3 November 2023

To,

The Competition Commission of India

Sub: Comments on the Draft Competition Commission of India (Lesser Penalty) Regulations, 2023 issued for public consultation.

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the Draft Competition Commission of India (Lesser Penalty) Regulations, 2023 on behalf of the Antitrust Section of the International Bar Association (*IBA*). The Co-chairs and representatives of the Antitrust Section of the IBA would be delighted to discuss the enclosed submission in more detail with the Competition Commission of India if that would be useful.

Yours sincerely,

Samantha Mobley

Co-Chair Antitrust Section

INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

COMMENTS ON THE DRAFT COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2023

3 NOVEMBER 2023

1. INTRODUCTION

1.1. Earlier this year, the Competition (Amendment) Act, 2023 (***Amendment Act***) introduced several changes to the Competition Act, 2002 (***Competition Act***). In particular, the Amendment Act introduced a 'lesser penalty plus' framework as well as provisions allowing the withdrawal of a lesser penalty application and forfeiture of its benefits.

1.2. On 16 October 2023, the Competition Commission of India (***Commission***) released the draft Competition Commission of India (Lesser Penalty) Regulations, 2023 (***Draft Regulations***) for public consultation. At the outset, the International Bar Association (***IBA***)'s Antitrust Section (***IBA Antitrust Working Group***) would like to thank the Commission for the opportunity to provide comments on the Draft Regulations. Such an inclusive process will ensure that a robust, effective, and workable lesser penalty framework is arrived at, benefiting all stakeholders.

1.3. The IBA Antitrust Working Group congratulates the Commission on the comprehensive nature of the Draft Regulations and the clarity they provide on a number of key aspects. The IBA Antitrust Working Group would like to assist the Commission in further bolstering the Draft Regulations, and with that objective, is providing certain suggestions.

2. ABOUT THE IBA

2.1. The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "*global voice of the legal profession*", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including India, and it has considerable expertise in providing assistance to the global legal community.[1]

2.2. The IBA Antitrust Working Group includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.[2]

2.3. In the past, the IBA Antitrust Working Group has made submissions to the Commission and the Ministry of Corporate Affairs (***MCA***) on various different occasions.[3] The IBA Antitrust Working Group hopes that the present submissions assist the Commission in finalising and arriving at an effective lesser penalty framework. The IBA Antitrust Working Group's suggestions are set out below.

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1 See https://www.ibanet.org/.

2 See https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.

3 The IBA Antitrust Working Group has previously made submissions to the Commission and the MCA on several occasions, including: (i) in February 2007, on the Competition Amendment Bill, 2006; (ii) in March 2008, on the draft Competition Commission of India (Combination) Regulations; (iii) in August 2013, on the Competition (Amendment) Bill, 2012; (iv) in December 2014, on trigger events for merger notification in India; (v) in April 2015, on amendments to the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (***Combination Regulations***); (vi) in February 2016, on the de minimis target exemption; (vii) in September 2018, on the proposed amendments to the Combination Regulations; (viii) in December 2018, on the Competition Law Review Committee suggestions; (ix) in December 2019, on amendments proposed to the Combination Regulations; (x) in March 2020, on the Competition(Amendment) Bill, 2020; (xi) in March 2022, on the renewal of the "*group*" definition and the *de minimis* target exemption; (xii) in September 2023, on the proposed amendments to the Settlement and Commitments Regulations; and (xiii) in September 2023, on the proposed amendments to the Combination Regulations.

3. THE DRAFT REGULATIONS SHOULD RETAIN ORAL MARKERS

3.1. Regulation 5(1) of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (***2009 Regulations***), permitted applications for lesser penalty to be made orally or in writing to the appointed designated authority. Regulations 6(1) and 7(1) of the Draft Regulations now require that a lesser penalty application be submitted only in writing.

3.2. The application for lesser penalty is a 'first-to-door' system where the time of approaching the Commission is crucial for determining the marker status designated to a prospective applicant. The marker status that is assigned is an important criterion to determine the reduction in penalty that is awarded to each party.

3.3. While the IBA Antitrust Working Group acknowledges the intent behind mandating that applications for lesser penalty be made in writing only, the IBA Antitrust Working Group respectfully submits that such a change may lead to increased procedural delays. Accordingly, the Draft Regulations should continue to permit oral applications for lesser penalty as is the case in other jurisdictions such as Canada, the United Kingdom (***UK***) and Brazil.

3.4. For instance, in Canada, the Competition Bureau of Canada (***CBC***) accepts both oral and written proffers[4] and recommends that an applicant requests a marker orally over the telephone.[5] In the U K, the Competition and Markets Authority (***CMA***), at the request of the applicant, allows the applicants to submit lesser penalty applications orally.[6] Similarly, in Brazil, the Administrative Council for Economic Defense (***CADE***) allows a party to submit / file the leniency application orally[7] and also via telephone.[8]

3.5. The IBA Antitrust Working Group considers that oral applications for lesser penalty would be the quickest way to secure a marker status for prospective applicants. Therefore, to encourage applications for lesser penalty, prospective applicants should be allowed to make applications for lesser penalty orally as well. Without such a framework, enterprises may face greater delays and practical difficulties while applying for lesser penalty.

