protection measures applied;
- Assessing the impact of the processing of personal data; potential consequences, unwanted damage, measures to reduce or eliminate such risk, harm;
- The consent of the data subject;
- Having a document showing the binding and responsibilities between organizations and individuals transferring and receiving personal data of Vietnamese citizens for the processing of personal data.

Conclusion

Currently, there are no further guidelines on how to prepare a sample PDP Impact Assessment or Cross-border Transfer Impact Assessment. Besides, a new draft of the decree on governmental sanction applied to violations relating to cyber security including violations relating to such assessments has just been released for public comments. As the guidance under the PDPD on the content of both impact assessments seems to be ambiguous, it is expected that the competent authority will issue further clear and detailed guidance on this matter. In theory, it is necessary to prepare and store the PDP Impact Assessment and Cross-border Transfer Impact Assessment by the enforcement date of the PDPD. As a result, each company directly or indirectly processing personal data or engaged in cross-border transfer of personal data should pay attention to the analysis of the PDPD and prepare the necessary impact assessments in accordance with the PDPD.

[Author]



Tran Thi Viet Nga (Nagashima Ohno & Tsunematsu Hanoi Branch)
nga_tran@noandt.com

Nga Tran is a Vietnamese qualified lawyer in the Hanoi Office. She has been assisting foreign investors, foreign invested enterprises, and foreign organizations to start and expand their business and operation in Vietnam. She also provides legal advice regarding general corporate matters, competition, labor issues, and regulatory and compliance matters.

[EDITORS' PROFILES]



Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

nobuo_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

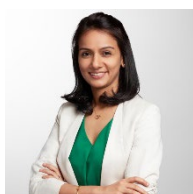


Keigo Sawayama (Nagashima Ohno & Tsunematsu Hanoi Branch Partner)

keigo_sawayama@noandt.com

Keigo Sawayama is a partner at Nagashima Ohno & Tsunematsu and a representative of its Hanoi Office (Nagashima Ohno & Tsunematsu Hanoi Branch). He has been stationed in Hanoi since 2011 and providing legal services mainly to Japanese companies and its affiliates to expand their business into Vietnam and other countries in South-East Asia.

He is a graduate of the University of Tokyo (LL.B., 2004) and Harvard Law School (LL.M., 2011). He was admitted to the Japan Bar in 2005 and New York State Bar in 2014.



Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

rashmi_grover@noandt.com

Rashmi Grover is an attorney in the Singapore Office. She is qualified in India and the UK. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian market and advising clients on corporate commercial and finance transactions including transactions involving mergers, acquisitions, formation of joint ventures, private equity investments, business/asset acquisition transactions, regulatory filings and debt issuances.

This newsletter is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this newsletter but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan

Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes locations in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi, Jakarta and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced attorneys from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road Level 41
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office

(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)



34th Floor, Bhira Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office

(Nagashima Ohno & Tsunematsu HCMC Branch)



Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office

(Nagashima Ohno & Tsunematsu Hanoi Branch)



Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Jakarta Office (*Associate office)

(IM & Partners in association with

Nagashima Ohno & Tsunematsu)



Jakarta Mori Tower 14th Floor, Unit 1401
Jalan Jenderal Sudirman Kav. 40-41
Jakarta 10210, Indonesia
Tel: +62-21-25098080 (general)
Fax: +62-21-25098090 (general)
Email: info-jakarta@noandt.com

Shanghai Office

(Nagashima Ohno & Tsunematsu

Shanghai Representative Office)



21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

For more details on our global practice

If you would like to receive future editions of the NO&T Asia Legal Review by email directly to your Inbox, please fill out our newsletter subscription form at the following link: https://www.noandt.com/en/newsletters/nl_asia_legal_review/

Should you have any questions about this newsletter, please contact us at [<asia-legal-review@noandt.com>](mailto:asia-legal-review@noandt.com).

Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Asia Legal Review.