



Lakshmikumaran  
& Sridharan  
attorneys

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# LENIENCY GUIDE



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Section 46 of the Competition Act empowers the Competition Commission of India (“**CCI**”) to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The leniency scheme is designed to induce members to help in detection and investigation of cartels. Experiences in other jurisdiction have shown that leniency schemes have proved very helpful to competition authorities of foreign jurisdictions in successfully proceeding against cartels.

1

## What is the law governing leniency in your jurisdiction?

The Competition Act, 2002 (the “**Act**”) is the principal legislation that entails the statutory framework for leniency programme in India.

Further, the CCI has also notified the Competition Commission of India (Lesser Penalty) Regulations, 2009 (the “**Lesser Penalty Regulations**”) pursuant to the Act. The Act and the Lesser Penalty Regulations provides the legal framework (including the conditions to be satisfied, procedure and quantum of leniency etc.) by which the CCI can grant immunity or impose lesser penalty than leviable under the Act in the case of a cartel.

2

## Is cartel a civil or a criminal offence in your jurisdiction? If it is a criminal offence, is the leniency granted by Courts, and what precautions should a leniency applicant take while filing the leniency application before a Court?

A cartel conduct is a civil contravention and not a criminal offence under the Act. It is explicitly envisaged under the Act as per the Section 46 of the Act that the CCI 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.*

It is pertinent to state that imposition of penalty is discretionary under the provisions of the Act and the Lesser Penalty Regulations. The discretion of the CCI with respect to reduction in monetary penalty will be exercised with due regard to the stage at which the applicant comes forward with the disclosure, the evidence already in possession of the CCI, the quality of the information provided by the applicant and the entire facts and circumstances of the relevant case etc.



The Leniency Regulations provide for priority status wherein the first leniency applicant may get up to or equal to 100% immunity, whereas the second leniency applicant and third applicant(s) may be entitled to up to or equal to 50% and 30% immunity respectively. The first applicant may be granted benefit of reduction of 100% of penalty under the circumstances wherein it:

- (a) First makes vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion regarding the existence of a cartel which is alleged to have violated Section 3 of the Act; and
- (b) The CCI at the time of the application did not have sufficient evidence to form such a prima facie opinion

Or

- (a) Is the first to make vital disclosure which establishes the contravention of Section 3 of the Act in a matter under investigation; and
- (b) The CCI or the Director General ("DG") did not at the time of application, have sufficient evidence to establish such a contravention.

The second applicant and third applicant(s) may be given immunity only by submitting evidence which significantly adds value to the evidence already in possession of the CCI or DG to establish the existence of the cartel which is alleged to have violated Section 3 of the Act. Therefore, the application to the CCI must be extremely specific and granular seeking leniency under the Lesser Penalty Regulations, and such application must contain all material information and evidence relating to the establishment or existence of a cartel.

It is imperative that once the decision has been made by applicant to apply for leniency, it should file the application or should contact, orally or through e-mail or fax to the Secretary, CCI (who is the designated authority under the Lesser Penalty Regulations) without any delay because of the priority status and the concept of significant added value. Thus, if the second and third leniency applicant(s) come forward and make the application but do not furnish significant added value (in terms of the Lesser Penalty Regulations), they would not get any leniency and their scope of defence would also reduce since by filing the leniency application they would have already admitted to being a part of the cartel.

3

### **What are the pre-conditions for obtaining leniency in your jurisdiction & what factors are taken into account by the competition authority while deciding whether the applicant should be given leniency or not?**

Any enforcement case (viz. abuse of dominant position or anticompetitive agreement) before the CCI is set in motion by an information filed by any person ("Informant") or upon a reference sent by the Central Government to the CCI or State Government or by the CCI on its own knowledge. The cases which are initiated based on leniency application are set in motion by the CCI under the head of *suo moto* (on its own knowledge) cognizance.

