

September 13, 2023

Via Website: <https://cci.gov.in/stakeholders-consultations/15>

SUBJECT: Joint Section Comments to the to the Competition Commission of India on the Regulations Relating to Settlements and Commitments

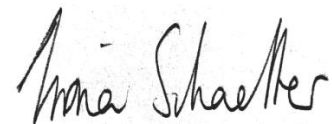
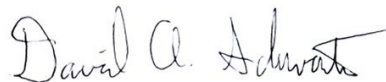
Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to the to the Competition Commission of India on the Regulations Relating to Settlements and Commitments.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF
ANTITRUST AND INTERNATIONAL LAW ON THE DRAFT REGULATIONS
RELATING TO SETTLEMENTS & COMMITMENTS UNDER INDIA’S
COMPETITION ACT**

September 8, 2023

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The American Bar Association Sections of Antitrust and International Law (the Sections) welcome the opportunity to submit these comments to the Competition Commission of India (the CCI) on the draft Competition Commission of India (Settlement) Regulations, 2023 (the Draft Settlement Regulations) and the Competition Commission of India (Commitment) Regulations, 2023 (the Draft Commitment Regulations) (collectively, the Draft S&C Regulations), published for public consultation on 23 August 2023. These comments reflect the expertise and experience of the Sections’ members with competition law and economics.

The Antitrust Law Section is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section’s scope of expertise.¹

The International Law Section (the ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and

¹ Past comments of the Antitrust Law Section are available online at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs. The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section’s Council after debate reflecting the diversity of viewpoints among the Section’s members.

practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-governmental entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.²

EXECUTIVE SUMMARY

The Sections would like to compliment the CCI for proposing detailed procedures for settlements and commitments, and for providing us with an opportunity to comment on the Draft S&C Regulations. For the reasons set forth in detail below, the Sections respectfully recommend that CCI revise the draft S&C Regulations as follows:

1. Use of applicants' information against parties: The Draft S&C Regulations should not permit the CCI to use any information submitted by applicants against them. This would compromise their rights of self-defense and place them at a significant disadvantage should the proposed terms of such settlement or commitment be unacceptable to them. This requirement would significantly affect the incentives to utilize the S&C provisions and would undermine the purpose of their introduction.
2. The absence of a mechanism to review: It is difficult for competition agencies to anticipate every market change - whether in terms of market structure, competition dynamics or changes in regulatory frameworks - particularly in fast moving markets. Agencies therefore need the ability to review the terms of settlement agreement or commitments if they become redundant or unjustifiably onerous for the applicant to implement. Consistent with practice in other jurisdictions, the Draft S&C Regulations should allow the CCI the power to review and modify its settlement or commitment orders, subject to procedural safeguards.
3. Providing adequate time frames to submit commitments: The current 45-day timeframe (extendable by another 30 days) to submit a "complete" commitment proposal is inadequate and should be increased. An enhanced and flexible time period will incentivize prospective applicants to submit a complete application and will be in keeping with the international best practices. The Draft S&C Regulations should be amended to allow commitment applicants the opportunity to submit an application at any time until the investigation has been concluded by the Director General and received by the parties.

² About Section Policy, American Bar Association, https://www.americanbar.org/groups/international_law/policy/about.

