RESPONSE TO THE

PUBLIC CONSULTATION ON "THE COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2023"

November 2023 | *Issue No. 111*

ESYA centre

Attribution: *Response to the Public Consultation on "The Competition Commission of India (Lesser Penalty) Regulations, 2023".* Issue No. 111, November 2023, Esya Centre.

Esya Centre
B-40 First Floor
Soami Nagar South,
New Delhi - 110017, India

The Esya Centre is a New Delhi based technology policy think tank. The Centre's mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. More details can be found at *www.esyacentre.org*.

Layout & Design: Khalid Jaleel

Introduction

The Competition Commission of India (CCI) opened public consultations on the Draft (Lesser Penalty) Regulations, 2023 ("Draft Regulations") on October 16, 2023. The Esya Centre[1] is pleased to be afforded an opportunity to respond to the Draft Regulations.[2]

Our response is divided into two parts. Part I provides a preliminary overview of our response, with Part II delving deeper into specific aspects of the regulations, such as timelines and confidentiality.

Part I – Preliminary Overview

The purpose of lesser penalty and leniency plus provisions is two-fold. One such regulations have the potential to bolster the CCI's ability to uncover cartel activity that would otherwise go undetected without significantly increasing resource allocation to such detection.[3] Two, they also incentivize entities or individuals involved in cartel to cooperate with the CCI in exchange for lesser penalties.

However, the following aspects of the Draft Regulations may disincentivize cartel participants from providing information to the CCI:

1. **Use of information provided by an LP or LP Plus applicant -** the Draft Regulations allow the CCI and Director General to use information provided by an LP applicant even if the application is withdrawn.[4] Similarly, Regulation 3(3) provides that information, documents, and evidence provided by an LP applicant can be used in the ongoing matter if the applicant fails to comply with the conditions specified in Regulation 3(1). The prospect of providing the CCI and DG with information that can be used against an applicant in the same matter will likely deter entities or individuals from participating in the leniency/lesser penalty process.

1. The Esya Centre is a New Delhi-based technology policy think-tank. Its mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It simultaneously aims to build domestic institutional capacities for generating ideas that enjoin the triad of people, innovation and value, consequently helping reimagine the public policy discourse in India. More information can be found at: www.esyacentre.org.

2. The response is prepared by Mohit Chawdhry (Fellow) and Akanksha Dutta (Junior Fellow) on behalf of the Esya Centre.

3. https://www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf

4. See Regulation 10 of the Draft Regulations.

2. **The vagueness of criteria to determine the monetary penalty reduction under an LP Plus application -** Regulation 5 lists the factors the CCI will consider when deciding an LP Plus application. The factors, as currently drafted, are broad and leave considerable scope for interpretation, detracting from the predictability and certainty of the LP process. Specifically, it is unclear how the CCI will determine the likelihood of the second cartel being detected without the LP Plus applicant's disclosure. Similarly, the term "any other factor" in the Proviso to Regulation 5 leaves considerable scope for interpretation. The resultant uncertainty will disincentivize entities or individuals from providing the CCI with relevant information and disclosures.

3. **Lack of a confidential/hypothetical pre-application consultation mechanism -** Finally, the Regulations do not currently provide for a confidential pre-consultation process. Such a process can be vital in helping cartel participants evaluate whether the information they possess qualifies for reduced penalties before making a formal application, providing them with much-needed clarity and guidance and promoting their participation in the LP/LP plus process. The UK and EU, among other countries, allow LP applicants to approach their respective competition authorities and seek guidance on the likelihood of receiving reduced penalties based on the information they possess.

Each submission is detailed further in the following section.

Part II – Detailed Submissions

1. Limit the use of information provided by an LP applicant to the CCI

S. 46(2) of the Act and Regulation 10 allow an LP applicant to withdraw its application at any time before the receipt of the DG's investigation report. However, s. 46(3) and Regulation 10(2) provide that any information, evidence, or document submitted by the LP, except its admission, can be used by the CCI or DG where an application is withdrawn. Furthermore, Regulation 3(3) states that the CCI and DG can use the information provided by an LP applicant even if the application fails due to the LP's non-compliance with Regulation 3(1), which requires, among other things, full and complete cooperation with the CCI, provision of relevant documents and information, and refraining from concealing or destroying material evidence.

These provisions will hinder the effectiveness of the LP regime by deterring cartel participants from providing information due to the fear of self-incrimination. Indeed, a cartel participant providing information to the CCI under the LP regime may be rendered worse off than other non-cooperating cartel participants. This militates against the International Competition Network's (ICN) "not worse off" requirement, which states that leniency or lesser penalty regulation regimes should ensure that cooperating participants are not worse off than other non-cooperating cartel members.[5]

Moreover, leniency regimes in leading jurisdictions ensure that information provided by an LP applicant is not used against it, or if such information is used, the LP is granted reduced penalties. For instance, Singapore's leniency regime states that where a leniency application is withdrawn, not granted, or revoked, the applicant may either withdraw the information provided to the Competition and Consumer Commission of Singapore or still provide the information and seek a mitigating reduction in financial penalties.[6] It further clarifies that records of oral submissions made by an applicant will not be used by the CCCS unless the information is resubmitted or if the CCCS obtains the information through its formal investigation powers.[7] Similarly, the Immunity and Leniency Programs under Canada's Competition Act provide that information submitted by a leniency applicant will not be used

5. https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CWG_LeniencyChecklist.pdf

6. https://www.cccs.gov.sg/approach-cccs/applying-for-leniency/eligibility

7. https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/immunity-and-leniency-programs-under-competition-act#sec03-2-5

directly against if its leniency marker is canceled (i.e., the process fails) or the application is withdrawn.[8] Such information will be treated as confidential or settlement privileged, based on the facts of the case.

