13 September 2023

To,

The Hon'ble Competition Commission of India

Sub: Comments on the Draft Competition Commission of India (Commitment) Regulations, 2023 issued for public consultation

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the Draft Competition Commission of India (Commitment) Regulations, 2023 on behalf of the Antitrust Section of the International Bar Association (***IBA***).

The Co-chairs and representatives of the Antitrust Section of the IBA would be delighted to discuss the enclosed submission in more detail with the Hon'ble Competition Commission of India if that would be useful.

Yours sincerely,

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Co-Chair Antitrust Section

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Co-Chair Antitrust Section

INTERNATIONAL BAR ASSOCIATION
ANTITRUST SECTION

COMMENTS ON THE DRAFT COMPETITION COMMISSION OF INDIA (COMMITMENT) REGULATIONS

13 SEPTEMBER 2023

1. INTRODUCTION

1.1 Earlier this year, the Competition (Amendment) Act, 2023 (***Amendment Act***) introduced several changes to the Competition Act, 2002 (the amended act shall hereinafter be referred to as the ***Competition Act***). In particular, the Amendment Act introduced a mechanism for an enterprise under investigation to offer commitments to the Hon'ble Competition Commission of India (***Commission***) with respect to allegations of abuse of dominance and vertical restraints, to address the identified competition concerns. The Amendment Act clarified that the detailed procedure for offering such commitments shall be set out under regulations to be formulated by the Hon'ble Commission.

1.2 On 23 August 2023, the Hon'ble Commission released the draft Competition Commission of India (Commitment) Regulations, 2023 (***Draft Commitment Regulations***) for public consultation. At the outset, the International Bar Association (***IBA***)'s Antitrust Section (***IBA Antitrust Working Group***) would like to thank the Hon'ble Commission for the opportunity to provide comments on the Draft Commitment Regulations. Such an inclusive process will ensure that a robust, effective, and workable commitments mechanism is arrived at, benefiting all stakeholders.

1.3 The IBA Antitrust Working Group congratulates the Hon'ble Commission on the comprehensive nature of the Draft Commitment Regulations and the clarity they provide on a number of key aspects. The IBA Antitrust Working Group would like to assist the Hon'ble Commission in further bolstering the regulations, and with that objective, is providing certain suggestions set out below.

2. ABOUT THE IBA

2.1. The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "*global voice of the legal profession*", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including India, and it has considerable expertise in providing assistance to the global legal community.[1]

2.2. The IBA Antitrust Working Group includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.[2]

2.3. In the past, the IBA Antitrust Working Group has made submissions to the Hon'ble Commission and the Ministry of Corporate Affairs (***MCA***) on various different occasions.[3] The IBA Antitrust Working Group hopes that the present submissions assist the Hon'ble Commission in finalising and arriving at an effective commitments framework. The IBA Antitrust Working Group's suggestions are set out

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1 See https://www.ibanet.org/.

2 See https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.

3 The IBA Antitrust Working Group has previously made submissions to the Hon'ble Commission and the MCA on several occasions, including: (a) in February 2007, on the Competition Amendment Bill, 2006; (b) in March 2008, on the draft Competition Commission of India (Combination) Regulations; (c) in August 2013, on the Competition (Amendment) Bill, 2012; (d) in December 2014, on trigger events for merger notification in India; (e) in April 2015, on amendments to the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (***Combination Regulations***); (f) in February 2016, on the *de minimis* target exemption; (g) in September 2018, on the proposed amendments to the Combination Regulations; (h) in December 2018, on the Competition Law Review Committee suggestions; (i) in December 2019, on amendments proposed to the Combination Regulations; (j) in March 2020, on the Competition (Amendment) Bill, 2020; and (k) in March 2022, on the renewal of the "group" definition and the *de minimis* target exemption.

below.

3. THE COMMITMENTS PROCESS SHOULD BE MORE CONSULTATIVE

3.1. The Draft Commitment Regulations currently do not provide a mechanism for any discussions / deliberations between the applicant and the Hon'ble Commission. For the effective functioning of the commitment mechanism, the IBA Antitrust Working Group respectfully submits that applicants would need to engage in robust and iterative discussions with the Hon'ble Commission on various aspects, including the: (a) scope of the alleged anti-competitive conduct; (b) nature, efficacy, and extent of remedies to be offered; (c) term / duration of the commitments; and (d) modalities for implementation and monitoring the commitments. It would therefore be helpful to include an avenue for discussions / deliberations between the applicant and the Hon'ble Commission throughout the process especially, prior to the applicant submitting a commitment application and revising their initial commitment application. This would not only be consistent with international best practices but will also ensure that the applicant fully understands the theories of harm and competition concerns being considered by the Hon'ble Commission and can tailor the commitment application accordingly. It will also provide an opportunity to the Hon'ble Commission to gauge solutions which are effective, workable, and implementable. Therefore, a deliberative process will benefit both the applicant as well as the Hon'ble Commission in arriving at the right solution.

