



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Settlements and Commitments mechanism proposed under the Indian Competition (Amendment) Bill 2022 - An Analysis

Jai Hindocha^a

^aSymbiosis Law School, Noida, India

Received 18 January 2023; *Accepted* 03 February 2023; *Published* 06 February 2023

The Competition (Amendment) Bill of 2022 was introduced in the Lok Sabha on August 5th, 2022¹, based on the recommendations of the Competition Law Review Committee that submitted its report in 2019. Some of the significant changes that the Bill seeks to bring about include the introduction of a deal-value threshold for the Indian merger control regime, enhanced penalties, and the introduction of a system of settlements and commitments. The settlements and commitments mechanism has been implemented in the United States (US) and the European Union (EU) to address the issue of excessive delays in antitrust investigations against enterprises, which take a toll on the regulator's precious and valuable resources. This article deals with the concept of settlements and commitments in antitrust law, its benefits, the relevant provisions of the Competition (Amendment) Bill, 2022 relating to this proposed mechanism, and briefly discusses the prevailing mechanism in the US and EU. It also analyses the proposed amendments and how this system of settlements and commitments can be effectively implemented in India.

Keywords: *settlement, commitment, investigation, procedure, delays.*

INTRODUCTION

¹ 'The Competition (Amendment) Bill, 2022' (PRS Legislative Research) <<https://prsindia.org/billtrack/the-competition-amendment-bill-2022>> accessed 17 January 2023

The Competition (Amendment) Bill of 2022 (hereinafter referred to as the Bill) proposes to overhaul the Competition Law regime in India to make it at par with global standards. Many of the proposed provisions and changes in the Bill have been inspired by antitrust laws in matured jurisdictions such as the European Union (EU) and the United States (US).

One of the key amendments proposed by the Bill is the introduction of a **settlements and commitments mechanism** within the Indian Competition Law regime, which provides for a speedier and smoother procedure for antitrust investigations by the Competition Commission of India (CCI), the country's antitrust regulator. This would facilitate a reduction in the investigation timelines, thereby benefitting the concerned enterprises, as well as the regulator.

Settlements and Commitments are crucial alternatives that may be available in an adjudicatory mechanism. A settlement, in the context of any litigation or investigation initiated against a party, as the same suggests, entails a proposal to make a payment, or offering any other such factors, accept or reject. Generally, when a party offers a settlement, it implies that they are admitting to their guilt². An acceptance of a proposal for settlement would mean that both parties are on the same page, and are willing to agree (in the form of a settlement) based on certain terms and conditions. A commitment, on the other hand, would be certain changes or actions proposed that a party would promise and commit to implementing, to deal with certain concerns raised regarding its conduct, while at the same time not admitting to its guilt³.

The proposed settlements and commitments mechanism will directly address one of the primary issues faced by the CCI, i.e., lengthy, prolonged, and burdensome investigations. The intricate and long-drawn-out investigative procedures in an antitrust case, especially those that deal with anti-competitive agreements (Section 3 of the Competition Act, 2002) and abuse of

² 'India: Settlements & Commitments - A Welcome Step Under The Competition (Amendment) Bill, 2022' (Mondaq, 9 January 2023) <[https://www.mondaq.com/india/antitrust-eu-competition-/1268766/settlements--commitments--a-welcome-step-under-the-competition-amendment-bill-2022#:~:text=The%20Competition%20\(Amendment\)%20Bill%2C%202022%20\('Bill',different%20stages%20of%20the%20inquiry](https://www.mondaq.com/india/antitrust-eu-competition-/1268766/settlements--commitments--a-welcome-step-under-the-competition-amendment-bill-2022#:~:text=The%20Competition%20(Amendment)%20Bill%2C%202022%20('Bill',different%20stages%20of%20the%20inquiry)> accessed 16 January 2023

³ Dr. Vijay Kumar Singh, 'Settlement and Commitments: Potential recipe for improving effectiveness of Competition Law in India' (*Bar & Bench*, 07 January 2021) <<https://www.barandbench.com/columns/settlement-and-commitments-effectiveness-competition-law-india>> accessed 16 January 2023

dominant position (Section 4 of the Competition Act, 2002)⁴, is a huge regulatory hurdle that enterprises face. It is also a huge burden on the resources of the CCI as well.

