

## Designing Effective Leniency Programme for India: Need of the Hour

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Cartels are considered to be the most egregious competition law offence. Leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects. They can only be effective, if cartelists not seeking leniency, perceive significant punishment to be sufficiently apt. These programmes involve a commitment to a pattern of penalties designed to increase incentives of cartelists to self-report to the competition law enforcer. Leniency programmes in different countries may mutually reinforce these incentives on members of international cartels. Some developing countries have anti-cartel leniency programmes. If other developing countries were to adopt leniency programmes, a political commitment to fight cartels is necessary for such a programme to be effective. Thus, this paper focuses on the importance of the leniency programme, the ingredients to ensure its successful implementation in India and the paper also reviews the experience of other developed countries to draw relevant lessons for India.

## BACKGROUND

The OECD Recommendation of the Council Concerning Effective Action against Hard Core Cartels adopted on March 25, 1998 defined '*hard-core cartel*' as "*...an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive 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.*"

Supreme evil of antitrust, cartels are the most flagrant of all anti-competitive practices<sup>1</sup>. It is an agreement among business entities of a particular sector that come together to control the relevant market through various ways such as artificial price raising, limiting output levels, credit terms etc., of the products. The economic term for involving in such anticompetitive activities is known as 'collusion'. According to the economic theory, there are two forms of collusion: express<sup>2</sup> and tacit collusion<sup>3</sup>. Generally, the former is illegal and penalised in almost all jurisdictions however, the latter is permitted.

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<sup>1</sup> Gráinne Hawkes, Cartels – The Case for Criminalisation in the European Union; *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* 540 U.S. 398, 408 (2004); available at <https://sjeldraft.files.wordpress.com/2014/05/cartels-the-case-for-criminalisation-in-the-european-union.pdf>

<sup>2</sup> Competition authorities indicate that they are empowered only to catch express collusion. A finding of express collusion is based only upon whether there is evidence to show that the parties have communicated directly with each other. Express collusion per se unlawful.

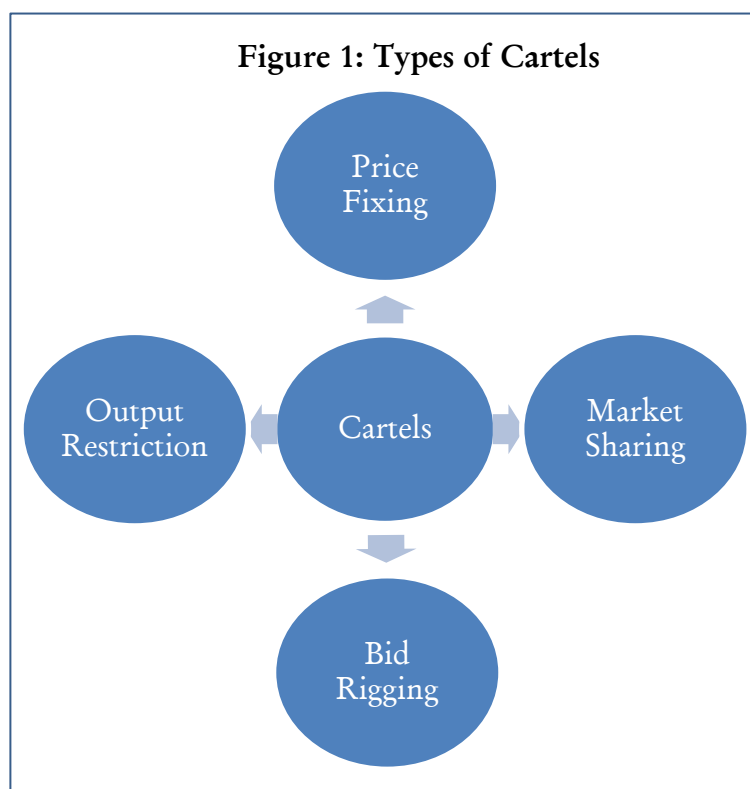
<sup>3</sup> Tacit collusion is a market conduct that enables firms to obtain supra-normal profits, where "normal" profits correspond to the equilibrium situation. Tacit collusion can arise when firms interact repeatedly. They may then be able to maintain higher prices by tacitly agreeing that any deviation from the collusive path would trigger some retaliation. John Black, *Oxford Dictionary of Economics*, Oxford University Press, New Delhi, Second Edition, 2002, at p. 193-194; Nidhi Singh, *Cement Cartelisation in India and Europe*, CCI Report, assessed at <http://cci.gov.in/images/media/ResearchReports/NidhiInterns160311.pdf>; last visited on July 6, 2015

Generally, cartels operate within industries where the products are homogeneous in nature, have no substitute and consumer demand would remain more or less unaffected by the change in price of the products. For instance, in cement industry, consumers would continue to buy the product irrespective of its price as there is no substitute for cement in construction.<sup>4</sup>

Likewise, consumers would continue to buy sugar, onion and milk even if their prices surge.<sup>5</sup> The intention behind forming a cartel is to raise price above competitive levels, causing loss not only to the consumers but also to the producers, as a result it affects the whole economy.

Cartel agreements are difficult to detect, however, with adequate severe penalties, cartel members feel the risk of punishment to outweigh the benefits from the illegal conduct. This subsequently compels them to confess their

anti-competitive practices<sup>6</sup>. Generally, competition authorities detect cartel activities while conducting investigation. Considering the case of India, cartels are defined under the Competition Act, 2002<sup>7</sup>. The main element of a cartel is the existence of *consensus ad idem* between competing enterprises, not to compete with each other, rather come together to gain profits.<sup>8</sup> Section 3(3) covers anti-competitive agreements and cartels distinguish itself from other anticompetitive agreements in terms of penalty imposed by the Competition



<sup>4</sup> Recently, in September 2015, Confederation of Real Estate Developers Association of India (CREDAI) supporting the decision of CCI, refused to purchase cement from companies that were guilty of cartels.

<sup>5</sup> assessed at [http://articles.economictimes.indiatimes.com/2012-07-08/news/32578276\\_1\\_cartels-ugly-word-cci](http://articles.economictimes.indiatimes.com/2012-07-08/news/32578276_1_cartels-ugly-word-cci) last visited on July 6, 2015

<sup>6</sup> R S Kemani, A Framework for the Design and Implementation of Competition Law and Policy; [https://books.google.co.in/books?id=HX6-aIPZQC&pg=PA24&lpg=PA24&dq=Cartel+agreements+are+difficult+to+detect.+Stringent+penalties+outweigh+the+risk+of+punishment&source=bl&ots=pt1eU9iF3\\_&sig=dg2kPEtS3\\_0WvkMQi89G6s2aFPM&hl=en&sa=X&ved=0ahUKEwjA0fHE8qXJAhVFIKYKHTUkARgQ6AEIGzAA#v=onepage&q=Cartel%20agreements%20are%20difficult%20to%20detect.%20Stringent%20penalties%20outweigh%20the%20risk%20of%20punishment&f=false](https://books.google.co.in/books?id=HX6-aIPZQC&pg=PA24&lpg=PA24&dq=Cartel+agreements+are+difficult+to+detect.+Stringent+penalties+outweigh+the+risk+of+punishment&source=bl&ots=pt1eU9iF3_&sig=dg2kPEtS3_0WvkMQi89G6s2aFPM&hl=en&sa=X&ved=0ahUKEwjA0fHE8qXJAhVFIKYKHTUkARgQ6AEIGzAA#v=onepage&q=Cartel%20agreements%20are%20difficult%20to%20detect.%20Stringent%20penalties%20outweigh%20the%20risk%20of%20punishment&f=false)

<sup>7</sup> Section 2(c): cartels 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.”; Read more about cartels on <http://www.competition-commission-india.nic.in/advocacy/CARTELS.PDF> ; last visited on July 21, 2015

<sup>8</sup> Veena V. Rajes, Competition Act, 2002 In Comparison With The Antitrust/ Competition Laws In Force In The USA and European Union With reference To Cartels

### Figure 2: Negative Effects of Cartels

The diagram illustrates the negative effects of cartels. At the center is a circle labeled "Negative effects of cartels". Surrounding this central circle are four other circles, each representing a specific negative effect: "Higher prices" at the top, "Lack of transparency" on the right, "Restricted output" at the bottom, and "Carving up a market" on the left. These four outer circles are connected by a thick, light blue circular band.

