



Draft CCI Regulations on Lesser Penalty and Lesser Penalty Plus

a summary
by

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I. Context

On 16 October 2023, the Competition Commission of India (CCI) issued the draft [Competition Commission of India \(Lesser Penalty\) Regulations, 2023](#) (Draft LP Regulations) and an accompanying [background note](#). We discuss the key features of the Draft LP Regulations below, along with some initial analysis.

Comments on the Draft LP Regulations may be submitted to the CCI by 6 November 2023.

Defined terms in this document refer to definitions in the Draft LP Regulations. Where necessary, we refer to the relevant provisions of the amended Competition Act, 2002 (Act), which provide additional context to the changes proposed to be introduced through the Draft LP Regulations. These statutory provisions are not yet in force, and will likely be notified once the Draft LP Regulations are finalised.

II. Introduction of Lesser Penalty Plus

1. What are the benefits that the CCI has introduced under the “lesser penalty plus” (LPP) provisions?

An applicant who has filed an existing lesser penalty (LP) application, and who makes a full, true and vital disclosure in respect of the existence of a second cartel is eligible to receive:

- an additional reduction in monetary penalty of up to 30% in the first cartel; *and*
- A reduction of penalty of up to or equal to 100% in respect of the newly disclosed cartel.

[Reg 5]

Axiom5 Comment:

- The Draft LP Regulations offer leniency applicants in an ongoing cartel inquiry the incentive to disclose the details of another unrelated cartel.
- However, the Draft LP Regulations do not offer clarity on certain practical aspects.
 - There is no clarity on the stage of inquiry proceedings when a successful LPP applicant would secure a reduction in penalty up to 30% with respect to the first cartel inquiry. Inevitably, the inquiry pursuant to a LPP application would follow the initiation of a preceding cartel inquiry. Hence, while two investigations may run concurrently, they may terminate at different points in time. It's unclear whether the CCI will extend the benefit of lesser penalty to an LPP applicant at the time it concludes the first cartel inquiry or will wait for the conclusion of both the inquiries.
 - Moreover, the benefit of LPP is contingent on: (q) disclosure of sufficient information to enable the CCI to initiate a cartel inquiry; and (2) other factors such as, the likelihood of the detection of the second cartel but for the LPP application, and any other factor deemed relevant by the CCI.

- The grant of benefit under the LPP provisions linked to “*any other factor deemed relevant*” does not offer sufficient certainty to applicants seeking to report unrelated cartels.
- This is particularly problematic since unlike other jurisdictions (e.g. the [UK](#)), the CCI does not allow potential applicants to approach it on a no-names basis (or otherwise) to determine whether or not markers are available.
- The Draft LP Regulations should be amended to: (a) require LPP applicants to report the existence of the second cartel within a reasonable period of time; (b) require the CCI to the extent possible, to take administrative steps to make a *prima facie* determination in the second cartel within a reasonable period of time; and (c) to the extent possible, require the CCI to provide LPP applicants with time-bound and predictable processes to ensure that they are awarded the enhanced penalty reduction in the first cartel case. This will ensure greater certainty and predictability, which serve to enhance the attractiveness of the LP regime.

2. What are the factors the CCI will consider when determining whether to grant an applicant a “lesser penalty plus” benefit?

The discretion to grant any LPP benefits lies with the CCI. The CCI is required to consider:

- the likelihood of the CCI or the DG detecting the newly disclosed cartel without the LPP application;
- factors that distinguish the newly disclosed cartel from the existing cartel; and
- any other factors deemed relevant by the CCI.

[First and second proviso to Reg 5]

The above is in addition to the existing factors listed in *Reg 3(5)*, which are applicable to LP applications as well.

Axiom5 Comment:

- The Draft LP Regulations list only two specific factors - the likelihood of detection of the second cartel and the distinguishing factors between the first and second cartel. A catch-all provision allows the CCI to consider

any other factors it may deem relevant, giving it wide discretion and introducing unpredictability in this regard to potential LPP applicants.

- In the interest of greater certainty and predictability in the Draft LP Regulations, the other factors likely to be considered by the CCI should also be listed.
- For instance, some additional factors considered in leniency plus regimes in other jurisdictions include:
 - The quality/strength of the evidence presented by the leniency plus applicant which is not already available with the authority; ([Australia](#))
 - The conduct of the leniency applicant, both pre and post discovery of the cartel conduct ([Australia](#));

The effort undertaken by the leniency plus applicant to investigate the additional cartel ([UK](#)).

