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LENIENCY AND THE RISKS OF PRIVATE ENFORCEMENT IN THE EUROPEAN UNION: CROSSROADS AT THE DAMAGES DIRECTIVE

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ABSTRACT

The Leniency regime has undoubtedly played a significant role in the detection and subsequent prosecution of cartel in the European Union. At the same time, owing to increased consumer awareness, private action claims or "compensatory claims" against antitrust infringers have also witnessed a noticeable rise. However, there seems to exist a cause-and-effect relationship between the Leniency Programme and the Private Enforcement framework wherein the latter has led to a decrease in the number of Leniency applications being filed, thereby interfering with the detection of cartels. It is against this backdrop, that this paper analyses the relationship between Private Enforcement and the Leniency regime and argues that Private Enforcement does not necessarily acts as a barrier for firms to apply for leniency. While taking into account the Damages Directive, it has been argued that both Leniency and Private Enforcement can be harmoniously balanced so as to afford enough protection to both Leniency applicants as well as victims of anti-competitive behaviour.

INTRODUCTION

"While we work hard for consumer interests in public enforcement, gaps and flaws in our legal system mean victims of Competition Law infringements are foregoing not just millions – but billions in compensation." – Neelie Kroes, the then European Commissioner for Competition Policy,[1] commented on the state of Private Enforcement in the year 2008. She emphasised on how despite the Commission's efforts to advance consumer interests, there remain shortcomings in seeking individual redressal through the courts, particularly when consumers are directly affected by the actions of cartels. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) form the core of Competition Law infringements, specifically the work of hard-

[1] *Neelie Kroes, European Commissioner for Competition Policy, address at BEUC dinner, Strasbourg 22nd April 2008 SPEECH/08/212*

core cartels under Article 101;[2] they have been described as "striking at the very heart of the principal virtue of economic activity";[3] the "supreme evil of anti-trust"[4] and "cancers on the open-market economy".[5] These emphatic descriptors illustrate the degree to which cartels can distort competition in the market, to the detriment of all participants. It is for this reason, that they attract the highest penalty across all jurisdictions in service of competition rules.[6] These rules are aimed at ensuring lower prices, improved product quality, and guaranteeing consumer protection by maintaining effective market competition. The remedies that the Commission advocates for in this regard are two front – penal and compensatory. The sufficiency of the latter is subject to widespread contemporary debate, especially when it aims to ensure consumers' access to private enforcement as a mechanism to claim compensation for the losses suffered at the hands of such cartels.[7] A key concern for the Commission has been balancing this compensatory objective with identifying cartels via leniency.

Leniency has increasingly become a critical bargaining counter, utilised to encourage businesses to divulge information regarding their potential involvement in cartels and cooperate with the concerned authorities in exchange for immunity from fines.[8] The reliance on this regime is evident from the number of cartels that have been uncovered via leniency since its inception. In the year 2016, the European Commission imposed a penalty of €2.93 billion[9] on truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco, and DAF) for colluding on the pricing of trucks and passing off the costs of compliance with stricter emission rules, pursuant to MAN's Leniency Application, for which it received full immunity from the Commission.[10] Similarly, the Indian Competition watchdog, the Competition Commission of India, launched a successful investigation against manufacturers of zinc-carbon dry batteries, pursuant to a leniency application filed by

[2] *OECD Publication, Recommendation of the Council Concerning effective Action against hard core cartels, C (98)35/FINAL of May, 1998,3*
[3] *Neelie Kroes, 'Enforcement of Prohibition of Cartels in Europe' in European Competition Law Annual 2006*
[4] Verizon communications Inc v. Law Offices of Curtis V Trinko, (2004) 540 US 398, 408
[5] *Mario Monti, 'Cartels Why and How? Why should we be concerned with cartels collusive behaviour?' Speech to Third Nordic Competition Policy Conference, Stockholm (September 2001).*
[6] *10% of the annual turnover, See 2006 Fining Guidelines*
[7] *Mario Monti, Effective Private Enforcement of EC Antitrust Law, Address at the EU Competition Law and Policy Workshop (June 1-2, 2001).*
[8] *Scott D. Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (The 24th Annual National Institute on White Collar Crime, Miami FL, 2010*
[9] *One of the highest penalties in history, only second to Google, which was fined EUR 4.3 billion for abusing its dominant position in the Android market space.*
[10] *Trucks Case AT 39824.*

