

Using Leniency Effectively in Anti-Cartel Investigations: A Study of Recent Trends in Cases Decided by the CCI

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Abstract

The Directive Principles of State Policy as enshrined in Article 39 of the Constitution of India lay down, inter alia, that the State shall direct its policy towards securing that the operation of the economic system does not result in concentration of wealth, to the common detriment. However, a study of the Indian market, decades after the enactment of the Constitution, reveals that the same is prone to wealth concentration, due to the concentration of production and supply of goods and services. A classic manner in which such concentration occurs is through the formation of cartels.

Generally speaking, cartels are covert arrangements between competitors to eliminate rivalry amongst themselves, in the market. Cartels are lucrative agreements because if a cartel flourishes then the total profits made by the participants of the cartel would be higher than the individual profits made by them in a competitive market. Cartels act like a single firm monopoly and are prohibited the world over because of the damaging effects they have on the economy.²

In India, the MRTP Act, 1969, was enacted to give effect to the directive enshrined in Article 39 of the Constitution of India. However, the MRTP Act became redundant due to various reasons, including economic reforms like liberalization and globalization. India's present law, the Competition Act, 2002, aims to curb cartelization effectively. With the use of contemporary tools like leniency programmes, the Competition Commission of India is encouraging cartel members to co-operate in anti-cartel investigations, resulting in crackdown of cartels in various important sectors of the economy. This paper analyses the impact of cartels on the economy and the measures being taken by the Competition Commission of India to deter cartelisation, by grant of leniency to whistleblowers.

Key words: *Constitution, MRTP, Competition, Cartel and Leniency.*

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² Dr. Tilottama Raychaudhuri, Cartels and Competition Law, Lecture delivered at the 72nd Orientation Programme organised by the UGC-Human Resource Development Centre, Jadavpur University, abstract available at <http://www.hrdeju.in/wp-content/uploads/2019/06/Abstract-Book-72OP.pdf>, (last visited on Oct. 29 2019).

I. Introduction - Anti Competitive Agreements

Anti-competitive agreements are agreements between firms which prevent or restrict competition in the market. They can be broadly classified into two kinds - horizontal and vertical. While horizontal agreements are agreements between firms which operate at the same market level, like agreements between producers of competing products, vertical agreements are between firms that are in a supply relationship, like agreements between the producer and seller of a particular product. Horizontal agreements pose greater concern to competition as such agreements entail a combination of market power and foster the creation of monopolies. Vertical agreements, on the other hand, are an important feature of commercial life, and can be regarded as an alternative to vertical integration.³ Vertical agreements affect competition only when the firm entering into such an agreement, has sufficient market power. In such cases, competition from competing brands [inter brand competition] is limited, therefore it is important that there exists sufficient competition within the supply chain [intra-brand competition]. However, if the firm entering into a vertical agreement does not have market power and is constrained by competition from rival brands, then restraints on competition imposed by it within the supply chain [intra-brand competition] may not affect the market.⁴

Since vertical agreements exert mixed effects on the competitive process, they have to be evaluated carefully by competition law. That is why, in most jurisdictions, vertical agreements are tested on the rule of reason, while horizontal agreements are susceptible to per se rules.⁵ The Competition Act,

³ “Ideally a supplier organising its distribution chain would prefer a system of vertical integration. This is because restrictions imposed in distribution of products by vertically integrated firms may escape the scope of competition law, as for an agreement to exist it needs two or more firms, whereas a parent and its wholly owned subsidiary constitute one economic actor”. See Tilottama Raychaudhuri, “Vertical Restraints in Competition Law: The Need To Strike The Right Balance Between Regulation and Competition” NUJS Law Rev Volume 4 Issue 4 (2011) <http://nujlawreview.org/2016/12/05/vertical-restraints-in-competition-law-the-need-to-strike-the-right-balance-between-regulation-and-competition/> (last visited on Oct. 29 2019).

⁴*Id.*

⁵ *Id.* There are some categories of horizontal agreements, like those fixing prices, dividing markets, restricting output and fixing bids/tenders which are illegal and attract action by competition authorities the world over. However not all horizontal agreements are prohibited. Hard core cartels are detrimental to consumer welfare, but there are other

2002, also follows this method. In India, Section 3(3) of the Competition Act deals with horizontal agreements and Section 3(4) with vertical agreements. The horizontal agreements mentioned in the Act are of four kinds. Agreements which-

- (a) *“directly or indirectly determine purchase or sale prices;*
- (b) *limit or control production, supply, markets, technical development, investment or provision of services;*
- (c) *share the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;*
- (d) *directly or indirectly result in bid rigging or collusive bidding.”*⁶

These agreements are presumed to have *“appreciable adverse effects on competition.”* On the other hand, the five vertical agreements listed in the Act, tying arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal, and resale price maintenance agreements, are prohibited only if *“they cause, or are likely to cause appreciable adverse effects on competition in the market.”*⁷ Thus, it is evident that in India vertical agreements are subject to the rule of reason, and are not presumed to adversely affect competition, unlike horizontal agreements, where such presumption operates.⁸

II. Cartels

Among all horizontal agreements, cartels are considered to be the most detrimental to the competitive fabric of the market. Cartels are prohibited the

forms of horizontal agreements like research and development agreements, joint ventures etc. which may be beneficial for the economy. Such agreements are not considered to be per se illegal but are evaluated by the rule of reason.

