



## THE DETECTION OF BID-RIGGING CARTELS THROUGH THE LENIENCY ARRANGEMENT

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### Introduction:

The Competition Act, 2002 defines “*cartel as an association of producers, traders, sellers or service providers who, by agreement amongst themselves, limit, control or attempt to control the sale, production, price or distribution of goods and provision of services.*”<sup>1</sup> The objective of Competition law is to detect and prevent the formation of such anti-competitive agreements. The reason being cartels negatively impact market economy and consumers by creating higher prices and lower quality goods.<sup>2</sup> Moreover, due to their tacit nature cartels are difficult to detect. To address this issue leniency provision was introduced in the competition law and now has been made part of competition law framework of various jurisdictions. Leniency arrangement gives an opportunity to corporations to confess to their involvement in a cartel, in exchange for immunity or reduction in penalty.<sup>3</sup> The objective of this paper is to discuss the enforcement of the leniency provision under

the Competition Act, 2002. It would be discussed with the aid of Leniency Regulations and the orders passed by the Competition Commission of India on cartel leniency. Further, enforcement of leniency provision under EU Competition Law regime will be discussed and a comparison will be drawn out between the leniency provisions in the two jurisdictions.

### Leniency provisions under the Competition Act, 2002:

The Competition Act, 2002 was brought into force with the aim of preventing practices which have an appreciable adverse impact on competition and to promote and sustain competition in the market.<sup>4</sup> With this objective Competition Commission of India (CCI) was established, which is the principal regulator for anticompetitive practices across all sectors. The Competition Act, 2002 along with various regulations, such as the (Lesser Penalty) Regulations, 2009 forms part of competition regime in India. Section 3 of the Act deals with anti-competitive agreements. Cartel as defined under section 2(c) is presumed to have an appreciable adverse impact on competition. Section 3(3) states that certain horizontal agreements including cartels, which:

- a) directly or indirectly determine purchase or sale price;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;

<sup>1</sup> The Competition Act, 2002, Section 2 (c).

<sup>2</sup> Jihyun Park, Juhyun Lee and Suneung Ahn, “Bayesian Approach for Estimating the Probability of Cartel Penalization under the Leniency Program”, (2018), available at: <https://www.mdpi.com/2071-1050/10/6/1938/pdf> (last visited January 21, 2020).

<sup>3</sup> J.D. Jaspers, “Leniency in exchange for cartel confessions”, *European Journal of Criminology* (2020), Vol. 17(1), available at: <https://journals.sagepub.com/doi/full/10.1177/1477370819874432> (last visited January 16, 2020).

<sup>4</sup> The Competition Act, 2002.



- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or in any other similar way;
- d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.<sup>5</sup>

The CCI being the enforcing body, initiates cartel investigations upon receipt of information either as a complaint or a leniency application. It also has the power to initiate *suo moto* investigation or upon a reference made to it by a government or statutory authority.<sup>6</sup> The leniency application is a type of whistle-blower protection which offers a lenient treatment to a cartel member who reports to the Commission any information on a cartel.<sup>7</sup> Section 46 of the Competition Act, 2002 states that, if any producer, distributor or seller is part of any cartel which is alleged to have violated section 3 of the Act, makes a true disclosure in respect of such violations, the Commission may impose a lesser penalty than leviable under the Act.<sup>8</sup> The Commission has also brought into effect the Competition Commission of India (Lesser Penalty) Regulations, 2009. This power has been given to the Commission under section 64 of the Competition Act, 2002.<sup>9</sup> These Regulations provide the framework under

which the Commission can give lesser penalty than provided under the statute in case of cartel membership. The leniency programme comprises of three main components, which are:<sup>10</sup>

- a) conditions to be complied with for getting benefit under the leniency programme;
- b) the procedure for grant of lesser penalty;
- c) the quantum of penalties that are waived when a cartel member cooperates with the Commission.

