

13. ANALYSING THE IMPACT OF LESSER PENALTY PLUS REGULATIONS: A LEGISLATIVE COMMENT

*Lavina Dembla & Shivya Verma**

Abstract

This research paper examines the evolution and impact of leniency programs, with a focus on India's recent introduction of the Leniency Plus Program (LPP) within its competition framework. It discusses the legal and regulatory framework surrounding cartels, emphasising the significance of leniency mechanisms in deterring anticompetitive practices. It assesses the effectiveness of leniency programs in encouraging cartel disclosure and facilitating enforcement proceedings by the Competition Commission of India (CCI) by examining the provisions of the Competition Act and recent amendments.

Furthermore, the paper critically assesses the challenges and implications associated with the implementation of leniency regimes in India, drawing comparisons with established practices in jurisdictions such as the United States and the European Union. It highlights concerns regarding resource constraints, ambiguity in penalty determinations, and the need for alignment with domestic legal norms. Ultimately, the paper underscores the importance of addressing these challenges to enhance the effectiveness of leniency mechanisms and strengthen antitrust enforcement in India's competitive landscape.

Keywords: leniency plus program, cartels, anticompetitive, deterrence, disclosure

INTRODUCTION

The Competition Commission of India has updated the existing CCI (Lesser Penalty) Regulations, 2009,¹ which encourage businesses and individuals to report cartels. The term “cartel” is defined under Section 2(c) of the Competition Act, 2002 as an association

* Lavina Dembla and Shivya Verma are both Final-year students pursuing BBA LLB (Hons.) from School of Law, UPES Dehradun.

¹ The Competition Commission of India (Lesser Penalty) Regulations 2009, No 4 of 2009 (India)

of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.² Section 3(3)³ of the Act prohibits horizontal agreements, including cartels, and presumes that such agreements are anti-competitive and cause appreciable adverse effect on competition (AAEC) unless proven otherwise.

The Leniency Program was introduced in India in 2009 through a regulation issued by the CCI, which complements Section 46⁴ of the Competition Act, 2002. The implementation of the Leniency Program by CCI offers parties the benefit of immunity or reduced penalties if they report the existence of a cartel. This program forms a crucial part of the CCI's endeavours to enhance its enforcement of competition law and to bring its practices in line with global standards. The Commission recently issued the CCI (Lesser Penalty) Regulations, 2024 (LP Regulations)⁵ on February 20, 2024, replacing the previous CCI (Lesser Penalty) Regulations of 2009. These new regulations incorporate the concept of the “Lesser Penalty Plus” (LPP) mechanism. These regulations allow applicants a lesser penalty, subject to the conditions laid down in Regulation 3.

UNDERSTANDING THE LENIENCY MECHANISM IN INDIA

A leniency program functions as a form of protection for whistleblowers by providing amnesty or reduced penalties to members of a cartel who disclose the cartel's activities to the Commission. In the normal course, according to the proviso to section 27 (b)⁶ penalties levied by the CCI can be severe, amounting to as much as 10 per cent of turnover or income for the preceding three financial years, or larger multiples in cases involving cartels. Various leniency programs have been developed by competition authorities to motivate and reward individuals involved in such anti-competitive behaviour, aiming to

² The Competition Act 2002, s 2(c) (India).

³ *ibid* s 3(3).

⁴ *ibid* s 46.

⁵ The Competition Commission of India (Lesser Penalty) Regulations 2024 (India).

⁶ (n 2) s 27(b).

foster reporting of such anti-competitive practices and deterrence of competition infringements in India.

The provision of the Lesser Penalty was first introduced through section 46 of the Competition Act, 2002. Section 46 of the Act lays down the conditions for the operation of the Lesser Penalty provision. Later on, on 13th August, 2009, the CCI (Lesser Penalty) Regulations were enforced to give effect to section 46 of the Act. To be eligible for immunity or a reduction in penalties, the applicant must fulfil specific requirements. These include offering full and vital disclosure of the cartel's activities, discontinuing involvement in the cartel immediately upon filing the application, and cooperating fully with the CCI throughout the investigation. According to the Leniency Regulations, the first application for leniency may receive up to or equal to 100% immunity, while the second applicant and any subsequent applicants may receive up to or equal to 50% and 30% immunity, respectively, depending on priority position.⁷

