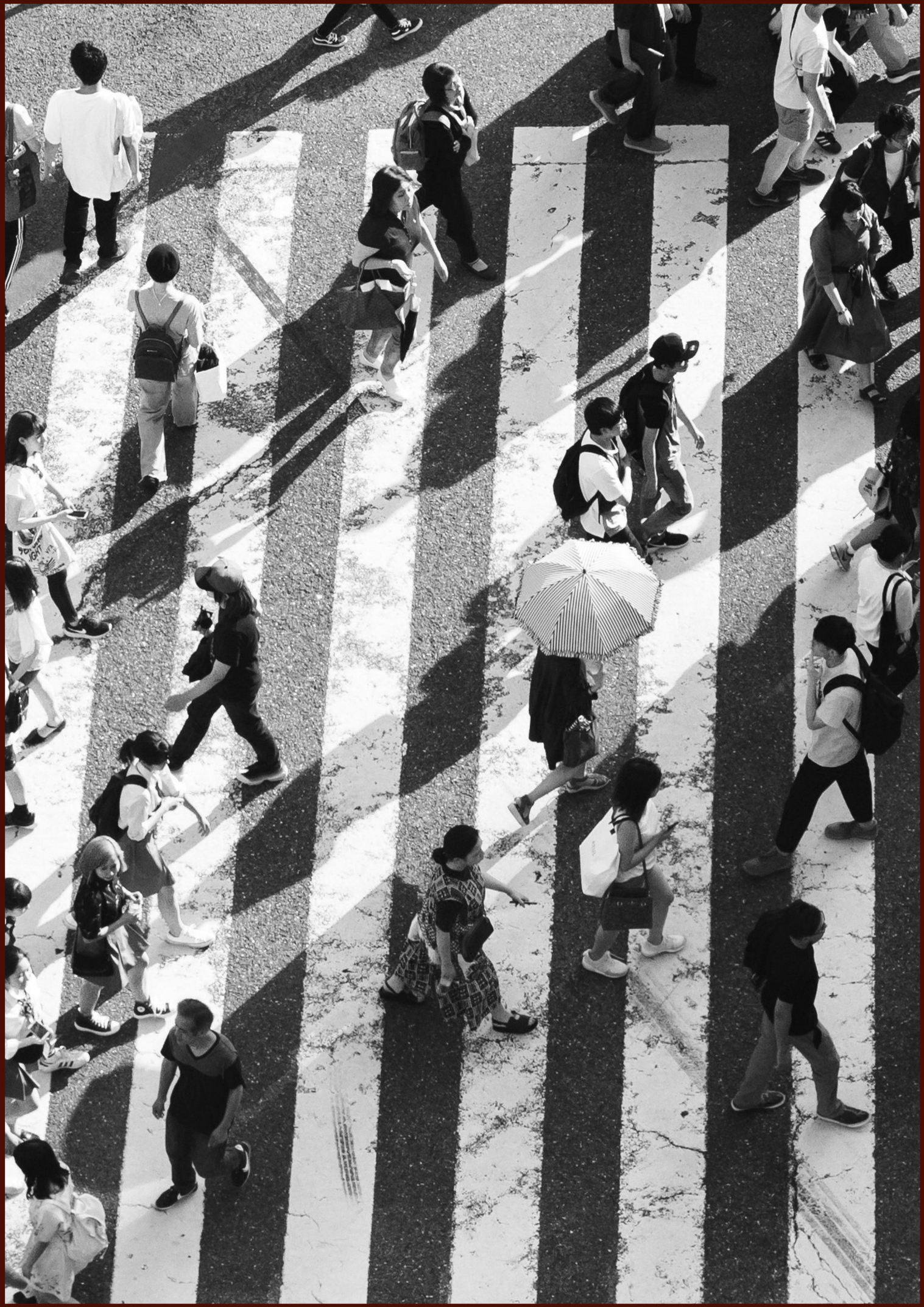


Navigating Balanced Market Dynamics

Recommendations for
CCI's Settlement and
Commitment Rules

February 2024



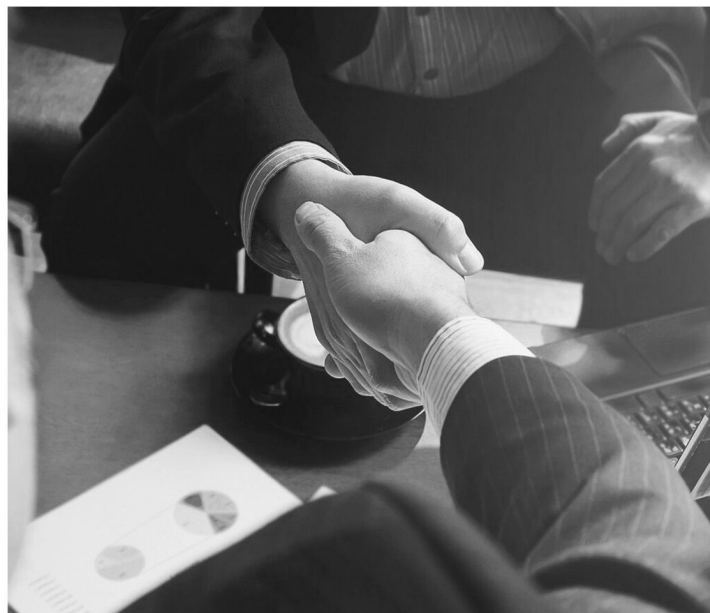


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The Competition Commission of India (CCI) introduced draft regulations for Commitments and Settlements proceedings on August 23, 2023, following the Competition (Amendment) Act, 2023. These frameworks provide companies implicated in cases of abuse of dominance and anti-competitive agreements the opportunity to settle with the CCI rather than go to court. Commitments and Settlements thus offer an alternative to litigation and are aimed at quicker (dispute) resolution vis-à-vis market correction.



Settlement

An enterprise can apply for settlement to the CCI after receiving the Director General's (DG)¹ report but before the CCI passes an order. The CCI will evaluate the contraventions' nature, gravity, and impact and may accept the settlement proposal, subject to the terms and implementation details specified in the regulations. If the CCI and the concerned party do not reach an agreement on settlement, or if the CCI deems settlement inappropriate, the inquiry will proceed.

Commitment

Similar procedures are outlined for offering commitments, where enterprises can apply to provide commitments to the CCI after the CCI has directed the DG to investigate based on a prima facie opinion but before the DG sends their report. The CCI will consider the nature, gravity, impact, and effectiveness of the proposed commitments before accepting or rejecting them.