Source:  
[http://www.economicsonline.co.uk/Business\\_economics/Cartels.html](http://www.economicsonline.co.uk/Business_economics/Cartels.html)

Source:  
[http://www.economicsonline.co.uk/Business\\_economics/Cartels.html](http://www.economicsonline.co.uk/Business_economics/Cartels.html)

For instance, about 20 airlines worldwide were found guilty of price fixing on perhaps \$20 billion of freight shipments and were fined a total of \$3 billion and the compensation claims from ripped-off customers comfortably exceed \$1 billion<sup>11</sup>. Driven by such impediments, competition authorities of various jurisdictions have considered cartel enforcement as their priority over the last decade. In this regard, combating cartel activities demand stringent laws, therefore the punishment for such anti-competitive activities are the most severe in the nature. In the second half of 2013, potash prices dropped by over 20 per cent when one of the two export cartels that control global supplies broke down.<sup>12</sup> The European Union, Argentina<sup>13</sup> and several other jurisdictions

<sup>10</sup><http://stats.oecd.org/glossary/detail.asp?ID=3157>, last visited on July 6, 2015.

<sup>12</sup>[https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20141219CartelsCompetitionMineralsKooroshyPrestonBradley.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141219CartelsCompetitionMineralsKooroshyPrestonBradley.pdf)

<sup>13</sup> Argentina recently introduced a leniency policy. The cartel prohibition is enforced by the National Commission for the Defence of Competition (CNDC); available at <http://www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2015/argentina> ; last visited on August 19, 2015

believe only in civil penalties whereas, Australia<sup>14</sup>, South Korea, the US and several others impose criminal sanctions. Also, there are some jurisdictions such as Argentina, India that have largely civil penalties, but include criminal penalties for specific anti-competitive activities such as bid rigging.

## RATIONALE FOR A LENIENCY PROGRAMME

At present, Competition Commissions (Commission) worldwide are deeply involved in using its resources to detect horizontal agreements, especially cartels and their egregious effect on market. Cartels are secret by definition and owing to the technicalities, the competition authorities need to dedicate enormous efforts to discover cartels and deter them. Quite frequently due to lack of evidence, it's difficult to take an action against a cartel even though the commission has its knowledge.<sup>15</sup> Leniency/ amnesty programs are universally accepted as one of the best way to detect cartels. This is because the activity is so guarded that internal information is necessary to break such agreements.<sup>16</sup> The idea has been extensively borrowed from Prisoner's dilemma theory (mentioned in Box 1) which was originally used to devise business strategies between rival competitors. It depicts as to how the theory is the origin of the policy used in present times as the best tool to detect as well as to eliminate cartels from the market. According to this program, a cartel member has to report or confess its cartel participation or provide germane information regarding the cartel to the Commission. The provided information must be relevant enough to help detect cartel or to crack the cartel. Usually, the cartelists have to report information by himself and provide full cooperation in terms of providing relevant inside evidence thereby assisting the Commission to take actions against other cartel members. Depending upon such evidence, the Commission has to be lenient while providing penalty. Also, the offer to provide full immunity is available only for the first applicant eventually decreases in leniency for other cartel members providing significant evidences. Gathering evidence is a challenge for competition agencies, thus granting amnesty to cartel members would encourage them to report such anticompetitive activity. Through this program, the inside evidence is obtained more rapidly at a lower direct cost as compared to other methods of investigation, triggering swift and efficient resolution of cartel related cases.

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<sup>14</sup> The Australian Parliament passed the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 on 16 June 2009. It follows the US approach of criminally prosecuting individuals and corporations for competition law violations; assessed at [http://www.paulhastings.com/assets/publications/1527.pdf?wt.mc\\_ID=1527.pdf](http://www.paulhastings.com/assets/publications/1527.pdf?wt.mc_ID=1527.pdf) last visited on July 22, 2015

<sup>15</sup> Saumyaambekar, Competition Assessment of Leniency Policies and Introduction to Marker System and Amnesty Plus; assessed at <http://cci.gov.in/images/media/ResearchReports/LeniencyPoliciesIntroductionToMarkerSystemandAmnestyPlus.pdf> last visited on July 7, 2015

<sup>16</sup> Massimo Motta, Competition Policy; Theory and Practice, (Cambridge: Cambridge University Press, 2004), at p. 193; assessed at <http://cci.gov.in/images/media/ResearchReports/LeniencyPoliciesIntroductionToMarkerSystemandAmnestyPlus.pdf>, last visited on July 7, 2015

### Box 1: Prisoner's Dilemma

#### Prisoner's dilemma:

First proposed by two noble mathematicians Merrill M. Flood and Melvin Dresher in 1950, the model is the background of a successful leniency program. An absurdity in decision analysis in which two individuals acting in their own best interest pursue a course of action, does not result in an ideal conclusion. It is developed in such a manner that both the parties choose to protect themselves at the expense of other members. It works well in an oligopoly market. For instance: Coca Cola and Pepsi Co in soft drinks sector; Apple and Samsung in the mobile phone sector. It is evident from this table that a prison can achieve the most for him if both the prisoner's cooperate and reveal the information.

	Prisoner B Stays Silent	Prisoner B Betrays
Prisoner A Stay Silent	Both serve six months	Prisoner A serves ten years Prisoner B goes free
Prisoner A Betrays	Prisoner A goes free Prisoner B serves ten years	Both serve five years

*Source: Ulrich Blum, Nicole Steinat, Michael Veltins, 'On the Rationale of Leniency Programs: A Game-Theoretical Analysis' [2008] European Journal of Law & Economics*

*The above model is known as the decision matrix that explicitly depicts all the possible decisions that a 'prisoner' may take when put in a position equivalent to the discussion; available at <http://lizengland.com/masters/prisonersdilemma.htm>*

These programs are framed to create 'race for confessions' by providing incentives to cartel members to admit thereby aiding the competition law enforcers and in return they reward one or a few more, whistleblowers with a substantial reduction in penalties as compared to other cartel members. Although applying different degree of penalties for the same illegal conduct seems unfair or discriminatory, it is available to any cartel member on similar scale.<sup>17</sup> First adopted in 1978 in the U.S.<sup>18</sup>, these programs allow corporations or individuals involved in illegal cartel activity to receive amnesty if they come forward and denounce

<sup>17</sup> The use of leniency programs as a tool for the enforcement of competition law against hardcore cartels in developing countries; UNCTAD, August 26, 2010; available at [http://unctad.org/en/Docs/tdrbpconf7d4\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf); last visited on July 27, 2015

<sup>18</sup> In 1974, Congress enacted the Antitrust Procedures and Penalties Act. Cartel crimes were changed from a misdemeanor to a felony, the maximum fine for a cartel violation was increased to \$1 million, and the maximum term of imprisonment for collusion was increased to 1 year; Congress passed the Antitrust Amendments Act of 1990. The Act increased maximum fines to \$10 million for corporations and \$350,000 for individuals. Prison terms increased to a term of up to three years; Vivek Ghosal, D. Daniel Sokol, Designing Optimal Cartel Enforcement CESifo Area Conference on Applied Microeconomics, Feb 28-March 1, 2014; available at



the cartel.<sup>19</sup> With a few amendments, the U.S was successful in cracking cartels, increase in cases filed to about 60 cases per year, which made several countries adopt their own leniency programs.<sup>20</sup> The new policy was much liberal than the old policy in terms of reduction in sanctions awarded to spontaneously reporting firms and possibility to apply when firms are already under investigation. In 1996, European Commission decided to introduce a leniency program; however it was tainted with lack of transparency and several other lacunae. By 2010, around 50 jurisdictions had adopted leniency program with medium and low economies such as Brazil, Mexico, South Africa having active leniency program. It has been witnessed that these countries have been allocating the resources from merger review towards this program to build staff skill where parties are less eager.

