

Unraveling Antitrust Leniency: An Analytical Study on Recent Effectiveness Patterns

Sabin Tiwari* & Asmita Tiwari**

Abstract

Cartel formation threatens consumer welfare, innovation, and competition. Their clandestine nature makes practices such as price-fixing, market allocation, bid rigging, and exchange of sensitive information difficult to detect unless members betray partners. Leniency programs, offering immunity in return for disclosure, have emerged as key enforcement tools. However, OECD statistics show a decline in applications between 2015 and 2023, raising concerns of overuse, abuse, and reduced deterrent value. Critics caution that excessive leniency weakens sanctions, even for repeat offenders, and may overshadow alternatives such as whistleblower mechanisms. This paper analyzes the downward trend in leniency applications, particularly through 2023, from psycho-economic and legal perspectives. It evaluates effectiveness in cartel detection and explores innovations such as leniency inflation, leniency plus, and private enforcement actions applied globally. Further, it examines non-leniency tools and the compatibility of leniency with settlement frameworks, as reflected in recent proposals to amend India's competition law. References to Indian jurisdiction are included to illustrate settlement, leniency plus, and confidentiality aspects. Although anchored in the decline observed until 2023, recent OECD data from 2024 suggests a resurgence of leniency in certain jurisdictions, potentially reflecting renewed trust or early impacts of institutional reforms. This study therefore offers a timely, multidimensional assessment of leniency regimes, contributing insights into their evolving effectiveness amid shifting global enforcement patterns.

Keywords: *Leniency Inflation, Leniency Plus, Private Enforcement, Confidentiality of Information, Reward, Sanctions, Imprisonment*

I. Conceptual Development of Leniency

Leniency tools used in combating cartels can be understood as a reduction of penalties in lieu of information provided against the cartels. Leniency Programs are an effective measure under cartel penalty regimes and are regarded as a significant reactive detection tool that aids in detecting

* Sabin Tiwari is an Advocate specializing in Corporate and Business Law, a Partner at Lekhnath Lawyers Associates, and an Assistant Professor at Gandaki University, Nepal. The author can be reached at stiwari@reasonouslaw.com

** Asmita Tiwari is an Advocate specializing in Corporate and Business Law, a Partner at Lekhnath Lawyers Associates, Pokhara, and a Lecturer at Prithvi Narayan Campus, Tribhuvan University, Nepal. The author can be reached at email2atiwari@gmail.com

a cartel.¹ For example: in law enforcement, offering leniency to a suspect who provides valuable information reacts to a crime already committed, facilitating detection of broader criminal activity. Unlike proactive tools, which focus on preventing issues through foresight (e.g., surveillance or strict regulations), leniency operates after the fact, leveraging flexibility to address and resolve situations while potentially uncovering hidden details. As a prominent tool, it brings information that exposes secret anticompetitive compacts to the notice of competition authorities. Thereby, it aids in their effective detection and prosecution.² Accordingly, destabilization of agreement occurs as internal trust breaks among the cartel members.³ On the flip side, it provides immunity to the cartel member who is first to admit the liability and cooperate with the authorities. Here, the main aim is to create a race of confession.⁴ The application of leniency tool offers the benefits like: detection, deterrence, sanctioning, cessation and co-operation.⁵

The leniency programs have roots on pioneer laws that aimed to establish and prevent the free and unfettered market.⁶ The US created the first antitrust leniency program⁷ and this policy of 1978 was the consequence of the unusual and unexpected requisition made to the “*antitrust division*” by one of the titans of the anti-trust bar. This gave the division the evidence which owed to substantial proof of the cartel activity in a major industry that was not in the information of the division. In lieu of this, the division deferred from prosecuting the company along with its executives. Accordingly, there were no charges, sentences and no prima facie effect in civil damage actions. This became the mode of acceptance of terms of first leniency policy in the US by division.⁸ However, the effectiveness was realized only after its reformation in 1993.⁹ Thus, the initiation and consequently the development¹⁰ has now expanded to every jurisdiction. Concerning the application of it in the US, thereby creating the race among the conspirators, the leniency is granted after deciding upon the who informed first. It means, “*the race for the one leniency grant can sometimes be decided by hours.*”¹¹ This situation becomes

¹ Vincent S. Abraham & Catarina Marvao, ‘Leniency of the Competition Commission of India’, *Working Paper*, Competition Commission of India, 2022, p. 18, available at <https://www.cci.gov.in/public/images/economicconference/en/paper-on-leniency-of-the-competition-commission-of-india1663219827.pdf>, accessed on 24 January 2024; Also see, ‘OECD Competition Trends 2022’, OECD Publishing, Paris, 2022, p. 38, available at <https://web.archive.oecd.org/2022-03-21/624967-oecd-competition-trends-2022.pdf>, accessed on 31 January 2024.

² ‘The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels’, *Policy Paper No. 299*, OECD Roundtables on Competition, 2023, p. 9, available at <http://www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf>, accessed on 21 January 2024.

³ *Ibid*, p. 6.

⁴ ‘Anti-Cartel Enforcement Manual: Searches Raids and Inspections’, *International Competition Network*, 2009, pp. 1-51, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMSearchesRaids.pdf, accessed on 28 January 2024.

⁵ ‘Anti-Cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Policy’, *International Competition Network*, 2014, pp. 4-5, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf, accessed on 28 January 2024.

⁶ *The Sherman Antitrust Act*, 1890, United States of America.

⁷ Joan-Ramon Borrell, Juan Luis Jiménez & Carmen García, ‘Evaluating Antitrust Leniency Programs’, *Journal of Competition Law & Economics*, volume 10:1, 2014, p. 107-136, available at <https://doi.org/10.1093/joclec/nht017>, accessed on 22 January 2024.

