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## Cartel and Leniency Program in Competition Law

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*The goal of the leniency program was to discover cartels and enforce competition law by imposing less severe penalties, if any, on businesses that give the Competition Commission information that would be difficult to get through an investigation alone. Companies see it as a chance to avoid paying any fines that might be imposed. The leniency program's goal is to persuade businesses to provide information by offering a decrease in penalties. The Indian Competition Commission, however, has taken a haphazard approach to award discounts and upholding secrecy. This article's first and second parts focus on the notion of a cartel and the theory and use of the leniency program in the Competition Act of 2002. The third section talks about India's legal system for detecting cartels.*

**Keywords:** *cartel, leniency, cci, members, agreement*

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### INTRODUCTION

Tax, in simple words, is a contribution of society to the respective government for its benefits. The Competition Act of 2002 governs the Indian Competition Commission, which is in charge of enforcing the Cartel laws. The National Company Law Appellate Tribunal (NCLAT), then the Supreme Court of India, can hear appeals of the Competition Commission's decisions in any given case. The Competition Commission Act of 2002 prohibits the civil courts from enforcing

any proceeding pertaining to any specific topic that has been stated by the Commission and NCLAT under the regulated act. The leniency program provided by Section 46 of the Competition Act, 2002<sup>1</sup> serves as a channel for businesses or people to acknowledge their participation in the cartel that is illegal under Section 3 of the Competition Act and to cooperate with the Director-upcoming General's investigations. Businesses that assist in disclosing information about the cartel are rewarded with reduced fines, which may even include a 100% waiver of penalties. In order to persuade businesses to divulge information concerning cartels, which would help the Act achieve its goals, the provision about the waiver of the whole penalty was inserted. To fulfill the goals of the leniency program, the Competition Commission of India (hereafter, "CCI") established the CCI (Lesser Penalty) Regulations, 2009.

## **CARTEL**

The term "cartel" is used to describe common anti-competitive agreements and/or coordinated practises between rivals, such as (i) price fixing, (ii) market allocation, (iii) collectively refusing to supply or engage in business (group boycotts), (iv) imposing quotas, or (v) collusive bidding in tenders. Such agreements and coordinated actions have historically been seen as criminal by nature. The most severe kind of competition limitation is often regarded as cartels. They are the end result of rivals trying to boost their profits by regulating various market-related factors, including pricing and output.<sup>1</sup> A cartel is simply an arrangement between two or more businesses or partners engaged in the public provision of goods and services in order to regulate deceptive price structures. The businesses that fall under cartel organizations function as a single or entire entity.

## **CONCENTRATION**

In essence, a cartel has less control over the market than a monopoly. It establishes a scenario in which a single market participant owns every facet of goods and services in order to make them widely accessible to the general population. Some cartels were created to reduce competition, while others were created to trade illegal goods like illegal drugs. The cartels prevent new

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<sup>1</sup> 'Cartels' (ACCC) <<https://www.accc.gov.au/business/competition/cartels>> accessed 25 January 2023

businesses from starting up, which typically halts innovation for that particular product. This results in a boring situation where the cartel is the only entity allowed to offer goods and services to the general people. Cartels and other anti-competitive arrangements are forbidden by Section 3<sup>2</sup> of the Competition Act of 2002. Additionally, Section 3 contains the following provisions that, in essence, forbid cartel firms from entering into anti-competitive agreements:

- Buying and selling decisions are made both implicitly and explicitly.
- Limiting control over service sales, investment, and production.
- The geographical market's distribution.
- Therefore, such agreements ought to be regarded as invalid.

A civil offence is committed when Section 3 of the Competition Act, 2002 is broken. A fine of up to three times the specified collected profits or ten percent of the entire sales, whichever is higher, could be imposed on all businesses implicated in the creation of the cartel.

The legislation also pertains to the following situations when there is a criminal offence:

- Disregard for the competition commission's directives.
- Breaking a **National Company Law Appellate Tribunal (NCLAT) order without a justification. Section 19<sup>3</sup> of the Competition Act**, read together with Sections 26<sup>4</sup> and 27<sup>5</sup>, governs cartel investigations.

Companies and individuals may face charges under the antitrust laws outlined in the Competition Act of 2002. According to **Section 27** of the Competition Legislation of 2002, the commission may issue reprimands to businesses that violate Section 3 of the act, must stop engaging in any anti-competitive behaviour paying a fine that is up to three times the total profits made by the entire group or ten percent of the turnover to alter any contract in a way that violates section 3.

