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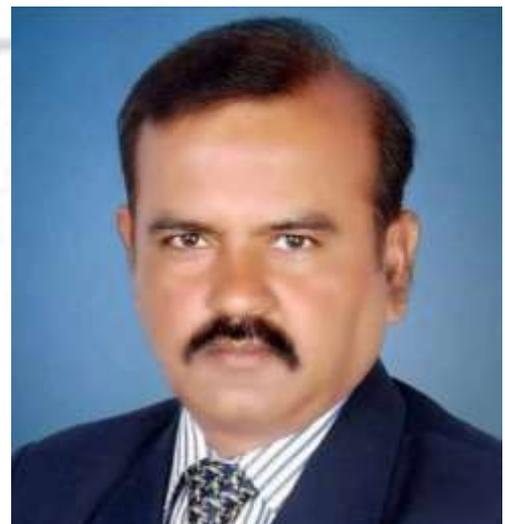
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CARTEL REGULATION AND LENIENCY PROGRAMME: CRITICAL ANALYSIS OF COMPETITION LAWS IN INDIA

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Abstract

Cartelization is the practice of collusion between competitors of a market which exploits the market resources and disrupts competition in the market. Cartels work behind the curtains of secrecy and collude by way of price fixing, bid rigging, sharing customers, etc. to control competition in the market for their mutual benefit that is often detrimental to the interest of consumers in the market. Thus, it becomes pertinent to have a legal framework in place to keep regulate cartels and dismantle them. Hence competition laws come into play. The Competition Act 2002 and the Competition Commission of India (Lesser Penalty Regulations) 2009 provide for Leniency programme. It helps in detection, investigation and regulation of cartels by using one of the members of the cartel as an informant to get inside information. The informant in return receives immunity and lesser penalty than mentioned in the provisions of the Act. This paper aims at understanding the cartel regulation in India and the effectiveness of leniency programme while regulating cartels in the market. The paper discussed the various anti-competitive practices and agreements along with the provisions under the Act for the regulation of cartels. It further discusses the leniency programme in India and related statutory provisions. It also looks into the role of CCI in implementation of the leniency programme by discussing certain orders and cases dealt by the authority. The author concludes the paper by identifying the drawbacks in the system and need of improvement for better regulation of competition in the market.

Keywords – anti-competitive practices, cartels, competition, Competition Commission of India, leniency, penalty.

Research Objective

To critically analyse the effectiveness of cartel regulation and the leniency programme under Competition regime of India, specifically focusing on the Competition Act of 2002 and the role of the Competition Commission of India (CCI).

Research Question

Whether the current regulation pertaining to cartel regulation and leniency programme adequate to curb cartelization in the Indian market?

Research Methodology

This paper adopts a doctrinal research approach, focusing on the critical analysis of statutes, case law, and existing literature like research paper, articles, books, etc. on cartel regulation and the leniency programme in India. The study also involves reviewing relevant competition laws and orders of CCI.

Introduction

The liberalisation of the economy owing to India's strive towards globalisation, has resulted in the opening up of the Indian economy to the foreign market players. This new access of the Indian economic market to the world has necessitated a need for a proper legal framework for competition, as the market would be facing domestic as well as global competition makes it pertinent for the country to have an investor friendly environment. Therefore, the Competition Act of 2002 was enacted, aiming to promote competition in the Indian market while also setting up mechanisms for preventing any exploitative activities by the dominating members of the market. This Act played a major role in the economic development and liberalisation of the country while also keeping a check on the restrictive and unfair trade practices by the dominant market players having apparent control over the market activities.

A fair and efficient legal structure for regulation of competition in a developing country is innate to the smooth functioning of a domestic and for imbibing competition in the international market. Competition law and regulations encourages sustainable development while also prohibiting anti-competitive behaviour that obstructs economic development and growth. However, while implementing such a legal framework, it is important to keep such regulations in accordance with the degree of development of the concerned country because such laws cannot be singularly fit into every jurisdiction and country.

The primary aim of Competition law is to ensure that the market players are not engaging in any kind of restrictive and unfair trade practices that are detrimental to the competition and consumer welfare in the market. It focuses on market efficiency, safeguarding consumer's interests from market

distortions by ensuring that fair competition prevails in the market.¹ Predominantly, the legal framework laid down for competition regulation in India, fixates on preventing a single or few dominant market players to have an upper hand in the decision making by way of price fixing, abuse of their dominant position, formation of cartels, etc. However, the aim of competition is not only to prevent such practices but also to promote competition amongst the various businesses in the marketplace that in turn acts to be beneficial to the consumers of the market.

