# AN ANALYSIS OF INDIAN LENIENCY MECHANISM IN CARTEL DETECTION

*A Thesis Submitted*

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**By**

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# CANDIDATE'S DECLARATION

I hereby certify that the work which is being presented in the thesis, entitled "**An Analysis of Indian Leniency Mechanism in Cartel Detection"** in the fulfilment of the requirements for the award of the degree of Doctor of Philosophy in Law at Galgotias University, Greater Noida is an authentic record of my own work carried out during a period from 2018 to 2023 under the supervision of Prof. (Dr.) Namita Singh Malik.

The matter embodied in this thesis has not been submitted by me for the award of any other degree of this or any other University/Institute.

Nishikant Bibhu

This is to certify that the above statement made by the candidate is correct to the bestof our knowledge.

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Sign. of Supervisor Sign. of External Examiner

# ABSTRACT

Cartel leniency is a term used to describe a clause in competition law that permits members of cartels—illegal agreements between rivals to control prices or restrict competition—to obtain lighter punishments or immunity in exchange for helping the authorities with their investigation.

A cartel member might contact the CCI under the Indian programme for leniency and disclose crucial details about the cartel, including supporting documentation, in exchange for lenient treatment. The manner in which the cartel member contacts the CCI and the importance of the information provided will determine the degree of leniency.

A cartel member might contact the CCI under the Indian programme for leniency and disclose crucial details about the cartel, including supporting documentation, in exchange for lenient treatment. The manner in which the cartel member contacts the CCI and the importance of the information provided will determine the degree of leniency.

The first participant to contact the CCI and disclose material information may be granted full immunity, which means they won't be subject to any fines or penalties. Depending on the time and level of their cooperation, the subsequent participants may be eligible for a reduction in fines of up to 50%.

The cartel member must offer all pertinent data and proof required for the CCI to prove the existence of the cartel in order to be qualified for leniency. They must also keep all information completely secret and provide full cooperation during the investigation.

By offering rewards to cartel members who reveal illicit deals, the leniency programme hopes to foster a culture of compliance and deterrence. It supports healthy competition in the Indian market by identifying and punishing anti-competitive behaviour.

The goal of India's leniency programme is to identify and break up cartels that hurt consumers and the free market. It intends to make the discovery and prosecution of anti-competitive practices easier by providing incentives for cartel participants to come forward.

The programme aims to reward anyone who work with the police to uncover such practice s, acknowledging that cartel members may have been forced or persuaded to take part in

illegal agreements. The programme promotes self-reporting and deters further involvement in cartels by offering leniency.

A cartel member must approach the CCI voluntarily and offer substantial evidence that can help establish the existence of the cartel in order to qualify for leniency. For the CCI's investigation and future enforcement measures, this evidence should be essential.

Additionally, the applicant for leniency must consent to total confidentiality with regard to their collaboration with the CCI. Because of this confidentiality, other cartel members won't be made aware of the investigation, enabling the government to collect more evidence and implement strong enforcement measures.

The "marker" technique used by the leniency programme gives preferential consideration to the first cartel member to contact the CCI. If they meet all requirements and offer crucial information that aids in the establishment of the cartel, they can be given full immunity from fines and penalties.

It is crucial to remember that the leniency programme does not ensure total immunity or protection from legal repercussions. The applicant must continue to cooperate and adhere to the program's rules in order for the leniency to be granted.

The leniency programme is an effective weapon in the battle against cartels because it provides incentives for members to come forward and admit their involvement. By guaranteeing lower pricing, more options, and innovation in the market, it ultimately helps consumers and improves the CCI's capacity to identify and prosecute anti-competitive practices.

# ACKNOWLEDGEMENT

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The thesis is dedicated to my grandfather, Late Prof. (Dr.) Bhola Prasad and my parents, Mrs. Manju Sinha & Dr. Arun Kumar. The prayers they have offered and the patience with which they have tolerated my irregular absences at times when they have most needed my presence demonstrate their selflessness, which stretches back to when I was a youngster. Unfortunately, my grandfather did not survive to see me receive my PhD. However, my parents must be feeling proud to see me with a doctorate in Law.

I owe my wife, Priyanka Parasar, a great deal of thanks for motivating me to treat my work obligations seriously with her sometimes scathing but always direct statements. She is the person I can trust the most with both advice and criticism, so I have every reason to think that she will be as happy with the outcome of my thesis as I am. I would also be negligent if I failed to mention the one who lights up my life the most: my daughter Rutvika Singh. Rutvika's presence kept me cheerful and energetic through out my research work.

Of course, the list of things for which we are thankful is not exhaustive. My sincere gratitude is extended to each and every person who has contributed to the accomplishment of this difficult but ultimately beneficial journey. I sincerely hope that each and every one of them will realise the value of my help at some point in the future.

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# LIST OF PUBLICATIONS

1) **Article titled "Cartel Leniency Scheme : A step towards abolishing cartelization from Indian Markets"** published in **Vidyabharti International Interdisciplinary Research Journal (Special issue on Multidisciplinary Academic Research in Current Era (October 2021) ISSN : 2319-4979 (Indexed in web of sciences) (Peer Reviewed).**

2) **Article Titled** "**Critical analysis of the key proposals suggested by Competition law Review Committee under draft competition (Amendment)Bill 2020"** published in **Sodh Sanchar Bulletin ,** an international multidisciplinary peer reviewed referred research journal **(Listed in UGC Care List)** ISSN – 2229-3620

3) Article titled: **A Comparative Analysis Of Cartel Leniency Schemes In India And USA** published in **International Journal of Advance and Innovative Research(Peer Reviewed & Referred Journal)** Jan – March 2023 (Vol. 10 Issue 1) ISSN : 2394-7780, Indexed in SJIF Journals master list evaluation process, Impact factor – 7.363

# LIST OF ABBREVIATIONS

| | |
|---|---|
| **AAEC** | Appreciable Adverse Effect on Competition |
| **ACPERA** | Antitrust Criminal Penalty Enhancement and Reform Act |
| **AIBA** | All India Brewers Association |
| **AIDCM** | Association of Indian Dry Cell Manufacturers |
| **AT&T** | American Telephone and Telegraph Company |
| **BCCI** | The Board Of Control For Cricket In India |
| **BEML** | Bharat Earth Movers Limited |
| **CCI** | Competition Commission of India |
| **CLRC** | Competition Law Review Committee |
| **CMA** | Competition & Market Authority |
| **COMPAT** | Competition Appellate Tribunal |
| **DCBs** | Dry Cell Batteries |
| **DD** | Demand Draft |
| **IP** | Internet Protocol |
| **ESCL** | Essel Shyam Communication Ltd. |
| **DG** | Director General |
| **DOJ** | Department of Justice |
| **EC** | European Commission |
| **EEC** | European Economic Community |
| **EIIL** | Eveready Industries India Limited |
| **EMD** | Earnest Money Deposits |
| **EPS** | Electric Power Steering System |
| **EU** | European Union |
| **FAQs** | Frequently Asked Questions |
| **FBI** | Federal Bureau of Investigation |
| **FTC** | Federal Trade Commission |
| **GIIL** | Geep Industries (India) Pvt. Ltd |
| **HQ** | Head Quarter |
| **ICN** | International Competition Network |
| **INL** | Indo National Ltd |

| | |
|---|---|
| **INR** | Indian National Rupees |
| **IPR** | Intellectual Property Rights |
| **JSAI** | JTEKT Sona Automotive India Limited |
| **LPG** | Liquified Petroleum gas |
| **MOP** | Market Operation Price |
| **MPCDA** | Madhya Pradesh Chemist & Distributors Federation |
| **MPCDF** | Madhya Pradesh Chemist & Druggist Association |
| **MRTP** | Monopolistic Restrictive Trade Practices |
| **MSME** | Micro Small & Medium Enterprises |
| **NCA** | National Competition Authorities |
| **NCLAT** | National Company Law Appellate Tribunal |
| **OECD** | Organisation for Economic Co-operation and Development |
| **OP** | Opposite Party |
| **PCC** | Pure Car Carriers |
| **PMC** | Pune Municipal Corporations |
| **PSA** | Product Supply Agreement |
| **R&D** | Research & Development |
| **SAIL** | Steel Authority of India Ltd. |
| **Sec** | Section |
| **TELCO** | Tata Engineering and Locomotive Co. Ltd |
| **TFEU** | Treaty on the Functioning of the European Union |
| **UBL** | United Breweries Limited |
| **UK** | United Kingdom |
| **US** | United States |
| **USA** | United States of America |

# CHAPTER – 1

# INTRODUCTION AND CONCEPTUAL FRAMEWORK

## 1.1) Introduction

Antitrust laws, also referred to as competition law, are the Magna Carta of free enterprise. They are equally crucial to maintaining our system of free business and economic freedom. Therefore, competition rules guard against and control market competition. In today's market, cartels among rivals are a particularly significant and prevalent type of anticompetitive action. Today, every nation's competition commission uses its resources to look for cartels and their flagrant impact on the market. However, cartels are by their very nature secret, so the antitrust authorities must work very hard to find, identify, and prevent them. Even though the commission is aware of a cartel, most of the time no action can be done against it due to a lack of proof. The implementation of the leniency programmes has considerably bolstered attempts to identify cartels. Leniency, as the name suggests, refers to an exemption from all or some of the penalties that would otherwise be imposed on a cartel member who discloses their membership to an enforcement agency.

Thus, in this research the researcher aims at analyzing the functioning of the corporate leniency program as implemented in India with a comparative study of USA & European Union leniency programs while the focal point of the entire research remains at the analysis of leniency program in India and its role in detection of cartels as an incentive mechanism.

The leniency under leniency scheme is provided to the disclosing member of a cartel. In India under sec 46 of the Competition Act 2002 (hereinafter will be called ‘Act’) the protection is given to the seller, service provider, distributor, producer etc. Who is a member of the cartel, if made a full and true disclosure in respect of the alleged violations of competition policy, the cartel of which the disclosing producers, sellers, distributors, traders or service providers are members, must have an allegation to violate the anti competitive provisions of the Act. This means the cartel is a subject of an anti competitive agreement.

Regulation 3 of Lesser Penalty Regulations[1] **(Annexure I)** provides for the conditions for applicants who are in search of the leniency under the leniency scheme under the Act. If the competition commission of India (herein after referred as "commission" or CCI) is not directing something contrary, the applicant seeking the leniency protection will no longer be a member to the cartel. It is also provisioned that the disclosure done by the applicant seeking lesser penalty must be vital information regarding the breach of sec 3(3) of the Act. It also provides for the furnishing of all documents, information and evidence, by the applicants, which is required by the commission. It also provides for the intention of the applicants disclosing information to be genuine and to give the full information continuously and expeditiously in the course of investigation as well as other proceedings before the commission. The commission under this regulation also bars the applicants in regards to the concealment, manipulation destruction or removal of the relevant documents. The relevancy is judged on the ground that how much these documents contribute in the establishment of the cartel. The failure of the applicants to comply with such conditions gives a freehand to the commission to use the evidence and information given by the applicant as per the provisions mentioned in the Act. However these restrictions on the applicants are not exhaustive and they can be provided with further restrictions under sub regulation 3 as read under :

**"*Conditions for lesser penalty***. *– (1) An applicant, seeking the benefit of lesser penalty under section 46 of the Act, shall- (a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission*

*(b) provide vital disclosure in respect of contravention of the provisions4 of section 3 of the Act*

*(c) provide all relevant information, documents and evidence as may be required by the Commission*

*(d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and*

*(e) not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a cartel.*

[1]Competition Commission of India (Lesser Penalty) Regulations, 2009, No. 4 of 2009, (Aug. 13, 2009)

*(1A) Where the applicant is an enterprise, it shall also provide the names of the individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought by such an enterprise.*

*(2) Where an applicant fails to comply with the conditions mentioned in sub- regulation (1), the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.*

*(3) Without prejudice to sub-regulations (1) and (2), the Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case.*

*(4) The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to – (a) the stage at which the applicant comes forward with the disclosure; (b) the evidence already in possession of the Commission; (c) the quality of the information provided by the applicant; and (d) the entire facts and circumstances of the case".*

The regulations give the vast power to the commission in regards to the decision of monetary penalty which the commission shall exercise giving consideration to the quality of information given by the applicant, the stage at which the applicant turned up for disclosure, the evidence which the commission is already having. In "***Indian Railways for supply of Brushless DC Fans and other electrical items"***[2] though Pyramid was the 1st applicant, the CCI did not give complete reduction in penalty due to the stage at which Pyramid had approached the CCI, i.e., after the investigation had commenced. This doesn't mean that the CCI is not inclined towards granting complete immunity from the penalty, but it depends upon the vitality of the information given and the stage when it was provided. "In ***re: Cartelization in respect of zinc carbon dry cell batteries market in India"***[3] This was the first time when CCI granted total exemption to the first applicant of leniency including its office bearers, as the investigation was because of the Panasonic's disclosure to the CCI even

[2] In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Competition Commission of India, Suo Moto Case No. 03 of 2014, Order dated 18.01.2017 .

[3] In***re: Cartelization in respect of zinc carbon dry cell batteries market in India*** , Competition Commission of India, Suo Moto Case No. 02 of 2016, Order dated 19.04.2018

in ***"re: Anticompetitive conduct in the dry-cell batteries market in india"***[4]after assessing the leniency application filed by the 1st applicant The CCI, granted a 100% reduction in penalty.

Regulation 3[5] is a condition precedent to regulation 4[6] of the lesser penalty regulations which provides for the granting of lesser penalty than the original penalty as per sec 27 (b) it also talks about the manner in which the commission decides the lesser penalty to be imposed to the applicants. The lesser penalty is not a right of the applicant hence an applicant under regulation 4 after fulfilling the criteria under Regulation 3 may be granted the total reduction i.e up to or equal to one hundred percent, if he comes first for making a disclosure which is vital and through which the commission can form a prima facie opinion in regards to the existence of the cartel which is alleged to be in violation of section 3 of the Act. Secondly a hundred percent benefit of reduction in penalty may be given in a case when the applicant at first provides the commission a vital disclosure and submit evidence in favour of the violation of Section 3 of the Act with regards to a case where investigation is still going on and has not been completed. This is also a condition that the CCI has no sufficient proof to prove such violation when the leniency application is being filed. The total benefit of the leniency which means the benefit up to hundred percent will be provided if such benefit has not been provided to any other applicant at first in such matter. But this doesn't mean that the commission has no provision for any further applicant disclosing vital information. The commission prepares a priority list of the applicants whom the commission thinks to be fit for the lesser penalty benefits and provides the reduction in penalty accordingly. If for any further applicant subsequent to the first applicant, the commission thinks that the information furnished through evidence by him is of added value to whatever evidence the commission or the Director General was having already and vital to identify the presence of a cartel which is in violation of section 3 of the Act[7], may provide the benefit of lesser penalty. In Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations') the Lesser Penalty Regulation provides and fixes the total number of applicants who file the leniency application to seek lesser penalty and that was up to three applicants depending on what additional value the subsequent applicants add in the information given by the first applicant. Now the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations') ('Amendment') 2017 broke the limit of number of applicants

[4]Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Competition Commission of India, Suo Moto Case No. 02 of 2017, Order dated 30.08.2018
[5]*Supra* note 1, at regulation 3.
[6] *Id*. at regulation 4
[7]The Competition Act, 2002, No. 12, Acts of Parliament, 2003, (India).

seeking immunity through this regulation and authorized CCI to accept the leniency application filed my more than three applicants who will be eligible for a maximum leniency of 30% depending on the additional value of their information.[8]

The Amendment of 2017[9] kept the door open for more than three applicants to get the benefit of leniency. This means even more than three applicants now can get immunity under this amended regulation of 2017 with a condition that the third and any further applicant will be eligible or a leniency up to thirty percent. This will prompt all members of a cartel to come forward for filing a leniency application. In ***"Nagrik Chetna Manch v. Fortified Security Solutions and others",***[10] *the Competition Commission has granted leniency to more than three applicants.*

## 1.2) Statement of Problem

Because the leniency programme provided cartel members who provided essential information to the competition authorities with whistle-blower protection, it is considered to be one of the most successful methods for breaking up existing cartels and producing a deterrent effect for the formation of cartels in the future. In the case of the cartel leniency programme, the first person to apply for leniency is granted whole immunity, but subsequent applicants are eligible for a lower punishment in accordance with the laws.

The United States of America is responsible for initiating leniency programmes for the very first time in 1978. Since that time, these programmes have undergone a number of changes, helping them to become one of the most effective leniency programmes in a number of different jurisdictions. The year 1996 saw the beginning of leniency programmes in the European Union, and in 2009, the Competition Commission of India (Lesser Penalty) regulations were issued by the CCI. These laws were subsequently updated in 2017[11].

It is very necessary for there to be a significant risk of harsh punishment in the event that cartels are discovered in order for the leniency programme to be a success. Sanctions have

[8]AZB & PARTNERS, ADVOCATES & SOLICITORS, https://www.azbpartners.com/bank/the-competition-commission-of-india-amends-lesser-penalty-regulations/ (last visited December, 13, 2019).
[9]*Supra* note 1
[10] Nagrik Chetna Manch v. Fortified Security Solutions & Ors, Competition Commission of India, case no. 50 of 2015.
[11]*Supra* note 1.

been imposed on members of cartels in accordance with section 27 of the Competition Act 2002. This causes cartel members to compete with one another to submit their leniency applications in order to obtain the most potential advantage from the leniency scheme. Second, the competition authority, which in India is known as the Competition Commission of India (CCI), should have the ability to conduct investigations in order to unearth members of cartels. This will produce the threat of detection and force members of cartels to ask for leniency before being discovered by the competition authority. Last but not least, there has to be confidence between the applicants for leniency and the competition authority, and the competition authority's judgement should be based on the regulations rather than on the authority's own judgement.

According to the CCI lesser penalty regulations, it is the responsibility of the competition Commission to evaluate whether or not the evidence that is provided by the leniency applicants is complete, true, and vital disclosures that can help in making a prima facie opinion regarding the cartel, the existence of which was unknown to the competition Commission. It is reduction in penalty, and the regulations make it abundantly clear that the first applicant will be granted a lesser penalty equal to or up to one hundred percent, the second applicant will be granted a lesser penalty equal to or up to fifty percent, and the third applicant and subsequent applicants will be granted a lesser penalty equal to or up to thirty percent. This is provided that the disclosure that the applicants have given CCI adds significant value to the evidence that is already available with CCI. Because of these broad discretionary powers, the Competition Commission of India (CCI) did not grant the first applicant a reduction of penalty of one hundred percent in the case of In Re: Cartelization in respect of tenders floated by "***the Indian Railways for supply of Brushless DC Fans and other electrical items"***[12]. Instead, the CCI granted a reduction of penalty of seventy-five percent to the leniency applicant because it was of the opinion that since it had already begun its investigation and was already in possession of evidence, it Similarly, in the case of "***Nagrik Chetna Manch v. Fortified Security Solutions and others"***[13], the CCI reduced the penalty for the first petitioner by just fifty percent because the CCI was already in the process of conducting its inquiry. Because of this approach taken by CCI, the question arises as to whether or not a leniency application can provide any real value after CCI has already begun

[12]*Supra* note 2.
[13]*Supra* note 10.

its inquiry. In the study, the researcher will offer answers to this question by comparing the provision in question to those of other jurisdictions.

Before the amendment in Competition Act in 2023, the CCI's leniency programme does not offer an applicant a full and guaranteed exemption from penalty in the event that the applicant is a member of a second cartel that is harming a different relevant market. These regulations are also known as amnesty plus regulations, and they are present in the leniency programmes of both the United States of America and the European Union. Additionally, there is no provision for an increased penalty under the current leniency regime if the leniency applicant is caught for cartelization for a second time. This clause, which is included in the leniency programme that is administered in the United States of America and the European Union, is known as the penalty plus provision. Because of these shortcomings and the fact that not all leniency applicants may be awarded the benefit of a lighter penalty, a significant number of applicants choose not to appear before the CCI in order to take advantage of the leniency programme. The researcher is going to investigate the significance of the amnesty plus and penalty plus clauses that are included in the CCI leniency programme.

In addition, there is a rising worry over the secrecy of the information submitted by the application as well as the anonymity of the identity of the applicant who is requesting leniency. All of the disclosures that the applicant had made were made public by the CCI in the case of the "***Nagrik Chetna Manch"***[14] because the CCI was of the opinion that the information that had already been gathered by the DG could be made public in the DG's report, thereby endangering the identity of the applicant and discouraging potential applicants in the future from approaching the CCI under the leniency programme. The topic of privacy and confidentiality will be investigated by the researcher as part of the study.

It is often believed that the most significant obstacle to the successful implementation of policy is its lack of predictability. In India, the leniency programme is still trying to establish its footing. This is compounded by issues surrounding the program's transparency caused by the vast discretionary powers of the CCI. The India Leniency Program is Still Evolving, and Applicants Have Only Started Approaching CCI Since CCI Amended the Leniency Regulations in 2017[15] The India Leniency Program is Still Evolving in India As of right now, there are no empirical studies addressing the effectiveness of Indian leniency regulations; the researcher's goal is to fill this vacuum in the research. A comparison will be made between

[14] *Id.*
[15] *Supra* note 1.

the provisions of leniency rules in the United States of America and those in the European Union, both of which have effectively operated their leniency programmes from the late 1980s all the way up until the present day.

## 1.3) Literature Review

**Books**

**European Competition Law Annual 2006: Enforcement of Prohibition of Cartels edited by Claus-Dieter Ehlermann, Isabela Atanasiu, Bloomsbury Publishing, 11th Series, 2007**

This book is the collection of articles about major issues in the theory and practice of competition law, written by foreign specialists, that aims to fill the gap in European Competition Laws and Other major jurisdictions regarding knowledge and understanding about this increasingly critical area of law. It shows development of all important legal concepts through experience of various countries and comprehensive survey and analysis of key concepts and issues in competition law. It demonstrates user friendly structure which presents analysis of both topic-by-topic and jurisdiction-by-jurisdiction issues in competition law regimes across the globe. Contributors include a galaxy of experts in the field including: Sir Christopher Bellamy, Ulf Boge, Allan Fels, Eleanor M Fox, Alan Goldberg, Philip Lowe, Michael Reynolds and Richard Whish. The Article contributed by William A. Kovacic who also happens to be the Commissioner of US Federal Trade Commission.

**Peter J. Wang et al., COMPETITION LAW IN CHINA: LAWS, REGULATIONS, AND CASES, 1st ed. 2014, Oxford University Press, Oxford.**

The authors have studied anti-Monopoly law of the Peoples Republic of China and all the relevant provisions dealing with competition law there. The authors have also incorporated regulations issued by the State Council, National Development and Reform Commission, State Administration for Industry and the Ministry of Commerce.

**Kiran Klaus Patel and Heike Schweitzer, THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW, 1st ed. 2013, Oxford University Press, Oxford.**

The authors retrace the development of competition law not only from collective European perspective but also from the perspective of each member state of European Union. Present the role of European Court of Justice in the protection of competition, the influence of national and international competition law on the development of EEC competition law and the role of industrial policy in the economic integration of European Union.

**Niamh Dunne, COMPETITION LAW AND ECONOMIC REGULATION: MAKING AND MANAGING MARKETS, 2015, Cambridge University Press, Cambridge.**

The author has explored the relationship between economic regulation and competition policy with respect to market control. The author compares and contrast the position of competition law in the US and EU with a focus on economic regulations concerning antitrust.

**United Nations Conference on Trade & Development (UNCTAD) Report No. TD/RBP/CONF.7/4 dated 26th August, 2010**

Hardcore cartels are considered by many to be the most egregious competition law offence. Leniency programmes are today the most convenient way to track cartels and get the proof of their existence. But they are effective only if the members who don't seek leniency perceive significant punishment. These programmes prescribe provisions for lesser penalty rewards to the members of cartels who report such existence. Different country's leniency schemes can be mutually materialised on members of international cartel.

**Caron Beaton-Wells and Christopher S. Tran, ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION, 2015, Hart Publishing, Oxford.**

The author discusses the role of leniency policies in anti-cartel law enforcement. He probes various leniency policies adopted by competition authorities worldwide and their effectiveness in combating cartelisation. He explore the intersection between leniency and compensation, compliance and criminalization. The book is a result of an interdisciplinary study with law, economics and criminology.

**T Ramappa, COMPETITION LAW IN INDIA POLICY, ISSUES AND DEVELOPMENTS, 3rd ed. 2013, Oxford University Press, Oxford.**

The author discusses the evolution of competition law in India from the then existing Monopolies and Restrictive Trade Practices Act, 1969 to the enactment of Competition Act, 2002. The author discusses anti-competitive agreements, abuse of dominant position and combination regulations. The author has presented a comparative analysis of competition law in the US, UK and EU you and has also discussed important judgements of foreign jurisdictions.

**Christopher Harding and Jennifer Edwards, CARTEL CRIMINALITY: THE MYTHOLOGY AND PATHOLOGY OF BUSINESS COLLUSION, 2016, Routledge, Abingdon.**

The author has discussed various categories of anti-competitive business cartels which are engaging in practices such as market sharing, restriction on output, bid rigging and price fixing. The author presents a jurisprudential analysis and discuss various theories dealing with business collusion. The author has discussed leading case laws in order to bring out a behavioural analysis with respect to formation of cartels and presented solutions which can culturally fit to deal with the problem.

**Ariel Ezrachi and Maurice E. Stucke, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM – DRIVEN ECONOMY, 1st ed. 2017, Harvard University Press, Cambridge.**

The author explodes the impact of data driven algorithms on price fixation and analyses weather the current competition policies are effective enough to prevent anti- competitive practices in the emerging online economy. The Other studies development of super platforms and super applications which control the data flow of the consumers which may result into modern forms of monopolies. The authors studies competitive pricing in The E-Commerce and whether the invisible hand theory is still viable.

**Baskaran Balasingham, THE EU LENIENCY POLICY: RECONCILLING EFFECTIVENESS AND FAIRNESS, 2017, Kluwer Law International, Alphen aan den Rijn.**

The author describes the development of the EU leniency policy and analyses the effectiveness and fairness of it. The author discusses its application in the fight against hard core cartels and whether the leniency policy would be effective with cartelisation. The author has extensively conducted a judicial review of the decisions of the EU courts in cartel related matters and has studied the severity of the fines imposed by it. The author also takes into consideration the 2002 and 2006 leniency notices and leniency related amendments by the 2014 antitrust damages directives.

**Dr. Souvik Chatterjee, COMPETITION LAW IN INDIA AND CARTELS IN INDIA AND USA, 2nd ed. 2017, Allahabad Law Agency, Faridabad.**

The author has looked into the interpretation of relevant market to examine anti- competitive agreements. The author has compared the competition regions of USA and India with respect to cartelisation and has analysed the issue in socio economic concern. The author analyses the corporate leniency program started by CCI in order to understand its efficacy.

**CCI Report on Leniency Program submitted as Research Project Report on Emerging Issues of Cartels dated December, 2007**

The creation of cartels is one of the most serious anti-competitive practices. In cartels, competitors agree to forgo competition in exchange for cooperation, which prevents consumers from reaping the benefits of competition. Cartel agreements are widely regarded as the most destructive of all forms of anticompetitive behaviour since they directly violate the principles of competition in this situation. There is evidence to support the claim that cartels undermine market competition. According to the European Union's XXXII Report on Competition Policy, published in 2002, cartels have a negative impact on social welfare, cause allocative inefficiency, and divert money from consumers to their members through changing output. Participating in cartels to avoid competition leads to the formation of unprofitable and unstable market numbers, less technological advancements, and higher pricing. Numerous nations have adopted specific tactics to combat cartels in response to the detrimental effects of these organisations. These tactics include monitoring of individuals, media relations, liaison with competition authorities, infiltration, market research, leniency programmes, whistle blower and informant programmes, among others. However, the leniency plan is the most crucial of them all.

**Dr. Ariel Ezrachi, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES, 6th ed. 2018, Hart Publishing, Oxford.**

The author has studied all the leading cases of European competition law. The book deals with article 101 TFEU, Article 102 TFEU and the European merger regulations. The author compares the intersection between intellectual property rights and competition law and the role of state action in implementation of competition law. The author also makes reference to a number of cases from United States in order to compare the provisions of antitrust to

determine the scope and application of competition law. The author also deals extensively with the enforcement mechanism of the European commission and the national courts of various nations of Europe.

**Richard Whish and David Bailey, COMPETITION LAW, 8th ed. 2018, Oxford University Press, Oxford.**

The authors have discussed competition policy in UK and EU and has explain the application of member states under the EU competition rules. The book assimilates a wide variety of resources, including judgments, decisions, guidelines, and periodical literature to describe cartels and cartel prevention mechanisms devised under the EU and UK.

**Evaluating Anti-trust Leniency Programs by Joan-Ramon Borrell, Juan Luis Jiménez and Carmen García, Oxford Journal of Competition Law & Econoics, Vol. 10, Issue 4, December 2014**

This article finds that the leniency programs increase the perception of effectiveness among the business community. A leniency policy is one component of a leniency program, which also includes internal agency processes, for example how the agency implements their leniency policy. The competition authorities treat leniency programmes as a tool to trace cartels.

When a member of Cartel breaks the rank and makes full, true and vital disclosures which results in bursting the 'Cartel', the Anti- Trust authorities have to take a more diluting view on the stance of penalties and should be empowered to take stock of the new facts so arising. The scheme is developed for the defection of members of a cartel from the cartel agreement. The party making disclosure will, however, be subject to other directions of the respective anti-trust legislation.

**Alison Jones et al., EU COMPETITION LAW: TEXT, CASES, AND MAETRIALS, 7th ed., 2019, Oxford University Press, Oxford.**

The author has discussed the Treaty on the Functioning of the European Union and more specifically the impact of article 101 on the competition related matters in the European Union. The author discusses the role of institutions in promotion of competition in the market

and the role of state under article 106 of TEFU. The author has explained public enforcement of competition and national competition authorities of the antitrust provisions.

**Vinod Dhall, COMPETITION LAW TODAY: CONCEPTS, ISSUES AND THE LAW IN PRACTICE, 2nd ed. 2019, Oxford University Press, Oxford.**

The author has covered the evolution of competition law in India from the MRTP act to the present competition act. The book has all important case laws dealing with evolution of competition policy in India. The author has covered horizontal and vertical restraints and the abuse of dominance in the market. The book is updated with the latest leniency regulations passed in 2017.

**Corporate leniency in India: A look at India's corporate leniency programme regarding cartels and a snapshot comparison with the US position by Dr. Souvik Chatterji, Assistant Professor at National Law University, Jodhpur, Competition Law Insight, 14 April 2015**

Corporate leniency is an important step in combating cartels in different jurisdictions. India has civil fines to combat cartels, established by law, whereas the US has criminal penalties. India grants partial leniency to second and third informants as well. The US system has examined many cartel cases and busted the cartels with leniency programmes. The Indian system is new. The Competition Commission of India (the CCI) started working on it in 2008. This article compares India's system of corporate leniency with the US regime to try and analyse the system's usefulness.

**Ioannis Lianos et al., COMPETITION LAW: ANALYSIS, CASES, & MATERIALS, 1st ed. 2019, Oxford University Press, Oxford.**

The author provides an interdisciplinary approach to competition law with respect to economic context and has done an extensive comprehensive analysis of the provisions of competition law in EU and UK. The analysis is supplemented by various case laws which deal with the history and working of competition law and policy in EU and UK.

**Richard Posner, ANTITRUST LAW, 2nd ed. 2019, University of Chicago Press, Chicago.**

The author has played a major role in transforming the field of antitrust law into a body of economically rational principles. The author was the first to present antitrust law through the lens of economic and economic Welfare of society. The author provides the development in the antitrust field since 1976 in this book and presents a host of antitrust questions in the new economy and presents his case as to application of antitrust law in internet service providers, software manufacturers and communications equipment and services.

**E. Thomas Sullivan et al, ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS, 8th ed. 2019, Carolina Academic Press, Durham.**

The Author deals with the unique issues that are arising in antitrust enforcement in US which are stemming from vertical restraints and horizontal restraints. The author focuses on the impact of mergers and acquisitions on competition law and the subsequent US legislations to deal with it. The author has covered all the major case laws arising in US relating to antitrust.

**David J. Gerber, COMPETITION LAW AND ANTITRUST A GLOBAL GUIDE, 2020, Oxford University Press, Oxford.**

The Porter provides a global context to competition law by comparing and contrasting the competition policies in the US, European Union and emerging markets of Asia and Latin America. The author discusses emerging challenges to competition policies in the form of new age hard-core cartels emerging and the role of leniency policies in regulating them.

**Ingrid Margrethe Halvorsen Barlund, LENEINCY IN EU COMPETITION LAW, 2020, Kluwer Law International, Alphen aan den Rijn.**

The author has analysed the scope of leniency provisions in European Union competition law. Through his study he determines whether the leniency applicant can self-report with and has the right to compensation when the market participant has suffered due to loss of competition. The author provides valuable suggestions of the shortcoming of the leniency

provisions and the regulatory steps needed to be taken to give the policy a greater leverage. The author compares leniency practice in the US antitrust law with the position in EU.

**Maria Wasastjerna, COMPETITION, DATA AND PRIVACY IN THE DIGITAL ECONOMY: TOWARDS A PRIVACY DIMENSION IN COMPETITION POLICY?, 2020, Kluwer Law International, Alphen aan den Rijn.**

The author close the interlinkage between competition policy and data privacy and presents a critical analysis whether the present competition policy in its current form is adequate to tackle the rising challenge of data privacy fuelled by a shift from offline to an online economy. The author underlines the importance of non-price parameters in competition such as the consumer choice and suggest ways on how competition law can protect privacy and address challenges rising from digital privacy violation in the abuse of market power. The author studies recent case law in European Union and United States in her study.

**Thomas K. Cheng, COMPETITION LAW IN DEVELOPING COUNTRIES, 1st ed. 2020, Oxford University Press, Oxford.**

The author analyses the relationship between competition law enforcement and economic development and looks at it from the perspective of development. The author presents the perspective of developing country to address the question of how competition law enforcement can help to promote economic growth and development. The Other studies whether the approach of developed Nations will be applicable to developing nations in designing their competition policy and suggest how competition law enforcement it can better in corporate development concerns without causing undue dilution on protecting consumer welfare.

**Jingyuan Ma, COMPETITION LAW IN CHINA: A LAW AND ECONOMICS PERSPECTIVE, 2020, Springer, Berlin.**

The author provides a comprehensive framework of the history and development and structural framework of Chinese competition law from the economic perspective. The author analyses various cases of competition law or involving concentration of market power,

monopolistic agreements and abuse of dominant position. The author compares the position of law in China vis a vis US and EU.

**Steven Van Uytsel et al, RESEARCH HANDBOOK ON ASIAN COMPETITION LAW, 2020, Edward Elgar Publishing Ltd., Cheltenham.**

ASEAN region is one of the fastest growing regions in the whole world. The author provides a comprehensive overview of the substantive competition law provisions in the ASEAN region and also includes Japan, Hong Kong and Taiwan. The author studies the impact of EU and US in the formation of competition policy of these regions.

**Jay P. Choi et al., COMPETITION LAW AND ECONOMICS: DEVELOPMENTS, POLICIES AND ENFORCEMENT TRENDS IN THE US AND KOREA, 2020, Edward Elgar Publishing Ltd., Northampton.**

The author provides an interdisciplinary approach to competition law with the economic analysis of its application in Korea. The author studies the evolution of competition law in Korea and provides a Framework for developing countries that can be adopted. The author compares the position of law in US and Canada 6000 Trends that are emerging globally as well as in Korea.

**Herbert Hovenkamp, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE, 6th ed. 2020, West Academic Publishing, St. Paul.**

The author studies the ideological development of antitrust policy in America and presents an extensive treatise of case laws which dealt with market power and more specifically its concentration in few hands. The author discusses the US approach of dealing with limitations to competition and analyses its success and failures.

**Lynden Griggs et al., COMPETITION LAW IN AUSTRALIA, 3rd ed. 2020, Kluwer Law International, Alphen aan den Rijn.**

The author provides an economic and historical background regarding the development of competition law in Australia and conduct a detailed analysis of cartels and other horizontal agreements and the leniency policy adopted to combat it. He analyses various forms of restrictive agreements and abuse of dominance in particular merger control, tests of illegality and civil remedies and criminal penalties in the Australian competition law.

**C. Paul Rogers III and William R. Andersen, ANTITRUST LAW: POLICY AND PRACTICE, 5th ed. 2020, Carolina Academic Press, Durham**

The author has discussed the antitrust law in US and has provided for its evolution as well as functioning. The author deals with Sherman and Clayton act and the Robinson Patman act and deals with the importance of Federal trade Commission in regulation of antitrust matters. The book remains one of the extensive treatise leading to further development of antitrust laws of the judicial decisions.

**Thesis**

**Divakar Babu, "The competition act 2002 A critical study", (2010), (Unpublished Ph.D. Thesis, Sri Venkateswara University, Tirupati).**

In the present study the author has given a historical background with respect to evolution of competition law in India from the MRTP Regiment to the present competition law regime. The author has also given the evolution with respect to the antitrust laws in the United States. The author has studied the anti-competitive agreements and case laws relating to cartelisation.

Lastly the author has provided his insight with respect to regulation of combinations under the competition act and has provided his suggestions with respect to the lacuna in it.

**Harinder Pal Singh, "An analytical study of competition laws in Europe and India", (2011), (Unpublished Ph.D. Thesis, Punjab University, Chandigarh).**

In this thesis the author has done a comparative analysis between competition laws of India and European Union and has given the conceptual dimensions relating to horizontal agreements and their impediments on competition. The author has also dealt with vertical agreements and their anti-competitive effect and lastly the author has contrasted the position of Europe and India with respect to abuse of dominance in competition. Based on his study the author has presented the recommendations that could be included in the Indian competition act will be the position of law in Europe.

**Ravi Prakash, "Competition Law and its Implications for Intellectual Property in India", (2015), (Unpublished Ph.D. Thesis, Banaras Hindu University, Varanasi).**

The author has dealt with the interface of competition law and intellectual property rights and has deliberated upon competition concerns in exclusionary licensing agreements. The thesis also deliberate upon abuse of dominant position with respect tointellectual property rights and the role of competition policy. The author provides andeconomic approach with respect to the interface and compare the position of law in India, United States and United Kingdom. Lastly the author provides a critique of competition policy with respect to the TRIPS agreement.

**Silky Mukherjee, "Interface between competition law and intellectual property law a study of United States European union and Indian law" (2016), (Unpublished Ph.D. Thesis, Gujarat National Law University, Gandhinagar).**

The author has presented a comparative analysis of the interplay between intellectual property rights and competition law. Or the author has studied the position in European Union, United States of America and India. The author presents a detailed comparative study of EU and US intellectual property law and competition law through judicial pronouncements and presents suggestions in the competition policy of India.

**Rishabh Yadav, "Position of cartels vis à vis competition law in India a critical study",**

**(2017), (Unpublished Ph.D. Thesis, Maharshi Dayanand University, Rohtak).**

In the present study, the author has presented the legal framework for detecting cartels in India. The author has started by first presenting a basic understanding of the cartels, the way they function and the authorities dealing with cartelisation in India. The author then proceeds to provide a critique with respect to the competition policy in India vis a vis United States, China, United Kingdom and European Union. However the study does not focus in detail regarding cartelization in the foreign jurisdictions. The author analyses the various case laws emerging in the MRTP regime and leading case laws in US, UK and Europe. The thesis deals with the economic aspects of cartelisation as well and the harm that is caused by cartels to the consumers. The thesis is based on 2009 CCI Leniency Regulations and not the latest 2017 regulations.

**Biranchi Narayan Prasad Panda, "Comparative study of competition law and policy in India China and Japan Special focus on the cartel abuse of dominance and cross border issues", (2018), (Unpublished Ph.D. Thesis, Jamia Milia Islamia University, New Delhi).**

In this thesis the author presents a comparative study of the competition law policies in India China and Japan and deals with the abuse of dominance in the competition jurisprudence. Presents The Evolution of competition law from a global perspective and discusses the US while MRTP regime. The author discusses the position of law with respect to cartels in India China and Japan and the ways that the respective competition regimens have adopted to counter the abuse of dominance.

**Apoorv Mawai, "Competition Law and Its Changing Dimensions", (2018), (Unpublished Ph.D. Thesis, Dr Ram Manohar Lohiya National Law University, Lucknow).**

In this thesis the author has given a judicial approach to cases related with competition law and has focused upon various sectors of the economy such as chemical manufacturing industry, online transport network, cement sector, sports, gas and chemical sector, steel industry, Indian film industry and auto industry. The author has also critically analyse the developments in economy with respect to prevailing competition in the sectors mentioned.

**Deepika Prakash, "A study of the anti-competitive agreements in the Indian healthcare delivery services", (2018), (Unpublished Ph.D. Thesis, National Law University, Delhi).**

The author has conducted an analytical study of anti-competitive agreements in the Healthcare sector and has provided the exemptions that are granted to anti-competitive the US antitrust law and the EU competition regime. The author has analysed various cases that are decided by competition Commission of India relating to Healthcare industry and has focused on issues that are arising out of it. The author has given suggestions for enforcement procedure of anti-competitive agreements and the leniency provisions under the competition Act.

**K. Gagan, "Abuse of dominant position under competition act 2002 a comparative study with USA", (2018), (Unpublished Ph.D. Thesis, University of Mysore, Mysuru).**

The study provides a theoretical and philosophical foundation of competition law with respect to its evolution across the world. The author focuses on international trade law and the principles of World Trade Organisation, GATT and TRIPS with respect to formulation of competition policies across the jurisdictions. The study compares and contrast the abuse of dominant position in India with United States of America and suggests policy changes to combat abuse of dominant position.

**Ann Tressa Mathews, "Combating cartelization in India a critical study with reference to the Indian competition act 2002", (2019), (Unpublished Ph.D. Thesis, National Law School of India University, Bengaluru).**

The author has explored the regulatory Framework for combating cartelisation in Indiaand the role of CCI. Give a comparative analysis to combat cartelisation in EU, UK, US and Australia and has focused on the leniency Framework in each of thosejurisdictions. The author has also analysed specific sectors in India such as cement manufacturing sector, insurance sector and air cargo sector and has suggested ways to combat cartelisation.

**Journals**

**Nathan H. Miller, "Strategic Leniency and Cartel Enforcement", 99(3) TAER 2009, pp. 750-768.**

The author has used empirical prediction and moment conditions to develop a theoretical model of cattle behaviour. The author has applied this model to all the indictments and information report issued over a 20 year span. The study is useful as the author has presented an empirical model to prove that leniency scheme enhances deterrence and detection capabilities.

