

PRACTICAL GUIDE TO THE LENIENCY REGIME IN INDIA

The Competition Act, 2002 (“**Act**”) is the principle antitrust legislation in India which aims to promote and sustain competition and freedom of trade in different markets in India, in addition to protecting consumersⁱ, through the establishment of a statutory regulator, i.e. the Competition Commission of India (“**CCI**”). To this end, the Act makes provisions for the prohibition of different kinds of anti-competitive behaviour, including the formation of anti-competitive agreements.

Section 3 of the Act prohibits anti-competitive agreements in India and categorizes such agreements broadly into two types – horizontal agreements (which are concluded between parties on the same level of the supply chain) and vertical agreements (which are concluded between parties on different levels of the supply chain). It is to be noted that pure commercial agreements, not falling under the ambit of horizontal or vertical agreements, are also amendable to be analyzed under Section 3(1) of the Act, which is the omnibus clause.

Section 3(3) deals with agreements which are concluded between parties who are on the same level

CARTEL ARRANGEMENTS ARE PRESUMED TO CAUSE AN APPRECIABLE ADVERSE EFFECT ON COMPETITION IN INDIA.

THIS PRESUMPTION CAN ONLY BE REBUTTED BY THE ALLEGED CARTEL PARTICIPANTS BY WAY OF DOCUMENTED EVIDENCE

of the supply chain and are direct competitors of each other in the same relevant market. Horizontal agreements which are covered under the ambit of Section 3(3) are traditionally caught within the definition of a ‘cartel’. 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. The formation of a cartel between competitors is presumed to cause an appreciable adverse effect on

competition (“AAEC”) (which may be rebutted by the parties in form of documented evidence) in the relevant market and is punishable in terms of Section 27 of the Act.

Section 27 envisages the imposition of a penalty on each member of a cartel for up to 3 times its profit for each year in which the cartel operates or 10% of the relevant turnover of each year in which the cartel operates, whichever is higherⁱⁱ. Further, in terms of Section 48 of the Act, monetary penalties may also be imposed on the individual officials of such enterprises involved in the cartel.

In addition to monetary penalties, the CCI is also empowered to issue cease and desist orders, suitable directions or modifications to the agreement between cartel members and/or other orders as it deems fit.

CARTEL REGIME IN INDIA IS SIZE AND INDUSTRY AGNOSTIC. ALL COMPANIES AND INDUSTRY ASSOCIATION, ESPECIALLY, THE COMPANIES INVOLVED IN GOVERNMENT PROCUREMENT MUST BE AWARE OF THE PRINCIPLES OF COMPETITION LAW

COMPETITION COMPLIANCE IS THE KEY GOING FORWARD. *IF YOU THINK COMPLIANCE IS EXPENSIVE, TRY NON COMPLIANCE*”- FORMER US DEPUTY ATTORNEY GENERAL, PAUL McNULTY

However, with a view to strengthening the cartel enforcement regime of the CCI, the Indian

LENIENCY REGIME HAS BEEN FOUND TO BE AN EXTREMELY SUCESSFUL TOOL FOR DETECTING CARTELS

LENIENCY APPLICATIONS MAY BE ON THE RISE AND CONTINUE TO BE THE MOST EFFECTIVE TOOL TO DETECT CARTELS IN THE FORSEEABLE FUTURE, ESPECIALLY IN A POST COVID WORLD

Parliament duly included a provision in Section 46 of the Act for grant of leniency (i.e. complete or partial reduction in penalty) to members of cartels who voluntarily inform the CCI about the existence of a cartel and of its activities. Much akin to whistleblower provisions in other economic statutes, Section 46 of the Act empowers the CCI to provide

confidentiality and relief in terms of monetary penalties to members of cartels or to individualsⁱⁱⁱ involved in a cartel, who volunteer to bring a cartel to the attention of the CCI through the provision of full, true and vital disclosures and continuous and sustained cooperation with the CCI^{iv}.

