

**A PRACTICAL THREE-STAKEHOLDER PERSPECTIVE IN IDENTIFYING AND
SOLVING OPTIMAL PROCEDURAL GAPS IN THE SETTLEMENT AND
COMMITMENT PROVISIONS OF THE COMPETITION AMENDMENT ACT,
2023**

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ABSTRACT

This paper analyzes the new Settlement and Commitment provisions introduced by Sections 48A and 48B of the Competition (Amendment) Act, 2023. The new provisions emphasize quicker case disposal, and market improvements by violators. However, issues remain in the statute and the current draft regulations. These include a lack of any appeals to both orders, with heavy dependence on the Competition Commission of India's ("CCI") discretion to decide on the revocation of such orders and assess whether to accept settlement applications. These issues as analyzed by this paper, pose a question of whether preventing third-party grievance addressal, in furtherance of avoiding backlogs, is an effective method in preventing anti-competitive practices. The draft regulations for both thus, must address these optimal issues in a more objective method to avoid trivializing public interest in favour of quicker disposal. The paper through a deep analysis points out issues, that could hurt several stakeholding pointers in Indian Competition Law including, the CCI itself, the aim of effective case disposal, enterprise participation and the public. Further, this paper aims to emphasize clarity and consistency in the regulations, to ensure that enterprises consider taking the new provisions as a viable option, instead of opting for litigation which may take years to conclude. Thus, with an intent to push Indian Competition Law to newer thresholds which include working in market economies to improve inequality, this paper points out the importance of public participation in the process of settlements and commitments, to ensure that these salient features are used by enterprises widely but do not supersede and dwindle the importance of public interest.

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I. INTRODUCTION

Section 48A of the Competition (Amendment) Act, 2023 has introduced the provision of Settlement, with the onus of initiating the settlement being on the enterprise. The provision allows for any enterprise to offer (as an application) a settlement with CCI after they receive an investigative report from the Director General as per Section 26(4) of the Competition Act, 2002. These applications will be invalid¹ If an order is passed by the CCI under Sections 27 and 28, a timeline will be established. Thus, the process is an effort for faster case disposal. After assessing the settlement application, the CCI will either reject the application under Section 48A(5) or agree to the terms and pass a suitable settlement order under Section 48A(3). The draft Competition Commission of India (Settlement) Regulations, 2023 (draft settlement regulations) framed by the CCI have introduced a timeline of 120 days² for conducting proceedings from a settlement application, in an effort for quick disposal. Section 48B³ has introduced the provision of Commitment, with the onus of the enterprise applying to the CCI and ‘commit’ to working on the contraventions highlighted by the investigative report.

The draft Competition Commission of India (Commitment) Regulations, 2023⁴ (“Draft commitment regulations”) framed and released by the CCI have introduced 90-days⁵ to complete such proceedings, with an aim of quick adjudication, and faster improvements. The major difference between a settlement and commitment is that from the face of a bare reading of both provisions⁶, Section 48B commits the enterprise to work on improvements and standards as set by the CCI in the future. Section 48A however, is an undertaking that a successful settlement order will lead to the infringement being solved. There are similar issues in both provisions which seem out of the fact that 48A and 48B are available for the same offences which include abuse of dominant position in the market⁷ and anti-competitive agreements at different levels of the production chain in the market.⁸

¹ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48A.11.

² Draft Competition Commission of India (Settlement) Regulations, 2023, reg 4(5).

³ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48B(1).

⁴ Draft Competition Commission of India (Commitment) Regulations, 2023.

⁵ Draft Competition Commission of India (Commitment) Regulations, 2023, reg 4(8).

⁶ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48A and 48B.

⁷ The Competition Act, 2002 (Act 12 of 2003), s. 4.

⁸ The Competition Act, 2002 (Act 12 of 2003), s. 3(4).

