

FASTER, FAIRER ANTITRUST? A LOOK AT INDIA'S PROPOSED SETTLEMENT AND COMMITMENT REGULATIONS

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ABSTRACT

Antitrust laws play a crucial role in fostering healthy competition, benefiting consumers through lower prices, better choices, and increased innovation. However, the mechanism of competition regulation in India often faces a harsh reality with lengthy investigations and protracted litigation. Amidst concerns about the effectiveness of the antitrust regime, many stakeholders have been clamoring for a revision of the Competition Act, advocating for a more credible Antitrust watchdog and a fairer competitive landscape in India. To this end, the CCI has introduced the draft Regulations for Settlement and Commitment proceedings, thereby significantly overhauling the substantive and procedural framework of the competition law regime in India. The Regulations are expected to mark a turning point for tech giants under investigation, granting them an avenue to settle disputes while streamlining regulatory processes and encouraging corrections within the market. However, several key aspects of the draft Regulations remain shrouded in ambiguities and concerns. These include the absence of interim relief provisions for third parties during settlements, no provision for appeal after the final settlement/commitment order, the exclusion of cartel cases, meager settlement discount, and the CCI's unfettered discretion to use the applicant's information against them. This article outlines the challenges of the traditional antitrust enforcement regime and highlights the emergence of the Settlement and Commitment Regulations as a potential solution. However, it also identifies potential loopholes and challenges in implementing the Regulations effectively. Further, to navigate these challenges, the essay draws insights from established Settlement and Commitment mechanisms in other jurisdictions like the EU and the UK and proposes targeted suggestions for India's approach.

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INTRODUCTION

A robust competition law and policy is crucial for boosting the economy and enhancing the consumer welfare of a country. In India, the CCI plays an important role in ensuring the balance between competition and innovation in the market. However, the regulatory mechanism for competition law enforcement in India is plagued by protracted and long-drawn investigations/appeals and low realization of penalties. Notably, according to the CCI's Annual Report for 2022-23, investigations by the Director General (DG) were still pending in 51 cases.¹ Even at the appellate stage, 186 appeals against the decision of the Commission were pending in the National Company Law Appellate Tribunal (NCLAT) as on March 31, 2023.² Further, during the period 2022-23, the CCI imposed penalties of approximately INR 2672.48 Crores in cases of contraventions of Sections 3³ and Section 4⁴ of the Competition Act, 2002 (hereinafter "the Act"). Surprisingly, against these orders, the CCI realized penalties only worth approximately INR 2.65 Crores.⁵ These factors exemplify the inefficiency inherent in the traditional competition law enforcement mechanism in the market, particularly in times of dynamic digital market. The newly proposed CCI's Draft Competition Commission of India (Settlement) Regulations, 2023⁶ (Settlement Regulations) and the Competition Commission of India (Commitment) Regulations, 2023⁷ (Commitment Regulations) offer a glimmer of hope in addressing the highlighted issues. The draft regulations stem from the Competition (Amendment) Act, 2023⁸, which introduced Sections 48A and 48B into the Competition Act, 2002⁹, establishing a settlement and commitment mechanism for alleged contraventions of Section 3(4) and Section 4 of the Act.¹⁰ The amendment allows parties to seek Settlement and Commitment from the CCI in matters concerning anti-competitive vertical agreements and abuse of dominance. The draft regulations aim to introduce procedural efficiencies, potentially enabling the CCI to intervene more swiftly and effectively in specific cases where parties choose to expedite investigations.

¹ COMPETITION COMMISSION OF INDIA, ANNUAL REPORT OF THE COMPETITION COMMISSION OF INDIA, 2023, at 16 (India).

² COMPETITION COMMISSION OF INDIA, ANNUAL REPORT OF THE COMPETITION COMMISSION OF INDIA, 2023, at 25 (India).

³ The Competition (Amendment) Act, 2002, § 3, No. 12, Acts of Parliament, 2002 (India).

⁴ The Competition (Amendment) Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

⁵ COMPETITION COMMISSION OF INDIA, ANNUAL REPORT OF THE COMPETITION COMMISSION OF INDIA, 2023, at 19 (India).

