INTRODUCTION OF COMMITMENTS IN INDIAN COMPETITION LAW ENFORCEMENT: IS IT TOO EARLY TO COMMIT?

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ABSTRACT

The Indian Parliament, pursuant to the changes recommended by the Competition Law Review Committee Report is considering an amendment to the Competition Act, 2002 vide the Competition (Amendment) Bill 2020. One of the proposed changes seeks to introduce a framework for resolving cases with a package of remedial obligations in response to Commission concerns. The use of commitments and settlements for context-specific resolution of cases provides an undeniable appeal however such a form of staccato decision making does not come without its costs. To that end, the article examines the leading cases from foreign jurisdictions and the errors they committed in the implementation of such a mechanism. Additionally, the central argument this article makes is that placing reliance on such a form of decision making represents a significant divergence from realizing the ideal of the formal rule of law. While these decisions might offer legal comfort through a quicker resolution of cases on the one hand they can also compound over time and lead to a situation of shadow jurisprudence where eventually market participants would find it difficult to comprehend the law and how it is being implemented by quasi-judicial authorities such as the Competition Commission of India. The article concludes by providing suggestions on how such a mechanism (if it must) can be introduced by recalibrating the best features of the foreign legislations which would also be in alignment with the Constitution's basic structure and not be in divergence with the formal rule of law ideal.

Keywords: Antitrust, Amendment, Commitments, Settlements, Competition.

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I. INTRODUCTION

The Competition Act 2002 ('the Act' *or* 'the Competition Act') came into force on 20th May 2009 and the Competition Commission of India ('CCI' *or* 'the Commission') has since actively worked towards its statutory objectives of preventing practices which have an adverse effect on competition, encourage competition in the market, protect consumer interest as well as ensure freedom of trade carried on by other participants in markets in India.[192] To address practices that have an adverse effect on competition in India, the CCI has the power to pass orders through Section 27[193] and Section 28[194] *after* an enquiry has been conducted by the Commission. Therefore, the CCI presently is not equipped with powers to preliminarily address instances where a business wishes to voluntarily come forward and offer commitments in the form of behavioural changes and avoid a full-fledged enquiry and the negative press that comes with it. To address this lacuna, the Indian Parliament is considering the introduction of commitments in the Act[195] to optimally utilize its resources and reduce pendency of cases by securing remedial commitments from businesses instead of proceeding with a full decision to address the antitrust concerns.[196]

At first blush, this move of modernizing the procedural framework to more efficient mechanisms is praiseworthy, but a deeper investigation would highlight that introducing such a potent tool prematurely would end up doing more harm than good in the long run. With the object of comprehending the stance of established jurisdictions on commitment decisions, this article will first analyze the position in mature jurisdictions such as the European Union ('EU') and the United States ('US'). Subsequently, this article will highlight the administrative appeal that commitment decisions have which makes them attractive for competition regulators. Nevertheless, the article argues that such a form of decision making makes a sharp divergence from achieving the formal rule of law ideal and how such decisions can compound over a period of time and cause systemic degradation and give rise to a shadow jurisprudence that would lead to ambiguity and uncertainty. Lastly, the article would discuss the developments in India

[192] Arjun Nihal Singh, 'The Need For Settlements And Commitments Under The Competition Act, 2002' (Mondaq,16 January, 2020) <https://www.mondaq.com/india/cartels-monopolies/883880/the-need-for-settlements-and-commitments-under-the-competition-act-2002.> accessed 18 November 2021.
[193] Competition Act 2002, s 27.
[194] Competition Act 2002, s 28.
[195] Competition (Amendment) Bill, 2020, s 48B.
[196] Vartika Rawat, 'Competition Act Amendment: Commitments and Settlements to ensure defaulters name is not publicly sullied' (Economic Times, 30th October, 2019) <https://cfo.economictimes.indiatimes.com/news/competition-act-amendment-commitments-and-settlements-to-ensure-defaulters-name-is-not-publicly-sullied/71814532> accessed 18 November 2021.

concerning ad hoc decision making and consider whether commitment decision making is the right move going forward for competition law enforcement in India.