4. Ensuring confidentiality during the settlement & commitment process: The process of negotiating settlements and commitments invariably involves the submission of commercially sensitive information and confidential documents. The International Competition Network recognizes the importance of agencies setting out clear and transparent rules for maintaining confidentiality throughout the investigative process. The Draft S&C Regulations should include specific provisions that ensure the confidential treatment of all materials submitted by an applicant during the settlement or commitment proceeding, either by including a specific provision extending confidential treatment to all materials submitted during the S&C process or, alternatively, by specifically referencing the provisions of Section 57 of the Competition Act.
5. Introducing a transitory mechanism to preserve rights: The substantive provisions introducing settlements and commitments were enacted in April 2023 but have not yet been enforced. Consequently, parties who are part of ongoing investigations cannot apply for a settlement or commitment merely because of the staggered implementation process. New statutory provisions that introduce a novel mechanism typically include transitional provisions that retrospectively extend benefits under the new mechanism. In keeping with ICN principles and India's own constitutional courts that allow benefits to be made available retrospectively, the CCI should incorporate a transition process that permits companies who were eligible to make a settlement or commitment application on the enactment date, i.e., April 2023, to continue to be eligible on the date the provisions are enforced.
6. Calculation of the "Settlement Amount": The Draft S&C Regulations grant the CCI the discretion to decide the Settlement Amount without requiring any discussion or consultation with the settlement applicant. Further, a settlement applicant is unable to compute the potential financial exposure from the payment of a Settlement Account since the CCI's Proposed Penalty Guidelines, which will set out the principles for such calculation, have yet to be published. The basis for arriving at a Settlement Amount must be clear, predictable and transparent and should be based on a discussion with the settlement applicant. Recognizing that the monetary incentive to settle is an important factor, the CCI should consider raising the maximum discount available to applicants from 15% to at least 25% to appropriately incentivize applicants, or consider replacing the "maximum 15% discount" with a minimum, guaranteed baseline reduction to the Settlement Amount to provide applicants with some ability to estimate their financial exposure.
7. Settlement & commitment orders should be binding on the agency and the applicant: The Draft S&C Regulations prescribe only that the CCI's settlement and commitment orders are final and binding on the applicant, without any mention of whether the CCI is bound by its own settlement and commitment orders, subject to its power to review (see Issue 2) and the power to revoke settlement or commitment orders, in certain circumstances specifically identified under the Draft S&C Regulations, after granting

the applicant an opportunity to be heard. It is essential for commitment and settlement mechanisms to be predictable and certain for applicants to continue to use them. This requires the inclusion of a provision in the Draft S&C Regulations that precludes agencies from unilaterally modifying the terms of a settlement or commitment order.

8. Third party participation in settlements & commitments processes: The Draft S&C Regulations do not safeguard against parties or third parties (in the case of commitments) misusing their comments to advance unsubstantiated theories of competition harm to create business or timing impediments. The Draft S&C Regulations should be appropriately modified to require parties to provide any comments on a sworn affidavit.
9. Prescribe a formal process for discussing settlements & commitments: Formal discussion and meetings with the CCI and its staff are necessary in the S&C process to ensure that both the applicant and the CCI are able to understand, appreciate and address each other's concerns and design appropriate solutions or remedies. The ICN's recommendations recognize the need for dialogue for arriving at well negotiated settlements or commitments. The Draft S&C Regulations should also include a process that allows S&C applicants to engage in open and meaningful dialogue with the CCI through the entire process.
10. Inadequate time frame for revising settlement and commitment applications: The Draft S&C Regulations permit applicants to revise settlement or commitment applications within 15 days of the CCI expressing its concerns. This is unlikely to be sufficient for an applicant to meaningfully address such concerns. The ICN emphasizes the importance of providing parties with sufficient time to address agency concerns. The Draft S&C Regulations should increase the time period to submit revised applications by permitting applicants and the CCI to negotiate the time period within which a revised application may be submitted on a case-by-case basis.
11. Safeguarding against the invalidation of an application: The deemed "withdrawal" of a settlement or commitment application where the CCI believes it is incomplete or defective essentially terminates the settlement or commitment process and restarts the formal inquiry without providing notice or opportunity to the applicant to explain why its application does not merit withdrawal. The Draft S&C Regulations should be amended to require the CCI to issue a reasoned order, and provide parties with an opportunity to explain why its application is not incomplete or defective.

SPECIFIC RECOMMENDATIONS

I. Use of applicants' information against parties

The Sections note that the Draft S&C Regulations permit the CCI to use information submitted by parties as part of a settlement or commitment application against them or

against other parties to the inquiry who are not party to the settlement or commitment.³ In order to promote the use of an effective settlements and commitments (S&C) mechanism, the Sections respectfully submit that the Draft S&C Regulations must balance investigative processes with the applicant's expectation that the information it submits to the agency will not prejudice its legal position should it decide not to proceed with the settlement or commitment process.

