Page 775 - 785 **DOI:** *https://doij.org/10.10000/IJLMH.113850*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: https://www.ijlmh.com/
Under the aegis of VidhiAagaz – Inking Your Brain (https://www.vidhiaagaz.com/)

This article is brought to you for "free" and "open access" by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact **Gyan@vidhiaagaz.com**.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to **submission@ijlmh.com.**

Cartel Leniency in India: An Analysis

SAKSHI GUPTA[1]

ABSTRACT

Lord Denning observed, "People who combine together to keep up prices do no shout it from the house tops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do". Cartels are agreements between enterprises that work in secrecy and aim to exploit market power and disrupt free and fair competition in the market. Since cartels are so bad for an economy, it becomes imperative to have a system in place so as to keep them in check. This is where the Leniency Programme i.e. The Competition Commission of India (Lesser Penalty Regulations) 2009, steps in. The Leniency Program helps to detect these cartels as they provide incentives in the form of reduction in the grant of penalty to the cartel members, in case they come ahead and disclose the existence of the cartel. It can be said to be a type of whistle-blower protection, wherein the members are given benefit in the form of reduced penalty if they come ahead and give full, true, and vital disclosure/ information about the cartel.

This paper aims to study the Leniency Program in India in detail while further critically analyzing the loopholes present in the same. The Leniency Regulations were amended in 2017, the same amendments shall be discussed and their impact and success/failure shall also be analyzed in the paper. There is a presence of a lot of vague concepts in the regulations, like the usage of the term "added value" when it is not clear what added value includes. Another is the usage of the term "may be" instead of "shall be" for grant in reduction of the penalty, which makes the regulations less certain and goes against the very purpose for which the regulations were enacted. It gives undue discretionary powers to CCI to decide the quantum of penalty to the leniency applicants. The same shall be discussed and analyzed along with a way ahead to solve them in form of recommendations and suggestions.

Keywords: *Cartel, Leniency, Competition Commission of India, Penalty, Members.*

I. INTRODUCTION

The free market is not a god; we have to do everything we can to make the market competitive ~ Michael Gove[2]

[1] Author is an Assistant Professor, Maharashtra National Law University, Aurangabad, India.
[2] Michael Gove, https://www.michaelgove.com/, last visited 24.05.2022.

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

India's pursuit of globalization has resulted in liberalization of the Indian economy. This process caused the Indian economy to open up, thereby making it face competition both domestically as well as globally; which in turn necessitated a "level playing field and investor friendly environment". Hence, was enacted the Competition Act 2002, which focused on promoting competition in market while preventing any exploitation of market power.

Competition Law seeks to prevent businesses from engaging in any practice that is harmful to competition and consumer welfare. Competition Laws promote efficiency in the market, prevent market distortions and ensure fair competition in the market. It aims to ensure that there is no market domination by a handful via means of price fixing, cartelisation or abuse of dominant position etc.

Anti- Competitive Agreements are dealt under Section 3 of the Competition Act 2002. It prohibits "any enterprise or association of enterprises or person or association of persons to enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which 'causes or is likely to cause an appreciable adverse effect on competition' within India". Any such agreement entered would be otherwise void.

Cartels are defined under Section 2(c) of the act as *"including an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services"*.

Cartels are dealt under Section 3(1) read with Section 3(3). Cartels are horizontal agreements (arrangements between enterprises at the same stage of the production chain) which:

a) "directly or indirectly determine purchase or sales prices
b) limit or control production, supply, markets, technical development, investment or provision of services
c) allocate geographic markets or customers or
d) directly or indirectly result in bid rigging or collusive bidding"

Presumption of a Cartel: As per the Competition Act, 2002, cartels are included in the category of agreements, which are presumed to have AAEC. The reason behind this presumption is the inherent harmful nature of a cartel as the consumers and business houses lose the benefits of the competition. Moreover, since there is no formal agreement and the best evidence is usually in possession of the charged parties, which are not likely to easily part with it and make available

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

to the investigator of the enquiring authority. Many a times price-parallelism is often used as an effective defense, posing a challenge for competition authorities. U.S.A and European courts have adopted a 'parallelism plus'[3] approach which requires showing the 'plus factors' beyond merely the firm's parallel behavior in order to prove that an antitrust violation has occurred. This approach to establishing collusive price-fixing without direct evidence of an agreement was also used in India in Cement Cartel Case[4] wherein the commission held that the parallelism in prices, production and dispatch was a result of cartel agreement.