The businesses in the market strive towards providing better goods, products and services for the consumers than their competitors, thus retaining and promoting a healthy competition in the market. A monopolistic control over prices by one entity affects economic efficiency of the market, thus affecting product quality and further affecting the consumers and competition in the market. Having a good competition offers consumers a variety of goods and services with a wide range of prices, which also warrants efficient resource allocation and stimulating progress for the economic growth of the country. Competition law, economics and economic activities are intertwined at its core because the authority's safeguarding competition use an array of economic theories, concepts and evidence to recognize the anti-competitive patterns and behaviours in the market by the businesses and enterprises in the market. Competitive law moderates the adverse effects of market dominance arising from the concentration of power in a particular industry.

The prominence of competition in a progressively innovative and globalised economy between various enterprises is the lifeblood of strong and effective markets. Competition benefits the consumers by providing them with a great deal of an array of goods and services, thus widening the scope of choices for the consumers. It encourages firms to innovate by decreasing pressure on costs and providing incentives for the efficient organization of production. As such, competition is a central driver for productivity growth in the economy. Therefore, competition is a fundamental aspect of consumer welfare for businesses in the economic setup of a country, making it essential to be regulated by a proper legal framework. A codified set of rules and regulations not only maintains the promotion and sustenance of competition in the market but also governs the anti- competitive practices of the various market players, ensuring no abuse of dominant position by the major market players.

¹ Sakshi Gupta, Cartel Leniency in India: An Analysis, 5 IJLMH, 775, 775-785 (2022).

The authority governing competition in India was set up by way of Section 7 of the Competition Act 2002² and was called the Competition Commission of India (CCI), working as the primary watchdog for detecting any anti-competitive behaviour by the market players in all sectors. The CCI is an autonomous regulatory body that enforces competition laws and imposes penalties on contravention of any provisions of the Act. CCI works as a regulatory body keeping a check on anti-competitive practices in the market and follows a zero-tolerance policy for any agreement or collaboration between the enterprises and businesses which is detrimental to the consumers' interest and causes any adverse effect on the competition in India. Therefore, the CCI in accordance with the provisions provided under the Competition Act 2002, safeguards the interest of the consumers and maintains competition in the market by governing the big enterprises and their involvement in any anti-competitive behaviours and agreements.

Anti-Competitive Practices

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”³

The Competition Act 2002 is the legal framework set up to promote competition, safeguard the interests of consumers in the market by stating clear guidelines for the market players and governing the restrictive and unfair trade practices by the dominant market players.⁴ The Chapter II of the Competition Act 2002 discusses about prohibition of certain agreements, abuse of dominant position and regulation of combinations, as per the provisions under the Chapter. These anti-competitive practices take place by way of anti-competitive agreements, stated under Section

² The Competition Act, 2002, §7 (India) (“7. *Establishment of Commission.*— (1) *With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the “Competition Commission of India”.*

(2) *The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.*

(3) *The head office of the Commission shall be at such place as the Central Government may decide from time to time.*

(4) *The Commission may establish offices at other places in India.”*

³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1773) (Oxford, England, 1723-1790).

⁴ Dr. Saurabh Chandra & Megha Solanki, *Effectiveness of Whistleblower and Leniency Programme in Detecting and Preventing Cartels*, 5 CMRU. JCLA. (Aug. 2023).

3 of the Competition Act 2002.⁵ Section 3 clearly states that if any agreement between enterprises “causes an appreciable adverse effect on competition” in the market in India, such agreement would be void ab initio.⁶ The Competition Act, 2002 “prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.”⁷ The Act also clearly defines the terms “agreement” under Section 2(b)⁸ and “enterprise” under Section 2(h)⁹, which are essential to realise the intricacies of the anti-competitive agreements and how it is utilized for market manipulation in favour of the dominant players. However, “appreciable adverse effect on competition” is not defined in the Competition Act, 2002. But Section 19(3) of the Act lists down certain factors¹⁰ that must be taken into account when determining whether an

⁵ The Competition Act, 2002, §3(1) (India) (“No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.”).