Panasonic.[11] Based upon a 2017 report, most cartels have been detected through the Commission's leniency programme.[12]

At the same time, Private Enforcement is a crucial element for effective antitrust regulation. Not only does it provide a means for the victims of anti-competitive behaviours to claim damages or compensation, but it also supplements the inadequacy of public enforcement in certain situations.[13] However, recent times have seen a sharp decline in the number of leniency applications, owing to an increase in the number of private actions for damages.[14] This paper evaluates the relationship between private enforcement and the leniency regime in the European Union, while also briefly analysing the Indian context. While a commonly accepted narrative suggests that the increased risk of private enforcement deters firms from applying for leniency, it has been argued that this is not always the case. Basis the discussion, the paper moves through the shortcomings of the current framework to suggest additional ways in which the leniency regime can be strengthened, while also maintaining a robust private enforcement space.

THE CAUSAL LINK BETWEEN LENIENCY AND PRIVATE ENFORCEMENT

The EU's competition enforcement has historically honed in on public enforcement via national competition authorities as opposed to private litigation within the member states.[15] This is in contrast to the United States, wherein private cases make up about 90% of all antitrust proceedings in court.[16] As early as 2001, the European Court of Justice (ECJ) stated that the efficacy of Article 85 (now Article 101) of the TFEU would ameliorate if individual consumers were entitled to compensation for losses sustained from infringements.[17] The court emphasized on the dual effect that it would have; first, the existence of the right to seek compensation would strengthen the

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[11] *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India [CCI] Case No. 02 of 2016; Other notable cases: Cartel in the -* ***Flashlights market (****Case No. 01 of 2017****); Electronic power steering systems (****Case No. 07(01) of 2014****); Industrial and automotive bearings (****Suo Moto Case No. 5 of 2017****); Pune Municipal Corporation (****Case No. 50 of 2015 and Case Nos. 03 and 04 of 2016****);*

[12] *EU Commission, Report on Competition Policy 2017 COM(2018) 482 final, page 3.*

[13] *Clifford A. Jones, 'Private antitrust enforcement in Europe: a policy analysis and reality check' W. Comp.[2004] 27(1), 13-24*

[14] *Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann, Jannika Schad, 'The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence' (2021) Duesseldorf Institute for Competition Economics, page 4*

[15] *Commission Staff Working Document: Impact Assessment Report – Damages actions for breach of the EU antitrust rules SWD(2013) 203 final, page 5*

[16] Jorg Philipp Terhechte, 'International Competition Enforcement Law Between Cooperation and Convergence'(Springer, 2011), page 26

[17] *Case C-453/99 Courage v. Crehan (2001), para 26*

working of the competition rules by discouraging agreements and practices that often distort competition in the market, and second, it would also contribute towards the maintenance of effective competition in the community.[18] It was believed that the ineffectiveness of the then antitrust damages framework could be best addressed by a combination of public and private enforcement which would ensure minimum protection of victims' right to damages.[19] The essential guiding principle behind this line of thought was that all victims of anti-competitive conduct under the EU Competition law would have access to an effective redress mechanism that would fully compensate the victims for the harm that they would have suffered.[20] This opinion went on to inspire the European Commission's provision of damages for those able to prove a legitimate claim, leading to the adoption of a Directive outlining the right to "full compensation" for those affected.[21] In tandem, the Recommendations on Collective Redress Mechanisms set in motion the "right to sue for damages,"[22] effectively empowering consumers to take action as a collective against cartels.

While private enforcement aids the cardinal goal of competition law, i.e., the protection of consumers, leniency has, in time, proved to be the most promising weapon in fighting cartels.[23] It was introduced in the year 1996 as a compliance programme.[24] The mechanism was particularly imperative in cases where the Commission found itself unable to gather enough evidence to sufficiently establish a competition infringement. Leniency leads to the creation of the "prisoner's dilemma"; each player of the cartel is effectively caught in a Catch-22 and the trust between them deteriorates as each one speculates on who may potentially shelve out in exchange for immunity or a fine reduction.[25] The Commission invites such potential whistle-blowers to assist and "add

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[18] Ibid, para 27

[19] EU Commission, 'White Paper on Damages Actions for breach of the EC Antitrust rules' COM(2008) 165.

