

Beyond the Headlines: A Deep Dive into Settlements and Commitments

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A. Background

One of the most significant amendments that is proposed to be introduced by the Competition (Amendment) Bill, 2022, as amended (the **2022 Bill**) in India pertains to settlements and commitments. Although the Madras High Court did observe in a 2015 judgment (*Tamil Nadu Film Exhibitors Association vs. Competition Commission of India & Ors.*) that the scheme of the Competition Act, 2002 (the **Act**) in essence allows parties who have potentially engaged in anti-competitive conduct to enter into a “compromise or settlement” (subject to scrutiny by the Competition Commission of India (the **CCI**)). There was no express provision in the Act which would allow a settlement or a compromise as contemplated by this judgment. It is the 2022 Bill which now seeks to formally introduce a

settlements and commitments mechanism as part of the Indian antitrust regime.

Whilst the CCI has had a good track record of clearing merger cases in a timely and efficient manner, this has unfortunately not been the case on the enforcement front. In December 2019, the CCI assessed that the average time taken by it to dispose off a behavioural case was over two years. Further, as at March 2022, 128 antitrust cases were pending at various stages of investigation.

As these investigations require significant resources, it has become imperative to introduce negotiated remedies in the form of settlements and commitments which would facilitate disposal of these cases on a fast-track basis, thereby enabling the freeing up of the CCI’s

limited resources. The additional benefits of this mechanism would be to enable parties to seek early termination of an arduous and expensive investigation process, and importantly to rid the markets of continuing anti-competitive practices at an earlier date than would otherwise be possible, which is the ultimate aim of competition law.

B. The Proposed Regime

The 2022 Bill envisages the introduction of a mechanism pursuant to which parties that are involved in alleged anti-competitive vertical agreements and / or abuse of dominance will be entitled to propose a settlement and / or offer commitments. Cartels are expressly excluded from the ambit of this mechanism, presumably on the basis that there is a well functioning leniency regime already in place to deal with cartels.

Whilst the terms 'settlement' and 'commitment' are not clearly defined under the 2022 Bill, a holistic reading of the proposed provisions makes it appear that a commitment would involve offering behavioural changes, whereas a settlement would involve a monetary component (in the nature of a fine or penalty) in addition to offering behavioural changes.

Another difference between settlements and commitments lies with respect to the time at which these may be offered or proposed. Whilst commitments may be offered once the CCI has issued its *prima facie* order but before the party receives the investigation report as issued by the Office of the Director General (the **DG**), a settlement may only be proposed by a party to the alleged anti-competitive conduct at any time

after the investigation report has been issued by the DG but before the CCI passes its final order. However, considering the intent behind the introduction of this mechanism, query whether the CCI should have been provided with the option to propose settlement proceedings even prior to receipt by the party(ies) of the DG's investigation report? This would be similar to the position in the European Union (the **EU**), where parties can offer to settle non-cartel cases even before the European Commission (the **EC**) completes its investigation.

Further, as is typical, the CCI has been given the discretion to either accept or reject a settlement / commitment proposal. However, unless a party and the CCI do not see eye to eye on the final terms (in which case the settlement / commitment process would fall through), such party does not have the ability to withdraw its offer / application. In this regard, whilst it was recommended by the Parliamentary Standing Committee on Finance (the **SCF**) in its final report that parties be given the option to withdraw their offer / application (which was not accepted), we believe that given the extensive time period within which such an offer / application can be made, there ought to be sufficient time for the parties and their counsel to carefully evaluate whether or not to utilise this mechanism.

The only recommendation of the SCF that has been currently included as a further amendment to the 2022 Bill is with respect to compensation claims by affected consumers post completion of the settlement proceedings. We believe that this is in line with international best practices and would strive to ensure consumer welfare.

With respect to appeals, the 2022 Bill does not allow an appeal post a settlement / commitment decision. This is a divergence from the position in the EU wherein the EC does permit appeals against such decisions (albeit on limited grounds such as issues arising from calculation of the penalty). In fact, even the SCF in its report seemed sympathetic towards permitting parties to apply to the CCI to revisit the settlement / commitment after the final order of the CCI. However, the legislative amendment recommended by the SCF takes the view that appeals against final orders should not be allowed. Owing to this inconsistency, it is unclear as to what the intent of the SCF was on this front.

Whilst the decision to not allow for any appeals is understandable to aid and assist in early resolution, we believe that it would have been reasonable to allow appeals on very limited grounds. This would have also been in line with the leniency regime wherein the applicants, despite admitting to their participation in a cartel, are allowed to appeal against the CCI's final order. Given that this right to appeal has not been incorporated in the 2022 Bill yet, query whether this is now a missed opportunity?

C. The Way Forward

It is evident that the enforcement of the settlements / commitments mechanism has the potential to produce several benefits such as reducing the burden on the CCI (including the DG) as well as on parties, ending the anti-competitive practices in question, and aiding quicker implementation of any market corrective measures. These provisions should however be carefully enforced. In this regard, it would be helpful for the CCI to consider adopting guidelines

on the use of appropriate remedies in case of settlements and commitments. A regular ex-post evaluation on the effectiveness of the entire regime would also be beneficial in identifying and addressing potential concerns on an ongoing basis. This would ensure a more credible enforcement system.

It is also uncertain as to whether an overuse of this mechanism (particularly where a case requires detailed guidance on complex or novel questions of law) may be counterintuitive to the goal of consumer welfare in the long run as it can mean fewer precedents and legal uncertainty with respect to the treatment of potential infringements. As such, antitrust jurisprudence in India is still at a developing stage. It would be interesting to see how the jurisprudence (hopefully!) continues to evolve once this mechanism is enforced.

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