3. Are there any other conditions to which LPP applicants are subject?

Yes, LPP applicants are subject to the same conditions as LP applicants.

These are:

- They shall not participate in the cartel from the time of disclosure to the CCI, unless the CCI directs otherwise;
- They shall provide “vital disclosure(s)” in respect of the contravention under s. 3 of the Act.
- They shall provide all relevant information, documents and evidence as required by the CCI;
- They shall cooperate genuinely, fully, continuously and expeditiously throughout the investigation and CCI proceedings; and
- They shall not tamper with evidence or documents that may contribute to the establishment of a cartel in any manner.

[Reg 3(1)]

4. Is there a time limit for submission of an LPP application?

Yes. An LPP application may be filed only until the submission of the DG's investigation report to the CCI. *[Proviso to Reg 7(1)]*

Notably, the Draft LP Regulations introduce this time limit for LP applications as well. *[Proviso to Reg 6(1)]*

Axiom5 Comment:

- Based on existing CCI procedure, it is not possible for parties to know when this proposed deadline has lapsed. Parties under investigation are not always aware of when the DG Report is submitted to the CCI. Although they may have a general sense of the stage of the investigation based on interactions with the DG, parties are formally notified of the completion of the investigation once the CCI shares the DG Report with the parties.
 - Notably, there is generally a time lag between the submission of the DG Report to the CCI and the forwarding of the DG Report to the parties, especially in cartel cases where the DG has to prepare non-confidential versions for circulation (sometimes, several non-confidential versions, where there are multiple parties under investigation).
 - Additionally, as per the statutory investigation procedure under Section 26, the CCI may also direct the DG to conduct a further investigation or choose to conduct a further inquiry itself, after receiving the DG Report. As such, the submission of the DG Report to the CCI may not signify the completion of the investigation in all cases.
- In the interest of fairness and clarity, the Draft LP Regulations should be modified to allow potential applicants to submit LP or LPP applications until the receipt of the DG Report by the parties, under Section 26(4).
- This would also be in line with the CCI's position on the timeframe within which to submit settlement applications, as well as the position in other jurisdictions:
 - In the [EU](#), leniency applications may be disregarded *after* the publication of the Statement of Objections by the European Commission. Note, however, that the EU does not have a "leniency plus" regime.

- In the [UK](#), there is no prescribed deadline for the submission of leniency applications - however, leniency applications submitted at more advanced stages of an investigation receive fewer benefits (discretionary reduction in penalties of up to 50%) as compared to applicants who are the first in line and have submitted applications sooner, such as prior to the start of an investigation (may receive blanket immunity).
- Similarly, in the [US](#), corporate leniency is available both before and after the Department of Justice (DOJ) opens an investigation, although [recent guidance in 2022](#) requires that companies are required to “promptly” report anticompetitive conduct to the DOJ.

5. Under what circumstances can the CCI or the DG continue to use the evidence submitted in an LPP application?

The DG or the CCI can continue to use the evidence provided even if the LPP applicant does not comply with the conditions specified in Reg 3(1) (see [point 3](#) above). *[Reg 3(3)]*

Further, the DG or the CCI may also use the evidence and information submitted by LP and LPP applicants even if they subsequently withdraw the application. The only exception to this is with respect to the fact of admission of contravention by the applicants. *[Reg 10(2)]*

Axiom5 Comment:

- This is in line with the position in other jurisdictions. For instance, in the [UK](#), information and evidence submitted as part of failed or withdrawn leniency applications may be used by the regulator as part of its investigation, except for any information or evidence that is self-incriminating.

6. Is there a prescribed format in which to submit an LPP application?

Yes, the Draft LP Regulations have introduced Schedule II, which lists the information required in an LPP application.

