COMPETITION INFRACTIONS

THIS ROUTE CAN AVOID PROTRACTED LITIGATION, GIVEN HOW A DEFINITE FINDING OFTEN ELUDES THE CONVENTIONAL ROUTE. NEED TO EXTEND THIS TO CARTELS TOO

Settlement a good option

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Views are personal

FOLLOWING A 2012 complaint, the Competition Commission of India (CCI) imposed a penalty of ₹136 crore on Google in 2018 by a majority (4-2) order, for abuse of dominance. The order, having been stayed, is yet to reach finality. In contrast, following a 2019 complaint, the French Competition Authority imposed a fine of 220 million euros on Google in 2021 for allegedly abusing its dominant position, after Google settled on paying a fine and changing some of its business practices.

This probably motivates the Competition (Amendment) Bill 2022, which proposes the settlement of proceedings initiated for the alleged contraventions (agreements having an appreciable adverse effect on competition and abuse of dominance). However, some discomfort is visible in certain circles about the propriety of settlement of competition infractions. Most of the enforcement action in matured jurisdictions is resolved by settlement with the accused parties, which generally consent to the entry of judicial or administrative orders without admitting or denying the allegations against them. It is not new in India also. Many commercial laws provide for settlement by way of compounding. Sebi commenced the settlement of securities infractions via a circular in 2007. The statute was, however, amended in 2014 to explicitly enable settlement. In 2006, a new chapter was incorporated into the Code of Criminal Procedure 1973 to facilitate plea bargaining, a kind of consent settlement, for some offences that attract imprisonment of up to seven years.

The advantages of this kind of settlement are many in contexts like India's. It frees up the scarce resources of the authorities and the judicial system, which are already saddled with a very large number of enforcement actions awaiting disposal for years. It allows the authorities to have innovative deterrents for the accused while achieving equitable remedies for the victims. Most importantly, it achieves something in days or months, which decades of trial may fail to, and avoids the risk of the accused going scot-free after prolonged, expensive, and valiant legal battles, often for some technical reasons.

The need for settlement of competition infractions is great for three reasons. First, a definite finding in a given context is extremely difficult as competition law follows the rule of reason, where what matters is the context rather than the conduct. For example, only an enterprise having a position of strength can abuse its dominance. Two reasonable persons would have two opinions on whether an enterprise has a position of strength. Depending on the skill and expertise of personnel, the kind and extent of information available, and the quality of tools and technology used, one may arrive at a false context, yielding either a false negative or positive. Nothing is more damaging to an economy than punishing a false negative (penalising a business for its impeccable conduct).

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Second, the CCI has levied an aggregate penalty of over ₹20,000 crore over the years. The deterrent effect of this penalty quantum is not visible on the ground as realisation of penalties has been negligible, thanks to protracted litigation. Even this penalty comes after prolonged proceedings, which put an undue burden on the informant to establish the infraction. In the interim, the miscreant continues with the misconduct.

Third, the product or conduct in question may disappear after damaging the market, but much before the authorities take a view of the same.

Theoretically, any enforcement action—irrespective of its gravity—can be settled. It is subject, however, to the condition that the settlement terms are appropriate for the alleged violation. While considering the appropriateness of the terms, the Commission can take into account all relevant factors, keeping in view the objective of the statute and the gravity of the violation. These factors may include: was the violation intentional, was it beyond the control of the party, was it technical and/or minor in nature, does it warrant a penalty under the statute and, if so, the likely amount of penalty, the party's conduct in the investigation process and disclosure of full facts, its history of violation of laws, the remedial/preventive measures undertaken since the violation to minimise recurrence, the quantum of harm to consumers or the party's gain, conditions necessary to deter future non-compliance, whether the party has admitted the guilt, and other facts and circumstances.

The terms can be very innovative and may include payment of money in the form of settlement charges, disgorgement of illegal gains, cease-and-desist from a practice, permanent injunction, behavioural or structural remedy, censure, etc. Therefore, the settlement should be available for all infractions, including cartels which are not presently covered in the Bill.

Some are apprehensive that a liberal approach to settlement may encourage potential miscreants to violate any provision of the law and settle the violation if at all caught. However, settlement is not a matter of right. The settlement terms proposed by the party may not be accepted. Sebi accepted 107 applications for settlement and rejected 167 in 2021-22. Even assuming for the sake of argument that a proceeding could be settled, it is not a cause for concern as long as the objectives of enforcement are fully realised. That is, at least the same outcomes, as would have been obtained if the proceedings were adjudicated on merits, are achieved through the settlement. At times, the settlement may achieve more than the adjudication on merits simply because the terms of the settlement could be more innovative. They are more effective because these orders are passed only after compliance with the terms of the settlement.

However, care needs to be taken to ensure that the process is not abused. A party accused or likely to be accused of a violation may seek settlement at any stage of the proceeding. The process must not be completed until the fact-finding process is over, as that would enable appreciation of the full gravity of the violation. If full facts have been unraveled, there is no need to have the views of any third party to arrive at a settlement. Objective parameters must be laid down to determine the terms of the settlement. The terms could be vetted by external experts to ensure fairness and proportionality. The parties must be under obligation to disclose the details of the settlement, in addition to the disclosure of the settlement order by the CCI on its website. The Commission may use the disgorged amount to compensate consumers wherever possible.

A settlement that ends protracted litigation yet deters future violations is a superior solution. As the maxim goes: *Expedit republicae ut sit finis litium.* (It is for the good of the state that there should be an end of litigation.)