⁶ The Competition Act, 2002, No 12 of 2003, s. 3(3) .

⁷ *Id.*

⁸In India, even horizontal agreements are not prohibited “per se.” According to Indian law, the term “shall presume” means a rebuttable presumption. See Indian Evidence Act, 1872, Section 4: *“Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”* See also *Sodhi Transport Company V. State of Uttar Pradesh*, AIR 1980 SC 1099 and *R.S. Nayak V. A.R. Antulay*, AIR 1986 SC 2045.

world over, by all systems of competition law, because of their damaging effects.⁹ Cartels cause loss to the consumers as well as the economy. Cartels act like a single firm monopoly and its members need not make any effort to improve the quality of their products or enhance efficiency of operation. Cartels effectively act as a barrier to entry for new firms by sending false signals about the market and thereby succeed in keeping less efficient companies in business.¹⁰ International cartels that have been exposed have caused losses of over millions of dollars annually to individuals and companies, in the US alone. The overcharges caused globally by cartels amount to billions of dollars every year. In addition to overcharges, cartels have caused waste and inefficiencies that are much more damaging to global welfare.¹¹

Studies conducted by economists on the impact of cartels in developing countries, between 1995 to 2013, show that the same is quite substantial. In developing countries, affected sales related to GDP ranged between 0.01% to 3.74% on an average, while the maximal value reached 6.38% for South Africa in 2002.¹² The damage caused due to the extra profits made by such cartels was also significant, with the maximum rates reaching almost 1% of GDP (South Korea in 2004 and South Africa in 2002).¹³ These studies demonstrated that price overcharges due to cartelisation, in developing countries, were more or less similar to that in developed countries, which called for strong antitrust enforcement measures in the former.

Since cartels are secret agreements, they are difficult to detect. At the same time, being collusive agreements, there is considerable debate among economists and policymakers about how stable and sustainable cartels really are. Cartel data is

⁹ Dr. Tilottama Raychaudhuri, Cartels and Competition Law, Lecture delivered at the 72nd Orientation Programme organised by the UGC-Human Resource Development Centre, Jadavpur University, abstract <http://www.hrdeju.in/wp-content/uploads/2019/06/Abstract-Book-72OP.pdf>, (last visited on Oct. 29 2019).

¹⁰ MARK FURSE, COMPETITION LAW OF THE EC AND THE UK 134-135 (4th ed. 2004).

¹¹ OECD, Report on Hard Core Cartels, 2000, <http://www.oecd.org/dataoecd/39/63/2752129.pdf> (last visited on Oct. 29 2019).

¹² MARC IVALDI, FRÉDÉRIC JENNY AND ALEKSANDRA KHIMICH, CARTEL DAMAGES TO THE ECONOMY: AN ASSESSMENT FOR DEVELOPING COUNTRIES, <https://cepr.org/sites/default/files/Ivaldi%20-Cartel%20Damages%20061214.pdf> (last visited on Oct. 29 2019).

¹³ *Id.*

subject to measurement error, variables which may not be observable, and sample bias. There are, however, some generalizations that can be made about cartel behavior or success.¹⁴ There are certain markets where cartels appear to recur. And generalizations show that these markets display several characteristics which influence cartel sustainability, as depicted below:

Conditions Conducive to Cartelisation:¹⁵

Smaller Number of Firms	High
Higher Concentration Index	High
Similar Cost Functions of Firms	High
Homogenous goods	High
High entry and exit barriers	High
Low Price elasticity of Demand	High
Discontent with existing performance	High
Trade Associations	High
Large Powerful Buyers	Low
Demand fluctuations	Low
Threat of Legal Sanctions	Low

III. Anti-Cartel Legislation

Anti-cartel laws across the world are more or less similar, as their purpose is to prohibit and deter cartelisation. Hence, almost all systems of competition law

¹⁴ MARGARET C. LEVENSTEIN AND VALERIE Y. SUSLOW, WHAT DETERMINES CARTEL SUCCESS http://www.umass.edu/economics/publications/econ2002_01.pdf (last visited on Oct. 29 2019).

¹⁵ Adapted from Ritu Raj Arora and Runa Sarkar, Detecting Cartels in the Indian cement industry: An Analytical Framework, <http://www.iitk.ac.in/infocell/announce/convention/papers/Industrial%20Economics%200%20Environment,%20CSR-01-Ritu%20Raj%20Arora,%20Runa%20Sarkar.pdf> (last visited on Oct. 29 2019).

prohibit horizontal agreements on price fixing, limiting/controlling production and markets, sharing markets and sources of supply.¹⁶ Further, the expression ‘agreement’ does not only denote a written, legally enforceable agreement but also applies to informal agreements, gentlemen’s agreements, simple understandings and concerted practices whereby parties coordinate with each other in the absence of a formal agreement.¹⁷

In countries like the United States, cartels are per se illegal, without being tested on the basis of their effects. Jurisdictions like the EU require proof of an impact on competition to find an enterprise guilty, but some horizontal cartel arrangements have been placed within the ‘object box’, so that the competition authority is absolved from demonstrating that these agreements have anti-competitive effect.¹⁸ Countries, like India, have adopted a more conservative approach and require proof of effect in all cases, but the burden of proof is shifted in the case of horizontal agreements. As a result, it is presumed that cartels have anti-competitive effects, and this presumption must be rebutted by the defendant if the contrary is to be believed.¹⁹

IV. Methods for Effective Anti-Cartel Action

At the international level, the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) have been proactive in the formulation of anti-cartel policy. Studies have also been conducted on cartels and their impact, by the United Nations Conference on Trade and Development (UNCTAD). In 1998 the OECD adopted a

¹⁶See EC Treaty, Chapter III of the UNCTAD’S Model Law on Competition, 2004 Article 81(1) (a)-(c); The Singaporean Competition Act of 2004 § 34(2); Indian Competition Act, 2002, Act No. 12 of 2003 § 3(3).

