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Cartel Leniency Program in India – Why No Race Here?

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Abstract :

This study analysis the implementation of the cartel leniency program by the Competition Commission of India using comprehensive data and finds a distinct lack of a 'race' to the agency. We specifically focus on why prima facie findings have not resulted in a 'shock' to expected returns and hence induced leniency applications. Through theoretical and empirical analysis we find several inconsistencies in the determination and application of the penalty, thereby leading to much uncertainty and a lack of correlation with the gain or harm of a cartel. The resulting appeals, strategic or otherwise have only served to reduce the effective penalty and render the leniency program weak. In the conclusion, we offer suggestions to improve the program.

JEL Classification: K21, K42, L40, L41, L44

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CONTENTS

List of Figures

List of Tables

I. Introduction

In considering an appropriate legal framework for attracting private supply of information when dealing with cartels, provisions outlining the penalty and leniency structure in the Competition Act, 2002 (*hereinafter* "the Act") need to be considered together. A high effective deterrence through a combination of a higher possibility of detection and high penalties can render greater success. A higher penalty alone would not be sufficient although theoretically, a low probability multiplied with a higher penalty[1] can keep effective penalties at a deterrent level, exceedingly high penalties can result in undesirable outcomes.[2] For instance, firms that face a very high fine may have to close with a higher probability. However, increasing the probability of detection and establishing an act of cartelisation also has a drawback as it requires the consumption of significant resources. Hence, a leniency clause that encourages co-conspirators to inform the Competition Commission of India (hereinafter 'CCI') helps increase the probability of detecting cartels and simultaneously lower enforcement costs from original levels. That it helps to create a 'prisoners dilemma' type of a situation leading to a breakdown of cooperation between cartel members and hence better enforcement of anti-cartel investigations has been established by theoretical and empirical studies.

In this study, we provide an assessment of the leniency mechanism by using comprehensive data. In the process, we analyse CCI's interpretation and application of provisions related to the choice of penalty base, the methodology for determining penalty reductions, i.e., mitigating and aggravating circumstances and, the application of leniency provisions, all of which play a crucial role in determining the success rate of the leniency program.

II Literature Review: An Appropriate Leniency Framework

The design of the leniency program is crucial for the success of the same. This section provides an overview of theoretical and empirical literature to distil factors that induce a positive effect.

Motta and Polo (2003) evaluate the structure of such policies and conclude that they would be effective only if open to informants even after investigations have been initiated.[3] Firms decide to participate in a cartel if the net of the expected benefit and cost (probability of being detected times the penalty) is sufficiently positive,[4] and unless this payoff is affected negatively during the period of collusion, they have no reason to come forward and report themselves. This alteration of payoff can be induced once investigations have been initiated as the

[1] Initially propounded by Gray Becker in his classic paper it has since attracted criticism for its excess focus on the level of punishment. See, Gary Becker, 'Crime and Punishment: An Economic Approach' (1974) in Gary S. Becker and William M. Landes (eds), *Essays in the Economics of Crime and Punishment* (NBER, 1974).

[2] Even though lower probability of detection may seem attractive due to lower enforcement costs the high levels of penalties needed to offset this low detection probability may be socially undesirable.

[3] Massimo Motta & Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21(3) International Journal of Industrial Organization 347.

[4] Depending on the risk preference

probability of detection increases, thereby reducing the net payoff.[5] So, restricting leniency to the pre-investigation stage does not automatically increase leniency applications (hereinafter 'LA') unless macroeconomic circumstances or internal dissensions alter the expected benefit. Spagnalo (2004), in his infinite interaction oligopolistic model, finds an optimal leniency program to be one that is 'courageous' in that it not only provides amnesty from punishment but also rewards the first informer, particularly when the relationship between firms are long term.[6] However, given constraints, his results show that even moderate leniency programs that do not consider rewards are also effective but best when restricted to the *first* informant as it reduces the possibility of taking strategic advantage of the program. Similarly, Cecil, Rey and Kovacic, (2006)[7] call for moving beyond just leniency and offer bounties for deviating colluding firms. They argue that individual bounties and leniency are complementary in nature. The existence of the former, forces the colluding firm to pay the informed insider to prevent whistle blowing but, that act of payment itself could render the cartel unstable, as the reduced fines may now appear more attractive for the firm, hence encouraging deviation. However, restricting leniency to just the first applicant has its demerits. It may possibly block information that might be needed to convincingly establish a cartel infringement, particularly if the threshold conditions for the first informant is on the lower side and may also deny the agency an opportunity to conclude cases faster and cost-effectively.[8] Klein (2011) shows that such programs increased the intensity of competition in industries, thereby reducing cartel stability.[9] Chen and Rey (2013)[10] find the need for higher rates of leniency when random investigations by the agency have a lower probability of succeeding, a general idea conveyed by Becker (1968)[11] earlier. Marx et al. (2015), in their model studying multiproduct firms, raise concerns that while leniency can help raise detection of cartels, it reduces penalisation in other products.[12] It creates an incentive for firms to strategically report 'sacrificial cartels' in which their gains are little and claim leniency in other products where they derive substantial profits.[13]

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[5] Gordon Jochem Klien, 'Cartel Destabilization and Leniency Programs: Empirical Evidence' (2019) Economics Bulletin, AccessEcon <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854426> accessed 10 January 2020.

[6] *See*, OECD, 'Roundtable on Challenges and Co-ordination of Leniency Programmes' (5 June 2018) Note by the United States <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/leniency_united_states.pdf> accessed 10 January 2020.

[7] Cécile Auberta, Patrick Rey and William E. Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24(6) International Journal of Industrial Organization 1241.

[8] *See,* OECD, 'Leniency for Subsequent Applicants' (2012) <http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf> accessed 15 January 2020): The benefits and position of OECD countries favouring this position is presented in the in its policy round tables.

[9] Klein (n 5).

[10] Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs' (2013) 56(4) The Journal of Law & Economics 917.

[11] Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) Journal of Political Economy 169.

[12] L. Marx, C. Mezzetti, and R. Marshall, 'Antitrust Leniency with Multiproduct Colluders' (2015) 7(3) American Economic Journal: Microeconomics 205.

[13] ibid.

The US was the first to introduce leniency in 1978. It incorporated changes in 1993 that provided automatic leniency to the first informant, if the entity had no pre-existing investigations, extended the same benefit to its individual officers and permitted leniency even after investigations had been initiated.[14] This led to a huge increase in the number of leniency applications from one per month to around twenty by 2010.[15] Miller(2009), employing times series analysis, finds that leniency innovations, introduced in the US in 1993, were followed by an immediate spike in cartel enforcement and later settled down to pre-innovation levels indicating enhanced deterrence.[16] The experience of the US shows the criticality of an appropriate design which includes high penalties, increased probability of detection and transparency in rule implementation.[17] However, new factors seem to be affecting the performance of leniency. Ghosal and Sokol (2018)[18] examine the evolution of cartel enforcement in the US, taking data for the period 1969 to 2016, and find a contrary result. Their analysis shows a decreasing trend in cartel cases accompanied by increased penalties in terms of average number of days of incarceration and, to a smaller extent, the average fines. They attribute this to the possibility that firms could be gaming the enforcement mechanism using technology and increased reliance on tougher-to-prove 'tacit collusion'.

We see a similar positive response to changes in the EU leniency system, which was first introduced in 1996, with subsequent changes in 2002 and 2006. In 1996 the leniency provisions (*hereinafter* 'LP')[19] permitted applicants, provided investigations had not yet begun, a waiver up to 75%, depending on the amount of information the Commission already possessed and the relevance of the information provided by the informant.[20] The ensuing lack of transparency and certainty in determining penalty waivers was recognised and sought to be corrected in 2002 when the Commission provided a full waiver to the first applicant if the firm provided information that enabled initiation of investigations or establishment of an infringement, subject to the condition that the Commission did not already possess the

[14] Vivek Ghosal and D. Daniel Sokol, 'The Rise and (Potential) Fall of U.S. Cartel Enforcement' (2018) University of Florida Levin College of Law Research Paper No. 19-3 <https://ssrn.com/abstract=3162867> accessed 25 January 2020.

[15] In 1993 the US introduced two other modifications to its 1978 corporate leniency program. It offered automatic leniency if there was no pre-existing investigation and employees of the corporation were exempted from criminal sanctions. The combined effect led to a huge increase in the number of leniency applications per month from one to around twenty by 2010. *See*, OECD, 'Roundtable on Challenges and Co-ordination of Leniency Programmes' (2018) Note by the United States <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/leniency_united_states.pdf> accessed 10 January 2020; *See also,* Department of Justice (USA), 'The Modern Leniency Program After Ten Years - A Summary Overview Of The Antitrust Division's Criminal Enforcement Program' (August 12, 2003) <https://www.justice.gov/atr/speech/modern-leniency-program-after-ten-years-summary-overview-antitrust-divisions-criminal> accessed 12 January 2020.

[16] Nathan S. Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99(3) The American Economic Review 750.

[17] OECD, 2018 (n 6) 3.

[18] Ghoshal and Sokol (n 14).

[19] Same abbreviation is also used for "Lesser Penalty" in Indian context.

[20] Commission Notice on the non-imposition or reduction of fines in cartel cases (96/C207/04) [July 19, 1996].

information necessary for either of these actions.[21] In 2006 the conditionalities were further clarified, and a marker system was established. The first informant was provided with a complete waiver if its information-enabled targeted inspections or led to the establishment of an infringement subject to the earlier conditions and other new conditions that ensured cooperation.[22] In another attempt to reduce transactions costs and improve speed and efficiency, a settlement system was introduced in 2008.[23] There have been several empirical studies that have helped us analyse the impact of these changes. Brenner (2009)[24] studied a data set of 61 cases from 1990 to 2003, highlighting the impact of leniency when first introduced in the EU and when there was no automatic and full leniency to the first applicant. His study highlighted that there was no increase in the average number of detections after the introduction of the 1996 leniency policy. Riley (2010) finds the 2002 and 2006 changes causing a significant surge in the number of leniency applications and in the percentage of firms which successfully managed to get a reduction in the penalty. The average number of cartel decisions also saw a jump from around two, before 2002, to around eight per annum.[25] Dominte et al., (2013) [26] reviewed 57 cartel cases decided by the EU Commission, which resulted in sanctions, for the period 2000 - 2012. They examined in detail the microlevel effect of various determinants used in deciding the fine. They found that approximately 50% of the total undertakings involved applied for leniency, and 85% were successful. However, they opine that reduced fines could have an unwelcome upward bias on recidivism. While LP's are designed to create a 'race' between co-conspirators to apply for leniency, based on the study of EU data for 16 years (1996-2012), Zhou and Gartner (2012) find a bias in theoretical studies which predict such an outcome.[27] Instead of inducing destabilisation in existing cartels and consequent race to reveal the same, they found 75% of the leniency applications taking place after a cartel had collapsed, with a substantial percentage of applications occurring after a year of the collapse or after a 'dawn raid.'[28] However, the period of delay was found to reduce after the EU introduced a change to its leniency program in 2002 and offered automatic and

[21] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C45/03) [February 19, 2002].

[22] Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2015/C 256/01) [August 5, 2015].

[23] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (L 171/3) [July 1, 2008].

[24] Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' (2009) 27(6) International Journal of Industrial Organization 639.

[25] Alan Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' (January 2010) CEPS Special Report <http://aei.pitt.edu/14570/1/Modernisation_Final_e-version.pdf> accessed 20 February 2020.

[26] Oana Dominte, Daniela Şerban and Alina Mihaela Dima, 'Cartels in EU: Study on the Effectiveness of Leniency Policy' (2013) 8(3) Management & Marketing Challenges for the Knowledge Society 529.

[27] *See,* Jun Zhou and Dennis L. Gärtner, 'Delays in Leniency Application: Is there Really a Race to the Enforcer's Door?' (2012) TILEC Discussion Paper No. 2012-044 <https://ssrn.com/abstract=2187771> accessed 20 January 2020.

[28] Chen and Rey (n 10).

complete leniency to the first applicant[29] and reduced fines for subsequent applicants when conditions were fulfilled.

Moving on to studies for multi jurisdictions, Borell et al. (2013)[30] analysed the effectiveness of antitrust enforcement for 47 countries, with cartel policy as one of the variables. His study of effectiveness is based on the presence (absence) of five criteria, which includes per se illegality, published guidelines for cartel enforcement, criminal sanctions, punitive damages, and a LP. Among these five criteria, he finds the existence of a LP to have the highest marginal impact on the effectiveness, and the same is visible amongst countries which had recently adopted the same. Emphasising the increasing reliance on LP, it has been reported that only two countries out of seventeen issued cartel decisions in 2018, which did not involve LP applications, indicating the significant role of reduced fines.[31] In the same report, by Allen and Overy, there are three significant findings: firstly, that there is a decreasing number of LP applicants, therefore, increasing the importance of the 'whistle blower'; secondly, the potential negative impact of claims for private damages on LP applicants and lastly; an increasing trend of settlement actions. Others point out the reduced cartel enforcement in Europe and attribute the same to the possibility that firms which are a part of global cartels have less incentive to avail of a leniency benefit as they face higher penalties arising out of actions across multiple jurisdictions.[32] It is important for competition enforcement agencies to recognise the strategic nature of interaction involved in the detection and penalisation of cartels. Cartels could simultaneously invest in efforts aimed at reducing the possibility of any one firm turning a 'confessor', by reducing all traces of evidence of coordination. Marx and Mezetti (2014) discuss a few cases in which cartels had hired external consulting agencies to manage the operation of the cartel keeping in mind the need for reducing the ability of any firm to seek leniency.[33]

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[29] *cf.* COMMISSION NOTICE on the non-imposition or reduction of fines in cartel cases (96/C 207/04) – Para B – NON-IMPOSITION OF A FINE OR A VERY SUBSTANTIAL REDUCTION IN ITS AMOUNT "…will benefit from a reduction of at least 75 % of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated" *with* Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03) Para A(8) – IMMUNITY FROM FINES - The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed…"

[30] Joan-Ramon Borrell, Juan Luis Jiménez & Carmen García, 'Evaluating Antitrust Leniency Programs' (2014) 10(1) Journal of Competition Law & Economics 107.

[31] Philip Mansfield, Thomas Masterman and Laura Harvey, 'Global Cartel Enforcement Report' (2019) Allen and Overy <https://www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/campaigns/global_cartel_enforcement_control/global_cartel_enforcement_report_-_2019.pdf> accessed 20 January 2020.

[32] Michael Acton, '*EU cartel enforcement is on the wane, but don't blame Vestager*' (8 Nov. 2018) Mlex Market Insight, LexisNexis *available at* <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/eu-cartel-enforcement-is-on-the-wane-but-dont-blame-vestager> accessed 22 January 2020.

[33] Leslie M. Marx and Claudio Mezzetti, 'Effects of antitrust leniency on concealment effort by colluding firms' (2014) 2(2) Journal of Antitrust Enforcement 305.