**Eberhard Feess and Markus Walzl, "Evidence Dependence of Fine Reductions in Corporate Leniency Programs", 166(4) JITE 2010, pp. 573-590.**

The authors have analysed the grant of full immunity which is given to the first self- reporting. The paper has given valuable suggestions as to the amount of evidence that need to be provided by the first applicant to be provided full immunity. The author hasdistinguished between two firms which are both first applicants, one which is giving high evidence vis-a-vis the other firm giving less evidence and has argued that full leniency benefit should not be provided to both.

**Sasha-Lee Afrika and Sascha-Dominik Bachmann, "Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India—A Comparative Overview", 45(4) TIL 2011, pp. 975-1003.**

The authors have studied the ways to combat cartelisation in the emerging economies and have argued that increased cross-border cooperation between domestic competition authorities in the developed world can regulate anti-competitive activities effectively. The authors have taken into consideration competition policies and laws of three emerging economy of South Africa, India and Brazil and have compared it to the competition policy of European Union. Porters provide a compelling case for a synchronised and international approach in combating cartelisation to help developing nations in protecting their markets from unfair competition practices.

**Ariel Ezrachi and Jiøi Kindl, "Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime?", 23(1) NLSIR 2011, pp. 09-26.**

The authors have conducted an exploratory study in the criminalization of cartel regime in Indian economy. The authors compare Indian law with European Union and explore the limitations of financial penalties in effective cartel enforcement. The authors present a compelling case for criminalization of cartel activities in India as is the position in United States which acts as a much better deterrent in combating cartelisation. The authors also look into the socio economic conditions of Indian society and present suggestions for a gradual move from administrative penalties to criminal liability using competition advocacy.

**Maria Bigoni et al., "Fines, leniency, and rewards in antitrust", 43(2) TRJE 2012, pp. 368-390.**

The authors have conducted an experimental study regarding the impact of fines and rewards

on leniency applications to combat cartelisation. The authors argue that leniency improves competition in the market by deterrence effect which leads to competitiveness in the pricing of the products. The authors suggest that leniency and reward have a direct correlation with each other and higher reward results into a better Run leniency scheme.

**Rajat Sethi and Simran Dhir, "Anti-Competitive Agreements under the Competition Act, 2002", 24(2) NLSIR 2013, pp. 32-49.**

The author have studied protection against dominance, cartels and unfair trade practices under the Competition Act, 2002. The authors have emphasized on the loopholes present in the Competition Act video, 2002 which are plaguing the judicial verdict with ambiguity. The authors have provided their suggestions to Competition Commission of India to significantly improve its functioning. The authors have studied in detail the standard of assessment under section 3 of the act and CCI's orders in relation to anti- competitive agreements.

**Zhijun Chen and Patrick Rey, "On the design of leniency programs", 56(4) TJLE 2013, pp. 917-957.**

The authors have studied the positives and negatives of cartel leniency programs and have developed a model which captures this trade-off. The authors have compared the optimal leniency policy with respect to the effectiveness of investigations. The authors contend that leniency should be offered before the starting of investigation and while the investigation is in progress so as to successfully uncover cartels. The authors have analysed whether to restrict leniency to first informant only and present a compelling case to prohibit leniency for repeat offenders.

**Joseph E. Harrington, Jr., "Corporate leniency programs when firms have private information: The push of prosecution and the pull of pre-emption", 61(1) TJIE 2013, pp. 01-**

Every cartel member has certain private information which is essential for prosecution agencies to prove the existence of a cartel. The author through this exploratory study tries to find the incentive that exist to a private form to apply for leniency application when it has private information to be shared. The author has highlighted the prosecution effect and the pre-emption affect which forces the firm to apply for cartel leniency before other firms. The author suggest policies that can be used by the authority for greater use of leniency program.

**Vivek Ghosal and D. Daniel Sokol, "The Evolution of U.S. Cartel Enforcement", 57(3)**

**TJLE 2014, pp. 51-65**

Have studied the literary work of Robert Bork in The Antitrust Paradox. They have examine the structure of cartel enforcement as per the work carried out by Bork. The authors have also compared the literary work of Robert Bork with that of Richard Posner to give a perspective of cartel prosecution. The authors have studied the three stages of cartelisation and given their suggestions to combat it.

**Leslie M. Marx et al., "Antitrust Leniency with Multiproduct colluders", 7(3) AEJM 2015, pp. 205-240.**

The authors studies the leniency policy in United States in multiproduct colluders and uses global games approach to model alternative implementation strategy of antitrust leniency programs. The author has suggested cartel profiling as one of the measures to mitigate cartelisation and reduce the possibility of anti-competitive agreements. The author also studies whether the current monetary resources in investigation of collusion is sufficient of FTC's budget needs to be increased.

**Joseph E. Harrington Jr. and Myong-Hun Chang, "When can we expect a corporate leniency program to result in fewer cartels", 58(2) JLE 2015, pp. 417-449**

In order to understand the leniency programs in United States of America, the authors have studied a theoretical framework of leniency programs in order for them to be effective in reducing the presence of cartels. The authors have explored various policies that can be adopted by competition authorities so that leniency program will have the intended effect of reducing the number of cartels.

**Konstantinos Charistos, "Leniency programs under demand uncertainty: cartel stability and the duration of price wars", 118(1) JE 2016, pp. 35-46.**

The author has analysed the impact of leniency programs on cartel stability when firms are not able to perfectly observe their rival's choices and when demand is uncertain in the economy. The author has distinguished between pre investigation leniency and post investigation leniency and has shown that pre investigation leniency may or may not be effective in combating cartelisation whereas post investigation leniency may have ambiguous welfare effects. The author has also argued that leniency programs may also result in reduction of welfare in those markets where negative demand shocks are frequent.

**Catarina Marvão, "The EU Leniency Programme and Recidivism", 48(1) RIO 2016, pp. 01-27.**

The author studies the self-reporting mechanism under the EU leniency program and the effect of it in the deterrence of future cartels. The author has conducted an empirical study of all the penalty reductions that have been granted. Through the study by author that forms are also learning to play the leniency game with respect to self-reporting and how the form cheat their way to claim the reduction in penalty which leads to two major implications for efficacy of leniency applications.

**Robert M. Feinberg et al., "The Determinants of Cartel Duration in Korea", 48(4) RIO 2016, pp. 433-448.**

The authors have analysed Korean fair trade commission's anti cartel cases from 1989 to 2003 to effectively determine the duration of reported cartel cases. The authors have studied the leniency programs run in Korea to effectively determine its effect on cartel detection and whether the fine imposed is an effective deterrent on formation of cartels.

**Vivek Ghosal and D. Daniel Sokol, "Policy Innovations, Political Preferences, and Cartel Prosecutions", 48(4) RIO 2016, pp. 405-432**

The authors have studied the policy determinants and political preferences that have guided cartel enforcement in US. The authors have conducted an empirical study and have examined intertemporal shifts in US cattle cases during 1969 to 2013. The authors have studied four distinct cartel policy regimes: pre 1978, 1978-1992, 1993-2003 and 2004, 20

## 1.4) Objectives of Research

1) To evaluate national framework in enforcement of laws related to cartels.
2) To study the leniency programs run in developed economies of U.S. and E.U.
3) To suggest the scope of possible modifications in leniency program in Indian Competition Act, 2002.
4) To determine discretionary power of CCI in in adjudicating 'significant value addition' while granting the quantum of lesser penalty.

## 1.5) Scope and Limitation

The Research focuses upon the legal aspects of combating cartelization in India. The researcher will limit his research to the aspects of combating cartelization with a special focus on the leniency scheme adopted by the Indian Competition regulator. This research expands its scope only to the prohibition of cartels in India and the approach of Indian leniency mechanism. This research also has its scope in analysing the over all impact of Indian leniency mechanism and measuring the perfection/imperfection of the scheme in India. The study is limited to the Indian perspective, however references are taken from the leniency mechanism of some other select jurisdictions such as of USA and EU. Moreover as the title suggests the intention is to circle down the research to an extent to not to go beyond jurisdiction related practice which shall include issues related to prohibition of Cartels and lenicny. Further, it is the base idea and form of research to analyze, compare with other legal frameworks and suggest measures for improvement and additions to the Indian legal framework.

## 1.6) Hypotheses

**H1** Indian leniency Program is not as effective as the leniency schemes of developed nations.

**H2** Lack of amnesty plus and penalty plus provisions in the Competition Commission of India (Lesser Penalty) regulations, 2017 is a hindrance to effectively combat cartelisation.

**H3** The discretionary power of CCI in in adjudicating 'significant value addition' while granting the quantum of lesser penalty is a hindrance to the leniency program

## 1.7) Research Questions

1) Whether the amended leniency provisions in Competition Commission of India (Lesser Penalty) regulations, 2017 provide an effective deterrence against cartelization?

2) Whether the leniency provisions under the Competition Act of 2002 is in pari-materian with the leniency provisions of U.S., E.U

3) Whether the lack of complete and guaranteed exemption from penalty for leniency applicants involved in a single cartel or a part of another cartel, is a hindrance to the leniency program?

4) Whether discretionary power of CCI in in adjudicating 'significant value addition' while granting the quantum of lesser penalty is a hindrance to the leniency program?

## 1.8) Research Methodology

**The study employs Descriptive and Analytical methods of Research**

Descriptive research includes observations surveys and fact-finding enquiries of different kinds. The major purpose of descriptive research is description of the status quo of a situation. Through descriptive research we study the characteristics of the object of the research. As in my research where I am checking the efficacy of the Leniency scheme under the Competition Act 2002 , here through descriptive research methodology I will try to give a clear picture of the existing Leniency mechanism in India, USA and EU. In this way a descriptive research methodology helps in in answering the question of "What" and not of "Why". The whole purpose of employing the descriptive research methodology in my research is to get to know the demography of the situation which means the participants who have been benefited out of the Indian leniency mechanism. The primary function of applying this research methodology is to get to know the nature of the existing leniency mechanism. For example if at one point of time it is assumed that the researcher is trying compare the Leniency Mechanism of India with leniency mechanism of certain developed countries so here the researcher will try to observe the leniency provisions of India and well as the leniency provisions of all those select jurisdictions of which the researcher aims to compare. This observation based descriptive research and finding will help in observing and analyzing the different leniency mechanism adopted by India and Select jurisdictions. This will ultimately uncover the efficacy of Indian Leniency mechanism directly or indirectly. Here all the

researched wants is to understand the behavioural aspect and intent of the antitrust regulators in implementing and executing the leniency mechanism in its jurisdiction. Through descriptive research methodology the researcher can conduct a social or quantitative research in the market involving the conduction of survey research.

The method of research applied during this research is primarily descriptive and analytical. The researcher would be applying primary and secondary sources to substantiate the research which may include stautes, articles, cases, books, reports etc. the mode of citation which has been used in this research is a uniform mode.

**Tools and Techniques of Data Collection in Research**

- **Library Research**

The researcher utilized the library of the university extensively during his research. The sources which are available to the researcher in the library are books, journals, reports of seminars and conferences organized on the competition Law, Research papers, thesis and dissertations, copies of decided cases, magazines etc.

School of Law, Galgotias University's library has a rich collection of materials in print and electronic format. It has a rich resource of database subscriptions as well. The researcher will utilize all those printed books, journals, volumes and utilize all the database available in the library.

- **Case Laws**

The cases pertaining to Competition Act of 2002 decided by CCI, COMPAT, NCLAT (earlier COMPAT) and the Supreme Court of India was analyzed and observed extensively by the researcher.

- **IT Techniques/ Online Resources**

**ONLINE DATA BASE:**

- Ebc Reader E-Library
- Economic And Political Weekly
- Hein Online
- Jstor
- Kluwer Arbitration Online
- Lexis Advance India
- Ligitquest
- Manupatra

## 1.9) Organization of the Research

**The research is compiled as :**

**Chapter 1** provides an introduction to the leniency program under Indian Competition Act, it also includes statement of problem, the review of the literature, objectives of the research, scope & limitation, hypothesis framed, research questions, research methodology used. This chapter also deals in the basics of law on competition in India i.e. MRTP Law and the evolution of The Competition Act in India and its development.

**Chapter 2** deals in the viewpoint on cartels with special reference to the historical development of cartels in India, USA and European Union Countries.

**Chapter 3** explains the existing leniency provisions in India and also examines the various factors on which leniency is awarded. This chapter also discusses the approach of the Indian regulator while granting or rejecting leniency to an applicant.

**Chapter 4** aims at analysing the leniency regime existing at developed jurisdictions such as USA and European Union. It provides an examination of the leniency regimes in USA, EU and India by analysing in a comparative manner.

**Chapter 5** analyses the existing scenario of the leniency mechanism in India in detail by a detailed discussion on various decisions given by Competition Commission of India. In this study of cases under this chapter the researcher aims to attract the uncertain behaviour of CCI while deciding a leniency application.

**Chapter 6** it is a conclusive chapter which summarizes the complete research with conclusions and suggestions.

## 1.10) Law on Competition in India: MRTP Law

We have experienced various changes in the competition law regime of our Country (India). It was the post-independence phase when we felt a need of a law which regulates and monitors the commercial market of India. It was the time when India had greater state interventions and only a few dominant enterprises were prevalent in the market, we came up with MRTP Act 1969 in order to restrict such monopolistic trade activities.

For a long time, there remained a controversy with regard to compatibility of socialism with any form of competition between Karl Marx and Proudhon. Proudhon saw socialism essentially as a "free Association" of small property owners, of independent producers owing their means of production. He argued that necessary evil of capitalism is that it gives monopoly on the means of production to bankers and industrialists and thus, small business enterprises were ousted from the market. This in turn degraded the small artisans and peasants into wage – slaves . in such a competition a genuine competition , with presupposed equality and freedom was impossible. He further argued that socialism would break the capitalist monopoly on the means of production. Describing capital accumulation as the basic tenet of capitalism, Marks stated that "Competition contains the seed of future capital accumulation that is achieved through "mergers & Acquisitions".[16] This leads to capital accumulation which then further results in the demise of many small firms , the cannibalism of other competitors and the ultimate "evolution of monopoly power.[17] According to Raybould, the concept of monopoly is quite ancient and can be traced back to United states where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by American companies wherein owners of stocks held in competing companies transferred those stocks to trusts which then controlled the activities of those competitors[18]. The Sherman Act was a simple, short statute . As intended , it was interpreted by case laws. Some of the deficiencies of the law were sought to be made up through the Clayton Act 1914, which contains provisions of merger control and also against tying, price discrimination and exclusive dealing.

[16]Tibor *Varady, The emergence of Competition Law in (former) Socialist Countries*, 47 AMJ Comp L, 229, 229-276 (1999).
[17]THOMAS KARIER, BEYOND COMPETITION : THE ECONOMICS OF MERGERS AND MONOPOLY POWER 11 (Taylor & Francis group 1993).
[18]ALLISON JONES AND BRENDA SUFRIN, EU COMPETITION LAW : TEXT, CASES AND MATERIALS, (Oxford University Press, Oxford 2019).

India has witnessed Congress rule till 1977, the congress government believed the philosophy of socialism and supported the principle that there should not be concentration of resources in the hands of few only. With aim of this philosophy the Congress government constituted various committees with aim to come up with a mechanism which could control the concentration of wealth in few hands.[19] These were the committees which ultimately recommended for the MRTP Act 1969 to check the concentration of wealth with few.

1. **Hazari Committee (1951)** – India had the licensing system under the Industrial Development and Regulation Act 1951, in which all the big business houses which had offices in Delhi used to submit the applications for trade license at the earliest and the licensing policy advocated the "first come first serve" .taking the location advantage, these business houses were able to grab trade licenses and the other small enterprises didn't get chance to trade under the licensing system. To review this system of licensing a committee was constituted under the chairmanship of Dr. R.K. Hazari, who was a consultant to the planning commission. The committee[20] found that there was a disproportionate growth of some big business houses of India because of the licensing system. This report created furore in Parliament.

2. **Mahanlobis Committee on the Distribution of Income and Levels of Living (1964)** –

   This committee[21] was set up in 1960 and was called as "**Distribution of Income and Levels of Living**" . this committee was formed to analyse that who all got the benefit of 1st and 2ndfive year plans as there was no any appreciable increament in people's per capita income. The other challenge before this committee was to assess the monopolistic tendencies, which the committee assessed and submitted that the then economy helped the big business houses in concentrating wealth and creating monopoly. This committee also pointed out the big government institutions had also supported in the creation of monopoly.

[19]Dr. S. Chakravarthy, *Why India Adopted New Competition Law,* CUTS INTERNATIONAL *(*Jan 23, 2023, 8:30 PM*)*, https://www.cuts-CCIer.org/pdf/Why_India_Adopted_a_new_Competition_Law.pdf

[20]The Hazari Committee was established in order to study the Industrial Licensing System that was established by the Industries Development and Regulation Act, 1951. Dr. R.K. Hazari, a consultant for the Planning Commission, served as the committee's head. 1967 was the year that this committee handed in its report, in which it pointed out a number of problems with the licencing scheme.

[21]In order to investigate the results of the first two five-year plans, the Mahalanobis Committee was established. As a result of these two schemes, there was not a significant rise in the average income of each individual, hence the purpose of this research was to investigate the distribution of income in order to determine who exactly benefited from it.

3. **Monopolies Inquiry Commission [MIC] (1965)**

After accepting the recommendations of Mahalanobis committee, the government had established a committee under the leadership of Justice K C Das Gupta in 1964 under the commission of inquiry Act 1952. This committee was also called the Monopolies Inquiry Commission or Das Gupta commission. The task with this committee was to enquire into the effect of concentration of power in private hands. This committee[22] had also been entrusted a task to suggest a legislation in light of such enquiry. This resulted into the passing of MRTP Act 1969.[23]

We can find the genesis of MRTP Act in the Article 38 and 39 of Directive principles of state policy under Indian constitution. The Monopolistic and Restrictive Trade Practices Act, 1969, was enacted to check that the economic system should not be operated in a way to result into the concentration of power in few hands. This Act[24] also ensured the prohibition of monopolistic trade practices, unfair trade practices and restrictive trade practices. It came into existence on 1st June 1970 with following features.

- **It followed a Command and Control Approach** -It was the mandate of the Act to get the sanction of central government for any enterprise having an asset of more than 20 crores, in case it intended to go for any corporate restructuring. So ultimately it could be understood as a command and control of the government over the expansion of the enterprises, indicating it a hindrance in free trade philosophy.

- **Trade Practices which are monopolistic in nature** – MRTP Act 1969 had the provision of monopolistic trade practices under chapter IV. The monopolistic Trade Practice was introduced in the statute by an amendment to MRTP Act in 1984. Actually Monopolistic Trade Practices are those practices which has or likely to have the effect of unreasonably obstructing competition in distribution or supply of any goods or services or maintaining the charges for the services or prices of goods at a unreasonable level by way of controlling the production or limiting the production, distribution or supply of goods or services. These

[22]In the report that was handed in by the Dasgupta Commission in 1965, it was stated that "there were dangers from concentrate economic powers and monopolistic practices and they exist in large measure at present or potentially"
[23]The name of this piece of economic law is the Monopolistic and Restrictive Trade Practices Act, and despite its significance, it has generated a great deal of heated debate. The MRTP act India became fully operational on June 1, 1970, after the MRTP Bill had been successfully enacted the previous year, in 1969. In the years that have followed, several changes have been made to this statute (1974, 1980, 1982, and 1991). All of India's states, with the exception of Jammu & Kashmir, were required to comply with this legislation.
[24]The Monopolistic And Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament, 1969(India)

monopolistic trade practices also involved the effect of limiting technical development to the detriment of goods produced, supplied or services rendered. These were the activities which were supposed to be undertaken by big enterprises, which are dominant in the market. The dominance of the enterprises were decided on the basis of the size of the enterprise.

- **Restrictive Trade Practices "**Restrictive Trade Practices are the practices which have the effect of distorting or preventing competition in any manner or which tends to bring the manipulation of prices or conditions of delivery or to modify or affect the supplies in the market relating to goods and services. Common restrictive trade practices are : Price discrimination, tie up sales, excusive dealings, resale price maintenance, refusal to deal etc. so the crux of restrictive trade practices are the practices through which some enterprises try to control the supply of products in the market by way of restricting production. Hence this MRTP Act 1969 didn't allow such practices and ensured that the enterprises didn't practice these activities.

- **Unfair Trade Practices**: unfair trade practices relates to deceptive practices undertaken by the enterprises in order to promote its sale so these false and deceptive practices were categorized under unfair trade practices. These provision of unfair trade practices were not included in MRTP Act before 1984. MRTP Act 1969 didn't talk about the protection of consumers against misleading and false advertisements, hence the non inclusion of unfair trade practices were raised by Sachhar Committee which opined that sale promotions and advertisements became the recognized mode of business techniques, and the deceptive advertisements or the false expressed promise of gifts which were not at all intended had become the prime concern of the relations between and enterprise and consumers, hence the committee recommended to have protection of consumers from such practices under the MRTP Act 1969 and a separate chapter on unfair trade practices was recommended to be inserted. As a result section 36 A was inserted in MRTP Act 1969 prohibiting the unfair trade practices.

  As the nature of the MRTP Act was non dynamic and vague secondly the demand of the liberalization era in 1990s was the touchstone of the MRTP law in which a number of loopholes was noticed in the MRTP Act which led to various amendments in such Act. In 1977 a high-level committee was constituted by the government under the chairmanship of Rajinder Sachar to review of MRTP Act 1969. The committee thus recommended to widen the scope of MRTP Act 1969 to include various unfair trade practices like hoarding, deceptive advertisements, supply of hazardous products etc. the committee also pondered upon the

need to have an autonomous commission to check economic concentration. As per the Sachhar Committee, the proposed autonomous commission should be empowered to investigate restrictive practices and consequently the power to punish, impose fine and control mergers involving dominant enterprises.

Consequently in 1984 the MRTP Act was amended on the basis of the recommendations of Sachhar Committee [25]. With this amendment the provisions related to unfair trade practices were added and the provisions relating to monopolistic enterprises seeking prior approval were deleted. As the world economy was being globalized, it became necessary to foster and encourage competition in the market. The year of 1991 was a landmark year as India witnessed a shift from "command and control economy" to an economy dependent on free market principles as it was a dire need in India being liberalized and globalized and the economy was opened up. In 1991 the amendment in MRTP Act deleted the provisions requiring the prior sanction of the government before establishing a new undertaking.

However it was felt that even after going through several amendments, the MRTP Act 1969 was not able to deal with issues like Cartels, predatory pricing, bid rigging, abuse of dominance etc. hence on 27th February 1999 it was announced to enact a law on competition policy by the Finance Minister of India in his budget speech, in which it was told that the MRTP Act became obsolete in the light of the LPG mode of the country and it is not in tune with the open Indian economy and hence a need was felt to shift from restricting monopoly to promoting competition. And consequently a committee was appointed by the government to suggest a law on competition which can cope up with the newly opened Indian economy.

It was adopted in light of the New Economic Policy and widened the horizons of the Indian economy, thereby putting a halt to the "Licence Raj" which was a key impediment to our country's growth and development. Several additional revisions were made to the Act, but it was later realised by lawmakers that in light of the various inadequacies that the Act still held, even after several amendments, indicated that a more fundamental adjustment in the field of Competition Law is required. Even key definitions of anti-competitive law were not provided by the Act. As a result, in September 2009, the MRTP Act was replaced by the Competition Act, 2002, paving the path for a more healthy, competitive market.

[25]Report of the High-powered Expert Committee on Companies and MRTP Act, 1978.

### 1.10.1) Drawbacks of MRTP Act

A number of attempts were made to make the MRTP Act 1969, congenial to the changing economy, even after that several loopholes existed in the Act which didn't let it be an option for a law on competition in India. here are some drawbacks of the MRTP Act 1969.

I. Vague and Ambiguous Law – Sec 2 (o) of MRTP Act 1969 explains the term "Restrictive Trade Practices" this provision includes the provisions which are prevented or restricted in any way, but this Act didn't help in identifying any act as restrictive trade practices as it failed to define the term "restrictive trade practices". However under Sec 2(o) the MRTP Act included all probable offences which lead to a different interpretations by different courts which ultimately leads to uncertainty.

II. MRTP Act considered the dominance of an enterprise anti competitive, it didn't matter under the MRTP Act, whether any enterprise had abused its dominance or not, once an enterprise attains a dominant position, it was rendered bad under MRTP Act. This consideration of MRTP Act was considered unhealthy for a fair competition in the market, which ultimately resulted in loosing the essence of law. If we understand this consideration of dominance under MRTP Act, we can illustrate that if any enterprise is having 25% control over the total market share, MRTP Act considered it bad, while having 24% control in market share was not considered bad. This gives the impression that such consideration of dominance under MRTP Act was illogical.

III. Penalties not laid down– MRTP Act 1969 seemed to be a law which applied lenient approach in context of setting a deterrent effect on those who were discovered to be involved in anti-competitive activities. MRTP commission was empowered to pass orders in case of any anti-competitive practices, but the penalties were not cleared in the Act so maximum under MRTP Act 1969, the MRTP commission could have passed the order of cease and desist and ultimately such orders would not have deterrent effect.

IV. Even the "Rule of reason" principle was recognized by the Supreme court[26], this rule was not applied in MRTP Act 1969 and all the offences under MRTP Act was considered "Per se Illegal" rather applying the principle of "Rule of Reason". However, the rule of reason has been developed in course of MRTP Act 1969, but it was rendered ineffective in light of the 1984 amendment of MRTP Act 1969.

V. Extreme Government Control – This Act provides for the extreme government control over every kind of business irrespective of their sizes. Even it was obligatory for the enterprises to seek the approval of the central government if it goes for any combinations or restructuring which was very complex and time-consuming process, which ultimately discouraged the enterprises from opting for any corporate restructuring. They thought this mandate arbitrary. This restriction on restructuring was ultimately a restriction on the free market.

VI. As MRTP Act 1969 didn't control the activities of any enterprise which were running outside India and whose involvement in anti-competitive practices resulted adverse effect on Indian markets. So MRTP Act failed to have an extra territorial jurisdiction.

### 1.10.2) Unclear Jurisdiction of the MRTP Commission–

The insertion of section 36A in MRTP Act through the Amendment of MRTP Act in 1984, gave a purpose to this Act to protect the final consumer from unfair trade practices of business, however this purpose of MRTP Act was concurrent with the purpose of Consumer Protection Act, which gave an implication that the consumers had two options to proceed with in case of any violations under unfair trade practices, one under MRTP Act and the other under Consumer Protection Act. While the philosophy says that the protection and promotion of competition should be the primary aim of such law and here MRTP Act was involved in dealing cases which were supposed to be dealt under consumer protection Act.

[26] Telco v. Registrar of Restrictive Trade Agreements, 1977 AIR 973, 1977 SCR (2) 685

### 1.10.3) Judicial Opinions

As we have discussed that the MRTP Act had certain limitations and hence aneed was felt of a separate Law on competition. These limitations of MRTP Act has been further substantiated by the decisions discussed below:

We have also discussed above the case of "***Tata Engineering and Locomotive Co. Ltd vs. Registrar of Restrictive Trade Practices Agreement"***[27] where TELCO had agreements with its dealers which stated that the declares couldn't sell the vehicles outside a fixed territory, which was challenged as a restrictive trade practice under the MRTP Act. Prima facie it generally looks like a restrictive trade practice, but in this case the commission applied the principle of rule of reason the first time and told that such restriction was imposed to ensure that the distribution of goods through out the country must be equal, hence these restrictions imposed on dealers of TELCO by TELCO was not at all "restrictive trade practice" but unfortunately the philosophy involved in this decision was overlooked in the 1984 amendment of MRTP Act[28] under which territorial allocation was made a restrictive trade practice per se. This decision shows that MRTP Act didn't accommodate the doctrine of Rule of Reason which was also one of the limitations of MRTP Act 1969.

In "***Truck Operators Union vs. Mr. S.C. Gupta & Mr. Sardar"***[29], the company discriminated amongst the members and non-members while fixing different freight rates. The members had to pay comparatively less freight rates than the non-members, which ultimately resulted in the increased transportation cost for the non-members, and this was alleged as a restrictive trade practice by the non-members. The commission ultimately held it a restrictive trade practice but did not impose any penalty but only passed "cease and desist order". This decision shows that the commission had no power to impose penalty or any kind of monetary fine under MRTP Act 1969, what it could do maximum was to pass "cease and desist orders" only, that's what the decision of the commission in this case.

Further, the philosophy used in "***American Natural Soda Ash Case"***[30] also expressed the limitation of the MRTP Act 1969 under which the Supreme Court held that the commission

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[27] *Id.*

[28] *Supra* note 24. The suggestions made by the Sachar Committee served as the foundation for this amendment. The Act was amended to include Section 36A in order to safeguard final consumers from unfair trade practices and to provide for the effective pursuit of legal action against those who engage in such acts.

[29] Truck Operators Union v. Mr. S.C. Gupta & Mr. Sardar AIR 1986 SC 991 (1995) 3 CTJ 70 (MRTPC)

[30] American Natural Soda Ash Corporation (ANSAC) v. Alkali Manufacturers Association of India (AMAI) and others, (1998) 3 CompLJ 152 MRTPC

(MRTPC) didn't have any extra territorial jurisdiction and it couldn't take any action against the cartel existing outside India even if it is hampering the Indian markets. The court has shown its inability to order a restriction over a foreign cartel , by saying that as the statute didn't provide any extra territorial jusrisdiction of the Act, the court's hands were tied and it couldn't take any action against this.

In Registration "***DG (IR) vs. Modi Alkali and Chemicals Ltd"***[31]The MRTP Commission got an information regarding the existence of a cartel which became a reason of the scarcity of goods and a result the prices of hydrocholoric acid and chlorine gas was hiked. The DG in his investigation report submitted the non existence of any cartel but in further enquiry by the commission, the commission defined the concept of cartel as it was not defined under the MRTP Act, however the petition was dismissed on the grounds of no evidence, still the decision was an important one in the light that it proposes the concept of cartel which is anti competitive but it also indicated the limitation of MRTP Act as it didn't mention about cartels.

[31] Director General of Investigation and Registration [DG (IR)] v. Modi Alkali and Chemicals Ltd 2002, CTJ 459 (MRTP)

## 1.11) Evolution of Competition Act in India

It was realised by the Indian government that many provisions of the MRTP Act and judicial pronouncements thereof, are not useful in the changing economic condition of the country. To maintain the MRTP Act, the government introduced prominent amendments in MRTP Act in 1991, later when World trade Organization was established, it changed the whole economic scenario of the world and hence the Ministry of commerce of government of India set up an expert group on interaction between trade and competition policy. The need for an appropriate competition law to check anti-competitive practices , was the recommendation of that expert committee . after relying on the recommendation of the said expert committee and realizing the need of a new competition law, The government of India has formed a high level committee on competition policy and law called the Raghwan committee[32], this committee was entrusted with the task to suggest a new competition law for the country. Taking consideration of international developments, this committee in its report advised for a new competition law and on the basis of that report, the competition Act was enacted by the Indian parliament in December 2002, which received the President's assent in January 2003.

So keeping in view, the opening of the Indian economy as a result of the economic development, the liberalization of Indian economy , the prevention of control and command and to cope up with the globalized economy, ultimately, the Competition Act was passed on the recommendation of Raghwan Committee[33].

There were some controversies regarding the objectives of competition law, however a major agreement was on the objective of restricting the private parties from obstructing the market and make the economy work better. The competition act mainly focused on three functions :

1) To prohibit anti competitive agreements between enterprises which creates an appreciable adverse effect
2) It also prohibits the misuse or abuse of the position attained by a dominant enterprise

[32]In 1999, following the publication of guidelines by the World Trade Organization, the Indian government took the first steps toward establishing the Raghavan Committee. This was a high-level committee whose primary focus was on the competition policies as well as the competition laws for the country. The formation of this committee was initiated in 1999.
[33]*Id.*

3) It also aimed on regulating combination between enterprises if it exceeds certain prescribed limit of total asset or turn over.

Besides these functions the Competition Act also focused on competition advocacy[34]. This Act made it obligatory on CCI to spread competition awareness amongst the citizens and also to create awareness regarding competition advocacy.

The Competition Act prohibits a person or an enterprise from entering into any anti-competitive practice with respect of supply, production, storage, distribution, control or acquisition of goods or provision of services if these activities cause or is likely to cause an adverse effect on competition in India that is appreciable in nature.[35] This Act also renders such agreement as void.[36]

### 1.11.1) Anti-competitive agreements

This Act also clarifies on as to what is an appreciable adverse effect ? It says that, if by entering into any agreement by the enterprises or its association or by persons or their associations or by any person and enterprise, they determine the purchase or sale price directly or indirectly or control or limit the supply, production, the markets, investments, technical developments or provision of services or shares the source of production or market or provision of services by allocating geographical area of market, or allocating types of goods or services or number of customers in the market or through any other similar way or directly on indirectly if they involve in bid rigging or collusive bidding, these activities if agreed upon by the enterprises or its association or by persons or their associations or by any person and enterprise will be presumed to have an appreciable adverse effect. However not only the agreements with respect to these activities, even they carry such practices as discussed or if they take any decision taken in regards to these practices, will be presumed to have an appreciable adverse effect carry such practices as discussed or if they take any decision taken in regards to these practices, will be presumed to have an appreciable adverse effect carry such practices as discussed or if they take any decision taken in regards to these practices, will be presumed to have an appreciable adverse effect carry such practices or if they take any decision in regards to these practices, this will also be presumed to have an appreciable adverse effect on competition if these parties who are entering into such

[34]Competition advocacy refers to all the things that are done to encourage a competitive business environment. The main people who benefit from competition policy and law are consumers, whose well-being is the stated goal of the Competition Act.
[35] Competition Act, 2002, *supra* note 7, at § 3(1).
[36]*Id.*at § 3(2).

agreements or who carries such practices or who takes such decision including cartels should be engaged in identical or similar trade of goods or provision of services.

### 1.11.2) Abuse of dominant position

The concept of dominant position can be explained as a position of strength which enables an enterprise to run unaffected by the competitive forces in the relevant market. Rghwan committee[37] clarified the distinction between the efficiency and the intention of the enterprises with regards to market capitalization, there is always a large difference between the efficiency to have a greater market share and intentionally acquiring and maintaining the market power which will ultimately result in abuse of dominance. Dominance is not per se restricted until it is misused which we call as abuse of dominance. The new Competition Act 2002 only restrains the abuse of dominant position but not dominance per se. there are certain circumstances which will be considered as abuse of a dominant position such as the circumstances where an enterprise or a group imposes unfair and discriminatory condition in purchase or sale of goods or services or impose such unfair or discriminatory price in purchase or sale of goods or services, which also includes predatory pricing. When such enterprises or groups restrict or limit the provision of services or production of goods or market or if limit or restrict the scientific or technical development which relates to goods or services to the prejudice of consumers. We have also seen in the case of "***Surendra Sing Burmi V BCCI"***[38] that in case where the enterprises indulge in such practices which deny the market access for other enterprises, the practice of such denial of access to market is itself the abuse of dominant position. From the case of "***US V Microsoft Corp"***[39] we can conclude that if any enterprise is using its dominant position of one relevant market to enter into any other relevant market, this will also amount to the abuse of dominant position, which is also provisioned under Sec 4 (2)(e) of the Competition Act 2002. However to determine the abuse of dominant position first it should be identified that whether the enterprise is having a dominant position actually or not. There are certain factors[40] which can be taken into regards by Competition Commission of India (hereinafter used as CCI) while determining the dominant position of an enterprise. We have also discussed that only maintaining a dominant position is not restrained under Competition Act 2002, however there are several factors over which the dominant position of an enterprise depends including the market share of the

[37] *Supra* note 32.
[38] Surendra Sing Burmi v. Board of Control of Cricket in India, Competition Commission of India, case No. 61/2010
[39] United States v. Microsoft Corp, 346 U.S. App. D.C. 330, 253 F.3d 34 (2001)
[40] Competition Act, 2002, *supra* note 7, at § 19(4)

enterprise, the size and resources of the enterprise, the size and importance of customers, the economic power of the enterprise, the dependence of consumers over the enterprise etc.

### 1.11.3) Regulations on combinations

The competition Act 2002 is a regulator of combinations[41] which includes mergers or acquisition or amalgamation of enterprises. This Act regulates these combinations in a way that it directs certain enterprises to take the approval of CCI before proceeding to combinations. These enterprises are categorized on the basis of their would be post combination total asset and turnover. If the post combination total asset or turnover of any person or enterprise exceeds from a certain limit as prescribed by the government, that person or enterprise needs to take the approval from CCI before that combination. I case if there are proposed combinations of a group of enterprises the threshold limit for the assets and turnover are comparatively greater.

Combination under section 5 of the Competition Act 2002[42]means:

1) Acquisition of control, shares, voting rights or assets of one or more enterprises by one or more persons:
2) Acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing business:
3) Mergers and amalgamations between or amongst enterprises when the combining parties exceed the threshold set in the Act. The terms of threshold specified in the Act are in terms of assets or turnover in India and outside India.

The Competition Act prohibits enterprises from entering into combinations that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India.[43]

The enterprises or the persons who propose for combination have the option to send a notice regarding this to the commission (CCI) disclosing the details of their proposed combination.[44] Once the CCI is in receipt of the notice, it will get the proposed combination investigated[45]

[41]Competition Act, 2002, *supra* note 7, at § 5
[42]*Id.*
[43]Competition Act, 2002, *supra* note 7, at § 6(1)
[44]Competition Act, 2002, *supra* note 7, at § 6(2)
[45]Competition Act, 2002, *supra* note 7, at § 6(3)

and on the basis of the report or further inquiry it can approve or approve with modifications or disapprove the combinations as the case may be.[46]

### 1.11.4) Extra-territorial jurisdiction

It has been evident that the competition scenario of India also gets affected by any agreement entered into outside India, in such agreements entered outside India, the CCI gets the power to enquire into such agreements, if it affects competition in India. The CCI can also enquire into any issues of abuse of dominant position and combinations as if the act originates in India. The CCI for this purpose can have an arrangement with some foreign agency with the prior approval of the central government. It evidences the extra territorial jurisdiction of the Competition Commission of India under Competition Act 2002.

### 1.11.5) Penal Provisions, Remedies, Recoveries and Enforcement

The Act empowers CCI to order remedial measures including prohibitory direction to cease & desist, impose penalties, award compensation, direct modification of agreements, recommend division of a dominant enterprise and pass such other order as it may deem fit. The Act also provides for penalties for contravention of the orders, failure to comply with directions of Commission or furnishing of false information or suppression of material information etc. In case the delinquent enterprise is a company, its directors and officers are also liable for their deliberate acts of contravening the provisions of the Act.

The range of powers given to CCI allow it to structure remedies to the facts of each case and the need thereof to be used judiciously.

[46]Competition Act, 2002, *supra* note 7, at § 31.

## 1.12) Draft Competition Amendment Bill 2020

The heroes of Independent India were highly impressed by the principles of socialism and hence after independence the policies were framed by the government with an aim to achieve the socialistic pattern in the country, following the soviet standards of industrialization.[47] With the changing demand of the economy after the LPG regime in 1990, India had to go global to maintain trade relations with the countries across the globe. Even before the economic reforms of 1990, when there were a greater state intervention in the economic activities of the country, the Monopolies Inquiry Commission in October 1965 reported that only a few industries were highly prevalent in the market and they were also reported to be involved in monopolistic practices concentrating the economic power in their hands. The committee also talked about the securing of trade licence exclusively by the big industries. Later on Hazari Committee[48] was constituted to review the industrial licensing system under Industries (Development and Regulation) Act 1951 the report criticised the inappropriate growth of some of the big businesses in India. This report became a reason for a long debate and ultimately MRTP Act 1969 influenced by Article 38[49] and 39[50] of Indian constitution came in existence as the first law dealing in Competition in India. Later on assessing the inefficiency of the objectives of MRTP Act 1969, Rajendra Sachhar Committee was constituted to review it. This committee was in favour of the constitution of a commission to check the restrictive practices at national level, the committee also favoured not to keep the public enterprises out of the purview in order to check monopolistic activities. This report ultimately lead to the amendment in MRTP Act in 1984.Despite amendments, MRTP Act 1969 was not sufficient in accordance with the globalised India to deal various issues barring competition in the market ex – Cartels, Refusal to deal, Bid rigging etc hence in the budget speech of finance ministry on February 1999 it was indicated that India needed a shift from the current legislation for the promotion of competition and hence Raghwan committee[51] was constituted in 1999 for searching a new legislation in wake of the liberalisation of Indian economy. The committee submitted its report on May 2000 in which it assessed the focus of the world's competition regime which was primarily towards a) Anti competitive agreement b) abuse of dominant position and c) combinations. So after various rounds of consultations

[47]ABIR ROY & JAYANT KUMAR, COMPETITION LAW IN INDIA 33(Eastern Law house 2018).
[48]*Supr*a Note 20
[49]INDIA CONST. art.38.
[50]INDIA CONST. art. 39.
[51]*Supra* note 32

with various stakeholders, the government passed the Competition Amendment Bill 2001, which further became The Competition Act 2002.

The Competition Act 2002 underwent various amendments in 2007, 2009 further to make it more congenial. With the same purpose and with the passage of time, the existing structure of Competition Act 2002 demands changes which was proposed under the Competition (Amendment)Bill 2020, however which was further resulted in the amendment of 2023.

**Analysis of draft competition (Amendment)Bill 2020.**

In wake of minimising the role of Competition Commission of India (CCI) with a purpose to lighten the burden of CCI, the Ministry of Corporate affairs has put the draft Amendment Bill of Competition Act named as Competition (Amendment)Bill 2020 for public comments. This Bill is based on the recommendation of a expert committee on Competition Law i.e. The Competition Law Review Committee (CLRC) in order to make the Act more particular, expand the scope of the previously existing Act, giving it comparatively a more robust structure. Ministry of Corporate affairs, through the review committee articulated larger concerns of the market under the draft Bill.