⁶ The Competition Commission of India (Settlement) Regulations (2023).

⁷ The Competition Commission of India (Commitment) Regulations (2023).

⁸ The Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).

⁹ The Competition (Amendment) Act, 2002, § 3, No. 12, Acts of Parliament, 2002 (India).

¹⁰ The Competition (Amendment) Act, 2002, § 3(4), § 4, No. 12, Acts of Parliament, 2002 (India).

However, while presenting opportunities for reduced litigations & speedy resolutions, the draft regulations also raise concerns due to existing loopholes and ambiguities. A careful consideration of the potential challenges is crucial for ensuring the effectiveness of any regulatory framework. On this pretext, this essay makes an attempt to delineate the existing loopholes and ambiguities within the draft regulations, aiming to provide a more balanced framework for newly introduced settlement and commitment mechanisms in India.

PROMISING FEATURES AND LOOPHOLES

The draft regulations are in line with contemporary laws and regulations of developed anti-trust jurisdictions. In some respects, the draft regulations even surpass standards set by parallel jurisdictions. However, much remains to be desired and further refinements are necessary to elevate the draft regulations to an even higher standard. Before delineating the loopholes, it would be pertinent to appreciate the promising feature of the draft regulations.

It is significant that the draft regulations distinguish between admission of contravening facts and admission of guilt¹¹, which is an uncommon and commendable feature compared to other jurisdictions.¹² Further, the CCI offers an opportunity to the party under investigation, the DG Office, and any other concerned party to express their objections and suggestions regarding proposed Settlements and Commitments which will ensure transparency and fairness in the procedure.¹³ The draft regulations also offer a flexible approach by allowing for ‘partial’ Settlement and Commitment, where parties can address specific violations while the investigation into other alleged contraventions continues.¹⁴ However, these positive aspects may be counterbalanced by gaps in the draft, potentially disincentivizing companies from opting for the Settlement and Commitment route. These include the absence of interim relief provisions for third parties, the exclusion of cartel cases, meager settlement discount, no provision for appeal and the CCI’s unfettered discretion to use applicant’s information against them.

¹¹ The Competition Commission of India (Commitment) Regulations (2023), Regulation 6; The Competition Commission of India (Settlement) Regulations (2023), Regulation 7.

¹² Commission Regulation (EC) No 773/2004, 2004, Art. 8, L 123, 2004 (European Union).

¹³ The Competition Commission of India (Commitment) Regulations (2023), Regulation 5; The Competition Commission of India (Settlement) Regulations (2023), Regulation 5.

¹⁴ The Competition Commission of India (Commitment) Regulations (2023), Regulation 12; The Competition Commission of India (Settlement) Regulations (2023), Regulation 12.

Exclusion of Cartels

Despite recommendations from the Parliamentary Standing Committee on Finance¹⁵, the Competition (Amendment) Act, 2023 restricts the scope of commitment & settlement option to potential infringements of Section 3(4)¹⁶ and Section 4¹⁷ of the act, excluding enterprises involved in cartels. The Ministry of Corporate Affairs (hereinafter referred to as MCA) justified the proposed exclusion on two grounds¹⁸; **Firstly**, the existing leniency mechanism for cartels offers a distinct approach to address such violations, rendering their inclusion within the Settlement and Commitment regime redundant. **Secondly**, the inherently “egregious and pernicious” nature of cartels and horizontal agreements, characterized by their fundamental anti-competitive intent, deems them unsuitable for the envisaged settlement mechanism, which is designed for less severe infringements.

However, the argument that cartels benefit from the leniency program overlooks a key objective of the Settlement and Commitment framework: “early closure of an inquiry and pre-emption of appellate litigation.” In contrast, the leniency mechanism primarily aims to “bust cartels”, but doesn’t guarantee early closure. Moreover, the exclusion of Cartels because they are “egregious and pernicious” does not seem reasonable. On the contrary, it should have incentivized the MCA to put cartels under Commitment and Settlement regime since Cartel cases represent a significant portion of the CCI’s workload¹⁹ and almost invariably harm consumers. Consequently, if the CCI’s decisions are stayed by appellate courts, consumers are deprived of any benefits.