With respect to India, a recent study by the CCI and the ICN (2018), which covered 37 jurisdictions, reveals that there were no cartel investigations that were spurred by LP application for the first eight years of enforcement which was quite contrary to the situation in several other jurisdictions where LP applications played a significant role.[34]

To sum up, studies so far suggest leniency programs which provide for LP's even after initiation of the investigation, allow for multiple applicants, automatic and full waiver for the first applicant with lower waivers, i.e., a clear marker system for later applicants, a penalty system that is inversely correlated with the probability of detection and, transparency in the process, have a higher likelihood of succeeding. Additional instruments that have either aided or can potentially aid are a settlement system and a whistle blower mechanism with a monetary reward. The emphasis of successful reforms has been to keep fines high to enhance deterrence and at the same time keep rules and procedures more transparent and certain to make cooperation easier. Most jurisdictions have seen a high proportion of cartel cases resolved through leniency applications. However, there is a need for the agencies to evolve solutions, technological or otherwise, to tackle increasingly complex evasive mechanisms that cartels have started employing and address the elephant in the room, namely, private compensation and potential multiple jurisdictions claims which could deter cartel members from cooperating.[35]

III Structural Breaks and the Evolution of Cartel Enforcement and Leniency Regulations

In this part, we examine changes in the anti-cartel enforcement mechanism and treat significant changes as a structural break which, *ceteris paribus*, if linearly evolving towards a better incentive-disincentive structure, should lead to increased reporting of cartels by breakaway firms. We identify three structural phases and the one as proposed. The first phase covers the period during the operation of the Monopolies and Restrictive Trade Practices Act,1969 *(hereinafter 'MRTP Act')* to the start of the Competition Act, 2002 *(hereinafter 'the Act')* enforcement in 2009; the second is from 2009 to 2017 with the unamended provisions of the Act and the CCI (Lesser Penalty) Regulations, 2009 *(hereinafter 'LP Regulations')* and the third phase from 2017 onwards when certain innovations were introduced, and amendments were made to LP Regulations. As seen in the US and EU, if the three periods were to see a linear evolution towards a better cartel enforcement mechanism, we should ideally see an increase in the number of LP applicants, i.e., proving the 'rush' hypothesis followed by a reduction after a peak reaction to innovations. *Ceteris paribus,* we should see the first leniency

[34] ICN Special Project, 'Cartel Enforcement and Competition' (2018) <https://www.cci.gov.in/sites/default/files/whats_newdocument/ICN%20SPECIAL%20PROJECT%202018.pd> accessed on 10 April, 2020.

[35] For instance, the Competition Markets Authority (UK) has developed an algorithm tool for detecting bid rigging. See, *CMA launches digital tool to fight bid-rigging,* (December 15, 2017) <https://www.gov.uk/government/news/cma-launches-digital-tool-to-fight-bid-rigging> accessed 20 April 2020.

application followed quickly by other applications as the payoffs change, and the time period for establishing cartel infringements should be lower, reducing the CCI's resource use. We examine data across the time periods using descriptive statistics to test for the same.

III (a) First Phase - The Weak Enforcement Phase (1969-2009)

Prior to the Act, the MRTP Commission, which enforced the MRTP Act, sought to reduce market share concentration by regulating the expansion and diversification of production by large firms[36] and also regulate anticompetitive practices by hauling up monopolistic and restrictive trade practices. While the MRTP Commission had dealt with cartel cases, studies have pointed out that it was extremely ineffective owing to several reasons such as the fact that it: lacked definitions of crucial anticompetitive acts, including that of a 'cartel'; even if it did identify a cartel it could only pass a 'cease and desist' order - which too was not adequately enforced; did not consider cartelisation as *per se* anticompetitive; dismissed identical pricing cases, even in the case of bid-rigging as requiring direct evidence of the agreement and; it did not have extraterritorial jurisdiction.[37] Between 1969 and 1991, the MRTP dealt with 64 potential cartel cases of various types and passed cease and desist or prohibition orders in 25 instances.[38] During 1991 and 20, out of a total of 26 cases, there were 9 positive findings with orders of cease and desist or prohibitions issued.[39] Although there were several cases decided upon by the MRTP, without an effective penalty provision and follow-up enforcement of orders, there were many instances of the same industry or trade association engaging in repeated acts of collusive behaviour.[40] Most complaints were inevitably by affected parties in the supply chain and a few initiated by the MRTP itself.

III (b) Second Phase – New Regulations (2009-2017)

[36] The control over expansion and diversification was done away with by a 1991 amendment to complement the new economic policy.

[37] Aditya Bhattacharjea and Oindrila De, 'Cartels and the Competition Commission' (2012) 47(35) Economic and Political Weekly 14. (For a more exhaustive study of the MRTP cases *see* CUTS International and NLU Jodhpur, 'Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India' (2008) <https://www.cci.gov.in/sites/default/files/cartel_report1_20080812115152.pdf> accessed 10 February 2020.

[38] ibid (CUTS) 109. (The allegations were related to price fixing (24), bid rigging (15), Collective Boycotts (20) , and market allocation (7). The study could get access to data only on 56 of the 64 cases and in certain cases it appears to treat resale price maintenance between the producer and distributors as cartel cases which we exclude in the count. For instance, see case 16.

[39] These numbers are at variance with Bhattacharjea and De 2012 (n 37) who reports 7 cases in each of these periods. However, we adopt the numbers of the CUTS (n 37) as their study involved a more comprehensive analysis of cases using all available material which often involved the study of difficult-to-access physical documents.

[40] CUTS and NLU (n 37) (Transport/truck operators/Road transport associations, Tyre manufacturers, Alkali manufacturers/ associations, Bombay Cotton Waste Merchants Association were a few sectors/associations/firms are examples of repeated instances of collusion which attracted a cease and desist order or voluntary acceptance to not engage in such activities.)

This phase saw the formal beginning of the new legal system - the Act with the CCI enforcing provisions related to cartels as incorporated under Section 3 of the Act from 2009.[41] From a comparative perspective, the regulatory structure is certainly stronger than in the first phase. Section 3 of the Act defines and prohibits the agreements which have an "appreciable adverse effect on competition" (*hereinafter* "AAEC") in India. Agreements are broadly defined to include any understanding or arrangement, or action in concert. However, depending upon the nature of parties and the agreement, it is categorised as a 'Horizontal Agreement' under Section 3(3) of the Act or 'Vertical Agreement' under Section 3(4) of the Act. In both scenarios, the test of anti-competitiveness is dependent upon the AAEC that such acts have within India. Although AAEC is not defined in the Act, certain parameters are provided under Section 19(3) of the Act for establishing AAEC. Horizontal agreements which intend to fix prices, limit supply and innovation, allocate markets or rig bids are presumed to have an AAEC, i.e., *per se* anticompetitive. However, there is no such presumption in vertical agreement cases, i.e., a *rule of reason* approach is adopted.[42] As per the statutory scheme, cartels are included in the definition of horizontal agreement and are meted harsher sanctions. This differentiation between cartels and other horizontal agreements is outlined in Section 27(b) of the Act. In instances of non-cartel horizontal agreements, CCI has the discretion to impose up to 10% of the average turnover of the last three preceding financial years. For cartel infringements, CCI has an additional option of imposing a penalty capped at three times the profits derived or up to 10% of the turnover, both computed *for each* year of the continuance of the cartel.[43] Clearly, the wider discretion with stronger penalty provision is aimed for higher deterrence.

The Act also incorporates a leniency framework. Section 46 of the Act provides the CCI with the power to impose a lesser penalty when a cartel participant provides 'full, true and vital' information. Amendments in 2007[44] brought in two changes which created a positive tilt towards creating a better payoff for providing information. Firstly, the sentence "*lesser penalty shall be imposed by the Commission only in respect of …who first made the full, true and vital disclosures*" was amended to remove the word '*first'*.[45] As it allows for more than one applicant, the amendment could create a cascading effect with the first informant propelling others to join – a '*rush effect'*. The issue of gaming in the present market or alternate markets, by the same firms, could be addressed by the CCI, when it considers mitigating or aggravating (repeat offence) factors and, by employing a sliding scale approach in deciding the degree of penalty for later applicants. A further amendment to Section 46 of the Act requires information to be provided *before the investigation report of the Director General's office has been received* by the CCI. The earlier position required information to be provided '*before proceedings were*

[41] The Competition Act, 2002 received the assent of the President on the 13 January 2003 and then enacted, however the commencement of Section 3 and 4 and provisions related to its enforcement took place from May 20, 2009.

[42] Rajasthan Cylinders and Containers Limited v. Union of India, 2018 SCC OnLine SC 1718 [73].

[43] Excel Crop Care Ltd. v. CCI (2017) 8 SCC 47 [104] – [105].

[44] Competition (Amendment) Act, 2007 (No. 39 of 2007) (IN).

[45] Competition Act, 2002 (IN), s 46.

initiated or investigation had been initiated under section 26 (1).[46] Initiation of investigations enhances the element of risk for cartel participants, thereby altering their payoff and encouraging potential informants from within. Blocking them at the 'initiation' stage would have rendered weak the leniency program. Now, with the amendment, investigations could induce 'cheating' from amongst cartel participants whose risk appetite is the least. Once the 'marginal' participant confesses on the cartel, the next-in-line firm faces an enhanced risk due to the 'cheating firm' and hence may also decide to report to the CCI as the provision no longer restricts itself to only the 'first' informant. Hence, the amendment can enable a quicker closure with a lower cost.

Additional LP Regulations were formulated and notified by the Commission in 2009,[47] laying out conditions for lesser penalty , the quantum of deduction, the procedure for deciding the same, provisions for confidentiality and finally, a schedule providing for an application format for the informant. The factors considered when deciding upon the magnitude of lower penalty, laid out in Reg. 3(4) of the LP Regulations, include the stage at which the informant comes forward, the quality of information, the evidence that the Commission already has and, the overall case facts.[48] The first applicant, subject to factors mentioned above, can be given a reduction of penalty *up to* 100 percent, the second, provided the information provided has "added value", can get a reduction up to 50 percent and, the third up to 30 percent.[49] However, Reg. 4 of the LP Regulations limited the maximum number of lesser penalty applicants to only three in this phase. It is quite possible that the first applicant may not get the 'priority status', after its submission has been assessed and, hence other applicants could move up the list.[50] This phase introduced features that have been established as having a positive impact on the LP performance. But the *de facto* degree of deterrence, certainty and transparency of the mechanism can only be judged by an assessment of the actual implementation.

III (c) The Third Phase (2017 – Present)

An amendment to the LP Regulations in 2017 brought in changes to address concerns over implementation of the same. Some of the changes included: (i) removal of the cap on number of applicants allowing the third and following applicants a reduction up to 30% of the monetary penalty;[51] (ii) inclusion of the word 'individuals', to allow for covering responsible employees of a firm involved in a cartel, within the definition of 'applicant' hence removing the earlier restriction that only a *firm* could be an applicant;[52] (iii) confidentiality provisions were amended to permit a harmonious application of relevant provisions of CCI (General)

[46] Competition Act, 2002 (IN), s 26(1).
[47] Competition Act, 2002 (IN), s 64.
[48] Competition Commission of India (Lesser Penalty) Regulations, 2009 (IN) reg 3(4).
[49] Competition Commission of India (Lesser Penalty) Regulations, 2009 (IN) reg 4.
[50] Competition Commission of India (Lesser Penalty) Regulations, 2009 (IN) reg 5(8).
[51] CCI (Lesser Penalty) Amendment Regulations, 2017 (IN) reg 2(3).
[52] CCI (Lesser Penalty) Amendment Regulations, 2017 (IN) reg 2(1).

Regulations, 2009 (hereinafter "General Regulations")and LP Regulations; [53]and (iv) clarifying the content of the application.[54]

Since, prior to the 2017 amendments, the number of LP applications were limited to only three applicants, a peculiar position arose in *Nagrik Chetna Manch case,*[55] a bid rigging case, which witnessed 6 LP applicants. To overcome the cap, the accused firms' seemed to have planned their LP applications by distributing them across different tenders. However, this case seems to have provoked the amendment to remove the cap on LP applicants to allow more firms to join in and provide information. If the first three firms have provided information that has led to the possession of sufficient proof by the CCI, a further extension may not really benefit later applicants. This amendment adds value only if the CCI feels that three LP applicants may still not be sufficient for a quick closure of the case, but nevertheless, it can encourage more firms to participate.

Including 'Individuals' within the leniency framework provides for greater certainty.[56] Section 48 of the Act allows for penalising individual employees who are found responsible for the conduct.[57] A firm now needs to submit names of such individual employees so as to provide them immunity.[58] This can have a positive impact as it eliminates the agency-cost bias that can creep in, with the management/individuals wanting to prevent a leniency process to avoid individual penalties, even if the firm were to benefit from such action. However, this development falls short of an explicit whistle-blower clause that could have encouraged 'aware' employees to reach out to the CCI directly.

The third change related to confidentiality may, however, negate the positive developments. While an applicant's identity was earlier protected, it can now be revealed when the same is *necessitated by law*.[59] This was based on the need for harmonising and clarifying the confidentiality of information provided and the identity of the LP applicants made during investigations and information arrived at independently by the DG. In this scenario, what was to be protected under the confidentiality clause for LP applicants conflicted with the provisions of the General Regulations.[60] With this amendment, the treatment of confidentiality of the applicant and content changes. Prior to amendment, as per Reg. 6 of the LP Regulations, the

[53] CCI (Lesser Penalty) Amendment Regulations, 2017 (IN) regs 2(5) and (6).
[54] CCI (Lesser Penalty) Amendment Regulations, 2017 (IN) regs 2(7).
[55] Nagrik Chetna Manch v. Fortified Security Solutions and ors. Case No. 50/2016 (CCI, 1 May 2018)
[56] CCI (Lesser Penalty) Regulations, 2009 (IN), reg 2(a).
[57] Competition Act, 2002 (IN), s 46.
[58] CCI (Lesser Penalty) Regulations, 2009 (IN) reg 3(1)(a).
[59] Samir R Gandhi, Shruti Hiremath and Shivam Jha, 'India: Cartels' (2019) ASIA PACIFIC ANTITRUST REVIEW <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2019/article/india-cartels> accessed 10 March 2020); *See also,* Nisha Kaur Uberoi, Gautam Chawla and Harshita Singh Parmar, 'Competition Panel Needs to Take Fresh Guard' (2019) The Hindu Business Line <https://www.thehindubusinessline.com/opinion/competition-panel-needs-to-take-fresh-guard/article28711899.ece> accessed 10 March 2020.
[60] CCI (General) Regulations, 2009 (IN) reg. 35.

applicant's identity, information, documents, and evidence furnished by the applicants are treated confidentially. This provision created an overarching effect on any provision of the General Regulations by using the "notwithstanding clause", which means that even if the general provision requires the information to be supplied to other parties in the process, confidentiality will still prevail. However, vide with the newly inserted Reg. 6A of the LP Regulations, DG can now disclose the information, documents, and evidence to any party for the purposes of investigations, with the permission of CCI.