⁶ The Competition Act, 2002, §3(2) (India) (“Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.”).

⁷ Competition Commission of India, Advocacy Series, Provisions Related to Cartels, (2020), https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/cartel%20book.pdf.

⁸ The Competition Act, 2002, §2(b) (India) (““agreement” includes any arrangement or understanding or action in concert,—

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;”).

⁹ The Competition Act, 2002, §2(h) (India) (““enterprise” means a person or a department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space;

Explanation.—For the purposes of this clause,—

(a) “activity” includes profession or occupation;

(b) “article” includes a new article and “service” includes a new service;

(c) “unit” or “division”, in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;”).

¹⁰ These factors are as follows:

- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

agreement has an appreciable adverse effect on competition under Section 3.¹¹ The two types of agreement that can be anti-competitive in nature having appreciable adverse effect on competition, as per the Act are Horizontal Agreements under Section 3(3) and Vertical Agreements under Section 3(4).

According to Section 3(3) of the Competition Act, 2002, certain horizontal agreements are assumed to be anti-competitive as they would create an appreciable adverse effect on the competition. Such horizontal agreements also leads to cartels. In reference to the case of *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors. (Case No. 03/2009)*, it can be argued that this presumption regarding certain horizontal agreement being anti-competitive in nature, can be rebuttable. In this case¹² the Competition Commission of India (CCI) held that presumption about an agreement having appreciable adverse effect on competition can be rebutted by the parties involved in such arrangement or agreement, provided that they are able to justify and prove that the conduct and market behaviour of the parties were in favour of competition and does not have an appreciable adverse effect on competition in India. The onus of proving the presumption false will fall upon the parties accused of entering into such alleged anti-competitive agreement. The only exception to such presumption is in case of joint ventures, entered into through horizontal agreements that enhances efficiency in production, distribution, supply, storage, acquisition or control of goods or provision of services, and such agreements will be assumed to not have an appreciable adverse effect on competition in India.

In accordance to Section 3(3), it can be summarized that horizontal agreement can be further divided into the following types:

1. Price Fixing Agreements [Section 3(3)(a)]
2. Limiting or controlling – production, supply, market, technical development, investment, or any provision of service [Section 3(3)(b)]
3. Allocation of area or market [Section 3(3)(c)]
4. Bid-rigging or Collusive bidding [Section 3(3)(d)]

¹¹ Rajat Sethi & Simran Dhir, Anti-Competitive Agreements under the Competition Act, 2002, 24 NLSIR. 35, 32-49 (2013).

¹² *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors. (Case No. 03/2009)*

5. Cartels [defined under Section 2(c)]

By the virtue of Section 3(4) of the Competition Act 2002, vertical agreements causing appreciable adverse effect on competition in India is prohibited. The vertical agreements are agreements between enterprises or businesses which are at different level of production chain in different markets for goods or services. The Section provides for different types of vertical agreements that may cause appreciable adverse effect on competition. If any of the agreement so mentioned in the Section is presumed to cause such effect, then it would be considered to be in contravention of Section 3(1) and attract penalties under the Act. The different types of vertical agreements as per Section 3(4) are:

1. Tie-in arrangements¹³ [Section 3(4)(a)]
2. Exclusive supply agreement¹⁴ [Section 3(4)(b)]
3. Exclusive distribution agreement¹⁵ [Section 3(4)(c)]
4. Refusal to deal¹⁶ [Section 3(4)(d)]
5. Resale price maintenance¹⁷ [Section 3(4)(e)]

Section 3 is not restrictive in nature only, it also provides for exception to the prohibitions under Section 3(5). The Act under the Section specifically provides certain agreements to be exempted from the ambit of being anti-competitive in nature irrespective of it causing appreciable adverse effect on competition. It has been provided to protect joint venture agreements that are generally made with the purpose of attaining better efficiency in multiple manufacturing processes like production, supply, distribution, storage, acquisition and control. This Section aims at promoting

¹³ The Competition Act, 2002, §3(4), Explanation (a) (India) (“*Tie-in arrangements*” include any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.”).

¹⁴ The Competition Act, 2002, §3(4), Explanation (b) (India) (“*Exclusive supply agreements*” include any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.”).

¹⁵ The Competition Act, 2002, §3(4), Explanation (c) (India) (“*Exclusive distribution agreements*” include any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.”).