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<sup>2</sup> Competition Act 2002, s 3

<sup>3</sup> Competition Act 2002, s 19

<sup>4</sup> Competition Act 2002, s 26

<sup>5</sup> Competition Act 2002, s 27

**Section 48<sup>6</sup>** of the statute allows for the prosecution of certain individuals. Everyone involved in the cartelization of the business would be accountable and considered guilty. The CCI must first demonstrate that rivals had come to an agreement to fix prices, restrict or control supply, production, markets, technological advancement, investment, or service provision, share or allocate markets, or rig bids in order to prove the existence of a cartel. An agreement has a broad definition under the Competition Act.<sup>7</sup>

The CCI has also made it clear (in its decisional practise) that a variety of "coincidences" and "indicia" can be used to infer the existence of an anti-competitive agreement. The CCI and the DG also have extensive authority to gather evidence, including the ability to look for and confiscate papers as well as gather information during dawn raids in order to prove the existence of a cartel. If a horizontal agreement is discovered, it is assumed that it will result in an AAEC, unless it refers to a joint venture that will increase efficiency. This assumption can be refuted. But the CCI's decision-making process suggests that this responsibility

## **DIRECTOR GENERAL**

Cartels are typically very covert and it might be difficult to establish evidence of their presence because they are illegal. The Office of the **Director General** is implementing a leniency program that the CCI introduced (DG). The program's objectives are to motivate businesses to report anti-competitive behaviour on their own, as well as to offer proof that other businesses are involved in such behaviour. The leniency program encourages businesses to turn over cartel-related inside information in exchange for immunity from fines or a sizable decrease in penalty. If the information a cartel's first applicant for leniency offers is sufficient for the Commission to launch an inquiry, the cartel's first applicant may be granted full immunity.

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<sup>6</sup> Competition Act 2002, s 48

<sup>7</sup> Andrej Kmiecik, 'Comparative Guides' (*Mondaq*)

<<https://www.mondaq.com/Guides/Results/11?country=100&mode=all>> accessed 21 January 2023

**Section 46<sup>8</sup>** of the Act in conjunction with the Leniency Regulations, which outline the qualifications for eligibility, the process to be followed for the imposition of a lighter penalty, and the advantages offered, control India's leniency policy.<sup>9</sup>

## LENIENCY REGULATIONS

The Leniency Regulations provide for a reduction in the penalty of up to 100% if an applicant informs the CCI of crucial information regarding the existence of a cartel and no other applicant has already received a reduction in the penalty from the CCI. This benefit of a reduced fine would only be given to an application if the CCI lacked adequate evidence to prove the existence of a cartel.<sup>10</sup>

Companies must meet a number of requirements in order to be eligible for this program, including:

- Making a voluntary disclosure;
- Providing complete and accurate disclosure of all material facts;
- Cooperating with the investigation;
- Not having forced other parties to engage in the anti-competitive practise; and
- Not having been involved in the practice for an extended period of time.

A corporation may be granted immunity from prosecution or a reduction in penalties if it satisfies the requirements for leniency, according to the CCI.

## CCI

The Competition Commission of India (CCI) has implemented an innovative leniency program in order to promote individual and corporate cooperation in the investigation of cartel cases. A

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<sup>8</sup> Competition Act 2002, s 46

<sup>9</sup> India:Cartels; <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-cartels> Last accessed: 21, January' 2023.

<sup>10</sup> An Analysis of Cartelization under Indian Competition Law; <  
<https://www.mondaq.com/india/antitrustcompetition-law/1213070/cartels-comparative-guide#:~:text=The%20Competition%20Act%20defines%20a,goods%20or%20provisions%20of%20services%22>>  
Last Accessed: 20,January' 2023.

voluntary disclosure program called the Leniency Program was created to encourage both individuals and organizations to help the CCI in its investigation of cartel cases. Under the Program, immunity from punishment is offered to the initial applicant who offers information on the cartel that leads to a successful investigation and the application of penalties. The Program also provides an exemption from punishment or a reduction of penalty for those who provide information following the first applicant but before the investigation has started, or even during the investigation. The Leniency Program aims to bring attention to cartels, which are difficult to recognize and investigate.

The Leniency Regulations underwent significant amendments in August 2017. A person who participated in a cartel on behalf of a corporation and files a leniency application to the CCI in order to ask for a reduction in punishment is now clearly included in the definition of "applicant" under the Leniency Regulations thanks to the 2017 Amendment. The 2017 Amendment now offers a corporation the ability to list the identities of cartel members for whom it is requesting a lighter sentence when submitting a leniency application. The most advantageous improvement brought about by the 2017 Amendment is the requirement to reduce penalties for applicants (including individuals) who meet the requirements. The CCI had complete discretion over whether and how much to reduce a penalty prior to the 2017 Amendment. The amount by which a penalty should be reduced is still up for debate, and there is no guarantee that the reduction will be 100% even though the grant is required.

