



## FIRST INDIAN LENIENCY DECISION

### INTRODUCTION

The Competition Commission of India (CCI) in the first ever decision involving leniency in a cartel case (*Suo Moto Case No. 03 of 2014 – In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*), published on 19 January 2017, granted a 75% reduction in penalty to M/s Pyramid Electronics (*Pyramid*), after it confessed to being part of a bid rigging cartel in violation of Section 3(3)(d) of the Competition Act, 2002 (*Competition Act*).

### BACKGROUND

The case was initiated based on an information received by the CCI from the Central Bureau of Investigation, alleging cartelisation among three firms, namely Pyramid, M/s R. Kanwar Electricals (*Kanwar*) and M/s Western Electric and Trading Company (*Western*) (together, the *Opposite Parties*). Based on this, the CCI passed a *prima facie* order directing the Office of the Director General (DG) to investigate. Following the receipt of a notice from the DG, Pyramid filed a leniency application under Section 46 of the Competition Act read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (*Lesser Penalty Regulations*).

### LEGAL POSITION ON LENIENCY IN INDIA

Section 46 of the Competition Act provides for imposition of lesser penalty on a member of a cartel who makes *full, true and vital disclosure* in respect of the cartel. Under the Lesser Penalty Regulations, the first party to make such disclosure to the CCI can benefit from a reduction in penalty of up to 100%, if the disclosure enables the CCI to either (a) form a

*prima facie* opinion regarding the existence of a cartel, or (b) establish a cartel in a matter under investigation where the DG/CCI did not have sufficient evidence to do so at the time of the application. Subsequent applicants for lesser penalty may also secure up to 50% or 30% reductions, respectively, if they disclose evidence that provides *significant added value* to the evidence already in possession of the CCI/ DG. Further, a leniency applicant must co-operate until the completion of the proceedings before the CCI/DG, in order to secure a reduction in penalty.

### PYRAMID'S LENIENCY APPLICATION

In support of its leniency application, Pyramid argued that it played a vital role in explaining the functioning of the cartel to the DG, and had marshalled cogent evidence which disclosed the *modus operandi* of the cartel in detail, providing the “missing links” in the DG's investigation. Additionally, Mr. Sandeep Goyal, an ex-partner of Pyramid who had since retired, had also made himself available during the investigation. Pyramid also stated that it (a) would continue to co-operate with the CCI/DG; (b) had ceased further participation in the cartel; and (c) had not taken any steps to coerce others to participate in the cartel.

### OTHER EVIDENCE

In contrast to Pyramid's stand, the other Opposite Parties contested the existence of the cartel altogether. Given this, the CCI also relied on (a) e-mails regarding the future rates to be quoted on tenders, (b) similarity with actual rates quoted to the Indian Railways; (c) records of frequent calls, and (d) corroborating statements on oath, in addition to the information received under Pyramid's leniency application.

# COMPETITION MATTERS



Shardul Amarchand Mangaldas

For private circulation only

New Delhi, 20 January 2017

## PENALTIES

Under Section 27(b) of the Competition Act, the CCI may impose a penalty which is higher of, up to three times (300%) of net profit or 10% of turnover, for each year of the continuation of the cartel, on each cartel participant. The cartel arrangement in this case only existed during 2013, and accordingly, the CCI considered the turnover and net profit for FY 2012-13 only.

While considering the penalties to be imposed, the CCI evaluated the higher of the profit and turnover for each cartel participant and imposed a penalty of INR 2,09,14,961 (approximately USD 307,125) being 100% of net profit on Western, and INR 20,01,012 (approximately USD 29,384) being 3% of the turnover of Kanwar, which is approximately one-third of the maximum penalty that could be imposed on either yardsticks, bearing in mind factors, such as the duration of the cartel, volume and value of the tender affected by the cartel.

## REDUCTION IN PENALTY FOR THE LENIENCY APPLICANT

In relation to Pyramid, adopting a similar approach, the CCI determined a penalty of INR 62,36,634 (approximately USD 91,582) being 100% of the net profit for FY 2012-13. However, in view of Pyramid's leniency application, the CCI granted a 75% reduction in penalty, and imposed a penalty of INR 15,59,159 (approximately USD 22,895).