Evidences in Cartel cases:

1. Direct evidence: Document or documents (including email messages), oral or written statements by co-operative cartel participants.
2. Circumstantial evidence: Communication evidence, Economic evidence (Conduct, Evidence related to market structure, Facilitating practices)

As discussed already that the firms often tend to justify the parallel behavior in prices, production, dispatch or supplies conduct in prices by explaining the fundamentals of market forces such as demand, increasing cost of production and other economic factors. Thus it remains a fact that the parties to an anti-competitive agreement will not come out in the open. This is one of the reasons why the definition of 'agreement' under Section 2 (b) has been made inclusive and wide enough. Therefore, the Commission is not impeded from using circumstantial evidences. Further OECD in its paper held that, "*Circumstantial evidence is of no less value than direct evidence for it is the general rule that law makes no distinction between direct and circumstantial evidence in order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreement*."[5]

II. CARTEL LENIENCY REGIME IN INDIA

Cartels have a harmful effect on the competition in the market. They are presumed to have appreciable adverse effect on competition in market. It is difficult to detect cartels without any proper sanctions in place, as they work in secrecy and are concerted efforts. Hence some incentive needs to be given to the parties so that they can act as a whistleblower and disclose the existence of the cartel. Hence, came into force the Competition Commission of India (Lesser Penalty) Regulations, 2009.

[3] William E. Kovacic, Robert C. Marshall, Leslie M. Marx and Halbert L. White, *" Plus Factors and Agreement in Antitrust Law"*, Michigan Law Review Vol. 110, No. 3 (December 2011), pp. 393-43.
[4] *Builders Association of India v. Cement Manufacturers'*, CCI Case No. 29/2010,
[5]OECD, Prosecuting Cartels without Direct Evidence of Agreement https://www.oecd.org/competition/cartels/38704302.pdf (last visited on 31st May 2022)

Section 46 of the Competition Act read with the Competition Commission of India (Lesser Penalty) Regulations 2009, governs the law relating to leniency with regard to cartels in India. It provides an incentive to the cartel members who are ready to share "full, true and vital information" with the Commission. It can basically be said to be a type of whistle blower protection to the person who comes forward and discloses information about the existence of a cartel, who would have otherwise faced stringent action by the Commission if the Commission would have discovered the cartel on its own. There exists only administrative liability on the cartel members and no criminal liability for the same.

III. ESSENTIAL INGREDIENTS TO CLAIM RELAXATION UNDER THE LENIENCY REGIME

Section 46 lays down the following conditions that need to be fulfilled by the applicant to claim the benefits of Lesser Penalty Regulations:

1. "The applicant (producer, seller, distributor, trader or service provider) should cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission.
2. The applicant should provide all the full, true and vital disclosures in respect of violation of section 3(3).
3. The applicant should provide all the relevant information, documents and evidence as may be required by the competition commission from time to time for further investigation.
4. The applicant should also cooperate genuinely, continuously and expeditiously throughout the investigation and also in the proceedings before the Competition Commission.
5. The applicant should not conceal, destroy, manipulate or destroy or remove any relevant documents in any matter which could contribute to the establishment of a cartel or which would hinder any investigation process carried out by the Competition Commission.
6. The disclosure shall be before the report of investigation of the Director General (DG) under Section 26 of the Act, or even where the matter is under investigation, without the disclosures made by the applicant, the Commission or the DG would not have been able to establish contravention due to insufficient evidence".

The Competition Commission may subject the applicant to further restrictions and conditions

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

in the matters of reduction of monetary penalty after due regard to-[6]

1. "The stage at which the applicant comes with the application of disclosure
2. The evidence already in possession of the government
3. The quality and the vitality of the information provided by the applicant.
4. The facts and circumstances of the case".

IV. QUANTUM OF THE PENALTIES

The Lesser Penalty Regulations after 2017 amendment confer the benefit of leniency of disclosure not just to the first, second or third markers but also to any subsequent applicants who fulfill the disclosure requirements under Section 46 of the Act. The quantum of penalty after the amendment [7] is as follows[8]:

1. "The first applicant may be granted upto 100% reduction in penalty;
2. The second applicant may be granted reduction upto 50 %; and
3. The third or any subsequent applicant may be granted relaxation upto 30%".

This addition of subsequent applicants for relaxation in penalty, introduced after the amendment, has helped in instilling confidence amongst the cartel members to come up and disclose about the existence of cartel. Earlier due to lack of certainty of making it to the first three applicants, the enterprises and individuals used to shy away from making any self incriminating disclosures.

