COMBATTING CARTELS IN INDIA: JUSTIFYING CRIMINALIZATION

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# Table of Contents

I. Introduction ................................................................................................................................. 4

II. Are the Current Cartel Penalties in India Optimal? ................................................................. 6

II.I Options for Increasing Deterrence ............................................................................................ 6
   (A) Using Effective Investigative Techniques to Increase the Probability of Detection of Cartels .......................................................... 7
   (B) Improving the Operation of the Leniency Programme ........................................................................... 7
   (C) Imposing Heavier Fines ............................................................................................................. 8

III. Criminal Sanctions: The Way Forward ...................................................................................... 10

III.I Historical Development of Criminalization ........................................................................... 10

III.II Criminalization and the Moral Justification ........................................................................... 11

III.III Why Criminalization? ........................................................................................................... 12

III.IV Criminal Sanctions in Australia ............................................................................................ 16
   (A) Towards Criminalization ........................................................................................................... 16
   (B) Cartel Conduct Provisions ......................................................................................................... 17
   (C) Administrative Framework: Investigation and Prosecution of Cartel Conduct .................................... 19
   (D) Administrative Framework: Immunity Policy ............................................................................. 20

IV. Investigation Techniques in Detecting Criminal Cartels ............................................................ 21

IV.I Criminalization of Cartels in the U.S. Allows Use of Enhanced Investigational Tools and Processes ..................................................... 21

IV.II Criminal Sanctions: The ‘Standard of Proof’ Requirement ....... 22

IV.III Lessons from the US: Need for Special Investigating Tools in India ............................. 23
   (A) General Powers of Search and Seizure......................................................................................... 24
   (B) Power to Search Private Homes ................................................................................................. 25
   (C) Powers of General Detection .................................................................................................... 25

V. Leniency Policy as a Remedy to Cartelization ............................................................................ 26

V.I US Leniency Program ................................................................................................................. 26

V.II Lessons from the US: Implementing the ‘Irresistible Offer’ Method .................................... 30

VI. Conclusion ................................................................................................................................... 33
I. INTRODUCTION

Cartel conduct is considered as a serious anathema to competitive markets. It has often been seen that cartels eventually lead to artificial price raising, reduction in consumer choices and an impediment to business innovation. Driven by these concerns, competition authorities around the world have made cartel enforcement as their top priority over the last decade. In order to do so, these authorities have advocated for tougher anti-cartel law. These stricter laws have come in the form of increased penalties, improved leniency strategies, increased financial grants to the competition authorities. As part of this ‘stricter’ regime, there has also been a contemporary movement in support of introducing criminal sanctions for serious cartel conduct, also known as ‘hard-core’ cartels. Although the debate over whether to impose criminal liability is still in its nascent stage, there seems to be a strong case in its favor.

There have been more than thirty countries, including the most developed economies of the world, who have introduced criminal sanctions for hard-core cartels in some form or the other. The campaign has been led by US Department of Justice which has repeatedly stressed on the view that incarceration is the most effective measure in deterring cartel conduct. Under the existing penalty regime in India, corporations involved in cartels can only be imposed with pecuniary fines as envisaged in the Competition Act, 2002. Since there are no criminal liabilities available for these offences, the liability structure in India, tends to fall short as far as deterrence is concerned.

The report strongly argues the need for a shift from a fairly benign Indian regime involving insipid civil fines to a heavy-handed one which would carry the stigma of conviction and a jail sentence. The report is an attempt to justify criminalization as a policy reflecting pragmatic governmental intervention in free market, a policy grounded on sound reason and experience and one which is also justified on moral considerations. In addition, the report also takes into account the criminal enforcement mechanisms of various countries as a guide to some of the lessons that can be learned from them. Once understood as a form of business class theft
which is clearly as harmful to their victims and society as a whole as more common forms of theft, it would be appropriate to treat hard-core cartel infringements through the criminal process.