The conditions to be complied with for grant of lesser penalty are: further participation in the cartel from time of its disclosure is to be ceased; full disclosure with respect to violation is to be made; relevant information, documents and evidence as required by the Commission is to be provided; continuous cooperation with the Commission throughout the investigation is essential; and no relevant documents are to be concealed or destroyed.<sup>11</sup> Further, the procedure for grant of lesser penalty is also provided in the Lesser Penalty Regulations, 2009. It provides that an application may be made to the designated authority containing all the relevant information with regard to existence of a cartel. Thereafter, the designated authority shall within three working days put up the matter before the Commission for its consideration. Such applicant shall be given

<sup>5</sup> The Competition Act, 2002 (Act 12 of 2003), s. 3(3).

<sup>6</sup> Farhad Sorabjee and Vaibhav Choukse, "India: Enforcement Policies", in John Buretta and John Terzaken, *The Cartels and Leniency Review* 130-132 (2019) (Law Business Research Ltd, United Kingdom).

<sup>7</sup> CCI, *Leniency Programme*, Advocacy Series 8, available at: [https://www.cci.gov.in/sites/default/files/advocacy\\_b](https://www.cci.gov.in/sites/default/files/advocacy_b)

ooklet\_document/Leniency.pdf (last visited January 23, 2020).

<sup>8</sup> The Competition Act 2002 (Act 12 of 2003), s.46.

<sup>9</sup> Section 64: Power to make regulations-The Commission may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

<sup>10</sup> *Supra* Note 7.

<sup>11</sup> The Competition Commission of India (Lesser Penalty) Regulations, 2009.



a priority status by the Commission.<sup>12</sup> In addition the identity of the applicant as well as the information disclosed shall be kept confidential. If the aforesaid conditions are complied with, the Commission may grant benefit of reduction in penalty up to or equal to one hundred per cent. This is subject to the condition, that at the time of the application, no other applicant has been given the benefit of reduction in penalty.<sup>13</sup>

### **Leniency cases before Competition Commission of India:**

In *Re: Cartelisation in respect of tenders floated by Indian Railways for supply of Brushless DC fans and other electrical items*<sup>14</sup>, the first reduction in penalty order was passed by the Commission. The Commission took cognizance based on the information received by Central Bureau of Investigation (CBI), wherein it alleged that during an inquiry it had found that three firms namely, M/s Pyramid Electronics, Parwanoo, M/s R Kanwar Electricals, Noida and M/s Western Electric and Trading Company, Delhi had engaged in cartelisation in respect of tenders floated by the Indian Railways and the Bharat Earth Movers Limited (hereinafter 'BEML') for the supply of Brushless DC fans and other electrical items.

The evidence which was relied upon by the DG during the investigation, were e-mail correspondence, call data records and statements of the opposite parties. Based on the information given as per the leniency application filed by office bearers of M/s Pyramid Electronics, e-mail and call data records, the Commission was able to

establish the existence of a cartel among the abovementioned members.

Further with regard to the leniency application submitted by partners of M/s Pyramid Electronics, the Commission granted a 75 per cent reduction in penalty. Although the party was the first to make disclosure, admitting existence of a cartel, 100 per cent reduction in penalty was not granted, since disclosure was made at later stage of the investigation. At that time the Commission was already in possession of e-mail evidence given by CBI, which enabled it to form a prima facie opinion as to existence of a cartel.

In *Re: Cartelisation in respect of zinc carbon dry cell batteries market in India*<sup>15</sup>, the Commission took up the case suo moto in pursuant of the leniency application filed by Panasonic Energy India Co. Ltd. It was alleged in the application that there existed a cartel between the manufacturers and suppliers of zinc-carbon dry cell batteries. The members involved in the cartel were Eveready Industries India Ltd, Indo National Ltd and Panasonic Energy India Co. Ltd. The objective of the cartel was to control the distribution and price of zinc-carbon dry cell batteries in India. This was in contravention of section 3(3) read with section 3(1) of the Competition Act, 2002.

In this case, the Director General (hereinafter, the 'DG') used its power to conduct dawn raid. The power is conferred upon the DG under section 41 of the Competition Act, 2002. It empowers the DG

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Suo Moto Case No. 03 of 2014, (Competition Commission of India, 18/01/2017).

