DECODING DISCRETION: THE CCI'S APPROACH TO LENIENCY UNDER THE 2024 REGULATIONS

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This Article examines the scope and limits of agency discretion under the Competition Commission of India (Lesser Penalty) Regulations, 2024("LP Regulations"). An effective cartel leniency programme rests on transparency and predictability, cornerstones that are critically undermined by excessive agency discretion. This Article argues that the LP Regulations perpetuate a regime of unnecessary and unreasoned discretion, thereby jeopardising the effectiveness of India's leniency programme. The resulting unpredictability plausibly deters potential applicants, who cannot accurately perform the cost-benefit analysis required for self-reporting.

The Article first examines the Competition Commission of India's ("CCI") historical application of leniency through a doctrinal examination of its decisions, highlighting inconsistent and poorly reasoned penalty reductions in cases such as Dry Cell Batteries and Solid Waste Processing. This record reveals the shortcomings of a standards-based approach as presently applied. Drawing on the jurisprudential rule-versus-standard dichotomy, the Article advocates for a shift to a rule-based framework. It contends that explicitly embedding evaluative factors into the LP Regulations, rather than relying on broad agency discretion, is essential to reduce arbitrariness and provide the certainty necessary to incentivize cooperation.

Finally, the Article critiques the 2024 LP Regulations, focusing on the Lesser Penalty Plus framework ("LP Plus") under Regulation 5(3). Provisions allowing the CCI to consider the "likelihood" of detection or "any other factor deemed relevant" are overly broad and fail to cure the pre-existing unpredictability in the leniency regime. The Article concludes by recommending that the CCI adopt a reasoned, rule-based

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approach, emulating jurisdictions like the United Kingdom and Canada by publishing clear criteria and indicative factors to guide its discretion, thereby fostering confidence in the leniency programme.

Keywords: *Competition Commission of India, Leniency Programme Regulations, Rule-based Approach, Agency Discretion, Cartel Detection.*

I. INTRODUCTION

An effective leniency programme is frequently described as having three 'cornerstones': (i) threat of severe sanctions for participation in cartel activities, (ii) fear of detection by a pro-active competition agency, and (iii) transparency and predictability in the competition agency's policies and conduct.[1] The author concerns himself with the last element in this paper. He argues that unnecessary and/or unreasoned discretion vested in the Competition Commission of India ("CCI") via the Competition Commission of India (Lesser Penalty) Regulations, 2024[2] ("LP Regulations") will make CCI's leniency programme ineffective. The ineffectiveness stems out of the unpredictability anticipated by potential leniency applicants. To this end, he proceeds as follows: Part-II highlights the importance of predictability in CCI's conduct. Part-III uses the jurisprudential rule-versus-standard dichotomy to argue for a rule-based approach in incorporating relevant factors into the LP Regulations. Part-IV critiques the LP Regulations for providing unnecessary and/or unreasoned discretion to CCI. Finally, Part V concludes.

II. DISCRETION IN LENIENCY PROGRAMS

Cooperation and self-reporting by cartel participants are essential to detect cartel activity. Such cooperation significantly depends upon the third cornerstone of an effective leniency programme – transparency and predictability of the competition agency. This is because greater certainty in how the potential leniency applicant will be treated and penalised will determine its cost-benefit calculus. If it is *certain* that the expected value from cooperation would be more

[1] Scott D Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4 *Competition Law International* 4.
[2] Competition Commission of India (Lesser Penalty) Regulations 2024, notified in the Official Gazette (20 February 2024).

than the expected value from colluding, it will reveal vital information about its cartel. Hammond argues that for such certainty to be possible, there needs to be an 'abdication of prosecutorial discretion'.[3] He relies on the experience of the US Antitrust Division of the Department of Justice which earlier had a great deal of 'prosecutorial discretion'.[4] He contends that as per the Division's experience, if a firm cannot accurately predict the result of its corporate confession, the firm is by far less inclined to disclose its misconduct, particularly in situations where no official investigation is underway.[5]

Such an experience is arguably true for India as well – the wide discretion exercised by the CCI in leniency applications might be one of the reasons for the very few number of leniency applications. CCI's unreasoned discretion can be gauged from the following cases:[6]

1. In *Brushless DC Fans*,[7] the sole applicant got a 75% penalty reduction because, as per CCI, it had already formed a *prima facie* opinion before the applicant made disclosures.[8]

2. In *Dry Cell Batteries*,[9] the first applicant got a 100% penalty reduction, whereas the second and the third applicant got a 30% and a 20% reduction respectively. However, CCI did not provide adequate reasons for the different penalty reductions for the subsequent applicants.