Notably, competition agencies in several jurisdictions have published guidance that requires that the documents and information submitted as part of settlement or commitment discussion do not form part of the overall investigative record. For instance, the French antitrust authority's guidance on settlement procedures states that *"No document or paper transmitted by the parties relating to the implementation of the settlement procedure will be included in the investigation file. The same shall apply where the implemented procedure has not resulted in the signing of a settlement report."*⁴ Similarly, the Japan Fair Trade Commission's (JFTC) guidance document on commitment procedures indicates that the applicant will not be subject to any disadvantageous treatment in the ongoing investigation if it withdraws its commitment application.⁵

The Sections note that a productive settlement and commitments process is predicated on the submission of a robust application that requires the applicant to describe its commercial strategies, and provide details of potential market impact - such as the nature, gravity and impact of the alleged contraventions. Indeed the Draft S&C Regulations make such a disclosure mandatory for either settlement or commitment applications to be considered as "complete" and the CCI retains considerable discretion to "deem" incomplete applications to have been withdrawn. Further, the CCI may reopen the formal inquiry proceedings where an application is incomplete or if it fails to agree on settlement or commitment terms with an applicant. The CCI has adequate tools to ensure the completeness of settlement or commitment application; it should not include the information submitted by applicants through the S&C process as part of its investigative record as this would place the applicant at a significant disadvantage.

If the information submitted by settlement or commitment applicants were to be used against them, it would compromise their rights of self defense and place them at a significant disadvantage should the proposed terms of such settlement or commitment be unacceptable to them. This requirement will significantly affect the incentives to utilize the S&C provisions, and will undermine the very purpose for their introduction. The S&C Provisions represent an opportunity for the agency and the applicant to address competition issues in a fair, open and predictable manner to reduce litigation and conserve agency resources. It is unlikely that parties will be willing to enter into settlement or commitment discussion with the CCI if there is a risk that their own information might be used against them.

³ Regulation 12 of the Settlement Regulations and Regulation 11 of the Draft Commitment Regulations.

⁴ Para 24, [Procedural Notice of 21 December 2018 on the settlement procedure](#).

⁵ Page 6, JFTC, ["Policies Concerning Commitment Procedures"](#), 2018.

The Sections submit that the Draft S&C Regulations be amended to: (a) disallow the CCI from including any or all the materials submitted as part of settlement or commitment application from the investigation case file altogether; [or in the alternative (b) the materials submitted by settlement and commitment applicants may only be used as part of the investigation case record against *other* investigated parties, if any, after offering them sufficient opportunity to contest such materials].

II. The absence of a mechanism to review

The Sections note that the Draft S&C Regulations do not permit parties to seek a modification or review of the terms of their settlement or commitment orders once agreed.⁶ It is difficult for a competition agency to foresee market changes, in terms of its structure and/or competition dynamics - particularly in fast moving markets. Changes in market conditions after the agency has arrived at a settlement or commitment order, may render it redundant (from a market correction standpoint) or unjustifiably onerous for the applicant to implement. Likewise, a change in local laws other than competition law, governing the relevant products/services may render the agreed remedies unworkable or obsolete. Therefore, it is important that Draft S&C Regulations allow the CCI the power to review and modify its settlement or commitment orders, in certain circumstances specifically identified in the Draft S&C Regulations and subject to procedural safeguards such as granting the applicant an opportunity to be heard.

This would be consistent with the practice in various jurisdictions, including the United States,⁷ European Union, United Kingdom, Singapore, and South Korea,⁸ each of which allow their competition regulators to modify the settlement and/or commitment terms if these may be rendered inappropriate due to any change in the underlying facts, law, market structure or competitive conditions. This also includes a scenario where the settlement or commitment terms prevent the applicant from efficiently competing in any market through means that are available to its competitors.⁹

Therefore, the Sections submit that the Draft S&C Regulations should suitably be amended to: (a) allow for the settlement or commitment orders to be revised, in certain circumstances specifically identified in the Draft S&C Regulations, such as changes in the underlying facts, law, market structure, or competitive conditions; (b) allow parties or the CCI to request a periodic evaluation of a settlement or commitment order to determine its

⁶ Regulation 11 of the Draft Settlement Regulations and Regulation 10 of the Draft Commitment Regulations.

