

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 2 | JUNE 2020 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

| LAW AUDIENCE JOURNAL® |
| VOLUME 2 & ISSUE 2 | JUNE 2020 |
| ISSN (O): 2581-6705 |

EDITED BY:
LAW AUDIENCE JOURNAL'S
EDITORIAL BOARD

| LAW AUDIENCE JOURNAL |

| VOLUME 2 | ISSUE 2 | JUNE 2020 | ISSN (O): 2581-6705 |

| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |

| IMPACT FACTOR (2018): 2.527 |

| COPYRIGHT © 2020 BY LAW AUDIENCE JOURNAL |

(ISSN (O): 2581-6705)

*All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (**Law Audience Journal**), an irrevocable, non-exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known.*

No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non-commercial uses permitted by copyright law.

*For permission requests, write to the publisher, subject of the email must be "**Permission Required**" at the email addresses given below.*

Email: lawjournal@lawaudience.com, info@lawaudience.com,

Phone: +91-8351033361,

Website: www.lawaudience.com.

Facebook: www.facebook.com/lawaudience

Instagram: www.instagram.com/lawaudienceofficial

Contact Timings: 5:00 PM to 9:00 PM.

DISCLAIMER:

*Law Audience Journal (ISSN (O): 2581-6705) and Its Editorial Board Members do not guarantee that the material published in it is 100 percent reliable. You can rely upon it at your own risk. But, however, the Journal and Its Editorial Board Members have taken the proper steps to provide the readers with relevant material. Proper footnotes & references have been given to avoid any copyright or plagiarism issue. Articles published in **Volume 2 & Issue 2** are the original work of the authors.*

*Views or Opinions or Suggestions (**if any**), expressed or published in the Journal are the personal point of views of the Author(s) or Contributor(s) and the Journal & Its Editorial Board Members are not liable for the same.*

While every effort has been made to avoid any mistake or omission, this publication is published online on the condition and understanding that the publisher shall not be liable in any manner to any person by reason of any mistake or omission in this publication or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this work.

All disputes subject to the exclusive jurisdiction of Courts, Tribunals and Forums at Himachal Pradesh only.

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 2 | JUNE 2020 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

**“A COMPARATIVE ANALYSIS OF CARTEL LENIENCY IN
INDIA AND USA.”**

**AUTHORED BY: MS. GARIMA SINGH & CO-AUTHORED BY: MR. SHARVIN
VATS, GALGOTIAS UNIVERSITY,
EMAIL IDS: GARIMASINGH5465@GMAIL.COM,
SVSHARVINVATS@GMAIL.COM,
PUBLISHED AT: WWW.LAWAUDIENCE.COM.**

I. ABSTRACT:

“The mere existence of Cartels deprives the consumers and other enterprises of a fair deal. A Cartel is an agreement between two or more enterprises who have agreed not to compete with each other and subsequently involves in activities like price fixing, bid riggings, restricted output of good and services or division of the market area. A cartel arrangement is very hard to detect and deter with and Leniency acts as a key tool to do so. It is most widely used around the globe to tackle Cartels. They are important to detect as they can damage the growing economy because they tend to remove the benefits of a healthy Competition with growing of product prices and less choice for consumers. The Leniency programs are used to encourage the reporting of Cartels.

A conditional immunity or lesser penalty is given to the member of the Cartel who comes forward to report its existence and provide the appropriate authority i.e. Competition Commission of India (CCI) and Department of Justice (DOJ) in America. By this, the Cartels not only get destabilized but also maximises the chances for the authority to stop other Cartels. Both the CCI and DOJ have given clear guidelines for providing immunity to the applicants. These programs ultimately help the authorities to detect and break up the Cartel operations.”

Keywords: *Cartels, leniency programme, India, U.S.A, C.C.I., D.O.J.*

II. INTRODUCTION:

The key aspect of a growing economy is its dependency on the business happening in that economy. The very basic understanding of a business is that it is done to maximise the profit and minimise its losses. In order to maximise the profit a business enterprise needs to eliminate its competition because more the enterprises in a specific field of business, less are the chances of maximised profit.