Lack of Interim Relief

The draft regulations lack provisions for interim relief to aggrieved parties, leaving them without recourse in case applicant parties opt for settlement and commitment route. The root of confusion stemmed from draft regulations²⁰ which suggest that the inquiry against an applicant will be put on hold until a final decision is reached on the settlement or commitment application. It means that reliance on Section 33²¹ of the Act is not viable, as it

¹⁵ Standing Committee on Finance, Anti-competitive practices by big tech companies, 2023, at 33 (India).

¹⁶ The Competition (Amendment) Act, 2002, § 3, No. 12, Acts of Parliament, 2002 (India).

¹⁷ The Competition (Amendment) Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

¹⁸ Standing Committee on Finance, Anti-competitive practices by big tech companies, 2023, at 33, 34 (India).

¹⁹ CCI’s settlement, commitment provisions a ‘game-changer’ | India (law.asia) (Making room for confessions)

²⁰ The Competition Commission of India (Commitment) Regulations (2023), Regulation 4; The Competition Commission of India (Settlement) Regulations (2023), Regulation 4.

²¹ The Competition (Amendment) Act, 2002, § 33, No. 12, Acts of Parliament, 2002 (India).

only empowers the CCI to grant relief when an inquiry is ongoing, which is not the case during Settlement and Commitment proceedings.²² Hence, the lack of provision for interim relief will restrict the CCI ability to issue interim relief orders, even if deemed necessary during Settlement and Commitment proceedings.

The omission of interim relief provisions within the Settlement and Commitment framework presents several challenges; **Firstly**, it could raise concerns about the effectiveness and fairness of the Settlement and Commitment proceedings as without interim relief, aggrieved parties could suffer ongoing harm while the proceedings unfold; **Secondly**, Aggrieved parties might need to resort to alternative legal avenues to seek interim relief, potentially leading to multiplicity of legal proceedings, which goes against the objective of the draft regulations.

Non-Confidentiality Clause

The draft regulations ensure that disclosure of contravening facts during Settlement and Commitment proceedings does not imply an admission of guilt.²³ However, this advantage is undermined by the fact that the disclosed facts can be used against the applicant in inquiries outside the scope of settlement proceedings.²⁴ Further, the draft regulations allow the CCI to share a “non-confidential summary” of orders passed under Section 26(1)²⁵ of the Act, including details of, alleged contraventions, and settlement/commitment proposals.²⁶ However, no express right for applicants to claim confidentiality over their submissions exists. As a result, apprehensions exist that, in the event an applicant fails to reach a settlement with the CCI, disclosed contravening facts can be utilized by the CCI in subsequent investigations against the applicant. This raises questions regarding potential self-incrimination and its implications for the right to a fair trial. Additionally, the dissemination of a “non-confidential summary” of the order to third parties could enable them to potentially use the information against the applicant in inquiries unrelated to the Settlement and Commitment proceedings.

²² The Competition Commission of India (Commitment) Regulations (2023), Regulation 4; The Competition Commission of India (Settlement) Regulations (2023), Regulation 4.

²³ The Competition Commission of India (Commitment) Regulations (2023), Regulation 6; The Competition Commission of India (Settlement) Regulations (2023), Regulation 7.

²⁴ The Competition Commission of India (Settlement) Regulations (2023), Regulation 6.

²⁵ The Competition (Amendment) Act, 2002, § 27, No. 12, Acts of Parliament, 2002 (India).

²⁶ The Competition Commission of India (Commitment) Regulations (2023), Regulation 5; The Competition Commission of India (Settlement) Regulations (2023), Regulation 5.

Upholding confidentiality would offer several crucial benefits: **Firstly**, it would incentivize applicants to come forward and engage in genuine settlement/commitment discussions without fear of sensitive information being exposed. **Secondly**, it would prevent the strategic use of information from settlement/commitment procedures in unrelated legal disputes, ensuring fairness and protecting the rights of applicants.

