

# UNMASKING CARTELS: A COMPARATIVE ANALYSIS OF ANTITRUST LENIENCY AND LESSER PENALTY SCHEMES IN THE USA, UK, EU, AND INDIA

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## Abstract

This paper provides a comparative analysis of antitrust leniency and lesser penalty programs in four significant jurisdictions: the US, UK, EU, and India. In this context, through the study of the statutory and procedural framework, it evaluates the criteria for leniency, reduction percentages, confidentiality clauses, and withdrawal procedures. This paper also examines the recent development, namely in India where the Lesser Penalty Regulations, 2024 introduce the "Lesser Penalty Plus" program. The research findings are based on the examination of the substantive law and case law principles, illustrating the way in which competition authorities use tiered rewards in order to undermine anticompetitive arrangements as well as encourage voluntary compliance

**Keywords:** Withdrawal, lesser Penalty Regulations, Substantive Law, Anticompetitive Arrangements

## Introduction

Cartel agreements and others of such anticompetitive nature are extremely difficult to establish due to the highly confidential nature of these arrangements and the need to rely on insider knowledge in order to bring about convictions. In order to address this problem of implementation, competition regulators have implemented leniency programs globally.

In the United States, the Antitrust Division of the Department of Justice operates a vigorous corporate and individual leniency scheme bolstered by provisions in the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) that reduce civil liability. The UK's Competition and Markets Authority (CMA) has a similar scheme as does the European Commission; all three heavily rely on tiered leniency schemes to break up cartels. The UK scheme is divided into Types A, B, and C while there is a banded

system for immunity and fine reductions under the EU scheme.

India's Competition Commissioning has significantly updated its enforcement framework with the introduction of the Lesser Penalty Regulations 2024. This updated regime formalizes comprehensive conditions for cooperation and introduces the "Lesser Penalty Plus" scheme to explicitly encourage the disclosure of cartels. This article comparatively analysis the procedural mechanisms, eligibility criteria, and the judicial precedents of these four distinct regimes to identify global best practices and emerging trends in antitrust enforcement.

## United Kingdom

### Leniency Scheme By the Competition and Markets Authority)<sup>1190</sup>

#### Conditions to avail benefit of leniency scheme

To apply for leniency, a business must have a **concrete basis to suspect cartel activity**, such as documentary or witness evidence [(3.14)]. Once an application is made, the business must meet several ongoing conditions [(3.15)]: “

- **Information:** Provide the CMA with **all relevant information, documents, and evidence** regarding the cartel activity [3.15)].
- **Cooperation:** **Cooperate throughout the application process and any formal investigation**, which includes keeping the application confidential [(3.15)].
- **Termination:** **Cease participation in the cartel activity**, though the CMA may advise on how to do this without alerting other members [(3.15)].
- **Admission:** If the CMA makes a provisional finding, the business **must admit to engaging in cartel activity** and not behave inconsistently with such an admission [(3.15)].
- **Coercer Test:** To qualify for Type A or Type B leniency, the business **must not have coerced another business** into joining the cartel. If coercion occurred, only Type C leniency is available [3.15)]. For Type B and Type C leniency, the business must also **add significant value** to the CMA’s investigation, for example, by providing documentary evidence or making witnesses available, and cooperate proactively [(3.16)].

#### Types of leniency schemes

There are three types of leniency, determined by whether the CMA is already investigating or if

other cartel members have applied [(3.2, 3.3)]. A summary is provided below:

- **Type A immunity** [(3.4, 3.5)]:
  - ❖ **Guaranteed** if the CMA has not yet begun an investigation and no other cartel members have applied [(3.4)].
  - ❖ Offers **guaranteed immunity from financial penalties, guaranteed immunity from criminal prosecution** for all cooperating current and former employees, **guaranteed immunity from disqualification** for all cooperating current and former directors, and **exemption from debarment and exclusion from public procurement** [(3.5)].
- **Type B leniency** [(3.6-3.10)]:
  - ❖ **May be available** if the CMA has already started an investigation but no other cartel members have applied. It is **not guaranteed** [(3.6, 3.7)].
  - ❖ Offers a **reduction in financial penalties of up to 100%** (though unlikely to be more than 75%), **discretionary immunity** from disqualification for some directors, and in exceptional cases, **discretionary immunity from criminal prosecution** for some employees [(3.8)].
  - ❖ Exemption from debarment and exclusion is granted only if the business receives a 100% reduction in penalties [ (3.10)].
- **Type C leniency** [(3.11-3.13)]:
  - ❖ **May be available** if another cartel member has already applied for leniency. It is **not guaranteed** [(3.11)].

