

## BUSTING CARTELS: THE INDIAN LENIENCY REGIME

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### *Abstract*

*Cartelization affects the overall competitive nature of a market, acting to the detriment of the consumers and competitors outside of the cartel. It has been noted as a serious form of antitrust violation and is dealt with strictly, all around the world. However, cartels are often hard to detect, and in some instances harder to prove to exist. This is owing to measures taken specifically to avoid the existence of a cartel, as has been noted by the Competition Commission of India. One of the most effective means of cartel enforcement around the world is introducing leniency programs. However, leniency programs for cartels have become one of the most effective means in cartel-enforcement, around the world. This, however, cannot be conclusively said for the Indian leniency regime. This paper seeks to analyze the Indian leniency regime, the problems faced by it and the manners in which it can be improved. In order to do so, firstly, all 14 applications for leniency adjudicated upon in 4 cartelization matters by the Competition Commission of India have been analyzed.*

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*Secondly, reference has been made to the leniency regime in the United States of America and an analysis of the leniency regime in the European Union has been carried out. Both these jurisdictions have two of the most effective competition regulation regimes in the world. This has been done to see what lessons the Competition Commission of India can learn to effectively employ a tool recognized as one of the most effective means of busting cartels.*

## I. INTRODUCTION

Cartels can be best understood as “any anticompetitive concerted practice(or arrangement), by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.”

Such arrangements act to the detriment of the consumers and other competitors in the market and are presumed to have an appreciable effect on competition. Consequently, they are prohibited as under the Competition Act, 2002 (the “**Act**”).<sup>1</sup> The factors which shall be taken into consideration while determining whether such adverse effect exists have been set out in Section 19(3) of the Act. However, one of the fundamental problems concerning curtailing of cartelization is detecting cartels and conclusively proving their existence. Since, the prohibition on participating in anti-competitive agreements and the penalties such offenders may incur are well known, it is typical that such activities are conducted in a clandestine manner, meetings are

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<sup>1</sup>The Competition Act, 2002, §3, No. 12 of 2003 [hereinafter The Competition Act, 2002].

held in secret and the associated documentation reduced to a minimum.<sup>2</sup>

Consequently, competition regulators the world over have introduced leniency programs to aid cartel enforcement, wherein, members of such cartels are given incentives to approach the competition authority and aid them by providing information. In jurisdictions with advanced competition regulation regimes such as USA and EU, such leniency programs have become the most important tool for detecting cartels and are also purported to deter such infringements from occurring.<sup>3</sup> In the United States, from 1996 to 2010, of the fines collected from companies for antitrust violations, 90% came from investigations assisted by leniency applicants.<sup>4</sup> Of the approximately 50 international cartel investigations ongoing at any time in the USA, more than half of these investigations are initiated, or are being advanced, on the basis of information procured from leniency applicants.<sup>5</sup> In the European Union, out of 57 cartels investigated and established to exist, 53 were done so by means of the leniency notice i.e. almost 93%. Furthermore, of the 352 corporations involved in these, 166 filed for leniency, i.e., 47.16%.<sup>6</sup> Thus, the importance of an effective leniency regime as a motivator for cartel members to cooperate with competition regulators cannot be denied.

In India, the Competition Commission of India (“CCI”) can grant leniency to any cartel member who approaches it and aids the CCI,<sup>7</sup>

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<sup>2</sup>Builders Association of India v. Cement Manufacturers Association & Ors., 2016 CompLR983 (CCI), ¶ 183 (hereinafter Builders Association of India).

<sup>3</sup>ARON BEATON WELLS AND CHRISTOPHER TRAN, ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 140 (2015).

<sup>4</sup>Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, ADDRESS BEFORE THE 24<sup>TH</sup> ANNUAL NATIONAL INSTITUTE ON WHITE COLLAR CRIME (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download> (hereinafter Hammond).

<sup>5</sup>*Id.*

<sup>6</sup>O Dominte, D Serban & AM Dima, *Cartels in EU: Study on the effectiveness of leniency policy*, 8 MANAGEMENT & MARKETING 529 (2013).

