

Asia Internet Coalition (AIC) Industry Submission on the Draft Regulations on Settlements and Commitments (collectively the “Draft S&C Regulations”)

13 September 2023

To
Mrs Ravneet Kaur
Chairperson, Competition Commission of India (CCI)

On behalf of the [Asia Internet Coalition](#) (AIC) and its members, I am writing to express our sincere gratitude to the Competition Commission of India (CCI) for the opportunity to submit comments on the Draft Regulations on [Settlements](#) and [Commitments](#) (collectively the “Draft S&C Regulations”). AIC is an industry association comprising leading internet and technology companies. We seek to promote technology and policy issues in the Asian region, and we are fully committed to the cause of a safe and open internet.

We would like to thank the CCI for its initiative to seek public comments and engage in a comprehensive review of the Draft S&C Regulations. We are grateful for this opportunity to provide our suggestions which will implement the provisions of the Competition Amendment Act, 2023 (Amended Act) and introduce a new mechanism to swiftly address market anomalies and cut down on protracted litigation.

In particular, we commend the CCI for providing detailed guidance on the manner in which commitments and settlement applications may be made, the process to be followed in doing so and outlining a robust mechanism to ensure that rights and obligations are suitably balanced. Indeed, for the settlement and commitment mechanism to be successfully operationalized, the CCI must, through the Draft S&C Regulations provide a clear, certain and consistent process for its implementation to “ensure procedural efficiencies by enabling swifter resolution of cases” (2019 Report of the Competition Law Review Committee (CLRC Report)).

As a general observation, we applaud the CCI for clarifying through the draft S&C Regulations, that commitment and settlement applications respectively, do not require as a precondition, an admission that applicants have contravened the Act. This will act as a tremendous incentive for parties who are undergoing antitrust investigations, to discuss mutually acceptable solutions, without prejudice to their legal positions. The introduction of specific timelines at each stage will also ensure that the process is time bound, consultative, and efficient.

There are some areas in which the Draft S&C Regulations may be further ne-tuned and made user-friendly. For instance, applicants should be provided more time to submit their commitment and settlement applications, instead of the short 75-day period currently envisaged. Further, to incentivize applicants to submit settlement or commitment applications instead of engaging in protracted litigation, the CCI may consider providing greater reductions in the settlement amount payable and must not permit the information submitted by an applicant as part of the process, to be used as evidence against it. The CCI may consider striking an appropriate balance between incentive and deterrence and the Draft S&C Regulations by providing appropriate confidentiality protection to applicants and precluding third parties from misusing the consultation process to address commercial rivalries.

The CCI's implementation of the Competition Act over the last 14 years has demonstrated a "best in class" antitrust enforcement mechanism which is in line with global best practices, including those recommended by the International Competition Network (ICN) and the OECD. The CCI has set high benchmarks for the protection of confidential information and in developing suitable processes which provide parties an adequate opportunity to be heard in a timely and consistent manner. The Draft S&C Regulations must embody the same high standards of competition enforcement and our comments below are an effort to contribute to this process.

As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide inputs into the policy-making process in India. **As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request CCI to consider.**

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact me directly at Secretariat@aicasia.org or +65 8739 1490.

Thank you for your time and consideration and we look forward to hearing from you.



Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments and Recommendations

Section A: Recommendations On Draft Commitment Regulations

1. **Timelines (Regulation 3(2)):** The 75-day period (30 days + discretionary 45 days) timeline for offering settlements is not sufficient. The wording of Section 48B(2) of the Competition Act, 2003 (Competition Act) as amended by the Competition (Amendment) Act, 2023, (Amendment Act) appears to show that the outer limit for parties to submit commitment applications is till the submission of the DG Report. Accordingly, recommend extending this timeline to allow parties to offer commitments anytime after the Prima Facie Order has been passed but before the submission of the DG Report. This would also cover existing cases where 75 days have been crossed. Alternatively, recommend extending the initial timeline of 45 days to 60 days which would be extendable by a period of 30 days and further extended by such additional time that might be granted to the DG to complete its investigation or per a party's legitimate requirement as determined by the CCI. It is settled law that beneficial legislation should be interpreted widely and in favour of the party such that the rights conferred by the legislation are not taken away.
2. **Process timelines (Regulation 4(8)):** We recommend the outer limit of 90 days and to ensure efficiency in process re timeline, recommend that CCI should be empowered to define the timetable appropriate to the circumstances of the case (for example to take account of the number of businesses entering into commitment discussions). Doing so would be in line with international best practices as well.
3. **Use of information (Regulation 11):** We recommend removing the provision allowing information provided in the commitment application to be used against the applicant or other parties if the commitment fails/ is withdrawn. Recommend specifying that (a) information submitted in the commitment proceedings will not be used against the applicant, consistent with international best practices; and (b) CCI teams responsible for reviewing commitment proposals, which may contain self-incriminating evidence, are distinct from the teams involved in adjudicatory proceedings in case the commitment offer is withdrawn or unsuccessful.
4. **Pendency of inquiry (Regulation 4(3)):** We recommend that, similar to SRs, the CCI should mandatorily put the inquiry against an applicant into abeyance till final decision on the commitment application is reached.
5. **Engagement:** We recommend implementing (a) pre-filing commitment discussions, similar to PFCs in combinations, and parties may submit a Letter of Interest (LOI) before formal discussions.
6. **Confidentiality:** We recommend the application of confidentiality regulations to the commitment process, access to confidential submissions of parties through a

