



**Luthra *and* Luthra**  
LAW OFFICES INDIA

## COMPETITION LAW ALERT

SPECIAL EDITION

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In the Special Edition of the Luthra and Luthra Law Offices India Newsletter, we have attempted to give our readers a snapshot of the recent updates in the competition law space in India. Since the newly introduced Regulations and Notifications affect both, the enforcement regime and the merger control regime, this Special Edition has been split in the same manner. We hope that our readers find this Special Edition informative and interesting.

## Changes in the Enforcement Regime

This section captures the recent changes in the enforcement regime of the Competition Commission of India (**CCI / Commission**). We believe that with these changes, compliance with competition law has become sacrosanct and organizations must ensure that a culture of competition is built across the entire organization.

## Determination of Turnover or Income Regulations

The CCI has notified the CCI (Determination of Turnover or Income) Regulations, 2024 (**Turnover Regulations**) in order to provide clarity on how the turnover of an enterprise or income of an individual has to be assessed for the purpose of determining quantum of penalty under Section 27(b) and 48 of the Competition Act<sup>1</sup>, 2002 (**Act**).

- (i) **Turnover or income determination for 'enterprises' under Section 27 of the Act:** The Turnover Regulations specify that the turnover or income includes value of sales and other operating revenue as per the audited consolidated financial statements. However, other income, indirect taxes, trade discounts and intra group sales, shall not be taken into account while determining the turnover / income.
- (ii) **Income determination for 'individuals' under Section 48 and 27(b) of the Act:** The Turnover Regulations specify that income of an individual will be the gross income as per the Income Tax Return (**ITR**), which shall exclude income from house property and capital gains. However, in- case an individual has not filed his/ her ITR in any jurisdiction or has filed it in multiple jurisdictions (excluding India), in such a case, a Chartered Accountant will have to certify the income figures duly supported by an affidavit by such an individual.

## Penalty Guidelines

The CCI has notified the much awaited CCI (Determination of Monetary Penalty) Guidelines, 2024 (**Penalty Guidelines**). These guidelines provide clarity in relation to the methodology or factors

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<sup>1</sup> Both, Sections 27(b) and 48 of the Act deal with power of the CCI to impose penalty on "Enterprise" and delinquent individual for violation of Section 3 of the Act (anti- competitive agreements) and Section 4 of the Act (abuse of dominance).



which the CCI will consider while imposing monetary penalties on delinquent parties.

- (i) **Determination of Penalty for enterprises under Section 27(b) of the Act:** As per the Penalty Guidelines, the first step is to determine 30% of the 'average' relevant turnover / income<sup>2</sup> (based on nature and gravity of the offence, nature of the industry including implications on the economy). The second step entails determination of the penalty by adjusting the amount determined in the first step subject to the legal maximum<sup>3</sup>. However, the CCI will have due regard to various factors while determining the penalty as per the second step which include (a) whether the enterprise has implemented a competition compliance program; (b) admission of contravention; (c) extent of cooperation; (d) duration of the offence; (e) role of the enterprise; (f) retaliatory measures on other enterprises to participate in the contravention etc.

The Penalty Guidelines also clarify that where the determination of relevant turnover is not feasible, the CCI may consider the 'global turnover' derived from all products and services, for the purposes of penalty.

Further, the Penalty Guidelines also clarify that in-case of cartels where the CCI is empowered to impose penalty on the profit of a delinquent entity, profit after tax shall be considered.

- (ii) **Penalty for individuals under Section 48 of the Act:** The Penalty Regulations specify that the CCI may impose penalty on individuals which shall not be more than 10% of the average income of the person for the last three preceding financial years. Further, while determining the penalty percentage on individuals, the CCI may have due regard to the nature and gravity of the offence, role and duration of the involvement, extent of cooperation etc.
- (iii) **Penalty under Section 43A of the Act:** The Penalty Regulations specify that for gun-jumping<sup>4</sup>, the penalty can extend upto 1% of the total turnover or assets or the value of the transaction, whichever is higher of such a combination. However, while determining the amount of penalty, the CCI shall have due regard to factors such as consummation

<sup>2</sup> Relevant turnover / income means the turnover / income derived by an enterprise from the sale of product/ services to which the contravention relates. Further, for the purpose of calculating the relevant turnover / income, the time period to be considered is three years preceding the year in which the Director General's report is received by the CCI or (in appropriate cases with reasons to be recorded in writing) three years preceding the contravention.

<sup>3</sup> Maximum amount of penalty permissible under the Act. In- case of abuse of dominance cases, the legal maximum is 10% of the average global turnover. In-case of cartel cases, three times of the profit or 10% of the global turnover for each year of the continuance of the agreement, whichever is higher.

<sup>4</sup> Failure to file a combination notification before the CCI or consummating a combination without notifying the CCI.



