
CCI INTRODUCES LENIENCY “PLUS” REGIME IN INDIA- WILL IT SUFFICE

India’s fair market watchdog, Competition Commission of India (“CCI”), after due consultations, has finally notified the “**leniency plus**” mechanism to further strengthen cartel detecting framework in India.

CCI, in exercise of its powers under 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 Act**”) , has notified the Competition Commission of India (Lesser Penalty) Regulations, 2024 (“**2024 Regulations**”) through a [Gazette Notification dated 20 February 2024](#).

Under the 2024 Regulations, the leniency plus facility has been introduced to provide a leniency applicant (“existing applicant”) of an existing cartel, an incentive to share information about a second cartel that is not known to the CCI. Under this facility an existing leniency applicant will get an **additional reduction in monetary penalty up to 30% of the penalty imposed** with regard to **the first cartel**, besides obtaining benefit of **reduction in penalty up to or equal to 100% in respect of newly disclosed cartel**. Further, the 2024 Regulations have brought certain corresponding changes in the Competition Commission of India (Lesser Penalty) Regulations, 2009 (“**2009 Regulations**”) now repealed by 2024 regulations.

Legal Framework of newly enacted leniency plus mechanism

The new leniency plus regime has been introduced in furtherance to sub-section (4) to Section 46, which was inserted through the Competition (Amendment) Act, 2023. Under this mechanism, if during the course of cartel investigation any enterprise , which is part of a such cartel makes disclosure of another cartel which has alleged to have violated Section 3 of the Act, and pursuant to such disclosure the CCI is able to form *Prima facie* opinion under sub-section (1) of Section 26 of the Act about existence of another cartel then in such situation such existing applicant would be considered as eligible for the leniency plus benefit and would be granted additional monetary reduction in penalty to be imposed by CCI., provided that such enterprise or an individual , involved in the cartel on behalf of the enterprise , is already a leniency applicant in the previous cartel.

Further, the 2024 Regulations set out the following certain prerequisites for the applicants to qualify themselves for the penalty plus mechanism:

- a. *The applicant must have an existing investigation going on for a cartel to which it has already disclosed to the CCI.*
- b. *The applicant must cease to participate in the cartel from the time of its disclosures.*
- c. *The applicant should make disclosure that must be sufficient to enable the Commission to form a prima facie opinion.*

- d. *The applicant shall provide all the relevant documents, information and evidence that may be required by the Commission.*
- e. *The applicant should co-operate (a) genuinely (b) fully and (c) expeditiously throughout the investigation.*

As per the Regulation 5 of the 2024 Regulations, an applicant, who was earlier a leniency applicant and had made full and true disclosure that led the CCI in forming *prima facie* opinion with respect to the existence of the cartel (first cartel) and further makes true disclosure that subsequently led the CCI in forming *prima facie* opinion with respect to the existence of the another cartel (second cartel), in such situation such applicant will be granted up to or equal to 30% additional reduction in penalty with regard to first cartel besides obtaining benefit of reduction of up to or equal to 100% reduction in penalty with respect to second cartel.

Also, in the case of more than one applicant for lesser penalty plus of a newly disclosed cartel, then the Commission shall not examine the next or subsequent applications unless the application of the first applicant is rejected by the CCI.¹ When the benefit of “lesser penalty plus” is not granted to the first applicant then the CCI may examine the subsequent applicant(s) in the order of their priority status for grant of “lesser penalty plus” status.² Further, before rejecting the application for “leniency” or “leniency plus” as under 2024 regulation the CCI is mandated to provide an opportunity of being heard to such applicant.³

Additionally, 2024 Regulation provides facility of withdrawal of lesser penalty or lesser penalty plus application. However, the applicant is only allowed to withdraw before the investigation report is submitted by the DG to the CCI. Also, in the case of withdrawal, the DG or CCI shall be at liberty to use any information, evidence or document submitted by the applicant except admission.

Changes introduced by 2024 Regulations.

<u>Existing 2009 Regulations</u>	<u>Newly enacted 2024 Regulations</u>
Regulation 2: Definitions (c) “applicant” included any member of the cartel or any individual who has been involved in the cartel on behalf of the	Regulation 2: Definitions Following new clauses have been inserted. (b) “admission”- means statement or submission made by a party that it has indulged in the alleged violation of Section 3 of the Act.

¹ Regulation 7 clause 1 of the regulations 2024

² Regulation 7 clause 6 of the Regulations

³ Regulation 3 clause 7

<p>enterprise and submits an application for lesser penalty to the Commission.</p>	<p>(c) “applicant” includes an enterprise or association of enterprises or a person or association of persons who has been involved in the cartel <u>though not engaged in identical or similar trade to be a leniency or leniency plus applicant.</u></p> <p>(h) “newly disclosed cartel”-means the second cartel discovered by the Commission pursuant to the disclosure made by an existing applicant for leniency in respect of a cartel under investigation.</p>
<p>Regulation 3: Conditions for lesser penalty</p> <p>The regulation did not contain a provision regarding rejection of application in case of any false evidence given during the cartel investigation. Further upon rejection the applicant was not provided with the opportunity of being heard. Further, in case of rejection of the application due to failure to furnish information as asked by the DG or CCI during the course of investigation there was no provision for inquiry against the applicant, thereby creating fear of this provision being misused solely for the purpose of seeking monetary reduction in the penalty.</p>	<p>Regulation 3: Conditions for lesser penalty or lesser penalty plus</p> <p>(i) A new clause (f) in sub regulation (1) has been added which prohibits an applicant from giving any false evidence or omitting any material information.</p> <p>(ii) Two new sub regulations (3) & (5) have been added which empowers the Commission to reject an application in case of failure of the applicant to provided full and true disclosure of the information and evidence or both as required by the DG or the Commission from time to time.</p> <p>(iii) However, a sub-regulation (6) added makes it mandatory for the Commission to provide an opportunity of hearing to the applicant before rejection under sub regulation (3) & (5).</p> <p>(iv) Further, in case of rejection of the application under sub regulations (3) or (5), a new sub regulation (8) has been added which empowers the Commission to conduct an independent inquiry against the application for reason leading to rejection of his application.</p> <p>(v) A new clause (d) has been added to sub regulation (9) which makes it obligatory for the Commission to grant reduction in penalty</p>