It may be noted herein that multiple jurisdictions have a firm leniency programme in place to facilitate effective enforcement with respect to cartels and to detect cartels which would have otherwise passed undetected by the relevant authorities. In some jurisdictions where cartel members face criminal conviction, the leniency programme permits such members to self-report their participation in a cartel in order to escape criminal penalties, while also strengthening antitrust enforcement at the same time. Though India does not prosecute cartel participants criminally, through the enactment of Section 46, the CCI seeks to provide a reduction in monetary penalties to cooperative applicants, while increasing its ability to locate and effectively stop cartels from disrupting different markets across India.

The leniency regime has, by and large, increased vigilance about cartelization in India and contributed to effective enforcement. Till date India has seen a total of 8 cases in which orders granting lesser penalty have been passed. Out of these 8 cases, 100% leniency has been granted in 5 cases (through 6 orders^v) and variable percentages of reduction in penalty has been granted in the remaining 3 cases. In one other recent case where a lesser penalty application was filed by a member of a cartel, the CCI made no separate assessment of the leniency application since it decided to impose no monetary penalty on any member of the cartel^{vi}.

It is pertinent to note that the draft Competition (Amendment) Bill, 2020 (“**Bill**”) has proposed an amendment to section 3(3) of the Act which would expand its scope to include enterprises which, though not engaged in identical or similar trade, act in furtherance of an anti-competitive agreement. This would necessarily cover entities facilitating the operation of a cartel too, thus including hub and spoke arrangements within its ambit. Thus, a company would have also to ensure that the actions of their channel partners are

HUB AND SPOKE CARTELS – THE NEW COMPLIANCE PARADIGM

also in compliance with the Competition Act, to reduce their exposure to cartel fines. If the aforesaid amendment is introduced, the probable consequences would be that participants in hub and spoke cartels would also be allowed to file leniency applications.

PROCEDURE FOR FILING LENIENCY APPLICATIONS

In furtherance of the objectives envisaged under Section 46 of the Act, the CCI has formulated The Competition Commission of India (Lesser Penalty) Regulations, 2009 (“**Leniency Regulations**”) which comprehensively lays down the conditions and procedure for application and grant of leniency to cartel participants in India.

Prior to the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 (“**2017 Amendment**”), an application for lesser penalty could only be submitted by the members of a cartel (i.e. enterprises). However, vide the 2017 Amendment, the CCI now permits both enterprises as well as individual officials of enterprises involved in the cartel to submit a leniency application. In India, the procedure for the disclosure of a cartel / information regarding a cartel to the CCI by a leniency applicant is laid down in Regulation 5 of the Leniency Regulations read with Section 46 of the Act. Every such disclosure must be made to the CCI prior to conclusion of investigation by the Director General into an alleged cartel.^{vii}

The procedure for filing of leniency applications in India is provided below:

(a) Filing of leniency applications in writing:

As per Regulation 5 of the Leniency Regulations, an application for lesser penalty may be filed by an applicant or their authorized representatives (such as advocates) containing all material information as provided in the Schedule to the Leniency Regulations. Such information shall include:

- The name and address of the leniency applicant
- A description of the cartel’s arrangement and details of its aims, objectives and activities

- Information about the goods and services involved
- the estimated volume of business affected in India by the alleged cartel
- The geographical market within which the cartel operates
- The commencement and duration of the cartel
- Information about the other members of the cartel
- Other competition authorities or courts approached in relation to the cartel
- Detailed evidence in support of the leniency application
- Other information as directed by the CCI

FOR GLOBAL CARTELS, IT IS ESSENTIAL TO SHOW THE VOLUME OF BUSINESS AFFECTED IN INDIA IN THE LENIENCY APPLICATION DUE TO THE EFFECTS DOCTRINE ENSHRINED UNDER SECTION 32 OF THE COMPETITION ACT

Enterprises filing leniency applications must also mention the names of the individuals involved in the cartel on behalf of whom it also intends to seek leniency.

(b) Filing of leniency applications orally / through fax or email

As per the procedure provided under the Leniency Regulations, a leniency application may inform the CCI orally or through fax or email about a cartel. However, if the leniency applicant provides information to the CCI either orally, or through fax or email, the CCI shall direct the applicant to submit a written leniency application containing all the material particulars mentioned in the Schedule to the Leniency Regulations within a period of 15 days. However, if an applicant fails to adhere to the 15 day time-limit or to a period of further extension as may be granted by the CCI, the leniency applicant shall lose its claim to its priority status and its opportunity to be granted leniency.