<sup>7</sup>Competition Act, 2002, *supra* note 2, at § 46.

possibly to the extent of 100%<sup>8</sup> of the penalty liable to be imposed, subject to certain conditions. However, the leniency program in India did not have a smooth start. This is primarily because of concerns such as confidentiality, etc., relating to the leniency regulations, further coupled with the uncertainty over the CCI's attitude towards leniency, which persisted owing to a lack of cases where leniency was sought. After the amendment to the relevant regulations i.e. the Competition Commission of India (Lesser Penalty) Regulations, 2009, in 2017, ambiguities with respect to confidentiality were cleared out,<sup>9</sup> the scope of applicants was clarified to include persons and not just corporations,<sup>10</sup> and the scope of number of parties to be granted a reduction in penalty was increased with the removal of limitation on the number of applicants.<sup>11</sup> The next section of this article examines the requirements for the relevant declarations to be made and the extent to which leniency may be granted to an applicant.

## II. COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (the “**Regulations**”) detail the grant of lesser penalty, the conditions and the procedure subject to which such lesser penalty may be granted, as under Section 46 of the Act. An applicant seeking the grant of lesser penalty must:

- I. cease any participation in the activities of the cartel from the date of its admissions unless otherwise directed by the CCI,

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<sup>8</sup>Competition Commission of India (Lesser Penalty) Regulations, 2009, Regulation 4(a), No. 4 of 2009 (hereinafter Lesser Penalty Regulations).

<sup>9</sup>*Id.* at Regulation 6.

<sup>10</sup>Lesser Penalty Regulations, *supra* note 9, Regulation 2(1)(b).

<sup>11</sup>Competition Act, 2002, *supra* note 2, at § 4(b).

- II. provide vital disclosures in respect of violations under the Act,
- III. provide all relevant information, documents and evidence as may be required by the CCI,
- IV. fully co-operate throughout the investigation and proceedings before the CCI,
- V. not conceal, destroy or remove relevant documents in any manner, that may contribute to the establishment of the cartel.<sup>12</sup>

Where the applicant is an enterprise, it must also provide the names of individuals who have been involved with the cartel on its behalf and for whom lesser penalty is sought. Furthermore, the CCI may subject the applicant to any further restrictions or conditions after examining the facts of the case, if it deems fit.<sup>13</sup>

Reductions in penalty can be understood to be on a first come first serve basis. The cartel member who first makes a vital disclosure by submitting evidence can be granted a reduction in penalty up to or equal to 100% of the penalty liable to be imposed in the event that such evidence helps establish a prima facie opinion regarding the existence of a cartel and initiate an investigation or establish the existence of a cartel.<sup>14</sup>

Applicants subsequent to the first applicant may also be granted a reduction in penalty if they are able to provide any evidence which may provide 'significant added value' to the evidence already in possession of the CCI or Director General, regarding the existence of a cartel. 'Added value' has been explained in the Regulations to mean

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<sup>12</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 3(1).

<sup>13</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 3(3).

<sup>14</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 4(a).

the extent to which the ability of the CCI or Director General is enhanced to establish the existence of a cartel.<sup>15</sup>

A second applicant in a chronological order may be granted a reduction in penalty up to or equal to 50% of the penalty liable to be imposed,<sup>16</sup> and any subsequent applicant may be granted a reduction in penalty up to or equal to 30% of the penalty liable to be imposed.<sup>17</sup>

An applicant seeking to avail such lesser penalty must make an application containing the following information regarding cartel activities:<sup>18</sup>

- information regarding the cartel such as the arrangement of the alleged cartel, its aims and objectives and activities carried out in furtherance of thereof;
- the goods or services involved;
- the geographic market covered;
- the commencement and duration of the cartel;
- the estimated volume of business affected by the cartel in India;
- details of any other Competition Authorities approached, if any, or intended to be approached;
- Information regarding the persons who knew of and were involved in the cartel, their addresses.

Amongst certain other information required for procedural purposes.

The Regulations have been amended over time with the limitation on the number of applicants being removed, the scope of applicants

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<sup>15</sup>*Supra* note 12.

<sup>16</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 4(c)(i).

<sup>17</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 4(c)(ii).

<sup>18</sup>Lesser Penalty Regulations, *supra* note 9, at The Schedule.

being expanded and provisions for confidentiality relating to identity of the applicant, information and evidence being introduced. These can only be considered as attempts to further disclosures relating to the existence of cartels by persons or entities associated with the cartels.