¹⁷Richard Whish, Control of Cartels and other Anti Competitive Agreements in Competition Law Today 46 (Vinod Dhall eds. 2007).

¹⁸ Ibid.

¹⁹ “In case of agreements as listed in Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition within India; the onus to rebut this presumption would lie upon the Opposite Parties. The parties may rebut the said presumption in light of the factors enumerated in Section 19(3) of the Act”. See *Builders Association of India v. Cement Manufacturers’ Association (CMA) and Ors.* [Case No. 29 of 2010] at para. 288.

Recommendation for Action against Hard Core Cartels.²⁰ This recommendation was followed by several other reports identifying specific requirements for effective anti-cartel action.²¹ Some of these requirements are discussed below:

i. Special powers of investigation

Cartel busting requires special tools which differ from the tools required for investigation of other competition law violations. Since cartels are secretive and illegal arrangements, parties go to great lengths to hide evidence of the same. Therefore, discovering the existence of a cartel is, in itself, a huge task. To investigate cartels, competition authorities need to be given additional tools, like the power to conduct dawn raids, enter premises, seize documents, maintain surveillance of homes and office premises and monitor telephone conversations/e-mails. Most countries have given such special powers of investigation to their competition enforcement authorities.

ii. Whistle-blowing and Leniency

Cartels being collusive agreements are inherently unstable, as there is always incentive to cheat. Therefore, crucial tools in detection of cartels are leniency programmes where participants of a cartel who disclose to competition authorities their role in the cartel and cooperate with the investigation, are rewarded by a reduction of, or complete amnesty from, penalty. Leniency programmes have been highly successful, worldwide, in uncovering cartels. The United States Department of Justice has cracked more cartels with the aid of leniency programmes than it has with all other investigation tools

²⁰ OECD, Hardcore Cartels, available at www.oecd.org/dataoecd/39/63/2752129.pdf (last visited Oct. 29 2019).

²¹ See. Recommendation of the Council concerning Effective Action against Hard Core Cartels, c(1998) 35/Final, May 13, 1998; Implementation of the Council Recommendation concerning Effective Action against Hard Core Cartels: First Report by the Competition Committee, January 1, 2000; Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws, DAFFE/COMP, April 9, 2002; Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation, December 15, 2005.

combined.²² Most countries today have leniency programmes in place.²³ However, to be successful, leniency programmes must provide a high degree of certainty of leniency to the informant and also provide assurances about confidentiality of information obtained. If the leniency is discretionary and the leniency policy lacks clarity then cartel members may not take the risk of coming forward with information.

iii. Fines and Criminal Sanctions

A prerequisite to any leniency programme is strong sanctions in the form of heavy fines. To ensure that cartel members volunteer information, the risk of cartelisation must appear to outweigh the potential rewards. In other words, firms will be deterred from acting as a cartel in a country's market, if that country's competition authority imposes heavy fines as penalties which are considerably more than the profits made by the cartel.²⁴ The fine levels currently being imposed by the EU are a good example of strong sanction. Though EU has no criminal penalty, the fines imposed by the EU are significantly greater than fines imposed for similar conduct in countries like the United States. In the United States, companies that do not cooperate with the investigation are often liable to pay fines that exceed 30 percent of the revenue generated by the sale of the cartelised product or service during the entire duration of the cartel agreement. In Europe, late informants can expect to pay much more.²⁵

²²SCOTT D. HAMMOND, CRACKING CARTELS WITH LENIENCY PROGRAMS, www.justice.gov/atr/public/speeches/212269.pdf last accessed on 29/10/19.

²³PAUL HASTINGS, CARTEL REGULATION, GLOBAL COMPETITION Review 2010, <http://www.paulhastings.com/assets/publications/1527.pdf> (last visited on Oct. 29 2019).

²⁴MARGARET LEVENSTEIN ET AL., INTERNATIONAL CARTEL ENFORCEMENT: LESSONS FROM THE 1990S, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265741 last accessed on 29/10/19.

²⁵SCOTT D. HAMMOND, THE EVOLUTION OF CRIMINAL ANTITRUST ENFORCEMENT OVER THE LAST TWO DECADES, <http://www.justice.gov/atr/public/speeches/255515.html> (last visited on Oct. 29 2019).

