

## Leniency Programme in Cartel Cases: Pattern and Practices of Competition Commission of India *vis a vis* Legislative Framework

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**Abstract:** There has been a consensus across the world about the adverse effects of cartels on economy as well as consumer welfare which function tacitly in domestic jurisdictions as well as cross border realm. The chief challenge before the competition authorities in cartel enforcement has been the detection, identification and proof of existence of a cartel. Cartel agreements function secretly and their *modus operandi* may be through casual meetings, over the seminars or trade fairs, through emails or telephonic conversations etc. The most effective tool for detecting cartels in mature competition law regimes has been the Leniency Programme and this has been adopted in many jurisdictions across the world. India also has laid down its Cartel regulation in the Competition Act, 2002 and leniency programme in 2009 through its Lesser Penalty Regulations 2009. It has been more than a decade that the lesser penalty regulations are in place in India but it wasn't until 2017 that the first order under this legislative framework was passed. After a decade, it becomes pertinent to review the success, failures or challenges that have come in cartel enforcement by CCI and use of leniency programme to detect as well as deter cartelisation in India. After a careful study of all the cases in which reduction in penalty was ordered by CCI since 2017, it is found that due to lack of uniform and certain guidelines as to imposition of penalty, there remains uncertainty among the potential applicants to come forward with vital information about the cartels. Therefore, the Lesser Penalty Regulations should be detailed in line with the international standards and there should be uniform guidelines in the pattern and practices of penalisation by the CCI.

**Keywords:** cartels, leniency programme, Competition law, Competition Commission of India, OECD, Lesser Penalty

### I. INTRODUCTION

The most egregious form of competition violation is cartelisation. According to OECD a cartel is: "An anti-anticompetitive agreement, anti-competitive concerted practice, or anti- competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce" (OECD Report, 2002). Cartels are the tacit agreements entered into by the firms of an industry to collude in price fixing, bid rigging, market sharing or restricting output which

cumulatively result in harming the interests of the consumer on one hand and on the other, adversely affecting the economy of the country by wastage of resources of the society, inefficient utilisation of resources. Due to blurring of economic boundaries across the world, the operation of international cartels has affected the economy of the developed as well as developing countries. Therefore the competition regimes worldwide and international communities have targeted the detection and penalisation of cartels unanimously. However the chief challenge before the competition authorities is how to detect a functioning cartel. since these agreement are tacit in nature, often taking place in

very subtle manner and on platforms like lawful associations, there is great secrecy attached to their functioning. A cartel meeting may take place in a conference room, or a hotel room, or any trade fair, or any seminar or workshop of the relevant industry or even on a phone call and emails. Therefore the chief target of enforcement authority is to bust a cartel.

## II. LENIENCY PROGRAMME

Leniency programme in a competition law regime have been agreed to be the most effective tool of detecting a working cartel. Therefore in all the major competition law regimes, leniency programs have been put in place through definite legislations. Leniency programmes facilitates the breaking of silence among the cartel members. The international standards of the programmes provide for the complete amnesty to the first applicant who is also a member of the alleged cartel to provide true and full information about the modus operandi of the cartel to the competition authorities and facilitate the investigation into the cartels.

### *2.1 Cartel Enforcement and Leniency Programme in India: The Legislative Framework*

Section 3(3) of the Competition Act provides, “Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of

persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition”

Further, section 27 empowers the Competition Commission of India to impose penalty in case of violation of section 3 of the Act. The penalty can be imposed “as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: [Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover for each year of the continuance of such agreement, whichever is higher.”

Provision for Leniency has been made under section 46 of the Act where, “The Commission may, if it is

satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations”

The Lesser Penalty Regulations were framed in 2009. These regulations provide details on the basis of which CCI can impose reduced penalties than what it is empowered to impose under the statute.

Though, it has been more than a decade since the leniency programme is in place in the Indian competition law, it was not until 2017 that the CCI made its first order under the Lesser Penalty regulations. So far there has been handful of cases where leniency programme has been used as a tool in detecting and establishing the existence of cartel agreements. After a decade, it becomes pertinent to study these orders of the CCI, the patterns and practices adopted by the CCI in exercising the power of reducing penalty as an intensive to give information about the cartel activity.

