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# Revolutionizing Enforcement: Settlement and Commitments Mechanism in Indian Competition Law

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## ABSTRACT

*Given the numerous ongoing anti-trust cases, it is crucial for India to enhance and accelerate its anti-trust resolution system. The Indian Government has taken a commendable step by passing the Competition Amendment Act, 2023. This act aligns India with worldwide standards by introducing the "Settlement and Commitment Mechanism". The addition of these two new instruments to the enforcement mechanism arsenal of the Competition Commission of India aims to facilitate prompt intervention and resolution of anti-trust matters, thereby providing relief to both consumers and enterprises, and ultimately benefiting the economy as a whole. This would additionally contribute to the decrease in administrative expenses.*

*The Competition Law Review Committee's report emphasized that the main reasons for introducing the settlement and commitment mechanism are to achieve procedural economy and efficiency in enforcement. Implementing these measures will enable CCI to expedite the resolution of anti-trust proceedings, resulting in increased efficiency and reduced expenses. Businesses would also benefit from expedited investigations and reduced ambiguity. Essentially, this method would serve to enforce new measures that discourage the guilty party, while also ensuring fair solutions for the victims. Similar practices are already implemented in various other jurisdictions, including the European Union, Japan, Singapore, United and Germany.*

*This article explores the newly introduced provisions of "Settlement and Commitment" in Indian Competition Act and their potential impact on competition enforcement. This paper aims to study the Settlement and commitment system introduced under Section 48A and Section 48B of Competition (Amendment) Act, 2023 in-depth. The paper shall also touch upon the similar systems present in the legislative framework of EU, UK and pave the way for Indian Commitment and Settlement Mechanism.*

**Keywords:** *Competition Law, Competition Commission of India, Settlement, Commitment.*

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## I. INTRODUCTION

The Competition Act of 2002 established the Competition Commission of India (CCI) as the regulatory body tasked with implementing competition legislation. Historically, the main methods of ensuring compliance were through the use of investigation, adjudication, and sanctions.

The Competition Amendment Act, 2023 was passed by the Indian Parliament in April 2023, with the purpose of amending the Competition Act, 2002<sup>2</sup>. The Amendment Act has implemented extensive modifications to the fundamental and procedural structure of the competition law framework in India. The introduction of settlements and commitments is a notable amendment to the enforcement toolkit of the Competition Commission of India (CCI). These mechanisms aim to facilitate prompt intervention, benefiting consumers and the overall economy, while also substantially reducing administrative expenses. Equivalent techniques have already been implemented in several other jurisdictions, including the European Union (EU), United Kingdom, Germany, Japan, and Singapore.

The European Commission (EC) have the authority to approve settlements<sup>3</sup> (for cartel behavior) and commitment (for non-cartel behavior) from parties undergoing inquiry. The commitments mechanism has been utilized extensively by the EC, with a cumulative count of 43 decisions as of 2022<sup>4</sup>. From 2005 to 2019, over 50 percent of enforcement decisions were made using the commitments method, without any determination of wrongdoing by the parties being investigated<sup>5</sup>. The European Commission (EC) has approved the commitments made by Amazon and concluded its investigations into specific allegations of anti-competitive behavior in the e-commerce market<sup>6</sup>. Additionally, it consistently gains advantages from the

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<sup>2</sup> The Competition (Amendment) Bill 2022, also known as the 2022 Bill, was presented to the Indian Parliament on August 5, 2022. It was then referred to the Parliamentary Standing Committee on Finance, known as the Committee, for their recommendations. The Committee presented its recommendations in December 2022, and on 8 February 2023, the Ministry of Corporate Affairs (MCA) implemented certain further changes to the 2022 Bill. The 2023 Bill, which was approved by the Indian Parliament in April 2023, incorporates certain suggestions from the Committee and includes additional revisions introduced by the MCA.

<sup>3</sup> Commission Regulation (EC) No 622/2008 of 30 June 2008 modifies Regulation (EC) No 773/2004 by specifying the procedures for resolving disputes in cases involving cartels.

<sup>4</sup> The European Commission has made commitment decisions under Article 9, which can be found in the Table provided by Practical Law Competition. The information is available from the following source: (<https://uk.practicallaw.thomsonreuters.com/0149Default?&firstPage=true&OWSessionId=0a63dc70663e4e449e5f2cdc12a7c41f&skipAnonymous=true>) last accessed on May 10, 2024.

<sup>5</sup> The article titled "EU: Settling Antitrust Non-cartel Conduct Matters with the European Commission" was published in Global Competition Review on 2 February 2021.