[20] Ibid; There are multiple judgments of the European Court of Justice – from Courage, Manfredi, Kone, Otis, Skanska, Sumal – all of them have emphasised this basic principle time and again. Full compensation of cartel victims is the core underlying principle of EU private enforcement of competition law which cannot and must not be easily restricted.

[21] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 7

[22] Recommendations on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60

[23] Gianni De Stefano, 'Access of damage claimants to evidence arising out of EU cartel investigations: a fast evolving scenario' (2012) 3 Global Competition Litigation Review; Almost 60% of the cases have been discovered through this compliance programme.

*[24] EU Commission, '**Commission Notice on the non-imposition or reduction of fines in cartel cases'** (96/C 207/04); Superseded by 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' (2006/C 298/11)*

[25] Tine Carmeliet, 'How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle' (2011-12) 48 Jura Falconis number 3

significant value" to investigations into suspected violations of Article 101 in the hope of building a solid case against cartel activity. Undoubtedly, leniency programmes are crucial in the EU's attempts to fight cartels.[26] It is even fair to say that private enforcement, to some extent, is dependent on leniency;[27] when a potential whistle-blower does not apply for leniency owing to the fear of private litigation against him, it is likely that there would not be a detection of the cartel at all, and therefore, no basis for follow-on/private claims. It is, though, highly likely that a leniency applicant would have an arsenal of evidence, some even self-incriminating, outlining its participation in the infringement. The problem lies here – since the presenting of such information is required to obtain immunity,[28] the whistle-blower would be unable to dispute allegations in a Court of Law, naturally making them the prime target for private action.

WHISTLEBLOWER PROTECTION AND THE DAMAGES DIRECTIVE

Private actions for damages rose after the Courage judgment in 2001. To lay down minimum standards for Private Enforcement across the EU, the Commission published a Green Paper in 2005,[29] and after much deliberation, an amended White Paper in 2008.[30] However, it was only in 2014, that a Directive containing certain rules governing actions for damages was adopted.[31] It aims to ensure that the victims of competition law infringement effectively exercise the right to full compensation, while also ensuring a smooth interplay between public and private enforcement.[32]

The Damages Directive has removed significant obstacles in the effective functioning of the private enforcement regime. To provide background, firstly, the Directive recapitulates the presumption of Appreciable Adverse Effect on Competition (AAEC) provided under Article 101;

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[26] Claire Rey, 'The interaction between public and private enforcement of competition law, and especially the interaction between the interests of private claimants and those of leniency applicants' G.C.L.R. [2015] 8(3) 109-125, page 109

[27] Laura Guttuso, 'I'm an immunity applicant, get me out of here: joint and several liability Revisited' [2014] 7(2) Global Competition Litigation Review 94-104

[28] Renato Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in C. Barnard and O. Odudu (eds), The Outer Limits of EuropeanUnion Law (Oxford and Portland, Oregon:Hart Publishing, 2009) 401-435, page 429

[29] EU Commission, 'Green Paper on Damages actions for breach of the EC antitrust rules' COM(2005) 672 final

[30] EU Commission, 'White paper on damages actions for breach of the EC antitrust rules' COM(2008) 165 final

[31] EU Commission, 'Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' L 349/1 (Damages Directive)

[32] EU Commission's Staff Working Document on the implementation of the Damages Directive, SWD(2020) 338 final

that cartel infringements cause harm.[33] Further, it mandates that final infringement decisions of National Competition Authorities/Review Courts act as evidence in all Member States.[34] Consumers have a limitation period of at least five years[35] and are entitled to compensation for loss (including of profit) and interest,[36] with each undertaking involved in cartel activity held jointly and severally liable for the harm caused.[37]

Available Exemptions for the Leniency Applicant

Without compromising the rights delineated to private enforcers, the Directive has provided for evidential exemptions, such as protection from disclosure of leniency documents,[38] to safeguard the interests of the leniency applicant. The Directive itself recognises that leniency programmes are "important tools for public enforcement" of competition law since they, not only aid in the detection and subsequent prosecution of the infringers of competition law, particularly cartels, but they also bolster the effectiveness of action for damages in cartel cases.[39] To give effect to this, the Damages Directive, apart from prohibiting the disclosure of leniency documents, provides that even in cases where a person might get access to the files of a Competition Authority then such documents will be deemed inadmissible in the court of law.[40] The strong emphasis that the Directive lays on proportionality of the evidence disclosed also indicates an attempt to strike a balance between private and public enforcement, seeing that the former may have an adverse effect on enforcement by public authorities.

