

BREAKING THE CARTEL SILENCE: A STUDY OF LENIENCY MECHANISMS IN THE INDIAN COMPETITION LANDSCAPE

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Abstract

Identifying and prosecuting cartels, which is often called the supreme evil of antitrust, is still among the most difficult issues of competition authorities around the world. The cartels are very dangerous to consumer welfare, they suppress innovation, and they pervert market efficiency due to the secretive nature and the coordinated anti-competitiveness behavior of such cartels. The Competition Commission of India (CCI) has increasingly been using its leniency program, which has been based on Section 46 of the Competition Act, 2002, to unravel these illegitimate arrangements in the Indian context. This is a research paper that offers a detailed analysis of the development and the success of the leniency mechanisms in the Indian competition arena. It follows the path of the development of the Lesser Penalty Regulations of 2009 to the ground-breaking amendments of 2017 and the introduction of the so-called 'Leniency Plus' regime by the Competition (Amendment) Act, 2023. The paper estimates the practical difficulties that limit a vigorous race to the CCI by examining some of the trends and legal precedents in enforcement, such as the initial case of Brushless DC Fans and the broad Battery Cartel decisions. These obstacles comprise procedural ambiguity, the elevated evidentiary bar to vital disclosure, the threat of follow-on damages, and the threat of public procurement debarment. Additionally, the paper looks at the mechanism of Leniency Plus in detail, the mechanism that is capable of incentivizing self-reporting in various markets of the product, and conforms to the international best practice in the US and EU. The study employs a descriptive and analytical approach, which uses the provisions of the statutes, regulatory guidelines, and critical analysis by scholars. The results imply that the Indian leniency regime has grown considerably, but the bottom line to its success is the improvement of transparency in the procedures, the high level of confidentiality protection, and a balance between the carrot and the stick of penalties reduction and effective deterrence. The paper ends with a series of policy recommendations to tighten the leniency framework in order to have a more competitive and transparent market environment in India.

Keywords: *Cartels, Leniency Mechanism, Competition Commission of India, Leniency Plus, Section 46, Competition Act 2002, Anti-competitive Agreements, Market System, Bid-rigging.*

I. Introduction

A. Background

The current age of economic globalization has seen the fast growth of markets, and with it,

more competition and more advanced means of manipulating markets. These are the most pernicious types of anti-competitive conduct, though the cartels. A cartel refers to an

underground contract among rival companies to stabilize prices, restrict production, divide markets, or engage in bid rigging²¹⁰². Such arrangements have a direct negative impact on consumers and the economy through artificial price-inflation and innovation stifling. Cartels are notoriously hard to detect due to their secretive nature and the fact that cartels do not leave much in the way of hard evidence.

In India, the competition law in the country was overhauled by passing the Competition Act, 2002, which superseded the outdated Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. In the 2002 Act, the Competition Commission of India (CCI) was formed as the only regulator with the aim of preventing practices that have an appreciable adverse effect on competition (AAEC). The Act realized the complexity of cartel detection; hence, Section 46, which enables the CCI to impose a reduced penalty on participants who voluntarily turn in to them with crucial information regarding the presence and activities of the cartel, was included in the Act.²¹⁰³ This leniency process is meant to establish a kind of race to the CCI amongst members of the cartel that will take advantage of the natural suspicion and unrest of these criminal organizations to bring them to justice

B. Meaning of Key Concepts

To understand the Indian leniency landscape, it is essential to define several foundational concepts:

- **Cartels:** Section 2(c) of the Competition Act, 2002, defines a 'cartel' as 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.²¹⁰⁴

- **Leniency Mechanism:** This refers to a regulatory program that offers reduced penalties or complete immunity from prosecution to firms or individuals who voluntarily report their involvement in a cartel and provide evidence that helps the competition authority prove the violation.
- **Marker System:** The 'marker system' is a procedural tool used in leniency applications to establish the order of priority among multiple applicants. When an applicant first approaches the CCI with some information, they are given a 'marker' that reserves their place (e.g., first, second, or third) in the queue for potential penalty reductions, provided they follow up with full evidence within a specified timeframe.²¹⁰⁵
- **Leniency Plus:** Introduced by the 2023 amendment, 'Leniency Plus' is a mechanism where an applicant already cooperating in one cartel investigation (the 'first cartel') receives an additional penalty reduction for that cartel if they disclose the existence of a second, separate cartel (the 'second cartel').²¹⁰⁶

C. Importance of the Issue

The ability of the competition regulatory regime to prevent and destroy cartels is often used as a measure of its effectiveness. In India, despite the ten years of implementation, the rate of leniency applications was quite moderate until not so many years ago. The launch of Leniency Plus and the continuous quest to perfect the Leniency Regulations are an indication of the CCI's perseverance to make the regime more appealing. However, the issues still exist, such as the high burden of evidence a person must provide to obtain the application, the threat of subsequent damages, and the uncertainty in

²¹⁰² Competition Act, 2002, § 3(3), No. 12, Acts of Parliament, 2003 (India).

