

# THE POWER TO PARDON VIS-A-VIS THE POWER TO PUNISH – AN ANALYTICAL EXAMINATION OF THE INDIAN LENIENCY APPLICATIONS

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## Abstract

In course of this paper, the authors have sought to examine the concept of leniency in anti-cartel enforcement, the theoretical underpinnings of leniency programmes and the economic effect that such programmes and related regulatory approaches may have on market competition. In light of the theoretical context, the paper proceeds to present the output of detailed research conducted on the grant of leniency under the Competition Act, 2002, by examining all available orders passed by the CCI on this subject till date, with multiple objectives of studying the enforcement trends, determining the efficacy of the leniency provisions and providing suggestions for a more coherent leniency regime. In course of such analysis, the aspects that have been focused upon include the application of lesser penalty based upon the time and circumstances of the case, the quantum of reduction, and other relevant recurring factors. Based on this analysis, the authors provide suggestions for a possible way forward to overcome some of the challenges faced by both the regulator and the lesser penalty applicants, in the current leniency regime.

## I Introduction

*“The process of leniency involves accepting the reality of the current situation and finding a satisfying meaning therein, as opposed to misconstruing or denying the facts of the situation.”*

*– Sandra L. Schneider*

IN THE current era of increased communication and innovation, business is no longer confined within local or national boundaries. Thus, organizations no longer need to cater only to a domestic consumer base, but can target international consumers as well, allowing for quick growth. With rapid operational expansion by various business entities across multiple relevant markets, the scope of engaging in various anti-competitive practices has increased manifold. While anti-competitive practices are mostly governed via national laws, a threat to free global trade is increasingly becoming visible through the phenomenon of cartelization,<sup>1</sup> which when occurring on a cross-border or transnational level, is not easy for the domestic competition authorities to detect or punish.

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1 OECD, “Challenges in International Co-Operation in Competition Law Enforcement”, 16 Sep. 2014, *available at*: <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> (last visited on Jan. 16, 2023).

For an economy to thrive, healthy competition between the businesses is desirable, as it can ensure that the consumers can have access to quality products and services at the lowest possible prices. Cartelization, which can be described as collusion among competitors in order to artificially manipulate *inter alia* pricing and supply conditions, is severely detrimental to the economy.<sup>2</sup> Such cartelization may, in time, result in monopolization— which is why it is essential to identify and stop such conspiracies as early as possible.

For most nations, cartelization has now been legally recognized as an anti-competitive practice, punishable by law. Under the Indian legal regime as well, section 3 of the Competition Act, 2002, prohibits the formation of cartels by enterprises, persons, or any association of the same, related to “production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India”.<sup>3</sup> However, considering that in the two decades since the Competition Act has been enacted, more than a hundred cases placed before the Competition Commission of India (“CCI” or “Commission”) pertained to cartelization, the question arises as to how far the anti-cartel law has been successful in eliminating the practice.<sup>4</sup> It is in this context that the importance of a leniency program in anti-cartel investigations must be considered. Such a measure involves a relaxation in the penalties imposed on a whistle-blower, who may choose to report the workings of a cartel to the authorities. As long as the whistle-blower is able to provide the crucial information that can aid the authorities in knowing about, dismantling, and penalizing a cartel, they can have limited to full immunity from resulting financial penalties and imprisonment. Considering the ever pervasive nature of cartels, a robust leniency programme is indeed essential for any effective anti-cartel regulatory regime. The same is found in a number of international jurisdictions as well.<sup>5</sup>

The Indian legal system provides for a detailed leniency policy as well, under the Competition Act, 2002 and the Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter referred to as “Lesser Penalty Regulations”). Section 46 of the Competition Act, 2002 provides that, “[t]he 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 of the Competition Act, 2002, 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

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2 Kai Hüsichelrath and Tobias Veith, “The Impact of Cartelization on Pricing Dynamics: Evidence from the German Cement Industry”, ZEW Discussion Papers No. 11–067 (2011).

3 The Competition Act, 2002 (12 of 2003), s. 3.

4 Competition Commission of India, “Cartel Enforcement and Competition” 7 (2018).

5 Baskaran Balasingham, “The EU Leniency Policy: Reconciling Effectiveness and Fairness” 55 *Common Market Law Review* 1664 (2017).

as it may deem fit, than leviable under this Act or the rules or the regulations”.<sup>6</sup> The Lesser Penalty Regulations enacted in 2009 further elaborate upon various aspects of the provision, such as the conditions that must be fulfilled to grant someone a lesser penalty, how the amount of reduction can be calculated, the procedure to be followed, etc.<sup>7</sup> While a robust leniency program can be considered as one of the cornerstones of an effective anti-cartel regime, the efficacy of the Indian leniency policy yet remains to be fully ascertained.

The Competition Act, 2002 provides an exhaustive definition of cartels, in as much that for an agreement to signify a cartel, it need not be a written or even legally enforceable agreement. Due to the inherent illegality of cartelization, it is unlikely that the participators in one would have a written agreement to signify the same. Thus, an informal arrangement, understanding, or action made in concert may also be held as the basis of a cartel.<sup>8</sup> It is in this context that a whistle-blower may be essential in toppling a cartel, as the existence or actions of one may be near impossible to detect otherwise. The leniency policies primarily act as a lure, so that members of the cartel may themselves be enthused to provide valuable information, in exchange for a lesser penalty or full immunity from prosecution.

In India, a leniency policy was first brought into force in 2002, under the Competition Act, 2002 itself. Before that, anti-competitive practices were dealt with by the Monopolies and Restrictive Trade Practices Act, 1969 (“MRTP Act”).<sup>9</sup> However, this MRTP Act did not have any dedicated provision to deal with cartelization or leniency, which is why even during its operation a number of industries witnessed rampant cartelization. Even in cases of largescale cartels such as the *Soda Ash Cartel* case of 1996 and the *Trucking Cartel* case of 1984, the MRTP Commission was unable to provide effective redress.<sup>10</sup> After the enactment of the Competition Act, 2002, it was found that the existing legislation was not completely effective in curbing cartelization, as was evident from the continued existence of cartels in large-scale industries like tyre and cement.<sup>11</sup>

It was not until 2009 that the Lesser Penalty Regulations were brought into force, which provided much needed clarification and detail to the existing leniency regime.

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6 The Competition Act, 2002 (12 of 2003), s. 46.

7 The Competition Commission of India (Lesser Penalty) Regulations 2009 (No 4 of 2009).

8 *Ibid.*

9 Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).

10 *Haridas Exports v. All India Float Glass Mfrs Assn*, (2002) 6 SCC 600; CUTS International and National Law University, Jodhpur, “Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India”, available at: <https://www.cci.gov.in/images/marketstudie/en/docs1652440423.pdf> (last visited on Feb 24, 2023).

11 Tilottama Raychaudhuri, “Using Leniency Effectively in Anti-Cartel Investigations: A Study of Recent Trends in Cases Decided by the CCI” 11 *Indian Journal of Law and Justice* 172 (2020).

In 2017, these regulations were further amended, bringing even more circumstantial certainty in the granting of lesser penalty. Since the enactment of the Lesser Penalty Regulations in 2009, the Competition Commission of India, has produced multiple orders related to cartels.<sup>12</sup> A preliminary review of these orders reveals ambiguity with respect to imposition of penalty, as well as lack of consistency in the grant of leniency under similar or comparable circumstances. Such ambiguities could result in the dilution of the intent of leniency provisions, which is to encourage whistle-blowers. In course of this paper, the authors intend to present the output of detailed research conducted on the provisions relating to grant of leniency under the Competition Act, 2002, by examining all the orders passed by the CCI relating to grant of leniency till date, with the multiple objectives of studying the enforcement trends, determining the efficacy of the said provisions and providing suggestions for a more coherent, consistent and effective leniency regime.

Following the introductory part of the paper, the second part delves into a discussion highlighting the theoretical underpinnings and economic analysis of the role that leniency programmes play in anti-cartel enforcement. The third part contains a critical analysis of the Indian regulatory scenario with respect to leniency. While the basis of such criticism also draws support from the various effective best practices across other jurisdictions, the paper refrains from entering into a detailed analysis of specific jurisdictions other than India at this stage. The paper also does not reflect case-specific exhaustive details owing to paucity of space, instead it focuses on analysis of the output. In course of such analysis, the aspects that have been focused upon include the application of lesser penalty by the CCI based upon the facts and circumstances of each case, the quantum of reduction and other relevant, recurring factors. In the final part of the paper, the authors highlight the trends that become apparent from the leniency cases decided by the CCI and provide suggestions to overcome the existing difficulties.

## II Leniency: A theoretical overview

The trust that a cartel member has to display towards their fellow members involves rendering themselves vulnerable against betrayal by those members;<sup>13</sup> yet at the same time, there have been known attempts to formalise the cartel arrangement via secret accounts, semi-formal agreements and agreed-upon punishments for deviation.<sup>14</sup> It is this curious dynamic that leniency programmes seek to take advantage of, by increasing the rewards for betrayal –when combined with a credible threat posed by antitrust

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12 *Supra* note 4.

13 Christopher Leslie, “Antitrust Amnesty, Game Theory, and Cartel Stability” 31 *Journal of Corporation Law* 453 (2006).

