

LENIENCY PROGRAMME UNDER COMPETITION REGIME IN INDIA

Written by *Simran Kathuria*

5th Year BA LLB (Hons.) Student, Amity Law School, Delhi

ABSTRACT

Cartels are considered to be the utmost violation of competition law in India under the Competition Act, 2002. Leniency programme under the present law is the most effective tool for cartelists seeking leniency, to dodge significant punishment. These programmes involve a commitment to a pattern of penalties designed to increase incentives in form of lesser penalties for cartelists to self-report to CCI.

The article examines the rationale behind the leniency programme, its procedural aspects as an effective tool to combat cartelisation. An attempt has been made to assess the recent changes that have been made to the leniency programme in India, along with its constitutional validity as examined by courts. Most of the competition enforcement authorities around the world have adopted leniency program. In order to understand the policy drawbacks in the leniency protocols we have scrutinized other law enforcement measures adopted by European Union, Japan and USA. The benefits yielded by immunity programmes are many, and in order to increase the benefits we have listed a few conclusive suggestions.

The data used has been collected from archives, news articles, published statistical reports along with expert opinions of renowned lawyers specialising in competition law.

KEYWORDS: Cartel, Leniency Policy, India, Game Theory, Confidentiality

INTRODUCTION

Supreme evil of antitrust, cartels are the most flagrant of all anti-competitive practices.¹ In order to deal with the growing rampage of cartels disrupting fair markets and promoting unfair practices like price raising, limiting output levels and credit terms the Indian government has, to a certain extent, effectively introduced the subordinate legislation of Leniency Provisions. Cartel agreements are problematic to discern due to their clandestine operations and strict enforcement. However, with adequate severe monetary penalties, cartel members evaluate the risk of penalty to outweigh benefits from the illegal conduct. This subsequently compels to confess to their anti-competitive practices.²

Cartels are considered to be the utmost violation of competition law in India under the Competition Act (hereinafter ‘Act’)³. Leniency programme under the present Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter ‘Regulation’)⁴ along with the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 (hereinafter ‘Amendment’)⁵ secures lenient treatment for early confessors and conspirators who in exchange supply information that proves helpful to the Competition Commission of India (hereinafter ‘CCI’) for proving and penalising other cartel members.⁶ Leniency Provision under the current law does not lure the cartel members for avarice of leniency in a rat trap. Instead, leniency provisions are universally accepted as one of the best way to detect cartels since the activity is so guarded that internal information is necessary to break such agreements.⁷ The culmination of all the necessities and thought-processes brought about the leniency program in India.

RATIONALE FOR INCORPORATING A LENIENCY PROGRAMME

In order to raise the probability of detecting cartels, the leniency program has been implemented in many countries, such as the EU, the US, Canada, Australia, Korea. They have

¹D.G.GOYDER, GOYDER’S EC COMPETITION LAW (5th Ed, Oxford University Press Ch 2) pg 8; Verizon Communications Inc. v. Law Offices of Curtis V Trinkino, LLP 540 U.S. 398, 408 (2004).

² R S KEMANI, A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY (Washington, D.C. : World Bank Publication) (1999).

³THE COMPETITION ACT, 2002.No. 12 OF 2003.

⁴THE COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009 (NO. 4 OF 2009).

⁵THE COMPETITION COMMISSION OF INDIA (LESSER PENALTY) AMENDMENT REGULATIONS, 2017 (NO. 1 OF 2017).

⁶Competition Commission Of India, *Mission 2020, 8th Advocacy Series*, <http://cci.gov.in>.

⁷ Massimo Motta, *Competition Policy: Theory and Practice*, (Cambridge University Press), at p. 193 (2004).

proven that the program is a very effective device to detect cartels.⁸ This is because the activity is so guarded that internal information is necessary to break such agreements.⁹ The idea has been extensively borrowed from Prisoner's dilemma theory and the Nash equilibrium theory. In order to investigate these institutional design issues within the leniency programme, we must understand what these theories are.

