Commitment and Settlement Clause in Competition Act: Boon or Bane?

written by Pawan Khatri | October 23, 2019

The government is considering the introduction of a commitment and settlement clause in The Competition Act to reduce pendency of cases by reaching settlements extending relief to companies bleeding with loss in business due to such prolonged trials. The statistics for such trials in the past few years demonstrate that it takes an average of 4 years for the CCI to reach final decisions and almost 40-45% of such decisions are set aside by the appellate authority.

Long trials and high pendency are a result of increasing complexities of cases and shortage of resources in the DG's office which is responsible for the investigation of cases referred by the CCI. The Competition Law Review Committee (CLRC), has suggested the government to introduce the mechanism of commitment and settlement in order to achieve fast track and optimal disposal of cases using a mechanism which exploits fewer resources of the commission, saves time, helps avoid loss of business and enhance the ease of doing business.

Commitment v. Settlement –

Settlement involves an admission of violation and liability by the party for violation of anti-trust law. For the purpose of settlement, it is important that the authorities are able to establish with the initial investigation that there was a violation of the law. Set of fines and remedies are imposed on the party which are however lesser in comparison to what could have otherwise been imposed on the conclusion of full investigation and trial.

Commitment involves a denial of violation and liability still choosing to commit behavioural remedies in business operations as mutually agreed by the party and anti-trust authorities in order to avoid the impact of such nature which can be harmful for the competition. These remedies are usually agreed for a commitment by the party in exchange for the termination of further investigation by the authorities. Also, the commitment mechanism is usually offered only in less severe violations.

The Indian Scenario –

The intent behind the introduction of commitment and settlement mechanism in the Competition Act is to speed up the resolution mechanism for cases arising out of violation of the act. Quick Settlements will help to solve high pendency of cases and the tackle the backlog, but at the same time, any amendment in the law should ensure that it enhances the efficiency of the law and not just ease the burden of authorities.

The existing backlog and high pendency are attributable to the fact the Competition Commission of India (CCI) has scarce resources. Long delays from such adjudication procedure consequently lead to business suffering losses. In the midst of these problems, it shall be a huge relief if a mechanism enables the authorities as well as companies to achieve quicker resolution by entering into a settlement.

It is a known fact that Competition Law is hard to implement. There are so many factors involved and there are no fixed and fully accurate parameters to asses if a corporate move shall affect competition in the market and hurt consumers or not. In the history of all cases that have come before the commission, the probability of any case being easily assessable

of violation is extremely low. Mostly, the cases of violation are rather complex and gathering the evidence to establish such a violation is also difficult.

This further goes on establishing that CCI's pile of backlog and pending cases are only going to increase if no alternate resolution mechanism is introduced. The curves of the proposed mechanism are yet to crystallise. For example, under what kind of framework will the mechanism operate, how shall multiparty violations reach settlements, what shall be the monitoring mechanism to keep a check on whether companies are making amends in their behaviour as committed by them under the commitment mechanism.

Commitment and Settlement clause in other Anti-Trust Regimes -

Provisions providing for commitment, settlement and remedies with reference to anti-trust violations have been around for more than a decade in the US, EU & UK. It is important to note that, in most countries, such mechanisms are not offered or offered with a different procedure in severe cases involving hardcore violations and horizontal conduct under anti-trust laws involving violations which at times are also criminally prosecutable such as price-fixing, bid-rigging and market or customer allocation.

USA

In mid-'90s US witnessed a shift in Anti-Trust regime wherein the new approach was to avoid litigation and enhance regulation. This diplomatic shift in approach by antitrust enforcement agencies was propelled by the 'belief' that consent decrees have a higher potential to extract fines and better resolution from the parties under investigation in comparison to what it could obtain via litigation. The phrase "Time is Money" held truer than ever before as Businesses preferred commitments and settlements over prolonged trials even in cases where trials had a possibility to cost less or not lead to a fine at all if the agencies fail to put together evidence establishing a violation.

EU & UK

The anti-trust law enforcement agencies in the European Union and the United Kingdom have streamlined and expedited the mechanism for commitments and settlements. The European Commission which is responsible for anti-trust Regulation in Europe initially adopted the settlement mechanism whereas commitment mechanism was adopted after some years. Initially, the European Commission only allowed for settlements in vertical violations and cartel cases. However, it recently adopted a settlement mechanism with a different procedure for cases relating to abuse of dominant position since 2016. The procedure for settlement usually involved the commission showing evidence to the parties sufficient enough to bring the trial for violations to a final decision, the party is then offered to come up with their statement of objections. Eventually, the parties either admit the liability and agree to settle or deny liability and go to trial.

Whether adoption of Commitment and Settlement clause by Anti-Trust Agencies in the US, UK and EU against violation of Anti-trust laws an effective tool of resolution or not?

Taking into consideration past few instances of misuse and abuse of Anti-trust laws in the international sphere, the commitment and settlement mechanism has had an unfavourable effect on the fines imposed and remedies obtained by the agencies in such agreements. The remedies obtained from the settlement of such alleged violation have nowhere been close to a resolution

which could have been achieved from taking the case to trial.

Conclusion – Commitment and Settlement Clause

Settlements shall help the parties and the agencies to resolve disputes arising out of anti-trust violations in a quick, effective and thorough manner. The test for what constitutes an acceptable settlement is whether it can tackle the anticompetitive violation in a manner that it eliminates its negative impact and at the same time prevents a recurrence. The anti-trust authorities should not accept a proposed settlement if it fails to achieve the said objectives. In situations when the proposed settlement seems to fail the test of acceptable settlement, the commission should go to trial for a more effective result.

Settlements for violations which fail to impose adequate sanctions, fines and remedies which could alternatively have been achieved by litigation consequently affect not only the parties involved but also consumers. Promoting and creating a culture of commitments and settlements as a general measure for violation of anti-trust laws can affect the authority of CCI, the very existence of which is to deter companies from violation the anti-trust laws.

The reason why "settlements offer better resolutions than trial" is termed as a 'belief' and not a 'fact' because the mere existence of a settlement mechanism does not guarantee effective resolution. Rather an effective approach of enforcement agencies in the selection of cases and obtaining better remedies from the parties can help to transform this belief into a fact. Further, the implementation of such a commitment and settlement clause should not be introduced as a general substitute for litigation. The same can also help CCI to ensure that it does not weaken the deterrence effect of Competition Act.

Contributed By - Pawan Khatri

Designation - Associate

References -

- The Need for Settlements and Commitments Under the Competition Act – Available at https://www.azbpartners.com/bank/the-need-for-settlements-and-commitments-under-the-competition-act/
- Commitment Decisions In Antitrust Cases, Directorate For Financial And Enterprise Affairs Competition Committee – Available at https://www.justice.gov/atr/file/873491/download
- Antitrust Settlements: The Culture of Consent - Douglas H. Ginsburg, Joshua D. Wright. Available at https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf
- Settlement of cases under Indian competition law - Karan S. Chandhiok and Salman

Qureshi – Available at https://www.vantageasia.com/settlement-cases-indian-competition-law/
- The competition law needs to be effective – Available at Https://www.livemint.com/opinion/online-views/opinion-the-competition-law-needs-to-be-effective-11571675441630.html
King Stubb & Kasiva,
Advocates & Attorneys
Click Here to Get in Touch
New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi
Tel: +91 11 41032969 | Email: info@ksandk.com