

EFFECTIVENESS OF LENIENCY PROGRAMS IN COMBATING CARTELS

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INTRODUCTION

Cartels are agreements between enterprises (including a person, a government department and an association of persons/enterprises) not to compete on price, product (including goods and services) or customers.¹ The formation of cartels is the major structure that negatively impacts competition. The Competition Act of 2002 defines cartels in Section 2 (c) and according to it, "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

The Recommendation Concerning Effective Action Against Hard Core Cartels (henceforth referred to as "the Recommendation" or "the OECD Recommendation") was adopted by the OECD Council in 1998 in response to the growing international consensus. It urges member nations to make sure that their competition laws discourage cartels and provide for sufficient processes and institutions to identify and punish cartels. The Recommendation identified four types of conduct as falling within the definition of a hardcore cartel: a "hardcore cartel" is an anti-competitive agreement, anticompetitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.²

Since cartels are covert by nature, it is difficult to identify them. This is the reason that the majority of competition agencies worldwide have implemented programs to identify cartels in order to improve enforcement against them. These initiatives are commonly referred to as "leniency programs," "amnesty schemes," or "lesser penalties." In lieu of a reduction in the penalty that may be imposed in the absence of such disclosure, such mechanisms offer an incentive to infringers to come forward, cooperate, and disclose information, details, and

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¹ Competition Commission of India, Advocacy Series, available at <http://cci.gov.in>

² Organization for economic corporation and development, Reports 2000, available at <https://www.oecd.org/competition/cartels/2752129.pdf>

evidence regarding their cartel conduct and help the competition authority unearth such conduct.

Cartelists use their counterparts and other parties in order to get an unfair advantage. As a result, several nations consider their options for putting an end to their anticompetitive behavior. Their anti-cartel campaign has as its only goal the prosecution and deterrence of cartels. However, one distinctive characteristic of cartels is their extreme secrecy, which makes it challenging to identify and prosecute them. However, it's not impossible, as law enforcement organizations can and have learned their identities through insider intelligence that is disclosed to them—that is, from within the cartels themselves. And this brings us to one of the best instruments available for detecting cartels: leniency programs.³

RATIONALE FOR INCORPORATING A LENIENCY INITIATIVE

Numerous nations, including the US, Canada, Australia, Korea, and the European Union, have instituted leniency policies in an effort to raise the likelihood of busting cartels. They have demonstrated how effective the algorithm is as a tool for locating cartels. This is due to the fact that the activity is so closely regulated that breaking such agreements needs insider information. The Nash equilibrium and Prisoner's dilemma theories have a big impact on the idea. Since the activity is so well guarded that internal information is sought to breach such agreements, leniency programs are regarded as a means of detecting cartels. However, in order to investigate these institutional design issues with the leniency programs, it is necessary to understand what these notions are. When two people prioritize their personal interests over those of the collective, it creates a prisoner's dilemma where both sides lose out on what would have happened if they had worked together and looked out for the group's interests rather than simply their own. They thereby lose out on chances for reciprocal benefit and experience the unfavorable effects of their individualistic mindset. In this case, confessions from both parties would be enough to find the other guilty of the main offense. When an action profile is in Nash equilibrium, no one can increase their payout by deviating from it alone without the other party's participation or assent. Stated differently, it is a scenario in which both sides have attained a stable state of equilibrium and neither party stands to gain from unilaterally modifying their approach. Applying game theory to the prisoner's dilemma, we find that each prisoner is more likely to acknowledge that he is acting in his own short-term self-interest.

³ <file:///C:/Users/DELL/Downloads/SSRN-id3595143.pdf>

Regardless matter what the other prisoner does, both parties are better off confessing, so the confession strategy gains sway. The structural program outlined in the earlier theories serves as the foundation for the tolerance policy in competition law.⁴