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4 Note 60, Immunity and Leniency Programs under the Competition Act, CBC (available here).
5 Note 48, Immunity and Leniency Programs under the Competition Act, CBC (available here).
6 Guideline 4.31, applications for leniency and no-action in cartel cases, Office of Fair Trading (***OFT***)'s detailed guidance on the principles and process (available here).
7 Guideline 13, Guidelines: CADE's Antitrust Leniency Program (available here).
8 Guideline 30, Guidelines: CADE's Antitrust Leniency Program (available here).

Suggested edits:

Regulation 6(1): *For the purpose of grant of lesser penalty, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule I to these regulations, or may contact orally and subsequently also intimate in writing either in person or through e-mail or fax, to the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within five working days, put up the matter before the Commission for its consideration.*

Regulation 7(1): *For the purpose of grant of lesser penalty plus, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule II to these regulations, or may contact orally and subsequently also intimate in writing either in person or through e-mail or fax, to the designated authority for furnishing the information and evidence relating to the existence of newly disclosed cartel. The designated authority shall, thereafter, within five working days, put up the matter before the Commission for its consideration.*

4. THE DRAFT REGULATIONS SHOULD PROVIDE AN OPPORTUNITY FOR PRE-FILING CONSULTATION ON A 'NO-NAME' BASIS

4.1. The Draft Regulations do not appear to provide prospective applicants with an opportunity to consult the Commission on a 'no-name' basis prior to filing the application for lesser penalty.

4.2. The IBA Antitrust Working Group submits that for the effective functioning of the Draft Regulations, a no-name, verbal and non-binding pre-filing consultation (***PFC***) would be helpful. This step would enable prospective applicants to informally approach the Commission and gauge the response of the Commission. This would help prospective applicants make an informed assessment of whether they should apply for a lesser penalty. The absence of a no-name PFC would deprive prospective applicants of the beneficial opportunity to discuss the facts of their case with the Commission prior to applying for a lesser penalty.

4.3. A framework that enables prospective applicants to engage in robust discussions with the Commission would help prospective applicants to determine whether the evidence proposed to be submitted meets the threshold for the grant of lesser penalty and in some cases, whether the facts of the matter qualify as a cartel and are likely to be granted the benefit of lesser penalty. This would be especially helpful given that the Commission and the Director General (***DG***) may use the information provided in a lesser penalty application even in case of forfeiture or withdrawal of the application for lesser penalty.

4.4. In its decisional practice, the Commission has closed matters due to the absence of sufficient cogent evidence submitted by lesser penalty applicants.[9] A consultative process may also help avoid situations or number of instances where the Commission is forced to close cases due to the lack of evidence submitted by the prospective applicant. Such a framework would likely help save the time and resources of the DG and the Commission. Therefore, a deliberative process will mutually benefit both the applicant as well as the Commission.

4.5. Such a deliberative process would also be consistent with the Commission's general approach. For instance, on the merger control front, the Commission allows detailed deliberations between parties

[9] In Re: Alleged Cartelisation in Flashlights Market in India, Suo-Moto Case No. 01/2017 (available here); In Re: Cartelisation in the supply of Bearings (Automotive and Industrial), Suo-Moto Case No. 07 (02) of 2014 (available here).

and the case team through PFCs, and even the newly introduced draft Competition Commission of India (Combinations) Regulations, 2023 codify the PFC mechanism.[10] Further, parties also routinely engage in multiple discussions with case officers at the Commission during the review of a combination on a variety of aspects. The PFC process is extremely successful, widely used by parties and has made the regulation of combinations more efficient.

4.6. A deliberative process is also consistent with the approach followed in other jurisdictions. For instance, in the UK, the CMA allows a lesser penalty applicant to approach the regulator to undertake a discussion on a no-name basis about a given factual matrix (which can be expressed 'hypothetically'), with a view to the undertaking or individual obtaining comfort on an issue before deciding whether to make an application.[11] This deliberative process ensures that when the formal application is submitted, it already accounts for preliminary views from the authority, making the system more effective and workable.

4.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Regulations should provide opportunities for such informal meetings / discussions between the lesser penalty applicant and the Commission.

Suggested edits: Insertion of a new Regulation: *The Commission shall, upon a request by a prospective applicant, engage in 'verbal and non-binding' discussions and consultations on a 'no-name' basis, with the prospective applicant, to assess the evidence available with the applicant before the submission of the lesser penalty application, to determine the nature and extent of the alleged contraventions and the disclosures offered.*

5. THE IDENTITY OF THE LESSER PENALTY APPLICANT SHOULD BE CONFIDENTIAL

5.1. Regulation 8 of the Draft Regulations provides for two categories of information relating to an application which are to be treated as confidential: (i) the identity of the applicant; and (ii) the information, documents and evidence furnished by the applicant. The *provisos* to this regulation allow for the disclosure of the identity of the applicant, as well as for the disclosure of information, documents or evidence, as the case may be, in certain limited circumstances i.e.: (i) when such disclosure is required by law; (ii) when the prospective applicant has agreed to the disclosure; (iii) when there is a public disclosure by the prospective applicant themselves; (iv) by the DG for the purposes of the investigation, after taking prior approval of the Commission; and (v) in accordance with the procedure laid down under Regulation 35 of the CCI (General) Regulations, 2009 (***General Regulations***) (after the receipt of the investigation report, but before the final order is passed by the Commission).

5.2. The IBA Antitrust Working Group understands that Regulation 8 now appears to permit the Commission to disclose information, documents or evidence if the procedure under Regulation 35 of the General Regulations is followed. There is a lack of clarity as to whether the Commission and the DG are empowered to disclose the identity of the applicant. The IBA Antitrust Working Group

[10] Regulation 7 of the draft Competition Commission of India (Combination) Regulations, 2023.