II. OPTIMAL ISSUES IN THE SETTLEMENT PROVISION UNDER SECTION 48A

A. Appeals under Section 53B being barred from applying to Settlement Orders

Section 48A explicitly bars⁹ any appeals to the appellate tribunal under Section 53B¹⁰ from any settlement order. This is a legislative push for quick adjudication, as first, the onus is on the enterprise to apply for such reliefs. Further, there ideally should be no situation where an enterprise will appeal against a settlement order agreeing to its application. The procedure for settlements is to be governed¹¹ by appropriate regulations¹², which are still in draft. The draft settlement regulations, particularly Reg 4(2)¹³ and Reg 4(5)(d)¹⁴ allow for the settlement application to be revised if the CCI finds the same unacceptable prima facie or after due consideration of the comments/objections invited, as required by Reg 5¹⁵ of the regulations. Thus, the enterprise has several chances, although up to the discretion of the CCI, to offer an acceptable settlement application. If the CCI feels that the threshold of the settlement application is too high, considering the nature of the offence, or any other considerations that it is bound to consider by Reg 8, then the regulations and the amendment have correctly laid down the finality of a rejection of a settlement order under Section 48A(5). Thus, a settlement gives finality to the issue, such that the damages to the markets are rectified. Ideally, an appeal against such a process breaks the reason behind introducing the new provisions in the first place, which thus forms an optimal reason why such an option is barred.

However, the issue arises from the context that third persons are also, barred from appealing to the tribunal against a settlement order. The argument that may support this unintended consequence, is that allowing third-party appeals will open a plethora of cases for the Appellate Tribunal, the NCLAT, inadvertently hurting the intent behind increasing adjudication efficiency. Further, the CCI has the power to revoke the settlement order, if it finds any contravention of the same violation or any misrepresentation or any material change in facts, under Section 48C¹⁶ and can use third-party agencies for implementation¹⁷ if it believes that the sole activities by the enterprise are not enough. The only method by which third parties can bring up their grievances

⁹ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48A(7).

¹⁰ The Competition Act, 2002 (Act 12 of 2003), s. 53B.

¹¹ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48A(6).

¹² Draft Competition Commission of India (Settlement) Regulations, 2023.

¹³ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 4(2).

¹⁴ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 4(5)(d).

¹⁵ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 5.

¹⁶ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48A(6).

¹⁷ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 10.

is by giving objections if they come under the very wide meaning of “any other party” under Reg 5(1).¹⁸ It seems unlikely, however, that objections will be invited from the public at large. Damages from anti-competitive practices will not affect sole individuals. Thus, it is unlikely that a settlement order will manage to cover each contravention, as some may incidentally escape the CCI’s glare. The unilateral emphasis on the CCI’s discretion is contrary to a no-error probability. Errors that may be innocently missed can be addressed by public participation, which is missing in both the statutes and the regulations.

B. The Issue in the Blockade Faced by the Public in Settlement Proceedings

Objections to the settlement application are allowed by ‘any other party’ under Reg 5(1).¹⁹ However, there is no clarity if any other party could be a party away from a combination that is violating Competition Law and if any person or the public is included in the meaning of any other party. If the answer is positive, then it would be optimal to post a summary of the contraventions for public access. The non-confidential information summary is required to be prepared by the CCI under Reg 5(1)²⁰ for objections. If made public, it would still display sensitive details about the company’s violative actions, effectively dissuading the company from ever taking the option of settlement. It seems unlikely that every party would mean every public person, else public access to any such information seems to trivialize the intent behind settlements. Further, Reg 5(2)²¹ is framed by necessitating support by documents, which is unlikely to constitute information provided by public persons. An analogy with Section 19 shows the words used ‘receipt of a complaint’²² to prompt an inquiry. The same elusive language for public complaints is missing in Reg 5(1) of the settlement regulations. Thus, the public is likely to be barred from making comments and objections to the settlement proposal. This leads to an overwhelming dependence on the CCI’s investigation resources to ensure that the settlement is successful in redemption and improvement. The information provided to CCI by three independent informants caused the initiation of the inquiry²³, and then the Rs 1,337,76 crore penalty²⁴ to Google for anti-competitive

¹⁸ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 5(1).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 5(2).

²² The Competition Act, 2002 (Act 12 of 2003), s. 19.