²¹⁰³ *Id.* § 46.

²¹⁰⁴ *Id.* § 2(c).

²¹⁰⁵ Competition Commission of India (Lesser Penalty) Regulations, 2024, Gazette of India, pt. III sec. 4 (Feb. 20, 2024).

²¹⁰⁶ Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).

the calculation of penalties.²¹⁰⁷ Research into these mechanisms is urgently necessary among law students, practitioners, and policymakers, because it would give an idea of how to better incentivize self-reporting, so that the race to the CCI is a real and daunting threat to cartelists.

D. Research Problem

Although the Indian regime has been perceived to lack predictability and transparency, there is a statutory provision of leniency dating back to 2009. The key problem is the conflict between the widespread discretionary powers of the CCI provided by Section 46 and the need to provide a specific and stable environment that would be able to prompt risk-averse corporations to self-incriminate. Furthermore, the relationship between leniency and the recently added settlement and commitment measures remains one of the dynamic fields of legal studies.²¹⁰⁸

E. Research Questions

- How has the leniency mechanism changed since the 2009 Regulations in India to the 2023 amendment, the amendment of Leniency Plus?
- How far do decisions of the CCI and the so-called marker system offer the procedural certainty required to motivate the leniency applications?
- How would you identify the most critical practical issues, like the standard of evidence and the threat of confidentiality, that are posing challenges to the race to the CCI?
- What does the Indian regime of leniency plus with international best practices look like, and what can be learned by looking at the world, such as the US and EU?

F. Research Objectives

- Aims to follow the development of the leniency system in India in the Competition Act, 2002.
- To examine the procedure of the leniency programme, such as the marker system and confidentiality provisions.
- To measure the effect of new amendments, especially the introduction of Leniency Plus.
- To investigate judicial trends by case studies of the leniency grants by the CCI.
- To give suggestions on how the Indian leniency regime can be enhanced to be more effective and predictable.

G. Literature Review

The literature on Indian competition law extant singles out a number of major themes with respect to leniency. Articles by Bibhu (2019) and Rahim (2022) provide critical reviews of the initial treatment of the leniency programme, noting that despite the existence of a statutory framework, there has been inconsistency in the way the programme has been implemented.²¹⁰⁹ Bhattacharjee and De (2021) believe that the regime of penalty set by the CCI does not have a clear economic rationale often, losing the incentive to request leniency.²¹¹⁰ Newer studies, such as those by Bhaduri (2022) and T.S. and Tripathi (2023), have taken a closer look at the so-called Leniency Plus regime and are unsure whether it will actually create a competitive race or if firms are merely using it as a strategic tool²¹¹¹.

H. Research Methodology

The methodology used in this inquiry is descriptive, with its foundation being mainly made up of secondary sources, including the Competition Act, 2002, CCI (Lesser Penalty) Regulations, CCI orders and judgments as issued by the National Company Law Appellate

²¹⁰⁷ Nishikant Bibhu, *Cartel Leniency Program in India – A Critical Analysis*, 12 Indian J. Corp. Governance 80 (2019).

²¹⁰⁸ Mohsin Rahim, *A Critical Analysis of the Leniency Regime in India*, 9 Int'l J. L. Mgmt. & Humanities 450 (2022).

²¹⁰⁹ *Id*

²¹¹⁰ Aditya Bhattacharjee & Oindrila De, *India's Cartel Penalty Practices, Optimal Restitution and Deterrence*, 17 J. Competition L. & Econ. 401 (2021).

²¹¹¹ Anik Bhaduri, *Sweeter Carrots, Same Stick: Transplanting Leniency Plus into Indian Competition Law*, 6 Indian L. Rev. 300 (2022).

Tribunal (NCLAT) and the Supreme Court, as well as academic articles, governmental reports, and international guidelines. The framework is a comparative analysis aimed at comparing the Indian regime to international regulations of the United States and the European Union.

I. Scope and Limitation

This paper will be limited to the discussion of the leniency mechanisms that can be applied to cartels as per the Indian competition law. Although the discussion makes some brief mention of similar ideas like settlements and commitments, the main consideration is Section 46 and the Leniency Regulations. Another limitation of the study is that information regarding the leniency applications is publicly available to a rather limited extent because there are many aspects of the process that remain confidential to protect the identity of the parties involved.