Many countries also impose criminal sanctions on cartel participants, as jail sentences often act as greater deterrent than paying corporate fines. This system has been effective in countries like the United States where jail sentences have been imposed on individuals for being part of a cartel. This view is garnering popularity across the world. In the United Kingdom, the first jail sentences on individuals were imposed in 2008, in the marine hose cartel case, under the 2002 Enterprise Act. In 2008 itself, the UK's Office of Fair Trading charged four executives of British Airways with price fixing of passenger fuel surcharges. In Australia, criminal sanctions for cartelisation were introduced in 2009. Other countries like Chile, the Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Russia and South Africa have also adopted, or are considering adopting laws which will entail criminal sanctions for cartelisation.²⁶ In India, there is no criminal penalty for cartelisation. However, the fines payable for cartelisation in India are fairly heavy, as discussed later in this paper.

iv. Rewards Programmes

While leniency programmes break cartels from inside, incentives and rewards programmes are effective mechanisms to break cartels from the outside. Cartel informant reward programmes provide incentives in the form of money to third parties, who are not members of a cartel, if they provide information to competition authorities regarding the existence/functioning of a cartel. Rewards programmes are an effective way of gathering evidence about cartels and can act as a deterrent to cartel activity.²⁷ The U.S. Civil False Claims Act provides private rights to citizens to prosecute antitrust claims, by bringing action in the name of the US government. Private litigants are entitled to equitable relief and treble damages.²⁸ In South Korea, the Korean Fair Trade Commission has

²⁶ *Id.*

²⁷ However, a system of providing financial incentives to informants is not without risk. Antitrust authorities have to carefully evaluate the motive behind the disclosure of such information, as also test the quality of the evidence obtained. See generally International Competition Network, Anti Cartel Enforcement Manual, http://en.fas.gov.ru/netcat_files/Analitical%20materials/MKS/Anti-Cartel%20Enforcement%20Manual%20Chapter%20on%20Cartel%20Case%20Initiation.pdf (last visited Oct. 29 2019).

²⁸ William E. Kovacic, Private Participation in the Enforcement of Public Competition Laws, <http://www.ftc.gov/speeches/other/030514biicl.shtm> (last visited Oct. 29 2019).

established a rewards system for those who report competition law violations and the identity of the informant is kept confidential.²⁹ India however, does not have any rewards/incentive scheme in place for informants who report the existence of a cartel to the Competition Commission.

v. Cooperation Agreements and Workshops

International cooperation is of great significance in controlling international cartels, and also domestic cartels where firms involved have offices in foreign countries. The OECD and the ICN encourage international exchange of information to detect and prosecute cartels. The Competition Act, 2002, confers extraterritorial jurisdiction on the Competition Commission of India to investigate cartels which are located in foreign countries but whose impact is felt within the Indian market³⁰. Cooperation agreements are important to ensure smooth functioning of such extra territorial jurisdiction.

Another feature of the global effort against cartels is anti cartel workshops that bring together investigators and prosecutors from around the world. The ICN Cartel Working Group Subgroup 2 annually organizes a Cartel Workshop where representatives of competition enforcement authorities of different countries discuss measures which can be implemented for better cartel action. These workshops offer excellent occasions for fostering informal contacts between the Agencies, including at operational level.³¹ They also address the

²⁹See generally Fair Trade Commission, KFTC's launch of Reward System for Informants, available at www.ftc.go.kr/data/hwp/rewardssystem.doc last accessed on 29/10/19.

³⁰ Section 32 of the Competition Act, 2002, provides that "*The Commission shall, notwithstanding that,— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire..into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit.*"

³¹See generally the Japan Fair Trade Commission's website <http://www.jftc.go.jp/e-page/internationalrelations/icn.html> (last visited Oct. 29 2019).

need for institutional changes in new competition law regimes, like prioritisation of cartels, increased staffing, training and development, awareness of competition issues by consumers and the industry.

V. Cartel Control in India - A Dismal Record under the MRTP Act, 1969

India's competition law, the Competition Act of 2002, has come into force fairly recently. The earlier legislation, the Monopolies and Restrictive Trade Practices Act (MRTP Act) of 1969 was designed in accordance with the socio economic objectives of that time, and did not have specific provisions to deal with cartels. While several reasons can be put forth as to why the MRTP Act was ineffective, 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. Hence, we have a dismal record of cartel busting during the MRTP period. Some cases are discussed briefly, below:

i. Soda Ash Cartel

This was one of the early cartel cases of 1996. The American Natural Soda Ash Corporation (ANSAC) comprising of 6 American producers of soda ash, attempted to sell soda ash at a low, cartelized price in India. Upon reviewing the agreement between the ANSAC members, the MRTP Commission considered it to be, prima facie, a cartel and issued an interim injunction against it. The Supreme Court, however, in a much criticised judgment, overturned the order of the Commission, inter alia, on the ground that the MRTP Act, 1969, did not have any extra territorial reach and therefore could not take any action against ANSAC.³²

ii. Trucking Cartel

In 1984, the M.R.T.P. Commission passed a Cease & Desist order against Bharatpur Truck Operators Union (order dated 24.8.1984 in RTP Enquiry

³² See *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. See also Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India https://www.cci.gov.in/sites/default/files/cartel_report1_20080812115152.pdf (last visited Oct. 29 2019).

