To

The Secretary
Competition Commission of India
9th Floor, Office Block – 1
Kidwai Nagar (East)
New Delhi - 110023

3rd November, 2023

Subject: Stakeholder Consultation on the Draft Lesser Penalty Regulations, 2023 conducted by CCLE

Dear Sir/ Ma'am,

This is to inform that we had organized a stakeholder consultation on the **Draft Lesser Penalty Regulations, 2023** published by the CCI on 29th October, 2023 (Sunday).

Some of the panelists at the conference included:

1. **Christian Bergqvist**, Associate Professor, University of Copenhagen
2. **Vaibhav Gaggar**, Independent Counsel, Supreme Court of India
3. **Nikita Shah**, Assistant Professor, Nirma University
4. **Spurthi S. Krishna**, Assistant Professor, Vinayaka Mission Law School, Chennai
5. **Sumit Jain** (Moderator), Founding Director, CCLE

Please find attached the memorandum of the consultation along with the minutes which may also be considered as public comments submitted by us on the Draft Regulations.

Please let us know if you have anything to discuss and we will be looking forward to meeting you in-person.

Best regards,
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Memorandum of the stakeholder consultation conducted by CCLE on the Draft Lesser Penalty Regulations, 2023

1. It was broadly agreed that the leniency regime is pivotal to the implementation of competition laws across the globe as it allows the authorities to prevent cartelization and bust cartels. However, there are some variations across the jurisdictions on the form and shape of such schemes.

2. 'Leniency-plus' is a welcome initiative taken by the CCI, however, this is too early to celebrate. There is a dominant view that it will allow the regulator to detect more cartels by granting immunity to the whistleblower, however, it is yet to be demonstrated. An alternative viewpoint could be that 'leniency-plus' may end up propelling more parties to cartelize as the entity which has already secured full immunity at the Commission would now get scot-free in case it forms an anti-competitive agreement.

3. The Draft Regulations are silent on the presumption of guilt for the leniency applicant. The authorities have taken a contrary view in the Flashlight case and Beer case, and there is no further clarity on this as per the definition of 'applicant' in the regulations.

4. Another issue is the provision of joint application for subsidiaries under a single economic entity. All the leading jurisdictions including the EU and the UK have such a provision and there may not be a reason for India to differ on this.

5. Another important factor is the lack of stakeholder consultations on the part of the CCI before enacting the Regulations. Thus, there might be an ambiguity at the stage of filing a leniency application by the respondents on how to proceed further. This may even be used by the latter to pass on the enforcement cost to the CCI.

6. There is some clarity on the confidentiality regime, however, more is required to be done. It should be made clear in terms of what is withheld and what is disclosed to the parties and to the general public.

7. There is another larger issue of lack of guidelines on penalty which simply means that the parties are unaware till the time of final judgment, of the quantum of penalty to be imposed. This needs to be tackled by issuing fresh guidelines on penalties.

8. "Leniency-plus' without 'penalty plus' is of limited use. For instance, in the EU if you are the perpetrator of the cartel, the consequences are harsh. India lags on the same.

There is a discourse on criminalization of competition wrongs, however, there is no consensus on the same. As a starting point, the Commission may start off by putting more stringent penalties on individuals, along with the companies as the former is more wary of the law than the latter.

Minutes of the Stakeholder Consultation

Date: 29th October, 2023 (Sunday)
Time: 1800 hours IST

SJ: What is the philosophy of leniency regime under larger competition laws and why is it required?

Panelist 1: Leniency is a way to collapse cartels. It also allows companies to get out of the cartel. There are ways how you implement leniency. In Europe, you either give complete immunity, or you give a reduction. Immunity is available only to the first one who comes forward. In 2008, the European Commission (EC) introduced a settlement which is an alternative to leniency but is also complementary to it. In principle, however, they are not alternatives. Leniency is only at the initial stage when the Commission is unaware of the infringement, or they might have a suspicion. Leniency is only available to a point when the Commission doesn't have enough evidence to proceed with. Settlement makes the Commission's life easy. Commitment is a totally different animal. Leniency is a cornerstone of competition law, however, the issue of follow-on litigation exists.

SJ: There is a lack of case laws in Denmark or the EU. A practitioner's viewpoint would be helpful in the case of India.

Panelist 2: We have had the leniency since beginning, i.e. from 2009. However, there is no jurisprudence on C&S in the country. We have a 'leniency plus' scheme in the draft proposal. Leniency effectively means whistleblower. Cartels are one of the most difficult cases to crack worldwide. A leniency regime does multiple things for a regulator, i.e. it provides a starting point where a case is yet to be opened, gets evidence in the ongoing cases and obtains evidence which they otherwise would not have gotten at all. It also creates a race to reach the Commission once one of the entities files for leniency. There has been one such case in the global automotive market. It has happened in a case where the CCI

has given a full penalty waiver to a leniency applicant where they weren't the first one to file. Till 2016-17, the parties were not given the right to cross-examine and defend themselves, but now it is given.

