



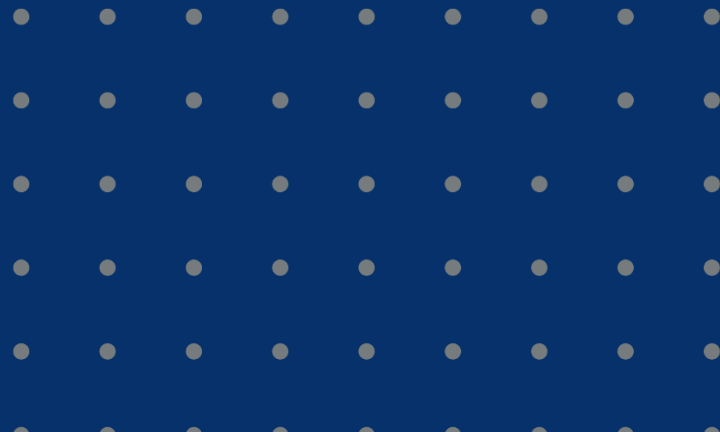
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Written Comments

COMPETITION COMMISSION OF INDIA'S DRAFT REGULATIONS ON SETTLEMENT AND COMMITMENT



COMPETITION COMMISSION OF INDIA'S DRAFT REGULATIONS ON SETTLEMENT AND COMMITMENT

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The Dialogue submitted two written comments to the Competition Commission of India, i.e., one on The Competition Commission of India Draft (Commitment) Regulations, 2023 and one on Draft Competition Commission of India (Settlement) Regulations, 2023. For the public version, we have combined both our written submissions in a single draft in the interest of conciseness and brevity.

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1. INTRODUCTION

The recent Competition (Amendment) Act, 2023 (2023 Act), has introduced the commitment and settlement frameworks to reduce antitrust litigation and ensure quicker market corrections. The Competition Commission of India (CCI/ Commission), on 23 August 2023, published the Draft Settlement Regulations (DSR) and the Draft Commitment Regulations (DCR) for public consultation. The regulations will allow an enterprise to approach the CCI and offer commitments or settlements in case of certain alleged contraventions of the Competition Act, 2002 (the Act).

The Dialogue submitted its comments on certain crucial aspects of the draft regulations. We have drafted these comments on the basis of secondary research as well as inputs collected from stakeholders in the legal fraternity, industry and civil society.

2. KEY THEMES

2.1. Implications for Findings of Contravention

The DCR & DSR provide that an order passed by the CCI agreeing to a commitment or settlement proposal does not mean that a party is in contravention of the law. The clause could encourage parties to approach the Commission without the apprehension of an adverse order. However, certain clauses may lead to uncertainty with respect to the potential implications of opting for the commitment or settlement mechanism.

2.1.1. Relevant Clauses from the DCR

Clause 6, describing the nature and effect of a commitment order, reads as follows:

“6(1) The order passed by the Commission agreeing to the commitments offered shall not be construed as a finding of contravention by the Commission against the Commitment Applicant.”

Clause 11, describing the power to use the information provided by the commitment applicant, reads as follows:

“Notwithstanding anything contained in these regulations, the Commission may use the information submitted by the Commitment Applicant against it or such other parties to the inquiry who are not part of the commitment proceedings.”

2.1.2. Relevant Clauses from the DSR

Clause 7(1), describing the nature and effect of a settlement order, reads as follows:

“7(1) Without prejudice to provisions of section 53N of the Act, the order passed by the Commission agreeing to the proposal for settlement shall not be construed as a finding of contravention by the Commission against the Settlement Applicant.”

Clause 12, describing the power to use the information provided by the settlement applicant, reads as follows:

“Notwithstanding anything contained in these regulations, the Commission may use the information submitted by the Settlement Applicant against it or such other parties to the inquiry who are not part of the settlement proceedings.”

2.1.3. Key Considerations

a. The regulations do not explicitly provide whether opting for commitment or settlement mechanism essentially means that an applicant has contravened the Act. However, it does say that an order accepting the commitment or settlement proposal shall not be construed as a finding of contravention against the applicant. The clause may encourage parties to file an application without the apprehension of its conduct being found in violation of the Act.

b. However, complexity arises when reading Clause 11 of the DCR or Clause 12 of the DSR which provides that the information submitted by the applicant may be used against it by the CCI. In the absence of clarity on the scope of this use of information, opting for the commitment or settlement mechanism may, in fact, lead to a finding of contravention through other orders of the CCI or appellate forums.

