

Immunity, Sanctions & Settlements 2014

India

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Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

Section 46 of the Competition Act, 2002 (Competition Act), along with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (the Lesser Penalty Regulations), provide the legal framework under which the Competition Commission of India (CCI) can grant full or partial immunity to successful applicants from administrative penalties. The leniency programme is only available for cartel conduct.

The first applicant may receive up to full immunity from a possible fine (ie, a 100 per cent reduction in financial sanctions).

Any immunity granted by the CCI will not extend to any private actions for damages initiated by third parties against the applicant.

2 Do the protections extend to current and former officers, directors and employees?

Although the Competition Act and the Lesser Penalty Regulations are silent on this aspect, the CCI is expected to extend such protection to the current and former employees of the immunity applicant.

If an enterprise fails to receive immunity, every person in charge of and responsible for the conduct of the company at the time of the cartel conduct will be deemed to have contravened the Competition Act. The Competition Act makes officers, employees and directors vicariously liable for an enterprise's conduct, unless they prove the contravention was committed without their knowledge or that they exercised all due diligence to prevent such contravention.

The current and former officers (in their individual capacities) may report the conduct to the CCI. In such cases, the enterprise will not be able to take the benefit of such immunity.

3 Is immunity available after an investigation begins?

Yes, immunity can be claimed by an enterprise after an investigation has begun. The applicant must apply for immunity before the CCI's investigation agency, the director general concludes its investigation and forwards the report to the CCI. However, the applicant shall not be eligible for immunity if, at the time of such application, the CCI or the director general already have sufficient evidence to establish the existence of the cartel.

4 What are the eligibility requirements before an investigation begins?

To qualify for grant of immunity, the following conditions must be satisfied:

- the applicant is the first to provide full and true information or evidence to the CCI that allows the CCI to form a prima facie opinion regarding the existence of a cartel and initiate an investigation;

- the CCI did not, previously, have sufficient evidence to form such an opinion;
- the applicant ceases to have further participation in the cartel; and
- the applicant cooperates fully, continuously and expeditiously with the CCI and the director general and does not conceal, destroy or manipulate any document or information.

5 What are the eligibility requirements after an investigation begins?

Once an investigation has begun, an enterprise may qualify for full immunity, provided that no other enterprise has applied for immunity and the evidence submitted by the applicant is sufficient to establish the existence of a cartel. However, the applicant shall not be eligible for immunity if, at the time of such application, the CCI or the director general already have sufficient evidence to establish the existence of a cartel.

In addition, the applicant will have to cease its participation in the cartel and undertake to cooperate with the CCI.

6 Will the applicant have to admit to a violation of law?

Yes. The term 'cartel' is defined as '[an] agreement [...to] limit, control or attempt to control the production, distribution, sale or price of or trade in goods or provision of services'. According to the Competition Act, only a cartel participant is eligible to make an application for leniency. As such, the applicant must admit its participation to the cartel.

7 Are ringleaders or initiators of the conduct eligible?

Yes. The Competition Act does not make a distinction between ringleaders and other participants of a cartel.

8 When must the applicant terminate its involvement in the conduct?

An applicant must terminate its involvement in the cartel immediately upon filing its application with the CCI, except where the CCI directs the applicant to continue its participation.

9 What constitutes termination of the conduct?

While there is no explicit guidance on this issue, as a matter of practice, the applicant is expected to completely cease any discussion or contact in furtherance of the alleged conduct.

10 Will the applicant be required to make restitution to victims?

No. However, the Competition Act allows for 'follow-on' claims (including

class actions) against the applicant by any person who has suffered any loss on account of the cartel conduct.

11 Can more than one applicant qualify for immunity?

No. Only one enterprise can qualify for complete immunity in a given cartel.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

No. See question 2.

13 Does the afforded protection extend to any non-antitrust infringements?

No. The immunity is limited to antitrust infringements under the Competition Act.

14 What confidentiality assurances are given to the first applicant to report?

Under the Lesser Penalty Regulations, the CCI is obliged to treat the identity of the applicant and the information provided by it as confidential, except where:

- disclosure is made with the consent of the applicant;
- the disclosure is required by law; or
- the applicant has already made public disclosure of such information.

