

INFOLEX

NEWSALERT

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COMPETITION COMMISSION OF INDIA PUBLISHES DRAFT REGULATIONS ON COMMITMENTS AND SETTLEMENTS

1. BACKGROUND

- 1.1. On August 23, 2023, the Competition Commission of India ("CCI") published draft regulations for commitments¹ and settlements² (collectively, "**Draft Regulations**") inviting public comments till September 13, 2023.³
- 1.2. The Draft Regulations are published pursuant to the recent Competition (Amendment) Act, 2023⁴ ("**Amendment Act**")⁵ which introduced a mechanism for settlements and commitments ("**S&C**"), enabling the parties to propose structural or behavioural S&C in cases of vertical restraints and abuse of dominance (excluding cartels). As such, the parties can propose commitments at any time after an investigation has been initiated under Section 26(1) of the Competition Act, 2002 ("**Act**") ("**Investigation Order**") but before the Director General's ("**DG**") investigation report ("**DG Report**") is issued, whereas settlements can be offered after the DG Report is issued but before the CCI issues a final decision. Even though the Amendment Act had introduced the provision of S&C applications, they are yet to be notified as they require supporting regulations to elaborate on modalities for consideration of these applications.

2. KEY FEATURES OF THE DRAFT REGULATIONS

A. Timeline and procedure

¹ The Competition Commission of India (Commitment) Regulations, 2023, available at: https://cci.gov.in/images/stakeholderstopicsconsultations/en/draft-commitment-regulations1692788680.pdf?utm_source=substack&utm_medium=email.

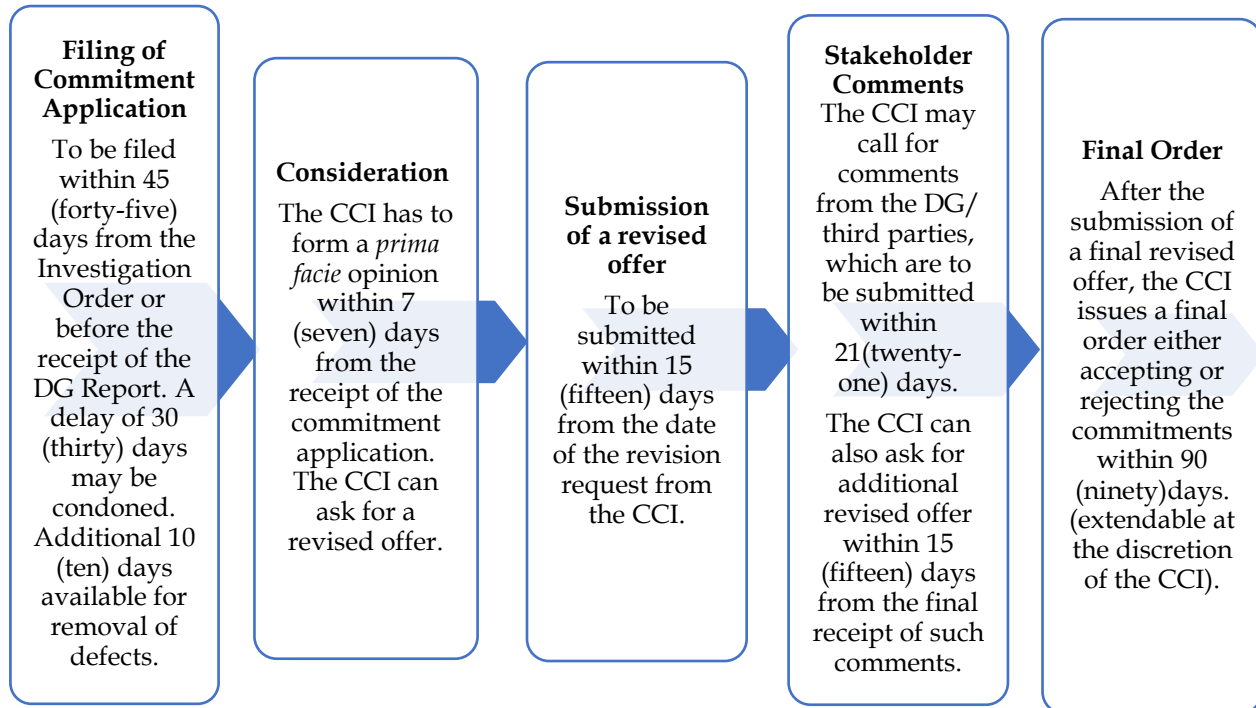
² The Competition Commission of India (Settlement) Regulations, 2023, available at: https://cci.gov.in/images/stakeholderstopicsconsultations/en/draftregulations1692787026.pdf?utm_source=substack&utm_medium=email.