(c) Assignment of marker status

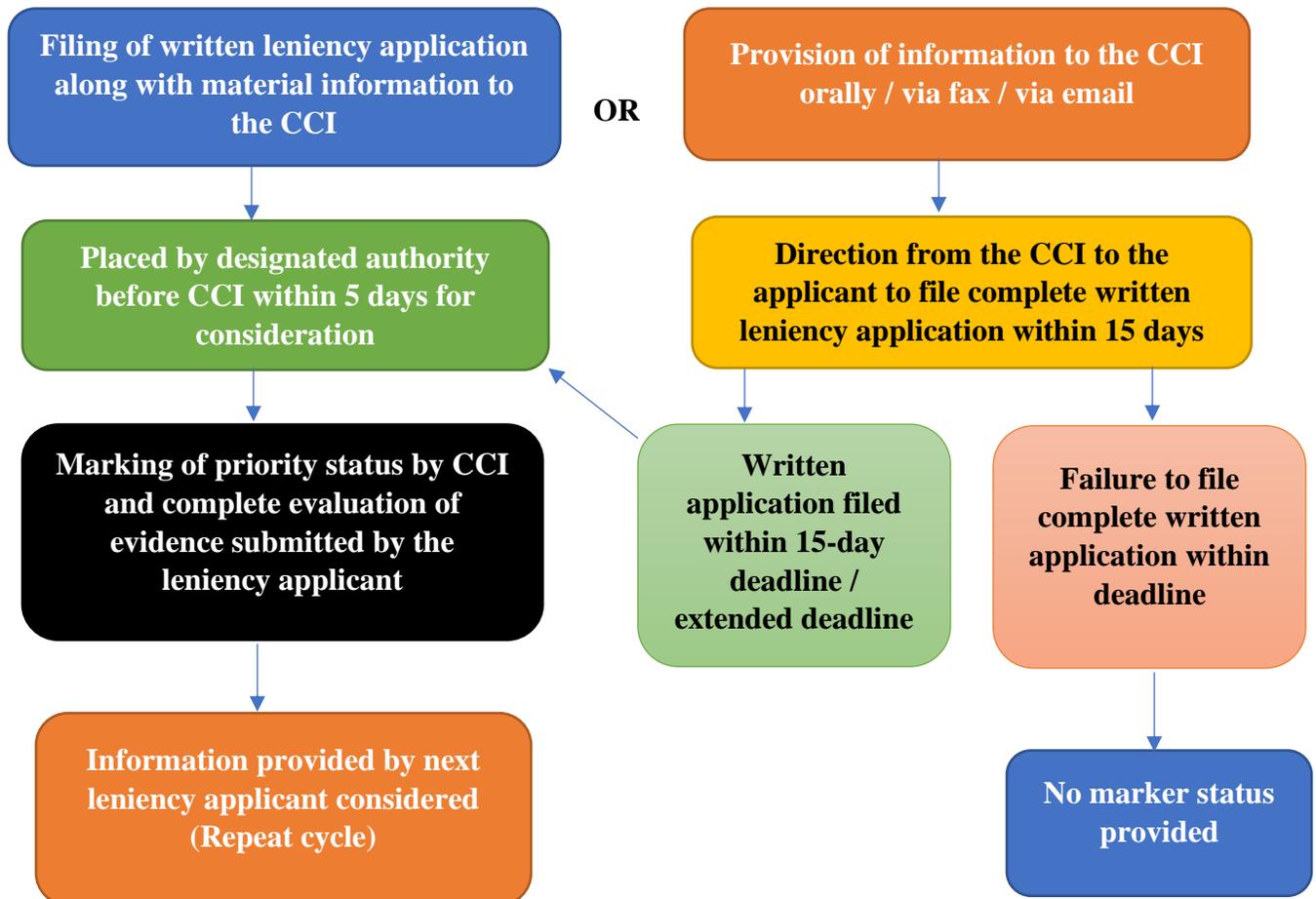
Upon the submission of the requisite application and all relevant documents, a designated CCI official shall place the matter before the CCI within a period of five working days, after which the CCI will duly consider the information and mark the priority status of the application. It is

important for an applicant to provide complete, true and vital disclosures to the CCI in order for a marker status to be accorded to it. It may be noted that the determination of the priority status / marker status of the application is one of the many factors that contribute to the determination of a reduction in penalty by the CCI (kindly refer to the next sub-section for more details). However, assignment of priority status does not, in every situation, guarantee the grant of lesser penalty, as the CCI has been quick to caution applicants in Regulation 5(5).