15 Does the authority publish guidance regarding the application of the programme?

Yes. The CCI has published an advocacy booklet on the leniency programme, which is available at: www.cci.gov.in/May2011/Advocacy/Leniency.pdf. However, the contents of the advocacy booklet cannot be treated as the official or binding views of the CCI.

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

No, except where other jurisdictions require ongoing participation in the cartel to conduct their investigation. Unless specifically directed by the CCI, such continuing participation may compromise the leniency application in India.

Immunity application and marker process

17 What is the initial process for making an application?

An applicant seeking immunity is required to establish contact with the secretary of the CCI to initiate the application process. This is typically done through counsel. Such contact may be initiated by submitting a formal written application for immunity in the prescribed format; or by applying for a marker through telephone, e-mail or fax by providing details of the existence of a cartel. The CCI will then consider the matter and inform the applicant of its priority status.

18 What information is required to secure a marker?

There is no guidance on the minimum information required to secure a marker position; and the CCI's practice has varied over time. Applicants should be able to secure a marker if they furnish the following information:

- applicant's name and address;
- contact details of the other enterprises in the cartel; and
- description of the cartel and the relevant market.

19 How much time will an applicant have to perfect its marker?

In those cases where the applicant has not submitted a written application in the prescribed format (see question 21) to initiate first contact, the CCI grants a period not exceeding 15 days to the applicant to furnish the material information in the prescribed format.

20 Can the deadline for perfecting the marker be extended?

Yes. The CCI has the discretion to extend the time for furnishing information.

21 What is required to perfect the marker?

The schedule to the Lesser Penalty Regulations prescribes the contents of a leniency application. The application should state the following:

- the applicant's name and address;
- contact details of other enterprises in the cartel;
- contact details of all individuals involved in the cartel including those who have been involved on behalf of the applicant;
- a detailed description of the cartel, its aims and objectives, details of activities, and so on;
- the affected goods or services (and the estimated volume of business affected) and territory;
- the date of commencement and the duration of the cartel;
- details of any other leniency applications (past or possible future applications) to other competition authorities in relation to the alleged cartel; and
- a descriptive list of evidence in support of the application.

To perfect the marker, the applicant should be in compliance with the eligibility requirements for the application (see questions 4 and 5); and adhere to any additional conditions or restrictions that the CCI may impose.

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

The Lesser Penalty Regulations oblige applicants to make 'full' disclosure of information. As such, the applicant is expected to have thoroughly checked its internal records and databases for information on the alleged conduct. If the additional information relates to the same cartel (for which the applicant has already secured a priority status), the applicant must submit it to the CCI. Any omission may result in the applicant losing its priority status.

On the other hand, if the additional information relates to a separate cartel, it may be advisable to submit a new application for immunity.

It is worth noting that there is no guidance from the CCI on this issue. The regulator may adopt an approach where it views the cartel activity at an industry or sector level; and not view the conduct as being several cartels within the same industry.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

No. The CCI will only consider other applicants, if the first applicant does not satisfy the conditions for grant of immunity (see questions 4 and 5).

24 What if the applicant's investigation reveals that no violation exists?

There is no guidance or decisional practice in this respect. Before arriving at the conclusion that no violation exists, the CCI is expected to call the applicant in for one or more hearings to discuss the application. If no violation is found, the CCI will dismiss the application and terminate the case. There is no provision in the Lesser Penalty Regulations that permits an applicant to withdraw its application.

25 What if the authority decides not to investigate?

The CCI can only refuse to investigate an alleged infringement if no prima facie violation of the Competition Act is made out. Indian competition rules do not permit the CCI to discontinue an investigation on policy or administrative grounds.

Immunity cooperation obligations

26 What is the applicant required to produce?

The applicant must promptly, fully and continuously cooperate throughout the investigation and thereafter, with the CCI. This obligation includes:

- responding to information requests from the CCI and the director general;
- promptly submitting any additional information (see question 22);
- not concealing, destroying or manipulating any document or information; and
- providing access to current and former (where possible) employees that were involved in the cartel.