II. COMMITMENT DECISIONS IN THE EUROPEAN UNION

The Rome Treaty of 1957 established what is today known as the European Union.[197] The Rome Treaty was renamed the Treaty on the Functioning the European Union ('*TFEU*') by the Lisbon Treaty[198] with effect from 1 December 2009.[199] The TFEU in addition to being the constitutional basis of the Union also regulates competition law within the Union. Article 101 of the TFEU prohibits anti-competitive agreements and concerted practices,[200] whereas Article 102 of the TFEU prohibits abuse of dominant market position.[201] The TFEU empowers the competition regulator to enforce these articles through two types of decisions i.e. "*prohibition*" decisions, which are taken pursuant to Article 7 of the European Union Antitrust Regulation ('*Regulation 1/2003*') where the Commission has the option to settle cases and bring an infringement to an end and "*commitment*" decisions which are taken pursuant to Article 9 of the same regulation wherein parties under investigation themselves offer voluntary commitments in the form of behavioural remedies or in some cases structural changes such as divestment of shares to address the antitrust concerns.[202]

Prior to the introduction of Regulation 1/2003, the Commission worked with an informal structure for addressing competition concerns.[203] Regulation 1/2003 introduced a formal procedure through which a company accused of violating EU competition law may offer commitments in the form of behavioural or structural changes to meet antitrust concerns. Upon satisfaction, the Commission can make those commitments binding on the company.[204]

Since its introduction, commitment decisions have become the Commission's mechanism of choice for addressing non-cartel investigations pursuant to Article 101 and Article 102[205] with

[197] Treaty of Rome, 1957.
[198] Paul Craig, 'The Treaty of Lisbon, process, architecture and substance' (2008) 33 European Law Review 137.
[199] Richard Whish & David Bailey, *Competition Law* (7th ed. Oxford University Press 2012).
[200] Treaty on the Functioning of the European Union, art 101.
[201] Treaty on the Functioning of the European Union, art 102.
[202] European Commission, 'Competition Policy Brief, To Commit or not to Commit? Deciding between prohibition and commitments' (European Commission, 15 April, 2021) <https://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf.> accessed 18 November 2021.
[203] Jean-François Bellis, 'EU Commitment Decisions: What Makes Them So Attractive?' (OECD, 11 April, 2021) <https://one.oecd.org/document/DAF/COMP/WD(2016)53/en/pdf.> accessed 16 November 2021.
[204] Id.
[205] Dominique Costesec, 'Has the Commission Kicked its Addiction to Commitment Decisions?' (Kluwer

more than 90% of the non-cartel cases being resolved by way of commitments.[206] One of the first cases resolved by way of offering commitments was the case of *Commission v. Alrosa*[207] where the Commission instituted investigations to assess whether De Beers' long-term purchase relationship of rough diamonds with its competitor *Alrosa* was in contravention to Article 101 and 102 of the TFEU.

The General Court was essentially tasked with either allowing or terminating extreme remedial discretion exercised under Article 9 commitment decisions by deciding whether they should be held to the same standard of proportionality as required under Article 7 prohibition decisions.[208] To this end, the General Court answered in the affirmative, holding that the Commission could only secure the least onerous outcome that addressed its concerns.[209]

However, the observations of the General Court was short-lived since, on appeal, the European Court of Justice ('ECJ') overturned the findings of the General Court and endorsed the Commission's administrative discretion to secure *any* remedial outcome it deemed fit.[210] This ruling by the ECJ received considerable criticism to the extent that some scholars even labelled it as the 'worst decision in the history of the ECJ'.[211] This is because the ECJ missed the opportunity to set a ceiling on what could be considered as a meaningful limit to the discretionary powers that lay with the Commission. The vast majority of staccato decisions that the Commission took through Article 9 made it even more convoluted for businesses to know how the Commission would address a particular violation especially in areas where there was a lack of judicial guidance in the form of precedents.

Competition Law Blog, 28 June, 2016) < http://competitionlawblog.kluwercompetitionlaw.com/2016/06/28/has-the-commission-kicked-its-addiction-to-commitments-decisions/> accessed 18 November 2021.