2.1.4. Examples in other frameworks

a. In the European Union (EU), settlement cases explicitly require parties to admit their liability if they want to benefit from the settlement process. As per paragraph no. 2 of the Settlement Notice, the parties to the proceeding have to admit to the European Commission (EC) about their participation in the cartel and their liability.¹

b. However, a notable distinction between the EU settlement regime and the proposed Indian settlement framework is that the EU limits settlement to cartel cases, while in India, it is proposed to encompass violations under Section 3(4) and Section 4 of the Act.

c. With respect to the consequence of filing a settlement application, it is stated that in case the EC decides to adopt settlement terms that are different from the ones proposed by the parties or decides not to go ahead with the settlement submissions, then the acknowledgements provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.²

d. Similarly, in the UK, the law clearly requires the CMA to issue an infringement decision even in settlement cases.³ Further, if the party decides to not go ahead with the settlement, then the CMA cannot use the admissions as evidence against any of the parties to the proceedings.⁴

2.1.5. Recommendations

a. The commitment and settlement regulations may provide clear guidance on whether parties engaging in the mechanisms will be required to admit contravention of the Act. This clarification will provide parties certainty on the potential consequences of opting for the commitment or settlement mechanism.

b. Additionally, the regulations may clearly communicate how the information provided by the applicant will be utilised and in what circumstances the information can be utilised by the CCI as evidence. This can ensure transparency in the commitment and settlement process.

¹ Para 2, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. Retrieved September 12, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

² Para 27 and 29, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, EUR-LEX - 52008XC0702(01) - EN - EUR-LEX. (n.d.-c). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

³ Rule 9(5), Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014. Retrieved from <https://www.legislation.gov.uk/uksi/2014/458/made>

Also see Para 14.26, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (2022, December 1). Retrieved 13 September, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement>

⁴ Para 14.32, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022, December 1). Retrieved from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement>

2.2. Calculation of settlement discount

Under the DSR, the settlement will also include a financial consideration i.e., settlement amount. This is in line with various global frameworks, where a settlement process also involves furnishing an amount. The DSR states that the process for calculation of the settlement amount would be prescribed under the penalty guidelines. Further, the regulations allow the Commission to impose a discount of up to 15% on the settlement amount.

2.2.1. Relevant Clause in DSR:

Clause 6, describing the manner of determining the settlement amount, reads as follows:

“(1) The Settlement Amount may extend up to the maximum amount of penalty that would have otherwise been leviable under section 27(b) of the Act.

(2) For the purpose of determining the Settlement Amount, the Commission will be guided by the Penalty Guidelines.

(3) Further, the Commission shall consider the level of cooperation extended, nature of disclosure made by the Settlement Applicant and the settlement proposal, and may apply a settlement discount and reduce the amount determined under sub-regulation (1) and (2) by up to 15% (fifteen per cent).”

2.2.2. Key Considerations

a. The primary subject of deliberation on this clause pertains to the ambiguity surrounding the calculation of settlement discount, as the DSR allows for a range of “up to 15%” on the settlement amount. While the regulations mention that the CCI will be guided by Penalty Guidelines for calculation of the Settlement Amount, the manner of calculating the exact discount has not been delegated to Penalty Guidelines.

b. Lack of clarity on the minimum discount that the applicant may get and on the calculation of settlement discount can potentially impact their ability to make informed strategic assessments when considering engagement in a settlement process with the CCI.

2.2.3. Examples in other frameworks

Different frameworks have come up with guidance on the calculation of settlement discount. In the UK, the settlement discount at the stage of pre-statement of objections can be up to 20%, whereas post-statement of objections can be up to 10%.⁵

⁵ Rule 14.30, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022, December 1). Retrieved September 13, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement>

2.2.4. Recommendations

- a. The CCI may consider providing clarity on the amount and the discount within the settlement regulations itself, rather than delegating it to the penalty guidelines. It will allow stakeholders to have a more cohesive view and analyse the regulations in a more coherent manner.
- b. Alternatively, the CCI may publish the penalty guidelines soon with guidance on calculating discounts to avoid delay in the finalisation of the settlement framework. For potential guidance on the calculation of discounts, the framework adopted by the UK may be referred to.
- c. The CCI may also consider adopting a fixed percentage discount on the settlement amount. Alternatively, it could establish a lower threshold for the percentage, for example, setting that the settlement discount will range between 10% and 15%. This approach would provide greater certainty to interested parties, which will further enable them to make more precise assessments when considering approaching the CCI as a settlement applicant.