Meager Settlement Discount

As per the draft regulations, the CCI will accept the settlement application on the payment of the settlement amount.²⁷ The CCI will be guided by the Penalty guidelines for determining settlement amounts, which are yet to be notified.²⁸ While the settlement amount can be as high as the maximum penalty allowed under Section 27(b) of the Act,²⁹ the CCI has the power to grant only a 15 percent discount on the settlement amount considering factors given under regulation 6(3).³⁰ Now, in this context, consider a situation where CCI determines the settlement amount equal to the maximum penalty payable under the act on account of cooperation extended and disclosure of facts made by the applicant party. In this situation, even if it is desirable to provide a discount which is reasonable considering the amount of cooperation made by the applicant, it would not be possible due to the 15 percent cap put by the draft regulations.

No Provision for Appeal

Under the draft regulations, the CCI has the power to accept or reject Settlement and Commitment applications, with no provision for review or appeal against its decision.³¹ The draft regulation becomes even more contentious in the context of commitment order. the commitments given to the CCI would not amount to a contravention, however, unlike in the case of settlements, third parties cannot claim compensation³². This, coupled with the finality of CCI decisions on commitments³³, the aggrieved third parties would have no recourse to seek compensation.

²⁷ The Competition Commission of India (Settlement) Regulations (2023), Regulation 5.

²⁸ Regulation-6, settlement regulations.

²⁹ The Competition (Amendment) Act, 2002, § 27, No. 12, Acts of Parliament, 2002 (India).

³⁰ The Competition Commission of India (Settlement) Regulations (2023), Regulation 6.

³¹ The Competition (Amendment) Act, 2023, § 48A, 48B, No. 9, Acts of Parliament, 2023 (India).

³² The Competition Commission of India (Commitment) Regulations (2023), Regulation 6; The Competition Commission of India (Settlement) Regulations (2023), Regulation 7.

³³ The Competition (Amendment) Act, 2023, § 48B, No. 9, Acts of Parliament, 2023 (India).

Further, even in the case of the applicant, consider a situation where the CCI decides the settlement amount equal to the maximum penalty payable for the alleged contravention. While the settlement amount might represent the applicant's worst-case scenario, the applicant would have no say since the settlement amount would be determined by the penalty guidelines. In this instance, if the applicant chooses to defy the settlement order, the act of defiance would authorize the CCI to impose litigation costs of up to INR 1,00,00,000/ for non-compliance of the settlement order. Now, from the above situation two implications could follow, either the applicant accepts the hefty settlement amount or defy the settlement order and bear the litigation cost coupled with reinstatement of inquiry. Furthermore, the draft regulations permit the CCI to use information provided by the applicant during settlement negotiations in the subsequent inquiry, potentially impacting the perceived fairness of the process.

SUGGESTIONS

Building upon the previous discussion on gaps within the draft regulations, this section makes an attempt to propose concrete solutions to address the identified loopholes. By fostering a more balanced and transparent framework, these suggestions aim to strengthen the effectiveness of settlement and commitment mechanisms within the antitrust regulatory framework.

Cartels

As advocated earlier, the CCI should consider including cartel cases, i.e., cases of contraventions of Section 3(3) of the Act, within the ambit of Settlement and Commitment mechanisms. For this, we can draw inspiration from other jurisdictions which have well-established settlement and commitment mechanisms for Cartel cases. For instance- the European Commission employs a settlement mechanism in Cartel cases³⁴, offering a 10% fine reduction to parties and the Commission applies leniency discount and settlement reduction cumulatively. The parties seeking settlement must acknowledge their participation in anti-competitive conduct and reach a mutually agreed-upon understanding with the Commission regarding the factual basis and legal characterization of their actions. To ensure fairness, the EC must demonstrate sufficient evidence against the participating companies, who then respond with a formal statement of objections. Further, the Commission

³⁴ Commission Regulation (EC) No 773/2004, 2004, Art. 10a, L 123, 2004 (European Union).

