

"CRACKING THE CARTEL CODE: UNVEILING THE EFFICACY AND LIMITATIONS OF LENIENCY PROGRAMS IN INDIAN COMPETITION LAW THROUGH CASE LAW ANALYSIS"

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Abstract

"Globalization is all those processes by which the people of the world are incorporated into a single world society" according to British Sociologist *Martin Albrow*.¹⁴⁸ Physical borders no longer restrict nations or corporations, and they are expanding globally. Product prices and supply are shaped in free market economy by the interactions of producer, supply and consumer demand, all of which contribute to a healthy competition which is advantageous to consumers. Nevertheless, this competitive environment is compromised by collusion among producers such as formation of cartels which set prices, impose output restrictions or split markets.

Cartels hinder international trade, restrict consumer choice and artificially boost price. Due to their notoriously secretive and complicated legal system which places a heavy weight of proof in their detection and prosecution, it becomes increasingly difficult to deal with them. Competition law preserve market efficiency and consumer choice, leniency programmes is one of the remedies under this serving as a vital anti-cartel strategy to grant immunity or mitigated penalties to whistleblowers, organisations who collaborate with law enforcement, furnish essential information and acknowledge engaging in antitrust breaches.¹⁴⁹

KEYWORDS: globalization, Anti-competition law, cartel, leniency

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¹⁴⁸ Martin Albrow & Elizabeth King, *Globalization, Knowledge and Society: Readings from International Sociology*, Sage Publications 1990

¹⁴⁹ Baskaran Balasingham, *The EU Leniency Policy: Reconciling Effectiveness and Fairness*, Kluwer Law International 2017

Introduction

Since the Competition Act's implementation, which only became full active in 2009, India's competition laws have grown increasingly complex. The monopolies and Restrictive Trade Practices (or MRTP Act of 1969) governed anti-competitive practices before this. The current legislation with its CCI has been charged with the duty of serving as an anti-trust regulator with goals of preserving market competition and offering consumers high-quality goods at competitive prices. This is done through reference from government or statutory body or a Suo-moto inquiry due to reception of information.

3 categories can be used to classify the major anti-competitive practices forbidden by the Act:

1. Anti-competitive agreements (inclusive of cartels)¹⁵⁰
2. Abuse of a position of dominance¹⁵¹
3. Combination regulation¹⁵²

Any anti-trust body including the CCI faces the most difficult challenge when it comes to detecting cartels, which makes the leniency programme even more crucial. Cartels are widely regarded as "the most egregious violations of competition law" drawing the scrutiny of all competition regulators.¹⁵³

Leniency programme

A "leniency programme" is a formal mechanism for providing lenient treatment to a member of a cartel who exposes the cartel to the Commission. It is a form of whistleblower protection. This is done to motivate and encourage different parties involved in the planning of such competition violations to come forward and reveal such anti-competitive agreements and support the competition regulators in exchange for immunity or leniency. Otherwise, the commission would take harsh

measures if the existence of the cartel was discovered by them alone.

Provisions

Under the competition act, this is provided under:

- **Section 46:** This clause offers protection from fines and legal action to anyone who fully discloses that they engaged in anti-competitive behaviour and furnishes the competition authority with supporting proof.
- **Section 46A:** This provision provides eligibility for a deduction when an individual fully discloses their participation in anti-competitive practices and submits evidence to anti-competition regulators. However, they will still not be immune from prosecution under section 46.
- **Section 47:** This section outlines the process for submitting a request for leniency under section 46-46A, as well as the requirements for the approval of the request.

It is however important that the leniency programme in India is contingent upon specific qualifications and conditions, and not every instance of anti-competitive behaviours would qualify for leniency. To be eligible for leniency, businesses must fulfil the requirements outlined in the Competition Act of 2002 and give the competition authority complete, accurate and supporting evidence.

The "**Competition Commission of India (Lesser Penalty) Regulations, 2009**" were created by the Commission to implement the leniency programme.¹⁵⁴

¹⁵⁰ Section 3 of the Competition Act

¹⁵¹ Section 4 of the Competition Act

¹⁵² Section 5 & 6 of the Competition Act

¹⁵³ Fighting hard core cartels, Recent Progress and Challenges Ahead (OECD 2003) DOI: <https://www.oecd.org/>

¹⁵⁴ Simran Kathuria, Leniency Programme under Competition Regime in India, NLUJ Law Review 5(2) 116, 2018

Extent of Penalty Reduction:

Applicant status	Extent of penalty reduction	Pre-conditions
1 st Applicant	Up to 100%	Vital disclosure of evidence on cartel activity that enables the CCI to form a prima-facie opinion on the existence of a cartel
2 nd Applicant	Up to 50%	In the opinion of the CCI, the evidence submitted provides significant added value to the evidence already in the possession of the CCI or DG.
Subsequent Applicant	Up to 30%	In the opinion of the CCI, the evidence submitted provides significant added value to the evidence already in the possession of the CCI or DG.

