COMPETITION ASSESSMENT OF LENIENCY POLICIES AND INTRODUCTION TO MARKER SYSTEM AND AMNESTY PLUS

DISSERTATION TO THE COMPETITION COMMISSION OF INDIA

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~ 1 ~
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TABLE OF CONTENTS

1. INTRODUCTION........................................................................................................6

2. CHAPTER 1-
   CARTELS................................................................................................................9

3. CHAPTER 2-
   LENIENCY POLICY AS A REMEDY TO CARTELIZATION.........................13

4. CHAPTER 3-
   COMPARISON BETWEEN LENIENCY POLICY OF U.S., EU AND
   INDIA..........................................................................................................................20

5. CHAPTER 4-
   MARKER SYSTEM: THE NEW AGE WEAPON..............................................29

6. CHAPTER 5-
   AMNESTY PLUS.....................................................................................................41

7. CONCLUSION..........................................................................................................43

8. BIBLIOGRAPHY.....................................................................................................45
LIST OF ABBREVIATIONS

1. ACCC- Australian Competition & Consumer Commission
2. ARC- Act against Restrictions of Competition
3. Division- U.S. Antitrust Division
4. DOJ- Department Of Justice
5. EC- European Commission
6. EU- European Union
7. OECD- Organization of Economic Co-operation and Development
8. U.S- United States
9. UK- United Kingdom
INTRODUCTION

In the beginning there was only law. Then came law and society, law and history, law and economics and so on. These developments have transformed the vocation of the legal scholar from that of a Priest to that of a Theologian.” ----Ms Kathleen Sullivan, Dean of Stanford Law School.

Competition laws, known more popularly as Antitrust laws in the United States,

“...are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”

Thus Competition laws protect and regulate the competition in the market. The ultimate and paramount aim of this law is protection of consumers. There can be no perfect market achieved in the world but what can be achieved is a regulated market which does not hamper consumer’s protection as also of other players in the market.

One of the important objectives of Competition law in India is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.”

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1 United States v. Topco Associates, Inc. 1972 U.S Supreme Court
2 Judgment in Civil Appeal No. 7999 of 2010 pronounced on 9th September, 2010
Cartels among competitors are a particularly serious and growing form of anticompetitive behavior in today’s market. They may lead to price increases, lessen the competitive pressure among market players, impede the optimal allocation of resources, reduce or even eliminate the incentive of firms to operate efficiently and to innovate, and ultimately harm consumers and the economy itself.

The competition commission of every country in the world today is involved in using its resources to detect cartels and their egregious effect on market. Cartels are however secret by definition and the antitrust authorities need to dedicate a great deal of effort to discover, ascertain and deter them. Most of the times due to lack of evidence, no action can be taken against a cartel even though the commission has its knowledge. The efforts to detect cartels have been strengthened significantly by the use of the leniency programmes which will be discussed later in detail.

Leniency programs are universally accepted as being the best way to investigate cartels. This is because the activity is so secretive that insider information is necessary to break the agreement.\(^3\)

Thus paper seeks to achieve an analysis of Cartels and its corresponding issues. The main issue at hand being how to increase detection of cartels in India. Though leniency policy has been adopted by India, there has not been any significant use of it by participants of cartels and thus due to lack of evidence majority of cartels go undetected. Thus this paper also seeks to introduce to the Indian Competition Law, the Marker System as has been adopted and used effectively by different jurisdictions today and a new concept of amnesty plus which is used today by few countries but to great effect. The

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The purpose of this document is to draw together the key practices concerning the implementation of an effective leniency policy and give suggestions for changes to the Indian Competition Law so that the practice of Cartels in India is detected with better ease and participating companies, at the same time have a safe way out of the hefty fine imposed as punishment on them thus making it a win-win situation.
CHAPTER 1-CARTELS

Cartel as defined by the European Commission for Competition is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.⁴

On the other hand, the Indian Competition Commission through its Competition Act, 2002 defines that a "cartel" includes 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;

Thus the European Commission includes only independent companies in the domain for cartels while the Indian Commission includes different class of persons to form a cartel. This makes the domain of cartels in India much wider than that of the EC.

The Office of Fair Trading defines cartels as an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal.⁵

Cartels are likely to be more harmful in developing economies because here the rate of detection and quick judicial punishments may not match with those in the developed world. Mexico and Colombia are best examples where the ill-famed drug cartel mafia is known to be constantly engaged in a state of 'drug war'.

The first question that arises in the domain of cartels is what the general nature and legal basis of cartel prohibition is; civil or criminal? While India and European Union have

⁴Available at http://ec.europa.eu/competition/cartels/overview/index_en.html
⁵Available at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/what-cartel
civil penalties for cartels, UK, Australia and U.S. believe in criminal penalty for the grave offence of cartelization. In fact, Australia has some of the toughest cartel laws in the world and adopted criminal liability on account of the Dawson review of 2003 that suggested criminal sanctions for cartel conduct although subject to resolution of a number of issues.\footnote{Dawson Review of 2003 with its cartel program \url{http://cartel.law.unimelb.edu.au/index.cfm?objectid=0CA28DBC-5056-B405-510FFE002570A99D}}

Some countries like Germany deal with the problems of cartels in a combined manner. Minor infringements which only require a cease and desist order are dealt with in an administrative process which is governed by the Act against Restrictions of Competition (ARC). However, where the authority intends to impose fines, the proceedings are governed by the Code on Administrative Offences and the Code on Criminal Procedure.\footnote{Provided by the International Comparative Legal Guide (ICLG) which gives current and practical legal information of laws of different jurisdictions \url{http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=126&chapters_id=3317}}

The other important issue in cartels is the extra-territorial application of the rules of the Competition Laws. In Competition Act of India, section 32 of the Act provides that

‘The Commission shall, notwithstanding that,—

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.⁸

Thus the Indian Competition Act has extra-territorial jurisdiction. It emphasizes on the effects of the cartel on competition in India and it need not be formed in India.