The inclusion of 'subsequent applicants' for providing reduction in grant of penalty has helped to provide relaxation in quantum of penalty and to boost confidence amongst enterprises and individuals to come forth and disclose about the existence of cartels. Earlier, the enterprises were uncertain if they would make to the list of top 3 applicants and hence used to be reluctant to share any information, but the after the amendment this particular apprehension has been taken care of by covering even subsequent applicants under benefit of Section 46 of the act.

The Lesser Penalty Regulations 2009 were amended on 22 August 2017. The amendment brings the much-needed clarity and incentives to the enterprises and individuals for their pro-active assistance in cartel detection, thereby facilitating the existing leniency regime in India. Following are some of the note-worthy amendments brought about:

[6] Regulation 3, Competition Commission of India (Lesser Penalty) Regulations, 2009
7 Lesser Penalty Amendment Regulations 2017
[8] Regulation 4, Competition Commission of India (Lesser Penalty) Regulations, 2009

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

- The limitation of the number of markers has been removed. The amended regulations recognize the markers even beyond the first 3 spots, that is to say, that the applicants even after the first 3 positions can avail the benefit of leniency regulations if they provide any information that helps in adding 'significant added value' to the evidence already in the possession of the CCI. This amendment will encourage more cartel participants to come forth and make disclosures.
- The amendment allows the access to file not just to leniency applicants but also third parties who have been impleaded in leniency proceedings.
- Another important change is with regard to the confidentiality provision, the addition of the new proviso to Regulation 6 of the regulations "allowing the DG to disclose information, documents and evidence submitted by a leniency applicant, to a party to the proceedings, if the DG deems that such disclosure is necessary for the purpose of investigation (even if the leniency applicant has not agreed to such disclosure). In such cases, the DG makes the disclosure for reasons to be recorded in writing and after taking prior approval of the CCI".
- The amended regulations clearly provide that the benefit/ immunity shall be granted to both enterprises as well as so as to encourage them to make full disclosures without any fear.
- The earlier proviso to Regulation 4 of Lesser Penalty Regulations has been deleted and it provided that an application for the reduction in penalty upto 100% shall be available to only one applicant, which now means that the benefit of first marker (100% waiver) may be granted to more than one applicant.

V. ANALYSIS THROUGH CASE LAWS

1. In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items[9]

This was the first leniency decision by the CCI. In this case, CCI took suo motu cognizance of "bid rigging/ collusive bidding of tenders floated by Indian Railways for brushless DC fans". One of the colluding firms, M/s. Pyramid Electronics, disclosed the modus operandi of the cartel to CCI and confirmed the existence of a cartel. "The cartel was also proved with the help of scrutiny of communication and exchange of communication between the key personnel of the firms during and after the period of bidding of tenders and exchange of quotations between the

[9] Suo Motu Case No. 03 of 2014

firms for the purpose of upcoming tenders". While the DG investigation was going on, one of the parties applied for leniency. The CCI in its final order stated that whatever information/ disclosures were made by the parties, it added value to their already known knowledge about the existence of the cartel, however since CCI was already in possession of the information due to which it could form a prima facie opinion about the existence of cartel and start the investigation. Hence, due to this reason, full complete 100% immunity was not granted to the party and only 75% reduction was allotted to M/s. Pyramid Electronics.

2. **Pune Municipal Corporation Case:**[10]

The case was initiated on the basis of complaint filed by Nagrik Chetna Manch under section 19(1)(a) of the Competition Act. It was alleged that there was bid rigging in tenders ("for municipal organic and inorganic solid waste processing plants") issued by Pune Municipal Corporation (PMC) by 6 parties. While the DG investigation was going on, one of the parties applied for leniency and this was further joined in by 5 other parties at later stages. Neither of the 6 parties were given full immunity. Four applicants were given reduction in their penalty on the basis of the dates of their applications and the values they added to the investigation. However, the remaining two did not get any benefit of disclosure, as they did not add any significant value to the information already known.

CCI on the basis of its information received, initiated 2 further investigations into allegations of bid rigging in other tenders. CCI passed final order in two cases involving "bid rigging/ collusion in three tenders floated by Pune Municipal Corporation for Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant". CCI took up these cases suo motu under Section 19 of the Act based on the disclosure by firms (who approached the CCI as lesser penalty applicants) under Section 46 of the Competition Act, 2002 read with the Competition Commission of India (Lesser Penalty) Regulations, 2009.