[11] Guideline 3.3, applications for leniency and no-action in cartel cases, 'OFT detailed guidance on the principles and process (available here).

believes that the term "*information*" under this *proviso* may be interpreted widely and be extended to include the identity of the applicant.

5.3. With the introduction of a lesser penalty plus framework, the current confidentiality provision risks the disclosure of the applicant's identity in respect of the original cartel before the final order is issued with respect to the cartel to which the lesser penalty plus framework applies. This would impinge on the safeguards that have been put in place to protect the identity of the prospective applicant. Such situations will prejudice the lesser penalty applicant and will disincentivise applicants from engaging with the lesser penalty framework. Non-disclosure of the lesser penalty / lesser penalty plus applicant's identity would also protect the whistleblower of a cartel, who may be an employee of a company, thereby ensuring that they are not subject to any adverse actions from the enterprise they work at.

5.4. The prospective applicant performs a role that is similar to that of an informant before the Commission in uncovering a cartel. Therefore, to incentivise prospective applicants to engage with the lesser penalty framework, prospective applicants should be accorded the same level of confidentiality that is accorded to a confidential informant's identity, where the prospective applicant's identity: (i) is kept confidential throughout all stages of the process; and (ii) disclosed, if expedient, only after an opportunity of being heard. Such an approach would be in line with the intent of and procedure laid down under Regulation 35(1) of the General Regulations.

5.5. Protecting the identity of the lesser penalty applicant would also help in uncovering real time evidence in cases where the lesser penalty applicant continues participation in an active cartel at the direction of the Commission. Divulging the identity of the lesser penalty applicant would risk the remaining cartel members disengaging with the lesser penalty applicant which would render it onerous to gather evidence to prove a cartel.

5.6. This would also be similar to the practice in other jurisdictions. For example, in Kenya and South Korea,[12] the identity of the lesser penalty applicant is kept confidential throughout all stages of the procedure and is not disclosed to anyone outside the competition authority during the investigation or even once the decision has been taken.[13]

5.7. Accordingly, the IBA Antitrust Working Group respectfully recommends that the Draft Regulations explicitly clarify that the identity of the prospective applicant will be kept strictly confidential as being similar to an informant under Regulation 35(1) of the General Regulations. Alternatively, the IBA Antitrust Working Group respectfully recommends that a clarification should be provided that the identity of the prospective applicant should not be disclosed in the Commission's final order with respect to any cartel(s) still under investigation.

Suggested edits:

Regulation 8: (1) *Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission or the Director General shall treat as confidential,—*

(a) the identity of the applicant (in the same manner as that of informant under Regulation 35 of the Competition Commission of India (General) Regulations, 2009); and

[12] Question 15, Cartel leniency in South Korea: Overview (available here).
[13] Guideline 14, Competition Authority of Kenya, Leniency Program Guidelines (available here).

(b) the information, documents and evidence furnished by the applicant under regulation 6 and/or regulation 7:

Provided that the identity of the applicant or such information or documents or evidence may be disclosed if,—

(i) the disclosure is required by law; or

(ii) the applicant has agreed to such disclosure in writing; or

(iii) there has been a public disclosure by the applicant

Provided further that where the Director General deems it necessary to disclose the information, documents and evidence (which shall not include the identity of the applicant) furnished under regulation 6 or regulation 7, as the case may be, to any party for the purposes of investigation and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to be recorded in writing and after taking prior approval of the Commission.

Provided furthermore that after receipt of the investigation report by the Commission, the Commission may disclose such information or documents or evidences (which shall not include the identity of the applicant), in terms of provisions of regulation 35 of Competition Commission of India (General) Regulations, 2009.

(2) *The identity of the applicant shall remain strictly confidential throughout the proceedings and even after the final order has been passed, unless the disclosure is being made under any of the grounds as listed in the first proviso to this regulation.*

Alternatively, suggested edits (only in the event the edits suggested above are not accepted):

Regulation 8: (1) *Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission or the Director General shall treat as confidential,—*

(a) the identity of the applicant; and

(b) the information, documents and evidence furnished by the applicant under regulation 6 and/or regulation 7:

Provided that the identity of the applicant or such information or documents or evidence may be disclosed if,—

(i) the disclosure is required by law; or

(ii) the applicant has agreed to such disclosure in writing; or

(iii) there has been a public disclosure by the applicant

Provided further that where the Director General deems it necessary to disclose the information, documents and evidence (which shall not include the identity of the applicant) furnished under regulation 6 or regulation 7, as the case may be, to any party for the purposes of investigation and

the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to be recorded in writing and after taking prior approval of the Commission.

Provided furthermore that after receipt of the investigation report by the Commission, the Commission may disclose such information or documents or evidences (which shall not include the identity of the applicant), in terms of provisions of regulation 35 of Competition Commission of India (General) Regulations, 2009.

(2) *The identity of the applicant shall remain strictly confidential till the final order in the newly disclosed cartel has been issued, unless the disclosure is being made under any of the grounds as listed in the first proviso to this regulation.*

6. APPLICANTS SHOULD HAVE AN OPPORTUNITY TO BE HEARD BEFORE FORFEITURE OF BENEFITS

6.1. Regulation 11 of the Draft Regulations stipulates that the benefit of a lesser penalty / lesser penalty plus shall be forfeited if the Commission "*is satisfied that the applicant, during the course of inquiry / proceedings, has failed to comply with the conditions on which the benefit of lesser penalty or lesser penalty plus was granted by the Commission"*. In such a situation, the prospective applicant shall be subjected to an inquiry for the contravention in respect of which lesser penalty or lesser penalty plus, was granted.

