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Leniency Regime in India: Recent Developments

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ABSTRACT

The Competition Act of 2002 was passed to foster positive competition and eliminate practices that are harmful to consumers' ability to make informed purchasing decisions in the market. The Authorities charged with regulating competition across the world have always regarded cartels as a grievous sort of anti-trust violation. The elimination of cartels has been the most important objective of the majority of the world's jurisdictions, thus the Competition Commission of India {hereinafter "CCI" or "Commission"} has not been an exemption for this pattern. As time has passed, the work of finding and punishing cartels has grown more difficult for those who oversee fair trade. As a result, to assist with the enforcement of laws, numerous nations, including India, have embraced leniency systems to empower organizations associated with cartels to reveal data about any current cartels in return for complete or frictional resistance from prosecution. In 2017, several amendments were likewise done to the Lesser Penalty Regulations, that altogether extended the extent of powers presented to the CCI concerning leniency programs in the nation. This article particularly deals with the recent developments concerning the leniency regime in India and its legal framework.

Keywords: *leniency, competition, CCI.*

I. LENIENCY: MEANING AND FACETS

Cartels have been groupings of makers or merchants, the main aim of whom is to aggregately amplify their benefits via the use of any business activity, including but not only limited to cost fixing, confining inventory, or some other technique. These sorts of arrangements and affiliations discourage good contests in the market, which in turn hinders the rivals' ability to survive in the market and expand their businesses.

For example, market research found that the final customers pay an average price which is 49% more than the price at which the product is sold in its genuine form. The fact that 249 cartel instances were studied in 20 developing nations and showed that the extra earnings collected with the help of the cartels had been analogue to 1 per cent of the GDP of different nations is

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horrible to observe.[3]

The unfurling of occasions to distinguish a cartel depends entirely on fortuitous proof, for example, correspondences among the organizations, varieties in bid citations that are not supported by cost contemplations, as well as minutes of the social meetings that happened between contenders, and so on, proving the existence of a cartel has proven to be an extremely challenging endeavour. It is endowed with a strong and learned anti-trust structure, the European Union can identify seventy to seventy-five per cent of cartel proceedings that are initiated by businesses requesting leniency before the CCI. From this point on, the global authorities tasked with ensuring fair trade will augment cartel discovery with a comprehensive leniency mechanism.

Leniency provisions are a particular sort of insurance for whistle-blowers. They provide businesses that are participating in cartels the option to come out and expose information about the cartels. In return for resistance or leniency in the punishment forced, the undertakings have the opportunity to furnish significant proof and help out resulting examinations. On the off chance that the current cartel had been revealed by the CCI, the undertakings would have been subject to stringent action. However, the undertakings have the chance to avoid this outcome by providing significant proof and helping out resulting investigations.[4]

Sec. 46 of the Act, accommodates the leniency clause, and peruses along these lines:

"The Commission may if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations."[5]

This provision was included in the act with the primary objective of exposing any anti-competitive cartels that may exist in the market and discouraging businesses from getting into such arrangements themselves. Based on the detainee's quandary, the goal is to instil a feeling of mistrust in the minds of those who take part in cartel activities. This is because there is always the possibility that one of the participants may reveal the cartel agreement to the authorities that are engaged.

[3] Angela Dua, *The Indian Leniency Program & Its Evolution*, RSRR (Feb. 19, 2020), http://rsrr.in/2020/02/19/the-blog-elucidates-on-the-future-of-the-indian-leniency-regime-after-the-2017-amendment-discusses-some-important-changes-post-amendment-and-states-relevant-measures-for-a-more-effective-leniency/.
[4] S. Muralidharan & C. Deshpande, *Scope for Intersection between Antitrust Laws and Corporate Governance principles vis-à-vis cartel deterrence in India*, NUJS L. R. 93 (2016).
[5] The Competition Act, 2002, No. 12, § 46, Acts of Parliament, India (2002).