In the regard of extra-territorial jurisdictions, almost all the countries have unanimously accepted the principle that if the cartel affects the competition in their relevant market then it does not matter if any party to the agreement is outside their country.

Some famous cartel cases of the world are The International Vitamins Cartel in which all leading manufacturers of vitamins located in Belgium, Canada, France, Germany, Japan, the Netherlands, Switzerland and the United States, including Hoffmann-la Roche AG and BASF of Germany, Rhone-Poulenc of France operated for over 10 years from 1989 to 1999 and covered all major vitamins consumed the world over, Cement cartels of Argentina, Pharmaceutical cartels, washing powder cartel of Unilever and Procter&Gamble etc.

The secretive and elusive nature of cartels makes it difficult for any Competition authorities to detect or discover it. Generally cartels were discovered by the information received on investigation conducted by the commission or by individual complaints of natural or legal persons. But this did not help in getting any substantial evidence against the cartel players and resulted in them walking scot-free. This process also required a long period to detect cartels and fewer number of cartels could be discovered.

On account of these difficulties, Commissions across the globe tried to innovate new methods to detect cartels. One such method that is highly prevalent today is a leniency policy. Today almost all Competition Commissions across the globe use leniency policies to help detect cartels faster. The fear of a hefty fine makes the cartel participant opt for a leniency policy where their fine is reduced if vital information about the cartel is provided. This leniency policy across different jurisdictions is discussed in detail below. Also improvisations in these policies made by U.S. and EU are discussed and their inclusion in Indian competition law is discussed in detail in the forthcoming chapters.
CHAPTER 2- LENIENCY POLICY AS A REMEDY TO
CARTELIZATION

Different jurisdictions have different laws for cartels. In the same way there are
different leniency policies implemented by different jurisdictions. A leniency program for
cartels and other illegal teams seems is appealing both from a theoretical and an empirical
perspective. Theoretically, a reduction in the fine imposed, for the first self-reporter and high
fines for all other team members gives an incentive to be the first one who comes forward.
Three main features of a market make it easier for the firms in this market to conspire. The
first of these being, the elasticity of demand. Markets such as oil, gas, power, cement, steel,
which have no substitutes available, provide greater scope for huge profits by price rise, and
hence a chance for explicit collusion among the firms.

Second broad feature is the level of competition in the market. The fiercer is the
competition and lower the prices, in absence of cartel, the greater are the likely benefits from
setting up of a cartel. The airline sector with a large number of private players competing
with one another for each priority route or on favoured timings in a busy route could be an
typical example.

Third being, the barriers to entry in a given market. Low barriers to entry or
expansion in a given market make a cartel difficult as any new player with better efficiency
can undermine the cartelised price.\footnote{Predicting cartels: Difficult task for competition regulator- Economic Times of India} Retail consumer sectors such as those of readymade
garments, handicrafts etc could be examples. A cartel is difficult to be sustained for long as
there is an inherent tendency amongst members to derive maximum benefits by cheating on
others by undercutting the cartel price. The more efficient the member of a cartel, greater

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would be the benefit of such cheating. Such cheating is easier in case the cartel is operating simultaneously in a large number of geographic markets. A large number of firms in a given market also facilitate such cheating as the detection becomes difficult. The likelihood of the cheating being detected by other cartel members further reduces the success of a cartel. On detection, the cartel either fails by itself or clue about the same is given by a victim of such cheating to competition authorities.

A leniency programme comes as a handy tool for such 'defectors' to mitigate their likely punishments. Leniency programs reduce fines for cartel members that bring evidence to the antitrust authority. The penalties for companies that breach the competition rules can be very severe. But illegal cartel participants have a limited opportunity of either reducing this penalty or avoiding it completely. Different competition commissions operate a leniency policy whereby companies that provide information about a cartel in which they participated might receive full or partial immunity from fines. It has been said that the most important contribution of recent years to the global fight against cartel formation and sustainability is the adoption of leniency programmes by a growing number of national jurisdictions.

Leniency policies have until now been globally successful in fighting cartels through each of the policies’ four stages:

1) prosecution, making conviction and penalization stricter and more frequent;

2) detection, making discovery more probable;

3) desistance, making cartels less stable, seeding mistrust and suspicion among cartel partners; and
4) deterrence, making cartels less profitable.\(^{10}\)

In February 2002, the Commission of the European Union has substantially revised its law enforcement against cartels. In particular, the new policy follows the path of the leniency program enacted in the U.S. in 1993 and stresses the opportunity of fine reductions for self-reporting cartel members. The U.S. Leniency program is considered the most effective leniency program till date for a number of reasons.

On August 10, 1993, the Department of Justice (DOJ) Division of U.S. announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions\(^{11}\).

"An effective leniency program will lead cartels members to confess their conduct even before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon the cartel stonewall, race to government, and provide evidence against the other cartel members."\(^{12}\)

In Hammond’s experience, transparency must include not only explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies. The American leniency program, Hammond says, is inherently transparent because the exercise of prosecutorial discretion in its application has, to a great extent, been eliminated. The initial leniency programme introduced in 1978, which was designed to maintain a greater degree of prosecutorial discretion, and ran for 15 years, simply

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did not work. The programme was revised in 1993 to make it easier and more attractive for companies to come forward and co-operate with the Antitrust Division. Although there have been a number of amnesty applicants he would have preferred to prosecute, Hammond’s experience has been that prospective leniency applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the programme – a company that cannot accurately predict how it will be treated as a result of its corporate confession, is far less likely to report its wrongdoing.

The DOJ identifies six key components of an effective leniency policy, and they are:

1. transparency and predictability of the operation of the policy
2. maximum possible reward for those who qualify
3. the benefits of the policy should be limited to the first to qualify
4. the policy should provide full protection for cooperating corporate executives
5. the cooperation requirements of the policy should be clear and not related to the value of the evidence
6. the policy should provide for prompt notification to the applicant of the outcome of their application.

