

Empirical Insights into Leniency and Leniency Plus: Evaluating India's Cartel Deterrence Regime

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Abstract

The Competition Law of India has been enacted with the goal of consumer welfare and consumer choice enshrined under Articles 38 and 39 of the Constitution of India. Competition Act 2002 prohibits anticompetitive agreements, abuse of dominance and regulates combinations. Cartels are the horizontal agreements included under Section 3 of the Competition Act. Cartels are most distortive form of anticompetitive agreements that can hamper competition in the market and reduce consumer choice. To govern and break cartels Government of India introduced Leniency provision in India in 2009 however leniency incentives could not attract enough cartel members to come forward and self-report.

On 20 February 2024 'Leniency Plus Regulations, 2024', have been enforced to strengthen the anticartel laws. This research seeks to study the efficacy of leniency regulations in India by studying and analyzing all the cases decided by Competition regulatory authority i.e. Competition Commission of India on Leniency. This research is a result of empirical method, where data collection involves the analysis of cases that are decided by the Competition Commission of India on cartels where leniency application had been filed.

Keywords: *leniency applications, collusive practices, bid-rigging, priority marker status, vital disclosure, reduction in penalty.*

I. Introduction

The period of liberalization, privatization, and globalization led to the Indian government realizing the limitations of the Monopolies and Restrictive Trade Practices Act, 1969, in addressing competitive practices. As a result, the Indian

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Parliament enacted the Competition Act, 2002 (the Act), which grants authority to the Competition Commission of India (CCI) to promote fair competition in Indian markets, protect consumer rights, and maintain trade freedom.

Though the Competition Act, 2002 (12 of 2003) was passed by the Legislature on 13th January 2003, but it came into force from March 31, 2003, to 2011. Section 3 along with many other provisions came into force on May 20th, 2009. The remaining sections were activated through subsequent notifications. This makes it an unusual instance where the entire Act wasn't put into effect through a single notification. Instead, different parts of the Act were enforced gradually through multiple notifications issued over time.³

The Competition Act of 2002 mandates the creation of a Commission tasked with thwarting practices that harm competition. Its objective is to foster and maintain competitive environments in markets, safeguard consumer interests, and uphold the freedom of trade practiced by all market participants. Competition Law governs the 3 types of violations, viz. anticompetitive agreements, abuse of dominant position and regulation of combinations.

In industries with varying levels of efficiency among firms, competition compels less efficient firms to exit. Consequently, welfare is enhanced as output is generated at reduced costs.⁴

Anti-competitive agreements are prohibited under the Act if they result in appreciable adverse effect on Competition (AAEC). The Act does not expressly use the terms 'horizontal' and 'vertical' agreements, it prohibits them implicitly under sections 3(3) and 3(4) of the Act respectively.

Cartels are the Horizontal form of anti-competitive agreements that are regarded as the most perilous type of anti-competitive agreements, present considerable risks to both markets and economies through the suppression of competition. In case of cartels there is presumed AAEC on the party involved in cartel however such presumption is rebuttable.⁵

³ Excel Crop Care v. CCI, 8 SCC 47 (2017).

⁴ Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004.

⁵ M/s Rajasthan Cylinders and Containers Ltd. vs. CCI, 2019 SCC Online Del 7806.

In response to recommendations from the Competition Law Review Committee (CLRC), the Indian Government has put forth a proposal to incorporate Leniency Plus into the framework of Indian Competition Law. This initiative, officially outlined in 'The Gazette of India' on February 20th, 2024, seeks to bolster the effectiveness of the Indian Cartel Leniency Program.

The CLRC emphasized that incorporating Leniency Plus could provide added incentives for firms to voluntarily disclose and report more instances of cartel behavior. This program was anticipated to stimulate increased revelations of anti-competitive agreements, ultimately aiding the Competition Commission of India (CCI) in detecting and prosecuting cartel cases.

This paper delves into exploring leniency regime in India by analyzing empirical evidence collected from various cases decided by the Competition Commission of India. This paper also discusses cartels, penalties, Game theory and Nash equilibrium, Legal framework of Leniency including Leniency Plus.

II. Cartel and its types

Section 3 of the Competition Act delineates prohibitions against both horizontal and vertical agreements that exhibit anti-competitive tendencies and result in 'appreciable adverse effect on Competition' (AAEC). Notably, the phrase "appreciable adverse effect on competition" remains undefined within the ambit of the Competition Act. However, Section 19(3) of the Act outlines precise factors to consider when evaluating whether an agreement truly leads to an appreciable adverse effect on competition in accordance with Section 3.

In accordance with Section 3(3) of the Competition Act, horizontal agreements, specifically cartels, are presumed to cause an AAEC ('effects based' approach). Nevertheless, this presumption can be challenged, and the burden to refute it rests on the individual accused of participating in such an agreement. Consequently, arguments advocating for the beneficial aspects of agreements could potentially invalidate this presumption, although this might prove challenging particularly in the context of cartels.⁶

⁶ Rajat Sethi & Simran Dhir , "Anti-Competitive Agreements under the Competition Act,2002," NLSIR Vol 24 No. 32, pp 34, 2013, <https://repository.nls.ac.in/nlsir/vol24/iss2/3/>

The significance lies in acknowledging that the Act embraces an "effects" based approach, focusing on the potential or actual anti-competitive effects of agreements. It does not penalize agreements solely based on their intended anti-competitive outcomes if those effects are unlikely to occur. This differs from certain other jurisdictions, such as the European Union, where agreements are prohibited if they aim to or distort competition, regardless of their intended effects.⁷