<https://globalcompetitionreview.com/guide/the-settlements-guide/first-edition/article/eu-settling-antitrust-non-cartel-conduct-matters-the-european-commission>. Last accessed on May 10, 2024.

<sup>6</sup> Case COMP/AT.40462 and Case COMP/AT.40703, *Amazon*, available at ([https://ec.europa.eu/competition/antitrust/cases1/202252/AT\\_40462\\_8825091\\_8265\\_4.pdf](https://ec.europa.eu/competition/antitrust/cases1/202252/AT_40462_8825091_8265_4.pdf)), last accessed on May 10, 2024.

administrative efficiency resulting from the settlement procedures. In 13 out of 18 cartel instances since 2018, all or some of the parties involved sought to reach a settlement with the EC, which resulted in a 10 percent decrease in their penalties. The European Commission (EC) also utilizes an informal "cooperation procedure" for non-cartel behavior. In this procedure, if an infringement is found and structural remedies are imposed, the parties involved can receive a reduction in fines of up to 30 percent as a reward for their cooperation.<sup>7</sup>

European national authorities have extensively depended on these instruments to implement antitrust regulations<sup>8</sup>. In February 2022, the UK's Competition and Markets Authority (CMA) approved the commitments made by Google about the Privacy Sandbox feature of their Chrome browser. The CMA is presently assessing the commitments proposed by Google as part of a distinct examination into its Play Store payment policies<sup>9</sup>. The German competition law regulator, Bundeskartellamt, has approved the commitments made by the German Olympic Sports Confederation and International Olympic Committee about advertising limits placed on Olympic participants and companies<sup>10</sup>.

The CCI shall now possess a toolkit that is on par with international competition law bodies. With the growing emphasis on regulation in digital markets, these authorities can assist the CCI in promptly dealing with possible anti-competitive behavior, while also allowing it to allocate its resources to regulate severe anti-competitive behavior. It is yet to be determined how efficacious these procedures shall prove to be.

### **(A) Provisions outlined in the Competition Amendment Act, 2023**

In India's competition law regime, the Competition Commission of India (CCI) has the authority to instruct the Office of the Director General to investigate a potential infringement if there is prima facie opinion to support it<sup>11</sup>. Subsequently, the DG presents a report detailing

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<sup>7</sup> An example of this can be found in Case AT. 39759 - ARA Foreclosure, European Commission, paragraphs 161-162, dated September 20, 2016 ([https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39759/39759\\_3071\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39759/39759_3071_5.pdf)) Last accessible on May 10, 2024.

<sup>8</sup> i) In the UK, the relevant laws are Section 31A of the Competition Act, 1998 and Rule 9 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014. These laws should be read together with the Guidance on the CMA's investigation procedures in Competition Act 1998 cases (specifically paragraphs 10.17 and 14). ii) In Germany, the relevant law is Section 32b of the Competition Act – GWB, as amended. Additionally, the Bundeskartellamt uses the Information Leaflet Settlement procedure in fine proceedings, which was issued in February 2016.

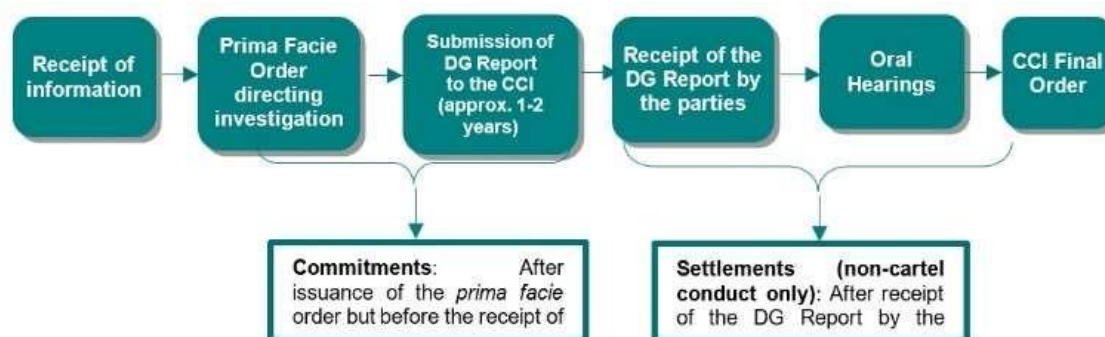
<sup>9</sup> Case number 50972 - Investigation into Google's 'Privacy Sandbox' browser changes, February 11, 2022 ([https://assets.publishing.service.gov.uk/media/62052c52e90e077f7881c975/Google\\_Sandbox\\_.pdf](https://assets.publishing.service.gov.uk/media/62052c52e90e077f7881c975/Google_Sandbox_.pdf)) last accessed on May 10, 2024.

