

LENIENCY PROVISION UNDER COMPETITION LAW: AN EFFECTIVE TOOL TO DETECT CARTELS IN THE MARKET

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INTRODUCTION

The competition authorities/authorities across the globe are facing abundant complications in detecting the anti-competitive practices (including cartels) ongoing in the market as detection of cartels plays a prominent role in ensuring the fair play in the market across the globe. So in order to detect the cartels more efficiently and in an operative manner, leniency policies have been designed to give the incentives to the participants who are indulge in the cartels, with an initiative to approach the competition authorities by disclosing their participation in such unlawful activities. Leniency policy is regarded or can be said as a whistle blower shield by offering the lenient handling to the participants indulged in the cartels who discloses the information of such activities before the Commission. With the growing conduct of cartels ongoing all over the world, more than 50 countries across the globe have adopted the leniency policies for the identification and detection of the cartels ongoing in the market.

In trail with the most developed countries like European Commission and the United States, the Competition Act, 2002 which has been replaced by the Monopolistic and Restrictive Trade Practices (MRTP) Act, 1969 provides the leniency regimes in India under Section 46 of the Act, providing the participants to make an application for lesser penalty before the Competition Commission of India (CCI) who have contravened the provisions of Section 3 of the Act by disclosing and furnishing the relevant facts and evidences which the Commission deems to be fit. Also, it covers the infringement of Section 3(3) of the Act which deals with cartels, among other things like Price-fixing, Bid-rigging. Leniency application in India is available for both the enterprises and the individuals who have contravened the provisions of Section 3 of the Act.

Cartels are such agreements which creates an appreciable adverse effects on the competition (AAEC) and it is very difficult to detect their existence as such actions are done secretly by the market competitors. So, leniency regime is a way forward approach implemented by the Competition Commissions to determine and detect the ongoing cartels in the market across the globe.

➤ **Why there is a necessity of Leniency Application?**

Cartels are secret by definition and owing to the technicalities, the competition authorities need to dedicate enormous efforts to discover cartels and deter them. So, leniency application plays an important tool in deterring and detection of agreements including cartels which is an innovative approach by the competition authorities across the globe. 'Hard core' cartels indulged in by the participants are very hard to identify as the existence of such cartels is very secretive in nature, thus creating difficulty for the competition authorities to identify such practices. In determining such hardcore cartels ongoing in the market, the leniency provisions of such competition authorities plays an important role to tackle such cartels. The competition authorities are mandated to maintain that there should be a fair play in the market.

It is a beneficial policy initiated by the competition authorities in institution of leniency regimes across the globe. From the Commission's point of view, it is much easier to detect the ongoing cartels and ensuring the fair play in the market. And, from the defendants' point of view, defendants applying for leniency programme would be granted reduction in the penalties which is to be imposed by the Commission only if they approach the Commission with relevant information, evidences which the Commission deems/believes it to be true.

➤ **Cartel leniency in India**

¹The conduct of agreements including (cartels) is a civil offence and not the criminal one in India. The leniency policy/regime under the Indian legal framework is enshrined as per Section 46 of the Competition Act, 2002 which states that if any producer, seller, distributor, trader or service provider has contravened the provisions of Section 3 of the Act or have been indulged in the cartels ongoing in the market, then they may approach the Commission for the application of lesser penalty regulations by disclosing and furnishing the relevant facts and evidences which the Commission believes it to be true.

The parties approaching the Commission with the true and vital disclosure of facts and evidences would be eligible for the lesser penalty which is to be imposed by the Commission and such reduction in the penalty is on first come, first served basis and which is for the maximum first three parties but it has been further amended which reads as mentioned below. However, Section 46 of the Act states that no application for leniency can be made once the Director General (DG) has submitted the report to the Competition Commission of India.

¹ The Competition Act, 2002 (Act of 2002), s. 46

✓ ²Recent Amendment under the Competition Act, 2002

The leniency programme has been in operation since the enforcement of the Competition Act, 2002 in May 2009. But the Competition Commission of India has introduced first amendment on 22 August 2017 regarding the lesser penalty regulations which has allowed the individuals who are part of the cartels to approach for the leniency application before the Commission and this amendment has abolished the limitation of applicants applying for lesser penalty before the Commission and has also provided the marker status for individuals as well.

