Page 1881 - 1900 **DOI:** *https://doij.org/10.10000/IJLMH.1110022*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 3

2025

Decoding Cartel Leniency Program of India, U.S.A., E.U. and Australia with special reference to the Agriculture Sector

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ABSTRACT

The paper examines the vital role that leniency programs play in breaking up cartels in various countries, with an emphasis on the US, EU, and India. It looks at the intricacies of leniency policies, emphasizing the "leniency plus" and "penalty plus" systems in the US and Australia, which allow businesses who reveal more cartel activity to get less fines. According to the research, the leniency provisions of Indian competition law are based on EU legislation, but they also call for additional growth along the lines of the US system. The limited success of India's leniency policy, as seen by the relatively small amount of leniency orders granted in comparison to the US and EU, is a primary reason for concern. Drawing on the US's more successful leniency policies, the paper also highlights the necessity of clear rules and incentives to entice businesses to come forward with information on cartel activity. It also discusses the topic of discovery orders and information exchange in global settings, pointing out the different strategies used by Australian and US courts. In order to improve India's ability to tackle anti-competitive conduct, the research concludes by recommending that its leniency framework be strengthened.

Keywords: *Cartels, Leniency Policies, Competition law, Anti -Competitive Practices*

I. INTRODUCTION

Before examining the statutory framework on cartel leniency in various jurisdictions, it is critical to grasp the meaning and definition of the term 'cartel.' It is critical for governments around the world to have a clear definition of what constitutes a cartel. Cartels, in their most basic sense , are agreements between firms or companies to control production, market shares, output, and other aspects of their operations.[3]A cartel can be formed by either explicit or

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[3] (*Canadian Economy Online*) <http://www.canadianeconomy.gc.ca/english/economy/cartel.html> accessed 5 January 2023.

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implicit collaboration among members of a group. Explicit cooperation happens when the members of a cartel meet in person to deliberate how to monopolise a certain market segment. A common outcome of such gatherings is the signing of agreements amongst the participants. Such official agreements are likely to be reached as a result of clandestine meetings, which are extremely confidential.Implicit collusion occurs when the members of a corporation demonstrate their intent to engage in collusive behaviour through their conduct, rather than through words. It occurs when a firm initiatiates and sets a price which increases gains for all other firms, and the other firms follow suit, knowing that they will benefit from doing so. Because of the lack of a documented agreement, prosecuting implicit collusion between businesses is more challenging than prosecuting explicit collusion.

A. Definition of Cartel in Various Countries

(a) India

Section 2(c) of the **Indian *Competition Act, 2002*** lays down the definition of cartel as *"an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services"*

The Apex Court of India in ***Union of India v. Hindustan Development Corporation***[4] uphled the aforesaid definition.

(b) Australia

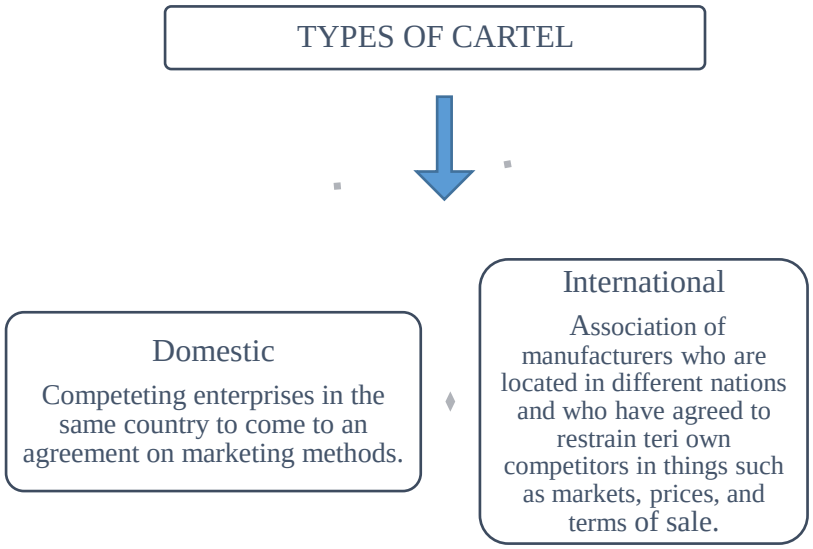
Part-IV of the **Competition and Consumer Act, 2010** contained the cartel provision**.** Specifically, **Section 45AD (2)-(3)** of the Act states that a corporation is not permitted to enter into any contract that contains a clause relating to price-fixing, market or customer allocation, bid rigging and restricting production and supply.

The OECD Recommendation of the Council Concerning Effective Action against Hard Core Cartels defined 'hard-core cartel' as[5] *"…an anticompetitive agreement…….or lines of commerce."*

B. Kinds of Cartels

Broadly speaking, domestic cartels and international cartels are the two types of cartels that exist.

[4] UOI v. Hindustan Development Corporation (n 5), para 2.1.
[5] 'Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels' (*OECD*, 25 March 1998) <https://www.oecd.org/daf/competition/2350130.pdf> accessed 5 January 2023.