### III. LENIENCY APPLICATIONS MADE BEFORE THE CCI

As of May 2018, 4 applications seeking lesser penalty in matters have been adjudicated upon. All 14 applications filed in the 4 matters have been discussed below with reference to the stage at which the application was filed, the information provided by the applicant as evidence, the CCI's opinion on the evidence and the consequent adjudication of such applications by the CCI. This has been done in an attempt to analyse the approach of the CCI, whether uniform or not.

S. No.	Details	Percentage of penalty relaxed  (In the order of filing of application)
1.	<i>In Re Brushless DC Fans</i> <sup>19</sup> (Collusive Tenders) Number of Applicants: 1 Status before Application:	75%

<sup>19</sup>*In Re*: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Competition Commission of India, Suo Moto Case No. 03 of 2014, Order dated 18.01.2017.

	<p>Investigation of the matter was in process and report of the Director General was pending.</p> <p>Information Provided:</p> <p>The sole Applicant explained the functioning of the cartel and the role of the various parties operating the cartel, the design and <i>modus operandi</i> of the cartel, duration of the cartel, incentives for formulating the cartel, mode and manner for deciding the pricing of the products to be quoted in tenders and mode of deciding about the name of the winner in the tenders.</p> <p>CCI's Observations:</p> <p>The CCI took note that such information provided by the Applicant enabled the Director General to identify the collusion over pricing, and that such information provided was relied upon to establish the existence of the cartel. However, the CCI also took note of the stage at which the applicant provided such information whilst deciding the percentage of penalty to be relaxed. It was noted that a <i>prima facie</i> opinion had already been formulated before the Applicant made disclosures.</p>	
2.	<p><i>In Re Zinc Carbon Dry Cell Batteries</i><sup>20</sup></p> <p>(Price Fixing)</p> <p>Number of Applicants: 3</p>	<p>OP3: 100%</p> <p>OP1: 30%</p>

<sup>20</sup>*In Re*: Cartelisation in respect of zinc carbon dry cell batteries market in India, 2018 CompLR467 (CCI).

	<p>Status before 1<sup>st</sup> Application:</p> <p>Investigations started after Opposing Party-3 (“OP3”), acting as an informant, admitted to having been part of the cartel and sought lesser penalties under Section 46 of the Act.</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> Applicant: OP3</li> </ul> <p>Information Provided:</p> <p>The application of OP3 detailed the circumstances that led to the formation of the cartel, the <i>modus operandi</i> of the cartel and the steps taken to ensure that the detection of violations, as well as a price war amongst the cartel members, does not take place. Information regarding the use of a trade organization (OP4 in the proceedings) to facilitate information exchanges and consequent collusion was also provided.</p> <p>CCI’s Observations:</p> <p>The CCI observed that the information and evidence provided by OP3 was crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, the nature and extent of information exchanges amongst OPs with regard to the cartel. Furthermore, it proved useful identifying the names, locations and email accounts of key persons of OPs actively involved in the cartel activities. The information and cooperation received from OP3 enabled the Director General to conduct dawn raids at the premises of the other OPs and seize quality evidence in the form of emails, handwritten notes and various other</p>	OP2: 20%
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	<p>documents.</p> <ul style="list-style-type: none"> <li>• 2<sup>nd</sup> and 3<sup>rd</sup> Applicant – OP1 and OP2, respectively:</li> </ul> <p>Information Provided:</p> <p>OP1: Disclosures regarding product involved, commencement/ duration of cartel, <i>modus operandi</i> of the cartel, evidence of role of AIDCM – the trade association involved (and OP4 in the proceedings) and involvement of certain individuals were made by OP1.</p> <p>OP2: (Not detailed in the final order)</p> <p>CCI's Observations:</p> <p>The CCI noted that OP1 and OP2 had not made any value addition to the investigation by means of evidence submitted as the evidence collected from OP3 and consequent investigations had been sufficient to establish that a cartel existed. It, however, took note of their cooperation throughout the course of the investigation.</p>	
3.	<p><i>In Re Fortified Security Solutions</i><sup>21</sup> (Collusive Tenders)</p> <p>Number of Applicants: 6</p> <p>Status before 1<sup>st</sup> Application:</p> <p>Director General had already gathered some evidence which indicated violations</p>	<p>OP6: 50%</p> <p>OP5: 40%</p> <p>OP4: 50%</p>

<sup>21</sup>Nagrik Chetna Manch v. Fortified Security Solutions & Ors., 2018 CompLR425 (CCI).

