



# **Settlement in Cartel/ Anti-Trust cases**

## **(Commentary/ reflections by CCI on settlements in the Indian Anti-Trust context)**

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## Existing Statutory Framework



- Under the existing framework, while CCI has been empowered to grant leniency in cartel cases, subject to satisfaction of certain conditions, the Competition Act does not expressly recognise settlements or commitments.
- In *Tamil Nadu Film Exhibitors Association v. CCI (2015)*, the Madras High Court held that the scheme of the Competition Act allows parties to enter into a compromise or settlement and CCI may accept such compromise or settlement. The Court relied on Section 27 as conferring wide powers on CCI to pass residuary orders.



## **Need for Settlement/ Commitment/ Prioritization**

- Behavioural cases before the CCI may take several years to dispose of. A significant amount of the CCI's resources are expended on long-drawn investigations and defending appeals from its orders. It is therefore imperative to consider ways in which the CCI's resources may be utilized more optimally.
- See next slide in time taken by CCI in issuing various orders.



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## Need for Settlement/ Commitment/ Prioritization contd.

Stage	Timeline prescribed under General Regulations	Actual time taken	Average	Minimum and Maximum time taken <sup>2</sup>
Orders under Section 26(2)	60 days [Regulation 16(2)]	3.08 months		13 days <sup>3</sup> to 15 months <sup>4</sup>
Orders under Section 26(1)	60 days [Regulation 16(2)]	2.17 months		12 days <sup>5</sup> to 14 months <sup>6</sup>
DG Investigation	60 days <sup>7</sup> [Regulation 20(2)]	10.31 months		1 month <sup>8</sup> to 35 months <sup>9</sup>
Final Orders	Within 21 working days of the conclusion of final arguments [Regulation 32(2)]	12.37 months (from the receipt of the Main Investigation Report) <sup>10</sup>		1 month to 38 months <sup>11</sup>
Total time taken for disposal for cases which underwent investigations	No timelines mentioned	25.71 months (from the receipt of information till the passing of final order)		5 months <sup>12</sup> to 63 months <sup>13</sup>



## Need for Settlement/ Commitment/ Prioritization contd.



- Therefore, there is an urgent need for the CCI to move towards a mechanism which ensures that the adjudication of cases by the CCI is put on a fast track and consumes fewer of the CCI's resources, without affecting the quality of adjudication and investigation.
- In other mature jurisdictions such as the European Union (**EU**) and United Kingdom (**UK**), competition law enforcement is streamlined and expedited by way of *prioritization, commitments and settlements*.



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# Commitments



- One way to manage pendency and ensure efficient disposal of cases is by encouraging commitments. The European Commission (**EC**), though not obligated to do so, can consider a commitment decision if and when:
  - the companies under investigation are willing to offer commitments which remove the EC's initial competition concerns as expressed in a preliminary assessment;
  - the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases);
  - efficiency reasons justify that the EC limits itself to making the commitments binding, and does not issue a formal prohibition decision; and
  - the commitments can be either behavioral or structural and may be limited in time. Moreover, the EC can reassess the situation if a material change takes place in any of the facts on which the decision was based. It is also possible for the company to ask the EC to lift a commitment that is no longer appropriate.



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# What are the effects of a commitment decision?

- The company to whom the decision is addressed must respect the conditions of the settlement. Otherwise the EC can impose on it a fine amounting up to 10% of their turnover, and also periodic penalty payments are possible until it complies with the commitments. Moreover, national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures.
- While the addressee of a commitment decision does not receive a prohibition decision, with the consequent negative publicity, for a violation of the antitrust rules, neither does it get the EC's blessing, the commitment decision being a substitute for a prohibition decision and not for an exemption decision. The commitment decision is a formal settlement solicited by a company under investigation and agreed by the EC where its enforcement priorities justify this choice.
- In EU, commitments can be structural and behavioral. The EC views structural commitments as more effective than behavioral commitments.



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## What are the effects of a commitment decision? Contd.

- Therefore, in cases where CCI has given its *prima facie* order, to curtail the time and heavy investment of resources of both the DG and the CCI, it may be beneficial that the party against which anti competitive activity is alleged may offer commitments. This would help the DG focus on the priority sectors and conducts. Additionally, this would speed up the time taken to conclude a case. Commitment does not require admission of guilt but merely an obligation to take corrective measures in relation to conduct that may be viewed as anti competitive by CCI.
- When commitment procedure was introduced in EU it became the most prevalent enforcement mechanism in EU to address infringements of Article 102 and 101 Treaty on the Functioning of the European Union (**TFEU**) (other than cartels).



# What is Settlement



A settlement is used by the EC to speed up the procedure for adoption of a cartel decision when the parties admit to the EC's objections, and in return receive a 10% reduction in the fine.