While there is an urgent need for a system where the investigation timelines can be reduced and fast-tracked, it must be ensured that the CCI's investigative powers and regulatory activities are not faltered in the process. Therefore, while working towards shorter investigative procedures on one hand, it must be ensured that the quality of the investigation is not compromised⁵- the hallmark of an effectively formulated and implemented settlements and commitments mechanism would be the ability to maintain a balance between these two factors.

SETTLEMENTS AND COMMITMENTS UNDER THE COMPETITION (AMENDMENT) BILL, 2022

Sections 48A and 48B of the Bill provide for a settlements and commitments mechanism for two types of antitrust violations under the Act- vertical anti-competitive agreements and abuse of dominant position.

A. Settlements under Section 48A⁶

According to Section 48A of the Bill, a settlement is an offer by an enterprise accused of violating either Section 3(4) of the Act or Section 4 of the Act, by way of an application to the CCI, to deposit a particular sum in the form of a payment, or proposing any other terms. The timing of such an application is really important- it may be filed between the time a party receives the report of the Director General (DG) under Section 26(4) of the Act and the time when the CCI passes a final order in the matter. Therefore, an enterprise willing to offer a settlement must file the same within this period. The CCI, on receipt of such application, may, after taking into account various factors, including the nature, severity, and effect of the alleged antitrust violations as well as the objections, suggestions, and opinions of other stakeholders such as the

⁴ 'The need for settlements and commitments under the Competition Act' (AZB & Partners, *Advocates and Solicitors*, 1 April 2019) <<https://www.azbpartners.com/bank/the-need-for-settlements-and-commitments-under-the-competition-act/>> accessed 15 January 2023

⁵ India: Settlements & Commitments (n 2)

⁶ Competition (Amendment) Bill 2022, s 48A

Director General, and other parties, among others, may either accept such offer or reject it. If the CCI finds the proposal for a settlement acceptable, then it would stop the antitrust investigation that has been initiated against the concerned enterprise, thereby putting an end to a lengthy and tedious investigation. However, if the CCI does not find the proposal acceptable, or based on the facts and circumstances of the case it feels that it would not be ideal to entertain or accept the proposal, or the concerned enterprise and the CCI are not able to agree on the terms and conditions of the settlement, then the CCI may reject the proposal and continue with the investigation. An order passed by the CCI either accepting or rejecting the proposal for a settlement is not appealable by an enterprise⁷.

B. Commitments under Section 48B⁸

Commitments have been provided for under Section 48B of the Bill, wherein an enterprise accused of violation of Section 3(4) or Section 4 of the Act may approach the CCI by way of an application, proposing to introduce certain changes, remedies or rectifications in its conduct to address or alleviate CCI's concerns of anti-competitive behaviour by such enterprise. Such a proposal for commitments may be made by an enterprise anytime between the passage of an order under Section 26(1) by the CCI and the issuance and receipt of the DG's report under Section 26(4) of the Act. Apart from the timing, the mechanism for commitments as provided in the Bill is quite similar to that for settlements, wherein the CCI, on receipt of a proposal for commitments will evaluate the same, weigh its pros and cons in light of the nature and severity of the alleged contraventions, factor in the objections, opinions, and suggestions of the DG and other parties, and then accordingly decide whether it wishes to accept the proposal for commitments or not. An order passed under Section 48B relating to commitments as well is not appealable by an enterprise⁹.

⁷ 'Competition Law Update: Government Introduces Draft Bill to Overhaul Indian Competition Act' (DMD Advocates)

<<https://www.dmd.law/pdf/Draft%20Bill%20to%20Overhaul%20Indian%20Competition%20Act.pdf>> accessed 15 January 2023

⁸ Competition (Amendment) Bill 2022, s 48B

⁹ Competition Law Update (n 7)

Furthermore, Section 48C of the Bill addresses a situation where despite there being a settlement or commitment in place, an enterprise violates the same, in which case the CCI is empowered to withdraw the order that it has passed under Section 48A or 48B, as the case may be. Furthermore, if the CCI finds out that an enterprise has concealed certain facts from the regulator or there has been a substantial change in the facts and circumstances, in such situations as well the CCI may withdraw its order. A withdrawal of order would imply that the settlement or commitment no longer has any binding value. In such a scenario, the CCI would also be empowered to resume or re-initiate the investigation and impose costs on the concerned enterprise upto one crore rupees

BENEFITS OF THE PROPOSED SETTLEMENTS AND COMMITMENTS MECHANISM

The proposal for introducing a system for settlements and commitments, if implemented correctly, would contribute a great deal to the ease of doing business in India. As mentioned earlier, it would speed up the pace at which cases relating to vertical anti-competitive agreements and abuse of dominant position are dealt with and disposed of by the CCI, thereby saving precious time, and reducing the burden on the resources of the CCI, as well as of the enterprises. It will also lessen the number of antitrust litigations filed against the parties, thereby again helping reduce the burden on CCI's scarce and valuable resources.