## ***2.2 CCI Judgements on Lesser Penalty***

### ***2.2.1 In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, 2017***

Lesser penalty application was submitted by the Opposite Part 1 undertaking full cooperation and disclosure of vital information to the Director

General during the course of investigation. It was claimed that there was full cooperation during the inquiry in the alleged cartelisation and also provided substantial evidence it possessed. It not only explained the operation of the cartel and the roles played by various participants of the alleged cartel, the manner in which prices of BLDC were discussed to be quoted in the future tenders of railways. The Commission considered the application and submissions by Applicant of Lesser Penalty and ordered for the seventy five percent reduction in the penalty imposed under section 27 of the Act. It was noted by the Commission that “at the time, when the application was made by OP 1, the Commission was already in possession of the e-mail evidence furnished by CBI which enabled the Commission to form a prima facie view regarding the existence of a cartel in contravention of the provisions of Section 3 of the Act.” To quote “The Commission notes that although OP 1 is the first to make a disclosure in this case, however, the Commission is also cognizant of the stage at which the Applicant approached the Commission i.e., not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the Commission at that stage.”

### ***2.2.2 In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India Vs. Eveready Industries India Ltd & Ors., 2018***

In the instant case, Lesser Penalty application were filed by three opposite parties. OP3 was the first to file the application, OP 1 submitted the application

three days after the commencement of the investigation by DG and OP 2 filed LP application three weeks later. Priority status was assigned by the Commission accordingly. The Commission observed that “that the information and evidence provided by OP-3, first applicant to file Lesser Penalty Application, was crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, nature and extent of information exchanges amongst OPs with regard to the cartel and identifying the names, locations and email accounts of key persons of OPs actively involved in the cartel activities.” Therefore, a reduction of hundred percent in penalty was ordered in favour of the OP3.

However in case of OP 1 and OP 2, the Commission noted that they had filed application at the stage when the DG and the Commission was in possession of material evidence already and therefore information and evidence provided by the second and third applicants did not result in “significant value addition”. However, on account of “genuine, full, continuous and expeditious cooperation during the course of investigation in the present case”, the second and third applicants were given thirty percent and twenty percent reduction in penalty respectively.

### ***2.2.3 Nagrik Chetna Manch v. Fortified Security Solutions & Others, 2018***

In this case, seven LP applications were filed at different stages of the investigation. The  
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Commission observed that by the time first application was received “DG had already gathered some evidence which indicated bid rigging/ collusion amongst Ops” however, since it “made good value addition to the ongoing investigation as it provided a better and clear picture of the operation of cartel” fifty percent reduction in penalty was granted to the first applicant. In case of other applications also, penalty was reduced to fifty, forty and 25 percent on the grounds of “good value addition”. However, no relaxation was given to the OP1 as in the opinion of the Commission, there was no value addition by the information furnished by the party even though “supported the investigation and co-operated with the investigation/ inquiry throughout and accepted information indicating the modus operandi of the cartel and evidence in its possession or available to it.”

### ***2.2.4 In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing v. Laks Green India Private Limited & Others, 2018***

Four opposite parties submitted the Lesser Penalty Applications after the investigation in the alleged cartel was initiated by the DG. OP1 being the first applicant crucial disclosure as to the ways and methods of the operation of cartel and the role of different persons in the cartel conduct which was considered a “reasonable value addition” by the Commission and such information was also relied upon by the DG in its report. A reduction of fifty percent in the penalty was ordered in such situation.

By the time next three applications were received by the Commission, it was already in possession of the most of the information and the value addition was considered as minimal. Therefore, no reduction was given to the applicants.

### ***2.2.5 In Re: Cartelisation By ... v. Essel Shyam Communication ..., 2018***

In an alleged bid rigging cartel case, both companies: Globecast and ESCL filed LP applications. The Commission assigned the First priority Status to Globecast and Second Priority Status to ESCL.

The Commission noted that “Globecast, the first applicant to file Lesser Penalty Application, made vital disclosure by submitting evidence of the alleged cartel and enabled the Commission to form a prima facie opinion regarding existence of the cartel.” also, “Globecast furnished various vital evidences in the matter which disclosed the modus operandi of the cartel such as the details of sporting events and chronology of the related events in which bid rigging took place, role of ex- employees of Globecast, internal inquiry conducted by Globecast at Singapore, email correspondence in relation to preparation and submission of bids in concerted manner, email correspondence showing sharing of commercially sensitive and confidential price information, forensic report related to the electronic evidences and the mirror image of the confiscated laptops, mobiles etc. and email correspondence in relation to draft consultancy agreement between ESCL and Bharat.” This was

considered as sufficient to give hundred percent reduction in penalty.

The lesser penalty application from ESCL was received after it received notice from DG. The information given by the ESCL though was “not found vital to the establishment of the conduct of bid-rigging, they are still important as the same disclosed one of the factors in the background of which information exchange in violation of the provisions of the Act took place between the parties.”