	<p>under the Act had taken place.</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> Applicant – OP6:</li> </ul> <p>Information Provided:</p> <p>OP6 made a critical disclosure regarding the <i>modus operandi</i> of the cartel. OP6 disclosed not only the roles of the persons involved in the cartel but also provided evidence such as emails, bank statements in furtherance of the same.</p> <p>CCI's Observations:</p> <p>The CCI opined that this made for significant added value to the ongoing investigation by providing a better, clearer picture of the operations of the cartel while also substantiating the investigations of the Director General and completing the chain of events. However, it took note of the fact that the application was filed only after the Director General had come into possession of evidence</p> <ul style="list-style-type: none"> <li>• 2<sup>nd</sup> Applicant – OP5:</li> </ul> <p>Information Provided:</p> <p>OP5 made disclosures regarding <i>modus operandi</i>, role of persons involved and provided emails to substantiate the same. The CCI was of the view that this made for good value addition and aided the investigation by revealing the modalities of operation of the cartel. Further, statements made before the DG helped in establishment of the cartel.</p> <p>CCI's Observations:</p>	<p>OP2: 25%</p> <p>OP7: Nil</p> <p>OP1: Nil</p>
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	<p>The CCI, however, took note of the stage at which the application was made and the fact that the <i>modus operandi</i> had already been made known by OP6. The CCI also took note of the continuous full cooperation on part of the applicant.</p> <ul style="list-style-type: none"> <li>• 3<sup>rd</sup> Applicant – OP4:</li> </ul> <p>Information Provided:</p> <p>The <i>modus operandi</i> of the cartel in respect of another set of tenders was made known by OP4. OP4 also disclosed that it was agreed to make proxy bids, providing copies of emails to prove the same. OP4 also provided additional information regarding the functioning of the cartel and how bids were placed on its behalf.</p> <p>CCI's Observations:</p> <p>The CCI was satisfied that value addition had been made to the evidence in possession regarding the tenders in question. It took note that as the tenders involved were different from the ones in respect of which OP6 had filed an application. It would be treated as the first applicant for the tenders which OP4 was involved with, and penalty was decided accordingly, keeping in mind the overall belated stage at which the application was made.</p> <ul style="list-style-type: none"> <li>• 4<sup>th</sup> Applicant – OP2:</li> </ul> <p>Information Provided:</p> <p>OP2 admitted to having orchestrated the cartel in all tenders. Disclosures regarding</p>	
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	<p><i>the modus operandi</i> were made, thus confirming the disclosures made by the previous three applicants. OP2 admitted to arranging for proxy bidders and provided documents to prove the same.</p> <p>CCI's Observations:</p> <p>The CCI noted that by the time OP2 had made the application, a lot of evidence had already been collected and almost all of the information provided by OP2 was already available with the CCI. The CCI noted that the only value addition by OP2 was regarding procurement of the digital key for uploading the documents on behalf of other bidders from the computer of OP2, and thus the value addition by OP2 was minimal.</p> <ul style="list-style-type: none"> <li>• 5<sup>th</sup> Applicant – OP7:</li> </ul> <p>Information Provided:</p> <p>Admissions concerning assistance to the cartel were made. Although admissions concerning the existence of, and assistance provided to, the cartel were made, participation in the cartel was denied.</p> <p>CCI's Observations:</p> <p>The CCI took note of all the disclosures that had already been made before it and was of the view that there was no value addition.</p> <ul style="list-style-type: none"> <li>• 6<sup>th</sup> Applicant – OP1:</li> </ul> <p>Information Provided:</p> <p>Admissions regarding orchestrating the cartel and propping up proxy bidders to</p>	
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	<p>ensure that the tenders were awarded to OP2 were made. OP1 furnished documents and evidence, however, the CCI was already in possession of the documents.</p> <p>CCI's Observations:</p> <p>The CCI noted that OP1 had also been cooperative but had made no value addition to the investigation by the evidence provided.</p>	
4.	<p><i>In Re: Cartelization in Tenders No. 21 and 28</i><sup>22</sup></p> <p>(Collusive Tenders)</p> <p>Number of Applicants: 4</p> <p>Status before 1<sup>st</sup> Application:</p> <p>This case originated from information received by the CCI in the above case, to rig Tender Nos. 21 and 28 of 2013 floated by the Pune Municipal Corporation, which were not investigated as a part of the above case. 3 of the 4 parties were also OPs in the above case. The 1<sup>st</sup> Application was filed subsequent to the initiation of investigations.</p> <ul style="list-style-type: none"> <li>• 1<sup>st</sup> Applicant – OP1:</li> </ul> <p>Information Provided:</p> <p>The CCI noted that when OP1 approached it and admitted to being a part of the cartel, the DG had already gathered evidence</p>	<p>OP1: 50%</p> <p>OP2: Nil</p> <p>OP4: Nil</p> <p>OP3: Nil</p>