C. Meaning of Leniency

'Leniency' allows a cartel member to be partially or completely exonerated from the penalties/punishment that would otherwise be inflicted on him in response to reporting the cartel and presenting evidence or a substantial piece of information related to the cartel to law enforcement authorities. For the uninitiated, leniency requires cooperation from corporations or members linked with such corporations in order to disclose their participation in cartel conduct in exchange for total amnesty or a partial or considerable decrease in financial penalties, respectively. "Corporate amnesty" and "corporate leniency," for example, are terms that are routinely used in the USA to refer to complete protection from criminal prosecution and fines for businesses.

In ***Intel Corp. v. Advanced Micro Devices, Inc.***[6]**,** leniency programme was defined as policy that "allows cartel participants to confess their wrongdoing in return for prosecutorial leniency."

Leniency Programmes

Leniency programmes are formulated to encourage cartel members to initiate and contact the competition agency in order to confess its involvement in cartel conduct, and cooperate with the agency by providing pertinent information and proof to the authority. The objective is to cause a rift between the cartel's heart and soul by leveraging on its trust and mutual benefit.[7]

Administrative versus Criminal Sanctions

Administrative sanctions involve imposition of fines as a punishment for cartel conduct under administrative or civil law. Criminal sanctions give leniency programmes extra anchorage due

[6] 542 U.S. 241 (2004).
[7] UNCTAD MENA Programme (n 19).

to the fact that sanctions may include prison sentences for individuals. Countries around the world are progressively pursuing criminal charges against hard core cartels. This is true in countries such as Australia, the UK, and the USA.[8] The Sherman Act can be executed both criminally and civilly in the USA by the authority. Price-fixing, market allocation and bid-rigging are among the more flagrant offenses of Section 1 of the Sherman Act that can result in criminal prosecution of cartels. The Department of Justice pursues less serious matters in civil court. In India, on the other hand, "all competition violations are civil in nature,"[9] including the most serious cartel offences.

Prerequisites of an effective leniency policy

Prerequisites of cartel leniency programes are as follows:

i. High danger of identification and imposition of severe punishment
ii. Sanctions imposed are significant
iii. Clarity and transparency

Advantages of leniency programmes

The following are some of the advantages of establishing and implementing leniency programmes for competition agencies:

i. Deterrence
ii. Detection of cartels
iii. Sanctioning by authorities made easy
iv. Cessation cartel operations
v. Increased international cooperation in cartel identification and investigation
vi. Improved collection of intelligence and evidence
vii. Reduced adjudication costs

II. LEGAL FRAMEWORK OF CARTEL LENIENCY IN INDIA

Cartel Leniency Programme under Competition Act, 2002

The definition of cartel serves as a foundation for the prohibition of agreements that impair

[8] Sébastien Lafrance, 'Criminalisation of Cartels: A Comparison Between India and Canada (PART-I)' (*The Contemporary Law Forum*, 21 February 2021) <https://tclf.in/2021/02/23/the-criminalization-of-cartels-a-comparison-between-india-and-canada/#post-9747-endnote-35> accessed 5 January 2023.
[9] Aditya Bhattacharjea, 'Trade, Development and Competition Law: India and Canada Compared' (2013) 5 Trade Law & Development 43, 61.

competition and are prohibited under s. 3 of the Act. Cartel behaviour is outlawed in India by the Competition Act, 2002, which is enforced by ss. 3(1) and 3(3) of the Act. An agreement that has or could have an appreciable adverse impact on competition (hereinafter referred to as a 'AAEC') is prohibited under s. 3(1) of the Act from being entered into by an undertaking. According to s. 3(3) of the Act, once it has been proved that there is a cartel, the presumption is that the cartel is causing an AAEC on the market, and there is no need for an express examination into the consequences.

Section 3(3) of the Indian Competition Act is exhaustive in nature. This implies that *only those agreements which are provided in the provision qualify as cartels or horizontal* anti-competitive agreements and no other agreements may be added to the list.

According to few authors "many of the provisions of the Indian competition law are modelled on EU/UK competition law, *albeit with local law specificities.*"[10]

Procedure for Combatting Cartelisation

The concept of a leniency programme is embodied in s. 46 of the Act, 2002. The leniency applications can be submitted either orally or in writing. The following are the fundamental procedural steps in the fight against cartelization:

- Step 1: Receipt of the Information
- Step 2: Prima facie opinion on the matter
- Step 3: Investigation by the DG
- Step 4: Inquiry by the CCI
- Step 5: Order by Commission- Upon completion of its inquiry, if the CCI discovers any agreement that is in violation of s. 3, the CCI may issue any appropriate order mentioned in the statute.
- Step 6: Interim Orders by Commission:[11]

Mechanism dealing with leniency application

The CCI (Lesser Penalty) Regulations, 2009 was enacted in pursuance of the section 64 of the CCI Act, 2002. Regulations enacted by the CCI allow for lower fines for parties who voluntarily disclose critical information about cartels on the declaration that their disclosure is

[10] Suzanne Rab, 'Indian Competition Law: 10 Years on An International Perspective' (2012) 2 COMPETITION LAW REPORTS, 100.
[11] Competition Act, 2002, Section 33.

