CPI Columns
South Asia

April 2023

Section 48A of the Amended Competition Act – A "Settlement" on Quicksand?

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Section 48A of the Amended Competition Act – A "Settlement" on Quicksand?

By Anisha Chand & Tanveer Verma[1]

On March 29, 2023, the Lower House of the Indian Parliament passed significant amendments to the Competition Act, 2002 ("Competition Act"), the chief legislation dealing with competition laws in India. The amendments were approved by the Upper House of the Indian Parliament on April 3, 2023, and will become law upon receiving assent from the President of India.

One of the many significant changes to the Competition Act brought in by the amendments is the introduction of Section 48A which provides for a "settlement" mechanism in enforcement proceedings. The salient features of the settlement mechanism under Section 48A are given below:

- It will allow a charged party to approach the Competition Commission of India ("CCI") with a proposal for settlement of the proceedings initiated for the alleged contraventions,
- It will be applicable only to matters of abuse of dominant position and anticompetitive vertical agreements, and not anticompetitive horizontal agreements (cartels);
- The settlement proposal can be initiated only after the Director General ("DG") has submitted its investigation report to the CCI, but before the CCI has passed its final decision;
- Settlement can include both monetary payment and other commitments/modifications which could be monitored by the CCI,
- The DG, parties concerned, and even third parties can submit their objections and suggestions to the proposal;
- CCI will have discretion to allow / disallow the settlement proposal. The discretion is to be based on the *nature*, *gravity* and *impact* of the contraventions:
- No appeal against an order by the CCI accepting/rejecting the settlement proposal is allowed; and
- The detailed mechanism to be followed by the CCI during settlement proceedings has been left for the CCI to formulate through regulations.

To provide more context on the need for a settlement mechanism, the Competition Act empowers the Competition Commission of India ("CCI") to impose hefty monetary penalties (as high as 10 percent of the turnover or three times the profit) for abuse of dominant position and anticompetitive agreements. Among its other powers, its ability to prescribe behavioral remedies and direct divestiture of businesses / assets of a dominant enterprise are noteworthy. However, despite the CCI being bestowed with enormous powers for disciplining an erring enterprise, it may not be incorrect to state that the CCI had become virtually toothless on account of lengthy appellate litigation lifecycle. Majority of the contravention orders of the CCI are appealed against, and it can take as long as 8-10 years from the date of the CCI's decision for the matter to be finally settled by the Supreme Court of India.

For this reason, perhaps, the CCI has unfortunately not been able to recover even 1 percent of the total monetary penalties imposed by it since its inception. Information available in the public domain indicates that out of the total of INR 138.8 billion (~USD 1.6 billion) levied in fines between FY12 to FY19, the CCI was able to realize only INR 1.3 billion (~USD 15.4 million) (approx. 0.9 percent) until FY19.

The newly introduced settlement mechanism, by prohibiting further appeals, promises to bring finality to the proceedings sooner rather than later, in addition to facilitating market corrections in a timely manner. This mechanism will also

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bring CCI processes in line with international best practices.

I. Need to Finetune

The success of the settlement mechanism would ultimately depend on its ability to garner the confidence of the charged parties. While carrying out a trade-off assessment between appealing against the final penalty order on one hand and approaching the CCI for settlement on the other, the charged parties should be able to positively lean towards settlement.

However, the present framework of the Competition Act in general and the settlement mechanism under Section 48A in particular, could dissuade the charged parties from electing for settlement over the traditional appeal system. The authors believe that the Competition Act is wanting of substantial refinement for the settlement regime to be seen as an attractive and desirable option. The following paragraphs briefly deliberate over a few facets that ought to be prioritized and examined before pinning our hopes on the success of the settlement mechanism:

(i) Lack of Transparency in CCI's Approach in Deciding the Quantum of Penalty

Section 27 of the Competition Act provides discretion to the CCI to impose a monetary penalty which could be up to ten percent of the average of the turnover for the last three preceding financial years. However, this discretion is wide and absolute since the Competition Act does not provide any guidance or set down the principles to be followed by the CCI when deciding the quantum of penalty. Equally, the decisional practice of the CCI provides little guidance and remains largely shy on details regarding the manner in which the quantum of monetary penalty is to be arrived at.

For a charged party to even weigh settlement as a viable alternative, it is imperative for the charged party to, at the outset, be able to predict with some degree of certainty the quantum of fine which it is realistically exposed to. This *"ability to predict"* would serve as the proverbial light house for the settlement negotiations to set sail.

Accordingly, as a starting point, the Competition Act should be suitably supplemented through penalty guidelines or golden principles to guide the CCI while deciding the quantum of penalty. Penalty guidelines will provide much needed clarity and certainty to the parties in their trade-off decision between electing settlement or facing penalties.