In this specific circumstance, it is required that before the CCI may delve into the lighter penalty restrictions, it must first inoculate certain fundamental requirements in its requests, like the nature of the data. The disclosure must be an "essential disclosure," the candidate's participation should be authentic, finished, and brief, and the pertinent proof should not be destroyed or altered, to name just a few of the requirements that must be met.[6]

II. THE INDIAN LENIENCY REGIME: A SNAIL'S WALK

The U.S.A. was the first nation to use leniency practices. This was done to reduce the challenges that competition authorities have when trying to identify cartel agreements as a means of reducing prices. Within three years, the nation saw a rise in the number of such instances that was equivalent to a multiplicative increase of two. According to the findings of market research, the introduction of the leniency regime brought about a huge decrease in the occurrence of cartel formation (by 59 per cent), while simultaneously increasing the rate of cartel discovery (by 62 per cent).

On the other hand, the Indian Competition Law regime hasn't been able to successfully emulate the success of the American system. The reason for this is CCI in India has been given an unjustifiable amount of discretionary authority. The Regulations specify that the CCI has a very large amount of leeway in determining the penalty that will be applied to the initial applicant and that this decision will be based on factors such as the important disclosures made, and the stage the application is in, and subsequent confessions. In addition, the "any other requirement" criterion is relatively vague and adds a layer of ambiguity.[7] So, it creates a barrier for businesses that are participating in cartels and prevents them from approaching the CCI. In contrast to this, the leniency system in developed nations like the U.S. and Australia has well-formulated clauses in which the first undertaking to reveal information about a cartel is granting leniency.

III. ORDERS OF THE COMPETITION COMMISSION- A STRING OF IRREGULARITY CONTINUES

It is possible to get an idea of how inefficient the CCI is at issuing orders addressing leniency programs by observing the non-uniformity that exists across all five leniency degrees that have been given in the decade since the provision was first established. In the year 2007, the CCI issued its very first leniency order. The Cartelisation regarding tenders sent off by the Indian

[6] R. Sharma and K. Agarwal, *CCI's Application of the Leniency Regulations*, Competition Law Observer, https://competitionlawobserver.wordpress.com/2018/08/09/ccis-application-of-the-leniency-regulations/ (last visited Jun. 15, 2022).

[7] S. Gandhi, A. Gopalakrishnan and others, *Cartel Leniency in India: Overview*, Thomson Reuters Practical Law (Oct. 1, 2019), https://uk.practicallaw.thomsonreuters.com/ (last visited Jun. 15, 2022).

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Railways concerning the stockpile of brushless DC Fans as well as other electrical products case had been a *Suo-motu* action taken by the CCI. As part of this action, the CCI fined three companies along with their officeholders for bid-rigging. Because this person became an approver and contributed significantly to the CCI's investigation into whether or not a cartel existed, the CCI reduced the total amount of the penalty that might be levied against this person by 75%. [8]

In the case titled "Re: Cartelization by Broadcasting Service Providers by Rigging the Bids Submitted in Response to the Tenders Floated by Sports Broadcasters," the companies that constituted the cartel were given leniency. The very first application was given a score reduction of one hundred per cent, whereas the second applicant was given a score reduction of only thirty per cent. It is vital to note, in any case, that order records show that the subsequent candidate contributed anything of significant worth to the analytical systems and made the essential divulgences. Some mentions show that the principal application, who was awarded a discount of one hundred per cent, did not "fully" assist in the inquiry, which is required by Section 46 of the Act. This was a problem since the applicant was awarded the discount.[9]