It may be noted herein that as per Regulation 5, the CCI has stated that it shall consider the information from the next leniency applicant and assign subsequent marker statuses only after the entire information provided by the earlier leniency applicant has been duly evaluated. The CCI has complete discretion to reject an application for leniency if true and full disclosure is not made by the applicant. In such an event, subsequent leniency applicants shall be elevated to higher priority statuses in order of their position as leniency applicants.

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For ease of understanding, the procedure to be followed by the CCI while granting leniency is illustrated as follows:



CONDITIONS FOR GRANT OF LESSER PENALTY

In order to obtain a holistic understanding of the leniency regime in India and to reap the benefits of this mechanism, it is important for every potential leniency applicant to understand which factors influence the CCI’s decision to grant a reduction in penalty. Regulations 3 and 4 of the Leniency Regulations deal with the factors that are considered by the CCI while passing an order

for imposition of lesser penalty. Regulation 4 also clearly lays down the conditions based on which the quantum of reduction in penalty is to be granted.

The conditions which are taken into account to determine whether a leniency ought to be granted by the CCI are as follows:-

- a. Whether the applicant has provided vital disclosures and all relevant information, documents and evidence as is required to find a contravention of the Act
- b. Whether the applicant has co-operated genuinely, fully, continuously and expeditiously throughout the course of the investigation and other proceedings
- c. Whether the applicant has ensured that it has not concealed / destroyed / manipulated / removed the relevant documents in any manner that may contribute to the establishment of a cartel
- d. Whether the applicant approached the CCI at an early stage
- e. Whether the CCI was in possession of sufficient evidence at the time of application to find a contravention of the Act
- f. Whether the quality of the information provided by the applicant was of sufficient utility to the CCI
- g. Whether, in the facts and circumstances of the case, leniency should be granted

A LENIENCY APPLICANT MUST ACT SWIFTLY AND PROMPTLY TO ENSURE THAT THEY GET THE MAXIMUM PROTECTION UNDER THE ACT

A JUDICIOUS CALL MUST BE TAKEN ON THE STRATEGY DEPENDING ON THE STAGE OF INVESTIGATION AND THE MARKER STATUS

Additionally, under Regulation 4, the CCI has dealt with the factors which are to be taken into account while computing the percentage of reduction in penalty. The Leniency Regulations,

as they stand post the 2017 Amendment, primarily envisage the following scheme for grant of lesser penalty based on priority status:

SR. NO.	PRIORITY / MARKER STATUS	PERCENTAGE OF REDUCTION IN PENALTY PERMITTED
1.	First	Up to or equal to 100%
2.	Second	Up to or equal to 50%
3.	Third or subsequent	Up to or equal to 30%

Regulation 4, therefore broadly contemplates offering reductions in penalty on the basis of marker status. The same are elaborated upon as follows:

- a. **First marker:** The CCI has noted that up to 100% reduction in penalty may be granted to an applicant who is the first to provide vital disclosures to the CCI that enables it to form a *prima facie* opinion under Section 26(1) of the Act of cartelization or enables the CCI to establish a contravention of Section 3, particularly where the CCI or the Director General was not in possession of sufficient evidence to establish the same in the first place. First markers have traditionally been granted a greater benefit in terms of reduction of penalty, provided that the information submitted by them was vital and provided greater clarity about the *modus operandi* of the cartel. Further, in order for the first marker to avail of the benefit of reduced penalties, they must have fully, genuinely, expeditiously and continuously cooperated with the CCI.

CCI's practice of granting higher reductions in penalties is sufficiently illustrated in a catena of cases. In the case of *In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)*^{viii} (“**EPS Cartel case**”), the CCI in its order dated 9th August, 2019, granted 100% leniency to NSK Limited, Japan and its employees since NSK had approached the CCI first with vital information that led to the disclosure of the cartel. Similarly, in the case of *Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcaster*^{ix} (“**Globecast case**”), the CCI granted 100% reduction of penalty to Globecast since it was the first applicant to file for leniency in the given matter.