3.2. The need for a deliberative process is especially important as commitments are currently required to be submitted on the basis of a *prima facie* order only. However, the *prima facie* order only reflects a preliminary view on the matter by the Hon'ble Commission based on the limited information / evidence available before it at that stage. Further, the opposite party is not required to be afforded an opportunity of hearing at this stage. Therefore, the concerns identified in the *prima facie* stage are unlikely to have benefitted from any verification. A deliberative process will assist the Hon'ble Commission and the applicant to narrow down the issues which require commitments and make the process more effective. Given the apparent intention that there should be a single, limited opportunity for offering commitments, there is risk where a party is expected to engage on commitments only on the strength of a *prima facie* order, which may benefit from further consideration.

3.3. While the Draft Commitment Regulations provide for potential hearings, these hearings are: (a) only after the application has already been submitted; (b) at the discretion of the Hon'ble Commission; and (c) a formal process with the parties presenting and the Hon'ble Commission observing; it is not conducive to working through the concerns and evaluating possible solutions. Accordingly, incorporating an avenue for deliberations would be helpful for the process to be successful.

3.4. A deliberative process is consistent with the Hon'ble Commission's general approach. For instance, on the merger control front, the Hon'ble Commission allows detailed deliberations between parties and the case team through pre-filing consultations (***PFCs***), and the draft amendments to the combination regulations envisage codifying PFCs within the regulations itself.[4] Further, parties also routinely engage in multiple discussions with case officers at the Hon'ble Commission during the course of review of a combination, particularly where remedies are required. The PFC process is widely used by the parties and has made regulation of combinations both expedient and efficient.

3.5. A deliberative process is also consistent with the approach followed in other jurisdictions. For instance, in the European Union (***EU***), there are multiple state-of-play meetings between the Directorate General of Competition (***DG Comp***) and the commitment applicant where the DG Comp

[4] Regulation 7 of the draft Competition Commission of India (Combination) Regulations, 2023.

and the applicant engage in open and detailed discussions.[5] The DG Comp informs the applicant of the theories of harms, issues etc. to be considered and the applicant discusses possible solutions with the DG Comp. Similarly, in the United Kingdom (***UK***), there are detailed state-of-play meetings between the Competition and Markets Authority (***CMA***) and the applicant, including on the nature of allegations raised, remedies required, timelines, etc.[6] This deliberative process ensures that when the formal application is submitted, it already accounts for preliminary views from the authority, making the system more effective and workable.

3.6. Similarly, in South Africa, there are nuanced and ongoing discussions between the Competition Commission of South Africa (***CCSA***) and the potential applicants. In Brazil, as a matter of practice, there are regular informal negotiations and deliberations between the applicant and the Administrative Council for Economic Defence (***CADE***), which help both sides arrive at a faster resolution for the competition concerns that have been identified. Therefore, other BRICS jurisdictions also follow a consultative process.

3.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Commitment Regulations should provide opportunities for meetings / discussions between the commitment applicant and the Hon'ble Commission throughout the process. As has been done with the pre-filing consultation process in the draft amendments to the combination regulations, iterating this process within the regulations would enable the Hon'ble Commission and its officers to engage meaningfully towards this end.

Suggested edits:

Regulation 3(1): *A Commitment Applicant may make an application to the Commission in writing, after consultation with the Commission, accompanied by fee as provided under sub-regulation (1) of regulation 8, containing the information as specified below.*

Regulation 4(10): *The Commission shall, upon a written request by the Commitment Applicant, engage in discussions and consultations with the Commitment Applicant throughout the process at regular intervals, including before the submission of any revised Commitment Application, to determine the nature and extent of the alleged contraventions and commitments offered.*

4. ABSENCE OF COMPREHENSIVE THEORIES OF HARM TO ADDRESS IN THE COMMITMENT APPLICATION

4.1. As indicated in paragraph 3.2 above, a commitments application is currently required to be submitted on the basis of a *prima facie* order only. However, the *prima facie* order only reflects a preliminary view on the matter by the Hon'ble Commission based on the limited information / evidence available before it at that stage. Moreover, at times, the Hon'ble Commission does not arrive at any definitive view on an issue in its *prima facie* order and leaves it open for the Director General (***DG***) to examine. Further, often, the opposite party is not even heard at this stage. Therefore, the concerns identified in the *prima facie* stage may not be reflective of the concerns that may finally be identified by the Hon'ble Commission, and it may not be prudent to require applicants to offer commitments solely on the basis of concerns identified in the *prima facie* order.