experiences several advantages associated with the settlement mechanism such as shorter and faster administrative procedures leading to a smaller number of cases in appeal and more efficient use of resources in the Cartel Directorate. It is pertinent to note here that since the adoption of the mechanism in 2008, the EC has successfully decided 35 cases through settlement.³⁵ Not limited to this, in a study conducted by using a panel data set of all EC Cartel cases between 2000 and 2014, it was found that settlements reduced the average case duration by over 8 months,³⁶ and the number of appeals of Commission decisions decreased by over 50%.³⁷ Germany's settlement mechanism shares similarities with the EU's, however, encompassing a broader range of antitrust proceedings, including Cartels. In Germany, the maximum settlement discount is 10%, granted by the Federal Cartel Office on top of any potential leniency discount.³⁸ However, it is important to note that this 10% reduction is applied sequentially, meaning it is calculated after any leniency discount has already been subtracted from the original fine amount. This is in contrast to the European Commission which applies leniency discounts and settlement reductions cumulatively, resulting in a *de facto* higher overall reduction in fines than in Germany. Therefore, it is evident that the leniency regime and settlement reductions can operate concurrently and potentially offer additional incentives for companies involved in cartels to choose settlement options due to the potential for reduced fines. Consequently, expanding the scope of the draft regulations to encompass contraventions under Section 3(3) of the Competition Act and granting at least 10% settlement reductions in cartel cases could enhance the effectiveness of these mechanisms.

Confidentiality

As mentioned earlier, the draft regulations for settlement procedures mandate the CCI to share a non-confidential summary of an order issued under Section 26³⁹ of the Act, along with additional details related to settlement/commitment with third parties. This practice, while intended to increase transparency and invite suggestions/objections to the proposed

³⁵ Available at: https://competition-policy.ec.europa.eu/antitrust-and-cartels/cartels-cases-and-statistics_en (Official EU Commission's cartel case pool) (last visited on 25 October 2024).

³⁶ K. HÜSCHEL RATH & U. LAITENBERGER, THE SETTLEMENT PROCEDURE IN THE EUROPEAN COMMISSION'S CARTEL CASES: AN EARLY EVALUATION (Journal of Antitrust Enforcement, 2017) 458–487.

³⁷ M. HELLWIG, K. HÜSCHEL RATH & U. LAITENBERGER, SETTLEMENTS AND APPEALS IN THE EUROPEAN COMMISSION'S CARTEL CASES: AN EMPIRICAL ASSESSMENT, (Review of Industrial Organization, 2018) 52(1), 55–84.

³⁸ Available at: <https://competitionlawblog.kluwercompetitionlaw.com/2014/01/17/the-fco-publishes-note-on-settlement-procedures-in-antitrust-proceedings-in-germany/> (last visited on 26 October 2024).

³⁹ The Competition (Amendment) Act, 2023, § 26, No. 9, Acts of Parliament, 2023 (India).

settlement/commitment, raises significant concerns regarding the confidentiality of information shared by applicants with CCI. Hence, an alternative approach that prioritizes a more balanced framework for confidentiality within the settlement and commitment process should be adopted. To this end, the draft regulations can incorporate the definition of “*sensitive information*” which ensures that no information which is detrimental to the interests of the applicants shall be disclosed. For this purpose, reference can be made to Commission Regulation (EC) No 773/2004.⁴⁰ While the regulation lacks an explicit definition of “*sensitive information*,” it outlines key characteristics that could be considered for purposes of defining “*sensitive information*”. Following the regulation, the definition of sensitive information could be;

“Sensitive information includes business secrets or any other confidential information, which may be considered as confidential, insofar as its disclosure would significantly harm the applicant.”

In the context of the definition, the “*any other confidential information*” would be deemed to include any contravening facts, settlement proposals, commitment proposals etc. since the term is of wide amplitude, it would be able to cover any information which could be considered as confidential in the given circumstances. This approach would safeguard applicants from the potential misuse of information in subsequent legal proceedings, such as follow-up proceedings in case the CCI rejects the settlement proposal.

Similarly, to ensure fairness and safeguard due process, the draft regulations should extend the right against self-incrimination to applicants for any information disclosed in settlement proceedings. This will prohibit the CCI from utilizing any information disclosed by the applicant within their settlement proposal, especially information directly pertaining to the alleged contravention or other potentially incriminating details, in any follow-up proceedings or proceedings not part of the settlement proceedings.