III (d) Fourth Phase - Towards Leniency Plus

The proposed fourth phase hinges on enacting reforms suggested by the Central Government constituted 'Competition Law Review Committee' (CLRC), mandated to ensure the Act *"is in sync with the needs of strong economic fundamentals."*[61] The CLRC has proposed introducing provisions relating to "Leniency Plus" as a proactive enforcement strategy to encourage companies already under investigation for an alleged cartel to report instances of cartelisation in alternate markets that are unknown to the CCI.[62] Another change proposed is an amendment to Section 46 to allow for the withdrawal of LP applications.[63]

IV Data Analysis – No Big Rush to the CCI

This section presents an analysis of data related to leniency applications in India from 2009 to 2021. Through this disaggregated analysis, we present some of the positives and shortcomings of the journey so far. We discover that the percentage of cartel cases that have witnessed LP applications is small compared to the global trend. Most of these appear to have been due to internal factors adversely affecting cartel net benefits and thereby inducing leniency applications.

IV (a) Just how many cartel cases do we have exactly? Understanding CCI's interpretation of Section 3 (3) of the Act and its application to Professional/Trade Associations (PTA's).

Section 3(1) of the Act prohibits agreements that have an AAEC, and Section 3(2) of the Act declares any such agreement as null and void. Section 3(3) of the Act addresses horizontal agreements and presumes all such agreements as causing AAEC. The wordings of Section 3(3) of the Act reads in manner as to treat agreements/decisions, between/of enterprises (persons) or associations of enterprises (persons), persons and enterprises, "*including* cartels, engaged in identical or similar trade of goods or provision of services," [64] as having an AAEC when the action involves : (a) determining purchase or sale prices; (b) controlling production, supply,

[61] Ministry of Corporate Affairs, *Report of the Competition Law Reform Committee Report* (2020) [1.4] 17.
[62] ibid [10.1 – 10.3] 92 -94.
[63] ibid [10.4 – 10.6] 94 -95.
[64] Competition Act, 2002 (IN) s 3(3).

technological development; (c) involves sharing of markets or consumers ; or (d) bid rigging. A *proviso* provides an exception for joint ventures which can have efficiency-enhancing procompetitive benefits. Quite clearly, there is a differentiation made between 'other' horizontal agreements and cartels. The term 'agreement' is defined in Section 2(b) of the Act to include "any agreement or action in concert".[65] Cartels are defined in Section 2(c) of the Act as "an association of producers, sellers, distributors, traders or service providers who, by *agreement amongst themselves* limit control or attempt to control…",[66] prices, production etc. A Trade Association is not defined in 'The Act'. We believe the term "agreement amongst themselves" is crucial to differentiating cartels from other horizontal associations, as mentioned in Section 3(3). Only if there exists an agreement (explicit or tacit) as provided in section 2(b) can there be a cartel.[67] In other words, when a formal association passes a decision violating Section 3(3) but there is no agreement between the members themselves, it is to be treated as a non-cartel horizontal agreement.[68] However, given that these two types are penalised differently, if the section is enforced in this manner, then it can lead to a strategic misuse of a trade or professional association by the members. They could create membership clauses which can alter payoffs, such that, not following the formal association decision can lead to a worse-off situation. Hence a formal organisation could be used to bypass the need for an "agreement amongst themselves" to avoid penalties altogether or, at worst, face nominal penalties. Good practices would dictate that the competition authority provide broad guidelines to prevent such attempts knowingly or unknowingly. For instance, the UK's Competition and Markets Authority (CMA) has published a set of *do's* and *don'ts* for associations.[69] Such guidelines can determine the grounds for categorising association decisions as 'cartelisation' or 'simple horizontal agreements'. When a PTA plays an active role in helping its members arrive at an agreement that is aimed at or results in price-fixing, market sharing, and so on, it should be considered as a cartel. Our attempt in this section is to understand if the CCI has provided clarity in differentiating between these two categories, applied the right penalties and hence deterred such strategic uses. Further, it also helps us to derive the basis for CCI's computation of the total number of 'cartel' cases and if it missed any strategically 'hidden' cartels.

[65] Competition Act, 2002 (IN), s 2(b).

[66] Competition Act, 2002 (IN), s 2(c).

[67] Rajasthan Cylinders and Containers Limited v. Union of India, 2018 SCC OnLine SC 1718 [72] ("…one of the anti-competitive practices is cartelisation, the essential postulate whereof is agreement between enterprises or association of enterprises or persons or associations of persons in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of service, which causes or is likely to cause an appreciable adverse effect on competition within India.").

[68] Example: Sandhya Drug Agency v. Assam Drugs Dealers Association and Ors., Case No. 41/2011 (CCI, 09 December 2012); *See also,* G. Krishnamurthy v. Karnataka Film and Chamber of Commerce and Ors., Case No. 42/2017 (CCI, 30 August 2018).

[69] CMA, *Dos and Don'ts for Trade Associations* (25th September 2015).
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358304/Trade_Association_dos_and_don_ts.pdf> accessed on 10 December 2020.

Table 1 below on data related to Section 3(3) cases from 2009 – 2021 reveals a total of 122 orders where CCI found *prima facie* contravention and directed investigations by the DG.[70] It found contravention in 95 of these cases post inquiry.[71] However, only 44 of these 95 were determined as *cartels*. Further, penalties were not imposed in all 44 orders, as some were clubbed or, in some cases, since the parties were already penalised in an earlier case on similar facts, no fresh penalty was levied.[72] Thus, of these 44 orders, only 32 were distinct cases. Similarly, in the 51 non-cartel horizontal agreement cases, only 31 were distinct cases. Overall, out of 95 orders, only 63 were distinct cases. Of these 63 distinct cases, 32 were cartels and 31 were horizontal agreement.

Table 1: Numerical Description of Cases under Section 3 of the Act from 2009 - 2021

S. No.	Description	Number of Cases	No-Contravention	Contravention	Distinct cases of contravention
A	*Horizontal Agreement*	57	6	51	31
B	*Cartel*	65	21	44	32
A+B	***TOTAL***	**122**	**27**	**95**	**63**

Of the 32 distinct cartel cases, in 3 cases, no penalty was imposed, keeping in view the facts of the case[73] giving us 29 cartel orders with penalty.

In assessing the data, we find an implicit categorisation of 'Section 3(3) cases' (in the enforcement process) while determining penalties. They include : (a) 'non-cartel' association cases; (b) 'association driven' cartels; (c) '*non-cartel* driven' bid rigging infringements and; (d) hardcore cartels. Section 3(3) prohibits agreements aimed at creating cartels, and Section 46 of the Act, states that the Commission may impose a lesser penalty on any member of a "cartel" who has made full, true, and vital disclosure in respect of the alleged violations.

[70] Competition Act, 2002 (IN), s 26(1).

[71] Competition Act, 2002 (IN), s 27.

[72] Example: **Group 1 Clubbed Cases:** In Reliance Big Entertainment v. Karnataka Film Chamber of Commerce and ors., Case No. 25 of 2010 (CCI) 7 Associations from Cinema and Entertainment Industry were penalised by CCI with 10% of their average turnover. Order under this case was clubbed with matters relating to Case No. 41/2010 (CCI), Case No. 45/2010 (CCI), Case No. 47/2010 (CCI), Case No. 48/2010 (CCI), Case No. 50/2010 (CCI), Case No. 58/2010 (CCI), Case No. 69/2010 (CCI); **Group 2 Clubbed Cases: Penalty** imposed in Case No. 25 of 2010 was carried forward in the cases herewith when similar organisation were tried again in later matter with Case No. 9/2011 (CCI), Case No. 16/2011 (CCI), Case No. 17/2011 (CCI) and Case No. 71/2011 (CCI). Thus, no fresh penalty was levied on the associations involved.

[73] (i) Re: Principal Chief Engineer, South Eastern Railways, Ref. Case No. 05/2011, (CCI, 21 February 2013); (ii) In Re: Cartelisation in Industrial and Automotive Bearings, Suo moto Case No. 05/2017, (CCI, 05 June 2020); and (iii) Chief Materials Manager, South Eastern Railways v. Hindustan Composites Ltd and Ors., Ref. Case No. 03/2016 (CCI, 10 July 2020)

Wordings of the provision clearly indicate that the benefit of the leniency ought to be extended only to 'cartels' and not to any other anti-competitive agreement. However, there appears to be inconsistency and lack of clarity in the approach of the CCI. Parameters distinguishing between (a) and (b) are not clear. In the case of (c), it extends leniency under section 46 to 'non-cartel' driven bid-rigging but, not the harsher penalties provided in the *proviso* of section 27(b) of the Act.

LP Applications are meant to allow the discovery of hard to detect cartel cases which are *per se* anti-competitive. Bid rigging cases are both *per se* anticompetitive and hard to detect, hence the asymmetry in the application of Section 27(b) and 46 of the Act is puzzling. The implication of this incongruity is further discussed in a later section dealing with leniency cases. With respect to (a), CCI has categorised 57 cases as anti-competitive horizontal agreements, violative of Section 3(3), but not construed as a cartel. A common feature observed in each of these 57 orders was that the anti-competitive conduct was rooted in a decision or resolution of a PTA concerned. In a very early case, *Santuka Associates Pvt. Ltd.*,[74] CCI held that a decision taken by an association for its constituent enterprises should be covered within the scope of Section 3(3) of the Act,[75] but it did not term them as a *cartel*. In the said case, directions issued by the All India Organisation of Chemist and Druggist Association (AIOCD) was found to be violative of Section 3(3) (a) and (b) of the Act. The AIOCD aimed to eliminate price competition at the retail level by fixing trade margins and restricting the supply of drugs. CCI held that that AIOCD, "*took decisions …on behalf of the members who are engaged in similar or identical trade of goods* and that such practices carried on, or decisions taken by AIOCD as an association of enterprises are covered within the scope of Section 3(3)."[76] Since CCI saw such infringements as borne out of horizontal agreements but not cartelisation, it opted to penalise only the association, based on its respective preceding three financial years average turnover (income), technically ruling out the applicability of the *proviso* to Section 27(b) and thereby Section 46 of the Act. However, the CCI does not appear to be consistent or clear, in the factors used to demarcate cartels from simple association actions. PTA's were often fined nominal amounts based on the reasoning that they had no substantial revenue, apart from the receipt of fees and charges from members.

The European Court of Justice (ECJ) in *AC Treuhand v. Commission*,[77] held that a cartel facilitator who had assisted in implementing the cartel would be equally liable. ECJ's decision was premised on reasons that the facilitator contributed by its own conduct, was either aware or able to reasonably foresee the actual conduct planned or put into effect by other undertakings and was prepared to take the risk.[78] This position of a facilitator can be compared

[74] Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors. Case No. 20/2011 (CCI, 19 February 2013).
[75] ibid [28.8].
[76] ibid [28.8].
[77] Case -194/14P AC Treuhand V Commission (EU:C:2015:717).
[78] ibid [30].

to that of an association. Thus, not just the members but the association should also be equally liable as an active cartel facilitator, even if it is not itself in any specific trade or business, with the penalty recoverable from the members if the former is unable to pay the same.[79] European Courts have been consistent in their approach, as a similar position was also stated in earlier cases. In FNCB v. Commission,[80] the court affirmed that, where associations engaged in practice directly for the benefit of their members and in cooperation with them, maximum fine can be imposed by considering member's turnover; even though association had no power to bind their members. This position and interpretation would close the possibility of disguising cartels through PTA guidance. Further, in *Verband Der Sachversicherer*,[81] it was clarified by the EU court that a "decision by an association of undertakings" under Article 101(1) covers "*recommendations of an association of undertakings, which are formulated by committees acting within the framework of the association and which are communicated to the association's members, constitute the expression of a concerted practice put into effect by the undertakings affiliated to the association with the object of restricting competition between those undertakings*."[82] Hence it is not even necessary that the decision of an association be binding on members to bring them within the scope of Article 101(1). All that is required is that the recommendation is made with the object or effect of influencing the commercial behaviour of its members.[83] The position of the CCI is quite a distance from this.

For example, in *FICCI – Multiplex Association of India,*[84] CCI penalised the producers and distributors for '*cartel like'*[85] behaviour. It introduces a new term '*cartel like*' and again calls the same as 'cartel' in its final report creating much terminological confusion. The producers and distributors organised themselves under the umbrella of an association by the name 'United Producer and Distributor Forum' (UPDF) with a view to control the distribution and exhibition of films in multiplexes and thereby coerce the multiplexes into sharing a higher percentage of their revenue. It provides a classic example of the strategic use of an association to achieve cartel objectives. To achieve this, the UPDF issued notice to all its members and non-members to not to release new films to the members of the multiplex association. In pursuance of UPDF notices, two other associations, namely - Association of Motion Pictures and TV Programme Producers and the Film and Television Producers Guild of India Ltd., also issued similar notices to its members. CCI identified their conduct as *price fixation* and limiting

[79] OECD, *Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations*, (4 November 2008) <http://www.oecd.org/regreform/sectors/41646059.pdf> accessed 10 June 2020.

[80] Cases C-101/07 P and Case C-110/07 P Coop de France betail et viande v. Commission [2008] ECR I-10193, [2009] 4 CMLR 743.

[81] *Verband der Sachversicherer* Case 45/85 [1987] ECR 405.

[82] ibid [28].

[83] Case T-111/08 *MasterCard and Others* [2009] ECR I-5655, ¶243; See also *Verband der Sachversicherer* Case 45/85 [1987] ECR 405.

[84] FICCI-Multiplex Association of India v. United Producers/Distributors Forum, Case No. 01/2009 (CCI, 25 May 2011).

[85] ibid [23.9] "Existence of cartel like conduct is sufficient to attract the mischief of section 3 (3) of the Act."

supply as "*cartel-like behaviour*"[86] prohibited under Section 3(3)(a) and (b) of the Act and accordingly penalised 27 members of the association with a nominal fine of Rs. One hundred thousand each, not in any way computed based on members profits or turnover as provided under Section 27(b) of the Act.[87] The CCI, in its order, noted that firms engaged in film production and distribution being the beneficiaries of the coordinated action had played an active role in organising the various members to act collectively.[88] This easily fits the definition of cartels as it involves "agreement amongst themselves". Yet, they were all handed out 'administrative' fines while this should have ideally been listed and treated as a 'cartel' case.

Even if one overlooks the above argument as an issue of interpretation and/or a function of the evolutionary application of ideas, inconsistency again plays up. In the *Indian Sugar Mills Association*,[89] violation of Section 3(3) of the Act by two PTA's, namely, the Indian Jute Mills Association (IJMA) and the Gunny Trade Associations (GTA)] was established by CCI. The CCI found the role of the PTA member firms to be explicit and that the association was acting at the behest of its members. [90] The association provided the 'plus factor' for coordinating and implementing the cartel decision while the members 'explicit' role indicated "agreements amongst themselves". CCI concluded that the arrangement between the associations was a violation of Section 3(3)(a) and (b) of the Act and "*Further, the impugned activities also fall with the meaning of cartel in terms of Section 2(c) of the Act…"*[91] Yet while imposing a penalty only the association and its office-bearers were penalised, and the constituent members were let off. The CCI imposed a penalty of 5% of the average of the previous three years turnover (income) of the association. Both *FICCI – Multiplex Association of India* and *Indian Sugar Mills Association* provide clear illustrations of cartels facilitated by associations and possible agreements between the members themselves, but the CCI treated them as non-cartel Section 3(3) of the Act infringements while considering penalties.[92]

There are only three cases in which both the association and members involved were penalised. In these cases, the CCI determined that the association concerned was involved as

[86] ibid [31].
[87] ibid [34].
[88] ibid [26.1] - *"the entities/persons, who have greater stakes in the film industry and who are engaged in production-cum-distribution business, were instrumental in mobilizing the film community for furthering their cause".*
[89] Indian Sugar Mills Association & Ors. v. Indian Jute Mills Association and Ors., Case No. 38/2011 (CCI, 31 October 2014).
[90] ibid [165].
[91] ibid [178].
[92] *cf.* EU Council Regulation (EC) No 1/2003 - Article 23(2) - Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association. Further, in context of deciding the turnover, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) states in ¶14 as "Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members."

a cartel 'facilitator' although no specific decision or resolution was employed.[93] We believe some category (a) type cases could have qualified as cartels, and unless this loophole is tackled, it may allow some cartels to slip through the net. Considering these distinctions created by the CCI, we eliminate these 57 cases of associations and use only those specifically characterised by the CCI as cartels giving us 44 cartel cases. This gives an average of approximately 4 cases per annum, much higher than the previous MRTP era, which resulted in 34 positive findings over nearly 38 years for an average of less than 1 per year.[94] One could reasonably argue that cartel detection has become more effective compared to the previous era.