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5 European Commission's (***EC***) *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* (***Best Practices***, available here), paragraph 60, 129 - 133.

6 *Guidance on the Competition and Markets Authority's investigation procedure in the* Competition *Act 1998 cases* (***CMA Guidance***, available here), paragraph 10.22.

4.2. It is therefore respectfully recommended that after robust deliberations between the Hon'ble Commission and the applicant, the Hon'ble Commission should issue a more informed and targeted statement of concerns to the applicant, setting out the exact issues that need to be addressed (and filtering out issues that do not require commitments). This will ensure that the commitments required are not excessive, are tailored to address the identified concerns and are implementable in a timely manner.

4.3. This recommendation is also in line with the observations in the Parliamentary Standing Committee on Finance Report on the Competition (Amendment) Bill, 2023 (***PSC Report***), which had suggested that the Hon'ble Commission should issue a statement of concerns so that the enterprise(s) under investigation has a clear understanding of the anti-competitive effects being considered by the Hon'ble Commission and can offer suitable remedies.[7]

4.4. This proposed construct is also consistent with other provisions in the Competition Act. For instance, in relation to combinations, after the Hon'ble Commission has issued a *prima facie* opinion under Section 29 of the Competition Act (that a proposed combination is likely to lead to an appreciable adverse effect on competition), Section 29A mandates the Hon'ble Commission to provide a statement of objections identifying its specific concerns with the proposed combination. Following the receipt of this statement of objections, parties to the combination can submit appropriate modifications. A similar standard should be followed for commitments as well.

4.5. Such a proposal is also in line with the approach followed in other jurisdictions. For instance, in the EU, if a commitment applicant intends to submit an application prior to the issuance of a Statement of Objections by the EC, the EC engages in state-of-play meetings with the applicant and issues a "*Preliminary Assessment*" that sets out its specific theories of harm which require redressal.[8] The Preliminary Assessment issued by the EC is significantly more detailed and targeted than the *prima facie* order typically issued by the Hon'ble Commission. The applicant can then offer commitments aimed at eliminating the specific anti-competitive concerns as set out in the Preliminary Assessment. Similarly, in the UK, the CMA issues a detailed statement of its competition concerns to the applicant (after engaging in state-of-play meetings with the applicant), and the commitment applicant may offer remedies based on the concerns highlighted in this statement.[9] Again, the statement of concerns is typically significantly more detailed and targeted than the Hon'ble Commission's *prima facie* order.

4.6. Similarly, in South Africa, given that commitments can be offered even after a referral for prosecution (where the key theories of harm are disclosed) or indeed during the prosecution itself (where additional evidence is led), the applicant may be provided with additional facts and information that may not be provided at the outset of an investigation.

4.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Commitment Regulations should provide for a detailed statement of theories of harm to be shared with the applicant. The IBA Antitrust Working Group is cognizant of the fact that it would be impractical to expect this for each and every case where a *prima facie* order is issued. As such, this exercise may be undertaken only for cases where a party approaches the Hon'ble Commission expressing a desire to offer commitments.

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7 PSC Report (available here), paragraph 3.48.

8 Best Practices (available here), paragraphs 121-125. The Best Practices envisage that this is a comprehensive and cogent document that contains a summary of the main facts as well as an assessment of all the competition concerns identified. Therefore, the Preliminary Assessment is significantly more detailed than the *prima facie* order of the Hon'ble Commission.

9 CMA Guidance (available here), paragraph 10.22-10.25.

Suggested edits:

Insertion of a new Regulation [3(2)]: *Following the prima facie order under sub-section (1) of Section 26 of the Act, if an Opposite Party expresses an interest in offering Commitments, the Commission shall issue a detailed statement of concerns to the Commitment Applicant after discussion with such party, identifying the specific competition concerns that need to be addressed by way of Commitments.*

5. HEARINGS SHOULD BE MANDATORY

5.1. Regulation 4(7) of the Draft Commitment Regulations provides that the Hon'ble Commission "may" grant the applicant an opportunity of being heard, before rejecting a commitment application.

5.2. The current discretion over grant of hearings could result in situations where an application is rejected without any hearing opportunity. An order rejecting an application is likely to materially impact the rights and interests of a commitment applicant. These proceedings determine parties' rights, and therefore, it is critical from a due process stand-point that a hearing opportunity is guaranteed by the regulations. Adherence to due process and preserving a fair right of defence is the cornerstone of the International Competition Network (***ICN***) Best Practices[10] which the Hon'ble Commission has consistently adopted. This is also in line with the principles of natural justice enshrined under Section 36(1) of the Competition Act. Accordingly, it is suggested that hearings should be made mandatory prior to rejection of an application.