Lengthy and tedious litigations and investigation procedures are considered to be huge regulatory hurdles for businesses, and this is why any mechanism to reduce the timelines of such investigations is always a welcome step. The settlements and commitments mechanism under the Indian Competition Law regime will not only help fast-track the antitrust investigations against enterprises but also ensure and foster an amicable investigation and adjudicatory process. Rather than having a full-fledged investigation that would be onerous both for the regulator as well as the enterprise, with the possibility of an unfavourable antitrust order with a penalty against an enterprise, it is efficient and economical to have a settlement and commitments mechanism to provide closure to the investigation earlier. This would also help

lessen the adverse impact that a CCI investigation (and subsequent order) has on the reputation and goodwill of a business.¹⁰

As a byproduct of reduced investigation and adjudication timelines, the proposed settlements and commitments system will also effectively facilitate swifter corrective behaviour by deviant enterprises¹¹. When an inquiry and adjudication by a regulator is fast-tracked and ends with a settlement or commitment, an enterprise is also encouraged to incorporate the necessary changes in its conduct or practices, thereby swiftly and effectively reducing the anticompetitive effect of the same on the market.

SETTLEMENTS AND COMMITMENTS IN FOREIGN JURISDICTIONS

The mechanism of Settlements and Commitments is available in matured jurisdictions such as the EU and the US. It is based on these mechanisms that this system is also being introduced in India.

A. EUROPEAN UNION (EU)

In the EU, the settlements system was introduced in 2008 primarily for cartel investigations- this mechanism involves an admission of guilt by the concerned enterprise(s). The European Commission (EC) is empowered to decide, on a case-by-case basis, for which type of cartel it is willing to entertain a proposal for settlement. Where the concerned parties to a cartel are willing to admit their liability and involvement in the antitrust violation, they may try to offer a settlement to the European Commission (EC), the antitrust regulator in the EU. The EC then grants the benefit of a reduction in the penalty to be imposed upon such parties. In the EU, settlements are usually offered by parties in situations where it is felt that the EC does have a strong case and evidence against such parties. There is no scope for having any negotiations with the EC as to the existence of a cartel or not. An enterprise that has offered a suitable

¹⁰ India: Settlements & Commitments (n 2)

¹¹ 'Settlement, commitment framework will help ensure faster market corrections: CCI chief Ashok Kumar Gupta' (*The Economic Times*, 4 September 2022) <<https://economictimes.indiatimes.com/news/company/corporate-trends/settlement-commitment-framework-will-help-ensure-faster-market-corrections-cci-chief-ashok-kumar-gupta/articleshow/93983568.cms?from=mdr>> accessed 13 January 2023

proposal for settlement that is acceptable to the EC will enjoy the benefit of a fast-tracked investigation and a reduced penalty¹².

In the European Union jurisdiction, there is a primary difference between settlements and commitments- commitments are not utilized in matters relating to cartels, and they do not involve a finding by the EU that there has been a competition law violation by an enterprise. Furthermore, it does not involve the imposition of any penalty whatsoever- instead, certain legally binding obligations and duties are cast upon the concerned enterprise that is to be fulfilled, to alleviate the anti-competitive concerns and red flags raised by the EC. On the other hand, settlements, as mentioned earlier, are primarily used in cartelization matters, where a violation of antitrust law is established by the EC, and then there is a settlement (if acceptable) in the form of putting an end to the investigation and the imposition of a reduced penalty¹³.

As far as the timing of submitting a proposal for settlement is concerned, under EU law, an enterprise is free to approach the EC with a proposal for settlement at any stage after it comes to know that there is an investigation against it. For this, a written application will have to be made by the concerned enterprise. Upon receipt of such application, the EC may begin with the relevant discussions for settlement with the enterprise. During the course of such discussions, issues such as the facts and circumstances of the matter and the severity and duration of the violation, among others, need to be factored in. All these discussions need to be conducted in a time-bound manner¹⁴.