Under the MRTP Act 1969 only 7 cases were decided by the MRTP Commission between 1991 to 2007 and the same number as between 1972 to 1976 and most of them were dismissed. MRTP Act proved to be ineffective and was repealed in 2009. The Competition Act's Sections on cartels are fairly potent and there is clarity in the definition. Section 2(c) of the Competition Act, 2002 defines cartel as:

“cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution sale or price of, or trade in goods or provision of services;”

Section 2 (b) defines an agreement to include *“any arrangement, understanding or action in concert...”*. Under s.2 (b) it is not necessary for such agreements to be formal or in writing. The CCI has endorsed the often-repeated statement of Lord Denning that "a nod or a wink will do."⁸ The definition provided in Section 2(b) of the Act is broad and comprehensive rather than restrictive. It acknowledges that an agreement can be implied, and it extends to instances where parties may communicate implicitly, such as through gestures or non-verbal cues. It is observed by the Commission that the Act contemplates civil liability in such circumstances.⁹

There are four types of cartels mentioned under s. 3(3) and these are presumed to cause an appreciable adverse effect on Competition.

1. Agreement to fix prices

⁷ *Ibid.*

⁸ In Re: LPG cylinder manufacturers, 2012 SCC OnLine Comp AT 195; Suo Moto Case No. 03 of 2011.

⁹ In Re: Mr. Rizwanul Haq Khan, Dy. Chief Material Manager, Office of the Controller of Stores, Southern Railway, Reference Case No.2 of 2016 (CCI).

2. Restrict Supply
3. Allocate markets or customers
4. Rig Bids

‘Presumption of AAEC’ eliminates the necessity for the CCI to demonstrate both the intention and effects of anti-competitive behavior, a stipulation that significantly hindered the MRTP Commission.¹⁰ Competition Commission of India’s first cartel decision came in May 2011 in the case of **FICCI-Multiplex Association of India vs. United Producers /Distributor Forum and Others**¹¹ where three groups of Hindi Film Producers had directed their members to withhold the release of new films to negotiate a better revenue-sharing deal with multiplex owners. The CCI fined each producer group a nominal amount of Rs. One lakh, reasoning that their boycott began prior to the enforcement of the anti-cartel section of the Act. According to author Aditya Bhattacharjea “this was an unpropitious beginning for the anti-cartel enforcement under the new law”.¹² In Cement cartel case CCI had imposed a fine of Rs.6,307 crores on 11 major cement manufacturers for cartelization.¹³

Bid rigging is ‘a particular form of collusive price-fixing behaviour by which firms coordinate their bids on procurement or project contracts.’ This distorts the bidding procedure and, by depriving the procuring entity of the advantages of fair competition, can lead to considerable financial (and possibly social) harm. Bid rigging manifests in various ways, such as uniform pricing, cover bidding, bid rotation, bid suppression, market division, and collective boycotts.¹⁴

III. Penalties for Violation of section 3

In the Excel Crop Case, the Supreme Court of India elucidated that the primary aim of India's Competition Act is deterrence and punishment: “...Penal provision contained in Section 27 of the Act serves this purpose as it is aimed at achieving the objective of punishing the offender and acts as deterrent to others.”

¹⁰ Aditya Bhattacharjea & Oindrila De “Cartels and the Competition Commission”, *ECONOMIC AND POLITICAL WEEKLY*, Vol 47, No.35 ,2012

¹¹ Case No.1 of 2009.

¹² *Ibid.*

¹³ Builders’ Association of India vs. Cement Manufacturers Association & Others Case No. 29 of 2010.

¹⁴ In Re: Rizwanul Haq , Reference case No. 02 of 2016.

When the CCI confirms a violation of section 3, Section 27 of the Act grants it the authority to take various actions. These include issuing a 'cease and desist' order, imposing monetary fines on the parties involved, instructing modifications to agreements, directing the relevant enterprises to adhere to any additional orders it issues, and complying with its directions.

The Commission proceeds to determine the penalty amount to be levied on the violating parties as per Section 27(b) of the Act. Pursuant to this provision, the Commission is authorized to impose penalties on both the contravening parties and their persons. Furthermore, according to the proviso under Section 27(b) of the Act, in the case of a cartel, the Commission may impose a penalty of up to three times the entity's profit for each year of the agreement's duration, or ten percent of its turnover for each year of the agreement's continuance, whichever amount is higher.¹⁵

The Competition Commission of India used to calculate penalties based on total profits or turnover until 2017 but following the Supreme Court's decision in the Excel Crop Care case, it has shifted to a regime focusing on relevant turnover.¹⁶

In relation to financial sanctions, Section 27(b) of the legislation empowers the Competition Commission to levy a fine of up to ten percent of the mean turnover over the last three preceding fiscal years. Should a collusion be formed by a cartel, the penalty imposed on each participant by the Competition Commission may reach: (a) 10% of its turnover for each year the agreement persists; or (b) three times its profit for each of those years, whichever amount is higher.

¹⁵ Suo Moto Case 7 of 2014.