<sup>1190</sup> Competition & Mkts. Auth., Short Guide to Cartels and Leniency for Businesses (2025).

- ❖ Offers a **reduction in financial penalties of up to 50%, discretionary immunity** from disqualification for some directors, and in exceptional cases, **discretionary immunity from criminal prosecution** for some employees [(3.12)].
- ❖ There is no automatic exemption from debarment; however, receiving leniency may serve as relevant evidence to argue against exclusion.

### Procedure to avail leniency scheme

The leniency application process involves several steps [(4.1)]:

1. **Before Applying:** Businesses should **seek legal advice** and conduct **internal enquiries** to secure evidence and verify cartel activity. It is crucial to **keep the matter confidential** during this phase [(4.2, 4.3)]. Confidential guidance can be sought from the CMA's leniency enquiry line (020 3738 6833) without disclosing the business's identity initially [(4.4)].
2. **Step 1: Applying for Leniency:** The business or its legal representative makes an **initial call to the CMA leniency line** (020 3738 6833) to check leniency availability, providing details like the industry and cartel type, but typically not the identity at this stage [25 (4.5)]. The CMA checks availability (usually within two working days) and responds. If available, the business's identity is then required to grant a **leniency marker**, which provisionally grants leniency assuming all conditions are met [(4.5)]. For Type B and C, individual employee/director immunity is decided later [(4.6)].
3. **Step 2: Leniency Application Package:** The business submits an application package, including **all relevant documents and a detailed leniency**

**statement** [(4.8)]. The CMA reviews this package and decides whether to launch a formal investigation [(4.9)].

4. **Step 3: Cooperating with a Formal Investigation:** If a formal investigation begins, the business signs a letter confirming its commitment to cooperation [(4.10)]. This includes **answering questions, searching for evidence, and making employees and directors available for interviews** [(4.11)]. A constructive approach is expected, and for Type B/C, greater assistance leads to a larger discount [(4.12, 4.13)]. Cooperation is also required for criminal cartel investigations [(4.14)].
5. **Step 4: Signing a Leniency Agreement:** This is a **formal agreement** between the business and the CMA, confirming that the business has met the conditions and will receive immunity or a reduction in penalties. It also confirms the business's **admission of cartel activity** [(4.16)]. This agreement is signed towards the end of the investigation, and for Type B/C applicants, the final discount level is confirmed at this point [(4.17)].

### Confidentiality provisions

Confidentiality is a critical aspect throughout the leniency process:

- Before applying, businesses must **keep internal enquiries confidential** to prevent others from becoming aware they are considering a leniency application [(4.3)].
- As a condition of cooperation, the business must **keep confidential the fact that it has applied for leniency** [(3.15)].
- The CMA will work with the business to manage the termination of cartel involvement in a way that **avoids alerting other cartel members** to the CMA's awareness of the cartel activity [(3.15)].

**“Withdrawal procedure”**

The CMA may withdraw leniency if a business fails to meet the specified conditions [(4.18)]:

- The CMA will usually **discuss its concerns with the business** and **provide an opportunity to rectify the issue** [(4.18)].
- If the business fails or is unable to address the CMA's concerns, leniency

will be withdrawn [(4.18)].