No.10/1982), Goods Truck Operators Union, Faridabad, (order dated 13.12.1989 in RTP Enquiry No.13.13.1987), Rohtak Public Goods Motor Union (order dated 25.8.1984 in RTP Enquiry No.250/10983), for price fixing in the form of similar freight rates. However, due to dearth of penalty provisions in the MRTP Act, no fines could be imposed in this matter.³³

iii. Cartels in Cement, Tyres, Railways

In April, 2007, the Government of India admitted to the existence of cement cartels operating in the country for many years and its inability to deal with them without the existence of an effective competition law. The then Finance Minister, P. Chidambaram, acknowledged that there were well known cartels in the tyre as well as the cement industry.³⁴ In July 2008, the Business Standard published a news item stating that the Indian Railways procurement system was plagued by cartels and bid rigging which ran into thousands of crores, each year.³⁵

VI. Cartel Control under the Competition Act, 2002

The Raghavan Committee Report, which recommended the enactment of the Competition Act, 2002, stated that an important reason for enacting a new competition law was to prevent cartels, both domestic and international, from indulging in anti-competitive practices in India.³⁶ Unlike the previous law, the Competition Act, 2002, contains numerous provisions relating to cartels, starting

³³ Ibid.

³⁴ See PTI, Govt can't ban cement cartel: FM, <http://timesofindia.indiatimes.com/business/india-business/Govt-cant-ban-cement-cartel-FM/articleshow/1952019.cms#ixzz1DoYDMk6b> (last visited Oct. 29 2019).

³⁵ See Sowmya Suman, [Competition Law and Cartelisation](http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=543), http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=543 (last visited Oct. 29 2019).

³⁶ Report of the High Level Committee on Competition Policy and Law, paras. 1.2.3-1.2.4 https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf (last visited Oct. 29 2019).

from a proper definition of the term cartel,³⁷ to wide powers of investigation,³⁸ imposition of penalty on cartel members³⁹ and grant of leniency by the Competition Commission, for cooperation with cartel investigation.⁴⁰ In the last decade, the Competition Commission has been active in its prosecution of cartels. As of 2018, the Commission has passed more than 72 orders against companies for cartel infringements. The Commission has also imposed monetary penalties of more than 80 billion rupees on cartels, out of which penalties of more than 5 billion rupees were imposed in 2018 itself.⁴¹

Complex cases, such as those relating to cartel conduct in an oligopolistic market have also been dealt with by the Commission. The Commission has drawn a distinction between price parallelism in a non-collusive oligopoly and price parallelism due to coordinated behavior in an oligopoly. In the case *Builders Association of India v. Cement Manufacturers' Association (CMA) and Ors*⁴² the Commission noted that competitors in the cement market meeting under the umbrella of an association and exchanging data regarding price, production and supply, which in turn corresponded with market behaviour, could not be termed as mere price parallelism but mirrored “a condition of

³⁷Section 2(c) of the Competition Act, 2002, defines cartel as “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”.

³⁸ See Competition Act, Sections 19, 26, 32, 33 and 36.

³⁹Section 27 of the Competition Act, 2002, states that “...Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.”

⁴⁰Section 46 of the Competition Act, 2002, lays down the power of the Commission to impose lesser penalty. It provides that “The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

⁴¹Farhad Sorabjee and Amitabh Kumar, *The Cartels and Leniency Review - Edition 7 - India*, available at <https://thelawreviews.co.uk/edition/the-cartels-and-lenieny-review-edition-7/1179747/india> (last visited Oct. 29 2019).

⁴² Case No. 29 of 2010 [Order dated: 20.06.2012].

coordinated behaviour and existence of an anti-competitive / agreement in violation of provisions of section 3(3) (a) of the Act.”⁴³

i. Grant of Lesser Penalty

As discussed earlier, grant of lesser penalty or “leniency” is a form of protection given to whistle blowers by offering them lenient treatment if they give evidence of a cartel to the Commission. Leniency is one of the most effective tools to encourage cartels members to come forward and submit information about the same, in return for an incentive in the form of reduced penalty.⁴⁴ Leniency programmes have a deterrent effect on the creation of cartels as they create distrust and suspicion amongst cartel members.⁴⁵ This can be explained with the help of the game theory prisoner’s dilemma model. Game theory helps in predicting the result of games of strategy where the participants (and in case of cartels, the members) have incomplete information about each other’s intentions, and where exchange of information is difficult.⁴⁶

The classic prisoner’s dilemma situation is where there are two prisoners, who have committed a major as well as a minor crime. The police have evidence to nail them for the minor crime but not enough evidence to convict them for the major crime. During interrogation, if one confesses against the other and gives evidence about the major crime, the same would help the police in convicting the other. The police would want a conviction, so they offer an incentive to both the prisoners, saying that if one confesses against the other then the former would get no jail time whereas the latter would get the maximum sentence of 10 years. If both the prisoners confess then both will get a five year sentence.

⁴³ Ibid at para 6.6.13

⁴⁴ See

https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf (last visited Oct. 29 2019).

⁴⁵ See <https://ec.europa.eu/competition/cartels/leniency/leniency.html> (last visited Oct. 29 2019).

⁴⁶ “A game (in strategic or normal form) consists of the following three elements: a set of players, a set of actions (or pure-strategies) available to each player, and a payoff (or utility) function for each player. The payoff functions represent each player’s preferences over action profiles, where an action profile is simply a list of actions, one for each player. A pure strategy Nash equilibrium is an action profile with the property that no single player can obtain a higher pay off by deviating unilaterally from this profile.” See <http://www.columbia.edu/~rs328/NashEquilibrium.pdf> (last visited Oct. 29 2019).