The CCI based on the evidence placed on record by the Informant or on a receipt of a reference from the Central Government or a State Government or on its own knowledge finds out that there is a prima facie contravention of the provisions of the Act, then the CCI passes a prima facie order under Section 26 (1) of the Act and directs the DG , the investigating arm of the CCI to investigate into the matter.

Pursuant to an order under Section 26 (1), DG initiates the investigation. Under the scheme of the Act, DG has been vested with vast powers for investigation and can issue notices<sup>1</sup> to the parties and other persons/enterprises to furnish information. The DG is empowered to summon and direct the parties or any other person to come for deposition before it. On conclusion of the investigation , the DG prepares a detailed investigation report ("**DG Report**") which it then submits to the CCI.

Upon receipt of the DG Report, the CCI sends a non-confidential version of the DG Report to all parties for their comments. Thereafter, the parties submit their reply to the DG Report. This is followed by detailed oral hearings before the CCI. After hearing all the parties, CCI passes a detailed order. It may find no case of cartelization and acquit the parties or it may find the parties guilty of cartelization and impose penalties and pass other suitable directions. It must be noted that even if the DG report finds that the parties have not acted in violation of the provisions of the Act, still the report is furnished to all parties for their comments.

As such, the statutory framework provided under the Act and the Lesser Penalty Regulations provide that a leniency application can be made even after a prima facie case is made out and the DG is investigating the matter. However, Section 46 of the Act states that leniency application cannot be made once the DG has issued the DG Report.

Regulation 3 of the Lesser Penalty Regulations under the Act provides the conditions for grant of lesser penalty, which include:

- (a) The applicant should not have any further participation in the cartel, from the time of making disclosures, unless the CCI directs otherwise;
- (b) The information provided by a leniency applicant must be a "Vital Disclosure". Vital disclosure has been defined under Regulation 2(i) of the Leniency Regulation to mean *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 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.

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<sup>1</sup>Practically multiple notices are issued



Therefore, the application to the CCI has to be extremely specific and granular seeking leniency under the Lesser Penalty Regulations, and such application must contain all material information and evidence relating to the establishment or existence of a cartel.

- (c) The applicant should co-operate to the best of its ability with the CCI by providing all relevant information, documents and evidence as required;
- (d) The applicant should co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI; and
- (e) Relevant evidence should not be concealed, destroyed, manipulated or removed by the applicant.

In addition to the above conditions, the CCI may subject the leniency applicant to further restrictions or conditions, as it may deem fit in the facts and circumstances of each case.

The Lesser Penalty Regulations also provides for a priority status depending upon its marker (marker system is discussed below)

- (a) First applicant: The applicant may be granted benefit of reduction in penalty up to 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 CCI to form a prima-facie opinion (as required under Section 26(1) of the Act) regarding the existence of a cartel.

It must be noted that the immunity would be given only if the CCI did not have, at the time of application, enough evidence to form such a prima facie opinion. Further, the CCI may also grant immunity up to 100% if applicant is the first enterprise to make a vital disclosure by submitting evidence in a matter under investigation which establishes a cartel contravention, and the CCI or the DG did not, at the time of the first leniency application possess sufficient evidence to establish a cartel contravention;

- (b) Second and third applicant(s): The applicant marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the full penalty leviable; and the applicant(s) marked as third in the priority status may be granted reduction of penalty up to or equal to thirty percent of the full penalty leviable. It is interesting to note that under the Lesser Penalty Regulations, there can be more than one applicant which can be marked as third applicant. Having said that, each and every applicant must add value to get lesser penalty benefit.
- (c) It is imperative to emphasize on the aspect that, Lesser Penalty Regulations provide that second and third applicant (s) would also be entitled to reduction in penalty on making disclosure by submitting evidence, which in the opinion of the CCI, provided significant added value to the evidence already in the possession of the CCI or the DG to establish an existence of a cartel. Added value has been defined to mean the extent to which the evidence so provided by the concerned applicant enhances the ability of the CCI or the DG to establish the existence of a cartel, which is alleged to have violated Section 3 of the Act.