According to the theory a prisoner's dilemma exists when two parties pursue their own individual interests and act in a manner which provides them with maximum mutually exclusive benefits, thus resulting in both parties ending up in a worse position than if they had cooperated with the group's interests instead of their own.¹⁰ In such a scenario the confession of either would be enough to convict the other of the major crime. The police wants to convict at least one, and hopefully both of the prisoners for the major crime, so they offer each the same deal, which will lead to a reduced sentence if they testify against the other prisoner. In such a scenario if both of them don't testify and follow the group interest then they will be least harmed as the police will not be able to convict them of the major crime, but in case one testifies and the other does not then one of them will be at a great disadvantage as he will be convicted for both, major and minor crimes. If both of them testify then they will both serve equal sentences. The difference between the first and the last case scenario is that if both the prisoners follow the dominant strategy and confess, then both prisoners will be worse off than they could be if neither of them confesses. According to John Nash's game theory the first is known as globally optimal solution, whereas the last scenario is the Nash Equilibrium.¹¹ Nash Equilibrium can be defined as an action profile with the property that no single player can obtain a higher pay off by deviating unilaterally from this profile.¹² If we apply the game theory to the prisoner's dilemma each prisoner pursuing his own short-term self-interest would most likely confess. This makes confession a dominant strategy since both of them are better off confessing regardless of what the other prisoner does.

In relation to competition law, the above theories provide for the structural programme upon which the leniency policy is based. The theories provide a realistic arrangement for applicants

⁸Monti, M, "The Fight Against Cartels" summary of the Talk by Mario Monti to EMAC, (2002).

⁹ SUPRA N. 7

¹⁰Ulrich Blum, Nicole Steinat, Michael Veltins, 'On the Rationale of Leniency Programs: A GameTheoretical Analysis' European Journal of Law & Economics (2008).

¹¹ Nash, John F, *Equilibrium Points in N-Person Games*. *Proceedings of the National Academy of Sciences* 36 (1): 48-49 (1950). Neumann, John and Oskar Morgenstern: *Theory of Games and Economic Behavior*, Princeton, NJ: Princeton University Press (1944).

¹²Kreps, David, Paul Milgrom, John Roberts, and Robert Wilson, *Rational Cooperation in the Finitely Repeated Prisoner's Dilemma*, *Journal of Economic Theory* 27: 245-252 (1982).

to obtain amnesty by competition authorities. This is because; arrangements are framed to create a ‘race for confessions’ by providing bait to cartel members to admit thereby aiding the competition authorities, in return for amnesty. Such a reward can be given to one or more, whistleblowers leading to substantial reduction in penalties imposed upon them as compared to other cartel members.¹³

PROCEDURAL ASPECTS UNDER THE LENIENCY PROGRAMME AND CHANGES IN THE REGULATION

INFRINGEMENTS OF COMPETITION LAW COVERED UNDER THE LENIENCY PROVISIONS

The leniency provision 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.”¹⁴ Thus, it covers infringement of section 3(3) of the Act which deals with cartels, among other things like:

- Price-fixing.
- Bid-rigging (collusive tendering).
- The establishment of output restrictions or quotas.
- Market sharing or market allocation.

There is no criminal liability for cartel conduct under the Act. The leniency programme only extends to the administrative liability imposed on cartel members under the Act.¹⁵ Chapter VI of the Act contains various provisions relating to penalties that can be imposed by the Commission. Section 46 confers power upon the Commission to impose lesser penalty.¹⁶

TIME FRAME TO BE ADHERED TO WHILE FILING LENIENCY APPLICATION

The application for leniency must be made at the earliest possible point. Although the Act specifically provides that leniency applications can be made after the investigation has started, they do require that any application be made before the Competition Commission of India

¹³ UNCTAD Report, August 26, 2010; http://unctad.org/en/Docs/trbrpconf7d4_en.pdf.

¹⁴Section 46, SUPRA N. 3

¹⁵Section 3 and Section 53N, SUPRA N. 3

¹⁶Alkem Laboratories Limited and Ors. vs. Competition Commission of India and Ors. 2016CompLR757(CompAT) (2016).

receives an investigation report from the Director General.¹⁷ In the Brushless DC Fans case¹⁸, the applicant was only awarded a 75% reduction in penalty because the investigation of the DG had already commenced. Therefore, those applicants who apply under the programme after the investigation commences, are at a loss, than those who apply before the commencement of the investigation. The reason for such a disadvantaged position of an applicant who obtains second or third priority status has the onus of adding value over and above stating a vital disclosure. Therefore, it is crucial and imperative that a leniency application is extremely exhaustive and includes all evidence to show the presence of a cartel. An application made which does not add value will have twin negative effects from the applicant's perspective: (a) not getting lesser penalty from the CCI; and (b) since the applicant has made the leniency application, they have admitted that they are involved in a cartel, and hence their scope of defence will get jeopardized. Thus, if a decision has been made to file a leniency application, the concerned applicant must act without any delay whatsoever in order to be able to clinch any leniency from the CCI. It would be ideal to approach the CCI orally and get a priority marker along with an additional time frame of 15 days to file a detailed application. Recently Amendment regulation brought about procedural changes, leniency applicants now have a 15-day window from the date of communication with CCI via receipt to file a leniency application with the CCI by amending sub-regulation (4) of regulation 5. This move has essentially provided more time for the applicant to deliberate and file an application encouraging applicants to file a leniency application instead of being indiscriminately time bound.