Additionally, it is also provided that an infringer that has been granted immunity under the leniency programme is only liable to its direct and indirect purchasers, thereby relieving the immunity recipient from the joint and several liability for the whole harm caused by the cartel and limiting its contribution to the amount claimed.[41]

Evidentiary Disclosures and the Concerns with Access to Files

[33] *Damages Directive (n 32), Article 17.*
[34] Ibid, Article 9
[35] *Ibid, Article 10*
[36] *Ibid., Article 3*
[37] *Ibid, Article 11*
[38] *Ibid, Article 6*
[39] *Ibid, Recital 26*
[40] *Ibid, Article 7*
[41] *Ibid, Article 11(5)*

The instinctual understanding is that by applying for leniency, a firm essentially invites private action because they are effectively submitting the evidence required to show their own violation. The ECJ tried to deal with this problem in cases such as Pfleiderer[42] and Donau Chemie,[43] although, in the end, it created greater controversy.[44] In both these cases, the ECJ emphasized that domestic law must be applied by courts and tribunals in a manner that adheres to the general principles of equivalence and effectiveness. This ensures the effectiveness of the leniency programmes being balanced with the right of injured victims' to seek compensation by way of gaining access to documents that help create a case in their favour.[45] In other words, the national courts must weigh the interests in favour of and against the disclosure of leniency/cartel files. The ECJ, in Donau Chemie, further added that 'any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents would undermine the effective application of Article 101 TFEU. On the other hand, it would also affect the rights of the individuals provided under the provision and in the Charter.[46] However, the problem with the reasoning in these decisions is that the court did not provide any clarity on how to 'balance the interests' and perform the weighing exercise while either granting or refusing to grant access to all or any of the leniency documents.[47]

As a consequence of the Damages Directive, such issues have been remedied under its guidelines.[48] The Commission explicitly provides for exemptions to protect the co-operating undertakings from the disclosure of self-incriminating evidence such as leniency statements and settlement submissions, which the claimant might obtain through access to files of the Competition Authority.[49] Further, such statements have been made inadmissible in the court,[50] and sanctions

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[42] Case C-360/09 Pfleiderer v Commission EU:C:2011:389; The ECJ held that the EU law does not preclude a third party who has been "adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement".

[43] Case C-536/11 Donau Chemie and Others EU:C:2013:366.

[44] C. Canenbley and T. Steinworth, 'Effective Enforcement of Competition Law: Is there a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?' [2011] 2(4) J.E.C.L. 315-326, page 321

[45] Pfleiderer (n 43), para 30-32.

[46] Ibid, para 31

[47] Ibid, para 35

[48] Ingrid Vandenborre and Thorsten Goetz, 'EU Competition Law Procedural Issues' [2013] 4(6) Journal of European Competition Law and Practice 506-513, page 507.

[49] Damages Directive (n 32), Article 6(6).

[50] EU Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' (2006/C 298/11), Article 6.

are imposed on parties who breach this discovery rule.[51] Documents that have been created and used specifically for competition proceedings become available only upon the closing of the dispute.[52] For the protection of the disclosure of the leniency statements, the Damages Directive also offers the option for leniency statements to be made orally as opposed to in writing. These critical mandates ensure that leniency applicants do not risk their submissions being used against them by third parties, especially in cases of private enforcement.

Bypassing Joint and Several Liability

One significant concern for leniency applicants is that they will end up being the primary target of harmed consumers[53] and so must bear the brunt of all losses caused by other cartel participants; cartel players are subject to joint and several liability.[54] Moreover, while infringers may claim contributions from others,[55] the sheer convolution of most legal proceedings is still discouraging. To address this concern, the Damages Directive states that successful leniency applicants are only required to compensate direct and indirect purchasers/providers.[56] They are hence only liable to parties if the other player is unable to compensate them in full.[57] Due to the introduction of this provision in the Directive, applicants typically have an advantage in cases of Private Enforcement over the other cartel players, thereby further encouraging leniency applications.

