



13 September 2023

To,

The Hon'ble Competition Commission of India

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

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the Draft Competition Commission of India (Settlement) 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 (SETTLEMENT)
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 enter into a settlement with the Hon'ble Competition Commission of India (***Commission***) with respect to allegations of abuse of dominance and vertical restraints. The Amendment Act clarified that the detailed procedure for entering into such a settlement 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 (Settlement) Regulations, 2023 (***Draft Settlement 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 Settlement Regulations. Such an inclusive process will ensure that a robust, effective, and workable settlements 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 Settlement 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 settlements framework. The IBA Antitrust Working Group's suggestions are set out

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 SETTLEMENTS PROCESS SHOULD BE MORE CONSULTATIVE

- 3.1. The Draft Settlement 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 settlement 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) extent of settlement amount feasible in the facts of the case; (d) term / duration of the settlements; and (e) modalities for implementation and monitoring the settlements. 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 settlement application and revising their initial settlement 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 settlement 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 settlements are currently required to be submitted on the basis of the Director General's (*DG*) report only. However, the DG's report is not binding on the Hon'ble Commission.⁴ The Hon'ble Commission may (and often does) disagree with the findings of the DG. A deliberative process with the Hon'ble Commission will assist in identifying the key concerns in respect of which the Hon'ble Commission expects settlements to be offered, to make the process more effective. Given the apparent intention that there should be a single, limited opportunity for entering into a settlement, there is risk where a party is expected to engage on settlement only on the strength of the DG report, which may benefit from further consideration.
- 3.3. While the Draft Settlement Regulations provide for potential hearings, these hearings are: (a) only after the settlement 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.⁵ 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 meetings between the European

⁴ Section 26 of the Competition Act. Also see *Shri Saurabh Tripathy v. Competition Commission of India*, 2019 SCCOnLine Del 10498.

⁵ Regulation 7 of the draft Competition Commission of India (Combination) Regulations, 2023.

Commission (*EC*) and the settlement applicant where the EC and the applicant engage in open and detailed discussions.⁶ The EC informs the applicant of the theories of harms, issues, etc. to be considered and the applicant discusses possible solutions with the EC. Similarly, in the United Kingdom (*UK*), there are detailed discussions between the case team and the applicant, including on the nature of allegations raised, remedies required, timelines, etc.⁷ 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. 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. Similarly, the Hungarian Competition Authority (*GVH*) also follows a consultative process, with the aim of protecting the applicant's rights and assessing whether a common position can be reached. The GVH may even set out the criteria and potential fine levels it is considering and the extent of reduction in fines it may consider, based on the facts and information available to it.
- 3.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Settlement Regulations should provide opportunities for meetings / discussions between the settlement 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 Settlement 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 9, containing the information as specified below.

Regulation 4(11): The Commission and the Settlement Applicant shall, upon a written request by the Settlement Applicant, engage in discussions and consultations throughout the process at regular intervals, including before the submission of any revised Settlement Application, to determine the nature and extent of the alleged contraventions and terms of the settlement offered.

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

- 4.1. As indicated in paragraph 3.2 above, a settlement application is currently required to be submitted on the basis of the DG's report only. However, the DG's report is not binding on the Hon'ble Commission.⁸ The Hon'ble Commission may (and often does) disagree with findings of the DG. Therefore, the concerns identified in the DG's report may not be consistent with the concerns that

⁶ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (available [here](#)), paragraphs 14 - 19.

⁷ *Guidance on the Competition and Markets Authority's (CMA) investigation procedure in the Competition Act 1998 cases (CMA Guidance*, available [here](#)), paragraphs 14.10-14.12.

may finally be identified by the Hon'ble Commission. Accordingly, it may not be prudent to require applicants to offer settlements solely on the basis of concerns identified in the DG's report.