⁷ Para 24, OECD, [Commitment Decisions in Antitrust Cases - Note by the United States](#), 2016.

⁸ Para 2.2.2, OECD, [Competition Policy Roundtable Background Note - Remedies and commitments in abuse cases](#), 2022. The US Supreme Court's ruling in *Rufo v. Inmates of Suffolk County Jail*, 502 US 367 (1992), antitrust consent decrees can now be modified if parties can demonstrate that there is a "significant change in circumstances [that] warrants revision of the decree".

⁹ Para 25, OECD, [Commitment Decisions in Antitrust Cases - Note by the United States](#), 2016.

continued efficacy and viability; and (c) grant applicants an opportunity to be heard before the CCI issues its order to review the settlement or commitment terms.

III. Providing adequate time frames to submit commitments

The Sections note that the Draft S&C Regulations currently prescribe a significantly limited time frame within which parties may submit their commitment applications, i.e. 45 days from the CCI's issuing its preliminary order directing a formal inquiry, or before the receipt of the investigation report prepared by the Director General (the DG), whichever is earlier.¹⁰ The CCI has the discretion to extend this time period by an additional 30 days. The Sections believe the current timeframe for an applicant to submit a "complete" commitment proposal is inadequate and needs to be increased. The Organization of Economic Cooperation and Development's (the OECD's) Council on Transparency and Procedural Fairness in Competition Law Enforcement recommends that parties and third parties be offered reasonable time to prepare their actions and responses.¹¹ Given that the preparation of a commitment proposal is time consuming and data intensive, the 45-day time frame does not allow commitment applicants reasonable time to make a commitment proposal as envisaged in the Draft S&C Regulations.

Several competition agencies provide flexibility in their timelines to offer commitments. This incentivizes prospective commitment applicants and also ensures that the agency receives a thorough and well considered application. In the United States, for instance, settlement negotiations (used synonymously with commitments) may be initiated at any point of the proceedings with both the Federal Trade Commission (the FTC) and the Antitrust Division of the Department of Justice (the DOJ).¹² Similarly, the Competition and Markets Authority (the CMA) in the United Kingdom, permits a party under investigation to offer commitments at any point before a decision on infringement is made.¹³

The Sections submit that the Draft S&C Regulations be amended to allow commitment applicants the opportunity to submit an application at any time until the investigation has been concluded by the Director General and its investigation report is received by the parties. Enhancing the time available to submit commitment applications will ensure that applicants have carefully considered their positions, collected the requisite information and crafted a complete application. In addition, the CCI may benefit from a longer timeline during which they can meaningfully consider and accept commitment applications. This will not only enhance the incentives for commitment applicants, but will also streamline the process for the CCI to consider an application and swiftly agree on its terms.

¹⁰ Regulation 3(3) of the Draft Commitment Regulations.

¹¹ Para 4, OECD, "[Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement](#)", 2021.

¹² Para 15, OECD, [Commitment Decisions in Antitrust Cases - Note by the United States](#), 2016.

¹³ Para 10.21, CMA, [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#).

IV. Ensuring confidentiality during the settlement & commitment process

The process of offering and deciding on settlement and commitment applications in antitrust proceedings will invariably involve the submission of commercially sensitive information and confidential documents. The Sections note that India's Competition Act, provides robust protection for such confidential information through Section 57 of the Competition Act itself, along with Regulation 35 of the General Regulations.¹⁴ This is consistent with the International Competition Network's (ICN) Recommended Practices for Investigative Procedures, which highlight the importance of clear and transparent rules on confidentiality throughout the investigation process, including "*what information is entitled to confidentiality protections, how to submit and designate confidential information, and the circumstances under which confidential information may be disclosed.*"¹⁵

