



ADVOCACY SERIES

8

Competition Act, 2002

Leniency Programme



Fair Competition
for Greater Good

भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA



VISION

To promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth.

MISSION 2020

Competition Commission of India aims to establish a robust competitive environment through

© *proactive engagement with all stakeholders, including consumers, industry, government and international jurisdictions*

© *being a knowledge intensive organization with high competence levels*

© *professionalism, transparency, resolve and wisdom in enforcement.*

DISCLAIMER

This quick guide is published as part of the Competition Advocacy and Awareness Programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009, and seek legal advice, wherever necessary.



INTRODUCTION

This booklet contains information about the “Leniency Programme” for detecting Cartel¹ cases. This programme is designed to support effective enforcement of the Competition Act, 2002 (as amended), [the Act]. A transparent and predictable leniency programme has been proven to be an effective tool to detect, investigate and combat cartel cases worldwide.

The Competition Commission of India (CCI)

Competition Commission of India has been set up under an Act of Parliament with the mandate:

- ✓ to prevent practices having adverse effect on competition,
- ✓ to promote and sustain competition in market,
- ✓ to protect the interests of consumers, and
- ✓ to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

¹ For details on Cartels, please see Appendix I.

Competition Act 2002

With a view to ensure that there is no adverse effect on competition in India, the Act prohibits:

- ✓ any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India,
- ✓ abuse of dominant position by enterprises

The Act also regulates entering into combinations (consisting of mergers, amalgamations and acquisitions).

Cartels: Penalty Provisions under the Act

Cartel formation is a pernicious offence under the Act. The Commission is empowered to inquire into any cartel, and to impose upon each person or enterprise included in that cartel, a penalty of up to 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement, whichever is higher.

In addition, the Commission has the power to pass *inter-alia* any or all of the following orders (section 27):

- ✓ direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- ✓ direct the enterprises concerned to modify the agreement.
- ✓ direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- ✓ pass such other order or issue such directions as it may deem fit.

Rationale of Leniency Programme

- ✓ It is an incentive to those cartel members who choose to share information and cooperate with the Commission.

LENIENCY PROGRAMME

What is Leniency Programme?

- ✓ Leniency programme is a type of whistle-blower protection, i.e. an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel.
- ✓ Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anti-competitive agreements and assist the competition authorities in lieu of immunity or lenient treatment.
- ✓ Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own.

Leniency Provisions under the Act

Section 46 of the Act provides for such leniency provisions which states:

“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 it may deem fit, than leviable under this Act or the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader

or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also 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.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) had given false evidence; or
- (c) the disclosure made is not vital,

and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.”

Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anti-competitive agreements and assist the competition authorities in lieu of immunity or lenient treatment.



Leniency Programme – For Whom?

Leniency programme is available for those enterprises / individuals who disclose to the Commission their role in a cartel and cooperate with subsequent investigations, are rewarded by a reduction of or complete amnesty from penalty. Leniency programs are universally accepted as being the best way to combat cartels.

To effectuate the leniency programme, the Commission has made Competition Commission of India (Lesser Penalty) Regulations, 2009. The salient features of the same are given in the succeeding Chapter.

THE REGULATION - COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009²

To carry out the leniency provisions in the Act, section 64 empowers the Commission to draft regulations for matters in respect of which provisions is to be made by regulations. In pursuance of such powers, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought out in August 2009. These Regulations provide the framework in which the Commission can give lower punishments than statutorily provided in the case of cartel membership.

There are three main components of a leniency programme. These are - a set of conditions to be satisfied for getting benefits under the leniency programme, the procedure for grant of lesser penalty, and the quantum of penalties that are waived when lenient treatment is meted out to the cartel member who cooperates with the Commission by submitting information on the cartel. Each of these components is described below:

2 For details, please see Appendix II.

Conditions to avail Benefits of Leniency Provisions

The applicant must:

