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UNDERSTANDING LENIENCY PROGRAM UNDER THE US, EU AND INDIAN COMPETITION LAWS*

INTRODUCTION

One point that almost all competition authorities agree upon is that there is a requirement for deterring cartel behaviour. Over the years different tools have been employed to effectively curb them. There are certain prerequisites, the essential cornerstones that must be in place before a jurisdiction can successfully implement a leniency program. First, the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. These three major cornerstones — severe sanctions, heightened fear of detection, and transparency in enforcement policies — are the indispensable components of every effective leniency program.[1]

> Firms that participate in cartels are usually fully aware of the unlawfulness of their conduct. They know, therefore, that they should avoid the creation of incriminating documents that would be discovered by a competition authority when conducting surprise inspections ('dawn raids'). They will often arrange to meet in jurisdictions where they are unlikely to be scrutinized by competition authorities and they may use code-names and resort to other practices to avoid detection. It follows that competition authorities may find it very

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[1] Scott D. Hammond, *Cornerstones of An Effective Leniency Program,* available at https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program (Last accessed in Oct, 2017)

> difficult to compile evidence that will satisfy a court to the required standard of proof that there has been illegal behaviour. For this reason a lot of thought has been given to the question of what additional tools are needed to enable competition authorities to operate effectively.[2]

The adoption of whistle blowing and leniency has been implemented by both Department of justice in USA and the European Commission in the EU for busting cartels. Whistleblower and leniency is vital to the competition authorities as gathering evidence of the existence of cartels is difficult, but the whistle blower provides substantive information to the authorities to further the investigation and accumulate much needed evidence. He may provide informative data about meetings, contracts, the participants in the cartel and the anti-competitive practices covered by it. In exchange of this information, the whistle-blower is given immunity or reduction in penalty that might have been imposed if the competition authorities discovered the cartel before the relevant information was given by him.

In the OECD Cartel Report[3] , the importance of leniency is further explained as:

> The programs uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases.

Leniency also helps 'overcome jurisdictional obstacles associated with obtaining witnesses and evidence located abroad, as well as with investigating and ultimately sanctioning foreign cartel participants.'[4] Indian competition law has enacted provisions on leniency; however, they have not lead to any major breakthrough in busting cartels in India. Following is a brief examination of leniency programmes in more established competition law jurisdictions of USA and EU along with Indian provisions regarding it.

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[2] Richard Whish , *Control of Cartels and Other Anti-competitive Agreements,* available at http://www.circ.in/pdf/RichardWhishCPS-03.pdf (Last accessed in Oct, 2017)

[3] OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002*,p 11, available at https://www.oecd.org/competition/cartels/1841891.pdf (Last accessed in Oct, 2017)

[4] Versha Vahini, *Indian Competition Law,* Lexis Nexis

Leniency policy under US antitrust law

The antitrust authorities in the US adopted leniency programme as early as 1978. The initial programme was not very successful as it 'failed on the principles of transparency and certainty'.[5] Further it was not an automatic immunity rather on the discretion of the DOJ. It was in the year 1993 that the programme was changed significantly. It bought in more clarity, widen the scope of amnesty. Presently in the US there are two types of leniency i.e. corporate and individual. The rationale behind this is the fact individuals found guilty may be subsequently punished with imprisonment.

Under **corporate leniency/ corporate immunity/ corporate amnesty** policy which were introduced in the year 1993, if a corporation reports its illegal antitrust activity at an early stage, then it is not charged criminally for the activities being reported. As per the corporate leniency policy[6] floated by DOJ, leniency would be granted before the investigation has begun, if the following conditions are met:

1. At the time the corporation comes forward to report the illegal activity; the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

In case a corporation does come forward whether before or after the investigation has begun to report an illegal antitrust activity but does not meet all six of the conditions above, it may still be granted amnesty if the following conditions are met:

[5] R. Hewit Pate, *International Anti-Cartel Enforcement',* paper presented at ICN Cartel Workshop Sydney, Australia, available at https://www.justice.gov/atr/speech/international-anti-cartel-enforcement (Last accessed in Dec, 2017)
[6] DOJ , *Corporate Leniency Policy*, available at https://www.justice.gov/atr/file/810281/download (Last accessed in Oct, 2017)

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

The application of condition seven above depends primarily upon how early the corporation comes forward and whether it coerced another party to participate in the illegal activity. In case the corporation comes out before the investigation begins, the burden of satisfy this condition would be low. The burden would increase the closer the division comes to having evidence that is likely to result in a sustainable conviction.