Out of the total of 44 contravention orders, 33 cases relate to the act of bid-rigging with an average cartel duration of 2.68 years, and 11 cases relate to non-bid rigging cartels with an average cartel duration of 2.75 years. Further, of these 44 cases, around 12 of these were clubbed together, for reasons explained earlier (treated as a single infringement) and, in 3 cases, CCI decided to not to impose penalty. So, for the purpose of our analysis, we are left with 29 decisions for analysing the application of penalty and leniency provisions. In total 6 associations and 259 enterprises[95] were penalised in these 29 cases. A total fine of INR 15.5 million and INR 90.94 billion was levied on the associations and enterprises, respectively. Of these, firms in 8 cases benefited by using the lesser penalty provisions to get penalties reduced by INR 2.28 billion. In the next section, we examine the success of the LP.

IV (b) Leniency Applications – A Lukewarm Response

Leniency programs across jurisdictions aim to destabilise cartels by providing incentives to information providers without whose help enforcement agencies would have a lower likelihood of establishing cartels.[96] Leniency provisions can induce distrust between the colluding firms and hence destabilise cartels.[97] Keeping this in view, most jurisdictions use a marker system that provides penalty reductions that are correlated to the order in which applicants approach the Commission, i.e., *the* first informant gets a higher waiver compared to later applicants, other things, such as vitality of the information, remaining the same. The CCI

[93] (i) Builders Association of India v. Cement Manufacturers Association and Others, Case No, 29/2010 (CCI, 31 August 2016) –association was used as platform to share information; (ii) India Glycols Ltd. v. Indian Sugar Mills Association and Other, Case No. 21/2013 (CCI, 18 September 2018) – Members colluded in submitting the bids by quoting collusive prices and sharing quantities using the platform of ISMA and signals provided by EMAI; (iii) In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Motu Case No. 02/2016 (CCI, 19 April 2018) – Association facilitated cartel activities amongst its members by providing a convenient platform for sharing /discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions.

[94] CUTS (n 37). Even if we include bid rigging cases as a part of the cartel cases decided by the MRTP the CCI average is still far higher.

[95] Within these 5 enterprises got full immunity under the lesser penalty framework.

[96] M.E. Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency? (2015) in Beaton-Wells C and Tran C (eds) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Oxford: Hart Publishing).

[97] YJ Choi and KS Hahn, 'How does a corporate leniency program affect cartel stability? Empirical evidence from Korea' (2014) 10(4) Journal of Competition Law and Economics 883.

has three sources of supply of cases. It is empowered to inquire into alleged anti-competitive acts *suo moto (hereinafter* "*suo moto* cases")[98] or it can act on receipt of information by '*any person, consumer or their association or trade associations*' (*hereinafter* "Information cases")[99] or lastly act on references provided by the central or state government (*hereinafter* "Reference cases").[100] LP Applications are possible in any of the three categories, but when CCI forms a *prima facie* opinion to order investigation based on such application, the matter is classified as a *suo moto* case. Table 2 below outlines the source of detection in cartel cases, including the contribution of LP Applications in the detection of cartels.

Table 2: Source of Detection in Cartel Cases (2009-2021)[101]

SOURCE	NUMBER OF CARTEL CASES
Information - Section 19 (1)(a)	
Consumer	1
Corporate Entity	10
Associations/Civil Society	8
References - Section 19(1)(b)	
Central Government and Departments	7
State Government and Departments	3
Other Statutory Authority	--
Suo Moto - Section 19(1)	
Lesser Penalty Applications	7
Other Sources	8
TOTAL	44
Distinct Cases	32
Penalty Imposed	29

From the 32 distinct cartels cases, CCI received LP Applications in nine cases,[102] of which seven formed the basis of CCI's *prima facie* opinion, and two were made during the process of investigation. (*See,* Table 3 below). These nine cases can be effectively reducible to six by considering knock-on effects resulting from the primary cases, [103] namely, *Sports Broadcasting*

[98] Competition Act, 2002 (IN) s 19(1).
[99] Competition Act, 2002 (IN) s 19(1)(a).
[100] Competition Act, 2002 (IN) s 19(1) (b).
[101] As on 31 July 2021.
[102] (i) In Re: Alleged Cartelisation in Flashlights Market in India, Suo Moto Case No. 01/2017 (CCI, 06 Nov. 2018); and (ii) In Re: Cartelisation in the supply of Anti-Vibration Rubber Products and Automotive Hoses to Automobile Original Equipment Manufacturers, Suo Moto Case No. 01/2016 (CCI, 26 Feb. 2020) although a lesser penalty application was filed, however CCI did not find any contravention and hence the cases are not considered by us in the data.
[103] In Re: Cartelisation by Broadcasting Service Providers by Rigging the Bids, Suo Moto Case No. 02/2013 (CCI, 11 July 2018) (SBC)

(SBC), Electric Power Steering (EPS), [104] *Brushless DC Fan (BDC),* [105] *Pune Municipal Corporation (PMC),* [106] *Zinc Dry Cell (ZDC)* [107] and *Industrial and Automotive Bearing (IAB) cartel cases*. [108]

Table 3: Cartel cases with Leniency Applications (2009 - 2021)

TABLE 3A: Cartel Cases with Leniency Application as Source of Detection					
S.NO.	Case	Period of Conduct	Date of First LA	Investigation Start Date	First LP Reduction
1	*Sports Broadcasting Cartel*	July 2011 – May, 2012	11.01.2013	19.02.2013	100%
2	*ZDC Cartel I*	2008 – 2016	25.05.2016	22.06.2016	100%
3	*PMC Cartel II*	October 2013	01.08.2016	11.08.2016	50%
4	*ZDC Cartel II*	2012 – 2014	07.09.2016	08.02.2017	100%
5	*ZDC Cartel III*	2012 – 2014	07.09.2016	08.02.2017	100%
6	*Electric Power Steering Cartel*	2005 – July, 2011	NA	17.09.2014	100%
7	*Industrial and Automotive Bearings Cartel*	Oct.2009 - Mar.2011	26.06.2017	17.08.2017	*No Penalty*
TABLE 3B: Cartel Cases with Leniency Application submissions post initiation of the investigation					
1	*PMC Cartel I*	Dec. 2014 - March 2015	02.08.2016	29.09.2015	50%
2	*Brushless DC Fan Cartel*	27.02.2013 to 26.03.2013	10.03.2015	23.06.2014	75%

Of the seven LP applications which led to the discovery of a cartel, one led to the discovery of an existing hardcore cartel (*ZDC Cartel I*), six led to the discovery of previous acts of cartelisation (*SBC, EPS, IAB, PMC II and ZDC II and III*). LP applications in the other two, *PMC* and *BDC,* were prompted by the initiation of investigations. PMC and ZDC also led to knock-on effects with the accused firms providing information on four other related acts, which were considered by the CCI to be a part of a single infringement for deciding penalty. The percentage of cartel cases involving LP applications is 20%, including knock-on effects (of a total of 44 cases). Quite clearly, LP's do not seem to have induced cartel instability amongst existing cartels. For instance, the birth date of the Cement cartel, [109] which attracted a huge penalty and caught the fancy of most major news dailies, pre-existed the Act's enforcement but yet, did not induce any LP application once the CCI came into being. There was no 'shock'

[104] In Re: Cartelisation in the supply of Electric Power Steering Systems, Suo moto Case No. 7(1)/2014 (CCI, 9 August 2019). (EPS Cartel)

[105] 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. 03/2014 (CCI, 18 January 2017). (BDC Fan Cartel)

[106] Nagrik Chetna Manch v. Fortified Security Solutions and Others, Case No. 50/2015 (CCI, 1 May 2018) (PMC Cartel I); In Re*:* Cartelization in Tender No. 21 and 28/2013 of Pune Municipal Corporation for Solid Waste Processing, Suo Moto Case No. 03/2016 (CCI, 31 May 2018) (PMC Cartel II);

[107] In Re*:* Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Moto Case No. 02/2016 (CCI, 19 Apr. 2018) (ZDC Cartel I); In Re*:* Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Moto Case No. 02/2017 (CCI, 30 Aug. 2018) (ZDC Cartel II); In Re*:* Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Moto Case No. 03/2017 (CCI, 15 Jan. 2019) (ZDC Cartel III).

[108] In Re: Cartelisation in Industrial and Automotive Bearing Cartel, Suo Moto Case No. 05/2017 (CCI, 05 Jun. 2020). (IAB Cartel)

[109] Builders Association of India (n 95).

to the ex-ante expected benefits of the cartel. What, however, seems to be a predominant factor causing LP applications are external stimuli, including internal disagreements between the cartel partners, which enhanced the probability of detection even without a LA. A closer look at the three LP applications that led to the discovery of existing cartels buttresses this reasoning.

In *ZDC I,* the cartel seemed to be working very well as after a lean patch during 2011-12 and 2012-13, when the three top dry cell manufacturers either faced losses or had minuscule profits,[110] they bounced back with a phenomenal increase in profits over the next few years. The appropriate external stimuli, in this case, happened to be the initiation of anti-dumping investigations against imports of dry cells from China and Vietnam by the Directorate General of Anti-dumping and Allied Duties (DGAD)[111] on 20 October 2015 based on a complaint by the Association of Indian Dry Cell Manufacturers (AIDCM).[112] The three primary manufacturers of dry cells in India included - *Eveready Industries India Ltd. (EII); Indo National Ltd.(IN), and Panasonic Energy India Co. Ltd. (PEI).*[113] These three together accounted for more than 95% of the total market share[114] and were all represented by the AIDCM. An important factor that could have tilted the scale in favour of a cartel member deciding to report to the CCI could have been the investigations and deliberations of the DGAD. The report of the DGAD does not reveal any confidential information provided by the three manufacturers, but it does report that Godrej & Boyce Manufacturing Ltd (GBM), a company that sourced its supply of dry cells from imports and PEI, had alleged a cartel among the three primary producers.[115] GBM was not in favour of AD duties. The three primary firms had denied any cartelisation allegations and the DGAD also ignored the same, saying it had nothing to do with the allegation of cartelisation as its domain was only related to dumping investigations.[116] The DGAD operates under the overall direction of the ministry of Commerce, and once its report was finalised and published, it would have made the allegation public and hence a high probability of a *suo moto* action by the CCI. It was unfortunate that the DGAD did not report the same to the ministry or the CCI for due action, reflecting either poor awareness among the government departments or lack of coordination. PEI was privy to GBM's allegation, made in December 2015,[117] as it along with

[110] ZDC Cartel I (n 109) [9.24].

[111] Anti-dumping investigation concerning imports of 'AA Dry Cell Batteries', originating in or exported from China PR and Vietnam (Initiation Notification, DGAD, 20 Oct. 2015) *available at* <https://www.dgtr.gov.in/sites/default/files/adint_AA_Dry_Cell_Batteries_ChinaPR_Vietnam.pdf> accessed on July 22, 2021.

[112] Anti-dumping investigation concerning imports of 'AA Dry Cell Batteries', originating in or exported from China PR and Vietnam. (Final Finding, DGAD, 27 Sept. 2016) *available at* <https://www.dgtr.gov.in/sites/default/files/MOC636106776635402287_adfin_AA_Dry_Cell_Batteries_ChinaPR_Vietnam.pdf> accessed on July 22, 2021.

[113] ibid

[114] ibid 9.

[115] ibid 8.

[116] ibid 10.

[117] Initiation Notification, DGAD (n 113)

the other cartel members, responded by denying the same.[118] Yet, it filed for an LP application on 25 May 2016, a couple of months before the final report of the DGAD on 27 September 2016. It is highly probable that the allegation by Godrej&Boyce, itself being a part of a price fixing arrangement with the former, created an expectation of it emerging as a leniency applicant thereby causing PEI to do so itself.

An external stimulus can also be discovered in *Electric Power Steering*.[119] The two Japanese firms, JTEKT Corporation and NSL Ltd, involved in this cartel were already under investigation in 2011 by the Japanese Fair-Trade Commission and penalised for the same on 29 March 2013 for price-fixing in industrial machinery and automotive bearings.[120] JTEKT was an LP applicant in the same. The CCI has also acknowledged this fact in its final order.[121] These firms rigged bids for 'electric power steering' units between 2005 and 2011 through their Indian subsidiaries. NSK was the first LP applicant (followed by JTEKT), based on which the CCI initiated *suo moto* proceedings. In a heavily redacted report and otherwise protected by a 'confidentiality ring' the date of the first LP application is not clear but based on the *prima facie* finding date of the CCI,[122] it could be gauged to be in the second half of 2014, more than a year after the final ruling of the Japanese FTC. Quite clearly, the finding of the Japanese FTC was the driving force for the LP, and there also appears to have been no independent move by the CCI to initiate investigations as soon as the Japanese decision was made. Cooperation by enforcement agencies globally could help in quicker responses.

In the case of *SBC,* a bid-rigging case, the stimuli appear to be an acquisition of one cartel member by another gone afoul, prompting a LA.[123] Similarly, the discovery of the Industrial and Automotive Bearings Cartel (IAB), more than six years after its death(2011), through an LP application (June, 2017) by one of the colluding firms', Schaeffler AG, was also most likely prompted by a decision of the latter to rebrand and merge all its sister concerns in India under the brand name of Schaeffler India Ltd., in 2017.[124]

The leniency program's ability to destabilise existing cartels or terminated cartels depends on its ability to change the net benefit equation for cartels. Cartels that took birth before the CCI started functioning would have faced altered and higher expected costs due to the

[118] Final Finding, DGAD (n 113) [17]

[119] In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems), Sou Moto Case No. 7(1)/ 2014 (CCI, 9 Aug. 2019) [3]

[120] Japan Fair Trade Commission , *The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders against Bearing Manufacturers* (29 March 2013) <https://www.jftc.go.jp/en/pressreleases/yearly-2013/march/130329_2_files/130329.pdf> accessed July 20, 2021.

[121] EPS systems (n 121) 2, 10.

[122] ibid 3.

[123] SBC (n 105) 8 – 9.