- ✓ provide the information before the receipt of the report of investigation directed under section 26 of the Act
- ✓ cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the Commission
- ✓ provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Act
- ✓ provide all relevant information, documents and evidence as may be required by the Commission
- ✓ co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission
- ✓ not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.
- ✓ The reduction in monetary penalty will depend upon following situations:-
 - the stage at which the applicant comes forward with the disclosure
 - the evidence already in possession of the Commission
 - the quality of the information provided by the applicant
 - the entire facts and circumstances of the case

Procedure for Grant of Lesser Penalty

- ✓ The applicant can make application as per the contents specified in the Schedule either orally, or through e-mail or fax to the designated authority
- ✓ The Commission shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant but mere acknowledgement shall not entitle the applicant for grant of lesser penalty

- ✓ The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority
- ✓ Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
- ✓ Lack of continuous cooperation entitles Commission to reject the application after providing due opportunity of hearing to that applicant.
- ✓ After rejection of the priority status of first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission.

Quantum of Immunity under Leniency Provisions

The quantum of immunity available under leniency provisions in comparison to penalty prescribed under clause (b) of the section 27 of the Act is as under:-

Benefit of reduction in penalty upto or equal to 100% is available to the applicant if he is the first to make a vital disclosure enabling the Commission to form a prima-facie opinion regarding the existence of a cartel on the basis of evidence submitted. Further,

- ✓ Benefit of reduction in penalty upto or equal to 100% is available even if the matter is under investigation but without disclosures made by the applicant; the Commission or the Director General did not have sufficient evidence to establish such a contravention
- ✓ Benefit of reduction in penalty upto or equal to 100% will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission.
- ✓ The second or third applicant in the priority status may also be granted benefit of reduction in penalty to the tune of 50% and 30% of the full leviable penalty respectively on making a disclosure by submitting evidence, which provide a fillip to the already available evidence with the Commission

or Director General for establishing the existence of the cartel.

CONFIDENTIALITY

Under the Competition Commission of India (Lesser Penalty) Regulations, 2009, it has been specifically mentioned that the identity of the applicant as well as information obtained from it shall be treated as confidential and it shall not be disclosed save under the three situations stated below:-

- ✓ when the disclosure is required by law; or
- ✓ when the applicant has agreed to such disclosure in writing; or
- ✓ when there has been a public disclosure by the applicant.

Such an arrangement of maintaining confidentiality would encourage submission of vital information with the Commission.

CONCLUSION

A transparent and predictable Leniency Program of the Commission supports the effective and efficient enforcement of the Act. Individuals and business organizations are more likely to come forward, cooperate, and plead guilty (rather than litigate) when they are aware of the relevant leniency considerations and the benefit that they can derive by availing of the leniency programme of the Commission.

Benefits of an effective Leniency Program are as follows:

- ✓ There is high risk of detection of cartels and the sanctions imposed on cartel participants on detection is quite greater than the benefits that can be availed by cartelization.

- ✓ There is great deal of transparency and certainty in leniency programme of the Commission. The applicant coming forward with vital disclosures and following the pre-determined conditions can assuredly avail leniency provisions under the Act.
- ✓ The evidence that are collected through cooperation lead to greater clarity in fixing responsibility
- ✓ The fear of adverse publicity and stigma of violator of laws of the land and the incentives provided under the leniency programme must induce violating enterprises to apply for leniency.

In nutshell, availing of leniency provisions is a win-win situation for the Commission as well as for the cartel member who agrees to share information with the Commission.

HOW TO CONTACT THE COMMISSION

Anyone wishing to obtain additional information about the Act, the Competition Commission of India (Lesser Penalty) Regulations, 2009, or to file a information under any of these should contact the Commission at the following:-

Website : www.cci.gov.in	
Address: Competition Commission of India The Hindustan Times House, 18-20, Kasturba Gandhi Marg New Delhi – 110 001.	
For Enquiry relating to Competition Act, and Regulations, 2002	Designated authority, under regulation 2(f) and 5 of the Competition Commission of India (Lesser Penalty) Regulation, 2009
Secretary	Secretary
Competition Commission of India Tel. : + 91 – 11 – 23704651 Fax : + 91 – 11 – 23704652 Email: secy@cci.gov.in	Competition Commission of India Tel. : + 91 – 11 – 23704651 Fax : + 91 – 11 – 23704652 Email: secy@cci.gov.in

Cartel³

According to the Act

Cartel is defined in Section 2, sub-section (c) of the Act as:

“Cartel” includes 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”.