"In case involving tender floated in Financial Year 2013-14 penalty was imposed on four firms in terms of Section 27(b) of the Act at the rate of 10 percent of their average turnover for the years 2011-12, 2012-13 and 2013-14 *i.e.* three years preceding the year in which collusion took place. The penalty was also imposed on individual officials of three firms at the rate of 10 percent of their average income for the same three years. Keeping in view the modus operandi of the cartel, the stage at which the lesser penalty application was filed, the evidences gathered by the DG independent of lesser penalty application and co-operation extended in

[10] Suo Motu Case No. 50 of 2015 and No. 03 and 04 of 2016.

conjunction with the value addition provided in establishing the existence of cartel, CCI granted 50 percent reduction in penalty to Saara and its individuals than otherwise leviable. Pursuant to reduction, penalty imposed on Saara was INR 23.22 Lakh and INR 74,513 on its individual".

3. In Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters[11]

In this case, there was a cartel in form of Bid- rigging arrangement between Globecast and ESCL (Essel Shyam Communication Limited, now Planetcast Media Services Limited) in broadcasting service industry. Globecast was granted the first applicant status in this case and ESCL, the second priority status as it had filed the application after Globecast had disclosed information to CCI and thus CCI had already formed prime facie opinion about the same. It was further held in the given case that "collusion for even a single event is sufficient to establish contravention of provisions of Section 3 and which party has derived a higher benefit becomes immaterial".

In this case, based on the vital disclosures made by Globecast and its employees about the correspondences, role of ex employees and other exchange of sensitive information, CCI granted 100% reduction in penalty to Globecast and its employees because due to such disclosures only, CCI could detect the existence of the cartel. ESCL was also granted 30% reduction in penalty because of the information it shared such as NDAs between the parties and other correspondence.

4. In *Re*: Anticompetitive conduct in the Dry-Cell Batteries Market in India[12]

In this case, CCI passed the decision to impose penalty on Panasonic Energy India Co. Limited and Godrej and Boyce Manufacturing Co. Limited as they were colluding to fix prices of zinc-carbon dry cell batteries in India. CCI granted 100% reduction in penalty to Panasonic as they were the first party to apply for leniency and disclosed vital information about the existence of cartel.

"From the evidence collected in the case, which included an anti-competitive clause in the written agreement entered into between Panasonic and Godrej for supply of batteries, and e-mail communications between the key managerial personnel of the two of them, CCI found existence of a bi-lateral ancillary cartel between Panasonic and Godrej in the market of institutional sales of dry cell batteries. It was found that Panasonic, which had a primary cartel

[11] Suo Motu Case No. 02 of 2013
[12] Suo Motu Case No. 03 of 2017

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

with Eveready Industries India Ltd. and Indo National Limited as established in *Suo Motu* Case No. 01 of 2016 by CCI, having fore-knowledge about the time of price increase to be affected by this primary cartel, used such fore-knowledge as leverage to negotiate and increase the basic price of the batteries sold by it to Godrej. Further, Panasonic and Godrej, in accordance with the prices of the primary cartel, used to agree on the market price of the batteries being sold by them, so as to maintain price parity in the market".

Hence based on the above information, CCI established that both Panasonic and Godrej indulged in the "anti-competitive conduct of price co-ordination", in contravention of the provisions of Section 3 (3) (a) read with Section 3 (1) of the Act.

"Considering all the relevant factors, penalty on Panasonic was levied at the rate of 1.5 times of its profit for each year from January 2012 to November 2014 amounting to INR 31.76 crores, and on Godrej at the rate of 4 percent of its turnover for each year from January 2012 to November 2014 amounting to INR 85 lacs. Also, considering the totality of facts and circumstances of the case, penalty leviable on the individual officials of Panasonic and Godrej was computed at the rate of 10 percent of the average of their income for the preceding three years. As to Panasonic, to the officials of Panasonic also, 100 percent reduction in penalty was granted under the provisions of Section 46 of the Act read with the Lesser Penalty Regulations".

5. In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)[13]

This is the most recent Leniency decision by CCI. NSK Limited, Japan and JTEKT Corporation are amongst the top 5 global players in the Electric Power Steering systems market in terms of revenue. Both the above companies have their subsidiary in India i.e. Rane NSK Steering Systems Ltd and JTEKT Sona Automotive India Limited. CCI had found out the cartelization in the Electric Power Steering (EPS) market vide their order dated 9th August 2019.

The present case was commenced on the basis of a lesser penalty application by NSK which revealed the existence of the cartel. Later on, during the investigation by the Director General, JTEKT also approached the Commission by filing a leniency application.