²³ Barik S, ‘NCLAT Upholds Rs 1,337 Cr Penalty on Google: What Are the Allegations against It?’ *The Indian Express* (31 March 2023) <<https://indianexpress.com/article/explained/explained-sci-tech/nclat-penalty-google-cci-case-explained-8527495/>> accessed 29 December 2023.

²⁴ Srivats KR, ‘Android case: The story so far in CCI’s epic anti-trust battle against Google’ *The Hindu BusinessLine* (13 February 2023) <<https://www.thehindubusinessline.com/blexplainer/android-case-the-story-so-far-in-ccis-epic-anti-trust-battle-against-google/article66504468.ece>> accessed 29 December 2023.

practices in Android devices.²⁵ This further amplifies that even the highest stakeholder cases require public participation, the latter cannot be trivialized on account of cutting down on cases at the appellate tribunal.

C. The counter-productive dependence on the CCI's discretion

The margin of error being extremely low, puts intense pressure on the regulator, which cannot dedicate all its resources to one single order, considering the short period that it must follow. Further, assessing damages to the public, which is a consideration that must be accounted for under the 'nature of offence' threshold in a settlement application seems to be missing any public participation, unless the complaint was from the public and hence, becomes any party (without the aforementioned public access requirement). It is reported²⁶ that the CCI is suffering from resource woes, and staff shortages, and the utmost dependence on the CCI's discretion is a path to overwhelming failure and higher chances of errors and flaws. Appointments have been slow²⁷, which is contrary to the vast emphasis on CCI's interpretation rather than on statute or regulation. If say the settlement order is allowed, but the enterprise still damages the market and the public, the only possible redressal is for any public person to approach the CCI and prompt them to investigate Section 19, with a possibility to revoke the order, rather than directly appealing the same. Thus, the lack of any appellate provision is a serious issue, because it puts an assumption that there would be no margin for error in a settlement order and it closes off any public participation in the process as well, unless they are related to the investigation under Section 3(4) and Section 4 of the Competition Act, 2002.

Issues and violations listed under Section 3(4)²⁸, including output restrictions, exclusive supply and distribution, hurt consumers, which are the public²⁹, who have no participation. Section 4 disallows abuse of dominant positions as such actions affect consumers in exerting choices, and heed them to unfair prices, restricting them to unchecked control.³⁰ Thus, the lack of grievance redressal is an issue for the damaged public in case the settlement order does not redeem damages to a satisfactory

²⁵ *Id.*

²⁶ Doshi M, 'CCI's Resource Woes: India's Antitrust Agency Squeezed by Staff Vacancies, Workload' The Economic Times (9 March 2023) <<https://economictimes.indiatimes.com/news/india/india-antitrust-agency-squeezed-by-staff-vacancies-and-workload/articleshow/98508824.cms>> accessed 29 December 2023.

²⁷ Srivats KR, 'Competition Panel Gets Three New Members, Restoring Quorum for Watchdog' The Hindu BusinessLine (19 September 2023) <<https://www.thehindubusinessline.com/news/competition-panel-gets-three-new-members-restoring-quorum-for-watchdog/article67321774.ece>> accessed 29 December 2023.

²⁸ The Competition Act, 2002 (Act 12 of 2003), s. 3(4).

²⁹ Qaqaya H and Lipimile G [2008] The effects of anti-competitive business practices on developing countries and their development prospects, pg. v.

³⁰ *Id.*

point, which escapes the scrutiny of the CCI. One dilution could be to make the third-party agency monitoring compulsory option provided by Regulation 10³¹, but there is no guarantee a report by third-party agencies can accurately state that the enterprise is not violating any guideline, and not doing any damage to the public. Thus, downsizing the importance of appeals seems counter-productive, as several new informants will approach the CCI, causing new investigations, and a general waste of resources. The assumption is that the CCI has no margin for error which has no evidentiary basis and seems impossible considering the high number of consumers in the country³² and the diversified market economy. The only method to avoid this, without change, is to greatly increase the strength of the CCI in workforce and resources, which is not easy to process. Public interest in competition law has suggested developments to calculate losses on income graphs, and not solely on aggregate losses.³³ In increasing improved advocacy for competition law to help improve inequality in markets, the step could be prioritizing cases but not removing grievance redressal through appellate jurisdictions completely, especially when developments in competition law are now being seen as a gradual push for removing inequality worldwide.³⁴ The only option is to wait for the settlement order to be passed and provide information to the CCI that it may have missed optimal information. This may prompt the CCI to revoke the order under Section 48C on the information that may allege contravention currently occurring. Even if this would hurt the factual basis of the settlement order, the result may be positive for effective improvement.

