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Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by India

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenieny-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. Introduction

1. The Competition Act, 2002 ('the Act') is the legislation in India to promote and regulate fair competition in markets. The Act provides for the establishment of the Competition Commission of India (CCI), which is responsible for enforcing the provisions of the Act. To this end, the Act makes provisions for the prohibition of different kinds of anti-competitive behaviour, including anti-competitive agreements.

2. Section 3 of the Act prohibits, *inter alia*, cartels¹, which are the biggest threat to competition in markets. As per the provisions of the Act, cartel conduct is presumed to cause an appreciable adverse effect on competition ('AAEC').

3. As cartels are covert in nature, they are not easily detectable. It is for this reason and for strengthening cartel enforcement, that most competition agencies across the world have put in place programmes to uncover cartels. These programmes are popularly known as leniency programme, amnesty scheme or lesser penalty. Such mechanisms provide an incentive to infringers to come forward, cooperate, and disclose information, details, and evidences with respect to their cartel conduct and assist the competition authority in unearthing such conduct in lieu of granting a reduction in penalty which may be imposed in the absence of such disclosure.

2. Governing provisions of the Act and Regulations

4. The leniency programme in India, also known as the lesser penalty programme, is a significant tool implemented by the CCI to combat cartelisation, including bid-rigging. The CCI recognises the highly pernicious nature and detrimental effects of cartels on competition and consumer welfare. In order to incentivise enterprises and individuals to come forward and expose cartel activities, the leniency programme of CCI offers reduction in penalties to enterprises, including individuals, that voluntarily disclose their involvement in a cartel and provide full, true, and vital disclosures as well as continuous and sustained cooperation with the CCI during investigation and subsequent proceedings.

5. The lesser penalty regime is governed by Section 46² of the Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter, 'LP Regulations') as amended from time to time. In 2017, amendments were made to the LP Regulations, which allowed an application for lesser penalty to be made by any producer, seller, distributor, trader, or service provider included in any cartel, and such applicant may

¹ Section 2(c) of the Act defines a cartel as an association of producers / sellers / distributors / traders / service providers who agree to limit, control or attempt to control the production, distribution, sale or price of goods or services, or trade in goods or services.

² Section 46 of the Competition Act, 2002, relating to power to impose lesser penalty provides that:

"46. (1) 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 may be specified by regulations, than leviable under this Act or the rules or the regulations made under this Act....."

be: (a) an enterprise who is or was a member of a cartel or (b) an individual who is or was involved in the cartel on behalf of such enterprise ('LP applicant').

6. The CCI, *vide* notification dated 08.08.2017, amended the LP Regulations. The key amendments are as follows:

- *Enlargement of the scope of lesser penalty programme*: Earlier, only enterprises could avail the benefit of the LP Regulations, which has now been extended to individuals as well.
- *Clarification on number of applicants covered under lesser penalty*: It has been clarified that lesser penalty benefits can be accorded to more than three applicants.
- *Clarification on officials of enterprises*: Explicit provisions have been incorporated to extend lesser penalty benefits to the officers of LP applicant, in case the applicant is an enterprise.

7. As per the LP regulations, a cartel participant, by becoming the first LP applicant in the array, may get a reduction in penalty imposed up to or equal to 100% by making full, true, and vital disclosures regarding the cartel. The second applicant and/or third (or subsequent) LP applicant(s) disclosing evidence that provides '*significant added value*' to the evidence already in possession may also be granted benefit of reduction in penalty of up to or equal to 50 percent and 30 percent, respectively.

8. In order to avail the benefit of lesser penalty, the LP applicant may approach the Commission to provide some basic information such as name, address, contact and the cartelised product, in the first contact. The Commission marks the priority status of the LP applicant, intimation about which is given to the LP applicant. Thereafter, the LP applicant is required to submit a detailed application containing relevant details about the cartel, such as the nature of the cartel, its duration, the parties involved, and the markets affected, in the prescribed form.

