
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**EXAMINATION OF THE EFFECTIVENESS OF LENIENCY PROVISIONS
IN CARTEL DETECTION AND PROSECUTION UNDER INDIAN
COMPETITION LAW**- Anish Raj¹**INTRODUCTION**

"In gatherings of individuals within the same profession or trade, discussions often devolve into schemes against the public interest or plans to raise prices. Cartels represent the most severe form of anti-competitive behaviour and are considered the epitome of antitrust wrongdoing. To address the growing prevalence of cartels disrupting fair markets and promoting unfair practices such as price inflation, output restrictions, and credit limitations, the Indian government has partially adopted subordinate legislation in the form of Leniency Provisions. Due to their secretive nature and robust enforcement, identifying cartel agreements is challenging. However, cartel members weigh the risk of punishment against the benefits of illegal activity, particularly when faced with significant monetary penalties. Consequently, they are compelled to disclose their anti-competitive behaviour. According to the Competition Act of 2002, the formation of cartels is deemed the most serious violation of competition law in India. In exchange for information aiding the Competition Commission of India in identifying and penalizing other cartel members, early confessors and collaborators receive leniency under the leniency initiative established by this Act, the Competition Commission of India (Lesser Penalty) Regulations of 2009, and the Amended Regulations of 2017. The leniency provision within the current legislation does not lure cartel members into a cycle of leniency. Instead, it is seen as an effective method for uncovering cartels because their activities are so well-guarded that breaching such agreements requires insider knowledge. In essence, the leniency program serves as whistle-

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blower protection by rewarding members who disclose cartel activity to the CCI. The establishment of the leniency program in India resulted from a convergence of essential needs and cognitive processes."

RATIONALE FOR INCORPORATING A LENIENCY INITIATIVE

Numerous countries, including EU, US, Canada, Australia, & Korea, have instituted leniency programs to enhance the chances of exposing cartels. These programs have demonstrated the efficacy of algorithms in identifying cartels, given the high level of secrecy surrounding such activities, which necessitates insider knowledge to breach these agreements. The development of leniency programs is heavily influenced by theories like Prisoner's Dilemma and Nash Equilibrium. The Prisoner's Dilemma illustrates how individual pursuit of self-interest can lead to mutual detriment, as seen when both parties confessing would suffice to incriminate each other. Nash Equilibrium, on the other hand, depicts a scenario where no party can unilaterally improve their outcome without cooperation from the other, resulting in a stable state where neither benefit from changing strategy independently. Applying game theory to the Prisoner's Dilemma reveals that each prisoner is incentivized to confess due to the dominance of the confession tactic. Thus, the leniency policy in competition law is grounded in the structural framework outlined by these theories.²

PROCEDURAL ASPECTS OF THE LENIENCY INITIATIVE AND CHANGES IN REGULATION

A. Infringements of competition law: under the leniency provision

Under the leniency provision, if any producer, seller, distributor, trader, or service provider accused of violating section 3 provides a complete and truthful disclosure regarding the alleged infringement, and if the provided information is deemed essential by the Commission, then the Commission has the discretion to impose a reduced penalty on such entity, as it sees fit. Essentially, this provision encourages individuals or companies involved in a cartel to step forward and offer valuable information in exchange for potential penalties reduction. This provision specifically addresses infringements of section 3(3) of the Act, which covers cartel activities such as price-fixing, bid-rigging, imposing output limitations or quotas, and allocating

² Zingales, N. (2008). European and American Leniency Programmes: Two Models Towards Convergence?. *Competition Law Review*, 5(1).

resources or dividing markets. The Act doesn't impose criminal liability for engaging in cartel behavior; instead, the leniency program primarily deals with the administrative liability of cartel members under the Act. Chapter VI outlines various provisions related to the sanctions that the Commission may impose, with Section 46 granting the Commission the authority to impose a reduced penalty. It's important to note that the leniency scheme solely addresses the administrative culpability of cartel members under the Act.³

B. Timeline: Leniency application

The leniency request should be made promptly. Although the Act allows leniency requests to be filed after the investigation has commenced, they must be submitted before CCI receives the inquiry report from Director General. In Brushless DC Fan case, where DG investigation had already started, the applicant was granted only a 75% penalty reduction. Those who apply after the inquiry has begun are at a disadvantage compared to those who apply beforehand. It's advisable to contact the CCI verbally to secure a priority marker and a 15-day extension for submitting a detailed application. Procedural changes were implemented by amending subsection (4) of rule 5, requiring leniency applicants to submit their application within 15 days of communicating with the CCI. This amendment essentially provides applicants with additional time to prepare and submit their application, allowing them to request leniency without being constrained by arbitrary time limits.