Academics such as “Aubert, Rey, and Kovacic, Spagnolo and Leslie” support the idea of giving “ring leaders” more leeway because doing so

would erode the cartel’s credibility and make it unstable.¹⁵⁵

LITERATURE REVIEW

Anshuman Sakle & Anisha Chand, Leniency Regime in India: Beginning of a New Dawn¹⁵⁶

This paper analyses the Indian legislative framework governing leniency regimes and cartels with reference to Electronics Cartel Case. It emphasises the importance of “Competition Commission of India (Lesser penalty) Regulations, 2009 (the “Leniency Regulations”) and the Competition Act, 2002 (as modified)” and how it has been successful in uncovering the multiple cartels across various industries and imposing heavy penalties on violators.

The article did not really do justice to understand the underlying causes of how leniency programmes fail to become effective due to a variety of reasons.

Pranav Pathak, “Cartelization: Recent Trends and Issues Faced by India”¹⁵⁷

This paper proposes a creative approach in talking about the reasons for the origin of cartels such as liberalisation which brought about a freedom from regulation and a greater autonomy for businesses to manage their own operations. One of the main goals of competition law is to stop anti-competitive practices such as cartelization. The author claims that his succinct essay examines the evolution of the concept of cartelization from almost non-existent in the MRTP Act to its present manifestation in the Competition Act. It also talks about the recent past of India as well as the difficulties it may encounter going forward.

The article missed on the key point on how cartelization has existed from time immemorial but in different forms.

¹⁵⁵ Aubert, P. Rey & W.E. Kovacic, The impact of Leniency and whistle Blowing Programs on Cartels, 24 International Journal of Industrial Organization, 1241-1266 2006

¹⁵⁶ 13 COMPETITION L. INT’L 115 (2017)

¹⁵⁷ International Journal of Law and Legal Jurisprudence Studies, ISSN: 2348-8212, Pages 13-14 2016

Saklani, Sudhir Kumar, “Issues relating to cartelisation and bid rigging under competition law in India a study”¹⁵⁸

According to the author, competitors typically steer clear of rivalry because it hurts their income. Consequently, competitors band together, this kind of coordination is known as cartel. One sort of cartel is bid rigging, both are prohibited by competition law and are considered anti-competitive with CCI in charge of enforcing laws against it. The author also describes how India’s competition law has changed dramatically during the course of ten years of anti-cartel enforcement.

The article however fails to understand how demography and socio-economic conditions of a particular country affects the way legislations of anti-cartel enforcement.

Guha, Shouvik Kumar, and Tilottama Raychaudhuri, “Corporate Cartels and Leniency in India: An Anti-trust Perspective”¹⁵⁹

The study describes the various components related to the use of durability, which could influence whether or not a programme to monitor cartels is carried out in a compelling way. This paper concluded by discussing the ways in which the CCI and Indian legislation sought to carry out their respective act of kindness and the directives made by virtually identical entities. It also suggested the introduction of the possibility of Leniency Plus.

This paper however misses the possibility of creation of more cartels because of this as well as creating an atmosphere of distrust.

Levenstein, Margaret and Valerie Y. Suslow “Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy”¹⁶⁰

This paper focuses its attention to socio-economic effects on international cartels on developing nations. They find that cartels especially affect low-income nations since

there is an increased cost for business and consumers, decreased output and jobs, decrease innovation and technological advancement and this is combined with environmental investments. They suggest a collaboration with developed nations to strengthen policies and enforcement mechanisms.

The main loopholes include the lack of quantitative impact, not understanding the ground realities of relations between countries and gate-keeping of information.

Analysis

CASE LAWS

“Re: cartelization, Indian Railways Brushless D.C. Fans vs CCI”¹⁶¹: Following the revelation by M/s. Pyramid Electronics of cartel engaged in the manipulation of Indian Railways brushless DC fan tenders, the CCI opened an investigation. Even though Pyramid Electronics offered insightful information on the cartel’s activities, CCI had a substantial amount of proof of complicity beforehand. Pyramid Electronics thus earned lower penalty (75%) rather than full immunity despite providing helpful information due to pre-existing considerable evidence.¹⁶²

“Pune Municipal Corporation case”¹⁶³: In this case 6 parties were implicated in bid rigging allegations made against the corporation in waste-processing facility tenders. Based on the timing and significance of their disclosures made during the investigation, just 4 of these parties saw their penalties to be reduced since the rest did not contribute as significantly.¹⁶⁴