⁸ Donald C. Klawiter, ‘The U.S. Corporate Leniency Policy: It is Time for a Renaissance’ *Antitrust Chronicle*, volume 1:2, 2019, p. 1-7, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/01/CPI-Klawiter.pdf>, accessed on 22 January 2024.

⁹ Joan, Juan & Carmen (n 7), pp. 107-136.

¹⁰ *Ibid*

¹¹ John D Buretta & John Terzaken, ‘Spotlight: cartel leniency programmes in USA’, *Lexology*, 2023, available at <https://www.lexology.com/library/detail.aspx?g=1677ceca-f5d4-4f65-b5ee-b9c51dadbb24>, accessed on 22 January 2024

pertinent when the conspirators involved in the cartel know that the alleged agreement is on the verge of collapse. In the US, the leniency is granted to only one party in each conspiracy by the division.

The European Commission (“EC”) adopted it in 1996.¹² Prior to the introduction of leniency programs in the European Union, the Commission faced significant challenges in obtaining clear evidence to confirm the existence of cartels.¹³ Thus to decide on the existence of cartelization by going through the voluminous files requiring more time, the General Court was preferred.¹⁴ Later, the application of program was expanded due to enactment in all continents.¹⁵ Concerning its application in the EU, a leniency applicant who successfully fulfilled the purpose of the program, can either get exemption from the potentially high fine or can get substantial reduction from the fine.¹⁶

II. Psycho-Economic Perspective of Leniency

There exists psycho economic reasonings behind introducing leniency in detecting cartels. Firstly, it can be agreed that cartel members are initially competitors, who later agreed to manipulate the market competition at the cost of consumers for the sake of their benefits. So, there is always a risk existing where each of them fears that one of them may report the competition authorities to offer itself leniency and let others suffer the cost of the detection and penalty more than it gets. Thereby, leniency makes the cartel membership appear less attractive.¹⁷ Accordingly, there is a high chance of reporting of a cartel sooner or later. This situation is beneficial to the competition authorities to obtain the insider information that was circulated and abided under the cloak of secrecy. Additionally, the exposure of secrecy by one or concerned cartel members desegregates the unison of cartelization and re-builds the environment of rivalry where they start treating each other as their competitors again. Thus, leniency program gives legitimate forum to cartel members to cheat over their arrangement and cooperate with antitrust authorities where they are legitimately granted exemption from probable penalties in lieu of provided information.

From an economic perspective, companies involved in collusion are more likely to report themselves under leniency programs when they believe there is a real risk of being investigated by antitrust authorities. This tendency becomes stronger when the financial penalties for being caught are greater than the profits they expect to earn from colluding. In such cases, the threat of punishment acts as a deterrent. However, a major challenge in enforcing cartel laws is that many firms believe they will not be caught. Even if they are, they often expect the penalties to be less than the profits made from the collusion. This belief weakens the effectiveness of leniency programs and leads to a situation where the incentive to continue colluding is stronger than the incentive to self-report.¹⁸

¹² Ibid

¹³ Ioannis Lianos, Valentine Korah & Paolo Siciliani, *Competition Law, Analysis, Cases and Materials*, Oxford University Press, United Kingdom, 1st edition, 2019, p.1445.

¹⁴ Ibid

¹⁵ Joan, Juan & Carmen (n 7), pp. 107-136.

¹⁶ ‘Antitrust: Commission provides guidance on its leniency policy and practice, European Commission’, *European Commission*, Press release, Brussels, 25 October. 2022, available at https://ec.europa.eu/commission/presscorner/api/files/document/print/%20en/ip_22_6373/IP_22_6373_EN.pdf, accessed on 18 January 2024.

¹⁷ ‘Drafting and implementing an effective leniency policy’, *International Competition Network*, Anti Cartel Enforcement Manual, April 2014, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACENLeniency.pdf, accessed on 28 January 2024.

¹⁸ Vincent & Catarina (n 1)

III. Legal Framework of Leniency in India

Concerning competition law regime of India, Section 46 of Competition Act 2002 provides about leniency provision as “Lesser Penalty”. Leniency can be invoked only in respect to cartel conduct i.e. conducts which are in violation of section 3(3) of the Act.¹⁹ Alongside, the legal provisions in relation to the leniency has been amended vide 2023 amendment act.

The inception of Leniency policy in Competition laws of India was made in 2009. However, the application started only in 2017.²⁰ *In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, the Competition Commission of India (“CCI”) invoked leniency where 75% of total punishment was reduced for the first time to one of the parties to cartel. Here, complete immunity was not granted as the first applicant assisted the Commission only after the investigation had already started.²¹

Thereunder, the firm or individual who reports about the cartel and provides the information thereof is granted reduction in fines but which can extend to immunity as well. This immunity from fines is not granted to first leniency applicants given that the additional information that such a cartelist provides matters in addition to the information that the CCI already has about the cartelist.²² Out of Fifty-seven sample studies of cartel cases taken from 2011 to 2021, only eleven were concerned with the leniency application and where leniency was granted.²³

The Section 46 of the Competition Act 2003 and the recent CCI (Lesser Penalty) Regulations, 2024 are regulatory laws of Leniency in India. The substantive provision requires following threshold for qualification of lesser penalty in the Cartel offense:

- a) full, true, and vital disclosure;²⁴
- b) disclosure as such is to be made before the investigation report is received under section 26;²⁵
- c) significant value addition to the evidence requirement²⁶
- d) continued cooperation in disclosure until the completion of proceeding²⁷

The above stated conditions are to be further substantiated by:

- a) abstained participation in cartel activity after disclosure by the applicant²⁸

¹⁹ ‘FAQs on Lesser Penalty Regime’, *Competition Commission of India*, available at <https://www.cci.gov.in/images/whatsnew/en/faqs-on-cci-lp-regime1708500979.pdf>, accessed on 24 March 2024.