- b. **Second, third and subsequent marker**: Subsequent leniency applicants, in order of their marker status or priority status may also be provided a reduction in penalty, provided that the information and evidence granted by them to the CCI adds **substantial value or ‘significant added value’ on top of the information already available**. ‘Added value’ in this context refers to the additional input from the subsequent leniency applicants that enhances the CCI / the DG’s ability to establish the existence of a cartel. However, it is pertinent to note that subsequent leniency applicants are usually unaware of the information already supplied by the first leniency applicant and therefore, are unaware of whether their input amounts to significant added value, and hence they have to take an assessment depending on the stage of investigation and their marker status. As an example of the CCI's practice off emphasizing on added value of the information provided by the subsequent leniency applicants, we may note that in the Globecast case (supra), ESCL, the second marker was granted a 30% reduction penalty since ESCL had added significant value to the ongoing investigation. Despite filing an application only after a *prima facie* opinion had been formed, ESCL was found to have not only corroborated the existing evidence, but was also found to have contributed certain additional facts which added value to the ongoing investigation. By reason of the same, the benefit of lesser penalty was granted to the second marker.

FOR SUBSEQUENT MARKERS AFTER MARKER 1, CONCEPT OF ADDED VALUE IS THE KEY

JUDICIOUS CALL TO BE TAKEN FOR SUBSEQUENT MARKERS DEPENDING ON THE STAGE OF INVESTIGATION – ANALYZE QUESTIONS BEING POSED BY THE DG TO GATHER THE INFORMATION WHICH DG MAY ALREADY HAVE IN POSSESSION.

However, it is apposite to note that in the case of *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India*^x, the CCI had departed from the norm and granted a small reduction in penalty to the second and third markers for merely providing assistance in

corroborating the information which was already in the possession of the Director General. They provided no substantial addition to the existing evidence in the aforesaid case.

DECISIONAL PRACTICE OF THE CCI

The CCI in the 9 leniency orders passed by it has considered a number of factors while granting the cartel participants and their individual employees and ex-employees. The following table includes an exhaustive list of leniency cases in India along with the factors considered by the CCI and the percentage of reduction in penalty granted:

Sr. No.	Case	Percentage of reduction in penalty granted	Factors considered by the CCI in its orders while granting leniency
1.	In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Motu Case No. 03/2014	M/s Pyramid Electronics, Parwanoo (OP – 1): 75%	<p><u>Factors influencing grant of 75% leniency to OP – 1:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - First and only party in the case to approach CCI under leniency programme - Helped establish <i>modus operandi</i> of the cartel - Satisfactorily cooperated with the CCI <p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation, after the formation of a <i>prima facie</i> opinion
2.	In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Motu Case No. 02/2016	<ul style="list-style-type: none"> - Panasonic Energy India Co. Ltd. (OP – 3): 100% - Eveready Industries India Ltd. (OP – 1): 30% - Indo National Ltd. (OP – 2): 20% 	<p><u>Factors influencing grant of 100% leniency to OP – 3:</u></p> <ul style="list-style-type: none"> - First to file leniency application - True, full, vital disclosure of information and evidence - Genuine, full, continuous and expeditious cooperation <p><u>Factors influencing grant of 30% leniency to OP – 1:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - Second marker status - Genuine, full, continuous and expeditious cooperation

			<ul style="list-style-type: none"> - Corroboration of existing information b. Negative factors: - No significant value addition - Approached the CCI at a later stage of the investigation <u>Factors influencing grant of 20% leniency to OP – 2:</u> a. Positive factors: - Third marker status - Genuine, full, continuous and expeditious cooperation - Corroboration of existing information b. Negative factors: - No significant value addition - Approached the CCI at a later stage of the investigation
3.	Nagrik Chetna Manch v. Fortified Security Solutions, Case No. 50 of 2015	<p>Mahalaxmi Steels (OP – 6): 50%</p> <p>Lahs Green India Pvt. Ltd. (OP – 4): 50%</p> <p>Sanjay Agency (OP – 5): 40%</p> <p>Ecoman Enviro Solutions Pvt. Ltd. (OP – 2): 25%</p>	<p><u>Factors influencing grant of 50% leniency to OP – 6:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - First applicant - Vital disclosure regarding <i>modus operandi</i> of cartel - Good value addition to ongoing investigation - Genuine, full, continuous and expeditious cooperation <p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation <p><u>Factors influencing grant of 50% leniency to OP – 4:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - Third marker status, but first to approach the CCI regarding one of the two tenders involved - Vital disclosure regarding <i>modus operandi</i> of cartel - Good value addition to ongoing investigation - Genuine, full, continuous and expeditious cooperation