In accordance with subsection (4) of Section 46, which was added by the Competition (Amendment) Act, 2023, the new leniency plus regime has been implemented. The 2009 Regulations have since been replaced with the CCI (Lesser Penalty) Regulations, 2024 (LP Regulations), which have been notified. Under this mechanism, an existing applicant may qualify for leniency plus benefit, receiving an additional reduction in the monetary penalty imposed by the CCI. This occurs if, during the investigation of a cartel, an enterprise involved discloses the existence of another cartel that has allegedly violated Section 3⁸ of the Act. Consequently, if this disclosure enables the CCI to form a prima facie opinion under sub-section (1) of Section 26 of the Act regarding the existence of this other cartel, the enterprise or the individual acting on its behalf will be eligible for the leniency plus benefit, provided they have already applied for leniency in a prior cartel. To qualify for the leniency plus program, applicants must provide crucial information, including full and genuine disclosure of evidence⁹ necessary for the CCI to establish a preliminary opinion on the presence of a newly disclosed cartel.

⁷ (n 5) reg 4.

⁸ (n 2) s 3(3).

⁹ (n 5) reg 3(1).

Additionally, they need to furnish details regarding the ongoing investigation into the existing cartel where they hold priority status. Furthermore, they must justify how the newly disclosed cartel differs from the existing one. Applicants must adhere to a strict timeline, submitting their application before the Director General forwards the investigation report to the CCI concerning the existing cartel. Moreover, the CCI will consider the likelihood of detecting the newly disclosed cartel in the absence of leniency, plus any other pertinent factors deemed relevant, thus allowing the CCI significant discretion in its decision-making process. Additional reductions in penalties as per the LPP regime include a 30% reduction for the first cartel irrespective of the priority status and the potential to benefit from a full reduction of penalties, up to 100%, for the second reported cartel.¹⁰

IMPACT OF THE NEW LESSER PENALTY REGULATIONS ON CARTELS IN INDIA

The Lesser Penalty Regulations encourage cartel members to come forward and disclose information about the cartel's activities in exchange for reduced penalties or immunity. This helps competition authorities to detect cartels more effectively and prosecute them. Consequently, the introduction of the leniency program has led to an increase in the number of cartel cases investigated and prosecuted by the CCI. The implementation of the leniency regime in India has resulted in uncovering numerous cartels in sectors like automotive components and alcoholic beverages, enabling companies to receive penalty waivers of up to 100%¹¹ The new LPP regime, which has raised the incentive for applicants, is a positive move in this direction.

The new LPP Regulations have widened the scope of the Leniency Program to cater to the needs of the 2023 Amendment in the Competition Act. The term "Applicant" under the LP Regulations has been expanded to include enterprises that help a cartel operate, even

¹⁰ (n 5) reg 5.

¹¹ Surabhi, 'CCI launches leniency plus regime to curb cartels among companies' *Business Today* <<https://www.businesstoday.in/latest/corporate/story/cci-launches-leniency-plus-regime-to-curb-cartels-among-companies-418427-2024-02-21>> accessed 21 February 2024.

if they don't necessarily engage in a similar trade as other cartel members.¹² This is consistent with the Amendment Act's adoption of the idea of a "hub and spoke" cartel under the Act. Section 3(3) of the Competition Act presumes that horizontal agreements, such as cartels, have an appreciable adverse effect on competition (AAEC) per se, unless rebutted with evidence to the contrary. The 2023 Amendment in the Act addresses the emergence of hub-and-spoke cartels, where a third-party "hub" facilitates collusion among competitors ("spokes").¹³ While spokes are typically covered under cartel prohibitions, there's uncertainty regarding the liability of hubs under Section 3(3). The Competition Law Review Committee (CLRC) in its report proposed clarifying Section 3(3) to explicitly encompass such hubs. Instances of hub-and-spoke cartels were raised in the *Hyundai Motors case*¹⁴ and the *Uber case*,¹⁵ with criteria including the use of a hub for exchanging sensitive information and the existence of price-fixing collusion. However, the CCI didn't find sufficient evidence to conclude a hub-and-spoke cartel in the Uber case.