<sup>15</sup> Suo Moto Case No. 02 of 2016, (Competition Commission of India, 19/04/2018).



to conduct search and seizure operations in pursuance of a search warrant issued by a Chief Metropolitan Magistrate. These are usually carried out when the Commission has strong suspicions about a company being involved in major antitrust violations.

Thereafter, leniency applications were filed by other two opposite parties: Eveready Industries and Indo National Ltd. Both the parties alleged that they had made 'significant value addition' by providing a full, true and vital disclosure in relation to the cartelisation of zinc-carbon dry cell batteries. Further, since they fully cooperated in the investigation, they should be granted immunity from penalty.

The Commission upon analysis of the investigation report submitted by the DG and submissions of the opposite parties, came to the conclusion that the parties did engage in cartelisation, thereby acting in contravention of section 3(3) read with section 3(1) of the Competition Act, 2002. With regard to the lesser penalty applications, first priority status was granted to Panasonic Energy India Ltd, being the first applicant, which approached the CCI with the cartel information, even before the CCI could form a prima facie opinion. Consequently, it was granted a 100 per cent reduction in penalty. In addition, second priority and third priority status were granted to Eveready Industries and Indo National Ltd respectively. As a result, the Commission granted 30 per cent reduction in penalty to Eveready Industries and 20 per cent reduction in penalty to Indo National Ltd. This was due to the reason that they had approached the Commission with

the information only after the search and seizure operations of the DG.

In *Re: Nagrik Chetna Manch v. Fortified Security Solutions & Others*<sup>16</sup>, the Commission took cognizance based on information filed by the informant, Nagrik Chetna Manch. It was alleged that the opposite parties engaged in collusive bidding in tenders floated by Pune Municipal Corporation for maintenance of Municipal Organic and Inorganic Solid Waste Processing Plants. The lesser penalty applications filed by the six opposite parties and the information disclosed therein aided the Commission to establish bid-rigging in the tenders. However, reduction in penalty was granted only to those opposite parties whose disclosure made a significant value addition to the investigation. Further the stage at which disclosure was made was also considered significant. For instance, if the Commission already had the information disclosed and the value addition was minimal, no reduction in penalty was granted.

In *Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*<sup>17</sup>, the Commission initiated investigation upon lesser penalty application filed by Globecast (one of the opposite parties). It provided information with regard to its bid rigging arrangement with Essel Shyam Communication Ltd (ESCL) (second opposite party) in the market for provision of broadcasting services. Based on the information received, Commission ordered investigation to be conducted by DG. During the course of investigation, ESCL also filed

<sup>16</sup> Case No. 50 of 2015, (Competition Commission of India, 01/05/2018).

<sup>17</sup> Suo Moto Case No. 02 of 2013, (Competition Commission of India, 11/7/2018).



lesser penalty application. As a result, the Commission granted first priority status to Globecast and second priority status to ESCL. The information provided by Globecast enabled the Commission to form a *prima facie* opinion regarding the existence of a cartel. Further, it also fully cooperated with the Commission during the investigation. As a result, a 100 per cent reduction in penalty was granted to Globecast. On the other hand, ESCL was granted a 30 per cent reduction in penalty since the disclosure of vital information was made after receiving the notice from the office of DG. It can be inferred from the above-mentioned cases, that if a cartel member provides the Commission with information before it forms a *prima facie* opinion regarding existence of a cartel, reduction in penalty is more than disclosure made at a later stage.

In *Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)*<sup>18</sup>, the Commission inquired into cartelisation by NSK Limited, Japan and JTEKT Corporation, Japan along with their Indian subsidiaries. The relevant market in this case was the Electric Power Steering (EPS) Systems market. The case was initiated based upon lesser penalty application filed by NSK. Further, during the pendency of investigation by DG, JTEKT also approached the Commission with a leniency application. The DG upon its investigation concluded that both the parties had engaged in cartelisation. Further, upon analysis of the report submitted by DG, the Commission concluded that the parties had indulged in cartelisation in EPS

Systems market by directly or indirectly determining price, allocating markets and manipulating the bidding process. With regard to the imposition of penalty, the Commission granted 100 per cent reduction in penalty to NSK, since it was the first to approach the Commission with the information on cartelisation. Further, JTEKT was given 50 per cent reduction in penalty.

