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Regulations for Commitments, Settlements and Determination of Turnover, along with Guidelines for Penalty Computation come into force

On 6 March 2024, the Competition Commission of India (**CCI**) issued regulations for commitments, settlements, and determination of turnover, as well as guidelines on determining penalties. This marks a significant step in enforcing the amendments introduced by the Competition (Amendment) Act, 2023 (**Amendment Act**), which received presidential assent on 11 April 2023.¹

The Competition Commission of India (Commitment) Regulations, 2024 (**Commitment Regulations**) provide the mechanism through which an entity, against whom an investigation for anti-competitive vertical agreements and abuse of dominance has been initiated, can apply to the CCI and offer commitments to address the competition concerns identified in the CCI's *prima facie* order.

Similarly, the Competition Commission of India (Settlement) Regulations, 2024 (**Settlement Regulations**) provide the mechanism through which an entity, against whom an investigation for anti-competitive vertical agreements and abuse of dominance has been concluded, can offer settlements to address the competition concerns identified by the Director General (**DG**) in its investigation report (**DG Report**).

Notably, neither of these processes are available in the case of cartels.

The Competition Commission of India (Determination of Turnover or Income) Regulations, 2024 (**Turnover and Income Regulations**) provide the parameters for calculation of turnover or income for enterprises for the purposes of Section 27 of the Competition Act, 2002 (**Act**), and income for individuals for the purposes of Sections 27 and 48 of the Act.

The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 (**Penalty Guidelines**) provide clarity on the methodology, factors and quantum of penalty to be levied for contravention of various provisions of the Act.

The enforcement of these regulations and guidelines is a positive development, granting the CCI a new set of powers to intervene in a timely manner to facilitate market corrections more effectively and expeditiously. Enterprises being investigated can avoid lengthy and costly litigation by offering commitments and settlements. Also, the much needed guidance on calculation of penalties will help assess potential fines, making the penalty regime more certain and transparent.

Even though the industry strongly requested transitional provisions for ongoing inquiries, these are conspicuous by their absence. As a result, unfortunately parties to several ongoing cases will be “*timed out*” from offering commitments or settlements. Further, since other industry concerns shared during the public consultation of the draft regulations have not been fully addressed in the final iterations, many aspects of the enforcement of the new regime are now expected to be ironed out through actual implementation.

We set out below the key features proposed in each of these regulations and guidelines.

¹ A detailed briefing on the key changes made in the Amendment Act is available at <https://www.amsshardul.com/insight/indian-competition-amendment-bill-new-challenges-and-opportunities/>.



Commitment Regulations

Timing

1. An application for commitments under the Commitment Regulations (**Commitment Application**) must be filed within 45 calendar days from the receipt of the *prima facie* order passed by the CCI. This timeframe is much shorter than permitted under the Amendment Act, which allows an application to be filed anytime before the DG Report is issued.
2. The Commitment Regulations also state that the commitment proceedings shall be completed within 130 working days from the receipt of the Commitment Application by the CCI, up from the 90 calendar day period suggested in the draft regulations. Further, several timelines for steps in the overall process have also been clarified as being based on working days (and not calendar days).

Form and Contents of the Commitment Application

3. Apart from basic corporate information and details of previous contraventions or ongoing proceedings, if any, the Commitment Regulations require that a Commitment Application must contain: (i) details of the CCI's *prima facie* opinion; (ii) full and true disclosure of facts in respect of the alleged contraventions; (iii) details of the nature, duration, gravity and impact of the alleged contraventions and duration of the entity's involvement in the alleged contraventions; (iv) details of how the commitments offered address the alleged contraventions and competition concerns; and (v) the manner of implementation and monitoring of the commitments offered.
4. In addition, the Commitment Application must also be summarised in a form that does not contain confidential information, as the Commitment Regulations envisage providing the summary to the DG and parties to the matter, for an opportunity for comments, objections and suggestions on the commitment proposal. In appropriate cases, the CCI can also invite public comments.
5. The Commitment Regulations also require a specific undertaking to accompany the Commitment Application, which requires that the applicant (**Commitment Applicant**): (i) agrees to submit to the jurisdiction of the CCI; and (ii) waives its right to: (a) initiate legal proceedings against the CCI in relation to orders of the CCI accepting offered commitments (**Commitment Order**); (b) challenge the CCI's findings of fact and conclusions of law; (c) an appeal or review before the National Company Law Appellate Tribunal or other courts; and (d) raise any pleas of limitation or laches against the initiation or restoration of proceedings by the CCI if it finds that the Commitment Applicant violates the Commitment Order. Pertinently, the language of the Commitment Regulations also seems to suggest that these waivers shall remain in force even if the Commitment Application is rejected.