3. Factors affecting quantum of lesser penalty

9. In case an LP applicant fails to comply with the conditions or fails to cooperate, the applicant may lose the benefits of lesser penalty or the priority status awarded to the applicant may be forfeited. Thus, merely securing a priority status does not guarantee benefit of reduction in penalty under the LP regime.

10. While deciding quantum of reduction in penalty, several screens are considered/ applied to evaluate leniency applications and the level of cooperation provided by the applicants. These broadly include credibility (reliability and accuracy of information), Significance (nature and extent of the cartelised conduct, such as its duration and scope, and information already known to CCI), timeliness (e.g., whether the application was made before CCI had initiated an investigation or during the investigation), quality (level of assistance such as the provision of documents, witness statements, and other evidence) and procedures (whether all the procedural requirements were complied with). Accordingly, the benefit of reduction in penalty granted may vary depending on the timing of the application, the quality and significance of the information provided, and the cooperation extended by the applicant.

11. The entire matter is considered holistically³ before applying one or the other screen. For instance, in one of the matter⁴ where the Commission initiated investigation based on disclosures made by the LP applicant, the LP applicant's full and true disclosure and continuous co-operation enabled the Commission to establish the existence of the cartel, resulting in a 100% reduction of penalty.

12. In another matter,⁵ where the Commission received applications from four companies, including their individuals, at different points of time during the pendency of investigation before the Director General (DG), the Commission noted in its final order that *"...though OP-3 was the first lesser penalty applicant to approach the Commission, yet it had approached the Commission as a lesser penalty applicant only after investigation in the matter had been ordered. ...that full and true disclosures of information and evidence and continuous co-operation provided by OP-3 and its individual enabled in establishing contravention of the provisions of Section 3(3) of the Act by the OPs, as brought out supra. As such, on a holistic consideration of the matter, the Commission decides to grant to OP-3 and Mr. Alok Somani, 80% reduction in the penalty amount imposed upon them."* While assessing the Second marker, the Commission noted that *"...in terms of the disclosures and evidence provided, OP-1 was not able to provide much value addition to the information, material and documents already provided by OP-3 through its lesser penalty application. Nonetheless, full and true disclosures of information and evidence and continuous co-operation provided by OP-1 helped the Commission in establishing contravention of the provisions of Section 3(3) of the Act by the OPs. As such, the Commission decides to grant to OP-1, 40% reduction in the penalty amount imposed upon it."* Further, with respect to the third marker, the Commission noted that *"...by the time of its application, the DG already had in its possession, from the lesser penalty applications filed by OP-3 and OP-1, quite a lot of evidence required for establishing a cartel. However, some evidence submitted by OP-7 has been used by the Commission to form a complete trail evidencing anti-competitive conduct of the OPs;the Commission decides to grant to OP-7 and its three individuals, reduction in penalty to the tune of 30% of the total penalty leviable."* Furthermore, the fourth applicant was granted a reduction of 20% based on the quality of information provided, evidence already in possession at that time, and the entire facts and circumstances of the case.

³ While deciding the amount of reduction in penalty which may be awarded to an LP Applicant, the Commission gives due regard to:

the marker status of the applicant;

the stage at which the LP applicant comes forward with the disclosures (*i.e.* before initiation of investigation or during the investigation);

the evidence already in possession of the Commission at the time of filing of LP application;

the quality of the information provided by the applicant; and

the entire facts and circumstances of the matter.

⁴ Suo Moto Case No 06 of 2020, The detailed order can be accessed at <https://www.cci.gov.in/antitrust/orders/details/1036/0>

⁵ Reference Case No. 03 of 2018. The detailed order can be accessed at <https://www.cci.gov.in/antitrust/orders/details/648/0>

4. Balancing confidentiality and right of defence

13. To enhance the confidence of the LP applicant, the Indian leniency regime provides for confidentiality⁶ over the identity of lesser penalty applicant⁷ as well as the information, documents and evidence furnished by it as part of its Lesser Penalty application.

14. It is only after forwarding of the investigation report to the parties that the non-confidential version of the lesser penalty application is made open for inspection to the other parties involved in the matter. Further, if directed by the Commission, the lesser penalty application and information/documents submitted by the LP applicant thereunder can be made accessible through a confidentiality ring.