#### **European Union on leniency in cartels:**

It is significant to study the position of EU Competition law regime on cartel leniency since many countries have drafted their competition law framework based on key provisions of EU competition law regime. It serves as a valuable source to study recent trends and developments in the field of competition law.<sup>19</sup> The main body for the enforcement of competition law is the European Commission, the national courts and the national competition authorities of the Member States. Article 101 of the Treaty on the Functioning of European Union (TFEU), prohibits agreements which restrict competition and empowers the Commission to impose substantial fines for cartel behaviour.<sup>20</sup> The leniency arrangement in cartels is regulated by the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel cases (the Leniency Notice). It is based on two principles: firstly, the earlier the undertakings approach the Commission with information on a cartel, the higher the reward; and secondly, the value of the reward will depend on the nature of the material supplied. The Leniency Notice states that immunity from fines may be granted to an undertaking where

<sup>18</sup> *Suo Moto Case No. 07 (01) of 2014*, (Competition Commission of India, 09/08/2019).

<sup>19</sup> Maher M. Dabbah, *International and Comparative Competition Law* 159-161 (2010) (Cambridge University Press, United Kingdom).

<sup>20</sup> *Ibid.*



it makes essential contribution to opening of an investigation. A reduction in fine may be granted, where an undertaking provides such information to the Commission which adds ‘significant value’ to the evidence already in possession of the Commission.<sup>21</sup>

Similar to the priority status given to an applicant in India, the EU Leniency Notice provides for a ‘marker system’. Here an undertaking can approach the Commission and agree with it as to a date by when it will provide the evidence which will enable it to pass the threshold for leniency. If the undertaking ‘perfects’ the marker by the date agreed, its application will be deemed to have been made at the time of original approach to the Commission, and will in turn rank higher in the queue of leniency applicants, rather than an applicant which made an application before the marker was perfected.<sup>22</sup> It is also essential that the applicant maintains a close cooperation with the Commission during the course of investigation, in order to avail the benefit of immunity or reduction in penalty. In order to further promote this programme, in 2019, the Commission announced its eLeniency platform to make the process of submitting documents and statements for cartel leniency less cumbersome. Such corporate statements made must include a detailed description of cartel arrangement, contact details of the applicant along with other members of the cartel, and any information on a cartel given to the competition authorities of Member States.<sup>23</sup>

#### **European Competition Network (ECN):**

Even the European Competition Network (ECN), has its Model Leniency Programme. The Network allows for close cooperation between the competition authorities of the Member States and the European Commission. It further simplifies the burden for applicants and authorities in case of multiple leniency applications. It provides for making summary applications to National Competition Authorities (NCA), even when the Commission is well placed to deal with the case. It helps the applicant to secure its position in queue before the NCA. The Commission is best placed to deal with cases, when a cartel affects competition in more than three Member States, whereas NCA will deal with cases affecting competition within its own territory. However, NCA’s power to apply Article 101 of TFEU ends when the Commission initiates proceedings in relation to a case. At the same time, parallel action by the Commission and the NCA is possible when they focus on cases which are not the same in terms of product or geographical market.<sup>24</sup>

The network has a significant role in allocation of cases. For instance, if an authority is assigned a case, it may reallocate the same to another authority if it is in a better position to deal with that case. Its Model Leniency Programme has been endorsed by the heads of National Competition Authorities of Member States. More so most Member States have aligned their leniency programmes with the essential features of the

<sup>21</sup> Richard Wish and David Bailey, *Competition Law* 290-292 (2018) (Oxford University Press, United States of America).

<sup>22</sup> Ibid.