The Competition Commission's Leniency Program is outlined in Section 46 of the Act. It serves as a sort of encouragement for cartel participants who are prepared to share information with the Commission. Additionally, according to the law, a cartel member who is willing to share information about the cartels is given a type of whistle-blower protection. The Commission has designed a number of programs to encourage participants who are willing to share information that could be related to cartels or is currently violating competition laws to come forward and expose such anti-competitive agreements and work with the competition authorities in exchange for immunity or leniency. The leniency program is a type of protection offered to those who

come forward and give all the information about the cartel and who would otherwise face harsh actions from the Commission if the cartel is discovered by the Commission on its own.

### **POSITIVE FEATURES OF LENIENCY PROGRAMS**

- Cartels that are located through compassion programs are forced to adhere to restrictions since there is a higher chance that authorizations will be used. These initiatives have a huge impact since only the most indulgent candidate will be granted compassion.
- Mercy programs motivate co-working groups to supply useful information on the presence of other cartels, which may be studied in this way. These projects operate with the examination and indictment of cartel members as the mercy candidates give proof, which in any case probably won't be accessible.
- Impact on discouragement: The mercy program has a deterrent effect on cartel members who, prior to its launch, were continuously in danger of having their activities exposed to the implementing specialists by a representative of the Association or a competing association. As a result, with a tolerance program, the cartel part's plotters continue to run a higher risk of being discovered by experts.

### **CHANGES THAT HAVE RECENTLY BEEN MADE TO THE LENIENCY PROGRAMS**

The Leniency program is offered to individuals or businesses that inform the Commission of their involvement in the cartel and are prepared to assist in any subsequent investigations conducted by the Commission in exchange for a lower fine or, in some cases, immunity from the fine. The Competition Commission of India (Lesser Penalty) Regulations, 2009 were created by the Commission for the same reason since the leniency program has proven to be an effective tool in the war against cartels. Within the year 2017, the regulations for the reduced penalty were changed. The Regulations have been modified in the following ways:

1. The new regulations' revised definition of an applicant. Before the alteration in accordance with Section 2(1)(b), a corporation that applies for a lighter penalty and is a member of a cartel is referred to as an applicant. However, in accordance with the revised definition, the applicant

requests a smaller penalty and claims that any corporation, as previously described, would now also include any person acting on behalf of any corporation.

2. A revised definition of "party" has also been adopted, and it now includes any corporation or any character defined in accordance with Section 2 of the Act, as well as the primary and combined authorities, against which the inquiry is directed.

3. Additional changes have been made to the requirements for receiving a lower penalty. Previously, critical disclosures had to be given in order to acknowledge a breach of Section 3(3), but now they must be disclosed in order to acknowledge a violation of the Act. Additionally, a new part about the agency has been included, which indicates that if the applicant is a company, the company must disclose the names of the people who have been involved in the cartel's activities and for whom the enterprise is asking for leniency.

4. Prior to the regulations' revision, the leniency program permitted a reduction in a penalty or lighter penalty up to a maximum of three leniency packages on a first-come, first-served basis, subject to conditions like the quality of the information and the nature of the facts. This situation has altered as a result of the revision, which has also resulted in measures that will now allow more candidates to benefit from this program. Now, the first applicant can receive a penalty reduction of up to 100%, the second applicant up to 50%, and the 0.33 applicant or any other applicant in a similar situation can receive a 30% reduction. After the first three applicants have already benefited from the program's benefits for disclosing proof, this notification will no longer easily assist those who are willing to provide crucial information about cartels, but it may actually help the Competition Commission of India dismantle cartels more effectively in the future.

5. The earlier version of the rules did not contain any clauses addressing the disclosure of confidential information provided by the Director General as part of the utility at a later stage of the investigation process. However, when the adjustment was introduced, it has now been made clear that the Director General may release positive private information to any party for research purposes without the applicant's prior consent, but only if the Director General believes



that such information must be disclosed. But in situations like these, the Director General has the option to challenge the recording of the justifications for doing so in writing along with the concurrence of the Competition Commission of India. Normally, it is possible to examine the files throughout the inquiry process without waiting for the Director General's report. The revision now specifically states that nonexclusive materials in the context of leniency may only be inspected once the Competition Commission has provided a copy of the Director General to the relevant parties.