²⁰ Ibid

²¹ *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items v. Unknown*, 2017, Competition Commission of India, Suo Motu Case No. 03 of 2014, available at <https://indiankanoon.org/doc/185834463/>, accessed on 22 January 2024.

²² Vincent & Catarina (n 1)

²³ Ibid

²⁴ *The Competition Act*, 2002, India, s. 46.

²⁵ Ibid

²⁶ Joseph J. Bial et al., ‘Cartels & Leniency Laws’, *The International Comparative Legal Guides*, United Kingdom, 18th edition, 2025, pp. 1-10, available at https://www.actecon.com/media/files/ICLG_Cartels_and_Leniency_2025_18th_edition_1.pdf, accessed on 22 January 2024.

²⁷ *The Competition Act* (n 24).

²⁸ *The Competition Commission of India (Lesser Penalty) Regulations*, 2009, India, s. 3(1) a.

- b) genuine, full, continuous and expeditious cooperation²⁹
- c) abstain from concealing, destroying, manipulating or removing any relevant document in any manner which contributes to the establishment of the cartel.³⁰

Reduction of monetary penalty with respect to detected cartel are affected by certain factors like:

- a) *“a 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 case.”*³¹

Similarly, granting advantages of reduction of penalty is at the discretion of the CCI. This is reflected in Section 4 of the Regulations, which provides for three tiers of leniency i.e. 100%, 50%, and 30% reduction in penalties, depending on the applicant's level of cooperation and the value of evidence furnished to the CCI. Accordingly, the applicant who is first to help the investigating authority of CCI to form the *prima facie* evidence on cartel existence or the first applicant who is able to make vital disclosure on contravention of section 3 of the act on the case after the investigation has already started, it can be granted 100% of Leniency in penalty.³² For significant value added to the evidence already in possession of the investigating authority, the applicant is granted up to 50 % of leniency in penalty. Accordingly, for the third applicant depending on the level of cooperation he offers to the investigating authority, it is granted up to 30% of reduction.

Regarding who can be availed the facility of lessor penalty, the Competition Amendment Act, 2007 amended the requirement of first informer and mandated anyone involved in cartel who can make the *“full, true and vital disclosures”* under the section³³ could be availed as such. Thereby it widened the scope of the facility to incorporate many informers. It is thus perceived that allowing more than one applicant would lead to creating a rolling effect where the first informer propels others to join the race effect.³⁴

IV. Leniency in Competition Adjudication in India

The Lesser Penalty Policy, introduced in India in 2009 under the Competition Act, allows cartel members to receive reduced penalties in exchange for cooperation with the Competition Commission of India (CCI) in uncovering cartel activities. However, its first application occurred in 2017 in the Brushless DC Fans case,³⁵ reflecting a significant eight-year gap between enactment and implementation. This delay has been attributed to the CCI's lenient approach, characterized as a form of clemency, which may have discouraged cartel members from applying for leniency. The relatively mild sanctions

²⁹ Ibid, s.3(1) d.

³⁰ Ibid, s.3(1) e.

³¹ Ibid, s.3(4).

³² Ibid, s.4(a).

³³ The Competition Act (n 24).

³⁴ Somashekar T.S. & Praveen Tripathi, 'Cartel leniency programme in India—why no race here?', *Journal of Antitrust Enforcement*, volume 12:3, 2024, available at <https://doi.org/10.1093/jaenfo/jnad048>, accessed on 30 January 2024.

³⁵ Avaantika Kakkar, Sagardeep Rathi & Arunima Chatterjee, 'Competition Commission of India grants leniency for the first time', *mondaq*, 24 January 2017, available at <https://www.lexology.com/library/document?>, accessed on 6 June 2025.

imposed by the CCI were perceived as resembling a “civil penalty metric,”³⁶ reducing the incentive for cartel members to seek leniency and risk detection. Additionally, insufficient advocacy and awareness of the Lesser Penalty Policy likely contributed to its delayed uptake, as potential applicants may have been unaware of or lacked confidence in the program’s benefits. factors.³⁷ With the amendment in competition act, leniency plus has been incorporated seeking to make leniency more attractive for cartelists.

In context of India, before giving effect upon the leniency application, analysis of information and cooperation is made holistically where, the reliability, the level of cooperation, accuracy of the information that is enough to substantially establish the cartel, significance of the information i.e. whether the information exposes the grave and extreme cartel cases etc. are observed. Analyzing the fulfillment of these parameters, the CCI, In *Re: Cartelization in the supply of Protective Tubes to Indian Railways case*, ordered as such:

Opposition Party number 4, i.e. OP-4 extended “*genuine, full, continuous, and expeditious co-operation throughout the investigation along with that during the subsequent proceedings conducted by the Commission. Accordingly, it was granted 100% reduction in the penalty amount imposed upon them.*”³⁸

Similarly, in *Re: Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products et.al* (cartelization in bidding process case) where one of the individual members had applied as first applicant for leniency after the investigation had started, the Commission held that, it was eligible for only 80% of leniency even though he assisted the CCI through “*full and true disclosures of information and evidence and continuous cooperation*” as the first applicant. However, the commission was of the ratio that the cooperation upon the evidence was made after initiation of the investigation.³⁹

The requirement of value addition to the evidence collected as discussed earlier was invoked in a reference case filed by Nagarik Chetana Manch as an informant to anticompetitive bidding case. In the case, the Commission viewed and decided that even though one of the opponents who sought leniency undoubtedly supported and cooperated with the investigation throughout along with accepted the information which indicated the *modus operandi* of the case, the all actions could not make “*significant value addition*” to the already acquired evidence. Thus, despite the cooperation with the authority in regard to helping with evidence under its possession, it could not receive the benefit of leniency.⁴⁰

Similarly, in response to appeal in *In Re: Alleged anti-competitive conduct in the Beer Market in India v. United Breweries Limited and et.al*,⁴¹ the National Company Law Appellate Tribunal (NCLAT) upheld the Competition Commission of India’s (CCI) order penalizing leading beer manufacturers—

³⁶ Vincent & Catarina (n 1).