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thorough, true and vital and they shall fully cooperate with the CCI until the matter is closed. Following are a few key points from the regulations:[12]

1. Eligibility conditions for leniency application

2. Sliding scale of leniency from administrative penalties - According to s. 4 of the Regulation, applicants may be granted full or complete leniency to the extent that it is "up to or equivalent to 100 percent."

Applicant status	Extent of Penalty Reduction	Pre-Conditions
First applicant	Upto 100%	Vital disclosure of evidence.
Second applicant	Upto 50%	Evidence submitted added significant value to the evidence already in the possession of the CCI or DG.
Subsequent applicant	Upto 30%	Evidence adduced by applicant added value to the evidence already in possession of CCI or DG

In this context, it would be appropriate to draw attention to a fundamental flaw in this clause, namely the overuse of the term "may" in this section.[13] It gives the CCI greater discretion in the application of fines, which is clearly not what the businesses were hoping for. This makes the entire procedure of applying for leniency seem insignificant from the perspective of a potential applicant, as there is no certainty that sanctions will be imposed.

3. Procedure for obtaining a marker status - This system is outlined in s. 5 of the Regulation.

4. Contents of leniency application- According to the Schedule to the Regulation, the following elements must be included in a leniency application: the applicant's name and address; description of the cartel agreement, along with its purpose and goals; details of activities and functions carried out by the cartel; the goods or services engaged; the geographic market encased; the commencement and duration of the cartel; an estimate of

[12] Garima Singh & Sharvin Vats, 'A Comparative Analysis of Cartel Leniency in India & USA' (2020) 2 LAW AUDIENCE JOURNAL <https://www.lawaudience.com/a-comparative-analysis-of-cartel-leniency-in-india-and-usa > accessed 5 January 2023.
[13] Id.

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the amount of business affected by such cartel; and a list of evidence relied upon by the applicant.

5. Confidentiality

The CCI's Cartelisation Rulings

First and foremost, *in* ***re Alleged cartelization by cement manufacturers***[14], the cement manufacturing association was alleged to suddenly increase the prices per bag of cement from ₹ 147.80 to ₹ 230 in a short span of time even when there was no increase in the prices of raw materials. It discovered after the investigation that eleven cement companies were implicated for violation of s. 3. A substantial fine of ₹ 6307 Crores was levied on the cartel for violating s. 3 and s. 4 of the Act.

In ***Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters***[15], the CCI allowed leniency to both parties held guilty for cartel conduct under the provisions of the Act. The first applicant obtained a benefit equal to 100 percent exemption, whereas the second applicant earned a 30 percent reduction. The order higlights that the second applicant contributed more significantly to the investigation while the first applicant did not significantly cooperate with the investigation. However, CCI awarded 100% and 30% reductions in penalty to first and second applicant respectively. This implies that no matter the gravity of contribution, the first enterprise or individual to knock the doors of the CCI shall be awarded complete immunity.

In ***Automotive Bearings Case,*** [16] according to the findings of the DG inquiry report, there was a cartel between the companies. In spite of having reached a decisive conclusion regarding cartel conduct, the CCI only issued cease-and-desist orders against the perpetrators, as opposed to the deterring use of severe penalties, thereby departing from its typical strictness in imposing penalties.

Additionally, in the ***Composite Brake Blocks Case,*** [17] the Commission found the opposing party to be guilty of cartelization. However, it cited a number of justifications for not imposing a penalty on the businesses. First and foremost, the CCI considered the nature of the opposing party as a Micro Small and Medium-Sized Enterprise; second, the commission noted that the majority of the opposing parties had a small annual turnover; and third, the commission considered the economic collapse caused by COVID-19 and its impact on the

[14] Case No. RTPE 52 of 2006, Competition Commission of India.
[15] Suo Moto Case No. 02 of 2013, Competition Commission of India.
[16] Suo Motu Case No. 07 of 2014, Competition Commission of India.
[17] Ref Case No. 03 of 2016, Competition Commission of India.

opposing party.

The research reveals that cartelization is found to be prevalent across all industries in India, with no exception, viz, hospital services, agriculture sector (it is observed that state agencies, Agricultural Produce Marketing Committees (APMCs) and middlemen licensed by APMCs function virtually like a cartel during the purchase process) LPG, Railways, Film and Television Sector, Explosive Suppliers, Drugs, Air Cargo etc. When the means of forming cartelization take the form of trade unions registered under the Trade Union Act, 1926 and Societies registered under the Societies Registration Act, 1860, and when their activities are promoted as being in the furtherance of trading in goods or services, it is quite alarming. However, the CCI and the NCLAT have done and are continuing to do a fairly good job in bringing these organisations and societies inside the liability limits of s. 3(3).