5.3. This will be consistent with the safeguards built for similar situations under other provisions of the Competition Act. For instance, Section 26(9) of the Competition Act provides that parties are mandatorily required to be heard before issuance of an order closing the matter or finding a violation of the Competition Act. It is submitted that a similar right should be provided to a commitment applicant.

5.4. This will also be consistent with the approach in other jurisdictions. For instance, in South Africa, a commitments related agreement must be confirmed in a formal, public hearing.[11]

5.5. Given the significance of the commitments on markets, the opportunity for a hearing in addition to informal deliberations is essential to ensure the success of the commitment regime.

Suggested edits:

Regulation 4(7): *The Commission shall ~~may~~ before passing an order rejecting a Commitment Application under clause (b) and (e) of sub-regulation (5) and sub-regulation (6) above in terms of subsection (5) of section 48B of the Act grant the Commitment Applicant an opportunity of being heard.*

6. TIMELINES FOR SUBMITTING THE COMMITMENT APPLICATION

6.1. Section 48B of the Competition Act provides that enterprises under investigation may offer commitments "*at any time*" after a *prima facie* order has been issued, but before the receipt of the

[10] ICN Recommended Practices for Investigative Process (available here).
[11] Competition Act, 1998 (No. 89 of 1998) Section 49D(2). Available here.

DG's report by the enterprise and subject to further timelines prescribed under regulations.

6.2. In contrast, Regulation 3(3) of the Draft Commitment Regulations provides that a commitment application may only be submitted within 45 days from the date of issuance of a *prima facie* order. A delay of up to only 30 days may be condoned by the Hon'ble Commission for reasons recorded in writing.

6.3. At the outset, the tight timelines prescribed under the Draft Commitment Regulations are against the spirit of the Competition Act (which was to allow parties time until the issuance of the DG's Report to submit commitments) and may be seen as *ultra vires.*[12] It is also a settled rule of interpretation that where a statutory provision confers certain benefits to a party, such a provision must be interpreted widely and in favour of the party so as not to take away the benefit sought to be conferred.[13]

6.4. An unduly short duration may make the commitments framework unattractive and unfeasible for parties. A timeline of only 45 (+ potentially 30) days is likely to be insufficient for parties to: (a) assess the specific competition concerns that require redressal; (b) craft effective commitments which addresses the identified concerns, including ensuring consistency with proceedings or terms of settlement in other jurisdictions; (c) receive all necessary internal approvals within their organization (these are often large global entities with strict internal policies); and (d) prepare a robust commitment application explaining the effectiveness of the commitments. These overtly short timelines are likely to disincentivise parties from availing of the commitments route and may significantly hamper the effectiveness of this route.

6.5. Further, the intention of the Government was to allow parties time till the DG's report to submit commitments. This is evident from the PSC Report, where the MCA has noted that "*...the proposal is that before they are made aware of the contents of the* [DG] *investigation, they can opt for commitments".*[14]

6.6. Accordingly, the IBA Antitrust Working Group respectfully recommends that the limit of 45 days should be removed from the Draft Commitment Regulations, and enterprises should be permitted to submit commitment applications at any time prior to the receipt of the DG's report.

6.7. Such a proposal is in line with the practice in other jurisdictions. For example, in the UK, an applicant can offer commitments any time during the investigation, prior to the CMA's final decision.[15] Similarly, in South Africa, the commitments can be confirmed any time *"during, on or after the completion of the investigation of a complaint"*.[16] Therefore, commitments can be offered even "on the courtroom steps". In Brazil, an applicant can offer commitments any time during the investigation, either before the case is submitted to the CADE for a ruling or when the case has been submitted to the CADE, but a decision is yet to be made.[17] Similarly, the Hungarian Competition Act, 1996 (***Hungarian Competition Act***) does not set any deadline (either in days or otherwise) to offer commitments. Both in theory and in practice, it is possible to submit a commitment proposal to the

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12 It is settled law that regulations cannot go beyond the guardrails set out under its parent act. In this regard, the Hon'ble Supreme Court of India has held that "*it is well recognized principle of interpretation of a statute that conferment of rule making power by an Act does not enable the rule making authority to make rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto".* Addl. District Magistrate (Rev.) Delhi Admn. v. Siri Ram, AIR 2000 SC 2143.

13 *Har Sharan Varma v State of Uttar Pradesh,* AIR 1985 SC 378.

14 PSC Report, paragraphs 3.44-3.45.

15 CMA Guidance (available here), paragraph 10.21.

16 Competition Act, 1998 (No. 89 of 1998) Section 49D(1). Available here.

17 Guidelines: Cease and Desist Agreement for cartel cases, Administrative Council for Economic Defence, page 7. Available here.

competition authority at any time before its final decision in the case.

