IV. COMMITMENT AND SETTLEMENT SCHEME UNDER THE INDIAN COMPETITION LAW: A STEP TOWARDS BETTER ENFORCEMENT OF THE LAW

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ABSTRACT

This paper makes an attempt to study the commitment and settlement scheme, introduced by the Ministry of Corporate Affairs in the Competition (Amendment) Bill, 2020. The authors in order to dig deeper, have looked into similar schemes known by various other names in the European Union and the United States to analyse the potential successes and limitations in the Indian context. The said scheme, at its genesis, seeks to strengthen the public enforcement agency of nodal competition regulator. In furtherance, the authors have analyzed the 107 violation orders passed by the Competition Commission of India over a period of ten years (May 2009 – December 2018) to assess the applicability of the scheme in the Indian context. As per the results, it was realized that only 14 per cent of the violations found by the Commission were initiated on its own, and rest 86 per cent of the cases were initiated by private parties. The paper also forays into assessing its impact on the faster disposal of cases, and on some of the negotiation tools present in the Indian context of such a scheme. The authors conclude the paper by stating that even though the said scheme is yet to be enforced, experiences abroad and the data compiled for India over ten years would suggest that the road ahead is likely to be rockier than rosy for the Commission. It would be more prudent for Indian lawmakers to first rely on the experience abroad, and relate it with the experiences closer home to formulate a more robust competition law regime.

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I. INTRODUCTION

The Competition Act, 2002 ("Act") was enacted in order to usher in the post-liberalization reforms in India. The said legislation repealed its precursor, the Monopoly and Restrictive Trade Practices Act, 1969, and introduced both substantial and procedural changes to Indian Competition Law. One of the notable departures was that the former statute opined on the Indian economy as a whole, while the latter saw the economy on a piecemeal basis where rules would be determined by the 'Relevant Market ("RM")'.[1] The Act also stripped the Director General's Office of its power of initiating *suo moto* investigation, which a lot of entities believed were grossly misused to witch-hunt businesses,[2] and allowed the nodal regulator to have extraterritorial jurisdiction, among other things.[3] Yet both the legislations seek to regulate the market economy and replicate state intervention in the way industries organize themselves. Both of them seek to detect cartels and scrutinize single-firm conduct.

In its pursuit of antitrust policy goals, the Government of India ("GOI") recently released a draft version of the Competition Amendment Bill, 2020 where it has sought to introduce a commitment and settlement scheme to the

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[1] Sumit Jain, *Competition Landscape in the Sports Industry: Unravelling CCI's Decisions*, CENTRE FOR BUSINESS AND COMMERCIAL LAWS (May 22, 2020), https://cbcl.nliu.ac.in/competition-law/competition-landscape-in-sports-industry-unravelling-ccis-decisions/.

[2] H. K. Paranjape, *The MRTP Amendment Bill: A Trojan Horse*, 19(17) ECONOMIC AND POLITICAL WEEKLY, 715-29 (1984), www.jstor.org/stable/4373208.

[3] Mihail Danov, *EU Competition Law Enforcement: Is Brussels I Suited to Dealing with All the Challenges?*, 61(1) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 27-54 (2012), www.jstor.org/stable/41350135.

Act.[4] The GOI has relied on the Competition Law Review Committee's ("CLRC") recommendations to make such a change and seeks to strengthen the enforcement procedure of the Act through the same.[5] The paper seeks to study similar provisions prevalent in other competition jurisdictions of the world (the US and the EU), concerns associated with them, and relate it with the Indian experience of ten years of implementation of the Act. The authors have concluded the paper by pointing out gaps in the current scheme of the amendment, and at the same time suggesting possible recourse for the Indian lawmaker to achieve goals set in the Preamble of the Act.

II. BACKGROUND

Competition law enforcement is perceived to be a complex process worldwide.[6] The said process has to achieve twin objects: A) fulfil the goals established in the national competition policy; B) detect as many cartels and infringements as possible. While the goals of Indian competition policy are largely predictable,[7] there is no empirical data available on how much the Act has fared well in detecting the infringements happening. In fact, maximizing detection itself becomes a goal for the regulators as it is assumed that resources available with them are always scarce, and therefore the net violations would

[4] The Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (Feb. 12, 2020), Govt. of India, https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf.

