

MEASURING THE EFFICACY OF LENIENCY PROGRAMME IN INDIA: A COMPARATIVE ANALYSIS

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Abstract

Cartels are the supreme evil of antitrust. Cartels discourage competition in the market and harms the interests of the consumers. Cartoons hurt the freedom of trade carried on by market participants and transfer consumer surplus illegally from the consumers to the cartel participants. Well run leniency programmes have the potential to detect and punish the cartel and its members through a carrot and stick approach varun cartel participants when they become leniency applicants are incentivised by lesser penalty in comparison to other cartel members. Cooperation by the leniency applicant during the investigative process and legal certainty for reduction of penalty are the pillars on which leniency programmes are run. Lesser penalty becomes appealing only when there is severity of sanctions and the identity and information provided by the leniency applicant is kept confidential. The authors will analyse these parameters and compare Indian legal position with that of more mature competition jurisdictions such as USA and EU.

Keywords: Cartel, leniency, CCI, DOJ

I Introduction

Cartelization is one of the most serious offences under competition law and to combat cartelization in India, the Competition Commission of India is running a leniency programme under the Competition Act⁴⁹⁷ and the Competition Commission of India (Lesser Penalty) Regulations⁴⁹⁸ secures lesser punishment for early cartel confessors who supply vital information to the CCI regarding the existence and functioning of a cartel.⁴⁹⁹ Is a type of whistleblower protection mechanism which protects the cartel participants that diverge

true and fair information to the Competition Commission of India and incentivises them to divulge this information before the other cartel participants by providing them benefit such as lesser penalty in comparison to other cartel participants who have to pay the penalty amount in full.⁵⁰⁰

Cartels are the supreme evil of antitrust.⁵⁰¹ Indian Competition Act defines the cartel as, "cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."⁵⁰² Cartels are very hard to

⁴⁹⁷ The Competition Act, 2002.

⁴⁹⁸ The Competition Commission of India (Lesser Penalty) Regulations, 2009.

⁴⁹⁹ See generally CCI, COMPETITION ACT, 2002: LENIENCY PROGRAMME (providing an overview of The Competition Act 2002), http://164.100.58.95/sites/default/files/advocacybooklet_document/Leniency.pdf [perma.cc/CY2P-5VLN] (last visited Feb. 23, 2025); Simran Kathuria, *Leniency Programme Under Competition Regime in India*, 3 ASIAN L. & PUB. POLY REV. 72, 73 (2018) (examining the rationale and procedure of the leniency programme).

⁵⁰⁰ Kathuria, *supra* note 3, at 73; Cécile Aubert et al., *The Impact of Leniency and Whistle-Blowing Programmes on Cartels*, 24 INT'L. J. INDUS. ORG., 1241, 1242 (2006).

⁵⁰¹ Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

⁵⁰² The Competition Act, 2002, No. 12 of 2003, § 2(c).

detect as these are secret agreements amongst cartel participants and are generally not in written or oral form. These agreements are not legally binding but are followed by the cartel participants because of the huge economic gains that they may incur.

Global opinion for combating cartelization identifies leniency programmes as one of the most effective tools for cartel detection.⁵⁰³ This is due to the fact that cartelization is an illegal activity which cartel participants carry on in search of extra illegal profits, and in order to break the cartel, it is essential to offer incentives to the insiders running the cartel to divulge the information to the competition enforcement authority. Well-designed and well-implemented leniency programmes benefit the competition enforcement authority in finding out existing cartels and cartel members and, in turn, help consumers by breaking the cartels and restoring consumer surplus in the relevant market. Well-designed leniency programmes have the ability to break the law of omerta amongst cartel members and hence lower the cost of adjudication for the competition enforcement authority.⁵⁰⁴

Leniency programme was first started by the antitrust division of the United States Department of Justice in 1978. However, after its amendment in 1993, which thoroughly revamped the programme, it became successful in detecting and punishing cartels. Soon after this, the European Union also implemented its own leniency programme in 1996. In India, the earlier MRTP Act, 1969 did not have any provision of leniency and only when the Competition Act, 2002 was enacted, under

section 46 of the Act CCI's leniency programme was initiated.