In the issue known as the "Zinc-carbon dry cell manufacturer's cartel case," the CCI marked the total penalty down by one-hundredth of one per cent to reduce the overall amount.[10] The leniency application that was submitted by Panasonic itself was the one that exposed the conniving offering for setting valuing of zinc-carbon dry cell batteries in India that included Indo National, Eveready Industries, and Panasonic India. After that, Panasonic was given entire immunity as a result of the revelation, which led to the formation of a new cartel. After then, the leniency applications were submitted by the other two enterprises. However, according to the CCI, the evidence that they provided did not add any major value, and the Commission found that the material that was seized by the Director-General was "adequate" on its own. However, in recognition of the fact that both firms provided full cooperation to the CCI throughout the inquiry, the Commission reduced the penalty imposed on them by a respective 30% and 20% respectively. This decision of the Commission contradicts its conclusion in the Brushless DC Fans Case, in which leniency was conceded in light of the participation stretched out "related to," and not exclusively based on value addition given by the candidates. This decision of the CCI contradicts the conclusion in the Brushless DC Fans Case in which leniency

[8] A. Sakle and B. Budholia, *Amendments Proposed to the Indian Leniency Regulations*, Competition Law: A Cyril Amarchand Mangaldas Blog (Mar. 24, 2017), https://competition.cyrilamarchandblogs.com/tag/section-46/.

[9] Farhad Sorabjee, The Cartels and Leniency Review: India, JSA (Feb. 01, 2022), https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/india (last visited Jun. 15, 2022).

[10] Grey Matters, Key Developments under the Indian Leniency Regime, Touchstone Partners 01- 03 (2018).

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had been given.

In addition, seven different businesses were implicated in the case of NagrikChetnaManch for allegedly engaging in tricky offering and bid-fixing for several different bids. As a result of the applicants' willingness to cooperate with the Commission throughout its investigation of the cartel, the first and third applicants each received a reduction in the amount of the penalty equal to fifty per cent. After that, a reduction in the sanction that had been imposed on three further applicants was granted in recognition of their collaboration, esteem commitment, and need status. It is basic to observe that the Commission, although yielding that the value contributed by OP-2 was "limited," awarded a reduction on punishment given its assistance throughout the inquiry. This is something that should be taken into consideration. OP-1 was not eligible for a discount, even though they fully cooperated and disclosed all of the evidence. In addition, the markdown request for OP-7 was turned down for the same reason, which was that the value added to the inquiry was negligible (due to the evidence it presented).[11]

The anomalies that were evident in the Commission's leniency orders have been brought to light as a result of these judgements that were handed down by the Commission. The method used by the Commission is illogical and inconsistent since it evaluates candidates using multiple measures, such as "good value addition" and "substantial value addition," even though those applicants are in comparable positions. The preceding judgements have brought to light an excessive use of the discretionary powers that have been provided to the Commission, as well as an acute lack of consistency in the penalties that have been imposed and the leniency that has been granted.[12]

IV. PRIVATE ENFORCEMENT

This Act doesn't include any provisions for the private exercise or protection of rights. A person has the right to claim compensation under Section 53N of the Act for any misfortune or harm that can be displayed to have been incurred because of an infringement of the arrangements of the Act. A claim of this kind has to be submitted to the National Company Law Appellate Tribunal { *hereinafter* "NCLAT"}. Under the Act, such cases might be introduced either after the CCI concludes that a violation has occurred or after the NCLAT arrives at a decision that an infringement has happened if the decision reached by the CCI is appealed. However, standard procedure dictates that the NCLAT must first await the judgement of the Apex Court on the merits of the case before moving on with the process of hearing compensation claims. The

[11] OECD, *Prosecuting Cartels without direct evidence of agreement*, OECD 1 (2007).
[12] Luke Danagher, *The Criminalisation of Cartels: A European and Trans-Atlantic Perspective*, 33(11) ECLR 522 (Nov. 3, 2012).

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NCLAT has not yet decided whether or not it will issue an order on a claim for damages.

Even though India's law regarding damages is still in its infancy, it is conceivable for one or more people, along with the permission of the NCLAT, to make compensation claims on behalf of a large number of people. If many different people have been caused to suffer losses or damages as a result of an action taken by the same business or group of businesses, then a single one of those people may submit a claim for an award of compensation on the behalf of all. In addition, given that the size of the fine is a good indicator of the gravity of the crime, this may be taken into consideration as a significant variable in the process of determining the amount of the award.