“Re: cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters”¹⁶⁵: It was found that “Globecast and ESCL had engaged in bid-rigging in the

¹⁵⁸ Shodhganga: a reservoir of Indian Theses 2019

¹⁵⁹ International Journal of Management 11.10 (2020)

¹⁶⁰ Antitrust Law Journal, Vol 71, No.3 (2004)

¹⁶¹ Suo Moto Case NO.3 of 2014

¹⁶² Ibid

¹⁶³ Suo Moto Case No. 50 of 2015 and No. 03 and 04 of 2016

¹⁶⁴ Ibid

¹⁶⁵ Suo Moto Case No. 02 of 2013

broadcasting services sector.¹⁶⁶ Globecast was granted complete immunity for being the 1st to reveal vital details, whereas ESCL which learned of the situation later than CCI, was granted a 30% reduction in penalty.¹⁶⁷ Correspondence, responsibilities of former workers and other key vital information were disclosed which greatly aided the CCI's inquiry.

“Case of the Dry-Cell Battery Market Cartel: Godrej and Panasonic Energy”¹⁶⁸: In this case Godrej and Panasonic Energy were penalised for their conspiracy to set “zinc-carbon dry cell battery” pricing in India. After being the first to request leniency and reveal important evidence, Panasonic was granted complete immunity under section 46. Email exchanges between the corporation and anti-competitive language in the agreements served as evidence. On the basis of the companies profits and turnovers over the relevant period, the penalties were assessed.

“In Re: Cartelisation in the supply of Electronic Power Steering Systems (EPS Systems)”¹⁶⁹: in this case it was found that NSK and JTEKT were conspiring in the market for Electric power steering (EPS). As the initial application for leniency, NSK got 100% reduction in fines, while JTEKT who was the second informant was given a 50% reduction.¹⁷⁰ The ongoing exchanges between the business, which centred on quantity distribution, price and avoiding competition, exposed the existence of the cartel. Based on turnover and earnings associated with violation penalties were applied.

The recent decision by Supreme Court made it clear that fines must be assessed based on the turnover of the impacted goods and services as demonstrated in the **“Excel Crop case”**¹⁷¹ rather than taking into account the combined sale of the organisations concerned.¹⁷²

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Suo Moto case No. 03 of 2017

¹⁶⁹ Suo Moto Case No. 07 (01) of 2014

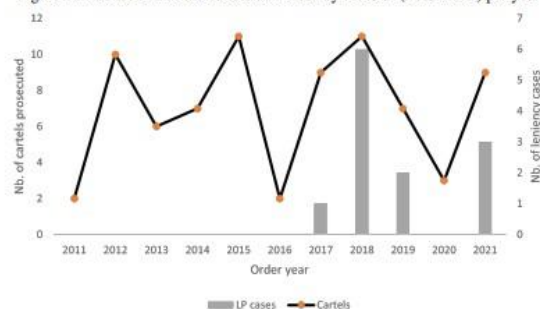
¹⁷⁰ Ibid

¹⁷¹ Excel Crop care vs CCI 2017 (6) SCALE 241

¹⁷² Ibid

STATISTICS

Figure 1: Distribution of the cartels convicted by the CCI (2009-2021) per year



Note: This figure includes 77 cartels that have been identified from the case files between 2009-2021. Due to insufficient data, 20 cartels are excluded from the empirical analysis.

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CRITICAL ANALYSIS OF LENIENCY

Based on the cases and statistics the following perks and flaws can be identified: -

ADVANTAGES OF LENIENCY PROGRAMME

Leniency programmes have multitude of advantages such as:

1. **Discovery and enforcement:** the CCI is able to successfully able to investigate and enforce rules to expose cartel activity. There is a broadening of the scope of the CCI and this enables the effective action against anti-competitive behaviour by motivating parties to expose such parties
2. **Deterrence and cooperation:** another interlinked advantage is the because of the increased risk of detection and imposition of penalties there is an effective deterrence in place along with encouragement of participation to expediate investigation and amicable settlements
3. **Development of Jurisprudence:** this programme makes a substantial contribution to the jurisprudential growth of competition law. It provides important insights that harmonise how competition laws are interpreted and applied, assisting regulators, businesses and attorneys in achieving greater compliance and comprehension.

¹⁷³ Vincent S. Abraham and Catarina Marvao, Recidivism, Shared Liability and Fines, Technological University of Dublin- College of business, Stockholm School of Economics 2023

4. **Consumer Welfare, economic growth and trust:** By bringing back a robust competition and providing consumers with more options and fair prices, the exposure of cartels fosters consumer welfare. Additionally, it promotes economic progress by paving the way for creative projects and new market entry, boosting global reputation and cultivating integrity and trust in the workplace.
5. **Effective resource allocation and education:** the prompt settlement of anti-competitive proceedings guarantees the best possible use of resources inside the CCI. Moreover, its prominence and accomplishments function as formidable pedagogical instruments, guiding enterprises towards an ethos of adherence, discouraging possible transgressors and enhancing consumer consciousness.