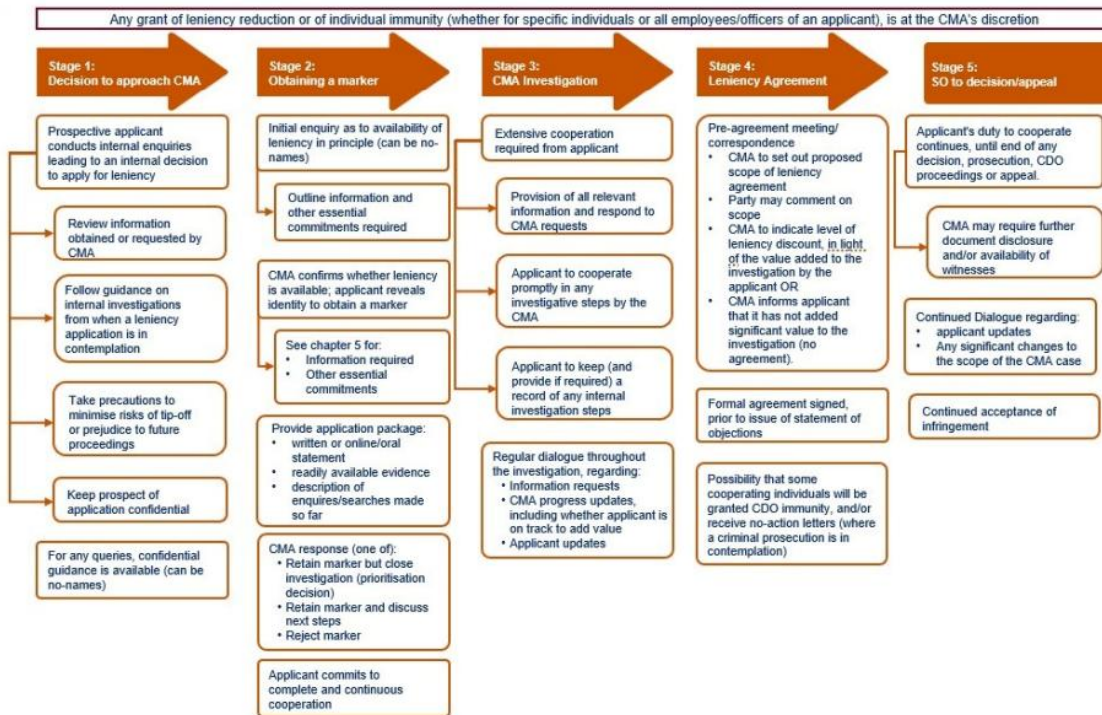
- If an employee or director fails to cooperate, the business's leniency will not be withdrawn, provided the business used its best efforts to secure cooperation. However, the non-cooperating individual will **lose any personal benefits** like immunity from disqualification or criminal prosecution [(4.19)].

Table A: Types of leniency (summary)