Finally, if neither prisoner confesses, each would get one year in prison on the minor crime, till police obtain more evidence.⁴⁷In a situation where the prisoners are unable to interact with each other, this poses a dilemma for both as to whether confession would be the right strategy and if so, at what point in time. The prisoner's dilemma is depicted graphically below:

		Prisoner B	
		Confess	Keep Quiet
Prisoner A	Confess	Both go to jail for 5 years	Prisoner B goes to jail for 10 years, Prisoner A goes free
	Keep Quiet	Prisoner A goes to jail for 10 years, Prisoner B goes free	Both go to jail for 1 year

Given this situation, each prisoner in pursuing his own self interest would be incentivised to confess. Though the game theory model has nothing to do with prisoners, or investigators, in reality, the model is ideal in explaining the behaviour of participants of a cartel. In case of cartels, which are inherently secret and collusive agreements, the enforcement authority offers cartel members a deal which is to co-operate in exchange for leniency. Therefore, for a leniency programme to be successful it has to be structured in a manner that the dominant strategy for each firm would be to confess.

⁴⁷ Christopher R. Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability, *Journal of Corporation Law*, Vol. 31, pp. 453-488, 2006 at p. 455, <https://pdfs.semanticscholar.org/665c/0aa8a7702da732a6a4d7ce2135ce68e62c6b.pdf> (last visited Oct. 29 2019).

ii. Leniency Provisions under the Competition Act, 2002

Section 46 of the Competition Act, 2002, contains provisions for grant of lesser penalty, subject to certain conditions. According to Section 46, *“The Commission may, if it is satisfied that any producer, seller... (etc) included in any cartel, which is alleged to have violated section 3, **has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:***

*Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed...**has been received before making of such disclosure.***

*Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller...who has made the **full, true and vital disclosures** under this section.*

*Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure **does not continue to cooperate...till the completion of the proceedings** before the Commission*

Provided also that the Commission may, if it is satisfied that such producer, seller..had in the course of proceedings,—

*(a) **not complied with the condition** on which the lesser penalty was imposed by the Commission; or (b) **had given false evidence**; or (c) **the disclosure made is not vital**, and thereupon such producer, seller...may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.”*

In August 2009, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought into force. These Regulations laid down detailed requirements for qualification for lesser penalty, the procedure to be followed for grant of lesser penalty and the quantum of waivers available. Grant of lesser penalty depends upon four factors:

- (a) the stage at which the applicant comes forward with the disclosure

- (b) the evidence already in possession of the Commission
- (c) the quality of the information provided by the applicant, and
- (d) the entire facts and circumstances of the case⁴⁸

In August 2017, several amendments were made to the Regulations. Under these amendments, the meaning of the term 'applicant' under the Regulations has now been expanded to allow an individual who has been part of a cartel, to make a leniency application to the CCI for grant of leniency. Also, importantly, grant of lesser penalty to an applicant who has fulfilled all the requirements is now mandatory. Earlier, grant of lesser penalty was discretionary. This amendment has introduced more certainty to the leniency programme by making grant of lesser penalty mandatory, as discretionary leniency does not offer enough incentive to whistleblowers. Further, the benefit of leniency is now applicable to later applicants, whereas earlier, leniency could only be granted to a maximum of three applicants.⁴⁹ However, a drawback of the 2017 amendment is that confidentiality of the information obtained and the identity of the applicant can now be disclosed by the Director General of investigation, for the purpose of investigation. The amendment fails to clarify the factors which would guide such disclosure. Another problem that remains is with respect to imposition of penalty.⁵⁰ The amount of reduction of penalty still remains the discretion of the Commission.⁵¹ Briefly, the penalty reduction, according to the Regulations, is as follows:

⁴⁸ For a detailed understanding of the procedure relating to grant of lesser penalty see CCI Advocacy Booklet, available at https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf (last visited Oct. 29 2019).

⁴⁹ See <https://www.azbpartners.com/bank/the-competition-commission-of-india-amends-lesser-penalty-regulations/> (last visited Oct. 29 2019).

⁵⁰ Ibid.

⁵¹ See <https://thelawreviews.co.uk/edition/the-cartels-and-lenieny-review-edition-7/1179747/india> (last visited Oct. 29 2019).

Competition Commission of India (Lesser Penalty) Regulations, 2009

Reduction in Penalty	Scenario
Up to 100%	Applicant is the <i>first to make a vital disclosure enabling the Commission to form a prima-facie opinion</i>
Up to 100%	Even if the matter is under investigation, if <i>without its disclosure, the Commission or the Director General did not have sufficient evidence</i> to establish the contravention
Up to 50% and 30% to the <i>second or third applicant(s)</i>	Submitted evidence provides a significant added value to the evidence already available with the Commission or Director General

iii. Implementation of Leniency Provisions by the CCI in recent cases

(a) *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*⁵²

This was the first leniency application received by the Competition Commission, and it related to bid rigging with respect to tenders floated by Indian Railways. The case was taken up by the Commission suo moto, based on information received from the CBI. During the course of investigation, M/s Pyramid Electronics, one of the participants in the cartel, applied for leniency. The Commission while considering the application, noted that the applicant was “*the first and only party to accept the existence of a cartel/bid rigging in tenders for railways for BLDC Fans and submit information in support thereof... the evidence submitted.. played a significant role in revealing the modus operandi of the cartel.*”⁵³ However, due to the stage at which the applicant applied for leniency – which was after the commencement of the investigation – the Commission granted a 75% reduction in penalty, as opposed to complete

⁵² Suo Moto Case No. 03 of 2014.