³ The Comments on the draft regulations can be submitted here: <https://www.cci.gov.in/stakeholders-topics-consultations>.

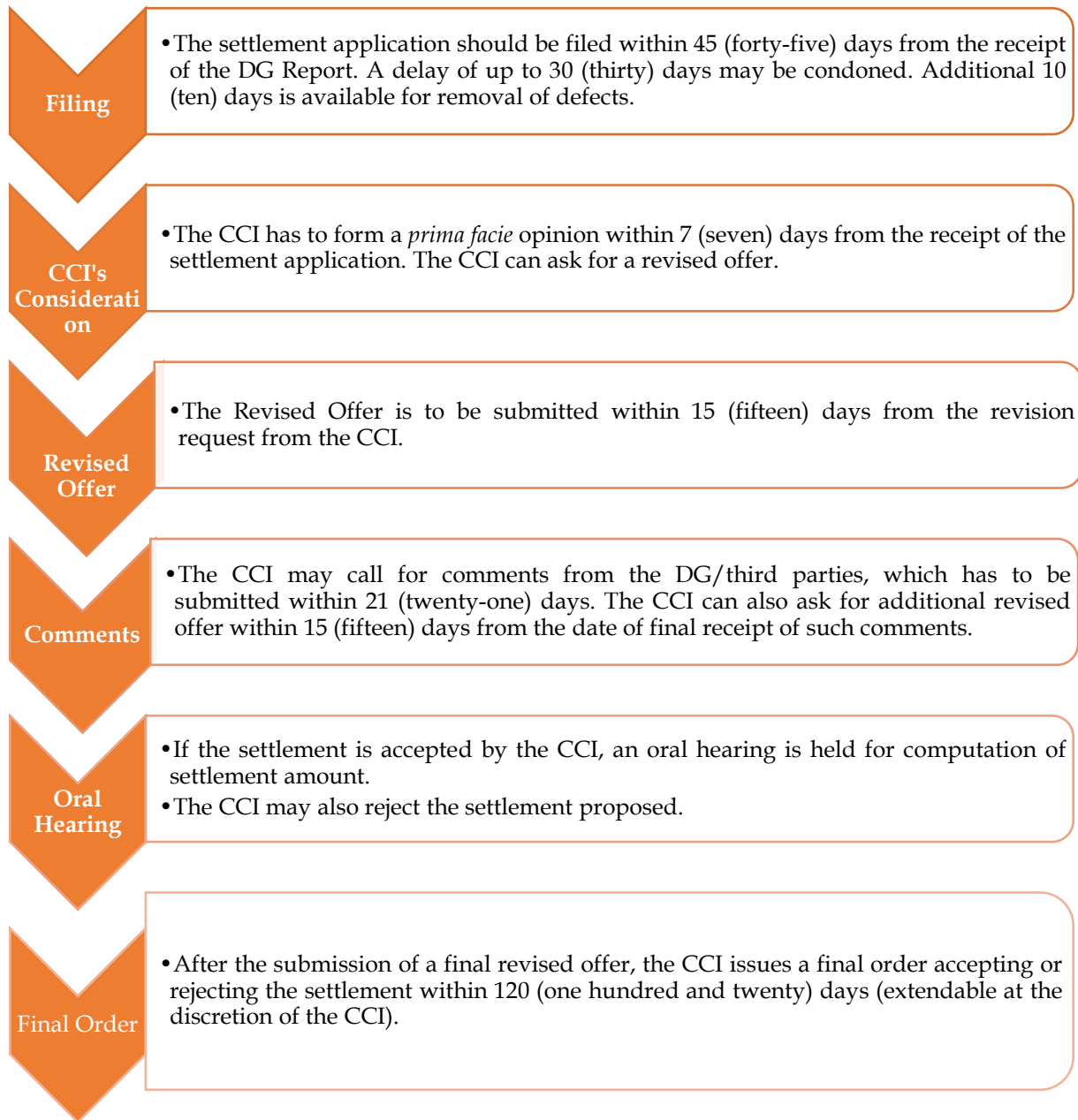
⁴ The Competition (Amendment) Act, 2023, available at: <https://www.cci.gov.in/images/legalframeworkact/en/the-competition-amendment-act-20231681363446.pdf>.

⁵ Our detailed briefing and key changes introduced by the Amendment Act, available at <https://induslaw.com/publications/pdf/alerts-2023/infolex-alert-competition-amendment-act.pdf>.