[206] Wouter P.J. Wils, 'Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?' (Concurrences Journal, 5 June, 2015) <https://www.researchgate.net/publication/280313836_Ten_Years_of_Commitment_Decisions_Under_Article_9_of_Regulation_12003_Too_Much_of_a_Good_Thing> accessed 15 November 2021; Geradin and Mattioli, 'The Transactionalization of EU Competition Law: A Positive Development?' (2017) 8 Journal of European Competition Law & Practice 634.

[207] *Commission v Alrosa* (2010) 5 CMLR 643.

[208] Kellerbauer, 'Playground Instead of Playpen: the Court of Justice of the European Union's Alrosa Judgment on Art.9 of Regulation 1/2003', (2011) 32 European Competition Law Review 1–8.

[209] *Alrosa Company Ltd. v Commission* (2007) 5 CMLR ¶ 92–111.

[210] *Alrosa Company Ltd. v Commission* (2007) 5 CMLR ¶ 377.

[211] Jenny, 'Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions' (2015) 38 Fordham International Law Journal 770.

III. CONSENT DECREES IN THE UNITED STATES

The US follows a dual antitrust enforcement structure where the Department of Justice ('DoJ'), as well as the Federal Trade Commission ('FTC'), can enter into settlements with violators of US antitrust law.[212] These settlements are formally called '*consent decrees*' at the DOJ and '*consent orders*' at the FTC.[213] Similar to the EU, the substantial use of consent decrees in the US is a reflection of its mutual benefits to both parties to the dispute. Protracted litigation imposes an enormous burden on the companies costing them exorbitant legal fees, bad publicity etc. which ultimately leads them to seek consent decrees if they feel their case is not strong enough. For the Government, such settlements are attractive since they save resources and resolve cases far quicker than the litigious route.[214]

Essentially, a consent decree symbolizes a consensus between the Government and the suspect to resolve an undecided antitrust dispute. The suspect agrees to the specific limitations for their future course of conduct and in return, the Government shows its willingness to terminate the suit on such agreed terms. The DOJ negotiated its first settlement in the year 1906[215] however, it was only after the introduction of the Clayton Act in 1914 that the mechanism came to be used with increased frequency.[216] Presently, the Antitrust Procedures and Penalties Act, 1974 also known as the '*Tunney Act'* expressly provides for such a mechanism.[217]

The procedure envisaged under the Tunney Act is strikingly different when compared to the model followed in the EU. The Tunney Act requires that the US publish a 'Competitive Impact Statement' and the Final Judgment in the Federal Register. Subsequently, a summary of the terms of the proposed Competitive Impact Statement and the Final Judgement is published in certain newspapers at least sixty (60) days prior to entry of the proposed Final Judgment. This notice is released with the objective of inviting comments from the members of the public regarding the proposed Final Judgement to the Antitrust Division of the Department of Justice of the United

[212] Alden F. Abbott, 'A Brief Overview of American Antitrust Law', (The University of Oxford Centre for Competition Law and Policy, 1 January, 2021) <https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l_01-05_1.pdf.> accessed 15 October, 2021.
[213] Daniel L. Rubinfeld, *Antitrust Settlements, The Oxford Handbook of International Antitrust Economics* 173 (Oxford University Press, 2015).
[214] Dabney, 'Antitrust Consent Decrees: How Protective an Umbrella?' (1959) Yale Law Journal 139.
[215] *United States v Otis Elevator Co.*, Decrees & Judgements in Fed. Antitrust Cas. 107 (1906).
[216] George Stephanov Georgiev, 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law', (2007) Utah Law Review 971.
[217] Antitrust Procedures and Penalties Act 1974, s 5.