One such way of maximising the profit is to team up with other enterprises hence forming a cartel. Cartels are however not easy to detect and requires a lot of time consumption and to investigate and gather evidence against the cartel. Therefore, these cartels are considered as cancers in the field of competition law. These cartels are formed so as to control the price of all legally traded goods and services while most of the cartels are found in illicit industries such as smuggling or drug trade.

The cartels not only control the prices in the market they also have the ability to restrict the output and act collectively like a single monopolistic approach. By this cartel not only increase their profit but also manages to move the surplus income from the consumer to the producer because of increase in prices and this is considered as a “deadweight welfare loss” to society.

Because of this negative effect on consumers by existence of cartels in an economy the Organisation for Economic Cooperation and Development (OECD) has identified four major categories regarding the conduct of the cartel: price fixing, restricted output, allocation of market and bid rigging¹. OECD via a recommendation concerning effective action in 1998 said that hardcore cartel is the most egregious violations of competition law. The primary object of a leniency programme is detection of such hardcore cartels. A leniency programme

¹ Satarupa Sarkar, *Cartels and Their Effect on Competition*, RACOLB LEGAL (March 16, 2017), <http://racolblegal.com/cartels-and-their-effect-on-competition/>.

regulates and detects such cartels while offering exemptions or a reduced penalty in lieu of substantive information and total cooperation from the person or enterprise acting as the informant. Organisation of Petroleum Exporting Countries (OPEC) comprises of fourteen oil rich countries with an objective to coordinate and unite the petroleum policies of the member countries². This is done by OPEC to achieve stabilisation in the oil market. It is important to note that OPEC's activities are considered legal because the protection of the US Foreign Trade Law. This is one example of a legalised cartel.

The best example of an illegal cartel is the South American drug trafficking organisations. They are commonly referred to as drug cartels as they fulfil the criteria of a cartel. As the name suggests these cartels control the price and supply of drugs by a set of rules made amongst themselves. The most famous and notorious cartel is the Medellin Cartel headed by the deceased Pablo Escobar from 1980s till his death in 1993. Other than South American Drug cartels there are Mexican, Italian and Russian drug cartels which are often highlighted because of their illegal trade.

III. CARTEL LENIENCY IN INDIA:

Cartel is defined under Section³ 2, sub-section (c) of the Competition Act as:

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

What is a “Cartel”?

1. Cartel is an agreement among enterprises (including a person, a government department and association of persons / enterprises) not to compete with each other on price, products (goods and services) type of customers.
2. The fundamental objective of cartel formation is to increase the prices above certain competitive levels which would have normally existed if cartels were not formed.

² James Chen, *Organization of the Petroleum Exporting Countries (OPEC)*, INVESTOPEDIA (February 24, 2020), <https://www.investopedia.com/terms/o/opec.asp>.

³ The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

Cartels affect consumers and economy by eliminating competition among enterprises. For consumers, cartelization usually results in higher prices of products and less or no choice for goods or/and services.

III.I WHAT IS A LENIENCY PROGRAM?

The purpose of leniency programme is detection of cartels. A Leniency programme in an official system offers lenient treatment to members of cartels who intends to report cartel's information to the Commission. This programme attempts to protect the whistle blower members of the cartel. Competition authorities have formulated various leniency programmes to encourage and incentivize various members indulged in cartelisation by infringing competition to come forward and disclose their anticompetitive agreements and to assist the competition authorities in lieu of immunity and lenient treatment⁴.

Competition Commission of India (CCI) is the regulatory authority which administers and enforces leniency programme. Rationale of leniency programme is to enable cartel members who want to cooperate and share information with the commission; otherwise if found by commission they would have to face stringent action of authorities concerned.

III.II LENIENCY PROGRAM-FOR WHOM?

Leniency programme is available for those enterprises / individuals who come forward to disclose their role and functioning of cartel to the Commission and cooperate with subsequent investigations and consequently they get some reduction or complete amnesty from penalty as their reward. Such programs for detecting cartels are practised universally as they are effective in combating cartels. To effectuate cartel leniency detection, CCI has framed Competition Commission of India (Lesser Penalty) Regulations, 2009⁵.