It must be reemphasized that all applications ought to fulfill the criteria of vital disclosure i.e. the application, if seen in isolation must be sufficient enough, in the opinion of the CCI, to form a prima facie opinion of an existence of a cartel.

It is to be noted that imposition of lesser penalty / immunity is discretionary under the provisions of the Act and the Lesser Penalty Regulations. It is not mandatory under the Act and the Lesser Penalty Regulations that CCI will grant immunity/ lesser penalty if an application is made. The operative word of the Lesser Penalty Regulations is that CCI "may" grant lesser penalty.

The discretion of the CCI qua reduction in monetary penalty will be exercised with due regard to the stage at which the applicant comes forward with the disclosure, the evidence already in possession of the CCI, the quality of the information provided by the applicant and the entire facts and circumstances of the case. There is no straight jacket formula to decipher as to how the CCI would exercise its powers under the Lesser Penalty Regulations.

4

## What is the procedure for grant of leniency/lesser penalty in your jurisdiction?

The procedure for grant of leniency/ lesser penalty in the relevant jurisdiction is elucidated below:-

### *The first step - Application:*

The applicant or its authorized representative can either:

- (a) Make an application as per the contents mentioned below; or
- (b) contact the designated authority (either orally or through email or fax) for furnishing of information and evidence relating to existence of cartel.

### *Followed by the Marker system:*

The CCI shall, upon receipt of application, mark the priority status of the applicant and the designated authority shall convey the same to the applicant. In the event the information is received orally or through email or fax, the CCI directs the said applicant to submit a detailed written application with all information and evidence within a period not exceeding 15 days. In the event the application is not received within a period of 15 days or such extended time as agreed to by the CCI, the said applicant loses its priority status. The date and time of receipt of the application by the CCI 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 CCI.



5

## **Please explain in not more than 200 words the practical steps a leniency applicant needs to keep in mind while filing a leniency application?**

As explained above, there is a priority system in the Leniency Regulations. Further, the applicants are given lesser penalty only if they fit the criterion of vital disclosure. Further, the second and third applicant(s) also have to add value, as mentioned earlier. Therefore, it is crucial and imperative that a leniency application is extremely exhaustive and includes all evidence to show the presence of a cartel. Further, the Lesser Penalty Regulations provide that the entire contents of the leniency application are confidential, so the subsequent applicant(s) do not have any visibility on the kind of evidence that has already been put forth before the CCI. Thus, to add value for the second and third applicant(s) is a herculean task. They should be cautious that they do not make a leniency application which does not add value. 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 defense gets jeopardised. 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.

6

## **Can more than one enterprise obtain leniency in your jurisdiction? If yes, how many applicants can obtain leniency and under what circumstances would the competition authority grant leniency to the second and the subsequent applicants?**

Yes, please see our response to Query 3 above.

7

## **What is the quantum of leniency/lesser penalty that can be given by your competition authority to the leniency applicants?**

Yes, please see our response to Query 3 above.

8

**Is there any marker system in your jurisdiction for a priority status for the leniency applicants? If yes, how does the authority accord the priority status? Are there any instances when a leniency applicant despite providing information before another leniency applicant was not accorded priority and on what circumstances and legal basis?**

Yes, please see our response to Query 3 above.

Also, Lesser Penalty Regulations provides that in the event an applicant, seeking the benefit of lesser penalty, has not provided full and vital disclosure of the information and evidence as required by the CCI, from time to time, the CCI can reject such an application. Thus, an applicant can lose its priority status if it fails to provide evidence and information to the CCI, as may be required by CCI from time to time. In addition, it must be noted that in the event the leniency applicant fails to comply with the requirements mentioned in our response to Query 3 above, the CCI is free to use the information in accordance with the provisions of the Act.