Many of the elements listed above are also common to leniency policies from other jurisdictions, including the United Kingdom\(^\text{13}\), Canada\(^\text{14}\), the European Union\(^\text{15}\) (EC) and Korea\(^\text{16}\).


In 1993, the Antitrust Division of the U.S. Department of Justice significantly revised its Corporate Leniency Policy and made it easier for confessing firms to qualify for amnesty. For example, the Division limited the discretion that it had possessed under its former policy as to whether to grant amnesty to a confessing firm. Under the revised program, firms that met certain criteria – for example, being the first to confess, not being a ringleader of the cartel, and confessing before government investigators had already developed their case against the cartel\textsuperscript{17} could automatically receive amnesty. When these requirements are applied to the Indian Law, we come to know that there is still a certain amount of discretion awarded to the Commission as mentioned in section 3 sub-section (4) of the Lesser Penalty Regulation of the Commission. If thought from the applying company’s mind, this discretion acts as an obstruction and creates a doubt in the mind of the company as to whether or not a leniency will be guaranteed. Also a lot of emphasis is given to the quality of information. In U.S. a company coming forward for subsequent reduction in fine is given lesser penalty not on the value of information necessarily. This increases the applicants there. In India, because what is asked for is substantial information and because reduction in fine depends on the value of information, companies feel reluctant to apply.

There are also some differences between the different jurisdictions. In the EC, leniency is not automatic and is more akin to plea bargaining, with penalties negotiated at the end of the investigative process. Emphasis is placed on the decisiveness of the evidence provided by the applicant and the level of co-operation provided by the applicant. In Canada, which like the U.S., treats cartels as criminal offences, the first applicant who meets the leniency policy criteria will receive complete immunity. The Canadian Competition Bureau (CCB) makes a recommendation for leniency to the Attorney General in appropriate cases.

\textsuperscript{17} Under the 1978 policy, amnesty was essentially precluded if the Antitrust Division had already begun an investigation into the suspected cartel. Under the new policy, the existence of an investigation did not automatically preclude leniency. Christopher Mason, the art of the steal 251 (2003).
where all requirements, such as cooperation, have been satisfied. The UK has a policy similar in terms to the U.S. Immunity is automatic if the pre-conditions are met. Immunity may also be offered to the first participant who comes forward after an investigation is underway. The UK has recently criminalized cartel behaviour. Korean law also criminalizes cartel behaviour. One interesting point to note is that the Korean law has a sliding scale rewards system that sees informants paid for ‘tip offs’ that lead to successful cartel prosecution.\(^\text{18}\)

Despite differing in few details, the common thread that goes through all of these leniency or amnesty policies is that subject to certain requirements, companies or individuals who disclose to the regulator their role in a cartel and cooperate with ensuing investigations, are rewarded by a reduction of or complete amnesty from penalty or prosecution. This incentive is afforded to the first and in some cases subsequent applicants. The regulators in these jurisdictions acknowledge and know that leniency policies are an invaluable and cost effective way of obtaining evidence, as well as creating greater uncertainty for those persons involved in a cartel.

In India, cartels have been formed in various sectors such as cement, steel, tyres, trucking, family planning devices, etc. India is also believed to be a victim of overseas cartel in soda ash, bulk vitamins, petrol, etc. These tend to raise the price of products or reduce the choice of consumers. Business houses are affected most by cartels as the cost of procuring inputs is increased or choice is restricted pushing the houses to become uncompetitive, unviable, or simply satisfied with lesser profits.\(^\text{19}\) The 1998 OECD Recommendation

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\(^\text{18}\) Review of the ACCC’s Leniency policy for Cartel conduct. Available at http://www.accc.gov.au/content/item.phtml?itemId=566510&nodeId=a280cf4f0d5d9e53b6e1d0b6427ef39f&fn=Leniency%20Discussion%20Paper.pdf

\(^\text{19}\) G. R. Bhatia, Combating Cartel in Markets- Issues and Challenges, EXECUTIVE CHARTERED SECRETARY, 654-657 (July 2006)
proclaimed that cartels are “the most egregious violations of competition law”.\textsuperscript{20} Developing countries are worse affected than their developed counterparts due to a mixture of the absence of a competition regime and an inadequate capacity to detect, discover, and prosecute domestic and overseas cartels.\textsuperscript{21}

The key advantage for India is that the competition law in other jurisdictions is very well developed, and as such there will be plenty of precedents and guidance to assist with the development of an Indian competition regime.

Thus as per the success of U.S. and EU leniency policies, that policy is the best which ensures the cartel participant transparency and swiftness in procedure. In the U.S. leniency policy when a company applies for leniency, if it satisfies the requirements of the policy, it is guaranteed a reduction in fine. What is required is minimum award of discretion in the system of leniency as that creates doubt in the mind of the applying companies. When the system is transparent and self explanatory, companies get an assurance that they will receive leniency.

\textsuperscript{20} OECD reports, fighting hard core cartels: Harm, effective sanctions and leniency programmes 12 (2002)

\textsuperscript{21} Bhatia supra 19
CHAPTER 3 - COMPARISION BETWEEN LENIENCY POLICY OF U.S., EU AND INDIA

The U.S. and EU leniency policies have a high success rate. But there is a vital fact which comes into play. The U.S. leniency policy was first drafted in 1978 and then amended in 1993. Prior to 1993 the policy did not offer immunity but rather "prosecutorial discretion" that was relatively ineffective. Scott Hammond, Director of Criminal Enforcement, stated "[prior to 1993] relatively few amnesty applications [in fact, no more than one a year] and did not lead to the detection of a single international cartel."22 Because of this, the Department of Justice changed its policy to the leniency policy of today which defines leniency as "not charging such an individual criminally for the activity being reported."23 The restructuring of the policy prove to be very effective and is supported by Department of Justice's statement, "the Amnesty program has been responsible for detecting and prosecuting more antitrust violations than all of our search warrants, consensual-monitored audio or video tapes, and cooperating informants combined. It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers."24 Today, almost 35 years down the line, this policy is considered to be effective.