<sup>23</sup> Philippe Chappatte and Paul Walter, “European Union: Enforcement Policies”, in John Buretta and John Terzaken, *The Cartels and Leniency Review* 69-

70 (2019) (Law Business Research Ltd, United Kingdom).

<sup>24</sup> Philippe Chappatte and Paul Walter, “European Union: Enforcement Policies”, in John Buretta and John Terzaken, *The Cartels and Leniency Review* 67 (2019) (Law Business Research Ltd, United Kingdom).



Model Leniency Programme.<sup>25</sup> However, the leniency programme established by the Commission, through its Leniency Notice and the ECN Model Leniency Programme is not binding on Member States.<sup>26</sup>

### Imposition of fines:

Imposition of fines on undertakings engaged in cartel activities is one of the principal sanctions available with the Commission. However, it does not have any power to impose criminal sanctions on individuals involved in a cartel. Regulation (EC) No. 1/2003 provides that fines can be imposed for breach of Article 101 of TFEU up to a maximum of 10 per cent of the worldwide turnover of the undertaking in the financial year preceding the decision. For imposing a financial penalty, the Fining Guidelines are taken into consideration.<sup>27</sup> Even with the Fining Guidelines in place, the Commission has substantial discretion in imposing fines. However, the discretion is to be exercised in a non-discriminatory manner. In the case of *BASF AG v. Commission*<sup>28</sup>, the parties challenged the level of fines imposed by the Commission. It was held that as per the 1996 Leniency Notice, the Commission had discretion to decide upon reduction of fines. The reduction could be granted only in case of genuine cooperation. However, in this case BASF only disclosed information with regard to anticompetitive conduct upon receiving statements of objections from the Commission. More so the information

disclosed was incomplete. The Court therefore held that the Commission did not err in assessing the value of fine imposed and granting 20 per cent reduction in fine.

The Commission also has in place a settlement procedure in cartel cases. It is intended to complement the Leniency Notice and the Fining Guidelines. Under the settlement procedure, the parties are to acknowledge their participation in a cartel and reach a common understanding with the Commission about the nature of the illegal activity and the penalty to be imposed. In return for cooperating, a 10 per cent reduction in fines is awarded, which is cumulative with leniency reduction.<sup>29</sup>

### Private Enforcement:

The EU law allows an injured party which has suffered loss as a result of cartel behaviour, to sue for damages before the national courts. A Damages Directive has been brought into effect to ensure effective enforcement of EU competition rules. The Directive contains rules which aim to facilitate claims for damages. These rules allow national courts to order parties to the proceedings and third parties to disclose information when victims claim compensation. It also provides for limitation period, which provides victims a reasonable opportunity to claim damages. A number of safeguards have also been provided so that

<sup>25</sup> Richard Wish and David Bailey, *Competition Law* 300 (2018) (Oxford University Press, United States of America).

<sup>26</sup> Piet Jan Slot and Martin Farley, *An Introduction to Competition Law* 231 (2017) (Hart Publishing, United States of America).

<sup>27</sup> Philippe Chappatte and Paul Walter, "European Union: Enforcement Policies", in John Buretta and John Terzaken, *The Cartels and Leniency Review* 73-

75 (2019) (Law Business Research Ltd, United Kingdom).

<sup>28</sup> 2007 ECR II-4949.

<sup>29</sup> Philippe Chappatte and Paul Walter, "European Union: Enforcement Policies", in John Buretta and John Terzaken, *The Cartels and Leniency Review* 76 (2019) (Law Business Research Ltd, United Kingdom).



companies cooperate with competition authorities.<sup>30</sup>

In the case of *Pfleiderer AG v. Bundeskartellamt*<sup>31</sup>, Pfleiderer requested the Court of Justice to order the Bundeskartellamt (Germany's national competition regulator) to allow it access to leniency documents of another company. It was required to prepare a civil action for damages against that company. The court discussed the role of leniency programmes in dealing with infringement of competition law. It held that an action for damages can significantly contribute to maintain effective competition in the European Union. Further, EU law does not preclude access to leniency documents by an injured party. However, it is for the National Courts to decide on a case by case basis as to which information is to be disclosed and which is to be protected. The German Court in this case refused access to the leniency documents to protect the effectiveness of cartel detection.