III. LEGAL FRAMEWORK OF CARTEL LENIENCY IN USA

Historical Background

In 1978, the first iteration of the USA Corporate Leniency Policy was designed. The initial policy was founded on the essential principle of granting complete immunity from prosecution in exchange for self-reporting and collaborating with enforcement agencies against other cartel participants. The USA, however, failed to create the requisite incentives for firms which could enable them to to self-report hard core cartel behaviour. Policy was amended in 1993 in order to cure the failure and to streamline the leniency programme. The following amendments were incorporated in the policy:

1) Leniency was awarded to businesses that were eligible even if there was already an investigation going on;

2) Criminal protection was extended to all officers, directors, and workers who came forward as informants of cartels.

Overview of Legal Framework relating to Cartel Leniency Programmes in USA

Cartel conduct is criminalised in the USA. This creates a legitimate fear of punishment among individuals involved in cartel operations. The Sherman Antitrust Act of 1890 provides a prison sentence of maximum ten years and a maximum fine of $100 million for violators of the statute. [18] Apart from this, the USA has been effective in constructing such an atmosphere that uncovers businesses to detection by effectively detecting cartels through the use of

[18] Antitrust Criminal Penalty Enhancement and Reform Act, 2004 15 U.S.C. §§ 215.

standard investigative techniques like search warrants, subpoenas, and wiretaps.[19]

In ***United States v. Trenton Potteries Co.***,[20] Trenton Potteries Company and 22 other enterprises entered into an agreement to fix the prices of their products. Together, the pottery businesses-controlled 82% of the relevant market in the USA. The federal government filed a complaint against the aforementioned corporations, alleging that they committed antitrust violations under the Sherman Antitrust Act. The respondents were found guilty of conspiring to determine and fixing prices for their products, thereby impeding interstate trade. The Court observed that: *"Only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Act. It does not follow those agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content."*

In ***Monsanto Company v. Spray-Rite Svc. Corp.***,[21] it was held by USA SC that it is essential to establish a 'conscious commitment to a common scheme' in order to prove existence of cartel.

Leniency Programme

In the USA, there are two parts to the leniency policy- Part A and Part B to ensure flawless execution of leniency programme. Which Part will govern the applicant's application is determined by the stage at which he chooses to come forward and admit about cartels.[22]

The USA leniency programme grants immunity only to the first applicant, creating a genuine race among cartel members to knock the doors of authority. Other subsequent leniency applicants may be eligible for reductions in fine, but this too is managed through negotiating plea deals by the DOJ and falls outside the scope of leniency. [23]

Types of Leniency Policies in USA

(a) Marker System- The system ensures that the location is reserved for such company for a specified time duration to allow for a more thorough investigation.

(b) Leniency Plus- If a corporation is being investigated for one cartel but is unable to obtain

[19] 'An Antitrust Primer for federal law enforcement personnel' (*USA DOJ*, April 2022) <www.justice.gov/atr/page/file/1091651/download> accessed 5 January 2023.
[20] 273 U.S. 392 (1927).
[21] 465 U.S. 752, 768 (1984).
[22] 'Corporate Leniency Policy 1993- Leniency Before an Investigation Has Begun' (*US DOJ*, 29 July 2015) <https://www.justice.gov/atr/corporate-leniency-policy> accessed 5 January 2023.
[23] OECD, *Policy Roundtables, Leniency for subsequent applicants* (154 DAF/COMP (2012) 25) <https://www.oecd.org/daf/competition/Leniencyforsubsequentapplicants2012.pdf>.

leniency for that cartel, it may be awarded leniency if it exposes the existence of another cartel or his involvement in another cartel..

(c) Penalty Plus- This approach is opposite of the 'leniency plus' policy. If a firm admits guilt to one antitrust offence but fails to disclose its membership in further cartels, the DOJ uses the 'penalty plus' policy to levy a more severe penalty.

IV. LEGAL FRAMEWORK OF CARTEL LENIENCY IN EUROPEAN UNION

Historical Background

The Commission's initial leniency policy, enacted in 1996 (and later changed and replaced by the 2006 policy[24]), was modelled after the USA revised Leniency Policy of 1993. Prior to this, fines had been lowered in some situations; the *Wood Pulp case*[25] and the *Franco-West African Shipowners Committees*[26] are two landmark cases. The serious implication of enaging in cartel conduct in the EU is demonstrated by the fact that in July 2005, the Directorate General of Competition formed a Cartel Directorate, which was charged with pursuing cartel cases, establishing policy, and cooperating with organisations like as the OECD and ICN.

Overview of Legal Framework relating to Cartel Leniency Programmes in EU

Cartels are illegal in the EU pursuant to article 101 of the Treaty on the Functioning of the European Union (hereinafter referred as 'TFEU'). [27] Article 101(1) of the TFEU prohibits any agreement between enterprises which prevents, restricts or distorts competition between EU member states. Article 101(3), on the other hand, contains exceptions to Article 101(1).

In ***Matra Hachette v. Commission***,[28] the General Court concluded that the decision to seek an exemption under an agreement between two firms must be qualified by reference to the four grounds set out in article 85(3) of the EC Treaty [EC Treaty is identical to the TFEU]. Additionally, the Court stated that it was the obligation of undertaking to adduce evidence to the Commission that the criteria were satisfied.

