

Effectiveness of Whistle blower and Leniency Programme in Detecting and Preventing Cartels

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Introduction

“People of the same trade don’t often meet together, even for merriment and diversion, but the discourse usually results in a plot against the public or some scheme to increase prices”¹

Cartels are the most egregious of all anti competitive behaviours and the ultimate antitrust evil.² To combat the increasing number of cartels that are disrupting fair markets and encouraging unfair practises such as price hikes, output limits, and credit restrictions, the Indian government has, to some extent, effectively adopted the subordinate legislation of Leniency Provisions. Due to their clandestine operations and stringent enforcement, cartel agreements are difficult to recognise. However, cartel members believe that the danger of punishment outweighs the advantages of engaging in illegal activity when substantial monetary penalties are in place. As a result, they are compelled to reveal their anti-competitive activities.

According to the Competition Act of 2002, formation of cartels is regarded as the most serious infringement of competition law in India. In exchange for information that aids the Competition Commission of India prove and penalise other cartel members, early confessors and conspirators are afforded

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¹ The Wealth of Nations, 1776 by Adam Smith

² D.G.Goyder, EC Competition Law; Verizon Communications Inc. v. Law Offices LLP 540 U.S (2004).

leniency under the leniency initiative established by this Act, the Competition Commission of India (Lesser Penalty) Regulations, 2009, and the Amended Regulations, 2017. The leniency provision of the current legislation does not entice cartel members into a rathole of leniency. Instead, leniency provisions are regarded as an effective approach to expose cartels, because the activity is heavily guarded that breaching such agreements requires internal information. That is to say, the leniency program acts as whistle-blower protection by rewarding members who disclose cartel activity to the CCI. The leniency programme in India was the result of the convergence of all necessities and mental processes.

Rationale for incorporating a leniency initiative

Several countries, such as the European Union, the United States, Canada, Australia, and Korea, have implemented leniency programs aimed at increasing the chances of uncovering cartels. They have shown that the algorithm is a very powerful tool for identifying cartels.³ This is because the activity is so strictly guarded that it requires insider knowledge to violate such agreements. The concept is significantly influenced by the Prisoner's dilemma and Nash equilibrium theories. Leniency programmes are accepted to detect cartels as the activity is so guarded that internal information is sought to break such agreements need to understand what these notions are in order to examine these institutional design difficulties with the leniency programmes. A prisoner's dilemma arises when two parties act in their own self-interest and prioritise their individual benefits, leading to a situation where both parties end up worse off than if they had cooperated and pursued the interests of the group instead of just their own. As a result, they miss out on

³ Monti, M., "The Battle against cartels", Conversation by Mario Monti to EMAC

opportunities for mutual gain and suffer from the negative consequences of their individualistic approach.⁴ In this instance, either party's confession would be sufficient to convict the other of the fundamental offence. Nash Equilibrium is an action profile where no individual can improve their payoff by deviating from it alone, without the cooperation or consent of the other party involved. In other words, it is a situation where both parties have reached a stable state of equilibrium, where neither party can benefit by changing their strategy independently.⁵ We discover that when we apply game theory to the prisoner's dilemma, each prisoner is more likely to admit that he is pursuing his own short-term self-interest. The confession tactic becomes dominant because both parties are better off confessing, regardless of what the other prisoner does. The leniency policy in competition law is based on the structural programme described in the preceding theories.

Procedural aspects of the leniency initiative and changes in regulation

A. Infringements of competition law: under the leniency provision

As per the leniency provision, “if any producer, seller, distributor, trader, or service provider who is accused of violating section 3, provides a full and factual disclosure related to the alleged infringement, and such information is deemed to be vital by the Commission, then the Commission may impose a reduced penalty on such a producer, seller, distributor, trader, or service provider, as deemed appropriate. In essence, the leniency provision offers an

⁴ Ulrich Blum, Rationale of Leniency Programs: Theoretical Analysis, 25(3), J. L. (2008)

⁵ Kreps, Rational Cooperation Finitely Repeated Prisoner's Dilemma, ECON. 245

incentive for individuals or companies involved in a cartel to come forward and provide useful information, in exchange for a potential reduction in penalties”. The provision applies to infringements of section 3(3) of the Act, which pertains to cartel activities. These activities include:

- a) Price-fixing
- b) Bid-rigging
- c) The imposition of output limitations or quotas
- d) The allocation of resources or division of markets.