<sup>10</sup> B 2 – 26/17, Decision under Section 32b of the Act against Restraints of Competition (GWB) ([https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B2-26-17.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B2-26-17.pdf?__blob=publicationFile&v=2)) last accessed on May 10, 2024.

<sup>11</sup> Section 26(1) of the Competition Act.

its findings upon concluding the inquiry<sup>12</sup>. The concerned parties are then provided with a chance to examine the DG Report and present their submissions to the CCI. Following this, the CCI issues a final order.

The Amendment Act contains two new additional sections, namely Section 48A and Section 48B, which enable parties to submit an application to the CCI (conditional upon payment of costs) for the purpose of entering into settlements or commitments. According to the Amendment Act, parties can make commitments at any point in time after the CCI starts an investigation but before they obtain the DG Report.<sup>13</sup> However, settlements can only be proposed by parties after they have received the DG Report, but before the CCI makes a final decision.<sup>14</sup>



When evaluating a proposal for settlement or commitments, the CCI takes into account the characteristics, seriousness, and consequences of the violations<sup>15</sup>. When evaluating commitment, the CCI will also assess the proposal's efficacy in resolving the alleged violations under investigation<sup>16</sup>. Additional terms and conditions may be imposed for the implementation and monitoring of the settlement or commitments. In addition, the CCI is obligated to offer the party being investigated, the DG Office, or any other party, the chance to present their complaints and ideas regarding the proposed settlement or commitments<sup>17</sup>. The acceptance of the proposed settlement or commitments would be conclusive, without any provision for filing a statutory appeal to the National Company Law Appellate Tribunal or the Supreme Court of India.<sup>18</sup> If the Competition Commission of India (CCI) determines that the settlement proposal or commitments are not suitable, and the party being investigated by the CCI does not agree on the terms of the proposal, the CCI has the authority to reject the proposal and proceed with

<sup>12</sup> Section 26(3) of the Competition Act.

<sup>13</sup> Section 48B(2) of the Amendment Act.

<sup>14</sup> Section 48A(1) of the Amendment Act

<sup>15</sup> Sections 48A(3) and 48B(3) of the Amendment Act.

<sup>16</sup> Section 48B(3) of the Amendment Act

<sup>17</sup> Section 48B(3) of the Amendment Act

<sup>18</sup> Sections 48A(4) and 48B(4) of the Amendment Act.

the adjudication process as per the established procedure.

Many parts of these mechanisms are currently not well understood, including the nature and purpose of the settlement procedures, how the culpability of parties will be determined, the variables that will be taken into account while evaluating offers, and the involvement of third parties.

The Competition Commission of India (CCI) released Regulations on 6 March 2024 on Commitments, Settlements, Turnover Determination, and Penalty Guidelines. This signifies a notable advancement in implementing the changes made by the Competition (Amendment) Act, 2023 (Amendment Act), which was approved by the president on 11 April 2023.

The Competition Commission of India (Commitment) Regulations, 2024 (Commitment Regulations) outline the process by which an entity, under investigation for engaging in anti-competitive vertical agreements and abuse of dominance, can submit an application to the CCI. This application allows the entity to propose commitments that aim to resolve the competition concerns highlighted in the CCI's preliminary order.

The Settlement Regulations of 2024, established by the Competition Commission of India, outline the procedure for an entity that has been investigated for anti-competitive vertical agreements and abuse of dominance to propose settlements that address the competition concerns identified in the investigation report conducted by the Director General.

## **II. IN-DEPTH DISCUSSION OF FEATURES OF**

### **(A) Competition Commission Of India (Commitment) Regulations, 2024**

#### **a. Timing**

A Commitment Application, which pertains to commitments made under the Commitment Regulations, must be submitted within 45 calendar days from the date the CCI issues the prima facie order<sup>19</sup>. This timeframe is significantly shorter than the one allowed by the Amendment Act, which permits an application to be submitted at any time prior to the issuance of the DG Report. According to the Commitment Regulations, the process of commitment must be finished within 130 working days from when the CCI receives the Commitment Application. This is an extension from the initial suggestion of a 90 calendar day term in the regulations<sup>20</sup>. In addition, it has been specified that certain timelines within the overall process be calculated based on business days rather than calendar days.