The underlying idea of leniency programmes has been borrowed from a principle of economics, which is known as the Prisoner's Dilemma.⁵⁰⁵ Under this principle, when multiple individuals are accused of a crime, but the competition enforcement agency lacks enough evidence for conviction, it relies upon the confessions that it obtains from the participants of the crime, as these participants are looking after their own individual interest instead of the group interest. This is the only possible because the competition enforcement authority offers reduced sentences and reduced economic penalty for those participants who confess to their wrongdoing and also give vital information about the participation of other participants of the crime. This carrot and stick approach leads to a win-win situation for both the competition enforcement authority, which gets clinching evidence, and the cartel participants, who get reduced penalties if they comply honestly.⁵⁰⁶

As noted above, leniency programmes must carefully consider rewards and punishments to induce cartel members to come forward and report cartelization. Generally, the leniency programmes are designed as such, wherein the maximum benefit is assigned to the first applicant, and the incentives start diminishing for subsequent leniency applicants. This leads to a mad rush amongst cartel members to be the first to secure the maximum benefit in the form of maximum penalty reduction, as they are aware that if they are late in reporting cartelization to the competition enforcement authority, the penalty reduction will be harder to get.⁵⁰⁷

These underlying principles make leniency programmes one of the most effective tools for

⁵⁰³ European Commission Press Release *SPEECH/00/295*, Mr. Mario Monti Member of the European Commission in Charge of Competition Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour? 3rd Nordic Competition Policy Conference Stockholm, 11-12 September 2000 (Sept 11-12 2000), http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm. [perma.cc/79P3-DURV].

⁵⁰⁴ See generally MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* (1st ed. 2004) (analyzing generally antitrust and competition policy); Sahithya Muralidharan & Chaitanya Deshpande, *Scope for Intersection Between Antitrust Laws and Corporate Governance Principles Vis-à-vis Cartel Deterrence in India*, 9 NAT'L UNIV. JURIDICAL SCIS. L. REV. 93, 103-04 (2016) (examining the intersection between competition law and corporate governance).

⁵⁰⁵ Aachman Shekhar & Aniket Chauhaan, *The Death of Leniency? An Analysis of the Impact of Blockchain on the Indian Leniency Programme*, 2022 U. ILL. J.L. TECH. & POL'Y 399

⁵⁰⁶ See *Prisoner's Dilemma*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/other/prisoner-s-dilemma> [perma.cc/RX7S-HZGS] (Feb 25, 2025) (defining the prisoner's dilemma).

⁵⁰⁷ Eric van Damme & Jun Zhou, *The Dynamics of Leniency Application and Cartel Enforcement Spillovers* 22 (TILEC Discussion Paper No. 2016-006, 2016).

detecting cartelisation and cartel members and help the competition enforcement authority in combating cartelisation. In this light, we will analyse the Indian leniency programme to help us identify the reasons for its relatively lesser success in combating cartels in comparison to other jurisdictions.

II Clarity and legal certainty regarding the marker system

According to the regulations⁵⁰⁸, the first step for a leniency applicant is to apply to CCI for a marker. The marker is nothing but a system to provide a priority status to the leniency applicant. This marker system is very crucial for the leniency applicant as it determines whether the leniency applicant will get a full reduction in penalty or not. The regulation states that a reduction in penalty up to 100% may be provided to the first applicant who makes a full, true and vital disclosure about the cartel. The second applicant in the priority status may get up to 50% of the reduction in penalty. Also, applications from 3rd priority status onwards may be granted a reduction in penalty of 30% for disclosures which provide significant added value to the evidence already in possession of CCI.