¹ The Director General, appointed by CCI after prior approval of the Central Government, assists the Commission, when so directed by it, in investigation of any contravention of provisions as set by the Competition Act, or any of its rules and regulations.



Relevance for India's consumption based economy

The introduction and implementation of robust settlement and commitment (S&C) laws by the Competition Commission of India (CCI) hold paramount significance for India's growing consumption-based economy. India's consumer market is poised for substantial growth, with an annual consumption expenditure expected to reach USD 6 trillion by 2030.² In this dynamic economic landscape,

efficient resolution mechanisms become imperative to expedite regulatory processes. The CCI's strategic focus on settlement and commitment mechanisms not only expedites the resolution of competition law cases but also facilitates a conducive environment for businesses, fostering fair competition. Streamlining these legal frameworks is poised to significantly contribute to India's economic vibrancy by promoting market integrity, mitigating anticompetitive practices, and providing a stable foundation for businesses to thrive and innovate amidst escalating consumer demands.

KEY OBSERVATIONS AND SUGGESTIONS

From a business point of view, Settlements and Commitments offer a key benefit by speeding up the resolution of issues with regulatory authorities. MNCs in foreign jurisdictions (such as the European Union (EU), United Kingdom, Germany, Japan), especially big-techs, have used settlement mechanisms as a viable option for mitigation of anti-trust and competition law queries. To effectively use these antitrust measures in India, the procedures must be clear, reliable, and considerate of the industry's interests, including safeguarding a company's reputation.