**Proposal of the insertion of "Settlement and Commitment" clause**:

The issue of settlements and Commitments comes into picture, the moment an entity realizes that it has violated the existing competition and went contrary to the legislation. This provision gives a mechanism to such entities to repent by agreeing on a term with the commission known as settlements and Commitments. However, we have the provisions of lesser penalty regulations which talks about how an entity or an individual who are the members of a cartel will apply for the lesser penalty or invoke the power of CCI under section 46 of the Competition Act to impose lesser penalty in case that entity or individual doesn't want to be trapped in legal proceedings and wish a lesser penalty to be imposed. The condition for granting the lesser penalty is the disclosure to be done by that entity or individual in respect of the anti competitive agreements carried on by the cartels of which they are a part. The significance of this disclosure is however dependent on the stage of the proceeding when the disclosure was done, this can also lead to the complete immunity, however complete immunity depends on several other factors as complete immunity penalties couldn't be awarded by CCI in case of ***"Indian Railways for supply of Brushless DC Fans and other electrical items"***[52]. But this leniency is only available for the members of a cartel.

[52] *Supra* note 2

In the same way if an entity realizes that it has violated the Act and is interested in settlement of the matter without going through a complex proceeding, Competition (Amendment)Bill 2020[53] proposes for a settlement clause under proposed section 48 A of the Competition Act 2020. The current position of the law says that in such circumstances the entity has no other way than to face the proceedings. However the proposed amendment Bill 2020 recommends a convenient way to settle the issue than to under go the legal proceeding prescribed under it. When an entity is under the scrutiny of the regulators, it has the option to settle its dispute or to commit for the non involvement of these activities in future which is also called a "Commitment". The need for a commitment clause was felt while going through the contention of CCI in an appeal against the order of "***Nhava Sheva International Container Terminal Pvt. Ltd. v. The Union of India &Ors"***[54] , the order of Bombay High Court, directed the parties to withdraw the case from the Commission on the submission that the parties agreed on a term that no further anti competitive practices would be continued. The Commission raised the matter in appeal on the ground that the Competition Act 2002 has no any provision regarding this settlement.

While in case of "***Tamil Nadu Film Exhibitors Association v. CCI",***[55] The Madras High Court held the validity of the Settlement and Commitment under the Competition Act, till they do not hinder the trade freedom and encourage the anti-competitive practices.

Now the question arises that, what is the proposed stage of scrutiny at which the settlement and Commitments can be offered? The answer to this question is, the settlement option is available to the entity against which a regulatory scrutiny is going on, after the Director General submits the report against it till the commission awards penalty under section 27 of the Competition Act 2002. Commitments can be opted even before the submission of the report by Director General. By analysing the stage at which the settlement and Commitment clause can be raised, it can be said that the settlement can be more negative for the party than

[53]The Draft Competition (Amendment) Bill, 2020 ("Amendment Bill") has proposed to introduce substantial changes in the Competition Act, 2002 (the "Act") through several amendments.
[54]Nhava Sheva International Container Terminal Pvt. Ltd. v. The Union of India &Ors, Writ Petition No. 14277 of 2018 (Supreme Court of India, August 6, 2019).
[55] Tamil Nadu Film Exhibitors Association v. CCI, Writ Appeal Nos. 1806 & 1807 of 2013 (India, Madras High Court, Dec. 12, 2014).

commitments as settlements can be opted after the DG Submits the report and the report may be negative for the party.[56]

**Proposed introduction of a "Governing Board"**

India is expecting a "Governing Board" to supervise the steps taken by the Competition Commission and to pass Notifications regarding the promotion of Competition in the market. The Board shall comprise of the secretary of the department of economic affairs, members of the Competition Commission of India, secretary to the ministry of Corporate Affairs and his nominee, Ministry of finance and his nominee, and four other part time members appointed by government. This board will be responsible for general superintendence, direction management and the affairs of the Commission. The main purpose of proposing the constitution of the Board is to bifurcate the adjudicatory administrative and rule making power of the commission in order to lighten the burden of CCI by entrusting it with only the adjudicatory powers and the rest is proposed to be transferred to the Board.

However there is a mixed response from the stakeholders and market experts. The contrary views suggest that the constitution of the "Governing Board" would be proved as a threat to the independence of the Competition Commission. The constitution of Governing Board with members from the government side will blatantly destroy the impartial status of CCI as the department of government is also a subject of scrutiny by CCI and imagine a situation where the government people sitting in the Governing Board and supervising the functions of CCI, will leave no stone unturned to dilute the decision making of CCI. This will be nothing but a compromise from the independence of CCI. Secondly the Bill should have gone more clear on the qualifications of the to be appointed part time members. The appointment of the directors of a company as part time members as manifested in proposed section 18B hints that such a company might get into a beneficial stand in respect of the anti trust investigation as well as merger approval, however the proposed provisions also talks about the disclosing of the interest of such members who are the directors of a company with the matters going

[56] Charanya L, *Competition Act Amendment: Commitments and Settlements to ensure defaulters name is not publicly sullied*, ET CFO.COM NEWS/LEGAL (Oct. 30, 2019, 10:33 AM), https://cfo.economictimes.indiatimes.com/news/competition-act-amendment-commitments-and-settlements-to-ensure-defaulters-name-is-not-publicly-sullied/71814532

on and accordingly they will be kept out of such meetings. In case of judicial functions which is proposed as the only task of CCI, it is pertinent to note that the members of the commission as well as the directors of the companies all are the part of the Governing Board, in such a scenario the independence of judicial functions can also be hampered.

**Extending the protection of IPR holders**

The Competition Act 2002 shows its intention while having section 3 (5) under its provision that, the IPR holders have certain rights to protect their property conferred to them under various legislations provided under sec. 3 (5). These rights should not be understood as an absolute right as CCI can allow the IPR holders only to impose "reasonable conditions" and not just any condition. Additionally, CCI shows it by expanding the clause with the intention that reasonable conditions only be imposed when doing so would be necessary to defend the IPR holder's rights; otherwise, they cannot even impose any conditions if they are not reasonable[57]. The Supreme Court has also noted the necessity to limit IPR holders' anti-competitive activities[58]. The crux is that the IPR holders are not totally immune from the barriers of Sec 3 (5) and the restriction applies to them as well until they do not feel imposing restriction against their intellectual property as a necessary act and impose reasonable condition, imposing unreasonable condition by the IPR holders keeps them out of the protection under section 3 (5) and can also result in tie in arrangements, however the Commission rejected the plea of the informant which claimed that there was a violation of Section 3 (4) and sec (4) by the opposite party[59]. The same has also been rejected by COMPAT. Now under the Draft Amendment Bill of 2020, the CLRC recommended for the deletion of the provision under section 3 (5) and the insertion of a separate section 4A and for balancing IPR with Competition Law, the committee also proposed a residuary clause (g) as a new clause adding to the protection to the IPR rights provided under previously given six statutes. Proposed clause (g) now also protects the IPR provided under any other law for the time being in force. So somewhere we can figure it out that the proposed amendments have tried to keep more balance between Competition Law and IPR.

The new Bill now has a provision of exemption to the IPR holders even in case of abuse of dominant position by inserting sec 4A in the Competition Act 2002. Even in the matter of

[57] K Sera Sera Digital Cinema Ltd. v. Pen India Ltd., 2017 SCC OnLine CCI 31 11.
[58] Entertainment Network (India) Ltd. v. Super Cassette Industries, (2008) 6 SCC 75.
[59] Ajay Devgn Films v. Yash Raj Films Pvt. Ltd., 2012 SCC OnLine Comp AT 233 (India)

"***AB Volvo v. Erik Veng (UK) Ltd"***[60] the European Union Commission held that the exercise of the IPR rights by an enterprise under certain circumstances can also be abusive.

The ambiguity which comes after inserting a new section 4A is about the decision of a relevant market. Deciding a relevant market is the most important factor which gives the exact picture of an abuse by a dominant enterprise. Fixing a relevant market in case of an IPR is still a grey area where more clarity should be given. Mere insertion of a new section under the abuse of dominant position is not sufficient to extract a conclusion about the actual abuse of dominance in a relevant market. There will be a threat to lose the existing balance between IPR and Competition Law which is in existence with the help of sec 3 (5) and joint factors given under sec 19 (3). Extending the exemptions to IPR holder under abuse of dominance situation by inserting sec 4 A may result in a distorted balance between IPR and Competition Law.

**Insertion of additional criteria under combination provision**

The Draft Competition Amendment Bill of 2020 proposes to expand the grip of the combinations provisions even on transactions in digital market by inserting a provisio clause after sec 5 (c) of the Competition Act which proposes to add additional criteria to decide the threshold for determining the approval by the commission. This additional criteria says that in addition to criteria given under clause (a), (b) & (c) of section 5, the central government will have power to notify additional criteria to determine threshold. These criteria will be notified by the Central Government in Consonance with the CCI. The Bill also extends the power of CCI to decide that which transaction will not be treated as combinations. However the Bill doesn't clarify about the specific additional criteria. However the implementation of these criteria will also cover those transactions which are currently escaping from the grip of Competition Act.

**Statutory recognition to the "Green Channel" approval in combinations**

In order to felicitate the ease of doing business in India, the "Green Channel" approval process was introduced in Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 by an amendment in 2019[61]. On the basis of the report of Competition Law Review Committee[62] the Green

[60]AB Volvo v. Erik Veng (UK) Ltd, Case 238/87, [1988] ECR 6211, (Oct. 5, 1988)
[61]Amended Combination Regulations, Ministry of Corporate Affairs, India, 13 August 2019.
[62]The Competition Law Review Committee (CLRC) was set up by the Central Government on 1st October 2018 to review the Competition Act 2002 and the Rules and Regulations framed there under . The CLRC submitted its report on the 26th July 2019.

Channel route was introduced in Competition Act 2002 which provides for the automatic approval of certain combinations in order to save the time and improve ease of doing business in the country. Now when we talk that under the green channel route only certain combinations are automatically approved, here by referring certain combinations we mean that the combinations between those parties which do not involve any horizontal, vertical and complementary overlaps, not only the parties but is also applicable to those entities in which the parties hold control or shares. This green channel route can be adopted by doing a self-assessment of the proposed transactions by the parties themselves and by filing form I along with a declaration of complying the condition set for a green channel approval. After filing a notice to the CCI, once the acknowledgement is received by the parties, they can initiate their combinations.

Under the proposed amendment Bill 2020, this green channel has been proposed a statutory recognition. The current data shows that during April to June 2020 only 4 combinations were notified under the green channel route out of 15 combinations.[63]

**Buyer's Cartel**

A cursory review of the parts of the Act that are related to cartels might provide some insight into the intent of the legislators who drafted the law. It is possible to draw the conclusion that it has placed an excessive amount of emphasis on "seller-oriented cartels" while ignoring the prospect of buyers banding together to form a cartel. The Act's legal definition of a cartel confines its applicability to other emerging possibilities of buyers creating a cartel.

The Competition Commission of India (hereafter "the CCI") has a number of measures that allow it to identify and penalise sellers who form cartels that are detrimental to competition. They did, however, fail to take into account the possibility of customers forming their own cartels. "***Pandrol Rahee Technology Pvt. Ltd. v. Delhi Metro Rail Corporation &Ors"***.[64] was a case in which the Competition Commission of India (CCI) dealt with the alleged anti-competitive behaviours of the respondents. During the course of the purchase of the metro-rail attachment system, they jointly chose only one private system above the others, with the intention of eliminating competition on the market.

According to the CCI, the perspective of the buyer does not fit inside the definition of "trade" that is specified in Section 2(x) of the Act. This definition may be found here. This provision

[63]Press Trust of India, *1 out of 5 combinations given approval under 'green channel' route: CCI*, BUSINESS STANDARD, (August 17, 2020, 10:39 PM), https://www.business-standard.com/article/companies/1-out-of-5-combinations-given-approval-under-green-channel-route-CCI-120081701599_1.html

[64]Pandrol Rahee Tech. Pvt. Ltd. v. Delhi Metro Rail Corp, Competition Commission of India, Case No. 03 of 2010.

is in precise accordance with the manufacturing, distributing, supplying, controlling, or storing of goods. According to the CCI, the term "acquisition" only refers to the actions that are carried out by businesses, and it does not include any activities that are carried out by consumers. The Competition Commission of India (CCI) determined in the case of "***XYZ v. Indian Oil Corporation"***[65] that buyer's cartels cannot be regarded equivalent to seller's cartels, and as a result, buyer's cartels do not have any legal standing. The legal system in India gives the Court the authority to interpret the statutes in such a way that they can be interpreted to incorporate the buyer's cartel model; nevertheless, there are no clear legislative provisions regarding this subject. As a consequence of this, there is an immediate need to alter the existing legislation in order to make room for this idea.

It is essential to bring up the fact that when formulating the Indian competition law, the legislative body ignored the idea of buyer cartels and instead focused on seller cartels in order to identify anti-competitive arrangements that fall under the purview of cartels. This is something that needs to be mentioned because it is important. However, as time went on, it became necessary to include regulations pertaining to buyer's cartels, which had been having an effect on the competitive market. These restrictions were included in the Indian legislation that governs competition. Because of this, the notion of buyer's cartels being included under cartels in the Indian competition legislation was incorporated in the Draft Competition Amendment Bill, 2020 (Amendment Bill)[66].

The Raghavan Committee Report[67], which was essential in the creation of India's present Competition Act, placed a strong emphasis on preventing the concentration of market power. The prohibition of anti-competitive agreements is sufficiently wide to encompass buyer's cartels, despite the fact that the Act does not mention the term "buyer." It has been legitimately understood that the legislative purpose was to include buyer's cartels. In accordance with the provisions of section 3(1) of the Act, the foundation of such an agreement must be "acquisition." This position is supported by section 3(3), which defines price-fixing and collusive bidding as horizontal agreements that establish the reasonable presumption of a "appreciable adverse effect on competition" (hereafter "AAEC").

[65] XYZ v. Indian Oil Corp, Competition Commission of India, Case No. 05 of 2018.
[66] *Supra* note 53
[67] *Supra* note 32

The Competition Law Review Committee[68] has recently made suggestions and recommendations for the inclusion of numerous different kinds of cartels, such as buyer's cartels and hubs and spokes cartels, into the Indian competition law.[69]

The Committee submitted a proposal to the CCI in line with its decisional procedure, requesting that the term "buyer" be added in the definition of "cartel" under Section 2(c) of the Act. This would extend the scope of cartels to include buyers and purchasers in India.

[68] *Supra* note 62

[69] Akshita Totla, *The Course of Hub & Spoke Cartels in India*, CUTS INSTITUTE FOR REGULATION AND COMPETITION (CIRC) (Sep 27, 2021, 9:30 PM), https://comp.circ.in/the-course-of-hub-spoke-cartels-in-india/.

## 1.13) Competition (Amendment)Act 2023 on leniency regime

The proposals made by the CLRC and the Competition Amendment Bill 2020, was a welcome step. However there were areas which needed reconsideration. The draft Bill raised serious concerns over the lesser penalty regime of India and proposed to introduce the leniency plus provisions in Indian cartel leniency mechanism. In 2019, significant gaps in the then existing framework were discovered, and as a result, a number of improvements were suggested for organised dealing of market competitiveness as discussed above. A few changes to the Competition Act were proposed by MCA in 2022, and the Joint Parliamentary Standing Committee (Standing Committee) was given the task of reviewing the changes in detail and consulting with relevant parties. The draft was presented to Parliament on 8/2/2023 after MCA added some more revisions based on recommendations from the Standing Committee. In addition, the Lok Sabha passed the Competition (Amendment)Bill, 2023 on March 29, 2023, and the Rajya Sabha followed the passing of Bill on April 3, 2023, that is also without debate. This legislation amended the Competition Act of 2002, which had been in effect for two decades, and now ultimately incorporated the reformatory provisions with regards to leniency scheme introducing leniency plus provision in the Competition (Amendment)Act 2023. The draft Bill however did not respond on several other issues which should have been addressed. A party under investigation can now receive preferential treatment in both cartel investigations if it exposes another group. The saliant features of the Competition (Amendment)Act 2023 **(Annexure II)** gives the CCI the ability to revoke a marker status that was granted to an applicant who did not cooperate. Now, a leniency applicant may also withdraw their leniency request. The evidence submitted as part of this application may, however, be used for investigational purposes by the CCI and Directorate General (DG) Office.

### 1.13.1) Leniency Plus: As introduced in Competition (Amendment)Act 2023

It was planned to add leniency Plus to the Competition Act by adding sub-section (3) to section 46, which says:

If a producer, seller, distributor, trader, buyer, or service provider discloses a cartel and makes a vital disclosure about another cartel violating section 3, the Commission can impose a lesser penalty on the already investigated cartel without prejudice to the newly disclosed cartel. This makes it clear that the way leniency plus works is in line with universal standards, as long as the Lesser Penalty Regulations are changed. It’s important to keep in mind that this “plus” factor for the original cartel doesn’t affect the new cartel in any way.

At the start, it's important to say that the idea of "Leniency Plus" is not widely accepted or followed around the world. Several states have avoided it, and the EU's framework for leniency doesn't include it. The European Commission does not lower fines or provides the leniency plus offer for information about other markets (leniency plus).

But the 2006 Leniency Notice does protect the applicant if it provides strong evidence that the Commission can use to prove additional facts that make the infringement worse or last longer. In this case, the Commission doesn't take those extra facts into account when deciding how much of a fine to give the person who submitted the evidence. In Thermal Systems (Case), for example, automotive air conditioning supplier Valeo asked for leniency and provided evidence that the violation affected two more customers. The Commission took the value of Valeo's sales to those customers out of "affected sales" when figuring out how much it would have to pay in fines. This kind of partial immunity can be like a discount compared to the fines that the other participants have to pay.

### 1.13.2) Link between leniency plus and penalty plus

Aside from that, leniency plus/Amnesty plus comes with an equally important companion, "penalty plus," which serves as the "carrot" to the "stick" of amnesty plus. Under penalty plus, a company's refusal to reveal its membership in another cartel while undertaking leniency procedures and cooperating with authorities is viewed as a key omission and acts as an aggravating sentence element. It has the potential to increase a fine or possibly lead to incarceration. As a result, amnesty and penalty plus are inseparably linked and cannot be separated.

Amnesty plus' success in the United States can be attributed to this coordinated effort. In Competition (Amendment)Act 2003, there is no provision for a punishment in addition to a fine. With only water and no sunlight, no fruit can be expected from a tree.

## 1.14) Conclusion

The proposals made by the CLRL and the Competition Amendment Bill 2020, seems to be a welcome step. However there are areas which need reconsideration. The draft Bill raises serious concerns when it does not talk about the process of election of the part time members in the Governing Board.

Further the Bill doesn't respond on the impact of settlement and Commitment order over the pending cases with the CCI. Whether the settlement and commitment order will be considered relevant while dealing with the pending cases, the draft Bill is not clear on that.

By the proposed insertion the protection (from the abuse of dominant position clause) to the IPR holders by inserting Sec 4 A, the Bill raises an issue of deciding a relevant market in case of IPRs. Deciding a relevant in case of IPRs is still a grey area. So this insertion of Sec 4 A raises serious concerns about fixing a relevant market. This poses a serious threat to lose a balance between the IPR and Competition Law.

Under the green channel route the threat is with the investee companies where the parties (to the combination) have the stake as these investee companies are also compared in context of the stake holding of the parties to the combination in them and they also become an object of the stake holding criteria of the parties. The parameters set in context of stake holding in them are so restrictive for the eligibility of a green channel route that only a few parties can opt for a green channel route of combinations. The draft Bill 2020 does not deal with these difficulties and hence there are instances of minimal opting of green channel route by the parties.

Ultimately the draft Bill with certain amendments and new additions was introduced in Loksabha on August 05, 2022, which was again referred to standing committee on 17th August 2022, the committee has submitted the report on 13th December 2022. Loksabha passed the Bill in March 2023 followed by Rajya sabha in April 2023, after the assent of the President in April 2023 which ultimately brought a new Competition (Amendment)Act 2023.

# CHAPTER – 2

# HISTORICAL BACKGROUND OF CARTELS

## 2.1) Introduction

A group which is based on such an agreement which distort competition by agreeing on the terms on not to compete with regards to products, services, price and the trade territory are generally called cartels. The parties to such agreements are the traders in general, who by entering into such agreement intend to control the market by leaving no option for the consumers. The cartels aim at to raise the price above the level of competition. Cartelization also results in poor qualities of products and services with higher price. Cartelization can be a result of either the explicit or implicit agreements, which makes it hard for the regulating authorities of the world to detect it. These explicit or implicit agreements are to fix the territory or price for sale, limit the production or supply engage in bid riggings. Ultimately we can say that it is an agreement between the competitors who are engaged in production, supply, distribution, storage or in providing any services to not to compete with each other. So it can be inferred that the three basic requirements to form a cartel are :

The competitors must be into an agreement

That agreement have the object of controlling, limiting, restricting, attempting to control the sale, distribution, production, price, trade of goods or services.

Such agreements concerns with the traders, sellers, distributors, service providers etc.

The cartels as a problem to the economy was also quoted by Adam Smith in his book "The Wealth of Nations" in 1776, but Smith didn't mention any way to combat cartels.

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary".[70]

Stuart Mill analyzed that trade is itself a social act so anyone who undertakes to sell any product to the public, his act affects the society in general hence his conduct of selling comes

[70]ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 82, Ed.1,(Metalibri 2007)

under the social jurisdiction. He also observed the doctrine of free trade and advocated that all trade restraints and restrictions on production are evil.[71]

Even before conquest of England by William, Duke of Normandy,in 11th century, England had the legislation to control the restrictive and monopolistic practices, which somewhere gives an impression about the history of cartels.[72]

Cartels are not the new concept, it existed since long. The group of merchants and artisans who used to trade in a particular area known as Guilds were regarded something like a cartel. Cartels existed in almost all countries which were economically sound. The German empire was also called "The land of Cartels". The main area of cartel activities was the central Europe. After World War I, in Japan and Europe, cartels became a form of market organization. Mussolini in Italy, Franco in Spain and Nazis in Germany utilised cartels to structure their economies. After late 19th century to around 1945, united states was not having a fixed or single approach towards trusts and cartels, it was an ambivalent approach, however this approach of USA changed during World War II, and it started with a negative approach towards cartelization.[73]

Cartels were prevalent in United States of America during the period of industrial trusts[74]. A trust is basically a grouping of interest of business which have substantial market power and can be embodied as a corporation, cooperating with each other in several forms.

Cartelization is the serious violation of anti trust laws.

The hardcore cartels[75] are based on the conduct they perform, these conducts are :

- Market Allocation
- Price fixing
- Bid Rigging
- Output restrictions

Prosecution for a hard core cartel is a priority objective of OECD. The OECD has also identified cartels as a hinderance to the global market liberalization as it prevents the gain flowing from the globalized market. The OECD council on March 25, 1998 by adopting a recommendation[76]) advised the countries who are the members to OECD to include effective

[71] JOHN STUART MILL, TREATISE ON LIBERTY (1859) 87 (Batoche Books, Kitchener 2001).

[72]Sarsiz Gupt , *Research paper on efficacy of competition law in controlling the cartels*, 8 IJCRT 3321, 3324 (2020)

[73]16 HOLM A. LEONHARDT, KARTELLTHEORIE UND INTERNATIONALE BEZIEHUNGEN. THEORIEGESCHICHTLICHE STUDIEN (Olms Verlag, Hildesheim 2013)

[74]Holm Arno Leonhardt, *The development of cartel theory between 1883 and the 1930s*. Hildesheim 2018. p. 18.

[75]According to the OECD, 'hard-core' cartel behaviour includes: "An agreement, concerted practise, or arrangement by competitors to fix prices, make rigged bids (collusive tenders), set output restrictions or quotas, share or divide markets by allocating clients or vendors to specific territories, regions, or lines of business that is anti-competitive" (OECD 1998).

[76] Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels, As approved by Council on 25 March 1998 C(98)35/FINAL - C/M(98)7/PROV

measures in their competition Laws for deterring the hardcore cartels effectively, it also stressed to have the provision for the effective sanctions for the cartel activities and recommended to have substantial enforcement procedures and authorities to detect these hard core cartels. The member countries were given a time of 10 years to implement these recommendations. After a time span of 10 years in 2017-2018, OECD planned to monitor the implementation of these recommendations in all the member countries. Now a days, the most prominent part of any domestic competition law is considered to be the prohibition measures of hard core cartels. "By engaging in a cartel activity the firms can raise the prices, restrict output and are able to act collectively as if they were single monopolist. Thus profits increase, surplus income moves from the consumer to the producer, and there is a 'deadweight welfare loss' to society as a result"[77]

### 2.1.1) Challenges in detecting hardcore cartels

Cartels are hard to be detected as the agreements which are the basis of the formation of the cartels can be expressed or can either be implied involving a lot of parties to the agreement which makes it not easily detectible. Evidence suggesting cartels is usually based only on circumstantial evidence, such as communications among the businesses, minutes of meetings conducted with rivals, tiny differences in bid quotations that are not explained by cost concerns, and the prevalence of cross-ownership amongst participants, amongst other instances.[78]

The most effective means which have been adopted by different anti trust authorities is the leniency programs. Leniency program provides for leniency in penalties for the members of a cartel who acts as a whistleblower and discloses the vital information regarding his cartel to the antitrust authorities. This Leniency scheme has been adopted by most of the member countries of OECD which is a step towards detection of cartels. The best result can be secured by deterring enterprises to form cartels, which can be the fundamental component of an ideal anti trust law. The sanctions must be imposed which includes heavy monetary fine.

Competition improves quality, lowers prices and makes people aware of the attraction of buying a product or service. Maximum benefits are claimed to flow when production and supply is competitively carried out. The anti-thesis of competition is monopoly, which generally is achieved when a few producers instead of competing with each other come together to form a cartel. It has been observed by the Supreme Court of India in the case of

[77] MARK FURSE AND SUSAN NASH, THE CARTEL OFFENCE11(Bloomsbury 2004)

[78]S. Muralidharan and C. Deshpande, *Scope for Intersection between Antitrust Laws and Corporate Governance principles vis-à-vis cartel deterrence in India*, 9) NUJS L. Rev 93, 103(2016)

Union of India v Hindustan Development Corporation[79], that "A cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly". Cartels are the most egregious violations of competition Law and are widely considered as the most harmful anti – competitive conduct prevalent in markets which are prohibited in most jurisdictions. The rivals are forced to keep such an agreement a secret because they are aware that it is illegal. As a result, it is seldom reduced to writing and is frequently discovered to be in the form of an arrangement or understanding. Furthermore, the strongest evidence against a cartel is frequently in the hands of the people accused, who are unlikely to readily part with it or make it available to the investigator or investigating authority. These pressures appear to have convinced lawmakers to enact that "Cartel is presumed to have appreciable adverse effect on competition".

The office of fair trading U.K explains the nature of a cartel and how cartels operate. In its simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually verbal and often informal. Cartels can be formed in almost any industry and can involve goods or services at the manufacturing, distribution or retail level. However, some sectors are most susceptible to cartels than others because of the structure or the way in which they operate. For example, where there are few competitors, the products have similar characteristics, leaving little scope for competition on quality or service, communication channels between competitors are already established, the industry is suffering from excess capacity or there is general recession.

As a part of the global campaign against cartel we have a lot of formal agreements which can be termed as cooperation agreements amongst major competition law jurisdictions like European Union (EU), Japan, USA, Canada and Australia. Even India has also concluded cooperation agreements with the competition authorities in Russia, USA, EU, Australia and Canada. A range of matters can be dealt with such agreements, including the provision of assistance in obtaining evidence located in foreign jurisdiction, obtaining testimony from witness and collecting fines. A particular issue is that national law may contain restrictions on the extent to which sensitive and confidential information may be shared with agencies in other countries, and yet that information may be precisely the kind that competition authorities would wish to exchange. It is likely that there will be amendments to national systems of law that impede the exchange of information of this kind. The OECD competition committee in October 2005, has also published the Best Practices for the formal Exchange of Information

[79]Union of India v Hindustan Development Corporation (1994) CTJ 270 (SC) (MRTP)

between competition authorities in hard core cartel investigation.[80] (**Annexure III**)

## 2.2) Cartels in USA

### 2.2.1) Introduction

Sherman Act 1890 of United States is said to be a start of modern anti trust law. The anti trust laws of US is actually a group of federal laws which intends to promote competition and regulate the business conduct of corporations. The anti trust law of United States originated in retaliation of the rise of trusts. In USA the large companies, started co-operating with rivals to fix prices and market shares, through trusts. Trusts were the unified management structure which facilitated the parties to it in their mutual coordination. The essentials of a trust used to be:

- A large association of business interests
- The traders used to cooperate with each other
- May be organized as a corporation or a trade association
- These businesses may also have their stocks in one another
- Trusts became the synonyms to the word "monopoly"

It has developed as a sense of monopoly in USA during 19$^{th}$century and early 20$^{th}$ century.

So in retaliation to these trusts, the competition policy which was developed by United States were termed as anti-trust laws. There were several reasons of trusts being problematic. Trusts engendered monopolies, complete control of any specific industry was gone to one group. The top level businesses earned huge while the small traders got less opportunities in a trust system. In a capitalist society all merchants must get an equal opportunity to trade, based on competition but these trusts was creating an effect opposite to this capitalist philosophy, however USA follows the capitalist structure.

### 2.2.2) The first trust

The establishment of the first trust in USA started with the establishment of the Standard Oil Trust[81] by John D. Rockfeler in 1863. At that time America was largely based on oil for its daily householding. Oil was used in the factories of USA, the people at USA used it at a

[80]Best practices for the formal exchange of information between competition authorities in hard core cartel investigations by oecd, october 2005 available at https://www.oecd.org/competition/cartels/35590548.pdf accessed on 20th March 2022

[81] John D. Rockefeller started the Standard Oil Trust in 1863. He grew the business until 1868, when it was the biggest oil refinery company in the world. The company changed its name to the Standard Oil Company in 1870, and Rockefeller then decided to buy up all of its competitors and combine them into one big company.

dailybasis for their households, Rockfeler used this as a business opportunity for gaining maximum profits and created a oil trust, forcing consumers to pay whatever price he wanted them to pay for oil. Standard oil company was the industrial empire of Rockfeler and his associates from almost 1870 to 1911 controlling almost all the market of oil production, processing & transportation in America. As the company started in 1863, later Rockfeler bought the company where he was working and he also invited H.M Flager to become his partner in the Standard oil company, which made it one of the largest refineries by 1870. After 10 years of this by 1880 this trust had eliminated all competition and started controlling the refining of almost 90% to 95% of oil produced by United States. All those associates companies of Rockfeler including his own, who were monopolising the oil market in USA in terms of production, processing and transportation, combined into a trust called Standard Oil Trust in 1882, by entering into a trust agreement called Standard Oil Trust Agreement. The terms of this trust agreement allowed the companies to be purchased, merged, divided, created. Even after the order of Ohio Supreme Court to dissolve this trust in 1892, this trust continued its operation from New York.

In 1890, President Benjamin Harrison passed the Sherman Antitrust Act in reaction to public unrest. This new law, named for Ohio senator John Sherman, made trusts and monopolies unlawful both within states and when dealing with overseas trade.

The law was an initiative in the correct direction, it was insufficient to prevent America's wealthiest persons, such as Rockefeller, from continuing to engage in immoral commercial practises. The government was hesitant to pursue the Sherman Antitrust Act because these affluent men gave huge sums of money to political elections. Another big monopoly was developed by railroads. Individual railroad corporations were aware of both industry and farmers relied on them to carry their goods across the country.

When it became evident that undercutting each other by lowering transportation prices would only hurt them, the enterprises banded together and founded the South Improvement Company, a monopoly. For those firms performing more shipping, the railroad companies set a fixed shipping price, and these businesses paid a cheaper rate as an incentive. Small companies and farmers were unable to ship goods by railroad due to this legislation, and their options were limited.

### 2.2.3) The trust-busting president

The Sherman Act was not enforced with any regularity until Theodore Roosevelt became the president. Roosevelt was a president of the people, and he believed strongly in government control of business to allow for healthy competition. He became renowned as the "trust-busting" president because of his tenacity. Actually Roosevelt focused more on regulating the trusts rather than finishing them. He didn't believe that all trusts were bad, he had his point of view that there are both good and bad trusts, so these needed to be dealt on individual basis, consequently he thought that Sherman Act is not a wise decision, however his suggestions were denied by the Congress and ultimately Sherman Antitrust Act was enforced.

The Act's primary goal was and continues to be to prohibit monopolies or cartels from raising prices as they see fit to preserve trade and supply. People and competing enterprises in the United States will be harmed if they may raise prices whenever they choose. The Sherman Act's entire objective was to let the market to determine where certain goods' prices should be set. This Act was designed to keep markets competitive, so if a corporation gains something approximating a monopoly solely via excellent business operations, that is totally acceptable.[82] first section defines monopolistic activity. The second illustrates which types of trade-related outcomes are monopolistic.

The Federal Trade Commission Act and Clayton Act was passed by the United States in 1914. The Clayton Act was enacted as an addition to the Sherman Act, and it clarified what other monopolistic practises, such as price fixing, price discrimination, and other unfair business practises, were illegal. The Federal Trade Commission Act was also in addition to the Sherman Act, which required businesses to be truthful in their advertising and sales tactics in order to prevent them from misleading customers about the products they were selling.

### 2.2.4) Modern trusts

The United States filed a lawsuit against Microsoft Corporation[83] in May 1998. The US claimed that the company violated antitrust laws when it sold operating systems and Web browsers. Microsoft was found guilty of breaking the Sherman Antitrust Act after a two-year legal battle. The court ordered Microsoft to split into two divisions, one for operating systems and the other for software. Microsoft appealed the decision, and the US Department of Justice

[82] Cartel Practices and Policies in the World War II Era , Honors thesis by Caleb Yoken Union College - Schenectady, NY available at https://digitalworks.union.edu/cgi/viewcontent.cgi?article=3275&context=theses accessed on 28/11/2022

[83] Supra Note 39

and Microsoft struck an agreement in November 2001. Microsoft was required to share its application programming interfaces with third-party companies rather than separating the company into two different units of operation. It would also be forced to appoint a panel of three people with unrestricted access to Microsoft's systems, data, and source code for the next five years in order to guarantee that the corporation followed the settlement's terms. Nine states and the District of Columbia objected to the settlement, alleging that it did not go far enough to combat Microsoft's monopoly. However, the settlement was granted by the United States Court of Appeals on June 30, 2004. The case has been chastised in the media for failing to provide sufficient evidence.

Another well-known example involves AT&T, a telecommunications firm. AT&T and its Bell System (named after inventor and scientist Alexander Graham Bell [1847–1922]) were a legally sanctioned monopoly for much of their history. The idea behind a monopoly was that the technology would run more efficiently as a single system rather than as a collection of disparate systems scattered across the country. The corporation was also in charge of the telegraph system in addition to telephones.

In 1949, AT&T was sued for antitrust violations, which resulted in a 1956 ruling limiting the company's operations to the regulated national telephone system and government work. As technology advanced, the government opened the field of long-distance telephone service to other, smaller corporations. When it came to long-distance telephone carriers, consumers had various options by the mid-1970s.

In 1974, the federal government concluded that limited competition was insufficient and brought an antitrust lawsuit against AT&T[84]. The corporation agreed to get rid of the Bell operating companies that provided local telephone service in January 1982. The Bell system was renamed AT&T in January 1984, and seven regionally controlled and operated Bell companies were formed. The company's assets grew from $149.5 Billion to $34 Billion, while its workforce grew from over one million to 373,000.

AT&T stated in 2000 that it would split into three companies: AT&T, AT&T Wireless, and AT&T Broadband. AT&T Broadband combined with Comcast the next year to become the Comcast Corporation. AT&T and SBC Communications merged in January 2005 to form the industry's leading networking and communications firm.

[84]United States v. American Tel. and Tel. Co., Civil Action No. 17-49)

Section 1 of the Sherman Antitrust Act of 1890 governs US competition law.[85] Cartel laws can be enforced criminally by the federal government as well as civilly by the federal government, state governments, and private parties in the United States. Under Section 1 of the Sherman Antitrust Act, criminal charges must be proven "beyond a reasonable doubt," whereas civil cases must meet the "preponderance of evidence" standard. The economic data, as well as "plus factors" such as comparable behaviour, are taken into account by the courts. The demonstration of parallel behaviour should be accompanied with a purposeful commitment. Sufficient evidence is required to begin a criminal trial, but the evidence with the prosecutor that meets the highest standard set for proof is required to prove the guilt of cartelisation. The term "agreement" is used under the Sherman Antitrust Act to refer to both formal and informal agreements. In criminal instances, however, the Department of Justice ("DOJ") must have concrete evidence to substantiate the agreement. While the introduction of circumstantial evidence is authorised in civil proceedings involving cartels, the Supreme Court stated that even such evidence must show that the act was done in concert with the intent and not on its own. [86] Restraints such as bid rigging agreements and price fixing among players are likewise to be considered per se illegal, according to the Court. [87] The Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) have broad investigative authority in criminal cases.[88]

[85]S. 1, Sherman Antitrust Act, 15 USC § 1-7 (1890).
[86]Monsanto *v.* Spray-Rite Service Corpn., 1984 SCC OnLine US SC 56: 79 L Ed 2d 775: 465 US 752 (1984).
[87]Cuts International and National Law University, Jodhpur, *Study of Cartel Case Laws in Select Jurisdictions: Learnings for the Competition Commission of India*, COMPETITION COMMISSION OF INDIA (April 25, 2008), https://www.CCI.gov.in/images/marketstudie/en/docs1652440423.pdf
[88] *Id.*

## 2.3) Cartels in European Union (EU)

### 2.3.1) Introduction

The EU's competition rules are intended to provide businesses with fair and equitable circumstances while also allowing for innovation, unified standards, and the growth of small firms.

To provide a level playing field for EU enterprises while ensuring choice and fair pricing for consumers, the European Commission monitors and investigates anti-competitive practises, mergers, and state aid. The competition legislation in effect within the European Union is known as European competition law. It fosters the preservation of competition within the European Single Market by regulating anti-competitive behaviour by businesses to guarantee that cartels and monopolies do not harm society's interests.

An informal partnership or arrangement between two or more competing companies is referred to as a cartel. Members of a cartel talk and communicate information about their businesses, or create agreements about their future behaviour, with the goal of reducing competition and raising their own pricing or profits.

All agreements and concerted activities between companies with the goal of preventing, distorting, or restricting competition within the internal market are prohibited under Article 101(1) TFEU[89]. The prohibition of cartels is a cornerstone of EU competition law, with the goal of safeguarding the internal market against any kind of collaboration between independent firms.

Despite the fact that antitrust law has grown in importance in the EU and other jurisdictions around the world in recent years, national and cross-border cartels are still thought to be appealing. The fundamental motivation for companies to enter into illicit agreements with their competitors is the potential for increased earnings from colluding activities. Market cooperation may result in larger profits than competition. Collusive business methods give the companies involved market power they wouldn't otherwise have. For example, market and/or customer allocation may become possible as a result of coordinated behaviour, allowing cartel participants to demand higher prices from their purchasers and ultimate customers, hence increasing their own profits. Lower expenses are another potential benefit

[89] Article 101 of the Treaty on the Functioning of the European Union forbids cartels and other agreements that could hurt free competition in the European Economic Area's internal market.

of cartel participation. Cartels help to maintain the status quo in the market and avoid investments in innovative assets and R&D that would be required if competition were present.

Price-fixing, bid-rigging (collusive tendering), the introduction of output restrictions or quotas, and/or market-sharing are all examples of "hard core" competition law restrictions that are commonly used in cartels. As a result, they will almost likely be determined to have a detrimental impact on competitiveness with no compensatory gains. As a result, cartel acts will always be in violation of Article 101(1) and will not meet the criteria for exemption.

The investigation and punishment of cartels and cartel facilitators has become a primary priority for competition authorities around the world.

Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") govern competition law in the European Union. Any sort of horizontal agreement between parties is prohibited by Article 101(1) of the TFEU. The Council Regulation (EC) No. 1/2003 of December 2002 (Regulation 1/2003) is the primary legislation that sets the framework for competition law enforcement in the EU today. However, if Article 101 of the TFEU is infringed, Regulation 1/2003 does not establish the standard of proof that the European Commission ("EC") demands. The EC has broad investigative and evidence-gathering powers under Regulation 1/2003, although getting direct proof is not always possible due to cartels' typically sophisticated business models.[90]

Agreements between two or more companies, decisions by associations of companies, and collaborative practises are all prohibited under Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). When the intent or impact is to prohibit, limit, or distort competition in the home market, the ban in paragraph 1 of Article 101 is not absolute. When an agreement is anti-competitive in principle but provides benefits, Article 101 (3) of the TFEU applies (such as improved production or distribution, promotion of technological or economic progress). It makes an exemption to Article's restriction (1).

The EC has often stated that in order to prove a breach, the evidence must be "sufficiently detailed and coherent."[91] The ECJ emphasised the link between deliberate parallelism and concert practise in the Wood Pulp decision.[92] Parallel behaviour can provide indirect

[90]Nisha Kaur Oberoi, *Investigation of Cartels: A Comparative Assessment of the Approaches Adopted by the Indian and EU Competition Regulators,* NLS BUS L REV 57, 64(2015).
[91]Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH *v.* Commission of the European Communities, 1984 ECR 1679.
[92] Ahlström Osakeyhtiö *v.* Commission. *Case C-89/85,*

evidence of collusion, according to the Court, but it can only be regarded outright collusion if the behaviour cannot be explained by market competition conditions. The European Courts have avoided debating a precise proof standard.[93] The evidence should be "firm," "exact", "consistent", "solid" and so on, according to the courts. What constitutes "sufficiently exact and coherent" is, however, unquantifiable and must be determined on a case-by-case basis.

Article 101(1) TFEU forbids certain activities: horizontal and vertical agreements (between rivals and non-competitors), whether multilateral or bilateral; decisions by associations of undertakings, such as regulations forcing members to adhere to specific pricing levels; and concerted practises, which are any direct or indirect interaction between competitors with the goal or effect of influencing the behaviour of others.

When confronted with a "whole complex of schemes and arrangements" the Commission does not need to characterise each undertaking's conduct within it as an agreement or a concerted practise; it only needs to show that the undertakings were part of a larger plan with a single anticompetitive goal, resulting in a single infringement.

According to Article 101(1), anticompetitive practises include fixing purchase or selling prices, restricting or controlling production, sharing markets or sources of supply, putting different conditions on similar transactions, and enforcing unrelated additional obligations before contracts are signed.

### 2.3.2) The prohibition under Article 101(1) :

The prohibition under Article 101(1) is subject to two limitations :

First, for agreements to be governed by EU law, they must have an impact on trade between Member States; otherwise, they would be subject to, if at all, national competition law; And second, EU law recognises a de minimis norm, as stated in the Commission's 2014 Notice on Agreements of Minor Importance: an agreement only violates Article 101(1) if its influence on competition is sufficient to have a noticeable effect, i.e., if it has enough of an impact on market conditions. This rule does not defend restrictions by object because the likelihood of negative consequences is so great that there is no need to show any actual or likely anticompetitive effects.