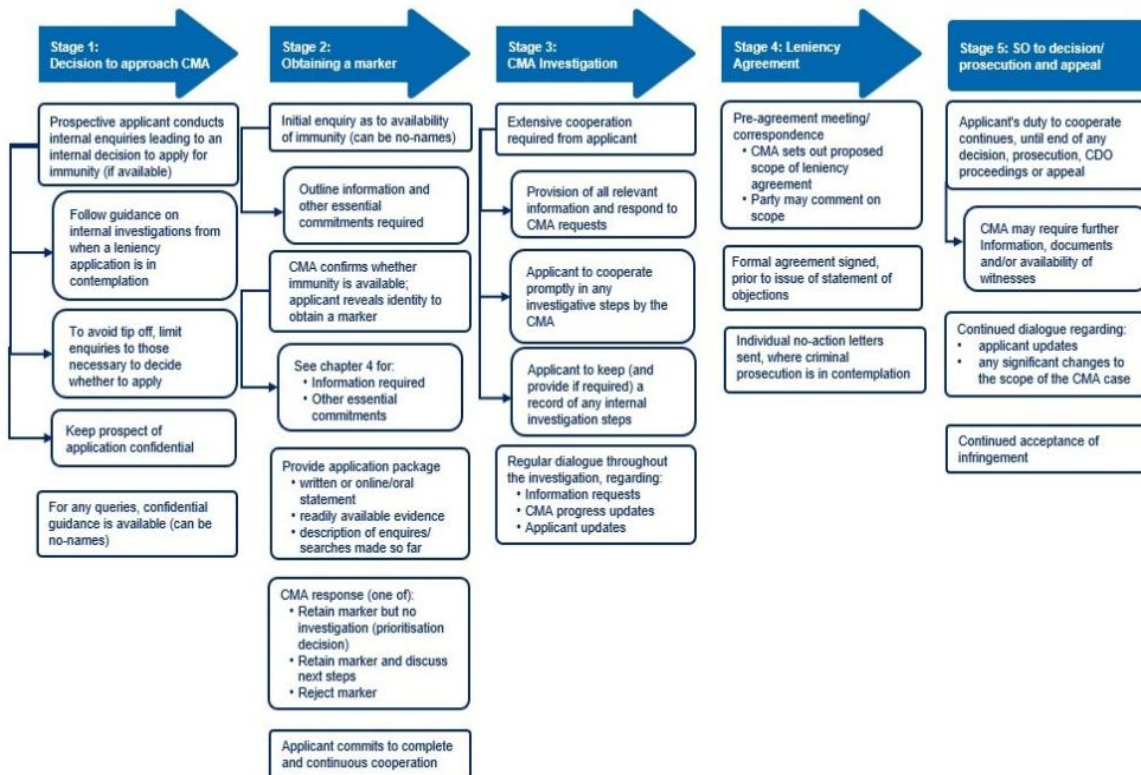
Stage of application	Minimum information	Conditions	Level of protection
<b>Type A</b> <ul style="list-style-type: none"> <li>• First applicant</li> <li>• No pre-existing investigation</li> </ul>	Information must give the CMA a sufficient basis for taking forward a credible investigation	(a) Provide the CMA with all relevant information, documents and evidence (b) Maintain continuous and complete cooperation throughout the investigation (c) Refrain from further participation in the cartel activity (d) If a leniency agreement is reached, admit to participation in cartel activity (which, by definition, is a breach of the law) (e) Must not have coerced another to take part in the cartel	<ul style="list-style-type: none"> <li>• Guaranteed corporate immunity from financial penalties</li> <li>• Guaranteed 'blanket' criminal immunity for cooperating current and former employees</li> <li>• Guaranteed CDO immunity for cooperating current and former directors</li> </ul>
<b>Type B</b> <ul style="list-style-type: none"> <li>• First applicant</li> <li>• Pre-existing investigation, but prior to statement of objections</li> </ul>	Information must add significant value to the CMA's investigation	Conditions (a) to (e) as above	<ul style="list-style-type: none"> <li>• Discretionary reductions in corporate financial penalties of up to 100%</li> <li>• Discretionary criminal immunity for cooperating current and former employees</li> <li>• Discretionary CDO immunity for cooperating current and former directors</li> </ul>
<b>Type C</b> <ul style="list-style-type: none"> <li>• Second or later applicant (or coercer)</li> <li>• Prior to statement of objections</li> </ul>	Information must add significant value to the CMA's investigation	Conditions (a), (b), (c), and (d) as above.	<ul style="list-style-type: none"> <li>• Discretionary reductions in corporate financial penalties of up to 50%</li> <li>• Discretionary criminal immunity for cooperating current and former employees</li> <li>• Discretionary CDO immunity for cooperating current and former directors</li> </ul>



Overview Chart B: leniency applications (after commencement of an investigation)



Overview Chart A: immunity applications (no pre-existing investigation)



USA Leniency Scheme By the DOJ Antitrust Dept

### Key Conditions & Benefits

- **Self-Reporting & Cooperation:** Applicants are required to provide **timely, truthful, complete, and continuing cooperation** throughout the Division's investigation and any resulting prosecutions.
- **Confession of Involvement:** A key requirement to receive a conditional leniency letter is to **confess involvement in the illegal activity without qualification and in its entirety**. For corporate applicants, a corporate representative must admit wrongdoing, and involved personnel are expected to do so as well, unless unavailable.<sup>1191</sup>
- **Prompt Reporting & Discovery:** Self-reporting must be prompt, meaning at the **earliest date an authoritative representative** (board, counsel, or compliance officer) was informed of the conduct. Failure to investigate further after learning of potential activity can lead to ineligibility.
- **Restitution & Remediation:** Applicants must use **"best efforts" to make restitution** to injured parties "where possible" and **improve their compliance program** to mitigate future risk.
- **Non-Leader/Originator:** The applicant **must not have coerced another party** to participate and **clearly was not the leader or originator** of the illegal activity. This criterion is construed in favor of granting leniency, making exclusion rare.

### Types of Leniency

- **Corporate Leniency:**
  - ❖ **Type A Leniency:** Available **before the Division has opened an investigation** and has not

received information about the illegal activity from any other source.