⁵³ Ibid at para 7.8

reduction.⁵⁴ Thus, the Commission in this case followed the accepted international practice of granting leniency according to the value as well as the timing of information received.

(b) *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India*⁵⁵

This case was taken up by the Commission pursuant to an application made by Panasonic Energy India Co. Ltd. for grant of leniency. Panasonic submitted that there existed a cartel in the market for dry cell batteries India, between Panasonic, Eveready Industries Ltd. and Indo National Ltd. Panasonic also informed the Commission that all three manufacturers were members of a trade association called the Association of Indian Dry Cell Manufacturers “*which facilitated transparency between the Manufacturers by collating and disseminating data pertaining to sales and production by each of the Manufacturers.*”⁵⁶ Here, the Commission granted 100% leniency (the first complete reduction of penalty in India) to Panasonic in view of the following factors:

- That it was the first to approach the Commission
- That the evidence helped in assessing the domestic market structure of batteries, nature and extent of information exchanges and identifying the names, locations and email accounts of key persons involved, and
- enabled the DG to conduct search and seizure operations.⁵⁷

With regard to Eveready Industries, who was second in making a disclosure, the Commission granted the benefit of 30% reduction in penalty in view of the fact that though the information received met with the requirements of ‘significant value addition’, Eveready had approached the Commission three days after the search and seizure operations commenced.⁵⁸ The Commission also granted Indo National Ltd. 20 percent reduction in penalty as it was third in making a disclosure and there was three week delay in approaching the Commission,

⁵⁴ Ibid at para 7.11

⁵⁵ Suo Motu Case No. 02 of 2016.

⁵⁶ Ibid at paras 1.2-1.3

⁵⁷ *Id* at para 10.2

⁵⁸ *Id* at para 10.4 (b)

though the company extended continuous and expeditious co-operation with the investigation.⁵⁹

(c) *Nagrik Chetna Manch v. Fortified Security Solutions and others*⁶⁰

This case related to bid rigging. According to the information filed, tenders were floated by the Pune Municipal Corporation during December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s).” Certain bids submitted towards these tenders were alleged to be rigged.⁶¹ During the course of investigation, the Commission received 6 lesser penalty applications from the parties involved. One significant aspect of this case was that some of the parties had acted as proxy bidders without having any presence in the relevant market. In its order, the Commission granted leniency to 4 out of the 6 applicants. The first applicant was granted 50% leniency based on the quality of information submitted and the stage at which the lesser penalty application was filed.⁶² Considering the co-operation and value addition extended by the second applicant and in conjunction with the priority status accorded, the second applicant was granted 40% reduction.⁶³ *Significantly, the applicant marker third in priority status was also granted 50% reduction in penalty in view of certain peculiar facts, that is, with regard to certain tenders, it was the first to give information to the Commission.* Thus, the Commission decided to give first priority status to the third applicant for those tenders.⁶⁴ The fourth applicant was granted 25% leniency considering the stage at which it approached the Commission, the co-operation extended and the value addition of the information submitted.⁶⁵

(d) *Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*⁶⁶

⁵⁹ *Id* at para 10.4 (c)

⁶⁰ Case No. 50 of 2015.

⁶¹ *Id* at paras 2-3

⁶² *Ibid* at paras 101-106

⁶³ *Id* at paras 107-113

⁶⁴ *Id* at paras 114-120

⁶⁵ *Id* at paras 121- 126

⁶⁶ Case No. 02 of 2013.

This case related to “exchange of commercial and confidential price sensitive information between (the parties) which resulted in bid rigging of tenders for procurement broadcasting services of various sporting events, especially during the year 2011-12”.⁶⁷ Here the Commission granted leniency to both the parties involved in the cartel. The first party, Globecast, got 100% reduction as it voluntarily gave information to the Commission and assisted in the detection and investigation of the cartel. It also cooperated fully and continuously throughout the investigation. The second applicant was also granted 30% leniency, as by the time it approached the Commission, the latter had already formulated a prima facie opinion and referred the matter to DG for investigation. However, in view of the value addition and evidence given by the second applicant, it was still granted leniency, notwithstanding the 100% reduction granted to the first applicant.⁶⁸

(e) Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India⁶⁹

This case is related to the earlier dry cell battery case. Panasonic filed information with respect to certain anticompetitive non-compete contracts between Panasonic Energy India Co. Limited and another dry cell battery manufacturer. The Commission, upon investigation, found evidence of a cartel and imposed penalties on the other manufacturer (and the company executives involved)⁷⁰ but granted Panasonic 100% leniency for “full and true disclosure of information and evidence and continuous cooperation... provided, (which) not only enabled the Commission to order investigation into the matter, but also helped in establishing the contravention of Section 3 of the Act”.⁷¹

In a subsequent dry cell batteries case,⁷² Panasonic again filed a leniency application informing the Commission that there that there existed a bi-lateral ancillary cartel between Panasonic Energy India Co. Limited, Godrej & Boyce Manufacturing Co. Limited, in relation to institutional sales. Upon investigation, the Commission concluded that a cartel indeed existed and gave Panasonic a

⁶⁷*Id* at para 2

⁶⁸*Id* at paras 127-132

⁶⁹ Case No. 02 of 2017.

⁷⁰ *Id* at paras 33-43

⁷¹ *Id* at para 40

⁷² Case No. 03 of 2017, Order dated 15.01.2019.