C. Conditions for the benefits of leniency provisions

The requirements for receiving a reduced penalty are outlined in Regulation 3, encompassing the following:

Unless specified otherwise by the Commission, the applicant must cease involvement in the cartel upon disclosure.⁴

- i. In case of an Act violation, the applicant must disclose "critical information."
- ii. The definition of "crucial information" within the leniency program is very narrow, requiring details that help the CCI establish a prima facie case of cartel existence and warrant further investigation by the DG's offices.

³ Kathuria, S. (2018). Leniency Programme Under Competition Regime in India. *ASIAN L. & PUB. POL'Y REV.*, 3, 72-73.

- iii. The applicant must provide the commission with relevant information, records, and evidence.
- iv. Full cooperation must be extended to the Commission in an honest, comprehensive, and consistent manner throughout the investigation and any subsequent proceedings.
- v. The applicant must not conceal, erase, alter, or remove any documents relevant to cartel formation. The monetary penalty for the applicant will be reduced based on various factors, including the timing of disclosure, possession of evidence by the Commission, accuracy of information provided, and the overall circumstances of the case.

In addition to the conditions, the CCI may impose additional restrictions or conditions on the applicant as deemed appropriate. Individuals involved in cartel activities are now eligible to apply as applicants or parties under the revised definition in the Amended Regulation. Furthermore, the changes underscore that the applicant must disclose the names of individuals involved in cartel activity seeking leniency.

Additionally, the regulations incorporate a priority marking system:

- i. First Applicant: If the applicant is the first to approach the CCI and provides significant evidence of cartel activity, they may be granted complete immunity or a penalty reduction of up to 100%, enabling the CCI to establish a prima facie case of cartel existence. The submitted information must be entirely unknown to the CCI.
- ii. Second or Third Applicant: An applicant with second priority status may receive a penalty reduction of up to 50%, while a third priority applicant may be eligible for a reduction of up to 30%. The third marker status can be obtained by more than two applicants.

Influenced by US leniency program, the Amendment Regulation introduced provision mandating Markers to identify both the initial and subsequent applicants providing crucial information about a cartel to the Commission.⁵ Previously, a three-marker restriction with penalties of 100%, 50%, and 30% existed, but currently, there is no limit on the number of markers used, with all eligible for a 30% leniency after the third. Consequently, more applicants are likely to come

⁵ Grasso, R. (2007). The EU Leniency program and US Civil discovery rules: a fraternal fight. *Mich. J. Int'l L.*, 29, 565.

forward with information about cartels. If a leniency applicant violates any of the leniency terms, the Competition Commission may deny or revoke the leniency.

D. Procedure to be followed in accordance with leniency scheme

The Regulations outline the process for applying for leniency under the Leniency Scheme:

Step 1: Initial Interaction: The Applicant is required to submit all relevant information, documents, and evidence regarding cartel conduct to the Secretary, CCI (designated authority). This includes any significant evidence within the applicant's possession, known to the CCI, as well as details on potential leads or sources of information for the CCI to explore. It is advisable to engage with the CCI to obtain a priority marker and a 15-day extension for submitting a complete application.

Step 2: Application Content: The request for a reduced penalty must include information about the applicant, a description of the alleged cartel member governance arrangement, and an estimated volume of affected business. All claims must be supported by incriminating evidence.

Step 3: Priority Status Assignment: The CCI will assign priority status to the applicant, with the Secretary notifying the applicant accordingly. If only preliminary information is provided, the applicant must supply complete information to the CCI within 15 days after receiving priority status designation. Failure to provide relevant information will result in the revocation of the applicant's priority status.

The Commission maintains confidentiality regarding the applicant's identity and provided information, except in cases where disclosure is legally compelled, the applicant has granted written permission, or the applicant has made a public declaration.