Once a corporation qualifies for leniency all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.[7]

[7] *Supra* note 3

Corporate Leniency Procedure

Once the request for leniency is received by the Antitrust Division and it believes the corporation qualifies for it, favourable recommendation is forwarded to the Office of Operations. This includes reasons why leniency should be granted. 'Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared' [8]. Subsequently, the Director of Operations reviews the request and forwards it to the Assistant Attorney General for final decision. However, if the division recommends against leniency, corporate counsel may seek an appointment with the Director of Operations to make their views known. Since the introduction of leniency programme, cartel detection has increased drastically.

Leniency Plus

If it is too late for a company under investigation for one cartel to obtain leniency, there is an option for receiving additional credit for giving sustainable information and assistance in a plea agreement of its involvement in a separate cartel. Number of factors are considered for this, including: (1) the strength of the evidence that the cooperating company provides with respect to the leniency investigation; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood that the Division would have uncovered the additional violation without the self-reporting, e.g., if there were little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Leniency Plus matter, then the credit for the disclosure will be greater. Of these three factors, the first two are given the most weight.[9]

Leniency for individuals

An year after the introduction of corporate leniency in the US, DOJ announced individual leniency policy for individuals who approach the antitrust division 'on their own behalf, not as part of a

[8] *Supra* note 6

[9] For a fuller discussion of substantial assistance sentencing departures and the Division's Leniency Plus program, see Brent Snyder, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Individual Accountability for Antitrust Crimes, Speech Before the Yale School of Management Global Antitrust Enforcement Conference (Feb. 19, 2016), https://www.justice.gov/opa/file/826721/download (Last accessed in Oct, 2017) ; Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Prosecuting Antitrust Crimes, Speech Before Georgetown University Law Centre Global Antitrust Enforcement Symposium (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download; and
Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), https://www.justice.gov/atr/file/518436/download.

corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware.'[10] By giving leniency to the individuals, it means not charging him criminally for the activity being reported.

Following are the conditions laid down for such individuals:

1. At the time the individual comes forward to report the illegal activity; the Division has not received information about the illegal activity being reported from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

The procedure for grant of leniency under individual policy is similar to that under corporate policy. The Policy also provides an alternative to persons who do not qualify the above conditions. Such people would be considered for statutory or informal immunity from criminal prosecution. This immunity is based on the decision of the Division which exercises is 'prosecutorial discretion' on case to case basis.

In case a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation are considered for leniency only under the provisions of the Corporate Leniency Policy and not under individual's leniency. Leniency policy in the US has gathered much momentum and success over the years with sufficient publicity and severity of sanctions. The Antitrust Division of DOJ had obtained 'corporate fines at or above the former $10 million statutory maximum in 46 cases and fines of $100 million or more against seven corporations.'[11] More than ninety percent of cartel cases since 1999 have been assisted by leniency applicants. The fines in both corporate and individual leniency have been reviewed and increased over the years making them more burdensome for competitors to enter into cartels. In particular, parties have sought the benefits of the leniency programme in a number of notable recent cases, including the DOJ's investigations of

[10] DOJ ,*Leniency Policy For Individuals,* available at https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf (Last accessed in Oct, 2017)
[11] Scott D. Hammond, *Cornerstones of An Effective Leniency Program,* available at https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program (Last accessed in Oct, 2017)

a large number of auto parts cartels[12], the air cargo case[13], liquid crystal display (LCD) panels[14] which was investigated by competition authorities both in the EU and US, dynamic random access memory (DRAM[15]) and numerous others.

Leniency Programme under EU competition law

The European Union adopted leniency programme in 1996[16]. The early version of it was narrow in scope and was revised in the year 2002 and then in the year 2006. The term 'leniency' refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case.[17]

Under the EU law, leniency policy offers companies which are part of a cartel to self-report and hand over evidence leading to either total or partial immunity from fines which would otherwise be imposed on them if they would not have reported the anti-competitive behaviour. The rationale behind the programme remains the same which is to 'not only pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.'[18]

The condition to obtain total immunity (known as Type 1A and 1B) under the policy is that he should be the first member of the cartel to inform the Commission of an undetected cartel. The

12 DOJ, Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars, available at https://www.justice.gov/opa/pr/nine-automobile-parts-manufacturers-and-two-executives-agree-plead-guilty-fixing-prices (Last accessed in Oct, 2017)

13 ABA Section of International Law, *Air Cargo Cartel,* available at https://www.americanbar.org/content/dam/aba/events/international_law/2013/09/2013_aba_moscow_disputeresolutionconference/antitrust4.authcheckdam.pdf (Last accessed in Oct, 2017)

14 EU, relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf (Last accessed in Oct, 2017)

15 Global Competition Review, *US settles with DRAM cartel,* available at http://globalcompetitionreview.com/article/1052475/us-settles-with-dram-cartel (Last accessed in Oct, 2017)

16 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases Official Journal C 207, 18.07.1996 p. 4-6, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996Y0718(01)&from=EN (Last accessed in Oct, 2017)