Meager Settlement Discount

The primary motivation for parties to participate in a settlement/commitment procedure is the potential for a reduced fine compared to what the regulator might impose for a violation of the law. However, if this discount is too rigid and low (maximum 15% as per the draft

⁴⁰ Commission Regulation (EC) No 773/2004, 2004, Art. 8, L 123, 2004 (European Union).

regulations) to incentivize an applicant to opt for settlement or commitment proceedings, the whole objective of the draft regulations will be defeated. Therefore, a more nuanced approach needs to be adopted. For instance- raising the cap beyond 15% would provide the CCI with greater flexibility to offer discounts commensurate with the level of cooperation and the specific context of the violation. Inspiration can be drawn from Turkish Competition Law No. 4054 which provides for a 25% settlement discount.⁴¹ Further, the draft regulations provide that the Commission shall consider “the level of cooperation extended, nature of disclosure made by the Settlement Applicant and the settlement proposal” to decide the discount to be given. However, it is suggested that CCI should also consider the severity of the violation, the impact of the violation attempts and the bargaining power to determine the settlement discount which can ensure a more balanced approach to penalties, avoiding overly lenient or excessively punitive outcomes.

Right to Appeal

Further, as highlighted in the previous section, the draft regulations don't provide for review or appeal against the decision of the CCI to accept or reject settlement and commitment applications. While the rationale behind barring appeals in the settlement and commitment framework to expedite resolution is a laudable goal, the complete absence of appeal or review mechanisms creates an unreasonable impediment in the fairness of the procedure. Allowing appeals or reviews on specific grounds could offer valuable checks and balances without hindering efficiency. For instance- instead of complete denial of right to appeal, appeals regarding aspects which are not denied by the applicant during the invitation of objections might be barred. However, appeals should be allowed for specific matters like the fine calculation methodology (including damage to the economy, individual circumstances, and payment ability). Additionally, a proportionality test could be implemented, allowing courts to review rejected settlement/commitment applications by the CCI and assess the adequacy of proposed settlement/commitments in addressing competition concerns. This approach aligns with the leniency regime, where applicants who confess to cartel involvement can still appeal the final order.

⁴¹The Act No. 4054 on the Protection of Competition, 22140, 1994, Additional paragraph: 16.06.2020-7246/Article 9, (Turkey).

Interim Relief

The lack of provision with regard to interim relief in the draft regulation would result in grave injustice to the third parties especially the party directly affected by the anti-competitive act of the applicant. As mentioned earlier, the omission to incorporate the interim relief regulation in draft regulation would directly question the effectiveness and fairness of the settlement and commitment proceedings and as a result, jeopardize the very objective of the draft regulations. However, this lacuna can be addressed in two ways. **Firstly**, the draft regulations could include a new regulation offering recourse to the aggrieved party for seeking interim relief from the CCI. **Alternatively**, an amendment to Section 33 of the act could be proposed, incorporating two additional terms: “*settlement proceedings*” and “*commitment proceedings*”. As mentioned earlier, relying on Section 33 is not viable for seeking interim relief, as it only permits such relief “*during an inquiry*” and not otherwise⁴² and since the draft regulations specify that settlement and commitment proceedings suspend the inquiry⁴³, aggrieved third parties are left with no recourse. Therefore, amending Section 33 to encompass settlement and commitment proceedings could afford necessary relief to the aggrieved party during these proceedings.

CONCLUSION

The ultimate aim of antitrust regulations and its enforcement agencies like the CCI is to foster a healthy market with robust competition, benefiting both consumers and competitors. This requires striking a balance between efficiency and fairness. Introducing settlement and commitment mechanisms presents an opportunity for the CCI to achieve its objectives more swiftly and efficiently. Companies readily cooperating and resolving their contraventions of the Act quickly can free up resources for the CCI to tackle other pressing cases. However, granting unfettered discretion to the CCI and rigidity against the companies can prove to be an impediment in achieving its objectives. Therefore, it is crucial to ensure that these mechanisms maintain a balanced approach so as to neither provide any adjudicating authority with excessive and unregulated power nor to jeopardize the fairness of the procedure.

⁴² The Competition (Amendment) Act, 2023, § 33, No. 9, Acts of Parliament, 2023 (India).

⁴³ The Competition Commission of India (Commitment) Regulations (2023), Regulation 4; The Competition Commission of India (Settlement) Regulations (2023), Regulation 4.