

November 3, 2023

Via Web Submission: <https://www.cci.gov.in/stakeholders-consultations/20>

SUBJECT: Joint Section Comments on the draft Competition Commission of India (Lesser Penalty) Regulations

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments to the Competition Commission of India on the draft Competition Commission of India (Lesser Penalty) Regulations, published for public consultation on October 16, 2023.

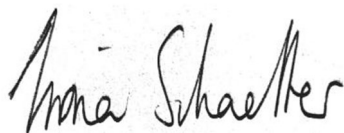
The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



David Schwartz  
Chair, International Law Section



Fiona Schaeffer  
Chair, Antitrust Law Section

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST AND  
INTERNATIONAL LAW ON THE DRAFT COMPETITION COMMISSION OF INDIA  
(LESSER PENALTY) REGULATIONS, 2023**

November 3, 2023

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The American Bar Association Sections of Antitrust Law and International Law (the Sections) welcome the opportunity to submit these comments to the Competition Commission of India (the CCI) on the draft [Competition Commission of India \(Lesser Penalty\) Regulations, 2023](#) (the Draft LP Regulations), published for public consultation on October 16, 2023. These comments reflect the expertise and experience of the Sections' members with competition law and economics.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section's scope of expertise.<sup>1</sup>

The International Law Section (the ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.<sup>2</sup>

### **EXECUTIVE SUMMARY**

At the outset, the Sections commend the CCI for the introduction of the "lesser penalty plus" (LPP) provisions in the Draft LP Regulations, which are likely to contribute to the continued success of the CCI's cartel enforcement program. The Sections' comments are intended to provide greater clarity and ensure adequate incentives to efficiently detect cartels.

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<sup>1</sup> Past comments of the Antitrust Law Section are available online at [https://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs](https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs). The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section's Council after debate reflecting the diversity of viewpoints among the Section's members.

<sup>2</sup> *About Section Policy*, AM. BAR ASS'N, [https://www.americanbar.org/groups/international\\_law/policy/about/](https://www.americanbar.org/groups/international_law/policy/about/).

1. ***Clarify when the benefit for lesser penalty plus (LPP) applicants accrues*** - The Draft LP Regulations introduce the new LPP regime, under which an applicant is eligible to receive: an enhanced reduction in monetary penalty of up to 30% in the first cartel; and a reduction of penalty of up to or equal to 100% in respect of the newly disclosed cartel.<sup>3</sup> However, where investigations do not run concurrently with the second cartel, it is unclear whether the LPP applicant will benefit from the enhanced penalty reduction in the first cartel, if the CCI has not yet evaluated whether the evidence provided is adequate for it to arrive at a *prima facie* opinion in the second cartel. In the interest of ensuring greater transparency, predictability and consistency, the CCI may consider amending the Draft LP Regulations to: (a) require LPP applicants to report the existence of the second cartel within a reasonable period of time; (b) require the CCI, to the extent possible, to take administrative steps to make a *prima facie* determination in the second cartel within a reasonable period of time; (c) to ensure that the identity of the applicant and the contents of its LPP application are kept confidential in both cartels; and (d) to the extent possible, require the CCI to provide LPP applicants with time-bound and predictable processes to ensure that they are awarded the enhanced penalty reduction in the first cartel case.
2. ***Provide more specific factors to determine whether an LPP application is successful*** - The Draft LP Regulations list only two specific factors that the CCI must consider when determining whether to allow or disallow an LPP application - the likelihood of detection of the second cartel and the distinguishing factors between the first and second cartel,<sup>4</sup> in addition to the CCI's wider residuary power<sup>5</sup> to consider "*any other factors it may deem relevant*" while awarding an enhanced penalty reduction to an LPP applicant. While regulatory discretion is important to allow for adaptability to different fact situations, the Draft LP Regulations may consider removing the proviso to Regulation 5 and assess LPP applications based on the factor mentioned in the main clause of Regulation 5, i.e. that the evidence disclosed by the LPP applicant is sufficient to help the CCI come to a *prima facie* decision about the existence of a second cartel; or in the alternative, the CCI may consider listing out additional factors likely to be considered to determine whether an LPP application is successful to ensure greater certainty and predictability.
3. ***Clarify time limit for submission of LP and LPP applications*** - The Draft LP Regulations permit LP and LPP applications to be filed only until the submission of the investigation report of the CCI's investigative arm, the Office of the Director General (the DG) to the CCI. Applicants are unable to determine when the DG's Report is submitted to the CCI. Consequently, the Draft Regulations should be modified to allow potential applicants to submit LP or LPP applications until the receipt of the DG Report by the parties, under Section 26(4) of the Act, in the interest of fairness and clarity.
4. ***Clarify timeline for withdrawal of LP and LPP applications*** – Currently, the Draft LP Regulations allow applicants to withdraw their LP or LPP applications only prior to the receipt of the DG Report by the CCI.<sup>6</sup> As indicated in issue 3 above, since parties under investigation are not formally notified of the completion of the investigation, or the submission of the DG Report by the DG to the CCI, the deadline for withdrawal of LP or LPP applications should be with reference to the receipt of the DG Report by the parties rather than by the CCI.