Suggested edit:

Regulation 3(3): *A Commitment Application shall be filed any time after the issuance of the prima facie order and before the issuance of the report of the Director General to the Commitment Applicant ~~within 45 (forty five) days from the receipt of the order passed by the Commission under sub-section (1) of section 26 of the Act. Provided that the Commission may entertain a Commitment Application after the period specified above, if the Commitment Application is received within a further period of 30 (thirty) days and the Commission is satisfied that there had been sufficient cause for not filing the same within the specified period after recording reasons for condoning such delay.~~*

7. TIMELINES FOR MODIFICATION OF THE COMMITMENT APPLICATIONS

7.1. The Draft Commitment Regulations allow the applicant to modify its commitment application, within 15 days, if the Hon'ble Commission is of the *prima facie* view that the proposed offer does not address the alleged contravention. The applicant is also allowed to modify the commitment application within 15 days of the Hon'ble Commission not being satisfied with the commitment proposal after its review of comments / objections by the DG / other parties.

7.2. A 15-day time period to modify and file a revised commitment offer may not be sufficient for an applicant to meaningfully consider the Hon'ble Commission's views and submit a revised application, especially for complex cases. In complex cases, especially for global companies, there are multiple teams (often situated in different time-zones), which are responsible for different aspects of a single product. Coordination and seeking of necessary approvals (which may be related to changes in the product) from all teams may be difficult for a company within a short time span. Given this, a 15-day deadline is unlikely to be met by the companies. Prescribing stringent timelines may be counter-productive and may impact the ability of the applicant to offer an agreeable and effective commitment proposal. Stringent timelines may also hamper the achievement of desirable administrative efficiencies from the settlement process.

Suggested edits:

Regulation 4(2): If the Commission is not prima facie satisfied with the commitments offered by the Commitment Applicant, it shall communicate to the Commitment Applicant the reasons for the same and call upon the Commitment Applicant to furnish, within 30~~15~~ (thirty~~fifteen~~) days of the receipt of the said communication, revised Commitment Application.

Provided that the Commission may allow the Commitment Applicant to file a revised Commitment Application within such other extended time, as it deems necessary.

Regulation 4(5)(c): if the Commission is not satisfied with the Commitment Application, it shall within 15 (fifteen) days after the expiry of period specified in regulation 5, communicate to the Commitment Applicant the reasons for the same and call upon the Commitment Applicant to furnish, within 30~~15~~ (thirty~~fifteen~~) days of the receipt of the said communication, revised Commitment Application.

Provided that the Commission may allow the Commitment Applicant to file such revised Commitment Application within such other extended time, as it deems necessary.

8. PROCEEDINGS SHOULD MANDATORILY BE KEPT IN ABEYANCE

8.1. Regulation 4(3) of the Draft Commitment Regulations provides that the Hon'ble Commission "may" keep the inquiry against the relevant enterprise in abeyance till its final decision on the commitment application, or till such time as may be directed by the Hon'ble Commission.

8.2. To ensure certainty and clarity in the process, it is recommended that the proceedings should mandatorily be kept in abeyance till the Hon'ble Commission's final decision on the commitment application (similar to the proposed position for settlements). Permitting the DG's investigations to continue in parallel may be a needless waste of resources and time of the Hon'ble Commission as well as the parties, which can be avoided given the possibility of the proceedings ending based on the commitments. Given the structural distinction between the Hon'ble Commission and the office of the DG, there is a risk of asymmetry of information, which can be easily averted by mandatorily placing proceedings in abeyance. In fact, if the inquiry is not kept in abeyance, the DG may continue its investigation and carry out a dawn raid at the applicant's premises. Such intrusive steps are wholly unwarranted if the applicant is, in parallel, offering commitments and the proceedings are likely to end.

Suggested edits:

Regulation 4(3): *When the Commitment Application complete in all respects is placed for consideration before the Commission under subregulation (1) above, the Commission shall ~~may~~ keep the inquiry against the Commitment Applicant in abeyance till final decision on the Commitment Application ~~or till such time, as may be directed by the Commission.~~*

9. USE OF INFORMATION FOLLOWING THE REJECTION OF AN APPLICATION

9.1. Regulation 11 of the Draft Commitment Regulations stipulates that information provided by an enterprise as part of its commitment application may be used by the Hon'ble Commission as evidence against the enterprise itself. This includes cases where the commitment application is rejected or withdrawn.

9.2. In cases where the commitment application is rejected or withdrawn, enabling the Hon'ble Commission to rely on the information collected as a part of that process risks parties incriminating themselves. Such information was provided in the specific context of the applicant potentially benefiting from the commitments process and the investigation closing. Such information may not have been shared freely in the course of a regular investigation.