However, the Draft S&C Regulations do not either reference or themselves contain any provision that extends such protection to confidential information submitted in a settlement or commitment application. The Sections submit that the Draft S&C Regulations should include specific provisions that ensure confidential treatment of all materials submitted by an applicant during the settlement or commitment proceeding. This would also be in line with the practice in competition agencies such as the CMA, which has ensured confidentiality in S&C proceedings by limiting disclosures made by the CMA and parties while settlement discussions are ongoing.¹⁶ Once settlements are finalized, the CMA publishes a press release referencing the non-confidential version of the settlement decision.¹⁷ Similarly, in Japan, the JFTC issues only a summary of the competition concerns and commitments offered, in cases where it accepts the commitment proposal.¹⁸

The Sections recommend that the Draft S&C Regulations be amended to either include a specific provision extending confidential treatment to all materials submitted during the S&C process; or alternatively, by specifically referencing the provisions of Section 57 of the Competition Act.

V. Introducing a transitional mechanism to preserve rights

The Sections note that the Competition (Amendment) Act, 2023, enacted in April 2023, introduced the substantive provisions of Sections 48A and 48B that enabled the CCI to accept settlements and commitments from the date on which these provisions are notified.

¹⁴ [Competition Commission of India \(General\) Regulations, 2009](#).

¹⁵ Para 10.2, page 9, ICN, [Recommended Practices for Investigative Procedures](#), 2019.

¹⁶ Para 14.34-14.36, CMA, "[Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#)", 2021.

¹⁷ Para 3.16-3.17, CMA, "[Transparency and disclosure: Statement of the CMA's policy and approach](#)", 2014.

¹⁸ Page 13, JFTC, "[Policies Concerning Commitment Procedures](#)", 2018.

However, since these provisions continue to await notification their benefits will become available only once the CCI has implemented the Draft S&C Regulations.

The Sections submit that parties to ongoing investigations that might have otherwise been eligible to apply for a settlement or a commitment under the provisions of India's amended Competition Act, may legitimately expect to do so without delay. It would be in keeping with the accepted principles of transparency and predictability, for the CCI to permit all companies that were eligible to make a settlement or commitment application on the enactment date, i.e. 11 April 2023 to continue to be eligible on the date the provisions are enforced. The *ICN's Guiding Principles for Procedural Fairness in Competition Agency Enforcement*¹⁹ provide that competition agencies should make transparent and predictable enforcement a priority, and that competition agencies should conduct enforcement matters under transparent rules and practices and provide parties under investigation with timely notice.

The Sections observe that without the inclusion of specific transitional provision in the Draft S&C Regulations, applicants may be deemed ineligible to apply for a settlement or commitment only because the time period for an applicant to submit such an application would in all likelihood have expired. This would deny some applicants the benefit of these statutory provisions, merely because of a staggered implementation date.

It is not unusual for new statutory provisions, particularly those that introduce an altogether novel mechanism, to be accompanied with transitional provisions that retrospectively extend the benefits that will become available under those new laws. As an illustration, the Trade Related Intellectual Property Rights (TRIPS) Agreement framed by the World Trade Organization (WTO) came into effect on 1st January 1995, but allowed countries with different [transition periods](#) to enforce its provisions on different dates. However, the so-called "mailbox provisions" under that law, allowed parties to avail of a benefit, i.e. the right to apply for a "product patent", from the beginning of the transition period, even though the decision on that application itself would only be taken at the time at which the national law was enforced. The Sections also note that in some jurisdictions it is a well-accepted principle of law that benefits once conferred by a statute, can be made retrospectively available to the parties seeking them.²⁰

The Sections suggest that the CCI include a specific provision in the Draft S&C Regulations that provides for a transitional mechanism whereby all communications received by the CCI that indicate a *bona fide* intent to offer a settlement or commitment, between the date of enactment of the Competition (Amendment) Act, 2023 (11 April 2023) and the date of the enforcement of the settlement and commitments provisions, will be eligible to apply for a settlement or commitment. All such communications received in this "transition" period, will be considered by the CCI as eligible for the submission of a formal settlement or

¹⁹ Para 2, ICN, "[Guiding Principles for Procedural Fairness in Competition Agency Enforcement](#)", 2018.

