

November 07, 2023

## CHANGES BROUGHT IN BY THE DRAFT OF COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2023

Recently, the Competition (Amendment) Act, 2023 (hereinafter referred to as "**Amendment Act, 2023**") has recently modified the Competition Act, 2002 (hereinafter referred to as "**Act**") bringing about various changes within the existing framework of penalties. In light of these changes, Competition Commission of India (hereinafter referred to as "**Commission**") has released the draft of the Competition Commission of India (Lesser Penalty) Regulations, 2023 (hereinafter referred to as "**Lesser Penalty Regulations, 2023**") which will supersede the earlier Competition Commission of India (Lesser Penalty) Regulations, 2009.

The Commission has invited written comments from stakeholders from October 16, 2023 to November 11, 2023 by duly filing the form given on the Commission's website.

The key takeaways brought by the Lesser Penalty Regulations, 2023 are as follows:

### **I. Expanded the Scope of Applicant:**

Previously, the term applicant was limited to encompass only the enterprise engaged in a cartel and the individual representing such enterprise within the cartel. However, the draft of the Lesser Penalty Regulations, 2023 now extends this definition to encompass such enterprise or association of enterprises or a person or association of persons, which are though not engaged in identical or similar trade but have the intend to participate or are participating in advancement of such cartel and submits an application for lesser penalty and/or lesser penalty plus to the Commission.

### **II. Definition of 'newly disclosed cartel':**

Due to the introduction of the Amendment Act 2023, which has established a leniency plus regime encouraging applicants to come forward with disclosures regarding other cartels, it is prudent to include and define the term 'newly disclosed cartel'. Under the draft of the Lesser Penalty Regulations, 2023, it is defined as a cartel determined by the Commission based on the disclosures made by the applicant, taking into account the information already in the possession of 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.

### **III. Grant of lesser penalty plus:**

Under the draft of the Lesser Penalty Regulations, 2023, the Commission has the authority to provide an additional reduction in monetary penalty to the applicant who offers full, true and vital disclosure concerning the existence of

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another cartel. The additional reduction in monetary penalty for the applicant can extend to a maximum of 30% of the penalty imposed with respect to first cartel, besides obtaining benefit of reduction in penalty up to or equal to 100% in respect of newly disclosed cartel. However, it is important to highlight here that Commission will exercise its discretion in reducing penalties only after assessing that whether the discovery of newly disclosed cartel could have been achieved by the Commission or the Director General without the submission of a lesser penalty plus application or any other factor as deemed relevant by the Commission.

#### **IV. Timeline and manner of submitting of application for presence of cartel:**

As per the draft of Lesser Penalty Regulations, 2023, any applicant seeking the benefit of a reduced penalty must submit the application at any point during the inquiry but prior to the Commission receiving the investigation report from the Director General under section 26 of the Act. However, its noteworthy to highlight here that apart from submitting an application, the Commission may be intimated in writing only, either in person or via email or fax, to provide evidence and information regarding the existing of the cartel. Moreover, the new draft of Lesser Penalty Regulations, 2023 also provides that if the application and required documents are not submitted within the 15 days from the date of Commission's communication of such direction, the applicant priority's status and consequent benefit for the lesser penalty will be forfeited.

#### **V. Procedure for grant of lesser penalty plus:**

The draft of Lesser Penalty Regulations, 2023 has laid down the procedure for grant of lesser penalty plus. It provides that applicants, or their authorized representatives, may submit an application containing specified material information as per Schedule II, or they can provide this information in writing, either in person, via email, or fax, to the designated authority to furnish evidence related to newly disclosed cartels. Notably, the application for lesser penalty plus can be made at any time before the Commission receives the Director General's investigation report. In case of multiple applicants for the same newly disclosed cartel, the Commission will not consider the second applicant unless the first applicant's application has been rejected. When a newly disclosed cartel is determined, the Commission will grant lesser penalty plus status for the first disclosed cartel and simultaneously assign priority status for the newly disclosed one. If the application isn't received within fifteen days from the communication of the direction, the lesser penalty plus status and priority status will be forfeited. The Commission may reject an application if the applicant hasn't provided full, true, and vital disclosure, however it will provide an opportunity for a hearing before rejecting the application. In cases where the lesser penalty plus benefit is not granted to the first applicant, subsequent applicants will move up in the priority order. The Commission's decision regarding lesser penalty plus status will be communicated to the applicant.

#### **VI. Withdrawal of Application:**

The applicant has been empowered under the draft of Lesser Penalty Regulations, 2023 to retract their submitted application. However, such withdrawal is only permissible until the Commission receives the report of investigation from the Director General regarding the relevant matter. Its essential to note that in the event of the applicant's withdrawal of the application, the Director General and the Commission retain the authority to utilize any information, evidence, or documents provided by the applicant for the purposes of this Act, except for the admission.

#### **VII. Forfeiture:**

This draft of Lesser Penalty Regulations, 2023 introduces a significant change regarding the benefits of a lesser penalty or lesser penalty plus. If, during an inquiry or legal proceedings, the Commission determines that the applicant has done any of the following:

- a) Failed to follow the conditions set by the Commission for the reduced penalty; or
- b) Provided false information or intentionally left out material information; or

c) Disclosed non-vital information.

Then, the applicant will lose the benefit of receiving a reduced penalty. Instead, they will face an inquiry for the offense they were initially being investigated for. Additionally, they may be required to pay the full penalty that would have applied if they hadn't applied for a reduced penalty.

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## AWARDS & RECOGNITIONS



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