6.2. Losing lesser penalty benefits is a potentially disastrous outcome for a lesser penalty applicant. Instead of facing reduced penalties, a prospective applicant suddenly faces very severe penalties having already self-incriminated itself in the alleged conduct. Yet, the Draft Regulations stipulate that an application for lesser penalty may be forfeited without any opportunity for the applicant to provide its position to the Commission. Given the very severe consequences facing an applicant, it is critical from a due process stand-point that the Draft Regulations provide an opportunity to be heard.

6.3. Adherence to due process and preserving a fair right of defence is a part of the International Competition Network (***ICN***) best practices[14] which the Commission has consistently adopted. This is also in line with the principles of natural justice enshrined under Section 36(1) of the Competition Act.

6.4. Such an approach will be consistent with other provisions of the Competition Act. For instance, the *proviso* to Section 26(9) of the Competition Act provides that parties are mandatorily required to be heard before issuance of an order closing the matter or finding a violation of the Competition Act.

6.5. Further, Regulations 6(7) and 7(6) of the Draft Regulations provide the opportunity of being heard before the Commission rejects the application, indicating that the Commission has factored in the need to adhere to the principles of natural justice at every material stage. A similar practice should be followed for the forfeiture of the application by the Commission.

6.6. Such a proposal is also in line with the approach followed in other jurisdictions. For instance, in the UK, if the CMA intends to revoke a leniency agreement, the applicant will be notified in writing and

[14] ICN recommended practices for the investigative process (available here).

given a reasonable opportunity to make representations.[15] Similarly, in Canada, the CBC states that it will typically discuss an applicant's potential non-compliance with its immunity program to address any shortfalls in its cooperation. At a minimum, an applicant will be given 14 days' notice of any intention to revoke interim immunity so that the applicant may remedy its failure (or explain why there has been no failure).[16]

6.7. Therefore, the IBA Antitrust Working Group respectfully suggests that a reasonable opportunity of hearing must be given prior to the forfeiture of an application.

Suggested edits:

Regulation 11: *The benefit of lesser penalty or lesser penalty plus under regulation 4 or regulation 5 to the applicant shall be forfeited, if the Commission is satisfied that the applicant, during the course of inquiry/proceedings, has failed to (a) comply with the conditions on which the benefit of lesser penalty was granted by the Commission; or (b) had given false evidence or omit to submit any material information knowing it to be material; or (c) the disclosure made is not vital, and thereupon the applicant shall be subjected to inquiry for the contravention in respect of which lesser penalty or lesser penalty plus, as the case may be, was granted and also be liable to the imposition of penalty to which such applicant is liable, had lesser penalty or lesser penalty plus not been granted.*

The Commission shall provide an opportunity of hearing to such applicant prior to passing an order on forfeiture.

7. OBJECTIVE LIMITS ARE REQUIRED ON THE OVERTLY BROAD THRESHOLD OF 'LIKELIHOOD' OF THE SECOND CARTEL BEING DETECTED BY THE COMMISSION

7.1. Regulation 5 of the Draft Regulations stipulates that the Commission can consider the 'likelihood' of the newly disclosed cartel being detected by it in absence of the lesser penalty plus application. As such, the Commission appears to have a wide ambit of discretion when deciding the reduction in monetary penalty in the context of the lesser penalty plus framework.

7.2. The Draft Regulations do not discuss what threshold would be applied while assessing this 'likelihood' and, therefore, the standard becomes overtly broad.

7.3. To ensure predictability, transparency and clarity in the lesser penalty plus process, the Draft Regulations should include a list of factors / evidence for the Commission to determine the 'likelihood' of discovering another cartel. For the implementation of an efficient and effective leniency programme, the ICN has also recognised that a leniency programme must be consistent, predictable and transparent.[17]

7.4. The IBA Antitrust Working Group respectfully recommends that the standard of 'likelihood' can be narrowed to a more demonstrable 'already possessing sufficient information' standard. This would be in line with jurisdictions such as Singapore where the undertaking can benefit from lesser penalty plus only if the Consumer Commission of Singapore (***CCCS***) "*does not already have sufficient*

[15] Guideline 10.8, applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process (available here).
[16] Notes 106-107, Immunity and Leniency Programs under the Competition Act, CBC (available here).
[17] Point 12(d), ICN Checklist of efficient and effective leniency programmes (available here).

information to establish the existence of the alleged cartel activity".[18] Similarly, in Canada, the CBC grants immunity plus where it is unaware of the offence or when it is aware of the offence but lacks sufficient information to refer the matter for prosecution.[19] Further, we suggest that we recommend a threshold of awareness as well, to cover situations where the Commission or the DG already possess sufficient information but are not really conscious of the second cartel. There could be situations where the Commission has raided and seized enormous data sets which could contain information relating to a second cartel, but the DG / Commission has not detected / spotted it as another cartel.