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<sup>19</sup> Regulation 3, Competition Commission of India (Commitment) Regulations, 2024

<sup>20</sup> Regulation 4, Competition Commission of India (Commitment) Regulations, 2024

### **b. Form and Contents of the Commitment Application**

In addition to basic corporate information and information about previous violations or ongoing legal actions, the Commitment Regulations state that a Commitment Application must include the following<sup>21</sup>: (i) the CCI's prima facie opinion; (ii) a complete and accurate disclosure of facts related to the alleged violations; (iii) information about the nature, duration, seriousness, and impact of the alleged violations, as well as the entity's involvement in them; (iv) an explanation of how the proposed commitments address the alleged violations and competition concerns; and (v) details about how the commitments will be implemented and monitored. Furthermore, the Commitment Application must be condensed into a format that excludes any sensitive data, as the Commitment Regulations require the summary to be shared with the DG and relevant parties. This allows them to provide feedback, raise objections, and offer suggestions regarding the commitment proposal. When deemed suitable, the CCI may also solicit public feedback.

The Commitment Regulations require the Commitment Applicant to provide a specific undertaking along with the Commitment Application. This undertaking includes agreeing to be subject to the jurisdiction of the CCI and waiving certain rights. These rights include the ability to initiate legal proceedings against the CCI regarding the acceptance of offered commitments, challenging the CCI's findings and conclusions, appealing or seeking review before the National Company Law Appellate Tribunal or other courts, and raising any pleas of limitation or laches against the CCI's initiation or restoration of proceedings if the Commitment Applicant violates the Commitment Order. Significantly, the wording of the Commitment Regulations implies that these waivers will continue to be valid even if the Commitment Application is denied.

### **c. Reviewing a Commitment Application**

When evaluating the effectiveness of the commitments proposed, the CCI will consider several factors: (i) the nature and type of behavior; (ii) the duration and extent of the alleged violations; (iii) whether the commitments adequately address the competition concerns identified; (iv) whether they can be implemented effectively and quickly and are easy to monitor; (v) whether they make the markets more competitive, demonstrate procedural efficiencies, have self-executing terms, and correct market distortions early on; (vi) whether the Commitment Applicant has previously violated the Act or is currently under investigation; and (vii) any other relevant factor deemed appropriate by the CCI. The CCI must give the Commitment Applicant

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<sup>21</sup> Regulation 4, Competition Commission of India (Commitment) Regulations, 2024

a chance to present their case before rejecting a Commitment Application.

#### **d. Nature and Effect of a Commitment Order**

Importantly, Commitment Orders should not be interpreted as a determination of wrongdoing against the Commitment Applicant, and these orders should not affect the CCI's investigation into other parties who are not involved in the commitment proceedings.

Nevertheless, any established facts against the Commitment Applicant or acknowledged in any continuing or concluded procedures inside or outside India, pertaining to the same legal matter, will be considered as admitted by the Commitment Applicant in connection to the commitment proceedings in India. Specifically, the Commitment Application only pertains to certain alleged violations, while the CCI's investigation into the remaining violations will proceed. The Commitment Regulations explicitly state that a Commitment Order is legally binding on the Commitment Applicant and cannot be appealed. This is in accordance with the stipulations of the Amendment Act and the obligation that must be provided under the Commitment Regulations.<sup>22</sup>

#### **e. Power to Use Information**

In the event that the CCI revokes and withdraws a Commitment Order, both the CCI and the DG are permitted to utilize the information and documents submitted by the Commitment Applicant during the proceedings governed by the Act<sup>23</sup>.

#### **f. Implementation and Monitoring**

The CCI has the authority to designate agencies to supervise the execution of the commitments made. The CCI has eliminated several prescriptive requirements in the final regulations concerning the selection of a monitoring agency, thereby granting greater freedom in making such appointments<sup>24</sup>.

#### **g. Revocation**

If a Commitment Applicant fails to comply with the Commitment Order, or if it is discovered by the CCI that the Commitment Applicant did not provide complete and accurate information during the commitment proceedings, or if there has been a significant change in the facts, the Commitment Order will be cancelled. The Commitment Applicant will be given a chance to explain themselves within 15 working days of receiving the show-cause notice. In the event that the Commitment Order is rescinded, the CCI has the authority to levy legal expenses

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<sup>22</sup> Regulation 6, Competition Commission of India (Commitment) Regulations, 2024

<sup>23</sup> Regulation 11, Competition Commission of India (Commitment) Regulations, 2024

<sup>24</sup> Regulation 9, Competition Commission of India (Commitment) Regulations, 2024



amounting to a maximum of INR 10 million (equivalent to about USD 121,000) and may additionally reinstate the investigation<sup>25</sup>.