- ❖ **Type B Leniency:** Available **even after the Division has opened an investigation**, provided the corporate applicant satisfies its criteria. The Division assesses if it has evidence "likely to result in a sustainable conviction".

- **Individual Leniency:** Available for individuals who **approach the Division on their own**, not on behalf of an organization. The window for individual leniency **closes once an organization requests a marker** and provides information.
- **Leniency Plus:** Allows an organization under investigation for one conspiracy (where it's not eligible for leniency) to receive **additional credit in its plea agreement** for that conspiracy by **reporting a separate, previously undetected antitrust conspiracy for which it is eligible for leniency**. This leads to a greater reduction in the recommended fine for the initial conspiracy.

### Procedure & Confidentiality

- **Applying for a Marker:** The process typically begins by contacting the Antitrust Division. An organization should seek a "marker" at the **first sign of potential wrongdoing**, as **only one organization or individual can receive leniency per conspiracy**. The **threshold for securing a marker is low**. Markers are granted for a limited period, typically 30 or 45 days, and can be extended.
- **Conditional & Final Leniency Letters:** Upon satisfying criteria, the applicant receives a conditional leniency letter, which provides "conditional" non-prosecution protection. A final letter is issued after all obligations are met,

<sup>1191</sup> U.S. Dep't of Just., Just. Manual § 7-3.300 (2024).

typically upon completion of the investigation and resulting prosecutions.<sup>1192</sup>

- **Confidentiality:** The Division treats an applicant's identity and information in **strict confidence** and does not publicly disclose it unless certain conditions are met (e.g., applicant disclosure, court order, criminal case requirement). Disclosure to foreign governments **requires the applicant's consent**.

### Withdrawal & Revocation

- **Withdrawal by Applicant:** An applicant can **voluntarily withdraw its application** after receiving a marker or a conditional leniency letter. Withdrawal means losing non-prosecution protection.
- **Revocation by Division:** The Division can **withdraw a marker** if an applicant cannot meet leniency criteria. It can also **revoke a conditional leniency letter** if the applicant is ineligible or fails to meet cooperation obligations. Revocation is rare. If a corporate conditional leniency letter is revoked, individual protections are void, though the Division may use discretion not to prosecute individuals who cooperated and were not responsible for the revocation.

### Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)

- ACPERA provides that in exchange for **timely and "satisfactory cooperation" with civil plaintiffs**, an applicant will only be liable for **"actual damages" attributable to its own commerce**, rather than treble damages and joint and several liability. This aims to incentivize self-reporting and cooperation in private lawsuits."

India

Lesser Penalty Regulations 2024

### Conditions to Avail Lesser Penalty or Leniency

An applicant seeking the benefit of lesser penalty or lesser penalty plus under Section 46 of the Competition Act, 2002, must fulfill several conditions. These include:

- **Ceasing Participation:** The applicant must **cease further participation in the cartel** from the time of its disclosure, unless directed otherwise by the Commission [44(a)].
- **Vital Disclosure:** The applicant must **provide vital disclosure** regarding the alleged contravention of Section 3 of the Act. A "vital disclosure" means a full and true disclosure of information or evidence to the Commission that is sufficient to enable the Commission to form a prima facie opinion about the cartel's existence or helps establish the contravention of Section 3.
- **Providing Information, Documents, and Evidence:** The applicant must **provide all relevant information, documents, and evidence** as required by the Commission.
- **Cooperation:** The applicant must **cooperate genuinely, fully, continuously, and expeditiously** throughout the investigation and other proceedings before the Commission.
- **Non-Concealment/Destruction:** The applicant must **not conceal, destroy, manipulate, or remove relevant documents** in any manner that could contribute to establishing a cartel.
- **Truthfulness:** The applicant must **not give any false evidence or omit to submit any material information** knowing it to be material.

<sup>1192</sup> Antitrust Div., U.S. Dep't of Just., Frequently Asked Questions About the Antitrust Division's Leniency Program (2023).

- **Naming Individuals:** The applicant must **provide the names of individuals involved in the cartel on its behalf** for whom lesser penalty or lesser penalty plus is sought.