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<sup>3</sup> Regulation 5, Draft LP Regulations.

<sup>4</sup> First and second proviso to Regulation 5, Draft LP Regulations.

<sup>5</sup> First proviso to Regulation 5, Draft LP Regulations.

<sup>6</sup> Regulation 10, Draft LP Regulations.

5. ***Provision for communication of marker status to LP and LPP applicants*** - The Draft LP Regulations and the CCI, in practice, do not disclose the perfecting of a marker until the publication of its final infringement order. Rather than simply acknowledging receipt of the LP or LPP application, the CCI should consider communicating the perfection of marker status once it has reviewed the information provided as part of the LP or LPP application. This would ensure greater transparency and clarity to parties.
6. ***Include transitional provisions in the Draft LP Regulations, including for ongoing cases*** - The Draft LP Regulations should include a repeals and savings clause to ensure that there is no uncertainty or lack of clarity with respect to the validity of actions taken by the CCI, DG or parties under the existing regulations once these are replaced by the final version of the Draft LP Regulations. The Draft LP Regulations should include a provision that allows parties currently under investigation to receive the benefit of the LPP process, to encourage parties to assist the CCI in discovering other cartels and increase the attractiveness of the leniency process to potential applicants.

## **SPECIFIC RECOMMENDATIONS**

### **1. Clarify when the benefit for lesser penalty plus (LPP) applicants accrues**

The Draft LP Regulations introduce the new LPP regime, under which an applicant who has filed an existing lesser penalty (LP) application, and who makes a “*full, true and vital disclosure*” in respect of the existence of a second cartel, is eligible to receive: an enhanced reduction in monetary penalty of up to 30% in the first cartel; *and* a reduction of penalty of up to or equal to 100% in respect of the newly disclosed cartel.<sup>7</sup> However, the Draft LP Regulations do not ensure that an LPP applicant will benefit from the enhanced penalty reduction in the first cartel, where investigations do not run concurrently with the second cartel.

In two separate cartel proceedings with distinct investigative timelines, it is possible that the CCI may evaluate the evidence received from a LPP applicant with respect to the second cartel, only after it has made a final determination in the first cartel. In such circumstances, the LPP applicant may neither know of nor receive an enhanced penalty reduction in the first cartel simply because the evidence provided in the second cartel has not yet enabled the CCI to arrive at a *prima facie* opinion. The Draft LP Regulations do not award an enhanced reduction in the first cartel until the evidence provided by the LPP applicant is shown to be adequate for the CCI to arrive at its *prima facie* opinion in the second cartel. In such a scenario, it is unclear whether the LPP applicant will benefit from the enhanced penalty reduction in the first cartel, if the CCI has not yet evaluated whether the evidence provided is adequate for it to arrive at a *prima facie* opinion in the second cartel.

The Sections note that the International Competition Network (the ICN) highlights the importance of transparency and certainty in the operation of a leniency policy, including building the trust of leniency applicants and consistency in the application of the policy. The ICN states, “*A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.*”<sup>8</sup> Similarly, the Organization for Economic Cooperation and Development (the OECD) also lists the importance of “*transparency, predictability and certainty of the requirements for entering the [leniency] programme*” as one of the key factors that impact the success

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<sup>7</sup> Regulation 5, Draft LP Regulations.