Following the success of U.S. leniency policy, the EU leniency policy was first introduced at EC level in 1996\textsuperscript{25} and revised twice, in February 2002\textsuperscript{26} and recently in December 2006 (2006 Leniency Notice).\textsuperscript{27} Unlike U.S. system which focuses solely on criminal aspects of antitrust law, EU's policy is used on civil suits (because criminal prosecution of anticompetitive law does not exist in EU). EU's leniency policy is also only available for companies because only companies and not an individual can be held liable for anticompetitive behavior. In addition to the granting immunity to companies which provide information on undetected cartel or one which provide evidence to prove the cartel infringement, because of its civil nature, EU policy also established a "sliding window" system for corporations that do not qualify for absolute immunity. The civil nature of EU's anticompetitive law made it possible to calculate punishment solely on monetary damages; therefore it is possible to establish a system where companies who can provide evidence that is considered to be of "significant added value" for Commission investigation are to be granted reduction in fines.

The "sliding window" policy in EU's leniency system reflects the cultural view on violation of antitrust as a civil matter rather than a criminal matter. Because of the absence of the violation carrying moral weight, it is acceptable that the penalties are reduced and for companies to contribute to the investigation against itself. Unlike the EU legal culture, any gross or minimal violation of antitrust law in U.S. carries a stigma and so partial exemption cannot be as easily calculated and it becomes less worthwhile for companies to aid

\textsuperscript{25} Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207 of 18.07.1996. This notice provided for a reduction from fine up to 75% for firms cooperating with the Commission.
\textsuperscript{26} Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 45, 19.02.2002, p. 3-5.
investigation against itself. With the help of violators, the EU Commission can more effectively resolve cases, and focus their limited resource on investigating and prosecuting other anticompetitive violations.\footnote{How the Punishment of the European Union Competition Law and United States Antitrust Law Reflect Respective View on Competition. Available at http://voices.yahoo.com/how-punishment-european-union-competition-4523875.html?cat=17}

In spite of the record high fines awarded to eight vitamins companies including Hoffman-La Roche (€800 million) for illegally agreeing to charge a higher price for their product, most cases of cartel do not have fines thus making the leniency policy a profitable option for companies. Thus the EU leniency policy is regarded as successful after it had undergone two amendments and experience of around 16 years.

The Competition Commission of India (Lesser Penalty) Regulations was first introduced in 2009. With only three years down the line for this leniency policy, it will definitely take more time for it to spread in the Indian markets and also gain more experience from other Commissions. Even though the best provisions of leniency policies from across different jurisdictions have been inculcated in the Indian lesser penalty regulations, there are still a few factors which are make the U.S. and EU leniency policies better than India’s.

**Similarity between EU and U.S. leniency policy**

**Reduced Penalty**: It is pertinent to note that currently in both the U.S. and EU; any or all cooperating cartel participants who may have lost the race for full immunity from prosecution may still receive a reduced penalty. That means that in both the U.S. and EU, two equally culpable members of the same cartel can receive vastly different penalties based on their
early acceptance of responsibility and the timeliness and value of their cooperation. In this case, India also falls in the same group as the Lesser Penalty Regulation in its section 4 subsection (b) states that ‘The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have violated section 3 of the Act.’

**Difference between EU and U.S. leniency policy**

**Momentum:** In the U.S., early cooperators not only provide evidence that is valuable that the Division can use against other participants of cartel, but also once their plea agreements are filed on the public record they often give a strong momentum that expedites the Division's investigation process and prosecution of other participants and even, in an Amnesty-Plus situation, other cartels. Plea negotiations are confidential, but once agreements are reached, the plea agreement is filed with the court and made public. Other cartel participants can then see that other participating firms have accepted their responsibility and promised to cooperate with the Division, and so they often quickly line up to plead guilty. The momentum created by seriatim, or serial settlement before the conclusion of an investigation is a powerful benefit to the Division that has no counterpart under the European Commission's settlement procedure.

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29 “Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions” - Ann O'Brien

30 See Federal Rule of Criminal Procedure 11
**Timing:** While cartel enforcers in both the U.S. and EU can obtain and reward early and valuable cooperation, a cartel participant in the quest to cooperate and quickly resolve its liability will find itself on radically different timelines in the U.S. and the EU.

A company that has not won in the race for full immunity in the EU may still be eligible for a reduced fine if agrees to cooperate pursuant to the European Commission's Leniency Notice, but it must wait till the conclusion of the Commission's investigation to learn if the Commission will engage in settlement discussions. In the U.S. on the other hand, that same cartel participant that has lost the race for full immunity may immediately initiate plea negotiations with the Division to simultaneously resolve its culpability and be rewarded for the cooperation it can provide. A cooperating cartel participant can reach a settlement with the Division at any time from very early in the Division's investigation until after formal charges are brought.  

Seriatim plea agreements are generally followed in the Division’s cartel investigations and the Division regularly negotiates and publicly files plea agreements throughout the course of its investigations. In addition, a plea agreement can be entered as soon as an agreement is reached and sentencing can take place immediately.

In the EU, a cartel participant seeking to cooperate and quickly resolve its liability may apply for a reduction in fine pursuant to the EU Commission's Leniency Notice, but the applicant will have to wait till the end of the administrative procedure to learn how its cooperation will be rewarded and what the actual fine imposed will be. There are a number of examples of companies that have simultaneously offered to cooperate in both the U.S. and the EU but had to wait for a long time and nearly years after settling in the U.S. to learn what their ultimate punishment or fine would be in Europe. This problem is made worse by the

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31 While the Division will entertain plea proposals both before and after indictment, most are entered pre-indictment where early cooperation holds an array of benefits for defendants.
numerous appeals of EU Commission decisions which are lengthy and where, at times, the lag has been almost a decade.