¹⁶ Aditya Bhattacharjea & Oindrila De, "Neither Crime Nor (Much) Punishment: India's Cartel Penalty Practices", in Basu, K., Mishra, A. (eds) *Law and Economic Development*. Palgrave Macmillan, Cham, 2023, https://doi.org/10.1007/978-3-031-24938-9_9

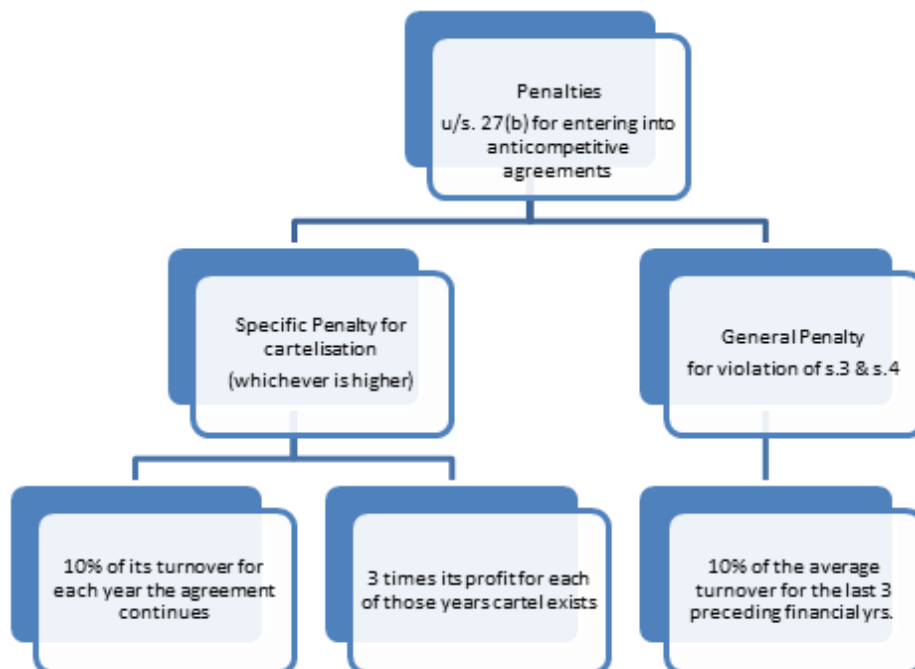


Figure 1: Classification of Penalties as per section 27(b) of the Competition Act, 2002

Penalties are of an administrative nature rather than criminal, with the Competition Commission of India (CCI) employing a less stringent evidentiary standard compared to the ‘beyond reasonable doubt’ criterion customary in criminal proceedings. The delineation of this reduced burden of proof has undergone modifications over time. Initially, the CCI characterized the standard as resting upon a ‘balance of probability’ and a ‘harmony of intention.’ Subsequently, it clarified that the criterion is defined by a ‘preponderance of probabilities.’ The Competition Appellate Tribunal (COMPAT) has articulated that a standard of ‘strong probability’ suffices, although its application varies depending on the specifics of individual cases, with improbable or notably serious occurrences necessitating more compelling evidence.¹⁷

¹⁷ P.K.Majumdar Basu, ‘Penalizing Anti-Competitive Agreements and Abuse of Dominance,’ 7 NUJS L. REV. 225 (2014).

“It may be noted that the primary objectives behind imposition of penalties are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.”¹⁸

So, the basic objective of penalties levied under section 27(b) of the Act is to deter parties from entering into anticompetitive agreements specifically cartelization, since these agreements are difficult to bust and distortive for markets.

IV. Legal Framework of Leniency Regulation

Originating in the United States in 1978, leniency programs have been adopted by numerous countries worldwide. In 1993, the Department of Justice (DOJ) introduced an enhanced leniency program aimed at disrupting existing cartels and preventing the formation of new ones. This program offers complete amnesty from federal prosecution to the first informant from each cartel, provided that no investigation into the cartel is underway. Additionally, it provides discretionary penalty reductions to conspirators who come forward during an ongoing investigation. This leniency program has become central to the enforcement efforts against cartels in the United States and has influenced similar programs implemented by antitrust authorities in Australia, Canada, the European Union, Japan, South Korea, and other nations.¹⁹

Leniency programs offer reduced sanctions to offenders who self-report, potentially deterring cartels by incentivizing defection from collusion. Those regulations that reward self-reporting parties can effectively deter collusion at minimal cost. When fines or rewards are seen as pure transfers, optimal leniency programs typically favor the first reporting party, making them the recipient of fines paid by others. These programs, which involve modifications to the law, aim to lower enforcement costs, mitigate risks, and facilitate early damage remediation, which is particularly advantageous for isolated wrongdoers

¹⁸ In Re: M/s Shivam Enterprises, Case No. 43 of 2013 (CCI).

¹⁹ Spagnolo Gaincarlo, Optimal Leniency Programs, Centre for Economic Policy Research, FEEM Working Paper No. 42, 2000, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=235092

committing isolated offenses.²⁰ Such Programs are beneficial to achieve objectives of a welfare state. In jurisdictions such as the UK, Canada, and Brazil, leniency plus remains an active component of the competition regime.

The leniency provisions in India are outlined in Section 46 of the Competition Act, 2002, and the procedural guidelines are specified in the Competition Commission of India (Lesser Penalty) Regulations, 2009.²¹ The 2009, leniency regulations offered a 100% reduction in fines to the first applicant, with subsequent applicants receiving 50% and 30% reductions.