6. The method for providing a lighter penalty has also been changed in comparison to the previous version of the regulations. The applicant or its representative may want to submit an application in advance for the same reason, or they may choose to get in touch with the designated authority verbally or by email to provide the necessary information. The authority then within three days ought to have brought the matter up before the fee. This three-day time limit has now been extended to five days.

The Competition Commission created the leniency program to encourage those involved in opposition infringements and cartel formation to come forward and reveal such anti-aggressive agreements. In exchange for leniency or complete immunity, this will help the opposition commission establish an honest opposition regime and expedite the investigation of these anti-aggressive agreements. The Competition Commission of India's policies, which it has been implementing over time, are in line with the changes made to the previous laws. The revisions reflect the Competition Commission's experience with and knowledge gained from such subjects, which has led to a steady increase in leniency programs. The changes made to the rules may encourage more people or organizations to come forward and disclose their knowledge of the anti-aggressive actions committed by players in exchange for immunity from prosecution and lighter fines, which will be advantageous to both parties. The leniency program protects those individuals or businesses who are willing to disclose accurate information about anti-competitive agreements, which they may participate in exchange for a lesser punishment or immunity that, in the real world, would have been more severe if those settlements had been

discovered by the Competition Commission of India. The Commission has expanded or opened its views toward the leniency program in the time that has passed.

### **REFORMS THAT COULD BE IMPLEMENTED FOR INDIA'S LENIENCY REGIME**

In comparison to the regime in India, the leniency policies in the EU, the UK, and the US are more regimented. However, it is crucial to keep in mind that India's competition law framework is still in its infancy and may be simplified by including a few elements from other nations with established competition law systems. Regarding the leniency regime, it is crucial that the legislature adopt some of the widely used provisions of the leniency regime of other jurisdictions in order to fulfill the purpose of leniency, which is to encourage more companies to file for leniency applications that will uphold the goals of the Competition Act. This is necessary for the evolution of competition law jurisprudence in India.

First and foremost, it is crucial to develop a standard procedure for awarding mercy in accordance with accepted benchmarks that are comparable to the rules established in the aforementioned countries. This would provide the businesses more assurance regarding the number of advantages and deductions they may list when applying for leniency. By implementing such benchmarks/tests, corporations would be encouraged to submit their leniency requests earlier and request a larger reduction in penalties.

Second, establishing a strategy for rewarding businesses and individuals that come forward and file for leniency is a crucial factor that could encourage companies to do so. This is comparable to the leniency regime in the UK, wherein the CMA may decide to offer a cash incentive to anyone who discloses information regarding the existence of a cartel. A comparable scheme in India will undoubtedly motivate more businesses to request leniency early on in order to claim immunity and a cash incentive.

Thirdly, India must guarantee protection to businesses that alert the Commission of the existence of a cartel in order to encourage the submission of leniency petitions. The 2017 amendment has softened the restrictions governing confidentiality because it gives the DG the authority to disclose a party's confidential material to a third party, subject to specific checks,

but it also deters businesses from requesting leniency. Before the 2017 change, neither the DG nor the CCI had the authority to disclose the particulars of an applicant who had submitted a request for leniency unless authorized by law. Since the modification, the DG has been given a wide range of discretion, allowing him or her to reveal to a third party for the sake of an inquiry even the identity of the person who asked for leniency. Adopting EU confidentiality regulations would help overcome the secrecy barrier.

Last but not least, it is important to offer whistle-blower protection to people. The 2017 modification added people to the list of applicants, broadening the pool of potential candidates. The UK's legal system is fully compliant with the requirements relating to personal protection. Adopting a similar strategy in which staff are shielded from termination and even financially rewarded would encourage people to submit applications, which might reveal a cartel. These four ideas would significantly aid in the development of Indian competition law jurisprudence.

## CONCLUSION

Cartels are quite possibly the most deplorable offense in contest regulation. The Rivalry Commission of India has executed a mercy program to control cartel development. Be that as it may, there are numerous escape clauses in the ongoing construction of tolerance program which needs examination. The most troublesome aspect of this program is the location of the cartel. Cartels are not effectively distinguishable, successful methods assume a significant part in the location of cartels. While going through the location of the cartel in a portion of the cases it is obvious that a stricter ward is expected to identify them. In this way, where the ward acted rigorously, cartels were identified without any problem. Furthermore, there is a need to further develop the punishment arrangements for the recognition of no-nonsense cartels. Further, there is a need for a successful mercy program, and the arrangement of heavier fines ought to be brought to light.