⁴ Manas Kumar Chaudhuri, Sagardeep Rathi & Anisha Chand, *The genesis and ailments of cartel regime in India: a critical analysis*, TAYLOR & FRANCIS ONLINE (December 23, 2019), <https://www.tandfonline.com/doi/abs/10.1080/24730580.2019.1703477?needAccess=true&journalCode=rilw20>.

⁵ The Competition Commission of India (Lesser Penalty) Regulations, 2009, No. 4, Acts of Parliament, 2009 (India).

III.III SCOPE OF APPLICATION:

The leniency programme covers infringements which:

- *Directly or indirectly determine the price of purchase and sale.*
- *Production, supply, markets, technical development, investment or provision of services is controlled or limited.*
- *Share the market or source of production or provision of services by allocation of geographical area of market, type of goods or services or number of customers in the market or any other similar way.*
- *Directly or indirectly indulge in bid-rigging (collusive tendering).*

These types of above-mentioned agreements result in significant penalties. But there is no criminal liability for cartelization in India. The leniency regime only extends to the administrative liability imposed on cartel members.

III.IV LENIENCY PROVISIONS UNDER THE ACT:

According to section 3(1) and 3(3) Indian Competition Act, 2002 any agreement between competitors is prohibited if it causes or likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India. Section 46 of the Competition Act along with the Competition Commission of India (Lesser Penalty) Regulations 2009 codifies and governs the law on leniency in relation to cartel investigations in India.

According to section 46 if the commission is satisfied that any member included in any cartel, which has allegedly violated s. 3 of the Act has made a disclosure of information of such violations and such disclosure is fruitful, it can impose less or no penalty than the leviable penalty under the Act.

III.IV.I THE REGULATION-COMPETITION COMMISSION OF INDIA (LESSER PENALTY) REGULATIONS, 2009:

To implement leniency provisions, section 64 of the Act empowers the Commission to draft rules and regulations for matters in respect of how this programme should be carried out in a procedural manner. The procedural aspects of the law on leniency in relation to cartel investigations are provided under the Lesser Penalty Regulations. The three essential components of a leniency programme are - conditions to be satisfied for availing benefit under the programme, the procedure for reduction in penalty, and the quantum of punishment which is waived off when lenient treatment is provided to the cartel member who discloses information to Commission by cooperation⁶. *Briefly, the Lesser Penalty Regulations set out the:*

- *Eligibility conditions for a leniency application.*
- *Sliding scale of leniency from administrative penalties.*
- *Procedure for obtaining a marker status.*
- *Contents of application for leniency.*
- *Confidentiality and related provisions.*

III.IV.II AMENDMENT IN 2017:

The CCI amended the Lesser Penalty Regulations in August 2017 to strengthen and streamline its leniency programme by attracting better-quality evidence.

- *Expanded the Ambit of the Lesser Penalty Regulations:*

The amendment enables individual members to approach CCI with evidence on bid rigging. An additional requirement was also introduced for applicants seeking leniency, which involves submission of details of individuals who were involved in the cartel on behalf of the

⁶ Malveka Nautiyal, *The Indian Leniency Program & Its Evolution*, RGNUL STUDENT RESEARCH REVIEW (February 19, 2020), rsrr.in/2020/02/19/the-blog-elucidates-on-the-future-of-the-indian-leniency-regime-after-the-2017-amendment-discusses-some-important-changes-post-amendment-and-states-relevant-measures-for-a-more-effective-leniency/.

applicant⁷. Therefore, while applying for leniency, the applicant can protect its employees involved in cartel by seeking immunity for them.

- ***Abolished the Earlier Cap on the Number of Leniency Applicants Who Could Benefit from the Leniency Program:***

Earlier the Act did not allow CCI to grant immunity to more than three applicants. But after the amendment this cap has been removed allowing grant of leniency to more than three applicants⁸. Subsequent applicants will be qualified for a penalty waiver of up to 30%, provided they cooperate in sharing vital information in giving "significant added value" to the already possessed evidence by CCI or the Director General. These criteria also apply to second applicants.

