

BACKGROUND NOTE: DRAFT CCI (LESSER PENALTY) REGULATIONS, 2023

The Competition Act, 2002 (**Act**) aims to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure the freedom of trade carried on by other participants in markets, in India. Section 64 of the Act empowers the Competition Commission of India (**CCI**) to make regulations consistent with the Act and the rules made thereunder for carrying out the purposes of the Act.

The Competition (Amendment) Act, 2023 (**Amendment Act**) introduced ‘lesser penalty plus’ and withdrawal of ‘lesser penalty’/‘lesser penalty plus’ applications in the existing framework of Section 46 of the Act

The ‘lesser penalty plus’ mechanism is introduced to incentivize an existing LP applicant in respect of the first cartel to give full, true and vital disclosures about a second cartel unknown to the CCI. The benefit for the applicant is that it will be eligible to receive additional reduction in penalty for the first cartel besides reduction in penalty as per priority status in respect of first cartel, subject to fulfillment of prescribed terms and conditions. This is in addition to a reduction in penalty given in respect of the second cartel in the manner specified in the regulations.

In view of the significant changes introduced by the Amendment Act, the CCI proposes the Competition Commission of India (Lesser Penalty) Regulations, 2023 (**Draft CCI (Lesser Penalty) Regulations 2023**), which will repeal and replace the Competition Commission of India (Lesser Penalty) Regulations, 2009. The Draft CCI (Lesser Penalty) Regulations 2023, *inter alia*, provide for the following:

- (a) Form and contents of the application for lesser penalty and lesser penalty plus;
- (b) Procedure for grant of lesser penalty and lesser penalty plus; and
- (c) Withdrawal of application for lesser penalty and lesser penalty plus.

The CCI invites stakeholders to submit written comments on the Draft CCI (Lesser Penalty) Regulations 2023 within 21 (twenty-one) days from 16.10.2023 to 06.11.2023. The comments must be only sent by duly filling the form hosted on the CCI’s website at: <https://cci.gov.in/stakeholders-topics-consultations>

**The Competition Commission of India (Lesser Penalty)
Regulations, 2023
(No. __ of 2023)**

New Delhi, the __day of ____, 2023

No. L-3(4)/Reg-L.P./2023-24. – In exercise of the powers conferred by sub-section (1) and clauses (ga), (gb) and (gc) of sub-section (2) of section 64, read with section 46 and clause (b) of section 27 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely: -

Short title and commencement

1. (1) These regulations may be called the Competition Commission of India (Lesser Penalty) Regulations, 2023.
- (2) They shall come into force on __day of ____, 2023.

Definitions

2. (1) In these regulations, unless the context otherwise requires, –
 - (a) –“Act” means the Competition Act, 2002 (12 of 2003) as amended from time to time;
 - (b) –“applicant” means an enterprise, as defined in clause (h) of section 2 of the Act, who is or was a member of a cartel and includes an individual who has been involved in the cartel on behalf of an enterprise; and further includes an enterprise or association of enterprises or a person or association of persons, though not engaged in identical or similar trade if it participates or intends to participate in the furtherance of such cartel and submits an application for lesser penalty and/or lesser penalty plus to the Commission;
 - (c) –“cartel” means a cartel as defined in clause (c) of section 2 of the Act;
 - (d) –“Commission” means the Competition Commission of India established under sub-section (1) of section 7 of the Act;
 - (e) –“designated authority” means an officer of the Commission who is authorized by the Chairperson to function as such, for the purpose of these regulations;