17 EU, *the Commission Notice on cooperation within the Network of Competition Authorities,* 2004/C/101/03, Para 37, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN (Last accessed in Oct, 2017)

18 European Commission, *Leniency* , available at http://ec.europa.eu/competition/cartels/leniency/leniency.html (Last accessed in Oct, 2017)

information must be sufficient for the Commission to launch an inspection of the premise of the companies allegedly involved in the cartel. In case the Commission already posses sufficient information for inspection or has already been done, such company must provide which would enable the Commission to prove the cartelization. The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company. The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.[19]

Such an undertaking must provide the following information to the competition authority along with its application:

– The name and address of the legal entity submitting the immunity application;

– The other parties to the alleged cartel;

– A detailed description of the alleged cartel, including:

  – The affected products;

  – The affected territory (-ies);

  – The duration; and

  –The nature of the alleged cartel conduct;

– Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence);

– Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.[20]

For companies which do not qualify for a full immunity, they may benefit from a reduced fine (known as Type 2) if they provide which represent 'significant added value' to the already in the possession of the Commission. By this it means that the information must be significant to reinforce Commission's ability to prove the infringement. The company disclosing the information must have also terminated their participation in the said cartel.

European Commission has also provided a 'model leniency programme' (the European Competition Network (ECN) Model Programme), the purpose of which is:

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[19] *Id.*

[20] European Competition Network, *Model Leniency Programme*, available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf (Last accessed in Oct, 2017)

..Is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Programme aims to alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed by introducing a model for a uniform summary application system.[21]

Procedure for immunity

An undertaking wishing to benefit from leniency has to apply to the competition authority and provide it with the information specified in the model programme. Before making a formal application, the applicant may on an anonymous basis approach the competition authority in order to seek informal guidance on the application of the leniency programme.

Once a formal application has been made according to the model programme, the competition authority will, upon request, provide an acknowledgement of receipt confirming the date and time of the application. The competition authority then assesses the applications in relation to the same alleged cartel in the order of receipt so as to decide which undertaking would get the leniency.

Subsequently, when the concerned competition authority has verified the evidence submitted and that it is sufficient to meet the 'evidential threshold for immunity' it would grant the undertakings conditional immunity from fines in writing. In case the evidence is not sufficient then the authority would inform the concerned undertaking in writing the rejection of the application for leniency. The undertaking may request the competition authority to consider its application for a reduction of the fine.

The competition authority would take its final position on the grant of immunity at the end of the procedure. If after having granted conditional immunity, it ultimately finds that the immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the competition authority would inform the applicant of this promptly. If immunity is withheld because the competition authority finds at the end of the procedure that the six

[21] *Id*

conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any other favourable treatment under this programme in respect of the same proceedings.[22]

Over the years due to the efforts by the National Competition Authorities under the aegis of European Commission, number of undetected cartels in European been stopped in different sectors such as agriculture, steel, construction, transport, electrical appliances and chemical.[23] For example in the period from Feb, 2002 till the end of 2005 the Commission received 167 applications under the 2002 Leniency Notice. Of these applications, 87 were requests for immunity and 80 were requests for reduction in fines.[24]

It is interesting to note, that to make the leniency policy more attractive towards potential whistle blowers in the Netherlands the Dutch Competition Authority launched a major initiative to bring an end to cartels in the construction sector by encouraging firms to admit their involvement and to seek leniency; the Dutch Government leant its support to the campaign. In its report for 2004 the Authority reported that 481 companies had decided to 'come clean' and to notify their illegal behaviour to it. The Dutch example is a striking illustration of what a campaign of this kind can achieve.[25] Such innovative application of the programme is noteworthy and must be considered by the CCI as well.

Leniency Programme in India

The Indian policy on leniency stems out from Sec 46 of the Competition Act, 2002. Under it if the Commission is satisfied that 'any producer, seller, distributor, trader or service provider' who is part of a cartel in violation of Sec 3 , has made a full and true disclosure in respect of the alleged violation which is vital . Such a producer, seller, distributor etc may be imposed a lesser penalty. For establishing a leniency policy, the Competition Commission formulated the Lesser Penalty Regulations (LPR) in 2009 which contains the substantive provisions regarding leniency in cases of violation of Sec 3.

[22] *Supra* note 19
[23] European Commission, *Competition: Commission proposes changes to the Leniency Notice,* available at http://europa.eu/rapid/press-release_MEMO-06-357_en.htm?locale=en (Last accessed in Oct, 2017)
[24] *Supra* note 20
[25] *Supra* note 3

The Indian LPR does not give a mandatory immunity. Under sub –regulation 4, there are the following lesser penalties that 'may be granted':

1. Reduction of penalty up to or equal to hundred percent, 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 Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged to have violated section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion[26].