[124] For a quick overview of the evolution of Schaeffler India, check it's presentation to investors. <https://www.schaeffler.co.in/remotemedien/media/_shared_media_rwd/03_worldwide_1/websites_worldwide/india_3/investor_relations/financials/investor_presentations/20170830_investor_presentation_schaeffler_india.pdf> accessed on November 29, 2021.

introduction of the new regulatory penalties and hence should have been induced towards leniency. But the fact that these cartels continued their collusion even after and did not find it tempting to opt for an LP application reflects their expectations of a low expected penalty that is not deterrent enough. For cartels that came into existence after the birth of the CCI, it is quite possible that they factored in the expected cost of being detected and convicted and took appropriate steps to reduce the same. But, in both types, a detection via prima facie case finding by the CCI should have substantially increased the expected cost and caused cartel destabilisation. Given that only two LP applications (of the twenty-one related cases), or 10%, have been compelled by a prima facie finding, it indicates the potential role of the 'other' influencing factors which shall be in the later sections.

IV (c) Application of Lesser Penalty – Consistency in the marker system

Although reduction of penalty is a discretion of the CCI and not regulatory mandated, it has displayed consistency in providing 100% waiver for all first LP Applicants, which led to the *discovery* of cartel activity, existing or otherwise, except for one. In the lone exception, *PMC II,* the CCI differed from its standard practice of 100% reduction for the first applicant, even though the LP applicant helped it in forming a *prima facie* opinion to launch an investigation. *PMC II* was a knock-on case derived from *PMC I*. PMC I was investigated based on information provided by an independent institution – *Nagrik Chetna Manch*. CCI ordered an investigation into the alleged bid rigging in tenders called by Pune Municipal Corporation (PMC). During its investigation, the DG unearthed evidence that pointed toward bid-rigging in other tenders of PMC. Not being authorised to undertake *suo moto* investigation or expand the scope of the existing investigation, the DG requested the CCI to enlarge the scope of investigation to include the additional tenders and firms involved. While the request of DG was pending, Saara Traders Private Limited, one of the alleged bid riggers in other tenders discovered by the DG, submitted a LP application on August 1, 2016. Based on this LP application the CCI formed a prima facie case and initiated an independent PMC Cartel II case. This triggered other cartel members also to file LP applications in PMC I Case. These disclosures revealed even further rigged bids which the CCI took *suo moto* cognizance, leading to the PMC III case.[125] *Ecoman Ltd*., the ring-leader, admitted to bid rigging (as the first LP applicant), prompting investigations in the *PMC III case*. In its evaluation of the LP Applications, the CCI stated that, though Ecoman Ltd., accepted the cartel and supported the investigation, it came forward only after the DG had already collected *strong evidence* to indicate a cartel.[126] The stage at which a lesser penalty applicant comes forward with disclosures is one of the determinants of fine waivers specified in the regulations.[127] So even though a formal inquiry had not yet commenced with respect to this additional rigged bid, the CCI refused a 100% waiver but allowed for a reduction of 50% in the

[125] In re: Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing, Suo moto Case No. 04/2016 (CCI, 31 May 2018): This case was not considered within lesser penalty framework.
[126] PMC II (n 108) [2], [75]
[127] CCI (Lesser Penalty) Regulation, 2009 (IN) reg 3(4).

monetary penalty. There was no mention of Ecoman's 'ring leader' role acting as a determinant (aggravating factor) in deciding the waiver.

In the two cases where it received LP applications after it had begun investigations, namely, *PMC I* and *BDC,* penalty reductions were not total. In *PMC I* and *BDC,* the first applicants in each approached the CCI almost after 10 and 8 months, respectively, from the date of initiation of investigations (*See*, Table 3 above). Nevertheless, in the former, the first applicant got a 50% reduction and, in the latter, a 75% reduction. The reasons given by the CCI in PMC I for not awarding an automatic 100% waiver, was that *"some evidence was already in possession of the DG"* [128] and in BDC, that the applicant came in "*at a later stage of the investigation…(with) evidence already in possession...*". [129]

So, in effect, it indicates that a 100% waiver cannot be assumed by the first LP application and is subject to whether : (a) the CCI has already initiated investigations, and (b) the applicant has come forth before the CCI has already accumulated *some/strong* evidence. These factors are confirmed in the *Brushless DC Fan* report. [130] There are valid reasons to indicate this is the right approach. In the process of its investigations, the DG presents the collected evidence to the alleged cartel members inviting their response. Based on this, the colluding firms are able to reasonably assess the probability of their conviction and may either prefer to submit a LP application or remain uncooperative. Such a stance does not serve the purpose of a leniency program as it requires the CCI to have already collected much evidence (if it could) after expending much time and manpower, which is partly what the program was to help with in the first place. Requiring them to confess early to get a 100% waiver could encourage the 'rush' we see missing so far. The CCI has shown consistency in using the marker system, and we do not see this as a factor in discouraging LP Applications.
Our conclusion for this section is that the leniency mechanism has only been marginally successful in encouraging applications despite its transparent implementation of the marker system and following empirically established good practices in our literature review section. However, certain gaps need to be filled particularly the lack of clarity in the classification of horizontal agreements, that are presumed to have AAEC, as cartels in the next part of our paper, we attempt to further analyse the possible reasons for the lack of a 'rush'.

V Decoding the Lukewarm Response

Despite the 2007 amendments, which incorporated certain accepted good practices into the LP and the CCI demonstrating consistency in using the marker system, we cannot say that the program was a success. The detection of cartels via leniency is relatively low, and more significantly, *prima facie* cases saw very few LP applications. If a *prima facie* detection of

[128] PMC I (n 108) [105].
[129] BDC (n 109) [7.11].
[130] ibid

cartelisation or bid rigging has been established, providing for an adverse 'shock' to the expected net benefit, why don't we have more firms opting for leniency? This serves as our starting point of analysis.

At the point of a *prima facie* finding, a firm has two options – opt for leniency or wait for the investigation and appeals to play out. It weighs the benefits of these two alternate processes to make an optimal choice. By opting for leniency, the firm admits the act and has no reason to go for further appeals unless it is dissatisfied with the penalty determined after the application of mitigating and aggravating factors and leniency regulations. A firm not opting for leniency has ostensibly two reasons for the same: (a) it believes it is innocent; or (b) it expects a probable false-negative and therefore, also hopes to avoid other costs such as damage to reputation and private compensation claims that could arise in the case of an LP Application. A bid-rigging firm can also face temporary blacklisting by private and government agencies, thereby affecting future profits. Further, lack of certainty in the determination of penalty may also push firms to avoid a LA.

Since expected penalties form an important component in the above-mentioned decision framework, we begin with this variable. Penalties can be based either on gains to the cartel members or losses caused. Landes (1983),[131] building upon Becker's work, pointed out that the penalty based on damages (losses) was efficient and that the same should be inversely related to the probability of conviction. The end objective of the penalty is to provide sufficient deterrence and not simple disgorgement.[132] However, estimation of losses can be difficult in many circumstances and hence penalties are based on gains. But a gains-based penalty would tend to be lower than a harm-based penalty, as harm outweighs benefits as represented by the 'deadweight loss'. Further, the social cost of the illegal act will also include enforcement costs. A 'gains' based penalty will have to be determined after considering the social costs and the difficulty in detection and 'conviction' of cartels. But, from a deterrence perspective, it is sufficient to ensure that the expected penalty is greater than the benefit. A strong deterrent is imperative to make leniency attractive. Since a cartel is formed after factoring in the ex-ante probability of being detected and the possible penalty, there is no incentive to opt for leniency unless there is an increase in either the risk and/or the penalty. A *prima facie* detection, by virtue of increasing the probability of conviction, can provide this incentive.[133] Behavioural analysis of cartels has challenged the assumption of rationality, required for making a decision on net expected benefits, on the grounds of excessive optimism (that the act of cartelisation would have a low probability of contravention finding), bounded will power (excessive weightage to short term payoffs) and/or, salience or availability heuristics/bias (perceived

[131] William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50(2)The University of Chicago Law Review 652.

[132] *See*, Wouter P J Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition 2; *But see also*, Einer R. Elhauge, *'Disgorgement as an Antitrust Remedy'*, (2009) 76 Antitrust L. J. 79.

[133] We take a prima facie finding as the starting point of our analysis here as we seek to understand why a larger number of such cases did not lead to leniency applications.

probability of contravention).[134] The estimation of probability of conviction at the *prima facie* level, however, addresses these limitations as it eliminates the need for heuristics by providing them readily estimable probability of contravention finding, *i.e.*, the conversions of prima facie detections into actual contravention by the CCI.

The effective penalty will also depend on other factors outlined below.

(A)The time lag: The longer the time lag between a *prima facie* finding and conviction, the smaller the present value of the penalty. This time lag is a sum of the three stages of decision that a case may face, i.e., the CCI, Appellate Tribunal (AT) [135] and the Supreme Court (SC).[136]

(B) Mitigating and Aggravating factors (M&A) and leniency-based reductions: The actual penalty is itself fixed by the CCI after considering M&A factors. Uncertainty with regard to the factors used in determining M&A factors and leniency waivers leads to poor predictability of penalties thereby, potentially discouraging LP applicants or inviting further appeals at the AT and SC.

(C) Private compensation claims and blacklisting: In addition, a firm has to factor-in compensation claims[137] and loss of potential profits due be being time-barred from participating in bids. Based on these various factors, a firm makes a choice based on the expected payoff arising out of opting or not opting for leniency.

The following variables and terms are used in our computations of the trade-off.

α - the probability of finding contravention by the CCI after a *prima facie* finding;

β - time lag discount factor;

π - the excess profit derived through a cartel;

θ - the average fraction by which the overall profits is greater than 'π' and;

N - representing the number of years of duration of the cartel

n - is the multiple applied to determine the penalty level

V (a) The Probability of Conviction post Prima facie – Providing for Salience

Our data shows that of 65 *prima facie* findings by the CCI have resulted in the establishment of 44 contraventions giving us an average probability of contravention finding of $\alpha = 0.68$. At

[134] Maurice E. Stucke, 'Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels' (2010) in Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement (University of Tennessee Legal Studies Research Paper No. 97) available at <https://ssrn.com/abstract=1535720> accessed on December 10, 2021

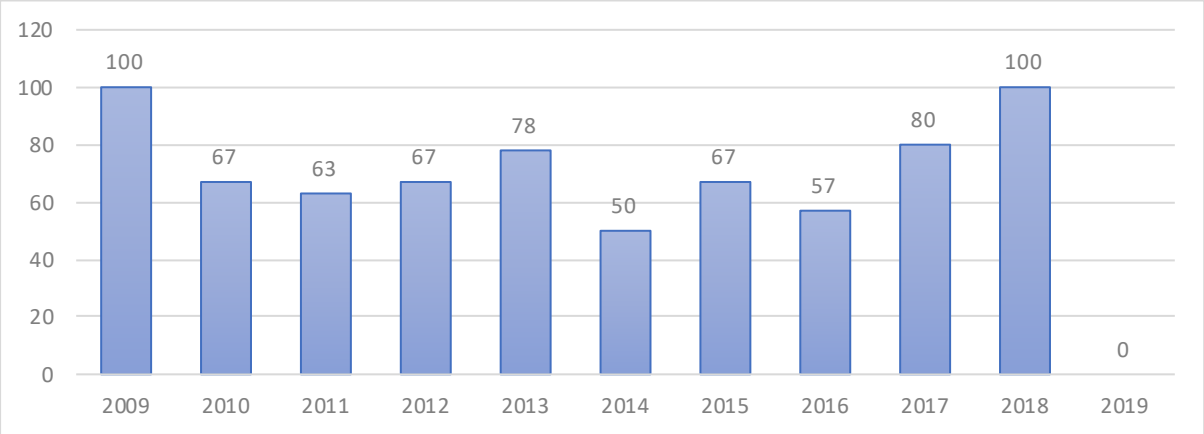
[135] Competition Act, 2002 (IN) s 53B: Appeal to Appellate Tribunal; The earlier appellate tribunal was the Competition Appellate Tribunal (COMPAT) which was substituted by the National Company Law Appellate Tribunal (NCLAT) with effect from May 26, 2017. Amended through Part XIV of Chapter VI of the Finance Act, 2017 (IN).

[136] Competition Act, 2002 (IN) s 53B: Appeal to Supreme Court.

[137] Competition Act, 2002 (IN) s 53N: Awarding Compensation.

the point of prima facie case, a firm has a good chance of being advised by its consulting law firm on the reasonable probability of being found in contravention hence, providing for an appropriate salience factor. This conversion rate of *prima facie* findings into the finding of contravention is reasonably consistent across the years, except for 2019, which, with only one case, has no positive finding.

Figure 1 Probability of Penalty



It is quite possible that there could have been instances of false positives or negatives, but it makes no difference for our analysis as this probability still provides for salience. In fact, the probability of being penalised may be closer to one if we assume that the CCI has accurately detected all cases of cartelisation without any false positives or negatives. Given $\alpha = 0.68$ (or = 1, if all contraventions have been penalised with no false negatives, the tipping-point optimal penalty, assuming no other consequences, to induce a leniency applicant, (given that the optimal penalty should be the gain weighted by the probability of conviction) will be π /0.68 = 1.47 * π, or at least equal to π, to encourage firms to apply for leniency.[138] It has to be emphasised again that this is not the optimal penalty for deterring cartels, rather it is only for inducing more LP applications at the prima facie level.

V(b) The Penalty Base – Confusing signals and misaligned interests

V(b)(i) Explaining the penalty base – potential for excessive penalties

The CCI appears to be vested with a triple discretion in imposing penalties. It first decides whether a penalty must be imposed or not, next, whether the "proviso to Section 27 (b)" of the Act should be applied, and lastly, the quantum of penalty to be imposed. *Proviso to Section 27(b)* of the Act gives the statutory basis for penalties in the case of cartels. The CCI can choose the higher of (a) 10% of the relevant turnover; or (b) three times the profit - both values applied

[138] Assuming no time lag

for each year during which the cartel was active. The profit base was amended in 2007 to provide for a clear shift towards the *total profits* earned during the cartel period, whereas the pre-amended section seemed to indicate excess profits that arose out of such agreements, i.e., additional profits attributable to cartelisation.[139] The actual penalty is decided after considering M&A factors.

Since total profits are likely to be higher than the excess profit derived by cartelisation, the ceiling penalty can be represented as:

$$3(1+\theta)\sum_{i=1}^{N}\pi_i \text{ with } (\theta \geq 0) \qquad (1)$$

CCI's option to choose turnover/revenue as the base is exercised if :

$$3(1+\theta)\sum_{i=1}^{N}\pi_i < 0.1\sum_{i=1}^{N}R_i \qquad (2)$$

For a single period infringement, this would be $3(1+\theta)\ \pi < 0.1$ R with 'R' representing revenue. Using revenue as the base should enhance the penalty but, in reality, depends on the actual percentage decided. So even if the condition (2) was satisfied, the actual absolute penalty can be much less than $3(1+\theta)\ \pi$, which may raise questions as to why require the higher of the two in the first place.

Further, while the *proviso to section 27 (b)* of the Act is aimed at penalising cartels higher than other horizontal agreements, with or without presumed AAEC, this may not actually turn out to be so. Let us consider the following hypothetical situation.