The lesser penalty guidelines lack specificity regarding the extent of subsequent penalty reductions. They establish four criteria: the timing of the applicant's disclosure, the Commission's existing evidence, the quality of the applicant's information, and the overall facts and circumstances of the case. However, the weight assigned to each criterion is unspecified.²²

Prior to the amendment of 2017 to the CCI (Lesser Penalty) Regulations 2009, only an order of priority was given i.e. 100%, 50% & 30% immunity from fines to the first applicant, second applicant and third applicant respectively. Post amendment, more than 3 firms can apply for lesser penalty leniency.²³

In the year 2019, the Competition Law Review Committee recommended the incorporation of leniency plus in the Indian leniency regime, asserting that increased immunity incentives would encourage more firms to provide information, thereby improving anti-cartel enforcement in India by reducing the efforts required for detection and prosecution by the CCI.²⁴ The CCI on 20th February, 2024 notified in the official Gazette The Competition Commission of

²⁰ *Ibid.*

²¹ Aditya Bhattacharjea, & Oindrila De ,2023 “According to this paper, India’s leniency structure is more similar to that of European Union where the Commission provides full immunity from fines to the first whistle blowing firm and also reduced fines for other leniency applicants depending on the cumulative conditions set up by the relevant leniency notice.”

²² *Ibid.*

²³ Cyril Amarchand Mangaldas Competition Team , : Leniency Regulations Amended, 2017 , <https://competition.cyrilamarchandblogs.com/2017/08/leniency-regulations-amended/>

²⁴ Anik Bhaduri, ‘Sweeter Carrots, Same stick: transplanting leniency plus into Indian Competition Law’ 7(1) Indian Law Review , 2023, 10.1080/24730580.2022.2140909

India (Lesser Penalty) Regulations, 2024 (No.02 of 2024). This addition to the law aimed to bolster the effectiveness of the Indian Cartel Leniency Program.

Leniency plus, also referred to as amnesty plus, is a framework enabling a cartel participant, unable to obtain full immunity under the leniency policy, to collaborate with an antitrust agency concerning a distinct cartel in a different market segment. In return, the company not only attains immunity regarding its engagement in the second cartel (under the leniency policy) but also secures an extra reduction in penalties for its involvement in the initially scrutinized illegal conduct, hence the designation 'plus'. The aim of leniency plus is to target cartelists operating in multiple markets, as those operating solely in a single market are ineligible. As part of a leniency program, leniency plus should serve the same goals: destabilizing, uncovering, and penalizing existing prohibited agreements, while deterring their formation.²⁵

A. Leniency: Rationale and Purpose

Christopher Leslie researched applying game theory to leniency programs, by adapting 'The Prisoners' Dilemma' game to a leniency program within antitrust law.

The concept of Leniency is based on the theory of Prisoner's Dilemma and Nash Equilibrium where the parties choose to sacrifice groups interest over their own individual interest and end up choosing worse situation.

Leslie argues that if the Applicant confesses to involvement in the cartel, they would be giving up the profits gained from the cartel. This is because the confession would lead to the compulsory dissolution of the cartel, thereby eradicating any chance of participating in future cartel activities. Companies that disclose the existence of a cartel are deemed unreliable for future cartel engagements, even in distinct product markets.²⁶

²⁵ Ibid.

²⁶ Sabino Douglas et. al, "Game Theory applied to the Brazilian Antitrust Leniency Program", 2024, <https://deliverypdf.ssrn.com/delivery.php?ID=350017064003082127068105099080098119097014088087016004031107068030089003066068009030032012051099111045001106069015094119076016058073017052065016066010126017016066090088029032123067118117089031123124084074076090076085067121015010114065095104107093124070&EXT=pdf&INDEX=TRUE>

a. Prisoner's Dilemma

Two individuals belonging to a criminal organisation find themselves incarcerated separately without any means of communication. The prosecutors are facing a challenge as they do not possess sufficient evidence to convict the suspects of the primary accusation, although they do have enough for a minor offence. Each detainee is presented with a decision to make: either to incriminate their partner by providing testimony against them, or to stay quiet and collaborate. The potential outcomes are as follows: if both parties decide to betray each other, they will each be handed a two-year prison sentence; if one individual chooses to betray while the other remains silent, the betrayer will be set free while the other will serve a three-year sentence; if both opt to remain silent, they will both be given a one-year sentence for the lesser charge.²⁷

Table 1: Game Theory²⁸

	S	B
s	-1,-1	-3,0
b	0,-3	-2,-2

b. Key Features of the CCI (Lesser Penalty) Regulations, 2024 (No. 02 of 2024)

These Regulations repeal the previous CCI (Lesser Penalty) Regulations of 2009. Present regulations apart from providing leniency in the present cartel also provide amnesty in second cartel. It uses the term leniency 'plus' for the full, true and vital disclosure of second cartel. The firm that self-reports its involvement in second cartel is also entitled to added incentives in first cartel apart from 'priority status' in second cartel. These regulations are a step further to deter collusion by incentivizing the parties involved and by breaking code of silence.

➤ Full, True and Vital Disclosure

The Competition Commission of India has instituted a leniency scheme for cartel participants through the Competition Commission of India (Lesser Penalty)

²⁷ A. Chassagnon, Competition Policy and Game Theory, pp.24, 2019, [https://www.parisschoolofeconomics.eu/docs/chassagnon-arnold/cpgt1_2019\(5\).pdf](https://www.parisschoolofeconomics.eu/docs/chassagnon-arnold/cpgt1_2019(5).pdf)

²⁸ Here S stands for silent and B stands for Betray.

Regulations, 2024, commonly referred to as the 'Leniency Regulations'. These guidelines are codified under section 46 of the Competition Act of 2002. The primary aim is to bolster the identification and deterrence of cartels by motivating participants to acknowledge their involvement and furnish evidence to the competition authority in return they are incentivized. Leniency applicants are eligible to gain a reduction in fines or immunity from penalty if they provide a full, true, and vital disclosure²⁹ and cooperate in the DG investigation.³⁰ The prerequisite to file the leniency application is that application should be received by the Commission prior to the Completion of the investigation report by the Director General.³¹

In this context, vital disclosure refers to evidence or information furnished by the applicant that is adequate for the Commission to form an initial opinion regarding the presence of a cartel or to substantiate the violation of the provisions outlined in section 3 of the Act.