Passing-on defence and Indirect Purchasers

As aforementioned, indirect consumers also have the right to sue the cartel participant, unlike in the US,[58] where only direct purchasers can sue the infringer; a passing on defence is available in the EU.[59] This essentially helps the defendant undertakings in reducing their liability where the claimants have successfully passed the overcharge to the subsequent purchaser, i.e., the indirect

[51] *Ibid, Article 8*
[52] *Ibid, Article 6(5).*
[53] *Renato Nazzini & Ali Nikpay, 'Private Actions in EC Competition Law' Competition Policy International 2008Nov 1:4(2):107-141, page 129.*
[54] *Damages Directive (n 32), Article 11(1).*
[55] *Ibid, Article 11(5).*
[56] *Jens-Uwe Franck, 'Striking a balance of power between the Court of Justice and the EU legislature: the lawon competition damages actions as a paradigm' E.L. Rev. [2018] 43(6) 837-857, page 853*
[57] *Damages Directive (n 32), Article 11(4).*
[58] *Especially when the US follows a high consumer welfare standard; Illinois Brick Co. v Illinois 431 U.S. 720, 97 S.Ct. 2061, 52 L. Ed. 2d 707*
[59] *Damages Directive (n 32), Article 14.*

consumer. While the burden of proof lies on the defendant,[60] it must be noted that defendants in such cases may request reasonable disclosures from the claimants or appropriate third parties if required.[61] The Passing on Defence has led to a significant decrease in potential compensation that the defendant must pay in the case of a successful claim. Concerning the right for the indirect purchaser to sue the infringer, although there exists a rebuttable presumption that a passing-on to that indirect purchaser occurred when certain requirements are met,[62] in practice it is difficult to estimate how much of the cartel overcharged is passed down through each distribution level[63] by the indirect purchaser. The further down the distribution chain, the more complex economic and factual analysis is required and the more the number of possible victims will be.[64] The harm suffered by end-users such as consumers is usually scattered and negligible, which leads to a high possibility that the infringer can avoid private anti-trust liability at all.

Some would argue that the above may be tackled by the use of class action, in particular, the opt-out collective action.[65] However, class action suits are rare due to funding and standing difficulties,[66] especially considering that the losing party is required to bear the legal costs of the successful one.[67] This makes class-action concerns a negligible risk to those applying for leniency.

<u>However, there remains a concern…</u>

An important point to consider is that the damages arising out of Private Enforcement can be significantly higher than the fines imposed by public enforcement. This is because of the fear of stand-alone or "follow-on" claims, in which there can be 'n' number of individuals who suffered and therefore seek damages; there is no cap as to financial liability. Further, since the protected undertaking would have already admitted its guilt via leniency, all the shots of individual claimants will be fired in its direction, making it the centre of all individual claims. In such cases, even the

[60] *Ibid, Article 13*
[61] *Zygimantas Juska, 'The effectiveness of antitrust collective litigation in the European Union: a study of the principle of full compensation' [2018] 49(1) International Review of Intellectual Property in Competition Law 63-93, page 76*
[62] *Damages Directive (n 32), Article 14(2)*
[63] *Juska (n 62), page 80*
[64] *Josef Drexl, 'Consumer Actions After the Adoption of the EU Directive on Damage Claims for Competition Law Infringements' (2015) Max Planck Institute for Innovation and Competition Research Paper no 15-10, 1-34, page 2*
[65] *Nazzini & Nikpay (n 54), page 120*
[66] *The effectiveness of antitrust collective litigation in the European Union (n 62), page 82*
[67] *Recommendations on Collective Redress Mechanisms (n 23), para 13*

provision of joint and several liability will not be good enough to act as an incentive for the immunity applicant. Essentially, while the Directive has certainly attempted to balance both objectives, there remain critical concerns that could lead to a significant decrease in the number of players applying for leniency, throwing a wrench into Competition investigations.

DIRECTIVE AND ITS SPILLOVER EFFECT: THE CASE IN INDIA

The Competition Regime of India is only a little more than a decade old and is modelled on the EU law. Since it is at its nascent stages, the Competition Commission of India (CCI), and the courts are still dealing with larger issues, mostly related to jurisdiction and procedures. While the Leniency framework has been highly successful so far,[68] there has only been little deliberation upon Private Enforcement. To give a bit of background: The Leniency programme in India is governed by Section 46 of the Competition Act, 2002, read with Competition Commission of India (Lesser Penalty) Regulations, 2009[69] wherein the CCI may impose a lesser penalty on an applicant involved in a cartel that has engaged in an anti-competitive agreement, for making a full disclosure in respect of the alleged violations. These Leniency regulations provide for up to a 100% reduction in penalty, provided the disclosures made by the applicant are vital to the cartel investigation, and/or provide significant added value to the evidence already in possession of the Commission.[70] In contrast to the EU, Private Enforcement regime in India is in the nature of a 'follow-on' action; Compensation claims can be filed with the National Company Law Appellate Tribunal (NCLAT), by individuals under Section 53N of the Competition Act, 2002 only after the contravention has been established by the CCI, and in cases of appeal, the NCLAT or the Supreme Court of India, as the case may be. Cases, where the provisions of Private Enforcement were invoked, are either sub judice, or pending finality on appeal with the Supreme Court of India.