Suggested edits:

Proviso to Regulation 5: *Provided that the discretion of the Commission, in regard to reduction in monetary penalty under regulation 5, shall be exercised having due regard to-*

a) ~~likelihood of the newly disclosed cartel being detected by the Commission or the Director General~~ whether the Commission already has sufficient information to establish the existence of the newly disclosed cartel without lesser penalty plus application and is aware that such information in its possession may establish the existence of a new cartel.

8. THE DRAFT REGULATIONS SHOULD SPECIFY THE FACTORS THAT WILL INFLUENCE THE AMOUNT OF THE PENALTY REDUCTION

8.1. Regulation 5 of the Draft Regulations provides wide discretion to the Commission in regard to reduction in monetary penalty. Apart from the criterion of the 'likelihood' of the new cartel being detected by the Commission (discussed above), the Commission can also take into account 'any other factor' deemed relevant by it.

8.2. The phrase 'any other factor' is vague, overtly broad and extremely subjective. It does not provide clarity to a prospective applicant as to what factors can be used to reduce the amount of lesser penalty that will be accorded. This creates a dual burden on the prospective applicant such that, the prospective applicant has to: (i) make their application compliant with the existing standards; and (ii) 'anticipate' the factors basis which penalty amount 'may' be reduced, and then make the application compliant on these counts as well. The IBA Antitrust Working Group believes that such additional requirements may disincentivise prospective applicants from engaging with the lesser penalty application.

8.3. The Organization for Economic Co-operation and Development (***OECD***) has suggested laying down clear standards for the type and quality of information that is sufficient for availing the benefit of a lesser penalty framework for the implementation of an effective cartel detection system.[20] Accordingly, clear guidelines on the factors that will be considered in the determination of the reduction of the penalty would make the lesser penalty framework more attractive to prospective applicants and make this framework more effective.

8.4. Such an approach would be consistent with the practice in other jurisdictions as well. For instance, in Canada, the CBC provides guidelines on the factors on which the size of the immunity plus credit

[18] Guideline 6.2 read with Guidelines 2.2 and 3.1, CCCS guidelines on lenient treatment for undertakings coming forward with information on cartel activity 2016 (available here).

[19] Notes 23 and 141, Immunity and Leniency Programs under the Competition Act, CBC (available here).

[20] Recommendation 1(iv), Recommendation of the Council concerning Effective Action against Hard Core Cartels (available here).

depends. These include factors such as: (i) the strength of the evidence provided by the applicant; (ii) the estimated significance of the case brought forward by the applicant; (iii) the affected volume of commerce; (iv) the geographic scope of the conduct in question; and (v) the number of co-conspirator organisations and individuals involved in the conduct in question.[21] Similar factors are also considered in the US when determining the credit to be given to a reportee for reporting an additional infringement.[22] These factors allow the applicants to assess their case before making an application.

8.5. Therefore, to provide certainty, the IBA Antitrust Working Group recommends that the final regulations clarify the factors that would typically be considered under Regulation 5 in the determination of the reduction of the penalty. Alternatively, if such factors are not included in the final regulations, the Commission should issue detailed guidance on the same itself.

Suggested edits:

Proviso to Regulation 5: *Provided that the discretion of the Commission, in regard to reduction in monetary penalty under regulation 5, shall be exercised having due regard to-*

a) whether the Commission already has sufficient information to establish the existence of the newly disclosed cartel without lesser penalty plus application, and

b) ~~any~~ other factors deemed relevant by the Commission~~.~~, such as:

- *quality and strength of the evidence provided by the applicant; and*
- *the estimated significance of the newly disclosed cartel, measured in such terms as the affected volume of commerce in India, the geographic scope of the conduct in question, and the number of co-conspirator enterprises and individuals involved in the conduct in question.*

9. LESSER PENALTY PLUS SHOULD APPLY TO EXISTING CASES

9.1. The Draft Regulations do not address the vital issue regarding the application of the lesser penalty plus framework to cases already pending before the Commission / DG.

9.2. There appears to be no reasonable basis for excluding pending cases from availing the benefit of lesser penalty plus. Any party which is a lesser penalty applicant in a case currently before the Commission, would be incentivised to disclose a new cartel if it is allowed the benefit of additional reduction in the penalty in the ongoing case.

9.3. The IBA Antitrust Working Group respectfully submits that for a defined transitional period, even cases for which the deadline to file a lesser penalty plus application may have elapsed, the applicants should be allowed to apply. Such a clause would create a conducive framework for adoption of the lesser penalty framework.

[21] Note 142, Bulletin on Immunity and Leniency Programs under the Competition Act, CBC (available here).
[22] Question 79, Frequently Asked Questions About the Antitrust Division's Leniency Program (available here).

Suggested edits:

Insertion of a new Regulation: *For cases that are pending before the Commission and where the stipulated timeline for filing a lesser penalty plus application has already elapsed prior to these Regulations coming into effect, the parties shall be permitted to file a lesser penalty plus application within 45 days of these Regulations coming into effect.*

10. ENSURING SUFFICIENT OPPORTUNITY TO AVAIL OF LESSER PENALTY IN A NEWLY DISCLOSED CARTEL.

10.1. The Draft Regulations provide for an additional reduction in monetary penalty of up to or equal to 30% of the penalty imposed in relation to the *first* cartel, for an applicant which divulges information which enables the Commission to form a *prima facie* opinion regarding the existence of a newly disclosed cartel under Section 26(1) of the Competition Act (in addition to the potential reduction of penalty of up to or equal to 100% in relation to the newly disclosed cartel).