CONDITIONS TO AVAIL BENEFITS OF LENIENCY PROVISIONS

Regulation 3¹⁹ and the Act²⁰ provide the conditions for grant of lesser penalty, which include:

- Applicant should cease to be a member of the cartel from the time of its disclosure unless otherwise directed by the Commission.²¹
- Applicant should provide 'vital disclosure' in respect of violation under the Act.²² 'Vital disclosure' has been defined under Regulation²³ to mean full and true disclosure of information or evidence by the applicant to the Commission, which is

¹⁷2nd proviso to Section 46, SUPRA N. 3

¹⁸Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014, order dated 18 January 2017 (2017).

¹⁹SUPRA N. 4

²⁰Section 46, SUPRA N. 3

²¹Regulation 3(1) (a), SUPRA N. 4

²²Section 3(3), SUPRA N. 4

²³Regulation 2 (1) (i), SUPRA N. 4

sufficient to enable the Commission to form a *prima facie opinion* about the existence of a cartel or which helps establish the contravention of the provisions of Section 3 of the Act. The ambit of vital disclosure is extremely specific and it should assist the CCI in forming a *prima facie* view that there exists a cartel and based on such disclosure provided in the leniency application, the CCI can direct the offices of the DG to investigate the matter.²⁴

- Applicant has to provide all relevant information, documents and evidence as may be required by the Commission.²⁵
- Applicant has to co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission.²⁶
- Applicant should not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.²⁷
- The reduction in monetary penalty levied upon the applicant 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.²⁸

In addition to the above conditions, the CCI may subject the Applicant to additional restrictions or conditions, as it may deem fit. The commission may reject the leniency application if there is non-compliance with the condition on which the lesser penalty was imposed by the Commission; or for giving false or incomplete evidence which in turn proves to be non-vital.²⁹ Post the amendment the new definition of applicant in Amended Regulation includes individuals who are involved in cartel activity to come forward as applicant or party to the proceeding. As an extension, the amendments also clarify that the leniency applicant shall also mention the name(s) of the individual(s) who were involved in the cartel activity and are now seeking leniency.

²⁴Regulation 4, SUPRA N. 4

²⁵Regulation 3 (1) (c), SUPRA N. 4

²⁶Regulation 3 (1) (d), SUPRA N. 4

²⁷Regulation 3 (1) (e), SUPRA N. 4

²⁸Regulation 3 (1) (4), SUPRA N. 4

²⁹Amit Sanduja, *Report on Leniency Programme: A key tool to detect Cartel*, Research Project Report, Competition Commission of India (CCI), New Delhi, (2007).

CATEGORIES OF LENIENCY AVAILABLE (MARKER SYSTEM)

The Regulations³⁰ also provides for a priority marker system.

- **If the concerned applicant is the first to approach the CCI:** The Applicant may be granted benefit of reduction in penalty up to or equal to 100% or immunity, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a 'prima-facie opinion'³¹ regarding the existence of a cartel. CCI must not have prior knowledge of the information given.³²
- **If the concerned applicant is the second or third to approach the CCI:** The applicant marked second in the priority status may be granted reduced monetary penalty up to or equal to 50% of the penalty leviable as per the Act³³; and the applicant marked as third in the priority status may be granted reduction of penalty up to or equal to 30% of the penalty leviable as per the Act.³⁴ More than two Applicants can obtain the third marker status.³⁵

All the conditions as stated above must be met by the Applicant regardless of the status they have been marked within the Brushless DC Fans, it was held that even though the applicant had obtained first position in the priority marker system he was not eligible for 100% waiver, this was because of the stage at which the Applicant approached the Commission i.e., not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the Commission at that stage.³⁶ Inspired by the US leniency program³⁷, the Amendment Regulation provided a provision for Markers to be allotted to refer to the first and subsequent applicants that provide vital disclosure to the Commission about the cartels. Prior to the amendment, a limitation on three markers was levied with a quantum of up to 100%, 50% and 30% leniency in fine, respectively. However, as of now there is no cap on the number of markers, all of them after third marker eligible for 30% leniency. This ensures that more applicant come forward to tip about cartels.