➤ **Conditions for Lesser Penalty or Lesser Penalty Plus**

An individual seeking the benefits of Lesser Penalty or Lesser Penalty Plus must:

- Immediately cease participation in the cartel upon disclosure.
- Provide essential disclosure regarding violations of section 3 of the Act.
- Furnish all pertinent information, documents, and evidence.
- Cooperate genuinely, fully, continuously, and promptly throughout the investigation.
- Refrain from concealing, destroying, manipulating, or removing relevant documents.
- Refrain from providing false evidence or omitting material information.
- Disclose the names of individuals involved in the cartel on their behalf, for whom they seek lesser penalty or lesser penalty plus.

²⁹ Definition clause (k) of CCI (Lesser Penalty) Regulations, 2024

³⁰ Regulation 3(1) of the Lesser Penalty Regulations, 2024 state that "to obtain the benefit of leniency under the Leniency Regulations, the applicant must satisfy certain conditions, including: (a) ceasing further participation in the cartel; (b) providing vital disclosure in respect of the cartel; (c) fully and continuously cooperating with the CCI and providing all relevant information as required by it; and (d) not concealing, destroying or manipulating relevant documents or evidence."

³¹ The Director General is the investigative arm of the CCI.

➤ **Reduction in Monetary Penalty by the Commission**

The Commission has discretion in reducing monetary penalties under these regulations, considering:

- When the applicant discloses information.
- Existing evidence held by the Commission.
- The quality of information provided.
- Adherence to the conditions specified above
- The entire facts and circumstances of the case.

➤ **Grant of Lesser Penalty and Lesser Penalty Plus**

If the applicant is the first one providing complete, truthful, and vital disclosure, enabling the Commission to form a prima facie opinion on a cartel's existence, may receive up to a 100% reduction in penalties under section 27(b) of the Act, if the Commission lacked sufficient evidence initially. Subsequent applicants may also receive penalty reductions by submitting evidence that significantly enhances the Commission's existing evidence or that of the Director General, aiding in establishing the cartel's existence.³²

An applicant who had previously provided full, true and vital disclosure concerning an alleged contravention of provisions of section 3 in the first cartel, and subsequently provides a similar disclosure regarding existence of another cartel (second cartel), enabling the Commission to form a prima facie opinion on the existence of a newly disclosed cartel under section 26(1), may receive an additional reduction in monetary penalty upto or equal to 30% of the penalty imposed for the first cartel. This is in addition to the potential benefit of a reduction in the penalty of upto or equal to 100%. Here the Commission follows carrot (incentive of monetary reduction) and stick (detering and punishing cartel in the form of penalties) approach.³³ This approach is already being followed in the USA.

³² The Director General is the investigative arm of the CCI.

³³ Sub regulation (5), CCI (Lesser Penalty) Regulation, 2024.

➤ **Priority Marker Status**

The Leniency Regulations encompass the provision of allocating ‘priority markers’ to applicants, indicating their position in the "queue" for leniency among the cartel members.

These regulations outline potential reductions in fines for leniency applicants, contingent upon meeting the above-specified conditions. Specifically, the CCI has the authority to grant reductions in fines as follows:

- The first applicant, by providing a vital disclosure enabling the CCI to form a prima facie opinion or assisting the DG in establishing a contravention, may receive a 100% reduction in fine, equating to immunity from fines.
- The second applicant, providing significant ‘added value’ to the investigation, might qualify to be eligible for a reduction of up to 50% of the monetary penalty.
- The third applicant may potentially receive a reduction of up to 30% of the financial penalty.

c. Procedure for grant of Lesser Penalty

An applicant is required to make an application as per schedule I of Lesser Penalty Regulation 2024. It could be in writing, email or through fax. The application is made to ‘designated authority’³⁴ and the ‘designated authority’ shall within 10 working days put up the matter before Commission for consideration.

Such application could be made anytime during enquiry but not after the report under section 26 has been received by the Commission. The designated authority shall record the date and time of the receipt of such an application.

³⁴ ‘Designated authority is defined under definition clause (f) of CCI’s (Lesser Penalty) Regulations, 2024 as “designated authority” means an officer of the Commission who is authorized by the Chairperson to function as such, for the purpose of these regulations

For the purpose of grant of 'lesser penalty plus', application as per schedule II of the regulations has to be made. The 'designated authority' then put up the matter before Commission within 10 working days.

➤ **Confidentiality And Withdrawal**

The common goal of both democracy and market competition is the same – “the maximization of public welfare” As India embraced globalization and opened its economy to the global market, the 'State' effectively relinquished control to '*invisible hands*' i.e., 'market forces'.³⁵

India's Competition legislation is a civil legislation that mandates the Commission to adhere to the principles of natural justice.³⁶

In a market characterized by covert collaboration among participants to undermine the public's interests, concerns naturally emerge regarding honesty and equity in how products, services, advertisements, promotions, and schemes are portrayed and represented. As Lord Denning rightly observed “*People who combine to keep up prices, do not shout it from the house tops. They keep it quiet; they make their own arrangement in cellars where no one can see. They will not put anything in writing, not even into words. A nod or wink will do.*” Competition law addresses behaviors in the economy that disrupt the smooth functioning of competitive markets, particularly those designed to mislead innocent buyers. Concurrently, it removes barriers to innovation and growth while fostering competition as a fundamental principle. Competition law strives to prevent the interests of individuals or groups from undermining the broader interests of the community.³⁷

Regulation 8 of the 2024 Regulations state that Commission & DG shall treat as confidential:

- (a) Identity of the applicant
- (b) The information, documents and evidence furnished by the applicant.