10.2. To ensure that the lesser penalty plus applicant is given sufficient opportunity to benefit from up to a 30% reduction in the original cartel (following its disclosure of the new / second) cartel, the IBA Antitrust Working Group respectfully suggests that the provisions clarify that following a lesser penalty plus application, the final order for the first cartel be issued only *after* the Commission decides whether the new information is sufficient to meet the threshold to direct an investigation by the DG under Section 26(1) of the Competition Act.

Suggested edits:

Regulation 5(1): In terms of sub-section (4) of section 46 of the Act and subject to the conditions laid down in regulations 3 and 4, an applicant, who had earlier made a full, true and vital disclosure in respect of alleged contravention of provisions of section 3 of the Act under regulation 6, makes a full, true and vital disclosure in respect of existence of another cartel (second cartel) in which it is alleged to have violated section 3 of the Act, which enables the Commission to form a prima facie opinion regarding the existence of newly disclosed cartel under sub-section (1) of section 26 of the Act, may be granted an additional reduction in monetary penalty up to or equal to thirty per cent of the penalty imposed with regard to the first cartel besides obtaining benefit of reduction in penalty up to or equal to one hundred percent in respect of newly disclosed cartel in terms of sub-section (1) of section 46 of the Act.

Provided that the Commission shall determine whether a lesser penalty plus application is successful before issuing an order to direct an investigation (into the second cartel) by the DG under Section 26(1) of the Competition Act.

11. SUFFICIENT INCENTIVE TO A LESSER PENALTY PLUS APPLICANT

11.1. The Draft Regulations provide that a lesser penalty plus applicant may be granted an additional reduction in monetary penalty *up to or equal to* 30% of the penalty imposed with regard to the first cartel, if the applicant divulges information which enables the Commission to form a *prima facie* opinion regarding the existence of a newly disclosed cartel under Section 26(1) of the Competition Act.

11.2. To balance, on the one hand, offering sufficient incentive to a lesser penalty applicant to disclose a new cartel which the Commission may not have otherwise been privy to, ensuring that a lesser penalty 'plus' applicant does not unduly benefit from a material "*30%*" penalty reduction for the original cartel, where the quality of the evidence furnished is ultimately poor. The IBA Antitrust Working Group respectfully submits that a minimum reduction of 10% should be provided to any applicant whose information enables the Commission to form a *prima facie* opinion regarding the existence of a newly disclosed cartel.

11.3. In other words, where the evidence furnished by the lesser penalty 'plus' applicant sufficiently enables the Commission to issue a Section 26(1) order with regards to the 'new' cartel – then the lesser penalty plus applicant must be assured of reaping some benefit for the original cartel. Should the information ultimately not be considered sufficient to make a final finding of infringement or where the lesser penalty plus applicant does not sufficiently cooperate – it risks forfeiting all or any reduction in penalty as to the 'new cartel.'

Suggested edits:

Regulation 5(1): *In terms of sub-section (4) of section 46 of the Act and subject to the conditions laid down in regulations 3 and 4, an applicant, who had earlier made a full, true and vital disclosure in respect of alleged contravention of provisions of section 3 of the Act under regulation 6, makes a full, true and vital disclosure in respect of existence of another cartel (second cartel) in which it is alleged to have violated section 3 of the Act, which enables the Commission to form a prima facie opinion regarding the existence of newly disclosed cartel under sub-section (1) of section 26 of the Act, may be granted an additional reduction in monetary penalty of at least ten percent (such that the total reduction in penalty with regard to the first cartel does not exceed hundred percent) and up to or equal to thirty per cent of the penalty imposed with regard to the first cartel besides obtaining benefit of reduction in penalty up to or equal to one hundred percent in respect of newly disclosed cartel in terms of sub-section (1) of section 46 of the Act.*

12. BENEFITS SHOULD EXTEND TO ALL RELEVANT INDIVIDUALS (SUCH AS, CURRENT EMPLOYEES, FORMER EMPLOYEES, FORMER DIRECTORS, WHISTLEBLOWERS, ETC.)

12.1. Regulation 3 of the Draft Regulations stipulates that a prospective applicant must provide the names of the individuals who have been involved in the cartel on its behalf, and for whom the lesser penalty is being sought.

12.2. The IBA Antitrust Working Group notes that the Draft Regulations do not automatically cover all individuals who are at risk of being subjected to proceedings under Section 48 of the Competition Act (which makes individuals in charge of and responsible to the company for its conduct of business liable for contravention of the Competition Act by companies). As such, there appears to be a difference in treatment between individuals who are named in the application and those who are not. To avoid such a situation where the names of such individuals have been negligently or deliberately omitted by an enterprise (for example, an employee blowing the whistle against the enterprise), this protection should be extended to all individuals who may be subject to proceedings under Section 48 of the Competition Act. Further, as a clarification, it must be stated that such individuals shall be subjected to similar conditions as the applicant for the grant of lesser penalty and lesser penalty plus. This is to avoid situations where protected employees refuse to cooperate with the investigation.

12.3. Therefore, the IBA Antitrust Working Group respectfully recommends that it should be clarified that all individuals who may be subject to proceedings under Section 48 of the Competition Act, shall automatically enjoy the benefit of the lesser penalty framework, irrespective of whether they have been named in the application.