Consideration of a Commitment Application

6. While assessing the effectiveness of the commitments offered, the CCI shall consider: (i) the nature and type of conduct; (ii) the duration and extent of the alleged contraventions; (iii) whether the commitments adequately address the identified competition concerns; (iv) whether they can be implemented effectively and expeditiously and are easy to monitor; (v) whether they make the markets more contestable, exhibit procedural efficiencies, self executing terms and early correction of market distortions; (vi) whether the Commitment Applicant has previously contravened the Act, or there are pending investigations against the Commitment Applicant; and (vii) whether the Commitment Applicant has modified the conduct which was *prima facie* found to be in violation of the Act, or any other factor deemed appropriate by the CCI.
7. The CCI is required to provide the Commitment Applicant an opportunity to be heard before rejecting a Commitment Application.

Nature and Effect of a Commitment Order

8. Helpfully, Commitment Orders shall not be construed as a finding of contravention against the Commitment Applicant and such Commitment Orders shall have no bearing on the CCI's inquiry into other parties who may not be a part of the commitment proceedings.



9. However, facts established against the Commitment Applicant or admitted in any ongoing or concluded proceedings in or outside India, in relation to the same cause of action, shall be deemed to be admitted by the Commitment Applicant in relation to the commitment proceedings in India.
10. Pertinently, where the Commitment Application only relates to some of the alleged contraventions, the CCI's inquiry on the remaining contraventions will continue.
11. The Commitment Regulations also clarify that a Commitment Order is binding on the Commitment Applicant and is non-appealable. This is in line with the provisions of the Amendment Act and the undertaking that is required to be provided under the Commitment Regulations.

Power to Use Information

12. If the CCI revokes and withdraws a Commitment Order, both the CCI and the DG may use the information and documents provided by the Commitment Applicant in the proceedings under the Act.

Implementation and Monitoring

13. The CCI can appoint agencies to oversee the implementation of the commitments offered. The CCI has removed some of the prescriptive regulations in the final regulations regarding the appointment of a monitoring agency, allowing them more flexibility in such appointments.

Revocation

14. If a Commitment Applicant fails to comply with the Commitment Order, or it comes to the CCI's notice that the Commitment Applicant has not made a full and true disclosure during the commitment proceedings or there has been a material change in the facts, the Commitment Order shall stand revoked after giving an opportunity to the Commitment Applicant to show-cause, within a period of 15 working days from the date of receipt of the show-cause notice. If the Commitment Order is revoked, the CCI can impose legal costs of up to INR 10 million (approximately USD 121,000) and may also restore the inquiry.

Fees

15. Filing fees have been reduced for smaller enterprises, and now range from INR 0.25 million (approximately USD 3,000) to INR 5 million (approximately USD 60,000) (depending on the Commitment Applicant's turnover).

New Procedural Provisions

16. The Commitment Applicant may file for confidentiality of information / documents during the commitment proceedings under the procedure set out in the Competition Commission of India (General) Regulations, 2009 (as amended) (**General Regulations**). Further, inspection and access to certified copies of documents will be restricted to the informant and the Commitment Applicant.²

Settlement Regulations

Timing

17. An application for settlements under the Settlement Regulations (**Settlement Application**) is required to be filed within 45 calendar days from the receipt of the DG Report or the confidential version of the DG Report (as applicable). This timeframe is much shorter than permitted under the Amendment Act, which allows a Settlement Application to be made until the final order is issued.
18. The Settlement Regulations also state that the entire settlement proceedings shall be completed within 180 working days from the receipt of the Settlement Application by the CCI, up from the 120 calendar day period suggested in the draft regulations. Further, several timelines for steps in the overall process have also been clarified as being based on working days (and not calendar days).

² A detailed briefing on the key amendments made to the confidentiality regime is available here: <https://www.amsshardul.com/insight/cci-amends-confidentiality-regime/>



Form and Contents of the Settlement Application

19. Apart from basic corporate information and details of previous contraventions or ongoing proceedings if any, the Settlement Application should include: (i) details of the findings of the DG Report; (ii) full and true disclosure of facts in respect of the alleged contraventions and findings of the DG; (iii) details of the nature, duration, gravity and impact of the alleged contraventions; (iv) details of how the proposal for settlement offered addresses all the alleged contraventions and competition concerns; (v) the manner of implementation and monitoring of the settlement offered; and (vi) details of other competition authorities, fora or courts, if any, which have examined or are currently examining the alleged contraventions including those where the settlement applicant (**Settlement Applicant**) has filed Commitment Applications and / or Settlement Applications.
20. In addition, the Settlement Application must also be summarized in a form that does not contain confidential information, as the Settlement Regulations envisage providing the summary to the DG and parties to the matter for an opportunity for comments, objections and suggestions on the settlement proposal. Notably, there is no provision for public comments in Settlement Applications, unlike the Commitment Regulations (*see paragraph 4 above*). Similar to the Commitment Regulations, Schedule I of the Settlement Regulations also requires the Settlement Applicant to submit an undertaking with the same waivers that have been discussed above for commitments. Pertinently, the language of the Settlement Regulations also seems to suggest that these waivers would remain in force even if the Settlement Application is rejected.