Leniency Programme

(a) Leniency Notice

The Leniency Notice of 1996 was updated in 2002 to improve on the elements on more transparency and certainty of fine imposition. The amendment in 2002 brought the

[24] Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006 Leniency Notice) (OJ 2006/C 298/11).
[25] [1932] OJ 85/1, para 148.
[26] [1996] OJ 134/1, para 174.
[27] Treaty on the Functioning of the European Union, OJ C 326/01 (2012).
[28] Case T-17/93 [1994] ECR 598.

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Commission's leniency policy in line with the corporate leniency policy of the USA Antitrust Division.[29] The Notice contains a clause providing for global protection from penalties.

(b) The Fining Guidelines, 2006

The Regulation 1/2003 incorporates the imposition of fines under Articles 23 and 24. It is a critical component of any leniency programme since it contributes significantly to deterrence. According to the Report on the functioning of Regulation of 2009[30], it was reported that "fines coupled with efficient leniency programme represent the most effective weapon in the Commission's arsenal for combating cartels." The Commission has the authority to punish businesses by imposing fine up to 10% of their yearly revenue in the prior fiscal year.

Sections 10 and 11 of the Guidelines provide for the imposition of penalties in a two-step process, firstly determining the amount of the fine and secondly, making adjustments to the fine. The Commission calculates the amount of fine by calculating the value of the products or services.[31] A punishment of 15-25% of the fine shall be levied as a punisment for participation in cartel activity, however fines cannot exceed 10% of the global revenue of the undertaking under Article 23(2) . Article 23(3) states that while issuing penalties, the Commission shall take into consideration the gravity and length of the contravention.

Sections 28-31 discuss aggravating and mitigating situations. Section 28 is concerned with aggravating factors:

- The basic amount will be enhanced by 100% if the enterprise consistently violates Articles 101 and 102, even after the Commission or the relevant NCA has found that the enterprise has committed an offence.
- A factor exacerbating the case is a refusal to comply with or impede the Commission's inquiry.
- Initiated or directed the violation and/or compelled others to commit the violation.

The following are the mitigating factors as defined in section 29[32] –

- Immediate cessation of cartel activities upon the Commission's commencement of its inquiry

[29] OECD, 'Hard Core Cartels 2000' (n 36).
[30] Commission of the European Communities, Communication from the Commission to the European Parliament and the Council, {SEC (2009) 574}, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0206:FIN:EN:PDF.
[31] Wouter P. J. Wils, 'Leniency in Antitrust Enforcement: Theory and practice' (2007) 30 World Competition: Law and Economics Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939399>.
[32] ibid 127.

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- Negligent infringement.
- limited participation in the contravention
- Cooperating with the Commission in areas other than those covered by the Leniency Notice
- Authorization or promotion of cartel violations by public authorities or by legalization.

(c) The ECN Model Leniency Programme

The European Competition Network adopted the Model Leniency Programme[33], a non-binding document with the dual objective of reducing the number of applications filed before NCAs and enhancing the effectiveness of leniency programmes, thereby ensuring the implementation of a uniform summary application system in 2006.[34]Section 16 of the Programme establishes a marker system in which an applicant's seat is reserved for immunity for a specified amount of time during which the individual is expected to acquire the relevant information and proof to establish cartel conduct.[35] The use of a summary application procedure aims to alleviate the administrative the burden associated with several leniency filings.

V. LEGAL FRAMEWORK OF CARTEL LENIENCY IN AUSTRALIA

The Competition and Consumer Act, 2010 (hereinafter referred as 'CCA') contains the competition law and policy in Australia and is administered by the Australian Competition and Consumer Commission (hereinafter referred as 'ACCC'). in the context of consideration of the shape of competition law in Australia, agricultural producers have long been identified as 'price-takers' in a weak bargaining position in comparison to processors and retailers. In 1976 the Swanson Committee Report identified the structural bargaining inequities among producers, processors and sellers: There are a very large number of sellers which individually have very little or no bargaining power and who sell to comparatively few buyers who further process the product and/or arrange for marketing to the consumer. In the majority of cases factors such as perishability of the products, limited on-farm storage facilities and the need for cash to meet production and living expenses compel the farmer to sell his product when it becomes available to sell. Due to the lack of uptake of collective bargaining authorisations attributed to complexity, inflexibility and lengthy turnover, the Dawson Report recommended

[33]European Competition Network, 'ECN Model Leniency Programme- Report on the Assessment of the State of Convergence' (2006) <available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf> accessed 5 January 2023..
[34] ibid.
[35] ibid, Section 16.

the introduction of a notification process for collective bargaining by small businesses dealing with large businesses in circumstances where such bargaining could generate 'public benefits'. The Dawson Report advocated that: (a) A transaction limit should apply to the definition of small business – $3m but variable by regulation (Recommendation 7.2); (b) A period of 14 days should be allowed to pass before notification is effective (Recommendation 7.3); and (c) Third parties should be able to make collective bargaining notifications on behalf of a small business group (Recommendation 7.4). The ACCC classification of 'small businesses' encompasses agricultural collective bargaining group applications pursuant to s 83B of the CCA. Currently, a party may give the ACCC a collective bargaining notice that it has made or proposes to make a contract, or proposes to give effect to a contract, which will be prohibited by the cartel provisions or s 45(2) of the CCA.[36]

Historical Background

The ACCC issued a guideline on leniency programme in the enforcement of competition laws in 1998. The ACCC revised and announced its Cooperation policy for competition law enforcement concerns in 2002. The cooperation policy was stated broadly and extended to any suspected violations of the Trade Practices Act of 1974. In essence, the cooperation policy recognised what had been occurring in practise, where leniency was shown to anyone who exposed illegal activity or supported the ACCC in its investigation and subsequent lawsuit. The type and amount of leniency under the cooperation policy awarded depended upon facts and circumstances of each case and were thus unpredictable from the standpoint of potential applicants.