II. History: Section 46 of the Competition Act, 2002.

Section 46 of the Competition Act, 2002, included the concept of leniency in the Indian competition law. This clause vests the Competition Commission of India (CCI) with the power to issue a lower penalty on any producer, seller, distributor, trader, or service provider suspected of being part of a cartel who makes a complete, honest, and full disclosure on the existence and activity of the cartel. Notably, this disclosure should be prepared before the presentation of an investigative report to the Commission by the Director General (DG). The law provides that when the Commission is satisfied that the necessary disclosure has been made, the Commission may approve of reducing the penalty which would otherwise be paid under Section 27. This power of discretion is the cornerstone of the Indian leniency regime, which is to break the cartel silence by giving the co-conspirators a possibility to defect through the law.

A. The 2009 Regulations: The First Step

Section 46 provided the legal basis of the leniency programme, but the procedural details were not well formulated until the Notification of the Competition Commission of India (Lesser Penalty) Regulations, 2009 was published. The 2009 Regulations about a diminished penalty provided the following terms that an applicant should not be involved in the cartel unless instructed otherwise by the CCI, should cooperate in good faith, and should provide all the relevant information and evidence.

Under the initial 2009 Regulations, the initial applicant who appeared, the so-called first-in, was entitled to a reduction of the penalty up to 100%. The second applicant may be granted the reduction of up to 50%, the third and further applicants may be granted the reduction of up to 30%. Nevertheless, the number of applications for leniency in the early years was really low despite this structure. Critics blamed such paucity on the high evidentiary threshold required of the first-in applicant on a 100-percent reduction, as well as ambiguity on how the CCI could use its discretion.

B. Amendments in 2017: Smoothing out the Process.

The CCI realised the drawbacks of the 2009 Regulations, so it made an important amendment in 2017²¹¹². These changes were aimed at making the programme more appealing and learner-friendly. Key changes included:

- Broadening the applicant pool: The changes of 2017 made it clear that applicants beyond the third might also seek leniency, and might receive an up to 30% reduction in case they made a meaningful added contribution to the investigation.
- Elucidation of vital disclosure: The amendments provided further clarification of what a vital disclosure is

²¹¹² Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017.

and that information must enable the CCI to make a prima facie or provide a significant added value to an ongoing inquiry.

- First-in burden: The amendments were much easier on the evidentiary burden of a first applicant by defining that the evidence sufficient to establish a prima facie state of cartel existence would be sufficient to establish the same.
- It was also clarified through the amendments that a leniency application submitted by a company would extend to the officers and employees of the same company on condition that they also cooperated with the CCI.

C. Marker System: The Detailed Procedure.

The most significant procedural mechanism of the leniency programme is the so-called marker system, as it defines the priority order and, accordingly, the possible extent of penalty abatement. The flow of the procedure is the following:

Contacting the CCI. An applicant (or authorised persons) may contact the CCI orally, via email, or in writing to express an intention to make a leniency application.

- Grant of marker: Guardian. Once the CCI ascertains that the applicant has provided sufficient preliminary information, it assigns a marker and notes the date and time of receipt. This marker provides the location of the applicant on the queue (e.g., first-in, second-in, etc.).
- Submission of the full application: The applicant is then given a set period of time, say 15 days, to make a formal application with all the necessary evidence and detailed information with regard to the cartel.
- Maintaining the marker: The applicant should remain cooperative and honest during the investigation as a way of maintaining the marker. This could potentially lead to loss of privilege of

priority and the penalty thereof. The marker system, therefore, offers procedural certainty that is necessary, especially when companies are gathering in-depth evidence, although they have reserved their position.

D. Confidentiality: The Protection of the Applicant.

One of the greatest discouraging factors to making a leniency application is the fear of publicity that would trigger reputational damage or individual damages lawsuits by clients or rivals. In order to address this risk, the Leniency Regulations and the Competition Act have strong confidentiality provisions:

- Section 57: This section forbids the release of information that relates to any enterprise or individual that has been purchased by CCI beforehand without written permission, except to the extent that the Act provides.
- Regulation 6: The Leniency Regulations specifically state that the name of the leniency applicant, as well as the information they present, is confidential and must not be leaked to a third party throughout the investigation. However, in reality, the non-confidential version of the final order of the CCI often deals with more than enough detail that the applicant who is leniency can be identified, and this raises the fear of later litigation in the NCLAT or even in the Supreme Court.

