



INDIAN COMPETITION LAW ALERT

COMPETITION COMMISSION OF INDIA NOTIFIES THE LESSER PENALTY REGULATIONS

On 13 August 2009, the Competition Commission of India (the **CCI**) notified The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009) (the **Lesser Penalty Regulations**), which, pursuant to the provisions of Section 46 of the Competition Act 2002 (the **Act**), prescribe the manner and degree to which the CCI can reduce the penalties for members of a cartel that make vital disclosure to the CCI, helping them to investigate and establish a cartel.

So, why do you, an enterprise¹, need to worry? Here are some questions you may want to ask yourself:

Have you ever?

- entered into any formal or informal arrangement or agreement with your competitors to:
 - determine the purchase or sale prices of products manufactured or services provided by all of you?
 - allocate markets or customers?
 - limit or control the:
 - production of goods or provision of services?
 - technical development of goods or in provision of services?
 - investment for development of goods/ provision of services?
- participated in bid rigging?
- colluded when submitting bids in response to an open tender?

¹ “Enterprise” under the Competition Act 2002 means “a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provisions of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation – For the purposes of this clause, -

- a) “activity” includes profession or occupation;
- b) “article” includes a new article and “service” includes a new service;
- c) “unit” or “division”, in relation to an enterprise, includes –
 - i) A plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 - ii) Any branch or office established for the provision of any service.”



- agreed not to compete with your competitors for particular customers (whether named or by class) and in respect of any products/ territories?
- shared any data on your prices (including input costs), markets that you operate in, production levels and other sensitive information with your competitors at any occasion?
- shared individualized and detailed current and/or forecasted sensitive and confidential information regarding prices/ production/ markets/ businesses with your competitors or has the level of information merely been historical and aggregated?
- discussed future investment plans, production capacity or inventories with your competitors?
- been privy to discussions at trade association meetings that involved discussing any/ all of the above data amongst its members, who compete with each other in the same market – even if you did nothing about it?

If your answer to any of the above questions was “ Yes”, “Maybe” or “I am not sure”, you need to read on...

A. How does the Competition Act perceive your conduct in relation to any of the above behaviour?

- The Act broadly defines an agreement as including any oral or written arrangement, understanding or action.
- Your conduct on the market pursuant to your discussions with fellow competitors/ trade association members may be viewed as a “**cartel**” that is presumed to have an appreciable adverse effect on competition in India.
- Any discussions relating to fixing of prices, limiting output, allocating markets or customers, bid rigging, etc. are presumed to create an appreciable adverse effect and are thus anti-competitive.
- Your arrangements/ agreements/ understandings with competitors (whether directly or through trade associations) may be declared void.

B. What are the consequences of violating provisions relating to anticompetitive agreements?

- You can be ordered by the CCI to modify/ discontinue/ not re-enter into any arrangements/ agreements/ understandings with competitors/trade associations that may relate to anti-competitive conduct.
- You are likely also to have to pay a significantly high monetary penalty for your participation in a cartel, i.e. up to 3 times of your profits for each year of the continuance of the offending behavior/agreement OR 10 percent of your turnover for each year of continuance, whichever is higher.
- You can also be directed to pay costs, additional monetary penalties and/or face criminal penalties, if you do not comply with the CCI’s orders.



- In the event of an adverse order, you may also have to pay compensation to any third parties aggrieved by your anti-competitive conduct.

C. How can you mitigate your liability for participating in a cartel?

- The Act provides that if you, as an enterprise which was/is engaged in a cartel, make a **full, true and vital disclosure** about the cartel that you were/are involved in, you may have lesser penalties imposed upon you by the CCI, as opposed to what may have been imposed as prescribed under the Act or any rules/ regulations framed thereunder.
- In order to secure such a lesser penalty, you will have to make a full, true and vital disclosure, and continue to co-operate with the CCI genuinely, fully, continuously and expeditiously throughout the period of investigation and until the completion of the proceedings before the CCI.

D. What do the Lesser Penalty Regulations deal with?

- The Lesser Penalty Regulations have specifically been introduced by the CCI to prescribe the method and extent to which the CCI may grant lesser penalties to applicants that make a vital disclosure of a cartel they have been involved in, in accordance with the parameters prescribed in the Lesser Penalty Regulations.
- The Lesser Penalty Regulations provide detailed rules on the procedure for:
 - applying for lesser penalty; and
 - the grant of lesser penalty.