9.3. Accordingly, use of this information outside the commitments process would effectively deter commitment applicants from providing full and complete disclosures before the Hon'ble Commission and may therefore seriously undermine the incentives of enterprises to opt for this process. This is especially since the discretion to reject an application lies completely with the Hon'ble Commission (that too, without a mandatory hearing requirement).

9.4. The suggestion being proposed by the IBA Antitrust Working Group is consistent with the position in other jurisdictions. For instance, in South Africa, the Tribunal has confirmed that any information submitted with the *bona fide* intention of attempting to settle a litigious matter is so called "*without prejudice*" and thus may not be disclosed, or relied upon, in adversarial proceedings by either party if settlement / commitment discussions fail. A failure to protect bona fide discussions in this way would have the perverse effect of dissuading commitments / settlement. The Tribunal has recognised

that a party may wish to explore making an admission purely for the purpose of deciding whether commitments / settlement is less costly than litigation, and should not be prejudiced as a result.[18] The relevant rules also provide that none of the members of a Tribunal panel that considered a consent order may participate in any further proceedings relating to that complaint.[19] Similarly, in Brazil, as a matter of practice, information that is furnished with the *bona fide* intent to settle a litigation is not used by the CADE in any adversarial proceedings, if the application is rejected. The information can only be used if the commitment applicant fails to adhere to their commitment obligations.

9.5. Therefore, the IBA Antitrust Working Group respectfully suggests that the Hon'ble Commission and the DG should be prohibited from relying on the information or acknowledgement provided by a commitment applicant where the application is rejected or withdrawn. Moreover, it is important that the case team engaging with parties on commitment be distinct from the case team stewarding the inquiry to ensure that the commitment proceedings do not prejudice the applicants should the commitment process be unsuccessful.

Suggested edits:

Regulation 11 (1): ~~*Notwithstanding anything contained in these regulations,*~~ *The Commission shall not use the information submitted by the Commitment Applicant against it or other parties to the inquiry who are not part of the commitment proceedings in cases where the Commitment Application has been rejected by the Commission or withdrawn by the Commitment Applicant*.

10. OPPORTUNITY TO ACCESS AND RESPOND ON THE COMMENTS RECEIVED FROM OTHER PARTIES

(i) *Preparation of the non-confidential summaries for the DG and / or other parties*

10.1. Pursuant to Regulation 5 of the Draft Commitment Regulations, the Hon'ble Commission may invite objections / suggestions on the proposed commitments from the DG as well as other parties, based on a non-confidential summary of: (a) *prima facie* opinion of the Hon'ble Commission; (b) alleged contraventions; (c) commitments offered; and (d) any other detail. However, the Draft Commitment Regulations do not clarify if the non-confidential summary would be prepared by the commitment applicant, to ensure that no confidential information of the applicant is inadvertently disclosed in the non-confidential summaries. As such, it may be prudent for the Hon'ble Commission to direct the commitment applicant to prepare the summaries to be released for the purposes of Regulation (1) or have the chance to at least vet the non-confidential summaries.

(ii) *Access to submissions and opportunity to respond*

10.2. As indicated above, the Draft Commitment Regulations provide that the Hon'ble Commission may invite comments from the DG, other parties or even the public in certain cases. However, the Draft Commitment Regulations do not provide an opportunity for a commitment applicant to access, respond, or rebut the comments received from such parties. This may result in the Hon'ble Commission relying on potentially incorrect, misleading, and motivated information, without verification or assessing any contrary (possibly exculpatory) evidence. To safeguard due process and provide the applicant a fair right of defense, it is critical that the applicant be permitted to access and submit responses to comments from other parties. Accordingly, the commitment applicant should

[18] *AGS Frasers International (Pty) Ltd v Competition Commission* (DEF098Aug15/EXC099Jul15). Available here.
[19] Rules for the Conduct of Proceedings in the Competition Tribunal 2001, Rule 25(d). Available here.

be granted access to confidential versions of the comments / objections / suggestions of the DG and other parties through the establishment of a confidentiality ring.

10.3. By enabling the applicant to access and respond to the suggestions, the Hon'ble Commission will ensure that its decision benefits from accurate and verified information without having to spend additional resources in independently verifying the accuracy of the representations received. Adherence to due process and preserving a fair right of defence is the cornerstone of the ICN Best Practices[20] meant to be adopted by the Hon'ble Commission.

10.4. The above suggestion is also consistent with the approach followed by the Hon'ble Commission itself under other provisions. For instance, in combinations, when third parties file comments, the transacting parties are permitted to access these comments and file their responses to such comments. It is suggested that a similar approach may be followed for commitments as well.