E. Competition (Amendment) Act, 2023: New Leniency Plus.

The biggest complementary change in the Indian leniency regime is the launch of the so-called Leniency Plus through the Competition (Amendment) Act, 2023. This amendment added Section 46(4) to the Act, which permits the CCI to impose another penalty reduction on an applicant who is already cooperating in a single cartel investigation when it is revealed that there is another cartel.

Reasons why the Leniency Plus mechanism outperforms other instances in cartel detection mechanisms. The mechanism of Leniency Plus is considered to maximise the detection of a cartel by encouraging the firms already under investigation to elaborate on the other cartels they belong to. It is based on the assumption that affiliation to one cartel is often associated with other affiliations.

2024 Regulations: To bring this provision into operation, the CCI has issued under this provision the Competition Commission of India (Lesser Penalty) Regulations, 2024, replacing the previous editions. According to these regulations, an applicant to the Leniency Plus can be provided with an additional penalty reduction up to 30 per cent of the penalty of the first cartel on top of the penalty reduction (up to 100 per cent) they might receive on the second cartel. This paradigm change is in line with the Indian competition law and the mature jurisdictions like the United States, United Kingdom, and European Union, where amnesty plus programmes have been very successful in eliminating the multi-market cartel networks.

III. The 'Leniency Plus' Mechanism: A Paradigm Shift

A. Concept and Rationale: Maximizing Cartel Detection

The concept and its rationale are that there is maximum cartel detection.

The presentation of the Leniency Plus scheme into the Indian competition scene represents an ambitious and policy-wise important addition to the enforcement arsenal of the Competition Commission of India (CCI). This process is to solve one salient issue in competition law, that of the continued existence of the so-called cartel web, in which companies that are members of a particular cartel are at the same time members of several other cartels dealing with different products or in different geographic markets. Through a so-called double benefit, the offer by Leniency Plus is aimed at motivating those firms that are

already subject to the care of the CCI to publish all their illegal operations.

The argument behind the Leniency Plus is two-fold:

- Efficiency: The scheme also helps the CCI to identify and examine various cartels at any given time, taking advantage of the data supplied by one of the cooperating parties.
- Deterrence: The process nurtures a permanent fear amongst cartelists that their conspirators might turn out in one market to have an upper hand in the other, and hence the lack of mutual trust between cartelists. In the Indian market, where the CCI has always faced problems of discovering cartels through its own market intelligence, Leniency Plus becomes an effective carrot to the stick of heavy fines.

B. 2024 Regulations: Step-by-step Procedure.

To ensure the 2023 amendment is operationalised, the CCI issued the Competition Commission of India (Lesser Penalty) Regulations, 2024. These rules provide a step-by-step system of how Leniency Plus applications are to be done:

1. **First, the requirement of the First Cartel.** An applicant has to be already a party to a minor penalty (leniency) in an ongoing investigation (the first cartel).
2. **Exposure of a Second Cartel.** The applicant should reveal the presence of a second separate cartel (the second cartel) of which the CCI already had no knowledge or of which there was no adequate evidence.
3. **Submission of the Leniency Plus Application.** The applicant has to make a separate application to the second cartel with the normal leniency protocol. At the same time, the applicant should submit a particular application of Leniency Plus that is connected to their initial case of a cartel.

4. **Benefit Calculation:** In the case of the second cartel, the applicant can get a penalty discount of up to 100 percent (when it is the first in the list of applicants).

In the case of the first cartel, the applicant can have an addition of up to 30% to the reduction that they were already entitled to. This is an added advantage that makes the mechanism very appealing, as it can significantly reduce the overall financial cost to a company that is facing several investigations.

C. Global experience: Amnesty Plus in the US and EU.

The influence of the Indian Leniency Plus regime is that the region is largely influenced by the programmes of Amnesty Plus (or Leniency Plus) used in the United States and the European Union.

1. **United States:** The United States Department of Justice (DOJ) was the first to introduce the Corporate Leniency Policy. In this policy, companies revealing a second cartel whilst under investigation of a first cartel may be granted a first second Amnesty Plus and a second penalty Plus (the latter serving as a deterrence against nondisclosure). America has reported several instances where the application of a single merciful individual resulted in the discovery of dozens of other related cartels in various sectors.
2. **European Union:** In the European Commission (EC), a similar provision, albeit known as Leniency Plus, is officially known as Leniency for another infringement. In cases where a firm is the first to provide evidence of an independent cartel, it will be to its advantage to have a decreased fine for the first cartel. This has turned out to be a key weapon used by the EC in fighting cartels in multi-product industries in the chemical and automotive industries.