<sup>22</sup>*In re: Cartelization in Tender Nos. 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing, Competition Commission of India, Suo Motu No. 3 of 2016, Order dated 31.05.2018.*

	<p>which indicated bid rigging/ collusion amongst OPs. However, OP1 made critical disclosures regarding how it was approached to be a part of the cartel, requests to provide documents of OP1 to place proxy bid and collection of documents for such purposes.</p> <p>CCI's Observations:</p> <p>The CCI found that the information provided by OP1 made for 'reasonable value addition' and helped to better understand the operation of the cartel. The evidence provided helped substantiate the evidence already in the possession of the DG, helped complete the chain of events and was relied upon to establish the existence of the cartel.</p> <ul style="list-style-type: none"><li>• 2<sup>nd</sup> Applicant – OP2:</li></ul> <p>Information Provided:</p> <p>A Director of OP2 admitted to having orchestrated the cartel, disclosing the <i>modus operandi</i> of the cartel. It was admitted that cover/ proxy bidders were brought in so it was assured that there were at least three eligible bidders in first round of bidding itself and tender would ultimately be awarded to OP-2. It was acknowledged that relevant documents for the tenders were provided by OP1 in furtherance of the collusive bidding.</p> <p>CCI's Observations:</p> <p>The CCI observed that almost all evidence provided by OP2 was already in its possession; it had been made aware of the</p>	
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	<p><i>modus operandi</i> by OP1 already and the only value addition which was made by disclosure of OP-2, was with respect to purchase/ procurement of digital keys for uploading the documents on website of PMC on behalf of other bidders from the computer of OP2. Therefore, in the CCI's opinion, the value addition was minimal. Furthermore, keeping in mind the stage at which the application was filed by OP2, no reduction in penalty was granted.</p> <ul style="list-style-type: none"> <li>• 3<sup>rd</sup> Applicant – OP4:</li> </ul> <p>Information Provided:</p> <p>It was disclosed that in order to help OP2 participate in the said tenders, authorization certificates were issued to OP2, as the latter itself was not engaged in manufacturing of composting machines, a prerequisite for being eligible to place a bid. Furthermore, in its application, the existence of a cartel was admitted but the applicant denied being a part of the cartel.</p> <p>CCI's Observations:</p> <p>The CCI was of the view that OP4 was not able to provide any added value to the establishing the existence of the cartel and thus deserved no reduction in penalty.</p> <ul style="list-style-type: none"> <li>• 4<sup>th</sup> Applicant – OP3:</li> </ul> <p>Information Provided:</p> <p>The proprietor of OP3, being the same as the abovementioned Director of OP2, admitted to orchestrating the cartel and disclosed the <i>modus operandi</i> of the cartel.</p>	
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	<p>It furnished documents and evidence. However, the material provided by OP3 was already in the possession of the CCI.</p> <p>CCI's Observations:</p> <p>The CCI noted that although OP3 cooperated during the investigation and provided evidence, it was unable to make any value addition and thus did not deem any reduction in penalty.</p>	
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#### A. Analysis of the orders

As of May, 2018, 14 lesser penalty applications have been filed and adjudicated upon by the CCI. The CCI has granted a 100% waiver of penalty in only 1 instance, wherein, one of the cartel members in Zinc Battery Manufacturers informed the CCI that a cartel existed even before there existed any evidence to form a *prima facie* opinion that the cartel existed. The CCI granted a 75% penalty waiver in *Brushless DC Fans* to the first informant and a 50% penalty waiver to the first informant in *Fortified Security Solutions*. The difference may be attributed to the evidence supplied by the parties and the extent to which such evidence helped in establishing existence of a cartel. In *Brushless DC Fans*, the first informant provided details about the functioning of the cartel and evidence which helped the Director General to establish collusion over pricing. In the *Fortified Security Solutions* case, however, the evidence provided by the first applicant helped to complete the chain of events surrounding the contraventions and supplemented the evidence already in the possession of the Director General.