³⁵ B.S. Chauhan, ' Indian Competition Law: Global Context' ,Journal of Indian Law Institute, Vol 54,No.3, 2012, <https://www.jstor.org/stable/44782475>

³⁶ Sections 36(1) and 36(2) of the Competition Act, 2002.

³⁷ B.S.Chauhan,' Indian Competition Law: Global Context' ,Journal of Indian Law Institute, Vol 54, No.3,2012, <https://www.jstor.org/stable/44782475>

However, there are some exceptions where it could be disclosed if:

- (i) Mandated by legal obligation.
- (ii) The applicant has provided written consent for such disclosure.
- (iii) The applicant has publicly disclosed the information.

Also, DG may disclose to any party for the purpose of investigation after taking prior approval from Commission.

Leniency applicant has the option of withdrawal any time before the DG submits its Report to the Commission under section 26.

V. Findings and Analysis

Since 2009 when Leniency regulations were introduced under s.46 of the Competition Act, 2002 only 3 applicants could file for LPA on first come first basis, however after 2017 amendments any number of applicants were allowed to file for leniency, provided LPAs are filed before DG submits its investigation report to the Commission.

In 2024, Leniency plus regulations are introduced into the leniency regime. Out of 21 LPAs filed before the Commission 14 are suo moto cases initiated by the Commission solely based on the evidence provided by the cartel member.

A. Analysis of No. of Leniency Applications filed per year

Evidence on the number of leniency applications filed per year does not reveal a very good reporting trend. Only in 2016 maximum number of cases were self-reported at 29 % and after that in 2013 and 2020 at 14%. In India Leniency regulations came into effect since 2009 and the analysis of number of cases filed per year so far reveals that it is less than 30%. In 2013 the first case and only case was reported, i.e. *In Re : Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters*, Suo Moto case No. 02 of 2013. While in 2021 only 10% leniency cases were reported.

Table 2: Data on No. of Leniency Applications filed per year

Year	No. of Applications Filed	Percentage (%)
2021	2	10%
2020	3	14%

2019	1	5%
2018	2	10%
2017	1	5%
2016	6	29%
2015	2	10%
2014	3	14%
2013	1	5%
Total LPA filed	21	100%

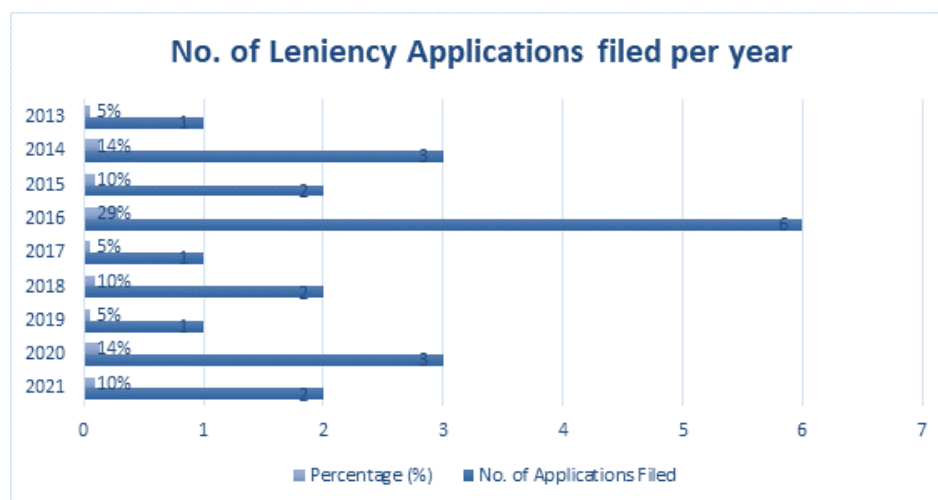


Figure 2: No. of Leniency Applications filed per year from 2009 to 2024.

B. Violation of Provisions of Section 3 of the Competition Act

Out of 21 Lesser Penalty Applications filed the data shows that some cases have more than one type of violation of section 3. An analysis of data reveals that in all the Leniency applications filed, 71% of cases involved violation of bid rigging. While other violations of section 3 were in lower percentage viz. determination of purchase or sale price was 29%, allocation of market was 19% and limiting the supply was 14%. *In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original*

*Equipment Manufacturers*³⁸ there is bid rigging as well as determination of purchase and sell price. *In Re: Mr. Rizwanul Haq Khan, Dy. Chief Material Manager, Office of the Controller of Stores, Southern Railway*³⁹ again there is determination of sale price as well as bid rigging involved. Again, in *In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of SBI across India*⁴⁰ there is bid rigging as well as geographical allocation of tenders.

