

SUBMISSION OF COMMENTS ON

DRAFT OF PROPOSED AMENDMENTS TO “THE COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009”

1. NEED FOR PROPER MARKER SYSTEM¹

With more than one member constituting a cartel, there might occur a situation where there are applications coming from cartel members at the same time that have formed a single cartel. This creates a lot of confusion as to the order of the queue. This order is of utmost importance as it plays a crucial role in determining the reduction of fine amount and penalty. There is a lack of transparency and questions might be raised on the basis of which a cartel member was kept above the other. Other hypothetical question worth considering by the Competition Commission of India (CCI) can be: Who will be the ‘first’ when two cartel participants approach the CCI together through a single application in which they admit their participation in the same?

Thus, marker system was introduced which is designed to reserve and protect the cartel member’s place in a leniency queue for a definite period of time. This was implemented to take care of such issues. This was also announced to increase the effectiveness and provide flexibility to the procedure and encouraging quick reporting of cartel activities. The marker system introduces an additional incentive for cartel members to cheat the cartel and blow the whistle.

India lacks a well-defined marker system which is one of the reasons why the Indian leniency program has not been used that often. Although the competition act does specify that an applicant shall be ‘marked’ after making an application before the Commission either through a written mode (which includes e-mails, fax etc.) or orally. However, due to the absence of a concrete marker system, where a leniency applicant shall be granted a marker only subjected to providing vital information so as to make a landmark change or initiation in the proceedings against the cartel, such remains vague. Lessons can be learnt from European Union that introduced its marker system in 2006.

A discretionary marker system can be introduced wherein an application can be accepted on the basis of only limited information. The applicant can then be granted time to provide further information and evidence to qualify for immunity. Under the proposed draft, there is no provision for additional time to furnish the required information.

2. NEED FOR DETAILED AND TRANSPARENT GUIDELINES ON PROCEDURAL ASPECTS

Incentives are of utmost importance in the success of the Lesser Penalty Regulations. Cartelists will weigh advantages and disadvantages when considering to disclose (their participation in) a cartel.

¹ Udai S Mehta and Suchismita Pati, *Designing Effective Leniency Programme for India: Need of the Hour*, CUTS Discussion Paper, 16 (2016), available at http://www.cuts-ccier.org/pdf/Designing_Effective_Leniency_Programme_for_India-Need_of_the_Hour.pdf

Therefore, an effective procedure of lesser penalty should therefore have a high degree of predictability, transparency and certainty, with a low burden of proof, heavy penalties and an emphasis on priority.² The ambiguity and unpredictability of the present conditions for lesser penalty and the discretionary procedure risk creating reluctance amongst firms in disclosing a cartel.

Section 3 (b) of the Draft requires applicants seeking the benefit of lesser penalty section 46 of the Act to “provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Act”. Vital disclosure is defined by the Draft as the “full and true disclosure of information or evidence by the applicant 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 contravention of the provisions of section 3 of the Act”. Rather, this broadly formulated condition could jeopardize the predictability and certainty of the outcome of the procedure, deferring cartel participants to disclose the cartel.

As reducing uncertainty will guarantee incentives, more detailed guidelines would be beneficial. For example, apart from the specifications mentioned in the Schedule, more clarity on procedural aspects needs to be provided (such as what types of information will the Commission view as most reliable and what the ideal nature of evidence should be). Giving these details would ensure that the applicant provides full disclosure without the fear of rejection of his application. Also, mentioning in the guidelines the threshold of burden of proof would be beneficial (e.g. keeping a low threshold would possibly result in more applications). Another option to increase incentives would be to guarantee a 100 percent penalty reduction for disclosure of the cartel by the first applicant (provided all conditions are met). For example, the EU grants immunity from any fine which would otherwise have been imposed provided certain conditions are met.³

Regulation 4 (a) of the Draft decreases incentives by not guaranteeing the first applicant full immunity but by stating that the first applicant *may* be granted benefit of reduction in penalty up to or equal to one hundred percent. The Commission seems to maintain great discretionary powers in this regard. If the first applicant fulfils the criteria laid down in the Act and the guidelines, then that applicant needs to be given full immunity. Full immunity from penalty for the first applicant would significantly improve the consciousness of applicants to consider such applications. Further incentives such as **immunising the approved applicant from appeals** for damages claim can also be provided.

3. THE NEED FOR A PROVISION ON SETTLEMENT

The objective of the lesser penalty regulations is to fast-track the process of cartel detection. Although the CCI lesser penalty regulations adequately provides incentives for cartel members to reveal themselves and confess, but the regulations do not allow for a subsequent Settlement

² OECD, Report on Leniency Programmes, available at http://www.oecd.org/LongAbstract/0,3425,en_2649_40381615_2474436_119666_1_1_1,00.html

³ Commission Notice on Immunity from fines and reduction of fines in cartel cases, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208(04)&from=EN)

Decision where entities charged with cartelisation can accept the allegations made against them in lieu of a reduced fine. This has been a practice in several jurisdictions such as the European Union.⁴

Under this procedure, the parties involved in the cartel after considering the allegations made to the Commission can choose to acknowledge their involvement and accept their liability. In return for this acceptance, the fine imposed would be a reduced amount (percentage can be decided by the Commission). This provision would go well with the objectives of the lesser penalty regulations as it also entails a shorter period of assessment, lesser burden on the parties and most importantly, it saves the Commission's resources to a great extent.⁵ Hence, it is recommended that a provision for settlement of cartels must be included in the regulations.

4. NEED FOR AMNESTY AND PENALTY PLUS PROVISIONS⁶

For a country like India to strengthen the Leniency program, it is quite essential to incorporate the 'amnesty' and 'penalty' plus provisions into the programme. Under amnesty plus scheme, an enterprise or individual willing to disclose any information to the commission about its involvement with another cartel activity also evades penalty. It not only provides information about the cartel that the applicant comes forward with but any other cartel that may be in place.

Also, the contribution that the Amnesty provision can make to the leniency policy may be ascertained by analysing the success that it had accorded to the leniency policy of the United States of America. By 2005, with the new Leniency Program in place, the application rate increased to approximately two every month. As amnesty plus provision is more of an incentive given to the enterprises, the 'penalty plus' provision is rather a provision of deterrence. In this provision, if an enterprise if found out does not reveal its involvement in another cartel that may be found out at a later stage, the watchdog has the option of cancelling or reducing the leniency accordingly and recommend heavier penalties. Such programs in the US and Canada deters the enterprises to reveal involvements in other cartels which in turn actually provides the watchdogs valuable information regarding other cartels. To bring in more clarity, the guidelines can also describe the treatment which would be given to a *ringleader* or a person coercing and enforcing the cartel conduct.

⁴ EU Settlement procedure for cartels, available at <http://ec.europa.eu/competition/cartels/legislation/settlements.html>

⁵ For a robust competition law, available at http://www.business-standard.com/article/opinion/for-a-robust-competition-law-116022100753_1.html

⁶ Supra 1