#### **h. Fees**

The filing fees for smaller firms have been decreased and currently vary from INR 0.25 million (about USD 3,000) to INR 5 million (approximately USD 60,000), depending on the turnover of the Commitment Applicant<sup>26</sup>.

#### **i. New Procedural Provisions**

According to Regulation 13 of the Commitment Regulations, the Commitment Applicant has the option to request confidentiality for information or documents during the commitment proceedings. This can be done by following the procedure outlined in the Competition Commission of India (General) Regulations, 2009 (as amended). Additionally, only the informant and the Commitment Applicant will have limited authorization to examine and get certified copies of the documents.

### **III. COMPETITION COMMISSION OF INDIA (SETTLEMENT) REGULATIONS, 2024**

#### **(A) Timing**

A Settlement Application must be submitted within 45 calendar days after receiving the DG Report or the confidential version of the DG Report, as applicable, in accordance with the Settlement Regulations. This timescale is significantly shorter than the one allowed by the Amendment Act, which permits a Settlement Application to be submitted until the issuance of the final ruling.

According to the Settlement Regulations, the full settlement process must be finished within 180 working days from when the CCI receives the Settlement Application. This is an extension from the 120 calendar day period proposed in the draft regulations. In addition, it has been specified that certain timetables for the various stages of the entire process be calculated based on business days rather than calendar days.<sup>27</sup>

#### **(B) Form and Contents of the Settlement Application**

In addition to providing basic corporate information and information about any previous violations or ongoing legal proceedings, the Settlement Application should include the following<sup>28</sup>: (i) a description of the findings outlined in the DG Report; (ii) a complete and

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<sup>25</sup> Regulation 10, Competition Commission of India (Commitment) Regulations, 2024

<sup>26</sup> Regulation 8, Competition Commission of India (Commitment) Regulations, 2024

<sup>27</sup> Regulation 3, Competition Commission of India (Settlement) Regulations, 2024

<sup>28</sup> id

accurate disclosure of facts related to the alleged violations and findings of the DG; (iii) specific details about the nature, duration, seriousness, and impact of the alleged violations; (iv) a comprehensive explanation of how the proposed settlement addresses all alleged violations and competition concerns; (v) information about how the settlement will be implemented and monitored; and (vi) information about any other competition authorities, organizations, or courts that have examined or are currently examining the alleged violations, including instances where the Settlement Applicant has submitted Commitment Applications and/or Settlement Applications.

Furthermore, the Settlement Application must be condensed into a format that excludes any confidential details, as the Settlement Regulations require the summary to be shared with the DG and involved parties. This allows them to provide feedback, raise objections, and offer suggestions regarding the settlement proposal. It is important to note that Settlement Applications do not include an opportunity for public comments, unlike the Commitment Regulations. Just like the Commitment Regulations, Schedule I of the Settlement Regulations also mandates that the Settlement Applicant must provide a commitment with the same exemptions as were previously mentioned for commitments. Significantly, the text of the Settlement Regulations indicates that these waivers would continue to be valid even if the Settlement Application is denied.

### **(C) Consideration of a Settlement Application**

The CCI will evaluate a Settlement Application using the same criteria and approach that it uses for a Commitment Application<sup>29</sup>.

### **(D) Nature and Effect of a Settlement Order**

It is important to note that the CCI's order accepting the Settlement Application (Settlement Order) should not be interpreted as a determination of wrongdoing by the Settlement Applicant. Nevertheless, as the Amendment Act explicitly permits subsequent legal actions for compensation related to Settlement Orders, it is yet to be determined how this division will be resolved.

It should be emphasized that the orders issued by the CCI, whether accepting or rejecting a Settlement Application, cannot be appealed. Furthermore, even if a party's Settlement Application is approved by the CCI, the CCI has the authority to investigate other parties who are not involved in the settlement process and can utilize the information provided in the Settlement Application against these parties. In addition, if the Settlement Application pertains

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<sup>29</sup> Regulation 4, Competition Commission of India (Commitment) Regulations, 2024

only to certain alleged violations mentioned in the DG Report, the CCI's investigation into the remaining violations will proceed<sup>30</sup>.

#### **(E) Power to Use Information**

The Competition Commission of India (CCI) has the authority to utilize information provided by the Settlement Applicant, even if the Settlement Application has been rescinded or withdrawn during the procedures under the Act<sup>31</sup>.