Fulfilment of the applicant's obligation to cooperate with the director general and the CCI is one of the key criteria under the Lesser Penalty Regulations that guides the CCI in its determination of the quantum of reduction in penalties.

27 Will the applicant be required to make a written confession?

Yes. The applicant (including an individual) has to make a 'written application' describing its role in the cartel. The oral statements of employees and directors are also reproduced in writing by the director general and signed by the deponent.

28 Can third parties obtain access to the materials provided by the applicant?

The CCI is obliged to treat the identity and the information provided by the applicant under strict confidentiality. A third party may obtain access to the materials only in certain circumstances (see question 14).

These confidentiality obligations are currently untested. The director general may disclose statements and documents while investigating third parties. Such information may also form part of the director general's report and be available to other parties (being investigated) to comment upon.

Moreover, a court may order such disclosure in follow-on litigations.

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

Implicit in the duty to cooperate with the CCI is the obligation to make reasonable efforts to secure the cooperation of employees. However, where such cooperation is refused, but the applicant has already provided sufficient evidence to meet the CCI's evidential threshold (see questions 4 and 5), the applicant will continue to be protected.

On the other hand, the employee may lose the protection (if any) accorded to him or her.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

In cases where owing to the obstructive conduct of the employee (such as destroying, falsifying or concealing evidence of the alleged cartel), the CCI forms an opinion that the applicant has not provided full and true disclosure as is required under the Lesser Penalty Regulations, the applicant would be at risk of losing its protection. To secure the protection, the applicant would have to establish that it can advance all evidence or information as may be required by the CCI, independent of the employees causing obstructive conduct; and such evidence is sufficient to meet the CCI's evidential threshold.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

No. However, such protection is limited to communications between an enterprise and its external counsel only.

Granting immunity

32 How does the authority announce its promise not to charge or sanction?

The CCI will communicate its decision to grant a full or partial reduction in penalty by way of a formal order. Such order may also contain additional conditions on the applicant.

Keeping in mind the confidentiality considerations stated above, it is expected that the order of the CCI would be addressed to the applicant only and not published for public records.

33 Does the authority put its commitment in writing?

Yes (see question 32).

34 Who is given access to the document?

Ordinarily the final orders of the CCI are published on its official website. It is expected that the orders of the CCI granting immunity will not be published for public records (see question 32). However, to date, there has been no order of the CCI in this regard and the practice of the CCI may vary in the future.

35 Does the authority publish a model letter for conferring immunity?

No.

Individual immunity or leniency

36 Is there an individual immunity programme?

There is no separate individual immunity programme under the Competition Act. Individuals can apply under the CCI's leniency programme in the same manner as a corporate entity.

37 What is the process for applying?

See questions 17, 18 and 36.

38 What are the criteria for qualifying?

Individual applicants are subject to the same criteria as corporations (see questions 4 and 5).

Revocation of immunity

39 On what basis can corporate immunity be revoked?

The CCI will only grant the immunity after concluding its inquiry into the alleged conduct. During this time, the applicant is expected to have made full and vital disclosure of the information and evidence; and comply with its obligations to continuously and genuinely cooperate with the CCI and the director general, and any other condition imposed by the CCI.

The CCI may revoke the immunity if it is satisfied that the applicant had in the course of the proceedings:

- not complied with the conditions of grant of immunity (see questions 4 and 5);
- had given false evidence; or
- the disclosure was not full, true and vital.

40 When can it be revoked?

The CCI may reject the application for immunity if the applicant fails to comply with its cooperation duties or does not make full and vital disclosure of the alleged conduct.

Similarly, the CCI may revoke the grant of immunity at any time if it concludes that the grounds of revocation are satisfied (see question 21).

Despite the Competition Act empowering the CCI to revoke the immunity, the Lesser Penalty Regulations only discuss the rejection of an application and

not the revocation of a grant for immunity. The CCI is expected to encourage applicants and may be disinclined to exercise its powers of rejection or revocation (as the case may be).

41 What notice is required to revoke?

Before rejecting an application or revoking a grant of immunity, the rules of natural justice mandate that the CCI give a written notice to the applicant to show cause as to its non-compliance of the Lesser Penalty Regulations. The applicant would be given an opportunity to present its case through written and oral submissions.