Consideration of a Settlement Application

21. The CCI will consider a Settlement Application on similar criteria and basis as it considers a Commitment Application (*see paragraphs 6 and 7 above*).

Nature and Effect of a Settlement Order

22. Importantly, the CCI's order accepting the Settlement Application (**Settlement Order**) is not to be construed as a finding of contravention by the Settlement Applicant. However, given that the Amendment Act specifically allows for follow-on actions for damages based on Settlement Orders, it remains to be seen how this dichotomy will be resolved.
23. It is important to note the orders passed by the CCI accepting or rejecting a Settlement Application are not appealable.
24. Separately, even if a party's Settlement Application is accepted by the CCI, the CCI can continue its inquiry into other parties who are not a part of the settlement proceedings and can use the information in the Settlement Application against such other parties. Further, if the Settlement Application only relates to some of the alleged contraventions as noted in the DG Report, the CCI's inquiry into the remaining contraventions will continue.

Power to Use Information

25. Like in case of commitments, the CCI has the power to use information submitted by the Settlement Applicant even in cases where the Settlement Application has been revoked or withdrawn during the proceedings under the Act (*see paragraph 12 above*).

Interim Order / Relief

26. A new provision allows the CCI to issue interim and / or other directions to protect the interest of consumers and / or to maintain / protect competition in the market during the pendency of the Settlement Application and require the Settlement Applicant to comply with the same. No standard is prescribed for such interim orders, so the CCI is likely to follow the same standards it follows in passing interim orders under the Act.

Settlement Amount

27. The CCI will compute the base settlement amount (the settlement amount can extend up to the maximum amount of penalty leviable under Section 27(b) of the Act), and shall be guided by the Penalty Guidelines (*see paragraphs 36 to 45 below*). The final settlement amount will be decided after applying a settlement discount of 15% to the base amount.



The Settlement Application will be rejected by the CCI if the payment of the settlement amount is not made within 30 calendar days of the Settlement Applicant accepting the CCI's communication on the settlement amount.

Implementation and Monitoring

28. Similar to the Commitments Regulations, the CCI can appoint agencies to oversee the implementation of the settlement offered, in terms of the General Regulations. The CCI has removed some of the prescriptive regulations regarding appointment of a monitoring agency, allowing them more flexibility in such appointments.

Revocation

29. The criteria and process for revocation under the Settlement Regulations are along the same lines as in the Commitment Regulations discussed above (*see paragraph 14 above*).

Fees

30. Filing fees now range from INR 0.25 million (approximately USD 3,000) to INR 5 million (approximately USD 60,000), depending on the Settlement Applicant's turnover.

New Procedural Provisions

31. The Settlement Applicant may file for confidentiality of information / documents during the settlement proceedings as per the procedure laid down in the General Regulations. Further, inspection and access to certified copies of documents will be restricted to the informant and the Settlement Applicant.

Turnover and Income Regulations

32. The Turnover and Income Regulations are largely consistent with the draft regulations issued on 22 December 2023, with some important updates, as set out below.

33. Under the Turnover and Income Regulations, "turnover" refers to the value of sales or operating revenue as recorded in the audited financial statements of the enterprise. In addition to the exclusion of indirect taxes, trade discounts and intra-group sales, the CCI has clarified the exclusion of "other income" from the calculation of turnover. While the definition of "turnover" under the Act was always clear and referred only to income from goods and services, the addition and subsequent deletion of an FAQ on the treatment of "other income" had led to ambiguity. The Turnover and Income Regulations bring additional comfort and clarity that turnover does not include "other income".

34. The Turnover and Income Regulations also provide that in cases where the audited financial statements are not available, turnover or income can now be certified by the statutory auditor, or by a chartered accountant and supported by an affidavit by an authorised representative of the enterprise concerned. The ability to have the turnover certified by a chartered accountant is a welcome development as statutory auditors may not provide a certification in the absence of an audit.

35. In relation to individuals, income shall be the gross total income and the Turnover and Income Regulations explicitly exclude: (i) income from house property; and (ii) income from capital gains. If the Income Tax Returns are not available or tax returns are filed in multiple jurisdictions or not filed in any jurisdiction, income may be considered as the total income as certified by a chartered accountant and supported by an affidavit by such individual.