The CCI's approach towards waiver of penalty in applications made after the first lesser penalty application has been made, has not been uniform. In *Fortified Security Solutions*, the CCI granted a partial

waiver of penalty to only parties whose evidence, according to the CCI, helped add value to the investigation and helped establish the existence of a cartel. With respect to 2 applications in the said case, the CCI didn't grant any waiver of penalty, in spite of cooperation on the part of the parties, as the evidence supplied by them didn't add significant value and enough evidence already existed to establish the existence of a cartel in accordance with the Regulations. However, in *Zinc Battery Manufacturers*, the CCI noted "With respect to the Lesser Penalty Applications of OP-1 and OP-2, the Commission notes that incriminating documents (both hard and soft copies) recovered and seized from the premises of the Manufacturers during the search and seizure operations on 23 August 2016 were independently sufficient to establish the contravention of Section 3 of the Act by OPs. Therefore, information/evidence on cartel including the period of cartel, submitted by OP-1 and OP-2 did not result in 'significant value addition'."<sup>23</sup> Yet it granted waivers of 30% and 20% of penalty to the two applicants because the CCI was satisfied with the cooperation rendered, seemingly in divergence with Regulation 4 of the Regulations.

Furthermore, the standard of 'significant added value' has caused more uncertainty. In *Fortified Security Solutions*, the CCI adjudicated upon 6 lesser penalty applications. On an analysis of the order, it can be seen that the CCI has provided no rationale for the reduction in penalty i.e. how the evidence submitted made for value addition to the evidence already in possession, whilst according a lesser penalty for disclosures relating to the same issue such as *modus operandi* or role of persons involved, etc. The CCI further stretched the concept to include 'reasonable value addition' in *Cartelization in re: Tenders No. 21 and 28*. While the argument may be made that this is within the discretionary power of the CCI, the language of the Regulations

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<sup>23</sup>*Supra* note 21, at ¶ 10.3.

gives another impression, defining ‘added value’ but still requiring that for a reduction in penalties, the added value must be significant.

Such an approach is not conducive towards furthering the leniency regime in India. There is a huge degree of uncertainty not only due to the small number of applications adjudicated upon but more so due to the inconsistent approach of the CCI. Furthermore, what has been described as the ‘carrot and stick approach’<sup>24</sup> seems to be followed in advanced foreign jurisdictions, wherein the parties may actually get the carrot in the form of immunity or lesser penalties, as huge fines are imposed in cartel matters (the EC imposed a fine of € 2.93 Billion on a truck manufacturers cartel)<sup>25</sup> but full immunity is granted to corporations which have provided conclusive evidence establishing the existence of a cartel even after the investigations have begun. Therefore, even if a party is a part of a cartel, it is in its best interests to make clear its role as great monetary penalties may be otherwise placed upon them. The CCI, in *Brushless DC Fans*, missed out on the opportunity to send a message to Indian entities that they too may be granted full immunity even if they provide evidence after the commencement of investigations, so long as it helps in conclusively establishing the existence of a cartel.

#### **IV. LESSER PENALTIES UNDER EU ANTITRUST LAW: A COMPARISON**

Europe and USA have the most developed competition regulation regimes in the world.<sup>26</sup> Therefore, in order to help ascertain the steps

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<sup>24</sup>Hammond, *supra* note 5.

<sup>25</sup>Case AT.39824 Trucks, European Commission (Commission Decision of Sept. 27, 2017).

<sup>26</sup>William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, presented at BATES WHITE FIFTH ANNUAL ANTITRUST CONFERENCE,

the CCI may take towards furthering the Indian leniency regime, the next section of this article analyses some instances of adjudication of leniency applications filed in Europe to analyse the approach of the European Commission, a forum which has helped foster a highly successful leniency regime. While the leniency regime in the USA has been highly effective as mentioned above, and despite having the first ever case of full immunity granted in a cartelization case, it hasn't been discussed in detail in this article owing to 2 fundamental differences between the competition regulatory mechanism in the USA and most other jurisdictions:

- i. cartelization is a criminal offence in USA,<sup>27</sup> as opposed to it being a civil offence in India and many other jurisdictions, where culpable individuals are held accountable in the form of prison sentences and active enforcement of the same,
- ii. leniency is only granted to the first applicant providing evidence which helps to conclusively establish the existence of a cartel.<sup>28</sup>

Neither of these 2 features exist in the Indian leniency program. Moreover, the leniency regulations of the EU and India are similar and, therefore, a comparative analysis of the EU regulations shall be helpful.