To achieve benefit from a leniency program, a jurisdiction must actively fight against cartels by significantly punishing the cartel members. Few of the benefits that can be achieved from a successful leniency program are as follows<sup>21</sup>:

- **Improved collection of intelligence and evidence:** It has been observed that there can be three methods of obtaining evidence; either by direct force, threatening company staff with sanctions in case of non-cooperation and leniency. It has advantages over the other two in many aspects. Firstly, it can be used to obtain all kinds of information and is not just confined to existing documents and records as it is in the first case. Secondly it saves a lot of time and resources and does not suffer from the problem of reliability as it is in the second method. The applicants know that there is no reward for providing wrong information, on the other hand this would invite penalties and a disqualification from being considered for leniency.
- **Increased difficulty of maintaining cartels:** Maintaining a cartel is an enormous task; all the participants have to coordinate their behaviour on consistent and collusive strategies allowing the participants to increase their profits. A leniency programme can be very effective in situations like these; it increases the payoff of cheating for the deviator thereby making it difficult for the cartel to sustain. The higher is the incentive offered; higher shall be the chances of cheating.
- **Lower cost of adjudication:** Leniency is a cost saving method, which does not involve the time taking court proceedings as the delinquent corporation would prefer not being held liable and getting an incentive in the form of a reduction or no penalty being imposed.

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<sup>19</sup>Zhijun Chen, Patrick Rey, Working Paper On the Design of Leniency Programs, n. 452, April 2007, revised on January 2012; accessed at [http://idei.fr/sites/default/files/medias/doc/by/rey/leniency\\_v2.pdf](http://idei.fr/sites/default/files/medias/doc/by/rey/leniency_v2.pdf) ; last visited on August 3, 2015

<sup>20</sup> A leniency program has for example been adopted by the EU Commission in 1996, revised in 2002; South Korea adopted in 2007

<sup>21</sup><http://www.mondaq.com/india/x/262428/Cartels+Monopolies/Leniency+Programmes+In+The+Detection+Of+Cartels+An+Overview+Of+The+Approach>

## ESSENTIAL INGREDIENTS OF AN EFFECTIVE LENIENCY PROGRAM

There lies a huge difference between a country with a leniency program and the same being effectively implemented to eliminate cartels. Mere existence of a law does not necessarily ensure that a country would receive the associated benefits of greater competition unless it is meticulously implemented with set guidelines and enforcement powers. Several countries in Middle East and North African regions have competition law with wide range of exceptions, making the leniency program ineffective. In practice, developing countries lack relevant experience to limit the application of these exemptions on horizontal agreements which eventually leads to acceptance of cartel behaviour in these countries. Also, the penalty provisions are not preventive to dissuade cartel members from continuing such anticompetitive practices.<sup>22</sup>

Mr. Fernando de Magalhães Furlan, Commissioner and Acting Chair of Conselho de Defesa Econômica (CADE), Brazil mentioned that there are certain necessary prerequisites for an efficient leniency program: (a) predictability of procedures; (b) protection of identities and data of leniency applicants; and (c) high risk of cartel detection and punishment.<sup>23</sup>

The three essentials have been elaborately explained as below:

- (i) High risk of detection and serious sanctions being imposed: The first prerequisite is the threat of severe sanctions for those who turn up with information in the end. It is so because, the commissions would have already received relevant information, therefore, these cartel members would be awarded sanctions with varying degrees of severity.<sup>24</sup> However, in few jurisdictions, sanction for hardcore cartel is not effective as it only prosecutes the entity and not individuals, making it less effective. In US, the antitrust authority imposes criminal penalty as well as fine pressurising the cartelists to give up and leak internal information. In EU, the law does not provide for criminal penalties for cartel activities however, it stands as a successful example in combating cartels.<sup>25</sup>
- (ii) Sanctions imposed are significant: An effective leniency program requires stringent penalty provisions on the cartel participants. This instills a genuine fear of detection of cartel activity or members involved in such anticompetitive activity. If cartel members perceive risk of detection, it could build fear and distrust among

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<sup>22</sup> Martha Martinez Licetti, Combating Cartels in Developing Countries: Implementation Challenges on the Ground, Competition Policy International, 2013, available at

<sup>23</sup> "The use of leniency programs as a tool for the enforcement of competition law against hardcore cartels in developing countries"- Summary of Round Table held on 9 November 2010

<sup>24</sup> Scott D. Hammond, Cornerstones of an Effective Leniency Program; November 2004, available at <http://www.justice.gov/atr/speech/cornerstones-effective-leniency-program> ; last visited on August 14, 2015

<sup>25</sup> Scott Hammond, Director of Criminal Enforcement, U.S Antitrust Division in ICN Workshop on Leniency Programs, Australia stated that "if a jurisdiction relies on fines alone to deter cartel activity, and it is notable to obtain fines of the same relative magnitude as the EU, then it may not be able to attract amnesty applicants"; available at <http://www.justice.gov/atr/speech/cornerstones-effective-leniency-program> ; last visited on August 17, 2015



cartel members. Tantalising cartel participants by rewarding them lesser penalty or complete relaxation from penalty would lure them to self-report rather than being punished for getting caught as a cartel member. The imagination of going to jail would itself make an entity confess. For instance, Germany has a separate Fining Guidelines introduced in 2013 where penalty is severe for cartel activities. It has separate provisions for corporate entities (maximum of 10 per cent of worldwide turnover in the previous business year) and individuals (upto €1million).<sup>26</sup>

- (iii) Transparency and certainty: There is a need for transparency in enforcement of leniency policies. The competition agencies of various jurisdictions must build that trust amongst cartelists so that they feel comfortable to come forward with relevant information and aid these authorities to crack the cartel case. The cartelists would only proceed with the decision to provide their information if the competition authority ensures sufficiently attractive provisions i.e., lessening or overlooking the degree of punishment for being actively involved in a cartel activity.<sup>27</sup> The ultimate duty of these authorities is to ensure that the provisions are apparent, comprehensive and coherently applied.