Let Y_{t-3}, Y_{t-2}, Y_{t-1} be the turnover for the previous three years, with specific values of Rs.100, Rs.200 and Rs.300, respectively. Assume an anticompetitive horizontal agreement has taken place in Y_{t-1}. It will lead to a maximum penalty of Rs.20[140] as per section 27(b) for a non-cartel, and a hard-core cartel can be penalised up to Rs.30, assuming 10% of the turnover is greater than three times the profit, as per the proviso. But assume the turnover values are inverted, i.e., decreasing with the years. In such a case, a hard-core cartel and a non-cartel horizontal agreement will face Rs.10 and Rs.20 as the maximum penalty, respectively.[141] The penalty could theoretically, therefore, be harsher on non-cartels even though the turnover is equal to

[139] Competition (Amendment) Act, 2007 (IN): earlier provision read as "*three times of the amount of profits made out of such agreements by the cartel*".'

[140] Ten percent of the average turnover of the previous three years i.e., (600/3)*0.1 = 20.

[141] Theoretically, the formation of a cartel should reduce the elasticity of demand and if $|E_p| < 1$ then the turnover of the cartelised firms will increase and hence the turnover base should be higher. But this assumes macroeconomic conditions are normal. A cyclical downturn could mean lower turnover despite cartelisation. Further, there is no reason to assume market demand would be inelastic, which could mean that cartel turnover would actually decrease.

that of a hardcore cartel. Hence the deterrence can be potentially inverted with cartels facing a lower penalty base.

In reality the *effective maximum penalty* that a firm can expect, once a *prima facie* finding has been established, also depends on the probability of conviction and the time discount factor. Incorporating these variables, the effective penalty is :

$$3(1+\theta)\ (\alpha)(\beta)(\sum_{i=1}^{N}\pi_i) \qquad (3)$$

Or

$$0.1\ (\alpha)(\beta)\sum_{i=1}^{N}R_i \qquad (4)$$

Assuming a one-period cartel and instantaneous penalty, the condition to induce LP applications at the time of a prima facie finding is:

$$n(1+\theta)\,\pi = \pi/\alpha \qquad (5)$$

π/α is the optimal penalty, and $n(1+\theta)\,\pi$ is the actual penalty imposed. The optimal multiple of profits, 'n' will be :

$$n = 1/\alpha(1+\theta) \qquad (6)$$

If $\theta = 0$ i.e., all profits are entirely attributed to the cartel action then:

$$n = 1/\alpha$$

Hence, the multiple is inversely related to the probability of detection and the portion of profits not attributable to the cartel specific action or, in other words, the profits that the cartel would have earned if they had not cartelised. In reality, since the CCI does not consider the 'but for' profits, there is potential for the actual penalty to be much higher. Since cartelisation tends to reduce the elasticity of demand to approximate the market elasticity, a more successful cartel, which has a larger proportion of 'cartel excess profits' and, also larger harm, would tend to face lower deterrence, which is an anomaly. Hence the current method of using total profits or total revenue, to arrive at deterrence, has two weaknesses: It is less likely to be related to harm and deterrence is likely to be greater for less successful firms, ceteris paribus. This holds true even for inducing LP applications i.e., more successful cartels are less likely to consider leniency. While M&A factors could be used to better align penalties with harm, it would still lack specifness, or be prone to error, as there is no estimation of harm or gain, to base these calculations on. We empirically establish this in the following sections.

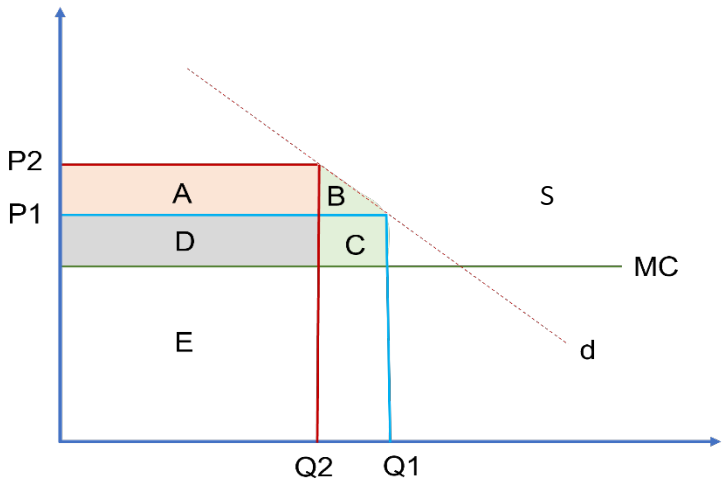
An illustration of the two penalty base's is given in Figure 3, below. Assuming constant marginal cost (MC) and no fixed cost, and that the cartel is selling to a final consumer, a firm derives profits equal to (D+C) with the competitive price P_1.[142] With cartel price P_2, profits increase by (A-C). The consumer loses (A+B), giving a deadweight loss of B+C. The excess profit, π , is (A – C), the total profit is (A + D), and the total revenue is (A+D+E). Hence, (D/A) is the θ. The deadweight loss is (-B-C). The CCI *is bound to choose* the greater of 3(A+D) and 0.1(A+D+E). A firm that has been convicted faces a probable penalty plus a private compensation claim. This amounts to:

$$Total\ pay\text{-}out = p(n(A+D) + (A+B)) = p(2A+B+D)$$

With $0 \leq n \leq 3$, 'n' being the profit multiplier and 'p' being the probability of a cartel detection and conviction. In the case of cartels selling to intermediate firms, the ability of the latter to '*pass on*' the price increase to the final consumers will play a role in the distribution of 'price overcharge'.

By considering a penalty ceiling higher than the excess profit (A+D>A), the Act seemingly provides for deterrence. Nevertheless, optimal deterrence will still hinge on the probability of detection of a cartel which is not possible to estimate.

Figure 2: Illustration of the Penalty Bases



V(b)(ii) Penalising firms – Schism between the rule and application?

While in hardcore cartel cases, the CCI has shown a greater preference for profits as the penalty base (73% of the firms), in bid rigging decisions, it has predominantly used turnover (94%). The CCI has levied an average of 0.80 times the profit on 19 firms across six cases (see

[142] Assuming single period infringement and instantaneous conviction.

Table 6), ranging from 0.5 to 1.5 times the profit before applying leniency. While levying profit-based penalties, a comparison of 3 times the profit and 10% of the turnover appears mandatory, but the CCI has not provided such comparisons in at least 10 cases, with two instances being due to non-availability of turnover data. Penalties on PTA's have been either 5% or 10% of their income, except in one instance, when a nominal sum of INR 100,000[143] was levied. Further, penalties have at times been substantially reduced by the AT when appealed.[144]

In 16 of the 23 bid rigging cases, the CCI has not adopted the proviso provided for cartels but has rather preferred the *main clause Section 27(b)* and hence used the percentage of the average turnover of the previous three years. In three cases, no penalty was imposed as the CCI considered the firms to either be 'very small' or affected by COVID contingencies.[145] In CCI's advocacy documents,[146] it indicates that bid rigging by 'cartels' and 'non-cartels' shall be treated differently, with the proviso penalty applying only to the former.[147] CCI's approach to bid rigging cases can be divided into pre-*Excel Cropcare* and post-*Excel Cropcare.*[148] Before the AT decided on *Excel Crop Care,* five bid rigging cases were levied penalties based on the main clause of section 27(b) of the Act.[149] In *Excel Cropcare,* three firms were penalised for rigging bids for Aluminium Phosphide tablets, a pest repellent sought by the Food Corporation of India. The three firms involved were penalised 9% of their average turnover for the previous three years.[150] However, this decision was challenged in the Appellate Tribunal by two firms which argued that CCI should have used the 'relevant turnover' as they were multiproduct firms

[143] FICCI-Multiplex Association v. United Producers and other, Case No.01/2009 (CCI, 25 May, 2011).

[144] Examples: Foundation of Common Cause v. PES Installations Pvt. Ltd. and Other, Case No. 43/2011 (CCI, 16 April, 2012) – In Appeal No. 93, 94, 95 of 2012 COMPAT, 25 February 2013 the penalty was reduced to 3% from 5%; In Re:- Aluminium Phosphide Tablets Manufacturers, Suo Moto Case No 02/2011 (CCI, 23 April, 2012) – In Appeal No. 81/2012, COMPAT, 29 October, 2021 the penalty was reduced to 1/10th of the original penalty imposed by CCI.

[145] Re: Reference Case No. 05/2011 (CCI, 13 February 2013); Chief Material Manager, South Easter Railways v. Hindustan Compositties Ltd. and ors., Ref. Case No. 03/2016 (CCI, 10 July 2020); People's All India Anti-Corruption and Crime Prevention Society v. Usha International Ltd. and ors., Case No. 90/2016 (CCI, 07 March 2021)

[146] CCI, 'Provisions Related to Bid Rigging' *available at* <https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Bid%20Rigging.pdf> accessed 28 November 2021.

[147] ibid 9

[148] Excel Crop Care Limited v. Competition Commission of India, [2013] CompLR799 (CompAT).

[149] Foundation for Common Cause v. PES Installations and Others, Case No. 43/2010 (CCI, 16 April, 2012), Coal India Ltd. v. Guld Oil Corporation Ltd. and other, Case No. 06/2011 (CCI, 16 April, 2012), In Re: Aluminium Phosphide Tablets Manufacturers, Sup moto Case No. 02/2011 (CCI, 23 April, 2012), In Re: Manufacturers of Asbestos Cement Products, Suo Moto Case No. 01/2012 (CCI, 11 February, 2014] and In Re: Suo moto Case Against LPG Cylinder Manufacturers, Suo Moto Case No. 03/2011 (CCI, 06 August, 2014). All but one firm were levied penalties based on their average turnover for the previous three years except in the LPG Cylinder case in which 47 firms were penalised 7% of their turnover but one firm was levied 2.1 times the profit as its turnover data was not available. The figure 2.1 times the profit , because of its preciseness, seems to have been arrived at by considering the equivalent average profit conversion for the other firms to ensure equality although there is no data to confirm the same.

[150] Excel Crop Care Limited v. Competition Commission of India, Appeal No. 79/2012 (COMPAT, 29 October 2013)

which sold products other than Aluminium Phosphide tablets. They contended that only the bid amount should be considered. The Appellate Tribunal agreed with the concept of 'relevant turnover' but defined the same as not just the bid amount but rather the entire turnover of Aluminium Phosphide tablets. CCI's original penalty would have amounted to 17.75% and 823.4% of the 'relevant turnover' and the specific bid revenue, respectively, for Excel Cropcare. For another involved firm, it was higher at 29.5% and 3253% respectively.[151] The AT's decision was upheld by the SC, which called for levying penalties based on the 'relevant' turnover ensuring that the punishment would be a sufficient deterrent and at the same time not disproportionate such that it could cause "death" of the firm involved.[152] The decision provided clarity on the appropriate penalty base and prevented excessive penalties.

Post-*Excel Crop Care,* the CCI has factored in 'relevant turnover' and has continued to rely on turnover in the remaining fourteen cases involving 77 firms but for 8 firms (across three cases) which have been penalised using profits.[153] In *SBC,* it used the *proviso* to levy 1.5 times the 'total profits' as the enterprises have not provided the details of *relevant turnover.*[154] In *Maharashtra State Power Generation Co. Ltd,*[155] it again uses the *proviso* to levy a penalty of two times the profit based on the reasoning that it was a hardcore cartel as the "*OPs reached an agreement to submit collusive tenders and to divide the markets. Thus, the case deserves to be dealt with utmost severity*."[156] This is extremely vague as every bid rigging involved an agreement between the firms involved. Unless the *market division* act as the differentiating factor. Also, the CCI provided no comparison of 10% of the turnover with the 3 times the profit before levying a profit-based penalty on the firms. The Commission states that the legislation has provided it "*wide discretion*" in the adoption of a penalty to adequately reflect "*the seriousness of the infringement*" and to provide adequate deterrence.[157] While this may be correct in deciding applicability between the 'main clause' or '*proviso*' to section 27(b) of the Act, it does not appear that such a choice is provided within the *proviso* itself. The *proviso* appears clear on the need to adopt the higher of three times the profit and 10% of the turnover, which automatically requires a comparison between the same. In the *BDC*[158] the CCI did compare turnover and profits and, accordingly levied one times the profit on two firms and

[151] Ibid [67-69] The COMPAT levied a penalty of 324.1 million, 771.4 million and 1.57 million on Excel Crop care, United Phosphorous, and Sandhya Organic (SO) respectively. SO was not a multiproduct firm but as it was a much smaller firm its penalty was lowered by the COMPAT from 9% to 0.9% of the turnover. According to COMPAT size appears to be a mitigating factor.

[152] Excel Crop Care Ltd. v. Competition Commission of India and Ors, (2017) 8 SCC 4781.

[153] In Re*:* Cartelisation by Broadcasting Service Providers by Rigging the Bids, Suo Moto Case No. 02/2013 (CCI, 11 July, 2018), Surendra Prasad v. Maharashtra Power Generation Company, Case No. 61/2013 (CCI, 10 January 2018) and 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. 03/2014, (CCI, 18 January 2017).

[154] In Re*:* Cartelisation by Broadcasting Service Providers by Rigging the Bids, Suo Moto Case No. 02/2013 (CCI, 11 July 2018) ¶ 124: CCI distinguished between restricted turnover and relevant turnover.

[155] Surendra Prasad v. Maharashtra Power Generation Company, Case No. 61/2013 (CCI, 10 January 2018).

[156] ibid [147].

[157] ibid

[158] Ibid [142].

3% of the turnover on one firm, as for the latter, 10% of the relevant turnover was greater than three times the profit. But, the turnover based penalty imposed translates to exactly one times the profit.[159] If the purpose of using the higher of the two was to ensure a penalty that was adequate in the reflection of the harm caused and deterrence created, it does not seem to be used in such a manner by the CCI. In *PMC Cartel I case,*[160] the CCI faced a different problem as four of the firms had no business activity related to the bids and hence would have had 'zero relevant turnover' for computation of penalty. Considering different, the context of *Excel Corp,* it went ahead with the total turnover of the firms irrespective of what activity they were derived from and imposed a pre-leniency penalty of 10% of the previous three years *average turnover* (income) for each firm.[161]

CCI's penalties in bid rigging cases seems to lack clarity in the application of the proviso as it is unclear as to what factors would qualify bid rigging as a hard-core cartel. Further, its application of penalties appears to bypass the deterrence rationale in choosing higher of the penalty bases provided in the proviso.

