



## ELP'S BIS SERIES – PART 2: LEGISLATIVE FRAMEWORK IN INDIA

### Introduction

In Part I of ELP's three-part series relating to product quality standard regulations applicable in India (**BIS Standards**), the overall regulatory environment in India and India's commitment at WTO was discussed at a macro level. In Part II, we delve into the legal provisions relating to BIS Standards, issuance of Quality Control Orders (**QCOs**) which make compliance with BIS Standards mandatory, and the issuance of BIS licenses. This issue deep dives into legal provisions and certain ambiguities and complexities in India's legal framework on the BIS front. The article also then goes onto discussing potential ways in which companies can navigate these complications.

### Historical Background

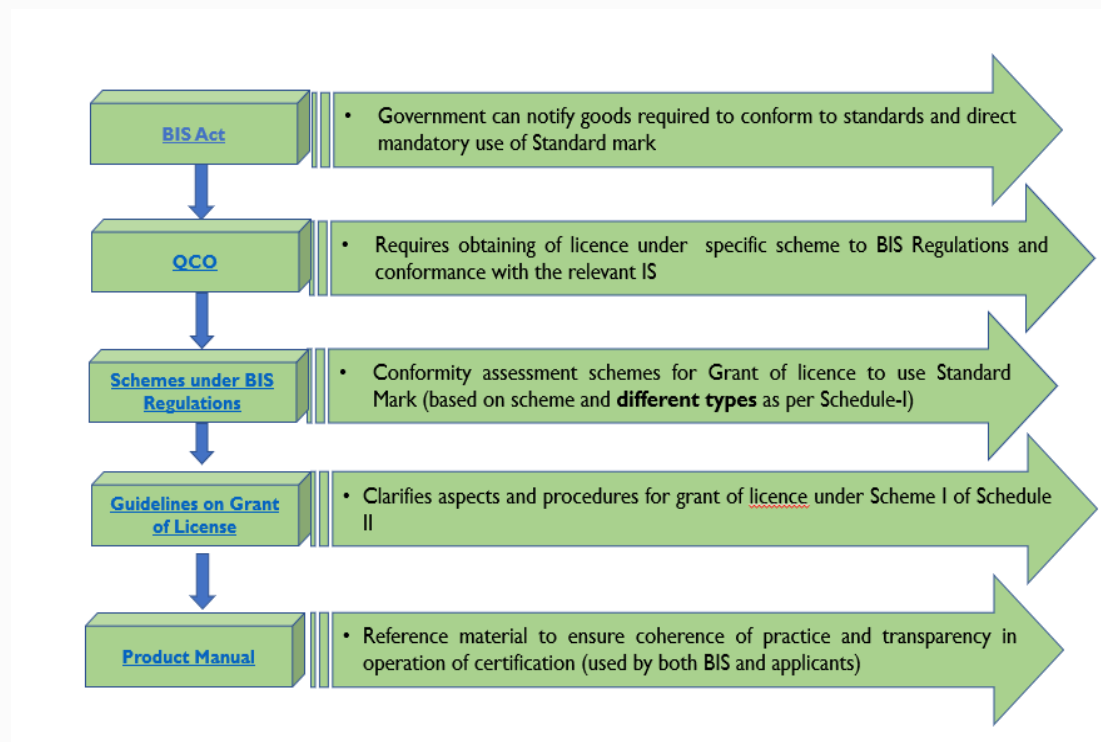
- The Indian Standards Institution (**ISI**) was set up pursuant to a resolution of the Government of India dated September 3, 1946. Thereafter, the Indian Standards Institution (Certification Marks) Act, 1952 was enacted. This enactment, however, did not contain any provision requiring compulsory use of the standard mark with regards to any particular article, nor did it confer any power upon the ISI to notify any article or process, so as to require compulsory licence or compulsory user of the Standard Mark.
- In the year 1986, the Parliament promulgated the Bureau of Indian Standards Act, 1986, which established Bureau of Indian Standards (**Bureau/BIS**) as a statutory corporation and conferred power on the BIS<sup>1</sup> to specify the standard marks and to grant licence for the use of the standard mark. BIS is the national body for issuing and regulating quality control standards in India working under the aegis of Ministry of Consumer Affairs, Food & Public Distribution, Government of India for:
  - providing safe reliable quality goods;
  - minimizing health hazards to consumers;
  - promoting exports and imports substitute;
  - Controlling proliferation of varieties etc. through standardization, certification and testing
- The erstwhile Act of 1986 now stands replaced by the Bureau of Indian Standards Act, 2016 (**BIS Act**). Indian Standards are issued by the BIS in terms of the BIS Act and the rules/ regulations made thereunder to regulate the quality of product in India.