However, to successfully detect and investigate these offences, the concerned investigating authorities need to be given added tools that are usually deployed with the police officials in criminal enforcement. Also, introducing criminal sanctions will undoubtedly impact on the methods and standards of gathering evidence since higher standards are required for presenting evidence at a criminal trial.

The structure of this report is as follows: Part II of the report maps the prevalent penalty regime in India. In addition, the report also seeks to address whether these penalty provisions are optimal considering these socially harmful forms of price-fixing. The report also puts forth certain alternatives with respect to increasing deterrence as far as cartel enforcement is concerned. Part III of the report marks the historical development of the criminalization of cartels. The report firmly attempts to justify that treating hard-core cartels as a form of criminal offence is appropriate. Part IV stresses on the need for improved investigation techniques. In addition, this part also touches upon the standard of proof requirements as part of introducing criminal sanctions. Part V of the report takes into account the existing leniency provisions in the US and argues that in order to successfully implement criminal sanctions, it is imperative that there simultaneously exists an equally attractive leniency mechanism which would ensure active ‘whistleblowing’. Part VI then follows with concluding remarks.
II. ARE THE CURRENT CARTEL PENALTIES IN INDIA OPTIMAL?

The Competition Commission of India (“CCI” or “Commission”) is empowered to act upon information received, reference made or it may also take *suo motu* cognizance of the suspected activity. Upon being satisfied that the alleged activity requires further investigation, it forwards the necessary information to the office of Director General which is in turn responsible for undertaking further probe. On reaching a positive finding of infraction, the CCI under S. 27 of the Competition Act, 2002 (“Competition Act” or “the Act”) may impose “a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher”. Further, individuals responsible for the conduct of the company are also liable to be punished.

There are some concerns regarding the effectiveness of our current framework about its effectiveness at deterring cartel behavior. The biggest concern is, considering the secretive nature of cartel activity, that it is often very difficult to detect cartels. It appears that jurisdictions with stricter cartel penalties than India have been more successful at detecting cartels.

Leniency provisions, which are considered to be one of the most effective tools to detect cartels, also affect the optimality of cartel enforcement in any jurisdiction to a great extent. Australia’s recent introduction of criminal penalties for cartel activities has reported an increase in leniency applications ever since the new law came into force.¹ On the contrary, Indian law, in its current form, has not attracted many leniency applications ever since the inception of the Act. There is, therefore, a compelling need to scrutinize the current penalty regime to further deter hard-core cartels.

II.I Options for increasing deterrence

Deterrence in cartel activity can be increased through a number of ways. This section analyzes some of these ways briefly:

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Using effective investigative techniques to increase the probability of detection of Cartels;

Improving the operation of the leniency programme; and

Imposing heavier fines.

(a) Using effective investigative techniques to increase the probability of detection of Cartels

The CCI is responsible for investigating and keeping a check on credible leads on cartel activity. One of the ways to increase deterrence could be sanctioning additional resources to the Commission which would provide the Commission with greater efficacy to detect cartels by investing in a large number of non-leniency based techniques and procuring technical help from other agencies in order to detect cartel behavior. However, this mode of increasing deterrence comes at the obvious cost of additional burden on the government which is responsible for the Commission’s funding.

(b) Improving the operation of the leniency programme

Another effective way to detect cartels is to have in place an effective leniency programme. The proviso to S. 46 in the Competition Act, 2002 provides for a leniency regime, wherein the Commission may impose a lesser penalty if it is convinced about certain findings. This is further laid down in the Lesser Penalty Regulations, 2009 (“Regulations”). Accordingly, the Commission may impose a lesser penalty on a cartel member that makes a “vital disclosure” i.e. information or evidence sufficient to allow the Commission to find prima facie that a cartel exists or to help establish the violation of the Competition Act.