Table 4: Penalty Statistics

Infringement →	Bid Rigging	Hard Core Cartels	Associations
Number of Cases	19	8	2
Number of Firms/Associations	159 Firms	73 Firms 2 Association	29
Average penalty based on turnover/income – Non leniency	**3%** *(137 Firms)* *[4 firms received a nominal amount of 10,000]*	**6.5%** *(54 Firms)*	**5%** (and nominal amounts of INR 100,000 for 27 firms)
Average penalty based on profits – Non - leniency	**2** *(3 Firms)*	**.5** *(10 Firms)*	
Average penalty based on turnover – leniency	**9.36%** *(11 Firms)*	**4%** *(3 Firms)*	
Average penalty based on profits – leniency	**1.75** *(4 Firms)*	**1.29** *(6 Firms)*	
Overall average - Converting penalties to profits based values		**0.8** *(19 Firms)**	

**In Case No.30 of 2013, the CCI levied turnover based penalties as the airlines involved in the cartel were incurring losses. However, one airline, namely Indigo, according to its annual reports, earned profits for the three years considered (2010-11, 2011-12, 2012-13). The penalty levied on Indigo of INR 637.4 million amounts to less than*

[159] 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. 03/2014 (CCI, 18 January 2017).
[160] PMC I (n 108).
[161] Ibid at [8.6]

0.1 times the average profit for the three years and for each year separately.[162] *We ignore the data for this case in the average.*

V(b)(iii) Penalising individuals – Misaligned interests

Section 48 of the Act permits penalising individuals responsible. If individual employees are not considered, then it leads to a disconnect between the interests of the firm and the former. By penalising employees, too, a better alignment of interests and deterrence is achieved. However, the CCI did not penalise any individual in several non- leniency cartel cases but has consistently done so in leniency cases. This gives a very contradicting signal. For the very first eight cartel investigations involving 115 enterprises and one PTA, no employee was penalised. The eight Leniency cases saw consistent penalising of employees found responsible at the maximum level of 10% of their annual income and provided a similar waiver given to the firm. But only 21% of the non-leniency cases saw employees being penalised an average penalty of 4.75% of the annual income. Even in what was arguably CCI's first blockbuster case - the cement cartel case,[163] in which it levied its highest penalty of INR 6.7 billion, not a single employee was penalised. One could conclude, on this basis, that opting for leniency would only lead to a greater loss for individuals concerned. If individual penalties mattered it creates a schism between the interest of the firm and the employee concerned when it comes to opting for leniency. But we believe a 10% annual income penalty affords little individual deterrence for a few reasons. Firstly, if an employee has been a voluntary accomplice to the act, they would have also been rewarded through an income increase which a 10% penalty may not capture. Secondly, such penalties could easily be absorbed by the firm itself through disguised payments to the employee. The draft Competition (Amendment) Bill, 2020 who proposes a cap of 10%, may not provide for sufficient deterrence.[164] If an employee was coerced into engaging in the act, a better mechanism would be to have a whistle-blower reward. Such a reward increases the risk of the detection of a cartel. This method is not new and is already practised by India's Securities and Exchange Board to tackle insider trading.[165]

V (c) Mitigating and Aggravating factors – Eluding legal certainty

In quantifying monetary penalties, the CCI will have to ascertain an appropriate multiplier on the base amount by applying the relevant M&A circumstances. The statutory requirement of assessing M&A factors is not explicit. Rather, it flows from the discretion vested in CCI to impose penalty *up to* a certain percentage or multiple. In Excel Crop Care Case,[166] Ramana J.

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[162] See, <https://www.goindigo.in/information/investor-relations/annual-report.html> accessed on November 28, 2021.

[163] Builders Association of India v. Cement Manufacturer Association, Case No. 29/2010 (CCI, 31 August 2016).

[164] Competition (Amendment) Bill, 2020 cl 27: Following text to be inserted in the Section 27(b): "impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover or income, as the case maybe, for the last three preceding financial years, upon each of such person or enterprise which is a party to such agreement or has abused its dominant position".

[165] SEBI (Prohibition of Insider Trading) Regulations, 2015- Chapter IIA.

[166] Excel Crop Care Ltd. v. Competition Commission of India, (2017) 8 SCC 47.

guided to follow a two-step process in quantifying penalties – STEP 1: Determining Relevant Turnover; and STEP 2: determining the appropriate percentage of the penalty based on aggravating and mitigating factors.[167] Thus, as per the judicial guidance, CCI shall take into consideration all relevant M&A factors as they serve as a good proxy for the harm/losses caused. In general, CCI's orders briefly mention various circumstances as mitigating factors. These include small tender size;[168] Small revenue from the relevant product;[169] tough industry conditions;[170] cooperation by the party;[171] size and significance of enterprise;[172] informant's conduct;[173] the existence of competition compliance programme;[174] solvency of the enterprise and;[175] demand-supply conditions[176]. Similarly, certain aggravating factors which were considered by CCI includes - loss to the public exchequer;[177] affecting public interest;[178] impact on the end consumer.[179] However, the inconsistency in using these factors creates uncertainty and cannot explain the issues pointed out in the earlier section. Firstly, CCI orders generally do not adequately reason out such factors, and secondly, there are no set principles/guidelines to employ those factors. As noted below, in Table 7, those cases where neither mitigating nor aggravating factors are provided in CCI orders tend to have the highest average penalty. On the contrary, the same results in the small average penalties, where mitigating and aggravating factors are provided in the orders. In 32 distinct cases decided by CCI, 18 orders are silent on mitigating factors and, 19 orders mention no aggravating factors. Further, in 11 cases, which involved 6 leniency cases, neither mitigating nor aggravating factors were provided. By not considering M&A in most leniency cases, the CCI throws a confusing signal across – if you

[167] ibid [112-113]: Court provided an illustrative list of factors *viz.* nature, gravity, and extent of contravention; role played by infringer; duration of participation, intensity of participation, loss suffered; market circumstances, entry barriers; bona fides of the party, profit derived from contravention etc.

[168] Bio-Med Private Limited v. Union of India and ors., Case No. 26/2013 (CCI, 04 June 2015) [71]; *See also,* In Re: cartelisation in CN Containers, Suo Moto Case No. 04/2013 (CCI, 10 June 2015).

[169] Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Suo Moto Case No. 03/2012 (CCI, 5 February 2014) [60].

[170] Indian Sugar Mills Association & Ors. v. Indian Jute Mills Association & Ors, Case No. 38/2011 (CCI, 31 October 2014) [190]; Express Industry Council v. Jet Airways (India) Ltd. and ors., Case No. 30/2013 (CCI, 07 March 2018) [131].

[171] Bio-Med Private Limited v. Union of India and ors., Case No. 26/2013 (CCI, 04 June 2015) [71]; Western Coal Fields Ltd. v. SSC Coal Carrier Private Limited and Ors. Case No. 34/2015, (CCI, 14, September 2017] [99].

[172] In Re: Cartelisation in CN Containers, Suo Moto Case No. 04/2013 (CCI, 10 June 2015); In Re*:* Anticompetitive conduct in the Dry-Cell Batteries Market in India, Suo Moto Case No. 03/2017 (CCI, 15 January 2019).

[173] Director, Supplies & Disposals, Haryana v. Shree Cement and other, Ref. Case No. 05/2013 (CCI, 19 January 2017); Western Coal Fields Ltd. v. SSC Coal Carrier Private Limited and Ors., Case No. 34/2015 (CCI, 14 September 2017).

[174] Director, Supplies & Disposals, Haryana v. Shree Cement and other, Ref. Case No. 05/2013 (CCI, 19 January 2017).

[175] In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala, Suo Moto Case No. 02/2014 (CCI, 10 July 2015).

[176] In Re*:* Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Moto Case No. 02/2016 (CCI, 19 April 2018).

[177] Bio-Med Private Limited v. Union of India and Ors., Case No. 26/2013 (CCI, 04 June 2015); Director, Supplies & Disposals, Haryana v. Shree Cement and other, Ref. Case No. 05/2013 (CCI, 19 January 2017).

[178] In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala, Suo Moto Case No. 02/2014 (CCI, 10 July 2015).

[179] Express Industry Council v. Jet Airways (India) Ltd. and Ors., Case No. 30/2013 (CCI, 07 March, 2018).

succeed, you get a waiver but on a higher penalty base. Depending on the waiver percentage, the effective penalty may not be lower than the expected non-leniency penalty! For instance, consider a cartel member firm with a profit of INR 10 million. Let us say, the CCI considers M&A factors and reduces the penalty base to 0.5 times the profit or INR 5 million. Suppose the same firm had opted for leniency, and the CCI gives a 50% reduction on the full penalty base of 3 times the profit (as no M&A factor was considered), which amounts to 1.5 times the profit or INR 15 million, higher than the non-leniency route. Further, even when these factors are mentioned, no principle-based analysis is provided, which adds to the uncertainty.

Table 5: Rubric of Mitigating/Aggravating factor and Average Penalty

	No Mitigating	Mitigating
No Aggravating	A. 6.67% (11 Orders)	C. 2.63% (8 Orders)
Aggravating	B. 5.03% (7 Orders)	D. 2.46% (6 Orders)

Based on the determinants used by the CCI in applying monetary penalties, we have three primary factors: the penalty base, M&A factors and whether the act has been classified as a hard-core cartel. The variation in penalties applied should be substantially captured by these three variables if these have been applied systematically. We provide an empirical test for this below.

Data

From our data set, we eliminate three types of outlier penalties - association penalties, those in which firms were levied a low nominal penalty uncorrelated with revenue or profit and finally, all those instances of penalties where profit-revenue comparisons were not provided in the decision document. This gives us 167 observations across 26 cartel cases. All profit-based penalties have been converted to the percentage of turnover to provide for comparison.

Regression model

The model is specified as below:

$$\text{Penalty (Y)} = \beta_0 + \beta_1 (PB) + \beta_2 (D_1) + \beta_3 (D_2)$$

- Y is the actual absolute amount of penalty that has been imposed before the application of leniency, if any.
- PB is the total penalty base amount considered by the CCI – 10% of average turnover or 10% of turnover for each year of cartel operation. Its coefficient should have a positive sign as the absolute penalty should increase with the turnover size.
- D_1 is a dummy variable that takes a value of 1 if it was a hardcore cartel else it is zero. The value of the coefficient should be positive as hard-core cartels should be penalised more in accordance with The Act.

- D_2 is a dummy variable that is equal to 1, if the CCI has indicated the presence of aggravating factors. All other combinations provided in Table 7 should attract lower penalty.

Results and analysis:

The regression results show the coefficients of PB and D_1 to be positive and very highly significant as theoretically expected. Other factors remaining the same, a one Rupee increase in turnover, leads to an increase in penalty by 0.024 Rupees. Hardcore cartels are, on an average, charged a penalty that is higher by Rs.227 million. However, the coefficient of D_2 turns out to be statistically insignificant. This indicates that CCI's use of aggravating factors has not led to any statistically significant difference in penalties from other cases indicated in Table 7. This can mean that CCI's penalties, while strongly related to turnover, are not correlated with harm. While turnover can indirectly capture harm, it depends on the actual percentage used, which in turn depends on M&A or harm. Overall, the model explains for only 56% of the variation in penalties which indicates a substantial amount of the divergence in penalties remains unexplained after considering all factors employed by the CCI in deciding penalties. While it is practically impossible to get a 100% explanation and in fact may not even be desirable as agencies may want to retain a certain degree of unpredictability to avoid gaming by firms, we believe the current position leaves scope for considerable unpredictability, which reduces the attractiveness of an LP applicant may lead to appeals and also undermine the leniency mechanism. In a comparable study, Connor and Miller (2016)[180] estimate the predictability of US cartel penalties between 1996 and 2010 for 124 global cartels and find a statistically significant and strong relation to harm.

Regression analysis:

Included Observations: 167 after adjustment

Variable	Co-efficient	Std. Error	t-Statistic	Prob.
C	-3.25E+08	1.72E+08	-1.887634	0.0609
PB	0.024767	0.002735	9.056643	0.0000
HC	2.27E+09	3.28E+08	6.926076	0.0000
AF	3.04E+08	2.15E+08	1.415009	0.1590

R-Squared	0.570074	Mean dependent Var	5.01E+08
Adjusted R-Squared	0.562161	S.D. dependent var	1.92E+09
S.E. of Regression	1.27E+09	Akaike Info Criterion	44.78287
Sum Squared resid	2.62E+20	Schwarz Criterion	44.85755
Log likelihood	-3735.396	Hannan-Quinn Criter	44.81318
F- Statistic	72.04497	Durbin-Watson Stat	1.112634
Prob (F-Static)	0.000000		

[180] John M. Connor and Douglas J. Miller, 'The Predictability of DOJ Cartel Fines' (2011) The Antitrust Bulletin 56(3) 525.

While there may be other reasons for appealing against the decisions of the CCI, lack of transparency in penalty computations may be a big factor.

V (d) The time factor and discounted penalty

Since detection and imposition of a penalty is barely instantaneous, we consider the time lag involved and hence the discount factor, β. The average time taken by the CCI is approximately three years (1087 days) for a cartel case. Of the 44 cases, 34 have been appealed at the AT, with 7 of the latter's 14 decisions moving to the SC, causing significant delays in the final decision. Adding time consumed at the AT and SC, we get an average of 2809 days or 7.7 years from the date of a prima facie finding. In the flowchart below (figure 4) we see that all decisions, except for three, resulting in penalties, including leniency cases, have been challenged in the AT and the SC. The decisions rendered in these later stages show that firms have had the decisions overturned or penalties reduced. As per the present status, CCI from 2009 – 2020 has imposed a monetary penalty of INR. 142,176.2 million, of which a meagre INR. 782.6 million has been realised. Almost 99.5% of the monetary penalty imposed is pending due to ongoing appeals. For instance, a penalty of INR. 63,170 million imposed on a cement cartel in 2012, after one round of appeal, is currently again pending with the AT for the second time.[181]

Using the 364 day g-sec returns as 6%,[182] we get β = 0.67. Considering the time element, the effective penalty for a one-period offence has to be at least :

$$1.47\,\pi/0.67 = 2.20\,\pi$$

for a firm to consider leniency, once a *prima facie* finding has been established. In reality the actual profit-based penalties have averaged $0.80\,(1+\theta)\,\pi$ and have never crossed 2.1 times overall profit. Since, however, it is the overall profits and not just the cartel excess profit that is used, the penalty can be a leniency inducer only if:

$$0.80\,(1+\theta)\,\pi = 2.2\,\pi$$

or

$$\theta \leq 1.75.$$

As already pointed out earlier, this has a larger impact on comparatively less successful cartels. For deterrence, the θ must be smaller, implying the cartel should generate smaller excess profit. The size of the excess profit depends on the ensuing marginal cost and price overcharge, the latter depending on demand elasticity. Globally, price overcharges have been estimated to

[181] Builders Association of India v. Cement Manufacturers Association and Others, Case No, 29/2010 (CCI, 31 August 2016).