V. CURRENT DEVELOPMENTS

The Ministry of Corporate Affairs (MCA) distributed a draught of the Competition (Amendment) Bill 2020, seeking members of the public to provide feedback on the proposed revisions to the Act. This was done following the recommendations of the Competition Law Evaluate Committee, which had been established by the MCA to review the Act and make revisions to bring it into line with worldwide standards of excellence and the evolving nature of the economic landscape. The bill is now being considered by the parliamentary committees. Key revisions put forward in the Bill relating to cartels as well as leniency are as per the following:

a. Penalties will be imposed on those who facilitate cartels: under the current structure, cartel agreements between rivals in India are believed to have an AAEC. It is recommended that this assumption be expanded to encompass a cartel facilitator, whether or not the working with the firm is involved in a transaction that is comparable to the one being facilitated by the cartel.

b. The extent of anticompetitive arrangements will be extended: under the ongoing structure, all the more, particularly as per Sec. 3 of the Act, the CCI is simply ready to look at and punish horizontal and vertical arrangements between parties. However, this will change with the new legislation. The bill makes it clear that it applies to all different sorts of agreements, including ones that may not fit neatly into a formal classification as either horizontal or vertical agreements.

c. Arrangement to be presented known as "leniency plus": the Bill puts forward to present a policy known as "leniency plus," which will allow an organisation that requests leniency corresponding to one cartel, thus assists in introducing another cartel to get a lessening in punishment for both the by and large existing cartels and the as of late uncovered cartels.

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The CCI conveyed a draft recommendation for a public remark in April 2021 intending to revise the detailed process for managing classification claims put forward by parties under Regulation 35 of the CCI (General) Regulations 2009.[13] The idea contains a mechanism for putting up a 'confidentiality ring,' which would allow parties involved in a procedure to discuss confidential material with one another. The CCI may establish a confidentially ring consisting of the authorised representatives of the parties, both internal and external, who bequest to be allowed to get to the secret or uncensored case reports of various parties. This ring may or may not be used. The internally authorised representatives who take part in the secrecy ring must come from streams that are not used for commercial operations (i.e., other than deals, promoting, or business groups). If it is deemed necessary for the inquiry, a secrecy ring of a comparable kind may likewise be established at the director-general level. The CCI has also recently held a workshop for stakeholders to address the comments and ideas that were generated as a result of the survey.[14]

During the last year, there have been several noteworthy rulings on cartel enforcement in India. These decisions come on the heels of the Bill and the draught proposal.

In December of 2020, the Supreme Court of India maintained the discoveries of the National Company Law Appellate Tribunal and the Competition Commission of India, dismissing a body of evidence against taxi aggregators Ola and Uber (all in all alluded to as the OPs) for taking part in an assortment of anticompetitive exercises, including finding that the OPs' plan of action comprised a centre point and-talked cartel. The case had alleged that the OPs engaged in various anti-competitive activities (the cartel claim). Claims had been made in front of the CCI that the OPs were utilizing their evaluating calculations to set rates amongst their drivers, so supporting a cartel. These allegations were based on the fact that the OPs were allegedly engaging in this behaviour. It was estimated that assuming the valuing calculation was eliminated, drivers would contend with each other on costs, which would, thus, forbid them from being able to charge excessively high fees (as calculated by the algorithm). The case was rejected by the CCI because for a hub-and-spoke cartel to be present, there must be connivance to set pricing, that in turn needs the presence of cooperation to take place. It is not possible for there to be collusion when drivers can access the pricing that is algorithmically established by the platform. The complainant registered an appeal in front of the National Company Law Appellate Tribunal (NCLAT), which noted, among other things, that the cartel claim had been laid out on the US class action suit according to US antitrust guidelines as well as couldn't be imported

[13] CCI (General) Regulations, 2009, Regulation 35, Acts of Parliament, 2009 (India).
[14] Office of Fair Trading, *Applications for leniency and no-action in cartel cases*, (OFT 1495), 11 (2013).