10.5. This suggestion is also consistent with the position followed in other jurisdictions. For instance, in the EU, market testing of commitments is followed by a specific state-of-play meeting where the EC informs the commitment applicant of the substance of comments received from the public. The commitment applicant may rebut or provide explanations to the EC in light of the comments received from various third parties.[21] This also reduces the burden on the EC of independently verifying the accuracy of representations received. Similarly, in the UK, the CMA holds a meeting with the commitment applicant to inform them of the responses received from other parties, and provides the applicant an opportunity to comment on such responses.[22]

10.6. Similarly, in South Africa, if third parties make representations during the hearing to confirm the commitments, the applicant is entitled to respond to such comments.[23] The Hungarian Competition Act also adopts a similar specific state-of-play meeting process where parties may be informed of any comments from third parties and may be provided an opportunity to comment on the same or modify their commitments.

(iii) *Requiring information from other parties on affidavit*

10.7. The Draft Commitment Regulations do not provide any safeguards with respect to the veracity of the comments / objections / suggestions provided by other parties. As such, it would be prudent to direct the third parties to submit their objections / suggestions / comments on an affidavit.

Suggested edits:

Regulation 5(1): While considering the commitments offered, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their comments, objections, suggestions, if any, on affidavit, within 21 (twenty one) days. For the said purpose, the Commission would share a non-confidential summary containing prima facie opinion of the Commission expressed in the order issued under sub-section (1) of section 26 of the Act along with details of the competition concerns, alleged contraventions, commitments offered by the Commitment Applicant and any other detail as deemed fit. For the removal of any doubt, it is clarified that the non-confidential summaries for the purposes of Regulation 5 shall be prepared by the Commitment Applicant, in consultation with the Commission.

[20] ICN Recommended Practices for Investigative Process (available here).
[21] Best Practices (available here), paragraphs 129-133.
[22] CMA Guidance (available here), paragraphs 10.23-10.24.
[23] Competition Act, 1998 (No. 89 of 1998) Section 52(1). Available here.

Provided that in appropriate cases, the Commission may also invite public to submit comments, objections and suggestions, if any, within 21 (twenty one) days, by publishing the abovementioned summary on its website.

Provided further that any other party that submits their comments, objections, or suggestions with respect to the Commitment Application shall accompany the same with an affidavit and backing evidence, as the case may be.

Regulation 5(3): The Commitment Applicant shall be granted access to the confidential versions of all the comments and accompanying materials received from such other parties, through the establishment of a confidentiality ring under the Competition Commission of India (General) Regulations, 2009, and be permitted to file its responses to such comments within the timeframe directed by the Commission.

11. NEED FOR A TRANSITIONAL CLAUSE *(if the suggestions on timelines proposed under point 6 above are not accepted)*

11.1. While the Competition Act enables the Hon'ble Commission to accept commitment applications in respect of pending cases on account of the outer limit for submitting commitment applications, the Draft Commitment Regulations do not address whether they would apply to cases already pending before the Hon'ble Commission / DG which have crossed the prescribed timelines, and appear to negate this ability with the 45 (+ potential 30) days' timeline to submit the commitment application. Based on publicly available data, it appears that as on 31 March 2023, there were approximately 118 pending cases before the Hon'ble Commission / DG,[24] which is not an insignificant number of cases, even if cartel cases were to be excluded.

11.2. There appears to be no reasonable basis for excluding such cases from availing of the commitments framework, especially keeping in mind the objective of the commitments mechanism (which is to facilitate speedy disposal of cases through appropriate modifications). Several pending cases may be able to benefit from faster redressal through appropriate commitments, and these cases should not be excluded simply because of the timing of the introduction of the final Commitment Regulations. Accordingly, if our suggestion set out in point 7 above (i.e., to allow commitment applications any time prior to the DG's report) are not accepted, it will be important to introduce a transitional clause for pending cases where the 45 (+ potential 30) days' timeline has already elapsed. Introducing such a transitional clause will be key for quick wins and establishing a runway for success of the new commitments regime.

11.3. Such an approach would be in line with the approach in other jurisdictions. In South Africa, the commitment provisions were applied to pending cases when the commitment mechanism was introduced.

Suggested edits (if suggested edits on point 7 are not accepted):

Regulation 15: *For cases that are pending before the Commission and where the stipulated timelines for filing a Commitment Application have already elapsed prior to these Regulations coming into effect, the parties shall be permitted to file a Commitment Application within [90] days of these Regulations coming into effect.*

[24] This is based on data available on the Hon'ble Commission's website, available here.

12. MECHANISM FOR APPLYING FOR MODIFICATION OR REVOCATION OF THE HON'BLE COMMISSION'S COMMITMENT ORDER IF CIRCUMSTANCES CHANGE

12.1. The Draft Commitment Regulations do not provide for an opportunity for an applicant to subsequently seek a modification or revocation of the remedies set out in the commitment order, in light of a change in the market circumstances, or any other legitimate reason.