On the face of it this may look like a fair system which rewards those leniency applicants who file for the marker system early. However, on careful reading of the regulations, it is observed that CCI has a lot of discretionary power in determining the extent of reduction of the penalty applicable to the leniency applicant. The first criteria that has to be satisfied by the leniency applicant is that the extent of disclosures made by it even when they are full, true and vital should provide to the CCI the information which is not existing with it at the time of the application of the marker system. This creates doubt in the mind of the leniency applicant as it is not aware of the extent of the information already available with CCI and whether they would be eligible for getting a reduction of penalty for 100% as it is on the

discretion of CCI to adjudicate whether the information provided by the leniency applicant is full, true and vital or not. Similar concerns exist for the second applicant and subsequent applications, as the criteria for them for providing the information should be of a significant added value to the information already provided by the leniency applicants before and available with CCI as per its own investigation. This uncertainty creates circumstances in which leniency applicants are not able to adjudicate for themselves whether applying for leniency would provide any benefit or not, and thus do not file leniency applications to CCI, defeating the purpose of the regulations altogether. If there is legal certainty in providing reduction in penalty to the leniency applicants, it will enable them to make their own cost-benefit analysis and report to CCI at the earliest the existence of cartels and their participation in the same.

Even the process for filing and obtaining a marker with CCI is riddled with uncertainty for the leniency applicant. A leniency applicant may file for a marker with the CCI either through email or fax or orally and within a time of 15 days has to provide all information relating to the evidence of the cartel. Here again the discretionary power of CCI comes into existence to decide whether the evidence provided by the leniency applicant provides for a full, true and vital disclosure and only then does CCI confirm the marker denoting its priority status amongst the applicants. Due to this any applicant who may have approached CCI first, if it does not fulfil the criteria it loses the marker and the next applicant then moves up the priority chain.⁵⁰⁹

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*,⁵¹⁰ The CCI adjudicated for a reduction in penalty of only 75% to the first and only leniency applicant, even though it stated in its order that

⁵⁰⁸ The Lesser Penalty Regulations, *supra* note 2, Regulation 5.

⁵⁰⁹ *Id.* Regulation 4(c)

⁵¹⁰ *In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, Suo Moto Case No. 03 of 2014, CCI.

the evidence provided by the leniency applicant was satisfactory and played a vital role in uncovering the cartel, and full cooperation was provided by the leniency applicant. CCI also stated that because CBI had provided it with email evidence of the existence of the cartel in that relevant market, it was aware of the cartel, and on the basis of that, it did not provide for a full reduction in penalty.

Similarly, in the case of *Nagrik Chetna Manch v. Fortified Security Solutions and others*,⁵¹¹ The CCI did not provide full immunity to the first applicant and was only provided with a 50% reduction of penalty despite the Commission acknowledging vital evidence and cooperation, which was provided by the leniency applicant, which was crucial in detecting the cartel. The reasoning provided by CCI for not allowing full immunity was that CCI had already started with an investigation through its office of the DG.

The first case in which CCI awarded full 100% reduction in penalty was in *In Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*.⁵¹² Globecast was the first leniency applicant and full 100% reduction in penalty was awarded to it because of the information provided by it CCI was able to form a prima facie opinion regarding the cartel. However, the second applicant only got a reduction of penalty by 30%.

The above cases clearly show the discretionary power of CCI in adjudicating the reduction of penalty for the first applicant, wherein CCI did not allow full reduction of penalty even though the leniency applicants had made full, true and vital disclosures to the CCI, just because CCI had already started its investigation in the relevant matter. This same practice is carried on by CCI for second leniency applicants and subsequent leniency applicants, within the criteria, which is a significant value addition for

determining the reduction of penalty. In the case of *In re: Cartelization in respect of zinc carbon dry cell batteries market in India*,⁵¹³ CCI provided the second applicant with the reduction of penalty of only 30% instead of 50% and provided lesser penalty of only 20% instead of 30% to the other applicants as it determined that the second applicant and subsequent applicant did not fully meet its criteria of significant value addition to the existing evidence against the cartel. These cases underscore the discretionary power of CCI, which creates legal uncertainty regarding the extent of the lesser penalty reduction available to the leniency applicants.⁵¹⁴

III Cooperation by the leniency applicant

When a leniency applicant files an application under the Indian leniency programme, the standard for cooperation by the leniency applicant with CCI is to provide full and true disclosure of information and evidence as required by the Commission from time to time. The duty of cooperation is fivefold under the regulation. CCI requires that the cartel participants shall cease to further participate in the cartel until and unless otherwise directed by the Commission. He is also required to provide vital disclosure in respect of the alleged contravention of the provisions of Section 3 of the Act and provide all relevant information, documents and evidence as may be required by the Commission. The cooperation has to be genuine, full, continuous and expeditious throughout the investigation and other proceedings before the Commission. The cartel participants must not conceal, destroy, manipulate or remove the relevant documents in any manner and not give any false evidence or omit to submit any material information which is material for the establishment of the cartel. While the cooperation from the cartel participant is required throughout the investigation, the CCI may withhold lesser

⁵¹¹ *Nagrik Chetna Manch v. Fortified Security Solutions and others*, Case No. 50 of 2015, CCI.