Suggested edits:

Regulation 3(2) - *The applicant shall provide the names of the individuals who have been involved in the cartel on its behalf and for whom lesser penalty or lesser penalty plus, as the case may be, is also sought by the applicant. However, where the applicant has failed to mention any individual who can be liable under Section 48 of the Act, such individual shall be entitled to the benefits of the lesser penalty or lesser penalty plus, if it is granted, in the same manner as that of the individuals whose names have been provided in the application.*

Provided that such individuals have complied with the conditions as the applicant for the grant of lesser penalty and lesser penalty plus under Regulation 3(1).

13. THE OVERLAPPING GROUNDS FOR FORFEITURE CAN BE STREAMLINED

13.1. Regulation 11 of the Draft Regulations provides three grounds on which lesser penalty benefits get forfeited i.e., when an applicant is found to "*have failed to (a) comply with the conditions on which lesser penalty benefits were granted by the Commission; or (b) had given false evidence or omit to submit material information knowing it to be material; or (c) the disclosure made is not vital*". The IBA Antitrust Working Group understands that under the Draft Regulations, the Commission can forfeit the benefits even if only one of these grounds has been satisfied.

13.2. This appears to contradict the structure of the Draft Regulations as one of the grounds for forfeiture is the failure of a prospective applicant to comply with the conditions on which the lesser penalty benefits were granted. These conditions for lesser penalty are detailed in Regulation 3 of the Draft Regulations, and include the obligation to provide full, true and vital disclosure. Given that full, true and vital disclosure are already part of the conditions for the grant of the lesser penalty benefit, this should not be a separate ground for forfeiture.

13.3. Therefore, the IBA Antitrust Working Group recommends that there should be only one ground for forfeiture, which should be '*failure to comply with the conditions'* on which lesser penalty (or lesser penalty plus) benefits were granted, which would sufficiently cover all the other grounds provided under Regulation 11.

Suggested edits:

Regulation 11: *The benefit of lesser penalty or lesser penalty plus under regulation 4 or regulation 5 to the applicant shall be forfeited, if the Commission is satisfied that the applicant, during the course of inquiry/proceedings, has failed to ~~(a)~~ comply with the conditions on which the benefit of lesser penalty was granted by the Commission; ~~or (b) had given false evidence or omit to submit any material information knowing it to be material; or (c) the disclosure made is not vital,~~ and thereupon the applicant shall be subjected to inquiry for the contravention in respect of which lesser penalty or lesser penalty plus, as the case may be, was granted and also be liable to the*

imposition of penalty to which such applicant is liable, had lesser penalty or lesser penalty plus not been granted.

14. THE REGULATION ON FORFEITURE CAN BE CLARIFIED

14.1. Regulation 11 of the Draft Regulations, on forfeiture, has a drafting error which takes away its desired meaning. The version in the Draft Regulations reads as follows (with suggested changes highlighted in red):

> "*The benefit of lesser penalty or lesser penalty plus under regulation 4 or regulation 5 to the applicant shall be forfeited, if the Commission is satisfied that the applicant, during the course of inquiry/proceedings, has (a) failed to ~~(a)~~ comply with the conditions on which the benefit of lesser penalty or lesser penalty plus was granted by the Commission;*"

14.2. Given that the regulation pertains to forfeiture of both lesser penalty and lesser penalty plus, the IBA Antitrust Working Group respectfully recommends that first ground (a) regarding "*conditions on which benefit of lesser penalty was granted"* should also be modified to read "*conditions on which benefit of lesser penalty and lesser penalty plus was granted".*

15. THE EFFECT ON / STATUS OF SUBSEQUENT APPLICANTS AFTER FORFEITURE BY AN APPLICANT WITH A PRIOR MARKER SHOULD BE CLARIFIED

15.1. Regulation 11 of the Draft Regulations stipulates that the benefit of a lesser penalty / lesser penalty plus shall be forfeited if the Commission is satisfied that the prospective applicant, during the course of inquiry / proceedings, has failed to comply with the conditions on which the benefit of lesser penalty was granted by the Commission.

15.2. The IBA Antitrust Working Group understands that the Draft Regulations as they stand, are silent on the status / position of the subsequent marker if the benefit of lesser penalty, granted to the marker prior to it, has been forfeited by the Commission.

15.3. To illustrate, A, B, C and D are members of a cartel, A, B and C are lesser penalty applicants (who were given a reduction of up to 100%, 50% and 30% respectively). After the conclusion of the proceedings, the Commission forfeits the lesser penalty application of B. As a result of the forfeiture, would C be eligible for the 50% reduction which was previously granted to B?

15.4. The above illustration raises a number of concerns such as: (i) regarding the grant of the lesser penalty to the subsequent marker; (ii) the ability of C (i.e., the third marker applicant) to now make a representation to receive the benefit of a second marker (since B's benefits have been forfeited); and (iii) if allowed, what will be the limitation period by which such representation can be made.

15.5. Similarly, the Draft Regulations are silent on the status / position of the subsequent marker if the benefit of lesser penalty plus granted to the party with a prior marker has been forfeited by the Commission.

15.6. To illustrate, A, B, C and D are members of the first cartel. A, B and C are lesser penalty applicants in that cartel while B and C are separately part of a second cartel. B is a lesser penalty plus applicant. C has also filed a lesser penalty plus and has the second marker in the newly disclosed cartel. After the conclusion of the proceedings in both the cartels, the Commission forfeits the lesser penalty plus application of B, thereby stripping of the benefit granted to B in both the cartels (including the lesser

penalty plus benefit in the first cartel and the benefit granted in the second cartel). B retains the benefit of lesser penalty in the first cartel. As a result of the forfeiture, the question would arise whether C would be eligible for the 30% reduction which was previously granted to B in the first cartel?