For a commitment application:



For a settlement application:



B. Key components of the applications

For a settlement application:

- 2.1. A settlement application should *inter alia* include: (i) details of the CCI's *prima facie* opinion in relation to the case; (ii) full and true disclosure of the facts in respect of the alleged contravention; (iii) details of the nature, duration, gravity, and impact of the alleged contravention; (iv) details of how the settlement proposed will address the alleged contravention and competition concerns; and (v) the manner of implementation and monitoring of the settlements offered and details of previous contravention and/or any ongoing proceedings. Additionally, a settlement application must include details of the findings of the DG Report and how it proposes to address the competition concerns.

For a commitment application:

- 2.2. A commitment application should contain the same details as mentioned above except the submission of the summary of the DG Report since the commitment application is filed before the DG investigation is concluded.

C. Statutory fees

- 2.3. Both S&C applications, have to be accompanied by a filing fee, which shall be between INR 5,00,000 (Indian Rupees Five Lakhs) (approximately USD 0.006 million)⁶ to INR 50,00,000 (Indian Rupees Fifty Lakhs) (approximately USD 0.06 million)⁷ (depending on the applicant's turnover).

D. Criteria for assessment

- 2.4. The CCI will assess the S&C applications on the following criteria: (i) the nature and type of conduct; (ii) the duration and extent of the alleged contravention; (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 the terms make markets more contestable; and (vi) whether the applicant has already modified its conduct voluntarily.

E. Quantum of the settlement amount

- 2.5. The CCI will accept the settlement application on payment of settlement amount. For determining such amount, the CCI will be guided by the penalty guidelines (which are yet to be published). While the settlement amount may extend up to the maximum penalty as may be imposed under the Act, the CCI has the power to give a maximum reduction of 15% (fifteen per cent) in the quantum of the settlement amount.

F. Evidentiary value of materials submitted as part of S&C applications

- 2.6. The materials and information provided by the parties as part of their S&C applications can be used against them or any other parties that are subjected to inquiry, who have not filed for the S&C proceedings.

⁶ Converted at 1 USD = INR 82.

⁷ Converted at 1 USD = INR 82.

- 2.7. Additionally, the CCI and the DG have the power to use disclosures provided by an applicant to build a case of contravention if the S&C application is rejected or withdrawn. Based on the information submitted in the application, the CCI can also start a fresh investigation or expand the scope of inquiry.

G. S&C would not amount to a contravention

- 2.8. While a successful settlement will not be tantamount to a contravention, third parties can still claim compensation. Neither the filing of the S&C applications nor the issuance of S&C orders will have a bearing on the inquiry in relation to the alleged contravention in respect of other parties who are not a part of the S&C proceedings.
- 2.9. Further, the commitments given to the CCI shall also not amount to a contravention, however, unlike in the case of settlements, third parties cannot claim compensation. Thus, the order of the CCI in relation to the S&C application shall be final and the applicants or third parties will not have a right to appeal.

H. Implementation and monitoring

- 2.10. The CCI may appoint independent monitoring agencies such as accounting firms, management consultancies, law firms, when it feels that the implementation of the final order regarding an S&C application calls for monitoring. These agencies shall: (i) confirm that they do not have any conflict of interest and are independent of the S&C applicants; and (ii) submit a report to the CCI upon completion of each action required for carrying out the terms for S&C.

I. Revocation

- 2.11. If the CCI finds that: (i) the final order in relation to an S&C application is not complied with; (ii) the disclosures made by the applicant are not true and full; or (iii) if there has been a material change in the facts, the CCI will be empowered to initiate proceedings against the applicant and revoke the S&C order. In such a case, the CCI can order the applicant to pay legal costs up to INR 1,00,00,000 (Indian Rupees one crore) (approximately USD 0.12 million).⁸

3. QUICK VIEW

- 3.1. It is heartening to see that the CCI has finally come up with the Draft Regulations. Further, the invitation of public comments on the Draft Regulations by the CCI is a laudatory move as it will foster transparency, promote inclusivity, and effective policymaking. While several provisions of the Amendment Act were made effective in May and July, earlier this year, provisions related to S&C were conspicuous by their omission. Given the short timeline for submission of comments on the Draft Regulations, it is expected that the Central Government will notify and bring these provisions into effect soon. Thus, it appears that ensuring faster and more efficient market correction as well as reducing litigation is a top priority for the Central Government. As such, the biggest and immediate benefactor of these provisions will be the Big-Tech companies who have been able to offer commitments in other jurisdictions to address competition law concerns regarding their conduct but have been unable to do so in India so far.
- 3.2. Given that the settlement amount will be dependent on the penalty guidelines, it is hoped that the penalty guidelines will be published soon. It is desirable that the CCI adopts a consultative procedure while

⁸ Converted at 1 USD = INR 82.

determining the outcome of the S&C application, as a system of man proposes and god disposes would be rather discouraging for an S&C applicant.

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