The judicial interpretation of the confidentiality provision in the Amendment Regulations has recently evolved significantly. Regulation 6A, which allows both leniency and non-leniency applicants access to files, significantly changes the law. Upon receipt of the Director General's inquiry report, parties with access rights are entitled to request the non-confidential version of the file. According to Regulations 6 and 6A, 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 without the applicant's consent, if deemed necessary by the

DG. This matter will be subject to further scrutiny as the DG has the authority to disregard the leniency applicant's confidentiality request.⁶

EFFECTIVENESS OF LENIENCY PROGRAMME IN INDIA

The Indian leniency program has experienced significant expansion since its inception, despite still being in its early phases. The Commission issued its first leniency ruling in January 2017, followed by leniency decisions in four other cases in 2018. Additionally, the CCI ruled on four more cases under the leniency regime in 2019-2020. Despite the increasing number of companies opting for leniency provisions, it's premature to deem the program a complete success. The detection of cartels through leniency remains relatively low, and the majority of prima facie cases have seen few leniency petition applications despite the 2007 amendments incorporating certain accepted best practices into the leniency provisions.⁷

POSSIBLE REASONS FOR THE UNENTHUSIASTIC RESPONSE BY FIRMS

The analysis presented here will delve into why more businesses do not opt for leniency to evade punitive penalties imposed by the CCI.

After prima facie finding, a company faces two alternatives:

- i. Choosing between leniency, or
- ii. Waiting for the outcome of the inquiry and appeals.

Cartel firms evaluate the benefits of these two alternatives to make the most favourable decision. Opting for leniency entails the company admitting guilt and having no grounds for appeal unless dissatisfied with the sentence imposed after considering mitigating and aggravating factors, as well as leniency conditions.⁸

A company declining leniency typically does so for two reasons:

- i. It believes itself to be innocent; or
- ii. It foresees a potential false negative and thus seeks to minimize other expenses associated with a Leniency Application, including reputational damage and private compensation claims. Bid-rigging companies may also face temporary blacklisting by commercial and

⁶ Roy, A. (2024). *Competition Law in India: A Practical Guide*. Netherlands: Wolters Kluwer.

⁷ Sakle, A., & Chand, A. (2017). Leniency Regime in India: Beginning of a New Dawn. *Competition L. Int'l*, 13, 115.

⁸ Ramappa, T. (2014). *Competition Law in India: Policy, Issues, and Developments*. India: Oxford University Press.

government entities, leading to reduced future revenues. Additionally, uncertainty regarding penalty assessment may dissuade businesses from pursuing a Leniency Application.

We start with this variable as expected penalties are a crucial component of the decision-making structure. Sanctions may be imposed based on the gains or losses of cartel members. Landes (1983), expanding on Becker's work, suggested that a penalty based on damages (losses) was efficient and should be inversely proportional to the likelihood of conviction. The aim of punishment, rather than mere disgorgement, is to establish adequate deterrence.⁹

RECENT TRENDS OF CCI WHILE AWARDING LESSER PENALTY

If a party reveals the existence of a cartel to the CCI before the formation of a prima facie opinion, the CCI is more inclined to grant a higher degree of leniency during its assessment, with the timing of the disclosure considered a critical factor. For example, in cases such as the Cartelization of zinc carbon dry cell batteries market in India (2 cases) and Anti-Competitive behavior in the dry-cell batteries market in India, the first applicant received a complete waiver of penalties, i.e., a 100 percent reduction, as they approached the CCI before a prima facie conclusion was reached.¹⁰ However, if the CCI had already taken notice of the matter and the parties approached the CCI afterwards, the reduction in penalty offered was significantly lower. This highlights the importance of the timing of a party's leniency request and disclosures, which can greatly influence the CCI's evaluation and determination of the appropriate penalty.

From the cases, it is evident that the CCI only considers granting complete immunity or a 100 percent reduction in fines to an applicant if the party discloses a cartel previously unknown to the CCI. Therefore, the timely and proactive disclosure of information about the cartel's existence and operation, especially before the CCI initiates its investigation, is crucial in determining the extent of leniency granted by the CCI. For instance, in the Battery Case¹¹, where Panasonic Energy India Co., Ltd was the first to disclose the cartel's existence and was consequently granted complete immunity. In contrast, in cases such as Brushless DC Fans and PMC, where the inquiry was already underway and significant time had passed, 9 months in the Brushless DC

⁹ Connor, J. M., & Lande, R. H. (2012). Cartels as rational business strategy: crime pays. *Cardozo L. Rev.*, 34, 427.

¹⁰ Sagar, A. (2021). A Critical Study on Regulating of Cartels By the CCI and Its Effect on the Economy and Consumers: A Comparative Study.

¹¹ Cartelisation in respect of zinc carbon dry cell batteries market in India[Suo Motu Case No. 02 of 2016].

Fans case¹² and 11 months in the PMC case, before the parties cooperated with the investigation, the CCI treated the leniency application as a case for reduced fines instead of complete immunity.