The inclusion of these tools in the Bills is set to be a positive development, indicating the growing sophistication of India's antitrust regulations, and also aligning with established practices in global antitrust systems. This also underscores the precedence in efficiency seen in other Indian regulatory bodies, like the Securities Exchange Board of India's settlement laws,³ and the settlement provisions of the Income Tax Act 1961.⁴

² <https://www.fortuneindia.com/macro/indias-consumer-spending-to-grow-to-6-trillion-by-2030-wef/102846#:~:text=Consumer%20spending%20in%20India%20will,the%20report%2C%20released%20on%20Wednesday.>

³ The Securities and Exchange Board of India (SEBI) also has implemented a mechanism for settlements. The SEBI Act, 1992 ('SEBI Act') read with the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 ('SEBI Settlement Regulations'), provide a mechanism for settlement of specific violations of various laws concerning the securities market, and by the payment of fees without admitting guilt.

⁴ <https://www.dor.gov.in/sites/default/files/Income%20Tax%20Act.pdf> (Section 245 of Income Tax Act 1961, further amended by Finance Act 2006)

We propose few suggestions and re-evaluations that the Commission (CCI) can take into its consideration. →



Protection of applicant information

It is suggested to reconsider the provision (Clause 12 of the Settlement Regulations and Clause 11 of the Commitment Regulations) which allows information provided in the commitment or settlement application to be used against the applicant or other parties. The current provision will disincentivise the parties to come forward and file the applications, thereby potentially reducing the very purpose of the legislations. Moreover, this is in contradiction to the provisions (Clause 7(1) of the Settlement Regulations and Clause 6(1) of Commitment Regulations) wherein the drafts say that the order passed by the Commission agreeing to the commitments and settlement offered shall not be construed as a finding of contravention by the Commission against the Applicant. A further review and clarity on this can foster a more cooperative atmosphere.

Global cue

The European Commission (EC), EU, if it decides not to go ahead with the settlement submissions, then the acknowledgements provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.⁵ Likewise, in the United Kingdom, the legislation explicitly mandates the CMA to render a verdict of infringement, even when cases are resolved through settlement.⁶ Additionally, if one of the parties opts out of the settlement, the CMA is prohibited from utilizing the acknowledgments as proof against any of the involved parties in the legal proceedings.⁷



5 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29> (paragraph nos. 27 and 29 of Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases)

6 <https://www.legislation.gov.uk/ukxi/2014/458/made> (Rule 9(5), Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014)

7 <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998cases#withdrawal-from-the-settlement-procedurefollowing-settlement> (Para 14.32 of Guidance on the CMA's investigation procedures in Competition Act 1998 cases)



Time period of filing the application

Under existing regulations, respondent entities are mandated to apply for commitment and settlement within 45 days (plus additional 30 days on reasonable grounds) post the initiation of a DG investigation and subsequent to the submission of the DG report respectively. Given the overarching objectives of Commitment and Settlements to streamline economically efficient decision-making processes and alleviate litigation burdens, it is recommended that the stipulated time constraints for application submissions be eliminated to broaden its scope, or alternately extended/relaxed, to allow parties the appropriate time and leniency to analyse, vet, draft and even consult on its application. The fundamental criteria, however, should persist—commitment applications can be submitted post the initiation of DG investigation but before the DG report submission, while settlement applications can be lodged after the DG report submission but prior to the issuance of the final order. Further, earlier filing of settlement applications can come with the incentive of the Commission providing a relatively greater penalty discount.

The proposition to remove or extend temporal restrictions on application filings is also rooted in the pursuit of heightened efficiency and a reduction in legal entanglements. By eliminating rigid time bars, the scope of S&C is envisioned to expand, aligning with the core objectives of promoting judicious economic decision-making and curtailing the burden of avoidable litigation time.

The proposed adjustment, while maintaining the foundational definitions, advocates for a more flexible temporal framework, allowing respondent entities to strategically engage with the S&C process throughout key investigative stages, fostering a nuanced and adaptive regulatory environment.