Under the UK's leniency regime, information provided as part of a withdrawn application can be used against the leniency applicant or third parties. However, where the Competition and Markets Authority seeks to use such information, it must consider awarding a fair and reasonable penalty reduction to the withdrawn applicant.[9]

Hence, the inclusion of safeguards against using the information provided by an LP applicant by the CCI and DG is necessary to incentivize cartel participants to cooperate with the CCI. Therefore, the Draft Regulations must be amended to prevent the CCI and DG from using submitted information where the LP application is withdrawn or revoked. Alternatively, the Draft Regulations should provide for a proportionate reduction in penalties for the applicant where information provided as part of a failed or withdrawn LP application is used by the CCI against the applicant or other third parties.

2. Clarify factors for determining the reduction in monetary penalty under Regulation 5

Regulation 5 empowers the CCI to grant an additional reduction in the monetary penalty imposed on an existing LP applicant, making a true, full, and vital disclosure regarding a second cartel. The disclosure must enable the CCI to form a *prime facie* opinion of the existence of the second cartel. The first proviso to Regulation 5 requires the CCI to consider the following factors when deciding the quantum of penalty reduction to be granted:

1. "likelihood" of the CCI/DG detecting the second cartel without the applicant's disclosure.

2. "any other factor" deemed relevant by the CCI.

The ICN's "Checklist for Efficient and Effective Leniency Programmes" states that leniency programmes should provide participants with maximum certainty and predictability.[10] However, the broad language in Regulation 5 introduces considerable subjectivity in determining relevant factors when

8. *https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf*

9. Ibid.

10. *https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CWG_LeniencyChecklist.pdf*

deciding on the penalty reduction, which negatively impacts the certainty and transparency of the LP process.

Other jurisdictions clarify the LP process by specifying the factors their competition authorities will consider when deciding on penalty reductions. For instance, the UK CMA Guidance provides illustrative factors that influence the amount of the reduced penalty, such as the scale of the consumer detriment involved in the additionally reported cartel, including the number and size of the affected markets etc.[11] The Canadian Competition Bureau also provides guidance on the factors to be considered while calculating the reduced penalty, including the strength of the evidence provided by the applicant and the estimated significance of the case brought forward by the applicant, measured in such terms as the affected volume of commerce in Canada, the geographic scope of the conduct in question, and the number of co-conspirator organizations and individuals involved in the conduct in question.[12]

The Draft Regulations must, therefore, clarify the factors that the CCI will consider when deciding on penalty reductions during LP Plus applications to foster certainty and trust in the process. They must also clarify how the CCI will determine the likelihood of the second cartel being discovered without the applicant's disclosure.

3. Establish a confidential pre-consultation mechanism for potential LP applicants

LP and LP plus applications typically involve the provision of confidential information to the Competition Authority. Moreover, potential LP applicants may want to informally ascertain whether the conduct they consider reporting constitutes a cartel and whether reporting it would entitle them to reduced penalties under the LP or LP Plus regimes. As such, providing an opportunity for potential applicants to consult informally with the CCI on a 'no-names' basis could encourage more cartel participants to make relevant disclosures.[13]

The European Union's Leniency Notice allows potential applicants to informally approach the European Commission on a no-names basis

11. https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf

12. https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/immunity-and-leniency-programs-under-competition-act#sec03-2-5

13. https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CWG_LeniencyChecklist.pdf

without any requirement to disclose the cartel's sector, participants, or other identifying details.[14] Furthermore, applicants are allowed to make 'hypothetical applications', in which they provide a detailed list of evidence they propose to submit at a later date. Applicants are not required to disclose their identity or that of other cartel participants but must specify the cartel's sector, geographic scope, and estimated duration.[15] The Commission can then inform the applicants whether the evidence they seek to provide entitles them to reduced penalties. Additionally, legal representatives of an undertaking can also approach the Commission's Leniency Officer, without disclosing their client's identity, to understand if immunity is available for the potential cartels the undertaking is involved in.[16]

The UK's Immunity regime similarly provides for optional confidential guidance and an immunity availability enquiry. In both situations, the undertaking's legal adviser can approach the CMA to understand the likelihood of being awarded immunity or leniency from penalties without disclosing their client's identity.[17] Undertakings can seek guidance on a range of issues, including investigative steps the applicants can take prior to making an application, whether the relevant conduct constitutes a cartel, and the CMA's handling of potential hypothetical scenarios on a no-names basis.[18]

Establishing a similar procedure for no-names consultation under the Draft Regulations could encourage individuals and undertakings to approach the CCI to understand the possibility of being granted lesser penalties, which, in turn, facilitates cartel discovery. The Draft Regulations should, therefore, establish the modalities of such a consultation mechanism.

14. *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52006XC1208%2804%29*

15. *https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf*

16. Ibid.

17. *https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf*

18. Ibid.

B-40 First Floor
Soami Nagar South
New Delhi - 110017
contact@esyacentre.org
www.esyacentre.org