It has been viewed that in order to ensure effectiveness of leniency programmes, access to voluntarily made self-incriminating statements by a leniency applicant should not be granted. Even the 2014 'Directive on Rules Governing Actions for Damages' confirms this view.<sup>32</sup>

Similar issue was brought before the Court in the case of *Bundeswettbewerbshorde v. Donau Chemie AG*.<sup>33</sup> It was held that the right of access to documents by third party

claiming damages may be disallowed only when disclosure of the document may actually undermine the public interest with regard to effectiveness of the national leniency programme.

Thus, the precise rules of procedure and quantification of damages vary among different EU Member States.

In order to have a coordinated leniency programme, in December 2018, the Council of the European Union officially adopted the ECN+ Directive. It would ensure that the National Competition Authorities have adequate power to impose sanctions and have in place effective leniency programmes which would encourage parties to come forward with evidence of cartels. The Member States have to incorporate this Directive in their national law by February 2021.<sup>34</sup>

A new Directive was also adopted in 2019 to protect whistle-blowers. As per the Directive, all companies with more than 50 employees, or with an annual turnover of 10 million euros, will be required to set up an internal procedure to manage the reports of the whistle blowers.<sup>35</sup>

#### Comparative Analysis:

From the above-mentioned discussion, certain points with regard to the leniency programme can be summarised. Firstly, the earlier an applicant approaches the Commission with the leniency application,

<sup>30</sup> Ibid.

<sup>31</sup> [2011] 5 CMLR 7

<sup>32</sup> Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* 605 (2018) (Hart Publishing, United Kingdom).

<sup>33</sup> [2013] 4 CMLR 19.

<sup>34</sup> Philippe Chappatte and Paul Walter, "European Union: Enforcement Policies", in John Buretta and John Terzaken, *The Cartels and Leniency Review* 74-79 (2019) (Law Business Research Ltd, United Kingdom).

<sup>35</sup> Ibid.



the higher is the reduction in penalty. For instance, in the zinc carbon dry cell case, Commission granted 100 per cent reduction in penalty to the first applicant, since the applicant approached the Commission even before it could form a prima facie opinion. Secondly, the quantum of reduction in penalty will depend upon the significant value added to the information with the Commission. It is essential that along with cooperating with the Commission in the investigation, any information provided by the informant pertaining to a cartel should be of significant value. For instance, in solid waste management case, the third applicant was granted higher reduction in penalty than the second applicant since it disclosed cartel information with regard to certain tenders. The position under EU Leniency Notice is also the same.

However, there is a concern with regard to calculation of penalty under India's Competition Law regime. In the absence of fining guidelines, it is difficult to determine what factors are taken into consideration while imposing penalty. This is in contrast to the position in EU, wherein with regard to the imposition of penalty in leniency applications, the Commission follows Fining Guidelines. The factors taken into consideration are: the percentage of the undertaking's value of sales in the market affected by the infringement; the amount determined based on value of sales will be multiplied by the number of years of participation in the infringement; additional sum is imposed to deter undertakings from participating in cartels; and aggravating and attenuating circumstances are also taken into consideration and adjustments are made

accordingly.<sup>36</sup> At the same time these Guidelines cannot actually aid in determining the ultimate penalty which will be imposed by the Commission. This is justified on public policy grounds, otherwise the undertakings would make calculations of the fine before approaching the Commission with cartel information.

In India as well, the CCI has been adopting a cautious approach with regard to imposition of penalties since the Supreme Court judgment in *Excel Corp Care Limited v. Competition Commission of India*.<sup>37</sup> In this case, the Supreme Court interpreted the term 'relevant turnover' and laid down guidelines to be followed by CCI while imposing penalties. The term 'relevant turnover' would mean turnover of a company with regard to the product, in relation to which provisions of the Competition Act, 2002 have been violated. For instance, in the EPS Systems case, the manufacturers of EPS Systems in India, being the subsidiaries of the applicants, their relevant turnover was taken into consideration for calculating penalty.<sup>38</sup> So, in the absence of Fining Guidelines, the CCI has been taking into account the guidelines laid down by the Supreme Court while imposing penalty.