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes. Any person aggrieved by the CCI's decision of either granting, rejecting or revoking of immunity can challenge the decision before the Competition Appellate Tribunal (CompAT). The Competition Act also provides for a further appeal to the Supreme Court of India.

Reduction in sanctions

43 Does the leniency programme allow for reductions in sanctions?

Yes. The leniency programme under the Lesser Penalty Regulations provides for partial reduction in sanctions to the applicants that do not meet the conditions for full immunity, and are marked as second and third in the priority status. Such enterprises have to provide 'significant added value' to the evidence already in possession of the CCI to qualify for reduction in sanctions. Such evidence must enhance the ability of the CCI or the director general to establish the cartel.

44 What is the process for seeking a reduction in sanctions?

An applicant seeking benefit of reduction in sanctions must:

- terminate its participation in the cartel (unless directed by the CCI to continue);
- provide full, true and vital disclosure of 'significant added value';
- fully and genuinely cooperate throughout the investigation; and
- not conceal, destroy or manipulate evidence.

The applicant must follow the same procedure for submitting an application as stated above for the first applicant (see questions 17 and 18).

45 Is there a marker process similar to immunity applications?

Yes. See question 18.

46 Are the reductions in sanctions fixed or discretionary?

The reductions in sanctions (including full immunity) are discretionary under the leniency programme. The applicants marked with second and third priority status may be granted reductions in sanctions up to or equal to 50 per cent and up to or equal to 30 per cent, respectively, by the CCI. Apart from the above, there are no other marker positions available under the Lesser Penalty Regulations.

47 How are the reductions in sanctions calculated?

See question 46.

The most important factor for determining the reduction in sanctions will be the added value and quality of the information, documents or evidence provided by the subsequent applicants. Moreover, for the purpose of determining the extent of reduction in penalty imposed, the CCI shall consider the following factors:

- the stage of such disclosure by the applicant;
- the evidence already available to the CCI;
- the quality of information provided by the applicant; and
- the entire facts and circumstances of the particular case.

48 Are there sentencing guidelines?

No, the CCI has not yet published any sentencing guidelines. The CCI has wide discretion to impose fines of either up to three times the profit made during the cartel or up to 10 percent of the turnover of the enterprise for each year of the cartel's existence.

In 2013, the CompAT introduced the concept of 'relevant turnover' by taking the view that in case of enterprises manufacturing multiple products, the calculation of penalties should be based on the turnover of the relevant product and not the total turnover of the enterprise. The decision of the CompAT is presently under challenge before the Supreme Court of India.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

There is neither any guidance under the Competition Act nor any case law published by the CCI in this regard. However, keeping in mind that the 'quality of the information' and that the 'entire facts and circumstances of the case' will be considered by the CCI while granting a reduction in monetary penalty, the CCI may favourably consider the applicant's role in expanding the scope of the investigation.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

Reductions in sanctions for all applicants (including the immunity applicant) are discretionary. In the case of subsequent applicant(s), only the upper ceiling (up to 50 per cent reduction for the second applicant; and 30 per cent reduction for the third applicant) is fixed.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

Under the Lesser Penalty Regulations, no additional incentives are offered to the applicants after the first or full-immunity applicant. However, if the CCI withdraws the benefit of full immunity from the first applicant owing to its failure to comply with the requirements stated in the Lesser Penalty Regulations, the subsequent applicant moves up in order of priority and may be granted full immunity. Additionally, the current and former employees of the enterprise may also benefit from the reduction in penalty.

52 Does the competition authority publish guidance regarding sentencing reductions?

No. The CCI has only published a general advocacy booklet on the leniency programme, available at www.cci.gov.in/May2011/Advocacy/Leniency.pdf.

53 Does the authority provide for "Amnesty Plus" benefits?

The Competition Act does not provide for the concept of 'amnesty plus'.

54 How is the Amnesty Plus discount calculated?

Not applicable.

Cooperation obligations for sentencing reductions

55 Are the cooperation obligations similar to those for immunity applicants?

Yes (see question 26).