The European Commission (“EC”) has provided a lenient approach towards cartel members who have either filed leniency applications enabling the EC to initiate investigations and conclude the existence

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[https://www.ftc.gov/sites/default/files/documents/public\\_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-european-union-and-united-states-convergence-or-divergence/080602bateswhite.pdf).

<sup>27</sup>Sherman Antitrust Act, 1890, § 1, 26 Stat. 209, 15 U.S.C (U.S.).

<sup>28</sup>*Part A, Part B, Corporate Leniency Policy*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/atr/file/810281/download>;  
Q. 4, Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters, THE UNITED STATES DEPARTMENT OF JUSTICE, 5, <https://www.justice.gov/atr/page/file/926521/download>.

of a cartel, or in cases where the informant have provided sufficient information to establish the existence of a cartel when the EC had sufficient information to initiate an investigation,<sup>29</sup> as seen in the *Methylglucamine*,<sup>30</sup> *Fine Art Auction Houses*,<sup>31</sup> and *Methacrylates*.<sup>32</sup> It may be noted that the CCI has also partially adopted a similar approach, granting a full waiver to the first applicant in *Zinc Battery Manufacturers* who had filed the lesser penalty application before there existed sufficient evidence to initiate investigations.

The EC may grant a reduction in penalty to cartel members who don't fulfil either of the 2 conditions mentioned previously, if they are able to provide 'significant added value' by means of evidence submitted ('Part III Applications').<sup>33</sup> The interpretation of 'added value' in Indian & EU Antitrust law is similar in theory, with the EC's 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' further detailing the manner in which evidence submitted is to be given importance.<sup>34</sup> The first undertaking to provide such significant added value may be granted 30-50% waiver of the total penalty liable to be imposed, while the second undertaking may be granted a waiver of 20-30% and on any subsequent undertaking, a waiver of upto 20% of the total penalty liable to imposed.<sup>35</sup> The EC shall also take into consideration the stage at which the application may be granted to more than one party i.e. a party that provides sufficient evidence to initiate investigations and also a party that that

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<sup>29</sup>European Commission, *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, (2006/C 298/11) at Part II, Section A, 8 (hereinafter Commission Notice).

<sup>30</sup>Case COMP/E2/37.978: *Methylglucamine*, European Commission (Commission Decision of Nov. 27, 2002).

<sup>31</sup>Case COMP/E2/37.784/*Fine Art Auction Houses*, European Commission (Commission Decision of Oct. 30, 2002).

<sup>32</sup>Case COMP/F/38.645 – *Methacrylates*, European Commission (Commission Decision of May 31, 2006).

<sup>33</sup>Commission Notice, *supra* note 30, at Part III, Section A, 23.

<sup>34</sup>*Id.* at Part III, Section A, 25.

<sup>35</sup>Commission Notice, *supra* note 30, at Part III, Section A, 26.

provides evidence to help conclusively establish the existence of a cartel.<sup>36</sup> It has been argued in India that post the 2016 amendment to the Regulations, the same approach exists in India,<sup>37</sup> owing to the deletion of a proviso which clearly stated that such full immunity shall only be granted to one party. However, the language of the amended regulations doesn't support the same view as the Regulations still read that a partial reduction in penalties may be granted to "applicants who are subsequent to the first applicant",<sup>38</sup> creating further confusion.

In *Methacrylates*, one of the cartel members provided evidence which enabled the EC to adopt a decision to carry out an investigation, prior to which the EC did not have sufficient evidence to adopt a decision to conduct such an investigation. Consequently, a full immunity from imposition of penalties was granted. Subsequently, a Part III Application was also filed wherein the EC was of the view that although the timing of the application was relatively early in the proceedings, in the month following the inspections, it was only after receipt of subsequent submissions that the EC concluded that the member qualified for leniency. This was in view of the nature and level of detail of these submissions, which strengthened the EC's ability to prove the facts in question. More importantly, even if the member had provided significant added value with its first submission and the time factor had been more in its favour, the extent to which the member had added value to the EC's case has remained limited throughout the proceedings. Furthermore, the extent to which the member cooperated represented added value has remained limited. However, in spite of this, the EC granted a waiver of 40% of penalty imposed. A 2<sup>nd</sup> Part III Application was also filed, wherein, the

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<sup>36</sup>*Supra* note 20.