Prohibited agreements are instantly unlawful and unenforceable under Article 101(2).

[93] *Supra* note 85.

However, an agreement that falls under the scope of Article 101(1) can be exempted if it meets each of the following criteria: I it improves the production or distribution of goods; (ii) it provides a fair share of the benefit to consumers; (iii) the restrictions are necessary to achieve those objectives; and (iv) it does not eliminate competition in a substantial part of the market. Exemptions can be given individually or in groups, depending on the type of agreement. While individual exemptions for object limitations are theoretically possible, practise indicates that they are unlikely to meet the requirements outlined above.

### 2.3.3) Enforcement of Article 101

While price-fixing cartels were to be the primary focus of the European Commission after the EEC Treaty came into effect in 1958, it was widely acknowledged that the Commission was unlikely to deal with many of these cases in practise. This was done for two main reasons: first and foremost. The most widespread, public international cartels disappeared after World War II as a result of the Antitrust Division's aggressive anti-cartel activity. [94]

There were also encouraging factors, including the first competition laws in a number of EU member states[95] and the implementation of what was then the EEC Treaty's Articles 85 and 86, now TFEU's Articles 101 and 101 (the Lisbon Treaty)[96].

In 1964, Professor George Stigler published a paper claiming that most cartels disintegrated naturally over time.[97] His work had the effect of making many regulators believe that price-fixing was a rare occurrence even though it was widely recognised as the most serious antitrust behaviour. As a result, it is understandable that many regulators felt that locating price-fixing cartels was not a top priority.

As a result of these factors, the Commission discovered approximately one cartel a year between 1958 and 1998.[98]

Article 101 can be investigated and enforced by the European Commission and national competition authorities.

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[94] W. Wells, Antitrust and the Formation of the Post-War World, New York: Columbia University Press, 2002, for a discussion of the extent of US influence on antitrust development. Such influence extended not only to conquered nations such as Germany and Japan, but also through the reach of the US economy – amounting to 50% of global GDP in 1945, which allowed the Antitrust Division to terminate many pre-War international cartel operations

[95] D.J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS, (Oxford University Press 2001) .

[96] On 1 December 2009, the Lisbon Treaty came into force and the current designation of the principal operative provisions of the EU competition rules changed from being Arts. 81 and 82 of the EC Treaty to Arts. 101 and 102 of the TFEU .

[97] G. Stigler, *A Theory of Oligopoly*, 72 JOURNAL OF POLITICAL ECONOMY, 44, 1964

[98] C. HARDING AND J. JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL AND CORPORATE DELINQUENCY, (Oxford University Press 2003).

An investigation and direct enforcement of Article 101 is the responsibility of the European Commission (EC). Additionally, the EU's NCAs and courts have the authority to enforce Article 101. (see Investigations and dawn raids by the European Commission: a quick guide). Complaints or "whistleblowing" by one of the infringing parties or individuals are usually the catalysts for investigations to be launched.

The most serious violations (hard core cartels) and those that have a significant impact on EU trade will be given priority by the Commission. In general, NCAs are interested in agreements and practises that have a significant impact on their own member state. The same alleged infringement can be investigated by more than one NCA, but there are rules governing co-operation between NCAs. NCAs are prohibited from enforcing a rule once the Commission has opened a formal investigation into it.

In recent years, the European Commission has been extremely successful in breaking up major European and international cartels. Many cartels have been exposed by the Directorate-General (DG) for Competition in a wide range of markets, including vitamins[99]

### 2.3.4) Unannounced inspection in the automotive sector

In several Member States on March 15th, 2022, the European Commission conducted surprise inspections at the offices of automotive-related companies and organisations[100]. Meanwhile, the Commission has sent formal information requests to a number of automobile-related firms.

Several companies and organisations may have broken EU antitrust rules prohibiting cartels and restrictive business practises, according to the European Commission (Article 101 of the Treaty on the Functioning of the European Union). Officials from the relevant national competition authorities joined the Commission's delegation. There were joint inspections with the Competition and Markets Authority (CMA) in the United Kingdom. A possible collusion in the collection, treatment, and recovery of end-of-life vehicles that are considered waste is the focus of the inspection and requests for information.

Preliminary investigations into alleged anticompetitive practises often begin with surprise inspections and information requests. However, it does not mean that the companies involved in these investigations are guilty of anti-competitive behaviour, nor does it prejudge whether

[99] Vitamins Cartel Case, COMP/E-1/37.512 – Vitamins (notified under document number C(2001) 3695), OJ L 6, 10.1.2003, p. 1.

[100]European Commission – Press release, "Antitrust: Commission carries out unannounced inspections in the automotive sector" Brussels, 15 March 2022

or not the investigation will be successful. It is the Commission's policy to ensure that companies have an opportunity to defend themselves in antitrust proceedings.

Coronavirus health and safety protocols have been followed during the inspections to ensure the safety of those involved.

There is no time limit on how long an investigation into anticompetitive behaviour has to be completed. According to the complexity of each case, how much cooperation is required from companies and associations and how well they exercise their rights of defence, the length of a case's investigation varies.

## 2.4) Cartels in India

### 2.4.1) Introduction

The Indian Parliament passed the Competition Act, 2002 to prevent unfair business practises. Free trade and "level playing fields" are ensured for all participants while protecting the interests of consumers. In this regard, the Indian Competition Act was established. All anti-competitive activities must be "eliminated," because of the numerous benefits that a sound competition policy has on the economy. As an example, under Section 2(c) of the Act, a cartel is defined as an arrangement that substantially reduces competition. Corruption in the marketplace is not in the public interest if cartels are trying to control the production, sale or price of a product they are selling.

Cartel laws are regulated and enforced by the Competition Act, 2002, which is overseen by the Competition Commission of India. The National Company Law Appellate Tribunal (NCLAT) and, if necessary, the Supreme Court of India can review the competition commission's decision in any given case. Because of the Competition Commission Act of 2002, the civil courts are prohibited from enforcing any decision made by the Commission or NCLAT pursuant to the governing act.

Businesses tend to band together for fear of being left behind in the marketplace, which often leads to mergers and acquisitions. Strong competing firms generally have an advantage in grabbing large amounts of public attention for selling their products and services, so the firms merge together to attain a higher amount of profits collectively in order to curb that competition.

Cartels are horizontal agreements that include limiting technological innovation, production, or supply; fixing prices, discounts, areas of operation, or customers; and collusive bidding. In India, cartels are presumed to be the cause of an AAEC and thus are null and void in this country. Antitrust law in India is grounded in the country's constitution, which answers the question of what social good competition law serves.[101] Cartel-related issues in India were not adequately addressed by the Indian government in the past. The Monopolies Commission in India was required to be notified of any trade restrictions. The idea behind this registration was to make it easier for the Commission to find the company in question in the event that a complaint was filed about its alleged involvement in a restrictive business practise.

[101] *Supra* note 49.

The Competition Act of 2002 defines a cartel as follows: Section 2 (C), A "cartel" is defined as a group of producers, sellers, distributors, service providers, enterprises who have agreed to limit, control, or otherwise attempt to limit production, distribution, or sale of goods or services, or the provision of services; in the Indian context, we can refer to Section 3 of India's Competition Act, 2002, which deals with anti-competitive agreements. Several parts make up Section 3 of the Act, and a simple reading would provide a clear picture of what is meant by the term "anti competitive agreements" especially in relation to cartels.

Anti-competitive agreements are referred to in Section 3 of the Competition Act, 2002. In the course of business, these agreements are often reached without formal documentation. To determine whether an agreement is anti-competitive, a coordinated effort is required. It is not necessary that the agreement be formal or written. As stated in Section 3(3), the term "cartel" refers to an industry. As a result, there could be sugar cartels, tobacco cartels, cement cartels, and so forth. "Specific" antitrust agreements are specifically mentioned in Section 3. Section 19(1) outlines the steps necessary to begin an investigation into an alleged anti-competitive arrangement. As a result, the Commission has the authority to conduct an investigation into any alleged violation of section 3(1) on its own initiative or in response to a complaint.[102] When an agreement is anti-competitive, how can one tell? Section 3(1)of the Act is alleged to have been violated, but how can that be? Many parties are involved in a business transaction, including suppliers, distributors, agents, and retailers. As a result, no one can be certain what the terms of an agreement covered by section 3 are (1). So, what's the answer? The answer lies in applying a "rule of reason" approach in which each case is judged on its own merits and dealt with on an individual basis.[103]

### 2.4.2) Imposition and determination of penalties

A violation of the code found in Section 3 of the Competition Act, which was passed in 2002, is going to be treated as a civil offence. To punish any and all businesses that participated in the formation of the cartel, a fine of up to three times the specified collected profits or ten percent of the total turnover, whichever is higher, could be levied against those businesses.

The act also applies to situations that constitute a criminal offence, specifically the following cases:

- a failure to comply with the directives issued by the competition commission.
- A violation of an order issued by the National Company Law Appellate Tribunal (NCLAT)

[102]T.RAMAPPA, COMPETITION LAW IN INDIA 20 (Oxford University Press 2009)
[103] Board of Trade of City of Chicago v US, 246 US 231 (1918), (The 'rule of reason' has been lucidly explained)

for which no reasonable grounds have been provided.

Companies and individuals alike may be held accountable for violations of the cartel legislation that was enacted as part of the Competition Act of 2002. In accordance with the provisions of Section 27 of the Competition Act of 2002, the commission has the authority to issue orders directed at businesses that have been found to be in violation of Section 3 of the Act. -

- To refrain from engaging in any activity that would inhibit competition.
- The amount of the penalty can be up to three times the total collective profits or ten percent of the turnover, whichever is greater.

The Competition Act of 2002 does not include any provisions for the imposition of criminal penalties or other sanctions on companies or individuals who participate in the formation of cartels. However, if the companies or individuals in question do not comply with the orders that have been stipulated by the competition commission, then the competition commission has the authority to bring criminal proceedings before the metropolitan magistrate. The sentence could be as long as three years in prison or a fine of 10 Million Indian Rupees (INR), or both.

In the cases involving cartels, there is neither a governed norm nor any kind of guideline in India that determines the penalties. On the other hand, because this is the standard procedure, the Competition Commission will have to take into account a specific or aggravating amount when deciding the level of the penalty. In the case "***Excel Crop Ltd. v. Competition Commission of India"***[104] the Supreme Court of India made a ruling and established aggravating and mitigating factors that would later be used to determine the level of the penalty. These aspects include the following:

- The scope and nature of the violation;
- the length of time during which cartels operated;
- the nature and extent of any damage caused by cartelization;
- the bona fide intentions of the company in question.
- profits that were made as a result of the illegal activity.

In case of "***Flashlight Case"***[105], even though the information had been shared between the competitors, the court decided that there was no violation of Section 3 of the act in this particular case. This ruling was made despite the fact that the information had been shared.

[104] Excel Crop Ltd. v. Competition Commission of India AIR 2017 SC 2734

[105] In Re: Alleged Cartelisation in Flashlights Market in India, Competition Commission of India, Suo Moto Case 01/2017

The commission that oversaw this case made the observation that the presumption of appreciable adverse effect on competition (AAEC) did not apply in this scenario because the parties' agreement does not include any provisions for the fixing of prices. In "***Rajasthan Cylinders case"***[106] the Supreme Court came to the conclusion that there was no involvement of any kind of collusive bidding, despite the fact that the bidders had fixed the prices exactly the same way and that a trade association meeting had taken place. Instead of being the result of collusion, parallel pricing fixation can be attributed to the nature of the market. In "***Madhya Pradesh Chemists and Distributors Federation (MPCDF) Vs. Madhya Pradesh Chemists and Druggist Association (MPCDA) & Others"***[107] the court came to the conclusion that any agreement that has an adverse effect on competition but is not actually covered by section 3 of the Competition Act, 2002 is illegal. In spite of this, the burden of proving which side of the cartel was guilty lies with the Commission in cases of such grave concern.

### 2.4.3) Anti cartel enforcement in India

The enforcement of cartel laws is probably the primary focus of competition laws in all jurisdictions, and the harshest penalties are reserved for cartel violations specifically. In the United States of America, the establishment of trusts by competitors that functioned as cartels was the impetus for the creation of the nation's antitrust law.

There has been no respite from the damaging effects that cartels have had on India. Cartels are suspected to have played a significant role in the development of the Indian economy, particularly in the production of homogeneous goods and services, including commodities such as mineral ores, timber, trucking, cement, sugar, ethanol, glass, construction, and real estate industries. Knowledgeable observers suspect that cartels have been rampant in Indian markets.

It is easy to understand why the Competition Act 2002 along with other competition laws around the world provides for severe penalties for proven cartels. These penalties can extend for each year of the cartel to the amount that is greater of either ten percent of the turnover or three times the profit. The severe punishment is intended to not only punish the companies that have broken the law but also the executives who are responsible for the offence.

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[106] Rajasthan Cylinders and Containers Ltd. v Union of India & Ors, Civil appeal no. 3546 of 2014

[107] Madhya Pradesh Chemists and Distributors Federation (MPCDF) v. Madhya Pradesh Chemists and Druggist Association (MPCDA) & Others, Competition Commission of India, Case No. 64 of 2014

Trade associations, which are present in the vast majority of industrial sectors, serve important functions, one of which is the projection of the challenges faced by the industry in relation to issues such as taxes, royalties, and mining. Historically, the government has traditionally delegated responsibilities in areas such as data collection to various associations. On the other hand, trade associations in India (and other countries as well) have frequently been operating as cartels or providing a willing platform for the operation of cartels.

The Indian bidding markets have been a particular hotbed for the proliferation of cartels in recent years. Even though supplies to private parties have not been safe from cartels, it is almost axiomatic to say that if bids are being submitted for supply against tenders floated by the government or a government agency, there is likely to be a cartel functioning in the background. This is the case even though it is almost axiomatic to say that there is likely to be a cartel functioning in the background.

It is commendable that the Competition Commission of India (CCI) has been proactive in its investigations of and efforts to punish cartels. Cartels have been responsible for approximately 63 percent of the cases investigated by the CCI, and they have been responsible for 60–70 percent of the penalties as well, according to data that is publicly available. In the well-known case of the cement cartel, the total amount of the fines that were imposed on 11 different cement companies was 6,300 crore rupees. Only about one percent of the total amount of the penalty was able to be recovered by the CCI, which significantly lessens the impact that the CCI's decisions have on acting as a deterrent. However, recoveries of the imposed penalties have been painfully low due to the protracted judicial processes. It is necessary for the appellate tribunal (NCLAT) and the courts to have a better understanding of the profoundly destructive effects of cartels and to make decisions regarding these cases with a sense of urgency.

### 2.4.4) Presence of a cartel: a classification of evidence

It is possible to provide evidence of the existence of a cartel through either direct confirmation, circumstantial evidence, or a combination of the two. Direct confirmation can come in the form of a written agreement among cartel members, an explanation from a cartel member who attended a meeting and reached an agreement with competitors, a reminder written within an organisation to report a meeting with competitors where an understanding was achieved, records of phone conversations with competitors, or an announcement from a person who was drawn closer by the cartel to go along with it.

On the other hand, evidence of a coordinated effort is difficult to unearth because members of a cartel typically do not agree verbally but rather enter into an agreement. In some cases, supporting direct confirmation with circumstantial or conditional evidence can be helpful. Even without the participation of anyone else, it may be sufficient to demonstrate the existence of a cartel; however, it is essential to exercise caution when interpreting circumstantial evidence.

Fortuitous proof is a different type of evidence that can be considered confirmation. Henry David Thoreau, a prominent American scholar, is credited with having written that accidental evidence, such as discovering a trout in a glass of milk, can be persuasive. He was implying that there is no other plausible explanation for this scenario other than the fact that the trout was purposefully mixed in with the milk by someone. The most useful application of conditional confirmation is found in situations in which there is only one possible clarification for an actuality. It is not impossible to implement this principle when conducting research on cartels. One ought to look for behaviour that gives a positive indication just in case there is a cartel. For instance, if all of a company's competitors in a particular market announce around the same time that they will be raising their prices by the same amount, this is behaviour that should be viewed as suspicious. It gives rise to the suspicion that they all colluded in order to increase their prices. However, there are other possible explanations, such as a data cost build that affected all of them similarly, a sudden change in popular demand for their product, or a sudden change in the cost of a substitute item. All of these are possibilities. Additional investigation might rule out some of the other explanations that could be possible. “When you have wiped out the unimaginable, the straggling leftovers must be reality” said anecdotal English investigator Sherlock Holmes. “When you have wiped out the unimaginable”. If all of the various intelligent explanations are eliminated, then the only consistent explanation for the sudden identical price increase announcements is that the competitors all talked to one another and agreed on the price increases. That would be conditional confirmation of a cartel agreement, or confirmation in a roundabout way.

Along these same lines, the Competition Act and its various provisions are portrayed. The Act will be examined to determine whether it is successful in overcoming the obstacles posed by the MRTP Act. On the basis of two country papers arranged by consultants working on this project, references are made whenever and wherever it is possible to the experiences of two other large economies, the United States and Brazil. This is done for the purpose of comparison as well as for determining the appropriate lessons to be learned. The paper

concludes with a few recommendations regarding strategies and operational concerns for the CCI to consider in order to actualize its command in accordance with the Competition.

### 2.4.5) Cartel conducts

Price fixing is the most typical activity of cartels. This is a broad phrase that refers to a wide range of coordinated measures conducted by rivals that have a direct impact on pricing. The most basic form is an agreement to charge some or all consumers a certain price or charges. Aside from straightforward price-fixing agreements, the following are also considered price-fixing[108]:

a) Consensus on price increases.
b) Consensus on price increases.
c) Agreement to keep a set price ratio between competing but distinct items;
d) An agreement to reduce or create standard discounts.
e) Agreement on credit conditions to be offered to clients.
f) Consensus to eliminate low-cost items from the market in order to limit supply and maintain prices high.
g) An agreement not to lower prices without informing other cartel members.
h) Agreement to follow advertised pricing.
i) An agreement to just not sell until the agreed-upon price is fulfilled; and
j) Agreements between competitors to divide markets either geographically or according to their customer base.

Since there is no room for any kind of competition, these kinds of arrangements are even more restrictive than the most formal price-fixing agreement. As a result, competition laws all over the world consider them to be illegal in and of themselves because they do not allow for any kind of competition. A rule known as "per se" is used to assess the behaviour of hard-core cartels and focuses solely on the question of whether or not a certain behaviour took place. Because of its deleterious impact on competition and absence of any redeeming economic value, hard core cartel behaviour is considered to be inherently illegal in many different jurisdictions. In the United States of America, a cartel agreement is considered illegal in and of itself. This indicates that no argument can be used to justify a cartel agreement, nor is there a requirement for any proof of harm. The likelihood of damage is high due to the fact that an arrangement of this kind invariably leads to an increase in prices

[108]Rai, Q &Saroliya, *Restrictive and Unfair Trade Practices – Where Stands the Consumer*?16 CUTS, (2003), https://www.scribd.com/document/435599204/013-A-pdf

without ever delivering appreciable gains to customers. This presumption was established by the courts after they had gained the knowledge necessary to judge similar agreements and had gained an understanding of the likely consequences of similar agreements. Therefore, the per se approach does not require a government agency to prove that there will be negative effects on competition, nor does it permit parties to claim that there will be positive effects on efficiency.

Without conducting an in-depth investigation into the specific damage that certain agreements have caused or the commercial justification for their utilisation, it is conclusively presumed that certain agreements are unreasonable and, as a result, illegal. Companies cannot avoid punishment under a per se analysis by demonstrating the alleged reasonableness or necessity of the challenged conduct. This is because these arguments are irrelevant. For instance, the argument that fixing prices was necessary to avoid cutthroat competition or that it only resulted in prices that were reasonable cannot be used to justify the practise of price fixing. In some other jurisdictions, the investigation of hard core cartel behaviour requires the use of a variety of effect tests. The purpose of these tests is not merely to determine whether or not a particular prohibited action was carried out; rather, they go one step further and require that a particular effect be demonstrated. For instance, certain jurisdictions call for evidence of an undue or substantial lessening of competition before permitting a "efficiency defence". Other jurisdictions do not have such requirements.

In addition, some jurisdictions use a hybrid approach, which allows for the prosecution of certain types of cartel behaviour, such as price fixing or bid rigging, on a per se basis, while other types of cartel behaviour, such as output restrictions or market allocations, are prosecuted on an effects basis. For example, the United States prosecutes price fixing on a per se basis, while Canada prosecutes bid rigging on a per effects basis. An effects approach that accepts the justification of hard-core cartel behaviour would seem to run counter to the widely held belief that this kind of behaviour offers no positive effects on the level of competition in the market. Under the third category of cartel behaviour, known as output restriction, businesses that produce and supply the same products or services come to an agreement to restrict the amount of their supplies to a lower proportion of their overall sales. The end goal of restricting supplies is to instil a sense of scarcity in the market, which will ultimately result in price increases for the relevant goods and services.[109] The fourth category, known as bid-rigging cartels and discussed in the section before it, involves coordinated

[109]CUTS , "Competition Policy and Law Made Easy", p.8 (2001)

actions on the part of businesses with regard to tenders for the procurement of goods and services and sales conducted via auction. In response to a tender that was issued by either a public authority or a private entity, it involves rival businesses working together in some capacity to limit the amount of competition in the market. The practise of collusive tendering, which is also known as bid rigging, can involve a variety of different types of agreements, the most significant of which are as follows:

1. Subcontract bidding, in which some of the bidders choose not to participate in the process in exchange for an agreement that some aspects of the bid will be subcontracted to them.

2. Complementary Bidding is a type of bidding in which some of the bidders submit bids that are either too high or contain conditions that are not acceptable, with the goal of awarding the contract to a predetermined winner. This would be after the competitors have come to an agreement that all of them, with the exception of one, will submit a tender with terms that they are aware will not be acceptable to the body that is doing the tendering. These bids will give the impression that there was a genuine competitive bidding process.

3. Bid rotation, in which competing businesses agree to take turns being the bidder with the lowest price in order to provide each other with an equal opportunity to win a contract.

4. The practice of suppressing bids, in which some of the competitors simply choose not to participate in order to ensure that the bid of a designated competitor is accepted.

5. Market division in which competing firms allocate particular customers or types of customers, products, or territories among themselves, and bids are rigged in accordance with such allocation.

Common bidding, in which companies come to an agreement to place identical bids in order to eliminate price competition. It can be challenging to detect and bring criminal charges for bid rigging, as is the case with all other types of cartel-like behaviour. It is not necessary for there to be a legally binding or formal agreement, as well as any punishment or other enforcement mechanisms that are contemplated, in order for a bid rigging offence to be established. This is due to the fact that the majority of laws governing competition broadly prohibit anticompetitive agreements and concerted practises among competitors. Quite

frequently, the simple act of information sharing between competitors prior to the awarding of a tender is sufficient to establish beyond a reasonable doubt that bid rigging has taken place.[110]

Constituent Elements Necessary for the Formation of Cartels The formation of a cartel is contingent upon the following three important conditions being met:

1. The cartel needs to be able to raise prices above what they would be if there were no cartel, but without significantly increasing the amount of competition from non-cartel firms.
2. The likelihood of receiving a significant punishment for participating in a cartel needs to be proportionally smaller than the potential benefits.
3. The cost of establishing and enforcing a cartel agreement needs to be relatively low in comparison to the gains that are anticipated from the agreement.

The firms will only participate in a cartel if they believe that it will raise prices above what they would be without the cartel and maintain those higher prices. Only in the event that the demand curve that a cartel is competing against is inelastic will an increase in price result in an increase in revenue. Due to the fact that there is a negative correlation between price and quantity demanded, the rise in revenue is accompanied by a decrease in the amount that customers want to buy.[111] A decrease in the quantity demanded and consumed, on the other hand, suggests that production costs will also decrease.

In conclusion, a rise in price brought about by the formation of a cartel is effective in the case of inelastic demand because it is accompanied by an increase in revenue, which in turn is accompanied by a decrease in total cost of production, which in turn leads to an increase in profit levels.

The competitive market in India raises substantial problems regarding buyer's power as well as its potential for misuse. Concern and conjecture have always been there over the creation of buyer's cartels, due to the fact that these cartels pose a significant risk to the Indian competitive system. In recent years, there has been a growing need to make sellers aware of these arrangements, as they have the potential to coerce sellers into lowering prices and increasing output.[112] As a result, it has become essential to amend the existing provisions under the Act and to incorporate the term, “buyer,” in the meaning of “cartel” within Section

[110]Lawrence Graham LLP, *Constructing the Olympics: Why Colluding for Contracts May Land You in Jail*, 1, COMPETITION LAW GRAM. 2(2006).
[111]D.P MITTAL, COMPETITION LAW & PRACTICE 102 (Taxmann Publications 2011)
[112]Hartej Singh Kochher, *Buyer’s Cartels: An Amendment too Late*, 1 INDRAPRASTHA LAW REVIEW 4 (2020).

2(c), in order to exercise control over these arrangements. The purpose of the ideas contained in the Bill is to provide assistance to the Indian Courts in acquiring a better understanding of buyer's cartels and the harm that they pose to the Indian competitive market, as well as to effectively promote healthy competition within the country .[113]

"It is also pertinent to point out that the CCI's opinion on instances pertaining to buyer's cartels is concerning. This is because these buyer's cartels pose a severe threat to the Indian competition regime".[114] Market participants and vendors are optimistic that antitrust case law would advance in this area both in India and elsewhere. Furthermore, it is crucial to highlight that the Bill's recommendation to either add a new definition for buyer's cartels or change the current provision to add the phrase "buyers" under the Act is a key first step towards limiting their presence in Indian markets. This should be noted because the recommendation is included in both the Bill and the Act .[115]

The CCI has, during the course of its history, taken into consideration and fined buyer's cartels in the Indian market for possessing an AAEC. Despite this, there have been other occasions in which the CCI has not given serious consideration to taking action against instances of buyer's cartels and misuse of buyer's power. In the matter of "***India Glycols"***[116], the argument that was presented in front of the CCI was that the united stance of oil corporations, as well as their agreement to buy ethanol at a pre-determined price, was in violation of the requirements of Section 3 of the Act. On the other hand, the CCI was not persuaded by the reasoning and stated that the pricing were determined by the Cabinet Committee on Economic Affairs.

[113] Mauro Grinberg, *Study of Cartel Case Laws in Select Jurisdictions*, Competition Commission of India (2008).
[114]Ramakant Kini v. Dr. L.R. Hiranandani Hospital, Competition commission of India, Case No. 39 of 2012.
[115]Saurabh Gupta, *Buyers' Cartels in India: An Antitrust Oversight?*, IRCCL (August 2, 2020, 8:20 PM), https://www.irccl.in/post/buyers-cartels-in-india-an-antitrust-oversight accessed on 2nd August 2022.
[116]*In Re*: India Gycols Limited v. Indian Sugar Mills Association, Competition commission of India, Case No. 21 of 2013.

# CHAPTER 3

# INDIAN LENIENCY MECHANISM: A ROADMAP TO TRACK CARTELS

## 3.1) Introduction

Cartelization refers to the practice of entering into an agreement that has the effect of reducing competition in a market, which is a substantial loss for consumers. The competencies required for an inquiry under the Competition Act are very unlike to those required for the detection of cartels. A specialized set of expertise is required for the uncovering of cartels.[117]

At the moment, competition commissions (Commissions) all over the world are highly interested in using their resources to uncover horizontal agreements, particularly cartels, and their flagrant effect on the market. Because cartels are by their very nature covert organisations, the regulatory bodies in charge of regulating competition need to expend a significant amount of effort to both uncover cartels and discourage their formation. Even when the commission is aware of the cartel's activities, it is usually difficult to take action against the cartel since there is insufficient proof.[118]

## 3.2) The need of a leniency program

By virtue of section 3(1)of the Act when read in conjunction with section 3(3) of the Act, cartels are deemed illegal in India under the Competition Act, 2002 (the Act). Under the provisions of the Act, enterprises are prohibited from engaging into agreements that have the potential to have a materially anticompetitive effect on the market i.e an appreciable adverse effect (AAEC) as outlined in section 3(1) of the Competition Act 2002. section 3(3) of Competition Act 2002 establishes a presumption that, once it is proven that a cartel exists, it is presumed to create an AAEC on the market without the need for an explicit investigation

[117]Pritanshu Shrivastava and Anurag Gupta, *Legal And Economic Review Of Cartels In Airline Industry – A Critical Analysis*, 1, ICLR 1, 6, (2015)

[118]Saumya Ambekar, *Competition Assessment of Leniency Policies and Introduction to Marker System and Amnesty Plus*, COMPETITION COMMISSION OF INDIA (July 8, 2015, 7:30 PM), http://CCI.gov.in/images/media/ResearchReports/LeniencyPoliciesIntroductionToMarkerSystemandAmnestyPlus.pdf

into the effects of the cartel's actions. This presumption is in place despite the absence of an explicit investigation into the effects.

In most cases, the government will have a hard time providing evidence that cartels even exist. It is common practice to base such proof primarily on circumstantial evidence, such as correspondence between the companies or minutes of meetings held with competitors.[119]

Because of the difficulties of the situation, authorities all over the world have been looking for ways to enhance their normal efforts to detect and punish cartels with effective leniency policies. These are intended to provide as an incentive for members of cartels to come forward to authorities and offer their assistance "by giving information and proof of the violation in exchange for full immunity or a reduction of antitrust fines."[120] Instilling a genuine fear of detection, the threat of severe sanctions for those who fail to cooperate, and transparency are the three prerequisites for building an effective leniency program. I Instilling a genuine fear of detection. (ii) The threat of severe sanctions for those who fail to cooperate. (iii) Transparency.[121] If the gains made from participation in cartels are greater than the fear of being found and having fines imposed, then leniency programs will not be adequate to prevent people from engaging in cartel activity.

This leniency program is nothing but an incentive and encouragement to those members of a cartel who opt to share information with the commission regarding the anti competitive agreements entered into. In support of the provisions of the leniency scheme in the Act under section 46[122] which authorises CCI to award lesser penalty. Under this section more than one cartel member can take advantage of a lesser penalty, Because of this, the CCI can use the lesser penalty rule to give a full waiver of the penalty (immunity) or less than the full penalty (leniency).In other words, the ideas of immunity and leniency could be added to the regulation to make the punishment less severe[123].The CCI brought the significant change in the Lesser penalty regulation of 2009 to The Lesser Penalty Amendment Regulations, 2017. The Regulations[124]requires the enterprises who are applying for leniency to have an umbrella

[119]OECD, http://oecd.org/competition/cartels/38704302.pdf (last visited May 4, 2020)
[120] Philippe Brusick, *Competition Guidelines : Leniency Programmes*, United Nations Publication 1, 13, (2016) https://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf
[121] Scott D Hammond, Department of Justice '*Cornerstones of an Effective Leniency Program*, DEPARTMENT OF JUSTICE (Feb, 9, 2020, 8:30 PM) www.justice.gov/atr/file/518156/download
[122]Provided further that the Commission will only give a lesser penalty to a producer, seller, distributor, trader, or service provider who has made all of the full, true, and important disclosures required by this section.
[123] Competition authorities all over the world offer leniency in the form of 100% immunity from fines or a reduction in fines up to a certain percentage based on a number of factors, such as the amount of knowledge or information available to competition authorities to start an investigation, when the leniency application is made (before or after the investigation), who was the first to apply, etc.
[124]*Supra* note 1

of sec 46 of the Act, to also furnish the details of all the individuals who are members are parts of such cartel, this enable the enterprises to seek immunity for their involved employees and former employees also. In case of *Re:* ***Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)***[125] it was Given that JTEKT/ JSAI was the second party to submit an application to the Commission for a lesser penalty and had significantly added value to the case, a 50% reduction in the fine was given to JTEKT/ JSAI and its individuals as well.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009) (the Lesser Penalty Regulations), was notified on 13th August 2009 as per the provisions mentioned in section 46 of the Competition Act 2002 (the Act), the manner and the magnitude to which the commission can reduce the penalties for the cartel members is prescribed in case they make the disclosures. These regulations introduced by the Competition Commission of India to have a manner and extent to which it can grant leniency in the penalties to the applicants who make the disclosure about the existence of the cartel they belong to as per the provisions provided by this regulations. The gravity of the cartelization is evident by the fact that under sec 27 of the Competition Act 2002, if after the inquiry the CCI finds that any agreement refereed in Sec 3 is in violation of section 3.

## 3.3) Status of leniency program in Indian competition law

The Competition Commission of India (CCI) is authorised to grant leniency in penalty under section 46 of the Act in case when a member of a cartel reveals its existence before the Director General submits its investigation report regarding this to the CCI. Section 19 of the Act, says that the CCI is empowered to inquire into the cartel on basis of information received by any third party or a member of a cartel or suo motto or on reference by the state or central government. To ensure that the information provided to the CCI is not false, the Competition Act prescribes for a hefty fee for furnishing the information with an aim to be entertained by CCI.

The leniency programme of different competition authorities are more or less based on the same policy with having similar purposes depending upon the varied market structure of different countries. With the advent of leniency program firstly in USA, it expanded across

[125] Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems) Competition commission of India Suo Moto Case No. 07 (01) of 2014 ; Order dated 09.08.2019

the globe with almost the similar structure with certain geographical or commercial reservations.

The importance of this program is in keeping a track on the cartels prevalent in the markets. Competition Commission of India is authorised to impose reduced fine if the member of a cartel discloses about its involvement in anti competitive agreements as a cartel member. This disclosure must be made before the DG submits its investigation to CCI. Section 19 of the Act, empowers the CCI to inquire into the contravention of the provisions of this Act specially in sec 3(1) or Sec 4(1) on either on its own motion or on various grounds mentioned in Section 19 of the Act. This is a discretionary power with the CCI.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 regulation 2, provides for the definition of an "applicant", who can file the lesser penalty application before CCI. Applicant as said is nothing but an "enterprise" which has been defined under sec 2 (h) of the Act. The Government has expanded the scope of an applicant and also included "Individuals" in addition to the enterprises, as an applicant, through the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Amendment 2017)[126].

The member of a cartel who discloses information is the one who receives the benefits of a leniency plan. The protection afforded by section 46 of the Act, extends to the producer, as well as the distributor, vendor, and other service providers. Who is a member of the cartel, if made a complete and true disclosure in relation to the alleged breaches of competition policy, the cartel of which the disclosing producers, sellers, distributors, traders, or service providers are members, must have an accusation to violate the anti competitive provisions of the Act. This is the case even if the disclosing producers, sellers, distributors, traders, or service providers made a false disclosure. This indicates that an anti-competitive agreement is being made about the cartel.

Regulation 3 of the Lesser Penalty Regulations sets forth the requirements for those seeking leniency under the Act's leniency programme. As long as the commission isn't ordering otherwise, the leniency application will no longer be a cartel member. An applicant seeking a reduced punishment for a violation of Section 3(3) of the Act must provide relevant facts in order to do so. In addition, applicants are obliged to submit any papers, information, and proof requested by the commission. As part of its inquiry and other processes before the commission, the commission requires applicants to be honest and truthful when revealing information and to present all relevant information. The applicants are also prohibited from

[126]Supra Note 1

hiding, manipulating, destroying, or removing key documents by the commission as a result of this rule. The relevance of these papers is considered on the basis of how much they contributed to the foundation of the cartel. If the applicants do not comply with these requirements, the commission has free rein to utilise the evidence and material provided by the applicant in accordance with the Act's provisions. There are several further limits that can be imposed on applicants under sub regulation 3 of this regulation.

The regulations give the vast power to the commission in regard to the decision of monetary penalty which the commission shall exercise giving consideration to the quality of information given by the applicant, the stage at which the applicant turned up for disclosure, the evidence which the commission is already having. In ***Indian Railways for supply of Brushless DC Fans and other electrical items***[127] though Pyramid was the 1st applicant, the CCI did not give complete reduction in penalty due to the stage at which Pyramid had approached the CCI, i.e., after the investigation had commenced. This doesn't mean that the CCI is not inclined towards granting complete immunity from the penalty, but it depends upon the vitality of the information given and the stage when it was provided. **In*re: Cartelization in respect of zinc carbon dry cell batteries market in India***[128] This was the first time when CCI granted total exemption to the first applicant of leniency including its office bearers, as the investigation was because of the Panasonic's disclosure to the CCI even in ***Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India***[129]after assessing the leniency application filed by the 1st applicant The CCI, granted a 100% reduction in penalty.

Regulation 3 is a condition precedent to Regulation 4 of the Lesser Penalty Regulations which provides for the granting of lesser penalty than the original penalty as per sec 27 (b) it also talks about the way the commission decides the lesser penalty to be imposed to the applicants. The lesser penalty is not a right of the applicant hence an applicant under Regulation 4 after fulfilling the criteria under Regulation 3 may be granted the total reduction i.e up to or equal to one hundred percent, if he comes first for making a disclosure which is vital and through which the commission can form a prima facie opinion in regards to the existence of the cartel which is alleged to be in violation of section 3 of the Act. Secondly a hundred percent benefit of reduction in penalty may be given in a case when the applicant at first provides the commission a vital disclosure and submit evidence in favour of the violation of Section 3 of the Act with regards to a case where investigation is still going on and has not been

[127] *Supra* note 2
[128] *Supra* note 3
[129] *Supra* note 4

completed. This is also a condition that the CCI has no sufficient proof to prove such violation when the leniency application is being filed. The total benefit of the leniency which means the benefit up to hundred percent will be provided if such benefit has not been provided to any other applicant at first in such matter. But this doesn't mean that the commission has no provision for any further applicant disclosing vital information. The commission prepares a priority list of the applicants whom the commission thinks to be fit for the lesser penalty benefits and provides the reduction in penalty accordingly. If for any further applicant subsequent to the first applicant, the commission thinks that the information furnished through evidence by him is of added value to whatever evidence the commission or the Director General was having already and vital to identify the presence of a cartel which is in violation of section 3 of the Act, may provide the benefit of lesser penalty. In Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations') the Lesser Penalty Regulation provides and fixes the total number of applicants who file the leniency application to seek lesser penalty and that was up to three applicants depending on what additional value the subsequent applicants add in the information given by the first applicant. Now the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations') ('Amendment') 2017 broke the limit of number of applicants seeking immunity through this regulation and authorized CCI to accept the leniency application filed my more than three applicants who will be eligible for a maximum leniency of 30% depending on the additional value of their information.[130]

The 2017 Amendment left room for more than three applications to be granted leniency. With the requirement that the third and any subsequent applicants be eligible or get a leniency up to 30%, this means that even more applicants than three can now receive immunity under this new regulation from 2017. This will encourage all cartel members to come forward and submit a leniency application. In ***Nagrik Chetna Manch v. Fortified Security Solutions and others***,[131] more than three applicants have received leniency from the Competition Commission.

[130] *Supra* note 8
[131] *Supra* note 10

### 3.3.1) Leniency program in India and its effects

For fighting with the cartels the world has developed the specific tools which involve the market studies, tracking the individuals involved, the groups negotiating with the competition authorities. The leniency program is a tool which allures the persons involved by promising leniency to them in case of penalties.

This program is basically a way to detect the cartels by providing them immunities from fines and penalties in return of their disclosure about the existence of the cartel of which they are a part.

According to International Competition Network, *"Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member, who reports its cartel membership to a competition enforcement agency"*. [132] Under section 27 of the competition Act, the CCI has a power to impose a penalty of up to three times the profit of each year earned by the sellers distributors producers service providers etc. By being involved in a the cartel which entered into such anti competitive agreement prohibited under section 3 or a penalty up to ten percent of its each year's turnover(Till the agreement continues) whichever is higher.

The success of leniency program is evident by the fact that the applications filed under the leniency program are in such a huge number which became a reason for revealing a lot of cartels.

Section 46 of the Indian competition Act says that if any member as named in the section of the cartel has violated section 3 of the Act but made the true disclosure of the act of violation by the cartel of which he is a member, the commission has a discretionary power to impose upon such member a lesser penalty as it may deem fit, but this provision of lesser penalty under sec 46 is applicable only to those cases where the report of investigation directed under section 26 has not been received before making of such disclosure.

[132] COMPETITION COMMISSION OF INDIA, http://CCI.gov.in/images/media/ResearchReports/leniencyproject_amitsanduja11032008_20080715104637.pdf AmitSanduja, *Report On Leniency Program: A Key Tool To Detect Cartels*, Competition Commission of India (last visited on August 19, 2016)

### 3.3.2) Present framework of leniency program

The source of the leniency scheme of the Competition Commission of India is sec 46 of The Competition Act 2002 which provides benefits to enterprises and individuals in return of their reporting about the existence of the cartel of which they are members. The Competition Commission of India (Lesser penalty) Regulations, 2009, Regulation 4 provides that CCI can give the benefit of leniency in the penalty up to 100% if the informant enable the CCI to form a prima facie opinion regarding the exercise of the cartel, by making a vital disclosure at first, by submitting the evidence of the existence of cartel.[133] In the same way the informant who stands second in the priority list can be given the reduction in the monetary penalty up to 50% and similarly the informant who is in the third position in the priority list can get a reduction up to 30% in the penalty. But in order to obtain this position (marker) applicant/informant must be ceased to be the participant in the cartel further unless the commission directs for a certain purpose. Now the new amendment in lesser penalty regulations allowed CCI to consider the applications of even more than 3 applicants for the immunity depending on the relevancy of their information and the addition which they do in the already given evidence and information .[134] "*Cooperate genuinely, fully, continuously and expeditiously all through the investigation and other proceedings before the commission; and not conceal, destroy manipulate or remove the relevant documents in any manner that may contribute to the establishment of a cartel"*[135] The informant in order to take the benefit of the leniency provision is obliged to give all relevant evidences regarding the violation of sec 3 of the Competition Act 2002 with true and complete disclosure. **In *Nagrik Chetna Manch v. Fortified Security Solutions and others*[136],** the CCI extended the benefit of lenient treatment to four of the six cartelists, even though all six had applied for leniency.

[133]Rudresh Singh, "*Cartels And Whistle-Blowing: The Importance Of Establishing A Robust Leniency Regime In India*"MONDAQ, March 3, 2023, 8:30 PM), https://www.mondaq.com/india/cartels-monopolies/467356/cartels-and-whistle-blowing-the-importance-of-establishing-a-robust-leniency-regime-in-india
[134]*Supra* note 1
[135]*Id.* at Reg. 3(d)
[136]*Supra* note 10

## 3.4) Filing of a leniency application

As per the report (February 2004) of US Department of Justice (DOJ) it was reflected that the rate of filing leniency application was one application per year in 1993 which was raised to one application per month.