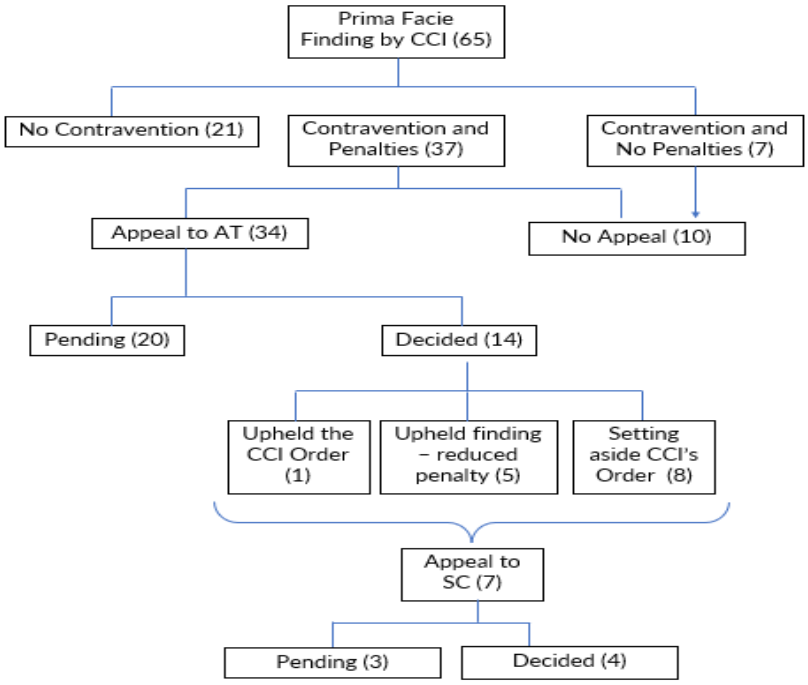
[182] RBI, *Treasury Bills: Yield 365 Days* (1992 – 2018) - The 364 days t-bill has been consistently above 6% till 2019 from mid-2010. *Available at* <https://www.ceicdata.com/en/india/treasury-bills-yield/treasury-bills-yield-364-days#:~:text=India's%20Treasury%20Bills%3A%20Yield%3A%20364,Nov%202018%2C%20with%2019%20observations> accessed 28 November 2021.

range from an average 15% to 49%, depending on studies.[183] This would, however, be industry-specific and cannot be generalised. For instance, in *Excel Crop Care* the CCI computed the excess price at approximately 35%.[184] But it does mean that less harmful cartels which face larger elasticity of demand and hence smaller price overcharges and excess profits may be the only ones to face bare level restitution with the current time lags. But since no attempt is made to calculate the θ and, as established earlier, M&A factors are inadequately used, CCI's penalties become very indeterminate in inducing LA's. More profitable cartels benefit by not opting for an LP and strategically using the appeals process to delay the penalty.

Table 6: Turnaround Time of Cartel cases.

CCI	
Investigation by DG	449 Days (Average of 33 Cases Data)
Time taken by CCI	573 Days (Average of 34 Cases Data)
Total Time *Prima Facie* - to CCI Decision	1086 days (Average of 36 Cases Data)
COMPAT/NCLAT	
Average time Taken in Disposing Appeal	632 Days (Average of 14 Cases Data)
SUPREME COURT	
Average time taken in disposing Appeal	Data insufficient.*

Figure 3: Decision Flowchart of a Cartel Cases with number of cases from 2009 - 2021



[183] Mean average of 49% with international cartels having an even higher percentage. John M. Connor, *Price-Fixing Overcharges : Revised 3rd Edition* (February 24, 2014) *available at* <https://ssrn.com/abstract=2400780> accessed 29 November 2021; *See also*, M. Boyer and R. Kotchoni, *'How Much Do Cartel Overcharge?*' (2015) 47 Rev. Ind. Organ. 119.

[184] The CCI computed cost of production and assumed a 10% profit margin to arrive at the 'but for' price.

In this section, we establish that there is a lack of transparency in the choice of an appropriate penalty base and in correlating the penalty with the level of harm. In the earlier section we showed how the current penalty base is not related to either the 'gain' or 'harm' and that the use of M&A factors plays a crucial role in correcting this. But our regression results show that this is poorly used. Therefore the effectiveness of penalties in both inducing leniency applicants at a prima facie stage or even leading to discovery of cartels is uncertain and asymmetrically favours more successful cartels. While the uncertainty may have encouraged further appeals, causing further delays and hence, reduction in effective penalties, strategic use cannot be ruled out. There is a need to rethink the penalty base used and consider 'excess profits' or 'price overcharge' rather than total profits or turnover.

In the next section, we address non-penalty factors that could deter firms from using the leniency route.

VI The way ahead and addressing other elephants in the room

Monetary penalties can be followed up with private action for compensation. Private action for compensation is of two types – (i) stand-alone actions; and (ii) follow-on action. Indian competition law provides for only the latter one in its enforcement framework,[185] and stand-alone actions are barred as per the provisions of the Act.[186]

The follow-on compensation claims can lead to excessive liability once the Commission has already achieved deterrence by imposing monetary penalties. As the liability of cartelists are usually joint and several for the harm caused by their infringement, theoretically, each victim can obtain full compensation from any cartelist(s). However, under the Indian competition law framework, an LP recipient is most likely be the primary target for follow-on action for compensation as co-cartelists, without lesser penalty deduction (including LP applicant's without full waiver), may spend years challenging the infringement decision in appeals. Once a finding of contravention becomes final against the LP Recipient, due to non-filing of appeal, as per Section 53N of the Act, a follow-on action for compensation can be initiated. In the absence of any protection under Section 46 of the Act and LP Regulations, victims can initiate action for full compensation against the LP Recipient for the harm done jointly by the cartel. If cartel penalties levied by the CCI are optimally deterrent, then compensation claims lead to excessive pay-outs and can deter LP applicants.[187] Several studies have pointed out the

[185] Competition Act, 2002 (IN) s 53N: Awarding compensation

[186] Competition Act, 2002 (IN) s 61: Exclusion of jurisdiction of civil courts; *See also,* Praveen Tripathi, "*Enforcement of Competition Law through Private Action for Damages",* in PRIVATISATION AND GLOBALISATION: CHANGING LEGAL PARADIGM (Sairam Bhat Ed., Eastern Law House Private Ltd., 2017).

[187] *See,* OECD, *'Challenges and Co-Ordination of Leniency Programmes*' (2018) [19 – 24] *available at* <https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf> accessed on December 8, 2021; *See also,* ICN, *'Good practices for incentivising leniency applications'* (2019) *available at* < https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf> accessed 8 December 2021.

negative impact that private follow-on actions have on LP's. Wils (2016), [188] in his survey of 30 practitioners, discovers that 83% of them indicated a decline in interest from their clients to apply for leniency. Though there were several factors for this declining interest, 36% of this 83% admitted the increased exposure in civil damages claims as a reason. [189]

Compensation claims have neither been instantaneous nor there have been in all cases. So far, we have only two cartel related compensation claims, with both decisions pending at the AT. [190] In *Excel Crop Care,* while the AT and SC had provided their decisions in 2013 and 2017 respectively, the compensation claim was made in 2019, more than two years later. Since the Act places no outer time limit for claims, a LP applicant has no clear indication of the net payoff through leniency, although the AT indicated that a *reasonable* time period would be within 'three years' from the date of a SC ruling. [191] The amount claimed in compensation introduces the second challenge for LA's as claimants demand compensation with an interest addition. It adding to the liability of the firm involved. In the instant case, even with a 'reasonable' interest rate applied by the AT, the cartel's total financial liability (Monetary Penalty + Compensation), [192] is almost 18% of the average relevant turnover of the preceding three years of the parties.

Most jurisdictions have adopted incentivising mechanisms for LP applicants against compensation actions. [193] Newly introduced, the EU Damages Directive [194] limits the liability on

[188] W PJ Wils, *'Private Enforcement of EU antitrust Law and its Relationship with Public Enforcement: Past, Present and Future'* (2016) World Competition: Law and Economics Review, 40(1) 3: See also, Philipp Kirst & Roger Van den Bergh, *'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Incentives'* (2015) J. of Comp. L. & Econ. 12(1) 13; Miriam C. Buiten, *'The Ambivalent Effect of Antitrust Damages on Deterrence*', (2019) CPI Antitrust Chronicle (1) 7.

[189] ibid Wils (2016): other factors include different versions of perceived uncertainty regarding - publication of parallel enforcement proceedings (26%), how authorities will grant leniency reductions (19 %), how authorities will calculate fines (14%), and how authorities will deal with requests for access to file for leniency submissions (12%).

[190] (i) Maharashtra State Power Generation Co ltd v. Nair Coal Services Ltd Ors, Compensation Application (AT) No. 02/2018 (NCLAT); and (ii) Food Corporation of India v. Excel Crop Care Ltd. & Ors., Compensation Application (AT) NO.79-01/2019 (NCLAT).

[191] Food Corporation of India v. Excel Crop Care Ltd. & Ors., Compensation Application (AT) NO.79-01/2019 (NCLAT) [Order dated 3 June, 2020] Page 45 & 46 , Compensation Application (AT) No.01 of 2019

[192] Excel Crop Care (P) Ltd. and Ors v. Competition Commission of India, Appeal No. 79/2012 (COMPAT, 29 October 2013) [67-69]: CCI levied a penalty of 9% on preceding three years average of *total turnover*. On an Appeal, COMPAT agreed with the 9% as appropriate level, but changed the base amount to 'relevant turnover'. On further appeal to SC, concept of *relevant turnover* was upheld. Thus, the penalty amount each party as per *relevant turnover* were as (i) Excel Crop Care Ltd. - Rs. 2,91, 69, 000; (ii) United Phosphorus Ltd. – 69,426,000; and Sandhya Organic Chemical (P) Ltd. – Rs. 15,70,000.

[193] ICN, *'Good practices for incentivising leniency applications'* (2019) [1.2.1] *available at* < https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf> accessed 8 December 2021: 18 among the 34 jurisdictions that allow private enforcement have rules in place that would limit or even exclude the liability of leniency recipients in damages actions.

[194] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance" (Adopted on November 26, 2014).

immunity recipient (leniency applicant that with full immunity) only against direct and indirect purchasers and suppliers.[195] Other victims can only claim compensation in exceptional cases, for instance, where they cannot recover compensation from a co-cartelist. Further, the joint and several liabilities of the immunity recipient to contribute to the damage claim shall also not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.[196] In the US, for incentivising cartel members to apply for leniency, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") incorporated a provision to exempt the leniency applicants from deterrent civil remedies.[197] Leniency applicants are only required to pay "actual damages" in follow-on civil damage claims instead of the treble damages. In addition, leniency applicants do not face joint-and-several liability. Thus, the liability of the leniency applicant is only to an extent the damages attributable to his trade in the goods or services affected by the anti-competitive conduct, not the commerce and trade of other members of the cartel.[198] In Brazil, Senate Bill No. 283/2016 proposes to establish double damages for parties injured by cartels, however, it exempts signatories of leniency agreements or cease-and-desist commitments (settlements) with CADE (Brazilian Competition Authority).[199] Beneficiaries of leniency will not be jointly liable, and the quantification of damages will be based on harm caused by their anti-competitive conduct.

Indian competition law does not explicitly provide any exemption or limit the liability of LP applicants. Changing this to provide asymmetric benefits to leniency applicants can convert more prima facie findings to leniency applications.

V Conclusion

This paper set out to examine whether the leniency programme in India has been successful in detecting and penalising cartels. We find little evidence that it has been a success as most cases have not been detected through leniency and even the one's where CCI has formed its prima facie opinion, it did not create any race to the agency. For a successful leniency program, there are three essential factors (i) size of penalties for optimal deterrence; (ii) consistency and transparency in decisional practice; and (iii) application of lesser penalty provisions for an effective penalty. The decisional practice of CCI suggests disproportionate penalty size i.e., penalties poorly correlated with gain or harm, lack of transparency and inconsistencies in the application of law in its orders. Leniency provisions should be designed with an aim to destabilise the cartel, which as per our analysis, requires few reforms in its framework.

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[195] Ibid Rec. 38

[196] Ibid Art. 11(5)

[197] 124 Stat. 1275, P.L. 111-190, § 1

[198] *See,* Niall E. Lynch, 'Immunity in Criminal Cartel Investigations: A US perspective' (2011) *available at* <https://www.lw.com/presentations/immunity-in-criminal-cartel-investigations-us-perspective> accessed 9 December 2021.

[199] ICC, 'Antirust Damages Action: Brazil' (2021) 9 *available at* <https://iccwbo.org/content/uploads/sites/3/2021/03/icc-antitrust-compendium-proceedings-brazil.pdf> accessed 9 December 2021.

The terminological confusion between horizontal agreements and cartels can lead to strategic misuse of associations with cartels operating under the cover of PTA's so-called unilateral decision, thereby protecting itself from penalties. As decisions of PTA's are per se considered as an agreement for the purpose of Section 3 of the Act, clarity on actions which can result in being classified as a hard core cartel will ensure both prevent cartels and ensure better detection. Similar clarity in the application of provisions and classification of 'bid rigging' acts as hard core cartels would better align probability of detection and harm with the penalty.

Guidelines on setting the penalties enhance transparency in the enforcement and also help in correlating the same with gain or harm.[200] A change from total profits or revenue to 'excess profits' or 'price overcharges'[201] would provide for better determination of deterrence.[202] Consistency in evaluating the mitigating and aggravating factors, which is lacking, is crucial for this correlation with harm.

Lack of transparency and strategic use appeals have led to a situation where almost all decisions, including leniency decisions, have been appealed, and the ensuing time overrun, effectively dampening the penalty. Strategic appeals could be partly deterred, if the at the stage of final decision, the firms are required to pay the penalty with an appropriate 'compounded interest', if convicted, to eliminate the adverse impact of time discounting.

At the same time, it is important to recognise that firms are reluctant to opt for leniency because of ensuing costs in terms of reputational damages, claims for compensation, and the cost of being blacklisted. By not preferring leniency, a firm can avoid the claims for compensation and continue to participate in the interim bids. While private action for compensation is the right of the victims of competitive injury, an appropriate balancing on interest must be ensured to avoid any negative impact on leniency disclosures. Thus, proactive steps may be adopted to dilute the civil compensation liability of the leniency recipient. For instance, successful leniency applicants could be allowed to bid without being blacklisted. The experience of other jurisdictions, seeking to reduce the blow of private compensation claims, could go a long way. The fear of multiple jurisdictional claims needs to be clarified to avoid excessive penalties. Following the practice used in abuse of dominance cases, basing penalty only on the specific geographic impact, rather than global revenue/profits, can help.

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[200] Robert Baldwin, Understanding Regulations (2nd Ed., OUP, 2012) 115.

[201] Yannis et al, in their study find other gains from using 'price over charges' rather than profits or revenue in terms of the resulting price price effect. See, Yannis Katsoulacos, 'Evgenia Motchenkova, David Ulph, 'Penalizing Cartels: The Case for Basing Penalties on Price Overcharge' (2015) International Journal of Industrial Organization (42) 70; Price overcharges as the basis of computation of penalty has been suggested by many: See Carstenand Crede and Liang Lu, 'Endogenous fines and detection probabilities for cartel deterrence: Experimental evidence' (2019) Working Paper. Centre for Behavioural and Experimental Social Science *available at* <https://ualresearchonline.arts.ac.uk/id/eprint/14992/> accessed 18 December 2021.

[202] OECD Regulatory Enforcement and Inspections (2014) 12 *available at* <https://www.oecd.org/gov/regulatory-enforcement-and-inspections-9789264208117-en.htm > accessed 15 June 2020.

Finally, individuals matter, whistle-blower rewards can help to attract information and destabilise cartels. Employees forced to engage in cartelisation, have a handy instrument in this. However, the proposed penalty cap of 10% of an employee's annual income, needs to be revisited, as it seems very unlikely to be a deterrent particularly if employee benefits are tied to company profits.

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