The Regulations also make a distinction while assessing the possible penalty reduction on the basis of applicant’s “priority status.” Consequently, the applicant first in line to provide a “vital disclosure” may receive up to 100 percent penalty reduction. The second and third applicants in priority may receive up to 50 percent and 30 percent respectively. These applicants, excluding the first applicant in order, are required to provide significant information in connection with the alleged activity in order to be eligible for reduction in penalty. In order to do
so, they must provide cogent evidence from which an inference of a likelihood of cartel can be
drawn by the Commission. Besides this priority status, the Commission is vested with the
discretion to decide the reduction of penalty on the basis of the following factors:

(a) Timing of the application;
(b) Evidence available with the Commission;
(c) Quality of the information provided; and
(d) Surrounding facts of the case.

Notwithstanding the discretion enjoyed by the Commission, the above framework as it
stands today may act as an obstruction with respect to inviting applications for penalty reduction.
The biggest obstruction relates to the provision wherein the Commission may impose a lesser
penalty. Accordingly, it is therefore absolutely up to the discretion of the Commission on
whether it wants to reduce penalty or not. This may sometimes deter the complainant from
bringing the information to the Commission since their immunity is not guaranteed. Moreover,
the Commission heavily relies on the quality of information being brought before it.

(c) **Imposing Heavier Fines**

The American Competition framework has had a history of imposing extraordinary fines
amounting to as much as 300 percent of the annual turnover of the company. However, many
theorists have argued that these high fines have at times not achieved the likely deterrent impact.
The first important reason, as Wils argues, is that majority of the companies would simply not be
in a position to pay such high fines, because even the profits accrued from anti-competitive
practices would not be in liquid form.² Also, the companies would not have sufficient assets that
could be liquidated to pay the fine, since, generally, annual turnover of these countries often
exceeds their net assets.

Moreover, collecting such huge fines would administratively be a complex process and
incur huge costs from the perspective of the Commission. The US Department of Justice

² Wouter P J Wils, ‘Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on
Undertakings but also Individual Penalties, in Particular Imprisonment?’, in C D Ehlermann 9ed, *European
(“DOJ”) also acknowledges this offending companies ability to pay huge fines as a serious administrative problem.³

Realistically, these problems support the inference that corporate fines have limited deterrent impact and therefore the problem cannot simply be solved by making these pecuniary liabilities more severe. This, therefore, makes the need of introducing criminal sanctions all the more compelling. In this respect Werden and Simon have argued:

“Prison sentences send a special message not conveyed by fines, and they send it much better, because prison sentences for white-collar crimes are much more newsworthy than fines and, thus, will be given more coverage in the media and will be noted by other businessmen.”⁴

The Organisation for Economic Co-operation and Development (“OECD”) has also argued that since pecuniary fines haven’t been optimally effective, there is a case to consider criminalization as an additional deterrent.⁵ There is enough anecdotal evidence that suggests that criminalization may play a significant role in deterring cartels. One of the examples is depicted in the interviews conducted by US Department of Justice with cartel conspirators in other countries who claimed that their sole reason for not operating such activities in the US was the presence of jail sentences there.⁶ Given the stringent criminal provisions prevalent in the US, conspirators often go to the extent of meeting outside the US while planning such activities.⁷ A survey conducted in the UK also suggests a similar inference.⁸

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⁴ Ibid. at 933
⁶ US Department of Justice, Ten strategies for winning the fight against hard core cartels, Presentation to OECD Competition Committee WP3, 2004.
III. CRIMINAL SANCTIONS: THE WAY FORWARD

III.1 Historical Development of Criminalization

The concept of introducing criminal sanctions for cartel behavior has had a long history. A wide variety of countries including Mesopotamia, India, China, and Israel had enacted laws prohibiting price-fixing, monopolization from antiquity. The tradition of criminalizing such practices in common law system dates back to as early as 1200s. In England, the common law antitrust prohibitions were reinforced by recurrent statutes. By 1548, the English system already had a statute in place that criminalized hard core cartels. This English common law was then subsequently imported into the American colonies, which then eventually led to a number of statutes prohibiting forestalling and monopolies.