14 J.D. Jaspers, “Managing Cartels: How Cartel Participants Create Stability in the Absence of Law” 23(3) *European Journal on Criminal Policy and Research* 319 (2017).

authorities and substantial penalties upon detection such as fines, imprisonment and extradition, this is meant to induce a race among cartel members to turn whistleblowers, which in turn destabilises the cartel.<sup>15</sup> The destabilisation may also be triggered by external factors including but limited to a change in the control and/or management of the enterprises involved, or even modification in the prevailing market realities.<sup>16</sup> One needs to remember that it is possible to consider the effect of leniency only on cartels that have been successfully identified and prosecuted by the competition authorities, which is why it is rather difficult to gauge the exact impact of such strategic programmes on cartels as a whole in any industry.<sup>17</sup>

In this context, it is useful to consider the Chicago School of thought that advances the Beckerian theory of optimal deterrence.<sup>18</sup> According to this theory, the cartel members are always going to weigh the potential gains from whistle blowing against the probable retaliation from other members.<sup>19</sup> Having said that, this theory makes certain assumptions about the rationalistic behaviour of all the members and a centralised decision-making structure within the cartel, the members having access to exact and symmetrical information about the gains and losses involved, and the capability of the antitrust authorities concerned combined with the penalties on detection posing a cumulative credible threat to the continuation of the cartel.<sup>20</sup>

With regard to the first assumption, one must admit the existence of a lack of uniformity about the decision-making process not only among multiple enterprises depending on factors such as size, scale and scope of functioning, access to resources including professional and legal advice *etc.*, but also within a particular enterprise among its various departments or divisions.<sup>21</sup> While it is true that profit remains an unifying

15 Giancarlo Spagnolo, "Optimal Leniency Programs", CEPR Discussion Paper No. 4840 (2000); *See also* Y.J. Choi and K.S. Hahn, "How Does a Corporate Leniency Program Affect Cartel Stability? Empirical Evidence from Korea" 10(4) *Journal of Competition Law and Economics* 883 (2014).

16 M.C. Levenstein and V.Y. Suslow, "What determines Cartel Success?" 44 (1) *Journal of Economic Literature* 43 (2006).

17 J.E. Harrington, "Optimal Corporate Leniency Programs" 56(2) *Journal of Industrial Economics* 215 (2008).

18 G.S. Becker, "Crime and Punishment: An Economic Approach" 76 *Journal of Political Economy* 169 (1968).

19 D. Daniel Sokol, "Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement" 78(1) *Antitrust Law Journal* 201 (2012).

20 Andreas Stephan and Ali Nikpay, "Leniency Decision-making from a Corporate Perspective: Complex Realities", in C. Beaton-Wells and C. Tran (eds.) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* 139 (Hart Publishing, 2015).

21 C. Harding, C. Beaton-Wells and J. Edwards, "Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?" in C. Beaton-Wells and C. Tran (eds.) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* 139 (Hart Publishing, 2015); *See also* Christine Parker, "The War on Cartels and the Social Meaning of Deterrence" 7(2) *Regulation and Governance* 174 (2013).

factor in such cases to a considerable extent, yet the approaches towards such profit may differ considerably and indicate substantial moral ambiguity and varying legal awareness among cartel members, which may pave the way for future instability that may in turn be exploited by leniency programmes.<sup>22</sup>

Regarding the second assumption, it is true that antitrust authorities across the world seek to widely advertise the leniency programmes within multiple industries<sup>23</sup> –yet there have been studies to reveal that in many of the leniency applications, the cartel might have already ended before the application had been made, which seems to indicate leniency applications being used as a strategic move rather than out of any inherent instability within the cartel triggered by such programmes.<sup>24</sup> While there does not exist hard data to support any overarching conclusion in this matter, arguments have been made that certain firms may be using leniency programmes to deliberately cause damage to their competitors by subjecting them to regulatory attention, or to divert focus away from a bigger cartel in another product or another industry in the process.<sup>25</sup> When considered from this perspective, the concept of leniency can evoke a default effect to destabilise a cartel, but at the same time, it can also trigger opportunistic enterprises to respond by putting their former fellow cartel members and current competitors in harm's way.<sup>26</sup> Further, as a logical corollary even though under extreme circumstances, it is possible for such enterprises to plan out a cartel in anticipation with the long-term goal of blowing the whistle on fellow members and escaping themselves by seeking leniency.<sup>27</sup> Smaller cartels may also be reported in order to deviate regulatory attention from larger and more harmful cartels, in a classic throwing-the-bone move<sup>28</sup> this motivation may be strengthened further by the recent 'leniency plus' approaches currently mooted by competition authorities across jurisdictions.

When it comes to the third assumption, one has to remember that leniency programmes do not exist in isolation in any legal system; on the contrary, they are related to whether successful prosecution of cartels may lead to criminal sanctions as well as private follow-on civil liability suits filed by parties having suffered injury because of the

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22 F. Haines and C. Beaton-Wells, "Ambiguities in Criminalizing Cartels: A Political Economy" 52(5) *British Journal of Criminology* 953 (2012); See also P. Whelan, "Cartel Criminalization and the Challenge of 'Moral Wrongfulness'" 33(3) *Oxford Journal of Legal Studies* 535 (2013).

23 M.E. Stucke, "Leniency, Whistle-blowing and the Individual: Should We Create Another Race to the Competition Agency?" in C. Beaton-Wells and C. Tran (eds.), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* 139 (Hart Publishing, 2015).

24 Stephan and Nickpay, *supra* note 20.

25 Levenstein and Suslow, *supra* note 16.

26 J.D. Jaspers, "Leniency in Exchange for Cartel Confessions" 17(1) *European Journal of Criminology* 106 (2020).

27 *Ibid.*

28 *Ibid.*

cartel's activities.<sup>29</sup> While not all jurisdictions may have the former sanctions in place as part of their competition law regime, one may safely opine that for enterprises to be genuinely attracted to leniency programmes, such programmes must also protect the applicant from subsequent criminal prosecution as well as private civil remedies to a considerable extent—at the same time, such prosecutions and civil suits against other cartel members may benefit from having access to the wealth of evidence revealed by the leniency applicant.<sup>30</sup>

Yet another concern that may arise in this context is over-enforcement on the part of the competition authorities coupled with an existing leniency programme. There may exist enterprises that seek to engage in socially efficient cooperation under certain market conditions; however, if the authorities are prone to misinterpreting the nature of the agreement between them, then those very enterprises may either opt for real collusion to escape collusion, or else misreport collusion to avail leniency fearing subsequent imposition of ruinous penalties otherwise by the authorities.<sup>31</sup> Eventually, the threat of such over-enforcement may even prevent such beneficial cooperation from starting at all—this is a very real possibility in jurisdictions where owing to nascent and inexperience regimes and their relatively low evidence standards, a hostile attitude of the competition authorities may actually lead to leniency programmes eventually yielding socially sub-optimal results.<sup>32</sup>

Finally, one must refer to the potential effects of the ordered-leniency approach adopted by several jurisdictions as on date, with the extent of leniency granted to an enterprise being determined by its position in a self-reporting queue—it seems obvious that such a policy would trigger a race-to-report to the antitrust authorities among the members of a cartel that is already fraught with instability owing to distrust, suspicion and other extraneous factors.<sup>33</sup> Such a race theoretically hastens self-reporting of a cartel, thereby allowing the authorities to take prompt action to minimise or negate its harmful effects on market competition. In addition, if the size of the penalty imposed also bears a direct relationship with the number of cartel members involved, then that may in turn deter formation of large cartels. In fact, studies exist revealing that the ideal extent of leniency that an applicant should be granted ought to take into consideration the

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29 R.D. Luz and G. Spagnolo, “Leniency, Collusion, Corruption, and Whistleblowing” 13(4) *Journal of Competition Law and Economics* 729 (2017).

30 Paolo Buccirossi, Catarina M. P. Marvão and Giancarlo Spagnolo, “Leniency and Damages” CEPR Discussion Paper No. DP10682 (2015); *See also* C. Marvão, “The EU Leniency Programme and Recidivism” 48(1) *Review of Industrial Organization* 1 (2016).

31 Natalia Pavlova and Andrey Shastitko, “Leniency Programs and Socially Beneficial Cooperation: Effects of Type I Errors” 2 *Russian Journal of Economics* 375 (2016).

32 *Ibid.*

33 Claudia M. Landeo and Kathryn E. Spier, “Optimal Law Enforcement with Ordered Leniency” 63 *Journal of Law and Economics* 71 (2020).

refinement criterion for equilibrium selection when more than one possible equilibrium position exists.<sup>34</sup> On the one hand, if all applicants are only granted a small discount in penalty by way of leniency, then either most of the members may apply or almost nobody will be likely to. If one assumes that the market conditions support application of the risk dominance refinement, then the first possibility becomes more likely and this approach is acceptable. On the other hand, if said conditions support the Pareto optimal refinement, the second possibility becomes stronger and then, offering bigger discounts in terms of leniency may prove to be more effective as a matter of antitrust policy.

In the light of the aforementioned theoretical discussion, the paper now seeks to examine the leniency regime in India and as evidenced by the way the CCI has dealt with the various leniency applications presented before it following the enactment of the Lesser Penalty Regulations in 2009.