The Act does not impose criminal liability for engaging in cartel behaviour. Instead, the leniency program primarily addresses the administrative liability of cartel members under the Act. Chapter VI contains a number of provisions relating to the sanctions that the Commission may impose. Section 46 gives the Commission an authority to impose a reduced penalty. The leniency scheme solely applies to cartel members' administrative culpability under the Act.⁶

B. Timeline: Leniency application

The request for leniency must be made as soon as feasible. Despite the fact that the Act explicitly permits the filing of leniency requests after the investigation has started, such requests must be submitted prior to the Competition Commission of India receiving the Director General's inquiry report. While the DG investigation into the Brushless DC Fan case had already commenced, the applicant was only allowed a 75% penalty reduction. Those who apply for the programme after the inquiry has begun have a disadvantage compared to those who apply before the investigation begins.⁷

⁶ Alkem Laboratories Ltd. & Ors. v. CCI 2016 LR 757 (2016)

⁷ Re: Cartelization of tenders by Indian Railways, supply of Brushless DC Fans, Case No. 03 of 2014

It would be desirable to contact the CCI verbally in order to receive a priority marker and a 15-day extension to file a detailed application. Procedural Changes were made by amending subsection (4) of rule 5. As per the amendment, applicants who wish to seek leniency must submit their application within 15 days of the date of communication with the CCI. This measure has essentially given the applicant extra time to consider and submit an application, enabling applicants to request for leniency rather than being timed arbitrarily.

C. Conditions for the benefits of leniency provisions

The requirements for granting a reduced penalty are set down in Regulation 3, which include:

- a) Unless otherwise ordered by the Commission, the applicant must cease to be a cartel member at the moment of disclosure.⁸
- b) In the event of a violation of the Act, the applicant is required to disclose “critical information.”
- c) The definition of “crucial information” under the leniency program is extremely narrow. The information provided must assist the CCI in establishing a prima facie conclusion that a cartel exists, and must be specific enough to warrant further investigation by the DG's offices based on such disclosure supplied in the leniency application.
- d) The applicant is required to furnish the commission with pertinent information, records, and evidence.
- e) The applicant is required to extend full cooperation to the Commission in an honest, comprehensive, and consistent manner throughout the investigation and any subsequent proceedings.

⁸ Regulation 3 of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009

- f) The applicant shall not conceal, erase, alter, or remove any documents that could lead to the formation of a cartel.
- g) The applicant's monetary penalty will be reduced depending on the following circumstances: -
 - The stage wherein the candidate discloses his or her identify.
 - The Commission already has possession of the evidence.
 - The ability of the applicant to provide accurate information.
 - The complete case's facts and circumstances.⁹

Apart from the conditions stated above, the CCI may impose further limits or conditions on the Applicant as it sees fit. Individuals engaging in cartel activities are now eligible to apply as applicants or parties to the action under the revised definition of applicant in the Amended Regulation. Furthermore, the changes emphasise that the applicant must include the name(s) of any individuals who participated in the cartel activity and are now requesting for leniency.

In addition, the regulations contain a priority marking system.

- **Applicant is the first to approach the CCI:** An applicant may be granted complete immunity or a penalty reduction of up to 100% if they are the first to disclose significant evidence of a cartel activity, enabling the CCI to arrive at a "prima facie decision" regarding the existence of the cartel. It is essential that the submitted information is entirely unknown to the CCI.¹⁰

⁹ Regulation 3(4) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009

¹⁰ Regulation 4 (a) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009.

- **Applicant is the second or third to approach the CCI:** An applicant with second priority status may receive a penalty reduction of up to 50% of the penalty specified by the Act, while an applicant with third priority status may be eligible for a penalty reduction of up to 30% of the penalty imposed by the Act.¹¹The third marker status can be obtained by more than two applicants.