- 4.2. It is therefore respectfully recommended that post issuance of the DG's report and 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 settlements). This will ensure that the settlements 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.⁹
- 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 settlements as well.
- 4.5. Such a proposal is also in line with the approach followed in other jurisdictions. For instance, in the EU, post discussions with the applicant, the EC typically issues a statement of objections to the applicant setting out its specific theories of harm which require redressal.¹⁰ The applicant can then offer settlements aimed at eliminating the specific anti-competitive concerns as set out in the statement of objections. Similarly, in the UK, the CMA issues a detailed statement of facts that sets out the alleged anti-competitive concerns being considered by the CMA, and the settlement applicant may offer remedies based on the anti-competitive effects as outlined in the statement of facts.¹¹
- 4.6. Similarly, in South Africa, given that settlement is possible 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 available at the outset of an investigation.
- 4.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Settlement 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 the DG's report is issued. As such, this exercise may be undertaken only for cases where a party approaches the Hon'ble Commission expressing a desire to enter into a settlement.

⁹ PSC Report (available [here](#)), paragraph 3.48.

¹⁰ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (available [here](#)), paragraph 23.

¹¹ CMA Guidance (available [here](#)), paragraph 14.14.

Suggested edits:

Insertion of a new Regulation [3(2)]: Following the report of the Director General, if an Opposite Party expresses an interest in entering into a Settlement, the Commission shall issue a detailed statement of concerns to the Settlement Applicant after discussion with such party, identifying the specific competition concerns that need to be addressed by way of Settlements.

5. HEARINGS SHOULD BE MANDATORY

- 5.1. Regulation 4(7) of the Draft Settlement Regulations provides that the Hon'ble Commission "may" grant the settlement applicant an opportunity of being heard, before rejecting a settlement application.
- 5.2. The current discretion over grant of a hearing 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 settlement applicant. These proceedings are the final determination of the 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 Practices¹² meant to be adopted by the Hon'ble Commission. 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 a settlement 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 settlement applicant.
- 5.4. This will also be consistent with the approach in other jurisdictions. For instance, in South Africa, a settlement agreement must be confirmed in a formal, public hearing..¹³
- 5.5. Given the significance of settlements on markets, the opportunity for a hearing in addition to informal deliberations is essential to ensure the success of the settlement regime.

Suggested edits:

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

¹² ICN Recommended Practices for Investigative Process (available [here](#)).

¹³ Competition Act, 1998 (No. 89 of 1998) Section 49D(2). Available [here](#).

6. CONCERNS WITH THE PROVISIONS ON THE SETTLEMENT AMOUNT

(i) Methodology for computation

- 6.1. Regulation 6(3) of the Draft Settlement Regulations provides that the Hon'ble Commission may reduce the amount payable by a settlement applicant (which may extend up to the maximum penalty under Section 27(b) of the Competition Act) by 15%.
- 6.2. The Draft Settlement Regulations, however, do not specify the exact parameters based on which the settlement discount shall be computed. It only refers to some generic factors such as "*the level of cooperation extended*", "*the nature of disclosure made*" and "*the settlement proposal*", which are fairly open-ended. The absence of clear and consistent criteria may make it difficult for settlement applicants to accurately gauge the reduction in penalty they can expect, which may reduce the attractiveness of the settlement mechanism.
- 6.3. There is also no obligation on the Hon'ble Commission to record reasons justifying the quantum of the settlement discount arrived at by the Hon'ble Commission. Since in settlement cases, a settlement amount replaces a penalty amount which is ordinarily levied by the Hon'ble Commission in all cases of a violation, not providing reasons to levy a settlement discount on an applicant may run contrary to the principles of natural justice. The Hon'ble Supreme Court of India has held that the Commission must record its reasons while arriving at a penalty.¹⁴ Similarly, there should be an obligation on the Hon'ble Commission to record reasons, in writing, while determining the settlement discount.