CRITICISM OF LENIENCY PROGRAMS:

1. **Resource restrictions and capacity:** Organisations, especially smaller ones, may have trouble meeting the leniency process's requirements due to resource constraints. These include the price of hiring an attorney and gathering the necessary proof, which could limit their ability to participate.
2. **Market Perception and reputation:** Businesses may be discouraged from coming forwards out of fear of unfavourable public perceptions or harm to the company's reputation.
3. **Administrative and Procedural Obstacles:** Complying with the intricate paperwork requirement and compliance obligations, as well as complex procedural requirements can be difficult particularly for businesses with little experience in administration or legal procedures.
4. **Delayed resolutions and uncertainty:** Protracted investigations and ambiguous results may deter

businesses from using the leniency process out of fear of drawn-out legal actions and erratic rulings that could jeopardise the stability of their operations

5. **Regulatory oversight and compliance costs:** Companies may be discouraged from participating if they face more regulatory scrutiny after leniency applications due to the associated higher compliance costs and continuous monitoring requirements
6. **Stakeholder confidentiality and trust:** Preserving confidentiality through the leniency mechanism and defending the interests of those participating may prove difficult, especially when it comes to building stakeholder trust and protecting sensitive data

Maintaining integrity, efficacy and equity of leniency programme in the context of coemption laws in India requires striking a balance between these factors.

Contemporary Issues

The competition (Amendment) Act 2023, which was just ratified, is expected to significantly alter the corporate environment in India especially in terms of creating novel solution as well as problems:

1. Deal Value threshold (DVT) for deals: the CCI must be notified of any transaction containing "substantial business operations" in India that exceeds two thousand crores.¹⁷⁴The exact definition and consequences of this however are still not well understood, which could result in a flood of files and increased expenses associated with compliance.
2. Reduced Lead times and Novel obstacles: the duration of merger reviews have been shortened to one hundred and fifty days. But this sped-up

¹⁷⁴ Manjushree RM and Vedika Mittal Competition Law 2.0 The Competition Amendment Bill 2022 VIDHI centre for Legal policy 2022 DOI: <https://vidhilegalpolicy.in/blog/competition-law-2-0-the-competition-amendment-bill-2022/>

procedure can result in more complexity so prior-planning is essential.¹⁷⁵

3. Settlements and Commitments: In order to facilitate a speedier conclusion, parties may choose to reach a settlement or make particular promises. These tools, however may expose the parties to claims for compensation particularly settlements and subject to CCI for approval.
4. Increased Cartel scope and leniency plus regime: The act now included “hub and spoke” systems so extending the cartel’s jurisdiction.¹⁷⁶ To reduce responsibilities, entities must either report or disassociate themselves from these kinds of deals
5. Penalties and International turnover: Penalties associated with a “global turnover” may cause issues. Global corporations may be held liable depending on how the CCI interprets whether this is consistent with the guidelines established by the “Excel Corp decision”¹⁷⁷

Suggestions & Conclusion

In conclusion, India’s leniency programme is an essential weapon in the fight against anti-competitive behaviour. It has demonstrated potential in exposing cartels and guaranteeing an equitable marketplace. Nonetheless, several suggestions might be taken into consideration to strengthen its effectiveness even more and promote greater involvement.

First and foremost, there is a pressing need to raise public and industry knowledge of the leniency programme. Clear rules that are available to everyone are essential for guaranteeing that candidates are treated fairly. Promoting early admission would result in larger fine reductions, which could encourage timely exposure.

Working together is crucial. Business that takes advantage of the Leniency Programme are required to collaborate closely with CCI with a strong emphasis on impartiality and discrimination free-execution.

The programme must be regularly reviewed and revised in order to maintain its efficacy and relevance in encouraging adherence to competition legislation. Crucial factors to take into account include also providing incentives for whistleblowers, streamlining processes and granting more leeway for further disclosures.

Organisations should be educated and trained on competition regulations and participation should be encouraged by presenting success stories and international best practices. Effective process guidance for participating firms will be ensured by timely reporting and ongoing support systems.

These recommendations, if integrated and implemented, hold the potential to strengthen the leniency programme, communication, education, legal protection could encourage many to come forward and work with authorities to effectively fight anti-competitive practices thereby establishing a more competitive and fair market environment.

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¹⁷⁵ Ibid

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¹⁷⁷ Excel Croop care vs CCI 2017 (6) SCALE 241

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