3. In *Solid Waste Processing*,[10] the first applicant got a 50% penalty reduction, whereas the three subsequent applicants did not get any penalty reductions.

Thus, there has been no clear standard followed by CCI in awarding penalty reductions to the first and the subsequent applicants. There might have been valid reasons to award different penalties in these three cases, but such reasons are not evident from the orders. Besides, a better approach would be to clarify the factors that CCI considers in such cases in the LP Regulations itself. Such an ex-ante clarification would eliminate the uncertainty and possibility of arbitrary discrimination contemplated by potential leniency applicants. The next Part considers the merits of such ex-ante inclusion of relevant factors in LP Regulations.

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[3] Hammond (n 1).
[4] ibid.
[5] ibid.
[6] For an exhaustive review of CCI's discretion in pre-LP Regulations, 2024 leniency cases, follow this link.
[7] *In re Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (*Suo Motu Case No 03 of 2014,CCI, 18 January 2017)
[8] ibid [7.10].
[9] *In re Cartelisation in respect of zinc carbon dry cell batteries market in India* (Suo Motu Case No. 02 of 2016, CCI, 19 April 2018)
[10] *In re Cartelization in Tender Nos 21 and 28 of 2013 of Pune Municipal Corporation for Solid Waste Processing* (Suo Motu Case No 03 of 2016, CCI, 5 August 2016).

III. RULES VERSUS STANDARDS – TO INCLUDE RELEVANT FACTORS OR NOT?

Here, I argue that the cornerstone of transparency and predictability requires either explicitly stated rules or clearly followed standards. Standards are more open-ended and less certain compared to rules.[11] With respect to LP Regulations, clear rules would require explicitly stating the relevant factors (could be) used by CCI in the evaluation of leniency applications. On the other hand, clearly followed standards would require consistent application of the open-ended regulations by CCI. As the last part demonstrated, this latter approach was clearly not followed by CCI. Thus, it is doubtful whether potential leniency applicants would repose confidence in the second approach for a few years to come. In this context, the clearly laid down rules might invite a greater number of leniency applicants.

Beyond transparency, leniency rules would have other benefits over standards. Rules do not require much delegation to individual(s) for their enforcement.[12] Using standards for determination by individual(s), for instance, of monetary penalty, might lead to arbitrariness in decision-making. Moreover, 'outcome discretion' might lead to a bias in favour of a lesser penalty (or "LP") reduction than what is justified in a particular case.[13] The problem would be exacerbated if this discretion is exercised in the opposite way in subsequent cases.

Admittedly, there are good objections against retaining leniency 'rules'. *Firstly*, it is argued that CCI is a specialised body with expertise over competition matters; as such, the legislature should not restrain CCI's discretion.[14] However, this argument overlooks the fact that the legislature is only empowered to restrict CCI's discretion as far as Section 46 of the Competition Act, 2002 is concerned.[15] As a delegated legislation, LP Regulations are framed by CCI, and, thus, can adequately reflect CCI's expertise vis-à-vis leniency applications. *Secondly*, it is argued that CCI has restricted financial, technical, and human resources. Consequently, CCI must be able to choose organizational, procedural, and decision-making structures that are as effective as possible, i.e., decisions that maximize economic return at the lowest feasible cost.

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[11] Louis Kaplow, 'Rules Versus Standards: An Economic Analysis', in *Scientific Models of Legal Reasoning* (Routledge 1998).
[12] ibid 53.
[13] ibid 56.
[14] Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment' [2010] Concurrences: Revue des Droits de la Concurrence 44, 45.
[15] Competition Act, 2002 (12 of 2003), s 46.

Although rules have higher ex-ante formulation costs, standards have higher ex-post costs for individual cases. In the context of leniency, providing clearer rules would increase the certainty of enforcement standards; and, thereby, inviting more leniency applications. This would help CCI recoup the upfront costs associated with leniency rules.

