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Written Comments

Draft Competition Commission of India
(Lesser Penalty) Regulations, 2023



WRITTEN COMMENTS

DRAFT COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2023

Designed by Shivam Kulshreshtha

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LIST OF ABBREVIATIONS

Competition (Amendment) Act, 2023	2023 Amendments
Competition Commission of India	CCI / Commission
Department of Justice	DOJ
Director General	DG
Draft Competition Commission of India (Lesser Penalty) Regulations	DLPR
European Commission	EC
European Union	EU
International Competition Network	ICN
Lesser Penalty	LP
Lesser Penalty Plus	LPP
Office of Fair Trade	OFT
Pre-Filing Consultation	PFC
United Kingdom	UK
United States	US

1 INTRODUCTION

On 16 October 2023, the Competition Commission of India (CCI/Commission) introduced the Draft Competition Commission of India (Lesser Penalty) Regulations, 2023 (DLPR). The DLPR will repeal and replace the Competition Commission of India (Lesser Penalty) Regulations, 2009. Importantly, it provides regulations for a new Lesser Penalty Plus (LPP) framework. The LPP regime was introduced within the leniency framework by

the recent Competition (Amendment) Act, 2023 (2023 Amendments).¹

The introduction of the DLPR, especially with a new LPP regime, is a welcome move which will help in curtailing cartel activity in Indian markets. The Dialogue is pleased to submit its comments on certain crucial aspects of the draft regulations. The comments have been drafted after an extensive literature review from multiple jurisdictions.

¹Section 46(4) of the Act, as amended by Clause 33 of the 2023 Amendments. Competition (Amendment) Act, 2023. (2023, April 11). Competition Commission of India. Retrieved November 6, 2023, from <https://www.cci.gov.in/images/legalframeworkact/en/the-competition-amendment-act-20231681363446.pdf>

2 KEY THEMES

2.1. Absence of Pre-filing Consultation

The DLPR does not provide for a pre-filing consultation (PFC) mechanism. A PFC can assist the applicant in assessing their position as a leniency applicant and receive guidance from the CCI pertaining to the same.

2.1.1. Key Considerations

- a. An essential goal of a Lesser Penalty (LP) framework is to enhance the identification of cartels, which are among the most serious antitrust violations and challenging to detect. Leniency programs are crucial in aiding the Commission in uncovering these cartels. Without a PFC stage, the parties may not have the option to approach the Commission to informally discuss the cartel conduct without admitting to being a participant.
- b. The CCI already follows the PFC process under its merger control regime, which is now also provided for under Clause 7 of the recently published Competition Commission of India (Combinations) Regulations, 2023. The PFC stage under the merger regime assists the parties coming to the Commission to gain clarity on the filing procedure and information required.

2.1.2. Other Frameworks

- a. In the European Union (EU), the European Commission (EC) allows informal, no-names exchanges to discuss potential leniency applications without revealing cartel details. Undertakings can also use a hypothetical application process to present evidence in hypothetical terms, safeguarding their identity. These measures help undertakings make informed decisions about leniency applications.²
- b. In the United Kingdom (UK), the Office of Fair Trade (OFT) enables parties to seek confidential guidance on various aspects of leniency and no-action programs.³ This guidance often occurs on a no-name basis and involves hypothetical discussions to help parties assess their status before making a formal leniency application.⁴
- c. The International Competition Network (ICN) also emphasises the ability of leniency applicants to anonymously explore with a competition agency whether leniency is available.⁵

2.1.3. Recommendations

- a. The CCI may consider introducing a PFC mechanism to enable potential applicants to gain clarity and guidance. The same may further enhance the efficacy of the LP mechanism.

² FAQ 6, European Commission. (2022, October). Frequently Asked Questions (FAQs) on Leniency. Retrieved November 06, 2023, from https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf

³ Office of Fair Trading. (2013, July) Applications for leniency and no-action in cartel cases. Retrieved November 06, 2023, from <https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf>

⁴ Para 3.3, Office of Fair Trading. (2013, July) Applications for leniency and no-action in cartel cases. Retrieved November 06, 2023, from <https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf>

⁵ International Competition Network. (2014, April). ANTI-CARTEL ENFORCEMENT MANUAL. Retrieved November 06, 2023, from https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf

2.2. Use of Information

As per the DPLR, the information, documents, and evidence submitted by the applicant can be used by the CCI or the Director General (DG) in case of failure to comply with the conditions under regulation 3(1) or in case the applicant withdraws application under regulation 6 and/or regulation 7.