## **Why settlement?**

From the viewpoint of a company involved in a cartel, the advantages are a shorter procedure and a reduced fine. The EC benefits from a shorter, quicker administrative process, allowing for more efficient use of staff in the cartel department, and a reduced number of appeals to the court.

## **How does it work?**

- When parties are convinced of the strength of the EC's case in view of the evidence gathered during the investigation and of their own internal audit, they may be ready to admit their participation in a cartel and accept their liability for it.
- The philosophy behind settlement is that the EC's services need to obtain a "common understanding" with all settling parties on the facts and the scope of the EC's potential objections in a case.

**Inter-play between leniency and settlement:** The reduction may also be granted even if the parties to the cartel have received reduction under the leniency notice.



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## Difference between settlement and commitments



S.No.	Settlement	Commitment
1.	A settlement is used by the EC to speed up the procedure for adoption of a cartel decision when the parties admit to the EC's objections, and in return receive a 10% reduction in the fine.	<p>The EC adopts commitment decisions in all sorts of situations and the conditions for its use are flexible. The EC is never obliged to terminate its proceedings by adopting an Article 9 commitment decision, but it can consider such a decision if and when:</p> <ul style="list-style-type: none"><li>▪ the companies under investigation are willing to offer commitments which remove the EC's initial competition concerns as expressed in a preliminary assessment,</li><li>▪ the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases),</li><li>▪ efficiency reasons justify that the EC limits itself to making the commitments binding, and does not issue a formal prohibition decision.</li></ul>
2.	A settlement decision does establish an infringement and requires an admission of guilt from the parties	Commitment decision does not establish an infringement and does not require any admission by the parties;



# Difference between settlement and commitments contd.



S.No.	Settlement	Commitment
3.	A settlement decision simply requires a "cease and desist" of past behaviour	Commitments decision requires commitment to future behaviour
4.	A settlement is not the same as a plea bargain. The Commission has to show the parties that it has sufficient evidence to bring a final decision, and must send a Statement of Objections.	The commitments can be either behavioural or structural and may be limited in time. Moreover, the EC can reassess the situation if a material change takes place in any of the facts on which the decision was based. It is also possible for the company to ask the EC to lift a commitment that is no longer appropriate.



# Relevant regulations in Indian law which support settlement



## ➤ **Income tax provisions**

- Income Tax Settlement Commission (Settlement Commission) (quasi-judicial body), set up per Section 245B of the Income Tax (I-T) Act.
- Empowered to regulate its own procedure – Income Tax Settlement Commission (Procedure) Rules, 1997

## ➤ **Securities and Exchange Board of India (SEBI) provisions**

- SEBI Act read with the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 (SEBI Settlement Regulations), envisages a mechanism for settlement of specific violations by the payment of fees without admitting guilt.
- SEBI had settled 378 cases during 2014-15 to 2017-18 and collected approximately INR 52.25 crore as settlement amount.



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## **Settlements and Commitments CLRC** **Recommendations**



“Therefore, in light of existing precedents and in the interest of procedural efficiencies associated with settlement mechanisms as discussed above, the Committee recommended that the Competition Act should be amended to expressly enable CCI to accept settlements from parties and provide for a settlement mechanism. The settlement framework should be applicable for alleged contraventions of agreements under Section 3(4) and the abuse of dominance under Section 4 of the Competition Act. The Competition Act should empower CCI to pass settlement orders subject to certain conditions which may include settlement amount and for non-monetary terms. With regard to timelines for submission of an application for settlement, it was agreed that the application may be filed only after receipt of the DG Report and within such time before the passing of a final order by the CCI, as may be specified by subordinate legislation. The Committee also agreed that an order granting or rejecting a settlement application should not be made appealable to the Appellate Tribunal. Detailed procedure for the settlement mechanism should be set out in subordinate legislation.”



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## **Settlements and Commitments CLRC** **Recommendations contd.**



“Based on its discussion, the Committee recommended that the Competition Act should be amended to empower the CCI to accept commitments from parties alleged to have contravened the provisions of Section 3(4) and Section 4 of the Competition Act. With regard to timelines for submission of an application for commitment, it was agreed that it should be submitted after an order under Section 26(1) of the Competition Act has been passed so that the parties are aware of the proceedings. It was further agreed that such application can be submitted within such period prior to the submission of the DG report as may be specified in subordinate legislation. The Committee also recommended that the CCI should have the discretion to accept or reject the application for commitments. Further, it was agreed that the law should enable the CCI to review its decision to accept commitments in certain circumstances, including where the concerned party has acted contrary to the terms of commitment, when there is a material change in facts on the basis of which the commitment decision was passed or where the commitment decision was based on false, misleading or incomplete information provided by the concerned party.”



# THANK YOU