Even then, there are some guidelines in place; The Lesser Penalty Regulations contain a provision for confidentiality of the information, documents, and evidence furnished by the leniency applicant. Such information is subject to disclosure if it is required by law, or if the applicant has

[68] *Looking upon the success of the leniency regime, the Government of India has introduced a 'leniency plus' regime under the Competition Amendment Bill, 2022, wherein the antitrust enforcement strategy aims to attract those companies which are already under investigation for one cartel, to disclose other, unrelated cartels, in exchange of additional reduction in fines. The efficacy of such a regime, though, is highly debatable; several EU states removed it after enactment owing to its adverse effects.*

[69] *The Competition Commission of India (Lesser Penalty) Regulations, 2009*

[70] *Ibid, Regulation 4(b)*

agreed to such disclosure, or the applicant has itself disclosed such information to the public.[71] Moreover, even the Director General, the investigative arm of the CCI, can disclose such information after taking prior approval from the CCI. However, it is pertinent to note that such disclosure is of little to no use for the potential damage claimants, since the disclosure can only be made to "any party for the purpose of investigation".[72] While this may be subject to moot, such construction of the provision of disclosure leads to a simple conclusion that excludes the possibility of access to leniency information by third parties which seek to bring an action for damages, thus incentivizing the Leniency applicant.

The Lesser Penalty Regulations, though, remain mum on issues such as the maintainability of compensation applications, or limitation periods within which affected parties can file claims. The NCLAT, in Excel Crop Care, addressed these issues to some extent. On the issue of maintainability – the scope/scheme of Section 53N, in its current form, only covers compensation claims arising out of the findings of the CCI or the NCLAT. However, the NCLAT, in its order on the preliminary issues, extended the scheme to also include applications arising out of the final orders of the Supreme Court.[73] Well, it only makes sense to do so; in National Stock Exchange, the damages claim was made when the matter was sub judice in the Supreme Court but has been kept in abeyance until the final decision of the Supreme Court.[74] Dealing with the issue pertaining to the period of limitation, the NCLAT suggested that a period of 3 years from the date of the ending of the "ultimate proceedings" would be reasonable to allow for the filing of a monetary claim.

However, there remains a similar concern, like that in the EU, about compensation in private claims exceeding that of the penalty in fines. A perfect example of this is the case of the National Stock Exchange of India, wherein a penalty of INR 550 million was imposed on the NSE for abusing its dominant position. It is to be noted that the compensation claim filed by the informant victim, MCX Stock Exchange Limited, is of INR 8.5 billion – almost 10 times that of the fine levied by the CCI.

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[71] *Ibid, Regulation 6*
[72] *Ibid*
[73] *Ministry of Corporate Affairs, 'Report of Competition Law Review Committee' (July 2019); The Competition Law Review Committee has also proposed an amendment to include compensation applications arising out of the final order of the Supreme Court in the act.*
[74] Compensation Application (AT) No.01 of 2019 Food Corporation of India v. Excel Corp Care Limited & Ors.; *The NCLAT gave the same reasoning for a Compensation application filed before the finality of the judgment from the Supreme Court of India.*

While so far it seems that the Indian competition watchdog did not have to deliberate upon protecting the interests of the Leniency Applicant from private claims, they will have to soon come up with a detailed framework to maintain the efficiency of the Leniency regime. Either way, with most of the decisions in this sphere close to attaining finality, the year 2023 seems to be the trending year for the Private Enforcement regime in India.