States.[218] Thereafter, during the sixty-day period, the US will assess, and at the end of that period respond to any comments that it has received. It will then publish the comments and responses of the US in the Federal Register. Post the completion of the sixty-day period, the US will file with the Court the comments and its own responses, and it may request the Court to enter the proposed Final Judgment. If the US requests that the Court enter the proposed Final Judgment after compliance with the Tunney Act then the Court may enter the Final Judgment without a hearing, provided that the Court is of the considered opinion that the Final Judgment is in the public interest and adequately addresses the antitrust concerns.[219]

The aforementioned procedure of the Tunney Act aims to provide a robust framework for judicial reviews of antitrust consent decrees. This is because the legislative intent of the Tunney Act, as outlined in the Congressional Findings and Declarations of Purposes, states in clear terms that the Tunney Act was enacted to introduce a robust mechanism of providing judicial review to antitrust consent decrees and to ensure that such consent decrees are in public interest whilst ensuring that judicial reviews are not watered down to mere rubber stamps.[220] While the Tunney Act prescribes a framework that appears to be superior in terms of robustness of procedure, the Act also suffers from several infirmities. One such infirmity came to light in the landmark case of United *States v. Microsoft*[221] where the tech giant was accused of safeguarding its operating system monopoly and seeking a new monopoly for its browser: "The Internet Explorer". The district court denied its approval to the consent decree because the court could not conclude to their satisfaction that the decree was in public interest. The court's primary objection was that the proposed consent decree did not address several antitrust concerns which were *not alleged* in the complaint.[222]

Subsequently, the Court of Appeals answered the novel question of whether the judge can reject a decree if it does not address the antitrust concerns *not raised* in the complaint in the negative. The Appellate Court held that, the issues referred to in the Tunney Act are only those which are part of the initial complaint and not what the court formulates at a later stage. It is important to

[218] Fredrick S. Young, 'United States Explanation of Consent Decree Procedures' US Department of Justice, (26 July 2019) < https://www.justice.gov/opa/press-release/file/1187716/download> accessed 28 May 2022.
[219] Lawrence M. Frankel, 'Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees' (2008) Antitrust Law Journal 550.
[220] Kevin R. Sullivan, 'Motion to Participate as Amicus Curiae', US Department of Justice, (8 February 2006) < https://www.incompas.org/files/tunney_feb8_2006.pdf> accessed on 28 May 2022.
[221] *United States v Microsoft* 253 F 3d 34 (D.C. Cir. 2001).
[222] Lawrence M. Frankel, 'Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees' (2008) Antitrust Law Journal 550.

consider at this juncture that this dispute arose due to the unclear text used in the statute itself. The Tunney Act provides for judicial review of consent decrees and requires them to be in the public interest however it fails to outline a definition of what would constitute public interest for the purposes of review nor does it provide any other form of guidance to judges to make an evaluative opinion on the same.

Nonetheless, the framework envisaged by the Tunney Act, albeit not perfect, serves a valuable deterrence goal while at the same time ensuring the participation of courts to maintain checks and balances and ensure that the competition regulator does not end up abusing their administrative discretion. Moreover, it also provides considerable guidance on how courts can be included in the ad hoc decision-making process by embedding judicial review of such orders in the text of the statute itself.

IV. THE ADMINISTRATIVE APPEAL FOR INTRODUCING COMMITMENT DECISIONS

There is an incontestable allure that comes with commitment decisions which explains why the competition regulators in foreign jurisdictions have relied on them heavily since their introduction. They provide a potent tool for realizing the policy goals with the highest efficiency. This efficiency is a direct corollary of the extensive administrative discretion that commitment decisions provide.

The model for commitment decisions embedded in the TFEU through Article 9 provides the Commission with unrestrained powers, the exercise of which allows it to pursue its policy objectives. This equips the Commission with the discretionary power to assess every case individually and implement the competition policy *above the law* i.e., by going ahead of the legislative standards through the application of novel theories of harm[223] as well as *below the law* by providing added leeway from the prescribed legislative standards in cases wherever appropriate. Viewed in this light, the Indian competition regulator can be ahead of the curve in emerging areas such as blockchain technologies where it can implement novel theories of harm[224] while not being constrained by legislative limitations to address emerging issues. Similarly, it can address issues that do not have a significant impact on the market by enforcing commitments that

[223] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[224] Geoffrey Manne, 'Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins' (2020) George Mason Law Review 1279.

are below the law since commitment decisions are intended to provide a system of cooperative resolution of cases in the first place.