2.3. Consultation Processes

The absence of a reference to consultations before filing an application in the DSR and DCR is noteworthy. Given the novelty of the commitment and settlement mechanisms within the Indian competition framework, parties interested in utilising this regime could greatly benefit from the introduction of a consultation stage.

2.3.1. Key Considerations

- a. The absence of a consultation mechanism, especially when the commitment and settlement regime is introduced for the first time, may potentially lead to uncertainty and disincentivization for relevant parties.
- b. This consultation stage would allow parties to seek clarity and address any questions they may have regarding this new regulatory landscape.

2.3.2. Examples of other frameworks

- a. Enterprises considering the submission of a merger notification to the CCI have the option to seek consultation with the CCI beforehand. A similar framework of pre-filing consultation is also present in the "Green channel applications".⁶ Further, Clause 7 of the Draft Combination Regulations recently published by the CCI have also discussed pre-filing consultation.⁷
- b. In the UK, during an ongoing investigation, businesses may opt to reach out to the CMA through direct contact with the case team to explore the potential for settlement.⁸ If a specific case warrants settlement, all

⁶ Para 7, Consultation prior to filing of notice of the proposed combination under sub section (2) of section 6 of the Competition Act, 2002. Retrieved September 12, 2023, from <https://www.cci.gov.in/images/combinationprefilingconsultation/en/pfc-guidance-note1651833852.pdf>

⁷ Clause 7, The Draft Competition Commission of India (Combinations) Regulations, 2023. Retrieved September 12, 2023, from <https://www.cci.gov.in/images/stakeholderstopticsconsultations/en/draft-combinations-regulations1693891636.pdf>

⁸ Clause 14.10, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022, December 1). Retrieved September 12, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement>

businesses involved in the investigation, excluding immunity applicants, are typically invited to consider settlement as an option.⁹

c. Japan's Guidelines on Commitment Process also allow for a similar consultation process to be undertaken by the parties and the Japan Fair Trade Commission prior to the start of the commitment process.¹⁰

2.3.3. Recommendations

a. The CCI may consider adding a consultation stage to the commitment and settlement mechanism at relevant stages. This will allow the parties to approach the CCI and gain clarity on their doubts with respect to the application process.

b. Furthermore, given that the commitment and settlement mechanism is new in nature to the Indian competition landscape, this may also ensure increased cooperation between the parties to the proceedings and the CCI.

2.4. Implications for pending cases

The intent behind introducing the commitment and settlement mechanism into the existing competition framework is to expedite the resolution of competition law cases. This initiative appears promising in addressing the resolution of current pending cases before the CCI, offering the potential for faster conclusion. However, the DCR and DSR are silent on whether they will cover cases pending before the CCI currently.

2.4.1. Key Considerations

a. In the light of several cases pending before the CCI, and considering the average of 25.7 months taken for case disposal¹¹, the inclusion of a clause that enables utilisation of the mechanism of the parties currently before the Commission can significantly alleviate the workload of the CCI and expedite the resolution process.

b. While the commitment and settlement mechanism promises to reduce the CCI's workload for future cases, those currently in progress, at the pre-DG report stage and post-DG report stages, which have not yet reached finality before the CCI, may be unable to avail themselves of this mechanism due to existing time limits for filing an application mentioned in both the DCR and DSR, respectively.