What is a “Cartel”?

- ✓ Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers.
- ✓ The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice for goods or/and services.
- ✓ A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. An important dimension in the definition of a cartel is that it requires an agreement

3 For more information on Cartels, please refer to advocacy booklet titled “Provisions Relating To Cartels” at the link given below:

» Log on to www.cci.gov.in

» Click on “Advocacy Booklets”

» Click on “Provisions Relating To Cartels”

between competing enterprises not to compete or to restrict competition.

- ✓ Cartels are universally established as being the most pernicious form of agreement for competition regulators. It is the most egregious violations of competition law. One of the most important goals of Competition Policy is to root out cartels. To deter the conspirators of cartels, stringent provisions for imposition of strong sanctions including criminal prosecution have been incorporated in various jurisdiction world-over. In India, participating in a cartel is a civil offence.

[Published In The Gazette Of India, Extraordinary, Part iii, Section 4]

**THE COMPETITION COMMISSION OF INDIA
NOTIFICATION**

**The Competition Commission of India (Lesser Penalty)
Regulations, 2009 (No. 4 of 2009)**

New Delhi, the 13th day of August, 2009

No. L-3(4)/Reg-L.P./2009-10/CCI. – In exercise of the powers conferred by section 64, read with section 46 and clause (b) of section 27 of the Act (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely: -

1. Short title and commencement

- (1) These regulations may be called the Competition Commission of India (Lesser Penalty) Regulations, 2009.
- (2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions

- (1) In these regulations, unless the context otherwise requires,–
 - (a) “Act” means the Competition Act, 2002 (12 of 2003);
 - (b) “applicant” means an enterprise, as defined in clause (h) of section 2 of the Act, who is or was a member of a cartel and submits an application for lesser penalty to the Commission;
 - (c) “cartel” means a cartel as defined in clause (c) of section 2 of the Act;

- (d) “Commission” means the Competition Commission of India established under sub-section (1) of section 7 of the Act;
- (e) “company” means a company as defined in clause (a) of Explanation to sub-section (2) of section 48 of the Act;
- (f) “designated authority” means an officer of the Commission who is authorized by the Chairperson to function as such, for the purpose of these regulations;
- (g) “Director General” means the Director General as defined in clause (g) of section 2 of the Act;
- (h) “priority status” means the position of the applicant marked for giving the benefit of lesser penalty in the queue of the applicants;
- (i) “vital disclosure” means 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.

- (2) Words and expressions used but not defined in these regulations shall have the same meanings respectively as assigned to them in the Act, rules, regulations or in the Companies Act, 1956 (1 of 1956), as the case may be.

3. Conditions for lesser penalty

- (1) An applicant, seeking the benefit of lesser penalty under section 46 of the Act, 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 violation under sub-section (3) of section 3 of the Act;
 - (c) provide all relevant information, documents and evidence as may be 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.
- (2) Where an applicant fails to comply with the conditions mentioned in subregulation (1), the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.
- (3) Without prejudice to sub-regulations (1) and (2), the Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case.
- (4) 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.

4. Grant of lesser penalty

Subject to the conditions laid down in regulation 3, the applicant may be granted benefit of lesser penalty than leviable under clause (b) of section 27 of the Act, as the commission may decide, in the following manner, namely;-

- (a) The applicant may be granted benefit of reduction in penalty upto or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged

to have violated section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:

Provided that the Commission may also grant benefit of reduction in penalty upto or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of section 3 of the Act in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention:

Provided further that the application for the benefit of reduction in penalty upto or equal to one hundred percent will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission.

- (b) The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have violated section 3 of the Act.

Explanation. – For the purposes of these regulations, “added value” means the extent to which the evidence provided enhances the ability of the Commission or the Director General, as the case may be, to establish the existence of a cartel, which is alleged to have violated section 3 of the Act.