LENIENCY PROGRAMS IN INDIA

Section 46 of the India Competition Act, 2002 establishes a leniency program. With reference to cartel cases, this section gives the Competition Commission of India the authority to impose penalties for Section 3 violations in compliance with Section 46's guidelines. However, CC has the authority under the Competition Act, 2002 to investigate potential violations of the laws pertaining to anti-competitive arrangements, including cartels. However, if the CCI is convinced that the applicant has provided complete disclosure of the cartels, they may apply under Section 46 of the Act for reduced penalties for violating Section 3. It should be noted that any producer, seller, distributor, trader, or service provider may request a reduction in fines under the section that follows, which refers to cartels. A written or verbal request for a reduction in penalty may be submitted. Section 64 of the Act gives the Competition Commission the authority to create regulations for leniency programs. Using this authority, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were passed. These rules offer a foundation within which the Competition Commission may impose fines that are lower than those specified in the Act. The Competition Commission operates according to a set of principles that are specified in the regulations. According to Section 57 of the Competition Act, any information that the CCI or Appellate Tribunal obtains must be kept confidential and not released unless required to do so by the Act or another law that is in effect at the time. Furthermore, the enterprise's prior consent must be obtained before making such a disclosure. Any instruction or directive issued by the CCI may be appealed to the Competition Appellate Tribunal⁵. Certain requirements must be met in order for Section 46 of the Act to grant lesser fines. If it is clear that the criteria under which cartels were subject to lesser penalties have not been met, CCI may rescind or reject such lesser penalties and impose penalties on the member who was responsible but managed to evade the punishment.⁶

The Schedule attached to the Act contains the information that qualifies a party for a leniency application. This information includes relevant names and addresses, the description of the

⁴ <https://www.cmr.edu.in/school-of-legal-studies/journal/wp-content/uploads/2024/01/Effectiveness-of-Whistleblower-and-Leniency-Programme-in-Detecting-and-Preventing-Cartels.pdf>

⁵ Section 53A, Competition Act, 2002

⁶ <file:///C:/Users/DELL/Downloads/SSRN-id3595143.pdf>

alleged cartel agreement, the goods or services involved, the geographical market covered, the start date and duration of the cartel, the names and details of the individuals who, to the best of the applicant's knowledge, were involved in the formation of the cartel, a list of the evidence supporting the application, and any other information that the CCI requires or directs to be appended to the application.⁷

The amount of immunity under the leniency provisions in relation to the penalties specified in Section 27(b) of the Act, which offers a penalty reduction of up to 100%. As long as the applicant makes the necessary disclosures first, the commission will be able to use the evidence they have presented to establish a preliminary opinion about the existence of a cartel. These fines are also applicable in cases when the matter is being investigated, but the Commission cannot prove a violation unless the petitioner discloses information.

Additionally, it may be awarded in cases when, at the time of the application, the commission had not given any benefits to any of the applicants. Additionally, if the second or third applicant provides evidence that supports the already-existing evidence against the cartels, they may also benefit from a reduction in penalty of 50% and 30% of the total leviable penalty, respectively.⁸

THE COMPETITION COMMISSION OF INDIA'S ROLE IN THE LENIENCY RULES

Since the Competition Act of 2002 was enforced in India and the Lesser Penalty Regulations were put into effect in May 2009, the leniency program has been in place. The Competition Commission of India (Lesser Penalty) Regulations, 2009, and the Act's leniency provisions were both interpreted by the CCI in the first-ever final order under the leniency program, which was issued in 2017. According to the CCI's public orders, it appears that it has frequently used its authority to make final orders that resulted in less severe penalties. Additionally, media sources indicate that the CCI has expanded its reach into a number of industries, including auto components, pharmaceuticals, conveyor belts, and other industries.

⁷ <file:///C:/Users/DELL/Downloads/SSRN-id3595143.pdf>

⁸ Competition act, 2002. Leniency Programs

Brushless DC Fans (Case No. 03 of 2014)⁹

This was the CCI's first decision to provide leniency. Based on data obtained by the Central Bureau of Inquiry, an agency entrusted with looking into economic crimes more broadly, a DG inquiry was suo moto (of its own volition) directed by the CCI. In reference to tenders announced by Indian Railways and Bharat Earth Movers Limited for the supply of brushless fans and other electrical equipment, the paper proposed cartelization between brushless fan makers and suppliers. Amidst the DG's inquiry, a party submitted an application for pardon. The CCI acknowledged in its final ruling that the applicant's disclosures significantly improved the analysis used to determine whether a cartel was in place. Nevertheless, the applicant was not given total immunity, and the amount of the penalty reduction was limited to 75%. This is due to the fact that the CCI already had the information necessary to establish a preliminary belief regarding the existence of a cartel and oversee a DG investigation. As a result, when it comes to defining "value-added," the CCI is extremely conservative.