- ***Allows Inspection Of Files By Parties To Information Submitted By Applicants.***

The amendment also covers the provisions of General Regulations for inspection of case files relating to the information submitted by the applicants under the Lesser Penalty Regulations. After that CCI shares the Director General's report with the parties concerned and "non-confidential" part of the report becomes available for inspection by the parties.

III.V CONDITIONS TO AVAIL BENEFITS OF LENIENCY

PROVISIONS:

The CCI is empowered for granting of full immunity from administrative penalties leviable on cartels under the Competition Act. ***An applicant will be rewarded a reduction in administrative penalties (up to 100% if it is the first applicant) and fulfils the following requirements:***

- *He must cease participation in the cartel from the time of the disclosure of information.*
- *He shall provide vital information for the alleged violation of the Competition Act.*

⁷ Samir Gandhi, *Cartel Leniency in India: Overview*, AZB & PARTNERS (February 1, 2019), <https://www.azbpartners.com/bank/cartel-leniency-in-india-overview/>.

⁸ Nisha Kaur Oberoi, *CCI's Amended Regulations Provide Clarity*, BLOOMBERG QUINT (September 6, 2017, 6:18 PM), <https://www.bloomberquint.com/opinion/ccis-amended-lesser-penalty-regulations-provide-clarity>.

- *He shall provide all the information, documents and evidence which are relevant and are requested by the commission.*
- *He shall co-operate honestly, fully, continuously and expeditiously throughout the investigation period and should not conceal, destroy or manipulates any relevant documents which can benefit the establishment of cartel. The CCI can also impose further conditions depending upon the circumstances of a particular case.*

In addition, to the grant of leniency, the first applicant should disclose vital information by submitting evidence against cartel enabling the commission to:

- *Develop a prima facie opinion regarding the existence of a cartel where the CCI in absence of evidence can't form that opinion.*
- *Establish a violation of section 3 by the cartel by providing evidence that the Director General or the CCI do not possess.*

III.VI SCALE OF LENIENCY FROM ADMINISTRATIVE PENALTIES:

The Lesser Penalty Regulations works on a sliding scale of leniency in relation to the administrative penalties. There is a sliding scale of leniency from administrative penalties under the Lesser Penalty Regulations. The second or third applicant in the priority status can also be granted the benefit of a reduction in penalty by up to 50% and 30% of the maximum permissible penalty respectively if they make a disclosure with sufficient evidence⁹.

As previously mentioned, the CCI amended the Lesser Penalty Regulations in August 2017 (amendment). Originally, the Lesser Penalty Regulations only extended the entitlement to a fine reduction to a maximum of three leniency applicants on a first come, first served basis. The amendment has done away with this limitation and has now permitted additional applicants to avail the benefit of the Lesser Penalty Regulations. All applicants subsequent to the third are now eligible for a reduction in penalty by up to 30% of the full leviable penalty.

⁹ Rajat Sharma & Kushagra Agarwal, *CCI's Application Of The Leniency Regulations*, COMPETITION LAW OBSERVER (August 9, 2018), <https://competitionlawobserver.wordpress.com/2018/08/09/ccis-application-of-the-leniency-regulations/>.

III.VII APPLICATION PROCEEDINGS:

In order to make a successful disclosure about an existing cartel, the applicant(s) have to file an application for leniency with the CCI. Once the application is filed the following procedure initiates.

III.VII.I MARKERS:

As per the provisions of the Competition Act, the applicant filing for leniency application can apply for a marker so as to obtain a spot in the leniency or immunity queue. This is done to gather required information and evidence to perfect the marker.

In order to apply for a marker, the following steps should be followed:

- Marker letter should be submitted to CCI either orally or by post. An e-mail can also be considered as a marker letter.
- The applicant should file a detailed written application of leniency with a span of 15 days from the date of submission of marker letter to CCI. However, if applicant fails to submit leniency application within 15 days his/her priority status is forfeited and the benefit of grant of lesser penalty is also relinquished¹⁰.

