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### INDIAN LENIENCY REGIME REVAMPED

23 February 2024

The new leniency regime under the Competition Act, 2002 (as amended) (Competition Act) came into effect on 20 February 2024. It marks the advent of the “leniency plus” framework – a cartel detection tool deployed in several jurisdictions including the U.S.A., U.K., Brazil, Canada, and Singapore.

The foundation for the new leniency regime was laid out in April 2023 when the Competition (Amendment) Act, 2023 (Amendment Act) first introduced a “leniency plus” framework. Following the Amendment Act, the Competition Commission of India (CCI) published draft lesser penalty regulations (Draft Regulations) on 16 October 2023 to supplement the new leniency regime. The CCI invited public comments on the Draft Regulations and received inputs from a number of stakeholders including industry associations, legal experts, policy think tanks, and academia. Subsequently, the Government of India notified the revised leniency provisions under the Competition Act, and the CCI simultaneously published updated lesser penalty regulations.

#### **Introduction of Lesser Penalty “Plus”**

The revised law establishes the framework for “lesser penalty plus” applications. Effectively, this law incentivizes leniency applicants in an existing investigation to disclose details of collusive conduct that is (i) unrelated to the existing investigation and (ii) not yet known to the CCI.

If the disclosure enables the CCI to *prima facie* determine cartelisation, in addition to a penalty reduction of up to 100% for the divulged cartel, the applicant is eligible for an additional reduction of up to 30% of the penalty for the ongoing matter.

#### **Eligibility of individuals**

Individuals (e.g., employees, directors, etc.) who are part of the leniency application for the initial investigation can be granted lesser penalty plus, if such individuals are part of the newly disclosed cartel and filed application.

#### **Penalty reduction**

The updated regulations grant CCI wide discretion to decide penalty reduction for a leniency plus applicant, empowering it to consider (i) likelihood of the newly disclosed cartel being detected without the application, and (ii) any other factor it deems relevant.

## **Procedure**

A lesser penalty plus application must include details of the (i) applicant, (ii) ongoing matter, (iii) newly disclosed cartel and (iv) similarities in the ongoing matter and new cartel, as well as justify that the newly disclosed cartel is separate from the current case. A lesser penalty plus application can be filed only before the CCI receives the Director General's (DG) investigation report in the ongoing case. Further, lesser penalty plus benefits are restricted to one applicant. The CCI will consider any subsequent application only if it rejects the preceding application.

## **Other Amendments**

### ***Amendment to "applicant" definition***

The revised regulations include an amended "applicant" definition, clarifying that any cartel participants, regardless of whether they are engaged in business activities similar to those of other cartel members, can file a lesser penalty or lesser penalty plus application.

### ***Revisions to conditions for granting lesser penalty / lesser penalty plus***

In addition to previous prerequisites, the amended regulations require lesser penalty / lesser penalty plus applicants to ensure that they do not provide false evidence or omit to submit material information (knowing that such information is material) in their applications.

### ***Provisions for withdrawing / rejecting applications***

In line with the revised legislation, the updated regulations allow lesser penalty / lesser penalty plus applicants to withdraw their applications before the CCI receives the DG's investigation report. The CCI can also reject applications which fail to comply with its requirements. The CCI must, however, provide an opportunity of being heard before rejecting an application.

Notwithstanding that an application is withdrawn or rejected, apart from an applicant's admission that it indulged in alleged cartel conduct, the CCI / DG can use the information, evidence and documents submitted by the applicant for the ongoing matter or for the purposes of the Competition Act (as applicable).

### ***Removal of oral communication and communication by telephone***

The previous regulations allowed oral communication / communication by telephone for (i) an applicant to inform the CCI that it will furnish information or documents in relation to cartel conduct, and (ii) the CCI to convey priority status to an applicant. However, the revised regulations require these to be in writing (including e-mail / fax) only.

## **Comment**

The advent of the leniency plus regulatory framework provides leniency applicants with another avenue to explore further reductions in penalties. While this incentive will benefit whistleblowers disclosing cartel conduct, the CCI will also potentially discover more cartels than it would have otherwise detected. The new regime should pose a stronger challenge for cartels to maintain co-operation and secrecy among all participants. However, the CCI's power to determine reduction in penalty is unfettered under the revised regulations. The CCI is expected to publish penalty guidelines in the near future which may provide guidance on the quantum of penalty to be imposed.

The revised regulations streamline the process for filing applications and implementing the leniency framework based on the CCI's practical experience and gained expertise in dealing with such matters.

Clarity that the CCI / DG cannot use admissions if an application is rejected / withdrawn brings certainty and predictability for applicants. Yet, leniency applicants need to be cautious in their applications considering the introduction of new prerequisites and information requirements, along with the CCI's power to reject applications.

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