This includes:

- Name and contact details of the LPP applicant and its authorised representative
- Details of the ongoing cartel in which the LPP applicant may have obtained priority status
- Disclosures pertaining to the newly disclosed cartel in terms of Schedule I (which relates to regular LP applications)
- Explanations of any similarity in the conduct, product, service or matter in the previous cartel with the newly disclosed cartel
- Justifications of how the newly disclosed cartel is distinct from the existing cartel
- Any other material information

III. Procedural changes

7. Has there been any change to the protection of confidential information submitted as part of LP and LPP applications?

Yes. The Draft LP Regulations now permit the CCI, after the submission of the DG Report, to disclose the contents of LP and LPP applications in accordance with [Regulation 35](#) of the Competition Commission of India (General) Regulations, 2009 (**General Regulations**), which facilitate disclosure of confidential information within a “confidentiality ring” in certain circumstances. *[Reg 8]*

Under the existing provisions, disclosure of confidential information including the identity of the applicant was permitted in certain circumstances:

- Where disclosure was required by law;
- Where the applicant consents to such disclosure in writing;
- Where the applicant itself has made a public disclosure; and
- Where the DG deems it necessary to disclose evidence (without the applicant’s consent), subject to the DG obtaining the prior approval of the CCI and having recorded its reasons for disclosure in writing.

Axiom5 Comment:

Access to case records is an essential aspect of parties’ due process rights. The extension of “confidentiality ring” mechanism to cartel cases, including the cases initiated on the basis of LP or LPP applications was most needed and is welcome.

8. Is it possible for the CCI to revoke the benefits granted to LP and LPP applicants? Under what circumstances can this happen?

Yes, the Draft LP Regulations introduce a provision which mandates that any benefit of lesser penalty (whether for LP or LPP applicants) stands forfeited if the CCI is satisfied that the applicant:

- did not comply with the conditions on which the benefit of lesser penalty was granted;
- gave false evidence or withheld material information;
- did not make a “vital” disclosure, i.e. the disclosure was not sufficient for the CCI to come to a finding of contravention.

In addition, the applicant would be subject to the inquiry in respect of the alleged cartelization, as well as a potential penalty for cartelization. *[Reg 11]*

Axiom5 Comment:

- Reg 11 is in line with the existing statutory position in the fourth proviso to Section 46 of the Act, which has not been used by the CCI thus far.
- As such, it is unclear as to whether the provision for forfeiture is applicable during the pendency of a cartel inquiry, or could be exercised by the CCI even after it comes to a final determination. Given the CCI’s practice so far has been to declare the benefit of lesser penalty only in its final infringement order, it appears that the CCI now has the discretion to direct forfeiture subsequent to this final determination.
 - Two of the three circumstances for forfeiture (failure to comply with conditions for leniency and lack of vital disclosure) are factors on the basis of which the CCI may reject LP or LPP applications in the first instance.
 - Moreover, orders of the CCI granting leniency are appealable to the statutory appellate authority and are therefore, subject to judicial review.
- It would not bode well for the effectiveness and predictability of the Draft LP Regulations if the CCI were also then granted the power to revoke the benefits already granted to LP and LPP applicants through a final determinative order. As such, Reg 11 should be omitted altogether from the Draft LP Regulations.

9. Are LP and LPP applicants permitted to withdraw their applications?

Yes, in line with the new amendments to the Act, the Draft LP Regulations introduce a provision that allows applicants to withdraw their LP or LPP applications. However, this may only be done prior to the receipt of the DG Report by the CCI. *[Reg 10]*

Axiom5 Comment:

As indicated in point 4 above, the deadline for withdrawal of LP or LPP applications should be with reference to the receipt of the DG Report by parties rather than by the CCI.

IV. Miscellaneous

10. **Can participants in a hub-and-spoke cartel also submit a leniency application?**

Yes, the definition of “applicant” now includes any person, enterprise or association which may not be a competitor of the other alleged cartel participants that is involved in a cartel. *[Reg 2(1)(b)]*

This is in line with the amendment to Section 3(3) of the Act, which came into effect in April 2023. As such, participants in hub-and-spoke cartels can now submit both LP and LPP applications.

11. **How is the reduction in penalty for second, third and subsequent applications calculated?**

The Draft LP Regulations clarify that the reduction of up to 50% and 30%, respectively for the second, third and subsequent LP applicants is on the “penalty imposed” and not the full penalty leviable. This is a welcome clarification. *[Reg 4(c)(ii)]*

12. **Do the Draft LP Regulations contain any transitional provisions?**

No, the Draft LP Regulations do not include the standard “repeals and savings” clause - potentially an unintentional drafting oversight.

Axiom5 Comment;

The Draft LP Regulations should be amended to include a repeals and savings clause to ensure that there is no uncertainty or lack of clarity with respect to the validity of actions taken by the CCI, DG or parties under the existing regulations, once these are replaced by the final version of the Draft LP Regulations.