- (f) – “Director General” means the Director General as defined in clause (g) of section 2 of the Act;
 - (g) – “newly disclosed cartel” means a cartel as determined by the Commission having regard to the disclosures provided by the applicant in Schedule I and Schedule II to these regulations, including the material available with the Commission or the Director General, which enables the Commission to form a *prima facie* opinion under sub section (1) of section 26 of the Act.
 - (h) – “party” includes an enterprise or person defined in clauses (h) and (l) of section 2 of the Act, respectively, against whom inquiry or proceeding is instituted and shall include the Central Government, any State Government or any statutory authority and shall also include any person permitted to join the proceedings];
 - (i) – “priority status” means the position of the applicant marked for giving the benefit of lesser penalty in the queue of the applicants;
 - (j) – “vital disclosure” means full and true disclosure of information or evidence by the applicant to the Commission, which is sufficient to enable the Commission to form a *prima facie* opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 of the Act.
- (2) Words and expressions used but not defined in these regulations shall have the same meanings respectively as assigned to them in the Act or the rules or regulations framed thereunder or in the Companies Act, 2013 (18 of 2013).

Conditions for lesser penalty or lesser penalty plus

- 3.** (1) An applicant, seeking the benefit of lesser penalty or lesser penalty plus under section 46 of the Act, shall-
- (a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
 - (b) provide vital disclosure in respect of alleged contravention of the provisions of section 3 of the Act;
 - (c) provide all relevant information, documents and evidence as may be required by the Commission;
 - (d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
 - (e) not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a cartel.

- (2) The applicant shall provide the names of the individuals who have been involved in the cartel on its behalf and for whom lesser penalty or lesser penalty plus, as the case may be, is also sought by the applicant.
- (3) 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.
- (4) Without prejudice to sub-regulations (1) and (3), the Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case.
- (5) The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to –
- (a) the stage at which the applicant comes forward with the disclosure;
 - (b) the evidence already in possession of the Commission;
 - (c) the quality of the information provided by the applicant;
 - (d) fulfilment of conditions specified in sub-regulation (1) and (4) above, and
 - (e) the entire facts and circumstances of the case.

Grant of lesser penalty

4. Subject to the conditions laid down in regulation 3, the applicant and individual mentioned in sub-regulation 2 of regulation 3 shall be granted benefit of lesser penalty on the amount leviable under clause (b) of section 27 and section 48 of the Act, as the Commission may decide, in the following manner, namely;—

- (a) The applicant and individual mentioned in sub-regulation (2) of the regulation 3 may be granted benefit of reduction in penalty upto or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a *prima facie* opinion regarding the existence of a cartel which is alleged to have contravened the provisions of section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:

Provided that the Commission may also grant benefit of reduction in penalty up to or equal to one hundred per cent, to the applicant and individual mentioned in sub-regulation (2) of regulation 3, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of the provisions of section 3 of the Act, by a cartel, in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention.

- (b) 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.

- (c) The reduction in monetary penalty referred to in clause (b) shall be in the following order—
 - (i) the applicant and individual mentioned in sub-regulation (2) of regulation 3 marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the penalty imposed; and
 - (ii) the applicant and individual mentioned in sub-regulation (2) of regulation 3 marked as third or subsequent in the priority status may be granted reduction of penalty up to or equal to thirty percent of the penalty imposed.;

Grant of Lesser Penalty Plus

5. In terms of sub-section (4) of section 46 of the Act and subject to the conditions laid down in regulations 3 and 4, an applicant, who had earlier made a full, true and vital disclosure in respect of alleged contravention of

provisions of section 3 of the Act under regulation 6, makes a full, true and vital disclosure in respect of existence of another cartel (second cartel) in which it is alleged to have violated section 3 of the Act, which enables the Commission to form a *prima facie* opinion regarding the existence of newly disclosed cartel under sub-section (1) of section 26 of the Act, may be granted an additional reduction in monetary penalty up to or equal to thirty per cent of the penalty imposed with regard to the first cartel besides obtaining benefit of reduction in penalty up to or equal to one hundred percent in respect of newly disclosed cartel in terms of sub-section (1) of section 46 of the Act.