### Present Legal Framework Governing Standards, QCOs and Issuance of License

At present, there are over 21,000 standards which have been formulated by BIS, majority of which are voluntary in nature whereas, some are made mandatory through the issuance of a Quality Control Order (QCO). A bird's eye view of the overall legal framework governing Indian Standards, QCOs and issuance of licenses to use BIS mark on the goods is diagrammatically represented below - each of which are further elaborated in the subsequent paragraphs:

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<sup>1</sup> Section 10 of BIS Act, 1986



### Formulation of Indian Standards – The Consultative Mechanism

- As the National Standards Body, the BIS is responsible for harmonious development of the quality standards for goods, articles, processes, systems and services including for matters connected therewith or incidental thereto. BIS develops Indian Standards through a consultative mechanism in technical committees, comprising of various stakeholders that have interest in the relevant subject – this is to ensure that views of all are given due consideration and a consensus is evolved while formulating a standard.
- The stakeholders can broadly be categorized as industry, consumers/ users, technologists (R&D and scientific institutions, academia, etc.) and government departments/ regulators.
- There are around 1000 technical committees in BIS carrying out standardization work in 15 broad technology areas/sectors<sup>2</sup>.
- Separate Division Council/ Sectional Committees oversee and supervise the work relating to formulation of Indian Standard.
- Further, all Central Government Ministries and State Governments, as well as Industry Associations across all sectors have been requested for creation of Standardization Cells with the objective to enhance stakeholder involvement. About 64 Standardization Cells have been created in Ministries, Industry Associations, PSUs<sup>3</sup>. Apart from consultation within the technical/sectional committees, draft standards are also open for public views/ comments.
- The Standards are regularly reviewed and formulated in line with technological developments to maintain harmony with International Standards. The review of Indian Standards occurs as and when considered necessary. It is however necessarily done at least once in five years to establish whether these standards are still relevant, accurate

<sup>2</sup> Source: BIS Annual Report 2020-21, available at: [https://www.bis.gov.in/wp-content/uploads/2022/02/Annual\\_report\\_for\\_final\\_approval\\_on\\_12-1-2022.pdf](https://www.bis.gov.in/wp-content/uploads/2022/02/Annual_report_for_final_approval_on_12-1-2022.pdf)

<sup>3</sup> Ibid

and up-to-date with state of-the-art technology. It is done for authorities to take appropriate action for their reaffirmation, revision, issuing amendments, declare obsolescence or withdrawal.

- There is at present, an exercise initiated to review and update all Indian standards dated prior to the year 2000, which is targeted to be completed over a period of two-three years. The review process requires thorough analysis of technical developments that have taken place in the product/ processes/practices/use or application/testing/ input materials, feedback from manufacturers and users, international and other globally available standards, etc. relevant to the standard under review<sup>4</sup>.



#### Pointers for companies

The relevant industry players should keep themselves informed as regards such consultations and submit their suggestions to the draft Standards. In case of any identified gaps between what the Standard prescribes and the practical feasibility of the testing requirements/ technological challenges, necessary representations may be made to the relevant BIS Sectional Committee to consider revision of the Standards. It is advisable for the companies that have a dominant place in the market to pitch for becoming part of such committees to make sure that their key inputs are taken into consideration while developing the standards.

#### Issuance of BIS license – Key legal provisions of the BIS Act

- In terms of Section 13 of the BIS Act, BIS has the power to grant: (i) a license to use or apply a Standard Mark, where any goods conform to an Indian standard or (ii) a certificate of conformance wherein demonstration of conformity is desired without the use of a Standard Mark.
- In terms of Section 16 of the BIS Act, the Central Government may direct compulsory use of standard mark on notified products by way of issuing QCOs. In respect of such notified products, in terms of Section 17 of the BIS Act, no person is permitted to manufacture, import, distribute, sell, hire, lease, store or exhibit for sale such goods without a Standard Mark.
- It is especially crucial to note Section 17 of the BIS Act. This provision has a wide impact and casts an obligation on various entities in the transaction chain i.e. a person who “manufacturers” or “imports” or “distributes” or “sells” or “stores or exhibit for the purpose of sale”. This intent to make everyone in the chain, and not just the initial manufacturer or the last seller, responsible. This fact is also corroborated by the definition of the term “person”<sup>5</sup> as well as the requirements of Section 18 of the BIS Act.