III. REGULATION DEFICIENCIES IN REVOCATIONS OF SETTLEMENT ORDERS

Revocation of settlement orders is governed by Section 48C³⁵ and Reg 11.³⁶ The language used in both is interpretative, where the CCI has the discretion to allow for revocation in case there has been a material change of fact, withholding of information or non-compliance. However, there are no rules regarding what the CCI should perform, whether it is by accepting third-party complaints, depending on informants, or conducting its investigations. The strict language in Section 53(B) which allows for an appeal by any person, does provide a better guarantee for the principles of natural justice, rather than the CCI's discretion, which can miss or in a negative light, ignore some information. Thus, another route could be for the revocation of settlement orders to

³¹ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 10.

³² Writer S, 'Consumer Boom' LiveMint.Com (7 September 2023) <<https://www.livemint.com/opinion/quick-edit/consumer-boom-11694110366970.html>> accessed 29 December 2023.

³³ Ezrachi A, Zac A and Decker C, 'The Effects of Competition Law on Inequality—an Incidental by-Product or a Path for Societal Change?' (2022) 11 Journal of Antitrust Enforcement 51 <<https://academic.oup.com/antitrust/article/11/1/51/6593927>> accessed 29 December 2023.

³⁴ *Id.*

³⁵ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48C.

³⁶ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 11.

have a clause accepting third-party information. This would then allow for a procedural process for third-party informants and complaints regarding settlement orders. The reason why there must be a clause dedicated to such cases, and not include the same under a very liberal interpretation of ‘comes to the notice’ under Section 48C is accountability. Consumers are valid stakeholders, and the wide discretionary powers given to the CCI in deciding such information must include accountability, especially when appeals are explicitly barred. Thus, Reg 10³⁷ could be framed to provide instructions to the CCI on dealing with third-party complaints alleging contravention or a change in facts against a settlement order, and how it must decide on whether they would result in a revocation of the order. This would assess the CCI in ensuring the facts remain consistent, instead of placing the sole pressure on the CCI to validate all facts.

Further, in the essence of public interest, it is beneficial if draft settlement regulations direct that the CCI must provide reasons for not acting on a complaint for a revocation, through a report. This would be an effective way of handling the issues that may arise from the bar of appeals against settlement orders. It would ensure that public participation helps maintain the zero margin for error. The ex-post provision of settlements will then help dissuade the very violation to at least not continue to affect consumers and the market, even after the settlement order. Further, revocations under Section 48C are also unappealable³⁸, which is acceptable to ensure the enterprise does not arm itself with endless litigation in case of a revocation. However, from a public stakeholder perspective, it may be optimal that such revocations, if rejected after giving the enterprise a hearing, continue to damage the market. Thus, the cycle starts again, by providing information to the CCI, in the hope that the same is considered. This amplifies the reason why rejection or non-consideration of information for revocation needs to be supported by accountability measures, such as reports or simple replies by the CCI. A lack of appellate jurisdiction cannot be used to defend if there aren’t enough safeguards. Worldwide, France has the appellate jurisdiction to review³⁹ EU Competition Committee Settlements and Commitments by third-party petitions. A dubious approach to third-party petitions in India, considering case delays is acceptable, only if there are several other safeguards available.

³⁷ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 10.

³⁸ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 48C.

³⁹ Cour d’Appel de Paris, Arrêt de 19 Décembre 2013.