The following elements must be implemented into the leniency program to curb cartels:

- (i) Deterrence: Imposing stringent penalty provisions would deter a cartel member to continue anticompetitive activities as there is an increased risk of keeping inside information to him rather than revealing it to the competition authorities. An effective program would encourage cartelists to come forward with substantial evidence thereby assisting and cooperating with the competition authorities to crack cartel. France authorities have imposed a whopping USD1.7bn on a single cartel along with Germany which imposed USD1bn on three cartels, reporting the highest penalties till date, compelling the cartel members to break the existing cartels.<sup>28</sup>
- (ii) Detection: It would enable the competition authorities to discover cartels in the relevant sector, thereby conducting investigations and cracking the collusion thereby promoting fair and healthy competition in the market. With disclosure of information by cartel participants under Markers system, more than one cartel can be detected thereby eliminating such practices from the relevant market. In European Union, after the introduction of the Leniency Notice in cartel cases in

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<sup>26</sup> Latin American Competition Forum, Session I: Criteria for Setting Fines for Competition Law Infringements

Background Note by the OECD Secretariat, Directorate For Financial And Enterprise Affairs Competition Committee, September 3-4, 2013, Pg 28, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2013\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2013)4&docLanguage=En)

<sup>27</sup> Xavier Groussot, Justin Pierce, Transparency and Liability in Leniency Programs: A Question of Balancing?; January 6, 2015; available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2545011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545011) ; last visited on August 17, 2015

<sup>28</sup> Global cartel fines reach new high in 2014 as enforcers continue to focus on auto parts sector, January 6, 2015, Allen & Ovary, available at <http://www.allenoverly.com/news/en-gb/articles/Pages/Global-cartel-fines-reach-new-high-in-2014-as-enforcers-continue-to-focus-on-auto-parts-sector.aspx>

2002, there was increase in number of leniency applications to 159 from 2002 to 2005.<sup>29</sup>

- (iii) Penalty: Stringent penalty provision is quite essential to eliminate cartel activities. Establishing higher punishment for cartel members would eventually ensure that the cartel members come forward to disclose inside information. Doing so would let the cartel members enjoy full or partial immunity rather than paying heavy fines or imprisonment as provided in respective competition laws. For instance, the Department of Justice imposed a penalty of US\$425 million to Bridgestone as it failed to reveal its price-fixing of auto parts in 2011.<sup>30</sup>
- (iv) Cessation: Leniency provisions work if the cartel participant discontinues from cartel practice and comes forward with information to the Commission. Confession of such relevant information would eventually release them from conducting such anticompetitive horizontal agreements. This would ultimately end cartel activity which was hampering the smooth functioning of the market. Elimination of cartel from the relevant market would help revive competition into the market.<sup>31</sup> In 2012 and 2013, the Japan Fair Trade Commission (JFTC) issued a number of cease-and-desist orders and surcharge payment orders against automotive parts manufacturers including manufacturers of wire harness, manufacturers procuring automotive generators, automotive starters, automotive windscreen wipers systems and automotive lamp manufacturers for bid-rigging.

## EXPERIENCE OF OTHER COUNTRIES

Most of the competition institutions around the world have adopted leniency program, however it varies in certain aspects (Refer to Annexure I). Countries such as Japan, South Africa and Brazil have successful leniency programs however countries like India and Pakistan hardly have used leniency program to detect cartels. Each country has adopted its leniency program which is influenced from that of developed countries such as the US and EU. Elaborated below are countries with their respective cartel sanctions and leniency program to eliminate cartels:

### BRAZIL

Influenced from the US antitrust law, Brazil adopted leniency program to combat cartels in 2000 when Law 10149/00 brought certain amendments. In 2003, Secretariat of Economic Law of the Ministry of Justice (SDE) internally reorganized to focus on cartels and entered agreements with the federal police and public prosecutors for joint criminal

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<sup>29</sup>Bertus van Barlingen and Marc Barennes, The European Commission's 2002 Leniency Notice in practice, EC Competition Policy Newsletter, Autumn 2005 at 6; available at [http://www.competitioncommission.gov.in/advocacy/LeniencyProject\\_AmitSanduja11032008.pdf](http://www.competitioncommission.gov.in/advocacy/LeniencyProject_AmitSanduja11032008.pdf)

<sup>30</sup> Thomas F Bush, Locke Lord LLP, United States - Department of Justice

<sup>31</sup> Anti-Cartel Enforcement Manual; Chapter II: Drafting and implementing an effective leniency policy, April 2014, International Competition Network; available at [http://www.icnmarrakech2014.ma/pdf/Intl-ICN-Anti-cartel\\_enforcement\\_manual.pdf](http://www.icnmarrakech2014.ma/pdf/Intl-ICN-Anti-cartel_enforcement_manual.pdf) ; last visited on August 18, 2015

and civil cartel investigations<sup>32</sup>. Later, in 2009 CADE (Administrative Council for Economic Defence) began imposing large fines and SDE made two dawn raids. Anticompetitive behaviour attracts criminal penalties with a criminal fine along with prison term of two to five years. For cartels, the sanctions are considered administrative infringements and criminal in nature. Fines are imposed between 0.1 to 20 per cent of the total turnover of the company. Also, for the individual liability of executives, penalty is dependent on proof of guilt or negligence.<sup>33</sup> Apart from this, such entities are excluded from public procurement or loans and credits from banks for a period of five years.

The cartel member would get full leniency if the program requirements are fulfilled as mentioned in Article 86 of the new Act. It requires submission of relevant information not available with the authority. He also has to be the first individual to approach the relevant authority i.e., SDE and confess its cartel activity. He must also be ceased from conducting any further cartel activity thereby agreeing to sign the agreement to cooperate in the same manner as the company. The Law 12,529/11 i.e., Brazilian Antitrust Act provides for a marker system where the SDE issues a marker by reserving a place in the queue for the cartel members for a period of 30 days. The law offers individuals to apply separately if the company does not apply. It also boasts of a 'Leniency Plus' provision where cartel member is not the first member to disclose cartel and get some benefit of disclosing certain inside information.

Till 2014, the fines imposed amounted to approximately 500million reais.<sup>34</sup> The competition authority has been quite active in conducting dawn raids and conducting investigations on receiving leniency applications that has successfully discouraged practices to harm fair and healthy competition in the Brazilian market. However, as it struggles to deal with issues related to discovery and confidentiality, especially in view of cross-jurisdictional cases, it has much to achieve before it is at par with developed countries.

## EUROPEAN UNION (EU)

In EU, Article 101 of the Treaty of the Functioning of the European Union (TFEU) prohibits anti-competitive agreements including cartels. Directorate General for Competition is the primary authority to carry out the investigations in respect of cartels. Regulation 1/2003 provides for a multilateral platform for EU Member States for each state to adopt their own leniency program. In 2006, the Commission adopted a revised leniency notice on immunity from fines and reduction of fines. The leniency notice offers both full leniency as well as partial leniency.<sup>35</sup> Full leniency is granted only to the first

<sup>32</sup> In 2002, SDE received first submission for a cartel activity in Sao Palo. The members were crushed rock companies that were involved in fixing prices, allocating consumers, restricting production etc in the market for crushed rock. In 2003, CADE conducted investigation against 21 companies involved in such cartel activities through dawn raids and found the companies guilty for cartel offence.; Fighting Cartels: Brazil's Leniency Program (2009), 3rd. ed; available at

[http://www.cade.gov.br/upload/Brazil\\_Leniencia\\_Program\\_Brochure.pdf](http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf); last visited on August 18, 2015

<sup>33</sup> <https://www.competitionpolicyinternational.com/cpi-cartel-column-2/>; last visited on August 19, 2015

<sup>34</sup> <http://globalcompetitionreview.com/reviews/63/sections/216/chapters/2550/>; last visited on August 19, 2015

<sup>35</sup> See Part A & B of Commission Notice on Immunity from fines and reduction of fines in cartel cases(2006/C298/11) available at

undertaking providing substantial evidence and information that would assist the Commission to either carry a targeted inspection in connection with the alleged cartel or find an infringement of Art 101 EC Treaty in relation to a cartel.

The Commission begins an investigation on the following four grounds:

- its own market intelligence or *suo moto*;
- following a complaint;
- following a reference from an National Competition Authorities (NCA); and/or
- leniency application.