III.VII.II INFORMATION/EVIDENCE:

After applying for marker, the applicant should keep the following points in consideration while filing leniency application under lesser penalty regulations.

- *The names and addresses mentioned in application should be relevant.*
- *In case of applicant living outside of India, the address, including e-mail, phone number etc. in India should be given for communication.*
- *The application must contain a detailed description of all the arrangements of alleged cartel along with its aims and objectives and all the activities carried out to achieve its aims and objectives¹¹.*
- *The goods or services involved.*

¹⁰ Anubhav Pandey, *Leniency Program of Competition commission of India*, IPLEADERS (September 10, 2018), <https://blog.ipleaders.in/leniency-programme-of-competition-commission-of-india/>.

¹¹ Abir Roy, *India*, ICLG To: Cartels and Leniency 96, 99-100 (2018).

- *The geographic market covered, etc.*

III.VII.III WITHDRAWAL OF LENIENCY:

Once the application is filed and accepted by CCI hence initiating an inquiry into the alleged cartel. The CCI can at any stage of said inquiry is at the discretion to withdraw the leniency if it feels that applicant has failed to comply with the condition subjected to him or lacks cooperation with the commission. However, if leniency is withdrawn it will be communicated after the completion of inquiry via CCI's final order.

The withdrawal of leniency will not under any circumstance be communicated during the inquiry proceedings¹². If the leniency of one of the applicant's is withdrawn the applicants remain eligible for leniency as per their application.

III.VII.IV CONFIDENTIALITY AND DISCLOSURE

As we saw in the above-mentioned facts, the applicants are bound to disclose information about and in doing so they expose their own identity. For this CCI follows the identity and information disclosure under which CCI cannot reveal the identity and information so as to protect these.

Exceptions of this rule are:

The identity of the applicant must be treated as confidential by both the CCI and Director General except:

- *Disclosure is required by law.*
- *The applicant has agreed to the disclosure in writing.*
- *The applicant has publicly disclosed this information.*

Likewise, CCI and DG have the obligation to keep the information, documents and evidence as confidential subject to certain conditions.

¹² Rahul Shukla & Aditi Gopalkrishnan, *Cartel leniency in India: overview*, THOMSON REUTERS PRACTICAL LAW (October 1, 2019), [https://uk.practicallaw.thomsonreuters.com/2-520-7061?__lrTS=20180422215052879&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-520-7061?__lrTS=20180422215052879&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

III.VIII CASE LAWS:

III.VIII.I BRUSHLESS DC FANS CASE:

This case was initiated as a *suo moto* investigation conducted by DG upon directions received by CCI which received the substantive information from CBI¹³. The report forwarded to CCI signified a cartel relation between the manufacturers and suppliers of brushless fans. This report was in Relation to Indian Railways tenders and Bharat Earth Movers Limited for a supply of Brushless fans along with other electrical items. One of the parties of this cartel filed for leniency during DG's investigation. CCI later on acknowledged that the disclosure made by applicant in lieu of leniency was indeed significant evidence of existence of cartel. However, despite this acknowledgement applicant was not given full leniency rather a reduced leniency of 75 percent. This is because of the fact that when the disclosure was made the CCI was already in possession of evidence and had formed a prima facie opinion about the existence of cartel. Therefore, it is important to note that in order to achieve full leniency a disclosure with all relevant information and evidence must be given to the CCI before it starts the investigation.

III.VIII.II ZINC CARBON DRY-CELL BATTERIES:

One of the parties to this case was Panasonic Energy India CO. Ltd. Hereinafter referred as Panasonic filed for a leniency application with the CCI¹⁴. Subsequently, based on this application CCI started an investigation to detect the cartel of dry-cell batteries between Panasonic, Eveready Industries India Ltd. (Eveready) and Indo National Ltd (Nippo). Soon after the association of Indian Dry Cell Manufacturers (AIDCM) was also considered as a part of investigation. Panasonic, Eveready & Nippo were members of AIDCM. The DG in his report claimed to have searched the premises and conducted seizure operations of these three companies while examining the facts, e-mails and other documents of their association.