100% reduction in penalty, while penalizing the other two companies and the individuals involved.⁷³

VII. Leniency Policy of the CCI as revealed in the cases above

The cases decided in the last three years show that the CCI is proactively implementing the leniency provisions of the Competition Act, 2002. Analysis of the cases reveals that the main factor taken into account by the Commission while granting leniency, is the stage at which the applicant comes forward with the disclosure. In most of the cases maximum leniency has been granted in the “no knowledge phase”, that is, where information has been given to the CCI about the existence of a cartel which helps the latter form a prima facie opinion. For example, in the dry cell batteries cases Panasonic was granted 100% leniency for revealing the existence and modus operandi of the cartel. Similarly, in the Sports Broadcasters case, Globecast was granted 100% leniency as it submitted vital evidence which assisted in the detection of the cartel.

Apart from the stage at which the information is given, another important factor looked into by the CCI is the quality of the information received. Thus, other than the first applicant, if later applicants come forward with information which results in significant value addition, such applicants are also given the benefit of leniency in the form of reduced fines. An interesting example would be the Nagrik Chetna case where the third applicant was granted 50% reduction in penalty in view of the fact that it had submitted crucial information to the CCI regarding some tenders. Thus, the Commission decided to give first priority status to the third applicant for those tenders.⁷⁴ This approach of the Commission of granting reduced penalty to later applicants is likely to incentivise more cartel members to come forward and act as whistleblowers.

Though implementation of the leniency provisions has been commendable and in tune with international practices, grant of leniency by the CCI suffers from certain drawbacks. One issue is with respect to imposition of penalty. There seem to be no clear guidelines in this regard. Section 27 of the Competition Act, 2002 empowers the CCI to impose penalty on each member of a cartel to the

⁷³ *Id* at paras 39-50

⁷⁴ *Id* at paras 114-120

tune of “*up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher*”.⁷⁵ Although the CCI has not issued any clarifications on imposition of penalty, in the case *Excel Crop Care v CCI & Ors*⁷⁶ the Supreme Court asserted that penalties based on turnover should be imposed on the “relevant” or product specific turnover, as opposed to the entire turnover of the company.⁷⁷ Moreover, while calculating penalty, the damage caused and the profits which resulted from the cartel activity should also be considered.⁷⁸

A perusal of the decided cases reveals that there is no consistency in fines imposed. In the dry cell batteries case, the Commission imposed penalty of 1.25 times of the profit. In the Broadcasters case, the CCI imposed a penalty of 1.5 times the profit, and in the DC brushless fans case, 1.0 times the profit. Thus, imposition of penalty is at the discretion of the Commission.

Another problem that may affect potential leniency applicants is the issue of confidentiality. The orders of the CCI reveal detailed information regarding leniency applications, cartel members, the modus operandi of the cartel, the customers involved etc. Such detailed information given to the public cause loss of reputation to the companies involved and may give rise to claims for compensation. The CCI may consider publication of a non-confidential final order which contains the minimum, necessary disclosures made by a leniency applicant.⁷⁹

⁷⁵ See Section 27 (b) of the Competition Act, 2002.

⁷⁶ *Excel Crop Care Ltd. V. Competition Commission of India*, (2017) 8 SCC 47

⁷⁷ *Ibid* at para 74 “*In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of ‘relevant turnover’ for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties*”.

⁷⁸ *Id* at paras 71-72

⁷⁹ See “The Curious Case of Leniency under the Competition Act, 2002 in India” <http://www.mondaq.com/india/x/816022/Cartels+Monopolies/The+Curious+Case+Of+Leniency+Under+The+Competition+Act+2002+In+India>(last visited on Oct. 29 2019).

VIII. Conclusion

The MRTP Act, 1969, was enacted with the view to reduce wealth concentration, in accordance with the objectives of the Directive Principles of State Policy as enshrined in Article 39 of the Constitution of India. Years later, due to various factors like liberalisation, globalisation and changes in India's economic policy, the MRTP Act, 1969, was repealed and the Competition Act, 2002 was enacted in its place, with a view to promote and sustain competition in the market. One of the main successes of the Competition Act, 2002 has been with respect to anti cartel action. Cartels are considered to be the antithesis of a free and competitive market and are prohibited by almost all systems of competition law, the world over, because of the damaging effects they have on the economy.

A classic way to effectively investigate and prosecute cartels is with the aid of evidence received from whistleblowers. As cartels are covert agreements, parties go to great lengths to cover their tracks. Though competition authorities all over the world have been given special tools to investigate cartels, none of these have been as successful as leniency programmes which encourage cartel members to act as whistleblowers and give information against the cartel.

India has started implementing its leniency programme, very recently. A study of cases decided by the CCI shows that India is gradually putting together a leniency policy which offers a degree of certainty to the whistleblowers about the grant of reduced penalty, depending upon the stage at which the information is given to the Commission and the quality of the information submitted. Such decisions by the Commission are likely to act as incentive for more cartel members to come forward and give evidence against cartels. Controlling cartels has become an important agenda in all competition regimes so far, the orders of the Commission regarding grant of leniency have been effective and in tune with international practices. Hopefully, as the leniency programme gains momentum, the Commission will be successful in breaking down more cartels operating in India and put an end to these so called 'cancers' which have been plaguing the Indian market for decades.