³⁷ Ibid

³⁸ *Problems And Miseries of Migrant Laborers v. Union of India*, Supreme Court of India, 2020, Suo Motu Writ Petition (Civil) No. 06 of 2020, available at <https://indiankanoon.org/doc/97877056/>, accessed on 28 January 2024.

³⁹ *Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and ors.*, Competition Commission of India, Reference Case No. 03 of 2018, available at <https://www.cci.gov.in/images/antitrustorder/en/0320181652428035.pdf>, accessed on 28 January 2024.

⁴⁰ *Nagrik Chetna Manch v. Fortified Security Solutions and ors.*, Competition Commission of India, Case No. 50 of 2015, available at <https://cci.gov.in/antitrust/orders/details/732/0>, accessed on 22 January 2024.

⁴¹ *Alleged anti-competitive conduct in the Beer Market in India v. United Breweries Limited and ors.*, Competition Commission of India, Suo Motu Case No. 06 of 2017, available at <https://www.cci.gov.in/images/antitrustorder/en/0620171652430028.pdf>, accessed on 12 June 2025.

Anheuser Busch InBev SA/NV (AB InBev), United Breweries Limited (UBL), Carlsberg, and their association (AIBA)—for cartelization in beer supply across various Indian regions. The investigation was triggered by a leniency application from AB InBev, followed by applications from UBL and Carlsberg. The CCI imposed penalties at 2% of the beer companies' turnover and 3% of AIBA's, granting AB InBev full penalty reduction, UBL 40%, and Carlsberg 20% under the leniency program. UBL, AIBA, and Carlsberg's office-bearers challenged the CCI order before the NCLAT, arguing the absence of a judicial member in the CCI, lack of jurisdiction to initiate investigations based on leniency applications, and no cartelization due to state-regulated beer prices. The NCLAT rejected these arguments, affirming the CCI's authority, dismissing the need for a judicial member, and noting that UBL's leniency application implied guilt, precluding merit-based challenges. UBL appealed to the Supreme Court, which admitted the case in February 2023 and stayed the NCLAT order pending final disposal.⁴²

Few studies which have done holistic economic analysis of the leniency program in India have argued that the leniency system in India has been ineffective. This ineffectiveness is attributed to the inconsistent and seemingly arbitrary manner in which the Competition Commission of India (CCI) imposes penalties in cartel cases, thereby undermining the deterrent effect the program is intended to create.⁴³ The CCI faces challenges due to insufficient resources, operating with a workforce which is below the specified quota.⁴⁴ Additionally, the existing staff are short-term deputed manpower from other departments which hampers realization of learning economies⁴⁵ ultimately leading to delayed case disposal.⁴⁶ Resolving these issues is crucial for enhancing the efficiency of CCI's enforcement efforts.

V. Lesser Penalty Application and Breach of Confidentiality

In alleged anticompetitive bidding filed by Nagarik Chetana Manch, all the opponents later joined the race for confession. Where they confessed the *modus operandi* of their anticompetitive practice which violated section 3(3). This case involved proxy bidders who participated in the tender due to ineligibility of their cartel members also claimed over the breach of right protecting confidentiality under section Lesser Penalty Regulations. The contentions raised by the opponents was: the statements which they made before the investigating authority as non-confidential information was actually disclosed. Additionally, investigation report which contained such non confidential information was forwarded to the opponents and thus contributed to a breach of confidentiality under Lesser Penalty Regulation.

While contending against the arguments, the commission stated following:

- a) The claim of the OPs on reputational harm was not because the information was made disclosure in the investigation report of the DG, but rather the information was made public at large. Here recognizing the investigation report was not the public document and thus

⁴² Aditi Khanna, Ela Bali, Vaibhav Choukse & Yavipriya Gupta, 'Year in review: cartels and leniency in India', *Lexology*, 2024, <https://www.lexology.com/library/detail.aspx?g=7d455bbf-f0c7-4117-9369-048d9b8c3bd2>, accessed on 12 June 2025.

⁴³ Aditya Bhattacharjea & Oindrila De, 'Anti-cartel Enforcement in India', *Journal of Antitrust Enforcement*, volume 5:2, 2017, pp. 166-196, available at <https://doi.org/10.1093/jaenfo/jnx001>, accessed on 5th September, 2025.

⁴⁴ Somashekar & Praveen (n 34).

⁴⁵ Ibid

⁴⁶ Ibid

not to be shared to the public at large as provisioned by the rule 47 of the “Competition Commission of India (General) Regulations, 2009”. Similarly, it stressed out on the same provision and stated that, since there was no direction on making the proceedings public, the question raised by the OPs on account of sharing the report with the public is not even the question.

- b) The commission indicated the misconceived understanding of the OPs on the confidentiality provisions of the available under the Lesser Penalty regime. It clarified that while information submitted as part of a leniency application is eligible for confidentiality, any statements or evidence subsequently collected by the Director General (DG) during the investigation, though possibly based on or derived from the leniency application, are treated as independent evidence. Therefore, such evidence does not automatically enjoy the same confidentiality protections as the original leniency submission. The Commission held that the OPs’ claim for confidentiality failed to meet the requirements set out under Regulations 35(3) and 35(9) of the Competition Commission of India (General) Regulations, 2009, and thus could not be granted. On this case, as the record did not show that confidential treatment was sought by the OPs and nor the same was granted by the DG under the regulation, this situation became analogous to: Confidentiality treatment was neither sought nor it was granted. Thus, the Commission decided that such information was non confidential for the purpose of this particular case.
- c) Furthermore, it stressed on section 57 of the Act and decided that, even if the confidentiality is sought under the lesser penalty regulation and even if it is granted under section 35 of the General Regulation, the ultimate decision upon the issue is upon the commission under section 57 of the Act which states that commission can disclose the information for the purpose of the Act.⁴⁷

In this way, CCI held that the firstly parties had to apply for the invoking confidentiality of the such information and secondly, even if they apply it is at the discretion of the authority whether to grant the confidentiality, provided that the information becomes independent evidence to CCI at later stage.