Panelist 3: We need to be clear on three things, i.e. deterrence is directly proportional to penalty which is directly proportional to leniency, leniency plus is directly proportional to penalty plus which is directly proportional to omnibus and uncertainty is directly proportional to lack of incentives given to the leniency applicants to come forward. Leniency is 14 years old now and we had 20 odd cases (subject to revision) where leniency has been filed. Anyone who enters the cartel takes three things into consideration, i.e. monetary cost, coordination cost and legal penalty cost. Since it's a civil wrong in India and not a criminal wrong, leniency rather acts as a disincentive for a cartelising entity to come forward rather than an incentive. It is because of the following reasons. First is the definition of 'applicant' which suggests that you are a member of the cartel. There is a presumption of admission of guilt. Ex. Flashlight case and beer cartel case. There is an ambiguity of the presumption of guilt and the new draft regulations don't throw any light on it. The second issue is that the definition says you are an 'enterprise' under the Act, and if you are a single economic enterprise, you'll have to file two applications for the purposes of leniency. In the shipping cartel, the Commission said that there is no provision for the joint cartel. In the EU, UK and Japan there is a provision of joint application. In spite of these draft regulations, we didn't go for a pre-consultation stage process which happens everywhere else. Pre-consultation is important so that the CCI doesn't repeat the mistakes committed in the flashlight case and beer cartel case. The third problem is the lack of conditional leniency. In India, there is a game of waiting where the applicant doesn't know if it is the first, second or third applicant. In the Zinc dry battery case, parties were given a reduction in penalty only based on the cooperation the parties extended. In Nagrik Chetna Manch, a contrary stance was taken.

Panelist 4: This is a whistleblower kind of policy. The draft guidelines do not give the parameters basis for which penalty will be imposed. Applicant includes enterprises, as well

as individuals. There should be a confidentiality clause specifically for individuals so that the information only reaches the Commission.

SJ: What is the position in Denmark on joint application and single economic entity concept?

Panelist 1: Managing leniency applications is complicated. In most of the countries, any wrongdoing on the part of a subsidiary can be attributed to the main group.

SJ: Is there a gap in the text and implementation of the law?

Panelist 2: We are just 14 years old and we are learning on the job. The problem is that there is no benchmark for penalty at all. Excel crop care by the SC speaks on the same. However, the law as laid down by the SC really incentivised for the parties to cartelise as now they not only escaped penalty on the global turnover but also only had to pay a penalty on the specific product.

SJ: Should the CCI issue guidelines on the penalty? Is there a compromise with the text of the law?

Panelist 3: The draft Lesser Penalty Regulations add nothing new. One good thing is the addition of the hub and spoke agreement. The second is clarity on the confidential regime. People are talking a lot about leniency plus regime but it will do no good. Rather it will incentivise entities to enter into more cartels as the filing entity might say that I am anyway going to get 100% waiver at the CCI so I will take care of it. There is also no concept of penalty plus in India. For instance, in the EU if you are the perpetrator of the cartel, the consequences are harsh. Leniency plus is of limited use without penalty plus.

Panelist 2: I believe leniency plus would work. It is for the reason that even on a 50% basis it does produce incentives for the entities to disclose evidence on another cartel.

Panelist 4: I believe we need more regulations on lesser penalty and penalty provisions. There are also some procedural gaps. I think we have been unable to follow the international standard as well. We might need more coupling with other regulations to achieve economically efficient outcomes.

Concluding remarks

Panelist 1: EU had regulations in 1996, revised in 2001 and 2006. We are working on the fourth leniency regulations so we really don't need a perfect system in place. It is essential to have transparency. India is a very interesting market to many Western countries. Having a system with flaws is better than not having a system at all. Harmonization is also good.

Panelist 2: There needs to be transparency. One critical thing for this regime to be successful is that CCI acts in a timely manner where it passes stiff orders imposing penalties on the violating companies. Unless there is fear, a leniency regime is not going to work. Secondly, I am a big supporter of criminalisation of competition wrongs.

Panelist 3: I also advocate criminal penalties. There are few recommendations I have. One is the clarity on the confidential part. Second, more administratively efficient penalties on the individuals as they are more scared than the companies. Third, there should be guidelines for private damages under section 53N of the Act.

Panelist 4: CCI should consider additional factors when it comes to granting leniency plus. There should be a differentiation between withdrawal and foreclosure.

Panelist 1: I am not sure on criminalisation of competition wrongs. While a CEO may be willing to pay a fine and get off, if there is a provision to send him/ her behind bars, he/ she might fight off till the end.