	only upon fulfilment of the conditions specified in clauses (a) to (d).
Regulation 4: Grant of lesser penalty It provided explanation for “added value”	Regulation 4: Grant of lesser penalty It provides explanation for “significant added value”.
No provision for grant in reduction for the lesser penalty plus applicants.	Regulation 5: Grant of Lesser Penalty Plus New Regulation 5 was inserted to grant a additional reduction of up to 30% for the existing cartel under investigation besides reduction up to 100% in case of newly disclosed cartel. To the lesser penalty plus applicants, with illustration and Proviso.
Regulation 5: Procedure for grant of lesser penalty Post receiving information from the leniency applicant, the designated authority was obligated to put the matter within five working days before the CCI for its consideration. Further, the regulation did not explicitly mention as to at what stage of the investigation, an application for leniency can be filed before the CCI. Also, CCI through the designated authority was required to provide a written acknowledgment to the applicants informing them of the exact priority status /marker of the applicant.	Regulation 6: Procedure for grant of lesser penalty Now, the existing five-day timeline has now been increased to 10 working days . The regulation explicitly mentions that the application for grant of lesser penalty can be made at any time during inquiry but not after the report has been submitted by the DG to the CCI. Further, the statutory obligation upon the Commission to inform the exact marker/priority status has been replaced with the words “ <i>appropriate priority status has been marked</i> ”
	Regulation 7: Procedure for grant of lesser penalty plus The new provision made for lesser penalty plus which is in sync with Regulation 6 above.
Regulation 6: Confidentiality	Regulation 8: Confidentiality No change
Regulation 6A: Inspection of documents	Regulation 9: Inspection and Certified Copies of Documents No change except changes necessitated due to relevant additions.
	Regulation 10: Withdrawal

	A new regulation to provide the facility of withdrawal of the leniency application any time before the submission of the DG report to the CCI under Section 26(3) of the Act has been provided.
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Comments:

Most cartel investigations in India are emanating from tenders for supplies floated by the public sector undertakings (PSUs), for public procurement through competitive bidding, wherein the bidders in order to eliminate competition, often enter into bid-rigging⁴ and other types of horizontal agreements with their competitors. It has been observed that, besides the [naïve cartels in the SMEs](#) due to ignorance about the competition law and strict provisions of the Act, even those entities which are aware of the law, are reluctant to be a leniency applicant because of the fears of getting blacklisted by the PSU's and not able to bid in the future along with the fear of reprisals and boycotts by competitors and their reputation in the Industry getting negatively affected. Therefore, the absence of appropriate remedies to balance the interests of these entities will certainly discourage them from coming forward as leniency or leniency plus applicants before the CCI. Further, even the new 2024 Regulations do not recognize an "individual" who though may not be involved in a cartel in the same or other competing enterprise yet comes to know about such illegal activities in the company. In other words, there is no incentive or even protection of identity of "whistleblowers" within an enterprise to come forward to disclose a cartel as till date there is no law to protect whistleblowers in India. Further, even including the whistleblower alone may not suffice, unless some reward or monetary incentive is introduced either in the Act or the Regulations.

In other advanced jurisdictions, the success of their leniency regimes are mainly due to such reward schemes. For instance, the Competition Market Authority ("CMA") in the UK, has recently increased the reward of up to £250,000 from the existing £100,000 for the whistleblowers.⁵ Also, in Europe Slovak Antimonopoly Office introduced a "cartel informant reward" system for individuals who are first to disclose significant evidence on illegal cartel practices, with rewards in the amount of 1 percent of the total fines imposed on infringers, capped at a maximum of €100,000.⁶ Interestingly, if a cartel list fails to pay the fine in time, the Antimonopoly Office pays out only 50 percent of the original amount to the whistleblower, capped at €10,000. Similarly, in Hungary, the Competition Commission offers a reward of up

⁴ Explanation to sub-section (3) of Section 3, of the Act.

⁵ <https://www.gov.uk/government/news/blowing-the-whistle-on-cartels>

⁶ <https://www.financierworldwide.com/whistleblower-programmes-making-cartel-detection-more-effective#:~:text=In%202014%2C%20the%20Slovak%20Antimonopoly,a%20maximum%20of%20E2%82%AC100%2C000.>

to 1 percent of the total fine levied in an infringement decision, with a cap of approximately €150,000.⁷

Therefore , although the introduction of a leniency “plus” regime to incentivize existing leniency applicants to disclose other cartels , by additional 30% reduction in penalties , irrespective of their priority or marker status is a welcome step in the right direction yet, in my view, it will not produce the desired results unless, firstly , the whistleblower scheme is introduced , with legal protections to such whistleblowers is provided and , secondly , a reward scheme is introduced.

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⁷ <https://www.financierworldwide.com/whistleblower-programmes-making-cartel-detection-more-effective>