			<p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation <p><u>Factors influencing grant of 40% leniency to OP – 5:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - Second marker - Vital disclosure regarding <i>modus operandi</i> of cartel - Genuine, full, continuous and expeditious cooperation <p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation <p><u>Factors influencing grant of 25% leniency to OP – 2:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - Genuine, full, continuous and expeditious cooperation - Small factual additions <p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation - Minimal value addition
4.	In re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing, Suo Motu Case No. 03/2016	Saara Traders Pvt. Ltd. (OP – 1): 50%	<p><u>Factors influencing grant of 50% leniency to OP – 1:</u></p> <p>a. Positive factors:</p> <ul style="list-style-type: none"> - First applicant - Vital disclosure regarding <i>modus operandi</i> of cartel - Good value addition to ongoing investigation - Genuine, full, continuous and expeditious cooperation <p>b. Negative factors:</p> <ul style="list-style-type: none"> - Approached the CCI at a later stage of the investigation
5.	Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports	Globecast India Pvt. Ltd. and Globecast Asia Pvt. Ltd. (OP – 2 and OP – 3): 100% Essel Shyam Communication Ltd. (OP – 1): 30%	<p><u>Factors influencing grant of 100% leniency to OP – 2 and OP – 3:</u></p> <ul style="list-style-type: none"> - First marker status - Allowed CCI to form its <i>prima facie</i> opinion

	Broadcaster, Suo Moto Case No. 02/2013		<ul style="list-style-type: none"> - Vital disclosure regarding <i>modus operandi</i> of cartel - Genuine, full, continuous and expeditious cooperation <u>Factors influencing grant of 30% leniency to OP – 1:</u> <ul style="list-style-type: none"> a. Positive factors: <ul style="list-style-type: none"> - Second marker status - Corroboration of existing evidence - Value addition to investigation b. Negative factors: <ul style="list-style-type: none"> - Approached the CCI after <i>prima facie</i> opinion was formed and notice was issued
6.	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Motu Case No. 02/2017	Panasonic Corporation, Japan (OP – 1; also filed on behalf of Panasonic Energy India Co. Ltd., i.e. OP – 2): 100%	<u>Factors influencing grant of 100% leniency to OP – 1:</u> <ul style="list-style-type: none"> - Allowed CCI to form its <i>prima facie</i> opinion - Vital disclosure regarding <i>modus operandi</i> of cartel - Genuine, full, continuous and expeditious cooperation
7.	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Motu Case No. 03/2017	Panasonic Corporation, Japan (OP – 1; also filed on behalf of Panasonic Energy India Co. Ltd., i.e. OP – 2): 100%	<u>Factors influencing grant of 100% leniency to OP – 1:</u> <ul style="list-style-type: none"> - Allowed CCI to form its <i>prima facie</i> opinion - Vital disclosure regarding <i>modus operandi</i> of cartel - Genuine, full, continuous and expeditious cooperation
8.	In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems), Suo Motu Case No. 07(01)/2014 (<i>Order dated 09.08.2019 against NSK Ltd. and JTEKT and their respective employees</i>)	NSK, Japan (NSK): 100% JTEKT: 50%	<u>Factors influencing grant of 100% leniency to NSK:</u> <ul style="list-style-type: none"> - First applicant - Allowed CCI to form its <i>prima facie</i> opinion - Vital disclosure regarding <i>modus operandi</i> of cartel - Genuine, full, continuous and expeditious cooperation <u>Factors influencing grant of 50% leniency to JTEKT:</u>