IV. THE CONSEQUENCES OF ALLOWING FOR PRIVATE COMPENSATION CLAIMS OUT OF SETTLEMENT ORDERS

Settlement applications under Section 48A are unique as they allow for the enterprise to choose to apply for a settlement, as soon as an inquiry is initiated, till the point that a final order has been passed, under Section 27 or 28 respectively. The Director General's report, as required by Section 26(4)⁴⁰ does not have information that leads to a proper evidentiary violation⁴¹, it constitutes facts and circumstances that lead to the CCI prima facie believing that a violation has occurred. Thus, the onus remains on the enterprise, which has to decide whether the implications of a violation are high enough to take up the settlement provision and make an application. Thus, to ensure that there is active participation by entering into such settlements, the impact of the 'offence' called into question is important. About the draft regulations, Reg 3 requires the enterprise to mention all the facts, and violations that are found by the Director General, including the nature of the offence mentioned. The time limit given to the settlement applicant is 45 days along with a 30-day discretionary increase. Thus, the only reason for enterprises to choose this provision, considering the lack of full scope of the investigation and the quick decision required, is that there must be no offence thus established. Reg 7(1)⁴² clearly states that a settlement order will not constitute a finding of contravention against the enterprise. However, this is explicitly limited to the scope of Section 53N.⁴³ Section 53N(1)⁴⁴ allows for any party to approach the tribunal and recover monetary compensation from the enterprise, due to damages arising out of findings of the commission and also, from an order of settlement. Thus, although settlement orders remain non-appealable as highlighted before, any person can claim compensation from a settlement order.

The intent behind this limitation is to ensure that adequate compensation is received by consumers, who would be impacted by abuses of dominant positions under Section 4 or violative agreements as noted in Section 3(4). This may be a dilution of the inadvertent impact of non-appeals of settlement orders. However, both provisions move in separate tangents. Thus, even if monetary compensation is awarded out of a settlement order, the above-mentioned issues, including nuanced continuous public damage, or contraventions escaping the CCI's scrutiny, remain. The second inadequacy is that settlement orders do not have any jurisdiction under Section

⁴⁰ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 26(4).

⁴¹ Singh PK, Gandhi S and Rai R, '3 Design Deficiencies in the CCI's Draft Settlement & Commitment Regulations' MoneyControl (10 September 2023) <<https://www.moneycontrol.com/news/business/3-design-deficiencies-in-the-ccis-draft-settlement-commitment-regulations-11343811.html>> accessed 29 December 2023.

⁴² Draft Competition Commission of India (Settlement) Regulations, 2023, reg 7(1).

⁴³ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 53N.

⁴⁴ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 53N(1).

42A.⁴⁵Section 42A⁴⁶ allows for any person to approach the tribunal and recover compensation if an enterprise is violating orders and conditions set by the CCI under various sections. Thus, a person cannot ask for compensation if any enterprise is violating a settlement order and damaging the public, it must wait for the CCI to issue a revocation under Section 48C. The revocation may be pushed by information provided by the person to the CCI, but the same has no guarantee that it is considered by the CCI.

A. The opaque gap in allowing for claims out of Settlement Orders but not out of contravention of such settlement orders

It is pertinent to note then that if settlement orders can attract compensation, and contravention of the same does seem to have hazy timelines, it is optimal to ensure that Section 42A also attracts settlement orders. This would then help cut down on contraventions and ensure effective adjudication of the damage caused. Further, it can help address the damage faced by contraventions of settlement orders. The increase in the number of cases, however, in hypothetical cases where the present approach of CCI's wide discretion is followed, contraventions may hurt consumers and continue until the revocation, and finally the order, and then again, through long litigation. Thus, it seems the current approach undertaken by the amendments hurts the intent behind the effective case disposal mindset. Section 53N does not account for revocations separately, and this may be on two assumptions, that any revocation under 48C will in the end lead to another settlement order or an order under Sections 27 and 28. This would then attract Section 53N.

There are no timelines for an investigation after revocation, and since the enterprise is allowed to be heard, there is no guarantee that a revocation will be efficiently addressed in real time to assess contraventions, as soon as the CCI is put to notice. Further, if contraventions of settlements are allowed to be solely applied for compensation under Section 42A, this would prompt the CCI with its wide discretionary powers, to conduct the revocation proceedings. If the appellate tribunal awards compensation, then the CCI could revoke the order and use the information for an effective investigation. The discretionary powers of the CCI need not wait for a judgment and can use the information provided by the petitions. Thus, Section 42A can be an effective method for allowing for contraventions compensation and address or the revocation mechanism introduced in Reg. 10 must also introduce a time limit for such proceedings, which is currently missing in the

⁴⁵ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s. 42A.