[5] MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE COMPETITION LAW REVIEW COMMITTEE-2018, 41-46 (2019), Govt. of India, http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

[6] B.S. Chauhan, *Indian Competition Law: Global Context*, 54(3) JOURNAL OF THE INDIAN LAW INSTITUTE 315-23 (2012), www.jstor.org/stable/44782475.

[7] Aditya Bhattacharjea, *India's Competition Policy: An Assessment*, 38 ECONOMIC AND POLITICAL WEEKLY 3561-574 (2003), www.jstor.org/stable/4413938.

always succeed the net detections.[8] It is in this pursuit that regulators keep redefining themselves so that they have more resources to implement the law, and at the same time result in faster disposal of cases - an aspect which can be attributed to the first object itself. The commitment and settlement scheme is one such tool incorporated to strengthen enforcement mechanisms prevalent in other competition jurisdictions of the world, and an attempt is being made to introduce it in the Indian context as well.[9]

III. ANALYSIS

Competition law enforcement can broadly be classified under two categories: A) Public enforcement; B) Private enforcement. As argued by Peyer,[10] public enforcement is a safer mode of implementation. The authority, as well as its officers, are public entities, and therefore the presumption is that all of them would be genuinely motivated towards market welfare. In the Indian context, the competition authority is empowered to initiate *suo moto* investigations against enterprises and find a case for infringement for public enforcement.[11] However, as analysed in the latter part of this paper, such a process has remained largely inadequate. Therefore, in order to strengthen the process, the GOI has innovated to introduce a commitment and settlement scheme to the Indian competition law. Section 48A and Section 48B of the Competition Amendment Bill, 2020 govern the settlement and commitment

[8] Kai Hüschelrath & Veith Tobias, *Cartel Detection in Procurement Markets*, 35 MANAGERIAL AND DECISION ECONOMICS 404-22 (2014).
[9] Laurent Warlouzet & Tobias Witschke, *The Difficult Path to an Economic Rule of Law: European Competition Policy, 1950—91*, 21(3) CONTEMPORARY EUROPEAN HISTORY 437-55 (2012), www.jstor.org/stable/23270673.
[10] Sebastian Peyer, *Cartel Members Only—Revisiting Private Antitrust Policy in Europe*, 60(3) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 627-57 (2011), www.jstor.org/stable/23017023.
[11] The Competition Act, 2002, No.12 of 2003, Acts of Parliament, 2003 (India), § 19.

scheme respectively. Even though the CLRC report places reliance on the EC law while advocating such a scheme,[12] the author has given equal importance to the US antitrust law to make a stronger case for reform.

IV. POSITION UNDER THE US LAW

US antitrust settlement agreements are governed by plea bargains and consent decrees.[13] The said process necessarily involves talks with the parties involved, where they can negotiate the exact amount with the authority for the violation.[14] The authority in return grants immunity to the violating parties from future proceedings.[15] One of the most recent case laws implementing such a scheme was in the matter of *US v. Microsoft*.[16] Even though the authorities didn't invoke a monetary fine in this particular case, they passed a slew of measures agreeable to the defendant which compensated for the market harm caused.

One important aspect of the US settlement scheme is that defendants relinquish their right to appeal.[17] This reduces the follow-on litigation for the authorities (thereby allowing them to focus more on other infringements), and at the same time is perceived to be a trade-off for the contravening parties where they are allowed to negotiate the exact fine with the authorities. There

[12]The Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (Feb. 12, 2020), Govt. of India, https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf.
[13] Andreas Stephan, *The Direct Settlement of EC Cartel Cases*, 58(3) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 627-54 (2009), www.jstor.org/stable/25622229.
[14] Maxwell S. Isenbergh & Seymour J. Rubin, *Antitrust Enforcement Through Consent Decrees*, 53(3) HARVARD LAW REVIEW 386-414 (1940).
[15] Peyer, *supra* note 10.
[16] US v. Microsoft Corp, No. CIV.A.98-1232(CKK), United States District Court, District of Columbia (2002), https://www.leagle.com/decision/2002375231fsupp2d1441362.
[17] Peyer, *supra* note 10.