However, on 30th June 2003, the ACCC implemented its present leniency policy. The policy's objective is to help the ACCC in detecting and deterring cartel activity. It has two primary goals:

- where the ACCC does not know about the existence of a cartel, the first firm or the individual will be offered a conditional 'immunity' from ACCC (Part A)
- when the ACCC knows about the existence of a cartel but lacks sufficient evidence to bring legal action, the firm or individual to first come forward will be granted conditional immunity from monetary penalties (Part B).

Overview of Legal Framework relating to Cartel Leniency Programmes in Australia

[36] William van Caenegem, Madeline Taylor, Jen Cleary and Brenda Marshall, "Collective Bargaining in the Agricultural Sector", Available at <https://agrifutures.com.au/wp-content/uploads/publications/15-055.pdf> accessed 5 January 2023.

Part IV of the CCA governs Corporate Cartel Conduct. When actual or prospective rivals agree to engage in specified cartel behaviour, a corporate cartel is established. Section 45AD (2)-(3) of the CCA states that a corporation is not permitted to enter into any contract that contains a clause relating to price-fixing, market or customer allocation, bid rigging and restricting production and supply.

Section 84 of the CCA makes it essential to establish the element of mens rea of the enterprise in respect to the cartel violation in order to determine whether a company is engaged in cartel behaviour or not.

The 2017 revisions to the CCA ban companies from participating in a coordinated conduct with one or more people that has the objective of distorting competition. Although section 45 of the CCA does not contain the definition of the term 'concerted practice,' the ACCC's August 2018 guidelines state that it "involves communication or cooperative behaviour that does not require all elements of understanding but involves more than a single individual responding independently to market conditions." Additionally, the bill's Explanatory Memorandum states that a concerted practise is *"any form of cooperation…..competition uncertainty."*

Similarly, it is critical to establish an individual's state of mind prior to prosecuting him or her for cartel infringement. Section 85 of the CCA stipulates that courts have authority to evaluate whether an individual can assert the defence of "acting honestly and reasonably under the circumstances." Australian law imposes civil and criminal sanctions on organisations and people that violate the law. The ACCC conducts civil investigations, whereas the Commonwealth Director of Public Prosecutions (hereinafter referred as 'CDPP') conducts criminal investigations. Different evidentiary standards apply to civil and criminal cartel violations. Civil proof is "on the balance of probability," but criminal proof is "beyond a reasonable doubt."

In ***CDPP v. The Country Care Group Pty Ltd. & Ors***.,[37] is an Australian firm that offered aged care equipment such as wheelchairs, alarm systems, and dementia products. Charges were brought against Country Care, its managing director and one employee for involvement in cartel conduct relating to price fixing. It is significant because it is the first criminal prosecution of an Australian business enterprise and of individuals in Australia for cartel behaviour.

[37] VID224/2019 Federal Court of Australia.

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Overview of Investigative Powers in Australia

The ACCC's primary investigative authority is vested in part XII of the CCA.

Section 155 of the CCA states that refusing or failing to abide by ACCC notice is an infringement punishable by a fine. The Penalty is up to AUD$2200 for an individual and up to AUD$111000 for a business. If this pattern persists, a conviction carries a two-year jail sentence. The reasonable search defence has also been added to section 155 (5B) of the CCA. Section 155(6) specifies the following factors that may be considered when determining what constitutes a reasonable search.

The present Australian regime enables the ACCC to seize information through search. However, before the search may be conducted, a court warrant must be secured.

Leniency Programme

The current Australian leniency policy, called the 'Leniency Policy' in Section III,VI, was announced in September 2019 which came into force on 1st October 2019.

The aim of the Leniency policy is clear from ACCC Chair Rod Sims' remark on the subject: *"The immunity policy is a critical component of our strategy for finding and destroying cartels. As a consequence of immunity petitions under our policy, it has enabled us to conduct several cartel investigations. This strategy, along with proactive information collection by the ACCC and whistle-blower complaints, has resulted in multimillion-dollar fines levied against cartel members."*[38]

The ACCC may propose to the CDPP that an application be given conditional immunity if it believes the applicant fits the conditions for conditional immunity. Immunity is provided in Australia only to the first qualifying leniency applicant. Even if a cartel member does not fit the threshold for conditional immunity, he or she may still be granted leniency from the ACCC.