An effective leniency programme would hinge on clear communication between potential leniency applicants and CCI. It is to be noted that what is required from a rule-based approach is not complete certainty in the outcome of leniency applications; rather, it is required that the applicants believe that they can control whether they receive leniency, and predict the amount of penalty reduction to a reasonable degree. Revoking leniency for non-compliance or non-cooperation by the applicants would not hamper such a rule-based approach.

The significance of a predictable rule-based approach is that it provides a less risky option to the firms engaging in risky cartelisation. Compared to the risk that is associated with not applying for leniency – where the firm either pays no fine (if it is not found guilty) or incurs a large fine (if it is found guilty) – applying for leniency guarantees a certain amount of lower fine. The risk reduction from applying for leniency decreases in proportion to the degree of unpredictability in the fines.

IV. LP Regulations

While the CCI clarified some concerns raised in the public comments over the Draft Regulations,[16] there are some lingering potholes of unnecessary discretion in the LP Regulations. To illustrate the larger point, 'may', 'unless otherwise directed' and other phrases of similar import have been used 16 times in merely 12 regulations and the accompanying schedules. Besides, the FAQs published by the CCI seeking to clarify these LP Regulations reiterate the regulations to a significant extent.[17] Since LP Regulations, 2024 are primarily focused on the LP plus framework,[18] as such, here, I analyse the discretion accorded to the CCI

[16] Competition Commission of India, 'General Statement on CCI (Lesser Penalty) Regulations, 2024' (CCI, 21 May 2024) < https://www.cci.gov.in/images/whatsnew/en/general-statement-cci-lesser-penalty-regulations-20241708451478.pdf > accessed 24 May 2024.

[17] Competition Commission of India, 'FAQs on Lesser Penalty Regime' (CCI, 21 May 2024) < https://www.cci.gov.in/images/whatsnew/en/faqs-on-cci-lp-regime1708500979.pdf#page=3.17 > accessed 21 May 2024.

[18] Background Note to the Draft CCI (Lesser Penalty) Regulations, 2023 < https://www.cci.gov.in/images/whatsnew/en/background-note-lesser-penalty-regulations1697440374.pdf > accessed 21 May 2024.

for the LP plus framework – Regulation 5 deals with the grant of LP plus. In particular, Regulation 5(3) has two problems – *firstly*, it provides that CCI's discretion with respect to reduction in monetary penalty is to be exercised with regard to the 'likelihood' of CCI detecting a new cartel based on the applicant's information; and, *secondly,* for determination of the reduction in monetary penalty, CCI may consider 'any other factor deemed relevant'.

LP Regulations do not clarify what criteria or factors would be used by CCI for assessment in either case. Thus, the standard is overly broad. I argue that CCI should, at the least, give an *indicative* list of relevant factors or nature of evidence which will guide its determination. Moreover, CCI should consistently apply these relevant factors in its determination to ensure transparency and predictability in its leniency programme. As such, the lesser penalty framework would be more appealing to potential applicants and more effective if there were explicit rules on the criteria that will be taken into account in determining the reduction of the penalty.

With respect to the 'likelihood', CCI can specify it in terms of the information it currently possesses or is likely to discover using available regarding the new cartel. A similar approach is followed in Canada, wherein, the Competition Bureau grants LP plus if it is unaware of the new cartel, or when it is aware of the new cartel but lacks enough information.[19] With respect to the 'any other factor deemed relevant', in the UK, for instance, the Office for Fair Trading (OFT) provides a list of factors that impact the decisions of OFT vis-à-vis monetary reductions of an applicant.[20] Some of the factors it lists include the scale of consumer detriment (in respect of the new cartel), the number and size of the markets affected, and the efforts of the LP plus applicant to investigate the new cartel.

V. Conclusion

Through this paper, I critiqued the LP Regulations and CCI's approach to the leniency programme in India. The former, through an overly broad standard-based approach, and the latter, through an ill-defined pattern of cases under earlier LP Regulations, have created a regime of unnecessary and/or unreasoned discretion. It would bode well for the leniency

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[19] Immunity and Leniency Programs under the Competition Act, CBC < https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/immunity-and-leniency-programs-under-competition-act > accessed 21 May 2024.

[20] Office of Fair Trading, Applications for Leniency and No-Action in Cartel Cases – OFT's Detailed Guidance on the Principles and Process (OFT1495, July 2013).

programme in India if CCI clarifies LP Regulations to reflect a reasoned rule-based approach, curbing its discretion.