Illustration:

In respect of Cartel A, X and Y are lesser penalty applicants having first and second marker status with reduction in penalty available of up to or equal to one hundred percent and fifty percent, respectively. Y, being aware of Cartel B, reports about it under regulation 7. Subject to fulfilment of requisite conditions, for reporting Cartel B, Y shall be eligible for additional reduction in penalty of up to or equal to thirty percent in respect of Cartel A, besides obtaining first marker status in respect of Cartel B.

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.

Provided further that while determining the newly disclosed cartel in terms of sub-section (4) of section 46 of the Act, the Commission shall have due regard to all relevant factors that distinguish the newly disclosed cartel from the existing cartel.

Procedure for grant of lesser penalty

6. (1) For the purpose of grant of lesser penalty, the applicant or its authorized 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 investigation directed under section 26 of the Act has been received by the Commission.

- (2) The Commission shall thereupon mark the priority status of the applicant and the designated authority shall convey the same to the applicant through post or e-mail or fax. If the intimation received under sub-regulation (1) is in writing either in person or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule I to these regulations within a period not exceeding fifteen days.
- (3) The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.
- (4) Where the application, along with the necessary documents, is not received within a period of fifteen days from the date of communication of direction under sub-regulation (2) or during the further period as may be extended by the Commission, the priority status of the applicant and consequent benefit of grant of lesser penalty shall stand forfeited.
- (5) The Commission, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the grant of 'appropriate priority status' of the application but merely on that basis, it shall not entitle the applicant for grant of lesser penalty.

- (6) Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
- (7) Where the Commission is of the opinion that the applicant or its authorized representative, seeking the benefit of lesser penalty or priority status, has not provided full, true and vital disclosure of the information and evidence as referred and described in the Schedule I to these regulations or as required by the Commission, from time to time, the Commission may take a decision after considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.
- (8) Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission and the procedure prescribed above, as in the case of first applicant, shall apply *mutatis mutandis*.
- (9) The decision of the Commission of granting or rejecting the application for lesser penalty shall be communicated to the applicant.

Procedure for grant of lesser penalty plus

7. (1) 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.

Provided further that in case of more than one applicant for lesser penalty plus in respect of similar newly disclosed cartel, the Commission shall not consider application of the second applicant, for grant of the lesser penalty plus

unless application of the first lesser penalty plus applicant has been rejected by the Commission.

- (2) Upon determination of newly disclosed cartel, the Commission shall thereupon grant the status of 'lesser penalty plus' to the applicant in respect of first cartel disclosed earlier in terms of regulation 6 and simultaneously mark the priority status of the applicant in respect of the newly disclosed cartel; and the designated authority shall convey the same to the applicant through post or e-mail or fax. If the intimation received under sub-regulation (1) is in writing either in person or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule II to these regulations within a period not exceeding fifteen days.
- (3) The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.
- (4) Where the application, along with the necessary documents, is not received within a period of fifteen days from the date of communication of direction under sub-regulation (2) or during the further period as may be extended by the Commission, the status of 'lesser penalty plus applicant' along with consequent benefit of reduction in penalty in respect of first cartel and priority status in respect of the newly disclosed cartel shall stand forfeited.
- (5) The Commission, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the grant of 'lesser penalty plus status in respect of first cartel disclosed earlier in terms of regulation 6 and grant of 'appropriate priority status' in respect of the newly disclosed cartel but merely on that basis, it shall not entitle the applicant for grant of lesser penalty plus and priority status.
- (6) Where the Commission is of the opinion that the applicant or its authorized representative, seeking the benefit of lesser penalty plus and consequent priority status for newly disclosed cartel, has not provided full, true and vital disclosure of the information and evidence as referred and described in the Schedule I or Schedule II or both, as the case may be, or as required by the Commission, from time to time, the Commission may take a decision after

considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.

(7) Where the benefit of the 'lesser penalty plus' is not granted to the first applicant by the Commission, the subsequent applicant(s), if any, shall move up in order of priority for grant of 'lesser penalty plus' status in respect of the first cartel and the procedure prescribed above, as in the case of first applicant, shall apply *mutatis mutandis*.