³⁰Regulation 4, SUPRA N. 4

³¹Section 26(1), SUPRA N. 4

³²Regulation 4 (a), SUPRA N. 4

³³Section 46, SUPRA N. 4

³⁴Regulation 4 (b), SUPRA N. 4

³⁵Ibid.

³⁶SUPRA N. 18

³⁷FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS; Published on January 26, 2017, at Pg 6; <https://www.justice.gov/atr/page/file/926521/download>.

The Competition Commission may decline or withdraw leniency if the leniency applicant breaches any of the conditions stipulated for grant of leniency.³⁸

PROCEDURE TO BE FOLLOWED UNDER THE LENIENCY SCHEME

The Regulations³⁹ provides for practical procedure to apply as an applicant under the Leniency Scheme.

Step 1: Initial Communication

The Applicant must provide the Secretary, CCI (designated authority) with all information, documents and evidence available to it regarding the cartel activity. This includes information that supports a finding of infringement, any exculpatory material in the leniency applicant's possession of which it is aware and information on possible leads or sources of information that the CCI can pursue.⁴⁰ It would be ideal to approach the CCI orally and get a priority marker along with an additional time frame of 15 days to file a detailed application.

Step 2: Contents of the Application

The application for lesser penalty shall, inter-alia, include details about the applicant, description of the alleged cartel member govern arrangement and the estimated volume of business affected by such alleged cartel All the claims must be supported via incriminating evidence.⁴¹

Step 3: Assigned priority status

The CCI will mark the priority status of the applicant and the Secretary will convey the same to the Applicant. In case only preliminary information is given by the Applicant to CCI, complete information has to be given to the CCI within 15 days after designation of the priority status. If the said information is not provided, the Applicant will lose its priority status.⁴²

CONFIDENTIALITY

The Commission treats the information provided by the Applicant and the identity of the applicant confidential unless

- The disclosure is required by law; or
- The applicant has agreed to such disclosure in writing; or
- There has been a public disclosure by the applicant.⁴³

³⁸Regulation 3(2), SUPRA N. 4

³⁹Regulation 5, SUPRA N. 4

⁴⁰Regulation 5, SUPRA N. 4

⁴¹Schedule to sub-regulations (1) and (2) of regulation 5, SUPRA N. 4

⁴²Regulation 5(2), SUPRA N. 4

⁴³Regulation 6, SUPRA N. 4

In the recent past the judicial opinion has thoroughly evolved on the confidentiality provision under the Amendment Regulation.⁴⁴ Ever since the grant of first leniency order to an applicant by the CCI there have been several apprehensions regarding the confidentiality of the identity of the informant. In *Brushless DC Fans* case, the informant waived confidentiality on its identity as well as the information furnished.⁴⁵ The apprehension arises when the informant uses their right under the Regulation to maintain their identity concealed. The commission lands in a thorny situation when the opposite party raises a concern about the access to evidence in order exercise their right of defense. In *Somi Conveyor belt* the law on this point was settled,

“Thus, it is clear that the entitlement of a party to the proceedings to inspect the documents or to obtain copies of the same is not absolute and it is always open to CCI to reject permission for inspection or furnishing copies if it is of the view that the documents/information require confidential treatment.”⁴⁶

This move sanctioned under the Amendment Regulation single-handedly addresses the malaise of not having access to documentary evidence or “file” claimed by various parties. In a significant move, regulation 6A allows not only leniency applicant but non-lenieny applicants to have access to file. This move allows those who have right of access to file to claim the non-confidential version of the file after Director General’s investigation report has been forwarded to parties. Furthermore, the Amendment introduced Regulation 6 and 6A allowing the Director General (DG) to disclose information, evidence and documents submitted by the applicant, to a party to the proceedings if such disclose is deemed to be necessary by the DG even if the applicant has not agreed to such a disclosure. However, given the DG’s ability to disregard the leniency applicant’s consent to not disclose, the matter shall be subject to a hearing.