²⁰ [Vijay v. State of Maharashtra](#), Supreme Court of India, 2006.

commitment application. This transitional mechanism would provide the required predictability and transparency in the process and greatly encourage the use of the settlements and commitments mechanism.

VI. Calculation of the “Settlement Amount”

The Sections note that the Draft Settlement Regulations require the CCI to charge a settlement applicant a “Settlement Amount”. The payment of the Settlement Amount is linked to the notional penalty that the applicant may have otherwise had to pay, should the CCI have found a contravention. The Draft S&C Regulations grant the CCI the discretion to determine the Settlement Amount by applying a “settlement discount” of up to 15% on the maximum penalty that it could have imposed for the alleged contravention under Section 27(b) of the Competition Act. This obliges the CCI to consider the contents of its (unpublished) penalty guidelines (the Proposed Penalty Guidelines).²¹

The Sections note that the Draft S&C Regulations grant the CCI the discretion to decide the Settlement Amount without requiring any discussion or consultation with the settlement applicant. Applicants do not have an opportunity to be heard by the CCI or to submit materials that might inform the CCI’s computation of the Settlement Amount. This allows the CCI to unilaterally determine the Settlement Amount without providing any opportunity to an applicant to provide its view on the size of the Settlement Amount and this will be recorded as part of the CCI’s final settlement order. Further, a settlement applicant is currently unable to compute the potential financial exposure from the payment of a Settlement Account since the CCI’s Proposed Penalty Guidelines that will set out the principles for such calculation, have yet to be published.

The basis for arriving at a Settlement Amount should be clear, predictable and transparent in keeping with the ICN’s Recommended Practices for Investigative Procedures. The Sections submit that the computation of the Settlement Amount should be based on a discussion with the settlement applicant, in keeping with the ICN’s recommendation that “*Engagement and dialogue between parties and agencies on significant procedural issues and relevant legal, economic, and factual bases for competitive concerns support fair and informed enforcement.*”²² Jurisdictions such as the United Kingdom²³ and France,²⁴ allow settlement applicants to make representations on the quantum of the penalty that the regulators may impose pursuant to a settlement application.

The Sections observe that settlements have been used by competition authorities across the globe to create incentives for themselves and companies, to save agency resources,

²¹ Regulation 4(8) and 6 of the Draft Settlement Regulations.

²² Para 6.1, ICN, [Recommended Practices for Investigation Process](#), 2019.

²³ Para 14.15-14.17, CMA, [Guidance on the CMA’s investigation procedures in the Competition Act 1998 cases CMA8](#).

²⁴ Para 37, [Procedural Notice of 21 December 2018 on the Settlement Procedure](#), 2018.

reduce litigation and related costs, swiftly recover penalties and address market imperfections. The monetary incentive to settle, while only one part of the consideration for businesses, is an important factor. Consequently, the Sections recommend that the CCI consider raising the maximum discount available to applicants from 15% to at least 25% to appropriately incentivize applicants, particularly since litigation costs in India are low and judicial time delays are usually lengthy in India. Further the CCI may consider replacing the “maximum 15% discount” with a minimum, guaranteed baseline reduction to the Settlement Amount to provide applicants with some ability to estimate their financial exposure..

Accordingly, the Sections suggest the following amendments to the Draft Settlement Regulations (a) specify a minimum threshold percentage for the Settlement Discount, to incentivize applicants to use the settlements process; or (b) provide a higher percentage reduction in the Settlement Discount; and (c) provide an opportunity to the settlement applicant to make representations on the quantum of the Settlement Amount before the CCI issues a settlement order.

VII. Settlement & Commitment orders should be binding on the agency and the applicant

The Sections note that the Draft S&C Regulations prescribe only that the CCI’s settlement and commitment orders are final and binding on the settlement or commitment applicant.²⁵ There is no mention of whether the CCI is bound by its own settlement and commitment orders.

The need to ensure predictability and certainty for applicants has been underscored in other jurisdictions, which prevent parties, including the agency, from unilaterally modifying the terms of a settlement or commitment order. For example, in the United States, court-ordered consent decrees between applicants and the DOJ are binding on both parties, and the DOJ cannot unilaterally modify the consent decree.²⁶ Requesting parties must petition the court to modify or terminate the consent decree.²⁷ The Sections submit that a provision in the Draft S&C Regulations to make the settlement and commitment orders binding on the CCI would ensure that there are no circumstances in which a settlement or commitment order is unilaterally altered. This would enhance predictability and certainty for applicants.