(ii) No engagement on the settlement amount

- 6.4. Regulation 4(8) of the Draft Settlement Regulations states that: "*the settlement amount computed and communicated to the Settlement Applicant shall be final and any application seeking revision of the same shall not be entertained by the Commission.*" Therefore, settlement applicants are not granted any opportunity to engage with the Hon'ble Commission on the settlement amount. There is also no opportunity to raise any objections or address possible errors in computation of the settlement amount (for instance, if incorrect turnover numbers are considered). This could result in incorrect settlement amounts, jeopardizing the overall effectiveness of the framework.
- 6.5. This approach is also inconsistent with other provisions under the Competition Act. For instance, under the proviso to Section 26 of the Competition Act, prior to the imposition of a penalty on an enterprise, the enterprise is provided with a hearing opportunity. During such hearings, the enterprise can raise arguments in relation to the quantum of penalty. Therefore, there is some amount of deliberation on the penalty quantum. A similar engagement on the settlement amount should be permitted here as well.
- 6.6. This suggestion is also consistent with the position adopted in other jurisdictions. For instance, in the UK, the CMA allows settlement applicants to make representations on the calculation of the settlement amount. The relevant CMA guidance states: "*where settlement is being considered prior to the issue of a Statement of Objections, each business considering settlement will be presented with a draft penalty calculation which is likely to contain some aspects which will be the same for each business considering settlement, and some which will vary to reflect the relevant business' particular circumstances. The CMA will also give each business the opportunity to make limited representations on the draft penalty calculation within a specified time frame as part of settlement discussions.*"¹⁵

¹⁴ *Excel Crop Care Limited. v. Competition Commission of India and Another* (2017) 8 SCC 47.

¹⁵ CMA Guidance (available [here](#)), paragraph 14.15.

Therefore, the IBA Antitrust Working Group respectfully submits that some amount of engagement on the settlement amount is important for transparency and effectiveness of the system.

- (iii) The penalty guidelines should be released prior to or simultaneously with the final Settlement Regulations

- 6.7. Regulation 6(2) of the Draft Settlement Regulations stipulates that the determination of the Settlement Amount is to be guided by the penalty guidelines. However, the draft penalty guidelines have not yet been issued for public consultation. It is recommended that the penalty guidelines should be implemented (following public consultation) either prior to or simultaneously with the final Settlement Regulations given they will be relied upon for implementation of the final Settlement Regulations.

Suggested edits:

Regulation 6(8): ~~...The settlement amount computed and communicated to the Settlement Applicant shall be final and any application seeking revision of the same shall not be entertained by the Commission.~~

Prior to deciding upon the final Settlement Amount, the Commission shall discuss, in good faith, the mutually agreeable Settlement Amount with the Settlement Applicant and offer an opportunity to the Settlement Applicant to address the Commission on the Settlement Amount.

Regulation 6(3): Further, the Commission shall consider the level of cooperation extended, nature of disclosure made by the Settlement Applicant, ~~and~~ the settlement proposal, ~~and other factors set out under the Penalty Guidelines~~, and may apply a settlement discount and reduce the amount determined under sub-regulation (1) and (2) by up to 15% (fifteen per cent). ~~The Commission shall set out in writing, the reason for arriving at the specific settlement discount in each case, as a part of its Settlement Order.~~

7. TIMELINES FOR SUBMITTING THE SETTLEMENT APPLICATION

- 7.1. Section 48A of the Competition Act provides that enterprises under investigation may offer settlements “at any time” after receipt of the DG’s report, but before the passing of an order by the Hon’ble Commission under Section 27 or Section 28, and subject to further timelines prescribed under regulations.
- 7.2. In contrast, Regulation 3(2) of the Draft Settlement Regulations provides that a settlement application may only be submitted within 45 days from the date of receipt of the DG Report. A delay of up to only 30 days may be condoned by the Hon’ble Commission for reasons recorded in writing.
- 7.3. At the outset, the tight timelines prescribed under the Draft Settlement Regulations are against the spirit of the Competition Act (which was to allow parties time until the issuance of the Hon’ble Commission’s final order, to enter into a settlement) and may be seen as *ultra vires*.¹⁶ 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