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straightforwardly into our country. This is particularly true given that the Operations' plan of action in India was not confining cost rivalry among taxi drivers to the weight of riders. It was seen that the basic action was pursued in a new antitrust ward, which was verifiably unique as well as couldn't be imported to work inside the ambit of the component managing changing rivalry worries under the Act. This was because the foreign antitrust jurisdiction was implicitly different from the domestic antitrust jurisdiction. As a result, the appeal was rejected by the NCLAT, and the ruling from the CCI was affirmed. The complainant was dissatisfied with the judgement of the NCLAT, so they appealed it to the Apex Court. However, the Apex Court maintained the conclusions of both the NCLAT and the CCI concerning the cartel accusation.[15]

The case brought against domestic airlines by the CCI for suspected cartelization was finally resolved in February 2021, and the airlines involved were Jet Airways, Indigo, Spice Jet, Go Air and Air India. Based on a letter from the Lok Sabha Secretariat (i.e., the Secretariat of the lower house of Parliament), the Competition Commission of India (CCI) took suo motu cognizance of the case to decide if there was any proof of cartelization in the carrier area, and it alluded the case to the Director-General (DG) for examination.[16] Notwithstanding, later carrying out a comprehensive examination, the DG concluded that there was no evidence of cartelization in the aviation industry. The findings of the DG were upheld by the CCI, and it was noted, among other things, that although the airlines used comparable pricing software and algorithms, there was a significant amount of manual mediation by income management staff to decide the calculation and costs for every individual aircraft. This was because of the way that unanticipated occasions, like tornadoes, as well as donning and far-reaching developments, can occur at any time. At the software level, no evidence could be used to prove coordinated conduct on the part of many airlines.

The Competition Commission of India (CCI) reached its conclusion in February 2021 that the Federation of Publishers and Booksellers Association of India (FPBAI) engaged in cartel activity when it established a body known as the Good Offices Committee. A subscription agent filed a complaint with CCI, which prompted the organisation to launch an inquiry into the matter. The Competition Commission of India (CCI) maintained the discoveries of the Director General's examination and noticed that the Federation of Publishers and Booksellers Associations of India (FPBAI) had taken part in anticompetitive direct by restricting and controlling the stock of books, diaries, and different distributions on the lookout for the

[15] Adam McCabe, *Exposing cartels: rewards and race to confession*, (Mar. 29, 2017) www.lexology.com/library/detail.aspx?g=7baa560f-b4aa-4d4d-8536-b55e5438a3d2 .
[16] Karan Chandiok and Ruchi Khanna, *Taking a lenient approach to leniency*, IBLJ (2019).

stockpile of books, e-assets, as well as print diaries in India by putting a cap on how much limits presented by its individuals to purchasers and giving warnings coordinating its individuals not to partake. The CCI issued an order to the FPBAI and its officials telling them to stop participating in cartel behaviour and to refrain from doing so in the future. In addition, the CCI fined the FPBAI and its officials a total of 0.03 million rupees for their involvement in the offence.[17]

The Competition Commission of India (CCI) reached its verdict in March 2021, finding home appliance dealers guilty of bid-rigging and cartelizing concerning tenders taken in by the local government body that controlled the rural pieces of the Pune region in the territory of Maharashtra. The call directed to offers was regarding the agreement of sewing machines for members of the so-called "backward classes," as well as for women and people with disabilities living in rural parts of the Pune district. The CCI opened an investigation into the matter after receiving a complaint about it from the People's All India Anti-Corruption and Crime Prevention Society. The conclusions of the DG were maintained by the CCI, and it was observed that the vendors partook in bid fixing by orchestrating among themselves the costs that should have been presented for the tenders. The CCI uncovered convincing proof confirmation of conspiracy, like the usage of the same Internet Protocol (IP) address to give in offers to get the tenders with practically no genuine premise, as well as call information records and the instalment of expenses for the tenders out-of-the same bank account. The Competition Commission of India fined each of the home appliance merchants 1 million rupees and each of the personnel who were responsible for the offence 10,000 rupees.[18]