Using a similar framework, India can make its competition regime in line with the best practices recognized globally, thus helping multinational corporations to coordinate leniency regimes in various jurisdictions.

D. Potential difficulties in India: Strategic Misuse and Procedural Delays.

Although the choice to implement the Leniency Plus mechanism will lead to greater cooperation, there are a number of future obstacles that face its implementation in India.

- **Strategic Misuse:** Firms can strategically report minor or low-impact cartels only so as to obtain the 30 percent discount that comes with a major case of cartel. Competition Commission of India (CCI) needs to be on its toes to ensure that the second cartel is a separate and material anti-competitive agreement.
- **Procedural Delays:** It is a known fact that CCI investigations take years. In case a firm petitioned under Leniency Plus, both the first and second cases of the cartel have to be resolved simultaneously, which may lead to delays in executing final decisions.
- **Evidentiary Standards:** The demand of the second cartel to contribute substantial added value is subjective in nature. In case the CCI develops a too high standard, the companies might find that the 30 percent plus incentive is not worth the cost of self-incrimination in a new case.
- **Introduction of Settlement:** The 2023 amendment introduced a new mechanism of Settlement and the Commitment. How Leniency Plus will relate to these tools- e.g., how a firm can settle the first cartel and receive leniency on the second- is yet to be established.

E. Comparison with Settlement and Mechanisms of Committal.

The Leniency Plus framework has to be considered in the context of the 2023

amendments. Whereas the leniency applies in the situation involving cartels, the mechanism of Settlement and Commitment (S&C) is relevant to other forms of anti-competitive agreement (Section 3) and dominance abuse (Section 4).

Leniency: This demands full disclosure and a confession of guilt and offers some form of reward in a quasi-criminal probe.

Settlement: A settlement allows a firm to settle an investigation by a certain sum of money and by undertaking specific behavioural changes without an official finding of contravention. This is the key difference between leniency, which is focused on detection, and the expeditious resolution that S&C is focused on. Leniency Plus stands alone in sequential investigations by giving an incentive that is multi-case. In the case of a firm, whether to seek Leniency Plus or to seek a settlement in the case at hand will depend on the strength of the evidence and the probability of 100 per cent immunity in the second cartel.

IV. Improvements and Implementation: Jurisprudence of CCI.

A. Introduction: The early years of the enforced leniency.

The approach of theoretical justification of leniency in India was first substantially experimented with many years after enacting the Competition Act, 2002. First, the race to the CCI was more of a gradual process since companies did not want to be the first one to explore the regulatory waters. But with the case of Brushless DC Fans in 2017, the CCI has issued a number of decisive orders, which have started to form jurisprudence regarding Section 46 and the Leniency Regulations. The cases are critical in understanding the manner in which the Commission considers the requirements of vital disclosure and the added value of evidence presented by leniency applicants.

B. Case Study 1: The Brushless DC Fans Case (2017).

*In Re: Cartelization in respect of tenders floated by Indian Railways for the supply of Brushless DC Fans and other electrical items*²¹¹³ was the first case where the CCI granted the penalty reduction on the grounds under the Leniency Regulations.

- **The Facts:** The CCI began an inquiry into the bid-rigging and cartelisation by a number of companies that were bidding on the tender floated by Indian Railways. Application M/s Pyramid Electronics was granted an application of leniency when the Directorate General had already initiated the investigation, but was not yet ready to complete the investigative report.
- **The Pyramid:** Leniency Grant: Pyramid Electronics provided vital disclosure by acknowledging that it was a member of the cartel and that it held meetings, price-fixing deals, and the modus operandi of the bid-rigging. Although the CCI is the only applicant, it reduced the penalty by 75 per cent.
- **Lessons Learned:** This case led to the conclusion that the 100% reduction is not necessarily granted even to the first applicant in case the disclosure was made after the investigation had been initiated. It also indicated that the CCI carefully weighs the timing and quality of the disclosure against information that it already had.

C. Case Study 2: The Battery Cartel Decisions (2018-2019)

The most high-profile leniency cases in India involved the cartelization of dry cell batteries by major players like Panasonic, Eveready, and Indo National (Nippo).

- **The Facts:** In *In Re: Cartelisation in respect of zinc carbon dry cell batteries*

²¹¹³ *In re* Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Case No. 01 of 2014, (CCI, Jan. 18, 2017)

market in India²¹¹⁴ Panasonic Energy India Co. Ltd. was the first one to file a leniency application, providing exhaustive evidence of a long-standing price-fixing agreement with Eveready and Nippo.