#### **(F) Interim Order / Relief**

A recent amendment enables the CCI to issue temporary and/or alternative instructions to safeguard consumer interests and/or uphold competition in the market while the Settlement Application is being processed, and mandates the Settlement Applicant to adhere to these instructions. There is no specific standard set for interim orders of this nature, thus the CCI is expected to apply the same rules it uses when issuing interim orders under the Act.

#### **(G) Settlement Amount**

The CCI will calculate the initial settlement amount, which can be as high as the maximum penalty amount allowed under Section 27(b) of the Act. The calculation will be based on the Penalty Guidelines. The ultimate settlement sum will be determined by deducting a settlement discount of 15% from the base amount. If the Settlement Applicant does not make the payment of the settlement amount within 30 calendar days of accepting the CCI's communication on the settlement amount, the Settlement Application will be rejected by the CCI

#### **(H) Implementation and Monitoring**

Like the Commitments Regulations, the CCI has the authority to designate entities responsible for supervising the execution of the settlement proposed, according to the General Regulations. The CCI has eliminated several prescriptive regulations pertaining to the selection of a monitoring agency, thereby granting them greater scope in making such appointments.<sup>32</sup>

#### **(I) Revocation**

The conditions and process for revocation under the Settlement Regulations are similar to those outlined in the Commitment Regulations mentioned earlier<sup>33</sup>.

#### **(J) Fees**

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<sup>30</sup> Regulation 7, Competition Commission of India (Commitment) Regulations, 2024

<sup>31</sup> Regulation 12, Competition Commission of India (Commitment) Regulations, 2024

<sup>32</sup> Regulation 10, Competition Commission of India (Commitment) Regulations, 2024

<sup>33</sup> Regulation 11, Competition Commission of India (Commitment) Regulations, 2024

The filing fees currently vary between INR 0.25 million (approximately USD 3,000) and INR 5 million (approximately USD 60,000), depending on the turnover of the Settlement Applicant<sup>34</sup>.

#### **(K) New Procedural Provisions**

The Settlement Applicant has the option to request confidentiality for information or documents during the settlement processes, following the procedure outlined in the General Regulations. Additionally, only the informant and the Settlement Applicant will have limited permission to examine and get certified copies of the documents.

### **IV. CRITICAL ANALYSIS**

#### **(A) Timelines and Procedure**

The laws implemented in India establish specific circumstances that determine when the parties can utilize settlement mechanisms and fulfil their commitments. Parties have the option to propose settlements once they have received the DG Report, but commitments can only be proposed before receiving the DG Report. Curiously, in most jurisdictions where these technologies are used, there are no specific and rigid events that determine when they should be implemented. The European Commission (EC), as well as the Competition and Markets Authority (CMA) and the Bundeskartellamt, do not usually place a restriction on the timing for parties to engage in settlement discussions or propose commitments. Both parties and authorities possess the capacity to determine the optimal course of action based on the type of investigation and the current state of acquired evidence.

An adaptable method certainly provides significant worth. In situations where there is compelling proof of anti-competitive behavior during the initial phase of an investigation, the regulatory body has the option to inform the involved parties and reach a prompt agreement, thereby avoiding the need to allocate substantial resources for further investigation such as gathering evidence and making report. The CMA explicitly encourages parties to reach settlements before it issues its statement of objections by offering a penalty reduction of up to 20 percent. In contrast, if the settlement is reached after the statement of objections is issued, the reduction is limited to only up to 10 percent.<sup>35</sup>

Furthermore, it is acknowledged by the courts that the DG Office possesses extensive and far-

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<sup>34</sup> Regulation 9, Competition Commission of India (Commitment) Regulations, 2024

<sup>35</sup> <https://globalcompetitionreview.com/insight/market-reviews/cartels-2024/article/united-kingdom-digital-markets-pharmaceutical-and-construction-sectors-in-the-spotlight-cma-awaits-new-investigative-and-enforcement-powers> Last accessed on 18<sup>th</sup> May 2024.

reaching investigative authority as stipulated in the Competition Act. The DG Office possesses the capacity to detect anti-competitive behavior beyond what is already mentioned by the CCI in its preliminary order for investigation<sup>36</sup>. Furthermore, it can also report instances of abuse of dominance violations if they are discovered during the investigation of a complaint related to a cartel. Parties that are being investigated may lack sufficient understanding of the substance of the accusations against them and may not be in a favourable position to decide their approach to negotiating with the CCI. The operational functioning of the deadlines and the presence of enough incentives for the parties to choose the commitment mechanism are still to be determined.