Influenced by the US leniency program, the Amendment Regulation included a provision that mandates Markers to identify the initial and subsequent applicants who furnish crucial information pertaining to a cartel to the Commission. A three-marker restriction with 100%, 50%, and 30% fines existed prior to modification. However, there is currently no limit on the number of markers that can be used, with all markers eligible for 30% leniency after the third. As a result, more applicant will come forward with information concerning cartels. If the leniency applicant violates any of the leniency terms, the Competition Commission may deny or rescind the leniency.¹²

D. Procedure to be followed in accordance with leniency scheme

The Regulations detail the steps involved in applying for leniency under the Leniency Scheme¹³.

Step 1: Initial Interaction

¹¹ Regulation 4(b) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009.

¹² Regulation 3(2) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009.

¹³ Regulation 5 of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009.

The Applicant shall send all information, papers, and proof related to cartel conduct to the Secretary, CCI (designated authority). This comprises any significant evidence that is within the applicant's possession, which the CCI is already aware of, and also encompasses details on potential leads or sources of information that the CCI may explore. It would be beneficial to communicate with the CCI in order to acquire a priority marker and a 15-day extension to submit a complete application.

Step 2: Application Content

The request for a lower penalty must include information about the person making the request, a narrative of the alleged cartel member governance arrangement, and an anticipated volume of affected business. All claims must be backed up by proof that is incriminating.¹⁴

Step 3: Assigned- Priority status

The CCI will indicate the applicant's priority status, and the Secretary will notify the applicant. The applicant must supply complete information to CCI within 15 days after priority status designation if only preliminary information is provided. The Applicant's priority status will be revoked if the relevant information is not provided.¹⁵

The Commission maintains the confidentiality of the applicant's identity and the information provided by them, except in the following cases:

¹⁴ Regulation 5(1) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009

¹⁵ Regulation 5(2) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009

- a) The disclosure is legally compelled; or
- a) The applicant has granted written permission for such disclosure; or
- b) The petitioner has made a public declaration.¹⁶

The judicial judgement on the Amendment Regulations confidentiality provision has recently developed significantly.¹⁷ By allowing both leniency and non-leniency applicants access to files, Regulation 6A significantly alters the law. Once the Director General's inquiry report has been received by the parties involved, those with access rights are entitled to request the non-confidential version of the file. In accordance with Regulations 6 and 6A, which were added by the Amendment, the Director General (DG) may disclose information, evidence, and records submitted by the applicant to a party involved in the proceedings, even if the applicant has not given consent, if the DG determines that such disclosure is necessary. The matter will be heard since the DG has the power to disregard the leniency applicant's confidentiality request.

¹⁶ Regulation 6 of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2009

¹⁷ *Somi Conveyer Beltings Ltd. v. UOI and others*, (2017)

Sl.No	Case No.	Case Name	Reduction in Penalty (in percentage)	
			Applicant Rank	Percentage
1	Suo Motu Case No. 03 of 2014	In Re: Cartelization of tenders by Indian Railways for supply of Brushless DC Fans and other electrical goods	1 st applicant	75
2	Suo Motu Case No. 02 of 2016	In Re: Cartelisation of zinc carbon dry cell batteries market in India	1 st applicant	100
			2 nd Applicant	30
			3 rd Applicant	20
3	Case No. 50 of 2015 and Suo Motu Case No. 04 of 2016	In Re: Nagrik Chetna Manch Case and In Re: Cartelization in Tender No. 59 of 2014 for Solid Waste Processing by Pune Municipal Corporation	1 st Applicant	50
			2 nd Applicant	40
			3 rd Applicant	50
			4 th Applicant	25
			5 th Applicant	NA
			6 th Applicant	NA
4	Case No. 03 of 2016	In Re: Cartelization in Tender Nos. 21 and 28 of 2013 of PMC for Solid Waste Processing.	1 st Applicant	50
			2 nd Applicant	NA
			3 rd Applicant	NA
5	Case No 2 of 2013	In Re: Cartelisation by broadcast service providers by bid-rigging submitted as response to the tenders issued by Sports broadcasters	1 st Applicant	100
			2 nd Applicant	30
6	Suo Motu Case No. 02 of 2017	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India	First and only Applicant	100%
7	Suo Motu Case No. 3 of 2017	In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India	First and only Applicant	100%