The EU Commission's settlement procedure likely will not dramatically change the timing of this process. A cartel participant seeking to settle will have to wait until the end of the Commission's administrative procedure to know its actual fine and if it received the settlement discount to be applied cumulatively to any leniency reduction. In India the disclosure of fine is made after the proceedings have been conducted and like EU only after the investigation is over, will the company find out its standing in the fines to be paid.

**Differentiated Settlement Discounts:** Another difference between the U.S. plea system and the EU Commission's settlement system is that the settlement discount in the U.S. can be, and usually is, different for various cartel participants, whereas in the EU the settlement discount is a fixed figure for all settling parties.

In the U.S., the cartel participants can receive a settlement discount depending when they have accepted their responsibility, i.e. the timeline, and the quality of their cooperation, with the earlier defendant settles the larger settlement discounts they receive than those received by later pleading defendants. This is consistent with the race-to-the-prosecutor's-door mentality that has successfully fueled leniency programs around the world. A cartel participant that is the "second-in" to self-report and loses the race for leniency in the U.S. can still win a substantial settlement discount by pleading guilty. This system induces quicker, higher quality cooperation.

While, as previously mentioned, second and subsequent cooperators can and do receive substantial rewards under the Commission's leniency program, the fixed settlement discount for all those parties who wish to settle provides very little or no additional incentive
for cartel participants to line up to be the first to settle, since in the end the last-in receives the same discount as the second in or third so on and so forth. In India, as per the Lesser Penalty Regulations, the discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to – (a) the stage at which the applicant comes forward with the disclosure; (b) the evidence already in possession of the Commission; (c) the quality of the information provided by the applicant; and (d) the entire facts and circumstances of the case

Thus in this case the reduction in penalty in India is based on the quality of information and on the discretion of the Commission.

**Difference or Similarity: Negotiation or Discussion of the Merits?**

The EU Commission Notice on Settlements makes clear that the Commission will not put into negotiations the existence of a cartel infringement or the appropriate fine. The concept that the settlement system must be "non-negotiated" is likely driven by a desire to distinguish the system from a U.S.-style plea system because of the negative connotations associated with plea bargaining discussed above.

A question that remains, one that will be important to prove how successful the Commission's settlement procedure, is: what does the Commission mean when it says it will not negotiate? The Commission Notice on Settlements says that the discussions "will allow the parties to be informed of the essential elements taken into consideration so far, such as the

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facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections.”

When and how this information is discussed with parties contemplating settlement will be critically important to the willingness of cartel participants to engage in settlement discussions with the Commission.

In the U.S., once plea negotiations are commenced, an open two-way dialogue takes place between the cartel participant's counsel and the Division, regarding certain significant terms of a possible plea agreement, including: the entity to be charged; the scope of the alleged conspiratorial conduct to be charged; the products or services covered by the conspiratorial agreement; the duration and geographic scope of the conspiracy; the scope of the nonprosecution protections and cooperation requirements; the sentencing recommendation; and the cooperation that the defendant is prepared to offer. In the experience of the Division, this dialogue is necessary to reaching a settlement.

The EU Commission's settlement procedure gives scope for discussions and seems to foresee that at least some of these items will be dealt with. The semantics of whether a dialogue between the Commission and cartel participants seeking settlement is called "negotiation" or "discussions" is less important than whether and to what extent it actually takes place.

The Lesser Penalty Regulations of Competition Commission has no provision for a dialogue or negotiation between the parties of a cartel and the Commission. Keeping in mind the Indian set up this is in fact beneficial as it avoids the prospects of the negotiation leading to reduction in fine due to bribery.

33 Commission Notice on Settlements, supra note 32, at 2.2.16
As seen above the U.S. and EU leniency policies have few similarities as well as differences. The Indian counterpart has tried to combine the merits of these leniency policies. But it has to be kept in mind that the success of U.S. and EU leniency policies was after trial and error and gaining of experience for more than 10 years. To expect success out of the leniency policy adopted by India, some gestation period has to be granted and few drawbacks have to be checked.
CHAPTER 4- MARKER SYSTEM: THE NEW AGE WEAPON

Introduction to marker system

It may be impracticable to expect applicants applying for leniency to complete a thorough investigation into allegations of cartel conduct before applying for leniency, particularly when it involves a number of jurisdictions. A marker system is a system whereby an entity can claim a position in the queue of all those seeking to make a disclosure. The perk is that this is done without providing all the information that would be necessary to complete the application. This simply implies that some basic information has to be given at the time that the marker is claimed. This includes information related to the parties to the cartel, the duration and nature of illegality, the product markets and territorial markets affected, and any parallel leniency applications. However, the detailed information on the financial position of the enterprise making the application and other such information can be submitted later.

This later date is fixed according to the marker date, and the complete disclosure has to be made in the additional time in order to maintain the position in the queue. The UK has possibly the most flexible marker system. Some countries, like the UK also allow for anonymous markers for a limited period of time. This is because there is a need felt to let an entity determine whether or not immunity is available to it before making a disclosure, in order to create an incentive for greater amount of disclosure. In Canada too, the original disclosure is usually made on a hypothetical basis by the applicant’s legal representatives and include information on documents and records available to support the allegations made and evidence or testimony that potential witnesses can give.

It is more helpful to ask an applicant to provide a summary of the alleged conduct and a full application for leniency within a certain period, for example say 28 days. Limiting the period in which a marker is valid to 28 days will ensure both that applicants provide details of
the conduct in a timely manner, and that the markers regime is implemented in a transparent and consistent manner.

**How will the marker system be operated in practice?**

It is in the interest of public to maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements. Nevertheless, there can be various circumstances that would justify the granting of a marker. Therefore, the decision to grant a marker should be made on a case to case basis, taking into account the intrinsic details of each situation and the justifications that the applicant presents for its request to get a marker.

