

Draft Lesser Penalty Regulations: Key Takeaways

The Competition Commission of India (CCI) has published the draft Competition Commission of India (Lesser Penalty) Regulations, 2023 (LPR 2023) seeking stakeholder comments by 6 November 2023.

Once notified, the LPR 2023 will amend the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR 2009). The LPR 2009 regulates the leniency programme which is available to those enterprises / individuals who disclose their role in a cartel to the CCI and cooperate with subsequent investigations in return of a reduction in penalty. The LPR 2023 will operationalise the lesser penalty plus / leniency plus facility introduced by the Competition (Amendment) Act, 2023 (Amendment Act).

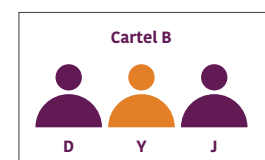
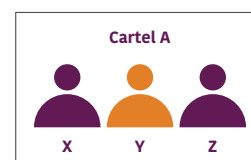
Key takeaways

▮ Leniency plus:

- 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.

▮ The benefit of leniency plus:

- A party considering leniency plus would have two monetary benefits: (i) the leniency plus applicant will get an additional penalty reduction of up to or equal to 30%, i.e., a further reduction on the penalty imposed in the first cartel; and (ii) be eligible for up to or equal to 100% penalty reduction in the newly disclosed cartel (*illustrated herein*).



- Y is a member of Cartel A and Cartel B.
- Y discloses the existence of the Cartel A as a leniency applicant.
- Y is eligible for 50% reduction in respect of Cartel A (having the second marker status).
- Subsequently, Y discloses Cartel B under regulation 7 of LPR 2023.
- Upon acceptance of leniency plus, Y will now be eligible for further reduction up to or equal to 30%, i.e., total of upto 80% in respect of Cartel A.
- Y will additionally get up to or equal to 100% (depending on it satisfying the conditions stated in LPR 2023) reduction in respect of Cartel B.

▮ Conditions and procedure for grant of leniency plus:

- a. Information to be provided:** The applicant must provide the following information: (i) vital disclosure i.e., full and true disclosure of information or evidence which is sufficient for the CCI to establish a prima facie opinion on the existence of a newly disclosed cartel; (ii) details of the investigation with respect to the existing cartel wherein it has obtained priority status; and (iii) justify how the newly disclosed cartel is a new/separate cartel arrangement vis-à-vis the existing cartel.
- b. Timeline for application:** To avail the benefits of leniency plus, the applicant must submit its application before the Director General submits its investigation report to the CCI in respect of the existing cartel.
- c. Other consideration(s):** Due regard will be given to the likelihood of the newly disclosed cartel being detected by the CCI / Director General in the absence of the leniency plus or any other factor that the CCI may feel is relevant, giving wide discretion to the CCI.

Other key changes

- a. Withdrawal of application allowed:** The LPR 2023 provides leniency and leniency plus applicants an option to withdraw their application any time before the receipt of the report of the Director General by the CCI.
- b. Forfeiture of application:** A leniency / leniency plus applicant forfeits the benefits under the leniency/ leniency plus facility in case of: (i) non-compliance of the conditions on which the leniency/ leniency plus was granted; (ii) submission of false evidence or wilfully omitting material information; and (iii) disclosures that do not satisfy the test of “vital disclosures” (as provided under the LPR 2023). In case of forfeiture, the leniency / leniency plus applicant will be treated at par with any other defendant who has not availed the benefit of leniency / leniency plus.

- c. Only written application will be allowed:** Parties looking to avail penalty reductions under the leniency / leniency plus facility must submit a written application. Oral applications will no longer be accepted.
- d. Hub and spoke cartels recognised:** The LPR 2009 regime only recognized “horizontal” cartels (i.e., cartels between competitors). In line with the recognition afforded to hub and spoke arrangements as a “cartel” in the Amendment Act, the LPR 2023 will extend the benefit of the leniency and leniency plus facility to the participants of hub and spoke cartels as well (i.e., cartel amongst competitors through or involving vertically linked players / other facilitators in the market).
- e. Waterfall mechanism for leniency plus:** The LPR 2023 clarifies that the benefit under leniency plus will only be given to one leniency plus applicant. Accordingly, the CCI will consider only one leniency plus application at a time. Unless the CCI rejects a leniency plus application filed by the first applicant, no subsequent applications will be considered. There is no clarity on whether “subsequent leniency plus applicants” would be informed that their applications are in queue and not presently considered, or would it be left for such applicant(s) to ascertain their status on account of lapse of time.

Initial thoughts

- a. Disclosures made can be used against the Existing Applicant & others:** While the identity of the Existing Applicant remains confidential, the CCI and the Director General may use any disclosures or evidence provided by a leniency / leniency plus applicant except an admission of contravention by the applicant, regardless of whether the application is accepted, rejected, or withdrawn.
- b. Confidentiality:** The LPR 2023 also clarifies that after the receipt of the report of the Director General the CCI may disclose such information or evidence

submitted by the leniency / leniency plus applicants. The fact that disclosures can be used by the CCI / Director General in any proceedings under the Act or be shared with third parties, may prejudice or reduce an applicant's incentive to opt for the leniency / leniency plus facility. Additionally, the extent to which these disclosures can be shared by the CCI/ Director General remains unclear.

c. Interplay between a leniency/ leniency plus applicant: Leniency applications are inherently confidential in nature. Practically, it remains to

be seen how the CCI will reconcile the conflicting position (if such situation arises) of a leniency and leniency plus applicant for the second cartel.

d. Comparison with global standards: While some jurisdictions do not have set standards for providing further reduction under the leniency plus facility, most mature jurisdictions curtail the maximum discount at below 30%. Accordingly, reductions higher than global standards may act as an incentive for the Existing Applicant(s) to make true, full and vital disclosure to the CCI.

Key contacts:

Avaantika Kakkar
Partner (Head - Competition)
avaantika.kakkar@cyrilshroff.com

Vijay Pratap Singh Chauhan
Partner
vijay.chauhan@cyrilshroff.com

Kirthi Srinivas
Partner
kirthi.srinivas@cyrilshroff.com

Dhruv Rajain
Partner
dhruv.rajain@cyrilshroff.com

Kaustav Kundu
Partner
kaustav.kundu@cyrilshroff.com

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Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai 400 013, India
T +91 22 2496 4455 E cam.mumbai@cyrilshroff.com W www.cyrilshroff.com
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