Zinc Carbon Dry-Cell Batteries (Case No. 02 of 2016 and Case Nos. 02 and 03 of 2017).¹⁰

The CCI launched an inquiry into the cartelization of dry-cell batteries between Panasonic, Eveready Industries India Ltd. (Eveready), and Indo National Ltd (Nippo) in response to a leniency application filed by Panasonic Energy India Co Ltd (Panasonic). The probe was then expanded to include the Association of Indian Dry Cell Manufacturers (AIDCM), of which Panasonic, Eveready, and Nippo were members. According to reports, the DG inspected documents, fax and email correspondence, and other records while conducting search and seizure operations on the properties of Panasonic, Eveready, and Nippo. Since Panasonic was the first to request leniency and provided evidence to support the CCI's initial conclusion that a cartel existed, the CCI awarded it complete immunity from administrative fines (100% reduction). For their cooperation in the case, Eveready and Nippo—which sought leniency at a later time—were given 30% and 20% reductions, respectively.¹¹

Then, on behalf of both Panasonic and itself, Panasonic Corporation filed a leniency application, accusing Godrej & Boyce Manufacturing Co Ltd (Godrej) (Case No. 03 of 2017) and Geep Industries (India) Pvt Ltd (Geep) of fixing the prices of dry-cell batteries sold by Panasonic, Geep, and Godrej, respectively. Godrej and Geep both sourced their dry-cell

⁹ Case no. 03 of 2014, Order dated 18.01.2017 available at www.cci.gov.in.

¹⁰ Case no. 02 of 2016, Order dated 31.08.2016 available at www.cci.gov.in.

¹¹ <https://www.azbpartners.com/bank/cartel-leniency-in-india-overview-2/>

batteries from Panasonic. Panasonic said that, in light of the decisions made by the main cartel including Eveready, Nippo, and itself, it had adjusted the cost of the batteries it supplied to Geep and Godrej. Despite the fact that Geep and Godrej were penalized by the CCI, Panasonic received a 100% reduction in penalty because the leniency application included crucial disclosures that allowed the CCI to establish a preliminary belief about the existence of a cartel involving Panasonic, Geep, and Godrej and to launch a DG investigation.¹²

Cartelisation in the flashlights market¹³ Case No. 01 of 2017

Eveready reported the sharing of information regarding the production and selling of flashlights in a leniency application. Eveready stated that through their exchanges under the AIDCM, it had shared information on flashlight prices, production, and sales with Panasonic, Nippo, and Geep. Panasonic then revealed that it had participated in the purportedly anti-competitive information exchange on the flashlights in a leniency application. Furthermore, Panasonic argued that the CCI ought to see its actions in the flashlight market as an extension of its previously declared actions in the dry-cell market. The CCI instructed the DG to look into Eveready, Panasonic, Nippo, Geep, and AIDCM's alleged anti-competitive behavior based on the material obtained through the leniency applications. Geep was cleared by the DG of any anti-competitive behavior. The battery makers presented the preliminary argument that since the CCI had previously penalized them for cartelization in the market for zinc-carbon dry-cell batteries (Case No. 02 of 2016), no separate case pertaining to the flashlight market could exist against them. Though complementary in nature, batteries and flashlights were distinct items in terms of their ultimate use and qualities, according to the CCI, which rejected the case.

Notably, the CCI noted following the evidence review that although the battery manufacturers had agreed to raise flashlight prices collectively and had shared commercially sensitive information through AIDCM, there was no proof that the agreement had actually been carried out. As a result, the CCI ended the investigation without penalizing any parties.