The marker is one of the key new features in the revision of the Leniency Notice of major jurisdictions and therefore the practical aspects of this system need to be developed following discussions with applicants and according to experience. When the Commission is dealing with a case where applications for leniency have been made in several different jurisdictions, it may need to coordinate the marker system with the other jurisdictions, as it would also coordinate first investigation actions.

**How long a time period can an applicant expect to have to perfect the marker?**

The time period to be granted to perfect a marker (i.e. to complement the initial information to bring it up to the standard required to qualify for immunity) will have to be decided on the facts and circumstances of each case. But it is clear from experience that the time period should be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be carried out swiftly. The longer the time period is, the higher
the risk of leakage of information about the investigation of the cartel become, which may ultimately jeopardize the entire purpose.

**What information must an applicant provide to get a marker?**

When applying for a marker, the applicant may be asked to provide the following information which has to be decided by the Competition Commission: the applicant's name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration of the cartel and the nature of the cartel conduct. This information is necessary to ensure that this is a serious application and that there are no prior applications relating to the same alleged infringement. This information would also allow the Commission to see whether the case concerns one or more Member States.  

**Why should the Commission grant a marker only for immunity applicants and not for reduction of fines applicants?**

It is necessary for the effectiveness of the leniency programme to maintain the race to the door between the applicants for immunity. Practical experience of EU and U.S. shows that following the Commission inspections, there may be several such applications in a short interval. It would also be in practice, difficult for the Commission to effectively process and assess several simultaneous markers for reduction in fines.

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34 This list of information is the same as in the ECN Model Leniency Programme (see IP/06/1288 and MEMO/06/356).
What is the difference between a hypothetical application for immunity and a marker request? Why can a marker not be combined with a hypothetical application?

A marker and a hypothetical application cannot be combined due to their different purposes and features. The hypothetical application is available to allow companies to ascertain whether the evidence in their possession would meet the immunity threshold before disclosing their identity or the infringement. In a hypothetical application, the company is supposed to actually show the evidence liable to meet the relevant immunity threshold, although it can be done by means of edited copies with the data that could identify the company and the cartel at that stage deleted.

In contrast, a marker is granted to protect the place in the queue of an applicant which has not yet gathered the evidence necessary to formalise an immunity application. In order to protect the place in the queue without obtaining the relevant evidence in exchange, the Commission must be in a position to ascertain whether it already has a previous immunity application for the same cartel and ensure that the company is seriously engaged to provide the evidence. Therefore, in order to obtain a marker, a company is expected to provide certain data listed in the Notice.

In some cases, a potential leniency applicant may wish to notify the Commission of its involvement in a cartel before it is in a position to provide the Commission with full details of the conduct. This may occur in the context of both domestic and international cartels where the potential applicant does not know the full extent of the conduct, or, in relation to international cartels, whether, and the extent to which, the conduct affected commerce in India. Allowing an applicant to take this approach is consistent with the U.S. and Canadian marker system. The question is whether the India Lesser Penalty Regulation should formally incorporate such a marker system. In the U.S., it is possible to ‘put down a
marker’ by contacting the relevant agency and establishing whether amnesty would be available, thereby saving a company’s place in line before making a formal leniency application. This procedure allows a company to inquire whether there is anyone who is ahead of it and, if not, to secure the company’s place at the head of the line for some period of time before making a formal leniency application. In the United States, this ‘marker’ may be put down simply by contacting the DOJ to establish that amnesty is available and notifying the agency of an impending application. Providing specifically for the use of markers may also overcome the perception (that might be held by some lawyers) that an application requires the provision of detailed written information which may be a disincentive for some applicants. This feature would also provide a formal way of identifying potential applicants by chronology and assist in determining, in circumstances where the first applicant withdraws the application or has it rejected, who the next applicant in line for leniency would be.

The leniency policy thus would need to be amended to provide that potential leniency applicants may place a marker identifying the applicant and giving a broad description of the type of cartel conduct and relevant industry in which the conduct has occurred. The applicant would then have time in which to provide full details of the conduct as currently required by the leniency policy. Another benefit of markers is that because only very basic details are required to put down such a marker, this may encourage ‘the race to the door’.35

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Countries which changed their leniency policy and introduced marker system

There are many countries across the globe which have amended their competition policies in the wake of new methods and techniques and incorporated the marker system in their policy. Surprisingly the number is very high and shows that it is time the Indian counterpart also incorporates it.

Countries which have introduced marker system in their leniency policy are Australia, Brazil, Bulgaria, Canada, Cyprus, Czech Republic, European Commission, France, Germany, Romania, Turkey, UK and U.S.\textsuperscript{36} Even small countries like Mexico, Pakistan and Poland have marker system in their leniency policies showing its need in today’s leniency policies.

Procedure followed in U.S.

In U.S., the Antitrust Division has frequently mentioned in its speeches, that time is of the essence in making a leniency application. On a number of occasions, the second company to apply for leniency has been beaten by a prior applicant by only a number of hours. The Division, however, understands that when a company wants to own up for an alleged participation in a cartel, authoritative personnel for a company may not know definitively whether the company has participated in a criminal violation of the antitrust laws. Under the marker system, a potential applicant may hold its position in line for leniency while its counsel gathers more information to support its leniency application. The company then gets a certain fixed period of time to complete its internal investigation, report its findings to the Division, and perfect its leniency application. While the company has a marker, no other company will be permitted to jump over or ‘leapfrog’ over the leniency applicant at the front of the line, even one prepared to perfect its leniency application immediately, thereby giving a greater incentive to applicant. If the company holding the marker fails to perfect its

\textsuperscript{36} Trends and Developments in Cartel Enforcement Presented at the 9\textsuperscript{th} Annual ICN Conference in Istanbul, Turkey April 29, 2010
application within the allotted time frame, it will lose its place in line and other companies will then be considered for leniency in the order in which they came forward.