• **The Leniency Grants:**

- **Panasonic:** As the first-in applicant who provided 'full, true and vital disclosure' before the DG investigation, Panasonic was granted a **100% reduction** in penalty.
- **Eveready:** As the second applicant, Eveready provided significant added value to the investigation and was granted a **30% reduction**.
- **Indo National:** As the third applicant, Indo National was granted a **20% reduction**.
- **Key Takeaway:** The *Battery Cartel* case was a milestone because it demonstrated that the CCI was willing to grant 100% immunity to the first whistleblower. This case truly signaled that the 'race to the CCI' was a viable and beneficial strategy for firms to protect themselves from massive fines.

D. Case Study 3: The Dry Cell Batteries (Subsequent Case) and Small-Scale Industries

Competition Commission of India (CCI) continued to narrow the focus of its regulation in other cases in the same industry but different product segments (e.g., the alkaline battery market). The CCI made hefty cuts in the case of *In Re: Cartelisation in the supply of Zinc Carbon Dry Cell Batteries to the Indian Railways*.²¹¹⁵, which were to be based on the order in which the applications are made. The Commission has also taken advantage of its leniency

program to fight cartels in the less-regulated segments, such as *In Re: Cartelisation in the supply of electric power steering systems*.²¹¹⁶ and in cases involving the supply of automotive parts. These examples indicate that the leniency regime does not exist only in large and multijurisdictional cartels but is a powerful tool of the CCI on all levels of the Indian economy.

E. CCI Decision-Making Process Analysis.

Studying the jurisprudence of the CCI, one can observe that there is a sequence of uniform thematic patterns in its decision-making procedures:

- **Evaluation of Vital Disclosure:** The CCI aims to find evidence that goes beyond mere admissions, which especially prizes contemporaneous records of the kind of electronic correspondence, meeting notes, and telephone-call records and logs that can together constitute an unquestionable paper trail of activity in the cartel.
- **Temporal Consideration:** The applicant must reveal the information at an earlier date to get a higher reduction. The distinction between a 100 percent and a 75 percent decrease frequently depends on whether or not the CCI is already aware of the cartel or not, or whether or not the CCI is involved in the investigation.
- **Significant Added Value:** To the later claimants, the CCI will assess whether the newly presented evidence enhances the evidentiary weight of the case or whether the new evidence adds to the period of time that the cartel was operating.
- **Cooperation and Admission:** The applicants must not only provide evidence but also admit their involvement and cooperate during the proceedings. The benefits of leniency may be lost by any regression or denial

²¹¹⁴ *In re* Cartelisation in respect of zinc carbon dry cell batteries market in India, Case No. 02 of 2016, (CCI, Apr. 19, 2018).

²¹¹⁵ *In re* Cartelisation in respect of zinc carbon dry cell batteries market in India, Case No. 02 of 2016, (CCI, Apr. 19, 2018).

²¹¹⁶ *In re: Cartelisation in the supply of Elec. Power Steering Sys., Suo Motu* Case No. 07 (01) of 2014, (CCI Aug. 9, 2019),

in the course of the investigation of the Directorate General.

F. Applications Success Rates and Trends.

Since 2017, the empirical record shows that leniency applications have been increasing steadily. An example is the annual CCI reports and orders of the people in which first-to-file applicants acquire the most common 100-percent cut when they provide substantial evidence. However, the final achievement of the program is measured by the final orders. Although numerous applications are submitted, the time that the DG needs to probe and the CCI to issue a final decision of three to five years remains a bottleneck in the process. Further, the regular references to the National Company Law Appellate Tribunal and the Supreme Court make the apparent predictability of an award of leniency to be postponed by years of court battle. Nonetheless, the jurisprudence is an indicator of a growing framework used by the CCI as its main tool for discovering cartels in India despite the challenges. It is expected that the next step of introducing the Leniency Plus will trigger this course of action even more so by motivating companies that belong to already identified cartels to report even more hidden agreements.²¹⁷

V. Leniency Programmes across Jurisdictions

VI. Critical Analysis and Comparative Perspective

A. Introduction: The Indian Leniency Regime Effectiveness Analysis.

The Indian leniency regime has definitely come a long way since the date of enactment of the Regulations of the year 2009. The recent implementation of the so-called Leniency Plus, the recent successes in such prosecutions like the one of the Battery Cartel, are evidence that the framework not only works, but is being refined as well. However, critical analysis reveals that it has a number of structural and procedural challenges still holding it down. To

shed some light on these loopholes, the Indian experience may be compared to the better-established leniency programmes in the United States and the European Union.