Effectiveness of leniency programme in India

The Indian leniency programme has expanded significantly since its inception, despite the fact that it is still in its early stages. In January 2017, the Commission issued its first leniency ruling, and in four other cases in 2018, the CCI granted leniency decisions. In addition, in 2019-2020, the CCI also ruled on four more cases brought under the *leniency regime*. The following are the incentives granted to leniency petitioners:

Even though the number of companies opting for the leniency provisions is on the rise, we cannot say that the programme is a complete success because the detection of cartels through leniency is relatively low and the majority of prima facie cases saw very few LP applications despite the 2007 amendments that incorporated certain accepted good practises into the leniency provisions.

Possible reasons for the unenthusiastic response by firms

The analysis here will focus on why don't more businesses choose leniency in order to avoid the CCI's punitive penalties.

A company has two alternatives after a prima-facie finding.

- a) choose between leniency or
- b) wait for the outcome of the inquiry and appeals.

The cartel firms analyse the advantages of these two alternative methods in order to make the best decision. By choosing leniency, the company agrees to the crime and has no reason to appeal unless it is unhappy with the sentence imposed after mitigating and aggravating elements were considered, as well as leniency restrictions.

A company that refuses to be lenient has ostensibly two reasons for doing so:

- a) it considers itself to be blameless; or
- b) it anticipates a probable false-negative and hence attempts to minimize other expenses connected with an LP Application, including reputational loss and private compensation claims.

Bid-rigging companies may also be placed on a temporary blacklist by commercial and government bodies, reducing future revenues. Furthermore,

uncertainty about the penalty assessment may encourage businesses to avoid a Leniency Application.

We begin with this variable since expected penalties are an essential component of the aforementioned decision structure. On the basis of the gains or losses of cartel members, sanctions may be levied. Landes (1983), building on the work of Becker, proposed that a penalty based on damages (losses) was efficient and should be inversely proportional to the likelihood of conviction. The goal of the punishment, rather than simple disgorgement, is to establish sufficient deterrence.¹⁸

Recent trends of CCI while awarding lesser penalty

If a party discloses the existence of a cartel to the CCI before the formation of a prima facie opinion, the CCI is more likely to grant a greater degree of leniency in its evaluation process, considering the ‘stage’ at which the party made the disclosure as a crucial factor. For instance, in cases like *In Re Cartelization of zinc carbon dry cell batteries market in India* (2 cases), and *In Re Anti Competitive behaviour in the dry-cell batteries market in India*, the CCI awarded the first applicant with a complete waiver of penalty, i.e., a 100 percent reduction in penalty, as the party approached the CCI prior to the formation of a prima facie conclusion. On the other hand, if the CCI had already taken cognizance of the matter, and the parties approached the CCI afterwards, the degree of reduction in penalty offered was notably lower. This indicates that the ‘stage’ at which a party makes a leniency request and

¹⁸ Wouter PJ Wils, ‘Antitrust Fines: Theory & Practice’ (2006)

disclosures can have a substantial impact on the CCI's evaluation and determination of the appropriate penalty.

From the cases mentioned earlier, it is evident that the CCI only considers providing complete immunity or a 100 percent reduction in fines to an applicant if the party discloses a cartel that was previously unknown to the CCI. Therefore, the party's timely and proactive disclosure of information about the cartel's existence and operation, especially before the CCI has initiated its investigation, is a critical factor in determining the degree of leniency granted by the CCI. For example, the Battery Case, where Panasonic Energy India Co., Ltd was the first to disclose the cartel's existence and was consequently granted complete immunity. Conversely, in the cases of Brushless DC Fans and PMC, the inquiry was already underway, and a considerable amount of time had elapsed - 9 months in the Brushless DC Fans case and 11 months in the PMC case - before the parties came forward and cooperated with the investigation. Consequently, the CCI treated the leniency application as a case for reduced fines instead of complete immunity. In the context of the COVID-19 pandemic, such as in the Industrial and Automotive Bearings Case, the CCI refrained from imposing any penalties in the directives issued. Furthermore, officers in the DG's office are encouraging cartel members to apply for leniency, and offering them leniency as an incentive to expedite the inquiry process.