¹⁶ The Competition Act, 2002, §3(4), Explanation (d) (India) (“*Refusal to deal*” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.”).

¹⁷ The Competition Act, 2002, §3(4), Explanation (e) (India) (“*Resale price maintenance*” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.”).

the interests of the consumer and benefit the economy by encouraging maintenance of healthy market economy, but at the cost of competition. Hence, firstly, Section 3(5) of the Act exempts agreements that safeguards the intellectual property rights of a person. If an agreement is entered into by a person to protect his intellectual property rights protected by the provisions of certain legislations mentioned under sub-clauses (a) to (f) of Section 3(5)(i), then such agreement would not be in the purview and in contravention of Section 3(1) of the Competition Act 2002. Therefore, such agreement under Section 3(5)(i) would not be considered to be anti-competitive in nature. Such agreements are commonly entered into for the protection of trademark and copyright infringement. Secondly, it exempts agreements, which are entered into for export related purposes exclusively for production, supply, distribution or control of goods or the provision of services, from the purview of Section 3(1) and 3(2) and not presumed to be anti-competitive agreements. Since India promotes economic growth as per its policies, it believes that such provisions will encourage participation of Indian enterprises in foreign market and therefore bars such agreement from being anti-competitive in nature.

The anti-competitive agreements cannot be traced down easily as they are a consequence of continuous transactions in the course of trade and are seldom put down into writing formally. These commence by the way of concerted action that determines the effect and nature of the agreement as being anti-competitive. The effect or nature of the agreement is not determined depending on it being a formal arrangement or in writing. By the virtue of Section 3(3), the Competition Act 2002 recognizes “Cartels” as being detrimental to competition in India. The cartels can be in any sector like sugar, tobacco, cement, gas cylinders, etc. The CCI inquiries into such Cartels as per Section 19(1) which lays down the procedure for the initiation of the process of inquiry into an anti-competitive agreement.¹⁸ Cartels are a classic anti-competitive agreement, which is hard to trace and investigation into them can be difficult as evidence is not easily traceable.

¹⁸ T. RAMAPPA, COMPETITION LAW IN INDIA 20 (Oxford University Press, 2nd ed. 2009).

Cartel

Cartels are agreements between businesses that are supposed to ordinarily compete with each other, but for the sake of mutual benefit or restrict competition, they reach a mutual agreement on price fixing, production targets, market strategies, and bid rigging that causes appreciable adverse effect on competition.¹⁹ The collusive agreement between the cartel members aim to increase and mutually benefit them by reducing competition in the market by way of price fixing, bid rigging or allocation of territories and by agreeing on matters like total industry output, market shares, establishment of common sales agencies and the division of profits or arrangement of these. They are prominent in oligopolistic markets, wherein there is a mix of small market players as well as big dominant players, usually involving homogeneous products.²⁰ These cartels have a formal understanding; however they hardly leave behind any paper trail or evidence which can be traced back to them. Therefore, identification and deforming cartels becomes difficult as it is seldom easy to prove existence of these cartels.²¹ All the regulatory bodies for competition puts relentless efforts to control formation of cartels as they are one of the most harmful anti-competitive activity that businesses and corporations can carry on which leads to increase in price, reduction in competition and detrimental to consumer interests in the market, thus affecting the economic activities.

The competition regime in India encompasses regulations for cartels under the Competition Act 2000. Section 2(c) of the Act defines cartels as an agreement among an association of producers, sellers, distributors, traders, or service providers, who agree to limit, control, or attempt to control any production, distribution, sale or price of goods and services to consumers in a market.²² The Organization for Economic Cooperation and Development (OECD) explained cartels as “*An anti-anticompetitive agreement, anti-competitive concerted practice, or anti-competitive arrangement*”

¹⁹ Yash Vardhan Garu & Kashish Harwani, Crisis Cartels and State Aid: An Alternative to Competition Authority During COVID-19 Pandemic, SCC BLOG (Aug. 10, 2021), <https://www.sconline.com/blog/post/2021/08/10/crisis-cartel/>.

²⁰ Divakara Babu Chennupati & Rajasekhara Mouly Potluri, A Viewpoint on Cartels: An Indian Perspective, 53 IJLM. 252, 252-261 (2011).

²¹ R.S. Khemani & D.M. Shapiro, Glossary of Industrial Organization, Economics, and Competition Law, OECD, Paris (1993).