B. India and Troubles in the Landscape: Why is the Race Still a Crawl?

India had fewer leniency applications than peer jurisdictions, even though the upper limit on the reduction of penalties was as high as 100. This is explained by several factors:

- **Delays and Uncertainty in the Procedural Process:** Inquiry by the Director General (DG) and the resultant CCI proceedings may require several years. A leniency applicant, at this period, is in legal limbo. The assurance of the abatement is merely fulfilled in the ultimate order, which in turn is subject to appeal in the NCLAT and the Supreme Court.
- **High Evidentiary Standards:** Full, true, and vital disclosure requirement is taken at face value. In case the CCI finds the pieces of evidence presented to them as not being very significant, the applicant might not be given the maximum reduction, even when he is the first to present them.
- **Risks of Confidentiality and Damages in the Future:** Although the CCI is confidential during the investigation, the final order usually gives sufficient details to enable third parties (customers or competitors) to be able to know about the leniency applicant. This subjects the firm to the risk of colossal follow-on damages claims pursuant to Section 53N of the Competition Act and the risk of being debarred by public procurement tenders.
- **The 'Race to the Court' vs. The Race to the CCI:** In most instances, companies prefer litigating the findings of the DG instead of seeking leniency. This is usually due to the fact that the base penalties in India are considered to be

²¹⁷ Cartels and Carrots: Unraveling the Flaws in India's Leniency-plus Approach, 11 (2024), <https://crclp.nliu.ac.in/cartels-and-carrots-unraveling-the-flaws-in-indias-lenieny-plus-approach/>

high, and the possibility of the stay or reduction by the appellate courts (NCLAT or the Supreme Court) is considered a possible option other than self-incrimination.²¹¹⁸

C. Compare and Contrast Viewpoint: India vs. the US and EU.

United States: The Gold Standard of Amnesty.

Corporate leniency is an invention of the United States Department of Justice (DOJ) Antitrust Division. The 1993 Corporate Leniency Policy has been generally referred to as the Gold Standard. The American model and the Indian model are different in a number of fundamental aspects. To begin with, it has been given a leniency of automatic character. Where a company is the first to disclose a cartel without the knowledge of the DOJ, and the company qualifies under some requirements, amnesty is not optional, but rather a question of morality. This model of Amnesty as a Right gives the corporations this certainty, which is a major motivation to self-report.

Secondly, the US uses a carrot and stick policy that entails criminal penalties. Cartel members in the United States are not only fined by the company but also charged with felony offences, which may result in lengthy terms of imprisonment by the courts for the perpetrators. The Amnesty extends to the corporation as well as its collaborating directors and employees. This individual threat of incarceration is a good motivator for executives to race towards the DOJ. Contrary to that, the Competition Act of India, although with individual liability, lacks criminal incarceration against cartelists except in the form of civil fines.

The European Union: The Leniency Notice and Significant Added Value.

The leniency program of the European Commission (EC) is based on the 2006 leniency notice. Similar to India, the EC has provided a tiered reduction (100 percent on the first-in, 30-

50 percent on the second, and so on). But EC has a much stronger structure on determination of Significant Added Value. The jurisprudence of the EC on the subject of what is meant by added value is comprehensive and, in that regard, gives an effective insight into how the Commission judges the weight of new evidence against the weight of what it already has.

The other important characteristic of the EU system is the protection of follow-on damages. According to the EU, in its Damages Directive (2014), the recipient of immunity is not liable jointly and severally for the injury caused by the whole cartel. They are only responsible for the damages that they have inflicted on their respective direct and indirect customers. This is a definitive aspect of Indian law based on massive third-party claims, which has been given the much-needed Safe Harbor by the Indian legislature. The threat of becoming the recipient of all the damages that will follow might make companies in India twice think about whistleblowing.

Comparing it to the U.S. Department of Justice (DOJ) and the European Commission (EC), one can distinguish several important differences:

Personal Liability: In the United States, involved players of a cartel are not only fined as corporations, but also charged with criminal penalties, such as imprisonment of the executives. This will generate a strong individual motive to blow the whistle. In India, although individual liability (under Section 48) is laid down in the Competition Act, criminal penalties like imprisonment have yet to become the competition enforcement mechanism of cartels.