### **III Current Indian regulatory scenario on grant of leniency – A study**

Although the Lesser Penalty Regulations under the Competition Act, 2002 came into force in 2009, the first leniency application was filed in 2017, in the Indian Railways (Brushless DC Fans) Case.<sup>35</sup> Shortly after this decision, the Lesser Penalty Regulations were amended to make the process of leniency more streamlined.<sup>36</sup> The scope of grant of leniency was expanded to include the following:

- i. Accepting of leniency applications from individuals who have been involved in a cartel on behalf of an enterprise,
- ii. Doing away with the upper limit on the number of leniency applicants (which was earlier limited to three)
- iii. Permitting disclosure of confidential information to other cartel members for investigation purposes, upon receiving approval from the leniency applicant or the CCI.
- iv. Requiring the applicant to submit the estimated volume of business which has been affected in India due to the alleged cartelisation<sup>37</sup>

Post this amendment, numerous leniency applications were received by the CCI and waivers granted, under the Lesser Penalty Regulations, 2009. Though the leniency regime seems to have been successful due to the sheer number of orders passed in a relatively

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34 *Ibid.*

35 In Re: Cartelization in respect of Tenders Floated by Indian Railways for Supply of Brushless DC Fans and other Electrical Items (Suo Motu 03 of 2014), order dated January 18, 2017.

36 Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017.

37 Cl. (g) of the Schedule to the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017.



short period of time, the hasty implementation of the regulation has been criticised on grounds of lack of consistency with respect to both imposition of fines, and the quantum of leniency. Before embarking on a detailed discussion on the cases, it is important to tabulate the cases where leniency has been granted by the CCI, since the inception of the leniency regime till 2022.

### Tabulation of CCI leniency decisions

#### *Case Tabulation by Chronology*

A total of 23 orders passed by the CCI involving cartelization and leniency, from 2017 till 2022, have been considered for the purpose of our analysis. While deciding these applications, the CCI has taken into account a number of factors including:

- i. Number of application(s) received in the case
- ii. Stage of receiving applications
- iii. Whether applications provided vital information/evidence regarding existence and/or *modus operandi* of cartel
- iv. Role of applicant(s) in the cartel
- v. Information/evidence already in possession of CCI
- vi. Cooperation of applicant(s) during the case
- vii. Nature of business of the applicant(s), with special consideration for MSMEs
- viii. Prevalent economic conditions in the country

Depending upon these various factors, a complete, partial, or no reduction in penalty has been granted to the applicants. These cases are listed chronologically, with key factors such as mode of cognizance, lesser penalty application details and granting of leniency (quantum and grounds of reduction) mentioned below:

Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (suo motu 03 of 2014), order dated January 18, 2017<sup>38</sup> v. Pyramid Electronics, Parwanoo, R Kanwar Electricals, Noida, Western Electric and Trading Company, Delhi *suo motu* cognizance was taken up, based on the information received from the Superintendent of Police, Anti-Corruption HQ, Central Bureau of Investigation (CBI).

During an investigation into alleged misconduct of a public servant, the CBI realised that three firms, namely, Pyramid Electronics, Parwanoo, R Kanwar Electronics, Noida and Western Electric and Trading Company, Delhi had formed a cartel regarding the

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38 Available at: <https://cci.gov.in/images/antitrustorder/en/suo-moto-case-no-0320141652437784.pdf> (last visited on Jan. 16, 2023).

tenders floated for Brushless DC fans and other electrical items, by the Indian Railways and the Bharat Earth Movers Limited. Pyramid Electronics applied for leniency during the DG investigation stage, and provided vital information relating to cartel/bid rigging. 75% leniency was granted to Pyramid Electronics as:

- (i) It was the first and only participant to accept the existence of a cartel;
- (ii) It was the first and only participant to submit adequate evidence relating to *modus operandi*;
- (iii) The application was made at a later stage after the initiation of application, when some evidence was already in possession of the DG and the CCI. Hence the applicant's prayer for 100% penalty waiver was declined.

**Cartelisation in respect of zinc carbon dry cell batteries market in India (*suo motu* 02 of 2016), order dated April 19, 2018<sup>39</sup>**

Eveready Industries India Ltd. (OP 1), Indo National Ltd. (OP 2), Panasonic Energy India Co. Ltd. (OP 3), Association of Indian Dry Cell Manufacturers (OP 4)

Taken up pursuant to an application dated May 25, 2016 filed by Panasonic Energy India Co. Ltd. (OP 3). Here OP 3 stated that Eveready Industries India Ltd. ('OP-1'), Indo National Ltd. ('OP-2'), and OP-3 had cartelised to control the distribution and price of zinc-carbon dry cell batteries in India. It also disclosed that they were members of the "Association of Indian Dry Cell Manufacturers" ('OP-4'), a trade association formed to facilitate transparency by collecting and distributing data of sales and distribution by manufacturers. Later, applications were also received from OP 1 and 2.

- (i) OP 3 received 100% leniency, as it was the first applicant and provided evidence to establish and investigate the cartel;
- (ii) OP 1 received 30% leniency as it was the 2<sup>nd</sup> applicant and approached the CCI three days after search and seizure. Though the DG already had evidence, OP 1 helped in connecting the information. However, there was no 'significant value addition.'
- (iii) OP 2 received 20% leniency as the 3<sup>rd</sup> applicant, as it approached the CCI 3 weeks after search and seizure. It aided the investigation and extended cooperation. However, it did not make any 'significant value addition' as documents and information were already in possession of the DG.

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39 Available at: <https://www.cci.gov.in/images/antitrustorder/en/suo-moto-case-no-0220161652433627.pdf> (last visited on March 16, 2023).

Nagrik Chetna Manch and Fortified Security Solutions (Suo Motu 50 of 2015), order dated May 1, 2018.<sup>40</sup> Fortified Security Solutions (OP 1), Ecoman Enviro Solutions Pvt Ltd (OP 2), Pune Municipal Corporation (OP 3), Lahs Green India Pvt. Ltd. (OP 4), Sanjay Agencies (OP 5), Mahalaxmi Steels (OP 6), Raghunath Industry Pvt Ltd (OP 7). Initiated based on information furnished by Nagrik Chetna Man challenging that bid rigging/collusive bidding occurred in the tenders floated by OP-3.

Lesser Penalty application was received initially from OP 6 during DG investigation, providing modus operandi of cartel, documents and proof. Soon after, applications were received from OPs 5, 4, 2, 7, and 1 – in rapid succession.

- (i) OP 6 was the first to apply and made critical disclosure regarding modus operandi, earning it 50% leniency;
- (ii) OP 4 applied at a later stage but it made a good value addition through documents and evidences (OP-4 accepted that it acted as a proxy bidder to help OP-2 win three bids) receiving 50% leniency;
- (iii) OP 5 applied at a later stage, when some information was already gathered. As it provided documents and accepted its involvement in the cartel, but limited it to providing documents for participation in two tenders. it received 40% leniency;
- (iv) OP 2 was the ringleader and orchestrator of the cartel, and applied for leniency when the DG already had significant evidence. Due to minimal value addition, it received 25% leniency;
- (v) OP 7 and OP 1 did not make any significant value addition at the stage when it applied, so leniency was not granted.

**Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing (Suo Motu 04 of 2016), order dated May 31, 2018<sup>41</sup>**

Lahs Green India Pvt Ltd (OP 1), Ecoman Enviro Solutions Pvt Ltd (OP 2), Fortified Security Solutions (OP 3), Raghunath Industry Pvt Ltd (OP 4)

Initiated SuoMotu based on information received in case no. 50 of 2015 (above) disclosing coordination among Lahs Green Pvt. Ltd. ('OP-1'), Ecoman Enviro Solutions Pvt. Ltd. ('OP-2'), Fortified Security Solutions ('OP-3') and Raghunath Industry Pvt. Ltd. ('OP-4') to rig Tender No. 59. [In Case No. 50 of 2015, cartelisation in Tender No. 59 was not investigated].

OP 1 filed a lesser penalty application, closely followed by OPs 2 and 4.

As OPs had already been penalized in earlier case no. 50 of 2015, no further penalty was levied.

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40 Available at: <https://cci.gov.in/images/antitrustorder/en/5020151652433457.pdf> (last visited on Dec. 16, 2023).

**Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing (03 of 2016), order dated May 31, 2018<sup>42</sup>**

Saara Traders (OP 1), Ecoman Enviro Solutions (OP 2), Fortified Security Solutions (OP 3), Raghunath Industry (OP 4)

Initiated Suo Motu, again based on information from case no 50 of 2015 disclosing coordination among Saara Traders Private Limited ('OP-1'), Ecoman Enviro Solutions Pvt. Ltd. ('OP-2'), Fortified Security Solutions ('OP-3') and Raghunath Industry Pvt. Ltd. ('OP-4') to rig Tender nos. 21 and 28 of 2013 which were not investigated earlier.

OP 1 filed for lesser penalty during investigation, shortly followed by OPs 2 and 4. OP 3 also filed for lesser penalty after prima facie anti-competitive practices were established.

*Granting of Leniency:*

- (i) OP 1 was the first applicant and provided critical disclosure regarding modus operandi, receiving 50% leniency;
- (ii) OP 2 provided information and evidence regarding modus operandi, but this information being already available, it did not receive any leniency;
- (iii) OP 4 did not provide any value addition, and was denied leniency;
- (iv) OP 3 did not provide any value additional, and was denied leniency.

**Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters (Suo Motu 02 of 2013), order dated July 7, 2018<sup>43</sup>**

Essel Shyam Communications Ltd. (now Planetcast Media Services Ltd) (OP 1), Globecast India Pvt Ltd. (Op 2), Globecast Asia Pvt Ltd (OP 3), Bharat K. Prem (OP 4), Jason Yeow (OP 5).

Initiated Suo Motu based on lesser penalty applications by OPs 2 and 3 disclosing its bid rigging arrangement with Essel Shyam Communication Ltd. ('OP-1') in the broadcasting services market.