¹⁶ 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.

sought to be conferred.¹⁷

- 7.4. An unduly short duration may make the settlements framework unattractive and unfeasible for parties.
- 7.5. 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 an effective settlement proposal 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 settlement application explaining the effectiveness of the proposal. These overtly short timelines are likely to disincentivise parties from availing of the settlements route and may significantly hamper the effectiveness of this route. From publicly available data, it appears that from the time the DG report is received by parties until the time the matter is finally settled by the Supreme Court, an antitrust issue or concern could take upwards of 5-10 years. Settlement proceedings save the Commission significant time and resources in first determining a final decision and then defending this decision in appellate proceedings. Against this factual background, there is a significant advantage, including to the Hon'ble Commission, in granting sufficient time to enterprises to ensure an effective settlement mechanism.
- 7.6. Accordingly, the IBA Antitrust Working Group respectfully recommends that the limit of 45 days should be removed from the Draft Settlement Regulations, and enterprises should be permitted to submit settlement applications at any time prior to the receipt of the Hon'ble Commission's final order. Such a proposal is in line with the practice in other jurisdictions. For instance, in South Africa, the commitments can be confirmed any time *"during, on or after the completion of the investigation of a complaint"*.¹⁸ Therefore, commitments can be offered even "on the courtroom steps". In Brazil, an applicant can enter into a settlement at 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.¹⁹ Similarly, the Hungarian Competition Act, 1996 does not set a time limit for an undertaking to submit a settlement application, and parties can indicate their openness to enter into a settlement at any point.

Suggested edit:

*Regulation 3(2): The Settlement Application under sub-regulation (1) may be submitted **any time** after the receipt of the report of the Director General by the Settlement Applicant under sub-section (4) of section 26 of the Act **and before the issuance of the Commission's final order under Section 27, Section 26(6) or 26(9) of the Act.***

~~*Provided that a Settlement Application shall not be entertained by the Commission if it is made after expiry of 45 (forty five) days from the receipt of report of the Director General by the Settlement Applicant.*~~

~~*Provided further that the Commission may entertain a Settlement Application after the period specified above, if the Settlement Application is received within a further period of 30 (thirty) days and the Commission is satisfied that there has been sufficient cause for not filing the same within*~~

¹⁷ *Har Sharan Varma v State of Uttar Pradesh*, AIR 1985 SC 378.

¹⁸ Competition Act, 1998 (No. 89 of 1998) Section 49D(1). Available [here](#).

¹⁹ Guidelines: Cease and Desist Agreement for cartel cases, Administrative Council for Economic Defence, page page 7. Available [here](#).

~~the specified period after recording reasons for condoning such delay.~~

8. TIMELINES FOR MODIFICATION OF THE SETTLEMENT APPLICATIONS

- 8.1. The Draft Settlement Regulations allow the applicant to modify its settlement 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 settlement application within 15 days of the Hon'ble Commission not being satisfied with the settlement proposal after its review of comments / objections by the DG / other parties.
- 8.2. A 15-day time period to modify and file a revised settlement 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 settlement proposal. Stringent timelines may also hamper the achievement of desirable administrative efficiencies from the settlement process.
- 8.3. Even in jurisdictions like the EU, US and South Africa, there are no stringent timelines prescribed for the parties and settlement processes remain largely flexible, depending upon the circumstances / complexity in each specific case / parties.