ADDRESSING GAPS & ISSUES

Through the discussions so far, it is clear that the incentives to apply for leniency outweigh the disincentives. Although, there are concerns that the EU Commission needs to address in the Damages Directive in order to maintain harmony between private enforcement and leniency. Since both the regimes complement each other, it is very important for the Commission to create an adequate balance between the two. Any defects/issues in one enforcement mechanism can have severe repercussions in the other.[75]

Introducing a cap on compensation by the leniency applicant

To address the problem of the leniency applicant possibly facing a heavy compensation claim, the Commission can introduce a cap on the maximum amount/share that the immunity applicant would have to pay to those affected. While some would argue, and rightly so, that this would affect the right to full compensation enshrined under Article 3 of the Damages Directive,[76] it would not be the case if the share of the immunity applicant under private enforcement is borne by other cartel participants. This would have positive dual effects; While it would protect the leniency applicant, on one hand, the fact that other cartel participant(s) have to bear its costs would deter them from cartelizing in the first place, and if they chose to do so, would make applying for leniency significantly more lucrative.

Supporting Leniency applicants through "Leniency Funds" or Commitments

[75] *Roger Gamble, 'Whether neap or spring, the tide turns for private enforcement: the EU proposal fora Directive on damages examined' [2013] 34(12) European Competition Law Review 611-620*
[76] *This has also emphasized by the ECJ in Courage, Manfredi, Kone, Otis, etc.*

Alternatively, the victims could be compensated from something equivalent to that of 'Fair Funds' in the US. Introduced in 2002 under the Sarbanes-Oxley Act, the 'fair funds' concept enables the fruition of the right of defrauded investors to redeem compensation for injury. Essentially, this provision authorizes the Securities and Exchange Commission (SEC) in the United States to collect and distribute fines, disgorgements and other damages recovered from indicted defendants, to injured investors.[77] Prior to the natural use of fair funds, the SEC did not consider it appropriate to be "a collection agency for victims of securities fraud."[78] In fact, the only approved recourse was private litigation whose verdict in terms of eligibility for and amount of compensation was final.[79] This strong stance of the SEC must be contrasted with contemporary competition authorities in that while the former was reluctant to explore alternative routes for recouperation, the latter is characterised by the pivotal concept of full compensation. Thus, the problem for competition authorities lies more in the inadequately addressed tug between private enforcement and leniency applications and less in the authorities' positionality or capability to incorporate a fair funds like concept.

Moving forward, a number of cases and statutory reforms expanded the SEC's powers to include the creation of separate 'fair funds' rather than directly remitting collected damages to the U.S. Treasury.[80] The SEC is now the ultimate authority to decide the liability and extent of fines and/or disgorgement payable and further, the necessity to distribute these collected amounts to the victims of injury. For the distribution necessity to arise, the SEC conducts a feasibility study addressing two primary questions – whether there is a distinct class of investors who have suffered discernible injury and whether the amount collected from the defendant would adequately compensate the victims.[81] These two guiding questions are extremely similar to the deliberations indulged in by the ECJ in terms of relevant causal link and the established right that victims have to full compensation;[82] the latter is where the need for a fair funds like concept is the most apparent. The

[77] *Urska Velikonja, 'Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions' (2015) 67 Stanford Law Review 333.*
[78] *Jayne W. Barnard, 'Evolutionary Enforcement at the Securities and Exchange Commission' (2010) 71 University of Pittsburgh Law Review 416.*
[79] *Velikonja (n 78), page 340.*
[80] *SEC v. Texas Gulf Sulphur Co., the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, and the Dodd-Frank Act of 2010.*
[81] *Velikonja (n 78), page 342.*
[82] *Manfredi, Kone, Otis.*

existence of a repository (whose skeletal framework already exists in ECJ jurisprudence) that would balance the full compensation right of victims with the leniency incentive of cartel participants is precisely what antitrust enforcement requires. Hence, the 'Leniency Funds', which would contain a proportion of penalties paid by competition law infringers, would be available to support the leniency applicant in paying its share of compensation to its direct and indirect purchasers/providers.

Compensation claims can also be kept in check by the introduction of a "Commitment Order"[83] in private enforcement, where the immunity applicant commits to pay, by itself, to the person who suffered the loss. These suggestions can help the leniency applicant get certainty in terms of exposure, and will give a higher sense of protection, thus incentivizing leniency.

In India too, implementing such a concept is not out of reach. In a 2019 report on the regulatory structure of competition law, the Competition Law Review Committee (CLRC), engaged in the number of recommendations relevant to our discussion.[84] First, the Committee identified the entry of disgorgement into Indian jurisprudence and contrasted it with restitution on the sole axis of focus – the former looks at the extent of wrongful benefit to the infringer and the latter looks at the extent of injury suffered by the victim as a result of said infringement. Further, since it is necessary for damages to be fair and reasonable, the Committee suggests that disgorgement must be seen more as a remedy than a penal provision. Viewing disgorgement as a remedy would essentially suggest going one step further than merely identifying and collecting wrongful gains; it would entail compensating the victim for said gains.