⁴⁶ *Id.*

draft regulation. If the former option is frivolous to the cause of effective and quick case disposal, then all the changes to Reg. 10 are optimal to ensure that the settlement provision remains quick and effective.

B. Issues in the apparent admission of guilt in compensation proceedings arising out of Settlement Orders

Section 53N, albeit with some issues highlighted, is a positive provision for compensation out of a settlement order. However, a settlement order in such adjudication then has to establish some guilt of contravention. Reg. 7(1)⁴⁷ clearly states that a settlement order would not amount to a “*finding of contravention*”.⁴⁸ Thus, it seems that the provision of Section 53N and the provisions of settlement orders are in clear conflict. Section 53N requires the contravention to be established, from which ideally the appellate tribunal will award compensation using judicial techniques. The language in Section 53N has been amended to simply include settlement orders, while the words “without prejudice to provisions of Section 53N” are present in the draft of Reg. 7(1). Thus, the language of Reg. 7(1) contradicts itself, and there is no clarity on how compensation could be granted when it is not a finding of contravention. This lack of clarity dissuades enterprises from choosing the provision of settlement in the first place. Thus, the intent to attract a major stakeholder in competition law breaks apart.

The hypothetical case could be that the CCI withholds releasing a settlement order which concludes a contravention but keeps a depository of the material facts confidential. This information then can be called upon only if a petition under Section 53N is admitted. Yet, there are no regulations which consider what the settlement order constitutes, and whether it would simply include the fee paid, or constitute other facts and circumstances. Settlement orders will be made public, and thus there must be some regulations (currently missing in the draft regulations), that govern what a settlement order constitutes. The open language will dissuade enterprises from entering into settlement applications, due to the provision of 53N. Thus, this gap is an optimal procedural issue that must be fixed. Further, there must be clarity that if Section 53N proceedings occur, the resultant judgment awarding compensation could also mean no contravention has been established. If not, then the contravention could also attract the provisions of other legislations, including relevant provisions of the Companies Act, 2013. This would further decrease enterprise participation in settlement proceedings.

⁴⁷ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 7(1).

⁴⁸ *Id.*

The hypothetical highlighted above, where say the CCI maintains a confidential summary, equivalent to the one that is used to invite objections, under Reg. 5⁴⁹, can have underlying issues. Reg. 3 of the draft settlement regulations⁵⁰, has several provisions which require the enterprise to include the contraventions, the reasons behind the same and the efforts to improve and remove the contraventions. Such information is sensitive to the public but also gives the CCI an advantage. There is no guarantee that the CCI will not initiate proceedings from separate violations, and use the information provided in the settlement application. This could have serious implications for the enterprise. There must be a consideration of confidentiality in such proceedings which intersects with the contrary proceedings that occur in Section 53N. However, if the Indian settlement regulations follow the EU Model⁵¹, there might be some clarity. The EU settlement regime⁵² is only for cartel anti-trust violations. These do involve an admission of guilt, to allow for private damage suits to pass on. Thus, if Indian settlement orders want to maintain Section 53N, in a method to ensure that private damages are awarded justly, it must occupy an admission of guilt by the Settlement Applicant.

Another issue that jumps out, is that the Director General report, which initiates the settlement time limit of 45 days plus 30 discretionary days⁵³, does not have evidentiary and nuanced reports of violations. It simply has a prima facie case of violation, according to the information and discretion of the CCI to prompt the inquiry. Thus, within the short period, the enterprise has to make a quick decision to admit guilt, understand that it may be brought to proceedings under Section 53N for private compensation, and apply for settlement. Thus, with all the issues, building from a procedural gap, it does seem that the inclusion of Section 53N is hasty, as the public is otherwise completely cut off from settlement proceedings unless they are the informant. This is a serious procedural gap, and the CCI must balance both public interest and enterprise participation in such proceedings.