⁵¹² *In Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*, Suo Motu Case No. 02 of 2013

⁵¹³ *In re: Cartelization in respect of the Zinc Carbon Dry Cell batteries market in India*, Suo Motu Case No. 02 of 2016, CCI.

⁵¹⁴ Parash Biswal, *The CCI's Leniency Programme: Shortcomings and Solutions*, 14 NUALS L.J. 29 (2020).

penalty benefit to the applicant at any stage if it determines that the cooperation is not genuine, full, continuous and expeditious. This stringent duty of cooperation starts from obtaining the marker status to the adjudication of the case by CCI.⁵¹⁵

The standard for cooperation in India has been borrowed from the EU, where leniency applicants have to cooperate genuinely, fully, on a continuous basis and expeditiously from the time of submission of their application throughout the commission's procedure. leniency applicant has to provide decisive evidence to the Commission. They have to produce a full corporate statement with the detailed facts at the time of submission of information to the Commission which can be done at the time of obtaining marker or at a later date as specified by the Commission. Even current employees, former employees and directors should be available for interviews with the Commission. All information has to be furnished promptly and should not be destroyed, falsified over concealing relevant information or evidence relating to the cartel.⁵¹⁶

The European Commission's approach to standards of cooperation has developed through its understanding of the US leniency programmes. The standard of cooperation requires that the applicant provide timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation. If the individual is an applicant then he has to report the wrongdoing with candour and completeness and provide timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation.⁵¹⁷ While the standards appear similar, it the approaches which differ across the jurisdictions. While the DOJ and EC refrain from exercising discretionary powers, the CCI

has shown an excessive willingness to use its discretionary powers to limit the benefit of a lesser penalty to the leniency applicants.

IV Severity of sanctions

Sanctions play a vital role in shaping the conduct of cartel participants. If the threat of detection is credible and the severity of sanctions exists, cartel participants may be dissuaded from carrying out cartel conduct. In the United States of America, cartel violations are punishable as a criminal conspiracy under Section 1 of the Sherman Act.⁵¹⁸ corporations may be fined up to 10 million dollars. Individuals may be fined up to 350 thousand dollars and may face a potential 3 year jail term. This fine may be increased to twice the gross gain derived by the conspirators from the crime or twice the gross loss suffered by the victim, in the case of both corporations and individuals. Most cases in the USA are settled by plea bargain and do not come to full trial. A grand jury conducts the investigations and FBI may also conduct searches. Obstruction or withholding of evidence, or lying to the grand jury, or giving false information can result in serious criminal charges and a jail term for cartel participants, as the investigation is conducted with the full force of federal criminal law. In the EU, member states may enforce criminal enforcement, but it is generally frowned upon. The member states investigate, sanction and terminate competition law violations. The fine may go up to 10% of the total turnover but it also expressly provides that the fine is not of a criminal law nature.⁵¹⁹

The punishment for cartelization in India as per Sec 27 of the Act is three times the profit for each year till the continuance of the cartel agreement or 10% of the turnover or income for each year the continuance of the cartel agreement, whichever is higher. With the amendment of the Act in 2023, CCI has the power to calculate the turnover based on the global turnover of the cartel participants. This is

⁵¹⁵ The Lesser Penalty Regulations, *supra* note 2, Regulation 3.

⁵¹⁶ Commission Notice on Immunity from fines and reduction of fines in cartel cases, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC1208%2804%29> (last visited Feb 24, 2025).

⁵¹⁷ Antitrust Division Leniency Policy and Procedures, <https://www.justice.gov/atr/page/file/1490246/dl?inline> (last visited Feb 24, 2025).