¹³ *In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, *Suo Moto Case No. 03 of 2014*, Competition Commission of India.

¹⁴ *In Re: Cartelization in respect of zinc carbon dry cell batteries market in India*, *Suo Moto Case No. 2 of 2016*, Competition Commission of India.

Panasonic was given full immunity was given full immunity by CCI as Panasonic was considered as first leniency applicant and it was only the disclosures made by Panasonic that led to the determination of cartel between these dry-cell manufacturers. However, Eveready and Nippo also applied for leniency at later stage and were given a leniency of thirty percent and twenty percent respectively as a reward for their cooperation in the investigation.

IV. CARTEL LENIENCY IN USA:

The United States has a very long history relating to cartels. One of the main reasons for passing the Sherman Act was to stop the big enterprises from involving in cartel activities. Cartel can be defined as a contract or combination in the form of trust or otherwise or conspiracy, which fundamentally subjects anybody who has some connection or contact with someone else.

The US leniency programme consists of two policies¹⁵:

- *The Corporate Leniency Policy.*
- *The Individual Leniency Policy.*

Under US Anti-trust law, the Department of Justice's (DOJ) Antitrust Division offers leniency to the individual (called 'leniency policy') and the corporate (known as 'amnesty programme').

The leniency policy gives corporations and individuals a chance to come forward and report the anti-trust activity involved in so as to avoid any criminal convictions or subsequent fines and incarcerations¹⁶.

IV.I REGULATORY AUTHORITY:

The regulatory authority has a role in prosecuting criminal violations with respect to federal Antitrust laws while DOJ has a responsibility to administer the leniency programme also known as amnesty programme. Meanwhile, the origin of Antitrust division's authority to

¹⁵ Beau W. Buffier & Stephen Fishbein, *Cartel Leniency in United States: Overview*, THOMSON REUTERS PRACTICAL LAW (June 1, 2014), [https://uk.practicallaw.thomsonreuters.com/4-501-2185?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-501-2185?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

¹⁶ The Division first implemented a leniency program in 1978. It issued its Corporate Leniency Policy in 1993, which substantially revised the program, and a Leniency Policy for Individuals in 1994.

administer such leniency programmes comes from the division's prosecutorial discretion in which it decides whether an indictment should be raised against a company or individual who has come forward voluntarily to report any involvement resulting in criminal violation of federal antitrust laws¹⁷.

IV.II SCOPE OF APPLICATION:

The above-mentioned leniency programmes are applicable to criminal violations of section 1 of Sherman Act, which is also a principal criminal statute enforced by Antitrust Division. It is important to note that the language of section 1 of Sherman Act does not anywhere express as to which violations are criminal in nature and which are civil in nature. For this the Anti-trust division has a well drafted policy regarding the criminal indictment for the cases of per se violations of section 1. ***They are as follows:***

- *Agreements to fix prices.*
- *Bid-rigging.*
- *Market or customer allocation.*

The civil antitrust enforcement either by DOJ or the Federal Trade Commission (FTC) is not covered by the leniency programme but the leniency programme may be applicable to all the offences committed in furtherance of the criminal antitrust violations¹⁸. For instance, a model corporate leniency, ensures leniency "for any act or offence [the applicant] may have committed [time period covered] in connection with the anti-competitive activity being reported".

This clearly means that leniency also implies for other connected offences which might be committed with the antitrust violation and not just the criminal antitrust violations. Conduct that is usually essential to the commission of a criminal anti-trust violation, such as mailing, faxing, or emailing bids agreed on with competitors, constitute other offences, such as mail or wire fraud violations or conspiracies to defraud.

¹⁷ Sherman Anti-Trust Act, 15 U.S.C. s. 1 (1890).

¹⁸ *Corporate Leniency Policy*, THE UNITED STATES DEPARTMENT OF JUSTICE (August 10, 1993), <https://www.justice.gov/atr/file/810281/download>.