			- Significant value addition - Genuine, full, continuous and expeditious cooperation
9.	In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems), Suo Motu Case No. 07(01)/2014 (Order dated 20.11.2019 against 4 ex-employees of NSK Ltd.)	4 ex-employees of NSK, Japan: 100%	Same as above

In addition to the 9 leniency orders mentioned in the above table, in the case of *In Re: Cartelisation in Industrial and Automotive Bearings^{vi}*, the CCI initiated proceedings in connection to a cartel in the domestic industrial and automotive bearings market from 2009 to 2014 on the filing of a leniency application by FAG Bearings India Ltd., which subsequently came to be known as Schaeffler India Ltd. However, in the aforesaid case, the CCI did not delve into the parameters necessary for determining a reduction in penalty, since it decided not to impose any monetary penalty whatsoever on any member of the cartel owing to the peculiar facts and circumstances of the case. The CCI merely issued a cease and desist order to all the members of the cartel, thus rendering the analysis of the leniency application as nugatory.

CONFIDENTIALITY OF LENIENCY APPLICANTS

The cornerstone of any whistleblower provision is the protection of the identity and confidentiality of the whistleblower. The leniency regime in India, likewise, has safeguards in place in the Leniency Regulations to protect the identity of the leniency applicant. Under Regulation 6, the CCI and the Director General are bound to maintain confidentiality of the identity of the leniency applicant and all information, documents and evidence provided by the applicant. Such information or identity can be declared if required by the law, or if the applicant has either consented to its declaration in writing or publicly revealed the said information.

However, post the 2017 Amendment, Regulation 6, in addition to the above, also grants wide discretion to the Director General to disclose such confidential information as it deems fit for the purpose of the investigation, after recording its reasons in writing and with due permission of the CCI.

It may be noted that to this end, the Director General had, for the first time, permitted the creation

CONFIDENTIALITY RING –
 MAINTAINING BALANCE BETWEEN
 RIGHT OF THE ENTERPRISE TO
 DEFEND ITSELF v.
 CONFIDENTIALITY OF THE
 LENIENCY APPLICANT

of a confidentiality ring in the EPS Cartel case (supra). Confidentiality rings are arrangements which are permitted in several jurisdictions at the investigation stage to provide ‘access to file’ to other parties in the case, in order to protect their right of defend themselves. The creation of a confidentiality ring is an effective tool to ensure

that a balance is struck between the right of parties to build their defence and the right of leniency applications to protect confidential disclosures. In certain jurisdictions, confidentiality ring arrangements in the form of mutually agreed ‘negotiated disclosure agreements’ are facilitated by the director general or the equivalent investigating authority between the parties to the case.

It may also be noted that in the context of inspection, through the insertion of Regulation 6A vide the 2017 Amendment, inspection of non-confidential versions of leniency applications are now permitted after the CCI has forwarded the Director General’s Report to the parties. Parties to a case can inspect the non-confidential versions of the aforesaid applications upon the payment of a prescribed fee and submission of a form to the CCI.

IS A LENIENCY APPLICATION SUFFICIENT TO PROVE THE EXISTENCE OF A CARTEL?

A very common misconception about the leniency regime is that the filing of a leniency application necessarily implies that there exists a cartel. While the leniency process is an excellent tool for detecting cartels, a leniency application cannot be taken on face value as there is always a possibility for frivolous cases being filed. Therefore, the CCI is duty bound to carry out a thorough investigation of all such applications in order to establish whether there is in fact a cartel.

In the recent case of *In re: Alleged Cartelisation in Flashlights Market in India*^{xii} (“**Flashlights case**”), Eveready Industries India Ltd. had filed a leniency application disclosing that multiple competitors in the flashlights market had exchanged sales and production data, along with price related information. The CCI, after a thorough perusal of the evidence provided came to a conclusion that though there was a clear exchange of sensitive information between the alleged members of the cartel, there was no evidence to show that such information had led to an increase in prices of flashlights in India. The CCI therefore found no merit in the existence of a cartel in terms of Section 3(3)(a) of the Act, in spite of a leniency application being filed.

Thus, the CCI should be vigilant in ensuring that frivolous leniency applications are not given undue time and should ensure that the leniency process does not become a tool that is misused by aggrieved competitors.