(a) 'Amnesty plus's regime

If a cartel member is not eligible for conditional immunity in the initial case but cooperates with the ACCC in an investigation into another cartel.

(b) Obtaining a marker

[38] Cartel immunity policy strengthened, whistle blowing tool launched' (*ACCC* media release 16/19, 6 September 2019) <ww.acc.gov.au/meida-relaese/cratel-imumnity-poilcy-strenthgened-whistelblowing-tolo-lauchued> accessed 5 January 2023..

(c) Reductions in liability

As mentioned in Sections IV.i and IV.iii, the first qualified applicant is totally exempt from civil action by the ACCC and possibly criminal prosecution by the CDPP. However, the Leniency Policy's immunity does not exclude private enforcement measures. The applicant may still be accountable for damages caused by the applicant's cartel action. Although there is no sliding scale for cooperation, the ACCC will endorse to the court any cooperation offered by a party and will take this cooperation into consideration when proposing a penalty or sentence. Ultimately, the court determines the punishment or sentence to be imposed on cartel participants.

In ACCC v. Visy Industries Holdings Pty Ltd.,[39] Visy and Amcor dominated and controlled around 90% of the fibre packaging industry. Between 2000 and 2004, the two corporations engaged into agreements to increase their respective product prices while maintaining their market shares.

The plan was uncovered when Amcor management revealed it to the ACCC and received immunity in exchange. Visy, too, finally acknowledged to being a cartel participant. It was fined $36 million by the Federal Court, with individual fines totalling $2 million. In a consumer class action, Visy and Amcor were sentenced to pay $95 million in damages to a class of over 4500 enterprises by the Federal Court.

In this case, Justice Heerey made the following observation: *"The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin…….Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect."*

VI. COMPARISON OF CARTEL LENIENCY PROGRAMMES OF INDIA WITH OTHER JURISDICTIONS

(a) Sliding Scale of Leniency from Administrative Penalties

In India, the Regulations, 2009 provide a sliding scale of leniency for administrative fines. The CCI has the authority to decrease fines of several leniency applicants. Additionally, the succeeding second or third priority applicant may be given a penalty reduction of up to 50% and 30% of the penalty, respectively, after adduction of evidence which adds considerable

[39] [2007] FCA 1617 Federal Court of Australia.

value to the material already in the hands of the CCI.

The USA, on the other hand, does not have a fixed sliding scale. Only the first enterprise to acknowledge its involvement in unlawful cartel activity is granted complete protection from prosecution. In this way, the necessity to be "first in the door" creates a competitive environment for companies to report their wrongdoing as soon as possible before one of their co-conspirators does so and begs leniency in exchange. According to the Antitrust Division, other early co-operators will earn greater co-operation leniency than later co-operators. However, unlike in India, the Anti-trust Division has not calculated the specific quantity of leniency that should be offered to early co-operators.

The European Commission using the sliding scale of leniency grants reductions in fines to leniency applicants in the order in which the leniency applicants contribute significant value to the evidence already in the hands of the Commission:

- In most cases, the first successful leniency application obtains a reduction in punishment ranging from 30 to 50%.
- The second successful leniency applicant often receives a reduction in penalty ranging from 20 to 30%.
- Subsequent successful leniency applicants receive a reduction in penalty of up to 20%.

When it comes to civil litigation in Australia, subsequent parties other than the "first-in" ones may be able to get lower fines for civil cases under the Policy if they cooperate with the ACCC in its investigations.

(b) Availability of Immunity or Leniency for Administrative Fines to Individuals

In accordance with the Indian Competition Act, people are entitled to immunity and leniency in the face of administrative fines. The Immunity and Co-operation Policy for Cartel Conduct applies to both businesses and people in Australia. In accordance with the Policy, an individual may apply directly for immunity from civil procedures, and the applicable requirements for seeking such immunity are the same as those for corporate applicants, with the exception of the two changes outlined in the preceding section.

Unlike the corporate leniency policy in the USA, the Anti-trust Division of the Department of Justice maintains a different leniency policy for individuals who come to the Division individually. An individual leniency policy is similar to the corporate leniency policy in that it gives protection from criminal prosecution by the Division.

Individuals are not subject to criminal or administrative punishment for participating in a

cartel, according to EU legislation.

(c) Criminalization of Cartels

Anti-competitive acts, including cartels, are not yet criminalised in India. In a similar vein, there is no criminal culpability at the EU level. Whereas in the USA, the Anti-trust Division of USA DOJ's leniency programme is intended to provide relief from criminal prosecution and is limited to criminal conduct. In accordance with the Division's leniency programme, criminal anti-trust crimes such as price fixing, bid rigging, capacity limitation, and allocation of markets are covered.

In Australia, if the ACCC is satisfied that an applicant meets the conditions for immunity from civil prosecution, the Commission will make a recommendation to the CDPP that immunity from criminal prosecution be granted. As a result, cartelization is now criminalised in Australia as well.

(d) Scope of Leniency Protection after it has been granted

When it comes to India, the Lesser Penalty Regulations, 2009 grant leniency protection only to the cartel in reference to which information is provided.