is also a chance that the entire settlement process fails and, in that case, the executive and the adjudicatory wing of the authority are clearly demarcated.[18] This allows the opting-in parties to repose faith in the authority where they have ample scope for cooperation, and at the same time walk out in case the process doesn't work out. In fact, the success of such a scheme is quite remarkable as 90 per cent of the corporate defendants opt-in for such a measure.[19]

V. POSITION UNDER THE EU LAW

The EU competition law settlement scheme is more procedural in nature.[20] The parties are not allowed to negotiate the exact amount with the Commission, and in return, they reserve their right to appeal. In fact, the amount of penalty imposed is unpredictable even till the last moment when the order is passed.[21] The limitation of such a process is that there is no clear demarcation between the administration and adjudicatory wing of the authority, and therefore once the parties opt-in for a settlement agreement, they either settle the violation with the Commission on its terms or face the same set of officers with whom the negotiation talks failed in adjudication.[22] In all, settlement proceedings are largely perceived to be an administrative process for the Commission where it reduces the number of hearings required to be

[18] *Id.*
[19] Peyer, *supra* note 10.
[20] Paranjape, *supra* note 2.
[21] Per Hellström, Frank Maier-Rigaud & Friedrich Wenzel Bulst, *Remedies in European Antitrust Law*, 76(1) ANTITRUST LAW JOURNAL 43-63 (2009), www.jstor.org/stable/40843701.
[22] Warlouzet & Witschke, *supra* note 9.

conducted to establish a violation, and in case the parties are not satisfied with the outcome, they can file an appeal with the higher authority.[23]

VI. IMPACT ON PRIVATE ENFORCEMENT

The author, in order to understand larger enforcement mechanisms available in the Indian competition law, processed the contravention orders passed by the Commission over a period of ten years (May 20, 2009 to November 6, 2018) available on its website.[24] It was found that out of 107 orders passed, an overwhelming 87 percent of cases were initiated by private entities (93). This suggests that the Indian competition regulator is heavily reliant on private players for enforcement of the law, a position closer to the US antitrust law where private players are entitled to treble damages in case of violation.

The said data raises multiple questions of law on the commitment and settlement scheme. Firstly, the said scheme doesn't talk about the locus of private entities. Even though the evolving jurisprudence around such a tool would suggest that it is invoked in public enforcement cases, overwhelming evidence in the Indian context would suggest that there is a high likelihood that the matter would be initiated by a private entity. This takes the given scheme in somewhat unchartered terrain when compared to the US and the EU where the Indian Commission hits a roadblock while drafting subordinate legislation under the Bill, more so in the context of the right to appeal being explicitly repealed. Any comparison with the US antitrust scheme viz-a-viz repealing the right to appeal would be flawed for a couple of reasons: A)

[23] *Id.*

[24] Competition Commission of India, *Antitrust-Section 27*, GOVT. OF INDIA, https://www.cci.gov.in/orders-commission/102.

Defendants in the US are allowed to negotiate the exact amount of settlement with the authority; B) Case is initiated by the authority itself.[25] Another important bearing of such an analysis would be that while the EU passes detailed settlement orders thereby allowing private entities to calculate damages caused, the US consent decrees contain very little details of the case in order to close the matter.[26]

If the Indian law is more inspired by the EU, private entities would still be able to calculate damages caused, and therefore would levy the appeal process under other economic laws, if not the Act. The CLRC report pays more reliance on the EU and therefore repealing the right to appeal of the parties appears to be even more unsubstantiated, even though it is introduced in the context of faster disposal of cases. The right to appeal is reserved in the EU under EC Article 230. The following questions cast serious doubts on the efficacy of the scheme itself given that – A) the Commission does not clearly demarcate its administrative and adjudicatory wing; b) the right to appeal is already repealed. The parties are less likely to opt-in for such a scheme as once they opt-in, they may be forced to settle the violation even on unfavourable terms with the Commission.