While considering the grant of reduction in penalty to Pyramid, the CCI took into account the following factors:

- (i) Pyramid was the first and the only party to accept the existence of the cartel;
- (ii) the evidence submitted by Pyramid played a significant role in revealing the *modus operandi* of the cartel which substantiated the evidence in possession of the CCI; and
- (iii) the co-operation extended by Pyramid during the investigation,

which together strengthened the investigation and assisted in establishing the existence of the cartel, by completing the chain of events. However, given the stage at which Pyramid had approached the CCI (i.e., after the commencement of the DG investigation) and the evidence already in the CCI's possession at the time of the leniency application, the CCI did not grant a complete waiver of penalty to Pyramid, as permitted under the Lesser Penalty Regulations.

## INDIVIDUAL PENALTIES

The CCI also imposed penalties on the individuals in charge of the Opposite Parties, at the rate of 10% of their average income for the three preceding financial years (i.e., 2011-12, 2012-13 and 2013-14). However, Mr. Goyal, who confessed to the conduct and co-operated with the investigation, was granted a 75% reduction in the penalty, in line with the reduction granted to Pyramid. Accordingly, he was only penalised INR 11,648 (approximately USD 171) instead of INR 46,594 (approximately USD 684).

## ANALYSIS

This is a seminal case in CCI's jurisprudence and marks the "coming of age" of the CCI's cartel enforcement regime. While the provisions on leniency have been in force since the Competition Act came into force in May 2009, it is only 7 and a half years later that the first case involving a leniency application has been decided by the CCI.

# COMPETITION MATTERS



Shardul Amarchand Mangaldas

For private circulation only

New Delhi, 20 January 2017

Crucially, the CCI has extended the scope of the leniency provisions (applicable to enterprises) also to the responsible individuals involved in the conduct, based on their co-operation with the investigation. This factor, along with the significant reduction in penalty, is extremely encouraging and should allay concerns in relation to the exercise of the CCI's wide discretion under the Lesser Penalty Regulations. The CCI has also exercised its discretion judiciously in granting a 75% reduction in penalty as opposed to 100%, bearing in mind the stage at which the leniency application was made, and the evidence in its possession, at the time of receipt of the leniency application. This also signals that the CCI would not be averse to granting a greater reduction, including a complete waiver of penalty, where the leniency application enables the CCI to form a *prima facie* opinion about the cartel.

Interestingly, the leniency applicant (and the responsible individual) specifically waived confidentiality assured under Regulation 6 of the Lesser Penalty Regulations not only on the information provided but also on their identity. As a

result, there was no occasion for the CCI to provide guidance on how they would balance the potentially conflicting interests of confidentiality of the leniency applicant on the one hand, and rights of natural justice and due process of the other parties on the other hand, especially in a contested case, as this one.

Although the CCI has not referred to the relevant turnover in determining the extent of penalties to be imposed, it has borne in mind the duration of the cartel and volume and value of the tenders involved. It is also heartening to note that the CCI has undertaken a threadbare analysis of the facts and has rightly evaluated not only the evidence provided by the leniency applicant, but also additional evidence gathered by the DG, thereby fortifying their order.

This case heralds the beginning of an important chapter in cartel enforcement in India and one is hopeful that the CCI will continue to do so with such well-reasoned jurisprudence.

## COMPETITION LAW TEAM

Pallavi Shroff

Managing Partner - Delhi Region  
pallavi.shroff@AMSShardul.com

John Handoll

National Practice Head – Competition Law  
john.handoll@AMSShardul.com

Naval Satarawala Chopra

Partner  
naval.chopra@AMSShardul.com

Shweta Shroff Chopra

Partner  
shweta.shroff@AMSShardul.com

Harman Singh Sandhu

Partner  
harman.sandhu@AMSShardul.com

Manika Brar

Partner  
manika.brar@AMSShardul.com

Aparna Mehra

Partner  
aparna.mehra@AMSShardul.com

### Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.

© Shardul Amarchand Mangaldas & Co

Authors: Shweta Shroff Chopra, Manika Brar, Anandh Venkataramani