Suggested edits:

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

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

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

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

9. USE OF INFORMATION FOLLOWING THE REJECTION OF AN APPLICATION

- 9.1. Regulation 12 of the Draft Settlement Regulations stipulates that information provided by an enterprise as part of its settlement application may be used by the Hon'ble Commission as evidence against the enterprise itself. This includes cases where the settlement application is rejected or withdrawn.
- 9.2. In cases where the settlement 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 settlements 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 settlements process would effectively deter settlement 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. This suggestion is also inconsistent with the position in other jurisdictions. For instance, in the EU, once an application is rejected, the EC can no longer rely on the information provided or the acknowledgements made by the applicant.²⁰ Similarly, in the UK, the CMA cannot rely on the admissions or acknowledgements made by an applicant once the application is withdrawn or rejected.²¹
- 9.5. Similarly, 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 fails. A failure to protect *bona fide* discussions in this way would have the perverse effect of dissuading settlement. The Tribunal has recognised that a party may wish to explore making an admission purely for the purpose of deciding whether settlement is less costly than litigation, and should not be prejudiced as a result.²² 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.²³ 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 settlement applicant fails to adhere to their settlement obligations.
- 9.6. 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 settlement applicant where the application is rejected or withdrawn. Moreover, it is important that the case team engaging with parties on settlements be distinct from the case team stewarding the inquiry to ensure that the settlement proceedings do not prejudice the applicants should the settlement process be unsuccessful.

²⁰ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (available [here](#)), paragraphs 27 and 29. This states that "*the acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.*"

²¹ CMA Guidance (available [here](#)), paragraphs 14.31-32.

²² *AGS Frasers International (Pty) Ltd v Competition Commission* (DEF098Aug15/EXC099Jul15). Available [here](#).

²³ Rules for the Conduct of Proceedings in the Competition Tribunal 2001, Rule 25(d). Available [here](#).

Suggested edits:

Regulation 12: ~~Notwithstanding anything contained in these regulations,~~ The Commission shall ~~not~~ use the information submitted by the Settlement Applicant against it or such other parties to the inquiry who are not part of the settlement proceedings ~~in cases where the Settlement Application has been rejected by the Commission or withdrawn by the Settlement Applicant.~~

10. OPPORTUNITY TO ACCESS AND RESPOND TO 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 Settlement Regulations, the Hon'ble Commission may invite objections / suggestions on the proposed settlement terms from the DG as well as other parties, based on a non-confidential summary of the: (a) *prima facie* opinion of the Hon'ble Commission; (b) findings of the DG report; (c) alleged contraventions; (d) settlement proposal; and (e) any other detail. However, the Draft Settlement Regulations do not clarify if the non-confidential summary would be prepared by the settlement 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 settlement 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 Settlement Regulations provide that the Hon'ble Commission may invite comments from the DG or any other party. However, the Draft Settlement Regulations do not provide an opportunity for a settlement applicant to access, respond, or rebut the comments received from such parties. This may result in the Hon'ble Commission relying on potentially incorrect, motivated, and misleading information, without verification or assessing any contrary (possibly exculpatory) evidence. To safeguard the 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 settlement applicant should 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 representations received. Adherence to due process and preserving a fair right of defence is the cornerstone of the ICN Best Practices²⁴ 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 settlements as well.

10.5. This suggestion is also consistent with the position followed in other jurisdictions. In South Africa,

²⁴ ICN Recommended Practices for Investigative Process (available [here](#)).

if third parties make representations during the hearing to confirm the settlement, the applicant is entitled to respond to such comments.²⁵

(iii) Requiring information from other parties on affidavit

- 10.6. The Draft Settlement Regulations do not provide any safeguards with respect to the veracity of and qualification of the comments / objections / suggestions provided by other parties and / or the DG, as the case may be. Therefore, it would be prudent to direct the third parties to submit their objections / suggestions / comments on an affidavit to verify the veracity of their statements.

Suggested edits:

*Regulation 5(1): While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their comments, objections, or 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, findings of the Director General in the investigation report received under sub-section (4) of section 26 of the Act along with details of the competition concerns, alleged contraventions, settlement proposal offered by the Settlement 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 Settlement Applicant.***

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

Regulation 5(3): The Settlement 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 7 above are not accepted)

- 11.1. While the Competition Act enables the Hon'ble Commission to accept settlement applications in respect of pending cases on account of the outer limit for submitting settlement applications, the Draft Settlement 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 settlement 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,²⁶ 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 settlements framework, especially keeping in mind the objective of the settlements mechanism (which is to

²⁵ Competition Act, 1998 (No. 89 of 1998) Section 52(1). Available [here](#).