- (c) The reduction in monetary penalty referred to in clause (b) shall be in the following order-

- (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(s) marked as third in the priority status may be granted reduction of penalty upto or equal to thirty percent of the full penalty leviable.

5. Procedure for grant of lesser penalty

- (1) For the purpose of grant of lesser penalty, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule, or may contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within three working days, put up the matter before the Commission for its consideration.
- (2) The Commission shall thereupon mark the priority status of the applicant and the designated authority shall convey the same to the applicant either on telephone, or through e-mail or fax. If the information received under sub-regulation (1) is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days.
- (3) The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.
- (4) Where the application, along with the necessary documents, is not received within a period of fifteen days of the first contact or during the further period as may be extended by the Commission, the applicant may forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.

- (5) The Commission, through its designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application but merely on that basis, it shall not entitle the applicant for grant of lesser penalty.
- (6) Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
- (7) Where the Commission is of the opinion that the applicant or its authorized representative, seeking the benefit of lesser penalty or priority status, has not provided full and true disclosure of the information and evidence as referred and described in the Schedule or as required by the Commission, from time to time, the Commission may take a decision after considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.
- (8) Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission and the procedure prescribed above, as in the case of first applicant, shall apply *mutatis mutandis*.
- (9) The decision of the Commission of granting or rejecting the application for lesser penalty shall be communicated to the applicant.

6. Confidentiality

Notwithstanding anything contained in the Competition Commission of India (General) Regulations, 2009, the Commission shall treat as confidential the identity of the applicant or the information obtained from it and shall not disclose the identity or the information obtained unless-

- (a) the disclosure is required by law; or
- (b) the applicant has agreed to such disclosure in writing; or
- (c) there has been a public disclosure by the applicant.

7. Removal of difficulty

In the matter of interpretation or implementation of the provisions of these regulations, if any doubt or difficulty arises, the same shall be placed before the Commission and the decision of the Commission thereon, shall be binding.



THE SCHEDULE

CONTENTS OF THE APPLICATION

[See sub-regulations (1) and (2) of regulation 5]

The application for lesser penalty shall, inter-alia, include the following, namely;-

- (a) name and address of the applicant or its authorized representative as well as of all other enterprises in the cartel;
- (b) in case the applicant is based outside India, the address of the applicant in India for communication including the telephone numbers and the email address, etc;
- (c) a detailed description of the alleged cartel arrangement, including its aims and objectives and the details of activities and functions carried out for securing such aims and objectives;
- (d) the goods or services involved;
- (e) the geographic market covered;
- (f) the commencement and duration of the cartel;
- (g) the estimated volume of business affected by the alleged cartel;
- (h) the names, positions, office locations and, wherever necessary, home addresses of all individuals who, in the knowledge of the applicant, are or have been associated with the alleged cartel, including those individuals which have been involved on behalf of the applicant ;

- (i) the details of other Competition Authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel;
- (j) a descriptive list of evidence regarding the nature and content of evidence provided in support of the application for lesser penalty; and
- (k) any other material information as may be directed by the Commission.

Secretary, CCI



ORGANOGRAM

Chairperson

Member

Member

Member

Member

Member

Member

Maximum 7 Members (including Chairperson)

Economic Division

Combination Division

Anti-Trust Division

Legal Division

Investigation Division

Advocacy Division

Capacity Building Division

Secretariat

DG Office

Regulations

notified by the Competition Commission of India

- ▶ The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009; (No. 1 of 2009)
- ▶ The Competition Commission of India (General) Regulations, 2009; (No. 2 of 2009)
- ▶ The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009; (No. 3 of 2009)
- ▶ The Competition Commission of India (Lesser Penalty) Regulations, 2009; (No. 4 of 2009)
- ▶ The Competition Commission of India (Determination of Cost of Production) Regulations, 2009; (No. 5 of 2009)
- ▶ The Competition Commission of India (General) Amendment Regulations, 2009; (No. 6 of 2009)
- ▶ The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011; (No. 1 of 2011)
- ▶ The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011

Above regulations
are available at
www.cci.gov.in

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COMPETITION COMMISSION OF INDIA

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