²² The Competition Act, 2002, §2(c) (India) (“*“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*”).

*by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce”.*²³

Section 3 of the Competition Act 2002 dealing with anti-competitive agreements includes cartel regulation. It can be derived by reading Section 3(1) with Section 3(3), which deals with horizontal agreements that are anti-competitive in nature. Section 3(3)²⁴ states that an agreement will presume to have an appreciable adverse effect on competition, which:

- a) determines purchase or sale prices directly or indirectly;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) allocation of geographical market or goods or services or customers in a market
- d) directly or indirectly results in bid rigging or collusive bidding.

The Competition Act 2002 makes presumptions with regard to the formation of cartels and their regulation under the Act. As per the Act, the formation of cartels is deemed to be a result of an agreement between the involved parties that is presumed to have an appreciable adverse effect on competition. The presumption is made on the basis that the inherent nature of the cartels is to harm consumers, reduce competition in the market and create entry barriers for new players. Additionally, the lack of formal agreement in writing and concrete evidence makes investigation by authorities under the Act extremely tedious and complex. The parties involved also use price parallelism as a defence for such anti-competitive behaviour, thus creating more hindrances for the regulatory authorities. Therefore, the legislators for competition law presume cartels to have an appreciable adverse effect on competition.²⁵

Generally, the objective of competition law is to promote, maintain and sustain competition in the market that will be advantageous for the market players and consumers in a competitive market.

²³ Organization for Economic Cooperation and Development (OECD) Reports 2000 <https://www.oecd.org/competition/cartels/2752129.pdf>.

²⁴ The Competition Act, 2002, §3(3) (India)

²⁵ Divakara Babu Chennupati & Rajasekhara Mouly Potluri, A Viewpoint on Cartels: An Indian Perspective, 53 IJLM. 252, 252-261 (2011).

Cartelization hinders into the objective of competition law because the competitors in a market agree to relinquish the competition and work together to collude against certain market players or consumers, consequentially affecting the competition in the market. The distinct feature of a cartel is its secretive nature of cartels that makes its detection and identification extremely complex. The sole mean of detection of such cartels is thereby the way of insider information by one of the members to the cartel for prosecution and deterrence of cartels. The investigative agencies gets information and uses them as evidence to expose cartels. This method of detection of cartels by the regulatory authorities is known as the leniency programme. It has been designed to promote deterrence against cartelization by encouraging the members of the cartel to provide information and evidence to the authorities in exchange for the benefit of substantial immunity from the consequences of prosecution.²⁶

Cartelization & Leniency Programme in India

The existence of “*hard core cartels are the most egregious violation of competition law*”.²⁷ The leniency programmes come into play for the detection, investigation, and regulation of anti-competitive practices such as hard core cartels. The leniency programmes deals with regulation and detection of cartels by offering substantial reduction or exemption in penalties to the informant, in exchange for cooperation and information about cartels. This makes detecting cartels easier and hinders with their functioning because benefits of leniency will be granted to only the first applicant.²⁸ The leniency applicant aids the investigation and prosecution of members of a cartel by providing actual evidence, that maybe otherwise difficult to procure by the investigative authorities. These programmes prompts the applicants to provide useful information on formation and existence of cartels for subsequent investigations, in lieu of immunity from the penalties or lesser penalties.²⁹

²⁶ Sneha Singh, Impact of Leniency Programs on Cartels: A Study with Reference to India (May 1, 2020), <https://ssrn.com/abstract=3595143>.

²⁷ ICN Working Group on Cartels, Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties (1998).

²⁸ Deepankar Sharma, Dimensions of Leniency Policies in BRICS: A Comparative Analysis of India, South Africa, Brazil, and Russia, 3 BRICS LJ., 201-223 (2016).

²⁹ Sneha Singh, Impact of Leniency Programs on Cartels: A Study with Reference to India (May 1, 2020), <https://ssrn.com/abstract=3595143>.

Cartelization is one of the most severe violation of provisions of Competition Act 2000 in India. The Competition Commission of India (Lesser Penalty) Regulations, 2009, and the Amended Regulations, 2017, states the provisions for the leniency programme, wherein leniency is afforded in exchange of information to the cartel members, confessors or conspirators, whoever being the first applicant to aid the Competition Commission of India to penalize cartels. As the cartels and information related to it are highly secretive and guarded, therefore leniency programmes are seen as an easy approach to get authentic information from internal sources to uncover cartels in India.