Global cue

Australia, for example has no fixed timeline for filing of settlement or commitment applications.⁸ Also, in UK's CMA, submitting settlement applications prior to the issuance of a statement of objections provides a maximum penalty discount of 20%, whereas the discount reduces to 10% for applications filed after the statement of objections.⁹



⁸ <https://www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf>

⁹ <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases> (Para 14.30 of Guidance on the CMA's investigation procedures in Competition Act 1998 cases)



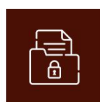
Application of these regulations to cases pending with CCI

The introduction of the commitment and settlement mechanism into the existing competition framework aims to accelerate the resolution of competition law cases. This effort seems encouraging in terms of resolving the existing backlog of cases at the CCI more swiftly, while also expediting case disposals, the current time of which stands at an average of 25.7 months.¹⁰ Nevertheless, it remains unclear from the settlement and commitment drafts whether they will apply to the cases currently awaiting resolution at the CCI. Although the commitment and settlement mechanism offer potential relief for future cases, the ones currently underway, particularly those at the pre-DG report and post-DG report stages, which have not yet concluded before the CCI, might not have the opportunity to utilize this mechanism. This limitation arises from the prescribed time limits for submitting an application, as outlined in both the drafts. Considering the numerous cases awaiting resolution at the CCI, introducing a clause that allows the parties currently involved with the Commission to utilize the mechanism can greatly ease the CCI's workload and accelerate the resolution process.

As a counter-argument, it can be understood that the 75 days period (45+30 days) granted to the applicants might impact the pending cases' ask for legitimacy within the draft laws, wherein the length of CCI's investigation (DG's investigation and DG's report) might have exceeded that stipulated time frame.

However, to serve the very purpose of the Competition Act and its ethos, and to be fair to all parties, considerations can be made in the form of some exceptions. This will also help relax the urgency of overall pending competition cases.





Confidentiality in commitment proceedings

The application of confidentiality regulations in commitment and settlement proceedings throughout can ensure a fair and secure process. Establishing a confidentiality ring for access to confidential submissions is suggested. This involves only publishing a public version of the commitment or settlement decision upon reaching an agreement (with non-publication if rejected) which can help protect sensitive information. Such enhanced protection will also be in alignment with Section 57 of the Competition Act, which provides protection pertaining to disclosure of information.

Moreover, according to the proposed regulations' Clause 5(1) of both S&C, the Commission will disclose a 'non-confidential summary' encompassing details such as details of the order passed under Section 26(1) of the Competition Act, competition concerns, alleged contraventions, and the settlement proposal/commitments from the applicant. However, there is no explicit provision granting the settlement/commitment applicant the right to assert confidentiality over their submissions. Given the comprehensive disclosures expected from the applicant, including sensitive business information and subsequent business repute, it is recommended that the applicant be afforded the right to claim confidentiality for their

submissions, aligning with Regulation 35 of the Competition Commission of India (General) Regulations, 2009.¹¹ The Commission may also refer to the precedence set under the Income Tax Act Section 245G wherein no person is entitled to inspect or obtain copies of reports related to the proceedings which are submitted by the Income tax authorities to the Settlement Commission, other than the person(s) that the case relates to.

Global cue

The EU law on settlements provides various safeguards to ensure confidentiality. The parties to the proceedings cannot disclose to any third party the contents of the discussions or of the documents to which they have had access in view of settlement without permission of the Commission. Also, parties to the investigation who have not requested settlement can get access to settlement submissions only after they commit not to make any copy of any information in the settlement submissions to which access is being granted.¹²

¹¹ <https://www.cci.gov.in/images/legalframeworkregulation/en/cci-general-regulations-20091652176202.pdf>

¹² <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29> (Para nos. 7, 34, 35 of Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases)