5. Nature of liability

15. There is civil liability for cartel conduct in India under the Act. Accordingly, the LP regime only extends to the administrative liability imposed on cartel participants. Under the *extant* Indian competition regime, in case of establishment of cartel conduct, penalty of up to ten percent of the average of the turnover of the infringer for the last three preceding financial years or up to three times of the profit for each year of the continuance of the cartel, whichever is higher, can be imposed upon the contravening entities.

6. Few important cases involving lesser penalty applications in recent years

6.1. Cartelisation by beer companies

16. This matter was initiated by CCI on the basis of a lesser penalty application received under the provisions of Section 46 of the Act from Crown Beers India Private Limited ('Crown Beers') and SABMiller India Limited ('SABMiller'), both ultimately held by Anheuser Busch InBev SA/NV ('Ab InBev'), for alleged cartelisation in relation to the production, marketing, distribution and sale of beer in India.

17. The CCI, after taking cognizance of the evidence of regular communications between the parties and disclosures made in the lesser penalty applications, concluded that the three beer companies United Breweries Limited ('UBL'), SABMiller and Carlsberg India Private Limited ('CIPL'), including their certain individuals, indulged in price fixation, restriction of supply, and sharing of market in the sale and supply of beer in various States and UTs in India, including through the platform of All India Brewers'

⁶ *Provisos to Regulation 6 of LP Regulations, 2009* reads that:

"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 furnished under Regulation 5 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."

⁷ The identity of the LP applicant is kept confidential from the date of first contact till the completion of proceedings before the Commission by way of passing of final order in the matter.

Association ('AIBA') which was also found to be actively involved in facilitating such cartelisation. The period of cartel was held to be from 2009 to at least October 10, 2018.

18. Giving reduction in penalty under the provisions of Section 46 of the Act of 100% to AB InBev and its individuals, 40% to UBL and its individuals, and 20% to CIPL and its individuals, the CCI directed UBL and CIPL to pay penalties to the tune of approximately INR 7500 million and INR 1110 million, respectively, besides passing a cease-and-desist order.

6.2. Cartelisation by maritime transport companies

19. The case was initiated by the CCI *suo motu*, on the basis of an application filed by Nippon Yusen Kabushiki Kaisha (NYK Line). Subsequently, Mitsui O.S.K. Lines Ltd. ('MOL') and Nissan Motor Car Carrier Company ('NMCC') also filed lesser penalty applications before CCI regarding cartelisation in the provision of maritime motor vehicle transport services to automobile Original Equipment Manufacturers (OEMs) for various trade routes.

20. The CCI, on the basis of material available on record, found that there was an agreement between NYK Line, Kawasaki Kisen Kaisha Ltd. (K-Line), MOL and NMCC with the objective of enforcement of the 'Respect Rule', which implied avoiding competition with each other and protecting the business of the incumbent carrier with the respective OEM. The CCI held all four opposite parties guilty of contravention of the provisions of Section 3 of the Act. As three companies filed lesser penalty applications, the CCI gave the benefit of reduction in penalty by 100% to NYK Line and its individuals, 50% to MOL and its individuals, and 30% to NMCC and its individuals and accordingly, directed them to pay penalties to the tune of approx. INR 242.3 million, INR 101.2 million and INR 286.9 million, respectively, besides passing a cease-and-desist order.

6.3. Cartelisation in the supply of Electric Power Steering systems (EPS systems)

21. The case was initiated on the basis of an application received by the Commission under Section 46 of the Act read with the Competition Commission of India (Lesser Penalty) Regulations, 2009, from NSK Limited, Japan (NSK)/Rane NSK Steering Systems Ltd. (RNSS). The case pertains to alleged anti-competitive conduct by NSK and JTEKT Corporation, Japan (JTEKT), along with their Indian subsidiaries, namely RNSS and JTEKT Sona Automotive India Ltd. (JSAI), respectively, in the Electric Power Steering (EPS) systems market. JTEKT/JSAI also subsequently filed a leniency application.