Amidst the COVID-19 pandemic, such as in the Industrial and Automotive Bearings Case¹³, 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 leniency as an incentive to expedite the inquiry process.

In both the Beer Cartel¹⁴ and the Protective Tubes Cartel¹⁵, the CCI issued orders on September 24, 2021, and June 9, 2022, respectively. They applied penalty amounts uniformly to the individuals involved, based on their income details from the preceding three financial years, rather than calculating penalties based on the duration of their involvement in the cartel. However, the CCI also reviewed lesser penalty applications from certain parties, and subsequently granted these applications, resulting in the same level of reduction in the penalty amount imposed on the individuals involved.

CONCLUSION

Our research findings indicate that cartels can operate effectively with minimal structural adjustments, making the destabilization of cartels a primary objective of leniency policies. There is a possibility for cartels to form strategic alliances with each other to evade sanctions due to the terminological overlap between cartels and horizontal agreements. Clarity regarding actions that qualify as hard-core cartel behavior would prevent cartels and enhance detection outcomes since Preferential Trade Agreements (PTA) determinations are considered agreements under Section 3 of the Act. Similar clarity in rule execution and the classification of "bid rigging acts as hard-core cartels" would improve the connection between the likelihood of detection and harm, and the penalty.

Penalty guidelines enhance enforcement transparency and facilitate the correlation of gains or harms. Transitioning from total profits or income to excess profits or pricing overcharges might

¹² Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items. [Suo Moto Case No. 03 of 2014].

¹³ Cartelisation in the supply of Bearings (Automotive and Industrial) [Suo Motu Case No. 07 (02) of 2014].

¹⁴ Suo Motu Case No. 06 of 2017.

¹⁵ Suo Moto Case No. 06 of 2020.

help determine deterrence more accurately. This association with harm necessitates consistency in evaluating mitigating and aggravating factors, which is currently lacking.

Due to a lack of transparency and deliberate use of appeals, nearly all decisions, including leniency judgments, have been contested, resulting in time overruns that effectively reduce the penalty's impact. Strategic appeals could be partly prevented if, at the final judgment stage, firms are required to pay the penalty plus appropriate 'compound interest' if convicted, to mitigate the negative impact of time discounting.

Furthermore, whistle-blower payouts can assist in information gathering and cartel destabilization, especially for employees coerced into engaging in cartelization. However, the proposed penalty ceiling of 10% of an employee's annual compensation should be reconsidered as it appears unlikely to serve as a deterrent, particularly if employee benefits are tied to business earnings.

Competition laws aim to foster and maintain market competition, safeguard consumer welfare, and uphold trade freedom, accurately reflecting current economic conditions. Therefore, adequate caution and safeguards should be employed to ensure that measures to combat anti-competitive behavior do not infringe on traders' and entrepreneurs' freedom.

Regarding the effectiveness of the leniency program as envisaged by the Competition Act, there is no indication that it has been successful, as most cases have not been unearthed through leniency, and even in cases where the CCI has established a prima facie opinion, there has been no urgency to report to the agency. An effective leniency program necessitates three elements: (i) severe penalties for maximum deterrence; (ii) consistency and transparency in decision-making; and (iii) the application of lesser penalty provisions for effective punishment. The CCI's decision-making practice indicates disproportionate penalty sizes, lack of transparency, and inconsistent application of the law in its orders.

Moreover, it is important to recognize that businesses are hesitant to opt for leniency due to associated expenses in terms of reputational harm, compensation claims, and the risk of being blacklisted. Companies can avoid compensation claims by refusing leniency and continuing to engage in interim bids. While victims of competitive harm have the right to seek private compensation, a proper balance of interests must be maintained to minimize any adverse impact on leniency disclosures. Therefore, proactive efforts could be made to reduce the leniency recipient's civil reparation liability. Successful leniency applicants, for instance, may be allowed

to bid without facing blacklisting. Lessons from other jurisdictions in mitigating the impact of private compensation claims could be beneficial. To avoid disproportionate penalties, the fear of multiple jurisdictional claims must be addressed. Following the pattern used in cases of abuse of dominance, a punishment based solely on localized territorial impact, rather than global revenue/profits, may be advantageous.¹⁶

¹⁶ Deepankar, S. (2016). Dimensions of leniency policies in BRICS: a comparative analysis of India, South Africa, Brazil and Russia. *BRICS Law Journal*, 3(2), 6-20.