<sup>8</sup> Para 2.3, ICN, “*Anti-Cartel Enforcement Manual: Drafting and implementing an effective leniency policy*”, 2014, available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG\\_ACEMLeniency.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf) [hereinafter, ICN ANTI-CARTEL MANUAL]

of a leniency regime. The OECD highlights that “[t]he transparency and predictability of a system is the combined result of the clarity and certainty offered by the applicable rules, and the authority’s implementation of these rules and general approach to leniency”.<sup>9</sup>

In light of the above, the Sections respectfully recommend that the Draft LP Regulations be amended to: (a) require LPP applicants to report the existence of the second cartel within a reasonable period of time; (b) require the CCI, to the extent possible, to take administrative steps to make a *prima facie* determination in the second cartel within a reasonable period of time; (c) to ensure that the identity of the applicant and the contents of its LPP application are kept confidential in both cartels; and (d) to the extent possible, require the CCI to provide LPP applicants with time-bound and predictable processes to ensure that they are awarded the enhanced penalty reduction in the first cartel case. This will ensure greater certainty and predictability, which serve to enhance the effectiveness of the LP regime.

## ***2. Specify factors to determine whether an LPP application is successful***

The Sections note that the Draft LP Regulations specify only two factors that the CCI must consider when determining whether to allow or disallow an LPP application - the likelihood of detection of the second cartel and the distinguishing factors between the first and second cartel.<sup>10</sup> The CCI also retains a wider residuary power<sup>11</sup> which permits it to consider “*any other factors it may deem relevant*” while awarding an enhanced penalty reduction to an LPP applicant. Such wide discretion given to the CCI undermines predictability and transparency for LPP applicants.

As indicated above, the Sections would emphasize that transparency, predictability and consistency are key to the success of leniency policies, as recognised by the ICN<sup>12</sup> and OECD.<sup>13</sup> While the Sections acknowledge that regulatory discretion is important to allow for adaptability to different fact situations, leniency regimes in other jurisdictions provide for certain additional factors that may be useful to determine the merit of a leniency plus application. For instance:

- a. [United States](#) (US): The potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of corporate and individual co-conspirators.<sup>14</sup>
- b. [Australia](#):<sup>15</sup>
  - i. The quality/strength of the evidence presented by the leniency plus applicant which is not already available with the authority; and
  - ii. the conduct of the leniency applicant, both pre and post discovery of the cartel conduct;
- c. [United Kingdom](#) (UK): The effort undertaken by the leniency plus applicant to investigate the additional cartel.<sup>16</sup>

The Sections respectfully recommend that the Draft LP Regulations may consider removing the proviso to Regulation 5 and assess LPP applications based on the factor mentioned in the main

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<sup>9</sup> Point 1, OECD, “*Executive Summary of the roundtable on Challenges and co-ordination of leniency programs*”, 2019, available at [https://one.oecd.org/document/DAF/COMP/WP3/M\(2018\)1/ANN2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2018)1/ANN2/en/pdf) [hereinafter, the OECD SUMMARY]

<sup>10</sup> First and second proviso to Regulation 5, Draft LP Regulations.

<sup>11</sup> First proviso to Regulation 5, Draft LP Regulations.

<sup>12</sup> Para 2.3, ICN Anti-Cartel Manual.

<sup>13</sup> Point 1, OECD Summary.

<sup>14</sup> Query 79, DOJ, *Frequently Asked Questions about the Antitrust Division’s Leniency Program*, updated as on January 3, 2023, available at <https://www.justice.gov/media/1226836/dl?inline> [hereinafter the DOJ LENIENCY FAQs]

<sup>15</sup> Para 4.3, OECD, *Policy Roundtable on Leniency for Subsequent Applicants*, 2012, available at <https://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>.

<sup>16</sup> Para 9.3, UK Leniency Guidance.

clause of Regulation 5, i.e. that the evidence disclosed by the LPP applicant is sufficient to help the CCI come to a *prima facie* decision about the existence of a second cartel. In the alternative, the CCI may consider listing out additional factors likely to be considered to determine whether an LPP application is successful to ensure greater certainty and predictability.