2.2.1. Relevant Clause

Regulation 3(3) of the DPLR, describing the use of information in case of failure to comply with conditions, states:

“Where an applicant fails to comply with the conditions mentioned in sub-regulation (1), the Commission or the Director General shall be free to use the information, documents and evidence submitted by the applicant, in the ongoing matter, in accordance with the provisions of section 46 of the Act.”

Regulation 10(2) discusses withdrawal of application as follows:

“(2) Where the applicant withdraws application under regulation 6 and/or regulation 7, as the case may be, the Director General or the Commission shall be at liberty to use for the purposes of the Act any information or evidence or document submitted by the applicant except its admission.”

2.2.2. Key Consideration

a. Use of information, evidence and documents submitted to the CCI in case of non-compliance or withdrawal may discourage potential applicants from providing full, true and vital disclosures. To ensure that the CCI receives critical information required to identify and curtail cartel activity, the provision may require reconsideration.

2.2.3. Other Frameworks

- a. In the EU, if it is determined that immunity is not applicable or that the undertaking is unable to fulfil the conditions of the EC, then the EC will communicate this to the undertakings in writing. In such situations, the undertaking has the option to retract the evidence provided for the immunity application. This does not preclude the EC from utilising its standard investigative authorities to acquire the information.⁶
- b. In the UK, information that is self-incriminatory and submitted after an undertaking applied for leniency using a marker approach will not be used as evidence by the OFT against the undertaking (referred to as a ‘failed bona fide applicant’) or any of its cooperating current and former employees and directors. This applies even if they have acted in good faith but do not qualify for leniency.⁷
- c. In Brazil, the rejection of the proposed leniency agreement, which must remain confidential, shall not be treated as an

⁶ Clause 20, European Commission. Commission Notice on Immunity from fines and reduction of fines in cartel cases. Retrieved November 06, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29>

⁷ Para 7.15, Office of Fair Trading. (2013, July) Applications for leniency and no-action in cartel cases. Retrieved November 06, 2023, from <https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf>

admission to the facts or an acknowledgement of the wrongful nature of the conduct under examination.⁸

d. In Chile, guidelines state that regarding information submitted, the leniency officer provides the applicant with the entire file content, excluding specific administrative documents mentioned in the withdrawal minute.⁹ Copies of the returned information are permanently deleted and cannot be used unless independently sourced. The officials from the leniency team are restricted from participating in investigations of the relevant market.¹⁰

e. Literature from the ICN also explains that in certain jurisdictions, when a leniency application has been evaluated by the authority and is found inadequate to grant leniency, the applicant is typically given a reasonable period to retract the evidence they provided to the competition agency. If the evidence is not withdrawn within this timeframe, it may be used in any subsequent investigation conducted by the competition agency.¹¹

2.2.4. Recommendations

a. The CCI may consider providing that in case of withdrawal and non-compliance, the information, evidence and documents submitted by the applicant will either not be used or used only in specific circumstances. In furtherance of the same,

the DLPR may establish clear and comprehensive factors for the usage of information.

2.3. Timeframe for Filing an Application

As per the DLPR, the LP or LPP can file an application before the Commission receives the DG report. However, the timeline can be made more certain and predictable if extended till the report is received by the parties.

2.3.1. Relevant Clauses

Regulation 6 (1) of the DLPR discusses the timeline for an LP application as follows:

“For the purpose of grant of lesser penalty, the applicant or its authorised representative may make an application containing all the material information as specified in the Schedule I to these regulations, or may also intimate in writing either in person or through e-mail or fax, to the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within five working days, put up the matter before the Commission for its consideration.

