



Leniency – Assessing Cooperation in Leniency Applications

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Introduction - Leniency /Lesser Penalty Programme in India



Penalty Provision in Competition Act, 2002

[Section 27(b)]



In case of contravention of Section 3 (cartel) or Section 4 (abuse of dominance), as the case may be, the Commission may impose penalty of upto 10% 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

In case of cartel, the Commission may impose upon each producer/ seller/ distributor/ trader/ service provider included in that cartel, a penalty of up to 03 times of its profit for each year of the continuance of agreement or 10% of its turnover for each year of the continuance of agreement, whichever is higher.



Provision for Lesser Penalty in the Act



Section 46: Power to impose Lesser Penalty

- If any producer/ seller/ distributor/ trader/ service provider included in any cartel makes a vital, full and true disclosure in respect of the cartel
- Commission may impose upon such producer/ seller/ distributor/ trader/ service provider a lesser penalty
- However, lesser penalty shall not be imposed - where the report of investigation has been received before such disclosure.
- If such producer/ seller/ distributor/ trader/ service provider included in the cartel in the course of proceedings,—
 - (a) Does not comply with condition on which lesser penalty was imposed; or
 - (b) Gives false evidence; or
 - (c) Makes a disclosure which is not vital,

then such producer/ seller/ distributor/ trader/ service provider shall be liable to the imposition of full penalty



Applicant for Lesser Penalty

[As per Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPRs)]



- An enterprise who is or was a member of a cartel
- An individual who has been involved in the cartel on behalf of an enterprise
- “Priority Status” granted to applicant for giving benefit of lesser penalty in the queue of the applicants



Quantum of Lesser Penalty [As per LPRs]



FIRST APPLICANT:

- **upto or equal to one hundred percent**, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel,
 - (i) enabling the Commission to form a prima-facie opinion regarding the existence of a cartel and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:
 - (ii) which establishes the contravention of Section 3 of the Act in a matter under investigation and the Commission, or the DG did not, at the time of application, have sufficient evidence to establish such a contravention:



Quantum of Lesser Penalty (contd..)

SUBSEQUENT APPLICANTS:

- The applicants who are subsequent to the first applicant may also be granted benefit if they disclose and submit evidence which provides significant added value to the evidence already in possession of the Commission or the DG
 - (i) the applicant marked as **second** in the priority status may be granted reduction of monetary penalty **upto or equal to fifty percent of the full penalty leviable**; and
 - (ii) the applicant marked as third or subsequent in the priority status may be granted reduction of penalty **upto or equal to thirty percent of the full penalty leviable**.



Assessing Quality of Evidence



Quality of Evidence – an important factor for determining reduction in penalty



Regulation 3(4) of the LPRs lays down the factors that are taken into consideration while determining reduction in penalty to Lesser Penalty Applicant (LP Applicant). This regulation provides as follows:

The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to –

- (a) the stage at which the applicant comes forward with the disclosure;
- (b) the evidence already in possession of the Commission;
- (c) **the quality of the information provided by the applicant**; and
- (d) the entire facts and circumstances of the case.



Assessing Quality of Evidence for 1st Applicant



- Is the evidence sufficient for successful initiation of cartel investigation and whether information enables effective targeting of investigation.
- Whether original direct evidence is furnished, such as emails amongst cartel participants, records of meetings, handwritten notes, *etc.* or only hearsay or indirect evidence such as testimony of witness or intra company e-mails , *etc.* Direct evidence is considered stronger than hearsay/ indirect evidence
- Whether there is a single piece of isolated evidence or there are multiple pieces of evidence belonging to different categories and consistent in terms of content. The latter has more probative value.



Assessing Quality of Evidence for Subsequent Applicant(s)



- The overall value added to the case by the evidence submitted by the subsequent applicant(s)
 - Whether the additional evidence corroborates or supplements the evidence submitted by first applicant
 - Whether the evidence provides additional facts either in terms of duration, product or geographic scope or composition of the cartel, *etc.*



Measuring Value of Cooperation



Cooperation embedded in Section 46 of the Act



Third Proviso to Section 46 of the Act states that:

- ▶ Lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Further, the fourth Proviso to Section 46 of the Act states that:

- ▶ If such producer/ seller/ distributor/ trader/ service provider included in the cartel (who has approached Commission as LP applicant) in the course of proceedings,—
 - (a) **Does not comply with condition on which lesser penalty was imposed; or**
 - (b) Gives false evidence; or
 - (c) Makes a disclosure which is not vital,

then such producer/ seller/ distributor/ trader/ service provider shall be liable to the imposition of full penalty