OPs 2 and 3 made lesser penalty applications and provided crucial information regarding bid rigging, followed by OP 1. They further disclosed that there was exchange of confidential price-sensitive commercial information between OP-1 and OP-2 and OP-

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41 *Available at:* <http://164.100.58.95/sites/default/files/Suo%20Motu%2004%20of%202016.pdf> (last visited on March 16, 2023).

42 *Available at:* <http://164.100.58.95/sites/default/files/Suo%20Motu%2003%20of%202016%20.pdf> (last visited on March 16, 2023).

43 *Available at:* <http://164.100.58.95/sites/default/files/Suo%20-%20Moto%20Case%20No.%2002%20of%202013.pdf> (last visited on Jan. 16, 2023).

4 through Mr. Bharat K. Prem ('OP-4'), an employee of OP-2, Jason Yeow ('OP-5'), an employee of OP-3, was also involved in the matter.

*Granting of Leniency:*

- (i) OPs 2 and 3 (together Globe cast) provided vital information and evidence regarding existence and modus operandi of cartel, thus receiving 100% leniency. However, the CCI noted that they did not disclose the fact that strategic investment discussions were going on between OP-1, OP-2 and OP-3.
- (ii) OP 1 corroborated the information and provided additional information which were important but not vital, and received 30% leniency.

**Anti competitive conduct in the Dry-Cell Batteries Market in India (Suo Motu 02 of 2017), order dated August 30, 2018.**<sup>44</sup> Panasonic Corporation, Japan (OP 1), Panasonic Energy India Co. Ltd. (OP 2), Geep Industries (India) Private Ltd. (OP 3).

Initiated Suo Motu, after receiving application and submissions from OP 1 disclosing the existence of a bilateral ancillary cartel between OP-2 and Geep Industries (India) Pvt. Ltd. ('OP-3') in the institutional sale of dry-cell batteries.

OP 1 submitted a lesser penalty application showing the existence of a cartel on behalf of itself and OP 2. The primary cartel was between OP-2, Eveready Industries India Ltd., and Indo National Ltd. OP-2 knew beforehand about the time of price increase to be affected by the primary cartel and used this information to convince OP-3 to increase the base price of the batteries. Based on the information provided, the CCI formed a prima facie opinion regarding the existence of a cartel between OP-2 and OP-3 and ordered DG investigation.

No findings were made against OP1.

- (i) OP 1's Indian subsidiary OP 2 received 100% leniency, due to providing information and evidence related to the existence and working of the cartel.
- (ii) No leniency application was made by OP3 and penalty was imposed accordingly.

**Alleged Cartelisation in Flashlights Market (Suo Motu 01/2017), order dated November 11, 2018**<sup>45</sup>

Eveready Industries India (OP 1), Panasonic Energy India (OP 2), Indo National (OP 3), Geep Industries India (OP 4), Association of Indian Dry Cell Manufacturers (OP 5).

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44 Available at: <https://www.cci.gov.in/images/antitrustorder/en/suo-moto-case-no-0120171652521672.pdf>(last visited on Mar.16, 2023).

45 Available at: <https://www.cci.gov.in/images/antitrustorder/en/suo-moto-case-no-0120171652521672.pdf>(last visited on Mar. 16, 2023)

Taken *Suo Motu*, based on lesser penalty application by OP1 disclosing the information exchange regarding sales and production of flashlights through the Association of Indian Dry Cell Manufacturers (“OP-5”).

OP 1 made a lesser penalty application with information and evidence, followed by an application by OP 2. Based on the material, the CCI formed a *prima facie* opinion and directed DG investigation.

In the absence of adequate evidence regarding market manipulation, cartelisation could not be proved.

**Anticompetitive conduct in the Dry-Cell Batteries Market in India (Suo Motu 03 of 2017), order dated January 15, 2019<sup>46</sup>**

Panasonic Corporation, Japan (OP 1), Panasonic Energy India Co. Ltd. (OP 2), Godrej and Boyce Manufacturing Co. Ltd. (OP 3)

Initiated after receiving an application from OP 1 disclosing the existence of a bilateral ancillary cartel between OP-2 and OP-3 in the institutional sale of dry-cell batteries.

OP 1 submitted a lesser penalty application proving the existence of a cartel on behalf of itself and OP 2. The primary cartel for coordinating market prices was between OP-2, Eveready Industries India Ltd., and Indo National Ltd. Based on the information provided in the Lesser Penalty Application, the CCI formed a *prima facie* opinion regarding the existence of a cartel between OP-2 and OP-3 and ordered DG investigation.

- (i) No findings were made with respect to OP 1,
- (ii) OP 1’s Indian subsidiary OP 2 received 100% leniency due to providing information and evidence related to the existence and working of the cartel.
- (iii) Penalty was imposed on Godrej, though the CCI factored in its insignificant market share and limited ability to negotiate with Panasonic India.

**Cartelisation in the supply of Electric Power Steering Systems (Suo Motu 07(01) of 2014) order dated August 9, 2019<sup>47</sup>**

NSK Ltd (NSK), JTEKT Corp (JTEKT), Rane NSK Steering Systems Ltd (RNSS), JTEKT Sona Automotive India Ltd (JSAI)

Initiated upon a lesser penalty application by NSK

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46 *Available at:* <https://www.cci.gov.in/antitrust/orders/details/747/0> (last visited on Mar. 16, 2023).

47 *Available at:* <https://www.cci.gov.in/images/antitrustorder/en/07-01-of-20141652432320.pdf> (last visited on March 16, 2023).

NSK made the first lesser penalty application. During the pendency, JTEKT also filed an application. Based on the Lesser Penalty Application, the CCI formed a prima facie opinion regarding anticompetitive conduct by NSK, JTEKT Corporation, Japan (‘JTEKT’), along with their Indian subsidiaries, Rane NSK Steering Systems Ltd. (‘RNSS’) and JTEKT Sona Automotive India Ltd. (‘JSAI’) respectively and directed DG investigation.

- (i) NSK was the first to apply and provided vital information enabling the CCI to form a prima facie case. Thus, NSK and its subsidiary RNSS received 100% leniency.
- (ii) JTEKT and its subsidiary JSAI received 50% leniency, as they were the second to apply but provided significant value addition to the existing evidence and cooperated throughout the investigation.

**Alleged Cartelisation in Anti-Vibration Rubber Products and Automotive Hoses (Suo Motu 01/2016) order dated February 26, 2020<sup>48</sup>**

Bridgestone, SRK, Tokai Rubber, Toyo, Yamashita, Marugo, Hokushin, Tokai Imperial, Teito, Kinugawa, Togawa, Toyoda and Daici Sangyo. The case was initiated *Suo Motu* based on information received under a lesser penalty application. (name not disclosed in public version of order). The allegations of cartelisation were dismissed as conclusive evidence was not found hence no leniency was granted in this case.

**In Re: Cartelisation in Industrial and Automotive Bearings (Suo Motu Case No. 05 of 2017) order dated June 5, 2020<sup>49</sup>**

ABC Bearings Limited (OP 1), National Engineering Industries Ltd. (NEI) (OP 2), Schaeffler India Ltd. (OP 3), SKF India Ltd. (SKF) (OP 4), Tata Steel Ltd., Bearing Division (Tata Bearing) (OP 5). Taken up pursuant to an application filed by FAG Bearings India Ltd. (now, Schaeffler India Ltd.) (OP 3).

Schaeffler India Ltd. (OP 3) applied for leniency, disclosing that OP-3 and four other companies namely, ABC Bearings Ltd. (‘OP-1’), National Engineering Industries Ltd. (‘OP-2’), SKF India Ltd. (‘OP-4’) and Tata Steel, Bearing Division (‘OP-5’) were involved in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014. Based on this information the CCI formed a prima facie view and directed DG investigation. During the pendency of the DG investigation, OP-2 also filed a Lesser Penalty Application.

This case was decided during the COVID-19 pandemic. The CCI held the companies as well as their 8 employees guilty of cartelisation. However, the CCI passed a cease

48 Available at: <https://www.cci.gov.in/antitrust/orders/details/64/0> (last visited on Mar. 16, 2023).

49 Available at: <https://www.cci.gov.in/antitrust/orders/details/698/0> (last visited on Mar. 16, 2023).

and desist order in this matter, stating that in view of the peculiar facts and circumstances of the case, ends of justice would be met if the parties “cease such cartel behaviour and desist from indulging in it in future”. Leniency was not provided.

**Chief Materials Manager, South Eastern Railway v. Hindustan Composites Ltd. and Others; Controller of Stores, Central Railways v. BIC Auto Pvt. Ltd. and Others; Chief Materials Manager, Eastern Railways v. BIC Auto Pvt. Ltd. and Others; Chief Materials Manager–I, North Western Railways v. BIC Auto Pvt. Ltd. and Others; Chief Materials Manager Sales v. Rane Brake Lining Ltd. and Another, order dated July 10, 2020<sup>50</sup>**

The case pertains to five reference cases, namely cases No. 03 of 2016, 05 of 2016, 01 of 2018, 04 of 2018, and 08 of 2018, which were consolidated by the Commission considering their similarity.

The Commission noted that no leniency application was made by the OPs as per the lesser penalty regulations. However, OPs submitted that they had provided full, true, and vital disclosures and had extended full cooperation during the investigation. They prayed for a reduction in penalties, which the Commission considered.