THE WAY FORWARD

The leniency regime in India has undoubtedly been successful in leading to more cartels being disclosed and swifter action by the CCI. However, the way forward for India to increase enforcement with respect to cartels has room for much improvement. While a strong leniency program does lead to effective cartel detection, India needs to implement a settlement regime where cartels are concerned as well.

The proposed introduction of several new provisions through the Bill has raised a great number of questions amongst antitrust practitioners. Among the provisions sought to be introduced by the Bill, there is a proposition for the insertion of Section 48A into the Act to introduce a settlement mechanism whereby parties being inquired into for contraventions of Section 3(4)^{xiii} and Section 4^{xiv} of the Act may settle the matter with the CCI. However, notably, the proposed amendment does not envisage a settlement mechanism for violations of Section 3(3) of the Act, i.e. cartels.

The Competition Law Review Committee Report, 2019 (“**CLRC Report**”), which had collated the views of a series of experts on possible amendments, and which forms the basis of the Bill, has quite surprisingly failed to justify the said exclusion apart by simply noting the fact that leniency is already granted under the existing framework. This has raised a very pertinent question regarding whether the existence of a leniency programme can be viewed as incompatible with the existence of a settlement regime for cartels. Are the two in any way contradictory to each other?

The short answer is no. Multiple jurisdictions such as the European Union have successfully implemented a leniency regime and a settlement mechanism simultaneously for cartels. The CLRC Report has, unfortunately, failed to appreciate that the leniency regime and the settlement regime operate in different spheres.

In cases involving leniency applications, notwithstanding the disclosure of a cartel, the CCI is bound to follow the entire procedure of an inquiry and hearing before it passes the final order. However, this is where the settlement procedure is different. A settlement results in the closure of a case forthwith, without any further investigation, upon an admission of guilt by the cartel participant in exchange for a reduced penalty. It is important to note that the very objectives of the two systems are different – one emphasizes on the discovery and effective investigation of cartels and another emphasizes on a speedy remedy that saves both time and resources. There is no incompatibility between the two

SETTLEMENT AND LENIENCY: CAN THEY CO-EXIST?

concepts. Additionally, leniency orders, like any order under Section 27 are appealable, whereas settlement orders are not.

Cartel detection is likely to increase manifold if a settlement mechanism is introduced in India. It is worth noting that while the leniency regime does lead to effective detection of cartels in most cases, the mere filing of a leniency application does not necessarily prove that a cartel for the purposes of Section 3(3) exists. The *Flashlights* case (supra) is testament to the same.

However, if a cartel participant approaches the CCI for settlement in relation to the cartel, the same would conclusively establish the existence of a cartel and no further investigation would be necessary.

With the CCI's constant endeavour to simplify, streamline and expedite enforcement in India, introducing a settlement procedure alongside the leniency programme is likely to save both time and a great amount of resources for both the investigating authorities and the parties themselves, while leading to stronger enforcement. As a way forward, in the interest of stronger enforcement, leniency and settlement procedures must be allowed to exist simultaneously.

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ⁱ Competition Commission of India v. Fastway Transmission Pvt. Ltd, (2018) 4 SCC 316

ⁱⁱ Section 27(b) of the Act

ⁱⁱⁱ The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017

^{iv} Provisos to Section 46 of the Act

^v Two orders for grant of lesser penalty were passed in the case of *In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems), Suo Motu Case No. 07(01)/2014*. The first order was passed against NSK Ltd. and JTEKT and their respective employees. The second order was passed with respect to 4 ex-employees of NSK Ltd.

^{vi} *In Re: Cartelisation in Industrial and Automotive Bearings, Suo Motu Case No. 5 of 2017*

^{vii} Proviso to Section 46 of the Act

^{viii} Suo Motu Case No. 07(01) of 2014

^{ix} Suo Motu Case No. 02 of 2013

^x Suo Motu Case No. 02 of 2016

^{xi} Suo Motu Case No. 5 of 2017

^{xii} Suo Motu Case No. 1 of 2017

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- ^{xiii} Provision relating to vertical agreements, which are anti-competitive when read with Section 3(1)
 - ^{xiv} Provision prohibiting the abuse of dominant position