VII. IMPACT ON FASTER DISPOSAL OF CASES

As dealt with above, the GOI has repealed the right to appeal under the context of faster disposal of cases. It needs to be kept in mind that as per the evidence available from other jurisdictions, the said scheme can only be

[25] Milton Katz, *The Consent Decree in Antitrust Administration*, 53(3) HARVARD LAW REVIEW 415-47 (1940).
[26] Competition Commission of India, *Antitrust-Section 27*, GOVT. OF INDIA, https://www.cci.gov.in/orders-commission/102.

implemented in public enforcement cases. Therefore, as stated above, since only 13 percent of violations are through public enforcement, therefore the said scheme, at best, would have only an incremental effect on the process. Given that the current form of the scheme puts defendants in a patchy spot, they are less likely to go for the scheme in the first place. A holistic reading of the Act would suggest that it is more convenient for the parties to keep delaying the matter and in case a violation is found, levy the appeal process. The Indian competition authority at maximum can impose a fine of three times the profit earned during the time of anti-competitive conduct, or ten percent of the average turnover for the last three preceding financial years (whichever is higher).[27] The defendants can compensate for such a fine by earning equivalent profit during the time of contravention as the investigation process is quite lengthy. Unlike the US, the Indian regulator cannot go for criminal prosecution of the individuals under the Act.[28]

VIII. OVERLAP WITH THE LENIENCY SCHEME

The Committee report suggests that the commitment and settlement scheme overlap with the leniency programme envisaged in Section 46 of the Act.[29] This claim has some merit. Both the schemes are tools of negotiation for the Commission to incentivize cooperation from the contravening parties - where the former saves time and resources expended in investigating the infringements, and the latter gets potential concession on the fine imposed.

[27] The Competition Act, 2002, No.12 of 2003, Acts of Parliament, 2003 (India), § 27.
[28] Peter Whelan, *Resisting the Long Arm of Criminal Antitrust Laws: Norris v the United States*, 72(2) THE MODERN LAW REVIEW 272-83 (2009), www.jstor.org/stable/20533242.
[29] The Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIRS (Feb. 12, 2020), GOVT. OF INDIA, https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf.

There are few technical differences though, between the schemes. The leniency programme is more in line with the commitment scheme (than the settlement) given that the time for submission of the applications is the same, i.e., before the submission of the investigation report. The difference is that while the defendant admits contravention in case of leniency application; it is not the case in a commitment scheme. More so, the right to appeal is reserved in leniency decisions where the commitment scheme explicitly repeals the same.[30]

The settlement agreement looks like a leniency process in terms of admission of guilt, however, the fundamental difference is that the timing of application differs. The settlement process can only be initiated once the investigation report has been submitted and in terms of CLRC - where the defendant is convinced with the strength of the case made against it. Therefore, the same looks quite administrative in nature as in the case of the EU.

IX. CONCLUSION

The GOI has introduced the commitment and settlement scheme in order to strengthen enforcement mechanisms in the Act. The said scheme is envisaged to be one step towards faster disposal of cases and freeing up scarce resources of the Commission. It may also result in better detection of cartels. However, as analyzed above, the plausibility of such a scheme remains rather grim. Repealing the right to appeal of the defendants casts serious doubts on the efficacy of such a scheme, more so when it is inspired by the EU law. The administrative and adjudicatory wing of the Indian Competition Commission are not demarcated which may further discourage the parties to opt-in for a

[30] The Competition Act, 2002, No.12 of 2003, Acts of Parliament, 2003 (India), § 53(B).

scheme. The US model may provide some respite; however, the parties are not allowed to negotiate the exact fine.

The amended sections in their current form provide scope for the parties to be locked-in, once they file for a settlement agreement with the Commission. The scheme is yet to see the light of the day and the experiences in the US, EU, and data compiled for implementation of the law over ten years in the Indian context would suggest that the road ahead is rockier than rosy for the Indian regulator. The Commission may opt for sub-ordinate legislation as present in the current form of the scheme, however the same cannot bypass the original text of the statute. It would be more prudent for the Indian legislator to rely on the experience abroad, and relate it with the experiences home as seen in the last few years. This would allow the formation of a more robust competition enforcement regime fulfilling goals envisaged in the Preamble of the Act.