The sanctions for such offences are civil in nature. It imposes fine upto 10 per cent of its global turnover in the preceding business year. It takes into consideration the gravity as well as duration of the infringement. In order to obtain reduction in fine an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession.<sup>36</sup> In the case of Shrimps<sup>37</sup> and Envelopes, the Commission reduced fine under point 37 of its Fining Guidelines, although it failed to justify such actions. It is therefore in the process of improvising its Guidelines on Fines and taking reference from Germany's fining guidelines which is much advanced with clear interpretation. Undertakings that do not meet the conditions of immunity may still be eligible to benefit from reduction of any fine. It provides for a discretionary marker system which is designed to preserve and protect the applicant's place in a leniency queue for a definite period of time.

It applies to the oral or written submission of the first applicant that meets the threshold and reduction of fine for each subsequent successful applicant. It is granted within a couple of hours signed by the Director for Cartels and is valid from that instant. As per the Commission Leniency Notice, the leniency applicant also has to mention about any other applications it has filed or intends to file with other competition authorities concerning the cartel it has reported. It further provided for confidentiality clause to the cartel members that restricted access of information limited to Commission which caused hurdles for claiming compensation. In this regard the Directive 2014/104/EU was introduced to improve the cartel deterrence effects following the Schenker case<sup>38</sup>. It has properly divided the information into three separate file heads named 'grey', 'black' and 'white' as mentioned in box 3. It facilitates private damage claims by cartel victims, which will sum up to antitrust fines in terms of expected sanctions for cartel members.

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[http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/c\\_298/c\\_29820061208en00170022.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf) last visited on August 17, 2015

<sup>36</sup>COMP/39.285 Airfreight, November 9, 2010 ; Point 8 and 23 of Commission Notice on Immunity from fines and reduction of fines in cartel cases; (2006/C298/11) available at

[http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/c\\_298/c\\_29820061208en00170022.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf) last visited on August 17, 2015

<sup>37</sup> COMP/39.633 Shrimps, November 27, 2013; COMP/39.780 Envelopes, December 10, 2014

<sup>38</sup> T-534/11 Schenker v European Commission, October 7, 2014, EU:T:2014:854

### Box 2: The Directive by European Commission

On April 17, 2014, the European Parliament approved the Commission's directive that aimed at assisting citizens and companies victims of cartels. The Directive aimed to remove the obstacles on receiving compensation by providing victims easier access to evidence they need to prove the damage and more time to make their claims. It established the following lists:

- **Black list** (absolute prohibition): national courts will not have an authority to disclose information regarding leniency statements
- **Grey list** (certain information): limited information regarding statement of objections and replies by the parties can be disclosed after the case is being closed by the antitrust authority
- **White list:** all the other evidence which can be disclosed with permission is placed here.

Source: [http://europa.eu/rapid/press-release\\_IP-14-455\\_en.htm](http://europa.eu/rapid/press-release_IP-14-455_en.htm)

## JAPAN

In Japan, Japan Free Trade Commission (JFTC) is the primary authority responsible for conducting investigations and slapping sanctions for antitrust practices under the Act on Prohibition of Private Monopolization and Maintenance of Free Trade (Japanese Anti-Monopoly Act) that came into force in January, 2006. Cartels which are known as 'unreasonable restraint of trade' is provided under Article 3 of the Law No. 54/1947, also known as Anti-Monopoly Act (AMA) which was reintroduced in 2002 with several amendments. AMA is extremely active in conducting investigations and sanctions are vigorous for cartel members for both criminal and administrative in nature, as defined under Article 7-2, paragraph 1(explained in table 2).

Table 1: Sanctions for cartel activity in Japan

	Criminal Sanction	Administrative Sanction (Surcharge)
Individuals	JPY 5million and 5 years fine	Not applicable
Corporate	JPY 500million	Manufacturer: 10 per cent, Retailer: 3 per cent and Wholesaler: 2 per cent Leader of cartel: 150 per cent of the original rate.

However, if the accused is involved in cartel activity for less than two years pleads guilty within the initial thirty days of investigation can be allowed reduction of sanctions by 20 per cent of fine. As per the leniency provision, full immunity is granted to the first applicant, individual or company if he approaches JFTC with accurate information and fully cooperate while investigating. However, the application should be made independently and voluntarily without any external coercion which ensures immunity

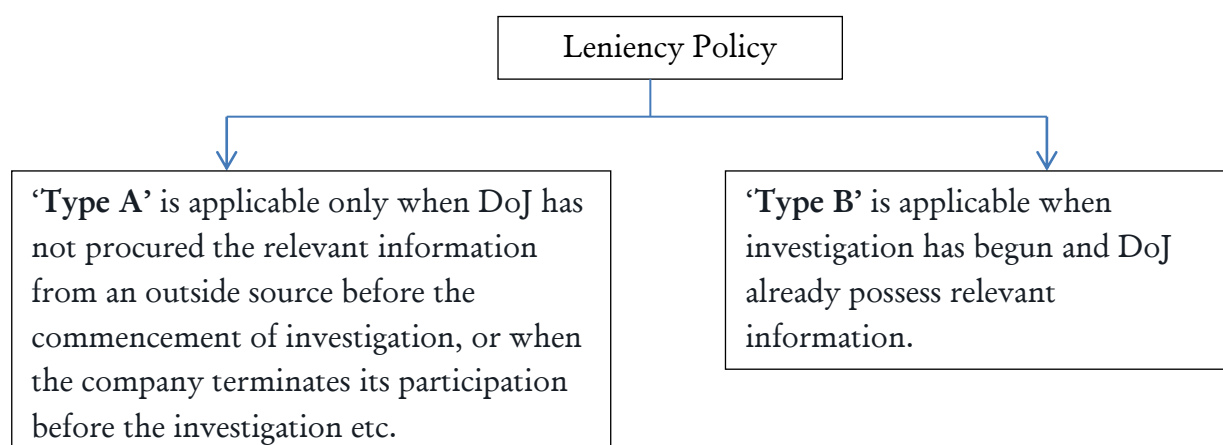
from criminal prosecution as well. After the 2009 amendment, the number of applicants eligible for leniency increased. The first applicant is granted full immunity; the second granted upto 50 per cent and third to fifth applicants granted 30 percent immunity. The provision of leniency plus, however, is not applicable in the case of Japan. The marker system as employed by the JFTC requires the applicant to submit or fax all the required evidence via Form No. 1 prior to the starting of the investigation.

Following this, a provisional certificate is issued and the applicant is required to fill Form No. 2 with full details of the violation within the set deadline. The JFTC assures nondisclosure of the identity of the applicant and the information provided by him during the investigation and even in culmination. However, in cases where JFTC has promised immunity to the applicant, the former can disclose the applicant's identity only on request and will of the latter along with the share of fine or leniency imposed. The applicant at all times is bound to secrecy and cannot substantiate his application of leniency without a legitimate reason. The number of cases in Japan as per the statistics of the JFTC reveals that total 775 leniency applications have been filed till 2014, with 50 in 2014 and 102 in 2013. Among the prominent cases, JFTC penalised five companies with JPY 16.9billion for being involved in cartel of optical fibre cables in 2010. Further, it has entered into international cooperation agreements with countries such as the US, EU and Canada for better investigation and detecting cartels at the international platform.