An opposite example of this can be the landmark case of *United Brands v. Commission*[225] which laid down the test for '*excessive pricing*' which had no reasonable relation to the economic value of the product supplied by itself or when compared against competitive standards prevalent in the market. The implementation of this test in subsequent cases has been a major hindrance in adjudicating prohibition decisions for decades.[226] However, the administrative flexibility that commitment decisions provide would in such a situation allow for better resolution of cases where the Commission is not constrained by previous decisions.

Moreover, commitment decisions allow for market interventions against particular companies as and when the Commission sees fit regardless of the legal novelty or the magnitude of its concerns. This invariably allows the Commission a 'free hand' to fix the inconsistencies and realign the market whenever the occasion arises.[227] Scholars have also suggested that the European Commission(s) have used commitment decisions to secure remedies that may not have succeeded in formal litigations.[228] At first view, this administrative flexibility sounds appealing considering its endless possibilities in competition enforcement. Nonetheless, this administrative flexibility does not come without its costs. Having acknowledged the seemingly endless possibilities that are afforded through administrative flexibility, the central purpose of this article is to explore the problematic consequences of this means of market intervention. Simply put, the prioritization of effective policy goals through unbridled administrative flexibility represents a repudiation of the formal rule of law to which the article now turns.

V. COMMITMENT DECISIONS VIS-A-VIS THE RULE OF LAW

Perhaps the strongest argument advanced against the reliance on commitment decisions is the fact that they fail to develop the law and the jurisprudence that emerges as a result of judicial decision making. Professor Ryan Stones proposed the argument that the legal uncertainty that

[225] *United Brands and United Brands Continental v Commission* (1978) 1 CMLR 429.
[226] Dunne, 'Commitment Decisions in EU Competition Law', (2014) 10(2) Journal of Competition Law & Economics 422.
[227] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[228] Rab and Sukhtankar, 'Alternative Competition Law Enforcement in Energy: The Application of Commitments under Article 9 Regulation 1/2003 in the Energy Sector', (2008) 17(6) Utilities Law Review 199–201.

emerges as a direct corollary of commitment decisions is also antithetical to the formal understanding of the rule of law as conceptualized by the works of scholars such as Fuller[229] and Hayek.[230] Professor Stones' central argument states that the rule of law at its core seeks to establish an institutional framework that approximates normative obligations.[231] Therefore, for its effective implementation, it requires a harmonious system that ensures three primary objectives. *Firstly,* there must be normative comprehensibility i.e., legal subjects must be able to comprehend their rights and their obligations. *Secondly,* there must exist generalized norms of equal application which essentially means that there must be an equal application of the law and all similar instances coming within their reach should be treated equally and consistently and *lastly,* there must be a system of independent review of the equally applied law for checking the legal validity as well as for reviewing substantive compliance of decisions which is usually entrusted with courts.[232]

The argument proposed by Professor Stones is not only essential for the day-to-day functioning of an effective legal system guided by the rule of law like ours but it also finds justification in economic theory which assumes critical importance in the domain of competition policy. New institutional economic theory proposes that the effectiveness of law as an institution diminishes if it cannot be comprehended by its subjects.[233] Moreover, normative stability is lost when the legal determination is carried out through ad hoc, singular interventions rather than equal application of law.[234] Since the first two limbs of the formal rule of law i.e., normative comprehensibility and fixed generality of norms are incapable of perfect realization,[235] the third limb i.e., judicial review by courts assumes significance. The third limb of judicial review not only provides a second chance to examine the correct application of legal principles but also empowers the courts to establish clearer and generalized legal norms instead of context-specific determinations which are bound to result in legal uncertainty over time.