- *Marker status for the first applicant*

Any individual or enterprise approaching the Competition Commission of India primarily who have been indulged in the agreements including (cartels), who discloses the relevant facts and evidences before the Commission, then after examining such facts and disclosures made by the first participant, the Commission may grant the full-fledged or up to 100% reduction in the penalty if the Commission believes it to be true and relevant.

- *Marker status for the second applicant*

Any individual or enterprise who approaches the Commission with the relevant facts and furnishes the information regarding the conduct of cartels before the Commission and if the Commission deems it to be fit, then may grant up to 50% reduction in the penalty.

- *Marker status for the third applicant*

Any individual or enterprise approaching the Commission with relevant facts and evidences which the Commission believes it to be fit, then after examining such facts disclosed by the applicant, the Commission may grant 30% reduction in the penalty.

- *No limitation on the subsequent applicants*

Before this amendment, the Competition Commission of India has restricted and limited the number of applicants applying for lesser penalty which was meant

² https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf

for the first three applicants only. But after this amendment as notified by the Commission in August 2017, there is no bar on the number of applicants applying for the leniency programme and would be eligible for the waiver up to 30% reduction in the penalty which is to be imposed by the Commission.

✓ **Powers of Director General (DG) as per the amendment**

As per the original regulations of the Competition Commission of India, DG was empowered to disclose the confidential information of the applicant only if it was waived off by the applicant applying for the lesser penalty regulations or was open in the public domain.

But after the recent amendment, the Competition Commission of India has given the power to the DG to disclose the confidential information of the applicant to another party regardless of the waiver made by the applicant; but while doing such disclosure during the course of investigation, the DG should record the reasons in writing and should get the prior approval from the Competition Commission of India.

➤ **Procedure and time limit of Leniency Application**

As per the Competition Commission of India (Lesser Penalty Regulations), the applicant has to get in touch with the Designated Authority for Lesser Penalty matters i.e. Secretary, Competition Commission of India. The applicant has to contact through telephone and followed by email/FAX or through written communication. After that, within fifteen days of his first contact/communication the applicant has to give a detailed application disclosing all the relevant information in the conduct of cartels. Up till now, this time limit of fifteen days was strictly adhered to.

In the recent times, an amendment has been made to the Lesser Penalty Regulations wherein party gets fifteen days of time from the date of receipt of his priority/marker status. So, this recent amendment provides some additional time to the applicant. The applicant has to strictly submit the detailed information within fifteen days failing which the applicant will lose its marker status.

➤ **Rejection/Withdrawal of leniency application**

Rejection: If any applicant approaches the Competition Commission of India for the lesser penalty regulations, and if the Commission believes or finds that the amount of information furnished by such an applicant is not vital or up to the mark or does not meet necessities of the Commission, then keeping such thing in knowledge, the Commission may reject that application. But the commission is permitted to use such information in order to carry on the case against such

entities. And once the application for the first applicant has been disallowed by the Commission, then the subsequent applicants applying for lesser penalty regulation will move up in the primacy status.

Withdrawal: If any applicant fails to co-operate with the Commission during the course of investigation in the establishment of the cartel or does not furnish the relevant and documentary evidence as required by the Commission, then the Competition Commission of India may withdraw the application of leniency programme of such applicant.

➤ **Benefits of leniency application**

- *From the Commission's point of view:* The provision of leniency application as enshrined under Section 46 of the Act has helped and is a way forward approach by the Competition Commission of India to detect the cartels more effectively which are ongoing in the market.
- *From the applicant's point of view:* As the Commission has instituted the provision of leniency application (lesser penalty regulations) under the Act, it has been a beneficial step for the applicants because penalties which are likely to be imposed by the Commission on the applicants for the conduct of cartels would be very hefty, but under Section 46 of the Act, the Commission has the provision to grant reduction in the penalties to the applicants who furnishes and discloses the true and relevant information before the Commission.

➤ **Case Law**

³Brushless DC Fans Case

Facts:

The present case pertains to bid-rigging indulged by the three entities namely, Pyramid Electronics, R. Kanwar Electricals and Western Electric and Trading Company for Indian Railway tenders for the supply of brushless DC Fans. In the present case the proceedings were initiated by the Commission *suo moto* through the information provided by the Central Bureau of Investigation (CBI).