## USA

The Department of Justice (DoJ) is the primary body responsible for carrying out investigations of cartel activities following the principles of Sherman Antitrust Act, 1890 (the Act) as its base of investigation. It defines cartel as both a criminal and a civil offence under section 1 and section 4 respectively. As per the civil code, the guilty has to serve ten years of imprisonment and/or pay a minimum fine amount of \$20,000. The punishment meted to companies involves 20 per cent of volume of affected commerce as a base fine. The Act sets maximum fine to be \$ 100million. However, in present times, the fines have gone up to \$1,000,000 for individuals and \$ 100,000,000 for corporations or an imprisonment for ten years or both as per the discretion of the court. As per the provisions of the Corporate Leniency Policy, leniency is restricted to only one entity. There are two types of leniency laid out by the department as mentioned in figure.

**Figure 1: Types of Leniency Policy**





However, leniency under both types is granted to only the first qualifying corporation or individual. Individuals also qualify for immunity protection under the Individual Leniency Program, quite similar to other jurisdictions. It also exhibits a leniency plus provision referred as “Amnesty Plus” which serves as an incentive to companies and individuals that do not qualify for complete forgiveness. In such a case, the respective company gets reduced sentence for reporting involvement of other companies’ dealing in different products or markets. Also, the provision of markers system is highly sought after to hold an applicant’s place in line for leniency as it gathers all possible information. The duration for which the marker is provided is generally for thirty days but is subjected to change depending on factors such as location and number of employees counsel needs to interview, the documents to be reviewed etc.

The identity of applicants and the information provided by them is treated as confidential and the DoJ does not publicly disclose the information it possesses until asked by the court to do so. However, in the case of an international cartel, the department is free to share information with foreign governments as per the provisions of bilateral antitrust cooperation agreements. In 2013, criminal fines imposed by the Anti-trust Division summed up to US\$1.02billion. The division dealt in cases involving products like panel clusters, seatbelts, heater, control panels etc. while 27 companies have pled guilty leading to criminal fine of more than US\$2.3billion, 35 individuals have been charged in price fixing leading to imprisonment of 12 to 24 months. The Bridgestone Corporation in 2014, pleaded guilty and paid a criminal fine of US\$425million. After two years of investigation followed by dawn raids; European and Japanese authorities, as Compania Sud Americana de Vapores, a Chilean shipping company pled guilty to pay a fine amount of US\$8.9million<sup>39</sup>.

Further, in November 2013, Criminal Antitrust Anti-Retaliation Act was passed that provided protection to whistle blowers. The success enjoyed by the US Department of Justice in detecting and bursting cartel activities can be largely attributed to the leniency policy of the state that has encouraged companies and individuals to cooperate in this otherwise demanding task.

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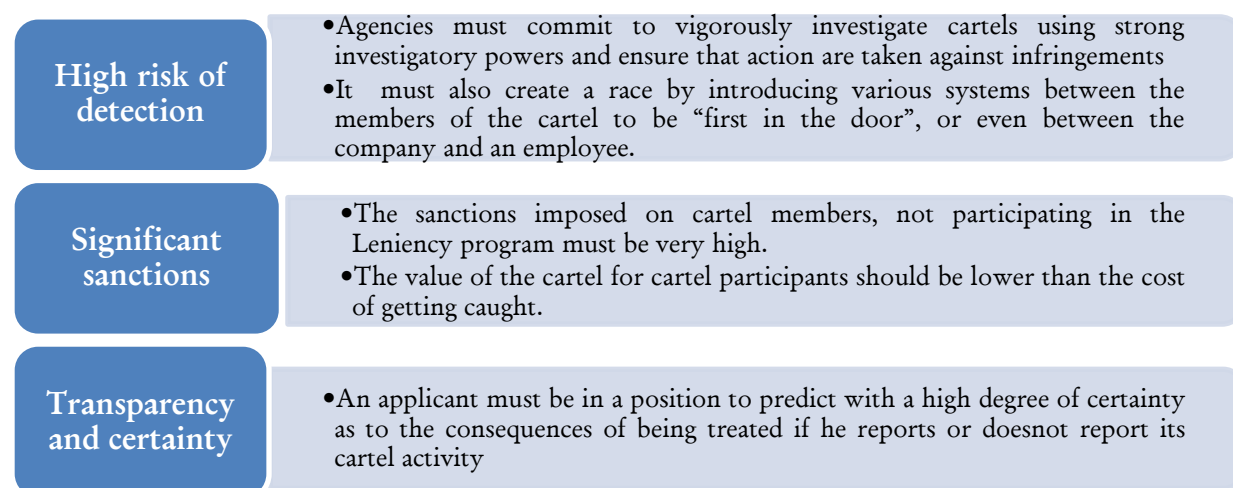
<sup>39</sup> Christopher Hockett, Arthur Burke, Neal Potischman and Samantha Knox Davis Polk & Wardwell LLP; United States: Anti-cartel Enforcement; The Antitrust Review of the Americas 2015; Pg 11, available at [http://www.davispolk.com/sites/default/files/hockett.aburke.potisch.shknox.GCR\\_article.sep14.PDF](http://www.davispolk.com/sites/default/files/hockett.aburke.potisch.shknox.GCR_article.sep14.PDF)

## LESSONS FOR INDIA

Adam Smith is often quoted for his comment on cartels:

*“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”.*

**Figure 2: Prerequisites to adopting a leniency policy**



In India, cartels have thrived mostly because there simplicity was not an effective watchdog till the CCI was set up and mandated to go after such cartels.<sup>40</sup> It made a clarion call to introduce leniency program after the cement cartel case was detected and 11 cement companies were slapped a whopping fine amount of INR6307crores. Till date, the CCI has passed orders in more than 237 cases imposing a total penalty of more than INR 9,500crores in 22 cases. Unfortunately, even after introducing Lesser Penalty Provisions in 2009, CCI has not been quite efficacious in implementing leniency program.<sup>41</sup>

Mentioned below are the lessons that can be learnt from various jurisdictions:

### (i) Need for Proper Marker System in India:

With more than one member constituting cartel, there might occur a situation where there are applications coming from cartel members at the same time that have formed a single cartel. This creates a lot of confusion as to the order of the queue. This order is of utmost importance as it plays a crucial role in determining the reduction of fine amount or penalty. There is a lack of transparency and questions might be raised on the basis of which a cartel member was kept above the other. Thus, marker system was introduced which is designed to reserve and protect the cartel member’s place in a leniency queue for a

<sup>40</sup> assessed at [http://articles.economictimes.indiatimes.com/2012-07-08/news/32578276\\_1\\_cartels-ugly-word-cci](http://articles.economictimes.indiatimes.com/2012-07-08/news/32578276_1_cartels-ugly-word-cci) July 7, 2015

<sup>41</sup> Cyril Shroff Et al., Cartel Enforcement in India: Standard and Burden of Proof, CPI Antitrust Chronicle 1 (2013), available at <http://awards.concurrences.com/IMG/pdf/india.pdf>, ; last visited on July 15, 2015

definite period of time.<sup>42</sup> This was implemented to take care of such issues. This was also announced to increase the effectiveness and provide flexibility to the procedure and encouraging quick reporting of cartel activities. The marker system introduces an additional incentive also to blow the whistle.<sup>43</sup>

India lacks a well-defined marker system which is one of the reasons of a poor effectiveness of leniency program in India. Although the Indian law does specify that an applicant shall be 'marked' after making an application before the Commission either through a written mode (which includes e-mails, fax etc) or orally<sup>44</sup>. However, due to the absence of a concrete marker system, where a leniency applicant shall be granted a marker only subjected to providing vital information so as to make a landmark change or initiation in the proceedings against the cartel, such remains vague. Lessons can be learnt from European Union that introduced its marker system in 2006. A marker system can be useful also to gather further information about future cartels that may occur at a later point of time. Thus, it can prove to be beneficial to detect cartels in a long term basis.