The reformation of EU leniency program also became a reason of the increased number of the filing of leniency application in EU. With the advent of leniency provision in EU in 1996 till following six years almost eighty leniency applications were filed.

The time limit to file the leniency application under Indian provisions has been extended under the *Amended Lesser Penalty Regulation 2017*[137]. Now the leniency applicant as per the emended provisions have a 15 days time to file application, from the date it receives the notice from the Competition Commission of India to mark their status (Priority).

It is advisable that companies should inform the prevalence of a cartel immediately after its detection. It must be noted before filing the leniency application that the person applying for it must have the vital information regarding the existence of a cartel which can facilitate CCI to form a prima facie opinion regarding the existence and hence the leniency can be claimed then.

When there is an obligation on the applicant to have the vital evidence regarding the cartelization it includes two concerns:

- How to assess the sufficiency of the evidence provided by the leniency applicant to the satisfaction of the CCI basing which it can form a prima facie opinion.
- What is the option available for the applicant or the member/members of a cartel when it fails on the ground of sufficiency of the evidence and it cannot satisfy the CCI with its evidence submission regarding the existence of a cartel.

In the ***Tyre Cartel Case***[138] and the ***Deutsche Bank case***[139] the CCI based on its principle of "beyond reasonable doubt standard" stressed on the unequivocal establishment of the existence of the agreement. The principle says that the CCI initiates its enforcement exercise, adopting the standard which is "beyond reasonable doubt". While in the ***Shoe cartel***

[137] *Supra* note 1
[138] In re All India Tyre Dealers Federation v Tyre Manufacturers, MRTP Case: RTPE No. 20 of 2008
[139] Neeraj Malhotra v Deutsche Post Bank Home Finance Limited &Ors, Competition Commission of India, Case No. 5/2009

***case***[140]and the ***Soda Ash Cartel Case***[141] the CCI opined that the standard of proof is on the "balance of probabilities" for establishing the existence of cartel.

We don't have any clear instruction or guidelines with regards to the level of evidence which is needed to CCI for forming a prima facie opinion. So in this regard we rely on some international practices to come to a conclusion as to what should be the level of an evidence to bring it in the satisfaction of the CCI to form an opinion. The same happened in ***Re: Cartelization by broadcasting service providers***[142]where the 2nd applicant added value to the investigation, made vital disclosures, but as it did not help CCI to form an opinion it was awarded 30% reduction in penalty.

Generally, when the cartel doesn't leave any direct evidence of its existence and is sustainable, without having a fear of being detected, it is a demand that the CCI gives stress on circumstantial evidence.

An applicant for a reduction in penalty for the first time to make a vital disclosure may be eligible for up to or equal to a 100% discount if the disclosure allows CCI to either: (a) establish that there is a cartel, where the CCI had insufficient evidence to form an opinion at the time of the application; or (b) prove that a violation has occurred by providing demonstrating evidence.

When a second party comes forward to offer information to the CCI or DG, they may be eligible for a reduction in penalty of 50% or more if the information they provide adds significantly to the information the CCI or DG already has.

A reduction in penalty of up to or equal to 30% may be available for third and subsequent applicants who present evidence that significantly enhances the evidence already possessed by the CCI or the DG. For this decrease to apply, the evidence must significantly improve on the evidence currently possessed by the CCI or the DG.

It is essential to keep in mind that even if an application has been given immunity in accordance with the leniency requirements, such protection will not extend to any compensation claims that have been filed by third parties.

[140]M/o Commerce, Govt. of India vs M/s Puja Enterprises & Ors. Competition Commission of India, Ref. Case No. 01 of 2012
[141]Shailesh Kumar v M/s Tata Chemicals Ltd &Ors, Competition Commission of India, Case No. 66 of 2011
[142]Re: Cartelization by broadcasting service providers, Competition Commission of India, Suo Moto Case No. 02 of 2013, Order dated 11.07.2018

Because there are only so many orders that have been published, it is not obvious whether or not applicants who come after the first one can move up in the priority list if the first applicant is dismissed for violating any of the fundamental conditions.

## 3.5) Requirements needed to be considered for leniency in India

**The following requirements need to be met in order to be considered for leniency:**

In general, the applicant is required to make full, true, and vital disclosure in order to secure a lesser penalty. In addition, the applicant is required to continue to cooperate with the CCI throughout the duration of the investigation and up until the conclusion of the proceedings before the CCI.

In order to be eligible for a reduction in penalty, a party that is seeking a lower penalty must first satisfy the necessary requirements that are outlined in the Lesser Penalty Regulations. The applicant is required by the conditions to refrain from concealing, destroying, manipulating, or removing any relevant documents that may establish the existence of a cartel; to cease further participation in the cartel, unless otherwise directed by the CCI; to provide vital evidence to the CCI; to extend genuine, full, continuous, and expeditious cooperation with the CCI throughout its investigation and other proceedings; and to cooperate with the CCI throughout its investigation and other proceedings.

In the event that the application does not fulfil the requirements outlined above, the applicant will not be granted any leniency. However, in the event that this occurs, the CCI shall be permitted to make use of any information and evidence provided by the applicant in the proceedings that are brought before it.

### 3.5.1) When to make a filing:

At any point in time prior to the DG submitting its investigative report to the CCI, an application for leniency may be submitted. Either before or after the CCI has begun its investigation, the application can be submitted either before or after the inquiry has been opened. This will cause the CCI to open its investigation. It is not at all unusual for petitions to be submitted after dawn searches have been carried out or after the applicant has received a notice requesting the production of documents.

### 3.5.2) Marker Position:

A marker can be placed to protect the applicant's priority position either verbally or in writing by sending a simple letter to the CCI before the applicant submits a complete application for the benefit of the Lesser Penalty Regulations. The marker can be placed either orally or in writing. It is possible to do this in order to guarantee that the applicant's compliance with the requirements is taken into consideration.

After the CCI has obtained a marker, it is expected to review it, determine whether or not it accepts the marker, and then communicate that affirmation along with the priority status of the application. This happens after the CCI has had the marker for a certain amount of time. After the marker has been approved, the applicant for leniency has fifteen days from the approval of the marker to present the leniency application in the necessary format, as stipulated by the Lesser Penalty Regulations.

### 3.5.3) Nature of evidence

It is the intrinsic nature of the cartel that they generally don't leave any evidence for their presence this evidence can be construed in a direct sense and this leads CCI to have this opinion that the direct evidence is not necessary to prove the existence of a cartel or the presence of an agreement.[143] Hence CCI give importance of the circumstantial evidence to find out and decide the existence of a cartel. This circumstantial evidence can be both the conduct based evidence or the circumstantial evidence in ***Alleged cartelization in flashlight market in India***[144]even after the conformity about the commercial sensitive information exchange between the alleged members, the existence of a cartel could not be proved because of the lack of cogent evidence.

CCI takes care of these evidences while carrying the inquires for the existence of a cartel. While in case ofthe conduct based evidence the CCI relies on similar or identical bidding prices, meeting between competitors, records and history of the cartelization and sharing of information, trade association membership is also one of the most important conduct based evidence relied by the CCI.

[143]Builders Association of India v Cement Manufacturers Association &Ors, Competition Commission of India, Case No. 29/2010.
[144]*Supra* note 105

## 3.6) Concern on confidentiality of leniency application

A leniency application is treated as a secret or we must say confidential between the party making the disclosure and the CCI till the pendency of the proceeding before CCI but the final orders of the CCI are the public orders and in its order it grants the leniency to the applicant who are in compliance with the Competition Commission Of India (Lesser Penalty) Regulations, 2009 and helped CCI by disclosing the violation and giving evidence. Regulation 6 of Competition Commission Of India (Lesser Penalty) Regulations, 2009 if the applicant has consented towards the disclosure in within or does a public disclosure in such a case the confidentiality is not protected by the CCI.

**Confidentiality**

Showing a departure from the nature of the confidentiality clause mentioned in Regulation 6 of the Competition Commission Of India (Lesser Penalty) Regulations, 2009, Regulation 35 of the competition Commission of India general regulations 2009 says that the CCI under regulation 35 has the discretionary power to grant confidential status to the informant who disclosed the cartel information and the information given by him during the course of investigation. While regulation 6 of Competition Commission Of India (Lesser Penalty) Regulations, 2009 makes it obligatory for the CCI to grant the confidentiality treatment to the identity of the leniency applicant and the information provided by him.

The reason behind maintaining the confidentiality of the identity of the informant and the vital information disclosure is to make the disclosure risk free and frequent affairs as to detect the more and more cartel.

Secondly the confidentiality is maintained to protect the leniency applicant and encourage them to have more and more disclosures without involving any risk of being public. The confidentiality clause has the objective towards the protection of the interest of the information giver or the leniency applicant as well as speedy and frequent detection of cartels. This confidentiality clause also puts the leniency cartelist in a better position than the non-leniency cartelists.

However, as per the provisions of lesser penalty regulation (Amendment)2017, If the Director General thinks that the disclosure of the documents or evidence or information is indispensable for investigation then he is allowed to disclose these to the parties to

proceedings. The consent of the leniency applicant is not a condition precedent to this. But this disclosure will be done with the permission of CCI and with the written recorded reason.

The question now arises that why do we have lack of leniency pleas? The research suggests that the leniency can be granted if the information given to the CCI is vital and the discretion is with the commission to decide it. It creates an uncertainty towards the grant of leniency. secondly the members of the cartel think that the risk of detection of the cartel is very low so why to opt for the leniency pleas. Separately, there has been a lot of media reporting about the approaching of an alleged cartel to CCI which raised concerns about the confidentiality of the members of the cartel disclosing vital information and put a question mark on the leniency effectiveness of the CCI.[145]

In the words of the European Competition Commissioner (speech: "The First Hundred Days", NeelieKroes, International Forum on European Competition Law, Brussels, April 07, 2005, SPEECH/05/205): "Cartels attack free markets at their very hearts. They don't just mess up the grass on a level playing field – they blow great holes out of the surface. And it is consumers who are asked over and over again to pay the price of replacing the turf."

[145] Varca Druggist & Chemist & Ors v Chemists & Druggists Association, Goa, *In Re: MRTP Case No. C-*127/2009/DGIR (4/28) .

## 3.7) Conclusion

The harm of the consumer which is must be proved in the court of law to have a locus for initiating proceedings under the competition law . This is the main objective of the competition law to protect the consumers form the anti-competitive activities going on in the market.

The leniency program in the competition act is well mentioned in the competition Laws of India but its well implementation is still in doubt. The applications in India under the leniency program are very less as compared to other countries. However, the introduction of the amended regulations[146] is proving itself phenomenal in creating a sense of larger security to the enterprises and individuals coming to disclose the information.

The number of applications filed under leniency program in Europe are greater in number than India. For destabilizing the cartels the people must be encouraged to report such cartelization and its existence to the competition authorities and this is a duty of the CCI and the authorities to make the disclosure procedure and post disclosure effects more congenial to the informant, to make the leniency program more effective and secured for the informant. Persons coming for remedy under this provision are very few and we can say it in a nascent stage.

I think there is a need to amend sec 46 of the Competition Act 2002 to the level that, the discretionary power of the CCI should be tightened and the satisfaction level of the CCI on the information received should be certain. The level on which the commission satisfies with the information should be made closer to, and encouraging for, the informant, otherwise it leads to the discouragement of the informant in disclosing the information.

The immunity under this provision must be absolute and should not be compromised. There should be more protection for the person disclosing the information in this regards.

In order to determine whether a requester should have received a bigger reduction, community courts are increasingly obligated by European legislation to consider the importance of evidence in the context of leniency.

[146] *Supra* note 1

Cartel is not a very generic term and concept hence there is also a necessity to make aware of different business houses regarding the concept of cartels and make all possible ambience discouraging the cartelization.

The leniency scheme in India is not too new to be well implemented but still it is not being late to have reformative measures. It can have a way to frequent cartel detection if the confidentiality clause is well noticed and the person making disclosure thinks himself protected disclosing the information this issue must be in the note of CCI and secondly CCI should be more active on its detection mechanism so as to expedite its search and seizure.

## 3.8) List of leniency cases decided by CCI till June 2022

| **2022 Leniency orders** | | |
|---|---|---|
| Case No. | Name of the case | Date of decision |
| 06/2020 (Suo Motto) | In Re: Cartelisation in the supply of Protective Tubes to Indian Railways | 09/06/2022 |
| 03/2018 Section 19 (1) (b) | In Re: Chief Materials Manager, North Western Railway Vs. Moulded Fibreglass Products and Others | 04/04/2022 |
| 02/2020 (Suo Motto) | In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India | 03/02/2022 |
| 10/2014 (Suo Motto) | In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers | 20/01/2022 |
| **2021 Leniency orders** | | |
| Case No. | Name of the case | Date of decision |
| 02/2016 Section 19 (1) (b) | Mr. RizwanulHaq Khan, Dy. Chief Material Manager, Office of the Controller of Stores, Southern Railway Vs. Mersen (India) Pvt. Ltd. and Another | 01/11/2021 |
| 07/2018 Section 19 (1) (b) | Food Corporation of India Vs. Shivalik Agro Poly Products Ltd. and others | 29/10/2021 |
| 02/2018 Section 19 (1) (b) | Eastern Railway, Kolkata Vs. M/s Chandra Brothers and others | 12/10/2021 |
| 06/2017 (Suo Motto) | In Re: Alleged anti-competitive conduct in the Beer Market in India | 24/09/2021 |
| **2020 Leniency orders** | | |
| Case No. | Name of the case | Date of decision |
| 01/2016 (Suo Motto) | In Re: Cartelisation in the supply of Anti-Vibration Rubber Products and Automotive Hoses to Automobile Original Equipment Manufacturers | 26/02/2020 |
| **2019 Leniency orders** | | |
| Case No. | Name of the case | Date of decision |
| 07 (01) of 2014 (Suo Motto) | In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems) against NSK Limited, Japan and Others . | 09/08/2019 |

| | | |
|---|---|---|
| 03/2017 | Anticompetitive conduct in the Dry-Cell Batteries Market in India Vs. Panasonic Corporation, Japan &Ors | 15/01/2019 |

| **2018 Leniency orders** | | |
|---|---|---|
| Case No. | Name of the case | Date of decision |
| Suo-Moto Case No 01/2017 | In Re: Alleged Cartelisation in Flashlights Market in India | 06/11/2018 |
| 02/2013 | In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters. Vs. EsselShyam Communication Limited & others | 11/07/2018 |
| Suo Motto Case 04/2016 | In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing Vs. Lahs Green India Private Limited & Others | 31/05/2018 |
| Suo- Motu Case No. 03/2016 | In re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing Vs. Saara Traders Private Limited & Others | 31/05/2018 |
| 50/2015 Section 19 (1) (a) | Nagrik Chetna Manch Vs. Fortified Security Solutions & Others | 01/05/2018 |
| Suo-Moto Case No. 02/2016 | Cartelisation in respect of zinc carbon dry cell batteries market in India Vs. Eveready Industries India Ltd &Ors . | 19/04/2018 |
| **2017 Leniency orders** | | |
| Case No. | Name of the cases | Date of decision |
| Suo-Moto Case No. 03/2014 | Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items . | 18/01/2017 |

# CHAPTER – 4

# LENIENCY MECHANISM IN DEVELOPED ANTI TRUST JURISDICTIONS

## 4.1) Leniency provision in USA

### 4.1.1) Introduction

The Sherman Act of 1890, The Clayton Act of 1914, and The Federal Trade Commission Act of 1914 are the major acts that have been enacted in the United States of America to address the formation of cartels, collusion, restraint of trade, and other practises that are of an anticompetitive nature. The Federal Trade Commission (FTC) and the United States Department of Justice (USDOJ) are the two primary agencies in the United States that are tasked with the responsibility of adjudicating issues pertaining to competition law and enforcing anti-trust legislation, respectively.

According to the Sherman Act, any contract, combination in the form of trust, or conspiracy that is harmful to trade or commerce is illegal. This prohibition may be found in section 1 of the act. In the United States of America, certain types of cartels, such as price fixing, are deemed to be unlawful on their own. When we talk about something being prohibited "per se," we imply that there is no way to disprove the widespread belief that the action in question has a negative impact on the economy.

In this particular instance, a judgement that has already been rendered by a US court needs to be mentioned. A number of foundations were founded by doctors in the case "***Arizona v. Maricopa County Medical Society case"***[147], with the goals of promoting fee-for-service medicine and providing the community with a competitive alternative to the already existing health insurance programs. The foundations reached an agreement with their doctor members to determine the maximum fees that the physicians may claim as complete payment for medical services rendered to policyholders of certain insurance plans. This agreement determined the maximum fees that the doctors could claim. According to Arizona's allegations, the defendants participated in an unlawful price-fixing conspiracy that violated the first provision of the Sherman Act. The issue that was being considered by the Supreme Court of the United States was whether or not there had been a violation of section 1 of the Sherman Act. There were agreements among competing physicians that set, by majority vote,

[147] Arizona v. Maricopa County Medical Society , 457 U.S. 332 (1982),

the maximum fees that they could claim as full payment for medical services rendered to the policyholders of certain insurance plans. These agreements governed the maximum fees that competing physicians could charge for medical services rendered.

The United States Supreme Court reached the conclusion that the fee agreements that were disclosed by the evidence in the case among independent competing entrepreneurs, physicians, fell snugly into the mould of horizontal pricefixing and that this was a violation of the Sherman Act on a per se basis. Inside the borders of the United States of America, tampering with price structures is a criminal offence regardless of whether the agreement is written or verbal. The fact that the members of the organization that was fixing prices were not in a position to dominate the market was ignored as an irrelevant consideration. However, the fact that they increased, decreased, or maintained prices and that they had disrupted the natural flow of market forces was given more weight than it otherwise would have been.

In order to encourage cartel reporting, leniency programs have been set up. A cartel player may not only be participating in one market, but may also have a presence in other markets, hence information provided by any one player may be used to evaluate cartel behaviour in other markets as well. This is based on the fact that Several antitrust provisions outlined by the US Department of Justice might help break up cartels in several industries.[148]

It is possible to file for "Amnesty Plus," which allows a cartel member under investigation by the FTC to have his or her penalty reduced not only for the newly reported cartel but also the cartel that is already under investigation by that agency.

When a cartel is uncovered later and successfully prosecuted, the sentence is increased by 'Penalty Plus', even if the cartelist had the option to take advantage of 'Amnesty Plus.'

In a cartel investigation, witnesses are asked the "Omnibus Question." We want to know if they've heard of cartel behaviour in any other markets outside the one we're discussing right now. They're more inclined to spill the beans on other cartels because of the perjury penalty they face.[149]

The carrot-and-stick strategy that these laws use is having a positive effect. Vitamins cartels[150] in twelve various marketplaces were found in a series of probe releases one after

[148]Deepankar Sharma, *Dimensions Of Leniency Policies In Brics: A Comparative Analysis Of India, South Africa, Brazil And Russia,3* BRICS LAW JOURNAL 6, 17(2016).

[149]*Id.*

[150] The vitamin cartel is the most widespread and harmful antitrust crime the Division has ever found. The people in the vitamin cartel agreed on everything from how much each company would make to how much they would charge and to whom they would sell their products. The people who were hurt by this plot were the people who bought

the other, making them the most prominent example of this. An additional case in point is the cracking of the citric cartel[151], which in turn led to the bursting of the lysine cartel[152]. There are likely to be other governments that seek to model their rules after the US agencies.

### 4.1.2) Status of leniency in USA

The United States of America had devised a corporate leniency program as an incentive for cartel members to reveal the cartel. On October 4, 1978, the Antitrust Division made the first announcement on its leniency policy. At that time, Assistant Attorney General John H. Shenefield declared that the Division would be forgiving of a business that disclosed its own involvement in cartel cases before any inquiry had even been launched. He said the Division would be forgiving of a corporation that disclosed its own involvement in cartel situations. It is anticipated that it will provide the FTC with full cooperation in order to ascertain the criminality of the other cartelists.[153] Because it led to numerous significant criminal prosecutions, the initiative was met with a tremendous amount of favourable feedback. The entire operation caused a ruckus in the cartel industry as a result of the breaking of cartels in many sectors in the United States. On the other hand, as time went on, there was a gradual decrease in the number of applications and indications of interest.

Because the prior program did not contribute much of value, a new and improved leniency program was implemented. The new leniency program included an important new component, which is the ability to apply for leniency after an inquiry has already been launched.[154] The new policy updated the previous policy to let a corporation to come forward after the beginning of an inquiry, give full cooperation to the Division, and avoid criminal punishment for both the company and its officials who cooperated. The US Department of Justice's Antitrust Division (the Division or DOJ) merits high praise for its anti-cartel efforts, particularly the recent uptick in enforcement activity that has occurred since the late 1990s.

vitamins, which are usually used as dietary supplements or to make food and animal feed healthier. But in the end, the conspiratorial actions of cartel members hurt the wallets of almost every American who took a daily vitamin supplement or ate a bowl of cereal in the morning.

[151]Hoffman-La Roche formed the citric acid cartel in 1991 because it had been successful in the past with vitamins.

[152]The investigation into lysine broke up a deal between the world's biggest lysine producers to set prices and divide up the market. Farmers add lysine to animal feed, which is a $600 million-a-year business around the world. The members of the lysine cartel agreed on how to divide up the world market.

[153] John H. Shenefield, Assistant Attorney General, Antitrust Division, Statement before the 17th Annual Corporate Counsel Inst. (October 4, 1978), noted in Trade Reg. Rep. (CCH) para. 50,388,)

[154] Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Antitrust Enforcement: “Some Initial Thoughts and Actions”, address before the ABA Section of Antitrust Law, New York (August 10, 1993),

Internationally, cartel enforcement conducted by the Division is regarded as the "gold standard" for antitrust enforcement.[155]

Following the amendments that was made to the statute in the United States in 1993[156], the country observed a rise in the identification of criminal cartels that was twice as high within the first three years.[157] Leniency programs in the United States have been shown in studies to raise the incidence of cartel discovery while simultaneously reducing the rate of cartel formation by a factor of 62 percent, according to those studies.[158] There are presently more than fifty nations that have developed leniency programs for the conduct of cartels.[159] Cartel involvement is considered a criminal offence in the United States, which results in a legitimate fear of being subjected to punishment. The maximum penalties for breaches of the Sherman Antitrust Act of 1890 were amended in 2004, increasing the maximum jail term to 10 years and increasing the maximum fines to up to $100 million. Traditional investigative methods such as search warrants, subpoenas, and wiretaps have been successfully used by the United States government to effectively detect drug cartels. As a result, the United States has been successful in developing an environment that places businesses at a high risk of being discovered. [160]

Since the Antitrust Division's Corporate Leniency Program has been met with such overwhelming success, more than 20 of the world's antitrust agencies have attempted to model it after their own policies.[161] In addition to a host of other improvements to methods of detecting and prosecuting collusion, the ongoing use and refinement of the leniency programme by the division has saved American consumers and businesses Billions of dollars in damages that otherwise would have been inflicted by hard core cartels. This has been made possible by improvements to methods of detecting and prosecuting collusion. The fact that the Division has recently achieved much larger fines, a greater number of individual prison sentences, and a greater detection of cartels, as well as its leadership among international antitrust authorities, are all indications of its overwhelming success.

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[155] American Cartel Enforcement in Our Global Era, AntitrustInstitute.org (Preview of Am. Antitrust Inst. Cartel Chapter of Presidential Transition Rep., posted February 24, 2017).
[156]Corporate Leniency Policy 1993.
[157]Sahithya Muralidharan and Chaitanya Deshpande, *Scope for Intersection between Antitrust Laws and Corporate Governance principles vis-à-vis cartel deterrence in India* 9 NUJS L Rev 93 (2016).
[158] WORLD BANK DOCUMENTS, http://documents.worldbank.org/curated/en/929311540796598810/pdf/131396-WP-PUBLIC-2018-WBG-Leniency-Note-Indonesia.pdf last visited October 30, 2019.
[159]*Supra* note 120.
[160]US DEPARTMENT OF JUSTICE, www.justice.gov/atr/page/file/1091651/download (last visited April 4, 2020) .
[161] THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/leniency-program ( last visited May 16, 2018).

The Antitrust Division of the United States Department of Justice (DOJ) does not follow the guidelines established by any statute for its leniency program. The Antitrust Division is responsible for the operation of the program since it is within its purview to exercise prosecutorial discretion. Both the Antitrust Division's Corporate Leniency Policy and its Leniency Policy for Individuals are components of this program (US Leniency Program).

A program of leniency is available to both people and companies through this division's operations. The Leniency Program is the foundation for many of the Division's investigations into cartels.

The Corporate Leniency Policy creates two different categories of leniency for companies to choose from: Type A and Type B. These types of leniency offer lower punishments to encourage businesses to disclose antitrust crimes. Importantly, the Division will only approve one application for corporate leniency per cartel conspiracy. As a consequence, the program may lead to circumstances in which members of the cartel conspire to be the first to turn themselves in to the government. In order to qualify for Type A or Type B leniency, applicants must make a complete confession of their participation in the conspiracy, take measures to terminate such participation, and promise to cooperate fully with the Department of Justice's investigation and enforcement activities going ahead.

The degree of burden placed on the company that submits a request for leniency varies, based on the amount of evidence which has previously been gathered by the Division. In those cases when the Division has only collected a minimal information, the informant bears a larger burden and is required to reveal more information on cartel formation.

It is necessary to make notice of the functioning of leniency in practice in USA. The provision for tolerance in American law can be evaluated using one of several different yardsticks. The first compliance level that is set for the first five leniency considerations comprises first in and complete cooperation. This level of compliance must be reached before any further considerations can be made. The Division needs to be satisfied on its own level that the company that had come for leniency had been the first one to come and that they had given that amount of evidence without which the establishment of the guilt would not have been possible. Additionally, the Division needs to be satisfied that the company had given that amount of evidence without which the establishment of the guilt would not have been possible. In the same vein, the corporation should immediately stop participating in the cartel activities and put an end to it as soon as possible.

### 4.1.3) Infringements covered under leniency program

The US Leniency Program is only applicable to criminal antitrust violations, which, according to the policy of the Antitrust Division, include only agreements among competitors to fix prices, rig bids, restrict output, or allocate markets or customers. The US Leniency Program also only applies to antitrust violations that are committed in the United States.

An individual who is granted leniency from the Antitrust Division will not be prosecuted for any criminal offences that are an essential component of the antitrust violation, since this is the division's policy (for example, mail or wire fraud offences in connection with the general antitrust offence). On the other hand, the United States Leniency Program will only shield a leniency applicant from criminal prosecution by the Antitrust Division of the Department of Justice. This protection does not extend to any other divisions or departments within the DOJ. According to the Antitrust Division, independent prosecuting agencies have, historically speaking, chosen not to pursue leniency applicants for further criminal activity that is an essential component of the antitrust offence. However, there are significant exceptions to this rule, and the Division does not have the ability to prohibit the conclusion in question. In a similar vein, the Department of Justice cautions leniency applicants that they should not expect to evade punishment for offences that are not related to antitrust.

### 4.1.4) Recent updates on criminal leniency program by department of justice (DOJ)

Important clarifications and modifications to the Antitrust Division's Corporate and Individual Leniency Policies (the "Leniency Program") were announced on April 4, 2022, in the form of revised Frequently Asked Questions about the Antitrust Division's Leniency Program ("FAQs"). These announcements were made by the Antitrust Division of the United States Department of Justice.[162] The majority of the recently implemented changes to the Leniency Program represent a formalisation of the Division's ever-evolving policies. These practises are now more specifically stated in the amended Frequently Asked Questions. These clarifications include a more in-depth examination of the conditions for achieving certain statutory restrictions on civil damages claims in accordance with the Antitrust Criminal Penalty Enhancement and Reform Act (often known as "ACPERA").

[162]U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM, https://www.justice.gov/atr/leniency-program, (last visited May 12, 2022).

The Division made two significant announcements on the policy updates on 4th April 2022.[163] First, the Division made an announcement that any corporation that wanted leniency had to have "promptly" self-reported the anti-competitive activity to the Division when they found out about it. This was a requirement for leniency. Second, the Division made an announcement that any business that wishes to request for leniency is required to take steps to strengthen its compliance program as well as to repair the damage that was brought on by the anti-competitive behaviour that is not being compensated for by reparations. Both of these revisions have an effect on the manner in which the Division is likely to administer the Leniency Policy moving ahead, as well as the calculus, costs, and predictability for businesses who are thinking about asking for leniency.

The Division will provide complete immunity from criminal prosecution and related fines to the first entity that self-reports a criminal antitrust violation and, after that, fully cooperates in the investigation being conducted by the Division. This is done in accordance with the Corporate Leniency Policy.[164] In the majority of cases, leniency guarantees that the company's present officials, directors, and workers won't be prosecuted for their roles in the scandal. Due to the fact that leniency may only be granted to a single entity at a time, a corporation that is participating in a criminal antitrust conspiracy is in a race against other companies to achieve leniency.

Generally speaking, in order to initiate the leniency procedure, a company will first contact the Division in order to obtain a "marking." A "marker" essentially reserves the option for leniency, allowing the corporation time to offer material to the Division that supports the antitrust infringement, and thereby reserving the opportunity for leniency (referred to as "perfecting the marker"). There was no criterion that specified when a company must seek a marker or disclose the activity in order to be eligible for leniency, prior to the announcement of changes done in the leniency policy in April 2022.[165] In order to prevent another firm from acquiring the leniency marker, the Division had urged corporations to seek a "marker" at the

[163] Jonathan Kanter, Assistant Att'y Gen., U.S. Dept. of Justice, Antitrust Division, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (April 4, 2022) (hereinafter Kanter Remarks), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers .

[164] Although the Division initially adopted a policy of corporate leniency in 1978, the policy did not take its current form until 1993, when revisions were made. These revisions limited the discretion that the Division had in its application of the policy and extended the company's immunity to include its current directors, officers, and employees .

[165] US DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/page/file/926521/download, (last visited May 12th May 2022).

"first evidence of wrongdoing" and "as soon as practicable." However, there was no clear timing requirement for reporting.

When the division determines that the marker has reached an acceptable level of accuracy, they will send a letter granting conditional leniency. This is "conditional" on the corporation completing specific criteria, such as the company providing full cooperation in the investigation being conducted by the Division and the company compensating those who were harmed by the anti-competitive activity (where possible).

Before the amendments that was made in April 2022, there was nothing that specifically required extra "remediation" of the harm that was created by the action. The restitution requirement was the one that came the closest to being completed, although in reality, the condition was often satisfied by a firm when it was identified in civil follow-on damage claims. Throughout its history, the Division has not intervened in decisions on the amount of restitution that should be paid, the individuals to whom it should be paid, or the timing of when it should be paid. In addition, the Division has not stipulated the presence of a compliance program as a prerequisite for showing leniency.

On April 4, 2022, the Division rewrote a new leniency policy and a document titled "Frequently Asked Questions regarding the Antitrust Division's Leniency Program." Additionally, two significant revisions to the corporate leniency policy were revealed on that same day. First, in order to be eligible for leniency, a corporation must quickly self-report unlawful activity once it has become aware of it.[166] The Division considers a self-report to have been made in a timely manner if, taking into account the facts and circumstances of the illegal activity as well as the size and complexity of the company's operations, the company either disclosed the conduct at the first indication of possible wrongdoing or after conducting a timely, preliminary internal investigation to confirm that a violation occurred.[167] A self-report is not considered to have been made in a timely manner if the company did not disclose the conduct at the first indication of In either scenario, the burden of proof lies on the firm to demonstrate that its self-reporting was done in a timely manner.

If the company/firm is unable to provide evidence that its self-reporting was done promptly or in a timely manner, the Division will not show any tolerance toward the firm. The following is an illustration of a situation in which the Division will not consider a reporting

[166]US DEPARTMENT OF JUSTICE, https://www.justice.gov/atr/page/file/1490246/download (last visited May 12, 2022)
[167]US DEPARTMENT OF JUSTICE https://www.justice.gov/atr/page/file/1490311/download (last visited May 12, 2022)

to be completed in a timely manner: “A corporation finds out about unlawful behaviour, confirms it, and then waits and waits to see if the government takes any action about the illegal behaviour and then, once the government has opened an inquiry, the firm comes in and pleads for leniency—which is not appropriate behaviour for a corporation.”[168] According to the explanation provided by Assistant Attorney General USA, the newly implemented requirement for prompt reporting would guarantee that a company that realizes it committed a crime and then sits on its hands hoping it goes undiscovered does not qualify for leniency.

Second, in order to be eligible for leniency, a corporation must now demonstrate that it has taken corrective actions to repair the damage it has caused and to enhance the quality of its compliance program. The Division made it quite apparent that the reparation payments to those who had been harmed are in addition to these corrective efforts.

Despite the fact that it is still too early to know how severely these changes would effect the Division's Corporate Leniency Policy in practice, the modifications do introduce new conditions for corporations to qualify for leniency. In spite of this, it is far too soon to speculate on how considerably these modifications will effect the actual implementation of the program. The amendments also introduce ambiguity as to whether or not corporations will be able to fulfil the new standards (for example, did the company disclose “promptly” enough), as well as what the costs will be for appealing for leniency in the event of a violation (for example, what additional remediation will be required). Because of this, the revisions constitute a considerable divergence from the transparent and predictable approach that has, for a lengthy amount of time, been one of the contributing factors to the success of the Division's leniency policy.

[168]Lewis Crofts, Speed of disclosure of cartels to be evaluated based on company characteristics, U.S. DOJ enforcer says, mLex (April 6, 2022)

## 4.2) Leniency program in European Union (EU)

### 4.2.1) Introduction

Anti-competitive agreements and coordinated practices are not allowed by European law according to Article 101 of the Treaty on the Functioning of the European Union (TFEU). At the European level, it is managed by the European Commission (Commission), but under Regulation (EC) 1/2003 on the implementation of the rules on competition that are laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty), member state competition agencies are also empowered to apply Article 101 of the TFEU in parallel with their own national rules. This is because Article 101 of the TFEU states that member state competition agencies are authorized to do so (Modernization Regulation).

The European Commission's leniency programme is governed by the Notice on immunity from fines and reduction of penalty in cartel cases (OJ 2006 C298/17) (2006 Leniency Notice), which was published on December 8, 2006 and updated on August 5, 2015. The programme addresses specific infractions of Article 101 of the Treaty of the European Union. The Commission's leniency programme is now recognised in main legislation as a result of Regulation (EU) 2015/1348 modifying Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. This came about as a result of the adoption of Regulation (EU) 2015/1348.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) can also be applied via national leniency programs run by competition authorities of member states. When filing applications for immunity and leniency to the European Commission, businesses will frequently choose to make simultaneous applications (perhaps in brief form) to relevant member state authorities. This is to prepare for the possibility that the Commission may decide not to launch an inquiry into the relevant behaviour in its entirety or in part. The Notice on co-operation within the network of competition authorities that was published in the Official Journal of the European Union (OJ 2004 C101/43) addresses the concurrent operation of several leniency regimes (ECN Notice).

### 4.2.2) Administrative or Regulatory body

Infractions of Article 101 of the TFEU, as well as the administration of the EU's leniency programme, are both the responsibility of the Commission's Directorate General for Competition (DG COMP), which is also in charge of conducting investigations and issuing sanctions.

However, in accordance with Regulation (EC) No. 1/2003[169]. Cartels fall within the purview of the national competition authorities (NCAs) located throughout the European Union. These NCAs are fully competent to implement both Article 101 of the Treaty on the Functioning of the European Union (TFEU) and their own domestic competition legislation.[170] The European Commission is the primary enforcement agency in the European Union, with the Competition Directorate General (the DG Competition) primarily responsible for the enforcement of the competition rules. In addition to the laws that govern antitrust in their respective countries, national courts are required to apply Article 101 to any activity that involves a cartel. In addition to the antitrust laws of their respective countries, national courts are required to apply Article 101 to cartel activity.

The Commission possesses extensive investigative and inspectional powers, including the authority to search private premises, question individuals, demand the production of information, and take statements from witnesses. Additionally, the Commission has the authority to seal premises or business records.[171] In addition, the Commission has broad discretion regarding the imposition of hefty fines for engaging in anticompetitive cartel behaviour in violation of Article 101 of the TFEU as well as for violations of the procedural rules (e.g., for failure to provide information).

[169] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty

[170] If a national competition authority within the European Union uses domestic competition law to investigate a cartel that may affect trade between Member States, then that authority is required to also apply Article 101 of the Treaty on the Functioning of the European Union (TFEU). This provision is found in Article 3(1) of Regulation (EC) No. 1/2003 .

[171] Regulation (EC) No. 1/2003 contains the most important regulations pertaining to the cartel enforcement processes that are carried out by the Commission. Regulation No. 773/2004, which controls the beginning of proceedings, the conduct of investigations, the management of complaints, and the hearing of parties, contains other pertinent rules .

### 4.2.3) Status of leniency scheme in EU

According to statements made by Margrethe Vestager, the EU Commissioner for Competition, cartels are the most basic danger to competition, and ever since the early days of the EU, the battle against cartels has been right at the top of the Commission's agenda.[172] However, the Commission is willing to consider granting preferential treatment to companies who volunteer information about a cartel in which they participate and in which they are involved. Individuals who are interested in providing information on cartels can also take use of an anonymous tip-off mechanism that is provided by the Commission.

1996 was the year that the European Commission issued its very first Leniency Notice.[173] In the year 2002, a new first Leniency Notice took the place of the previous one.[174] The most significant alterations were that immunity was made automatic and that reductions in fines were made to be more closely connected with the date of cooperation. In 2006, the European Commission made additional changes to its Leniency Notice. These changes were primarily intended to clarify the requirements for immunity in terms of the information that must be submitted, as well as the need of all leniency applicants to cooperate.[175]

### 4.2.4) Provisions under 2006 leniency notice of EU

**The Provisions under 2006 leniency notice, which is currently applicable, are as under**

- If an undertaking admits its membership in a cartel and is the first to offer information and evidence that the European Commission believes will enable it to conduct out a targeted examination in connection with the cartel, and if, there at time of the request for immunity, the European Commission did not yet have sufficient evidence to make decision to carry out the targeted inspection, then the European Commission will give the undertaking immunity from a potential fine that could be imposed.[176]
- The applicant asking for immunity must give the Commission a "leniency corporate statement."[177] This statement can be written or spoken, and it must include a detailed

[172]Margrethe Vestager, EU Commissioner for Competition: 'A new era of cartel enforcement' speech, 22 October 2021
[173] The Corporate Leniency Policy that was implemented in 1993 by the United States Department of Justice served as a clear source of inspiration for the 1996 Leniency Notice. This was much more apparent in the previous draft notice that was issued by the European Commission as part of the consultation procedure that took place before to the approval of the 1996 Leniency Notice; [1995] OJ C341/13.
[174] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C45/3.
[175] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17.
[176] Judgment in EGL and Others v Commission, T-251/12, EU:T:2016:114, paragraphs 148-169.
[177] The term "leniency corporate statement" is defined in Article 4a of Commission Regulation No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, as amended by Commission Regulation (EU) 2015/1348 of 3 August 2015, [2015] OJ L208/3, as a "voluntary presentation of [the undertaking's] knowledge of a secret cartel and [its] role therein, which may also be in the form of voluntary presentations of the knowledge of former or current employees or representatives of the

description of the cartel arrangement, as far as the applicant knows it at the time of the submission, as well as any other evidence about the alleged cartel that the applicant has or has access to at the time of the submission, especially any evidence that happened at the same time as the infraction.

- In the event that immunity has not been granted to any undertaking on the grounds described above, the Commission will instead grant immunity to the undertaking that was the first to submit information and evidence that will assist the Commission in finding a violation of Article 101 TFEU related to the cartel, provided that the Commission did not have enough evidence at the time that the submission was made. The undertaking is obligated to provide the Commission with proof of the alleged cartel from the time it occurred as well as a statement
- To get immunity, one must meet several other requirements. The undertaking must cooperate honestly, fully, continuously, and quickly from the time it submits its application throughout the Commission's administrative procedure. The undertaking must also have stopped participating in the cartel immediately after submitting its application, except for what the Commission thinks is reasonable to do to keep the integrity of the market. Also, an undertaking that tried to force other companies to join or stay in the cartel is not eligible for immunity.
- Undertakings disclosing their participation in a cartel that do not meet the requirements for immunity may still be eligible to reduce any fine that would otherwise be imposed if they provide evidence that represents significant added value compared to the evidence already in the European Commission's possession and meet the same conditions of genuine, full cooperation and termination of the infringing activity.[178]
- The first undertaking to produce such substantial additional value would earn a 30 to 50 percent reduction in the penalties that would have otherwise been levied. The second undertaking will receive a discount of 20 to 30 percent, and future undertakings will receive a discount of up to 20 percent.
- The degree of additional value relies on the amount to which the evidence given increases the European Commission's capacity to show the violation, either by its very nature or its level of specificity. The degree of corroboration from other sources necessary for the submitted evidence to be relied upon against other undertakings implicated in the cartel will

undertaking", "drawn up specifically for submission to the Commission with a view to obtaining immunity from or reduction of fines under the Commission's leniency programme".

[178]OECD,http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf (last visited Dec 13, 2021)

effect the value of that evidence, therefore compelling evidence will be given more weight than uncorroborated or just corroborating comments.

The European Commission adopted a cartel settlement procedure in 2008. Under this procedure, undertakings can receive an additional 10% fine reduction in cases where the Commission deems it appropriate by submitting a formal settlement submission that includes an admission of the violation and the undertaking's responsibility for it, the acceptance of a range of potential fines, and the waiver of a few procedural rights. [179]

The Leniency Notice, Fining Guidelines, and cartel settlement mechanism of the European Commission only apply to the European Commission's own antitrust enforcement.

However, the restriction on cartels that is found in Article 101 of the TFEU is also implemented by the competition authorities of each of the EU Member States. Indeed, the EU Member States are required to have a national competition authority that is authorised to apply Article 101 of the TFEU. Furthermore, those national competition authorities are required to apply Article 101 of the TFEU whenever they apply their national competition laws to cartels that may affect trade between Member States in accordance with Regulation 1/2003,[180] which came into effect on May 1, 2004.