In the *Paper Manufacturer Cartel Case*,¹⁶ the DG referred 20 companies that used predatory pricing to the CCI, which was the first step in the cartel action involving the manufacture of paper goods. Trident Limited was exposed as a colluding industry as the investigation moved forward; however, several companies were later cleared since they had no involvement in antitrust activities. Subsequently, the CCI agreed with the DG's conclusions and declared that the Undertaker had violated section 3(3)(a) of the Competition Act, thereby creating a hub-and-spoke collusion. A total of INR 500,000 in penalties was assessed; however, Trident was given amnesty, and the amount was lowered by 100%.

¹² Ravisekhar Nair, Parthsarathi Jha, Aayushi Sharma, and Bhaavi Agrawal, 'Competition Commission of India (CCI) publishes the CCI (Lesser Penalty) Regulations, 2024' *Economic Law Practice (ELP)*, (28 February 2024) <<https://elplaw.in/leadership/competition-commission-of-india-cci-publishes-the-cci-lesser-penalty-regulations-2024/>>accessed 28 February 2024

¹³ Ministry of Corporate Affairs, *Report of Competition Law Review Committee* (26 July 2019) 60-61

¹⁴ *Hyundai Motor India Ltd v Competition Commission of India* CCI order dated 14 June 2017, Case Nos 36 and 82 of 2014

¹⁵ *Uber India Systems Pvt Ltd v Competition Commission of India* CCI order dated 06 Nov 2018, Case No 37 of 2018

¹⁶ *Re: Anti-competitive conduct in the paper manufacturing industry* Suo Motu Case No 05 of 2016

Cartel enforcement has been a significant focus for the Competition Commission of India (CCI), resulting in substantial penalties for cartel cases since 2009. The Leniency Plus Program (LPP) serves as an extra incentive for individuals or entities to provide information regarding new cartels, which could enhance the CCI's ability to identify and investigate such practices. This mechanism could prove especially beneficial in sectors or markets known for a history of frequent cartel activity. The LPP Application can be made at any time before the CCI receives the DG report in the first cartel. Further, the regulation provides an applicant with the option to withdraw its LP or LPP Application before the CCI receives the DG report. However, the DG or CCI can utilise any evidence submitted under the withdrawn application, except the party's admission of guilt.

DISSECTING THE NEED FOR LPP MECHANISM UNDER THE 2024 REGULATIONS

The introduction of the Leniency Plus Program (LPP) in competition law was prompted by the success of the Leniency Program (LP), which aided competition authorities in investigating numerous cartel cases. This provision is often referred to as the "carrot and stick"¹⁷ approach by the Competition Commission of India (CCI), proving to be a beneficial strategy. Furthermore, as India's economy has grown and gained a significant position on the global stage, ensuring fair competition and preventing collusive practices in the market has become a prime objective of the Act. To align with international best practices, where leniency concepts have long been employed, it was imperative to introduce this mechanism in India.

The Indian leniency program, though relatively new, has experienced substantial development in the past few years. The Commission issued its first leniency order in January of 2017. Throughout 2018, the CCI issued leniency orders in four additional cases. Furthermore, between 2019 and 2020, the CCI resolved four more cases brought under the leniency regime. Some of the important cases in this regard have been discussed

¹⁷ Krishna Ravishankar, 'Leniency Plus: A Need for Introspection in the Indian Context' (Centre for Business and Financial Laws, NLU Delhi, 19 April 2023) <<https://www.cbflnludelhi.in/post/leniency-plus-a-need-for-introspection-in-the-indian-context>> accessed 10 April 2024

here. In the *Brushless DC Fans case*,¹⁸ the Commission granted a 75% reduction in penalty to an enterprise and its office bearers in a case of cartelisation involving tenders for Brushless DC Fans by Indian Railways. One bidder admitted to rigging tenders with two other bidders, exchanging communications on rates and quantities. Penalties were imposed on the three bidders and their respective office bearers, under Section 46 of the Act. In the *Re: Cartelisation in respect of Zinc Carbon Dry Cell Batteries Market in India*,¹⁹ the CCI granted Panasonic India (first applicant) and its personnel a 100% reduction in penalty after their leniency application revealed vital information leading to the detection of a cartel. Panasonic Japan's disclosures formed the basis for the CCI's initial suspicion, while Panasonic India provided crucial evidence and ongoing cooperation, solidifying the decision for 100% penalty reduction. Moreover, 30% and 20% reductions were granted to the second and third applicants, respectively.