/ part consummation of the transaction, violation of standstill obligations, non-furnishing of information, voluntary filing of the combination notice, conduct and cooperation of the parties etc.

- (iv) **Penalty under Section 42, 43, 44 and 45 of the Act:** The Penalty Regulations also lay down factors which the CCI may consider for determination of penalty if any party contravenes any order of the CCI or fails to comply with any directions of the CCI and / or of the Director General (**DG**), furnishes false statements or omits to place on record any information. These factors include extent and reasons for non-compliance / non-cooperation, nature of misleading information, knowledge of person furnishing the information about the same being untrue or incomplete etc.

### Lesser Penalty Regulations

The Ministry of Corporate Affairs (**MCA**) has notified certain sections of the Competition (Amendment) Act, 2023 dealing with the Lesser Penalty / Leniency Regime in India.

These include amongst other changes (including timeline for filing leniency plus application, forfeiture of leniency benefits, confidentiality, factors to be considered by the CCI for granting leniency benefit, the introduction of the 'Leniency Plus' mechanism to incentivize an existing lesser penalty applicant in respect of a cartel to give full, true and vital disclosures about another cartel, not in the knowledge of the CCI. Such applicant will be eligible to receive additional reduction in penalty (as a lesser penalty plus applicant) over and above the reduction in penalty which may be given to it as a lesser penalty applicant in the first cartel. Lesser penalty plus mechanism is expected to give a much-required impetus to the current lesser penalty regime in India.

The CCI has also notified the Competition Commission of India (Lesser Penalty) Regulations 2024 (**Lesser Penalty Regulations**). Some of the key features of the Lesser Penalty Regulations are as follows:

- (i) As per the Lesser Penalty Regulations, an applicant seeking the benefit of Lesser Penalty or Lesser Penalty Plus shall (a) cease to be a part of the cartel; (b) provide true, full and vital disclosures; (c) cooperate genuinely, fully, continuously and expeditiously; (d) not destroy, conceal or manipulate the evidence etc.
- (ii) An existing lesser penalty applicant can qualify for additional penalty reductions of up to 30% for the first disclosed cartel by providing full, truthful, and crucial disclosures regarding a second undisclosed cartel. Moreover, an applicant may receive complete penalty waivers for the newly disclosed cartel.
- (iii) An individual (in addition to any business entity) engaged in a cartel can come forward and blow the whistle before the CCI and can avail of the benefit of Lesser Penalty or



Lesser Penalty Plus. Furthermore, any association or trade body facilitating a cartel can also avail the benefit of Lesser Penalty. Such a provision did not exist in the earlier regime.

- (iv) A leniency applicant can withdraw its application prior to the submission of investigation report by the DG. However, the CCI has the power to use the information/ evidence disclosed by a leniency applicant against it.

## Settlement Regulations

The CCI (Settlement) Regulations, 2024 (**Settlement Regulations**) have been notified to formalize the procedure and implement the Settlement provision. These regulations provide a mechanism whereby an entity under investigation for contravention of Section 3(4)<sup>5</sup> or Section 4 of the Act can approach the CCI and offer settlements to address the competition concerns identified and get the proceedings abated thereby avoiding a long-drawn litigation. The key features of the Settlement Regulations are provided below:

- (i) **Content of application for Settlement:** The Settlement Regulations provide the form of the application which shall include the details of the entity, proof of payment of fee, details of the findings of the DG, impact of the alleged contravention, details of the settlement proposal and its subsequent monitoring, details of similar competition cases in other jurisdictions etc.
- (ii) **Timing:** The Settlement Regulations provide that a settlement application is required to be filed within 45 days from the date of receipt of the DG report, which is extendable at the discretion of the CCI.
- (iii) **Consideration of the settlement application:** The CCI shall consider the settlement application and if satisfied shall keep the inquiry against the applicant in abeyance till the decision on the settlement application. The CCI shall also invite objections and suggestions on the proposal of settlement from the parties concerned as well as the DG.
- (iv) **Determination of the settlement amount:** The CCI shall compute the base amount which could extend upto the legal maximum and the final amount would be determined by applying a settlement discount of 15% to the base amount.
- (v) **Fee for the settlement process:** Depending upon the turnover of the applicant, the filing fees for a settlement application ranges from INR 2.5 Lakhs to INR 50 Lakhs.

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<sup>5</sup> Anti-competitive vertical agreements.



- (vi) **Withdrawal of the settlement application:** An applicant may withdraw the settlement application at any time prior to passing of an order by the CCI.
- (vii) The Settlement Regulations also provide that the settlement proceedings should be concluded within 180 working days from the date of filing of the settlement application.
- (viii) It is also important to point out that no appeal shall lie against any order passed by the CCI under the Settlement regime.