Provided that an application under sub-regulation (1) of regulation 6 for grant of lesser penalty can be made at any time during inquiry but not after the report of

⁸ Article 86, para 10, Administrative Council for Economic Defense (CADE). (2011, NOVEMBER 30). LAW N° 12.529. Retrieved November 06, 2023, from <https://cdn.cade.gov.br/portal-ingles/topics/legislation/laws/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf>

⁹ Para 60, National Economic Prosecutor’s Office. (2017, March). Internal Guidelines on Leniency in Cartel Cases. Retrieved November 06, 2023, from https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf

¹⁰ Para 76, National Economic Prosecutor’s Office. (2017, March). Internal Guidelines on Leniency in Cartel Cases. Retrieved November 06, 2023, from https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf

¹¹ Para 10, International Competition Network. (2014, April). ANTI-CARTEL ENFORCEMENT MANUAL. Retrieved November 06, 2023, from https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf

investigation directed under section 26 of the Act has been received by the Commission.”

Regulation 7(1) of the DLPR discusses the timeline for an LPP application as follows:

“For the purpose of grant of lesser penalty plus, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule II to these regulations, or may also intimate in writing either in person or through e-mail or fax, to the designated authority for furnishing the information and evidence relating to the existence of newly disclosed cartel. The designated authority shall, thereafter, within five working days, put up the matter before the Commission for its consideration.

Provided that an application under sub-regulation (1) of regulation 7 for grant of lesser penalty plus can be made at any time before the receipt of investigation report of the Director General under section 26 of the Act in the first cartel by the Commission.”

2.3.2. Key Consideration

a. The regulations provide that an LP or LPP can file an application before the receipt of the DG report by the Commission. However, there may be a gap between the time of receipt by the Commission and receipt of the report by parties, leading to potential uncertainty. Therefore, parties may not have complete clarity about the time available to them to apply.

2.3.3. Other Frameworks

- a. In the EU, a party has to apply for leniency before receiving the Statement of Objections from the EC. In case of failure, the EC may disregard the application for leniency.¹²
- b. In the UK, there is no specified deadline under the OFT Guidance for submitting leniency applications. Therefore, a leniency application can be made at multiple stages of the case.¹³

2.4. Forfeiture of Benefit

Regulation 11 does not provide clarity on the stage at which the benefit of LP or LPP shall be considered to be forfeited. Clarification in this regard can provide certainty to the parties about their application and the inquiry to which it may be subjected after the forfeiture.

2.4.1. Relevant Clause

Regulation 11 of the DLPR discusses forfeiture as follows:

“The benefit of lesser penalty or lesser penalty plus under regulation 4 or regulation 5 to the applicant shall be forfeited, if the Commission is satisfied that the applicant, during the course of inquiry/proceedings, has failed to (a) comply with the conditions on which the benefit of lesser penalty was granted by the Commission; or (b) had given false evidence or omit to submit any material information knowing it to be material; or (c) the disclosure made is not vital, and thereupon the applicant shall be subjected to inquiry for

¹² European Commission. Commission Notice on Immunity from fines and reduction of fines in cartel cases. Retrieved November 06, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29>

¹³ Office of Fair Trading. (2013, July) Applications for leniency and no-action in cartel cases. Retrieved November 06, 2023, from <https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf>

the contravention in respect of which lesser penalty or lesser penalty plus, as the case may be, was granted and also be liable to the imposition of penalty to which such applicant is liable, had lesser penalty or lesser penalty plus not been granted.”

2.4.2. Key Consideration

- a. Regulation 11 is silent on the stage of forfeiture of the LP or LPP benefit, which may lead to the understanding that forfeiture may take place on or close to the final stage of the case. This is underscored by the previous practice of the CCI, which typically announces the benefits of a lesser penalty only upon issuance of its final infringement order.

2.4.3. Other Frameworks

- a. In the US, the DOJ can revoke the conditional leniency letter before granting the applicant a final leniency letter. The DOJ issues the final leniency letter after its investigation and any resulting prosecutions are completed.¹⁴
- b. The ICN guidelines suggest certain “good practices relating to leniency programmes”, wherein they emphasise having “maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency.”¹⁵

2.4.4. Recommendations

- a. The CCI may provide clarity on the stage at which the application shall be considered

to be forfeited. The same would enable enhanced certainty for applicants opting for the regime.

2.5. Applicability on Existing Cases

The DLPR does not provide guidance on whether the regulations would be applicable to the ongoing cartel investigations before the Commission.

2.5.1. Key Consideration

- a. The DLPR does not provide clarity on the applicability of the new regulations to existing investigations. This may require clarity since the LPP regime may enable parties currently under investigation for participation in a cartel to furnish relevant details about other cartels.