15.7. The Draft Regulations do not stipulate how the reduction in penalty in the original cartel will be forfeited for a lesser penalty plus applicant once the final order in the original cartel is passed. The 'best judgment rule' prevents the revision of any penalty after the final order is passed. For any clawback due to the forfeiture of the additional (*up to*) 30% penalty reduction for the original cartel would need to be paused till the investigation of the newly disclosed cartel is complete. This could significantly extend timelines. Forfeiture in this manner should not extend to lesser penalty plus applicants. Such situations may create uncertainty for prospective applicants which may affect the willingness of prospective applicants to engage with the lesser penalty framework. This may reduce the overall effectiveness of the lesser penalty framework.

15.8. Accordingly, the IBA Antitrust Working Group respectfully suggests that the Commission issues a clarification regarding the forfeiture of benefits to lesser penalty plus applicants.

Suggested edits:

Insertion of a *proviso* to Regulation 6(8) or a new sub clause after it - *Provided that where the benefit of lesser penalty is forfeited, the subsequent applicants shall move up in order of priority for the grant of the benefit of lesser penalty by the Commission and the procedure prescribed above, as in the case of the applicant whose benefit was forfeited, shall apply mutatis mutandis.*

Insertion of a new *proviso* to Regulation 7(7) or a new sub clause after it - *Where the benefit of lesser penalty plus is forfeited, the subsequent applicant(s), shall move up in order of priority for grant of lesser penalty plus status in respect of the first cartel, and the grant of lesser penalty in the second cartel and the procedure prescribed above, as in the case of the applicant whose benefit was forfeited, shall apply mutatis mutandis.*

16. CLARITY FOR STANDARDS TO BE APPLIED TO INTERNATIONAL CARTELS UNDER SECTION 32 OF THE COMPETITION ACT

16.1. Section 3(3) of the Competition Act provides that cartels between competitors shall be presumed to cause an appreciable adverse effect on competition (***AAEC***) (irrespective of the effect on competition). Resultantly, a prospective lesser penalty applicant that has engaged in conduct falling under Section 3(3) of the Competition Act has clarity on its violation, regardless of the quantum of business its conduct has affected in India. Such an applicant can submit a lesser penalty application with certainty. However, Section 32 of the Competition Act clarifies that the Commission will have jurisdiction over cartels entered into outside India, as long as the cartel has or is likely to have an AAEC.

16.2. Absent a *non obstante* clause in Section 32, it remains unclear whether the presumptive rule for AAEC would apply for cartels that have taken place outside India or whether a sufficient degree of effect on markets in India would be required, before filing a lesser penalty application. In other words, it remains if the 'per se' standard of AAEC applies to conduct falling under Section 3(3) of the Competition Act if the conduct takes place outside India. The IBA Antitrust Working Group respectfully submits that such clarity will guide practitioners to make an informed decision when applying for lesser penalty under these regulations. The IBA Antitrust Working Group therefore

respectfully submits that the Commission consider clarifying within these regulations the standard for submitting a lesser penalty application for cartel conduct that takes place outside India.

17. MORE CLARITY IS REQUIRED ON THE STANDARD OF DISCLOSURE FOR INDIVIDUALS AND FACILITATORS

17.1. The IBA Antitrust Working Group notes that the 2009 Regulations allowed an enterprise as well as an 'individual' who has been involved in a cartel on behalf of an enterprise, to be an applicant. In a welcome move, the Draft Regulations have expanded this definition[23] to now permit facilitators of a cartel to be an applicant. However, the Draft Regulations subject all prospective applicants to the same standard of disclosure when making lesser penalty applications (i.e., providing "*full, true and vital*" disclosure), irrespective of their involvement or role in the cartel in question. This creates an identical burden on differently placed applicants, since in multiple situations, individuals and facilitators might not possess *full* and *vital* information.

17.2. The IBA Antitrust Working Group believes that it is important to note that, barring exceptions, individuals and facilitators of the cartel may potentially be in possession of less information, compared to the enterprises that participated in the cartel.

17.3. The different roles played by different prospective applicants should be accounted for when determining whether "*full, true and vital*" disclosure has been provided. The failure to submit comprehensive information conclusively establishing a cartel should not be seen as failure to provide full and vital information considering the ability of the applicant.

17.4. The IBA Antitrust Working Group respectfully recommends that different applicants may be differently placed, and a clarification be added that individuals, facilitators, and other cartel participants may be assessed differently considering the extent of their participation in the cartel.

Suggested edits: Regulation 2(1)(j) - *"vital disclosure" means full and true disclosure of information or evidence by the applicant to the Commission, which is sufficient to enable the Commission to form a prima facie opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 of the Act.*   *The Commission while assessing such disclosure shall take into account the degree of information that can reasonably be expected to be provided by an applicant and hence, shall make the assessment keeping in mind whether the application has been made by an enterprise who is or was a member of a cartel, an individual who has been involved in the cartel on behalf of an enterprise or an enterprise or association of enterprises or a person or association of persons, though not engaged in identical or similar trade if it participates or intends to participate in the furtherance of such cartel.*

[23] This has been done in furtherance to the amendment to Section 3 of the Competition Act, which now also brings facilitators under the ambit of Section 3(3) ("*Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement*").