#### Quality Control Orders (QCOs)

- As stated earlier, majority of Indian Standards are voluntary in nature. However, some Standards are made mandatory by the issuance of QCOs. The decision to make a particular Indian Standard mandatory is essentially taken by the parent ministry dealing with the product covered under the Indian Standard (who then issues the relevant QCO making the Indian Standard mandatory). For instance, the QCO on steel products was issued by Ministry of Steel, on toys by Ministry of Commerce and Industry and on different chemicals by Ministry of Chemicals and Fertilizers.

<sup>4</sup> Ibid

<sup>5</sup> Defined as follows: “a manufacturer, an importer, a distributor, retailer, seller or lessor of goods or article or provider of service or any other person who uses or applies his name or trade mark or any other distinctive mark on to goods or article or while providing a service, for any consideration or gives goods or article or provides service as prize or gift for commercial purposes including their representative and any person who is engaged in such activities, where the manufacturer, importer, distributor, retailer, seller, lessor or provider of service cannot be identified”

- QCO is a gazette order issued under Section 16 of the BIS Act. The issuance of a QCO is an announcement by the Government of its intention to make the applicability of relevant standards prescribed by BIS, for the import /production/ storage/ distribution/ sale, etc. of the relevant products mandatory effective from a date mentioned therein. It stipulates the manner of quality control monitoring and procedure to be carried out to obtain licences (i.e. the relevant scheme of conformity to be followed– discussed in detail later). It also typically prescribes BIS as the authority responsible for enforcing the QCO, including the penal consequences for any contravention of the QCO.

### Coverage of products under the QCO

- The QCO specifies the scope and variants of the products which are specifically covered. Several questions/ambiguities arise here with respect to coverage under the QCO- whether a particular variant of a product is covered, whether parts/ components of the product are covered and even whether only pure products or even a combination/mixture of the product is also being covered.



#### Pointers for companies

The coverage of certain products/raw-materials/parts etc. within the scope of the QCO need to be specifically addressed by an applicant after examining the exact language of the QCO itself as well as the underlying Indian Standard which is made mandatory by the QCO.

### Applicability of QCOs to imported and exported goods

- QCOs are made equally applicable to both domestically manufactured goods as well as to imported goods. The requirement for imported goods to comply with QCOs may be found to exist under General Note 2(A) of Schedule-I of the ITC (HS) Import Policy, which talks about “mandatory Indian Standards of Bureau of Indian Standards”. The said Note stipulates that the “quality of products that are subject to mandatory Indian Standards, as applicable to domestic goods, shall be required to comply with quality specified for the product as per same Indian Standards”. For compliance of this requirement, all manufactures/exporters of these products to India shall be required to obtain BIS license for using Standards mark on their product.
- Appendix III of Schedule I - Import Policy of ITC (HS), 2012 gives a list of products under mandatory certification. While Appendix III is updated periodically, it sometimes is not always updated on a real time basis. Hence, one needs to get latest information as regards notification of QCOs from the Gazette of India.
- QCOs also typically provide for an exception to the goods which are meant for exports, consistent with the underlying thrust of consumer laws in India i.e. to safeguards interest of consumers in India.



#### Pointers for companies

It is important to analyze the text of the QCO no sooner than its draft is made public to identify its coverage and its bifurcation of products. This should be done immediately in order to represent the concerns of the stakeholders as regards the applicability of the QCO to the relevant ministry.

### Timelines for implementation of QCO

Recent trends indicate that a QCO comes into force in 180 days from the date of its publication in the official gazette. The same is subject to extensions, if any. In recent times of the pandemic, there have been several instances where the government has extended the timelines of certain QCOs as a measure for trade facilitation.

## Consultation with industry

As also highlighted earlier, prior to issuance of a QCO, it is expected for the relevant department/ authority under the BIS to commence interactions with the relevant industry participants to form a committee for preparation of the relevant standards - including testing requirements and post issuances of the QCO for development of the 'product manual' (discussed in detail in Part III of this article series).



### Pointers for companies

During the consultation phase with the Government, prior to issuance of a QCO, industry should make adequate representation on various aspects of the QCO in relation to which relief is required. This includes the date of implementation, specific exemptions for stock in hand or products meant for exports, relevant Scheme of certification to be adopted, coverage of the products etc.

## Legal challenge in courts

In the past, when the validity of a quality control order has been challenged by way of writ petitions, the courts have generally not been inclined to uphold such a challenge. The basis for this is the understanding that quality control orders are issued for the good of the public and in the over-all interest of the country<sup>6</sup>.