### **(B) Empowering Third-Party Participation: Market Testing of Commitments in Indian Competition Law**

The proposed commitments framework represents a significant change in the role of the Competition Commission of India (CCI), transforming it from a predominantly reactive adjudicatory body to a proactive market regulator<sup>37</sup>. An essential aspect of this method is including third parties in the assessment of commitments put out by parties under investigation, highlighting their crucial role in CCI proceedings.

Historically, the CCI has considered its processes to be inquisitorial, where informants are seen as simply "information providers" according to the Competition Act. Informants are not automatically included in CCI proceedings once an investigation begins. This is evident from the revisions made to the confidentiality rules, which state that their involvement in the confidentiality ring is dependent on the requirement or expediency for an effective inquiry<sup>38</sup>.

Requiring the participation of third parties in evaluating commitments is similar to practices in other regions, where competition authorities are required to subject such plans to a "market-test". The CCI can design more effective solutions by actively involving market actors. Currently, the Competition and Markets Authority (CMA) is assessing the commitments put out by Google on its Play Store invoicing procedures, which demonstrates their consultative

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<sup>36</sup> Competition Commission of India v. Grasim Industries Limited, (LPA 137 of 2014), 2019 SCC OnLine Del 10017

<sup>37</sup> Dunne, 'Commitment decisions in EU competition law', Journal of Competition Law & Economics [2014] 10(2), 399.

<sup>38</sup> In the case of Association of India vs. Prohibition & Excise Department, Government of Andhra Pradesh, Case No. 45 of 2021, the Competition Commission of India (CCI) denied the request of the informant to form a confidentiality ring in order to access the confidential submissions of the opposing parties. The CCI stated that the informant does not have an inherent right to be part of the confidentiality ring and that its inclusion is not necessary or beneficial for the case. The CCI finally dismissed the informant's charges against the opposite parties, clarifying that it did not consider any sensitive information from the opposite parties that was not disclosed to the informant.

approach<sup>39</sup>. The notice issued by the CMA to request feedback from interested parties has resulted in receiving multiple submissions, which has allowed for a comprehensive review of the proposed obligations and the resolution of any concerns that were expressed. Integrating input from other players into the assessment process increases the probability of implementing impactful commitments.

As per the commitments procedure, the CCI is required to give third parties the chance to provide comments or objections to commitments offered by the parties under investigation. This highlights the changing role of third parties and informants in CCI cases, which adds a variety of viewpoints to the regulatory landscape and improves the effectiveness of enforcing competition legislation.

### **(C) Considerations for Assessing Proposals for Commitments**

The use of commitments in managing issues in digital markets presents a compelling viewpoint. On one hand, this will enable the CCI to promptly provide specific solutions in the market, which it may not have the authority to directly enforce under Section 27 or Section 28 of the Competition Act. These sections can also be contested in higher courts, causing delays in necessary market intervention<sup>40</sup>. On the other hand, accepting commitments may result in the loss of opportunities to establish legal precedents in this sector. The intervention of the CCI in these markets is crucial due to the challenges in determining relevant markets, dominance, and contestability or competitiveness.

Therefore, it is feasible that commitments are more likely to be recognized in cases involving well-established anti-competitive practices such as Most-Favoured Nation clauses (MFNs), Resale Price Maintenance (RPMs), exclusivity, unfair terms and conditions, and so on in digital markets. It is appropriate to make a judgment on practices or behavior that has not been extensively addressed by legal decisions. Once the law is established, future behavior related to similar practices can be handled by settlement or commitment.

### **(D) Nature of the Settlements Mechanism and Admission of Liability**

One notable feature of the settlements mechanism under the Act is its apparent absence of a clear objective, which is commonly found in other significant jurisdictions. Specifically, it does not explicitly require the party to admit fault or aim to simplify administrative procedures.

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<sup>39</sup> Refer to Article 27(4) of EU Regulation 1/2003 for the European Union. Additionally, consult the CMA's inquiry procedures in Competition Act 1998 matters, specifically CMA8, paragraph 10.23.

<sup>40</sup> Competition regime: EU Procedure, negotiation and enforcement, Practical Law Competition, available at ([https://uk.practicallaw.thomsonreuters.com/6-107-3709?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/6-107-3709?transitionType=Default&contextData=(sc.Default))), last accessed on May 10, 2024.

In various different legal systems, the settlement procedure serves as an administrative mechanism used to expedite the decision-making process of a regulatory body in order to determine that the party being investigated has indeed violated the law. Conversely, the commitments approach enables the regulator and the party being investigated to reach an agreement on a specific set of actions that would promptly resolve the concerns, without officially determining a violation.