CONSTITUTIONALITY OF THE LENIENCY PROVISIONS

The core provisions of the leniency program enacted by the CCI as a piece of subordinate legislation have been subject to challenges in litigation on various grounds. It is, however, a fortunate benediction by the judicial arm of the Indian Constitution that has ensured that legal sanctity of Leniency Provisions has been upheld through intense reasoning. The narrative of

⁴⁴*Somi Conveyor Beltings Ltd. &Anr. v. Union of India &Ors.* 242 DLT 220 (DB) (2017).

⁴⁵SUPRA N. 18

⁴⁶*Ibid.*

challenges against the Leniency Provisions harks back to where formation of a *prima facie* opinion by the CCI on the basis on vital disclosure was in question.

PRIMA FACIE OPINION

Section 26(1) in the Competition Act, 2002 mentions that “On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter.”. In addition to this section, regulation 4(a) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 mentions that CCI may also be allowed to form an opinion on the basis of the vital disclosure made by the applicant in leniency program. The validity of this section 26(1) was contested in *Competition Commission of India v. SAIL*⁴⁷ where the power or function to form a *prima facie* opinion departmentally was challenged. The court observed “formation of a *prima facie* opinion departmentally, i.e., by the Director General (DG) appointed by the Central Government to assist CCI does not amount to an adjudicatory function but is merely of administrative nature.” Therefore, the power to form an opinion is not an adjudicatory function performed by the DG or the CCI, it pertains to administrative nature that does not condemn any person immediately.

The opinion generated by *prima facie* gaze over the evidence is an administrative action that initiates a proceeding and therefore, cannot be held as a prejudicial to fair proceedings. In the same case, the court also observed “At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no *prima facie* case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper.”⁴⁸ This further elucidates that the *prima facie* opinion formed by the DG is itself subject to scrutiny and can be disposed. In contradistinction, the *prima facie* opinion, in both the provisions of Section 26(1) of the Act and Regulation 4 of the notification are mere departmental action to cause investigation into the matter without entering the realm of adjudicatory process.

⁴⁷CCI v. SAIL, 10 SCC 744 (2010).

⁴⁸ Ibid.

PRINCIPLES OF NATURAL JUSTICE AND CONFIDENTIALITY

One of the most recurring challenges to the constitutionality of the subordinate legislation of leniency provision is the principle of *audi alteram partem* not being aligned to. In the case of Premier Rubber Mills v. Union of India⁴⁹, it was observed by the court that *prima facie* formation of opinion due to the vital disclosure does not generate an adjudicatory action against any party. “At that stage, it does not condemn any person and therefore, application of *audi altrem partem* is not called for.”

Since Section 36 of the Competition Act, 2002 as a parent act mandates that CCI shall be guided by the principles of natural justice, the argument pertaining to principles of natural justice has been further highlighted. Even though the contentions in aforementioned cases against attack the *prima facie* opinion and the confidentiality of evidence, individual and documents under Leniency Provisions, it is pertinent to note that principles of natural justice are not infallible constants germinated in the application of every statute. The purpose of the leniency provisions is to ensure safety, secrecy of the applicant which is essentially a whistleblower of the cartel operations. With due respect to the aggressive presence of the cartel and the power surge, it is also imperative as a purpose of the statute of encourage more individuals or parties to help detect cartels.⁵⁰ Therefore, it is only reasonable to infer and apply the principles of natural justices according to these circumstances. In the case of Natwar Singh vs. Director of Enforcement⁵¹ it was observed that flexibility arises even in cases of natural justice. The court observed that there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. In order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate the apparent purpose of the legislation.

One of the most recurring arguments that arose against the constitutionality of the Leniency Provisions is inability of the accused to access the evidence, information or documents of “vital disclosure”⁵² In the Regulations, there was no scope of the accused having a chance to access the confidential documents, files or evidence. The contention brought forth in various cases is

⁴⁹Premier Rubber Mills v. Union of India, (163) DRJ 599 (2017).

⁵⁰SUPRA N. 6

⁵¹Natwar Singh v. Director of Enforcement, 13 SCC 255(2010).