The Competition Commission of India (CCI) has been vested with the power to impose lesser penalties on any informant, disclosing crucial information, substantial for further investigation on any alleged violation of Section 3 of the Competition Act 2002. The leniency programme as per the provisions of the Act provides that the CCI will impose lesser penalty than prescribed under the Act, if full and true disclosure is made regarding alleged violation of Section 3 of the Act, which relates to cartels.³⁰ The first applicant to the leniency programme will be given lesser penalty provided that the following conditions³¹ are fulfilled, which are:

- a) CCI has to be satisfied that full and true disclosure of information has been made regarding alleged violation of section 3 of the Act by the producer, seller, distributor, trader or service provider, who are involved in the alleged cartel;
- b) The disclosures made are major and concrete, showing existence of a cartel;
- c) The disclosures to the CCI have been made before the receipt of investigation report directed under Section 26 of the Act³²;
- d) There is complete and continued cooperation from the person making the disclosure to the CCI till completion of proceedings under the Act;
- e) The producer, seller, distributor, etc. making such disclosure must be included in the cartel and has made the full, true and vital disclosures under the Section;
- f) The producer, seller, distributor, etc. making such disclosure has made no false or incorrect disclosures and has complied with all the conditions as provided, on the basis of which lower penalty can be imposed by the Commission.

³⁰ S.M. DUGAR, GUIDE TO COMPETITION LAW 1072 (Lexis Nexis Butterworths Wadhwa, 5th ed. 2010).

³¹ The Competition Act, 2002, §46(1) (India)

³² The Competition Act, 2002, §26 (India)

Section 46 of the Competition Act 2002 empowers the Competition Commission of India to impose lesser penalty and enforce a leniency programme. It authorizes the CCI to impose lesser fines on the person making any disclosure as provided under the Section. The provision for lesser penalty and leniency programme will be applied on “*any producer, seller, distributor, trader or service provider included in any cartel*”, on the condition that the Commission is satisfied that the disclosure made is full, true and vital for uncovering the alleged cartel. The application for such disclosure are submitted to the Commission, either in writing or orally, for lesser penalty. In order to implement this leniency programme effectively, Section 64 of the Act allows the CCI to introduce any regulations or rules for carrying out the purpose of the Act. The Commission, therefore proposed the Competition Commission of India (Lesser Penalty) Regulations, 2009 to lay foundation for leniency programme in India. The Commission also has the power to reverse or dismiss the lesser penalty if it is satisfied that the conditions given under the Act are not fulfilled and there was false disclosure of information regarding a cartel. It can impose penalty on the members of the cartel responsible for making such false disclosure, who were initially escaping liability by using the leniency scheme. Therefore, by way of the leniency scheme, the CCI gets a huge amount of power and autonomy over controlling cartelization in India.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 provides for a proper framework for the implementation of Leniency Programme in India, upon which the CCI can impose lesser penalties than it is mentioned in the Act. The information disclosed for lesser penalty to the CCI or Appellate Tribunal has to be kept confidential and is not be disclosed unless the Act or any other law at the time in force requires to do so. In case, such disclosure has to be done, the enterprise shall be notified and prior permission is to be taken. As per Section 53A of the Act, appeal can be made against any direction or order made by CCI to the Competition Appellate Tribunal.³³

CCI & Leniency Programme in India

The CCI passed its first final order related to leniency programme in 2017, wherein it interpreted the provisions of leniency contained in the Competition Act 2002 and Competition Commission

³³ The Competition Act, 2002, §53A (India)

of India (Lesser Penalty) Regulations, 2009.³⁴ Since then the CCI has passed many orders pertaining to lesser penalty and widened its spectrum to various sectors like auto-parts, conveyor belts and pharmaceuticals, etc.³⁵ In the case of *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, 2017*³⁶ the CCI passed its first final order pertaining to leniency scheme in India. In this case, penalty was imposed on three companies by CCI, namely, M/s Pyramid Electronics (“Pyramid”), M/s R. Kanwar Electricals (“Kanwar”) and M/s Western Electric Trading Company (“Western”) for the violation of the provisions for the Act, by the way of bid rigging. The leniency in penalty was granted to Pyramid by the CCI for about 75% reduction in total penalty levied, for turning into an approver for CCI. Being the first applicant, a complete reduction in penalty was not granted to Pyramid because it approached CCI at the stage after investigation was initiated.