E. What are the conditions for grant of lesser penalty?

- The Lesser Penalty Regulations stipulate essential conditions necessary for grant of a lesser penalty. These *inter-alia* include :
 - prohibition from further participation in the cartel, unless otherwise directed by the CCI;
 - provision of vital evidence to the CCI;
 - genuine, full, continuous and expeditious cooperation with the CCI throughout its investigations; and
 - the applicant not concealing, destroying, manipulating or removing any relevant documents relating to the cartel.
- Any reduction in the monetary penalty is a matter of discretion of the CCI and will be based on *inter alia*:
 - the stage at which the applicant comes forward with a disclosure;
 - the evidence already in possession with the CCI; and
 - the quality of the information relied upon by the applicant for such disclosure.



F. How can you make an application for imposition of lesser penalty?

- You can either :
 - make an application as per the form of application prescribed in the Schedule to the Lesser Penalty Regulations; or
 - contact the designated authority **orally**, by email or by fax.
- If you communicate information orally or via email/ fax, you will be required to submit a written application as per the Schedule to the Lesser Penalty Regulations, within a maximum time frame of 15 days.
- In the event you fail to submit your application within the 15 day time frame or such extended time period as the CCI grants, you may have to forfeit your claim for priority status and consequently for the benefit of lesser penalty.

G. What happens after you make your application?

- The date and time of your application will be recorded by the CCI.
- The designated authority will then place your application before the CCI within 3 working days of its receipt.
- The CCI will mark the priority status of your application and will convey it to you either by phone, email or fax. The CCI will also provide a written acknowledgment on the receipt of your application, informing you of your priority status.
- In the event the CCI finds that you have not furnished full and true disclosure of the information/ evidence as required by the Schedule to the Lesser Penalty Regulations or by the CCI from time to time, the CCI may reject your application; *provided however that* before rejecting your application for lesser penalty, the CCI is required to provide you with an opportunity of hearing.
- It is important to note that:
 - the CCI will not consider the status of subsequent applicants unless it has decided the status of the first applicant; and
 - applications filed subsequent to an application that is rejected by the CCI will move up in order of priority for the reduction in penalty.

H. To what extent can your penalties be reduced if you co-operate with the CCI?

- You can benefit from a reduction in penalty of up to 100%, if you are the first to have made a **vital disclosure** to the CCI, which disclosure enables the CCI to either:
 - form a *prima facie* opinion regarding the existence of a cartel, where the CCI did not have sufficient evidence at the time of your application to form such an opinion; or



amarchand mangaldas

- establish the contravention of the Act by providing evidence which the Director General or the CCI did not have in its possession in a matter under investigation.
- An applicant who applies for lesser penalty after the first application for lesser penalty can also benefit from a reduction in penalty of up to or equal to 50%, upon making a disclosure of evidence that provides **significant added value** to the evidence already in possession of the CCI or the Director General.
- Similarly, applicant(s) who are marked as third in the priority status may be granted a reduction of penalty up to or equal to 30% of the full penalty leviable, upon making a disclosure of evidence that provides **significant added value** to the evidence already in possession of the CCI or the Director General.

I. Is your application confidential?

- Your identity as well as the information disclosed by you will remain confidential.
- The requirement on confidentiality, however, can be dispensed with when:
 - disclosure is required by law;
 - you have agreed, in writing, to a disclosure; or
 - there has been a public disclosure by you.

Contact Us

We are available to discuss any concerns that you may have arising out of the Lesser Penalty Regulations. Please feel free to contact our team on:

Mrs. Pallavi S. Shroff, Partner and Head of Competition Law, New Delhi

- Email: pallavi.shroff@amarchand.com
- Mobile: +91 (0) 9810099911

Mr. Ashwath Rau, Partner, Mumbai

- Email : ashwath.rau@amarchand.com
- Mobile: +91 (0) 98200 08533

20 August 2009

Disclaimers

This document is not a substitute for legal advice. The content is intended for general informational purposes only. Readers should consult lawyers at the Firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

© All rights reserved.

No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium whether electronically or otherwise and whether or not transiently or incidentally to some other use of this publication) without our prior written consent.