The Commission took into account the fact that the OPs were MSMEs with small annual turnovers. Additionally, it was cognizant of the prevailing economic situation arising due to the outbreak of the COVID -19 pandemic and the current market shock. In the interest of justice, the Commission refrained from imposing any monetary penalty on the OPs as they had fully cooperated during the investigation and inquiry before the DG and the Commission, by not denying the material confronted by the DG.

**In Re: Alleged anti-competitive conduct in the Beer Market in India (*suo motu* Case No. 06 of 2017) order dated September 24, 2021<sup>51</sup>**

United Breweries Limited (OP 1), Crown Beers India Private Limited (OP 2), SABMiller India Limited (OP 3), Carlsberg India Private Limited (OP 4), All India Brewers’ Association (OP 5)

The CCI initiated the case on the basis of Lesser Penalty Applications filed by Crown Beer Pvt. Ltd. (‘OP-2’) and SABMiller India Ltd. (‘OP-3’).

The applications disclosed that OPs 2 and 3 had colluded with United Breweries Ltd. (‘OP-1’) and Carlsberg India Pvt. Ltd. (‘OP-4’) to coordinate the price of beer in various States and Union Territories of India, irrespective of the distribution model. Based on the information disclosed in the Lesser Penalty Application, the CCI formed

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50 Available at: <https://www.cci.gov.in/antitrust/orders/details/694/0> (last visited on Jan. 16, 2023).

51 Available at: <https://www.cci.gov.in/antitrust/orders/details/682/1> (last visited on Mar. 16, 2023).



a prima facie view and directed DG investigation. After DG's search and seizure operations, OP-1 filed a Lesser Penalty Application, followed by OP-4.

- (i) The Commission imposed no penalty against OP 2 as no contravention was found against OP-2.
- (ii) The Commission granted 100% Lesser Penalty Reduction to first applicant OP 3 since it disclosed the cartel's modus operandi and the market structure of the beer industry.
- (iii) The Commission granted 40% Lesser Penalty Reduction to second applicant OP 1 since the bulk of the evidence was collected from the dawn raid and the information submitted by OP-3.
- (iv) The Commission granted 20% Lesser Penalty Reduction to third applicant OP 4 as most of the evidence was already obtained but it cooperated with the investigation.
- (vi) The CCI disclosed names of all cartel participants, including individuals stating that the information used in its order did not qualify for any confidential treatment.

**Eastern Railway, Kolkata v. M/S Chandra Brothers (Ref. Case No. 02 of 2018) order dated October 29, 2021<sup>52</sup>**

Informant: Eastern Railway, Kolkata (IP), Chandra Brothers (OP1), Chandra Udyog (OP2), M/s Sriguru Melters and Engineers (OP 3), Rama Engineering Works (OP 4), Krishna Engineering Works (OP 5) Janardan Engineering Industries (OP 6) V. K. Engineering Industries (OP 7) Jai Bharat Industries (OP 8).

The CCI initiated the case based on the references filed by Eastern Railway through its Senior Deputy Manager against M/s Chandra Brothers ('OP-1'), M/s Chandra Udyog ('OP-2'), M/s Sriguru Melters and Engineers ('OP-3'), Rama Engineering Works ('OP-4') and M/s Krishna Engineering Works ('OP-5') alleging cartelisation in tenders floated for purchase of Axle Bearings. Based on this information, the CCI formed a prima facie opinion and directed DG investigation. Leniency applications were filed by OP 3 and OP 6 during pendency of investigation. However, OP 3's application was forfeited due to regulatory errors.

Considering the nature of business (MSMEs) and the COVID -19 pandemic, the Commission didn't levy any penalty on the OPs, provided they ceased their anti-competitive behaviour. The CCI noted that any penalty imposed on the parties would render them economically unviable and even result in their exit from the market.

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52 Available at: <https://www.cci.gov.in/antitrust/orders/details/677/0> (last visited on Jan. 16, 2023).

**In Re: Cartelisation in the supply of Bearings (Automotive and Industrial)(*suo motu* Case No. 07(02) of 2014) order dated October 21, 2021<sup>53</sup>**

NSK Ltd, Japan, NSK International (Singapore) Pte Ltd and NSK Bearings India Pvt Ltd (NSK); JTEKT Corporation, Japan, and Koyo Bearings India Ltd (JTEKT); and NTN Corporation, Japan (NTN)

Suo-Motu, initiated *via* an application from NSK Bearings Pvt. Ltd. disclosing anti-competitive conduct in the Bearings (Automotive and Industrial) market by NSK Ltd., Japan, NSK International (Singapore) Pte. Ltd., NSK, JTEKT Corporation, Japan, and Koyo Bearings India Ltd. (‘JTEKT’) and NTN Corporation, Japan (‘NTN’). Based on this information the CCI formed a prima facie view and directed DG investigation.

During the pendency of investigation before the DG, JTEKT approached the Commission and filed a lesser penalty application.

The Commission concluded that, in light of insufficient evidence being put forth by the DG or lesser penalty applicants, no case of contravention could be made out.

**Food Corporation of India v. Shivalik Agro Poly Products Ltd. and others(Reference Case No. 07 of 2018) order dated October 29, 2021<sup>54</sup>**

Food Corporation of India (Informant), Shivalik Agro Poly Products Ltd. (OP 1), Climax Synthetics Pvt. Ltd. (OP 2), Arun Manufacturing Services Pvt. Ltd. (OP 3), Bag Poly International Pvt. Ltd. (OP 4), Shalimar Plastic Industries (OP 5), Dhanshree Agro Poly Product (OP 6).

The CCI initiated the case based on the references filed by Food Corporation of India against Shivalik Agro Poly Products Ltd. (‘OP-1’), Climax Synthetics Pvt. Ltd. (‘OP-2’), Arun Manufacturing Services Ltd. (‘OP-3’), and Bag Poly International Pvt. Ltd. (‘OP-4’) alleging collusive bidding for procurement of Low Density Poly Ethylene covers for the period 2005-2017. Based on the materials on record, the CCI formed a prima facie opinion and ordered DG investigation. During the pendency of investigation, OP-1 to OP-4 filed leniency applications.

The Commission found that the companies had cartelised in the bids issued by the Food Corporation of India. However, keeping in mind their admission of guilt, as well as the fact that the MSME sector in India was already under stress and bearing the impact of the economic situation arising from the COVID -19 pandemic, the Commission decided not to impose any monetary penalty.

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53 Available at: <https://www.cci.gov.in/antitrust/orders/details/973/0> (last visited on Jan. 16, 2023).

54 Available at: <https://www.cci.gov.in/antitrust/orders/details/654/0> (last visited on Jan. 16, 2023).

**In Re: Rizwanul Haq Khan v. Mersen (India) Pvt. Ltd. (Reference Case No. 02 of 2016) order dated November 1, 2021<sup>55</sup>**

Rizwanul Haq Khan, Deputy Chief Material Manager, Office of the Controller of Stores, Southern Railway (Informant), Mersen (India) Pvt. Ltd. (OP 1), Assam Carbon Products Ltd. (OP 2)

The CCI initiated the case based on the references filed by Rizwanul Haq, Deputy Chief Materials Manager or Controller of Stores, Southern Railway against Mersen (India) Pvt. Ltd. ('OP-1'), and Assam Carbon Products Ltd. ('OP-2') alleging cartelisation in the procurement of carbon brushes. Based on the materials on record, the CCI formed a prima facie view and directed DG investigation.

During the pendency of investigation, OP 1 filed a Lesser Penalty application through e-mail dated 05.07.2019, followed by OP 2 who filed a lesser penalty application dated 12.07.2019.

The Commission found the companies and their respective officers guilty of cartelisation. However, considering the lesser penalty applications and admissions of guilt, as well as the fact that the companies were MSMEs and under stress from the economic situation arising from the COVID -19 pandemic, the Commission decided not to impose any monetary penalty.

**In Re: Anti-competitive conduct in the paper manufacturing industry (suo motu case no. 05 of 2016) order dated November 17, 2021<sup>56</sup>**

Banwari Paper Mills Limited (OP 1), Bindals Papers Mills Limited (OP 2) Fibremarx Papers Private Limited (OP 3), Indian Agro and Recycled Paper Mills Association (OP 4), K.R. Pulp and Papers Limited (OP 5), Khanna Paper Mills Limited (OP 6), Katyayini Paper Mills Private Limited (OP 7), Kuantum Papers Limited (OP 8), Madhya Bharat Papers Limited (OP 9), Naini Paper Limited (OP 10), Rama Paper Mills Limited (OP 11), Ruchira Papers Limited (OP 12), Sangal Papers Limited (OP 13), Satia Industries Limited (OP 14), Shree Bhawani Paper Mills Limited (OP 15), Shree Shyam Pulp & Board Mills Limited (OP 16), Shreyans Industries Limited (OP 17), Supreme Paper Mills Limited (OP 18), The Sirpur Paper Mills Limited (OP 19), Tirupathi Balaji Fibres Limited (OP 20), and Trident Limited (OP 21)

A note was submitted to the CCI by the DG's Office, disclosing that during the investigation in Case No. 30 of 2014 and Case No. 85 of 2015, certain evidence was collected indicating that paper manufacturers have indulged in price manipulation through concerted action. Based on this information, the CCI initiated the case on a *suo motu* basis.

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55 Available at: <https://www.cci.gov.in/antitrust/orders/details/651/0> (last visited on Jan. 16, 2023).

56 Available at: <https://www.cci.gov.in/antitrust/orders/details/642/0> (last visited on Jan. 16, 2023).

Only OP-21 filed a Lesser Penalty application during the pendency of investigation before the DG.