IV.III AVAILABILITY OF LENIENCY:

The leniency programme is applicable to all the criminal violations of section 1 of the Sherman Act. The DOJ is not empowered to impose civil fines for infringement of section 1 of the Sherman Act. Both the criminal convictions and civil fines can be avoided by a successful applicant under the leniency programme. Under the leniency programme, a successful leniency applicant can avoid both criminal convictions and criminal fines.

The Antitrust Division's Corporate Leniency Policy offers two types of leniency¹⁹:

- *Type A leniency, which offers immunity from prosecution where an applicant is the first to approach the Antitrust Division before an investigation is initiated.*
- *Type B leniency, which offers immunity from prosecution where an applicant is the first to approach the Antitrust Division after an investigation has begun.*

The conditions for meeting either a Type A or Type B leniency are similar and in practice the Antitrust Division has not emphasised the distinction between Type A and Type B leniencies.

IV.III.I TYPE A LENIENCY:

An applicant is entitled to receive type A leniency if it comes forward before the investigation is initiated and the following conditions should be met.

- *The company should come forward such a time when the antitrust division has not been approached by another source about the illegal activity*
- *The action should be taken to terminate the illegal activity as soon as the company discovers about the illegal activity.*
- *The company should provide the details of wrongdoing with honesty and provides the antitrust division complete, continuous cooperation throughout the investigation.*
- *The confession made of wrongdoing is truly a corporate act, unlike the private confessions of executives and officials*
- *The company should make restitution to injured party if and when possible.*

¹⁹ Robert B. Bell & Kristin Millay, *The Antitrust Division's Corporate Leniency Program*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/spring/antitrust-division-s-corporate-leniency-program/.

- *The company did not influence any other party to indulge in the illegal activity and should not be the leader or originator of said illegal activity.*

IV.III.II TYPE B LENIENCY:

Type B leniency is available to those applicants who co-operate after an investigation has begun if the following conditions are met:

- *The company is the first to come forward and qualify for leniency in relation to the illegal activity being reported.*
- *The applicant should come forward at such a time when the antitrust division has not yet established any evidence against the applicant which is likely to result in a sustainable conviction.*
- *The applicant should make sure that the prompt and effective actions were taken to terminate its role in illegal activities upon its discovery.*
- *The company should provide the details of wrongdoing with honesty and provides the antitrust division complete, continuous cooperation throughout the investigation.*
- *The confession made of wrongdoing is truly a corporate act, unlike the private confessions of executives and officials*
- *The company should make restitution to injured party if and when possible.*
- *It is the responsibility of antitrust division when sure that the leniency hereby granted is not unfair to others with respect to its illegal conduct and confessions about illegal activities*
- *However, the burden will be lower if the company comes forward prior to the beginning of the investigation into the illegal activities by the antitrust division. The closer the antitrust division comes to obtain evidence which will result in a sustainable conviction the more the burden will be on the applicant. However, in practice the Antitrust Division has not been inclined to disqualify leniency applicants on the basis that the applicant was a leader in or the originator of the activity. Instead, the Antitrust Division has sought to de-emphasise this element in favour of maximising the incentives for all participants in unlawful cartel conduct to voluntarily report their involvement to the Antitrust Division.*

IV.IV SECOND-IN-APPLICANTS:

If the Antitrust Division has already awarded leniency in an investigation, companies implicated in a cartel may still be able to obtain significant benefits by entering into plea agreements and co-operating with the Antitrust Division²⁰.

There are a number of means by which the Antitrust Division can reward second-in applicants for their co-operation, such as:

- *Substantially reducing fines.*
- *Spreading fine payments over a series of instalments.*
- *Investigating the guilty executives more favourably.*

IV.V APPLICATION PROCEEDINGS:

IV.V.I MARKERS:

The Antitrust Division provides a leniency applicant a marker for a specific period to secure its position at the front of the queue for leniency while the division collects more information via an internal investigation to substantiate the leniency application. While the marker is in effect, no other company can move up the line ahead of the applicant that has been granted the marker.