To obtain a marker, counsel must:

(1) disclose the general nature of the conduct discovered;

(2) identify the industry, product, or service involved in terms that are specific enough to allow the Division to determine whether leniency is still available and to protect the marker for the applicant; and

(3) identify the client.

While confirmation of a criminal antitrust violation is not required at the marker stage, in order to receive a marker counsel must report that he or she has uncovered information or evidence suggesting a possible criminal antitrust violation, e.g. price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes. A marker is provided for a finite period. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the marker may be extended at the Division’s discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.\footnote{\textit{ibid}}

Thus the U.S. has a very user friendly and effective marker system which acts as a great tool to detect cartels and increases the race to the door to obtain the marker.
Possible changes to Lesser Penalty Regulations

Information obtained from attorneys who have represented leniency applicants in the past highlighted some of the other issues that could inhibit potential applicants from self-reporting in some jurisdictions. These include:

1. inability of the applicant to anonymously explore with an agency whether leniency is available
2. possible disclosure to other enforcement agencies or third parties without the applicant’s approval
3. absence of “amnesty plus” credit (in systems where leniency programs do not contain predictable and transparent rules for reduction of fines)
4. absence of a marker system
5. discoverability of information and documents produced, not only in the jurisdiction where leniency is granted, but also mainly in other jurisdictions
6. a requirement to submit written leniency applications
7. a requirement to establish all the elements of an offence before receiving conditional leniency

Section 46 of the Competition Act in India mentions reduction in penalty and this is discussed in detail in the Lesser Penalty Regulation. If we want to include marker system in India then only few changes will have to be made. The current set up can remain the same for subsequent entrants and the reduction in their penalties.

For complete immunity, changes can be made to section 46 and section 4 (a) of the Regulation, mentioning what a marker is and how it can be used to get complete immunity.

Drafting and implementing an effective leniency policy- ANTI-CARTEL ENFORCEMENT MANUAL. Available at www.internationalcompetitionnetwork.org
Section 4 (b) of the Regulation can remain the same for later entrants for leniency in their fines.

In the current Lesser Penalty Regulation of India as per section 3 (1) (b) and (c), the applicant has to provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Competition Act and also provide all relevant information, documents and evidence as may be required by the Commission. This makes it essential for the company applying for leniency to have complete knowledge about the cartel and its violations. Some of the in detail requirements mentioned in the schedule of the Regulation at the end are namely:-

(a) name and address of the applicant or its authorized representative as well as of all other enterprises in the cartel;

(b) in case the applicant is based outside India, the address of the applicant in India for communication including the telephone numbers and the email address, etc.;

(c) a detailed description of the alleged cartel arrangement, including its aims and objectives and the details of activities and functions carried out for securing such aims and objectives;

(d) the goods or services involved;

(e) the geographic market covered;

(f) the commencement and duration of the cartel;

(g) the estimated volume of business affected by the alleged cartel;

(h) the names, positions, office locations and, wherever necessary, home addresses of all individuals who, in the knowledge of the applicant, are or have been associated with the alleged cartel, including those individuals which have been involved on behalf of the applicant;

(i) the details of other Competition Authorities, forums or courts, if any, which have been approached or are intended to be approached in relation to the alleged cartel;
(j) a descriptive list of evidence regarding the nature and content of evidence provided in support of the application for lesser penalty; and

(k) any other material information as may be directed by the Commission.

Thus a company could not apply for conditional immunity unless it had sufficient information about the cartel to give to the Commission. However, if new changes are introduced, a company can apply for a "marker" to secure its place in the queue while it gathers enough information to apply for conditional immunity. Few of the requirements mentioned above could be fulfilled to secure a marker or altogether new ones could be decided by the Commission, as it may deem fit to satisfy the acquiring of a marker. Once it has gathered enough information to "perfect" the marker, the applicant company must then provide this information to the Commission. This is called a "proffer". 39

The proffer will need to deal with a list of issues agreed with the Commission on a case to case basis. One critical aspect could be the effect of the cartel on India’s markets. The applicant could be given 28 days to present a proffer to perfect the marker, although the Commission has discretion to extend this timeframe. The provision of the proffer does not automatically mean conditional immunity will be granted. The Commission may decide that an applicant has not perfected the marker, either because it has not provided the necessary information or because it has not provided the information within the prescribed time. In this case, the leniency application will be declined and the next applicant in line will be given the opportunity to apply.

Thus using a marker system introduces elements of transparency and predictability to the leniency process. This is because in a marker system a leniency applicant is aware of

where it stands with respect to other applicants; the Commission will be able to inform the applicant whether it is the first to seek leniency or otherwise. As a result, the leniency applicant can assess its chances of ultimately receiving leniency. In the absence of a marker system, the prospect of receiving leniency would be more uncertain and potential leniency applicants, therefore, will shy away from reporting a cartel. In contrast, a marker system places the Commission in a win-win position. A company involved in a cartel is more likely to report the illegal conduct if the entity knows that it is the first cartel member to approach the Commission (and, therefore, is guaranteed immunity).

Similarly, if a company learns that it is not the first entity to approach the Commission, but the second or third, then there will also be a strong incentive to try and secure the next available benefit under the leniency policy. That is because when there are multiple immunity applicants, an adverse decision against the cartel participants is likely, given the information flowing to the Commission by the first company to obtain leniency. Thus, in any case, the would-be leniency applicant is provided with clarity of process, and firm expectations as to the outcome of its leniency application (subject to the applicant fulfilling its part of the leniency bargain).

The introduction of the marker system provides increased transparency and certainty of outcome, which should lead to a concomitant increase in leniency applicants and, thereby, enhance the efficacy of the Commission’s policy. In addition, the new marker system takes into account the practicalities of gathering documents and other information in a large company, and the substantial amount of time that is required to complete this exercise, even for a company eager to seek leniency. Currently a prospective leniency applicant is faced with the prospect of gathering the maximum amount of evidence relating to the cartel in the
shortest possible time, to stand as a prospective candidate and in the meantime hoping that leniency was still available.\textsuperscript{40}

Thus the incorporation of a marker system will definitely prove to be an incentive to a company to apply for leniency. Often misunderstood as a lenient option provided by a commission, marker system is in fact a tool which is of greater help to the commission and not the company.