Beginning with the British and German competition authorities in 2000, the majority of EU Member States' competition authorities have also implemented a leniency programme, following the lead of the European Commission. The different national competition agencies' leniency programmes and those of the European Commission are autonomous and separate from one another.[181] The European Competition Network (ECN), which unites the European Commission and the competition authorities of the EU Member States, established a first ECN Model Leniency Programme in 2006 and a second, amended one in 2012. As a consequence of this soft harmonisation, they are nonetheless mostly identical.[182] Last but not least, the European Parliament, Council, and European Commission adopted measures in

[179]See Article 10a of Commission Regulation No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] OJ L171/3 (further amended in 2015 by Commission Regulation (EU) 2015/1348, [2015] OJ L208/3), and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, [2008] OJ C167/1 (amended in 2015 by a Communication from the Commission, [2015] OJ C256/2) .

[180] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

[181] See Judgment in DHL Express, C-428/14, EU:C:2016:27, and Opinion of Advocate-General Wathelet in the same case, EU:C:2015:587.

[182] See the European Commission's ECN website: http://ec.europa.eu/competition/ecn/documents.html. The ECN Model Leniency Programme is not legally binding;

2014 and 2015 to limit the liability of businesses granted immunity under the leniency programme of the European Commission or a national competition authority in follow-on lawsuits for damages to their direct or indirect suppliers or customers, as well as to prohibit the use of leniency statements and settlement submissions in follow-on lawsuits for damages.

#### 4.2.5) Waivers of confidentiality

A leniency applicant must notify the Commission of any further applications they have submitted to or plan to submit to other competition authorities, according to the Commission Leniency Notice.

This information is meant to help the Commission work with other competition authorities on its investigation. Except for information exchanges within the European Competition Network, which are governed by specific rules,[183] the Commission will only share information received under the Leniency Notice with other competition authorities if the leniency applicant signs a waiver of confidentiality.

The International Competition Network (ICN) has adopted Waiver Templates and an Explanatory Note to make it easier to give waivers and make them the same everywhere (2014). DG Competition has given its full support to both this guidance and the ICN template. When making their first request under the Commission Leniency Notice, the applicants should give the waiver right away.

The ICN waiver template doesn't stop the competition authorities from sharing documents they get from leniency applicants. But DG Competition will usually only talk about general case information and won't share documents of this kind with the competition authorities listed in the waiver. Such exchanges could only happen in rare cases and with the applicant's permission ahead of time. Under EU competition law, no one can be charged with a crime. But the ECN+ Directive says that Member States have to make sure that the employees of applicants for immunity from national competition authorities and the Commission are not prosecuted or punished at the level of a Member State, where criminal penalties could be given to individuals.

[183]see Regulation 1/2003 and the Commission Notice on cooperation within the Network of Competition Authorities

### 4.2.6) Conclusion

The European Commission might use its investigative authorities, such as requests for information and inspections, to gather the information essential to uncover and penalise cartels from the firms implicated.[184] Legally, the European Commission may only utilise these tools if it already has a reasonable amount of information about the alleged cartel breach.[185] The exercise of these investigative capabilities is also difficult and takes a lot of time and administrative resources if the corporations involved do not cooperate fully. Cartelists will have learned their lessons and take great care to minimise written evidence of their plots in areas with a history of effective cartel enforcement.

The European Commission receives the assistance of the leniency applicants, through their leniency applications and their ongoing cooperation during the administrative procedure, which significantly reduces the difficulty, time and administrative cost of collecting intelligence and evidence of cartel violations.

Cartel enforcement resources will remain the same, but the European Commission will be able to catch and prosecute more of them. It may also speed up the completion of cartel investigations, since more and stronger evidence may be gathered, allowing for bigger fines to be imposed.

Competition Commissioner Margrethe Vestager announced on October 22, 2021, a new era for cartel enforcement in the EU, citing possible revisions to EU leniency policies in light of growing private lawsuits. There were just three cases in which the European Commission issued a ruling in 2020.[186] Cartel judgments have risen to seven in 2021, an increase of three.

The amount of leniency applications, which were formerly the driving force behind cartel enforcement, has decreased. A growing number of companies are concerned about the potential consequences of future damages lawsuits. In order to evaluate the appeal of its leniency programme, the European Commission is conducting consultations with companies and other competition enforcement agencies. Even while the regulations in Germany have already been altered, the country is considering offering even more perks to those seeking impunity, such as enabling cartel bosses to petition for leniency as well.

[184]'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Examination' (2003) 26 World Competition 567

[185]Heidelberg Cement v Commission, C-247/14 P, EU:C:2016:149

[186] European Commission Cartel Statistics, period 2017-2021; AT.40410 – Ethylene; AT.40299 – Closure Systems; AT. 39563 – Retail Food Packaging (re-adoption).

For the European Commission, whistleblowers are becoming increasingly important. For every year, it gets about 100 pertinent communications via its own electronic instrument.

# CHAPTER – 5

# UNCERTAIN APPROACH OF CCI TO DECIDE LENIENCY: ANALYSIS OF INDIAN DECISIONS

## 5.1) Introduction

Section 3(1)read in conjunction with section 3(3) of the Competition Act, 2002 forbids cartels in India. The Act's Section 3(1)prohibits undertakings from engaging into arrangements that have or have the potential to have a significant detrimental impact on competition (AAEC). In accordance with Section 3(3) of the Act, once a cartel is established, it is presumed to produce an AAEC on the market without the requirement for a detailed analysis of the consequences.

Despite the fact that the leniency Regulations have been in effect for 13 years, India has only just started to see leniency requests. Section 46 of the Act gives the Competition Commission of India (CCI) the authority to impose lesser punishments and lays out a number of disclosure conditions that must be met by the leniency applicant in order to qualify for leniency.[187] The Regulations specify the process and the reduction in fines that are given to businesses or people that want to come forward and share information about cartels. Previously, only the first three applicants to request leniency received fine reductions since the reduction was dependent on a marker system.[188] The "first-in" applicant is entitled for a 100% fine reduction if it allows the CCI to take cognizance of a matter or conduct an inquiry entirely on the basis of the information submitted. However, the 2017 Amendment abolished this restriction on the number of markers. The fine reduction for the second applicant can be up to 50%, and for the third and subsequent applicants, it can be up to 30%.[189] The Regulations define "added value"[190] as the degree to which the proof offered by the applicant in question improves the CCI's or the Director General's (DG)[191]ability to prove the existence of a cartel that is claimed to have breached section 3 of the Competition Act 2002.

[187]Competition Act, 2002, *supra* note 7, at § 46
[188]*Supra* note 6.
[189] Amendment to Regulation 4 of the 2009 Lesser Penalty Regulations; Although the first petitioner named additional cartel members in the material provided, this does not show their participation in the organisation. The terms "essential disclosure" and "substantial value added" take on special relevance in this situation; the more convincing the evidence, the more probable it is that the punishment will be reduced.
[190]*Supra* note 1, at regulation 4(b) Explanations.
[191] A Director General is appointed to assist the Competition Commission of India in conducting investigations into any violations of this Act's provisions.

The Indian Competition Law system has not been as successful as the American system. The reason is that the Commission in India has too much freedom of choice. The Regulations say that because of this, the Commission has a lot of freedom to decide the penalty for the first applicant based on things like important disclosures, the stage of the application, and confessions made later. Also, the "any other condition" parameter isn't very clear and adds another layer of uncertainty, making it harder for cartel participants to talk to the Commission. In contrast, the leniency regime in developed countries like the USA and Australia has well-thought-out rules that reward the first person to come forward about a cartel.[192]

In the last six years, companies have used and benefited from the Competition Act, 2002 (the "Act") leniency provisions more and more. The Indian competition law's leniency framework is made up of Section 46 of the Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (called the "Leniency Regulations"). The leniency framework gives the CCI the power to reduce penalties for whistleblowers, such as companies and their officers who are part of a cartel and tell the CCI important information. Such a reduction in penalty is only possible if the person asking for leniency tells the truth about the existence of the cartel, its role, how it works, its goals, etc. Even though the CCI has been using the leniency provisions quite often, it is hard to see a pattern because of how they do it.

## 5.2) Pattern followed by CCI while deciding the leniency applications

Under the Indian Leniency Regime, the Competition Commission of India (CCI) has a great deal of leeway to decide how much of a reduction in punishment should be granted. This gives the CCI discretionary powers. In accordance with the Lesser Penalty Regulations, the CCI is required to exercise this discretion while giving due consideration to the following factors: the stage at which the applicant comes forward with its disclosure; the evidence already in possession of the CCI; the quality of the information provided by the applicant; and the entire set of facts and circumstances surrounding the case.

In fact, the CCI has only reduced penalties by one hundred percent in cases where the first-in-line application was presented to the CCI at the very beginning, that is, when it exposed the existence of a cartel and made it possible to initiate an investigation. Even if the initial application is submitted after the start of an inquiry, the applicant may still be eligible for a

[192]EUROPEAN COMMISSION, http://ec.europa.eu/competition/cartels/leniency/leniency.html (Last visited Jul 28, 2020).

one hundred percent reduction in their sentence under the Lesser Penalty Regulations; however, this is contingent upon the applicant meeting all of the necessary requirements.

If an undertaking does something that is against competition, the penalty can't be more than 10% of the average turnover[193] of that undertaking over the three years before the offence. In the case of a cartel, however, the CCI can impose a fine of up to three times the profit of the violating undertakings or 10% of the undertaking's turnover for each year the cartel continues, whichever is greater.

However, in its decisional practice, the CCI has not awarded complete reduction to first-in-line applicants who petition for leniency after an investigation has been launched. This is due to the fact that the DG has already been in receipt of pertinent material at that stage in the process. In one instance like this one, the CCI only allowed the first petitioner a reduction in penalty that was 75% of the original amount.

## 5.3) In re: Indian railways for supply of brushless DC fans and other electrical items

**(Suo Moto Case No. 03 of 2014, Order dated 18.01.2017)**

The first order passed by the CCI with regards to leniency under the Competition Act was on 18th January 2017 when CCI granted leniency to the first applicant in Suo motto case No. 03 of 2014. This was the first time in the history of Competition Act 2002 that CCI passed order dealing the leniency provisions under the said Act.

So we can say that this case provided a footprint for the future leniency orders.

### 5.3.1) Facts & Background

The matter was related to the bid rigging in a tender floated by Indian Railways with regards to the supply of Brushless DC fans and other electrical items. The proceeding was instituted by the CCI based on the information provided by S.P of Anti Corruption, HQ, Central Bureau of Investigations. The S.P through a letter dated 01/04/2014 informed the CCI that while conducting an inquiry against a public servant the CBI came to know that three firms were involved in a cartel with respect to tenders floated by Indian Railways and Bharat Earth Movers Limited (BEML) for supplying brushless DC fans and other electrical items.

The SP in the letter dated 01/04/2014 mentioned that while the CBI was inquiring into the matter of the public servant got the email dated 17/03/2013 of Ramesh Parchani who was the

[193] According to the Supreme Court's ruling in Excel Crop Care Ltd. v. Competition Commission of India, Civil Appeal No. 2480 of 2014, turnover is to be considered as relevant turnover.

partner of M/S Western Electric and Trading Company, with an attachment giving the details of all four tenders floated by the Railways and BEML for providing DC fans, that detail included the rates and quantity units to be quoted by other members of cartels. The CBI also provided the attachment and the copy of the said email to the CCI. The informant provided the further details to CCI.

CCI then formed a prima facie opinion based on the information given by CBI and directed the Director General to proceed under section 26 (1) of the Act and to submit the report by conducting a detailed investigation.

While investigating, the DG took a note that amongst the parties that participated in the tenders, *M/s Pyramid Electronics*, *M/s R. Kanwar Electricals* and *M/s Western Electric and Trading Company* were Part I suppliers[194] and, M/s Kapson Industries Ltd., Jalandhar, M/s General Auto Electric Corporation, Mumbai, , M/s Light Engineering Corporation , Parwanoo and were Part II suppliers while the unapproved supplier was M/s BBC Corporation.

On the issue whether *M/s Pyramid Electronics*, *M/s R. Kanwar Electricals*and *M/s Western Electric and Trading Company* had violated Section 3(3)(d) read with Section 3(1)of the Act, the DG observed the e-mail dated 17.03.2013 which was furnished to the CCI by CBI. It was noted that the partner of *M/s Pyramid Electronics* Shri Sandeep Goyal, had sent this e-mail to the partner of *M/s R. Kanwar Electricals* Shri Ashish Jain, on 17.03.2013 Shri Ashish Jain had then forwarded this mail to Shri Gulshan Kapoor, the office executive of *M/s Western Electric and Trading Company*. The Director General then analysed and compared the rates submitted by *Pyramid Electronics* with regards to the mentioned four tenders and concluded that the rate put by *Pyramid Electronics* for tender No. 3012042OT460 dated 27.02.2013was the same as the rate mentioned in the attachment to the e-mail and the rate submitted for tender No. 4102130113 dated 25.03.2013 was almost identical. The comparison of the rates quoted by OP 1 *vis-à-vis* the rates suggested in the e-mail, is as follows:

[194] Research Designs & Standards Organisation, Lucknow ('RDSO') approved vendors are divided into two categories –Part I source/ supplier and Part II source/ supplier. Part I supplier is an older approved vendor which has earlier supplied as a Part II supplier for a certain period of time and whose supplies have received favourable report from the user (railway unit) .

**M/s Pyramid Electronics[195]**

| Tender No. and Due date | Procurer/ Tenderer | Rates suggested in the E-mail dated 17.03.2013 | Rate actually quoted | Remarks |
|---|---|---|---|---|
| 30120402OT460 (27.02.2013) | N.E Railway | 3510 | 3510 | Identical |
| 45131110 (20.03.2013) | S.C. Railway | 3481 | 3610.80 | Different |
| 4102130113 (25.03.2013) | North Railway | 3481 | 3480.75 | Almost Identical |
| DR01/RM2/120012 0506, BEML (26.03.2013) | BEML | 3520 | 3570.75 | Different |

After observing the similarity or equality of rates put by M/s Pyramid Electronics with that of the rates fixed in the attached email, the Director General concluded that Mr. Sandeep Goyal who was the partner of M/s Pyramid Electronics, had on 17th February 2015 admitted his sending of email to Mr. Ashish Jain, the partner of M/s R. Kanwar Electricals on 17th March 2013 and also admitted that the email contained an attachment which provided the distribution of the rates of bidding amongst M/s Pyramid Electronics, M/s R. Kanwar Electricals and M/s Western Electric and Trading Company for Brushless DC fans. Before quoting the bids for all tenders pertaining to Railways, contacted with Mr. Ashish Jain of M/s R. Kanwar Electricals and which lead to the quotation of almost same rates by others applicants also in those tenders. He also confirmed that, he along with Shri Ashish Jain of M/s R. Kanwar Electricals and Shri Ramesh Parchani of M/s Western Electric and Trading Company were involved in bid rigging with respect to these tenders. He also confirmed that

[195] *Supra* note 2.

they were in frequent conversation over phone regarding this bid rigging and also furnished the call records for the same. Which was also observed as true by the Director General by going through the call records of Mr. Sandeep Goyal, Mr. Ashish Jain and Mr. Ramesh Parchani. On the basis of all these data, the Director General concluded that M/s Pyramid Electronics had colluded with M/s R. Kanwar Electricals and M/s Western Electric and Trading Company to rig the bids.

The forwarding of the said email dated 17th March 2013 to an officer of M/s Western Electric and Trading Company by Mr. Ashish Jain of M/s R. Kanwar Electricals was an indication of involvement of M/s R. Kanwar Electricals in the alleged cartel for bid rigging, as observed by the Director General.

When the Director General compared the rated submitted by M/s R. Kanwar Electricals with regard to the all four tenders with the rates as agreed/sent in the attachment of the email, the Director General found that M/s R. Kanwar Electricals had not changed the rates and quoted the same rates which was sent through email in the attachment with respect to tender No.30120402OT460 and tender No. 4102130113. The rates suggested in the email dates 17th March 2013 and the rates actually quoted by R. Kanwar Electricals is as shownbelow :

**R.Kanwar Electricals[196]**

| Tender No. and Due Date | Procurer/ Tenderer | Rates suggested in the E-mail dated17.03.2013 | Rate actually quoted | Remarks |
|---|---|---|---|---|
| 30120402OT460 (27.02.2013) | N.E. Railway | 3481 | 3481.07 | Almost Identical |
| 45131110 (20.03.2013) | S.C. Railway | 3495 | 3757 | Different |
| 4102130113 (25.03.2013) | North Railway | 3520 | 3520 | Identical |
| DR01/RM2/1200120506 BEML (26.03.2013) | BEML | 3495 | Not bid | -- |

[196] *Id.*

Now the DG started assessing the conduct of Mr. Ramesh Parchani of M/s Western Electric and Trading Company. The DG was aware of the facts that Mr. Parchani of M/s Western Electric and Trading Company received the email (forwarded) by one of the executives of M/s Western Electric and Trading Company which in turn received this email from Mr. Ashsih Jain of M/s R. Kanwar Electricals, so the Director General here also started comparing the rates of the tender which was suggested to Mr. Ramesh Parchani of M/s Western Electric and Trading Company through the forwarded email and the rates actually Mr. Parchani quoted. The Director General found that the rates quoted by Mr. Parchani with respect to tender no. 30120402OT460 was approximately similar to what rates were suggested in that email. It was also found that rates quoted by Mr. Parchani with respect to tender no. 4102130113 was exactly same as suggested in that email. The rates suggested in the email and the rates actually quoted by M/s Western Electric and Trading Company is as shown below.

**M/s Western Electricals and Trading Company[197]**

| Tender No. and Due Date | Procurer/ Tenderer | Rates suggested in the E-mail dated17.03.2013 | Rates actually quoted | Remarks |
|---|---|---|---|---|
| 30120402OT460 (27.02.2013) | N.E Railway | 3495 | 3491.98 | Marginal difference |
| 45131110 (20.03.2013) | S.C Railway | 3520 | 3530 | Marginal difference |
| 4102130113 (25.03.2013) | North Railway | 3495 | 3495 | Identical |
| DR01/RM2/1200120506, BEML (26.03.2013) | BEML | 3481 | 3498.36 (Quoted by M/s Crompton Greaves Ltd.) | Different |

[197] *Id.*

When the DG was in the course of investigation, the Pyramid Electricals who was OP No. 1 filed an application under lesser penalty regulation, called a leniency application to CCI under section 46 of the Competition Act 2002 and admitted the existance of a cartel amongst R. Kanwar Electricals, M/S Western Electric and Trading Company and Pyramid Electricals. It has also provided the evidence in support of the cartelization.

### 5.3.2) Order & Analysis

The Director General submitted the report after a detailed investigation and conclusion. In a result of this the CCI after considering the report of the DG and submissions of the defendants held the cartelization of three parties named R. Kanwar Electricals, M/S Western Electric and Trading Company and Pyramid Electricals in four tenders floated by Indian Railways and BEML and ultimately imposed a penalty on these three parties and also on their responsible officers.

However CCI while entertaining the leniency application of Pyramid Electricals have observed the following points :

- That M/S Pyramid Electronics which was OP No. 1 has submitted the leniency application before the DG submitted the report of investigation.

- It has also praised Pyramid Electronics for providing the substantial evidence as a leniency applicant which corroborated the findings available with the DG

- However the CCI held that the application for leniency had been made by the applicant after the forming of prima facie opinion by CCI.

- CCI also supported that the pre application (leniency) evidences with the CCI was relatively substantial.

Pyramid Electricals was given a 75% leniency in penalty by the Commission as a result. This reduction was also handed to the relevant person who was in charge of Pyramid Electricals. R. Kanwar Electricals and Western Electric, the other two bidders, did not request mercy and were not given any relief from the penalties.

## 5.4) In *re*: Cartelization in respect of zinc carbon dry cell batteries market in India

**Suo Moto Case No. 02 of 2016, Order dated 19.04.2018**

On April 19, 2018, the Competition Commission of India ("CCI") published an order holding the three manufacturers of zinc carbon dry cell batteries in India, viz. Eveready Industries India Ltd. ("Eveready"), Indo National Ltd. ("Indo National") and Panasonic Energy India Co. Ltd. ("Panasonic"), a subsidiary of Panasonic Corporation Japan, along with their association, Association of Indian Dry Cell Manufacturers ("Association"), guilty of cartelization by fixing prices of zinc carbon dry cell batteries, limiting supply of batteries and dividing geographical market and consumers amongst themselves

### 5.4.1) Facts

Panasonic Energy India Co. Ltd. Filed an application on 25th May 2016 to the Competition Commission of India under Competition Commission of India (lesser Penalty) Regulations, 2009 read with sec 46 of Competition Act 2002. On the basis of this application the CCI taken the case into consideration suo motto.

Panasonic Energy India Co. Ltd in its application revealed the existence of a cartel amongst Eveready Industries India Ltd., Indo National Ltd. and Panasonic Energy India Co. Ltd. to control and manage the rates and circulation of zinc carbon dry cell batteries in India. This was in the violation of section 3(3) of the Act read with section 3(1)of the same. The subject matter of the cartelization was the manufacture of zinc carbon dry cell batteries. As the contravention to the provisions under the Act attracts huge penalties which can be equal to 10% of the average turnover of the enterprise, the Panasonic Energy India Co. Ltd. decided to file the leniency application. The applicant also disclosed that all the three members of the alleged cartel was the member of a trade association called Association of Indian Dry Cell Manufacturers which facilitated dissemination of data amongst them and helped in maintaining transparency in that regard. This association was also a party to the case of cartelization. The leniency applicant in its application revealed that the cartel members including the applicant were in trouble in 2013 due to the rising input cost incurred by them while producing and their previous attempt to neutralize this situation by hiking the price of zinc carbon dry cell batteries was a fail so by being harassed with the rising input cost, they decided to hike the maximum retail price of zinc carbon dry cell batteries and this was under a mutual understanding amongst them as the members of the cartels including the applicant

were knowing each other from years. This relation and situation facilitated them to form a cartel.

### 5.4.2) Order and Analysis

The commission observed on the basis of the disclosure made by Panasonic Energy India Co. Ltd. that:

a) There was a price increase which was coordinated by the members of the cartel including the leniency applicant (Panasonic Energy India Co. Ltd.)
b) Attempts to reduce the competition of prices at different levels of production chain by the members of the cartels (including Panasonic Energy India Co. Ltd.)
c) Serious measures were being taken by the members of the cartels (including Panasonic Energy India Co. Ltd.) to control the price and price competition amongst them.

So ultimately the commission based on all the material records and its observations made a prima facie opinion that, there was a violation of section 3 of the Competition Act 2002 by the accused enterprises (including Panasonic Energy India Co. Ltd.) and hence passed an order directing the office of Director General to conduct an investigation under sec 26 of the Competition Act 2002 and to submit a report of the detailed investigation. In its order the CCI also ordered the DG to conduct the investigation regarding the roles of the officers/executives of the accused enterprises. The search and seizure of the premises of the accused enterprises was also conducted by the DG pursuant to the search warrant issued to Chief Metropolitan Magistrate. The DG then recorded the testimonies of the management of the accused enterprises, started collection and assessment of data, the DG had also sent questionnaires to the accused persons. The evidence was collected from the premises of all the three parties by the Director General by conducting dawn raids in August 2016[198]. It was found in the investigation that the cartel were in existence from 2008 and the top management of the enterprises used to meet regularly on the issues of quantum of price rise and allocation of territories. The Association of Indian Dry Cell Manufacturers used to give them a platform to exchange commercially sensitive information.

Later in the month of August 2016, Eveready Industries India Ltd., had also filed the leniency application under regulation 5 of the Lesser Penalty Regulations 2009 read under sec 46 of

[198]Sai Krishna & Associates, https://www.saikrishnaassociates.com/appreance/images/pdf/compbuzz/Comp_Buzz_May_2018.pdf (last visited July 7,2021).

the Competition Act 2002 and later in September 2016 Indo National Ltd. has also filed the leniency application under the same provision.

The evidence arranged in this case indicated that the applicants (leniency applications) had the agreement amongst them under which they were exchanging price sensitive information amongst themselves for the sake of price setting and coordination. This arrangement between them existed from the time when section 3 of the Act was not enforceable. The arrangement between them was in existence from 2008 which continued till 23rd August 2016 when the DG conducted search and seizure. In order to get effect in their price arrangement Eveready Industries India Ltd. ("Eveready") used to announce its price increase through a press release which was being followed by Indo National Ltd. ("Indo National") and Panasonic Energy India Co. Ltd. ("Panasonic"), and they have done it almost 6 times. a subsidiary of Panasonic Corporation Japan, along with their association, Association of Indian Dry Cell Manufacturers ("Association"). The DG has also referred one email sent by R.P Khaitan of Indo National Ltd. ("Indo National") to Suvamoy Saha of Eveready Industries India Ltd. ("Eveready") in which these two shared their prices with suggestions. Mr. SuvamoySaha also accepted by seeing this email through the DG that by this email Mr. Khaitan had sent a pre discussed price with comments to him. Mr. Khaitan also confirmed this.

The DG also got various evidence against all the three enterprises in the form of fax, emails and meeting details which proves that there were coordination amongst the enterprises to hike the prices from several years.

In the matter of AIDCM who is also a party to the investigation, the DG found that AIDCM was indulged in providing platforms to the manufactures to discuss and pass information to each other regarding the price.

Based on the previous analysis, the DG came to the conclusion that OPs had engaged in anticompetitive agreements, conduct, and practice s during the time period from 20 May 2009 to 23 August 2016, in violation of Section 3(3)(a), 3(3)(b), and 3(3)(c) of the Act when read with Section 3(1). Following the discovery of the aforementioned contravention, the DG named specific individuals in accordance with Section 48 of the Act who actively participated in the violation of Section 3's provisions as well as those who were in charge of and accountable to the relevant companies for the conduct of their businesses. The Managing Director, Joint Managing Director, Whole-Time Director, Head of Marketing & Sales, and other officers/office bearers of OPs were discovered to be actively involved in this matter by the DG.

The Commission carefully studied the DG's investigation report before deciding to send an electronic copy of it to the OPs and anyone else the DG determined to be accountable for violating Section 48 of the Act in order for them to submit any comments or objections. The 28th November 2017 saw the hearing of OPs.By making a complete, accurate, and crucial disclosure about the alleged cartelization in the zinc-carbon dry cell battery, according to OP-1, it has added "significant value" to the case. It has also been revealed that Geep Batteries (India) Private Limited (hereafter, "Geep") was a member of AIDCM along with other Manufacturers and participated in the aforementioned cartel up until 2012.

Additionally, it has identified AIDCM (OP-4) as one of the members of the aforementioned cartel, strengthening the DG's probe even though OP-2 and OP-3 had previously denied AIDCM's involvement in price-fixing. Additionally, OP-1 said that it named Shri Osamu Oyamada, a member of OP-3 who was connected to the aforementioned cartel. OP-1 also claimed that it had offered proof that the cartel had existed for a number of years, including dates prior to 20 May 2009 and at least as recently as 23 August 2016. Further, OP-1 argued that because OP-1 and its members gave the investigators their complete cooperation, the Commission ought to absolve them of punishment. Additionally, OP-1 asked the Commission to take into account a number of mitigating circumstances when determining the appropriate penalty, such as the fact that India has one of the lowest per capita battery consumption rates globally, which limits the market's potential for battery demand, as well as the increase in the price of raw materials for zinc-carbon dry cell batteries, which caused OP-1 to lose business in the battery sector beginning in the fiscal year 2011–12. Additionally, OP-1 claimed that the price increase that OP-1 was impacted by was roughly in line with the price movement of the nation's entire basket of consumer products.

According to OP-2, it does not object to the conclusions stated in the DG report and has added "significant value" by making a complete, accurate, and crucial disclosure about the alleged cartelization of zinc-carbon dry cell batteries. Additionally, OP-2 and its members have provided the DG and the Commission with sincere, complete, ongoing, and prompt cooperation throughout the inquiry. OP-2 has asked the Commission to grant OP-2 and the company's other convicted participants in the aforementioned cartelization the fullest penalty waiver that is permitted.

According to OP-3, it learned of the current cartel of Manufacturers through its organization's Competition Compliance Programme and therefore approached the Commission under the Lesser Penalty Regulations. According to OP-3's subsequent contribution, it was the first to reveal the cartel's specifics and gave full disclosure, including all pertinent information,

papers, and submissions, which helped establish the cartel's existence and operational technique. Additionally, it worked cooperatively with the Commission and the DG throughout the entire process.

Additionally, OP-3 claimed that their application for a lesser penalty gave the Commission the power to both order an investigation and establish a violation of the Act. In light of this, the penalty should be completely reduced for OP-3 and its members.

As supported by OP-2 and OP-3, respectively, AIDCM claimed that it had no influence over the Manufacturers' dry cell battery price decisions. Regarding its employees, OP- 4 has declared that the Secretary of the association is the only one who works only in an administrative capacity for OP-4 and is therefore exempt from Section 48 of the Act's liability provisions. In this regard, the current Secretary of AIDCM, Shri Ravindra Grover, has raised the argument that actions under Section 48 of the Act against an officer of the "company" can only be taken after a finding of contravention against the "company" has been established under Section 27 of the Act.

Furthermore, it has been argued that Section 48 of the Act deals with corporate violations. Therefore, it does not apply to a group of unregistered corporations. Shri Ravindra Grover cannot be sued under Section 48(2) of the Act because he is not the Secretary of any corporation. Additionally, it has been argued that Shri Ravindra Grover has not been informed by the Commission as to whether Section 48(1) or Section 48(2) of the Act is being used against him in the current case, preventing him from understanding the precise nature of the case being made out against him and, as a result, from filing a suitable response.

Considering further the leniency application, the Commission has granted reductions in penalty in quantum of 30%, 20% and 100% to OP 1, OP 2 and OP 3, respectively and also passed a cease & desist order.

## 5.5) Nagrik chetna manch vs. Fortified security solutions and others

**(Case No. 50 of 2015),**

In the matter of "Nagrik Chetna Manch vs. Fortified Security Solutions and Others", which was heard on May 1, 2018, the Competition Commission of India (abbreviated as "CCI") handed down its third leniency ruling (Case No. 50 of 2015). In this order, it granted partial leniency to four out of six leniency applicants involved in bid-rigging of five tenders that were floated in 2014 by the Municipal Corporation of the City of Pune ("PMC"), for "Design, Supply, Installation, Commissioning, Operation." The bids were for "Design, Supply, Installation, Commissioning, Operation."

### 5.5.1) Facts

According to information that was posted on the Pune Municipal Corporation's website about the bid information and tender documents submitted by the bidders for specific tenders, a public charitable trust by the name of Nagrik Chetna Manch had filed an information with the CCI, claiming that it appeared that the bidders were engaged in anti-competitive conduct, such as bid rigging and/or collusive bidding. This information was developed using information from bidders' tender documents and bid information. Assuming that the allegations are true, the Competition Commission of India (CCI) issued an order on September 29, 2015 directing its investigating arm, the Director General (DG), to carry out an inquiry and report its findings. Despite the fact that the investigation was initially solely focused on two organisations, the DG later decided to expand the scope of the inquiry to include four other entities. This decision was made with the appropriate consent from the CCI. Between the 2nd and 5th of August 2016, five different parties submitted leniency applications to the CCI in the following order: Mahalaxmi Steels ("Mahalaxmi"), Sanjay Agencies ("Sanjay"), Lahs Green India Pvt. Ltd. ("Lahs Green"), Ecoman Enviro Solutions ("Ecoman"), and Raghunath Industry Pvt. Ltd. ("Raghunath"). It was submitted on September 20th, 2016, by the sixth party, which was identified as Fortified Security Solutions.

### 5.5.2) Investigation Report:

According to the report on the investigation that was issued by the DG on November 23, 2016, Ecoman had emerged as the L-1 bidder in all of the five tenders that were the focus of the investigation, while the other five players had provided cover bids. In addition, the people who owned and controlled the aforementioned companies were either members of the same family or were close friends with one another. The first company to apply for leniency, Mahalaxmi, and a few other bidders did not even operate in the relevant market. Instead, they were involved in a wide variety of other trades and industries, including the steel trading business, the distribution and stockists ship of drugs, the sales and services of electronic security systems, health and medical equipment, and so on. Despite this, they had been active participants in the PMC tenders and had submitted cover offers.

Some of these entities shared the same office address, which was managed by the same person. This information was disclosed by the parties in their leniency applications, and the Director General discovered it during the course of the investigation. Even the "contact information of a person for the bid," which were required to be supplied by the bidders during the online filing of the tender, were the same for some of the bidders. This is because some of the bidders were competing for the same contract. Demand Drafts ("DD"), which were required to be submitted as earnest money deposits ("EMD") along with the bids, revealed consecutive serial numbers and had been issued on the same day by the same bank, despite the fact that the offices of the bidders were located in different cities. This was despite the fact that the bids were required to be submitted along with the bids. In addition, these DDs for EMD were produced by deducting money from the accounts of regular people. In addition, some of the bidders had uploaded the tender papers using the same Internet Protocol address (commonly known as a "IP address"), with the times at which they logged in and logged out falling within a very tight range. Even some of the bidders' IP addresses were registered with the same cell number, which is an indication that the papers for the offer were submitted by the same individual from the same location. It also came to light that the proprietor of Ecoman had acquired the digital keys from the office of PMC on the bidders' behalf in order to avoid competition. The Director General came to the conclusion that all of the evidence suggested that the bidders were in cahoots with one another and had engaged in bid rigging or cartelization in each of the five tenders as a result of the information presented above.

On the 30th of August, 2017, a copy of the DG's investigation report was sent to the parties, as well as to their officers who were identified by the DG for having indulged in the practise of bid rigging or collusive bidding, for the purpose of filing their objections or suggestions, if there were any. The parties had until the following day, the 31st of August, 2017, to respond. On November 16, 2017, the CCI also held hearings with all of the parties.

### 5.5.3) Contentions of parties before CCI:

The parties defended themselves by bringing up a number of problems, despite the fact that they acknowledged and agreed with the findings that were presented in the DG's report. The majority of their contributions were organised as follows:

That, it has been determined that the current dispute does not come under the purview of Section 3 of the Act since the parties involved are not involved in a "identical or comparable trade of products or provision of services" and therefore are not rivals of one another. Some of the parties also argued that no penalty could be imposed on them in light of the guiding principles that were laid down by the Honorable Supreme Court in "***Excel Crop Care Limited v. Competition Commission of India and Anr".***[199]on the aspect of relevant turnover,' as they did not have any relevant turnover or relevant profit,' as they were engaged in businesses other than the infringing product.

That their rights and reputation were harmed as a result of a breach in the "confidentiality" that had been granted to them as leniency applicants. This breach occurred due to the fact that their statements, which were recorded during the investigation and contained in the DG report, were disclosed to the other parties, even before the CCI considered whether or not to grant them leniency.

That because the e-auction bids were available to any and all bidders, entrance was not restricted in any way by any purported agreement or cartel, which might be deemed to have an appreciably detrimental effect on competition. It was suggested that except from Ecoman, the L-1 bidder in all five bids, there was no other eligible bidder that participated in the PMC tenders throughout the years 2013-2015. This was the true even in the instances where the deadline for bidding was extended. It was suggested that the purpose of the purported cartelization was only to guarantee that PMC would not lengthen the period during which the tender could be filed. Therefore, it was argued that PMC did not suffer any genuine losses as

[199] *Supra* note 104

a result of Ecoman's actions, nor did Ecoman prevent other businesses from entering the market.

In addition to the aforementioned, the parties requested that the CCI take into account the following submissions: that the DG learned about the specifics of the mode and manner of the actions complained of through the Lesser Penalty Application that was filed by them; that no consideration was given to them by the L-1 bidder; that they were unaware of the Act's provisions; and that they have never been involved in any type of cartelization, proxy bidding or bid rigging. As a result, prayers were made for the issuance of maximum reduction in fines, asking for a holistic examination of the considerable value addition done by them as well as the prejudice caused to them as a result of the procedural defects.

### 5.5.4) Order by CCI

The CCI rejected the parties' assertion that Section 3(3) of the Act does not apply to this case since all parties are not involved in "identical or comparable trade of products or provision of services." and held that :

*"In the instant case, the Commission is of the view that it is the business activity of the parties that they are actually bidding for and the one regarding which the violation of law has been alleged which is relevant for the purpose of the applicability of Section 3(3)(d) Act rather than any other business activity(s) parties 'were' or 'are' engaged in. If the parties were allowed to escape the grasp of the Act by considering them as not competitors on the pretext that they are actually engaged in varied businesses, it may defeat the very purpose of the provisions of Section 3(3) (d) of the Act. Any construction other than this would mean that new entrants are totally exempt from the provisions of bid rigging for the reason that they are or were not involved in that business at the time of bidding".*

***On the matter of violation of Confidentiality, the CCI held**:*

*"When it comes to the issue of the harm on reputation, the CCI held that "the parties are claiming reputational harm not simply because some confidential information was disclosed in the investigation report of the DG but more because such information was disclosed to the public at large. In this regard, the Commission observes that it is well recognized fact that the investigation report is not a public document and is not to be shared with public. This aspect is enshrined in Regulation 47 of the Competition Commission of India (General) Regulations, 2009 (hereinafter, 'General Regulations'), which clearly provides that the proceedings before the Commission are not open to public, except where the Commission so*

*directs. In the instant case, there being no direction to make proceedings open to public, there was no question of sharing the investigation report of the DG with public".*

The CCI further argued that despite this regulatory requirement, the Informant, who had disclosed the investigation report to the media, was ordered to file an undertaking that the investigation report's contents and other information, documents, and evidence obtained during proceedings would not be disclosed to any person who is not a party to the proceedings or used for a purpose other than the proceedings under the Act. This undertaking was subsequently filed. In light of the aforementioned, it was determined that the claim that the DG or Commission's actions or omissions caused reputational injury was unfounded.

The CCI also disagreed with the parties' claim that the move had not appreciably affected the competition in India. The CCI made this observation in light of the fact that, according to the requirements of Section 3(3)(d) of the Act, bid rigging must be deemed to have a detrimental effect on competition regardless of its duration or purpose, as well as whether or not the cartel really provided any benefits. The accused parties "have neither been able to disprove the abovementioned assumption nor been able to establish how the impugned conduct resulted in the accrual of advantages to consumers or created advancements in production or distribution of the goods in issue," the CCI continued.

Further, the CCI noted that "mere possibility that other bidders could have bid for the tender cannot absolve the colluding OPs from their conduct of bid rigging." This statement was made in response to the claim that because bid rigging has not restricted entry, there is no appreciable adverse effect on competition and, therefore, no violation of the provisions of Section 3(3) of the Act. The Act's explanation of Section 3(3) makes it apparent that an agreement with the intention of lessening competition for bids, negatively impacting or manipulating the bidding process, or both, constitutes bid rigging. Therefore, it would be a violation of Section 3(3)(d) of the Act even if a small group of bidders conspired to rig or influence the bidding process.

The CCI determined that all six parties involved had engaged in bid rigging or collusive bidding in violation of the Act's requirements. As a result, in accordance with Section 27 of the Act, a pecuniary penalty equal to 10% of their average annual turnover for the previous three financial years was levied. However, the CCI paid consideration to how much the petitioners for leniency had helped to the conclusion of the investigation when determining the severity of sanctions for each of the charged persons.

Mahalaxmi, the first applicant for leniency, was deemed to have consistently supported the investigation and provided full and prompt cooperation by the CCI. The CCI also recognised that it had a part in exposing a cartel that had been fixing bids in a small number of tenders. Despite being the first to submit a request for leniency, the CCI ruled that Mahalaxmi was the only party who qualified for a 50% penalty reduction since she submitted her request later in the investigation, after some evidence had already been gathered.

In regards to Sanjay, the second application for leniency, the CCI noted that it had shown the modus operandi by disclosing the identities of those connected to Ecoman, the cartel's ringleader, and had also produced copies of certain crucial e-mails. As a result, it received a 40% reduction in the fine from the CCI.

Regarding Lahs Green, the third application for leniency, the CCI noted that it had given evidence that helped uncover the cartel for manipulating bids for certain tenders, information that neither Mahalaxmi nor Sanjay had offered. In light of this, the CCI made the decision to reduce its penalty by 50%.

Regarding Raghunath and Fortified, the fifth and sixth leniency applicants, respectively, the CCI reached the conclusion that the disclosure made by these entities did not lead to any value addition in the investigation, and as a result, no reduction in penalties was granted to them. Raghunath was the fifth applicant, and Fortified was the sixth.

The CCI also imposed penalties on the officers and persons who were found to have indulged in the aforementioned contravention under Section 48 of the Act, at the rate of 10 percent of their average income during the preceding three financial years, in accordance with Section 27(b) of the Act. These penalties were calculated based on the Act.

Concerning PMC, the CCI expressed its displeasure with the company for its failure to identify cartelization in its own tenders and offered some caustic observations. It was observed that evidence suggesting that PMC's conduct may have facilitated bid-rigging in these five tenders includes the uploading of one of the tenders by a bidder from PMC's IP address, call data records of communication between some of the officials of PMC with the L1 bidder, and other systemic failures on its part. In addition, it was discovered that the PMC did not conduct adequate research when reviewing the bid materials. Even though there were several obvious evidence of collusion, such as the same IP addresses, a same proprietor or director, the same office location, sequential serial numbers for DDs, etc., PMC did not take any of them into consideration when deciding which bids were eligible. In addition, in a few

tenders, an ineligible bidder was allowed to participate despite the fact that it neither had the required experience in solid waste management (as stipulated by the conditions of the tender) nor had been authorised to supply composting machines by any manufacturer. This was the case despite the fact that the ineligible bidder had neither the experience nor the authorization. Therefore, the CCI discovered blatant acts of omission and conduct on the part of PMC, which either purposefully or in some other way helped the bidders in their cartelization efforts. On the other hand, due to the fact that PMC's actions could not be considered to be in violation of the provision of the Act's Section 3(3)(d), the company could not be held accountable in accordance with the terms of Section 3 of the Act.

### 5.5.5) Analysis of the Order

The CCI has, for the very first time, differentiated between the confidentiality that is granted to the identity and information provided by a leniency applicant in accordance with the CCI (Lesser Penalty) Regulations, 2009 and the confidentiality that is granted by the DG to the information/evidence collected by the DG during investigation in accordance with Regulation 35 of the General Regulations, such as those collected through oral examination of parties and through issue of notices to the parties, on the ground that the information

In contrast to the decision dated 19th April 2018 in Zinc carbon dry cell batteries cartel case (Suo Motu Case No. 02 of 20), where all three charged parties filed leniency applications and the CCI granted reduction in penalties to all of them despite the fact that information/ evidence on cartel furnished by two of the applicants did not result in significant value addition,' the CCI has decided in the instant case not to grant any reduction in penalties. The CCI has not given any reductions to two parties despite documenting that they supported the investigation, cooperated with the investigation/inquiry throughout, and accepted intelligence showing the cartel's operational operandi and evidence in its control or available to' them. Thus, the CCI's strategy differs from its sequence in Zinc carbon dry cell batteries.

