

January 21, 2017

Competition Commission of India's First Order Granting Leniency

On Thursday, January 19th, the Competition Commission of India (“CCI”) published its very first order on a leniency application made by a member of a cartel. This landmark order of the CCI, constitutes a significant development in jurisprudence, coming as it does almost 8 years after the introduction of the leniency regime. Globally, leniency or whistleblower programmes are an antitrust regulator’s sharpest teeth to counter cartelisation. The leniency regulations in India were plagued by several apprehensions, including confidentiality concerns and lack of clarity on what level of information would be considered to qualify for the leniency benefits.

The order is the culmination of a *suo motu* investigation¹ undertaken by the CCI based on information forwarded by the Central Bureau of Investigation (“CBI”) in the course of a separate inquiry into alleged misconduct by a public servant. The information included details of an e-mail that was, in the first instance, circulated from M/s Pyramid Electronics (“Pyramid”) to M/s R. Kanwar Electricals (“Kanwar”) and in the second instance, forwarded by Kanwar to M/s Western Electric and Trading Company (“WETC”). The e-mail contained the quantity and rates to be quoted by Pyramid, Kanwar and WETC (collectively referred to as the “Opposite Parties”) in respect of four tenders floated by the Indian Railways and Bharat Earth Movers Limited for the supply of electrical equipment. The rates quoted by the Opposite Parties in two of the four tenders were identical to those mentioned in the e-mail. The CCI opined that the e-mail circulated amongst the Opposite Parties was direct evidence of an anti-competitive arrangement.

In addition to the e-mail, the CCI examined call data records between the Opposite Parties, which revealed “continuous communication” between the Opposite Parties before and around the date of these tenders. The e-mail and the call data records were corroborated by the statements and submissions of Pyramid, who also filed an application for grant of leniency under Section 46 of the Competition Act, 2002 (“Competition Act”) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (“Lesser Penalty Regulations”). Pyramid admitted that the Opposite Parties had decided to rig three tenders and had agreed upon the rates to be quoted. Pyramid also revealed other details such as the role of various parties operating the cartel, the design and *modus operandi* of the cartel, and the duration of the cartel. Viewed in tandem, the CCI held that the call data records, statements of Pyramid and the actual bidding data led to the conclusion that there existed an agreement amongst the Opposite Parties to allocate tenders and rotate bids. This agreement to rig bids and to share the market by mutual allocation of tenders was held to be in contravention of the provisions of Section 3 of the Competition Act, which prohibits market carve-outs and bid rigging arrangements. Consequently, the CCI decided to impose a penalty equivalent to the profits of Pyramid and WETC and a penalty of three per cent. of the turnover of Kanwar during the relevant period.

¹ *In: Re 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.

In considering the leniency application, the CCI noted that Pyramid's submissions had strengthened its case and that it was satisfied with Pyramid's co-operation in the matter. However, given that the leniency application was made by Pyramid post the matter being referred by the CBI, the CCI already had prior knowledge of the e-mail which enabled it to arrive at a *prima facie* view regarding the existence of the bid rigging arrangement. Accordingly, while Pyramid was granted first marker status in terms of the Lesser Penalty Regulations², and was entitled up to 100% reduction in penalties, the CCI granted only a 75% reduction in the penalty imposed on Pyramid. It is interesting to note that the benefit of the reduction in penalty has been afforded to the individual in-charge as well as Pyramid.

Key Takeaway:

Interestingly, the CCI decided to grant a significant reduction in penalty to the enterprise-applicant, as well as to the individual who was in-charge of the conduct of said enterprise, even though it was privy to the direct evidence of cartelization much before the application for leniency was made. We believe that this indicates the CCI's intention to encourage more leniency applications.

In line with the law, the two underlining parameters for grant of leniency appear to be complete co-operation during the investigation and value addition to the case due to the information and evidence submitted by the leniency applicant.

Disclaimer

This alert has been sent to you for information purposes only. The information and/or observations contained in this alert do not constitute legal advice and should not be acted upon in any specific situation without appropriate legal advice.

² The CCI is empowered to grant reduction of penalties in the following manner:

- (a) the CCI may grant a reduction of up to 100%, i.e. complete immunity, to the applicant who is the first to make 'vital disclosure' to the CCI;
- (b) the CCI may grant a reduction in penalty of up to 50% to the applicant marked second in priority, provided that such applicant discloses evidence that provides 'significant added value to the evidence' already in possession with the CCI; and
- (c) the CCI may also grant a reduction in penalty of up to 30% to an applicant marked as third priority provided that such applicant too discloses evidence with "added value" to the CCI.