⁵² Regulation 2(i), SUPRA N. 5

that the restriction due to confidentiality of documents or evidence did not allow the accused to prepare for the case to the best of their ability. Therefore, in the absence of access to files due to confidentiality, “the contention is that the regulations are arbitrary and in violation of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India to the extent that they do not provide the information/documents in the possession of CCI and Director General to the parties to an inquiry and investigation to present their views and defend their position.”⁵³ It is a right that fair hearing is guaranteed to every individual and it is their right to know the evidence used against them.⁵⁴

It is imperative, as a republic, to ensure that right of fair hearing is not merely enlisted but guaranteed to every person before an authority exercising the adjudicatory powers. However, disclosure not necessarily involves supply of the material.⁵⁵ Therefore, elucidating this, principle that nothing should be used against a person that hasn’t been brought to his notice is supplant and the tangible access to evidence is merely suppliant. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defense. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future⁵⁶ It is also pertinent to note that such terse and absolute paradigms of fair hearing apply to an actual adjudicatory process and not a departmental action or administrative. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. In other words, they (principles of natural justice) do not supplant the law of the land but supplement it.⁵⁷

RECENT AMENDMENT ON CONFIDENTIALITY AND ISSUE OF ITS CONSTITUTIONALITY

In addition to well-settled applications of principles of natural justice that have been found in conformity with the Leniency Provisions, the recent amendment in the confidentiality clause ensures access to file that allow a non-confidential version of the file to leniency applicants and

⁵³ SUPRA n. 49.

⁵⁴ Dhakeswari Cotton Mills Ltd. v. CIT 1 SCR 941(1955).

⁵⁵ SUPRA N. 51

⁵⁶ R. v. Secretary of State for Home Deptt., 1995 QB 43.

⁵⁷ A.K. Kraipak v. Union of India 2 SCC 262 (1969).

non-leniency applicants.⁵⁸ This allows not only the applicants but non-applicants including third parties to the proceeding to access a non-confidential version of the file. The issue that could furthermore arise with this amendment is the “non-confidential version” of the documents. The “non-confidential version” of the file does not provide the absoluteness of the original document. In essence, the original document is altered, concealing the details that could reveal the identity of the applicant. That implies the change in the minute details of the evidence that could change the entire evidentiary value of the document. A change in detail could entire lead the accused to miss out a semantic or an argument that might have changed the entire orchestrated arguments of the case.

On the contrary, the paradigm remains the same. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework.⁵⁹ Therefore, discarding the entire statute of Leniency Provisions by quoting semantics is to ignore the essence and purpose of the statute. The purpose of the statute is to maintain confidentiality and to gain information about cartels. Since *prima facie* opinion is a mere departmental administrative function, it does not reduce the chance of the accused to participate in a fair proceeding.

SUBORDINATE LEGISLATION

The Act and the amending notification are subordinate legislation. When legislation’s validity is attacked, the law is well settled that there is a presumption in favour of the validity of the act.⁶⁰ However, subordinate legislation does not carry the same amount of immunity which a legislation that is passed by the parliament enjoys. There was no restriction on a subordinate legislature’s power to delegate within its field as it had plenary powers of legislation', except that it could not create a parallel legislative body without preserving its own capacity.⁶¹This implies that subordinate legislation does not enjoy the same power as a regular piece of legislation does but it has no restriction to delegate within its field. Since Leniency laws are

⁵⁸ Regulation 6A, SUPRA N. 5

⁵⁹SUPRA N. 51

⁶⁰ Charan Lal Sahu v. U.O.I. 1 SCC 614 (667) (para 13) (1990).

⁶¹In re: Gray, 57 S.C.R. (Canada) 150, Chemical Reference case, 1943 S.C.R. (Canada), Australian High Court, Dignan's case, 29 C.L.R. 329.

delegated legislation spawned out of the purpose of Section 3 of the Competition Act, 2002, the purpose was served.

As held in Supreme Court Employees' Welfare Association Vs. Union of India⁶², the validity of a subordinate legislation is open to question if it is ultra vires the constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fair minded authority could ever have made it. The grounds upon which a subordinate legislation can be challenged are summed up in State of T.N. v. P.Krishnamurthy & Ors.⁶³ as under:

- (a) Lack of legislative competence to make the sub-ordinate legislation.
- (b) Violation of Fundamental Rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest Arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to make such rules).

Noting the above cases, the court observed⁶⁴ that there was no manifestly arbitrary or if son, unreasonable that Parliament never intended to confer such power. Therefore, there is nothing to suggest that parliament never intended the CCI to formulate a case-centric statute (In this case, Leniency Provisions) that would ensure better application of the parent stature.