The CCI held that the OPs had indulged in cartelisation by fixing prices of writing and printing paper. 100% reduction in the penalty amount was granted to OP-21, considering its full cooperation during the investigation. The other OPs did not file any application. In light of the COVID -19 pandemic, the CCI imposed a symbolic penalty of only Rs. 5 lakhs each on the OPs (OP-2, OP-4, OP-5, OP-6, OP-7, OP-8, OP-9, OP-10, OP-12, and OP-17) who had contravened provisions of the Act. One of the principal reasons for this, according to the CCI, was the fact that need for paper during the pandemic had diminished as most businesses were being conducted virtually. Hence imposition of significant penalty on these businesses would render them economically unviable.

**Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to Original Equipment Manufacturers (Suo Motu Case No. 10 of 2014) order dated January 20, 2022.**<sup>57</sup> Nippon Yusen Kabushiki Kaisha (NYK Line/ OP-1), Kawasaki Kisen Kaisha Ltd. (K-Line/ OP-2), Mitsui O.S.K. Lines Ltd. (MOL/ OP-3), Nissan Motor Car Carrier Company (NMCC/ OP-4).

The CCI initiated the case on a *suo motu* basis, based on a Lesser Penalty Application filed by Nippon Yusen Kabushiki Kaisha ('OP-1'), disclosing that OP-1, Kawasaki Kisen Kaisha Ltd. ('OP-2'), Mitsui O.S.K. Lines Ltd. ('OP-3'), and Nissan Motor Car Carrier Company ('OP-4') had colluded in maritime motor vehicle transport services. Based on the information, the CCI formed a *prima facie* view and ordered DG investigation.

During the pendency of investigation before the DG, OPs 3 and 4 approached the Commission by filing a joint application. The CCI opined that the concept of a single economic entity is alien to the Act, and therefore, leniency applications cannot be filed jointly. Hence, OPs 3 and 4 filed separate applications before the Commission on August 4, 2016.

- (i) OP 1 received 100% reduction, due to vital disclosures and continuous cooperation provided by them.
- (ii) MOL (OP 3) being the second lesser penalty applicant in the matter, MOL and its individuals were granted reduction in penalty up to 50% of the full penalty leviable.
- (iii) Furthermore NMCC (OP 4) being the third applicant, NMCC and its individuals were given 30% reduction in penalty leviable.

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57 Available at: <https://www.cci.gov.in/antitrust/orders/details/636/0> (last visited on Jan. 16, 2023).

**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 (*suo motu* case no. 02 of 2020) order dated February 3, 2022.**<sup>58</sup> Diamond Display Solutions Pvt. Ltd. (OP 1), AGX Retail Solutions Pvt. Ltd. (OP 2), Opal Signs Pvt. Ltd. (OP 3), Avery Dennison Pvt. Ltd. (OP 4), Amreesh Neon Pvt. Ltd. (OP 5), Macromedia Digital Imaging Pvt. Ltd. (OP 6), Hith Impex Pvt. Ltd. (OP 7)

The CCI initiated the case on a *suo motu* basis, based on the complaint received from SBI Infra Management Solutions Pvt. Ltd., alleging bid-rigging and cartelisation in the tender floated by them for the supply and installation of new signages or replacement of existing signages for branches or offices or ATMs of SBI located at specific metro centres of various circles of SBI across India. Based on the complaint, the CCI formed a prima facie view and ordered DG investigation. During the pendency of investigation before the DG, OP 4 filed a Lesser Penalty application. The other parties did not file for leniency. OP 4 was granted a 90% reduction in penalty for cooperation with the DG and the Commission in a genuine and full manner. It did not receive a 100% penalty, but 90%, as it approached the Commission two years after investigation was ordered by the Commission, based on the material already available on record.

**In Re: Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and Others (Reference Case No. 03 of 2018) order dated April 4, 2022**<sup>59</sup>

Chief Materials Manager, North Western Railways (Informant), Moulded Fibreglass Products (OP 1), Power Mould (OP 2), Black Burn and Co. Pvt. Ltd. (OP 3), Polyset Plastics Private Ltd. (OP 4), M/s Anju Techno Industries (OP 5), Calstar Steel Limited (OP 6), Jai Polypan Pvt. Ltd. (OP 7), Polymer Products of India Ltd. (OP 8), M/s Micro Engineers (OP 9), Quadrant EPP Surlon India Ltd. (Now MCAM Surlon India Ltd.) (OP 10), Skylark Projects Pvt. Ltd. (OP 11).

The matter was taken up by the Commission on a reference from Chief Materials Manager, North Western Railways against Moulded Fibreglass Products ('OP-1') and Power Mould ('OP-2'). The Informant alleged that OPs 1 and 2 had indulged in cartelisation in the bidding process for the procurement of high performance polyamide bushes and self-lubricating polyester resin bushes, which are substitutes, used in Bogie Mounted Brake Cylinder Coaches. Based on the complaint, the CCI formed a prima facie view and ordered DG investigation.

During pendency of the DG investigation, 4 lesser penalty applications were received on behalf of (i) Black Burn and Co. Pvt. Ltd. and its 5 individuals (OP 3), (ii) Moulded Fibreglass Products and its 5 individuals (OP 1), (iii) Jai Polypan Pvt. Ltd. and its

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58 Available at: <https://www.cci.gov.in/antitrust/orders/details/633/0> (last visited on Jan. 16, 2023).

59 Available at: <https://www.cci.gov.in/antitrust/orders/details/648/0> (last visited on Jan. 16, 2023).

individuals (OP 7), and (iv) Quadrant EPP Surlon India Ltd. (MCAM Surlon India Ltd.) (OP 10) and its 2 individuals disclosing evidence of a cartel.

- (i) OP 3, the first applicant, was granted 80% reduction in the penalty amount as it had filed for leniency after the investigation had started, though it had provided information which helped in establishing the cartel.
- (ii) OP 1, being second in priority status, was granted 40 % leniency as it could not provide much value addition but had made full and true disclosures of information and extended continuous cooperation.
- (iii) OP 7 was granted 30% penalty reduction as it was the third applicant. However, it helped the Commission to form a complete trail evidencing anti-competitive conduct of the OPs; and had therefore, provided value addition.
- (iv) OP 10 was granted 20% penalty reduction as it was the fourth applicant but some evidence given by it also amounted to value addition.

***In Re Cartelisation in the supply of Protective Tubes to Indian Railways (suo motu case No. 06 of 2020) order dated June 6, 2022<sup>60</sup>***

Polysat Plastics Private Ltd. (OP 1), Anju Techno Industries (OP 2), Power Mould (OP 3), Jai Polypan Private Ltd. (OP 4), Rama Engineering Works (OP 5), Polymer Products of India (OP 6), Hari Narayan Bihani (OP 7).

The matter was taken up by the Commission *suo motu*, pursuant to receipt of a lesser penalty application on behalf of Jai Polypan Private Ltd. (OP4) (including its individuals), for alleged cartelisation in the supply of protective tubes to the Indian Railways.

OP 4 disclosed that there was coordination and collusion amongst the OPs, from June 10, 2015 to June 29, 2020, in the tenders issued by the Indian Railways for procurement of protective tubes, wherein the OPs had quoted mutually agreed prices and allocated the tenders amongst themselves. Based on this information the CCI directed DG investigation.

*Granting of leniency:*

- (i) OP 4 was granted 100% reduction in penalty as the information submitted by it helped the CCI to form a prima facie case and establish contravention of the Act.
- (ii) Penalties were imposed on the other parties and their office bearers.

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<sup>60</sup> Available at: <https://www.cci.gov.in/antitrust/orders/details/1036/0> (last visited on Jan. 16, 2023).

- (iv) However, no individual penalties were imposed on OP-1, OP-2, OP-3 and OP-6 as these individuals had already been penalised in an earlier case (Ref. Case No. 03 of 2018 mentioned above) and also due to the fact that they were associated with MSMEs.

For further clarity, the authors have also tabulated the industry wise break up of grant of leniency. Till August 2022, about twenty three cases were decided by the CCI, where lesser penalty applications were made.<sup>61</sup> The total number of parties making lesser penalty applications, available within this period is around 54 [This number excludes *suo motu* case 01/2016, as the details of applicants were not provided in the order, and Ref. Cases No. 03 of 2016, 05 of 2016, 01 of 2018, 04 of 2018 and 08 of 2018, as no formal application for lesser penalty was made and no penalty was levied in such cases]. From the twenty-three cases as depicted above, a trend can be established where a few industries seem to lead, with respect to making lesser penalty applications. The industry-wise breakup of cases included.

Auto products and services: Electrical and other items for trains, Dry cell batteries, Waste processing, Broadcasting, Flashlights, Beer, Cover for food grain, Paper, Signage.

Considering that the top four industries, auto products and services, electrical and other items for trains, dry cell batteries, and waste processing account for seventeen out of the twenty-one cases, these industries evidently also see a high amount of cartel activity. Among the current pool of fifty-four lesser penalty applicants, for ten, no violation was found so no penalty was imposed. For a further five, even though violation was found, no penalty was imposed in light of other factors. Two applicants did not meet the minimum criteria for the application, and another one application was forfeited due to regulatory discrepancies. Among the remaining 36 applicants, the range of reduction of penalty was as follows: 100%: 11, 90%: 1, 80%: 1, 75%: 1, 50%: 6, 40%: 3, 30%: 4, 25%: 1, 20%: 3, 0%: 5

This data clearly shows that with eleven out of the thirty-six applicants receiving a complete reduction and another nine 50% or more reduction, the CCI is certainly not shying away from granting leniency. However, there remains subjectivity in the procedure which is creating lack of clarity amongst potential applicants. While some amount of regulatory discretion is inevitable, given that the facts and circumstances involved in the cases are bound to differ from each other, yet in the absence of a certain degree of predictability in the application of leniency, the provisions may not have their desired effect.