Table 3: Type of violation of Section 3 of the Competition Act,2002

Type of violation of section 3	Violation in number of cases	Violation Percentage
Bid Rigging	15	71%
Determine purchase/sale Price	6	29%
Shares the market	4	19%
Limiting the supply	3	14%

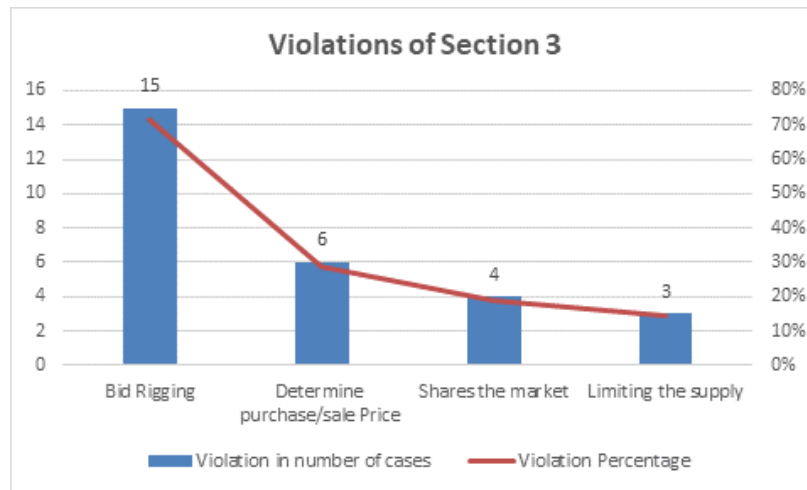


Figure 3: Type of Violation of provisions of section 3 involved

³⁸ Suo Moto Case No. 10 of 2014

³⁹ Reference Case No. 2 of 2016

⁴⁰ Suo Moto Case No. 2 of 2020

C. Public v. Private Enterprises

Leniency applications were filed against both private and public enterprises. Out of 21 LPAs 11 are public enterprises and 10 are private enterprises. In most of the cases where government tender was involved, Indian Railways was the sole buyer in the monopsony market structure. In six cases of leniency, Indian Railways was the buyer and issued tender. Other public enterprises included Municipal Corporation, Sports Broad casters, Food Corporation of India, SBI. As is visible in pie chart 52% of enterprises were public enterprises and 48% were private enterprises.

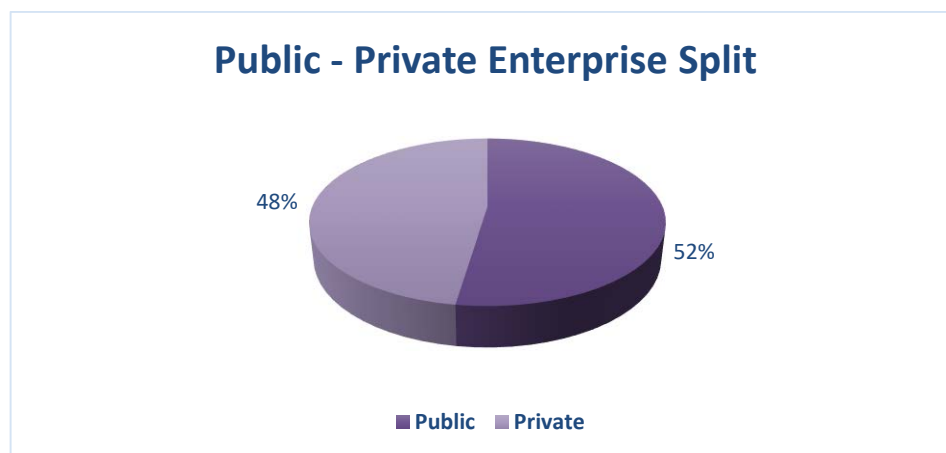


Figure 4: Private-public split of enterprises in Leniency cases decided from 2009 to 2024

D. Time taken by the Commission to decide the case after LPA is filed

Evidence suggests that in 7 cases CCI took around 2 years to decide the case, while around 4 yrs. in 3 cases, and 7 years in 2 cases. In other LPAs also it took around 1.5 to 4.5 years to decide the case. In only one case i.e. in In Re: Food Corporation of India, CCI took 9 months to decide the case. So, the data reveals that even after filing of LPAs and providing commission with all the evidence and information CCI takes 3-4 years on average to decide the case.

Table 4: Time taken by the Commission to decide the Lesser Penalty applications (LPA) from 2009 to 2024.

Citation of Case	Date of LPA filed	Date of Order	Time taken by the Commission to decide the case
Ref. Case No. 02/2020	03.06.2021	11.10.2022	Around 1.5 yrs.
Suo Moto Case No. 06/2020	Around 3 rd Quarter of 2020	09.06.2022	Around 2 yrs.
Case No. 24/2017	10.05.2018	12.10.2022	More than 4 yrs.
Ref. Case No. 03/2018	3 rd Quarter of 2018	04.04.2022	Around 4.5 yrs.
Suo Moto Case No. 02/2020	31.08.2020	03.02.2022	Around 1.5 yrs.
Suo Moto Case No. 10/2014	01.10.2014	20.01.2022	More than 7 yrs.
Ref. Case No. 02/2016	05.07.2019	01.11.2021	Around 2.5 yrs.
Ref. case No. 07/ 2018	Around 1 st Quarter of 2021	29.10.2021	Around 9 months
Ref. Case No. 02/2018	After DG submitted report i.e. after 30.09.2020	12.10.2021	N.A.
Suo Moto Case No. 06/2017	26.07.2017	24.09.2021	Around 4 yrs.
Suo Moto Case No. 01/2016	Around 4 th Quarter of 2015	26.02.2020	Around 4 yrs.