12.2. The remedies offered as part of a commitment are aimed at market correction, and therefore will typically be tailored to address the alleged anti-competitive effects. However, competitive dynamics of any market change over a period of time. This is especially the case in technology-based markets, where competitive dynamics can change within a short span of time.

12.3. Therefore, an enabling provision allowing parties to approach the Hon'ble Commission to seek modifications or revocation of the commitments in the future should be incorporated, so that adherence with the commitments do not end up placing the applicant at an artificial competitive disadvantage. The Hon'ble Commission shall continue to retain complete discretion to reject (or accept) such an application.

12.4. This would be in line with the approach in other jurisdictions. In the UK, the CMA may consider it appropriate to release the commitments where: (a) it is requested to do so by the person(s) who gave the commitments. In such cases, the CMA will generally consider it appropriate to release commitments where it has reasonable grounds for believing that the competition concerns identified by it at the time, or their acceptance or variation, no longer arise; or (b) the competition concerns identified at the time of their acceptance or variation no longer arise.[25] Further, the CMA can also accept a variation of commitments or commitments in substitution for the original commitments.[26] Similarly, in South Africa, where consent orders include behavioural remedies, it is possible to apply for a variation if sufficient grounds for such variation can be demonstrated.[27]

Suggested edits:

Regulation 16: The Commitment Applicant may submit a written application to the Commission to seek a modification or revocation of the Commitment Order in the future, setting out reasons for seeking such a modification or revocation. The Commission shall grant an opportunity of a hearing to the Commitment Applicant before issuing a reasoned written order either allowing or rejecting such an application.

13. LACK OF CLARITY ON THE CONSEQUENCES OF APPEALS BY NON-SETTLING PARTIES

13.1. Regulation 6(2) of the Draft Commitment Regulations states that the commitment decision in respect of any party will not have any effect on the proceedings against other parties in the same case. However, Regulation 6(2) does not clarify the consequences of a successful appeal against the final order passed by the Hon'ble Commission under Section 27, by a party that has not availed the commitment mechanism.

25 CMA Guidance (available here), paragraph 10.29.
26 CMA Guidance (available here), paragraph 10.28.
27 Competition Act, 1998 (No. 89 of 1998) Section 66. Available here.

13.2. It is therefore unclear whether the commitment order will still be binding on commitment applicants who have offered commitments to the Hon'ble Commission, if the order under Section 27 is set aside by an appellate authority. Such ambiguity may also encourage parties to try and 'game the system' by having some parties use the commitment mechanism, while others continue to contest the case.

13.3. It may therefore be appropriate to clarify that the commitment applicant is not permitted to benefit from a successful appeal as the commitment applicant should be bound by the order sought.

Suggested edits: *Regulation 5(3): The Commitment Order shall be final and binding upon the Commitment Applicant, including in cases where other parties may prefer an appeal against the final order issued by the Commission under Section 27 or Section 26 of the Competition Act.*

14. LACK OF CLARITY ON THE APPLICATION OF SECTION 26(2A) OF THE COMPETITION ACT ON THE COMMITMENT ORDERS

14.1. Section 26(2A) of the Competition Act empowers the Hon'ble Commission to refrain from inquiring into alleged anti-competitive conduct if the same or substantially the same facts and issues have already been decided by the Commission in its previous order. However, the Draft Commitment Regulations do not clarify that the scope of Section 26(2A) of the Competition Act would extend to any order issued by the Hon'ble Commission under Section 48B(3) of the Competition Act.

14.2. While the scheme of the Competition Act envisages that commitment orders are final, binding, and non-appealable, it is imperative that multiple allegations and litigations on same / similar issues are restricted. This will be in the best interest of the parties and the Hon'ble Commission. Therefore, it may be prudent to clarify that the Hon'ble Commission has the power to refrain from inquiring into any information / complaint against the settlement applicant that is based on the same facts and issues that have already been settled under the commitment proceedings.

Suggested edits: *Regulation 6(4): The term "previous order" under Section 26(2A) of the Competition Act includes any Commitment Order passed under Section 48B(3) of the Competition Act.*

15. FEE FOR FILING A COMMITMENT APPLICATION

15.1. Regulation 8 of the Draft Commitment Regulations specifies that a commitment application shall be accompanied by the payment of a filing fee that ranges from INR 500,000 (approx. USD 6,000) to INR 5 million (approx. USD 60,000), depending on the turnover of the commitment applicant in India.

15.2. High filing fees may disincentivise parties from availing of the commitment mechanism, thereby reducing the effectiveness of the commitment mechanism. Other jurisdictions such as the EU and the UK do not levy any filing fee for commitment applications. Therefore, the IBA Antitrust Working Group respectfully suggests that the quantum of filing fee may be reduced.

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