The Competition Commission of India (CCI) reached its verdict in October 2021, finding eight hub bearing makers at legitimate fault for bid fixing and cartelizing during tenders led by Eastern Railway (ER), one of the 18 Indian Railways zones, somewhere in the range of 2012 and 2014. After receiving a report from ER, the CCI decided to begin their inquiry into the matter. The CCI discovered indisputable evidence proof of agreement, which included messages, call detail records, and confirmations got in statements from organization delegates about choosing costs to be cited and amount distribution *inter-se* while offering for the ER tenders. This evidence was found in relation to axle-bearing manufacturers. Albeit the CCI found that the hub-bearing producers had participated in offered fixing, it chose not to impose penalties on them due to a number of mitigating factors. These factors included the "cooperative

[17] Wils, Wouter, *The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years. World Competition*, 39(3) World Competition 327-388 (2016).
[18] Sanskriti Jain, *Busting Cartels through Leniency*, FINANCIAL EXPRESS (Jan. 4, 2021), https://www.financialexpress.com/opinion/busting-cartels-through-leniency/2163422/.

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and non-adversarial approach adopted by the axle bearing manufacturers in admitting their involvement and coming forward to seek leniency," the little yield of the hub demean ring makers, confined employees, nonappearance of experience with the law, and the money related prostration of Coronavirus on the liquidity as well as credit requirements of the axle bearing manufacturers.

The Competition Commission of India (CCI) issued its verdict in October 2021, finding that engineering service providers had engaged in bid-rigging and cartel activity in bids conducted by GAIL (India) Limited (GAIL) for the rehabilitation of drilling well sites. Following receipt of a complaint from GAIL, the CCI decided to launch an inquiry into the matter.[19] The findings of the DG were upheld by the CCI, and it was noticed that the designing specialist co-ops had come to consent to organize their conduct in the accommodation of their particular offers by sending their proposals through a common IP address, from comparative premises, as well as with hardly a pause in between. This was noted in the report. In light of this, the CCI issued an order instructing designing specialist organizations and their officials to shun participating in anticompetitive direct. In addition, taking into account the fact that overwhelming a conduct revision on market members would add to the bigger reason for market remedy, the CCI forced an "emblematic punishment" on the designing specialist organizations.

VI. CONCLUSION

The author is of the strong opinion that the core of these rules rests in ensuring that the choices made by the Commission are consistent and predictable. Nonetheless, the Commission has not been steady while giving its requests in regards to leniency. This is on the grounds that, at times, the participation given by a part has been examined, while in different cases, the validity and exactness of the data have been viewed to give a lesser punishment. The Commission hasn't been the same at the time of providing its decisions concerning leniency. As a result, the writers accept that what is vital isn't just uniformity yet in addition consistency in the ordering. Even if the Indian Competition legislation was amended in 2007 in a manner that is to be commended, there is as yet a critical distance to go as far as the extensiveness and consistency of the leniency orders that have been issued by the Commission.[20] The Commission has the correct idea, but there are many issues that it has to investigate very carefully before it can fulfil its aim, which is to create a more lenient sentencing structure. If it fails to do so, the leniency regime will be

[19] Aditya Bhattacharjea, India's Cartel Penalty Practices, Optimal Restitution and Deterrence, RESEARCHGATE (2021).
[20] Deepankar Sharma, *Dimensions of Leniency Policies in Brics: A Comparative Analysis of India, South Africa, Brazil and Russia*, 3 BRICS Law Journal (2016).

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rendered pointless.

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