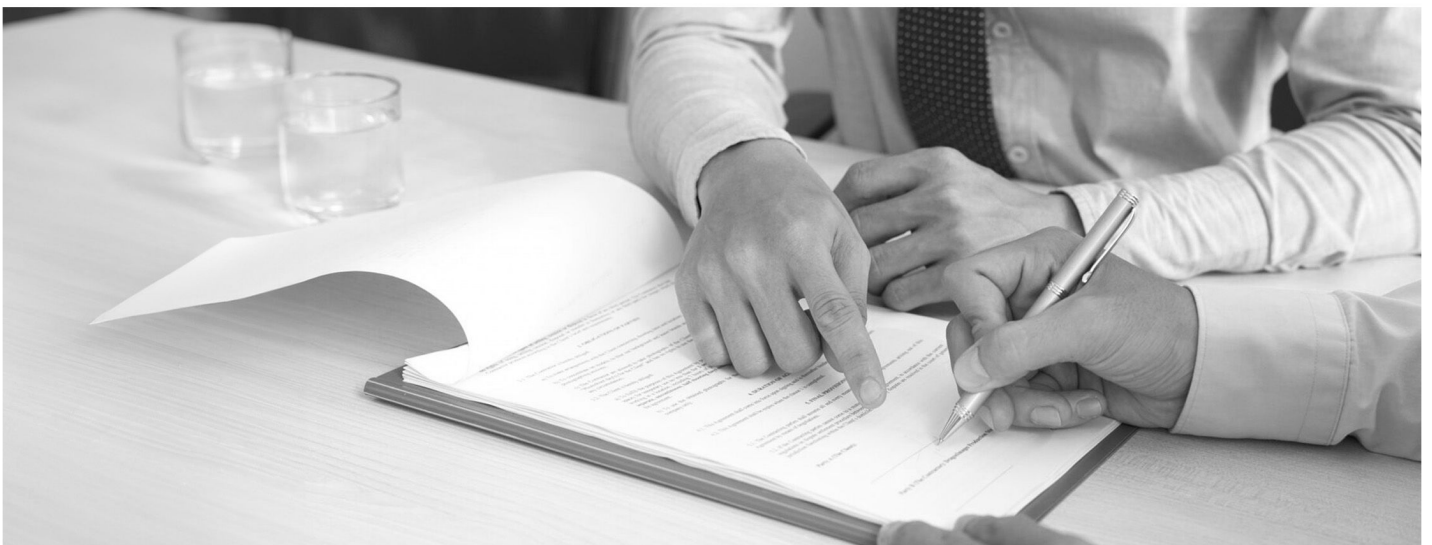


The cut off phases

The regulations introduced in India specify specific events that act as cut-offs for parties to utilize settlement and commitment mechanisms. Settlements can be proposed after the receipt of the DG Report, while commitments must be put forth before receiving the DG Report. A flexible approach will provide value, particularly in cases with early and compelling evidence of anti-competitive conduct, allowing authorities to convey information to parties and facilitate early settlements, thereby avoiding significant resource expenditure in evidence collection and report preparation.

Global cue

Notably, many jurisdictions employing these tools do not typically impose strict cut-off events. Entities like the EC, CMA, and Bundeskartellamt (Germany) generally allow parties and authorities flexibility in deciding when to engage in settlement discussions or propose commitments. Moreover, the CMA follows a penalty reduction model; it explicitly encourages pre-statement of objections settlements by offering a higher penalty reduction of up to 20 percent compared to 10 percent if settled post-objections issuance.