Conclusion

Our findings suggest that the cartel can function effectively with minimal structural changes, making cartel destabilisation a primary goal of leniency policies.

Due to the terminological overlap between cartels and horizontal agreements, it may be possible for cartels to form strategic alliances with one another in order to avoid being subject to sanctions. Clarification on actions that can result in a hard-core cartel classification will prevent cartels and ensure better outcomes detection since Preferential Trade Agreements (PTA) determinations are deemed agreements for the purposes of Section 3 of the Act. A similar level of clarity in rule execution and the classification of “bid rigging acts as hard-core cartels” would improve the link between the likelihood of detection and harm and the penalty.

Penalty guidelines increase transparency in enforcement and aid in the correlation of gain or harm. ¹⁹A transition from total profits or income to *excess profits or pricing overcharges* ²⁰might help determine deterrence more accurately. ²¹ This association with harm requires consistency in evaluating the mitigating and exacerbating factors, which is currently lacking.

Because of a lack of transparency and a deliberate use of appeals, nearly all decisions, even leniency judgements, have been challenged, resulting in a time overrun that effectively dampens the sentence. Strategic appeals could be prevented in part if, at the final judgement stage, the firms are required to pay the penalty plus appropriate 'compound interest' if convicted, to mitigate the negative impact of time discounting.

Moreover, because individuals' matter, whistle-blower pay-outs can aid in information collecting and the destabilisation of cartels. This is a great tool for employees who are compelled to engage in cartelization. However, the

¹⁹ Robert Baldwin, *Understanding Regulation* (2nd Ed, OUP, 2021)

²⁰ Carstenand Crede 'Endogenous fines and detection probabilities for cartel deterrence: Experimental Evidence' (2019)

²¹ OECD Regulatory Enforcement and Inspections (2014) 12

proposed penalty ceiling of 10% of an employee's annual compensation should be revisited because it appears unlikely to be deterrent, particularly if employee benefits are connected to business earnings.

Competition laws aim to encourage and uphold market competition, protect consumer welfare, and maintain trade freedom. This accurately reflects current economic situations. As a result, sufficient care and protection should be used to guarantee that anti-competitive behaviour-fighting measures do not impinge on the freedom of traders and entrepreneurs.

Regarding the effectiveness of the leniency programme as envisioned by the Competition Act, we find no indication that it has been a success, as the vast majority of cases have not been discovered through leniency, and even in cases where the CCI has established a prima facie opinion as there was no rush to the agency. An effective leniency programme requires three elements: (i) the severity of penalties for maximum deterrence; (ii) consistency and transparency in decision-making; and (iii) the application of lesser penalty provisions for an effective punishment. CCI's decisional practise implies disproportionate penalty sizes, that is, fines that are not proportional to gain or harm, a lack of transparency, and inconsistent application of the law in its orders.

In addition, it's critical to recognise that businesses are cautious to choose leniency because of the associated expenses in terms of reputational harm, compensation claims, and the price of being blacklisted. A company can avoid compensation claims by refusing to prefer leniency and continuing to engage in interim bids. While victims of competitive harm have the right to pursue private compensation, a proper balance of interests must be maintained to minimise any adverse influence on leniency disclosures. As a result, proactive efforts could be taken to reduce the leniency recipient's civil

reparation responsibility. Successful leniency candidates, for instance, may be permitted to bid without being blacklisted. Other jurisdictions' experience in reducing the impact of private compensation claims could be useful. To avoid disproportionate penalties, the fear of several jurisdictional claims must be addressed. Following the pattern employed in cases of abuse of dominance, a punishment based solely on the localised territorial impact, rather than global revenue/profits, may be beneficial.