confidentiality ring, and that the CCI must only publish the public version of the commitment decision if a commitment is reached and will not publish a decision if the commitment is rejected.

7. **Role of third parties (Regulation 5(1)):** We recommend that the scope of public consultation should be similar for both settlements and commitments and hence, the discretion to invite comments from the public under CRs should be omitted.

We recommend that the extent of information that Third Parties and public can provide on a commitment application be limited to factual information relevant to the commitment application and should be submitted through affidavits - to reduce the potential for motivated or ill-informed submissions. Recommend that the non-confidential summary of case records used for stakeholder consultation should be prepared by the applicant.

Further, we suggest that the applicants should be allowed to access the confidential versions of the submissions made by Third Parties and the public on its commitment application and thereafter allowed to engage with the CCI in commitment discussions on the submissions made by Third Parties and the public before the applicants submit revised commitment applications.

8. **Opportunity to be heard (Regulation 4(7)):** Recommend that an applicant should be provided a definitive opportunity of being heard before CCI rejects its commitment application. Further, recommend clarification that an applicant will have an opportunity to revise its commitment application after conclusion of the hearing.
9. **Modification of application (Regulations 4(2) & 4(5)(c)):** Recommend that (i) the timeline for submitting a revised application be revised from 15 days to 30 days and (ii) applicants be allowed to seek additional time to submit a revised application on reasonable grounds.
10. **Revocation of commitment order (Regulation 10):** Recommend that CCI should have the flexibility to modify a commitment order to reflect any material change in facts/law to ensure continued operation of the commitment order.
11. **Scope of CRs:** Recommend that Section 26(2A) apply to a commitment order - the CCI should not inquire into new complaints/issues that are already addressed in the commitment order.
12. **Commitment Fee (Regulation 8):** Recommend that fee payable be aligned with that payable on submission of an information to the CCI under Regulation 49 of the General Regulations.
13. **Details of past contraventions, pending proceedings and previous settlement / commitment applications (Regulation 3(1)(f)):** Such details are irrelevant to the assessment of a commitment application by the CCI, and would on the contrary be prejudicial. Recommend that this requirement be removed, or in the alternative be scoped to a period of 5 years prior to the passing of the Prima Facie Order in the

instant case and be limited to the same markets which are the subject of the Prima Facie Order.

14. **Final and Binding nature of the Commitment Order (Regulation 6(3)):**
Recommend that a new provision be inserted to allow the Commission to, upon application by the Commitment applicant, review the settlement order and make requisite changes to ensure that it stays relevant and responsive to changing market conditions.

Section B: Recommendations On Draft Settlement Regulations

1. **Timelines for Settlement Offers (Regulations 3(2) and 4(9)) and existing CCI cases:** The 75-day period (30 days + discretionary 45 days) timeline for offering settlements is not sufficient. Further, the wording of Section 48-A(2) of the Competition Act, as amended by the Amendment, appears to show that the outer limit for parties to submit settlement applications is till the issuance of the final order of the Commission. Recommend extending the timeline for submitting settlements till at least (a) the conclusion of oral hearings to offer settlements, or (b) a specified number of days from the date of reserving its final order. This would better balance out the interests of the CCI in saving time and resources and devising a comprehensive and effective settlement proposal. This will also give pending cases a better chance to benefit from settlements. It is settled law that beneficial legislation should be interpreted widely and in favour of the party such that the rights conferred by the legislation are not taken away.
2. **Settlement Discount Ceiling (Regulation 6(3)):** SRs prescribe a maximum settlement discount of 15%. There is no minimum discount prescribed. Recommend prescribing a minimum discount of at least 25% to make the settlement route more attractive to parties. For example, Turkish competition law allows settlement applicants a discount up to 25%. In the alternative, if the maximum discount is to remain 15%, recommend that the settlement amount should not extend up to the maximum leviable under Section 27(d) of the Competition Act.
3. **Settlement Discount (Regulations 3(1) and 4(8)):** Applicants are not permitted to offer submissions on the proposed settlement amount. Propose allowing parties to have input on the initial settlement amount (the full value of which should not extend to the full scope of penalty). Applicants should also have an opportunity to make submissions on mitigating factors related to the proposed settlement amount.
4. **Use of Information against the settlement applicant (Regulation 12):** Recommend removing the provision allowing information provided in the settlement application to be used against the applicant or other parties if the settlement fails/ is withdrawn. The use of information in this manner is contrary to international best practices, such as by