The Sections suggest that the S&C Regulations include an express provision that stipulates that the CCI is bound by its own settlement and commitment orders, subject to its power to review (see Issue II) and the power to revoke settlement or commitment orders, in certain objective circumstances defined under the Draft S&C Regulations, after granting the applicant an opportunity to be heard. This would enhance predictability and ensure that the

²⁵ Regulation 7(3) of the Draft Settlement Regulations and Regulation 6(3) of the Draft Commitment Regulations.

²⁶ [FTC Rule of Practice 3.72](#), specifies the procedure for the respondent or the FTC to reopen an order based on changes in fact, law, or the public interest.

²⁷ Para 26, OECD, [Commitment Decisions on Antitrust Cases - Note by the United States](#), 2016.

terms of settlement and commitment orders are not unilaterally revised, thus incentivizing parties to use this process as intended.

VIII. Third party participation in Settlements and Commitments processes

The Draft Settlement Regulations permit “any other party” (i.e., parties to the CCI proceedings - other than the settlement and/or the commitment applicant) to submit objections or comments to a settlement application within a 21-day period. Further, the Draft Commitment Regulations permit not only “any other party” but also the public at large to comment on a commitment application, again within 21 days.²⁸

The Sections observe that Draft S&C Regulations do not safeguard against parties or third parties (in the case of commitments) misusing their comments to advance unsubstantiated theories of competition harm to create business or timing impediments. Such comments, once received, may require the CCI to deploy valuable agency resources to further analyze and for parties to expend time and resources to explain. The ICN’s [Recommended Practices for Investigative Process](#) indicate that “*when parties and third parties submit their views, evidentiary claims, and defenses to the agency for consideration, agencies should encourage them to substantiate their views with factual support.*”²⁹ The Draft S&C Regulations do not require parties or third parties that submit their comments, to do so as a sworn statement on an affidavit, nor do they require such submissions to be accompanied by factual support. In the United States, it is entirely within the discretion of the relevant enforcement agency to invite public comments on settlement and commitment proposals.

Accordingly, the Sections recommend that the Draft S&C Regulations be appropriately modified to (a) require parties to provide any and all information as comments on a sworn affidavit; and (b) prescribe that all such comments be accompanied by factual support and decline to accept comments that are not compliant;.

IX. Prescribe a formal process for discussing settlements and commitments

The Sections note that the Draft S&C Regulations do not prescribe a process for negotiating or discussing a settlement or commitment with the CCI.³⁰ Such formal discussion and meetings with the CCI and its staff are necessary to ensure that both the applicant and the CCI are able to understand, appreciate and address each other's concerns and design appropriate solutions or remedies. However, the Draft S&C Regulations prescribe no such process and instead describe agency-applicant interactions entirely formalistically as being a series of written submissions, followed by consideration and decisions by the CCI. The ICN’s Recommended Practices for Investigative Process state that “*competition agencies should*

²⁸ Regulation 5(1) of the Draft Settlement Regulations and Regulation 5(1) of the Draft Commitment Regulations.

²⁹ Para 6.6, ICN, [Recommended Practices for Investigation Process](#), 2019.

³⁰ Regulations 3, 4 & 8 of the Draft Settlement Regulations and Regulations 3, 4 & 7 of the Draft Commitment Regulations.