In *Cartelization in respect of zinc carbon dry cell batteries market in India*,³⁷ the parties were manufacturer of dry cell batteries on a contractual basis, however afterwards they made an agreement, expressly mentioning that they would not compete against each other. Herein, the first applicant for the leniency programme was granted 100% reduction in penalty by the CCI. In the case of *Cartelization in respect of zinc carbon dry cell batteries market in India v. Eveready batteries India Pvt Ltd & Others*,³⁸ the three cartel companies involved were granted leniency as they approached the CCI requesting for lenient treatment to the exclusion of the association. The benefit of leniency was granted to a certain extent to Eveready Industries Ltd. and Indo National Ltd. And their office bearers and complete immunity was granted by CCI to Panasonic Energy India Co. Ltd. as the investigation began at the precept of the disclosure made by Panasonic.

In the case of *Nagrik Chetna Manch v. Fortified Security Solutions and others*,³⁹ six cartel members applied for leniency, wherein four of them were granted leniency by the CCI. This was a case of proxy bidding, where there were multiple parties who acted as proxy bidders to

³⁴ Sneha Singh, Impact of Leniency Programs on Cartels: A Study with Reference to India (May 1, 2020), <https://ssrn.com/abstract=3595143>.

³⁵ The curious case of leniency under the Competition act, 2002 in India, www.mondaq.com.

³⁶ Case no. 03 of 2014, Order dated 18.01.2017.

³⁷ Case no. 02 of 2016, Order dated 31.08.2016.

³⁸ Case no. 02 of 2016 Order dated 19.04.2018.

³⁹ Case no. 05 of 2015. Order dated 01.05.2018.

manipulate the bid, however, they were not actually present in the relevant market. The first applicant got 50% reduction in the penalty depending on the stage they came forward. In another case of *Anti-competitive conduct in the dry-cell batteries market in India*,⁴⁰ an investigation was initiated by the Commission on a bi-lateral ancillary cartel, due to a leniency application of Panasonic. The cartel was between a controlled entity of Panasonic in India and another battery manufacturer with regard to institutional sales. It was held that there was an existence of a cartel and 100% leniency was granted to Panasonic and Godrej and Boyce Manufacturing was penalized in this case.

It can be easily concluded by analysing these orders that leniency programme in India has been efficiently used by the CCI to expose cartels and ensure that the competition in the market is well regulated. However, the only concern that arises is the confidentiality that is to be maintained in such cases. It was observed that these orders passed by the CCI lacked confidentiality to the extent that details about parties involved, modus operandi and individuals involved were revealed that led to severe harm to the reputation and personnel of the companies involved. This can be a major drawback for leniency programme as lack of confidentiality can discourage applicants from giving information to the CCI about cartels. Therefore, it is pertinent that for effective and efficient implementation of leniency programme, a rational method of publication of non-confidential final order be adopted by the CCI, which restricts giving out too much information about the applicant and thus breaches confidentiality.⁴¹

Conclusion

Cartelization is one of the most significant issues faced by the Competition authority in India. Although, legal framework for competition in India has set up a stout leniency programme in India to combat the formation of cartels in the market, yet it has to go a long way to completely eradicate the issue. There are several scope of improvement in the programme, specifically with regard to detecting cartels. It not only requires stricter legal framework, but also stronger penal provisions for hard-core cartels. The new development of lesser penalty plus also gives hope for increased

⁴⁰ Case No. 03 of 2017. Order dated 15.01.2019.

⁴¹ Sneha Singh, Impact of Leniency Programs on Cartels: A Study with Reference to India (May 1, 2020), <https://ssrn.com/abstract=3595143>.

probability of detecting and investigating cartels more effectively by the CCI. However, the fight against cartelization still requires better ammunition from the CCI's end. Even though CCI empowered to take decisions regarding matters of cartels, thus it has to promote leniency programme efficiently to ensure that cartel members are confident to come forward with true and vital disclosures. The CCI has to build trust and lay good foundation of the leniency programme to ensure that it is working competently to detect and dismantle cartels. Although, the CCI has come a long way, yet it has a long way to go to regulate cartelization in India. The development of lesser penalty plus is the first step towards better competition laws for regulating cartelization.