Based on the present information, the Commission formed a prima facie opinion and directed the DG to conduct the investigation under Section 26(1) of the Act.

³ https://www.cci.gov.in/sites/default/files/Order_Suo_Moto_03_of_2014%20%28Final%29_1.pdf

Application of leniency programme:

During the course of investigation by the DG, the Pyramid Electricals filed an application under Section 46 of the Act for the leniency programme and admitted that the applicant has been indulged in the cartel.

Reduction in penalty by the CCI:

During the course of investigation, the Pyramid Electricals had filed an application under Section 46 of the Act for leniency programme. All the facts and the evidences furnished by the applicant were believed to be true by the Commission and were relatively substantial. So, on the ground of such evidences furnished by the applicant, the Commission granted 75% reduction in the penalty to the Pyramid Electrical for indulging in the cartel. While, the other parties did not file any application before the Commission for leniency programme, so, they were not granted any reduction in the penalty.

➤ **Cartel Leniency in European Commission**

⁴Conduct of cartels in other developed jurisdictions like European Commission is even a challenge for the competition authority to detect the ongoing cartels in the market. Cartels, being too secretive in nature are not easy to detect and identify the unlawful players and competitors in the market. ⁵Article 101 of the Treaty on the Functioning of the European Union (TFEU) defines cartel as any undertakings, decisions by associations of undertakings and concerted practices which may affect the trade between member states who either restricts and fixes the prices of the goods and services whether directly/indirectly or limits the control on production of the goods and services, thus creating an unfair play among the competitors in the market would be held liable for such practices by the Commission. Conduct of such agreements and practices including cartels is an offence of civil nature in the European Commission and if any player infringes the provisions of article 101 of TFEU, then the Commission imposes a hefty penalty on such players acting in the market.

But in order to detect and identify the cartels ongoing in the market, the European Commission has also adopted the leniency regime which says that an undertaking submitting the information with true facts and furnishing the relevant evidences before the Commission which the Commission believes it to be true, then the Commission may grant the leniency in the penalties which is to

⁴ The Treaty on the Functioning of the European Union (TFEU), art. 101

⁵ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

be imposed on such undertakings. Such immunity from reduction in fines is served on first come first basis by the Commission.

✓ **Amendment in the leniency programme**

In the year 2006, an amendment has been made by the European Commission 2006 regarding the provisions for granting the leniency in the penalties to the undertaking who have infringed the provisions of article 101 of TFEU. As per the 2006 amendment made by the Commission, the leniency regime under Part II, Section A of the leniency notice says that the Commission may grant the full reduction in the penalty for the undertaking approaching the Commission primarily by disclosing the information which is relevant and is capable of identifying the infringement of cartels under article 101 of TFEU. Further under Part II, Section B of the notice, it provides that if:

- Any undertaking furnishing the vital and relevant information, facts before the Commission which the Commission believes it to be true, then the Commission may grant 30% to 50% reduction in the penalty to the first undertaking who hands over the relevant information before the Commission.
- Any undertaking of the secondary marker status for the leniency programme, would be granted 20% to 30% reduction in the penalty by the Commission, if the Commission believes that the information furnished by such an undertaking is fit as per Commission's prerequisites.
- And for other subsequent undertakings (no restriction on the number of undertakings) providing the relevant evidences and disclosures for leniency regime before the Commission which the Commission believes it to be fit, would be granted up to 20% reduction in the penalty.

Also, if the undertakings disclosing the information before the Commission for leniency regime does not qualify the laid down conditions of the Commission in order to grant the immunity (lesser penalty), then under this recent amendment a favourable treatment is provided to them if they furnish the information which adds the significant value in the evidences which are already in the Commission's possession. If such condition is met, then the Commission may grant a reduction of up to 50% in the pay of fine.

➤ 6Case Law

Truck Cartel Case

Facts of the case:

In the present case, the MAN, DAF, Daimler, Iveco, Volvo/Renault and Scania were affianced in the price collusion of the medium and heavy trucks, thus, forming an anti-competitive behaviour in the market. During the course of investigation, it was found that the meetings were held among the players for such an activity on a large scale and the interchange of information through telephones were also came in the fingers of the Commission.