Second, the Committee lays down the skeleton for a 'fair funds' like fund in two ways – by mandating the operational and financial independence of the CCI and by discussing a possible settlements system. While discussing the quasi-judicial functions, the report requires that the CCI have independence on financial matters which may be ensured by way of a "one-time corpus fund"; it also points towards this financial independence being strengthened by revenues from fee earnings. This one-time fund can essentially be extended to create a permanent fund that would

[83] *Like there is one for public enforcement, where the undertaking commits to a certain understanding, powered by law, to stop the infringement of Article 101.*

[84] *Competition Law Review Committee 'Regulatory Structure of Competition Law', Working Group I, Ministry of Corporate Affairs (2019).*

allow the CCI to have full autonomy of decision while maintaining consumer welfare i.e., leniency applicants can expect their share of compensation to flow from this fund.

Even if a separate fund is not possible, the Committee discusses the possibility of using the Consolidated Fund of India (CFI). When discussing the settlement process to be engaged in by the CCI, the report requires the settlement amount to be credited to the CFI. This requirement is quite similar to Section 47 of the Competition Act, 2002 which directs all penalties collected under the Act to be credited to the CFI. Thus, it is possible that the CCI can manage a separate fund under the revenue account of the CFI that caters to this type of compensation and leniency applicant protection. The hitch with this proposal would be that any withdrawal made from the CFI has to have the assent of the Parliament which is bound to be counter effective when the ultimate objective of this Leniency Fund is consumer welfare – both in terms of uncovering a higher number of cartels as well as compensating the victim within a reasonable period of time. If we are to take the example of the SEC, strategic statutory changes allowed for the SEC to remit collected fines and disgorgements into the fair funds rather than to the U.S. Treasury which ultimately led to its robust and autonomous functioning. Thus, for the successful use of this route, we must advocate for lower procedural barriers.

A third route would be to utilize the 'Competition Fund' set up under Section 51 of the Act. The fund is set up to receive all grants and fees credited to the CCI, and is subsequently used to fund the salaries, allowances, and other expenses of the Commission. It explicitly allows the Commission to pursue its duties as per its prescribed purpose. This may be interpreted through the Statement of Objects and Reason for the Competition Bill, 2001, which places consumer welfare at the heart of the Act's objectives. Thus, there is a possibility that this justification may be used while using the Competition Fund as a Leniency Fund. However, before deeming this the right fit, we must address a potential hurdle – the explicit omission of allowing the Commission to receive "monies received as costs from parties to proceedings before the Commission."[85] Despite being pursuant to the objective of the Act, the Leniency Fund concept could potentially be blocked through this omission.

[85] *Clause (b) of Section 51 that allowed for this was omitted via Act 39 of 2007.*

CONCLUSION

Undeniably, there is a factual intersection between Leniency and Damages action. Both regimes are important in their own prospects for the efficacy of Competition Law, although Private Enforcement is extremely complex and significantly underdeveloped at the moment, much like the Leniency provisions in the 2000s. Naturally, this process will entail time to establish itself appropriately. A school of thought would still argue that the increased risk of Private Enforcement may decrease the incentives for undertakings to apply for Leniency, especially considering that the leniency applicant will still be liable to an extent under private claims. However, in the context of Nullus commodum capere potest ex sua injuria propria,[86] the financial benefits received from immunity in relation to Private enforcement may, ironically, encourage the infringer to consider the leniency application instead.

On the other hand, the framework offered by the Damages Directive and other regulations has laid the groundwork for a compromise between viable Private Enforcement options and an effective Leniency programme, especially because of the significant financial benefits a successful leniency applicant may reap. This means that it is possible to construct a regime wherein both concerns can eventually be balanced. While the European Commission deliberates upon bringing harmony between the two regimes, there clearly are some developments to watch out for, and to be in touch with not only the developing law, but also how it is interpreted by the EU courts. Facing evidential difficulties and ambiguity in outcomes at this moment, it is certainly expected that in the coming years, Private Enforcement will be a more realistic option for parties considering filing for a damages action.

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[86] *No one can make gains from their own wrongs.*

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