(ii) Uncertainty About the Principles to be Followed by the CCI While Allowing/Rejecting a Settlement Application

Section 48A directs the CCI to consider (i) the nature, (ii) gravity and (iii) impact of the contravention when deciding whether to allow a settlement application. In the absence of any guiding principles, these metrics appear vague and ambiguous.

Additionally, per the proposed text of Section 48A, the CCI will be required to carry out empirical studies for assessing the "gravity" and "impact" of the contravention. Such evaluation is reminiscent of the assessment required for appreciable adverse effect ("AAEC") under the extant Competition Act. However, the CCI's AAEC assessment in its decisional practice so far has been largely normative and theoretical, and less based on market studies or empirical data.

As an example, in August 2021, the CCI imposed a penalty of INR 2 billion (~ USD 24 million) on Maruti Suzuki (an Indian automobile manufacturer with ~50 percent market share) for resale price maintenance ("RPM"). According to the CCI, maintenance of RPM by a player with high market share not only thwarts intra-brand competition but also leads to the lowering of inter-brand competition, and therefore causes AAEC. However, the CCI's order is surprisingly bereft of any facts or figures to support the theory of softening of inter-brand competition.

The CCI's light-touch approach of relying on theories of harm *sans* supporting market realities to reach a positive conclusion of AAEC and imposition of mammoth penalties is a disturbing trend. If this pattern is not remedied, it could dissuade the charged parties from engaging in settlement negotiations with the CCI to begin with.

(iii) Uncertainty of the Aftereffects of Settlement Application

The settlement regime in its present form is quite ambiguous since it does not clarify whether an application for settlement would mean an admission of guilt. This ambiguity makes the whole process uncertain.

In the event, the CCI rejects the settlement application, would the charged party still be able to defend itself (without bias and with objectivity) against the findings of the DG's investigation report? This is a fundamental question that remains unaddressed to date. While Section 48A(5) provides for continuation of inquiry if the settlement application is rejected, the amendments do not clarity if the failure of settlement proceedings will not prejudice such inquiry.

The ambiguity is amplified since Section 48A uses the word "contravention" as opposed to "alleged contravention," the term used under Section 48B (also introduced by the recent amendments) which lays down the framework for "commitments" to be offered by a charged party during the course of an investigation. It is noteworthy that Section 48B is similarly worded as Section 48A. Based on the principles of statutory interpretation, the absence of the word "alleged" in Section 48A would imply admission of guilt by the charged party upon filing of settlement application which, as discussed above, could severely prejudice the rights of the charged party.

(iv) Ramifications on Private Enforcement Proceedings

Section 53N of the Competition Act provides power to any party which has been affected by the anticompetitive conduct to file claims before the National Company Law Appellate Tribunal ("NCLAT") for recovering compensation from the guilty parties. Section 53N also prescribes for initiation of class action for recovering damages suffered as a result of the contravention. Accordingly, depending on the gravity of the contravention and the number of affected parties, compensation awarded by the NCLAT in a Section 53N proceeding could be enormous.

The recent amendments also bring changes to Section 53N to allow compensation proceedings to arise from settlement orders under Section 48A passed by the CCI.

Calculation of damages on account of an anticompetitive conduct entails complex economic assessment. The Competition Act is also silent on the principles to be followed by NCLAT for calculating and awarding compensation. Till date, the NCLAT has not passed any order on a compensation claim which could provide some guidance on calculation of compensation. Accordingly, it is very difficult for a respondent party in a compensation claim to estimate the quantum of compensation.

The looming threat of private enforcement claim (with uncertainty on the quantum of compensation which could be awarded) could also discourage a charged party from engaging in settlement negotiations with the CCI.

(v) Excessively Pervasive Nature of the Settlement Regime

A settlement under Section 48A, can include two elements (i) settlement amount equivalent to a monetary sum and (ii) behavioral remedies or commitments which can be monitored by the CCI. The settlement mechanism does not provide for an ombudsman or any other tool to a party who may be aggrieved by excessive interference from the CCI during the monitoring process. The absence of a bulwark against any disproportionate intervention by the CCI during monitoring of behavioral remedies could further deter the parties from entering into a settlement with the CCI and ought to be cured.

II. Conclusion

While Section 48A has its heart in the right place, it is insufficient in its present avatar to achieve the desired outcome. Since a settlement negotiation between the charged party and the CCI would fundamentally be a numbers game where the party would choose the less expensive option among other factors, party's ability to predict with certainty the penalty which it is likely to face, would be the significant driving factor. A party would apply for settlement only if it believes that settling, even at the cost

of reputation risk, would be a superior alternative than preferring an appeal against the CCI's decision. *Ergo*, it is of vital importance that both the legislation and the CCI's decisional practice are appropriately upgraded to boost the confidence of the parties facing allegations for breach of Competition Act in order to motivate them to willingly choose the settlement mechanism as their go-to option.