Failure to provide a full and true disclosure of information and evidence as specified in Schedule I or II, or as otherwise required by the Commission, may lead to the **rejection of the application**. Similarly, failure to comply with the above conditions (sub-regulations (1) and (4) of regulation 3) either before the Director General or the Commission, especially after receiving the investigation report, can also result in the **rejection of the application**. However, before rejecting an application, the Commission must **provide an opportunity for the applicant to be heard**. Even if an application is rejected, the Commission or the Director General remains free to use the information, documents, and evidence submitted by the applicant in the ongoing matter.

### Types of Schemes

The regulations describe two main types of schemes for penalty reduction:

- **Lesser Penalty (Regulation 4):** This scheme allows for a reduction in penalty for applicants who provide significant cooperation.
  - ❖ **100% Reduction:** If an applicant is the **first to make a vital disclosure** by submitting evidence that enables the Commission to form a prima facie opinion about a cartel's existence, and the Commission did not have sufficient evidence at the time of application, they may be granted a **reduction in penalty up to or equal to one hundred percent** [51(a)]. This also applies if the applicant is the first to submit evidence that *establishes* a contravention of Section 3 in a matter under

investigation when the Commission or Director General previously lacked sufficient evidence to establish such a contravention [52(a) Proviso]. This benefit applies to both the applicant and the individuals involved on their behalf.

- ❖ **Subsequent Applicants (Added Value):** Applicants subsequent to the first can also receive penalty reduction if they provide evidence that, in the Commission's opinion, offers **significant added value** to the evidence already possessed by the Commission or Director General, helping to establish the cartel's existence [52(b)]. "Significant added value" means the extent to which the provided evidence enhances the ability of the Commission or Director General to establish the cartel's existence.

- **Second Applicant:** The applicant marked as second in priority status may be granted a **reduction of monetary penalty up to or equal to fifty percent** of the penalty imposed.
- **Third or Subsequent Applicant:** The applicant marked as third or subsequent in priority status may be granted a **reduction of penalty up to or equal to thirty percent** of the penalty imposed.

- **Lesser Penalty Plus (Regulation 5):** This scheme provides an additional reduction in penalty for an applicant who has already received a lesser penalty for one cartel (the "first cartel")

and then voluntarily discloses the existence of *another* cartel (the "newly disclosed cartel").

- ❖ An applicant who previously made a full, true, and vital disclosure regarding a "first cartel" and subsequently makes a **full, true, and vital disclosure about a "newly disclosed cartel"** (in which they also allegedly violated Section 3 of the Act) may be granted an **additional reduction in monetary penalty up to or equal to thirty percent** of the penalty imposed with regard to the **first cartel**.
- ❖ This is *in addition* to obtaining a **reduction in penalty up to or equal to one hundred percent** for the newly disclosed cartel, if they are the first to report it.
- ❖ Individuals who were part of the lesser penalty application for the first cartel may also receive the Lesser Penalty Plus benefit if they are also part of both the newly disclosed cartel and the Lesser Penalty Plus application.
- ❖ When determining a newly disclosed cartel, the Commission will consider **all relevant factors that distinguish it from the existing cartel**.
- ❖ The Commission's discretion for reduction under Lesser Penalty Plus considers the **likelihood of the newly disclosed cartel being detected without the Lesser Penalty Plus application** and any other relevant factor.

### Procedure to Avail Scheme

#### **For Lesser Penalty (Regulation 6):**

- **Application/Intimation:** An applicant can make a written application

containing all material information as specified in Schedule I, or simply intimate the designated authority (in person, by e-mail, or fax) about furnishing information and evidence relating to a cartel's existence.

- **Referral to Commission:** The designated authority must put the matter before the Commission for consideration within **ten working days**.
- **Timing:** The application can be made at any time during an inquiry but **not after the investigation report** directed under Section 26 of the Act has been received by the Commission.
- **Date and Time of Receipt:** The date and time of receipt are those recorded by the designated authority or on its server/facsimile machine.
- **Priority Status Marking:** The Commission marks the applicant's priority status, and the designated authority conveys this to the applicant. This marking alone **does not guarantee** the grant of lesser penalty.
- **Written Application Requirement:** If only an intimation is received, the Commission directs the applicant to submit a full written application (as per Schedule I) within **fifteen days**.
- **Forfeiture:** If the full application and necessary documents are not received within fifteen days (or an extended period), the **priority status and consequent benefits are forfeited**.
- **Evaluation Order:** The Commission will **not consider subsequent applications until the evidence from the first applicant has been evaluated**.
- **Priority Shift:** If the first applicant does not receive the benefit, subsequent applicants move up in the priority order.
- **Decision Communication:** The Commission's decision to grant or reject

the lesser penalty application is communicated to the applicant.