2.5.2. Recommendations

- a. The DLPR may provide clarity on the applicability of the DLPR to existing cases. It may extend the applicability of the DLPR to existing investigations, enabling existing and potential LP applicants to benefit from the LPP regime.

2.6. Meaning of Additional Significant Value

Regulation 4(b) provides that the evidence provided by the applicant must add significant value to the evidence already in possession of the Commission. However, the explanation of the regulation may need to clarify further what qualifies as “significant added value”.

¹⁴ United States Department of Justice. (2008, November 19). FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM. Retrieved November 06, 2023, from <https://www.justice.gov/media/1226836/dl?inline>

¹⁵ Appendix 1, International Competition Network. (2014, April). ANTI-CARTEL ENFORCEMENT MANUAL. Retrieved November 06, 2023, from https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf

2.6.1. Relevant Clause

Regulation 4(b) of the DLPR discusses the benefit to be granted to subsequent applicants for providing additional evidence as follows:

The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have contravened the provisions of section 3 of the Act.

Explanation - For the purposes of these regulations, - 'significant added value' means the extent to which the evidence provided enhances the ability of the Commission or the Director General, as the case may be, to establish the existence of a cartel, which is alleged to have contravened the provisions of section 3 of the Act.

2.6.2. Key Consideration

a. The DLPR explains “significant added value” in the explanation of regulation 4(b). However, the explanation only explains the term in light of the extent to which it helps the DG or the CCI in establishing the existence of a cartel. It does not clarify the nature, detail, relevance or other factors that would qualify the evidence as one that adds significant added value.

2.6.3. Other Frameworks

a. In the EU,¹⁶ to qualify for leniency, an undertaking must present the EC with

evidence of the alleged infringement that significantly adds to the EC’s ability to demonstrate the existence of the cartel. The concept of ‘added value’ pertains to the extent to which the provided evidence strengthens the Commission’s ability to prove the alleged cartel, taking into account factors such as the evidence’s nature, level of detail, and its direct relevance to the facts under consideration.

b. Evidence originating from the relevant time frame generally holds higher value than subsequent evidence, and incriminating evidence directly pertinent to the case is considered more valuable than indirectly related evidence.

2.6.4. Recommendations

a. The CCI may consider providing additional details about the nature of evidence required to add significant value to the evidence already in possession of the CCI.

2.7. Factors for Lesser Penalty Plus Applications

Factors considered while deciding on an LPP application may require more clarity. Uncertainty in this regard may disincentivise potential LPP applicants, impacting the effectiveness of the new regime.

2.7.1. Relevant Clause

The proviso of regulation 5 of the DLPR describes factors considered by the Commission while deciding the reductions in monetary penalty as follows:

¹⁶ Point 24 & Point 25, Clause 20, European Commission. Commission Notice on Immunity from fines and reduction of fines in cartel cases. Retrieved November 06, 2023, from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29>

“Provided that the discretion of the Commission, in regard to reduction in monetary penalty under regulation 5, shall be exercised having due regard to-

- a) likelihood of the newly disclosed cartel being detected by the Commission or the Director General without lesser penalty plus application, and*
- b) any other factor deemed relevant by the Commission.”*

2.7.2. Key Considerations

- a. The DLPR states that while deciding reductions for an LPP applicant, the CCI will consider certain factors, including ‘any other factor deemed relevant by the Commission’. A non-exhaustive clause may lead to uncertainty for potential LPP applicants.

2.7.3. Other Frameworks

- a. In the UK, the OFT’s Guidance provides a list while describing factors that will impact the decision of the OFT concerning monetary deductions of an LPP applicant. The OFT guidance states that the level of any discounts would depend on such factors as *“the scale of the consumer detriment involved in the additional reported cartel, including the number and size of the affected markets, the amount of effort gone to by the immunity applicant to investigate the additional cartel and the likelihood that the OFT would have uncovered the additional cartel in any event.”*¹⁷

2.7.4. Recommendations

The CCI may consider providing an exhaustive list of factors for deciding an LPP application to provide certainty to the applicants. The change may lead to incentivisation for parties to opt for the new framework.

¹⁷ Para 9.4, Office of Fair Trading. (2013, July) Applications for leniency and no-action in cartel cases. Retrieved November 06, 2023, from <https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf>



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