<sup>37</sup>Trilegal, *CCI Amends Lesser Penalty Regulations*, MONDAQ (Aug. 31, 2017), <http://www.mondaq.com/india/x/625190/Cartels+Monopolies/CCI+Amends+Lesser+Penalty+Regulations>.

<sup>38</sup>Lesser Penalty Regulations, *supra* note 9, at Regulation 4(b).

evidence submitted by the applicant helped the EC to extend the period of the cartel by about 18 and a half months. The EC ruled that the additional 18 and a half months would not be taken into consideration while determining the quantum of the penalty to be imposed on the second applicant under Part III. The said second applicant was also granted a waiver of 30% of penalty imposed on account of significant value added by its evidence and cooperation rendered.

The question of determining ‘significant added value’ has caused some understandable consternation and led to further disputes, owing to its subjective nature in practice. However, attempts have been made to curtail this subjectivity. It has been held that “for the purposes of applying the bands of reduction provided for in point 23(b) of the Leniency Notice, the Commission (EC) must establish the time at which the undertaking actually provided it with evidence representing significant added value with respect to the evidence already in its possession”.<sup>39</sup> Therefore, this helps in setting in place a structure that helps ascertain whether there actually exists added value in the evidence submitted in cases where there are multiple corporations seeking leniency.

The CCI, in all the 3 above mentioned orders passed by it has not specifically provided any rationale regarding the quantum of penalties reduced, as was given in *Methacrylates* and most other EC decisions. While it is understandable that the CCI has to act in a manner that furthers the leniency regime in India and that not granting reductions in penalties would not help its cause, the CCI has acted rather arbitrarily, if not randomly, in terms of what constitutes value addition and the percentage of penalty to be reduced. This approach certainly doesn’t help the cause and the state of the leniency regime shall not change unless the CCI adopts a more structured approach.

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<sup>39</sup>Solvay v Commission (hydrogen peroxide and perborate), Case T-186/06 [2011] 5 CMLR 428.

While the CCI has imposed substantial fines in cartelization cases to deter cartelization, it needs to alter its approach towards incentivizing cartel members to provide them with evidence in order to bust cartels more effectively.

## V. CONCLUSION

Cartels need to be dealt with effectively and it has been shown that this can be done with the use of effective leniency programs. However, the Indian leniency regime has a long way to go. In order for such programs to succeed, cartel members need to feel assured that it is in their best interest to provide information regarding cartel activities and that the consequences may be rather severe otherwise. This has been achieved in the EU and the USA, with cartel members who act either as informants or cooperate in investigations once they have begun being rewarded in the form of reduced penalties and often full immunity. The CCI has imposed huge fines on cartels (the Cement cartel was fined over Rs 6,700 Crores i.e. \$1 Billion). However, first, and foremost, it needs to adopt a more uniform mechanism of dealing with the leniency applications in order to create some degree of predictability necessary for convincing cartel members to cooperate with the competition regulator. Secondly, the CCI needs to define ‘significant added value’ and limit the number of parties to which it grants leniency in a matter. This would give motivation to act as informants or file leniency applications providing all evidence an entity can, instead of waiting to see the course the investigation takes with the assurance that a certain degree of leniency would anyhow be granted. This would have the added advantage of a reduction in the resources an investigation may require, resources that can be utilized elsewhere.

The CCI has often looked at jurisprudence from the EU, taking cognizance of internationally recognized standards and practices in

order to arrive at a just and fair resolution by taking into consideration relevant evidence, etc. For example, the CCI took note of the approach in the EU regarding information exchanges in the Cement Cartel case while adjudicating upon the matter.<sup>40</sup> It would be in the best interests of the CCI to ensure a uniform approach is adopted by it, one which would help further its own cause. It should not shy away from relying on the past efforts at regulation to determine the effectiveness of the measures employed.

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<sup>40</sup>Builders Association of India, *supra* note 3, at ¶ 198.