The recent cases reviewed by the CCI reveal a trend wherein full immunity or a 100% reduction in fines is typically granted only when the leniency applicant discloses a previously unknown cartel, as seen in the Battery Case involving Panasonic Energy India Co., Ltd. In contrast, in cases like the *Brushless DC Fans* and *PMC Case*,²⁰ where investigations were already ongoing for several months before cooperation, the CCI opts for reducing fines rather than granting complete immunity. Moreover, during the COVID-19 pandemic, orders passed by the CCI, such as in the Industrial and Automotive Bearings Case and the Brake Blocks Case, resulted in no penalties being imposed.²¹ Notably, officials at the DG's office now actively encourage cartel participants to apply for leniency, aiming to expedite investigations and promote leniency as a viable option for respondents.

¹⁸ *Re: Cartelisation 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

¹⁹ *Re: Cartelisation in respect of zinc carbon dry cell battery market in India v. Eveready Industries India Ltd.* Case No 02 of 2016

²⁰ *Re: Nagrik Chetna Manch* Case No 50 of 2015

²¹ Neelambara Sandeepan and Charanya Lakshmikumaran, 'CCI's Changed Approach to Enforcement Amidst the Pandemic' (Lexology, 26 August 2020) <<https://www.lexology.com/library/detail.aspx?g=7802b739-b3cb-45f3-836f-2894842ddc6d>> accessed 12 April 2024

A GLIMPSE INTO THE LENIENCY REGIME IN THE INTERNATIONAL SPHERE

The leniency regime, a widely adopted practice in nations such as the US, UK, Germany, Japan, and other OECD countries, has influenced India to align with international standards in competition law. Implementing these regulations within India's competitive landscape was a challenging endeavour. However, after thorough deliberation, India has embraced the Leniency Plus Program (LPP) mechanism to enhance competition effectively. The Sherman Antitrust Act (15 USC Section 1) forms the statutory basis for prohibiting cartel activities in the United States. It declares any contract, combination, or conspiracy restraining trade or commerce illegal. Both federal and state laws impose criminal and civil penalties on corporations and individuals engaging in such activities.²² However, only certain violations, such as price-fixing, bid-rigging, and market allocation, are consistently prosecuted criminally by the Antitrust Division, which holds exclusive jurisdiction over these cases. The US's Leniency Program is crucial as it grants leniency to the first cooperator in a conspiracy. Timing is critical, as the first to come forward receives the most leniency. However, subsequent cooperators may still benefit, with their cooperation decreasing in value over time.

In the European Union (EU), cartels are prohibited under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements that restrict competition. Unlike the US, the EU employs an 'objects and effects' approach, where hard-core cartels like price-fixing and bid rigging are considered anti-competitive by nature ('object'), so their impact on competition isn't analysed. Market definition isn't mandatory in these cases. However, agreements with restrictive effects, whether horizontal or vertical, may require assessment within the context of their relevant market. In the EU competition framework, the Commission has run a leniency program since 1996.²³ It allows companies in cartels to admit wrongdoing, potentially avoiding heavy fines. Participants who self-report and provide evidence may receive total immunity from

²² Ministry of Corporate Affairs, *Report of Competition Law Review Committee* (26 July 2019) 63-64

²³ European Commission, 'Leniency' <https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en#:~:text=In%20essence%2C%20the%20leniency%20programme,have%20otherwise%20imposed%20on%20them> accessed 7 April 2024

finer or reduced penalties. This program aids in uncovering secret cartels and obtaining insider evidence, serving as a deterrent to cartel formation and disrupting existing ones by fostering distrust among members.

The Organisation for Economic Co-operation and Development (OECD) is an international organisation that promotes economic growth and cooperation among its member countries. Additionally, it implements a leniency regime to detect and uncover cartels, aiming to ensure fair competition in global markets. Numerous competition authorities in the OECD member countries utilise leniency policies to detect, investigate, and prosecute serious cartel activities. To incentivise early disclosure by leniency applicants, many authorities have implemented "marker" systems.²⁴ These systems enable a prospective leniency applicant to provide initial information regarding their involvement in a cartel to the authority. In return, the authority commits to reserving the applicant's position for leniency consideration ("granting a marker") for a set period. During this time, the applicant can gather further information to complete their leniency application.