## Bureau of Indian Standards (Conformity Assessment) Regulations, 2018 ("BIS Regulations")

- The BIS Regulations prescribe [eight different types](#) of schemes wherein different types of procedures are prescribed for obtaining a licence or certificate of conformity for different products/ services/ processes.
- While eight different schemes having been prescribed, Scheme I is normally prescribed for procedure of obtaining the licence, especially for most consumer goods, as it is the most stringent out of all the eight schemes, with the procedure requiring a mandatory factory audit and licensing of premises.
- Critical to note is that the license granted under Scheme I is in relation to a "manufacturing premises"<sup>7</sup>. Therefore, once a BIS license is issued for a "manufacturing premises", such premises can then be used for marking the goods with the ISI mark.



### Pointers for companies

The BIS license is required to be taken in relation to the "manufacturing premises". In certain cases, an issue arises as to whether the license would be required for all the premises where any form of processing of the product is carried out. On this issue, although there continues to be legislative ambiguity, one may explore the following positions [after taking into account any clarifications issued by the Government in relation to the specific QCO]:

- **Conservative position:** Licence to be obtained for the actual manufacturers' location.
- **Balanced position:** When there are multiple manufacturing locations, a centralized facility can be identified to undertake activities to the extent higher than mere packing. Such activity can be argued to be equivalent to

<sup>6</sup> Yash Polymers vs. Union of India [(2011) 3 GLH 539], Sadar Bazar Electrical Traders Association vs. Union of India [(1990) 40 DLT 251], A.K. Subbaraja And Others vs Union of India [AIR 1994 Mad 104].

<sup>7</sup> Defined as follows: "the premises, either owned by the applicant or otherwise, where a part of the manufacturing activity takes place and includes the premises where the final manufacturing activity is carried out and where Standard Mark is to be used or applied".

bringing into existence of a new product. However, such location must equip itself with the necessary facilities required under BIS Regulations.

- **Aggressive position:** A centralized facility to undertake packaging of the product after procuring finished goods from factories. Based on definition set out in FTP, packing / labelling can be argued to be “manufacturing”.

### Guidelines for Grant of License

- The BIS Act and the BIS regulations are supplemented by certain Guidelines which are issued by the BIS as regards grant, renewal, change in scope of license etc. Key out of these is the Guidelines for Grant of License. BIS grants a licence based on successful assessment of the manufacturing infrastructure, production process, quality control and testing capabilities of a manufacturer through a visit to its manufacturing premises.
- The Guidelines read with Scheme I itself lays down two options for obtaining the license, one simpler than the other [it is noteworthy that a foreign manufacturer and a large-scale manufacturer cannot opt for the simpler option].
- The process of license is digitized to a large extent and all the applications for domestic manufacturers are required to be made through the online portal called “manakonline”. For foreign manufacturers, though the application needs to be filed physically (this function is still under development on the portal<sup>8</sup>), post grant of licence, the status of the same can be checked on manakonline portal.



### Pointers for companies

Even after obtaining the license, the account on the portal should also be regularly checked to note any new requirements notified by BIS from time to time.

### Penal Consequence and the Option of Compounding

- The BIS Act prescribe penal consequences in case of violation of the aforementioned provisions. In terms of Section 29(3) of the BIS Act, any person who contravenes the provisions of Section 17 can be punishable with imprisonment for a term which may extend up to two years or with fine which shall:
  - Not be less than INR 2,00,000 for the first contravention; and
  - Not be less than INR 5,00,000 for the second and subsequent contraventions
  - but may extend up to ten times of the value of goods or articles produced or sold or offered to be sold or affixed or applied with a Standard Mark, or with both.
- Compounding an offence signifies that all proceedings related to the issue at hand comes to a conclusion on payment of the compounding amount. The BIS Act<sup>9</sup> provides an option of compounding of an offence of the nature set out in Section 29(3) and committed for the first time. In terms of the Bureau of Indian Standards Rules, 2018, the compounding amount for an offence committed under Section 29(3) of the BIS Act shall be fifty percent of the maximum and subject to a minimum of INR 2 Lakh, of the applicable fine<sup>10</sup>.
- Practically, one hardly ever witnesses the imprisonment provisions under Section 29(3) being invoked. Hence, in case the BIS seeks to adopt an interpretation based on plain reading, the exposure to penal consequences is

<sup>8</sup> Source: BIS Annual Report 2020-21, available at: [https://www.bis.gov.in/wp-content/uploads/2022/02/Annual\\_report\\_for\\_final\\_approval\\_on\\_12-1-2022.pdf](https://www.bis.gov.in/wp-content/uploads/2022/02/Annual_report_for_final_approval_on_12-1-2022.pdf)

<sup>9</sup> Section 33 of the BIS Act.

<sup>10</sup> Rule 50

generally limited to INR 2 Lakh for the first offence.

*We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:*

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