This order shows that the CCI values the timing of leniency applications. In this case, the first leniency applicant got a 50% reduction in penalty, unlike the Zinc Batteries case where the first leniency applicant got a 100% reduction because leniency application was filed at a very late stage after investigation had begun and substantial evidence had been collected by the DG.

## 5.6) In re: Cartelization by broadcasting service providers
**Suo Moto Case No. 02 of 2013, Order dated 11.07.2018**

Globecast India Private Limited (GI) and Globecast Asia Private Limited (GA) (collectively referred to as Globecast), together with their respective accountable office-bearers, were granted leniency by the Competition Commission of India (CCI) on 11 July 2018. Essel Shyam Communication Limited (now Planetcast Media Services Limited) (ESCL) and its accountable officer bearers received a 30% reduction in a collusion lawsuit involving broadcasting services. This is the CCI's fourth ruling reducing penalties under Section 46 of the Competition Act, 2002 (Act) and the Competition Commission of India (Lesser Penalty) Regulations, 2009. (Leniency Regulations).

### 5.6.1) Background

The case began when Globecast submitted a leniency application, in which it detailed the bid-rigging relationship it had with ESCL. This material became the basis for the prosecution. On the basis of this application, the CCI formulated its prima facie order and assigned Globecast the status of having the highest priority possible. ESCL, on the other hand, was given the status of second priority since it did not submit its leniency application until after the prima facie order had been issued and after having received a notification from the office of the Director General (DG).

### 5.6.2) Investigation by Director General

During the course of the investigation into the case, the DG determined whether or not there was a transfer of information that was commercially sensitive between ESCL and Globecast; whether or not the arguments presented by the leniency applicants explained their alleged violations of the Act; and the key individuals of ESCL and Globecast involved in the alleged bid-rigging.

After the DG investigation report (DGIR) was turned in, the CCI gave permission for ESCL, Globecast, and an individual leniency applicant named Mr. Prem, who had previously worked for Globecast, to cross-examine the witnesses who had testified against them and whose statements had been relied upon in the DGIR. Mr. Prem was also a former employee of Globecast. The Director General provided a second report that recorded these cross-examinations, which only reinforced the results that it had already presented.

### 5.6.3) Violation of Section 3(3) of the Competition Act 2002

Both the CCI and the DG came to the same conclusion, which was that ESCL and Globecast were in violation of Section 3 of the Act because they had, through Mr. Prem, exchanged information that was commercially sensitive during the tenders for the procurement of broadcasting services that took place in 2011-2012. This conclusion was reached after an investigation into the e-mails and statements of the various parties involved, including e-mails sent from Mr. Prem's personal email accounts, in which exchanges of sensitive commercial information on bid prices, terms of offer, and other topics took place.

The two applicants for leniency provided contradictory explanations for why the information was shared: Globecast claimed that the information was shared as a result of an agreement between one of its employees and ESCL for monetary benefits, of which it was unaware; ESCL, on the other hand, claimed that the information was shared as a result of an investment proposal in ESCL that Globecast was pursuing, and that the information was shared at Globecast's request.

In addition, Globecast argued that during the period of the violation, it only won 2 of the 14 events, whereas ESCL won 10 of the events. Nevertheless, the CCI came to the conclusion that collusion for even a single event is sufficient to establish a violation of the provisions of the Act, and that it is irrelevant as to which party derived a higher benefit from the cartel.

### 5.6.4) CCI's Order & Leniency

Globecast and ESCL were each given a penalty by the CCI that was equal to 1.5 times their earnings for the length of time that they were in violation, which was from July 2011 to May 2012. In addition, the CCI levied fines against the persons who had been identified. These penalties were computed at the rate of ten percent of the individuals' income average for the prior three fiscal years.

However, after taking into account the evidence and the information provided by the leniency applicants, the CCI decided to reduce Globecast's and its responsible office bearers' penalties by one hundred percent. This was done because Globecast had made crucial disclosures by submitting evidence of the alleged cartel, which allowed the CCI to form a prima facie opinion regarding the existence of the cartel and strengthened further investigation. The evidence that was presented by Globecast, which included things like specifics of sporting events in which bid rigging occurred, the role of its former employees, e-mail correspondence regarding the exchange of commercially sensitive information, a forensic report related to the

electronic evidences, and many other things, was found to be essential in illuminating the cartel's mode of operation.

ESCL, on the other hand, which approached the CCI at a later stage in the investigation, was granted a thirty percent reduction in the penalty because it furnished additional facts such as proposed investment talks between the parties and related evidence such as a copy of the non-disclosure agreement and correspondence exchanged in this regard. In addition, the CCI took into consideration the fact that ESCL approached the CCI later in the investigation. Even while the evidence from ESCL was not absolutely necessary for proving that bids were rigged, the fact that it revealed one of the reasons behind the information exchange provided significance to the inquiry that was already underway.

### 5.6.5) Analysis

In a span of fewer than two years, the CCI has issued a total of four leniency orders. Each of these orders gives a glimpse into the considerations that the CCI makes when determining the penalties and immunity granted to the various cartel members who have asserted their right to immunity from prosecution.

It has now been established that the CCI accepts awarding a greater reduction where the leniency application enables the CCI to form a prima facie opinion about the cartel, including a complete waiver of penalty, and is objective in acknowledging the value addition. Consideration is given to whether or not the application is objective in acknowledging the value addition. In leniency cases in which the individual applicant played a central role in the cartel activity, the CCI order also strengthens the treatment of individual liability as a factor in determining whether or not to grant leniency. In conclusion, the CCI has guaranteed that the principles of natural justice are adhered to by conducting cross-examination and using the results of that examination to substantiate the DGIR.

## 5.7) In re: Anticompetitive conduct in the Dry-Cell Batteries Market in India

**Suo Moto Case No. 03 of 2017, Order dated 15.01.2019**

### 5.7.1) Facts

In September 2016, Panasonic Corporation, Japan, and Panasonic Energy India Co. Limited (hereafter called "Panasonic India") filed an application for leniency with the CCI. They said that they and Godrej & Boyce Manufacturing Co. Limited (hereafter called "Godrej") were in "a bilateral ancillary cartel" in the market for the institutional sale of dry cell batteries (DCBs) in India. Under its own brand name, Godrej sells DCBs that it gets from Panasonic India. Panasonic India said that it, Eveready Industries India Ltd., and Indo National Limited had a "primary cartel" in which they coordinated the prices of zinc-carbon DCB on the market.

Panasonic India knew that this primary cartel was going to raise prices at a certain time, so it used that information as a bargaining chip to get Godrej to pay more for the batteries it sold.[200]

Panasonic, India would make Godrej think that the Market Operating Price (MOP) and Maximum Retail Price (MRP) of all major DCB manufacturers would go up in the near future. Because of this, Godrej would be able to pass on the increase in the basic price of DCBs to consumers in the market.[201] In the end, Godrej sold DCBs at the agreed-upon prices under its own brand name.

A Product Supply Agreement (PSA) between Panasonic India and Godrej made it possible for Godrej to pay the prices set by the Primary Cartel.

Both parties were told by the PSA that they couldn't do anything that would hurt the other's business (Clause 8.2 of the PSA). To put this PSA and Clause 8.2 into action, Panasonic India and Godrej would keep an eye on the MOP of each other and other manufacturers in different parts of India and let each other know if they found any differences. The employees of Panasonic India who were in charge of consumer sales would also keep the head of institutional sales and Managing Director of Panasonic India up to date on the MOPs of Godrej in different parts of India and ask them questions about them regularly. The primary cartel worked with Panasonic India and Godrej to make sure that their prices were the same.

[200] In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India, Competition Commission of India, Suo Moto Case No. 03 of 2017 order dated 15.01.2019
[201] *Id.* at para 2.

Along with a copy of the PSA from January 12, 2012, the leniency application also included e-mails between Panasonic India and Godrej about this kind of monitoring and their agreement to keep prices the same.

After looking into it, the CCI Director General (DG) found that Section 3 (3) (a) read with Section 3 (1) of the Competition Act of 2002 has been broken.

### 5.7.2) Contentions given by Godrej

Godrej said that its business relationship with Panasonic India was one of a "buyer-supplier." Because of this, the agreement they made was vertical and not horizontal. So, the alleged cartel behaviour was just Panasonic India imposing resale price maintenance on Godrej. Instead, the situation should be looked at under Section 3(4) of the Act. So, the DG Report doesn't show that Section 3(4) of the Act has been broken because it doesn't show that there has been a significant negative effect on competition in India. Godrej also said that it was only a victim because the DG had found that Panasonic India had used its cartel position in negotiations with Godrej.

### 5.7.3) Decision given by CCI

But the CCI didn't agree with this because, from the consumers' point of view, the rebranded DCBs that Godrej sold, were in direct competition with the DCBs that Panasonic sold. The CCI also used Clause 17 of the PSA between Godrej and Panasonic India, which says that the two companies are "two independent principals in commercial transactions." Also, the CCI didn't agree with Godrej's claim that Clause 8.2 of the PSA was required by Panasonic India and that any attempt by Godrej to get rid of that clause from the PSA would have led to a deadlock, making it harder for Godrej to get into the market. Using emails between the two companies as evidence, the CCI said that even though Panasonic India had asked for Clause 8.2 to be added to the PSA, Godrej had gone ahead with the deal and thus could not say the anti-competitive clause had been „forced upon it as contended.

In the end, the CCI found that Panasonic India and Godrej were guilty of cartelization.

So, according to the exception to Section 27(b), the Commission can fine a company that is part of a cartel up to three times its profit for each year that the agreement lasts, or 10% of its turnover for each year that the agreement lasts, whichever is higher. In exchange for the leniency application, the CCI gave Panasonic India a penalty that was cut by 100%.

Concerning Godrej, the Commission only fined it 4% of its turnover for each year that the cartel lasted. They did this because "Panasonic India", as the manufacturer of dry-cell batteries and supplier of Godrej, was in a position to influence and dictate the terms of the anti-competitive PSA to Godrej, and Godrej, being a very small player with an insignificant market share in the market for dry-cell batteries.

Notably, "turnover" is used to figure out fines as the "relevant turnover" of the company for the product in question where the Act was broken, not the "total turnover" of the company for all of its products. This is in line with what the Supreme Court of India said in the case of *Excel Crop Care Limited v. Competition Commission of India and Others*[202]

### 5.7.4) Analysis

Horizontal conspiracies between competitors at the same level of the production chain are often a sign of a cartel.

Both companies make goods for consumers and set prices, quantities, quality, or service levels to compete with each other on the market. The result of the market depends on how firms interact strategically, that is, whether they compete with each other or work together in a cartel.[203]

In this case, things were made more complicated by the fact that Panasonic India sold DCBs to Godrej. This is called a "vertical relationship," and Godrej then sold the DCBs under its own brand name, which was in competition with the Panasonic brand.

The CCI has pointed out correctly that, from the point of view of consumers, Panasonic India and Godrej are competitors because the two brands are on the market at the same time. This means that collusive behaviour has hurt consumers. This was made even clearer by Clause 17 of the PSA, which said that the two companies were "two independent principals in commercial transactions."

per se illegality rule was then used, and the Commission thought there was no need to prove That the agreement leaves an adverse effect i.e appreciable on the competition in India in any significant way. This is a lot like how European Union law works, which is based on the idea of market integration and doesn't make as big of a difference between horizontal and vertical cooperation. Article 101 of the Treaty on the Functioning of the European Union says

[202] *Supra* note 104

[203] Han, M. A. (2011), *Vertical relations in cartel theory: managerial incentives, buyer groups & antitrust damages*, UNIVERSITY OF AMSTERDAM (July. 19, 2022),https://pure.uva.nl/ws/files/1409536/95614_05.pdf

that “all agreements, decisions of associations of undertakings, and concerted practises that could affect trade between Member States” are illegal.

## 5.8) Alleged cartelization in flashlight market in India
**Suo Moto Case No. 01 of 2017; Order dated 06.11.2018**

The Competition Commission of India (or "CCI/Commission") "In a big change from how it used to feel about cartels, has decided that just talking about raising prices among competitors doesn't count as a cartel if the decision to raise prices isn't carried out in the market. It has now been made clear that the exchange of strategic information between competitors is not enough to prove that they are working together, though it does show the possibility of collusion and can be seen as a "plus factor" that proves they are working together. When deciding what effect the parties' anticompetitive behaviour would have on competition in the market, the unique market conditions, such as the fact that most players' market shares were not the same and demand for the product was falling, were taken into account.

In an order from November 6, 2018, the CCI disagreed with the results of the investigation by the Director General (DG) and cleared four companies that make battery-powered flashlights, including Eveready Industries India Limited ("EIIL/ OP-1"), Panasonic Energy India Co. Ltd. ("PEIL/ OP-2"), Indo National Ltd ("INL/ OP-3"), Geep Industries (India) Pvt. Ltd. ("GIIL/ OP-4"), and the Association of Indian Dry Cell Manufacturer (AIDCM/ OP-5), of cartelization, saying that there wasn't enough evidence to show that the cartel did in fact cause the prices of flashlights[204] to be set, even though OP1 and OP2 filed two requests for leniency, confessing sharing of strategic information and discussions to raise prices among themselves.

### 5.8.1) Facts

The CCI started the case on its own after OP-1 filed an application under Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (the "Lesser Penalty Regulations") and Section 46 of the Competition Act, 2002 (the "Act"). In its application for a leniency, OP-1 said that strategic information about sales and production of flashlights was shared through an organisation called the Association of Indian Dry Cell Manufacturers(AIDCM). It was said that OP-1, OP-2, and OP-3 gave the AIDCM information about their production and sales every month from 2008 to 2016, but that OP-4 didn't share any information until April 2012. Also, OP-1 showed that there were times when OP-1, OP-2, and OP-3 talked about the product "flashlights" and shared information about

[204] Flashlights are small, portable devices that use batteries to give off light.

planned price increases or market information about prices, discount schemes, etc. This was against Section 3(3) read with Section 3(1)of the Act and was done to keep an eye on what competitors were doing on the market.

After that, OP-2 also filed Lesser Penalty Regulations and showed proof that OP-1, OP-2, and OP-3 shared information about the sale of flashlights through OP-5, talked about the state of the flashlight market at OP-5 meetings, and talked directly with OP-1, OP-2, and OP-3 about competition in the Indian flashlight market.

So, the Commission issued an order on February 8, 2017, under Section 26(1) of the Act, telling the Director General (the "DG") to look into the matter and give a report of what they found.

### 5.8.2) Report of the Director General

During the investigation, the DG looked at the written and electronic evidence provided by the OPs. This included emails and other evidence that could be used against them, such as a draft "press release" and responses to the DG's notices. The DG also wrote down the statements made under oath by some of the OPs and the AIDCM association.

DG looked at three types of evidence: I evidence that data about flashlights was shared, (ii) evidence of a draft press release, and (iii) evidence that business-sensitive information was shared. The DG gave the minutes of the AIDCM meeting held on April 19, 2016, which listed the sales of different types of torches by OP-1, OP-2, and OP-3 from 2012–13 to 2015–16, to the people in charge of OP-1, OP-2, OP-3, and OP-5. This was done so that OP-5 could put together and share sales and production data. Based on what these people said, the DG came to the conclusion that OP-1, OP-2, and OP-3 were able to keep an eye on each other's market shares in the organised market for flashlights in India because they shared information about production and sales. This made it easier for them to work together in the flashlights market. From the emails that were sent back and forth, the DG was able to figure out that the OPs had clearly agreed to raise the prices of dry cell batteries and flashlights and had planned to send out a "press release" through AIDCM.

In conclusion, the DG noticed that the OPs used to share production and sales data for all three types of flashlights (brass, aluminium, and plastic) through the OP-5 platform. This allowed them to keep track of their market share in India's organised flashlight market. Also, the documents and e-mails showing that OP-1, OP-2, and OP-3 shared commercially sensitive information showed that they were working together, which is what the Act means by "agreement."

Concerning OP-4, the DG said that it was a member of AIDCM and used to send AIDCM data every month until the middle of 2012. But when it stopped being a member of AIDCM, it stopped doing this. The DG didn't find any evidence that OP-4 made a strategic plan to raise the price of flashlights like other OPs did. Also, there was no other proof against OP-4 that it shared commercially sensitive information about flashlights.

Concerning AIDCM (OP-5), the DG found that it helped its members participate in cartels by giving them an easy way to talk about prices and other commercially sensitive issues under the guise of talking about market conditions. Also, it helped the Manufacturers keep an eye on how the cartel was working by collecting and sending regular reports on production and sales data from the member companies. So, the DG came to the conclusion that OP-1, OP-2, OP-3, and OP-5 had engaged in anti-competitive agreement/conduct and concerted practises in the domestic dry cell battery market of zinc carbon batteries from May 20, 2009 to July 31, 2016, breaking Section 3(3)(a) and Section 3(1)of the Act.

**5.8.3) Commission's analysis & order**

The Commission noticed that the e-mails and statements of the people involved showed that OP-1, OP-2, and OP-3 had agreed among themselves to raise the prices of both dry cell batteries and flashlights. Also, it seemed like OP-1, OP-2, and OP-3 were all on the same page about raising the prices of flashlights. But Mr. Suvamoy Saha's last email to Mr. Kumaraswami on March 26, 2012, with copies to Mr. R. P. Khaitan and Mr. S. K. Khurana, showed that the agreement was not carried out.

The Commission looked at the "exchange of commercially sensitive information" to see if the agreement to raise prices was carried out by the OPs individually. This included I printed notes of Mr. R. P. Khaitan of OP-3, in which he asked OP-1 about its pricing, wholesale price, margins, and promotional schemes, and (ii) an e-mail exchange between OP-1, OP-2, and OP-3 about Godrej's entry into the market. The Commission noticed that the printed notes of Mr. R. P. Khaitan and the statements of concerned people from OP-1 and OP-3 show that OP-1 and OP-3 talked about the prices of OP-1's products and shared commercially sensitive information with each other. But these notes and statements don't prove that the people involved actually agreed on how prices would go up or down. Also, the talk about prices between OP-1 and OP-3 did not prove for sure that they set prices. Also, the e-mails between OP-1, OP-2, and OP-3 show that these OPs were keeping an eye on new flashlights coming onto the market. However, this did not prove that the Act had been broken.

So, the Commission came to the conclusion that, even though there was evidence of exchange of strategic information related to production/sales data, a draught press release announcing a price increase, and price information between OPs that pointed to the possibility of collusion, there wasn't much evidence that OP-1, OP-2, and OP-3 actually worked together to set the prices of flashlights. Also, there was no information or proof in the case to show that the OPs followed through on the agreement shown in the March 2012 email exchange. Even OP-1, who said that the OPs were acting in a way that hurt competition in this case, said during the hearing that he didn't have any proof that the OPs' actions caused flashlight prices to go up. But CCI didn't agree with OP 2's claim that it was a single, continuous violation that was part of the earlier case of the cartel of dry cell batteries (suo moto case no. 02 of 2016). This is because OP 2 didn't tell the court in the earlier case, in which it got a 100% penalty waiver, that it was working together with other players in the flashlight market.

So, because there wasn't enough solid evidence, the CCI came to the conclusion that it can't be said that OP-1, OP-2, OP-3, and OP-5 formed a cartel and worked together to set the prices of flashlights for sale or purchase in violation of Section 3(3)(a) of the Act.

## 5.9) In re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)

**Suo Motu Case No. 07 (01) of 2014 ; Order dated 09.08.2019**

### 5.9.1) Background

The Competition Commission of India ("CCI/Commission"), in an order from August 9, 2019, found that two Japanese Original Equipment Suppliers (OES), NSK Limited, Japan ("NSK") and JTEKT Corporation ("JTEKT"), Japan and their Indian subsidiaries, Rane NSK Steering Systems Ltd ("RNSS") and JTEKT Sona Automotive India Limited ("JSAI"), were participating in cartelization in the Electric Power Steering (EPS) market.

In this case, NSK Limited, Japan ('NSK') and JTEKT Corporation, Japan ('JTEKT'), along with their Indian subsidiaries Rane NSK Steering Systems Ltd. ('RNSS') and JTEKT Sona Automotive India Limited ('JSAI'), are accused of acting anti competitive in the Electric Power Steering ('EPS') Systems market. Together, these companies are called the 'parties'.

Steering System is a group of parts, links, and other things that help a vehicle go in the right direction. The main job of a vehicle's steering system is to let the driver steer the vehicle. Steering systems can be either manual or powered.

A Power Steering is a device that helps drivers steer by increasing the steering effort of the Steering Wheel. This means that the driver has to put in less effort to turn the wheels when driving at a normal speed and a lot less effort when the vehicle is stopped or moving slowly. There are two more types of power steering systems: hydraulic and electric. The mechanics of an Electric Power Steering (EPS) System are simpler than those of a traditional system because it has fewer moving parts and no fluids. In an EPS System, an electric motor helps the vehicle turn when it is being driven.

The current case was started because NSK applied for a lesser penalty, which showed that the cartel was real. Later, while the Director General (or "DG") was investigating, JTEKT also went to the Commission and asked for leniency.

It's important to note here that after the DG submitted the investigation report, the parties came to an agreement to set up a confidentiality ring in the case.

### 5.9.2) Findings of Director General

The DG found that the parties were always talking to each other through meetings and phone calls between their employees and executives. This was in response to Requests for Information (RFI) and Requests for Quotations (RFQ) from three automakers for the supply of EPS systems to their subsidiaries in India and other places.

The goal of these interactions and communications was to coordinate prices, divide the market based on geography, divide the market based on the type of vehicle/platform/product, and, as a result, rig the bidding process.

### 5.9.3) Order and analysis

CCI noticed that the conversations and interactions between employees and executives of NSK and JTEKT were about RFQs from three car OEMs. Since the CCI order is secret and doesn't include information about the OEMs or the region where the supplies were needed, the RFQs are labelled as RFQ-A, RFQ-B, and RFQ-C.[205]

**RFQ-'A'**

The Commission took notice of the parties' admissions that NSK and JTEKT representatives met at NSK's headquarters and discussed price details for India and other markets where they were submitting their bids. Additionally, they acknowledged talking on the phone. It was noted that the goal of these discussions was to determine the pricing to be given in a way that would favour JTEKT for the provision of brushless EPS systems and NSK for the delivery of brush type C-EPS systems.

After two RFIs, NSK and JTEKT received a formal RFQ that included several territories but omitted India. For reference, however, prices for the Indian market were also explored. JTEKT provided a price in response to the RFQ after consulting with NKS, but it only applied to brushless EPS systems because brush type EPS systems were not one of the targeted products in the RFQ.

Only RNSS provided quotes in response to the RFQ for the brush type EPS since JSAI declined to participate, and as a result, RNSS was chosen and a supply order was issued to it. The Commission took notice of NSK's admission to the DG that RNSS directly responds to

[205] M.M Sharma ,*CCI penalizes two Japanese OES's -NSK and JTEKT, for admitted cartelization in supply of Electric Power Steering to OEMs-NSK obtains full waiver on penalty,* COMPETITIONLAWYER.IN(October, 25, 2019), https://www.competitionlawyer.in/1184-2/

RFQs for the Indian market requirements, though in cooperation with NSK. The Commission also took notice of NSK's statement that the cost RNSS had indicated for the RFQ was based on their conversations with JTEKT.

The Commission noted that NSK had acknowledged having profited from the relations with JTEKT because it was able to prevent a large decrease in costs for brush type EPS system quoted in India. In regards to RFQ-A, the Commission came to the conclusion that NSK and JTEKT had engaged in cartelization.

In their objections to the DG report, JTEKT and JSAI said that JSAI couldn't be considered part of the cartel because it wasn't directly involved in the contacts and meetings between NSK and JTEKT, and because it was a subsidiary of JTEKT, it wasn't part of the decisions about the rates to be quoted to OEMs for the global RFQ. They also said that JSAI handled the RFQ on its own and in a competitive way without any help from the people at JTEKT. But the CCI pointed out that JTEKT/JSAI didn't give a good reason for why JSAI didn't respond to the RFQ for a brush-type EPS system. Without a good reason, this kind of non-participation in India has to be seen in the context of a cartel between NSK and JTEKT, which can only mean that JSAI didn't respond because it was part of the cartel.

**RFQ-B**

CCI noticed that representatives from NSK and JTEKT used to talk at NSK's office or over the phone, and that was how they came to an agreement on the minimum bid level. NSK told JTEKT that it wasn't likely to get an order because it couldn't meet the OEM's development schedule because it didn't have a base for making C-EPS Systems in India. The DG noticed that NSK did not send in a quote in the end. JTEKT was chosen to win the bid. For another RFQ for brush-type EPS systems, the DG said that NSK didn't have the right technology to fill the order. However, NSK agreed with JTEKT that it would put in a high bid and then pull it, so JTEKT won the RFQ.

CCI noticed that NSK gave a quote, even though they didn't meet the technical requirements. This quote was, in essence, a cover bid. The Commission also noticed that NSK and JTEKT had reached an agreement on the minimum bid level. So, the CCI decided that NSK and JTEKT had acted like a gang in RFQ-B.

**RFQ-C**

CCI saw that a representative of NSK would often meet with a representative of JTEKT at a Karaoke Box. This was done on his boss's orders. During these meetings, specific price information was shared and the market was divided by deciding where NSK and JTEKT would make their supplies. The CCI also looked at an internal memo from JTEKT that said, "JTEKT would lose in India by a narrow margin." Even though the market allocation strategy didn't work because the OEM decided to only buy EPS from one supplier, NSK got the supply order after both NSK and JTEK submitted quotes. But CCI said that NSK had benefited from its contacts with JTEKT because it was able to get orders by guessing the price that JTEKT would quote, and NSK agreed with this.

The Commission came to the conclusion that NSK, JTEKT, and their India-based subsidiaries RNSS and JSAI engaged in cartelization in the EPS system market from at least 2005 until July 25, 2011. They did this by directly or indirectly setting prices, allocating markets, coordinating bid responses, and manipulating the bidding process of automobile OEMs, which resulted appreciably adverse on competition in India.

**Penalty**

The Commission gave NSK/RNSS a fine of INR 8,43,91,066/-, which was equal to 4% of the relevant turnover of RNSS. But because they were the first people to ask for leniency, their sentence was cut by 100%.

Concerning JTEKT/JSAI, the Commission decided to charge @1 times the relevant profit of JSAI for each year that the agreement stayed in place. This came to INR 34,14,62,886/-. But because they were the second people to ask for leniency and because they helped with the investigation, the penalty was cut in half and is now INR17,07,31,443/-.

## 5.10) In re: Alleged anti-competitive conduct in the beer market in India
**Suo Motto case no. 06/2017 order dated 24/09/2021**

The Competition Commission of India (abbreviated "CCI") has been doing dawn raids, and their latest decision found that three beer companies were running an all-India cartel. In an order from September 24, 2021[1,] CCI said that United Breweries Limited ("UBL"), Carlsberg India Private Limited ("Carlsberg"), SABMiller India Limited ("SABMiller"), and the All India Brewers' Association ("Association"), which are all called "Beer Companies," along with their key employees, worked together to sell and supply beer in different Indian states and union territories ("UT").

### 5.10.1) Background and Facts of the case

The matter was looked into because Crown Beers India Private Limited and SABMiller, both of which are owned by Anheuser Busch InBev SA/NV ("AB InBev"), asked for leniency. Based on what AB InBev said in its application for leniency, the CCI found that, in order to make sure their pricing policies were consistent, the beer companies worked together to i) align beer prices and (ii) seek price adjustments when making representations to several States and UTs of India, regardless of how alcohol was sold there. So, on October 31, 2017, the CCI made a "prima facie order" telling the Director General ("DG") to look into the matter ("prima facie order").

Then, from October 10, 2018, to October 11, 2018, the DG conducted ("Dawn Raid") searched and took things from the Beer Companies. During this process, the DG found proof that the Beer Companies were in regular contact with each other through emails (both internal and between the Beer Companies), WhatsApp messages, text SMSs, etc., which showed that the Beer Companies and the Association were working together. Right after the Dawn Raid, UBL filed a request for leniency, and then Carlsberg did the same.

### 5.10.2) Observation of CCI

Since the sale and distribution of alcohol, including beer, is a state subject under the Constitution of India ("State List"), which gives each state the freedom to decide how to tax and distribute alcohol, the CCI looked at how the Beer Companies were hurting competition in each state. CCI found that the Beer Companies: I coordinated prices in Andhra Pradesh, Karnataka, Maharashtra, Odisha, Rajasthan, West Bengal, Delhi, and Puducherry, which was against Section 3 (3) (a) of the Competition Act, 2002 (as amended) ("Act"); (ii) limited the

supply of beer in Maharashtra, Odisha, and West Bengal to fight against certain government policies, which was against Section 3 (3) (b) of the Act; and ( The CCI also found that UBL and AB InBev worked together to buy used beer bottles.

Also, the CCI decided that the Association, which was the only opposing party, broke Sections 3 (3) (a) and (b) of the Act by acting as a platform for the cartelization. The Association was the only opposing party.

### 5.10.3) Effects of the unfair business practises

It is important to note that CCI did not agree with the Beer Companies' claim that coordinated or concerted actions were better for the end consumer. CCI pointed out that the Act's rules don't just affect the end-consumers, but also the people in the middle of the supply chain. So, an action that are against competition can't get around the rules of the Act just because it's good for the end customer, even if it's bad for the people who work in the supply chain.

Also, when looking at the Beer Companies' arguments about the lack of an appreciable adverse effect on competition (AAEC), the CCI found that Section 3 (1) of the Act bans agreements that cause or are likely to cause AAEC in India. So, the exchange of commercially sensitive information like revenue and target details, cost cards, and price increase proposals to be made to state governments, etc., shows that there is an agreement that is likely to make the market less competitive even if it isn't put into action because some state governments won't agree to the price increase requests. So, the CCI thought that even if the state governments didn't agree to the price increase requests, it was clear that the agreement had already been carried out because price revision quotes had already been sent to the government as part of the talks between the OPs. So, the line for an agreement to set prices that hurts competition was crossed.

### 5.10.4) Imposition of Penalty

Under the CCI's “leniency regime,” “whistleblowers” can ask for the penalty to be completely waived or reduced, depending on how helpful the information they gave to the investigation was and what stage of the investigation the application for leniency was filed at. So, AB InBev was given complete immunity because it was the one who blew the whistle on the cartel and because it said important things in its leniency application. CCI noted that both UBL and Carlsberg went to the CCI under the leniency framework after the DG had done the Dawn Raid and had enough solid evidence to prove the cartel from the Dawn Raid and the leniency application filed by AB InBev.

As part of its strong commitment to fighting cartels and to set a good example for the leniency regime, the CCI gave UBL, which was the second company to ask for leniency, a 40% reduction in its penalty, bringing it down to INR 752 crore. In the same way, Carlsberg's total fine was cut by 20%, so the company had to pay a fine of INR 121 crore. Separately, the Association was given a fine of INR 6.25 lac.[206]

The CCI took into account a number of mitigating factors when deciding how much of a penalty to give. This included the fact that some interactions only happened in certain states, there was no AAEC, Beer Companies were breaking competition law for the first time, there was a lot of volume-based competition between Beer Companies in the beer market, and COVID-19 had an effect on the beer industry in India, among other things.[207]

But the Beer Companies argued that only the actual time period during which discussions took place in the states whose laws were broken by the Beer Companies should be used to figure out the relevant turnover and figure out the penalty. It was based on the Hon'ble Supreme Court's decision in the ***Excel Crop Case***[208], in which it was said that, according to the principle of proportionality, only the relevant turnover of the offending company should be taken into account when deciding on a penalty, not the company's total turnover. In response to the Beer Companies' argument, CCI pointed out that it would be a wrong way to look at the Excel Crop Case to say that only the sales on the few days when discussions about the collusion took place should be counted as relevant sales. Also, since the Beer Companies had already formed a nationwide cartel, the relevant turnover in this case shouldn't be limited to specific regions where the Beer Companies did things that hurt competition.

[206] Neelambera Sandeepan, Barkha Dwivedi *Leniency Dawn Raid and Penalty I A case of Cartelization in Beer Market*,LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (November, 26, 2021), https://www.lakshmisri.com/insights/articles/leniency-dawn-raid-penalty-a-case-of-cartelization-in-the-beer-market/#
[207] *Id*. at para 10.
[208] *Supra* note 104

## 5.11) In re: Cartelisation by shipping lines in the matter of provision of maritime motor vehicle transport services to the original equipment manufacturers

**Suo Motto case no. 10/2014 Order dated 20/01/2022**

The following Japanese car shipping companies were fined by the Competition Commission of India (CCI) on January 20, 2022, for engaging in unlawful cartel activity in relation to the provision of maritime motor vehicle transport services to automobile original equipment manufacturers (OEMs) in violation of sections 3(3) and 3(1) of the Competition Act 2002:

Mitsui OSK Lines Ltd. (MOL); Nissan Motor Car Carrier Company; Nippon Yusen Kabushiki Kaisha (K-Line); Kawasaki Kisen Kaisha Ltd. (NYK Line); and Kawasaki Kisen Kaisha Ltd. (NMCC).

The CCI issued a total fine of approximately 64 million Indian rupees to the four offending parties (the OPs) and 33 associated officials for their participation in the violation. The CCI reduced the penalty for NYK Line by one hundred percent, while MOL and NMCC each received a reduction of fifty and thirty percent, respectively.

### 5.11.1) Facts

On November 20, 2014, the CCI launched a criminal investigation into NYK Line after the company filed a leniency application under section 46 of the Act and the CCI (Lesser Penalty) Regulations 2009. (LPR). The agreements, including one or more or all of the OPs, revealed that the OPs had collaborated to supply OEMs with marine motor vehicle transport services for specific trade routes.

Based on the LPR application, the CCI established that the OPs had coordinated their pricing for OEM bids for transport services on pure car carrier (PCC) boats and ordered the Director General (the DG) to examine the issue. MOL and NMCC also filed leniency petitions while the DG was investigating and confessed their involvement. K-Line, on the other hand, disputed the claims.

### 5.11.2) Allegations

There was information shared between NYK and K-Line on freight pricing and positions, as well as timetables. MOL was also a party to the bid-rigging scheme.

Inter alia, in response to NYK Line and K-demands, Line's both companies synchronised their sailing schedules.

NYK Line and NMCC met to discuss this, and NMCC requested that NYK Line submit a proposal that was greater than the prices specified by NMCC. In addition, NMCC asked NYK Line to give a preliminary freight rate for a certain trade route (redacted).

Commission found that operators were communicating commercially sensitive information to coordinate prices to be offered for shipping vehicles on Pure Car Carrier ('PCC') boats to automakers.

The Commission concluded that Section 3(3)(a) and Section 3(3)(d) read with Section 3(1)of the Act make out a prima facie case of violation and asked the Director General (DG) to conduct a thorough inquiry.

### 5.11.3) Contentions of parties

K-Line argued that because the OPs had transported automobiles that were built by an Indian subsidiary of a worldwide OEM (also known as outbound intra-company sales), the Act's section 3(5), which deals with exports-related activity, should be interpreted to exclude such services.

The Competition Commission of India (CCI) refuted this claim by pointing out that Section 3(5) of the Act does not remove the applicability of Section 3 of the Act since Section 3(5) of the Act only offers a safe harbour for exports from India. In addition, it made it clear that the OEMs, not the OPs, were the ones responsible for exporting the goods because the OPs had given transport services to the OEMs. In addition to this, the CCI stated that if K-proposed Line's interpretation were followed, it would imply that cartels pertaining to the supply of any input products and services, as well as situations in which the final product was exported, were immune from the Act.

K-Line contended further that because the lines that were being studied were outbound (that is, leaving India), and the “final customer” was situated outside of India, there had been no harm created within India. K-Line, citing a judgement from the CCI[209], stated that the parties to such an anti-competitive agreement were not in breach of the Act since the majority of the relevant goods had been exported and India had not suffered any loss as a result of the arrangement.

This contention was likewise shot down by the CCI, which came to the conclusion that the Act's section 2(f) does not provide a distinction between a “ultimate consumer” and a

[209]Shri Nirmal Kumar Manshani v M/s Ruchi Soya Industries Limited & Ors, Competition Commission of India, case 76 of 2012.

"intermediate consumer." The CCI made the observation that original equipment manufacturers (OEMs) that had manufacturing bases in India would be regarded "consumers" since they had utilised the services offered by OPs. The Competition Commission of India (CCI) reasoned that it had jurisdiction over the issue since any arrangement among the OPs that was anti-competitive would necessarily have an effect on the OEMs in India.

K-Line maintained that the debate on freight levels ought to be regarded as suggestions rather than definitive prices due to the fact that no OP had been required to follow them. In addition, K-Line argued that it had no way of knowing what final statistics the other OPs arrived at because it was not privy to that information. In this regard, the CCI highlighted that even under the assumption that the final amount had not been discussed or established, the mere discussion of a guideline rate would be enough to vitiate the process of price discovery and set a maximum baseline for the final price.

In a later statement, K-Line asserted that the guideline price had not been adopted, and that in light of the CCI's decision in the ***Flashlight case***[210], there should be no anti-competitive agreement identified. The CCI disagreed and elucidated that the Act's section 3(1)prohibits not just agreements that cause damage but also commitments that are likely to cause harm. This prohibition applies to agreements that create harm. It further differentiated itself from Flashlight based on the facts of that case and pointed out that in that scenario, the Ops had not only communicated sensitive information but had actually put them into action. The CCI emphasised, citing its judgement in ***Beer Cartel***[211], that the execution of an anti-competitive agreement and the actual cause of harm are not conditions to find an infringement after the agreement has been made.

K-Line argued, with reference to the CCI's judgement in Rail Coach Kapurthala[212], that since OEMs divided tenders amongst relevant OPs for some contracts, there was no motivation for the bidders to compete. K-Line based its argument on the CCI's ruling. In addition, K-Line stated that the DG had rejected the likelihood that the OPs operated under normal market circumstances, and they did this by relying on the judgement that the Supreme Court made in the case of Rajasthan Cylinders[213].

[210]*Supra* note 105
[211]Re: Alleged anti-competitive conduct in the Beer Market in India, Competition Commission of India, Suo Motto Case No.06/2017 order dated 24/09/2021
[212]Deputy Chief Materials Manager, Rail Coach Kapurthala v Faiveley Transport India Limited, Competition Commission of India, case 06 of 2013.
[213]Rajasthan Cylinders and Containers Limited v Union of India & Ors, (2020) 16 SCC 615.

### 5.11.4) Observations and decision by CCI

On the other hand, the CCI made the observation that there would be no impact even if original equipment manufacturers (OEMs) negotiated lower freight costs and ultimately achieved their goal. It was emphasised that after the OPs corrupted the price discovery process by colluding, it was not expected that bargaining by OEMs would reach the same competitive freight rates that might have been discovered under competitive conditions. This was one of the main points of the report.

It was also stated that some of the OEMs did not have a formal bidding procedure and had instead approached the OPs on an individual basis in order to acquire quotations. This was done in order to prevent the discovery of a bid-rigging cartel. The Competition and Consumer Commission (CCI) responded to this argument by noting that a formal tendering procedure is not required in order to determine a breach of section 3(3)(d) of the Act, and it emphasised that the procurers had still been seeking for competitive rates.

The conclusion that the OPs had violated sections 3(3)(a), 3(3)(c), and 3(3)(d) of the Act was reached by the CCI after reviewing the material, which included, among other things, emails, depositions, visitor logs, meeting logs, calls, notes, and applications for lesser penalty regulations (LPR).

The OPs claimed, with support from ***Excel Crop***[214], that the penalty ought to be reasonable and based on "relevant turnover." By this they meant the turnover gained from a particular client, tender, and/or route. Nevertheless, the CCI made the observation that this kind of reasoning would not result in a penalty if the OPs refrained from quoting, and that it would also go against the spirit of ***Excel Crop***[215], which concerns multi-product businesses. Therefore, the CCI decided to impose the penalty at 5 percent of their relevant turnover from providing maritime transport services in relation to India during the cartel period (i.e., 2009-2012). The CCI stated that this amount was higher than 1.5 times the profit earned during the cartel period; however, in the case of NYK Line, its profit appeared to be higher than its turnover.

[214] *Supra* note 104.
[215] *Id.*

**Lesser Penalty**

The first applicant seeking a lesser penalty to make contact with the Commission was NYK Line. As a result of this, it was determined to be eligible for a reduction in the total amount of the penalty that had been imposed against it of up to one hundred percent. The leniency application that was submitted by NYK Line detailed the collusive measures that had been taken with its rivals along with the supporting papers and proof. Following the comprehensive revelation of evidence in respect to the exchange of commercially sensitive information, freight costs, and the subsequent restriction of supply, the CCI decided to order a probe into the situation. In addition, CCI provided one hundred percent immunity to NYK Line and persons affiliated with the company for reporting the existence of a cartel in the marine motor vehicle industry. After that, MOL and NMCC submitted proposals for a lesser penalty together with thorough explanations of the reasons why they should be traded together as a single entity rather than as separate businesses. Both of them were given the second priority status maker and the third priority status maker, respectively. MOL and its individuals were given a reduction in penalty of up to 50 percent and were fined a total of INR 10,12,97,243 for their role as the second leniency applicant. NMCC and its individuals were given a reduction in penalty of up to 30 percent and were fined a total of INR 28,69,44,134 for their role as the third leniency applicant.[216]

Because of the change in stance that the CCI took in the Shipping Lines Cartel ruling, there is now a large amount of doubt regarding the application of the SEE defence to proceedings that are brought under Section 3 of the Act. Agreements between subsidiaries and their parent companies might be scrutinised for antitrust violations if the CCI makes the decision to take such a view into consideration in future instances and applies it. Because of this, companies will be obliged to revaluate their internal group structures from the point of view of competition, which may have a negative influence on the ease with which business may be conducted in the nation. The ruling on the Shipping Lines Cartel has the potential to put companies at risk of motivated and spurious complaints being brought before the CCI. This risk is caused by the unanticipated scrutiny of agreements made inside a group.[217]

[216] MM Sharma, Vaish Associates, Advocates, *Cartel Of Maritime Motor Vehicles Transport Shipping Lines Busted In India*, MONDAQ(Feb, 25, 2022), https://www.mondaq.com/india/cartels-monopolies/1165664/cartel-of-maritime-motor-vehicles-transport-shipping-lines-busted-in-india

[217] Sagardeep Rathi & Armaan Gupta, Khaitan & Co., *Applicability Of The "Single Economic Entity" Concept To Cartels*, LEGAL (July, 5, 2022), https://legal60.com/applicability-of-the-single-economic-entity-concept-to-cartels/

## 5.12) In re: Cartelisation in the supply of protective tubes to Indian railways

**Suo Motto case no. 06/2020 order dated 09/06/2022**

In a Suo Moto case, the Competition Commission of India ("CCI/Commission"), in its order dated June 9, 2022, found seven companies guilty of rigging the bids put out by different railway zones to buy "polyacetal protective tube" for axle box guide in Integral Coach Factory (ICF) by working together in a cartel. These companies were Polyset Plastics Private Ltd. (OP-1), M/s Anju Techno Industries (OP-2), M/s Power Mould (OP-3), Jai Polypan Private Ltd. (OP-4), M/s Rama Engineering Works (OP-5), M/s Polymer Products of India (OP-6), and M/s Hari Narayan Bihani (OP-7)

### 5.12.1) Background

The case was started because OP-4 filed an application under Section 46 of the Act and Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR), saying that there was coordination and collusion between all the OPs from June 10, 2015 to June 29, 2020 in the tenders issued by the Indian Railways to buy protective tubes. This was done by, among other things, quoting mutually agreed prices and giving tenders to the same companies.