Conditions for Lesser Penalty

Regulation 3(1) of LPRs



An applicant, seeking the benefit of lesser penalty shall –

- (a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
- (b) provide vital disclosure in respect of cartel (full and true disclosure of information or evidence to the Commission, which is sufficient to enable the Commission to form a *prima facie* opinion about the existence of a cartel or which helps to establish the cartel);
- (c) provide all relevant information, documents and evidence required by the Commission;
- (d) **co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission**; and
- (e) not conceal, destroy, manipulate or remove the relevant documents in any manner, that may contribute to the establishment of a cartel



Value of Cooperation



- No quantitative formula for measuring value of cooperation
- Factors generally taken into consideration are:
 - Stage of investigation at which application was filed
 - Acceptance of responsibility for the misconduct
 - Timely, complete and true disclosure of all relevant facts and evidence establishing contravention
 - Facilitating appearance of current/ former directors, officers and employees, as well as any agents, for deposition
 - Assistance in conduct and completion of investigation
 - Cooperation in conduct of proceedings before the Commission



Case Studies



Bid rigging in Railway tenders for Brushless DC Fans

(*Suo Motu* Case no. 03 of 2014)



- Case was taken up by the Commission *suo motu* based on the information received from CBI
- CBI, during an investigation had found an e-mail which suggested that three firms had cartelised in respect of the three tenders floated by the Indian Railways for the supply of Brushless DC fans
- Three types of evidence (i) e-mail correspondence, (ii) call data records and (iii) statements of parties.
 - Email with proposed rates exchanged amongst three bidding firms. Parties quoted identical/similar rates to those in the e-mail in two out of three tenders.
 - Numerous calls exchanged amongst three firms, which began much before the first tender and continued during the period of the tenders.
 - Lastly, one of firms admitted under LPR provisions to being part of the cartel and brought out the purpose and modus operandi of the cartel which was corroborated by other evidence showing an arrangement to rotate the bids and to share the market by mutual allocation of the tenders amongst themselves.



Bid rigging in Railway tenders for Brushless DC Fans (contd..)

(*Suo Motu* Case no. 03 of 2014)



- Application received during investigation -DG report not received
- At the time Applicant filed application, e-mail evidence furnished by CBI was already in possession of the Commission. Applicant explained functioning, design and *modus operandi* of the cartel. Other parties had denied the existence of cartel but evidence submitted by Applicant provided missing links, supported the evidence provided by CBI and completed the chain of events. Information and evidence furnished by Applicant helped establish existence of cartel.
- Applicant had ceased participation in the cartel. Partner and ex-partner of the Applicant co-operated with the DG during investigation and made ex-partner available for cross-examination.
- Reduction in Penalty: Though Applicant was first and only one to make disclosure, however, keeping in view stage of disclosure and evidence already in possession of the Commission – Applicant was granted 75% reduction in penalty



Cartelisation in zinc carbon dry cell batteries market in India (*Suo Motu* Case no. 02 of 2016)



- Case was taken up by the Commission *suo motu* based on lesser penalty application of filed by Panasonic Energy India Co. Ltd. (PECIN), a subsidiary of Panasonic Corporation Japan
- Application revealed cartel in zinc-carbon dry cell batteries market amongst 3 parties - Eveready Industries India Ltd., Indo National Ltd. and PECIN - to control the distribution and price of zinc-carbon dry cell batteries in India.
- Commission directed DG to conduct an investigation and submit investigation report – DG carried out search and seizure operations (dawn raid) at the premises of 3 parties
- After search and seizure operations, Eveready Industries India Ltd. and Indo National Ltd. also filed lesser penalty applications.



Cartelisation in zinc carbon dry cell batteries market in India

(*Suo Motu* Case no. 02 of 2016)



Examination of evidence showed :

- Arrangement for price-coordination from 2008 till search and seizure operations of DG *i.e.* 23 August 2016.
- Regular contacts amongst top management - personal visits, meetings of association, exchange of fax messages, emails, *etc.*,
- Mutual agreement on the price increases (MRP).
- Implementation modalities of price increase decided by the parties including schedule of start of production, commencement of billing with new MRP and availability of products (with revised rates) in the market.
- To give effect to the decided price increase, the market leader *i.e.* Eveready used to make announcement of price increase through press releases. Price increase by Eveready was followed by Indo-national and PECIN.
- MRP increased in this manner at least on six occasions by Rs 0.50 (fifty paise) each, resulting in about sixty percent increase in price of the concerned product since January, 2010