2. After the first disclosure is made, the penalty may be lessen for the subsequent applicant if they submit evidence which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General ' to prove the existence of a cartel. The term 'significant added value' has been imported from the leniency policy of the European Commission. The order for monetary leniency for such applicants is to be in the following order:

- 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.

Hence, the leniency to cartel participants may be granted in the Indian context only up to three applicants and may be total or partial.

Meaning of the term 'applicant'

Under the Lesser Penalty Regulations the term 'applicant' means an enterprise, as defined in clause (h) of section 2 of the Act, who is or was a member of a cartel and submits an application for lesser penalty to the Commissions. Therefore, the Regulation talks about corporate leniency but no specific mention of an individual leniency has been made neither under LPR or Sec 46 of the Competition Act, 2002.It is presumed that it is includes both.

[26] The Competition Commission Of India (Lesser Penalty) Regulations, 2009, available at http://www.cci.gov.in/sites/default/files/regulation_pdf/regu_lesser.pdf (Last accessed in Oct, 2017)

In this context, it is significant to consider that till date there has been only one case in which CCI has granted lesser penalty. In the case of *In re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*[27] leniency application was moved by one of the enterprises which was part of the bid rigging and its partner Sri Sandeep Goyal. The fact that CCI granted a reduction of 75% to both the applicant and its partner, suggests that any reduction of penalty for the applicant enterprise will result in a commensurate reduction of penalty for the responsible individual as well, assuming of course that the individual has cooperated with the CCI[28]

Procedure for the grant of lesser penalty

Under sub-regulation 5, the applicant or its authorised representative make application containing of the relevant information mentioned under the Schedule , or contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within three working days, put up the matter before the Commission for its consideration. It is interesting to note here that under the LPR, mo leniency application can be entertained after the investigation report of the DG is received by CCI. In other words the applicant must make the disclosure after the investigation has started but before the report has been submitted on it by the DG. Another noteworthy point where the Indian position diverges from the EU is that in EU application for leniency may be made even for an undetected cartel which is not the case in India where only alleged contraventions under investigation can have applications made for lesser penalty.

The Commission gives the applicant a priority status and the designated authority conveys the same to the applicant either on telephone, or through e-mail or fax. In case the information receive is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days. The Commission also records the date and time of receipt of the application. If the application, along with the necessary documents, is not received within a period of fifteen days of the first contact or during the further period as may be extended by the

[27] Suo Moto Case No. 03 of 2014

[28] Khaitan & Co, *India : Competition Commission of India Grants Leniency For the First Time*, available at http://www.mondaq.com/india/x/562660/Antitrust+Competition/Competition+Commission+Of+India+Grants+Leniency+For+The+First+Time (Last accessed in Oct, 2017)

Commission, the applicant may forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.

After a written acknowledgement by the Commission through its designated authority, the application is evaluated. Only after the first application has been evaluated that the next applicant is considered by the Commission. If the Commission is of the opinion that the applicant has not made full disclosure of the information and evidence, it may reject the application after providing the applicant an opportunity to be heard.

The Regulation also lay down certain conditions for lesser penalty which have to be adhered by the applicant, they are:

1. Cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
2. Provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Act;
3. Provide all relevant information, documents and evidence as may be required by the Commission;
4. Co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
5. Not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a carte.

In case the applicant does not comply with these conditions, 'the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.' Other than these, the Commission may subject the applicant to any other restrictions or conditions as it deems fit.

Computation of lesser penalty-

Though there are no guidelines giving more clarity to the process by which the Commission would decide the lessening of penalty , sub- regulation 3 (4) lays down that the reduction of the monetary penalty is at the discretion of the Commission which is to be exercised with due regards to :

(a) the stage at which the applicant comes forward with the disclosure;
(b) the evidence already in possession of the Commission;

(c) the quality of the information provided by the applicant; and
(d) the entire facts and circumstances of the case.

Unlike the Guidelines by the European Union, there are no detailed factors, aggravating and mitigating circumstances which have been laid down for the exercise of discretion in deciding the monetary penalty under the Regulation. Another point to be considered is that whether an application is successful or not, the Regulation does not offer immunity from civil claims to the applicant, making him vulnerable for future civil actions by other members of the cartel.

Conclusion

Laws are legitimate only if the State can guarantee at least an average compliance of it. Enforcement is a way of communication. The methods and intensity of enforcement in a given field of law communicate the public commitment to the realisation of the goals laid down in legislation. Weak enforcement signals that the intention of the State is not serious regarding the legislation which in turn undermines the law's legitimacy. The provisions relating to leniency under the Competition Act, 2002 are vague and have not attracted whistleblowers making the programme unsuccessful. CCI needs to re-evaluate its provisions and introduce unique options so that members of cartels existing in India come out and co-operate with the investigation on curbing such harmful agreements in the Indian markets.