Pune Municipal Corporation¹⁴ (Case No. 50 of 2015 and Case Nos. 03 and 04 of 2016)

The case began with an "information" (complaint) submitted by Nagrik Chetna Manch under section 19(1)(a) of the Competition Act, which claimed that six parties had rigged bids in

¹² <https://www.azbpartners.com/bank/cartel-leniency-in-india-overview-2/>

¹³ (Case No. 01 of 2017)

¹⁴ Case No. 50 of 2015 and Case Nos. 03 and 04 of 2016)

contracts that Pune Municipal Corporation (PMC) had issued for municipal organic and inorganic solid waste processing plants. One applicant requested leniency throughout the DG's inquiry, and five more parties later applied at various points. The parties initially accused the DG of violating their right to due process, claiming that their remarks were not kept confidential and that this damaged their reputation. Even though the material was acquired from a leniency applicant, the CCI rejected the allegation and clarified that the evidence gathered by the DG as part of its inquiry was not subject to the secrecy given by the Lesser Penalty Regulations. Furthermore, it was decided that the processes, including the information in the DG inquiry report, remain confidential unless instructed differently by the CCI. None of the six leniency candidates who had approached the CCI during the investigation received full immunity. On the other hand, four applicants had their fines lessened in light of their application dates and the contribution they made to the investigation. Since the two surviving applicants' disclosures did not provide much value, there was no reduction in penalty for them. In light of the data it obtained in this instance, the CCI proceeded to launch two independent inquiries into claims of bid-rigging in further tenders. After starting the inquiry, the CCI received two more leniency applications in Case No. 03 of 2016 from different parties. The first application was submitted by one of the parties. Following the CCI's directive for a DG probe, a second application was submitted. Only the first applicant (out of the four) received leniency (50%) for supplying evidence that improved the inquiry. Due to the lack of substantial added value from their disclosures, the remaining applicants did not receive any reduction in fines. One of the parties in Case No. 04 of 2016 requested leniency from the CCI following the start of the DG investigation. Taking into account that the parties had previously paid a penalty in Case No. 50 of 2015, the CCI chose not to impose any further penalties.

Cartelisation in relation to tenders for broadcasting rights of sporting events¹⁵

The case was started because Globecast India Pvt Ltd and Globecast Asia Pvt Ltd (Globecast) jointly filed a lesser penalty application in which they revealed a cartel with Essel Shyam Communication Limited (ESCL) to rig contracts for the broadcasting services of different sports events in India. According to Globecast, ESCL and Globecast exchanged commercially sensitive information, which led to bid rigging. Following the establishment of a preliminary belief regarding the presence of a cartel, the CCI instructed the DG to look into Globecast and ESCL's actions. A leniency application was also filed by ESCL during the DG's inquiry,

¹⁵ (Case No. 02 of 2013).

supporting the material that was already in the public domain and revealing new information like Globecast's planned strategic investment in ESCL, which Globecast had not previously disclosed. Globecast received a 100% decrease in penalty from the CCI since their lower penalty application allowed the CCI to establish a prima facie case. A 30% decrease in penalty was given to ESCL since the evidence it provided improved the current investigation.

Electronic Power Steering Systems¹⁶ (Case No. 07(01) of 2014). The case was started as a result of a leniency application that NSK Ltd. (NSK) filed, accusing JTEKT Corporation, JTEKT Sona Automotive India Ltd. (JTEKT India), and Rane NSK Steering Systems India Ltd. (RNSS) of engaging in cartelization in connection with the supply of column type Electronic Power Steering Systems to specific original equipment manufacturers. Based on NSK's motion for leniency, the CCI established its prima facie view. The DG was then instructed to look into the actions of JTEKT, RNSS, NSK, and JTEKT India. Additionally, JTEKT submitted a leniency application to the CCI throughout the investigation. NSK (and RNSS) received a 100% decrease in penalty from the CCI since their lower penalty application allowed the CCI to establish a prima facie opinion. A 50% reduction in penalty was given to JTEKT since the evidence it provided was very valuable to the continuing investigation.¹⁷

CASE ANALYSIS

Suo Moto Case No. 03 of 2014 . Case:- In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items v Competition Commission Of India.

This was the CCI's first decision on leniency.