## **(ii) Introduction of Confidentiality Clause in the System**

Another major issue is that the whistle blowers must be ensured that there is maintenance of confidentiality and secrecy after they produce the first hand information. The first leniency applicant, Phoenix Conveyer Belt, India has come forward and disclosed the formation of cartel in conveyor belt segment is a sign that the CCI has failed to provide the adequate amount of secrecy that should ideally be accorded to such leniency applicants. The applicant's name should ideally be kept as a secret until something concrete could have been proven. It may be said in this regard that a concrete marker system can also help in maintaining such secrecy even if there are subsequent applications made for such leniency. This is because the applicant only receives a marker and he does not know about the marker holder before or after him. He is just aware of his position in the queue. Be that as it may, with the absence of a legitimate transparent framework, it is hard to empower persons from doing likewise.<sup>45</sup>

## **(iii) Provisions not Enticing Enough to Lure Applicant**

Also, the legislation has used the words 'vital disclosure' as an essential component to get amnesty however, the act is silent about what constitutes such vital information. Not been defined in the Act makes the provision generic in nature thereby enabling the CCI to interpret as per their discretion. Further, disclosure of information by first cartel member gets 100 per cent immunity. Ironically, the second applicant who disclosed information, validating the existence of such cartel is not entitled to 100 per cent immunity or reduction in penalty. He will be entitled to reduction within the meaning of 'added value' under section 46 of the Act. Hence, the question and confusion arises in the fact as to who is the one to furnish the vital information first so as to entitle the Commission to form a *prima facie* case. With the discretionary power given to CCI, the entity aspiring to disclose

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<sup>42</sup>[http://ec.europa.eu/competition/international/multilateral/2014\\_dec\\_leniency\\_programs\\_en.pdf](http://ec.europa.eu/competition/international/multilateral/2014_dec_leniency_programs_en.pdf); last visited on July 25, 2015

<sup>43</sup><https://www.law.kuleuven.be/jura/art/48n3/carmeliet.pdf> ; last visited on July 25, 2015

<sup>44</sup> Lesser Penalty Regulations 2009

<sup>45</sup> Regulation 4, The Competition Commission of India (Lesser Penalty) Regulations 2009

information regarding an existing cartel, rather than proceeding with making the disclosure will be in a dilemma as to his position if the information he provides is not considered as 'vital' by the Commission. Developed countries like US and EU provide surety in their laws while granting such amnesty.

The Competition Act, 2002 provides stringent sanctions for those guilty of cartel activities, however, it has not been successful in attracting members actively involved in cartel activity. The intention of business entities is ultimately to make profits and entering into cartel activities generates more profits. So, the CCI must understand corporation's perspective and design an ideal leniency program where the entity benefits from disclosing the information rather than benefiting from the cartel.<sup>46</sup>

*Value of cartel for cartel members < Benefits from leniency program*

In India, the legal framework encourages civil penalty rather than criminal liability unlike the US which provides for criminal sanctions. As mentioned, the Leniency program in the US is quite effective as presence of severe criminal charges creates more deterrence and fear on the mind of the cartel members. This gives option to the applicant to rather confess information to escape such sanctions. India can learn lessons from the US and Japan to bridge the gap created due to lack of such deterrence.

#### **(iv) Amnesty and Penalty Plus Provisions**

For a country like India to strengthen the Leniency program, it is quite essential to incorporate the 'amnesty' and 'penalty' plus provisions into the program. Under amnesty plus scheme, an enterprise or individual willing to disclose any information to the antitrust authority about its involvement with another cartel activity also evades penalty. It not only provides information about the cartel that the applicant comes forward with but any other cartel that may be in place. Looking into India's scenario where the concept of first to the door is not followed, the amnesty plus system can surely prove to be success and effective in bursting cartels. Also, the contribution that the Amnesty provision can make to the leniency policy may be ascertained by analysing the success that it had accorded to the leniency policy of the United States of America.

By 2005, with the new Leniency Program in place, the application rate increased to approximately two every month.<sup>47</sup> As amnesty plus provision is more of an incentive given to the enterprises, the 'penalty plus' provision is rather a provision of deterrence. In this provision, if an enterprise is found out does not reveal its involvement in another cartel that may be found out at a later stage, the watchdog has the option of cancelling or reducing the leniency accordingly and recommend heavier penalties. Such programs in the

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<sup>46</sup> Amit Sanduja, Report On Leniency Program: A Key Tool To Detect Cartels, available at [http://cci.gov.in/images/media/ResearchReports/leniencyproject\\_amitsanduja11032008\\_20080715104637.pdf](http://cci.gov.in/images/media/ResearchReports/leniencyproject_amitsanduja11032008_20080715104637.pdf); last visited on July 26, 2015

<sup>47</sup> Scott D. Hammond, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Address Before ABA Midwinter Leadership Meeting (Jan. 10, 2005) available at <http://www.justice.gov/atr/speech/overview-recent-developments-antitrust-divisions-criminal-enforcement-program>; last visited on August 17, 2015

US and Canada deters the enterprises to reveal involvements in other cartels which in turn actually provides the watchdogs valuable information regarding other cartels.

India introduced its Competition Law in 2002, making the required amendments with time. Further, the Leniency program was introduced in 2009, but it will take time to evolve. The Indian leniency policy which is still at a nascent stage, has already received one application. It is therefore suggested that the legislation rather than making deterrent provisions focus more on providing incentives so that the leniency applicants can come before the Commission rather than being deterred to stay away.

## CONCLUSION

CCI Chairman, Ashok Chawla has stated that India has witnessed continuous shifts in economic paradigm, due to which it has been quite an arduous task to implement a perfect competition law<sup>48</sup>. As compared to developed countries such as the US and the EU, the competition law of India is still developing and has a long way to go to that stage of excellence. Till date the CCI has had only one instance of leniency application. At a primitive stage, it is more or less difficult to comment on what exactly the Indian leniency policy is presently headed. What comes as a hope is the case in 2014 where the CCI directed investigation of 17 companies engaged in alleged cartelisation in the conveyor belt segment. The first leniency application made to the CCI by an Indian subsidiary of a German company in relation to an alleged cartel is the conveyor belt segment in India.<sup>49</sup> Few entities known to have been placed under the scrutiny of the CCI due to application of leniency include Sempertrans Nirlon, a wholly owned subsidiary of Austria's Semperit Holding and MRF, among others. These firms allegedly formed a cartel for procurement of conveyor belt through tenders floated by several private and public sector companies.

To conclude, the following suggestions have been mentioned as follows:

- A marker system should be established. As seen in EU and USA, the marker system there has played a huge role in the improvement of leniency policies. Also, the adequate amount of transparency and information shall be maintained.
- The term “vital information” provided in Regulation 4 of the Lesser Penalty Regulation must be explained so as to remove the ambiguity about the matter.
- An ‘amnesty plus’ system could be introduced to encourage further investigation.
- The incentives may be increased in the initial years at least so that there is an amount of encouragement to the existence of a cartel to report to the commission.

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<sup>48</sup> Implementation of competition law face challenges, says CCI chairman Ashok Chawla; June 13, 2014, available at [http://articles.economictimes.indiatimes.com/2014-06-13/news/50564414\\_1\\_ashok-chawla-fair-trade-norms-competition-law](http://articles.economictimes.indiatimes.com/2014-06-13/news/50564414_1_ashok-chawla-fair-trade-norms-competition-law) last visited on August 18, 2015

<sup>49</sup> Maulik Vyas, Antitrust regulator CCI may be lenient on cartel whistleblowers ; ET Bureau, February 27, 2014; available at [http://articles.economictimes.indiatimes.com/2014-02-27/news/47739680\\_1\\_alleged-cartel-competition-commission-regulator](http://articles.economictimes.indiatimes.com/2014-02-27/news/47739680_1_alleged-cartel-competition-commission-regulator) last visited on August 18, 2015

- The companies must have the fear of being detected by the commission. The commission must be active in this regard so that companies are deterred and before being found out in the middle of an illegal cartel, they report to the commission claiming leniency. Such can also be achieved by additional fines.
- Lastly, it is suggested that India should gradually evolve a country specific policy, , that furnishes the need of detecting, investigating and deterring cartel activities.