### 3. Clarify time limit for submission of LP and LPP applications

The Sections note that the Draft LP Regulations permit LP and LPP applications to be filed only until the *submission of the investigation report* of the CCI's investigative arm, the Office of the Director General (the DG) to the CCI.<sup>17</sup> The time period within which an applicant may file is often determinative of its ability to do so and must be predictable and transparent. The Sections note that the proposed time is unpredictable since applicants are unable to determine when the DG's report is submitted to the CCI. The submission of the DG's report to the CCI is purely an internal and administrative step with no notice provided or information given to the parties being investigated. Indeed, parties to investigation are only informed of the conclusion of the DG's investigation and the submission of its report when the CCI chooses to forward a copy of such a report to them<sup>18</sup>.

Further, the Sections understand that in practice, the CCI is not bound to forward the DG's report to the parties, and where it chooses to do so, it is not bound to adhere to a prescribed time limit. Consequently, the Section submits that permitting a LP or LPP application to be filed only until the submission of the DG Report to the CCI would lack transparency, since parties are not informed or made aware of such submission. Equally, it is unpredictable, since the CCI may choose not to forward a copy of the DG's report or may do so well after it has received such a report from the DG itself.

The Sections emphasize the importance of due process and procedural fairness in ensuring the success of any leniency program. The ICN recognises that inflexible timeframes regarding markers may reduce the incentives for early self-reporting and may impact the efficacy of a leniency program.<sup>19</sup> As indicated above, both the ICN and OECD prioritize transparency, clarity and consistency in the drafting and enforcement of leniency regimes. Introducing a more flexible timeframe would be in line with the position in jurisdictions such as the European Union (EU), where leniency applications are disregarded only if they are submitted after the issuance of the European Commission's Statement of Objections. In jurisdictions such as the US<sup>20</sup> and the UK<sup>21</sup> there is no bar on submitting leniency applications even after the investigation has commenced, although applicants are incentivised to submit applications sooner rather than later in the investigation process.

In the interest of fairness and clarity, the Sections recommend that the Draft LP Regulations be modified to allow potential applicants to submit LP or LPP applications until the *receipt of the DG Report by the parties*, under Section 26(4) of the Act. This would also be in line with the CCI's position on the timeframe within which to submit settlement applications.<sup>22</sup>

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<sup>17</sup> Proviso to Regulation 6(1) and Regulation 7(1), Draft LP Regulations.

<sup>18</sup> Section 26(4) of the Act.

<sup>19</sup> Para 3.1.1, page 11, ICN Anti-Cartel Manual.

<sup>20</sup> In the [US](#), corporate leniency is available both before and after the DOJ opens an investigation, although [recent guidance in 2022](#) requires that companies are required to "promptly" report anticompetitive conduct to the DOJ.

<sup>21</sup> In the UK, there is no prescribed deadline for the submission of leniency applications - however, leniency applications submitted at more advanced stages of an investigation receive fewer benefits (discretionary reduction in penalties of up to 50%) as compared to applicants who are the first in line and have submitted applications sooner, such as prior to the start of an investigation (may receive blanket immunity).

<sup>22</sup> Regulation 3(2) of the draft [Competition Commission of India \(Settlement\) Regulations, 2023](#), which were published for public consultation on 23 August 2023.



#### **4. Clarify timeline for withdrawal of LP and LPP applications**

In line with the amendments to Section 46 of the Act enacted in April 2023,<sup>23</sup> the Draft LP Regulations introduce a provision that allows applicants to withdraw their LP or LPP applications. However, as per the Draft LP Regulations, applicants may only withdraw their LP or LPP applications prior to the receipt of the DG Report by the CCI.<sup>24</sup>

As indicated in respect of the timeline for submission of LP and LPP applications (issue 3 above), parties under investigation are not formally notified of the completion of the investigation, or the submission of the DG Report by the DG to the CCI. Parties are only notified of the submission of the DG's report, once the CCI forwards a copy of the report to them, on the basis of a specific direction from the CCI, per Section 26(4) of the Act.