Such a legal system that aspires towards realizing the formal rule of law aligns with the vision of the Supreme Court of India which on several occasions has stressed on the importance of rule of law and its indispensable role in the effective functioning of our democratic republic. For

[229] Lon L. Fuller, *The Morality of Law*, (Rev. Edn Yale University Press, 1969).
[230] F.A. Hayek, *Law, Legislation and Liberty*, (1st Edn Routledge, 2013).
[231] Martin Loughlin, *Foundations of Public Law*, (1st Edn Oxford University Press, 2010).
[232] Ryan Stone, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) University of Oxford Yearbook of European Law 361.
[233] Kasper and Streit, *Institutional Economics: Social Order and Public Policy* (1st Edn Edward Elgar, 1998).
[234] F.A. Hayek, *Law, Legislation and Liberty*, (1st Edn Routledge, 2013).
[235] Id.

instance, in *K.T. Plantation (P) Ltd. v. State of Karnataka*,[236] the Supreme Court stated the following:

"The rule of law, as a concept, finds no place in the Constitution but has been characterized as a basic feature of the Constitution which cannot be abrogated or destroyed even by the Parliament and in fact binds the Parliament. The rule of law is one of the most important aspects of the doctrine of basic structure."[237] (emphasis added)

In the same vein, the Supreme Court in *State of West Bengal v. Debasish Mukherjee*,[238] expounded on the importance of judicial review in the following words:
"In a democracy, governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases. Where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. Even prerogative power is subject to judicial review"[239] (emphasis added)

Based on the foregoing, it would be fair to say that the aspirational values of the formal rule of law and the argument proposed by Professor Stones squarely aligns with the views of the Supreme Court of India. A departure from these values would invariably result in a systemic degradation of legal comprehensibility as well as normative certainty for individuals and businesses alike. Collectively, this would lead to a situation that is not in sync with the vision of a country founded upon the rule of law.

VI. POSITION HITHERTO IN INDIA

The Competition Act has been in operation for a little more than a decade now in India and has constantly evolved following the footsteps of other established jurisdictions such as the EU and the US. While there have been very few cases that have discussed the possibility of preliminary resolution of the case by offering structural or behavioural changes in the form of commitments or settlements, there is some guidance offered by judicial precedents. The CCI in the case of *In Re: M/s Royal Agency v. Chemist and Druggist Association*[240] observed that commitments and similar ad hoc mechanisms for the resolution of cases are not envisaged within the scheme of the

[236] *K.T. Plantation (P) Ltd. v State of Karnataka*, (2011) 9 SCC 1 ¶ 211.
[237] Id.
[238] *State of West Bengal v Debasish Mukherjee* (2011) 14 SCC 187 ¶ 35.
[239] Id.
[240] *In Re: M/s Royal Agency v Chemist and Druggist Association Goa* Case No. 63 of 2013 ¶ 23.

Act.[241] However, in *Tamil Nadu Film Exhibitors Association v. CCI*,[242] the Madras High Court held that cases can be resolved by offering settlements and the same would fall within the scheme of the Act under Section 27(g) since it provides residuary powers to the CCI. The sub-section gives the CCI the power to pass *"Any other order or issue such directions as it deems fit"* that have not been enumerated in the Section to meet the ends of justice. Additionally, the Supreme Court has already held that the powers conferred upon the CCI are of a wide magnitude to achieve the objective of the Act and ensure its proper implementation.[243] Moreover, the jurisprudence concerning ad hoc decision making is not entirely new to the Indian legislative framework, especially for quasi-judicial bodies. The Securities and Exchange Board of India ('SEBI') has already introduced its settlement proceedings regulations. Similar mechanisms are also provided for under the Income Tax Act[244] and the Central Excise Act[245] which suggest that different regulators in the country are headed into a more settlement-friendly regime.[246]

VII. DRAFT COMPETITION ACT (AMENDMENT) BILL 2020: AN ANALYSIS

The Competition Law Review Committee ('CLRC') constituted by the Ministry of Corporate Affairs ('MCA') took cognizance of the Madras High Court judgement[247] and observed that on a plain reading of Section 27[248], it does not expressly envisage a settlement or commitment procedure within the framework of the Act.[249] Subsequently, the proposed amendment bill for providing legal architecture to commitments and settlements seeks to insert Section 48A and 48B respectively under the existing legislative framework.[250] As per the bill, contrary to the position of commitment applications, settlements may be entered into by the parties after the Director-General ('DG') presents the report of the investigation to the CCI and concerned parties, but before the Commission makes the final decision.[251] This suggestion is inherently problematic considering that the DG would invariably be utilizing the resources of the Commission as well as require sufficient time to reach a conclusive decision. Therefore, this mechanism not only adds