Reduction in penalty by the Commission:

The MAN was granted the complete immunity from the Commission as it approached the authority primarily by disclosing all the facts and evidences for the behaviour of cartel activity. Along with MAN, all other players excluding Scania approached the Commission as well and they were also granted the reduction in the penalty as per the guidelines cited under 2006 leniency notice. In addition to that, the players were also granted the reduction of 10% in the penalty for the settlement of cartels as enshrined under the 2008 settlement notice. The Scania was not granted any immunity from the Commission.

➤ Cartel Leniency in United States

⁷ Cartels as enshrined under Section 1 of the Sherman Act is quite a tricky task for the Antitrust Division in United States to limit such conduct in the market. As Section 1 of the Sherman Act prohibits the conduct of cartels against the competitors who fix the prices of goods and services whether directly or indirectly or are involved in the bid-rigging are punishable with imprisonment up to three years or payment of fines up to \$350,000 for individuals and \$10,000,000 for the corporations under the eyes of the competition authorities positioned in the United States. There is a criminal liability for the demeanour of such cartels in the United States.

The institution of leniency programme by the United States is an operative tool to detect the engagement of cartels by the competitors who contravenes or

⁶ https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1593506308682&uri=OJ:JOC_2020_216_R_0007

⁷ The Sherman Antitrust Act of 1890 (The Act of 1890), s. 1

infringes the provisions of Section 1 of the Sherman Act. Because cartels of hard value which are not easy to detect, leniency programme is an advancing approach by the competition authorities in United States for the detection of such cartels. The competitors who approach the Competition Commission with significant evidences and deliver the information which the Commission considers it to be true, then in such a scenario they can get the reduction in the imprisonment or fine which is to be levied by the competition authorities for such conduct by the competitors.

➤ **Settlement in Cartel Proceedings**

Settlement of cartels is an operative and competent tactic adopted by the competition commissions across the globe against the defendants' who have been indulged in the cartel. The players who have indulged in the cartel may approach the Commission and confess their offence in order to get the reduction in the penalty which is to be levied by the competition authorities. The settlement regime is an advantageous activity from the defendants' point of view.

Settlement procedure in cartel cases have been a way accelerative step by the commissions as identifying the cartels which are of hard nature is quite a challenging task for the competition authorities across the globe. Many countries have opted the settlement procedure in the cartel cases which is beneficial for both the Commission and defendants'. The cartel settlement safeguards the swift and expeditious trial for the competition authorities which is to be initiated in contrast to the defendants' for the conduct of cartels.

⁸In European Commission, if the competitors admit their offence before the Commission and approach for the settlement programme, then the Commission may grant the 10% reduction in the fines, which is to be imposed on them.

➤ **Conclusion**

In a summarized way, leniency provisions adopted by the respective competition authorities is a very effective tool to crack the cartels across the globe. As is the nature of these hard-core cartels, the competitors in the market very secretively conduct them and it is a herculean task for the authorities to locate the trail of such activities. This leniency regime allows them to woo the persons/corporations, etc. indulged in cartels and saves them from hefty fines and civil/criminal offences, wherever applicable. This leniency programme works in a two-way system i.e. one it helps the competition authorities to track

⁸ https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html

and trail the cartel and saves their valuable time and resources; and two, it helps the persons/corporations, etc. who fell prey to such cartels in order to satisfy their greed to earn money in a short span of time and without making much efforts.

Leniency applications make higher chances of detection of cartels across countries which is a way forward approach opted by the competition authorities all over the world. Leniency programme helps in growing the economy and ensures the fair play among the competitors in the market.

The key focus of the leniency tools is to preserve consumer well-being at high level by warranting finest quality services and products at fair price. Many players bring down the free market to a standstill to mint money. In brief, it is very hard to crack, apprehend, and punish such plotters.

Leniency application is the one and only tool to overcome the complications that are being faced by the competition commissions on a large scale in detecting the ongoing cartels in the market across the globe. Detection of cartels has now become relaxed for the competition authorities who have opted for leniency programmes.