As such, the Sections recommend that the deadline for withdrawal of LP or LPP applications should be with reference to the receipt of the DG Report *by the parties* rather than by the CCI.

#### **5. Provision for communication of marker status to LP and LPP applicants**

The Sections note that the Draft LP Regulations specify that the CCI must communicate “*appropriate priority status*”<sup>25</sup> along with a written acknowledgment of receipt of the LP or LPP application. However, the Draft LP Regulations and the CCI, in practice, do not disclose the perfecting of a marker until the publication of its final infringement order.

The Sections respectfully suggest that rather than simply acknowledging receipt of the LP or LPP application, greater transparency and clarity would be provided by communicating the perfection of marker status once the CCI has reviewed the information provided as part of the LP or LPP application, subject to the existing condition that the communication of marker status does not entitle the LP or LPP applicant to the grant of lesser penalty.

This is borne out by the practice in other jurisdictions as well. For instance, in the US, the DOJ confirms whether a marker is available and whether an applicant is eligible to receive a marker, in the first instance;<sup>26</sup> once the marker has been “perfected”, the DOJ also issues a conditional leniency letter,<sup>27</sup> which communicates the DOJ's conditional acceptance that the applicant is eligible for Type A or Type B leniency. Similarly, in the UK, the CMA not only indicates marker status availability in principle on a no-names basis,<sup>28</sup> but also provides a confirmation of the marker once the applicant has submitted the “application package”, which contains the relevant information and evidence relating to the cartel.<sup>29</sup>

As such, the Sections respectfully recommend that the Draft LP Regulations be amended to include a provision for applicants to receive a confirmation of marker status, to provide for greater certainty, clarity and consistency in the Draft LP Regulations.

#### **6. Include transitional provisions in the Draft LP Regulations, including for ongoing cases**

The Draft LP Regulations do not include the standard “repeals and savings” clause, which is

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<sup>23</sup> [The Competition \(Amendment\) Act, 2023](#) was enacted by the Indian Parliament on 11 April 2023. Only some of the amendments were brought into force on [18 May 2023](#), by way of a notification issued by the Ministry of Corporate Affairs, Government of India.

<sup>24</sup> Regulation 10, Draft LP Regulations.

<sup>25</sup> Regulation 6(5) and 7(5), Draft LP Regulations.

<sup>26</sup> 703.340, “*Application Process*”, DOJ Leniency Policy.

<sup>27</sup> DOJ, Model Corporate Conditional Leniency Letter, 2022, available at <https://www.justice.gov/media/1226806/dl?inline>

<sup>28</sup> Paras 4,3-4.11, UK Leniency Guidance.

<sup>29</sup> Para 4.17, UK Leniency Guidance.

likely an unintentional drafting oversight. Relatedly, the Draft LP Regulations do not clarify if enterprises who are currently under investigation for an existing alleged cartel (or where they have filed an LP application) can also utilize the LPP process to disclose evidence relating to new cartels that the CCI is not yet aware of.

The Sections respectfully recommend that the Draft LP Regulations be amended to include a repeals and savings clause to ensure that there is no uncertainty or lack of clarity with respect to the validity of actions taken by the CCI, DG or parties under the existing regulations once these are replaced by the final version of the Draft LP Regulations. Further, the Sections respectfully suggest that the Draft LP Regulations be amended to include a provision that allows parties currently under investigation to also disclose the existence of a second cartel to receive the benefit of the LPP process. This will encourage parties to assist the CCI in discovering other cartels and increase the attractiveness of the leniency process to potential applicants.

## **CONCLUSION**

In summary, the Sections applaud the CCI for its efforts in crafting the Draft LP Regulations and emphasize that the key concerns arising from the Draft LP Regulations in its current form mainly relate to insufficient clarity in relation to certain provisions, both in substance and procedure. The Sections submit that effective competition-law enforcement would be assisted by greater clarity, certainty and transparency in the CCI's LP regime, supporting its continued success. The Sections appreciate the opportunity provided by the CCI to comment on the Draft LP Regulations. We would be pleased to respond to any questions the CCI may have regarding these comments or to provide additional comments or information that may be of assistance to the CCI.

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