9

**Practically what evidence can be presented and is considered as admissible in a leniency proceeding both by the Competition Authority and by Courts?**

The Lesser Penalty Regulations entails the following information/documents/evidence must be produced before the CCI as a part of the application:

- (a) Relevant names and addresses.
- (b) A detailed description of the alleged cartel arrangement.
- (c) The goods or services involved.
- (d) The geographic market covered.
- (e) Commencement date and duration of the cartel.
- (f) The estimated volume of business affected by the alleged cartel.
- (g) Names and details of all individuals who, in the knowledge of the applicant, are or have been involved in the cartel, including on behalf of the applicant.
- (h) Details of other competition authorities, forums or courts, if any, approached or intended to be approached in relation to the alleged cartel.
- (i) A descriptive list of evidence provided in support of the application.
- (j) Any other material information as may be directed by the CCI.





There are additional procedural formalities which are provided under the Competition Commission of India (General) Regulations which provide the manner in which evidence has to be submitted to the CCI. Those additional formalities would have to be followed by the applicant while submitting the leniency application.

10

### Till when can a leniency application be filed before the Competition Authority?

Please see our response to Query 3 above.

11

### Whether the leniency is granted by way of an official decree/order or by way of an agreement between the competition authority and the applicant/s?

The CCI would grant leniency, by way of an official decree/order.

12

### Under what conditions, a leniency order or agreement may be rescinded by the Competition Authority? Do Courts annul the leniency granted by the Competition Authority and / or settlements (including third party / private claims) entered into by parties in relation to a cartel case? If so, under what circumstances do the courts annul such leniency and settlements?

Please see our response above to Query 8 above

13

### In cases where leniency applications have been filed in multiple jurisdictions, does your competition authority cooperate with the competition authorities in other jurisdictions? If yes, explain the nature, extent and limitations of such cooperation.

Section 18 of the Act provides for co-operation between the CCI and competition authorities from other jurisdictions. The CCI has entered into co-operation arrangements with the US Federal Trade Commission ("**FTC**") and Department of Justice ("**DOJ**"), the Russian Federal Antimonopoly Service, the Australia Competition and Consumer Commission ("**ACCC**"), Commissioner of Competition,

Competition Bureau Canada (“**CB**”) and DG Competition of the European Commission. There are ongoing negotiations for entering into co-operation arrangements with competition authorities of the BRICS (Brazil, Russia, India, China and South Africa) countries. It is not known whether the CCI has co-operated with any of the above in relation to leniency. It is relevant to state herein the CCI is a part of the International Competition Network (“**ICN**”)as well.

14

### **In the case of filing leniency applications relating to multiple jurisdictions, what are the precautions a leniency applicant has to take?**

When the applicant decides to file a leniency application in another jurisdiction, it should simultaneously file the same application in India to get itself the immunity under the Lesser Penalty Regulations. Filing leniency applications is a global strategy and filing before the CCI is necessarily a part of such strategy.

15

### **Whether filing a leniency application absolves a leniency applicant from compensation claims / private actions? If not, what precautions should a leniency application take into consideration?**

The Act and the Lesser Penalty Regulations do not absolve the applicant from compensation/follow on claims. Thus, this must be taken into account by the applicant while making the application.

16

### **Can the competition authority also grant leniency to the Directors / officers in charge of the company / enterprise / undertakings which has filed the leniency application?**

The Lesser Penalty Regulation provide that lesser penalty would be granted to an applicant. Applicant has been defined under the Lesser Penalty to mean an enterprise who is or was a member of a cartel. The scheme of the Act and the Lesser Penalty Regulations only seems to indicate that the lesser penalty would be granted to the enterprise and not its directors/ officer in charge.



17

## Does your legislation / competition authority grant leniency to a ring leader and what are the conditions thereof?

The Act and the Lesser Penalty Regulations are silent on the treatment to ring leaders. There are certain pre conditions for grant of immunity (discussed above) but it is not stated anywhere in the Lesser Penalty Regulations that leniency would not be granted to a ring leader. Thus, based on the scheme of the Act and Leniency Regulations, leniency can also be granted to a ring leader.