22. The Commission found that NSK and JTEKT, upon receipt of Requests for Information/Requests for Quotation from automobile OEMs for the supply of EPS systems to their subsidiaries situated in various regions, including in India, had contact with each other through their employees and executives, during the period from 2005 to 25 July 2011, through meetings. Thus, the Commission held that NSK and JTEKT, and their Indian subsidiaries RNSS and JSAI, respectively, indulged in cartelisation in the EPS Systems market, from at least 2005 to 25 July 2011, by means of directly or indirectly determining the price, allocating markets, co-ordinating bid response, and manipulating the bidding process of certain automobile OEMs, which had an appreciable adverse effect on competition in India. Such conduct was in contravention of the provisions of Section 3 of the Act.

23. The Commission issued directions to NSK/RNSS and JTEKT/JSAI to cease and desist from indulging in cartel conduct with respect to EPS systems. With respect to penalty imposed, the Commission granted a reduction in the penalty up to 100% to NSK/RNSS

and its individuals and up to 50% to JTEKT/JSAI and its individuals. Pursuant to reduction, penalty to be paid by JTEKT/JSAI was INR 170.7 million.

24. The trend of decisions on leniency applications given by the CCI shows that the CCI adopts a balanced approach in giving reductions in penalty to leniency applicants.

7. Recent amendments: Competition (Amendment) Act, 2023

25. Recently, the Competition (Amendment) Act, 2023 has been passed and with respect to lesser penalty, the following salient features have been introduced through the amendment:

1. *Withdrawal*: Through the recent amendments, the Commission may allow a lesser penalty applicant to withdraw its LP application subject to certain conditions;⁸ however, notwithstanding such withdrawal, the DG and the Commission shall be entitled to use any evidence submitted by the LP applicant in its application for lesser penalty, except its admission.
2. *Leniency Plus*: To further incentivise LP applicants to voluntarily come forward and self-report/disclose the existence of another cartel in another market (different product or period or territory), the ‘Lesser Penalty Plus’⁹ framework has been introduced through recent amendment in the Act. In this way, cartels, that would have remained undiscovered otherwise, could be disclosed.

8. Success of the regime

26. The LP regime is a robust and efficient system for unearthing cartels. It has incentivised companies to come forward and provide information about the cartel conduct, which has helped the CCI detect such conduct more effectively.

27. The first lesser penalty application was received by the Commission in 2014 and the first final order in an LP matter was passed by the Commission in 2017. To strengthen and streamline the lesser penalty regime by attracting better-quality evidence through LP applications and ensuring that lesser resources are used in reviewing applications, the initial LP regime framework underwent certain changes in August 2017. As a result of the amendment carried out in 2017, the Commission noticed an increase in LP applications. Post Amendment, in the cartel cases decided by the Commission under Section 27, in around 60%¹⁰ of such cases, LP applications were received and the CCI relied upon the

⁸ Section 46(2) states that “*The Commission may allow a producer, seller, distributor, trader or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and within such time as may be specified by regulations.*”

⁹ Section 46(4) provides that “*Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form a prima facie opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, in respect of the cartel already being investigated, without prejudice to the producer, seller, distributor, trader or service provider obtaining lesser penalty under sub-section (1) regarding the newly disclosed cartel.*”

¹⁰ Based on cases decided by the Commission during 2017 to 2022.

disclosures made by cartel participants themselves. This shows the effectiveness of the leniency regime in unearthing cartels.

9. Conclusion and way forward

28. The journey of leniency regime so far has robustly supplemented the existing framework of cartel detection tools available with the Commission. The CCI has embraced a pragmatic approach that not only encourages erring entities to come forward under the leniency programme and cooperate with the regulator but also leads to effective and faster market correction. Accordingly, it has not only boosted efforts in the direction of uncovering the existence of cartel but also in the establishment of cartel offences in a number of cases. The experience shows the nuanced stance adopted by the CCI in implementing its leniency programme, keeping in mind the impact that cartels have on the economy of a nation. Leniency Plus being introduced through the Competition (Amendment) Act, 2023, is expected to provide further fillip to the existing leniency framework in unearthing more and more cartels in India.