IV.V.II INFORMATION AND EVIDENCE:

The applicant must provide full, continuing, and complete co-operation during the course of the Antitrust Division's investigation.

Applicants are expected to:

- *Provide a full description of all facts known to the applicant relating to the anti-competitive activity being reported.*

²⁰ S. D. Hammond, *Cornerstones of an Effective Leniency Program*, THE UNITED STATES DEPARTMENT OF JUSTICE, (November 22, 2004), <https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>.

- *Use its best efforts to secure the on-going, full, and truthful co-operation of the current directors, officers, and employees of the applicant, and encourage such people to voluntarily provide the Antitrust Division with any relevant information they may have²¹.*
- *Enable their current employees to be available for inquiry that antitrust division may hold.*

IV.V.III WITHDRAWAL OF LENIENCY:

Leniency can be withdrawn if the applicant fails to meet its obligations as set out in its conditional leniency agreement. Before the Antitrust Division makes a final decision to revoke a corporate applicant's conditional leniency, it will notify the applicant's counsel in writing of staff's recommendation to revoke the leniency.

IV.V.IV CONFIDENTIALITY AND DISCLOSURE:

The identity of the leniency applicant is not disclosed publicly by the antitrust division until and unless a court order has been issued for the disclosure of the identity in connection with the litigation. Similarly, any information provided by the leniency applicant is not disclosed by antitrust division except required by court to proceed with litigation.

IV.VI CASE LAWS:

IV.VI.I UNITED STATES V. TRENTON POTTERIES CO.²²:

In this case, a complaint was made under Sherman Act and it was alleged that the respondents are holding 82 percent of market share in a specific kind of pottery in manufacturing and distribution in the United States for combination in price fixing and limiting sales in interstate business. The respondents contended by saying that the prices

²¹ S. Muralidharan & C. Deshpande, *Scope For Intersection Between Antitrust Laws and Corporate Governance Principles vis-à-vis Cartel Deterrence in India*, 9 NUJS LAW REVIEW (2016).

²² *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

which were fixed were not unreasonable. The Court in its judgement recapitulated that the authority to conspire for fixing prices, whether reasonably or not incorporates the power to control and limit price fixation which itself is capricious in nature.

IV.VI.II ARIZONA V. MARICOPA COUNTY MEDICAL SOCIETY²³:

This case relates to the determination of prices in cartels i.e. price fixation. Doctors in the state of Arizona have opened various foundations in order to get free medicine service so as to create their health insurance plans alternative. Doctors demanded a very high amount of fee from its policyholders of insurance plan for payment of their health services. The state of Arizona brought an action in the court on the basis of violation of section 1 of Sherman Act and the alleged illegal price fixing collaboration. The US supreme court in its judgement held that such fixing of prices by doctors, medical professionals and others in the relevant market constitutes an offence under the Sherman Act as this conduct satisfies horizontal price fixing.

V. CONCLUSION:

The existence of cartels is one of the biggest problems to the Competition law worldwide. In the present scenario, these cartels have grown to impose a universal impact and are no longer concerned to specific economies. If a cartel of significant size controls the price of a product and increase it in self interest, then in this globalized world it is bound to have a universal effect.

Therefore, it is the need of the hour to make the leniency programs more and more trustworthy. So, a Leniency Program which is both transparent and predictable will be more effective and efficient in its enforcement.

This is what has been highlighted here through this comparative analysis between the Leniency Programs of India and US. It is clear that both the countries have leniency policies that motivate the individuals or enterprises to come forward and disclose sensitive relevant information to the CCI or DOJ as seen in the cases discussed above. Both the Leniency

²³ Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

Programs ensure proper disclosure policies so that the identity and information remain confidential which further induce a sense of security to the applicant. The lesser penalty awarded to the applicant also plays a significant role in giving the individuals or enterprises involved in the cartel illegal activities to come forward and disclose.

Thus, an effective and trustworthy Leniency Program is a win-win situation for both the authorities and the applicant. The authority gets to investigate and gather evidence against the cartel while the applicant gets lesser penalty or total exemption. This is an example of perfect maintenance of status quo.