The CCI has collaborated with various foreign competition authorities to conduct 'global dawn raids' to crack down on cartels. A dawn raid is an unannounced inspection conducted by the Commission/DG at the premises of an enterprise suspected of engaging in anti-competitive practices. The CCI, under Section 32²⁵ of the act, has signed MOUs with various international counterparts, including the US Department of Justice, the US Federal Trade Commission, the European Commission, the Canadian Competition Bureau, the Australian Competition and Consumer Commission, and the Russian Federal Anti-Monopoly Service. Additionally, an MOU exists among the competition authorities of Brazil, Russia, India, China, and South Africa (BRICS countries).²⁶ These agreements allow for coordinated global dawn raids to combat cartels across multiple countries. Such

²⁴ OECD, 'Competition and the use of markers in Leniency Programmes' <<https://web-archive.oecd.org/temp/2022-12-20/327413-markers-in-leniency-programmes.htm>> accessed 7 April 2024

²⁵ The Competition Act 2002, s 32 (India)

²⁶ Cyril Amarchand Mangaldas, 'Cartels and the Leniency Program in India: Cheat Sheet' (September 2020) <https://www.cyrilshroff.com/wp-content/uploads/2020/09/Cartels-and-the-Leniency-Program-in-India-Cheat-Sheet.pdf> accessed 14 April 2024

raids have already occurred during investigations into potential price-fixing among air cargo carriers by competition authorities from Asia, the EU, and the US.

CRITICAL ANALYSIS AND RECOMMENDATIONS

The New Leniency Regime has widespread implications in the Indian Competition landscape. While the leniency regime has yielded numerous significant benefits, there are also notable loopholes and areas requiring improvement that pose significant concerns within the Indian context. The absence of a competitive rush to report cartels, despite the expectation of such a phenomenon, highlights shortcomings in India's leniency program. While transparency and deterrent penalties are vital, inconsistencies in penalty determination and the use of mitigating factors have led to ineffective penalties. Appeals often reduce penalties to levels insufficient for deterrence, and leniency has been inconsistently applied, especially in bid rigging cases. These disparities deter leniency applications. Addressing these issues is crucial for enhancing the effectiveness of the leniency mechanism and encouraging genuine competition to report cartel activities.

While India's Leniency Regime and the LPP mechanism are greatly influenced by the US and EU, there are certain challenges in the implementation of the said regime. In the US, criminal sanctions, including jail time, for those breaching antitrust laws are considered highly effective deterrents. However, in India, the absence of such penalties diminishes the fear of individual whistleblowers, leading to questionable cooperation from companies, often driven by strategic motives. While factors such as cartel profits and potential losses shape their decisions, the lack of criminal sanctions weakens deterrence. Consequently, the introduction of Leniency Plus in India's competition framework may not yield significant practical benefits or replicate the impact seen in the US.

Another consideration is the increased expenses that the CCI will face in executing this program, stemming from additional investigations and adjudications related to leniency, plus applicants disclosing evidence of other cartels. However, given the limited human and financial resources of the CCI, implementing such a program may not be feasible. Furthermore, concerns arise from the contrast between the individual liability-focused leniency plus model in the US and the firm-centric model envisioned in the Indian

Competition Regime. Additionally, vague thresholds such as "significant added value"²⁷ and "vital disclosure" regarding the nature of evidence disclosed by leniency applicants also poses implementation challenges.

CONCLUSION

In conclusion, while leniency programs have demonstrated success in deterring cartel behaviour in various jurisdictions, their effective implementation in India faces unique challenges. Concerns such as limited resources of the CCI, ambiguity in thresholds, and the need to harmonise leniency provisions with the Indian competition framework underscore the necessity for careful consideration and adaptation. Enhancing clarity, bolstering resources, and aligning leniency mechanisms with domestic realities can contribute to a more robust deterrence against cartels within the Indian context.

²⁷ (n 5) reg 4