## ANNEXURE I: COUNTRIES AND THEIR LENIENCY PROGRAM<sup>50</sup>

Country	Legal Framework	Sanctions		Leniency Provisions	Conditions for leniency	Marker System <sup>51</sup>	Leniency plus program <sup>52</sup>
		Civil	Criminal				
BRAZIL	Article 36 of Brazilian Antitrust Law, 2011	<p>✓</p> <p>Administrative penalties for individuals in managerial positions range from 1 per cent to 20 per cent of the penalty imposed on the company; non-managerial positions, fines can range from 50,000 reais to 2 billion reais.</p> <p>Administrative fines for corporations that took part in cartel activities range from 0.1 per</p>	<p>✓</p> <p>Individuals: prison term of up to five years;</p>	Article 86, Chapter VII of Law No. 12.529/11(Brazilian Antitrust Law)	Immunity can be granted if the enterprise is the first to come forward, the regulator does not have enough information to begin an investigation against it, it ceases to participate in cartel activity, it was not the leader, it agrees to fully cooperate and it identifies other members	A marker system is provided for with additional information has to be submitted within 30 days of the first meeting	An applicant not qualifying leniency for the initial matter under investigation will receive leniency and a one third reduction in fine with respect to the first offence if it discloses a second cartel and meets the leniency program requirements for the second offence.

<sup>50</sup>Yaman Verma, *Cartels and Leniency Across Borders: Best Practices and Lessons for New Competition Regimes*; available at <http://www.cci.gov.in/images/media/ResearchReports/YamanVerma.pdf>

<sup>51</sup> ‘Marker’ system is defined as a procedure for cartel members who are first in line to apply for leniency and have sufficient information on a particular cartel they have been involved in. Interested cartel members are issued a marker for a particular period of time.

<sup>52</sup> The Leniency PLUS+ concept offers cartel members a way to reduce their risk exposure regarding cartel damage actions. Any cartel member may benefit from the Leniency PLUS+ concept. It is not conditional on the participation in public leniency programmes offered by competition authorities.; available at <http://www.carteldamageclaims.com/cdc-leniency-plus/>

Country	Legal Frame-work	Sanctions		Leniency Provisions	Conditions for leniency	Marker System <sup>51</sup>	Leniency plus program <sup>52</sup>
		Civil	Criminal				
		cent to 20 per cent of companies' turnover in 'the branch of business activity in which the violation occurred' in the year preceding the launching of the administrative procedure. Corporates guilty of cartels are prohibited from taking part in public procurement process for at least five years.					
EUROPEAN UNION	Article 101 of the European Commission (EC) Charter	✓ Available only to corporations and not individuals. The fine imposed can be upto 10 per cent of worldwide group turnover in the preceding business year.		2006 leniency notice	In order to get 100 percent immunity, an applicant must approach the Commission before the Commission has sufficient evidence to adopt an inspection decision or already has carried out an inspection in relation to the reported conduct and must provide the Commission with information which allows the Commission to carry out a 'targeted inspection'.	Exists, however it is in the discretion of the Commission whether to put it into use or not	The European Commission lacks leniency plus program.

Country	Legal Framework	Sanctions		Leniency Provisions	Conditions for leniency	Marker System <sup>51</sup>	Leniency plus program <sup>52</sup>
		Civil	Criminal				
INDIA	Section 3 of the Competition Act, 2002	✓ A penalty of up to either three times the total profits of the corporation responsible for the contravention or 10 per cent of the turnover of such an enterprise for each year of the continuance of the agreement, whichever is higher.	No sanctions	Section 46 of the Competition Act, 2002	The provision provides for full immunity only to the first person to make disclosure on fulfillment of certain requirements. These include disclosure of relevant information and cooperation with the Competition Commission to crack the cartel activity. The second in the line is entitled to receive up to 50 per cent immunity and the third up to 30 per cent immunity depending upon the substantial information disclosed.	Not expressly mentioned in the Act. Once application is submitted with relevant information in the form of documents, position is decided by the Commission.	The Indian Competition Act, 2002 lacks a leniency plus program.
JAPAN	Article 3 of The “Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade ” (Law No.	✓ The 2010 amendment encourages civil penalties. If an agent, an employee, or any other servant of a corporation has committed cartel conduct in connection with the business of the corporation, corporation will	✓ For individuals, imprisonment with hard labour for a maximum of five years or by a fine of no more than JPY 5,000,000	Introduced through the 2006 amendment; further amended in 2010	After 2010 amendments, any enterprise that (i) voluntarily goes ahead to report about an existing cartel and provides related documents to the JFTC, and (ii) ceases from such antitrust practices before the Commission conducts investigation is granted protection or reduction in penalty. The administrative surcharge payment is applied as follows: <ul style="list-style-type: none"> <li>• 1st applicant filed before initiation of investigation</li> </ul>	Exists; cartel members can reserve a place by submitting application through fax along with relevant forms mentioning evidence.	No

Country	Legal Framework	Sanctions		Leniency Provisions	Conditions for leniency	Marker System <sup>51</sup>	Leniency plus program <sup>52</sup>
		Civil	Criminal				
	54 of 1947)	receive a fine of no more than JPY500,000,000.			<p>gets total immunity;</p> <ul style="list-style-type: none"> <li>• 2nd applicant gets reduction by 50 per cent;</li> <li>• 3rd applicant gets reduction by 30 per cent; and</li> <li>• If application filed after initiation of investigation, reduction by 30 per cent</li> </ul>		
UNITED STATES	Section 1 of the Sherman Act	✓ Corporations are fined maximum of USD100 million, whereas USD1 million fine is imposed on individuals.	✓ Individuals face a maximum punishment of ten years' imprisonment.	(i) Corporate Leniency Programme, 1993 (ii) Individual Leniency Programme, 1994	<p>It is applicable only to the first applicant. It assures waive off of full penalty if the required conditions are fulfilled. These include :</p> <ul style="list-style-type: none"> <li>• Full disclosure of information and the entity must not have encourage parties to enter into cartel</li> <li>• That there must not have been an ongoing investigation;</li> <li>• That, wherever possible, the company must make restitution to injured parties.</li> </ul> <p>In circumstances where information has already been received by the regulator, an immunity application can still be made under such circumstances that the regulator does not have sufficient evidence to burst the cartel and hold the</p>	Exists; both corporate and individual can avail marker system. Counsel must report the discovery of some information or evidence indicating that the client has engaged in a criminal antitrust violation. The Division to determine if a marker is available, because another applicant may have already	The individual or corporate entity has to report the relevant data indicating the involvement of members in cartel activity; disclosing general nature of such conduct, thereby identifying the relevant industry, product, or service involved; and thus identifying the company.

Country	Legal Framework	Sanctions		Leniency Provisions	Conditions for leniency	Marker System <sup>51</sup>	Leniency plus program <sup>52</sup>
		Civil	Criminal				
					members liable for such an offence. Under the program, the enterprise seeking leniency must have to admit its cartel involvement in order to be eligible for such benefit.	requested and received a marker for the conspiracy. Marker granted for 30 days	