Suo Moto Case No. 07 (01)/2014	Around 3 rd Quarter of 2014	09.08.2019	Around 5 yrs.
Suo Moto Case No. 03/2017	07.09.2016	15.01.2019	3.5 yrs.
Suo Moto Case No. 01/2017	03.09.2016	16.11.2018	Around 2 yrs.
Suo Moto Case No. 02/2013	11.01.2013	11.07.2018	5.5 yrs.
Suo Moto Case No. 04/2016	04.08.2016	31.05.2018	2 yrs.
Suo Moto case No. 03/2016	01.08.2016	31.05.2018	Around 2 yrs.
Case No. 50/2015	02.08.2016	01.05.2018	Around 2 yrs.
Suo Moto Case No. 02/2016	25.05.2016	19.04.2018	Around 2 yrs.
Suo Moto Case No. 03/2014	10.03.2015	18.01.2017	Around 2 yrs.
Suo Moto case No. 07(02) /2014	Around 3 rd Quarter of 2014	21.10.2021	7 yrs.

E. Leniency Granted or Rejected

As the pie chart shows in 76% cases Leniency was granted by the Commission while in 24% cases LPA was rejected. LPAs were rejected on several grounds

like insufficient evidence provided by the cartel member or, cartel not established or, penalty already levied in previous cartel. In a few cases parties were not aware of the procedural formalities and filed LPA after DG already submitted its report to the Commission. Where MSME's were involved, Commission granted leniency reduction on penalty and also waived rest of the penalty.

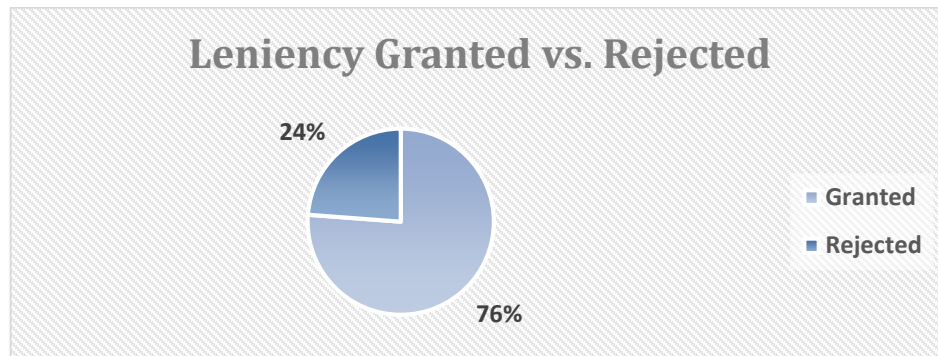


Figure 5: No. of cases where LPA was filed, and Leniency is granted by CCI.

VI. Conclusion

Out of 21 LPAs filed before the Commission 14 cases were initiated by the Commission solely based on evidence and information provided by the cartel member. An applicant to be eligible for leniency incentives in penalty for its participation in cartel is required to give full, true and vital disclosure and fully cooperate with the Commission during investigation. The Commission marks the applicants for 'priority status', first applicant can get upto 100% of reduction in fines and subsequent applicants also get reduction in penalties according to their contribution in DGs investigation. Those applicants who provide disclosure of second cartel during first cartel investigation are eligible to incentive of upto 100% penalty reduction in second cartel and 30% additional reduction in first disclosed cartel. Leniency plus applies to firms operating in multiple markets. In India leniency provisions were introduced to make cartel governance stronger, but empirical evidence suggests number of LPAs are very less. Only 21 LPA have been filed and decided so far since 2009. Also, the time taken by the Commission to decide the cases even after evidence and necessary information had been provided by the applicant by self-reporting is too long. So, is this slow disposal rate of cases really serving the objective of leniency laws i.e. to make anti-cartel efforts efficient?

There are only 15 unique cases where leniency is actually granted and cartel is busted as leniency cases are filed against same enterprises like 2 cases on solid waste management, 2 cases on dry cell batteries, 3 cases on bearing manufacturer etc. Also, the maximum no. of cartel violations are of bid rigging and in majority of cases public enterprise like Indian Railways, Food Corporation of India are involved. So, in public sector there is more contravention of the provision of section 3 specifically bid rigging. In 2018, in one case 31 parties have self-reported and filed for leniency, where CCI looked into the matter holistically and granted leniency on penalties. In four cases, Micro, small and medium enterprises' (MSMEs) indulged into collusive agreements, so Commission took the holistic approach as MSMEs were already under economic distress and imposing penalties may render them economically unviable and result in exit from market. Commission granted them leniency as well as waived the penalties by issuing 'cease and desist' order from indulging in cartels.

So far as the Penalties are concerned, the leniency program offers additional penalty reduction to firms who have already applied for leniency in one cartel and subsequently revealed involvement in another cartel. It provides them with the opportunity to receive an additional penalty reduction of up to 30% for the first cartel and 100% for the second cartel. These provisions basically seek to encourage cartel disclosure. These regulations are broader in scope as these cover a wide range on anticompetitive agreements. The objective was always to create deterrence effect on collusive practices. In India CCI has taken a lenient approach while levying penalties for cartel as most of the industries were MSME's is Micro, small, and medium enterprises. And issued a 'cease and desist' order for engaging in collusive practices. As the objective of the Act is to protect competition and these MSME's were already under financial distress because of losses incurred in the pandemic. So, leniency programs in enforcing cartel laws are a double-edged sword. While they have the potential to significantly enhance the detection and prevention of cartels, their implementation requires careful consideration. They can ultimately boost competition and benefit the economy. It's crucial for regulators and antitrust authorities to handle these programs cautiously, ensuring a balance between encouraging cooperation and safeguarding market competition.