\textsuperscript{40} Sandhu: the European Commission’s leniency policy: a success? : [2007] E.C.L.R.
CHAPTER 5- AMNESTY PLUS

Introduction of Amnesty Plus to India

Experience garnered over many years has taught antitrust authorities in the United States (U.S.) and the European Union (EU) that companies which have been colluding in one specific product or geographic market have the possibility to have been engaged in cartel activities in other adjacent markets. That is to say basically companies may be involved in a cartel in one market and another cartel in a completely different market.

In particular, Amnesty Plus in the U.S. offers a firm, which currently plea-bargains an agreement for participation in one cartel, where it cannot obtain guaranteed amnesty, complete immunity in a second cartel affecting another market. Provided that the firm agrees to fully cooperate till the end of the investigation of the conspiracy of which the Department of Justice was previously not aware, it is automatically granted amnesty for this second offence of cartelization. Moreover, the company gets a benefit in the form of a substantial additional discount, in the calculation of fine in any plea agreement for the initial matter which is under investigation. Amnesty Plus aims at attracting amnesty applications by encouraging subjects of ongoing investigations to consider whether they qualify for amnesty in other than the currently inspected markets where they engage in cartel activities.

Thus Amnesty Plus aims at multimarket cartels i.e. firms that are member of a cartel on more than one market. It means that once such firms are held guilty for any sort of collusive behavior on one market, they can be rewarded for reporting a cartel on another market. If a firm happens to be the first one reporting this other cartel, it obtains both full amnesty for this cartel and a discount of its fine for the original cartel. This reward may be as large as the fine initially imposed on the firm for the original cartel. Scott Hammond,
Director of Criminal Enforcement has reported that about 25 cartels have come to the attention of the U.S. Department of Justice because of Amnesty Plus.

Amnesty Plus can be beneficial only if the Commission is pursuing proceedings against a cartel participant and if they inform the Commission of their participation in a separate cartel of which the Commission is unaware or does not have enough evidence to file proceedings. They also have the opportunity to gain conditional immunity for the second cartel. The European Commission has acknowledged that the key issue in the decision to grant Amnesty Plus is determining whether the second cartel is in fact separate from the one they already know about, or whether it is simply another aspect of the same cartel.

It might be too early for the Indian Competition Act to include Amnesty Plus in its law, but this new policy clearly is a step ahead from a normal leniency policy and gives greater incentive to applicant companies to own up existing cartels. If India starts an Amnesty Plus policy, it might also be able to discover cartels not just in the local Indian market but also international cartels having their effect on India.

The only flaw that Amnesty Plus has is the formation of jointly stable cartels. Cartels can be coordinated because of Amnesty Plus too and therefore it requires greater surveillance by competition commissions.
CONCLUSION

This research paper first introduced the egregious concept of cartels and their effect across the globe. The best possible solution to cartelization as stated by U.S. and EU authorities being an effective leniency policy, this paper tried to analyze the leniency policies of few successful commissions.

Thus this research paper tried to compare the leniency policies of U.S., EU and India and find out the merits and demerits that India’s Leniency policy consists of. Being a country with a relatively new lesser penalty regulation, India had the advantage of incorporating all the clauses of successful leniency policies across the globe. But it has to keep up with the advancement in this sector and incorporate those changes which leading jurisdictions are making in their policies.

For this, the researcher tried to show how U.S. and EU leniency policies have introduced and effectively used a marker system which if incorporated in India’s policy, will prove not only as an incentive for the company applying for lesser penalty but also as a handy tool for the Competition Commission to detect cartels. A list of a number of countries which have amended their leniency policy and incorporated marker system, was shown emphasizing the fact that it is high time, it be included in our Regulations too. International experience has shown that one of the most important elements of establishing a successful leniency program is for agencies to raise education and awareness of the program and competition law generally. Educating and engaging business, government, consumer groups and even the public in general is important in order to heighten the awareness of any leniency program and ultimately to generate leniency applications. This goes hand in hand with a heightened awareness of the potential penalties for any involvement in cartel behaviour without the possibility of leniency.
Investigating whether leniency is available is often the first step for companies who find out about cartel conduct in their industry. The ability to apply after an investigation has commenced, along with the introduction of the marker system, means that there will be a much greater chance of leniency being available. There is hope that this will result in increased leniency applications, and consequently, increased detection of cartel conduct. However, it will be at least a few years before we can see whether the new guidelines make any significant difference to the Commission's detection and enforcement powers.

Lastly, the researcher has also tried to introduce the concept of Amnesty Plus which is slowly evolving in a number of jurisdictions. Even though India’s Lesser Penalty Regulation is too young to introduce this concept, it can be considered once our policy becomes mature.

There is direct link between the success of the leniency/whistle blowing culture and the position that the Competition Commission of India adopts in the future. High fines and active enforcement, such as that displayed by the European Commission, are more likely to increase leniency applications. It is unlikely that leniency would have been such a viable and attractive option for cartelists in the EU had the European Commission not adopted an aggressive fining policy. For example, in 2007 in the Chloroprene Rubber cartel, the leniency applicant avoided a fine of Euros 200 million whereas a foreign company involved in the same cartel received a fine of Euros 47 million. In the same year, in the Gas Insulated Switchgear cartel, a European leniency applicant avoided a fine of Euros 200 million whereas four Japanese participants were together fined Euros 264 million.

Thus, only strict punishments and hefty fines for a cartel, as a disincentive can make a transparent and effective leniency policy, an incentive.

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41 Jaishree J. Vyavaharkar, Blowing the Whistle on Cartels in India and beyond, 1 COMPETITION LAW REPORTS 272, 273 (2008)
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