B. UNITED STATES (US)

Settlements and commitments, have, over time, become an integral part of US Antitrust Law. In the US, both the antitrust regulators, i.e., the Department of Justice (DOJ) and the Federal Trade Commission (FTC) do allow settlements and commitments to be offered by enterprises under investigation. As far as commitments are concerned, the DOJ adopts the mechanism of issuance

¹² 'Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions' (*European Commission*, 30 June 2008) <https://ec.europa.eu/commission/presscorner/detail/it/MEMO_08_458> accessed 16 January 2023

¹³ *Ibid*

¹⁴ *Ibid*

of consent decrees (similar to consent decrees in India for civil suits), which are submitted to a Trial Court. This entire procedure does not entail any 'trial' as such¹⁵, as it is based on negotiations, resulting in a set of binding commitments on the enterprise. The FTC also issues consent orders with commitments by exercising its statutory powers, without the involvement of a trial. Consent decrees or orders in the US are used quite extensively in different categories of antitrust matters, including certain types of anti-competitive agreements, abuse of dominance, as well as for merger control¹⁶.

ANALYSIS

The proposed system of settlements and commitments will go a long way in ensuring a reduction in the timelines for antitrust investigations and adjudication of disputes. When it comes to the system of investigation and adjudication, procedural delays are a huge issue- this exacerbates the issue of pendency of cases as well, not only in Courts but also Tribunals and Quasi-Judicial bodies. The Competition Commission of India (CCI) is no stranger to this issue- lack of infrastructure and scarcity of human resources are some of the core factors that contribute to delays in the investigation, adjudication, and decision-making process for the CCI. This, in turn, also affects the enterprises that are facing antitrust scrutiny. Apart from addressing the issues of long delays, since this mechanism is primarily consent-based, the enforcement of competition law in India will become smoother, easier, and much more effective. This is because a settlement or a commitment between the CCI and an enterprise will be compliance-friendly as it is based on friendly negotiations.

A reading of the proposed provisions relating to settlements and commitments under Sections 48A to 48C of the Bill reveals that a lot of issues are to be addressed by subsequent rules and regulations, indicating that it will be in the hands of the CCI to decide upon these issues and frame regulations for the same. For instance, the terms of settlements under Section 48A and commitments under Section 48B, the time within which a settlement or commitment procedure is to be completed, and the procedural requirements for settlements and commitments, among

¹⁵ Need for settlements (n 4)

¹⁶ *Ibid*

others, are to be decided through further regulation. Since the CCI is the antitrust regulator of our country and it deals with the anti-competitive practices of enterprises first-hand, it is in the best position to gauge what kind of regulations need to be formulated to address the implementational issues that may arise in the enforcement of the settlements and commitments mechanism. Ideally, the regulations should ensure, *inter alia*, transparency in the settlements and commitments procedure, compliance with the principles of Natural Justice and the provisions of the Competition Act, 2002, conformity with the preambular notions of the Competition Act, and no compromise on the effectiveness of the investigation and adjudication by the CCI.

CONCLUSION

The proposal for introducing settlements and commitments in the Indian competition law regime will promote the ease of doing business, and also reduce the regulatory hurdle of lengthy and tedious antitrust investigations that many enterprises face in India. It would also foster and ensure speedier and swifter desirable rectifications in the conduct and actions of enterprises. Since a lot of discretion has been left to the CCI to decide upon and further define the procedural nuances of the proposed mechanism, the ball is now in CCI's court to come up with an effective and efficient set of regulations to deal with this new system. It would be advisable for the CCI to take inspiration from matured jurisdictions such as the EU and the US while framing regulations for the proposed mechanism, as well as while implementing the same.

The best way to ensure a correction of deviant behaviour, especially in the context of competition law, would be to end the proceedings on a mutual and amicable basis, rather than a lengthy investigation and adjudication that could lead to unfavourable results for an enterprise, i.e., a harsh order against it, coupled with a possibly hefty penalty, which can be challenged before a higher authority, thereby adding to the delays in such cases. When there is a mechanism like a consent decree (followed in case of civil suits and disputes), in the form of negotiated settlements and commitments, it is up to the enterprise to make the first move and show its willingness to cooperate and correct its behaviour. In such a case, it would also be reasonable for the law to prohibit an enterprise from challenging an order based on a settlement or commitment.