⁹ Clause 14.11 & Clause 14.10, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022, December 1). Retrieved September 12, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#withdrawal-from-the-settlement-procedure-following-settlement>

¹⁰ Para 3, Policies Concerning Commitment Procedures, Retrieved September 13, 2023, from https://www.jftc.go.jp/en/legislation_gls/antimonopoly_rules_files/policies_concerning_commitment_procedures.pdf

¹¹Page 4, Singh, K. (n.d.). *Settlement in Cartel/ Anti-Trust cases - (Commentary)*. Competition Cooperation EU. Retrieved September 11, 2023, from <https://competitioncooperation.eu/wp-content/uploads/2020/01/Session-III-Settlement-in-Cartel-Anti-Trust-cases-Dr.-K.D.SINGH-CCI.pdf>

2.4.2. Examples in other frameworks

Para 34 of the EC's notice on the conduct of the settlement procedures states that the settlement procedure will apply to *"any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union"*.¹²

2.4.3. Recommendations

- a. The CCI could take steps to accommodate ongoing cases, particularly those in the pre- DG report stages and post-DG report stages, within the commitment and settlement regime, respectively.
- b. This could involve incorporating a provision in the regulations that enables the inclusion of pending cases or conducting case-specific assessments to identify cases that align with the mechanism's goals and granting them entry, despite the existing time constraints in both the DCR & DSR.

2.5. Timelines

The DCR requires the applicant to file an application within 45 days of the section 26(1) order, and the DSR requires the applicant to file an application within 45 days of receipt of DG's report. This short timeline may not be sufficient for the parties to make effective decisions and make a commitment or settlement application.

2.5.1. Relevant Clause in DCR

Clause 3(2) & 3(3) of the DCR prescribing the timeline for submitting an application reads as follows:

"(2) The Commitment Application under sub-regulation (1) may be submitted at any time after an order under sub-section (1) of section 26 of the Act has been passed by the Commission but within the time prescribed under sub-regulation (3) or prior to receipt by the party of the report of the Director General under sub-section (4) of section 26 of the Act, whichever is earlier.

*(3) A Commitment Application shall be filed within **45 (forty five) days** from the receipt of the order passed by the Commission under sub-section (1) of section 26 of the Act.*

Provided that the Commission may entertain a Commitment Application after the period specified above, if the Commitment Application is received within a further period of 30 (thirty) days and the Commission is satisfied that there had been sufficient cause for not filing the same within the specified period after recording reasons for condoning such delay."

2.5.2. Relevant Clause in DSR

Clause 3(2) of the DSR prescribing the timeline for submitting an application reads as follows:

¹² Para 34, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. Retrieved September 12, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

“The Settlement Application under sub-regulation (1) may be submitted after the receipt of the report of the Director General by the Settlement Applicant under sub-section (4) of section 26 of the Act.

Provided that a Settlement Application shall not be entertained by the Commission if it is made after expiry of 45 (forty five) days from the receipt of report of the Director General by the Settlement Applicant.

Provided further that the Commission may entertain a Settlement Application after the period specified above, if the Settlement Application is received within a further period of 30 (thirty) days and the Commission is satisfied that there had been sufficient cause for not filing the same within the specified period after recording reasons for condoning such delay.”

2.5.3. Key Considerations

- a. The decision to file a commitment or settlement application is an important business decision and may take significant time. Therefore, 45 days might be too short of a period for parties to make the decision.
- b. For Commitments, the 2023 Act provides that an application may be filed any time after an order under sub-section (1) of section 26 has been passed by the CCI but prior to the receipt by the party of the report of the DG under sub-section (4) of section 26, as may be specified by regulations. Furthermore, for settlements, the 2023 Act provides that an application may be filed any time before the receipt of the report of DG and before the passing of an order under Section 27 or Section 28, as may be specified by regulations.

2.5.4. Examples of other frameworks

- a. In the UK, a business under investigation by the CMA can offer commitments at any time during the investigation, until a decision on infringement has been made by the CMA.¹³ Further, the CMA, while considering commitments, has to provide a notice to the party prescribing the time period within which the party can make representations.¹⁴ This varies from case to case.
- b. For settlements, in the UK, the businesses can approach the CMA either before or after the Statement of Objections is issued.¹⁵ Further, discussions are subject to a set timetable which is appropriate to the circumstances of the case rather than fixed at a set period.¹⁶
- c. In the EU, the EC has discretion in determining the appropriateness and pace of these bilateral settlement discussions with each undertaking, including their sequence, timing, and the disclosure of information, as discussions progress.¹⁷ Therefore, the EC decides the pace of the bilateral settlement discussions on a case-to-case basis.

¹³ Clause 10.21 of Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022b, December 1). Retrieved September 13, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#settlement-process>

¹⁴ Schedule 6A of Competition Act 1998. Retrieved September 13, 2023, from <https://www.legislation.gov.uk/ukpga/1998/41/schedule/6A>

¹⁵ Clause 14.10, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022b, December 1).