- the European Commission as well as the UK's Competition and Markets Authority, and risks jeopardising the attractiveness of the settlements regime. Recommend specifying that (a) information submitted in the settlement proceedings will not be used against the applicant, consistent with international best practices; and (b) CCI teams responsible for reviewing settlement proposals, which may contain self-incriminating evidence, are distinct from the teams involved in adjudicatory proceedings in case the settlement offer is withdrawn or unsuccessful.
5. **Scope of SRs:** Recommend that Section 26(2A) apply to a settlement order - the CCI should not inquire into new complaints/issues that are already addressed in the settlement order.
 6. **Engagement and Clock Stop:** Recommend implementing (a) pre-filing settlement discussions, similar to PFCs in combinations, and parties may submit a Letter of Interest (**LOI**) before formal discussions; and (b) stopping the clock on/pausing ongoing proceedings once an LOI is submitted by the concerned party.
 7. **Confidentiality:** Recommend the application of the confidentiality regulations to the settlement process, access to confidential submissions of parties through a confidentiality ring, and that the CCI must only publish the public version of the settlement decision if a settlement is reached and will not publish a decision if the settlement is rejected.
 8. **Mandatory Hearing (Regulation 4(7)) and Post-Decision Modification:** Recommend mandatorily hearing parties before adjudicating on their settlement application and providing for comprehensive settlement discussions at this stage. This would allow the CCI to discuss all concerns with the concerned party and allow the latter to design settlement options accordingly, and would be in line with international best practices such as in the European Union. Further recommend providing flexibility for the CCI to modify settlement terms post-issuance in case of material changes which renders the CCI's settlement order unworkable.
 9. **Process Timelines (Regulation 4):** SRs should allow modification of the offer, within 15 days of (a) CCI's prima facie view that the proposed offer does not address the alleged contravention; and (b) the CCI not being satisfied with the settlement proposal after its review of comments/ objections by the DG/ other parties. Recommend increasing the 15-day deadline to at least 30 days for modifying offers and allowing applicants to seek additional time if required, by providing sufficient reasons.
 10. **Opportunity to be Heard (Regulation 5):** CCI is obligated to provide an opportunity to (i) the concerned parties, (ii) the DG, and (iii) any other party (collectively, **Third Parties**), to submit their comments to the settlement application based on the non-confidential summary of the settlement application. Recommend that Third Parties can only submit factual information relevant to the settlement application and should use affidavits for submissions - to reduce the potential for motivated or ill-informed submissions. Recommend that the applicant shall be given access to the confidential version of such submissions by Third Parties (subject to the safeguards of a

confidentiality ring) and be permitted to file a response to the same. Recommend that the non-confidential summary of case records used for stakeholder consultation should be prepared by the applicant.

11. **Settlement Fee (Regulation 9):** The settlement fee is based on the incremental turnover of the parties. Recommend aligning the settlement application fee with the fee for submitting information to the CCI due to the already significant settlement amount that a party needs to pay and non-barred compensation applications.
 12. **Details of past contraventions, pending proceedings and previous settlement / commitment applications (Regulation 3(1)(f)):** Such details are irrelevant to the assessment of a settlement application by the CCI, and would on the contrary be prejudicial. Recommend that this requirement be removed, or in the alternative be scoped to a period of 5 years prior to the passing of the Prima Facie Order in the instant case and be limited to the same markets which are the subject of the Prima Facie Order.
 13. **Final and Binding nature of the Settlement Order (Regulation 7(3)):** Recommend that a new provision be inserted to allow the Commission to, upon application by the Settlement applicant, review the settlement order and make requisite changes to ensure that it stays relevant and responsive to changing market conditions.
 14. **Revocation of settlement order (Regulation 11):** Recommend that CCI should have the flexibility to modify a settlement order to reflect any material change in facts/law to ensure continued operation of the settlement order.
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