56 Will the applicant be required to make a written confession?

Yes (see question 27)

57 Can third parties obtain access to the materials provided by the applicant?

A third party may obtain access to the materials provided by the applicant under certain circumstances. (see questions 14 and 28).

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

Yes. In addition to the requirements of cooperation for immunity applicants (see question 29), the enterprise will need to demonstrate that its evidence provides 'significant added value' to establish the existence of the cartel.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

The effect of obstructive conduct by an employee is the same as for immunity applicants – see question 30.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

No. However, such protection is limited to communications between an enterprise and its external counsel only.

61 Can an applicant challenge the amount of the reduction of sanctions?

Yes. Subject to the upper ceiling (of 50 per cent and 30 per cent) provided under the Competition Act, the amount of reduction of sanctions granted to the applicant can be challenged by way of an appeal before the CompAT.

Settlements

62 How is the settlement process initiated?

The Competition Act does not provide for a settlement process.

63 Is the amount of the sanction always fixed in the settlement agreement?

Not applicable.

64 What role, if any, do the courts play in the settlement process?

Not applicable.

65 Are the settlement documents, including any factual admissions, made public?

Not applicable.

66 Is an admission of wrongdoing required?

Not applicable.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

Not applicable.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

Not applicable.

69 Will the authority settle with subjects who refuse to cooperate?

Not applicable.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

Not applicable.

71 May a party to the settlement agreement void the agreement after it is entered?

Not applicable.

72 Does the competition authority publish guidance regarding settlements?

Not applicable.

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Chandhiok & Associates is recognised as one of India's leading competition law practices and strategic partner in navigating India's rapidly evolving competition law landscape. The firm's clients include some of the largest Indian and international corporations; government agencies; and individuals.

The firm advises and represents clients on a full suite of competition law enforcement, including, cartels, market dominance; merger control and alliances; interplay of competition law and intellectual property rights; licencing and distribution; judicial reviews; compliance; competition policy; and sector regulation.

The Chandhiok & Associates competition team is highly regarded for its depth, responsiveness and inventive approach. The team consists of lawyers that have been part of some of the most ground breaking and high profile investigations since the competition rules were first enforced in 2009. The team regularly works in partnership with leading law firms across the globe on multi-jurisdictional mergers, alliances and international cartel investigations.

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Karan Singh Chandhiok is the practice head of the firm's competition law practice group. His practice focuses on all aspects of antitrust law. He has extensive experience in advising and representing clients on mergers, commercial arrangements, strategic alliances, behavioural (cartel and dominance) cases before the Competition Commission of India (CCI), and the Competition Appellate Tribunal. Karan has been recognised by Global Competition Review, Chambers & Partners (Asia-Pacific 2015) and the International Financial Law Review as a leading lawyer in India for competition law. He has been awarded the Asialaw Leading Lawyer for Competition and Antitrust for the past three years (2012, 2013 and 2014).

Karan advises and represents clients in hi-tech and information technology, auto and auto components, aviation, cement, steel, pharmaceutical and medical devices, real estate, chemicals, media, telecom and retail industries.

He has extensive experience in cartel investigations and has represented clients in India's first two leniency cases. Karan also counsels clients on commercial agreements especially on issues relating to rebates, discounts, licencing, distribution and regulatory compliance.

In 2011, as part of the Law Firm Working Group, Karan advised the CCI on the draft merger control regulations; and went on to take a keen part in the Committee on the National Competition Law Policy.

Karan obtained his bachelor in civil law (BCL) from the University of Oxford with a specialisation in competition law. He is dual-qualified in India and UK. Prior to moving to India, Karan worked at the London offices of Allen & Overy LLP.

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Vikram's experience covers a broad spread of sectors, including, pharmaceutical, healthcare, mining, explosives, air transport (cargo and passenger), and beverages and other consumer goods industries. Vikram has a keen understanding of economic data and its analysis; and this has consistently helped in formulating economic and legal arguments before the Competition Commission of India and the Competition Appellate Tribunal.

Vikram graduated from the University of Law, New Delhi with first class honours. Vikram also has an undergraduate degree in economics from the University of Delhi. He has authored various articles on competition law that have been published by, amongst others, the American Bar Association and the Manupatra Competition Law Reports.

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