⁵¹⁸ The Sherman Antitrust Act, 1890

⁵¹⁹ J. M. Joshua, Leniency in U.S. and EU Cartel Cases, 14 ANTITRUST 19 (Summer 2000).

in sync with the Hon'ble Supreme Court of India decision in the case of Excel Crop Care Limited v Competition Commission of India.⁵²⁰ The choice to incorporate criminal sanctions for cartelization and India depends on the credibility of the threat that it will offer to the cartel participants. This may just force the cartel participants to add to their cost of not disclosing their cartel behaviour and undertake a cost-benefit analysis, or whether to apply for leniency or not. Cartel participants apply for leniency when the rate of detection is high, and it is matched by the severity of sanctions, and criminal sanctions may just play a vital role in tilting the balance towards CCI to encourage more cartel participants to come forward to CCI regarding their criminal behaviour.

V Confidentiality of identity and information

The lesser penalty regulations⁵²¹ mandate that CCI shall keep the identity of leniency applicant confidential along with all the information provided by it until and unless the disclosure is required by law or the applicant has agreed to the disclosure in writing or the applicant has disclosed the information in public. Except for these conditions, the position of law is clear that it shall be the duty of CCI to safeguard the confidentiality of the identity of the leniency applicant and the information provided by it. This obligation is necessitated to protect the leniency applicant from litigations for breaching contractual obligations which may cause it irreversible loss. The same practice is carried on by EU members who do not share the evidence without the applicant's consent. The Commission does not disclose the identity of the first applicant to the other applicants while they are obtaining the marker but does inform to them their position in the priority order.⁵²²

Under the leniency programme in USA, the Department of Justice treats leniency applications as utmost confidential and does

not disclose the identity of the leniency applicant even to a foreign government even under bilateral cooperation agreements until and unless the applicant has agreed to it. This is done to preserve the leniency programme's viability and create a strong incentive amongst cartel participants to self-report.⁵²³

In the Nagrik Chetna Manch Case,⁵²⁴ The leniency applicants had requested that their disclosures to CCI be kept confidential and not made part of DG's report. However, the information provided by the leniency applicants was made part of the DG's report and was made public as CCI adjudicated that it was part of the DG's investigation. This blatant disregard of confidentiality obligations and utter disregard of cooperation made by the leniency applicants instilled fear amongst the minds of prospective leniency applicants that their cooperation may be made public by CCI if there is already an existing investigation by DG. A more nuanced approach by CCI is required wherein it should uphold confidentiality of leniency applicants and the information provided by them to make the leniency programme more effective.

VI Conclusion

Discretion is an impediment to legal certainty. Lack of certainty regarding the quantum of reduction of lesser penalty even after obtaining the marker status remains the top impediment to the leniency programme run by CCI. In order to make the leniency programme more attractive to cartel participants, the certainty of a lesser penalty is very important, as shown by the US and EU leniency programmes respectively. This lesser penalty benefit must be made available to the leniency applicant when the cooperation is genuine, full, continuous and expeditious throughout the investigation and other proceedings before the Commission. This ensures that the system is not gamed by leniency applicants and that they are rewarded

⁵²⁰ Excel Crop Care Limited v Competition Commission of India (Civil Appeal No. 2480 of 2014)

⁵²¹ The Lesser Penalty Regulations, *supra* note 2, Regulation 6.

⁵²² Commission Notice on Immunity from fines and reduction of fines in cartel cases, *supra* note 18.

⁵²³ Antitrust Division Leniency Policy and Procedures, *supra* note 19.

⁵²⁴ Nagrik Chetna Manch v. Fortified Security Solutions and others, Case No. 50 of 2015, CCI.

appropriately for their cooperation during the investigation process. The identity of the leniency applicant and the information provided must be kept confidential by the CCI to encourage more participation in the leniency programme. The forms for individuals who do not cooperate with CCI or do not participate in the leniency programme must be severely sanctioned. Only then will the carrot and stick approach work. The sanctions must be severe enough to act as a deterrent to all cartel conspirators. These suggestions will increase the effectiveness of the leniency programme run by CCI.