#### **For Lesser Penalty Plus (Regulation 7):**

- **Application/Intimation:** Similar to lesser penalty, an applicant makes a written application (as per Schedule II) or intimates the designated authority (in person, by e-mail, or fax) about a newly disclosed cartel.
- **Referral to Commission:** The designated authority puts the matter before the Commission within **ten working days**.
- **Timing:** An application for lesser penalty plus can be made at any time **before the receipt of the Director General's investigation report** under Section 26 of the Act in the first cartel.
- **Evaluation Order:** If there are multiple applicants for lesser penalty plus regarding a newly disclosed cartel, the Commission **will not examine subsequent applications unless the first applicant's application has been rejected**.
- **Date and Time of Receipt:** The date and time of receipt are those recorded by the designated authority or on its server/facsimile machine.
- **Priority Status Marking:** The Commission marks the applicant's priority status for both the lesser penalty plus (for the first cartel) and lesser penalty (for the newly disclosed cartel). This marking alone **does not guarantee** the grant of benefits.
- **Written Application Requirement:** If only an intimation is received, the Commission directs the applicant to submit a full written application (as per Schedule II) within **fifteen days**.
- **Forfeiture:** If the full application and necessary documents are not received within fifteen days (or an extended period), the **priority status and**

**consequent benefits for both schemes are forfeited.**

#### **Confidentiality Provisions**

The Commission or the Director General is required to **treat as confidential:**

- **The identity of the applicant.**
- **The information, documents, and evidence furnished by the applicant** under Regulation 6 (lesser penalty) and/or Regulation 7 (lesser penalty plus).

However, such identity or information **may be disclosed** under specific circumstances:

- If the **disclosure is required by law.**
- If the **applicant has agreed to such disclosure in writing.**
- If there **has been a public disclosure by the applicant.**

If the Director General deems it **necessary to disclose** the furnished information, documents, and evidence to any party for investigation purposes, and the applicant has *not* agreed to such disclosure, the Director General may still disclose it after **recording the reasons in writing and obtaining prior approval from the Commission.**

All submissions made before the Director General (except those made to the Commission within the initial fifteen-day period under regulations 6 and 7) are governed by the confidentiality provisions of Regulation 35 of the Competition Commission of India (General) Regulations, 2009.

Regarding **inspection and certified copies of documents**, the non-confidential versions of the information, documents, and evidence furnished by the applicant become applicable for inspection and certified copies after the Commission forwards the Director General's report containing findings to the concerned party. Any party inspecting or obtaining certified copies of these documents **must not disclose**

them for purposes other than the proceedings under the Act.

### **Withdrawal Provisions**

An applicant has the right to **withdraw their application** for lesser penalty and/or lesser penalty plus :

- At **any time prior to the receipt of the investigation report** under Section 26 of the Act by the Commission in the concerned matter.

If an applicant withdraws their application, the **Director General or the Commission remains at liberty to use any information, evidence, or document submitted by the applicant for the purposes of the Act, except for the applicant's admission of violation."**

### **Conclusion**

The comparative analysis of leniency programs makes it clear that the core principles of cartel enforcement are uniformly recognized—these are rapid self-reporting, substantial and ongoing cooperation, and absolute confidentiality. While the procedural rules vary, for instance, regarding the timelines for reporting under the "marker" system in different legal systems, the ultimate goal remains consistent and is to undermine anticompetitive schemes internally. The introduction of "Leniency Plus" or "Lesser Penalty Plus" policies in the United States and India further validates the application of a flexible and strategic approach intended to leverage existing cases and facilitate detection of cartels. An effective leniency policy should be based on an implicit threat, which consists in the possibility of revocation of any benefits provided if the requirements of ongoing cooperation are not fulfilled by the applicant.