[241] Id.
[242] *Tamil Nadu Film Exhibitors Association v CCI* (2015) 2 Competition Law Review 420 ¶ 27.
[243] *Competition Commission of India v SAIL* (2010) SCC 744 ¶ 86.
[244] Income Tax Act 1961, s 245B.
[245] Central Excise Act 1944, s 32E.
[246] SEBI (Settlement Proceedings) Regulations, 2018.
[247] *Tamil Nadu Film Exhibitors Association v CCI* (2015) 2 Competition Law Review 420.
[248] Competition Act 2002, s 27.
[249] CCI, 'Competition Law Review Committee Report' (Competition Commission of India, 10 July, 2019) <https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf.> accessed on 20 November 2021.
[250] Ashu Bhargav, 'Settlements and Commitments in the Indian Competition Regime: Construing Practicality' (IndiaCorpLaw 29 March, 2020) <https://indiacorplaw.in/2020/03/settlements-and-commitments-in-the-indian-competition-regime-construing-practicality.html.> accessed on 9 October 2021.
[251] Competition (Amendment) Bill 2020, s 48B.

an additional layer of procedural burden on the participants but also does little to save time and resources which is one of the primary reasons why businesses as well the Commission would want to pursue these mechanisms in the first place.

Moreover, similar to the model followed in the EU, the proposed bill accords the Commission wide discretionary powers to assess the "*nature and gravity*" of the contraventions and accordingly accept or reject the proposals advanced by businesses.[252] Notably, the bill does not enlist any grounds on the basis of which the Commission can decide whether the proposed commitments adequately address the competition concerns nor does it require any statement, such as the '*Competitive Impact Statement*' prescribed under the Tunney Act, by the suspect which could be used for public scrutiny. Further, the proposed bill also expressly rejects the possibility of judicial review as it clearly states[253] "*No appeal shall lie under section 53B*[254] *against any order passed by the Commission under this section.*" As the previous section highlights, granting such a wide degree of administrative flexibility would only lead to a situation of diminished normative certainty for businesses but also directly contribute towards systemic degradation of legal comprehensibility. Collectively, such a legal architecture would fail to realize the formal rule of law ideal.

VIII. CONCLUSION

It is an undisputed fact that the introduction of a commitments and settlements framework would result in procedural economy and faster resolution of antitrust disputes. As the article highlights, they would also equip the Commission to regulate the market based on their ideal vision since they would not be constrained by the limits imposed by the legislative text. However, this article has argued that such a form of market regulation especially when done prematurely can end up doing more harm than good. It is also important to consider that even advanced antitrust jurisdictions such as the EU and the US introduced such procedures for ad hoc decision making after a considerable period of time (few decades) post the enactment of the parent Act, whereas the Competition Act has only been in operation for a little more than a decade. Keeping in mind the nascent stage of antitrust jurisprudence in India it is important that not a lot of cases are closed by commitments as that would eliminate independent judicial determination of the legal issues involved in these cases. This assumes greater importance, especially in emerging areas where there is a lack of guidance in the form of judicial precedents.

[252] Id.
[253] Competition (Amendment) Bill 2020, s 48A (6) and s 48B (6).
[254] Competition (Amendment) Bill 2020, s 48B.

In conclusion, it is critically important that the Indian Parliament does not repeat the same mistakes its counterparts have made in the enforcement of competition law. The proposed bill must be recalibrated and include the best of the EU and the US models by implanting a mechanism of judicial review and limiting the unbridled administrative flexibility given to the competition regulator. If the Indian Parliament must introduce a mechanism of ad hoc decision making to resolve antitrust cases, it must not be at the cost of the rule of law ideal otherwise the foundational principles of our constitution would ring hollow.