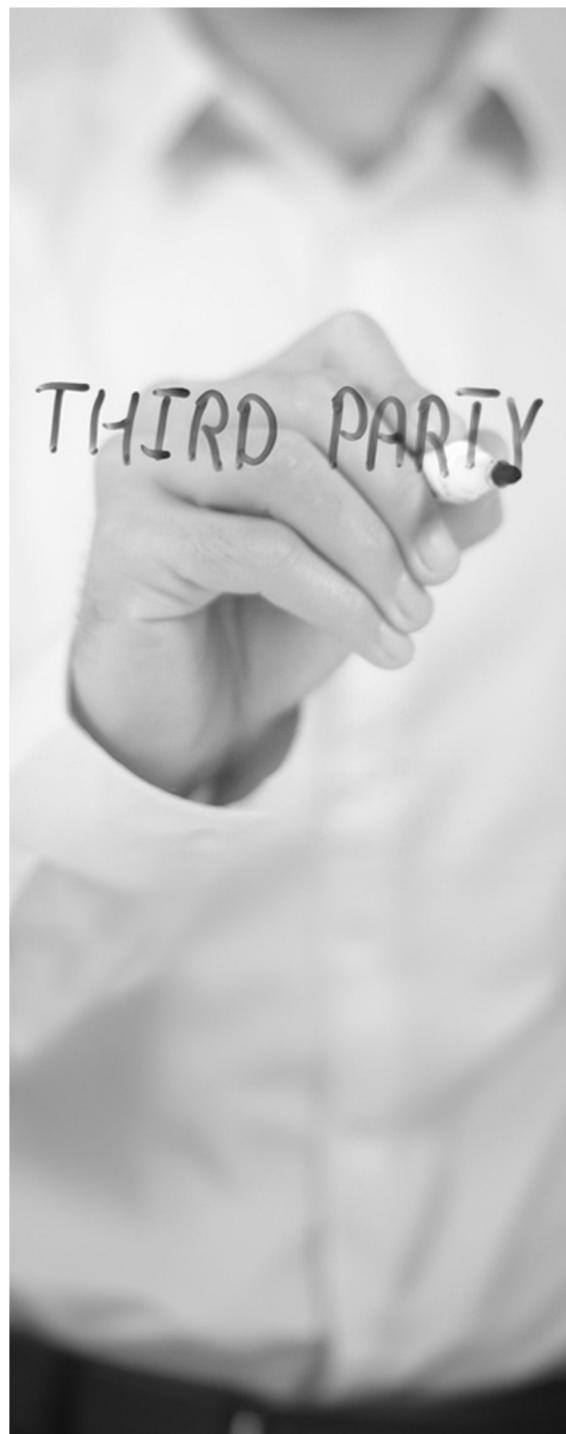


Legitimacy on third-party and public submissions

The involvement of third parties and public comments into the proceedings of commitments, although a welcome move by the Commission as it will help ‘market-test’ commitments, needs reconsideration. To minimise the potential for motivated or ill-informed submissions, it is recommended to limit the extent and exposure of information that Third Parties and the public can provide on a commitment application. This is also to ensure that parties are not impacted by a potential misuse of the provision, wherein the contraventions until that point, are only ‘alleged’. As a way forward, factual information relevant to the commitment application can be submitted through affidavits, reducing the risk of bias or misinformation. It is also proposed that the Commission considers removing the provision altogether.

Global cue

Consultations on commitments in the UK are restricted to interested third parties exclusively. The CMA in the UK specifically engages with parties likely to be impacted by commitments under the Competition Act, 1998.¹³ It says “the CMA will consult those who are likely to be affected by them and give them an opportunity to give their views”.



¹³ <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases> (Para 10.23 of Guidance on the CMA's investigation procedures in Competition Act 1998 cases)

 **Flexibility in modifying
commitment orders**

The Commission should embody the flexibility to modify a commitment or settlement order in response to material changes in facts or law. This flexibility is essential to maintain the continued efficacy and pertinence of the commitment order over time. This practice is consistent with an adaptive regulatory ecosystem, and with the principles of natural justice which CCI is mandated to follow in terms of Section 36 of the Competition Act. This is also important as the decision of the Commission is deemed to be final in the legislations without leaving the scope for possible appeals. The Commission may also refer to the precedence set under the Income Tax Act Section 245E.

Global cue

The South African Competition Act¹⁴ allows the Competition Commission to modify or revoke a consent order based on specific conditions, such as a material change in circumstances, new evidence, or non-compliance with the order by the undertaking. This provision helps maintain the relevance and effectiveness of the order in a dynamic market environment. Similar is the approach for Turkey's¹⁵ competition laws.