*provide opportunities for meaningful engagement during an investigation. This should include the opportunity for parties under investigation to present evidence and arguments/defenses in a timely and concise manner”.*³¹ Such open communication between parties under investigation and the investigating authority to discuss competition concerns and consumer harm allows both sides to identify, consider and subsequently determine the merit of the allegations.³²

The CCI already has a well-established pre-merger consultation mechanism with senior staff members in the context of merger review. Further, many jurisdictions recognize the need for dialogue for arriving at well negotiated settlements or commitments. For instance, the CMA permits parties under investigation to approach its case team during the course of an investigation to discuss the possibility of a settlement. Approaching the case team to discuss a possible settlement will not result in adverse inference against the business.³³ The settlement discussions are conducted orally and only the acceptance of the settlement requirements are confirmed in writing.³⁴ Similarly, in the United States, the DOJ and the FTC follow similar but parallel procedures to arrive at settlements.³⁵ Settlement negotiations permit dialogue between the agency staff and defense counsel, including discussions of the agency’s antitrust concerns and their views on the required remedy.³⁶ In the European Union, parties under investigation are encouraged to approach the case officer at any time (preferably at the earliest possible stage) to explore the option of a commitment decision. Thereafter, a State of Play meeting is set up, allowing the parties under investigation to engage in open and frank discussions with the European Commission.³⁷

Accordingly, the Sections recommend that the Draft S&C Regulations be appropriately modified to include a process that allows S&C applicants to engage in open and meaningful dialogue with the CCI through the entire process.

X. Inadequate time frame for revising settlement and commitment applications

The Sections note that the Draft S&C Regulations permit applicants to revise settlement or commitment applications if the CCI is not satisfied with the original settlement/commitment proposal.³⁸ However, an applicant has only 15 days to submit a revised proposal which is unlikely to be sufficient for an applicant to meaningfully address the CCI’s concerns, particularly where markets are complex, or where the applicant operates

³¹ Para 6, ICN, [Recommended Practices for Investigative Process](#), 2019.

³² Ibid.

³³ Para 14.10, CMA, [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#).

³⁴ Para 14.18, CMA, [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#).

³⁵ Para 3, OECD, [Commitment Decision in Antitrust Cases - Note by United States](#), 2016.

³⁶ Para 15, OECD, [Commitment Decision in Antitrust Cases - Note by United States](#), 2016.

³⁷ Para 118-119, European Commission, [Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU](#), 2011.

³⁸ Regulations 4(2) and 4(5)(c) of both the Draft Settlement Regulations & the Draft Commitment Regulations.

across multiple geographies or even where a proposal to settle or commit could entail renegotiating contracts with other business partners. The ICN's Recommended Practices for Investigative Process note that competition authorities must provide applicants an opportunity to engage in the investigation by issuing a timely notice, citing the need to provide applicants enough time to respond to an agency's concerns.³⁹

The Sections consider that providing parties with a meaningful opportunity to submit revised settlements/commitments would increase the likelihood of successful applications and result in the efficient resolutions of cases.

Accordingly, the Sections recommend that the Draft S&C Regulations be amended to increase the time period for applicants to submit revised applications, by permitting applicants and the CCI to negotiate the time period within which a revised application may be submitted, on a case-by-case basis.

XI. Safeguarding against the invalidation of an application

The Draft S&C Regulations permit the CCI to treat a settlement or commitment application as "withdrawn" if it believes that the application is "incomplete" or "defective", and the applicant does not rectify errors identified by the CCI within a specific time.⁴⁰ This deemed "withdrawal" of a settlement or commitment application essentially terminates the settlement or commitment process and restarts the formal inquiry by the CCI without providing notice or opportunity to the applicant to explain why its application is not incomplete or defective. The Sections note that a unilateral declaration by the CCI to deem an application as being "withdrawn" would contravene established due process rights which require the CCI to issue a reasoned order and provide the applicant with an opportunity to be heard and address any infirmities in its application.

The Sections therefore suggest that the Draft S&C Regulations be amended to require the CCI to issue a reasoned order, and provide parties with an opportunity to be heard before deeming an application as "withdrawn".

CONCLUSION

The Sections appreciate the opportunity provided by the CCI to comment on the Draft S&C Regulations. We would be pleased to respond to any questions the CCI may have regarding these comments, or to provide additional comments or information that may be of assistance to the CCI.

³⁹ Paras 5.4 and 6, [ICN Recommended Practices for Investigative Process](#), 2019.

⁴⁰ Regulations 3(3) of the Settlement Regulations & Regulation 3(4) of the Draft Commitment Regulations.