V. THE UNINTENDED CONSEQUENCES OF CLARITY IN THE COMMITMENT REGULATIONS FOR SETTLEMENT ORDERS

⁴⁹ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 5.

⁵⁰ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 3.

⁵¹ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171.

⁵² Mishra A, 'The Concerns around the New Settlement and Commitment Provisions under the Competition (Amendment) Act, 2023' <<https://cbcl.nliu.ac.in/competition-law/the-concerns-around-the-new-settlement-and-commitment-provisions-under-the-competition-amendment-act-2003/>> accessed 29 December 2023.

⁵³ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 3(2).

Any commitment order is explicitly barred from appeals under Section 53B.⁵⁴ Thus, the point highlighted above in 3.1., reiterates the no margin error along with a lack of public participation in commitment orders. However, in commitments, a bar to appeals is still ideal in line with the procedure laid down by the regulations.⁵⁵ Commitments under Section 48B do not involve an admission of guilt⁵⁶ or finding of contraventions⁵⁷ according to the draft regulations and unlike settlement orders, there is no jurisdiction of Section 53N for commitment orders.⁵⁸ The only process then ideally, is to ensure that the commitments offered by the enterprise as a mandate⁵⁹ of the application are effectively implemented, without too much dependence on frivolous litigation. However, the issue in settlement orders as seen in paragraph 3.2., with the lack of public participation in settlement orders is not seen in commitment orders, which sees public participation, at the discretion of the CCI. However, to avoid the issues in para 3.2., the appropriate case qualifier in Reg. 5(1) of the draft commitment regulations⁶⁰ should ideally be mandatory in all cases. Further, an enterprise must understand that even if the sensitive information is made public, or if the enterprise fears negative feedback after revealing the contraventions it committed, it will not face any private damage compensation proceedings under Section 53N.⁶¹ It would then, also never face an implication that a contravention has been established against it.⁶² This cost-benefit analysis compared with litigation that may reach the Supreme Court sees the benefit of a commitment application under Section 48B.⁶³ Litigation can attract heavy media attention which would attract massive public attention. Thus, the implications of negative public opinion are higher if, after a long pending litigation proceeding, the enterprise finds itself asserted as a violator of Indian law. Thus, the clarity in commitment regulations is quite commendable. However, such clarity has a largely unintended consequence. They show commitments as the only beneficial option, with settlements paling in comparison due to a chance of admission of guilt, and the clear jurisdiction of private compensation under Section 53N. This is a large issue which would decrease the use of settlements under Section 48A by enterprises.

An analogy with the EU model can be drawn here, to further understand why commitments are overwhelmingly occupying the appeal behind quick case disposal. The EU model introduces

⁵⁴ The Competition Act, 2002 (Act 12 of 2003), s. 52B.

⁵⁵ Draft Competition Commission of India (Commitment) Regulations, 2023.

⁵⁶ Draft Competition Commission of India (Commitment) Regulations, 2023, reg 6(1).

⁵⁷ *Id.*

⁵⁸ The Competition Act, 2002 (Act 12 of 2003), s. 53N.

⁵⁹ Draft Competition Commission of India (Commitment) Regulations, 2023, reg 3(1)(e).

⁶⁰ Draft Competition Commission of India (Commitment) Regulations, 2023, reg 5(1).

⁶¹ The Competition Act, 2002 (Act 12 of 2003), s. 53N.

⁶² Draft Competition Commission of India (Commitment) Regulations, 2023, reg 6(1).