### 5.12.2) Prima Facie view

Based on what OP-4 said in its application for leniency, the Commission wrote in an order dated November 17, 2020 that, at first glance, the OPs' actions seem to go against Section 3(3) read with Section 3(1)of the Act. The Commission then told the DG to look into the matter and write a report.

### 5.12.3) Findings of Director General:

In its report, DG found that the OPs regularly talked to each other via email about the prices to be quoted and how to divide up the tender quantities. Also, some of the OPs got emails asking them to pull their offers from tenders.

The DG also found that OPs were manipulating the bidding process by putting together a group or cartel of vendors, even for new vendors who were just getting started in the market and in the early stages of making things.

During their depositions, some of the OPs stated that they were under an agreement.

Based on these findings, the DG came to the conclusion that all 07 OPs had broken Section 3(3)(a), 3(3)(b), 3(3)(c), and 3(3)(d) of the Act when read with Section 3(1). Under Section 48 of the Act, DG had also found out who certain people were and what role they played.

### 5.12.4) CCI's findings & Decision

After looking at the DG Report, the LPR filed by OP-4, and the objections to the DG Report filed by the OPs, the CCI noticed right away that OP-1, OP-2, and OP-3 had all said they were sister companies to the Research Design and Standards Organization (RDSO), but they were still competing for the same product in the same tenders. The CCI also noticed that in 12 bids, all three sister businesses had used the same IP address to send in their bids.

During the investigation, the DG also found the email dumps. Based on the emails, the CCI found that there was regular communication between the OPs about the tenders put out by the different zonal railways to buy polyacetal protective tubes. The emails also showed how the collusion/coordination in the form of a cartel pool among the OPs worked. This included the allocation/allocation of tenders among the OPs, the revision of the sharing pattern, the addition of new members to the pool, the methods used to figure out the price to be quoted, discussion about the price to be quoted, complaints about undercutting, and communication among the OPs to withdraw offers.

Further, the emails showed that Ms. Shanta Sohoni, an employee of OP-1 who also worked for OP-2 and OP-2, played a key role in the cartel. She kept track of the cartel's records, divided up the tenders among the OPs, and was the hub of the cartel, through which all communications about the tenders were sent to the other OPs. She also admits that there is an agreement or understanding between the OPs.

Based on the analysis of the emails found by the OPs and the leniency application, the Commission agreed with the DG's conclusion that the OPs actively took part in discussing the bids and controlling the supply and allocation of the market for polyacetal protective tubes in various Railway tenders. This led to the Indian Railways' bidding process being manipulated.

Also, in response to the parties' claim that the OPs' actions didn't lead to any AAEC in the market, the CCI said that the parties' claim was wrong because, once an agreement of the types listed in Section 3(3) of the Act is established (including a cartel), it is assumed to have an AAEC in India. However, as per the ratio decidendi of the decision given by the Hon'ble

Supreme Court of India in the matter of ***Rajasthan Cylinders and Containers Ltd.***[218] the parties can disprove the presumption of AAEC by putting evidence to the contrary on record, but in this case, the OPs were unable to show any positive results from their cartel activity, such as benefits to consumers, improvement in production or distribution of goods or services, or promotion of technical, scientific, and economic development through production or distribution of goods or services., CCI finds no evidence that could change the fact that AAEC is likely to rule in favour of the OPs.

Also, CCI didn't agree with the parties' claims that the market structure and Indian Railways' monopoly forced them to make pool arrangements and form cartels in order to avoid losses and get their fair share of business. This was based on the ratio decidendi of the same Supreme Court ruling in the Rajasthan Cylinder case.

**Leniency and penalty order**

CCI came to the conclusion that all of the OPs had broken Sections 3(3)a), 3(3)b), 3(3)c), and 3(3)d) read with Section 3(1)of the Act.

On the subject of financial penalties CCI gave them a fine that was equal to 5 percent of the average turnover they made from selling protective tubes over the last three years. CCI also found that the people who played certain roles in the OPs were responsible under Section 48 of the Act and fined them 5% of the average of their incomes over the last three financial years.

CCI also said that OP-4 is eligible for up to a 100% reduction in the amount of the penalty because it worked honestly, fully, continuously, and quickly not only during the investigation before the DG but also during the subsequent proceedings before the Commission. As a result, they got a 100% reduction in the amount of the penalty they had to pay.

[218]Rajasthan Cylinders and Containers Ltd. v. Union of India and Others, 2018 (13) SCALE 493

# CHAPTER – 6

# CONCLUSION AND SUGGESTIONS

## 6.1) Conclusion

### 6.1.1) General remarks

As markets get bigger and more complicated, they will become vulnerable. In this case, the integrity of the market and the interests of consumers need to be protected by a strong and powerful regulator. The final message that competition authorities need to send is that joining a cartel will be expensive, and they will be prosecuted in every way possible. Most of the cases that the Commission knows about, come from informant. Usually, the informant is someone who works in a field where there isn't enough fair competition. The CCI looks into both reference and suo moto cases involving cartels. For example, the Commission launched a probe based on a referral from the Serious Fraud Investigation Officer and the Comptroller and Auditor General on the defence sector in the seminal cases of in Re Sheth& Co[219] and Re Maufacturers of Asbestos Cement Products[220]. DG, which is the investigative arm of the CCI, uses both structural and behavioural methods when conducting investigations. The behavioural method,[221] looks at how well companies work together based on how they talk to each other, how their products turn out, and how they act in the market on the other hand in the structural method[222], market characteristics of a certain industry are looked at, such as the number of firms, how similar the products are, and how elastic the demand is[223]. Because cartels are secret, both the DG and the Commission rely heavily on evidence that points in a certain direction. Some examples of circumstantial evidence are meeting minutes, memorandums, records of phone calls, letters, and so on[224]. Communication evidence is a type of circumstantial evidence that cartel companies met or talked to each other in some way, but it doesn't show what they talked about. It includes records of phone calls between

[219] In re Sheth & Co., Competition Commission of India, Suo Moto Case No. 04 of 2013
[220] In re Manufacturers of Asbestos cement Products, Competition Commission of India, Suo Moto Case No.01 of 2012
[221] An application of Chicago school of thought on competition law
[222] An application of Harvard school of thought on competition law
[223] *Supra* note 143
[224] Case of the Lombard Club, IP/02/844. The European Commission used meetings, records of phone calls, letters, and other things to figure out who was responsible for the price-fixing cartel of eight banks.

people who are thought to be in the cartel, but not the actual content of those calls. The CCI also takes into account travel to a common destination or participation in a meeting[225].

A cartel is a group of businesses that agree to limit competition between them. These businesses have their own legal identities, but they all do business in the same sector. To stop competition in the market, cartel members used different tactics, such as splitting the market, limiting supplies, setting prices, etc. It is very hard to find cartels and their members and bring them to justice according to the law. This is because cartels are secret agreements between their members, and most of these agreements are informal and hard to find and prove in court. Competition authorities around the world have the best tool in a "leniency programme," which gives cartel members an incentive to tell the truth about the existence of cartels in exchange for reduced penalties or full immunity under the relevant antitrust law. In India, the leniency programme is written into Section 46 of the Competition Act of 2002 and the Competition Commission of India (Lesser Penalty) Regulations, which were changed in 2017.

Because the leniency programme offered whistleblower protection to cartel members who gave important information to competition authorities, it is thought to be one of the most effective ways to break up cartels and make people less likely to join them in the future. In the cartel leniency programme, the first person to ask for leniency gets a free pass, and the rules say that subsequent people can get a smaller penalty.

The first leniency programme was started in the United States of America in 1978. Since then, it has been changed to become one of the most successful leniency programmes in many places. In 1996, the European Union started leniency programmes, and in 2009, the Competition Commission of India (Lesser Penalty) regulations were put in place in India. In 2017, these regulations were changed.

For the leniency programme to work, there needs to be a strong threat of harsh punishments if cartels are found. Section 27 of the Competition Act says that cartel members have to pay fines. This makes people in the cartel industry rush to apply for leniency so they can get the most out of the programme. Second, the competition authority, which in India is the CCI, should be able to do investigations to find cartel members. This will make cartel members afraid of being caught and force them to ask for leniency before they are caught. Lastly, there

[225] Cases of this kind include the cement cartelization case, in which the Cement Manufacturers Association was used as a place to share price information on cement, and the insurance cartelization case.

needs to be trust between those asking for leniency and the competition authority, and the competition authority's decision should be based on the rules, not on their own judgement.

Under the CCI Lesser Penalty Regulations, it is up to the Competition Commission to figure out if the evidence given by the leniency applicants is full, true, and important enough to help make a first impression about the cartel, which the commission did not know existed. The regulations make it clear that the first applicant will get a lesser penalty equal to or up to 100%, the second applicant will get a lesser penalty equal to or up to 50%, and the third and subsequent applicants will get a lesser penalty equal to or up to 30%. This is a reduction in penalty, if CCI thinks that the information they disclosed adds a lot of value to the evidence they already have. Because CCI has a lot of freedom to decide what to do, it didn't give the first applicant a 100% reduction of the penalty in the case of In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items[226]. Instead, it gave the leniency applicant a 75% reduction of the penalty because it had already started its investigation and had evidence. In Nagrik Chetna Manch v. Fortified Security Solutions and others[227], CCI only reduced the first applicant's penalty by 50% because CCI had already started its investigation. This is the position of CCI, which makes me wonder if a leniency applicant can add anything of real value to an investigation that CCI has already begun. In the study, the researcher will compare the provision to laws in other places to answer this question.

One of the most important parts of a leniency provision is the criteria for immunity and whether or not leniency is given on a sliding scale. Most places (except Japan) let people avoid fines even if the competition authority knew about the violation or didn't know about it. But the US and Canada have made it harder for cartel leaders to get full immunity by putting up extra barriers. Except for the USA, Canada, and South Africa, all of the other countries looked at here have some kind of sliding scale penalty, where the first person to apply gets full amnesty and subsequent applications get smaller reductions.[228] (Under the US amnesty programme, only the first company to admit guilt doesn't have to pay the fine, and other companies can't get their fines lowered.) Australia, Brazil, Canada, and the United

[226] *Supra* note 2.
[227] *Supra* note 10.
[228] Aditya Bhattacharjea Oindrila De, *India's Cartel Penalty Practices, Optimal Restitution and Deterrence*,424, IEG working paper, 11(2021) https://iegindia.org/upload/profile_publication/doc-010421_162610WP424fc.pdf

States all have “Amnesty-plus” programmes where a company that wants immunity for cartel A can also tell the truth about cartel B and get immunity for it.[229]

At the moment, the CCI's leniency programme does not give an applicant a complete and guaranteed exemption from penalties if the applicant is part of a second cartel that affects a different relevant market. These rules are also called “amnesty plus” rules, and they are part of the US programme, that give people a second chance. Also, under the current leniency system, there is no way for the person who asked for leniency to get a bigger penalty if they were caught for cartelization a second time. This is called the “penalty plus” provision, and it is part of the US and EU leniency programmes. Because of these problems and the fact that not all leniency applicants get the chance to get a lighter sentence, many people don't use the CCI's leniency programme.

Also, people are becoming more worried about the privacy of the information given by the applicant and the privacy of the identity of the applicant who is asking for leniency. In the Nagrik Chetna Manch case, the CCI made all of the applicant's disclosures public. This was because the CCI thought that the information already gathered by the DG could be made public in the DG's report, which would reveal the identity of the applicant and make people less likely to use the leniency programme in the future.

People think that the biggest threat to a policy's success is that if it can't be predicted. In India, the leniency programme is still finding its feet. This is because the CCI has a lot of power and there are concerns about how transparent it is. India's leniency programme is still changing, and applicants have only started coming to CCI since CCI changed the rules on leniency in 2017. At the moment, there are no empirical studies about how well Indian leniency laws work, and the researcher wants to fill this gap.

[229] The US programme lets a company avoid fines in cartel B (a separate product market) completely and cuts fines for cartel A participation by a large amount. This part of the amnesty programme encourages companies to report cartels in a different product market, even if they didn't get the chance to apply for full immunity in the primary market. OECD (2002a) says that the programme has worked well in the US, and that half of the investigations that were going on in the US at the time were started because parties in other cartel investigations worked together.

### 6.1.2) Specific remarks:

**Non-Existence of Criminal penalties in India[230]**

Those who violate antitrust laws and the code in the United States incur criminal penalties, including jail time. In the eyes of antitrust regulators, this is the most effective deterrent method. However, in India, where there are no criminal consequences or jail terms, whistleblowers are not discouraged because of the lack of such repercussions. As a result, any collaboration offered by businesses is suspect and is almost always used to further their own strategic goals. Taking into account the cartel's revenues and losses, as well as the proportional gains and losses incurred by their competitors, are all factors that influence this strategic decision (on the lines of game theory). However, only a criminal penalties scheme like the US's could have the desired deterrent impact. The introduction of Leniency Plus into the Indian competition framework is well-thought and will attain the real purpose, it can also be anticipated to reap the influence it has had in the United States over the last few decades.

**CCI's inconsistent approach while deciding leniency cases**

In the last six years, companies have used and benefited from the Competition Act, 2002 (the "Act") leniency provisions more and more. The Indian competition law's leniency framework is made up of Section 46 of the Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (called the "Leniency Regulations"). The leniency framework gives the CCI the power to reduce penalties for whistle blowers, such as companies and their officers who are part of a cartel and tell the CCI important information. Such a reduction in penalty is only possible if the person asking for leniency tells the truth about the existence of the cartel, its role, how it works, its goals, etc. Even though the CCI has been using the leniency provisions quite often, it is hard to see a pattern because of how they do it.

The first ever leniency application was made after the CCI looked into whether manufacturers of brushless DC fans were working together to win tenders from the ***Indian Railways***[231]. Even though the Central Bureau of Investigation gave information that led to the investigation of this case, one of the parties, M/s Pyramid Electricals, asked for leniency while the investigation was going on. In this case, the CCI said that M/s Pyramid Electronic was the

[230] Vedantha Sai (NUALS) Kochi, *Leniency Plus: A Potential Minus To The Indian Competition Framework*? INDIA CORP LAW,(March, 26, 2020), https://indiacorplaw.in/2020/03/leniency-plus-a-potential-minus-to-the-indian-competition-framework.html

[231] *Supra* note 2

first and only person to reveal important information, such as the fact that a bid-rigging cartel existed. The information that Pyramid gave matched the evidence that CCI got, and the fact that the applicant helped out in every way meant that CCI took the applicant's help into account when deciding the value of the information given. In other words, the CCI did not give Pyramid a full reduction in the penalty because Pyramid went to the CCI after the investigation had already begun.

This is different from how the ***CCI handled the Dry Cell Manufacturers cartel case***[232], which involved Eveready Industries India Ltd., Indo National Ltd., Panasonic Energy India Co. Ltd., and the Association of Indian Dry Cell Manufacturers. In this case, Panasonic had complete immunity, while Eveready and Nippo got some of their penalties reduced because they didn't add much value at the strategic time. This was different from the way CCI handled the previous case, Suo Moto Case No. 03/2014, where cooperation, even from the first and only applicant, was only looked at in conjunction with the disclosures made and not on its own.

In another case[233], the CCI gave NSK Ltd. a penalty reduction of 100% and gave JTEKT Sona Automotive India Ltd. a penalty reduction of 50%. This was because the former applicant's disclosures were the reason an investigation was started, while the latter applicant's evidence only added to an investigation that was already going on.

In another case[234], where the ***Puna Municipal Corporation*** was accused of rigging bids for solid waste processing plants in 2014, two applicants (Fortified Security Solutions and Raghunath Industry Pvt. Ltd.) were denied leniency because they added the least or least amount of value. It's important to note that CCI refused to lower the penalties for the two applicants, even though they had helped out. This shows that the CCI is taking a different approach than it did in the Dry Cell Manufacturers' Cartel case (see above), where applicants got a partial reduction in the penalty even though they worked with the government.

In an interesting turn of events, the CCI has also thrown out cartel allegations that were brought up in a leniency application. This was because there was no proof that the activities of the parties were carried out in a way that led to a cartel. In cases that began with leniency applications, the CCI also made some interesting decisions in the past to past years. In the anti-vibration rubber products and automotive hoses case, CCI found that even though some

[232]*Supra* note 3
[233]*Supra* note 125
[234]In re Cartelisation in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing, Competition Commission of India, suo moto Case No. 3 of 2016.

"Original Equipment Suppliers had contacts with their competitors, none of the OEMs actually sold vehicles in India with the disputed products installed". Also, the exchange of information happened before April 20, 2009, which is when the relevant parts of the Act went into effect[235]. So, the CCI ruled that India did not have an AAEC due to this. In another case of alleged cartelization involving the ***supply of Industrial and Automotive Bearings to certain automakers***[236], the CCI started an investigation after Schaeffler told them about the cartel in a leniency application. But the CCI decided not to punish the parties because "the ends of justice would be met" if the parties stopped acting like a cartel and didn't do it again. Even though it was thought that the Bearing Companies formed a cartel. Section 27(b) of the Act gives the Commission the jurisdiction to impose a penalty equal to 10% of the average annual turnover of the cartel or three times the profit generated by the arrangement. A strong warning in one case and a large fine in the other, according to the panel, would achieve the "objective of justice" in both circumstances. This raises concerns regarding cartel investigations and weakens enforcement in India because of the CCI's differing stances in the two leniency orders described above: ***the MSME cartel order for railways***[237] and the ***beer cartel order***[238] for the brewing industry. After the COVID-19 pandemic, the Indian antitrust watchdog is in the middle of a bubble of uncertainty that it has made for itself. In the wake of the pandemic, the watchdog was more lenient on cartel-like behaviour in the Micro Small and Medium Enterprises (MSME) sector. However, the watchdog did not let others off the hook for helping cartel-like behaviour. In October 2021, the Competition Commission of India (CCI or Commission) told eight companies to stop doing what they were doing because they had broken Section 3 of the Competition Act 2002 (Act) by rigging bids and working together in a tender put out by Eastern Railway. Due to the fact that the companies were MSMEs and that COVID-19 was a financial burden, CCI decided not to go after any money. On the other hand, CCI had already fined United Breweries (UB), Carlsberg, and the All India Brewers Association (AIBA) USD 116 million in a suo moto case on September 24, 2021, after finding them guilty of violating Section 3 of the Act by working together to sell and supply beer in ten states and union territories. Firms who violated Indian competition law were given a pass despite the fact that their actions had already disrupted the market before the outbreak. EU antitrust sanctions are also being levied, mainly in the form of fines totaling

[235]In Re Cartel in the supply of anti-vibration rubber (AVR) products and automotive hoses to Automobile Original Equipment Manufacturers, Competition Commission of India, suo moto Case No. 01 of 2016.
[236]In Re: Cartelisation in Industrial and Automotive Bearings, Competition Commission of India, Suo Motu Case No. 05 of 2017
[237]Eastern Railway, Kolkata V. M/s Chandra Brothers and others , Competition Commission of India, Reference Case No. 02 of 2018
[238]*Supra* note 211

more than €260 million. Anti-bid-rigging advocates consider it as a serious problem that has to be addressed. According to a recent ruling by the Indian Supreme Court, effective enforcement in cartel cases is essential for punishing and discouraging anti-competitive activity. As a result, it will be interesting to see if the Commission's new policy establishes a precedent for rectifying market conduct or a lack of clarity in cartel leniency decisions that might be harmful in the future.

Keeping aside the inconsistent approach described above, what is also pertinent to note is CCI's pattern in granting greater or even complete waiver of penalty in cases where the information provided by the applicants either enables CCI to form a prima facie opinion about the cartel or helps CCI in recognising the existence of a cartel. For example, in a particular order[239], the CCI gave Panasonic a 100% reduction in the fine because the applicant had made important disclosures about the existence of the cartel and how it worked. In another order[240] from 2018, CCI gave Globecast Asia a 100% penalty waiver for giving information about bid-rigging between the applicant and another company, which was also given some forgiveness in that case.

Based on what's been said, it's clear that CCI's approach is not very consistent, even though it uses a marker system that gives priority to leniency applicants in order to figure out how much of a penalty to give. CCI gives leniency based on how far along the investigation was when the disclosures were made and whether or not the disclosures were the reason why the investigation was started.[241] It's important to note that, according to the Leniency Regulations, one of the conditions for a lesser sentence is "vital disclosures," which are defined as information or evidence that allows the Commission to form a "prima facie" opinion about the existence of a cartel or that helps prove a violation of section 3 of the Act. Keep in mind that the Act's leniency provision, when read with the Regulations, is what Mr. D.K. Sikri, a former CCI Chairperson, calls "fantastic" for enforcement actions against cartels. Even in countries with more developed antitrust laws than India, leniency regimes are still the best way to find cartels. All of the leniency orders that CCI has given out show that the applicants' information is helping CCI find and punish anti-competitive market forces like cartels. With each new order, the people in the market learn more about the benefits of the leniency regime,

[239] *Supra* note 200.
[240] *Supra* note 142.
[241] Neelambera Sandeepan, & Mahwash Fatima, *Leniency regime in India: The CCI's consistently inconsistent approach,* THE TIMES OF INDIA(May. 5, 2021, 3:50 PM)
https://timesofindia.indiatimes.com/blogs/voices/leniency-regime-in-india-the-CCIs-consistently-inconsistent-approach/

which is based on the idea of incentives. So, for an applicant to see the incentive and come forward to share information, CCI must make its approach to providing incentives clear and consistent.

The three most vulnerable sectors in India are the cement, aviation cargo, and insurance industries. The Competition Commission of India (CCI) discovered cartel practises in the above-mentioned industries primarily via the submission of information to the CCI and the CCI's suo moto actions. Those in violation have been issued a cease-and-desist order as well as a monetary penalty by the Commission but in no any such cases leniency scheme was exercised by the parties, this shows that the 2002 Competition Act's leniency provisions need to be seriously revised because they were never utilised by the parties in any of these cases.

**Constitutional Validity of Leniency Provisions**

Some of the CCI's subordinate legislation has been challenged in court for various reasons, such as the leniency programme itself. A nice thing has been done by the judicial branch of the Indian Constitution to ensure that the Leniency Provisions are valid. The Leniency Provisions have been the subject of several legal challenges dating back to the time when the CCI was unable to generate a first assessment based on critical facts.

**Imperative viewpoint**

It is stated in a clause in Section 26(1) of the Competition Act, 2002,"On receiving a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there is a prima facie case, it shall direct the Director General to cause an investigation into the matter." Reg. 4(a) of (Lesser Penalty) Amendment Regulations, 2017 states that, in addition to this provision, the CCI may be able to make an opinion based on the significant information provided by the applicant in the leniency programme, which is also included in section 4(a) of The Competition Commission of India Amendment Regulations, 2017. In the case of Competition Commission of India v. SAIL[242] the legality of Section 26(1) was questioned. It was debated whether or not a department had the authority or responsibility to form a preliminary opinion.. According to the Supreme Court, "The creation of a prima facie opinion by the department (i.e., by the Director General (DG) designated to support the CCI, does not amount to a judicial duty; it is just an administrative one." When the DG or CCI have the authority to form an opinion, they do not make decisions. But this is really an administrative matter, and no one is being held accountable right away.

[242] CCI v. SAIL, (2010) 10 SCC 744 (India)

A “prima facie” examination of the evidence results in an opinion, which serves as the catalyst for further action. Because it initiates the process, it cannot be used as a weapon against fairness. “At the very beginning, the Commission is to utilise its power to request an investigation,” the court said in the same instance. As long as it finds no “prima facie” evidence to warrant issuing such an order to the Director General, it is free to make whatever decisions it deems appropriate. Shows how one might also debate and then discard the Director General's initial view. According to Section 26(1) and Regulation 4, the department's “prima facie” view is just an action taken by the department to initiate an investigation into the subject, rather than an adjudicatory procedure.

**Issue of Natural Justice Principle under Leniency Provisions**

One of the most common arguments to the validity of leniency of subordinate law is the failure to apply the concept of audi alteram partem. The court remarked in Premier Rubber Mills v. Union of India[243] that prima facie formation of opinion due to vital revelation does not result in adjudicatory action against any party. “At that level, it does not convict anyone, and hence the use of audi altrem partem is not required.” Since Section 36 of the Competition Legislation, 2002, as a parent act, stipulates that CCI be governed by natural justice principles, the argument related to natural justice principles has been emphasised further. Even though the arguments in the aforementioned cases are directed against the prima facie opinion and the confidentiality of evidence, individuals, and documents under the Leniency Provisions, it is important to note that natural justice principles are not infallible constants engendered in the application of every statute. The goal of the leniency provisions is to safeguard the applicant's safety and confidentiality as a whistleblower of cartel activity. With regard to the cartel's aggressive presence and power spike, it is also necessary as an objective of the legislation to encourage more persons or parties to assist in the detection of cartels. As a result, it is only acceptable to deduce and apply natural justice principles under certain situations. It was found in the case of Natwar Singh vs. Director of Enforcement[244] that flexibility emerges even in circumstances of natural justice. The court pointed out that there is no such thing as a purely technical violation of natural justice. The needs of natural justice must be determined by the facts of the case, the nature of the investigation, the norms under which the tribunal is operating, the subject matter to be addressed, and so on. Courts can insist on and demand additional procedures to guarantee a fair hearing as long as such actions do not contradict the legislation's stated aim. One of the most often raised objections to the

[243] Premier Rubber Mills v. Union of India, (163) DRJ 599 (2017).
[244] Natwar Singh v. Director of Enforcement, 13 SCC 255(2010).

validity of the Leniency Provisions is the accused's inability to acquire evidence, information, or documents of "vital disclosure." There was no provision in the Regulations for the accused to have access to sensitive documents, files, or evidence. The point raised in numerous cases is that the restriction imposed owing to the secrecy of papers or evidence prevented the accused from preparing for the proceedings towards the maximum potential.

As a result, "the contention is that the regulations are arbitrary and in violation of Articles 14, 19(1)(a), 19(1)(g), and 21 of the Constitution of India to the extent that they do not provide the information/documents in the possession of the CCI and Director General to the parties to an inquiry and investigation to present their views and defend their position."[245] Every individual has the right to a fair hearing, and they have the right to know what evidence was used against them.[246] As a republic, it is critical to ensure that the right to a fair hearing is not only recognised but also guaranteed to everyone who appears before an authority with adjudicatory powers. However, disclosure does not always imply the availability of the content. As a result, the idea that nothing should be used against a person that hasn't been brought to his attention is replace, and tangible access to evidence is also supplant. The law is very well known that if prejudiced claims are made against a person, he must be informed of them before to the hearing so that he can prepare his defence. However, there are several exceptions to this general rule where disclosure of evidential material would cause serious harm to the person directly involved or other people, or where disclosure would be a breach of confidence or would be detrimental to the public interest because it would involve the disclosure of official secrets, inhibit frankness of comment and the detection of crime, or make it impossible to obtain certain clauses of essential information at all. It is also worth noting that such suCCInct and categorical paradigms of fair hearing pertain to a real adjudicatory process rather than a departmental or administrative decision. The norms of natural justice are not designed to hinder legislative investigations.[247]

As a result of analysing more than 1100 different antitrust cases, the CCI has established a robust body of law. The enforcement regime seems to be well to uncover cartels thanks to the increased use of forensic tools, data analytics, and dawn raids to assist in the investigation process. Additionally, the leniency programme encourages self-reporting by providing incentives, so the enforcement regime is also well-equipped to uncover cartels. As India evolves into one of the largest and most rapidly expanding digital consumer bases, there is an urgent need for market inefficiencies to be addressed and resolved. While at the same time

[245] *Supra* note 192.
[246] Dhakeswari Cotton Mills Ltd. v. CIT 1 SCR 941(1955).
[247] A.K. Kraipak v. Union of India 2 SCC 262 (1969).

resolving the competitive issues in the technological markets, proper respect must be paid to the principles of efficiency and innovation.[248] Another factor contributing to cartel dissolution is the effective implementation of antitrust laws. Although penalties have been strengthened over the last decade, cartels are still being discovered despite this.[249]

There is a possibility that the success of cartel leniency programmes will be hindered by certain characteristics of emerging countries. The effectiveness of an amnesty program's incentives can be weakened by a number of factors, including close ties between businesspeople, a bigger informal sector, and a poorer "competitive culture." When it comes to worldwide cartels, individuals involved will give priority to pleading their case for leniency in those jurisdictions where the potential consequences for breaking the law are the highest. It's possible that this won't include many developing nations. It's possible that developing nations face larger opportunity costs when it comes to expanding their institutional capacities. In addition, their legal systems could include other dispute resolution procedures that are sufficient in nature. Under these conditions, it is possible that in certain countries the costs of a cartel-specific leniency programme will be greater than the advantages that they provide.[250]

**Inconsistency in granting Leniency** .

When it comes to punishments- At the moment, the Commission does not have a standard way to reduce penalties, such as a way to say what percentage of a reduction a person might get.

There is no list with a formula that guarantees that the applicant will get a certain amount off. This is clear from the fact that the CCI is held. In Re: Cartelization in relation to tenders put out by Indian Railways for the supply of Brushless DC Fans and other electrical items, the first applicant, M/s Pyramid, got a 75% discount, but in Re: Nagrik Chetna Manch, the first applicant got a 50% discount. So, the fact that there isn't a schedule that tells the applicant how much of a discount they'll get based on when they apply gets in the way of the goal and purpose of leniency.

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[248]Address by Shri Ashok Kumar Gupta, Chairperson, CCI in National Conference on Competition Law to celebrate the Azadi ka Amrit Mahotsav as part of Iconic Week of Ministry of Corporate Affairs in New Delhi, 11 JUN 2022

[249]Connor and Lande, 2008, Cartel *detection is not fading away*, Pg 2216, Cited in UNCTAD Report TD/ RBP/CONF.7/4, published on 26 August 2010.

[250]UNCTAD Note on *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries*, TD/RBP/CONF.7/4, published on 26 August 2010.

**Confidentiality Issue**

Regarding the confidentiality of the information, the amendment that took effect in 2017 gave the CCI and the DG the authority, with the agreement of the Commission, to reveal the information and name of the firm or persons to other businesses. The fact that this amendment creates a barrier for businesses to seek leniency raises a concern because it makes it more likely that their identity and other confidential information will be disclosed to rival businesses. This could result in the disclosure of trade secrets and disrupt existing commercial relationships.

**Cooperation with CCI : Not a guaranteed way to get leniency**

Both the situations involving the Pune Solid Waste Processing case and dry cells manufacturer case it gets evident that the CCI takes an opposite stance with respect to the granting of leniency on the basis of cooperation. In the dry cells manufacturer case, the Commission showed applicants favour by reducing their penalties on the sole condition that they cooperated with the investigation. In contrast, in the waste processing case in Pune, the Commission did not reduce the applicants' punishments in any way even after acknowledging the applicants' willingness to cooperate. This counterintuitive strategy creates a roadblock for businesses seeking leniency and adds another layer of difficulty to the inquiry. A significant barrier that stands in the way of businesses submitting leniency applications is the obvious ambiguity that is highlighted by the rulings issued by the Commission.

**No Provision for Rewards**

It's possible to make the leniency regime in India more attractive by setting up a monetary incentive programme for people and businesses.

### 6.1.3) Hypotheses testing

**(H1) (Ha): Indian leniency Program is not as effective as the leniency schemes of developed nations.**

The goal of leniency programmes is to encourage businesses engaged in cartels and other anti-competitive behaviour to come forward and work with competition authorities in exchange for reduced or waived penalties. While the Indian leniency programme seeks to persuade businesses to expose cartel conduct, there are some variables that might make it less effective than the leniency programmes in the US and EU in this regard.

Efficiency of Procedures: The efficacy of the programme can be greatly impacted by the effectiveness and predictability of the leniency procedures. Procedural length and uncertainty may deter businesses from submitting applications. Applications for leniency are handled via streamlined and clearly defined procedures in the US and EU, allowing for quick reviews and judgements. The Indian leniency programme, on the other hand, might profit from significantly streamlining its procedures to give leniency applicants speedier and more reliable results.

Penalty Reduction: The appeal of leniency programmes may also be influenced by how much the penalty is reduced. For the first application for leniency in India, the CCI may reduce the penalty by up to 100%; for the second applicant, up to 50%; and for subsequent applicants, up to 30%. Comparatively, both the US and EU leniency programmes provide greater discounts for early leniency applicants, frequently leading to the first qualifying applicant receiving full exemption from fines. Companies may be more motivated to cooperate if there is a chance of bigger penalty reductions in the US and EU.

Settlement Mechanism: The availability of settlement procedures is another factor that may affect how well a leniency programme works. The US and EU competition authorities have procedures in place to resolve disputes with applicants for leniency, which can hasten case resolution and offer additional incentives for cooperation. Although settlement of complaints is permitted by the Indian Competition Act, the procedure and rules for settlements are still being developed, and the CCI has less experience with settlements than the well-established settlement frameworks in the US and EU.

Awareness and Enforcement: The efficiency of any leniency programme also depends on the competition authority's awareness and enforcement initiatives. The leniency programmes in the US and EU have been in place for a longer time and have had remarkable success, raising awareness among businesses. Due to its recentness, the Indian leniency programme may not be as well known among prospective applicants. Additionally, compared to the US and EU, the number of instances successfully prosecuted under the Indian leniency plan has been very low, which may impair the perception of its efficacy.

In the realm of the findings, facts and analytical study of the chapters of the research it has been unequivocally established that the **hypothesis stands firmly proven.**

**(H2) (Ha): Lack of amnesty plus and penalty plus provisions in the Competition Commission of India (Lesser Penalty) regulations, 2017 is a hindrance to effectively combat cartelization.**

It's crucial to remember that the precise layout and application of a leniency programme, along with any potential "Leniency Plus" component, would depend on the laws and regulations of the relevant jurisdiction.

It can now be concluded that the ability of competition commission of India to identify and study cartels can be considerably improved by Leniency Plus. It generates increased incentives for cartel players to self-report and submit evidence against other cartel members by providing additional benefits above and beyond conventional leniency, such as decreased penalties.This may help find more cartels and discourage such behaviour in the future. We have also witnessed the introduction of "leniency plus" feature in the Competition (Amendment)Act 2023 which can be considered as a welcome step by the government.

However Aside from that, leniency plus comes with an equally important companion, "penalty plus," which serves as the "carrot" to the "stick" of amnesty plus. Under penalty plus, a company's refusal to reveal its membership in another cartel while undertaking leniency procedures and cooperating with authorities is viewed as a key omission and acts as an aggravating sentence element. It has the potential to increase a fine or possibly lead to incarceration. As a result, amnesty and penalty plus are inseparably linked and cannot be separated. Amnesty plus' success in the United States can be attributed to this coordinated effort.

**So this hypothesis stands proved** by the study and it can be concluded that the absence of leneicny plus & penalty plus in the Competition Commission of India (Lesser Penalty)

regulations, 2017 is a hindrance to effectively combat cartelization. India has introduced leniency plus in recent amendments understanding its need but still there is a need to add penalty plus as well, because only in a coordinated effort both can enhance the functioning of leniency scheme in India under Competition Act 2002.

**(H3) (Ha): The discretionary power of CCI in in adjudicating "significant value addition" while granting the quantum of lesser penalty is a hindrance to the leniency program.**

Since the corporations may anticipate the size of fines, which is typically emulating a civil penalty metre, the uncertain character of the CCI may have a negligible deterrent effect. In the Suo-moto case of 2017, where the commission discovered a cartel in the industrial and automotive bearings sector that had been adversely affecting consumer welfare for five years (2009-2014), there are some contemporary examples of this. However, because the case was resolved in June 2020, when India's economy was anything from stable, the commission decided not to impose any financial sanctions on the cartel members.

When an investigation has started and the parties then submit a leniency application, the CCI does not, in practise, allow the first applicant "up to 100%" reduction in fines. All parties filed their leniency requests following the start of the investigation in the "PMC Cases" (Cartelization with respect to tenders issued by Pune Municipal Corporation for Solid Waste Processing; Case No. 50 of 2015, Suo Motu Case No. 3 of 2016, and Suo Motu Case No. 4 of 2016). The first applicant for leniency in this case was given a "up to 50%" reduction in penalty, followed by the subsequent applicants.

In Cartelization in the Supply of Electric Power Steering Systems (Suo Moto Case No. 07 (01) of 2014) (the "EPS Case"), in which NSK Limited Japan ("NSK") had disclosed the existence of the cartel, the CCI granted total immunity through a 100% penalty reduction, whereas JTEKT Corporation ("JTEKT"), which had filed its leniency application during the DG investigation, was granted a reduction of 50% in the penalty imposed on it.

In the Dry Cell Batteries Case and the Sports Broadcasters Case, where the information revealed a new cartel, the CCI used its discretion to grant a 100% reduction to the first applicant. However, it also used its discretion and did not grant any reduction to the second and third applicants in one of the PMC Cases.

Based on the comprehensive research conducted and an examination of the competition patterns observed by the Competition Commission of India, it can be inferred that the **hypothesis has been substantiated.**

## 6.2) Suggestions

1) While the 2017 amendment in lesser penalty regulations[251] broadened the pool of those eligible to apply for leniency and extended it to the individuals as well, no provisions were included to provide any sort of protection for those who come forward with information about wrongdoing. *It is therefore suggested that cartel whistleblowers must be offered some type of protection (such as protection from removal from service) by the Commission in exchange for their cooperation.*

2) One of the important aspect of encouraging the filing of leniency petitions is India's requirement that enterprises providing information regarding the presence of cartels be given legal protection. Due to the 2017 modification[252], which allows the DG to release secret information of one party to another after specific inspections, but discourages corporations from applying for leniency, the regulations relating to secrecy have been weakened. It was formerly illegal for DG or CCI officials to divulge the identify or details of a leniency application, unless mandated by law. It is now possible for the DG to divulge the identity of the party that has requested leniency to another party in order to conduct an inquiry, which is an enormous expansion of the DG's authority. *It is therefore suggested that when it comes to secrecy, adopting the EU's standards would be beneficial.*

3) *It is also suggested to devise a standard method of giving leniency in accordance with widespread standards that are comparable to the requirements that have been stipulated in the jurisdictions of US and EU*. Because of this, the corporations would be able to have more certainty regarding the quantum of reduction in penalty to be imposed and other advantages that they may claim when making their leniency request. Adopting such standards or tests would also encourage corporations to file leniency petitions sooner in order to claim a higher reduction in penalty, which would be another benefit of adopting such benchmarks or exams.

4) *It is suggested* to ensure strict confidentiality for leniency applicants, protecting them from retaliation or harm. Guaranteeing anonymity during the leniency process can encourage more companies to come forward without fear of negative consequences.

5) *It is also suggested* to create a policy that grants rewards to corporations and individuals that

[251] *Supra* note 1
[252] *Id.*

come forward and file for leniency is another crucial aspect that might encourage companies to submit for leniency. This policy could be used to encourage companies to file for leniency. This operates in a manner very similar to the leniency regime that is in place in the United Kingdom. Under that system, anyone who comes forward with information regarding the existence of a cartel is eligible to receive a financial reward; however, the amount of that reward is left up to the discretion of the Competition and Markets Authority (CMA). If India had a programme that was analogous to this, it would definitely encourage more businesses to submit leniency requests at an earlier stage so that they might get immunity and win a cash benefit as well.

6) *It is also suggested* to establish precise criteria on the level of cooperation anticipated from applicants for leniency. This can entail being required to offer all pertinent data and proof, aid in the investigation, and work closely with the competition authorities throughout the procedure.

7) *It is suggested to adopt a Timely Decision-Making mechanism to decide the leniency applications by* Creating a clearly defined schedule for the competition Commission's decision-making. Potential applicants may become discouraged if leniency is granted slowly. The credibility and efficiency of the leniency regime will increase if decisions are made on time.

8) *It is suggested to actively promote the leniency programme* through education campaigns, workshops, and collaboration with trade organisations. More businesses may disclose anti-competitive practises if they are made more aware of the advantages of leniency.

9) It's possible that leniency provisions by themselves won't be enough to stop all businesses from using anti-competitive tactics. *It is therefore suggested* that the regulations can increase the deterrence effect by including a *penalty plus clause*. If businesses chose not to fully collaborate, they could potentially face greater penalties in addition to financial ones. By encouraging compliance and preventing anti-competitive behaviour in the first place, this serves as a stronger deterrence.

When compared to the system in place in India, the leniency regimes in place in the European Union and the United States are more organised. However, it is essential to keep in mind that India's system of competition law is still in its infant stages. This system, however, may be

simplified by incorporating the suggested conclusions and provisions from these jurisdictions of US & EU that already have an established competition law regime. Regarding the leniency regime, for the development of competition law jurisprudence in India, it is imperative that the legislature adopts some of the prevalent provisions of the leniency regime of other jurisdictions in order to fulfil the purpose of leniency, which is to entice more companies to file for leniency applications, which shall uphold the objectives of the Competition Act. In other words, it is imperative that the legislature adopts some of the prevalent provisions of the leniency regime of other jurisdictions in order to have one of the best effective leniency provisions.

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