VI. Emerging Trends

1. Changing Number of Leniency Application

The OECD jurisdictions have increased implementation of leniency programs. However, the report from 2015 to 2021 showed a declining number of leniency applications. The data submitted by 51 jurisdictions for the period of 7 years that provided complete leniency application data showed the drop of it by 58 %. The global trend of this decline over the period of 7 years is 65%. Considering the Asia Pacific region, the declining application from 2015 suddenly got at a spike in 2018 and again seems declining as of 2021 as per the study of 2022. However, the study shows the decline in 2020 and 2021 was not much different.⁴⁸ While some jurisdictions

⁴⁷ Nagrik Chetna Manch Case (n 40).

⁴⁸ *OECD Competition Trends 2022*, OECD Publishing, Paris, 2022, available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/02/oecd-competition-trends-2022_c266719c/a9c9f711-en.pdf, accessed on 25 January 2024.

showed resurgence of the applications like: Brazil, EU, Italy. Though the trends of declining leniency application are not indicative of success and efficacy of the leniency programs; they are supposed to indicate 2 major issues:

- a) Increasing reliance of competition authorities over other investigative tools or
- b) Increased deterrence in respect of committing cartel

Some of the reasons to declining application were mentioned as:

- a) *Lapse of time*,⁴⁹
- b) *General Deterrence and extreme reliance over the program*⁵⁰
- c) *Private Enforcement Action*⁵¹

Here, though the declining number is strived to be analyzed to test the effectiveness, the success or failure as such cannot be independently examined. The reason is, this analysis requires more qualitative data and in-depth analysis of the leniency cases rather than the surficial data provided by the member countries when asked. This fact has also been accepted by the OECD on this background note that the recent declining trend cannot give any distinctive conclusions on effectiveness or failure. However, it has suggested some measures to enhance the effectiveness.

Amidst the declining number since 2015 till 2023, OECD competition trend of 2024 showed the increasing number of leniency applications.⁵² The reasons for this increase as per OECD are: Cartel Ex -officio investigations, increased dawn raids post covid, increment in cartel bid rigging cases, decrease in cartel settlement etc. The possible reasons for the increasing number are yet to be discussed based on further research and study.

2. Leniency Plus

Leniency Plus represents a forward-looking approach to antitrust enforcement, designed to incentivize companies currently under scrutiny for one cartel to voluntarily disclose additional cartels that may be unknown to the competition regulator.⁵³ The act of revealing such information will result in a decrease in the penalty for the individual disclosing details about the first cartel.⁵⁴ Thereby reducing the penalty, incentivizing applicants in the first cartel is done, which is understood as leniency plus i.e. addition of lenient treatment. It helps the competition authority by bringing it the notice of multiple cartels existing. Thereby saving the time and resources required to be invested for investigation of Cartel, the framework increases the efficiency of prosecution and punishment.

Regarding the proposal to amend the section 46 by adding the leniency plus framework, the 17th standing committee took the reference of foreign jurisdictions like: Brazil, the USA, Singapore

⁴⁹ The Future of Effective Leniency Programmes (n 2), p. 9.

⁵⁰ Ibid

⁵¹ Ibid

⁵² *OECD Competition Trends 2025*, OECD Publishing, Paris, 2025, available at https://www.oecd.org/en/publications/2025/02/oecd-competition-trends-2025_435ed241.html, accessed on 12 June 2025.

⁵³ 'Investigative strategy and interviewing', *International Competition Network*, Anti-Cartel Enforcement Manual, 2021, available https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/01/CWG_ACCEM_Investigative_Strategy_CH5-2021.pdf, accessed on 28 January 2024.

⁵⁴ 'Report of Competition Law Review Committee', *Ministry of Corporate Affairs Government of India*, 2019, New Delhi, available at <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>, accessed on 28 January 2024.

regarding leniency plus framework where the framework incentivized the parties alleged of Cartel to disclose information regarding other existing cartels.⁵⁵ The Committee approved the amendment proposal made by the Competition Law Review Committee Report in this regard which has subsequently been added in amended competition act of India.

Accordingly, sub section 4 is added in section 46 which provides for leniency plus. It states “Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form a *prima facie* opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, in respect of the cartel already being investigated, without prejudice to the producer, seller, distributor, trader or service provider obtaining lesser penalty under sub-section (1) regarding the newly disclosed cartel.”⁵⁶

It has been argued that, unless stricter sanctions in the form of penalty plus are provisioned, only expecting the reveal of more cartel cases through leniency plus makes the enforcement of the cartel regime futile.⁵⁷

3. Leniency Inflation

Conceptually, *leniency inflation* refers to the overuse or strategic abuse of leniency programs as the primary tool for detecting cartels, often at the expense of proactive enforcement by competition authorities. This phenomenon has been identified as one of the contributing factors to the declining trend in leniency applications across several OECD jurisdictions. Enforcement agencies, in many cases, have come to rely heavily on self-reporting by cartel participants, rather than independently investigating and uncovering anti-competitive conduct. This overreliance can distort incentives: while authorities expect cartelists to come forward, cartel members, in turn, base their decision to self-report on complex calculations regarding the likelihood and timing of detection. This misalignment in expectations between enforcement authorities and cartel members creates an enforcement gap, weakening the overall effectiveness of anti-cartel regulation.