(8) The decision of the Commission of granting or rejecting the application for lesser penalty plus shall be communicated to the applicant.

Confidentiality

8. Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission or the Director General shall treat as confidential,—

- (a) the identity of the applicant; and
- (b) the information, documents and evidence furnished by the applicant under regulation 6 and/or regulation 7:

Provided that the identity of the applicant or such information or documents or evidence may be disclosed if,—

- (i) the disclosure is required by law; or
- (ii) the applicant has agreed to such disclosure in writing; or
- (iii) there has been a public disclosure by the applicant

Provided further that where the Director General deems it necessary to disclose the information, documents and evidence furnished under regulation 6 or regulation 7, as the case may be, to any party for the purposes of investigation and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to be recorded in writing and after taking prior approval of the Commission.

Provided furthermore that after receipt of the investigation report by the Commission, the Commission may disclose such information or documents or evidences, in terms of provisions of regulation 35 of Competition Commission of India (General) Regulations, 2009.

Inspection of documents

9. Notwithstanding the confidentiality under regulation 8, the provisions of sub-regulations (1), (3) and (4) of regulation 37 and the provisions of regulation 50 of the Competition Commission of India (General) Regulations, 2009, to the extent they relate to inspection, shall become applicable to the non-confidential version of the information, documents and evidence furnished by the applicant under regulation 6 or regulation 7, as the case may be, after the Commission forwards a copy of the report containing the findings of the Director General to the party concerned:

Provided that such party shall not disclose the information, documents and evidence so obtained other than for the proceedings under the Act.

Withdrawal

10.(1) The applicant may withdraw the application under regulation 6 and/or regulation 7, as the case may be, any time prior to the receipt of the report of investigation, under section 26 of the Act in the concerned matter, by the Commission.

(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.

Forfeiture

11. 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 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.

Removal of difficulty

12. In the matter of interpretation or implementation of the provisions of these regulations, if any doubt or difficulty arises, the same shall be placed before the Commission and the decision of the Commission thereon, shall be binding.

SCHEDULE I

CONTENTS OF THE APPLICATION

[See sub-regulations (1) and (2) of regulation 6]

The application for lesser penalty shall, *inter-alia*, include the following, namely: -

- (a) name, email, contact number and address of the applicant or its authorized representative as well as of all other enterprises in the cartel;
- (b) in case the applicant is based outside India, the address of the applicant in India for communication including the telephone numbers and the e- mail address, etc.;
- (c) a detailed description of the alleged cartel arrangement, including its aims and objectives and the details of activities and functions carried out for securing such aims and objectives;
- (d) the goods or services involved;
- (e) the geographic market covered;
- (f) the commencement and duration of the cartel;
- (g) the estimated volume of business [affected in India by the alleged cartel]¹;
- (h) the names, positions, office locations and, wherever necessary, home addresses of all individuals who, in the knowledge of the applicant, are or have been associated with the alleged cartel, including those individuals which have been involved on behalf of the applicant ;

¹ Subs. by the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 for the words, –affected by the alleged cartel.

- (i) the details of other Competition Authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel;
- (j) a descriptive list of evidence regarding the nature and content of evidence provided in support of the application for lesser penalty; and
- (k) any other material information as may be directed by the Commission.

SCHEDULE II
CONTENTS OF THE APPLICATION
[See sub-regulations (1) and (2) of regulation 7]

The application for lesser penalty plus shall, *inter-alia*, include the following, namely:-

- A. Name, email, contact number and address of the applicant or its authorised representative;
- B. Details of the ongoing matter / case(s) in which the applicant has already obtained any priority status;
- C. Disclosures pertaining to newly disclosed cartel as per the details sought in Schedule I (in two copies);
- D. Whether similarity between conduct/ product/ service/ matter referred in (B) and (C) above, whether yes/no, provide details in support of the answer;
- E. Justification as to how it is new/ separate cartel arrangement in view of disclosures made in point (B) and (C) above; and
- F. any other material information.