It was found by CCI that the parties (as mentioned in the above paragraph) were continuously engaged with each other in the form of meetings as well as telephonic conversations of their employees and executives. The purpose of such interactions/communications were aimed to (1) pricing for various types of vehicles, geographical regions, etc. (2) quantity allocation for various types of vehicles, geographical regions, etc. (3) only one of them (NSK/JTEKT) would

[13] Suo Moto Case No. 07(01) of 2014]

quote on receipt of requirement from the end user which would avoid any sort of competition between them.

The Commission imposed a penalty @ of 4% of the relevant turnover of Rane NSK Steering Systems Ltd which amounted to INR 8.44 Crores. However, being the first leniency applicant, they were granted 100% reduction in penalty. In case of JTEKT Sona Automotive India Limited, the Commission imposed a penalty @1 times of the relevant profit of JSAI for each year of continuance of the agreement which amounted to INR 34.14 Crores. However, being the second leniency applicant and cooperating with the investigation, they were granted 50% reduction on penalty.

- It is pertinent to note that in recent developments, Supreme Court in the case of Excel Crop[14] has clarified the "meaning of the term 'turnover' used for imposing penalty as holding that penalty ought to be levied on the 'relevant turnover' of the entities i.e. turnover pertaining to products and services that have been affected by the contravention and not the total turnover".

VI. CONCLUSION

The Leniency Programme in India has not been quite successful as compared to countries like USA and Australia due to the vast discretionary power vested on the Competition Commission of India. The commission has a wide discretionary power on deciding the penalty quantum. The role that CCI plays in the leniency programme is very crucial starting right from when it receives the applications till the completion of the proceedings. Hence, the CCI should take the whole process seriously and take required appropriate actions. In order to work effectively it should check the information provided by the applicant to ensure its relevance in regards to the application. The Competition Commission of India should cooperate with the applicant at every stage and vice-versa. The Commission also has the duty to inquire and examine the market for new techniques and methods/ ideas which can be incorporated so as to make leniency provisions more robust and strong.

CCI amended the Lesser Penalty Regulations to promote the use of leniency provisions, which is a positive step to encourage cartel detection. By way of amended regulations, CCI has provided incentives to enterprises and individuals to come forth and disclose existence of cartels, by removing existing caps on the number of markers and providing access to file to third parties (non leniency applicants) so that they can defend themselves in leniency litigation.

[14] Excel crop Care v CCI, 2017(6) SCALE241

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]

Despite all this, there still exists loopholes and lacunas in the leniency provisions that make them less impactful. There are lot of ambiguities in the usage of words which give lot of discretion to the CCI in granting reduction in penalty. For example, Regulation 4 of the Amended Regulations states the words "may" and "added value" which leaves it to the discretion of the CCI to decide upon the quantum of penalty despite him being the first applicant in the matter, based on the factors like information shared and the stage at which shared. The Amended Lesser Penalty Regulations state that a leniency applicant *'may be'* granted a reduction in penalty instead of using the word '*shall'* which would have provided more certainty to the leniency programme.

There is another ambiguous term in Regulation 4 of the amended regulations which is "added value" as deciding what is added value is highly vague and based on the discretion of CCI. For instance, M/s. Pyramids Electronics in the Brushless DC fans case was not given 100% reduction in penalty despite being the first priority status applicant. Such ambiguity causes apprehension amongst the applicants and discourages them to act as whistle blowers for cartel detection which further hampers the main purpose behind the leniency programme.

"The Competition Law Review Committee" was formed in October 2018 to "review the Competition Act and issued its report containing multiple recommendations with respect to the substantive aspects of the Competition Act as well as notable recommendations regarding the leniency regime", to the Ministry of Corporate Affairs on 26 July 2019. Based on the above recommendations in the CLRC report, the MCA introduced a draft Competition (Amendment) Bill 2020 containing following proposals to reform the leniency regime in India:

- "Leniency applicants being able to withdraw their leniency applications. However, the DG and CCI will be able to use any evidence submitted in the application.
- The introduction of leniency plus- to grant additional leniency to an enterprise if it discloses a second cartel in the first cartel proceedings in which it is already a leniency applicant
- The introduction of a 'buyer' as a leniency applicant".

Though the pro active role played by Competition Commission of India to ensure a free and fair competitive market in India is highly appreciable but there is still a long way to go to give the intended effect to the leniency programme in India.

*****

© 2022. International Journal of Law Management & Humanities [ISSN 2581-5369]