²⁶ This is based on data available on the Hon'ble Commission's website, available [here](#).

facilitate speedy disposal of cases through appropriate modifications). Several pending cases may be able to benefit from faster redressal through appropriate terms of settlement, and these cases should not be excluded simply because of the timing of the introduction of the final Settlement Regulations. Accordingly, if our suggestion set out in point 7 above (i.e., to allow settlement applications any time prior to the final order) 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 settlements regime.

- 11.3. Similar grandfathering clauses have also been included in other jurisdictions. For instance, in EU, the relevant regulations contain a grandfathering clause which extended the settlements framework to all cases which were pending before EC at the time of publication of the regulations.²⁷
- 11.4. Similarly, in South Africa, the settlement provisions were applied to pending cases when the settlement mechanism was introduced.

Suggested edits:

Regulation 16: For cases that are pending before the Commission and where the stipulated timelines for filing a Settlement Application have already elapsed prior to these Regulations coming into effect, the parties shall be permitted to file a Settlement Application within [90] days of these Regulations coming into effect.

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

- 12.1. The Draft Settlement Regulations do not provide for an opportunity for an applicant to subsequently seek a modification or revocation of the remedies set out in the settlement order, in light of a change in the market circumstances, or any other legitimate reason.
- 12.2. The remedies offered as part of a settlement 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, it may be prudent to incorporate an enabling mechanism permitting parties to approach the Hon'ble Commission to seek modifications or revocation of the terms of the settlement in the future, so that adherence with the terms of the settlement 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 (when remedies form a part of the terms of the settlement entered into), the CMA may consider it appropriate to release the remedies 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 the remedies 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

²⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (available [here](#)), paragraph 34.

or variation no longer arise.²⁸ Further, the CMA can also accept a variation of remedies or remedies in substitution for the original remedies.²⁹ Similarly, in South Africa, where consent orders include behavioural remedies, it is possible to apply for variations if sufficient grounds for such variation can be demonstrated.³⁰

Suggested edits:

Regulation 17: The Settlement Applicant may submit a written application to the Commission to seek a modification or revocation of the Settlement 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 Settlement 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 7(2) of the Draft Settlement Regulations states that the settlement decision in respect of any party will not have any effect on the proceedings against other parties in the same case. However, Regulation 7(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 settlement mechanism.
- 13.2. It is therefore unclear whether the settlement order will still be binding on settlement applicants who have offered settlements 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 settlement mechanism, while others continue to contest the case.
- 13.3. It may therefore be appropriate to clarify that the settlement applicant is not permitted to benefit from a successful appeal as the settlement applicant should be bound by the order sought.

Suggested edits:

Regulation 7(3): The Settlement Order shall be final and binding upon the Settlement 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 SETTLEMENT 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 Settlement 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 48A(3) of the Competition Act.

²⁸ CMA Guidance (available [here](#)), paragraph 10.29.

²⁹ CMA Guidance (available [here](#)), paragraph 10.28.

³⁰ Competition Act, 1998 (No. 89 of 1998) Section 66. Available [here](#).

- 14.2. While the scheme of the Competition Act envisages that settlement 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 settlement proceedings.

Suggested **edits**:

Regulation 7(4): The term “previous order” under Section 26(2A) of the Competition Act includes any Settlement Order passed under Section 48A(3) of the Competition Act.

15. FEE FOR FILING A SETTLEMENT APPLICATION

- 15.1. Regulation 9 of the Draft Settlement Regulations specifies that a settlement 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 settlement applicant in India.
- 15.2. High filing fees may disincentivise parties from availing of the settlement framework. Other jurisdictions such as the EU and the UK do not levy any filing fee for settlement applications. Therefore, the IBA Antitrust Working Group respectfully suggests that the quantum of filing fee may be reduced.