¹⁴ <https://www.compcom.co.za/wp-content/uploads/2021/03/Competition-Act-A6.pdf>

¹⁵ <https://www.lexology.com/library/detail.aspx?g=7aa47190-9c2c-4e5e-b60d-8cace071d4ad>



Subjectivity on the 'impact' of the alleged contraventions

Under the application of settlement and commitment (Clauses 3(1)(g) on both), the mention of 'impact of alleged contravention' to be filed by the applicant themselves seems vague and the same can be subjective, depending on one's own perception. To address the potential subjectivity inherent in the assessment of the impact of alleged contraventions under settlement and commitment mechanisms, it is essential to introduce a quantifiable metric that establishes a standardized framework for evaluating such impacts. The Commission should proactively define and delineate the precise parameters and dimensions that constitute the 'impact' of contraventions that the applicants are to file.

This entails the formulation of a structured methodology, perhaps involving financial, economic, and market-based indicators, to objectively quantify the repercussions of the alleged contraventions. By establishing a robust metric system, both the applicant and the Commission benefit from a clearer and more technical understanding of the impact, transcending individual interpretations. Incorporating specific criteria, such as financial losses, market share fluctuations, or other quantifiable benchmarks, will not only guide the applicant in providing a more detailed and objective assessment but also empower the Commission to conduct a rigorous and standardized review process.





Agencies to oversee settlement and commitment mechanisms

The monitoring of the settlement and commitment order by an external agency (reference to Clause 10 of Settlement Regulations and Clause 9 of Commitment Regulations) is an acknowledged step. The Commission also rightfully mandates that such an agency should not have any conflict of interest. The Commission should also separately mention and make sure that this provision of conflict of interest, in principle, accommodates any form of relationship, whatsoever, between the applicant's competitors and the agencies themselves. The Commission should explicitly stipulate that any potential conflicts extend beyond direct financial ties and encompass a comprehensive range of relationships between the applicant's competitors and the overseeing agencies.

This includes, but is not limited to, familial connections, professional collaborations, and shared business interests (including Board membership, whether present or previous). By emphasizing the need for a thorough examination of any conceivable relationship, the Commission ensures that the overseeing agency remains impartial and free from undue influence. Furthermore, the Commission should underscore the significance of transparency in disclosing any existing or past relationships between the agencies and competitors of the applicant. This disclosure should extend to both formal and informal associations, reinforcing the commitment to a fair and unbiased oversight process.



ADDITIONAL CONSIDERATIONS

Application fee

The proposed Regulations impose a substantial fee for the submission of settlement or commitment applications by the applicant. In contrast, the Lesser Penalty Regulations 2023 exempt leniency applicants from any filing fees when submitting their applications. The filing fee (reference to Clause 9 of Settlement Regulations and Clause 8 of Commitment Regulations), ranging from INR 5,00,000/- to INR 50,00,000/- linked to the applicant's turnover, is being mandated to accompany the application.

Furthermore, the Draft Settlement and Commitment Regulations stipulate that the applicant may need to make payments to monitoring agencies appointed by the CCI. In cases of non-compliance, the applicant is obligated to cover litigation costs and expenses related to misrepresentation. Additionally, settlement applicants may be required to resolve compensation applications. These financial obligations are likely to act as deterrents for parties considering settlement with the CCI.

Quantum to be paid

In accordance with the provisions outlined in the draft regulations, aligning the settlement amount with the potential penalty stipulated by the Competition Act introduces a strategic element in the decision-making process for involved parties. Enhancing the attractiveness of the settlement option, particularly for potential infringers, could be achieved through the imposition of a predetermined cap expressed as a percentage of the maximum statutory penalty.