## Commitment Regulations

The CCI has notified the (Commitment) Regulations, 2024 (**Commitment Regulations**) which provide how an enterprise (against which an investigation for anti-competitive vertical agreements and abuse of dominance is underway) has the option to offer commitments to the CCI to put an end to the proceedings. Some of the key features under the Commitment Regulations are provided below:

- (i) **Timing:** The application offering commitments (**Commitment Application**) must be filed within 45 days from the receipt of the *prima facie* order passed by the CCI which is extendable at the discretion of the CCI. The timeline for the overall commitment proceedings is 130 working days from the receipt of the Commitment Application by the CCI. However the Commitment Application should be submitted before the receipt of the DG's report.
- (ii) **Content of application for Commitment:** The content of a Commitment Application must include *inter alia* full and true disclosure of facts; details of the nature, duration, gravity and impact of the alleged contraventions; the commitments offered; the manner of implementation and monitoring and details of previous contraventions / ongoing proceedings. A non-confidential summary and an undertaking must also be attached.
- (iii) **Consideration of the commitment application:** The CCI shall consider the commitment application and if satisfied shall keep the inquiry against the applicant in abeyance till the decision on the commitment application. The CCI shall also invite objections and suggestions on the proposal of commitment from the parties concerned as well as the DG.
- (iv) **Fee for the commitment process:** Filing fees range from INR 2.5 Lakhs to INR 50 Lakhs and is linked to turnover of the Commitment Applicant.
- (v) **Nature and effect of commitment order:** Commitment orders cannot be construed as



a finding of contravention against the Commitment Applicant. The Commitment Order shall have no effect on the CCI's inquiry into other parties (who may not be a part of the commitment proceedings). Where the Commitment Application only relates to some of the alleged contraventions, the CCI's inquiry on the remaining contraventions will continue. The commitment order shall be binding on the Commitment Applicant and is not subject to appeal.

- (vi) **Implementation and Monitoring:** The CCI can appoint agencies to oversee the implementation of the commitments offered.
- (vii) **Revocation:** The CCI can revoke the commitment order in case of failure of the Commitment Applicant to comply or make full and true disclosure or there has been a material change in the facts. Thereafter, the CCI can impose legal costs of up to INR 10 million and may also restore the inquiry.
- (viii) **Power to Use Information:** If the Commitment order is revoked, both the CCI and the DG may use the information and documents provided by the Commitment Applicant.

## Changes in the Merger Regime

In line with the Central Government's larger agenda of 'ease of doing business' in India, the MCA has revised the monetary thresholds for combinations under the Act. These thresholds are a welcome step, and it is expected that the 'deal value' regulations will also be published shortly.

## Revised Thresholds

De Minimis/ Small Target Exemption				
Threshold		Old regime	New regime	
Value of Assets in India		INR 350 crores (~USD 42 million)	INR 450 crores (~USD 54 million)	
Value of Turnover in India		INR 1000 crores (~USD 121 Million)	INR 1250 crores (~USD 151 Million)	
Substantive Thresholds <sup>6</sup>				
Enterprise level/ Parties Test	India	Value of Assets	> INR 2000 crores (~USD 267 Million)	> INR 2500 crores (~USD 300 Million)
		Value of Turnover	> INR 6000 crores (~USD 720 Million)	> INR 7500 crores (~USD 901 Million)
	Worldwide including India	Value of Assets	> USD 1 Billion with at least	> USD 1.25 Billion with at least > INR 1250 crores in India (~USD 150 Million)

<sup>6</sup> A transaction which breaches any of the thresholds is notifiable before the CCI unless it can avail any of the exemptions provided in Schedule 1 of the Combination Regulations, 2011.



			> INR 1000 crores in India (~USD 120 Million)	
		Value of Turnover	>USD 3 Billion with at least > INR 3000 crores in India (~USD 360 Million)	>USD 3.75 Billion with at least > INR 3750 crores in India (~USD 450 Million)
<b>Group Level</b>	<b>India</b>	Value of Assets	> INR 8000 crores (~USD 966 Million)	> INR 10000 crores (~USD 1.20 Billion)
		Value of Turnover	> INR 24000 crores (~USD 2.8 Billion)	> INR 30000 crores (~USD 3.61 Billion)
	<b>Worldwide including India</b>	Value of Assets	> USD 4 Billion with at least > INR 1000 crore in India (~USD 120 Million)	> USD 5 Billion with at least > INR 1250 crore in India (~USD 150 Million)
		Value of Turnover	USD 12 Billion with at least > INR 3000 crore in India (~USD 360 Million)	USD 15 Billion with at least > INR 3750 crore in India (~USD 450 Million)





*This newsletter is only for general informational purposes, and nothing in this edition of the newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or competition law in general), please feel free to contact G.R. Bhatia/ Arjun Nihal Singh, at the below mentioned coordinates. © Luthra and Luthra Law Offices India 2024. All rights reserved.*

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