### ***2.2.6 In Re: Cartelisation in The Supply ... vs Unknown, 2019***

In this case, reduction in penalty was given on the basis of sequence of applications filed. And therefore, hundred percent reduction was ordered in favour of NSK and RNSS whereas 50 percent reduction was ordered in favour of the second applicant, JTEKT and JSAI. Similarly, the commission in the case of *Anticompetitive conduct in the Dry-Cell Batteries Market in India v. Panasonic Corporation, Japan & Ors.* 2019, took note of the lesser penalty application filed which made such disclosures vital for making a “prima facie opinion” of the existence of cartel. it was noted that “the Commission had no evidence to form such an opinion. Further, through the application, the Commission could get vital evidences which disclosed the modus operandi of the cartel such as the PSA and the e-mail communications exchanged between” the opposite parties. Therefore, hundred percent reduction was

granted to the applicants.

In the case of *Beer Cartel* decided in 2021, four applications were received by the Commission for the grant of lesser penalty. Regarding first application, it was observed that at the time when application was filed, there was no evidence already with the Commission to detect the cartel. moreover, the information like “the nature and modus operandi of the cartel and explained the market structure of Beer industry and the different models being followed in various States apart from submitting evidences with regard to exchange of e-mail communications between the key managerial personnel of the OPs” helped DG in its search and seizure operations. Therefore, the first applicant was considered eligible for full reduction in penalty. Benefit of 50percent reduction was given to the second applicant as “some evidence submitted by OP-1 has been used by the Commission above to form a complete trail evidencing anti-competitive conduct of the OPs, especially in relating to co-ordination in respect of premium institutions in Bengaluru, Karnataka and with respect to purchase of old/used bottles.” Subsequently 40 percent and 20 percent relaxation in penalty was given to the third and fourth applicants on account of “helped in mapping price parallelism in respect of Beer sold by the OPs”

Following the same line of reasoning, the commission, in the case of *In Re: Cartelisation in the supply of Protective Tubes to Indian Railways* 2022, ordered 100 percent reduction in

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penalty in the favour of the first applicant as “At that stage, the Commission and/or the DG had no evidence in their possession regarding cartelisation between the OPs. Full and true disclosures of information and evidence and continuous co-operation provided by OP-4 not only enabled the Commission to order investigation into the matter but also helped the Commission establish contravention of the provisions of Section 3(3) of the Act by the OPs.”

### ***2.2.7 In Re: Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and Others, 2022***

In this case, even though there was full and true disclosure by the applicant of lesser penalty and such information was relied upon by DG as well as the Commission, yet, since the application was filed after the initiation of the investigation into the alleged cartel full reduction was not ordered and the penalty was reduced to 80 percent of what the original penalty would have been levied. In case of the second and third applicants, though there was no substantial value addition in the information, yet, on account of “full and true disclosures of information and evidence and continuous co-operation provided”, forty percent and thirty percent reduction was ordered respectively. However, in the case of *In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India* 2022, only one party filed the application for

Lesser Penalty and at a later stage of the investigation. However, considering the cooperation extended by the applicant, ninety percent reduction in penalty was ordered. In the same way in the matter of *In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers* 2022, the first applicant provided “detailed account of the collusive actions of NYK Line with its competitors along with documents (including affidavits of its individuals) of evidence in support of such actions” of which no prior information or evidence was with the DG or the Commission. Therefore, 100 percent reduction was granted to the applicant.

Other applicants with second and third priority status, fifty percent and thirty percent reduction in penalty was granted.

(1)

### III. CONCLUSION

In almost all these cases, the chief concern of the Competition Commission of India has been the 'stage' at which the lesser penalty application has been filed and disclosures have been made. If the application is made after the commencement of the investigation and if the CCI has the material information in its possession, then hundred percent reduction in penalty is not granted. Higher degree of lesser penalty is provided if on the basis of the information, the Commission forms a *prima facie* opinion. Another important point to note is

that degree of reduction depends on the concept of “significant added value”. One of the major drawback in the procedure of granting reduction is that there are no fixed guidelines as to how much reduction is to granted in what circumstances and it has been completely left at the discretion of the CCI.

Closely analysing the above mentioned cases, it can be concluded that Leniency programmes prove to be most useful tool to detect a cartel activity. However to make them work best Leniency programmes work best it is important that the first applicant/member of the cartel has clarity and trust that amnesty would be provided with certainty if he comes forward. Also, another major requisite for a successful amnesty programme is that the penal provisions must be harsh so that it creates a deterrent effect on one hand and incentive on the for the cartel member to come forward with information. Also, mere primary information does not suffice for the success of leniency programme, it is important that the applicant must cooperate throughout the investigation of the cartel activity. Another major aspect for the effective implementation of lesser penalty regulations as an incentive is the guarantee of confidentiality of the information provided by the applicant and the assurance that the same shall not be used to raise claims of different nature by different stakeholders.

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