Cartelisation in zinc carbon dry cell batteries market in India (*Suo Motu* Case no. 02 of 2016)



Lesser Penalty to First Applicant

- Information and evidence found crucial to assess domestic market structure of zinc-carbon dry cell batteries, nature and extent of information exchanges amongst parties with regard to the cartel and identifying names, locations and email accounts of key persons of the parties actively involved in cartel activities.
- Information and cooperation received enabled the DG to conduct search and seizure operations at the premises of the parties and seize quality evidence.
- Full and true disclosure of information and evidence and continuous cooperation provided, not only enabled the Commission to order investigation but also helped in establishing contravention.
- Reduction of 100 (hundred) percent of the penalty leviable under the Act granted to the First Applicant and its individuals.



Cartelisation in zinc carbon dry cell batteries market in India (*Suo Motu* Case no. 02 of 2016)



Lesser Penalty to Subsequent Applicants

- Incriminating documents seized from the premises of the parties during search and seizure operations found independently sufficient to establish the contravention
- Information/ evidence on cartel including the period of cartel, submitted by subsequent applicants did not result in ‘significant value addition’.
- Eveready approached Commission three days after search and seizure operations and Indo-national approached after three weeks.
- However, both applicants provided genuine, full, continuous and expeditious cooperation during the course of investigation. They corroborated information already in possession of the DG/ Commission and helped connect/ explain evidence gathered during search and seizure operations.
- Reduction of 30 (Thirty) percent and 20 (Twenty) percent of the penalty leviable under the Act granted to Eveready and Indo-national respectively. Their individuals also granted similar reduction in penalty.



In Re: Nagrik Chetna Manch And Fortified Security Solutions & Ors. (Case no. 50 of 2015)

- Case was initiated by the Commission on the basis of an information filed by Nagrik Chetna Manch through its President Retd. Major General S.C.N Jatar
- Alleged bid rigging/ collusion in tender nos. 34, 35, 44, 62 and 63 of 2014 floated by Pune Municipal Corporation during the period December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)”
- Investigation revealed that six firms were involved in bid-rigging namely Fortified Security Solutions (Fortified), Ecoman Enviro Solutions Pvt. Ltd. (Ecoman), Lahs Green India Pvt. Ltd. (Lahs Green), Sanjay Agencies, Mahalaxmi Steels (Mahalakshmi) and Raghunath Industry Pvt. Ltd. (Raghunath)
- DG gathered several evidences during investigation, which showed collusion amongst bidding firms, such as common address, use of same bank account for preparing demand drafts, use of common IP addresses for uploading tender bids, *etc.*



In Re: Nagrik Chetna Manch And Fortified Security Solutions & Ors. (Case no. 50 of 2015)



- In Tender Nos. 34, 35 and 44 of 2014, the DG found collusion by Fortified, Ecoman and Lahs Green
- In Tender Nos. 62 and 63 of 2014, the DG found collusion by Ecoman, Sanjay Agency and Mahalakshmi
- Raghunath aided the cartel by certifying Fortified and Mahalakshmi as its authorized distributors to enable them to participate in the tenders. However, it did not participate in the tender itself. Director of Raghunath also prepared 2 DDs for Mahalakshmi from his bank account. Thus, Raghunath was found to have aided and abetted the cartel.
- CCI imposed penalty on Fortified, Ecoman, Lahs Green, Sanjay Agencies, Mahalakshmi and Raghunath, respectively, in terms of Section 27 (b) of the Act.



In Re: Nagrik Chetna Manch And Fortified Security Solutions & Ors. (Case no. 50 of 2015)

- During investigation, all six firms approached CCI as lesser penalty applicants.
- With respect to Tender nos. 33, 34 and 44 of 2014, five Lesser Penalty Applications were received from Mahalakshmi, Sanjay Agency, Ecoman, Raghunath and Fortified, respectively.
- With respect to Tender nos. 62 and 63 of 2014, four Lesser Penalty Applications were received from Lahs Green, Ecoman, Raghunath and Fortified respectively
- Considering that DG had already gathered several evidences at the time the Applicants approached the Commission, the reduction in penalty was granted as follows:
 - First Applicants i.e. Mahalaksmi and Lahs Green were granted 50% reduction in penalty
 - Subsequent Applicants i.e. Sanjay Agency and Ecoman were granted 40% and 25% reduction in penalty respectively.