Immunity as a Right vs. Discretion: In the U.S., the first person to report a cartel of which the DOJ has not already enlisted the investigation is entitled to automatic immunity (Amnesty). In India, a lesser penalty is never mandatory (granted by the Commission, may, upon being satisfied). Such absence of an automatic right

²¹¹⁸ Somashekar T.S. & Praveen Tripathi, *Cartel Leniency Programme in India—Why No Race Here?*, 11 J. Antitrust Enforcement 1 (2023).

to immunity is likely to discourage risk-averse companies.²¹¹⁹

Confidentiality and Discovery: The EU has stronger provisions against leniency statements being utilized in personal damage proceedings.²¹²⁰ The interaction between the secret laws of the CCI and the disclosure authority of the NCLAT and civil courts remains a developing law in India, causing some fear among prospective applicants.²¹²¹

D. What can the CCI Learn?

To make the leniency programme more effective, the Competition Commission of India would need to refer to a list of global best practices:

- **Increased Openness in the Process of Calculating Penalties:** Through the declaration of a clear and consistent formula for calculating the base penalties, companies will have a better chance of evaluating the actual worth of a reduction in leniency. The current paradigm of wide discretion clouds the cost-benefit calculations of the potential applicants.
- **Self- Reinforcing the Marker System:** The introduction of the marker system in the form of a formal system and the long evidence-collection period will tend to promote earlier disclosure and proactive compliance.
- **Dealing with Follow-on Damages:** Introducing laws to protect leniency applicants against joint and several liability in relation to follow-on damages would go a long way in reducing the inhibitory effect of post-factum litigation.
- **The Multi-Market Cartel Leverage of the use of Leniency Plus:** The CCI should actively advance its new nascent regime

of Leniency Plus, particularly in sectors that are typified by systematic cartelisation, like in the case of automotive parts, cement making, and government procurement.

VII. Conclusion and Suggestion

The Indian leniency regime is at a critical inflexion point. Even though the legal structure is mainly in place, its final effectiveness depends on the ability of the CCI to create a more foreseeable and safer system of whistleblowers. Introduction of 'Leniency Plus' is a positive step, but it needs to be supplemented by procedural revamps that will keep down the time wasting and the potential threat of follow-up litigation. India can guarantee the emergence of the race to the CCI as the most favored technique of firms desiring to exit lawless cartel arrangements by migrating to a rule-based and less discretionary model.

A. Recommendations for Strengthening the Leniency Regime

To enhance the effectiveness of the leniency mechanism and to incentivize more self-reporting, the following suggestions are offered:

1. **Introduction of Automatic Immunity:** The CCI should consider moving towards a model similar to the US DOJ, where the first applicant to report a previously unknown cartel is granted automatic 100% immunity from penalty, rather than leaving it to the Commission's discretion. This would provide the necessary 'certainty' to firms.
2. **Greater Transparency in Penalty Calculation:** The CCI should notify a set of 'Penalty Guidelines' that clearly explain how the base penalty is calculated and what specific factors lead to reductions. This transparency would help firms conduct an accurate cost-benefit analysis before applying for leniency.
3. **Protection from Follow-on Damages:** The legislature should consider amending the Competition Act or the

²¹¹⁹ U.S. Dep't of Justice, Antitrust Division, Corporate Leniency Policy (1993).

²¹²⁰ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17 (EU).

²¹²¹ Council Directive 2014/104/EU, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1 (addressing joint and several liability).

NCLAT rules to provide specific protections for successful leniency applicants against certain types of joint and several liability in follow-on damages actions. This would align Indian law with the EU's Damages Directive and reduce the 'second-stage' risk of self-incrimination.

4. **Enhanced Confidentiality and Discovery Rules:** The CCI and the courts should establish clearer rules for protecting the leniency file from discovery in non-competition civil litigations. Ensuring that the leniency statement is used only for the purpose of the Competition Act is crucial for maintaining the trust of the business community.
5. **Promoting 'Leniency Plus':** The CCI should engage in active advocacy to educate firms about the benefits of the 'Leniency Plus' regime. This is particularly important for multinational corporations that may already be familiar with 'Amnesty Plus' in other jurisdictions.
6. **Integration with Individual Liability:** To create stronger incentives, the CCI could consider a policy where corporate leniency automatically extends immunity to all cooperating directors and employees, without the need for separate individual applications.

B. Final Thoughts: The Future of Competition Enforcement in India

The Indian competition landscape is at an inflection point. With the 2023 amendments and the introduction of 'Leniency Plus,' the CCI has signalled its intent to be as aggressive as any global competition authority in its pursuit of cartels. However, the true success of these 'carrots' will depend on whether they are perceived as stable and reliable by the market. As India moves towards becoming a five-trillion-dollar economy, ensuring a level playing field through robust cartel enforcement is more

important than ever. The leniency regime, if implemented with transparency, predictability, and efficiency, can be the CCI's most potent weapon in safeguarding the competitive spirit of the Indian market.

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(Citing in 21st Bluebook Footnote Style – Sample Footnotes to be incorporated throughout the paper)

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