1. This case was taken up by the Commission suo moto, based on the information received from the Superintendent of Police, Anti-Corruption HQ, Central Bureau of Investigation (CBI), New Delhi vide letter dated 01.04.2014 wherein it was stated that the CBI, during an inquiry into certain alleged misconduct by a public servant, had found that three firms i.e., M/s. Pyramid Electronics, Parwanoo (hereinafter 'OP 1'), M/s. R. Kanwar Electricals, Noida (hereinafter 'OP 2') and M/s. Western Electric and Trading Company, Delhi (hereinafter 'OP 3') (collectively OP 1, OP 2 and OP 3 referred to as 'OPs') had cartelised in respect of the tenders floated by the Indian Railways and the Bharat Earth Movers

¹⁶ Case No. 07(01) of 2014

¹⁷ <https://www.azbpartners.com/bank/cartel-leniency-in-india-overview-2/>

Limited (hereinafter 'BEML') for the supply of Brushless DC fans (hereinafter 'BLDC fans') and other electrical items.¹⁸

FACTS

In response to the letter dated April 1, 2014, the CBI discovered, during its investigation into the alleged misconduct, an email dated March 17, 2013, in the inbox of OP 3 partner Shri Ramesh Parchani (hence referred to as "Shri Ramesh Parchani"), along with an attachment that contained information about four tenders that Indian Railways and BEML had issued for the purchase of BLDC fans. It included the amount unit value, the rates that OPs were to quote, and the total amount that each of them had to participate in these four bids. The Commission received a copy of the aforementioned email and its attachment.

It was further stated that in order to confirm whether the rates mentioned in the email attachment were the same as quoted by the OPs in the aforementioned railway tenders, the CBI had contacted the Northern Railway (NR) and the North Eastern Railway (NER) regarding the two tenders mentioned in the aforementioned attachments, namely tender No. 4102130113 dated 25.3.2013 and tender No. 30120402OT460 dated 27.2.2013. Based on the information provided, it was discovered that the rates stated in the email for each OP matched the rates they had provided for the aforementioned two tenders.

Following a review of all the documentation, the Commission initially believed that the matter contained a violation of Sections 3(1) and 3(3)(d) of the Competition Act, 2002 (henceforth referred to as the "Act"). As a result, the Director General (hence referred to as the "DG") was instructed by the Commission in its decision dated June 23, 2014, to investigate the case in accordance with Section 26(1) of the Act and to submit an investigation report. The Commission further stated that, aside from the three OPs that the CBI had identified, it was impossible to rule out the possibility that other bidders had engaged in bid rigging and that this matter needed more research. As a result, the DG carried out an inquiry and gave the Commission its investigative report on March 27, 2015.

Orders by the CCI

The Competition Commission of India (CCI) came to the conclusion that the OPs had engaged in bid rigging and collusive bidding in violation of Section 3(1) read with Section 3(3)(c) and

¹⁸ <https://vlex.in/vid/in-re-cartelization-in-678713169> also in scc online

3(3)(d) of the Competition Act. This conclusion was reached after reviewing the investigation report, the supplementary report prepared by the DG, and the submissions made by the OPs.

In the year 2012–13, the CCI levied penalties on OP 1 and OP 3, which were determined to be 1.0 times their respective profits, and on OP 2, which was assessed a penalty of 3% of its turnover for the same period. Additionally, the identified people were subject to penalties levied by the CCI, which were computed at a rate equal to 10% of their average income for the three previous fiscal years.¹⁹

Remarkably, a firm has been granted a reduction in penalty by the CCI for the first time, on the basis of its application under Section 46 and the LPR. Both OP 1 and Mr. Sandeep Goyal, the officer in charge of OP 1's involvement in the cartel, have received a 75% reduction in penalty from the CCI.

CONCLUSION

One of the most serious violations of competition law is cartelization. The Indian Competition Commission has instituted a leniency program aimed at preventing cartel formation. However careful examination is necessary because the existing leniency program framework has a lot of flaws. The hardest aspect of this program is the cartel detection. Effective procedures are crucial in detecting cartels, as they are not immediately identifiable. It is clear from looking through the cartel detection process in some of the cases that tighter jurisdiction is needed to find them. Therefore, cartels were easily identified in areas where the law was severely enforced. Additionally, the penalties for identifying hard-core cartels need to be improved. Furthermore, it is important to raise awareness of the existence of harsher fines and the necessity of an efficient leniency program. As a result, the CCI has made great progress toward the goals of the leniency program, but it still needs to work to strengthen it so that it can better serve India's competition legislation.

¹⁹ <https://www.lexology.com/library/detail.aspx?g=8b97e484-5bf6-4ba4-95e8-89083859aa09#:~:text=In%20Re%3A%20Cartelization%20in%20respect,s%20Western%20Electric%20and%20Trading>