LENIENCY PROGRAMS IN OTHER COUNTRIES

In comparison to other countries, India's Leniency program is not as successful as ones in Japan, the US or the EU. The problem lies not merely in a relatively small subordinate legislation that has fewer-than-needed provisions but the amount of meticulousness with which

⁶² Supreme Court Employees' Welfare Association v. Union of India, 4 SCC 187(1989).

⁶³State of T.N. v. P.Krishnamurthy & Ors., 4 SCC 517(2006).

⁶⁴SUPRA n. 49

their implementation should be. It is imperative to understand that an applicant in a leniency program is analogous to a whistleblower in a whistleblower program that requires secrecy. Since the entire premise of having the Act is to derive information about cartels that is almost impossible to discern without the help of these applicants, it is imperative to introduce a better framework. Even after the introduction of the said statute, India has been unable to even marginally disrupt the cartel activity.⁶⁵

AMNESTY PLUS AND LENIENCY POLICY UNDER THE DOJ, US

The US is the foremost leader in apprehending most number of cartels in the past decades within the countries and showing promising activity with respect to apprehending International Cartels associated with local companies.⁶⁶ The US has a comprehensive marker system that includes a certain amount of time period allotted to the first person in the queue for the marker. This ensures that the applicant is protected till the time application is responded. Leniency programs reduce fines for cartel members that bring evidence to the antitrust authority. Amnesty refers to the complete exemption from fines. Amnesty Plus aims at attracting amnesty applications by encouraging subjects of ongoing investigations to consider whether they qualify for amnesty in other than the currently inspected markets where they engage in cartel activities. In particular, Amnesty Plus offers a firm, which currently plea-bargains an agreement for participation in one cartel, where it cannot obtain guaranteed amnesty, complete immunity in a second cartel affecting another market. Provided that the firm agrees to fully cooperate in the investigation of the conspiracy of which the DoJ was previously not aware, it is automatically granted amnesty for this second offense. Moreover, the company benefits from a substantial additional discount, i.e. the Plus, in the calculation of its fine in any plea agreement for the initial matter under investigation.⁶⁷

CLASSIFICATION OF TIME PERIOD OF OFFENCE AND JAPAN

The number of cases in Japan as per the statistics of the JFTC (Japan Free Trade Commission) reveals that total 775 leniency applications have been filed till 2014, with 50 in 2014 and 102 in 2013. Among the prominent cases, JFTC penalised five companies with JPY 16.9billion for

⁶⁵ Cyril Shroff Et al., *Cartel Enforcement in India: Standard and Burden of Proof*, CPI Antitrust Chronicle 1 (2013), <http://awards.concurrences.com/IMG/pdf/india.pdf>.

⁶⁶ Christopher Hockett, Arthur Burke, Neal Potischman and Samantha Knox Davis Polk & Wardwell LLP, *United States: Anti-cartel Enforcement; The Antitrust Review of the Americas 2015*, Pg 11, http://www.davispolk.com/sites/default/files/hockett.aburke.potisch.shknox.GCR_.article.sep14.PDF.

⁶⁷ Yassine Lefouili and Catherine Roux, *Leniency Programs for Multimarket Firms: The Effect of Amnesty Plus on Cartel Formation* Pg. 3, (2008).

being involved in cartel of optical fibre cables in 2010 JFTC (Japan Free Trade Commission)⁶⁸ is the authority that is vested with the power, function and responsibility of curtailing unfair trade practices. Cartels have been defined under Article 3 of the Law No. 54/1947, also known as Anti-Monopoly Act (AMA) as “unreasonable restraint of trade”. Therefore, the law addresses cartels as a restraint in fair trade. Japanese Free Trade Commission has demarcated various categories within which respective quantum of punishment lies. Unlike Indian law, different categories of punishment and fine are levied with respect to the background in cartel practices. For instance, if the accused is involved in cartel activity for less than two years pleads guilty then a leniency of 20% is granted and so on.