⁶³ The Competition Act, 2002 (Act 12 of 2003), s. 48B.

commitments⁶⁴ for merger cases, with no admission of guilt. The offences under these provisions are different from settlement orders. Settlement orders apply to cartel cases only.⁶⁵ The CCI can follow the clear division in the EU model or procedure and ensure that the Director General's reports are framed to establish a high threshold of contraventions. However, since the new leniency regulations⁶⁶ have been released by the CCI, the importance of a settlement option has dwindled. Cartels now have the option to opt for leniency plus regulations⁶⁷, to avoid high penalties by revealing the presence of other cartels. Thus, it seems an easier option compared to the confusion seen in settlement applications. Thus, to ensure a harmonious construction for quicker disposal, the leniency plus regulations alongside commitments and settlements must have a clear division for offences. Ideally, settlement orders must dissuade the enterprise from choosing litigation, which may reach the Supreme Court, the framing of settlement provisions has yet to establish it being an ideal method, especially with the inclusion of 53N, and the ideal provisions of Commitment orders. Thus, it may seem that a viable solution would be the division of offences between Settlement and Commitment provisions, such that both remain ideal. A higher threshold with bigger fines and more private damages, can be equated to Settlement orders. Cost-benefit analysis of enterprises should be kept in mind such that the offences are grave enough for them to choose an admission of guilt and allow for private compensation proceedings under Section 53N, instead of challenging the CCI's orders (which could reach the Supreme Court and be relentlessly time-consuming). In this case, the lack of public participation may then be allowed, but with a higher threshold of checks and balances, rather than relying on an already exhausted regulator. These can include cartel cases or the abuse of dominant positions under Section 4 of the Competition Act. Section 3(4) violations may be equated to commitments, to ensure quick changes, as the offences in anti-competitive offences in production chains, impact public consumers the most. In conclusion, there must be a serious consideration of the offences equated to the provision of Settlement, in enterprise participation, and for the cause of cutting down on litigation. The simple dependence on the finality of settlement⁶⁸ and commitment⁶⁹ orders cannot be depended upon for quick case disposal.

⁶⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 171.

⁶⁵ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171.

⁶⁶ Competition Commission of India (Lesser Penalty) Regulations, 2024.

⁶⁷ *Id.*

⁶⁸ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 7(3).

⁶⁹ Draft Competition Commission of India (Commitment) Regulations, 2023, reg 6(3).

VI. CONCLUSION

The provisions of settlements and commitments are a definite push for Indian Competition Law to meet global outlooks, in efficient improvements and faster adjudication. However, as noted from the several procedural gaps, there is a major dependence on the CCI's discretion, to dilute the lack of clarity and procedural gaps. The CCI is the only regulator governing competition law in the country, and the little to no margin of error given by the provision is counterproductive. The CCI itself has pressure from staff shortages and resource woes, which makes the dependence on the discretion of the regulator very idealistic. There must be a definite balance between all stakeholders including public interest, enterprise participation, and the CCI in every supporting regulation. The various legislations and provisions unfortunately cause a tip in the balance for one stakeholder, to the disadvantage of the other stakeholder, hurting the intent behind introducing the settlement provision. Thus, if there are several procedural gaps covered by legislative endorsement, the CCI's performance will not possess pressure from a no-margin-of-error spectrum. Quicker case disposal and improvement in contraventions affecting the market would be an easier result to achieve. Resources will be ideally effectively distributed in maintaining antitrust regulations in India, with effective adjudication meeting improvements in the Indian market economy. Quick fixes in the market are ideal for consumers, who are damaged by anti-competitive practices, but cutting off public participation is not the ideal method. Accountability must be supported by stringent regulations framed⁷⁰ by the CCI.

Relying on CCI's discretion to direct commitment applicants to try for settlement may be an unideal yet immediate solution. However, this would not guarantee participation in settlement proceedings, the enterprise may simply withdraw its application which is allowed by both regulations before an order under both can be passed.⁷¹ Regulations thus need to address such gaps to avoid optimal issues that hurt legislative intent and Competition law. Thus, in the path forward with the Amendments, meeting worldwide competition standards would also meet a continuous development of solving issues of inequality in the market economy, where such provisions are key. The key to making the settlement provision at the forefront of development in competition law requires more clarity and fewer statutory gaps which bring in subjective interpretations.

⁷⁰ The Competition Act, 2002 (Act 12 of 2003), s. 64.

⁷¹ Draft Competition Commission of India (Settlement) Regulations, 2023, reg 3(4); Draft Competition Commission of India (Commitment) Regulations, 2023, reg 3(5).