Retrieved September 13, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#settlement-process>

¹⁶ Clause 14.12, Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8. (2022b, December 1). Retrieved September 12, 2023, from <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#settlement>

¹⁷ Para 15, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. Retrieved September 12, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

2.5.5. Recommendations

The Commission may consider relaxing the 45 days timeline for filing an application. Considering that the commitment and settlement framework is new for the Indian competition regime, it may be helpful for parties to have a broader or more lenient timeline, to the extent allowed by Section 48B(2) of the Act and Section 48A(2) of the Act.

2.6. Confidentiality

The DCR and DSR do not explicitly discuss safeguards for the confidentiality of the information submitted by the applicant. The regulations solely provide that it shall share a non-confidential version of the proposal only when inviting objections, suggestions, and in the case of commitments, public comments as well.

2.6.1. Relevant clauses of DCR

Clause 5 of the DCR describing the procedure for inviting objections, suggestions and public comments on a proposal for commitment submitted by the commitment applicant reads as follows:

*“(1) While considering the commitments offered, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their comments, objections, suggestions, if any, within 21 (twenty one) days. For the said purpose, the Commission would share a **non-confidential summary** containing prima facie opinion of the Commission expressed in the order issued under sub-section (1) of section 26 of the Act along with details of the competition concerns, alleged contraventions, commitments offered by the Commitment Applicant and any other detail as deemed fit.*

Provided that in appropriate cases, the Commission may also invite public to submit comments, objections and suggestions, if any, within 21 (twenty one) days, by publishing the abovementioned summary on its website.”

2.6.2. Relevant clauses of DSR

Clause 5 of the DSR describing the procedure for inviting objections & suggestions on a proposal for settlement submitted by the settlement applicant reads as follows:

*“(1) While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their comments, objections, or suggestions, if any, within 21 (twenty one) days. For the said purpose, the Commission would share a **non-confidential summary** containing prima facie opinion of the Commission expressed in the order issued under sub-section (1) of section 26 of the Act, findings of the Director General in the investigation report received under sub-section (4) of section 26 of the Act along with details of the competition concerns, alleged contraventions, settlement proposal offered by the Settlement Applicant and any other detail as deemed fit.”*

2.6.3. Key Considerations

a. It is necessary to ensure that the information disclosed by the parties during the commitment & settlement proceedings shall be utilised in a confidential manner and confidentiality shall be maintained throughout the process.

b. This safeguard will promote transparency and trust within the mechanism, ultimately contributing to the objective of speedier resolution of anti-competitive cases through increased participation.

c. Furthermore, the extent to which the party participates in the process to determine the scope of confidential and non-confidential information is not provided within the DCR and DSR.

2.6.4. Examples of other frameworks

a. The EU law on settlements provides several safeguards to ensure confidentiality. First, the parties to the proceedings cannot disclose to any third party the contents of the discussions or of the documents to which they have had access in view of settlement without permission of the Commission.¹⁸

b. Second, parties to the investigation who have not requested settlement can get access to settlement submissions only after they commit not to make any copy of any information in the settlement submissions to which access is being granted. Other parties, such as complainants, are not granted access to settlement submissions.¹⁹

2.6.5. Recommendations

a. The CCI may offer explicit guidance regarding the protection of information submitted by parties involved in the proceedings. It may also consider implementing practices that prioritise enhanced protection for the parties and the information they submit. This would also be in line with the spirit of Section 57 of the Act, which provides protection pertaining to disclosure of information.²⁰

b. The Commission can consider extending the applicability of confidentiality mechanisms that currently exist within the competition framework, including confidentiality rings, to the commitment and settlement regime. Alternatively, it may also refer to the framework within the EU for ensuring confidentiality during settlement proceedings.

c. The CCI can further consider having a round of consultation with the commitment or settlement applicant, wherein the applicant is given an opportunity to assist the CCI in finalising the information that is required to stay confidential.

¹⁸ Para 7, Para 34 of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. Retrieved September 12, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

¹⁹ Para 35, Para 34 of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. Retrieved September 12, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29>

²⁰ Section 57 of the Competition Act, 2002. Retrieved from <https://www.cci.gov.in/images/legalframeworkact/en/the-competition-act-20021652103427.pdf>



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