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61 Based on data available on the CCI website and also supplied by CCI for the Cartel Working Group [CWG] research purposes.

#### IV Findings and analysis

##### The positives

An analysis of decided cases reveal both positive and negative aspects of India's leniency regime. The positive factors are as follows:

*Firstly*, the CCI has been fairly consistent in its approach of considering leniency applications according to the time at which the application is made and the stage of the investigation. The CCI has affirmed that it will grant maximum leniency at the time it has little, or no information about a cartel, hence encouraging the race to disclose information. For instance, in the Globecast case, the CCI granted 100% leniency to Globecast as it had helped the CCI to form a "prima facie" opinion about the existence of the cartel. The second firm was granted only 30% leniency, as it volunteered information after the investigation had started.<sup>62</sup> A similar stance has been in other cases.

*Secondly*, the CCI has also shown that apart from the stage of giving information, it also gives weightage to the quality and evidentiary value of information. For instance, the CCI has granted leniency in cases where it already possessed evidence of a cartel, as the applicant furnished additional information revealing the modus operandi of the cartel.<sup>63</sup> This additional information was treated as "significant value addition" thus paving the way for similar applications, in future.

*Thirdly*, the CCI's proactive approach has encouraged firms to come forward with cartel information repeatedly. For instance, the CCI has granted Panasonic 100% leniency in three cases pertaining to cartels in the dry cell batteries market. In the first case, the CCI used the information furnished by Panasonic to get the names and locations of the cartel members and conduct a dawn raid at their premises, to gather crucial evidence against the cartel.<sup>64</sup> In the second case, the evidence given by Panasonic again helped the CCI to initiate investigation and establish cartel conduct.<sup>65</sup> In the third case, evidence given by Panasonic regarding an anti-competitive product supply agreement, coupled with full cooperation of Panasonic during the proceedings, helped the CCI investigate and bi-lateral ancillary cartel between Panasonic and Godrej in the market of institutional sales of dry cell batteries.<sup>66</sup>

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62 Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters (*suo motu* case 02 of 2013).

63 *Nagrik Chetna Manch v. Fortified Security Solutions* (case no. 50 of 2015).

64 *In Re: Cartelisation in respect of Zinc Carbon Dry Cell Batteries Market in India* (Suo Motu Case No. 2 of 2016).

65 *In Re: Anti-competitive conduct in the Dry-Cell Batteries Market in India* (Suo Motu Case No. 2 of 2017).

66 *In Re: Anti-competitive conduct in the Dry-Cell Batteries Market in India* (Suo Motu Case No. 03 of 2017)



*Fourthly*, the CCI has also granted individual leniency. For instance, in the batteries case, the CCI granted penalty reduction to individuals in proportion to the leniency granted to their companies.<sup>67</sup> A similar stance was taken by the CCI in its order pertaining to the electric power steering market.<sup>68</sup> This approach gives more reassurance to individuals while volunteering information about cartel activities of their firms. Past penalty history and mitigating factors such as association with MSMEs have also been considered by the CCI in the context of determining whether to impose any penalty on individuals, as apparent from the cases discussed above.

Further, the CCI is adhering to established legal principles by penalising cartel conduct only when the effects of the said cartel are felt in India. For example, CCI closed the case about a cartel in the automotive sector with respect to supply of anti-vibration rubber products and automotive hoses,<sup>69</sup> because the members involved in the alleged cartel were not selling the cartelised products within India and the cartel agreement had taken place prior to the applicability of Competition Act, 2002.

### **The shortcomings**

*Firstly*, the grant of a 'priority status' by the CCI does not automatically entitle an applicant to reduced penalty. Moreover, leniency applicants are not provided with information relating to their position in the priority status. Lack of this information may induce apprehension in the minds of potential leniency applicants and discourage volunteering of information. Keeping in mind the fairly nascent stage of the law, it is the view of the authors that more transparency in this respect will encourage cooperation.

*Secondly*, it is difficult to gauge the basis on which leniency may, or may not, be granted by the regulator. Cases have indicated waiver is subject to whether: (a) CCI has already started the investigation and that (b) the information submitted is strong evidence. However, this approach also has its shortcomings. The *Brushless DC Fans* was amongst the first proper leniency order passed by the Commission with 75% penalty reduction for the first applicant (not 100% as the Commission already had a prima facie case ready),<sup>70</sup> the *Zinc Carbon Case* saw the first 100% penalty reduction (despite the DGCI's independent case being considered sufficient, the 2nd and 3rd applicants were still

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67 *In Re: Cartelisation in Respect of Zinc Carbon Dry Cell Batteries Market in India* (Suo Motu Case No. 2 of 2016).

68 *In Re: Cartelisation in the Supply of Electric Power Steering Systems (EPS Systems)* (Suo moto Case No. 07(01) of 2014)

69 *In Re Cartel in the Supply of Anti-Vibration Rubber (AVR) Products and Automotive Hoses* (Suo Motu Case No. 01 of 2016).

70 *In Re: Cartelization in respect of Tenders Floated by Indian Railways for Supply of Brushless DC Fans and other Electrical Items* (Suo Moto Case No. 03/2014).

granted 30% and 20% penalty reduction),<sup>71</sup> the *Dry-Cell Batteries cases*<sup>72</sup> and the *Sports Broadcasting case*<sup>73</sup> also saw 100% penalty reduction granted to the first applicant due to the quality of information disclosed and its relevance for successful prosecution. However, the *Nagrik Chetna Manch case*<sup>74</sup> saw the Commission accord distinctive treatment in terms of penalty reduction to different but similarly placed applicants and apply varying standards such as “significant value addition” and “good value addition” in the same matter. Similarly, uncertainties can be found in other cases such as the Pune Municipal Corporation cases where certain applicants were accorded penalty reduction of up to 50% owing to the quality of the information provided by them,<sup>75</sup> while in contrast the *Electric Power Steering case* saw not only the first applicant being granted 100% penalty reduction,<sup>76</sup> but the second applicant also being granted 50% reduction for adding significant value to the investigation which was ongoing. Interestingly, in the *Industrial and Automotive Bearings case*,<sup>77</sup> the Commission abstained from imposing any penalty and passed a mere cease and desist order in view of the fact that the cartel conduct was induced by buyers.

*Thirdly*, there seems to be a mixed stance taken by the CCI with respect to the grant of individual leniency. A perusal of cartel cases shows that the CCI has not penalised individuals in some non-leniency cases, but has done so in some leniency cases. Even in the cement cartel case, in which CCI levied its highest penalty of INR 6.7 billion, not a single employee was penalised.<sup>78</sup> This approach could actually hinder individual applicants, as the cost of cooperation appears to be greater. It has been suggested that instead of imposing individual penalties, which again could be absorbed by the firm itself, a greater deterrent would be whistle-blower rewards, which would increase chances of cartel detection.<sup>79</sup>

*Fourthly*, the imposition of penalties and exemptions made by the CCI, particularly during the pandemic period has not been consistent. For instance, less than a month before the paper cartel order,<sup>80</sup> (where the CCI imposed a symbolic penalty on the

71 In Re: *Cartelisation in respect of zinc carbon Dry Cell Batteries in India* (Suo Motu Case No. 02/2016).

72 In Re: *Cartelisation in respect of zinc carbon Dry Cell Batteries in India* (Suo Motu Case No. 02/2016).

73 In Re: *Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters* (Suo Motu Case No. 02/2013).

74 In Re: *Nagrik Chetna Manch and Fortified Security Solutions*, Case No. 50/2015.

75 In Re: *Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing* (Suo Motu 04 of 2016).

76 In Re: *Cartelisation in the supply of Electric Power Steering System* (Suo Motu Case No. 07(01)/2014).

77 In Re: *Cartelisation in Industrial and Automotive Bearing* (Suo Motu Case No. 05/2017).

78 T.S. Somashekhar and Praveen Tripathi, “Cartel Leniency Program in India - Why No Race Here?”, NLSIU Working Paper No. 01/2021 (December, 2021).

79 *Ibid.*

80 In Re: *Anti-competitive conduct in the paper manufacturing industry (suo motu case no. 05 of 2016)*

OPs of 5 lakhs each, in view of their business being impacted during the pandemic) in another case, the CCI imposed a cumulative penalty of almost 30 lakhs on two companies and their office bearers for bid rigging.<sup>81</sup> Similarly, in March 2021, penalties of Rs. 10 lakhs each were imposed by the CCI on the opposite parties for bid rigging, in order to meet “the larger goal of swift market correction.” CCI. Here individual penalties of Rs. 10,000 each were also imposed upon office bearers of one company.<sup>82</sup> These reductions have been criticised on grounds of subjectivity.