The Antitrust Division of the USA may be able to broaden the extent of leniency protection if the corporation and the Antitrust Division discover that the anti-competitive activity was more widespread than first disclosed (either geographically or by product).

The EC does not give any protection against the discovery of another competition law infraction or the filing of legal claims by third parties against the company.

Immunity means complete protection from enforcement action by the ACCC and the CDPP in Australia as well. Immunity and cooperation, on the other hand, do not afford protection from private court actions.

(e) Leniency Plus & Penalty Plus

There is no mention of leniency plus or penalty plus in the Indian Competition Act or Lesser Penalty Regulations. The Competition Law Review Committee (hereinafter referred as 'CLRC'), which was established in October 2018 to review the Competition Act, has submitted its report to the Ministry of Corporate Affairs (hereinafter referred as 'MCA'), in which it recommends the introduction of a leniency plus policy as a part of leniency programme.

This is intended to develop a proactive antitrust enforcement instrument with the goal of drawing leniency applications by encouraging corporations currently under investigation for

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one cartel to disclose cartels that are not known to the CCI at the time of the inquiry. If introduced in Indian jurisdiction, the leniency plus policy would result in a decrease of the penalty of the first person or enterprise who disclosed the information, thereby encouraging applicants to come forward with disclosures about multiple cartels. Alternatively, the leniency plus policy of the USA may be cited in this context.

Cartel investigations initiated by the Anti-trust Division are sometimes prompted by members in one cartel reporting cartel activity in another cartel to the division. A firm or individual that discloses membership in a second cartel may be eligible for amnesty. In such a case, the Division will suggest to the sentencing court that the corporation be given a reduced fine in exchange for its cooperation in both investigations. Amnesty plus co-operation discounts are determined by the specifics of the case and the size of the business involved in the new conduct that has been disclosed.

When it comes to cartel behaviour in other markets, the EC does not give any extra punishment reductions in exchange for information. However, protection is provided to the applicant under the Leniency Notice, 2006 in cases when the applicant provides persuasive information that the Commission utilises to establish new facts that increase the intensity or length of the violation. The EU does not have a policy of penalty plus.

When a party cooperates with the ACCC in investigation of one cartel, that party may uncover and introduce evidence in connection to a second cartel. Such a party can apply for:

- Immunity from prosecution in the second cartel.
- "Amnesty plus" in the case of the original cartel's behaviour.

The term "Amnesty plus" refers to a proposal made by the ACCC to the court in order for a further reduction in civil penalties in connection with the first cartel. If the first cartel is being prosecuted as a criminal offence, the CDPP will suggest to the court that the punishment be reduced in light of the amount to which the party cooperated. Penalty plus policy, on the other hand, is not covered under Australian legislation.

(f) Foreign Submissions and Domestic Discovery

In both India and the European Union, the laws dealing to cartel leniency are silent on this subject.

Information and evidence that parties provide in foreign jurisdictions is often susceptible to discovery orders in USA courts. The USA court system has the authority to order leniency applicants to submit records in civil action that have been given to foreign anti-trust

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enforcement authorities. On the grounds of international courtesy, the courts in the USA on some instances have declined to order the production of materials that had been provided to foreign agencies. These rulings, on the other hand, are not always consistent and might differ depending on the courts and parties involved.

The ability of information and evidence presented in foreign jurisdictions to be subject to discovery orders in Australia is dependent on the following factors:

- The entity that is submitting the entries.
- The relevance of the submissions to the proceedings in Australia.
- Foreign laws and international treaties that are in effect in the foreign jurisdiction (such as the Hague Evidence Convention).

It is clear from the above analysis that the provisions of Indian competition law dealing to cartel leniency are modelled on those of EU competition law, with a few minor modifications. The author suggests that, via modifications, the legislation pertaining to cartel leniency should be further developed along the lines of the USA.

It is maintained that the CCI in India has the authority under the Regulations, 2009 to impose lower fines on an applicant who is no longer a cartel member at its discretion on the basis of considerations such as the stage of the application and the quality and significance of evidence. In contrast, leniency policies in countries such as the USA and Australia have well-defined guidelines under which the first corporation to apply and cooperate is granted leniency as long as they can prove cartel behaviour.[40] As evidence of the efficiency, or lack thereof, of the leniency regime in India, the fact that just ten leniency orders have been issued after 10 years of the passing of Regulations (as of June 2020) [41] speaks volumes.

The USA Antitrust Department, on the other hand, witnessed an average of one leniency application per month by 2003, following the implementation of its 1993 leniency policy, whilst the European Union witnessed 21 applications in total under its leniency programme from its inception in 1996 to 2005.[42] Without a doubt, only the USA has been the most successful in dismantling cartels with the assistance of its efficient leniency policy.

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[40] ibid.

[41] S. Gandhi et al., 'Cartel Leniency in India: Overview' (*Thomson Reuters Practical Law* (2019), <https://uk.practicallaw.thomsonreuters.com/2-520-7061?__lrTS=20180422215052879&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 5 January 2023.

[42] Wouter Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (2016) 39(3) WORLD COMPETION 327, 388.

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