Penalty Guidelines

36. The Penalty Guidelines have been introduced pursuant to Section 64B(1) read with Section 64B(3) of the Amendment Act to provide clarity on the methodology, the amount and the factors to be used by the CCI in computation of penalties. Although the Penalty Guidelines are not legally binding on the CCI, it is a significant step in bringing transparency in the method of calculating penalties, especially since the CCI now has the power to impose penalties with reference to an enterprise's global turnover pursuant to the amendment to Section 27(b) of the Act.



37. The guiding factors in determining penalties have been summarized below.

Base for Determination of Penalty Under Section 27(b) of the Act

38. The Penalty Guidelines stipulate that the base to be considered by the CCI for determination of the penalty is up to 30% of the average relevant turnover (i.e., the turnover relating to the product (or service) in respect of which the provisions have been contravened), or average income. Where it is not possible to determine “*relevant turnover*” the CCI has the power to levy a penalty on global turnover.

39. In determining the base penalty, the relevant or global turnover (as the case may be) will be considered for a period of 3 years preceding from the year in which the DG Report is received by the CCI. The CCI may, for reasons to be recorded in writing, deviate from this and consider the 3 years preceding the contravention.

40. While determining the base penalty, the CCI would also consider factors such as the nature and gravity of the contravention; nature of the industry or sector affected because of the contravention and its implications on the economy; and / or any other factor which the CCI may deem appropriate.

Power to Impose Higher Penalties

41. The CCI also has the power to impose a higher penalty (up to the maximum legal cap), if the penalty derived after all the calculations is found to be insufficient to create a deterrent effect.

42. The Penalty Guidelines provide that the CCI may defer from the guidelines in “*exceptional circumstances*”, without specifying what would constitute such “*exceptional circumstances*”. However, the CCI is required to record their reasons for deference from the Penalty Guidelines, in their final order.

Aggravating and Mitigating Factors

43. The base penalty amount is the starting point for the calculation of the penalty to be imposed and will be adjusted in light of additional factors discussed below. However, the overall penalty which may be imposed, shall at all times be subject to the maximum legal cap.

44. The Penalty Guidelines lists factors which the CCI may consider while determining or adjusting the penalty, without specifying the extent of addition or discount each such factor will have on the determination of the final penalty. Therefore, the CCI has the discretion and may even consider other factors which it deems appropriate in the facts and circumstances of each case in determining the penalty amount.

45. A snapshot of these factors have been provided below:

SN	Section 27(B)	Section 48(1) or 48(3)	Section 43A	Sections 42, 43, 44 and 45
Initial Threshold and Maximum Legal Cap				
1.	In non-cartel cases, the total penalty is not to exceed 10% of the average of the global turnover or income for the last 3 preceding financial years. In cartel cases – 3 times of the profit; or 10% of the global turnover or income, for each year of the continuance of the agreement, whichever is higher.	Not more than 10% of the average income of the person for the last 3 financial years.	Extend up to 1% of the total turnover or assets or the value of transaction whichever is higher.	Minimum and maximum penalty leviable as per the respective provision of the Act.



SN	Section 27(B)	Section 48(1) or 48(3)	Section 43A	Sections 42, 43, 44 and 45
Aggravating and Mitigating Factors				
1.	Duration of the contravention and / or duration of involvement of the enterprise in such contravention.	Nature and gravity of contravention by the company, for whose conduct such person has been held liable under Section 48 of the Act.	Consummation or part consummation of combination without giving notice.	Extent and reasons of non-compliance or non-cooperation.
2.	Role of the enterprise in orchestrating the contravening conduct.	Role, extent and duration of involvement of such person in the contravening conduct.	Violation of standstill obligations (substantive or procedural) prior to or after filing notice with the CCI under Section 6(2A) of the Act.	Nature of misleading information.
3.	Recourse to coercive or retaliatory measures on other enterprises to participate in the contravention and / or any retaliatory measures taken against other enterprise(s) with a view to enforcing the conduct or practices constituting the contravention.	Extent of cooperation by the person during the DG's investigation or the CCI's proceedings.	Non-furnishing of information during an inquiry under Section 20(1) of the Act.	Knowledge of the person furnishing the information about the same being untrue or incomplete.
4.	Repeated contravention	Repeated contravention	Voluntary filing of notice with the CCI.	Repeated contravention
5.	Admission of contravention, if any, by the enterprise and the stage at which such admission is made.	Furnishing of cogent evidence showing that his or her involvement in the contravention was substantially limited.	Conduct of the parties including making voluntary disclosures, cooperation during the inquiry, furnishing all requisite material or documents in response to the information sought by the CCI.	
6.	Furnishing of cogent evidence by the enterprise establishing that its involvement in the contravention was substantially limited.			
7.	Extent of cooperation by the enterprise during the DG's investigation and / or proceedings before the CCI.			
8.	Voluntary termination of alleged anti-competitive conduct, under intimation to the CCI.			
9.	Implementation of a competition compliance programme within the enterprise.			

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