The Competition and Consumer Commission of Singapore (CCCS) defines settlement procedures as "fast-track procedures." These procedures aim to achieve procedural efficiencies and resource savings by streamlining the administrative process, resulting in an earlier infringement decision compared to traditional procedures<sup>41</sup>. Similarly, the CMA characterizes the settlement process as:<sup>42</sup>

*"Whereby a business being investigated is willing to acknowledge its violation of competition law and agrees to abide by a simplified administrative procedure for the rest of the CMA's investigation." If this is the case, the Competition and Markets Authority (CMA) will enforce a diminished fine on the company... Settlement, when suitable, enables the CMA to attain efficiency through a simplified administrative process, leading to quicker implementation of any infringement decision, and/or cost savings in resources."*

The European Commission (EC) also outlines the process in a similar manner, placing emphasis on the following<sup>43</sup>:

*If parties have confidence in the Commission's case, supported by the evidence collected during the inquiry and their internal audits, they may choose to recognize their involvement in the infringement and accept responsibility. The purpose of this is to accelerate the legal process and ensure a decrease in the penalty that has been imposed. A settlement procedure expedites the administrative process by reducing its duration when the parties concerned reach an agreement with the Commission's case.*

Usually, there is a limit on how much fines can be reduced through settlement, and this limit is fixed and cannot be negotiated between the regulator and the parties involved. Parties are motivated to engage in settlement in order to obtain a decrease in the fine imposed for the breach. Furthermore, restricting the degree of penalty reduction through settlement achieves two objectives: (i) at this point, the Directorate General (DG) would have concluded the

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<sup>41</sup> CCCS Practice Statement on The Fast Track Procedure For Section 34 And Section 47 Cases.

<sup>42</sup> Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, December 10, 2021.

<sup>43</sup> Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions, June 30, 2008.

investigation, having collected and examined all relevant evidence, and (ii) the parties would have had the opportunity to examine the DG Report and the identified infringements. In the majority of important legal systems, individuals are required to acknowledge their culpability in order to access the advantages of a settlement process. The European Commission (EC) and the Competition and Consumer Commission (CCCS) provide a 10 percent reduction in penalties to parties who simplify the administrative process. The CMA encourages parties to make settlement agreements prior to the issuance of a statement of objections by offering a 20 percent reduction in the fine, as opposed to a 10 percent reduction after the statement of objections. The CLRC Report examines international legal principles regarding liability in settlement and commitment mechanisms. It highlights that a settlement decision involves recognizing wrongdoing and requires the parties to admit guilt, whereas a commitment decision does not establish wrongdoing or necessitate admission from the parties<sup>44</sup>. Nevertheless, the report does not distinguish when suggesting the incorporation of these procedures within the Indian competition law framework<sup>45</sup>. The provisions specified in the Amendment Act appear to lack a substantial differentiation between the two methods. The Amendment Act does not require the admission of guilt in settlements or agreements, and the CCI has the discretion to make decisions on a case-by-case basis. Notably, parties who have reached a settlement with the Competition Commission of India (CCI) under Section 48A of the Competition Act may still be liable to face claims for seeking financial compensation for any harm caused. It is well acknowledged that these claims can only be pursued against parties that have been found to have violated the Competition Act. Seeking compensation from parties that have not been proven guilty of violating the Competition Act is likely to encounter legal obstacles in Indian writ courts due to constitutional reasons. In addition, with regards to settlements, the CCI possesses the power to levy fines and compel parties to meet behavioural responsibilities. Although discretion itself is not inherently problematic, it would be advantageous for rules to clearly define criteria for authorizing settlements. Increased procedural efficiency arising from coordination among parties would probably result in less penalties.

## **V. CONCLUSION**

The commitment and settlement measures have been implemented to allow parties to willingly adhere to the provisions of the Competition Act, without having to undergo a DG investigation and consequent application of penalties. Similarly, this enables a decrease in the duration of

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<sup>44</sup> Para 4.2, CLRC Report

<sup>45</sup> Paras 4.6 and 4.8, CLRC Report.



investigations, quicker resolution of cases, and prompt rectification of market imbalances. The implementation of settlements and commitments processes is crucial for enhancing antitrust enforcement in India. These measures would enhance process efficiency and enable the CCI to promptly and efficiently intervene in certain cases where parties are prepared to expedite the closure of investigations. Many competition authorities worldwide often depend on similar techniques to accomplish their enforcement goals. However, there are other elements that need to be addressed in order to ensure that the CCI can effectively execute these processes in India. It is yet to be seen how CCI provides clarity regarding the implementation of the settlement and commitment procedures in real-world scenarios.

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