18

## In no more than 250 words, please provide any trend/ information which you find relevant from a practical perspective?

As mentioned above, the leniency application must be extremely granular to ensure that they get the protection under the Lesser Penalty Regulations. Since there is a priority status, it is critical that once a decision has been made to file the leniency application, the same must be done on priority and without any delay in time.

Further, if an enterprise has not filed an application but receives a notice from the DG and wishes to proceed to file a leniency to obtain some relief under the Lesser Penalty Regulations, it must be kept in mind that when the DG sends the first notice, it will also annex the prima facie order with the notice for submission of information. Typically, the notice would come after some time (may be after 12 to 18 months) after the prima facie order is passed because in a cartel investigation, the DG generally approached third parties for information and then armed with that information, they send information requests to the alleged participants in a cartel. In that case, DG already has substantial information and in a such a situation, if a cartel member wishes to file a leniency application, it may not get immunity because the applicant has not added value. Thus, time is of critical essence.

#### **NEW DELHI**

5 Link Road, Jangpura Extension,  
New Delhi 110014

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B-6/10, Safdarjung Enclave  
New Delhi - 110 029  
Phone : +91-11-4129 9811  
E-mail : lsdel@lakshmisri.com

#### **MUMBAI**

2nd Floor, CNERGY IT Park,  
Old Standard Mill,  
Appa Saheb Marathe Marg,  
Prabhadevi,  
Mumbai - 400 025  
Phone : +91-22-2439 2500  
E-mail : lsbm@lakshmisri.com

#### **CHENNAI**

2, Wallace Garden, 2nd Street  
Chennai - 600 006  
Phone : +91-44-2833 4700  
E-mail : lsmds@lakshmisri.com

#### **BENGALURU**

World Trade Center,  
No. 404-406, 4th Floor, South Wing,  
Brigade Gateway Campus,  
No. 26/1 Dr. Rajkumar Road,  
Malleswaram West,  
Bengaluru - 560 055  
Phone : +91-80-49331800  
E-mail : lsblr@lakshmisri.com

#### **HYDERABAD**

'Hastigiri', 5-9-163, Chapel Road  
Opp. Methodist Church, Nampally  
Hyderabad - 500 001  
Phone : +91-40-2323 4924  
E-mail : lshyd@lakshmisri.com

#### **AHMEDABAD**

B-334, SAKAR-VII,  
Nehru Bridge Corner, Ashram Road,  
Ahmedabad - 380 009  
Phone : +91-79-4001 4500  
E-mail : lsahd@lakshmisri.com

#### **PUNE**

607-609, Nucleus  
1 Church Road, Camp  
Pune - 411 001  
Phone : +91-20-66801900  
E-mail : lspune@lakshmisri.com

#### **KOLKATA**

2nd Floor, Kanak Building  
41, Chowringhee Road  
Kolkata - 700071  
Phone : +91-33-40055570  
E-mail : lskolkata@lakshmisri.com

#### **CHANDIGARH**

SCO No. 59, 1st Floor,  
Sector 26, Madhya Marg,  
Chandigarh - 160 026  
Phone : +91-172-4921700  
E-mail : lschd@lakshmisri.com

#### **GURGAON**

OS2 & OS3, 5th floor,  
Corporate Office Tower,  
AMBIENCE Island, Sector 25-A,  
Gurgaon- 122001  
Phone : +91-0124-477 1300  
E-mail : lsgurgaon@lakshmisri.com

#### **ALLAHABAD**

3/1A/3, (opposite Auto Sales)  
Colvin Road, (Lohia Marg),  
Allahabad -211001 (U.P.)  
Tel: (0532) - 2421037, 2420359  
E-mail : lsallahabad@lakshmisri.com