EU LENIENCY POLICY AND THE CARTEL SETTLEMENT PROCEDURE

Under the EU Leniency Policy the first to approach the authority with information and evidence incriminating the cartel is given complete immunity.⁶⁹ In order to make the leniency program watertight, several conditions are laid down in the notices.⁷⁰ Some such conditions include providing with a corporate leniency statement; severing all ties with the cartel; cooperating genuinely, fully, on a continuous basis.⁷¹ In order to maintain the integrity of the leniency program the Commission does not allow those firms/ individuals to participate and obtain immunity, who coerced other members to join the cartel. The EC further provides for a marker system for those who were not the first to approach the Commission. In such cases if the evidence presented by them adds significant value to the investigation, then such informants are eligible for significant reduction from any fine that the Commission might levy on the other cartel members.⁷² In 2008, the European Commission introduced a cartel settlement procedure, under which, , undertakings were made eligible to obtain an additional fine reduction of 10 % if they made a formal settlement submitting to their direct involvement in the infringement and acceptance of statutory liability for the same.⁷³ A recent empirical study of 52 EC cartel decisions adopted between 1 May 2004 and 1 May 2014 found that in 94 % of these cases at least one undertaking had applied for leniency.⁷⁴ The statistics confirm that the introduction of

⁶⁸ JFTC (Japan Free Trade Commission) (2010) http://www.jftc.go.jp/en/about_jftc/role.files/1009role_3.pdf.

⁶⁹ *EGL and Others v Commission*, T-251/12, EU:T: 114, paragraphs 148-169, (2016).

⁷⁰ Commission Notice, [2002] OJ C45/3 and [2006] OJ C298/17.

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⁷² OECD Policy Roundtable, *Leniency for Subsequent Applicants* (2012), <http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>.

⁷³ Article 10a of Commission Regulation No 773/2004 of 7 April 2004; Commission Notice, [2008] OJ C167/1.

⁷⁴ S. Broos, A. Gautier, J. Marcos Ramos and N. Petit, '*Analyse statistique des affaires d'ententes dans l'UE* (2004-2014)', 67 *Revue économique* 79 at 85 (2016).

the leniency program has indeed allowed the EC to effectively combat and penalize cartel activity.

CONCLUSION

The objective of competition laws is not only to prevent practices that have an adverse effect on competition, but also to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade. This is truly reflective of the changing economic conditions. Therefore, proper care and protection should be taken to ensure that the measures taken against anticompetitive practices do not go to the extent of interfering with the liberty of the traders and business people.

The same intent is reflected in leniency policy of India that is to cover violations under Section 3 of the Act and the infringements under Section 3(3) at the same time sticking to its root aims of cartel disclosure, luring cartel members and applicant's confidentiality. In order to realize these meticulous aims, this law does not merely have to fulfill its theoretical bulwarking but at the same has to ensure that it drives cartel members to want to cooperate with the government by making process "applicant-friendly" and non-cumbersome.

It was observed in this article that it is obviously imperative obligation of the legislation to ensure constitutional sanity. The arguments and rebuttals covered in various & sundry of cases evaluated herein allow the research paper to conclude that the constitutional sanity on the basis of *prima facie* opinion, principles of natural justice, fair hearing and fundamental rights is maintained. However, the avenue of mutual cooperation among the applicant and the government has been abandoned for most degree.

The article analyzed and compared other countries' leniency programs along with India's, critically evaluated the Regulations and Amendment and examined the debate of its constitutionality. With following suggestions, the article concludes:

- Optional allotment of "queue" in the marker system that allows for the protection of the applicant till the time application has been responded to.
- An additional "discount" or leniency system like Amnesty Plus that allows the cartel members to further cooperate with the government to provide vital disclosure.

- A schematic that enumerates the precise manner in which a file shall be turned to its “confidential version”. For instance, the manner in which name, identity shall be protected. This further ensures fair hearing to the defence.
- Instead of merely taking “relevant turnover” into consideration, the government should take into consideration different tiers of cartels and different demarcations of their turnovers. This will allow all tiers of cartel members to be interested in the program.
- One of the major drawbacks is that the anti-cartel enforcement activity of the Competition Commission of India has been wanting, largely as the result of the collection of inadequate evidence. In order to ensure an effective anti-cartel regime, it is essential to have a strong and robust leniency programme. The CCI's existing programme is unpredictable and does not incentivise whistle-blowers. In past cases, even the identity of the whistle-blower has not been protected. In contrast, in the European Union for example, over the last three years all cartel decisions have emanated from leniency applications. The advantage of an effective leniency regime is that it provides smoking-gun evidence, ensuring a finding of breach of law.⁷⁵ Therefore, the CCI must redesign its leniency programme and follow international best practices.

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⁷⁵ Naval Satarawala Chopra, *Need for a strong, effective leniency programme, Business Standard: Need for Robust Competition Law*, http://www.business-standard.com/article/opinion/fora-robust-competition-law-116022100753_1.html.

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