The concept of leniency inflation is considered to have an adverse impact on competition. It is characterized by “*leniency abuse*” and overuse, including by recidivists. It has been perceived as a trend manifested by potentially increasing use of leniency as a substitute of investigative effort. However, that excessive leniency creates distortions, waste of resources and reduced expected sanctions, ultimately undermining deterrence.⁵⁸

⁵⁵ “The Competition (Amendment) Bill, 2022”, *Standing Committee on Finance*, 17th Lok Sabha, Fifty second Report, 2022, New Delhi, available at https://sansad.in/getFile/lsscommittee/Finance/17_Finance_52.pdf?source=loksabhadocs, accessed on 26 January 2024.

⁵⁶ Ibid

⁵⁷ Anik Bhaduri, ‘Sweeter Carrots, Same Stick: Transplanting Leniency Plus into Indian Competition Law’, *Indian Law Review*, volume 7:1, 2023, pp. 26050, available at <https://doi.org/10.1080/24730580.2022.2140909>, accessed on 6th September, 2025.

⁵⁸ Anna Tzanaki, ‘From Economic Recession to Legal Opportunity: The Case for Cartel Criminalisation in Europe’, in C.D. Spinellis, Nikolaos Theodorakis, Emmanouil Billis & George Papadimitrakopoulos (eds), *Europe in Crisis: Crime, Criminal Justice, and the Way Forward. Essays in Honour of Nestor Courakis*, Ant. N. Sakkoulas Publishers L.P, Greece, volume 2, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892710, accessed on 27 January 2024.

The currently increasing trend of leniency implication and the quantitative reduction of value thereunder granted in each case can be better understood by “Leniency Inflation.”⁵⁹ This condition is better substantiated by the trend of obtaining substantial reduction of penalties even when the party to report about the cartel is not the first one. Today leniency mechanisms in Europe are criticized to be lowkey means in deterrence and are opined to be effective in detecting only low-key cartel.⁶⁰ Data on EC cartel Conviction showed that the number of recipients per cartel who had already been investigated and prosecuted increased. It means over the years; more cartel members have been granted leniency. For instance: all cartel members involved in recent EC automotive parts cartelization were granted leniency.⁶¹

Concerning the adjudication of international cartel, it is debated on account of regulatory complexity, due to the different leniency systems that each jurisdiction has adopted.⁶² For instance: A study examined twenty-one convictions of cartel cases, where it found that the same firm was the recipient of full immunity from monetary penalty in both the US and EU.⁶³ Moreover, four out of the cartel members were “repeat offenders” and the remaining nine were multiple offenders. Thus, it was argued that the immunity granted to these firms in the EU prevented the payment of fines that they had to pay on account of their gravity of infringement and recidivism. The study also gave another instance where the EU granted full immunity to the firms from fines when the investigation was going under the DOJ. The firms under investigation were again the repeat offender.

The multiple offenders who are potential recipients of large cartel fines, are aware of how to strategically use amnesty to avoid such fines and harm other cartel partners.⁶⁴ This instance has sought for the need of good cooperation among the antitrust authorities when cartel cases are subject of multiple jurisdiction.⁶⁵ In this realm, it has been invoked that antitrust sanctions for individuals which includes imprisonment, are supposedly perceived to enhance social welfare with effective deterrent moves.⁶⁶ Accordingly, the focus has shifted to absolute managerial liability from strict corporate vicarious liability where the firms would take the advantages of deficiencies of penalties under the veil of vicarious corporate liability.⁶⁷

Concerning India, CCI issued its initial leniency ruling in 2017, followed by seven such rulings in 2018, two in 2019, and one in 2020, all of which resulted in no penalties being levied. In 2021, the CCI issued three rulings related to leniency applications, with one of them resulting in no monetary penalties being imposed.⁶⁸ While India has different levels of leniency treatment based on their marking order and the quality of information the members provide, CCI is required to

⁵⁹ Catarina Marvão & Giancarlo Spagnolo, ‘Leniency Inflation, Cartel Damages, and Criminalization’, *Review of Industrial Organization*, volume 63:2, 2023, pp. 155-186, available at <https://doi.org/10.1007/s11151-023-09920-2>, accessed on 29 January 2024.

⁶⁰ Anna Tzanaki (n 58).

⁶¹ Catarina & Giancarlo (n 59), pp. 155-186.

⁶² Penelope Giosa, ‘Enhancing Leniency programs in Public Market’, *Journal of Antitrust Enforcement*, volume 9:2, 2020, pp. 1-26, available at doi: 10.1093/jaenfo/jnaa044, accessed on 25 January 2024.

⁶³ Catarina & Giancarlo (n 59), pp. 155-186.

⁶⁴ Vincent & Catarina (n 1).

⁶⁵ Catarina & Giancarlo (n 59), pp. 155-186.

⁶⁶ Anna Tzanaki (n 58).

⁶⁷ Ibid

⁶⁸ Joseph J. Bial et al., (n 26).

make holistic analysis while offering leniency on one hand and penalty in the other. It has been recommended that India also now needs to strengthen single informant rule, where only one applicant receives leniency, citing the success of the US Department of Justice's 1993 leniency program revision, which increased cartel detections by restricting full immunity to the first informant. This approach enhances deterrence by increasing the risk for non-reporting cartel members.

4. Reconciling Leniency and Settlement Provision

Competition Act 2002 does not recognize settlement and commitments. As this was lacking the Competition Law Review Committee ("**CLRC**") upon the deliberation emphasized on the need to incorporate settlement as negotiated remedy for the anticompetitive agreement cases as they offer "procedural economy and efficiency"⁶⁹ in respect of enforcing the rules.⁷⁰

CLRC stated, companies alleged can also get rid of long investigations and uncertainty.⁷¹ Also they offer the victims equitable remedies while ensuring imposition of new forms of deterrents.⁷² The report has taken the reference of "*Tamil Nadu Film Exhibitors Association v. CCI*," which shed the light on CCI power to exercise residuary power under section 27⁷³ enabling it to accept the settlement under the purview of the competition act itself. Given that the act allows parties to enter into the compromise or settlement.⁷⁴ However the committee noted, the plain reading does not explicitly provide as such.