Further, the Leniency Regulations (2017 Amendment), has broadened the scope of filing leniency applications. The scope of 'applicant' has widened to include an individual, who has participated in a cartel on behalf of an enterprise. Further, lenient treatment can be availed by more than three applicants, which was earlier restricted to three. Additionally, the grant of reduction in penalty is now mandatory, however the

<sup>36</sup> *Supra* Note 34.

<sup>37</sup> (2017) 8 SCC 47.

<sup>38</sup> *Supra* Note 18.



percentage of reduction to be granted is still discretionary.

### **Certain concerns regarding Leniency Arrangement:**

The analysis of cases brought before CCI so far, shows that although applicants have been coming forward with leniency applications, however there are certain issues which might hinder effective enforcement of this provision. One of the concerns that potential applicants might have is with regard to confidentiality. The applicants fear that the information disclosed will lead to loss of reputation of an enterprise, which would have a negative impact on their business. Another issue is of private enforcement. It means that parties who have incurred loss due to a cartel, can file a suit claiming damages. The EU as discussed above has a Damages Directive in force, which allows the National Courts of Member States to hear claims for damages. However, the Competition Act, 2002 does not provide for private enforcement of rights. Such compensation claims if any have to be filed before the National Company Law Appellate Tribunal (NCLAT). So far, no such order has been passed by the Tribunal.<sup>39</sup>

Other disincentives are: the fear of criminal sanctions (in certain jurisdictions), fear of being labelled as a traitor and uncertainty about the ability to obtain leniency.<sup>40</sup> These factors can hinder a potential applicant from approaching the Commission with any information on a cartel.

### **Conclusion:**

The leniency programme was introduced in the competition law with the aim of detecting cartels. It is difficult to uncover such anti-competitive agreements due to their concealed nature. This in turn results in such cartels being continued for a number of years. As a result, leniency provision is an effective tool being used by competition authorities to restrict such anti-competitive agreements. The features of this programme to grant immunity or reduction in fines has led a number of companies to approach the Commission with information on cartels.

The leniency programme in India under the Competition Act, 2002 is still in its nascent stages. However, it has become an important tool with the Commission to uncover cartels. And the recent orders passed by the Commission shows that the applicants are approaching the Commission with cartel information to gain immunity. At the same time, the enforcement of this provision is still in its initial phase and is being improved upon to address the issues mentioned above. For instance, to address the issue of confidentiality, amendment has been brought into effect in the Lesser Penalty Regulations 2009, that the Commission and the Director General shall treat the identity of the applicant and information disclosed by the applicant as confidential, unless disclosure is required by law or the applicant has agreed to such disclosure in writing. This would further aid in effective enforcement of this provision. On the other hand, the EU Leniency Notice which has been in force for some time has aided the Commission to uncover cartels which are difficult to detect otherwise. The

<sup>39</sup> *Supra* Note 6.

<sup>40</sup> International Competition Network, *Good practices for incentivising leniency applications*, (2019), available at:

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf>. (last visited February 2, 2020)



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Leniency Notice has also been supplemented with eLeniency programme and settlement procedure for effective enforcement of this provision. The Fining Guidelines which are a part of EU Leniency programme can be made part of India's Leniency programme. It would in turn help in understanding the factors taken into consideration by the Commission while granting reduction in fines or immunity.

In conclusion it has been observed that India's Leniency programme is still in its initial phase. It is still evolving in comparison to EU's Leniency programme. There are certain features of the European Union's leniency programme, which can be incorporated in India's leniency programme. Even the Competition Law Review Committee constituted by the Government of India has made recommendations in this regard. The introduction of settlement procedure and fining guidelines as mentioned above, would enable to further strengthen the competition law regime in India.

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