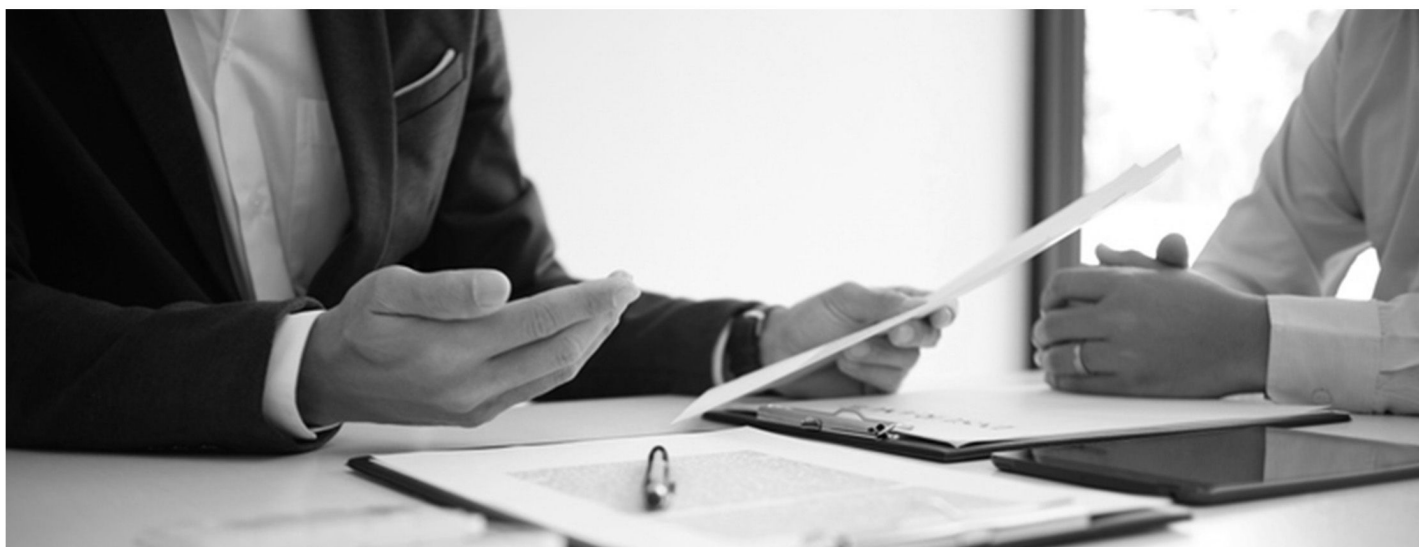
Introducing a capped percentage system serves multiple technical purposes.

Firstly, it provides a degree of predictability and financial clarity for parties contemplating settlement, as they can anticipate the upper limits of their financial obligations. This approach adds a layer of transparency to the settlement process, fostering an environment where parties can make informed decisions based on predefined parameters. Moreover, from a regulatory standpoint, implementing a capped percentage mitigates the risk of disproportionate settlements and ensures that the financial ramifications align more closely with the severity of the alleged contraventions.

Settlement discount

The existing limitation on the settlement discount (Reference to Clause 6(3)), capped at 15% of the leviable penalty, may discourage potential applicants from opting to settle with the CCI to expedite the closure of inquiries. To enhance flexibility and align with India's current focus on ease of doing business and expeditious market correction, it is proposed to increase the settlement discount cap beyond 15%. This adjustment would contribute de facto to fostering a business-friendly environment, and readiness for businesses to opt for settlements.

For cartels, which are deemed as more severe violations, a leniency applicant can receive concessions of up to 100% (50% for a second marker, and up to 30% for third markers and subsequent applicants) of the leviable penalty under Lesser Penalty provisions. Additionally, availing the "Leniency Plus" concession offers non-benefit of additional concessions. To better align with the trident objectives of (a) promoting ease of doing business, (b) reducing litigation, and (c) expediting market correction, it is suggested to consider raising the cap limit beyond 15% for concessions in the penalty to settlement applicants.



The proposed Regulations aim, among other things, the streamlining of procedures related to perceived vertical restraints and abuse of dominance cases. It is imperative for the viability of the settlement and commitment system to be upheld, ensuring an equitable equilibrium that serves the interests of the CCI, businesses, and various stakeholders. The strategy should prioritise averting protracted investigations and protracted legal proceedings, which can linger for over a decade, leading to a loss of relevance by the time a final decision is reached, given the ever-evolving competitive landscape in the market.

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