The Standing Committee headed by Shri Jayant Sinha, proposed the settlement provisions being helpful to significantly lessen the litigation is also provisioned by jurisdictions like: the EU, the UK and Singapore in their antitrust proceedings.⁷⁵ In EU, for the firms involved in collusion but do not apply for leniency; they are provided an extra opportunity where they can cooperate with the competition enforcement authority to get an exchanged reduction of fines after a case has been established against them in preliminary stage.⁷⁶ The Committee recommended the CCI to consider expanding the scope of Settlement to include Cartel under it as a practical approach to the whole process of settlement. To substantiate this, it added: It is for the courts to finalize on settlement provisions on vis a vis cartel case. The Committee would therefore recommend that the CCI should consider expanding the scope of settlements to include cartels also as a pragmatic recourse to the whole process.

Upon the proposal presented by The Federation of Indian Chambers of Commerce & Industry ("**FICCI**") to include Section 3(3) of the Act into the ambit of the settlement as that of the

⁶⁹ 'Commitment Decisions in Antitrust Cases', *OECD Roundtables on Competition Policy Papers*, 2016, DAF/COMP(2016)7, available at https://www.oecd.org/en/publications/commitment-decisions-in-antitrust-cases_bf426e05-en.html, accessed on 28 January 2024.

⁷⁰ Report Of Competition Law Review Committee (n 54).

⁷¹ Ibid

⁷² Ibid

⁷³ *Reliance Big Entertainment Private Limited v. Tamil Nadu Film Exhibitors Association*, Competition Commission of India, 2011, Case No. 78 of 2011, available at http://164.100.58.95/sites/default/files/782011_0.pdf, accessed on 30 January 2024.

⁷⁴ Report Of Competition Law Review Committee (n 54).

⁷⁵ *The Competition (Amendment) Act*, 2022, India.

⁷⁶ Dijkstra, P.T., Seifert, J. 'Cartel Leniency and Settlements: A Joint Perspective' (2023) 63 (2023) *Rev Ind Organ.* <https://doi.org/10.1007/s11151-023-09910-4>

USA, as by excluding the cartel cases, the primary objective of settlement would not be met. Ministry opined that it was not necessary. The FCCI had contended that if cartel offenses were excluded as such. Given that, cartelization being a public offense affecting the general public directly; availing settlement procedure would aid the parties to avoid the reputational damages as they could resort to the voluntary settlement for their alleged violation of Section 3(3). However, The Ministry was of the opinion that as horizontal agreements under section 3 were of egregious nature, they should be kept out of the settlement mechanism.⁷⁷ Moreover, the parties involved in Cartel were covered by provisions of Section 46 under leniency and thus it was not needed to incorporate them into the scope of the Settlement.⁷⁸ The CLRC report also did not include the Sub section 3 under settlement.

This way, substitution of Section 48 by 48 A was proposed by the standing committee which allows the parties alleged of contravention of section 3(3), 3(4) and section 4 of the Act to proceed for the settlement proceeding by applying for the same to the director of the CCI.⁷⁹ However, the Competition Amendment Act 2023 does not include cartels under section 3(3) to be settled under added Section 48(A).⁸⁰ Though a settlement Process can expedite early resolution, the absent fines make the deterrent impact of enforcement more fragile.⁸¹ This potentially substitutes leniency without significant improvement in detection.⁸² The Competition (Amendment) Act of 2023 appropriately refrains from extending the suggested settlement mechanism to cartels.⁸³ This shows that India is more or less concerned of deterrence effect against the cartels.

5. Incentivizing Private Enforcement Action

Under the ambit of private enforcement, the victims of cartelization can seek for claims against the harm and damages incurred due to the action. The jurisdictions where private enforcement has been introduced, the cartelists have to bear the criminal and civil sanctions along with the potential costs of litigation that the victims come across.⁸⁴ This measure is considered very effective as it helps the private parties reinforce their consumers' right from getting infringed due to anticompetitive acts. Private parties have direct and proximate relation with the harms induced from such activities. Thus, they can help detect the cartels. The mode of violation manifested in different forms can be traced out when the victims are best enquired and heard. Thus, private actions are considered to be bridging the gap when there is lack of effective law enforcement from the public enforcement authorities as well as in the context of failure in functionality.

Over the survey (2017-2018) conducted upon national competition agencies and non-governmental advisors by ICN, 94% of respondents from 36 Jurisdictions stated that actions against the private damages caused due to violation of antitrust law were possible in their jurisdictions.⁸⁵ Among

⁷⁷ The Competition (Amendment) Bill, 2022 (n 55).

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ *The Competition (Amendment) Act*, 2022, India.

⁸¹ Somashekar & Praveen (n 34).

⁸² Ibid

⁸³ Ibid

⁸⁴ OECD Competition Trends 2022 (n 48).

⁸⁵ Sinchit Lai, 'Incentivizing Private Antitrust Enforcement to Promote Leniency Applications', *Journal of Competition Law & Economics*, volume 17:3, 2021, pp. 728-749, available at <https://doi.org/10.1093/joclec/nhab009>, accessed on 25 January 2024.

them, 20% stated that private antitrust enforcement is a frequent instance and 46% stated that the exercise of measure was increasing.⁸⁶ This information shows that promotion of private antitrust enforcement actions have been increasing across many jurisdictions.

In the context of the EU, the member states have varying degrees of private enforcement cases. In the early 2000s, when the private enforcement actions were reviewed, the UK and Germany were only countries which initiated early to develop laws and introduce new mechanisms that ensured filing the cases of private damages action.⁸⁷ Among them the cases of Vitamin cartels were the early claims as of such in both jurisdictions.⁸⁸ Though private enforcement is absent in other member states, the UK has further marched a step by introducing a class actions system.⁸⁹ In this realm where there is no uniformity in enforcement of competition rules, the right to compensation is also affected.