Further, confidentiality is another contentious issue. Even though the CCI is bound to treat any information under the leniency regulations as confidential, the CCI had on previous occasions made the reports public.<sup>83</sup> In the *Nagrik Chetna Manch* case the CCI disclosed the statement by the applicants to the DG and later made them public as part of DG’s report even when the disclosure was confidential. Moreover, Regulation 6 allows the DG to disclose information given by the applicant to a party to the proceedings, if such disclosure is deemed to be necessary by the DG, even if the applicant does not agree to the same disclosure.<sup>84</sup> In order to overcome these difficulties, the CCI has amended the confidentiality provisions under Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (General Regulations)<sup>85</sup> in 2002, after consultation with the public. The key changes include: i) self-certification by the parties that the information sought to be kept confidential meets the parameters of the General Regulations, ii) the setting up of a confidentiality ring comprising of authorised representatives of the parties, who alone would have access to confidential information in a matter and iii) the treating of personal information such as call records, email and other such information obtained during dawn raids, as confidential information.<sup>86</sup>

## V Suggestions and way forward

Based on the overall analysis, the authors would like to put forward a few suggestions with respect to strengthening of the current leniency framework. At the outset, it is

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81 *GAIL (India) Limited v. PMP Infratech Private Ltd.*<sup>82</sup> (case no. 41 of 2019).

82 *People’s All India Anti-Corruption and Crime Prevention Society v. Usha International Limited and Others* (case no. 90 of 2016).

83 Nisha Kaur Oberoi, “Investigation of Cartels: A Comparative Assessment of the Approaches Adopted by the Indian and EU Competition Regulators” 57 *NLS Business Law Review* 58 (2015).

84 Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017, Regulation 6.

85 See The Competition Commission of India (General) Regulations, 2009 available at: <https://www.cci.gov.in/public/index.php/legal-framework/regulations/8/0> (last visited on Jan. 16, 2023).

86 See Available at: <https://elplaw.in/cci-updates-its-confidentiality-regime/> (last visited on Jan. 16, 2023).

important to remember that cartels have existed in India for decades, in several sectors.<sup>87</sup> India's competition law, the Competition Act, 2002, has come into force fairly recently. The previous legislation, the MRTP Act, 1969 was designed in accordance with the socio-economic objectives of that time, and did not have adequate measures to restrict cartel conduct. While there are several reasons as to why the MRTP Act remained powerless with respect to cartel activity, some of the principal issues were the lack of proper definition of cartel, limited power of the regulator to deal with cartels, no extra territorial jurisdiction, no provision for penalty and lack of adequate resources.<sup>88</sup> The Competition Act, 2002 brought with it a clear definition of cartel, along with heavy penalties for cartel conduct, including provisions for imposing individual penalty. The Lesser Penalty Regulations, 2009 marked a sea change in cartel prosecution by introducing a structured framework of granting leniency. Though the current leniency programme suffers from certain shortcomings, as detailed in the paper, one should proceed with caution before embarking on changes which can prove to be counterproductive. With this caveat, the authors are of the opinion that the following measures may be considered to strengthen the current leniency regime:

*Firstly*, as suggested in the Competition Amendment Bill, 2022 ("Amendment Bill"), it is important to move towards a leniency plus regime. In a leniency plus programme, a cartel which is a lesser penalty applicant can get further leniency if it discloses to the CCI the existence of another cartel, in another market. This would attract more leniency applicants, as those who do not possess information which qualifies as "value addition" in a current case, can still apply for leniency if they give the CCI information about other cartels in the market. Further, this system should be without prejudice to the lesser penalty applications in the new cartel, resulting in a win-win situation for both.<sup>89</sup>

*Secondly*, along with encouraging leniency, it is equally important to enforce higher penalties, as the losses from cartelisation should outweigh the potential gains. The Supreme Court's decision in the *Excel Crop* case had blunted our penalty provisions, as the court had held that while calculating penalty the CCI should take into account only the "relevant" turnover instead of the "total" turnover.<sup>90</sup> Reports seem to suggest that the government is now planning to modify the term "turnover" in the Amendment Bill, to mean "global turnover".<sup>91</sup> This change, according to the authors, should be

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87 See, Tilottama Raychaudhuri, "Using Leniency Effectively in Anti-Cartel Investigations: A Study of Recent Trends in Cases Decided by the CCI" 11(2) *Indian Journal of Law and Justice* 172 (2020).

88 *Ibid.*

89 See The Competition (Amendment) Bill, 2022 (Bill No. 185 of 2022), s. 42.

90 *Excel Crop Care Limited v. CCI* (2017) 8 SCC 47.

91 Pramod K. Singh and Rahul Rai, "Competition Amendment Bill, 2022: Embellishments That Merit a Relook" BQ Prime, Feb. 21, 2023, available at <https://www.bqprime.com/opinion/competition-amendment-bill-2022-embellishments-that-merit-a-relook> (last visited on Mar. 16, 2023).

implemented with caution so as to avoid over deterrence which may increase the cost of compliance for businesses. The term global turnover is also used in the European Commission (“EC”), but the latter exercises self-restraint by having guidelines in place which oversee the imposition of penalty. These guidelines require the EC to first arrive at a “basic amount” which is usually limited to the value of sales within the EC, and only in exceptional cases of worldwide cartels, extends to the global value of sales.<sup>92</sup>

Thirdly, if we are to consider imposition of harsher penalties, it is crucial to have penalty guidelines in place. As discussed earlier, the imposition of penalties and the exemptions made during the pandemic period have been criticised on grounds of subjectivity. The Amendment Bill contains provisions empowering the CCI to issue guidelines on the calculation and imposition of penalty and it is the opinion of the authors that the same should be put in place at the earliest.<sup>93</sup>

Fourthly, the success of any leniency programme depends upon the degree of incentive offered to the applicants. As discussed in this paper, grant of lesser penalty by the CCI depends upon the nature and quality of the evidence obtained, the stage of the investigation and several other factors. Evaluation of these factors have to be done on a case-to-case basis, hence leniency by its very nature is subjective and discretionary. A review of cases show that it is difficult for applicants to gauge whether or not they will be granted leniency and this may prove to be a severe disincentive. While it is not possible to change the principles on which grant of leniency operates, it is the suggestion of the authors that additional, explanatory guidelines be issued to the general public clarifying the meaning of key terms used in the Lesser Penalty Regulations, 2009. The EC has published a detailed statement of FAQs in October 2022, to clarify concepts and practices applied by the EC while deciding leniency applications.<sup>94</sup> This document contains explanations as to how the EC interprets “significant added value” and also explains its decisional practice. For instance, it elaborates that “In terms of evidential value, evidence contemporaneous to the facts in question will generally have a greater value than evidence established subsequently. Direct evidence (e.g. notes of a cartel meeting) has greater value than indirect evidence (e.g. travel records concerning attendance at meetings). Compelling evidence, i.e. evidence which is stand-alone and conclusive, has greater value than evidence that requires significant corroboration. Corroborating evidence, nevertheless, has significant added value if it allows the Commission to establish the facts of the infringement (e.g. cartel participants, their

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92 European Union, “Guidelines for Setting Fines” 29 May 2023, *available at* <https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-for-setting-fines.html> (last visited on Mar. 16, 2023).

93 *See* The Competition (Amendment) Bill, 2022 (Bill No. 185 of 2022), s. 64B.

94 *See* European Union, “Frequently Asked Questions (FAQs) on Leniency”, *available at*: [https://competition-policy.ec.europa.eu/system/files/2022-10/leniency\\_FAQs\\_2.pdf](https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf) (last visited on Jan. 16, 2023).

role in the cartel, existence and content of cartel meetings, duration, scope etc.) which could not otherwise be established to the requisite legal standard. Corporate statements generally require corroboration, which can be provided by pre-existing documents or another corporate statement from a different leniency applicant”<sup>95</sup> It is the submission of the authors that such clarifications also be issued by the CCI, so as to make the granting of leniency more transparent and predictable for the applicants.

Finally, maintaining confidentiality of leniency applicants is an important factor. The CCI as discussed earlier, has faced flack for disclosing confidential information and has amended the General Regulations accordingly. However, the authors submit that assurances of confidentiality can put the CCI in a predicament in situations where a disclosure is demanded by the other party, or required by the investigating agency. In order to facilitate cartel investigations, the EC has recently gone so far as to completely waive confidentiality, by requiring the leniency applicants to sign a waiver, allowing the Commission to share information.<sup>96</sup> A template has also been developed by the International Competition Network (“ICN”) in this regard.<sup>97</sup> This template details the procedure governing waivers, mentioning the limits of consent and procedural waivers (used only for procedural aspects of the investigation) and full waivers (used for exchanging substantive information given by the applicant). It is submitted by the authors that the ICN document can be used as a valuable guideline in deciding the limits of confidentiality for leniency applicants in India.

## VI Conclusion

The Leniency Programme in India is developing rapidly and the past few years show firms (and individuals) receiving leniency in various sectors, resulting in several cartel crackdowns. As detailed in this paper, there have been more than 50 leniency applications filed since 2017 and this is impressive for a new competition regime. However, there is room for the CCI to engage in a more structured application of leniency principles, with enhanced transparency and predictability in the process of granting the leniency. It is with this aim that the authors have provided the suggestions above. In conclusion, we believe that any guideline issued by the CCI, or modification made by amendment to the Lesser Penalty Regulations, should be detailed yet flexible enough for the CCI to decide leniency applications on a case-to-case basis. While it is not possible to develop a flawless mechanism, guidelines issued by the CCI to explain its practice, along with consistent and uniform application of the factors and considerations involved, will go a long way in strengthening the current leniency framework.

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95 *Id.* at 8.

96 *Id.* at 24.

97 International Competition Network, “Waivers of Confidentiality in Cartel Investigations – Explanatory Note”, *available at*: [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG\\_LeniencyWaiverNote.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf) (last visited on Jan. 16, 2023).