VII. Conclusion

The majority of experiments which align with available empirical evidence, have suggested that well-structured and effectively implemented leniency policies generally yield positive cartel deterrence effects. Regardless of the policy that permits reports after an investigation has commenced, the impact tends to be relatively restricted until and unless the penalties for non-applicants are notably severe or monetary incentives are introduced. Recent experiments suggest that the efficacy of a leniency policy critically depends on imposing severe sanctions like that of the US,⁹⁰ enabling it to generate substantial deterrence against cartels, even when the likelihood of detecting a cartel without reports is non-existent. Moreover, disqualification to hold directorship or any such other hierarchical position should be legally provisioned besides the civil liberties. A leniency policy that is excessively generous, providing fines reductions to numerous reporting firms, might create the impression of a highly successful competition authority with a substantial number of convicted firms. However, this approach could actually diminish social welfare by lowering cartel deterrence and escalating prosecution costs due to an increased number of prosecuted cartels.⁹¹

As stated above the instance of recidivism, is debated on account of the repeat offender.⁹² To these existing challenges, the effective enforcement strategies are highly demanding. As it is stated earlier, there are instances where the CCI is alleged of rampantly granting leniency. The discretionary power granted to CCI to grant exemption up to 100% is considered to be one of the causes of it. However, law mandates a basic ground to be the quality of information and their level of cooperation. This,

⁸⁶ Ibid

⁸⁷ 'Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India', *Cuts International & National Law University*, 2008, available at <https://www.cci.gov.in/images/marketstudie/en/docs1652440423.pdf>, accessed on 31 January 2024

⁸⁸ Ibid

⁸⁹ James Hennah & Thomas Caldwell, 'United Kingdom: Class actions – Litigation, Policy and Latest Developments', *Global Competition Review*, 6 November 2023, available at <https://globalcompetitionreview.com/hub/class-actions-hub/2023/article/united-kingdom-class-actions-litigation-policy-and-latest-developments>, accessed on 31 January 2024.

⁹⁰ Catarina Marvao & Giancarlo Spagnolo, 'What Do We Know About the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence', *Working Paper, No. 28*, Stockholm Institute of Transition Economics, 2014, pp. 1-26, available at <https://hdl.handle.net/10419/204739>, accessed on 29 January 2024.

⁹¹ Ibid.

⁹² Ibid.

subjective criteria of analysis should therefore, be used with an objectivity of deterring cartel besides obtaining the prima facie information of existing cartel. Moreover, it has been contended that lack of awareness and advocacy on leniency and legal remedies existing in case of infringement of consumers' rights due to anticompetitive agreements are existing. In this realm addressing the issue is important.

Nevertheless, OECD observations from 2024 suggest a rebound in leniency applications across several jurisdictions. This uptick may reflect renewed confidence in enforcement frameworks, increased post-pandemic investigations, and early outcomes of institutional reforms. While the recent rise is encouraging, persistent concerns remain regarding the long-term sustainability and consistent use of leniency programs in cartel enforcement. Given the widely acknowledged importance of leniency as a cornerstone of cartel detection, revitalizing its diminishing use remains essential. Several targeted strategies can support this goal.

Reward for whistle-blowers can serve as a potent destabilizing factor and contribute to obtaining crucial factual evidence of collaboration among members of a cartel.⁹³ A bill to amend the US Antitrust Enforcement law, has considered in rewarding such whistleblowers.⁹⁴ Affirmative incentives to the employees and associated representatives of the cartel members in response to informing about the leniency could aid in making the leniency program effective.⁹⁵ It has been suggested that such incentives should outweigh the retaliation that they can experience because of leaking the misconduct to the authorities.⁹⁶ Other most effective measure can be to raise awareness through enhancement of competition advocacy programs with respect to rights of consumers. It means strengthening private enforcement action can be deterring to enterprises to involve in anti-competitive agreements as the scope of cartel enforcement law is increased due to this measure.

It is to be borne in mind that the purpose of leniency is not only to detect the cartel but also to increase the chance of prosecution and make anti-competitive practices liable. The objectivity of penalty i.e. to create deterrence must always be the preference of the antitrust authorities. This does not allow them to use leniency program as a substitute of other investigative tools. Rather, effective cartel enforcement today requires the harmonious use of all available detection and prosecution tools. Moreover, penalizing the offenders in their personal capacity can be other measure. Most importantly, need to criminalize cartel offence has been raised as economists perceive cartelists to be well dressed theft. Alongside concerning the gravity of punishment that is imposed on account of horizontal agreement being relatively more grave than vertical one, the perspective on criminalization is found to be justified to sufficiently deter the commission.

To conclude, recent studies confirm that stringent sanctions are essential for the effectiveness of leniency policies. When leniency is used merely as a gateway to initiate investigations without the support of meaningful penalties it risks weakening the very deterrent impact it seeks to create. Cartels continue to pose a serious threat to market integrity and consumer welfare; thus, leniency should not come at the cost of accountability.

As discussed, rewarding only the first informant who provides substantial assistance and cooperates fully throughout the proceedings is the most effective and justified application of leniency. This

⁹³ Somashekar & Praveen (n 34).

⁹⁴ *Competition and Antitrust Law Enforcement Reform Act*, 2021, United States of America.

⁹⁵ Penelope Alexia Giosa, 'Enhancing Leniency programs in Public Market', *Journal of Antitrust Enforcement*, volume 9:2, 2021, pp. 347-372, available at <https://doi.org/10.1093/jaenfo/jnaa044>, accessed on 25 January 2024

⁹⁶ Ibid.

approach preserves the incentive structure of self-reporting while ensuring that enforcement objectives are met. In this way, leniency can serve not just as a detection tool, but as a mechanism to enhance the overall effectiveness of cartel enforcement and uphold the core objectives of antitrust law.