Taking into account the surrounding circumstances and actual impact of the harms caused by the cartel activity in question, legal sanctions varied from civil fines to criminal penalties. For instance, in times of war or famine, the act of exploiting the masses for personal gains at times could also attract death penalty. The earliest known cartel case – which was a jury trial in 326 BC concerning a formation of a cartel of formerly competing grain merchants – resulted in imposition of death penalty for raising grain prices. Other penalties included fines, seizure of goods, imprisonment etc.

The English antitrust laws carried not only criminal sanctions but religious force too. Religion was considered as a higher form of law and accordingly “law of God” was considered superior than the “law of men”. The Bible has also stressed on prohibiting monopolization and

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11 (1548) 2 & 3 Edw. VI c. 15. See Also Jones at 10.
13 (1353) 27 Edw. III, stat. 2, c. 11 (statute criminalizing forestalling and providing death penalty).
15 *Supra* at 10
the restriction of supply.\textsuperscript{16}

The Roman Catholic also finds its roots for restricting monopoly and price fixing in Thomistic philosophy. Monopoly in itself was not considered immoral, but a monopoly that resulted in unjust prices \textit{was} considered immoral. Monopolies (and by extension cartels), which included predatory and discriminatory pricing, were considered to be inherently against the notion of “just price.”\textsuperscript{17}

By the end of 18\textsuperscript{th} century, this notion of “just price” had evolved into notion of competitive price. This notion that private monopolies were a direct infringement to individual rights had now been engraved in almost all legal systems. For instance, several of the US states’ constitutions explicitly recognized such practices as violative of individual rights.\textsuperscript{18}

\textbf{III.II Criminalization and the Moral Justification}

Cartels have often been equated with theft. Possibly the most frequently quoted description of cartels in this context was given by Joel I Klein.\textsuperscript{19} He compared price-fixers to thieves:

> “Let me start with the obvious: cartel behaviour (price-fixing, market allocation and bid-rigging) is bad for consumers, bad for business and bad for efficient markets generally. And let me be very clear: these cartels are the equivalent of theft by well-dressed thieves and they deserve unequivocal public condemnation.”\textsuperscript{20}

The two elements that are intrinsically related with price fixing are; (a) theft and (b) fraud and deception. Both these elements are considered morally reprehensible to the extent that each of them is considered as worthy of extreme criminal punishments. Theft and fraud are

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\textsuperscript{16} Isaiah 5:8 (“Woe to those that add house to house/And join field to field/till there is room for none but you/To dwell in the land”); Proverbs 11:26 (“He that withholdeth corn, the people shall curse him: but blessing shall be upon the head of him that selleth it.”). As cited in Robert H. Lande. Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged. 34 Hastings L.J. 65 (1982), n24.
\textsuperscript{18} Constitution of North Carolina, 1776, Article 23 and New Hampshire State Constitution, 1908, Article 83.
\textsuperscript{19} The former Assistant Attorney General in the United States Department of Justice.
\textsuperscript{20} Klein, J.I., “The War against International Cartels: Lessons from the Battlefront”, Fordham Corporate Law Institute, 26\textsuperscript{th} Annual Conference on International Antitrust Law and Policy, New York, October 14\textsuperscript{th} 1999.
\end{flushleft}
universally condemned as morally wrong. What is the theft involved in cartel behavior?

The concept of overcharge is the underlying principle as far as theft is concerned. In a competitive market, price is generally considered fair owing to the outcome of forces (in the form of demand and supply) which is out of reach of either party. However, fixed price market is generally a result of a hidden agreement by sellers resulting into overcharge of goods. Consequently, consumers are bound to purchase cartelized goods since they are purposely deprived of a competitive price market.

In addition to causing crime, even an attempt to commit a crime is also considered reprehensible. As a result, attempt to commit theft is also deemed to be a crime. This goes on to explain why it should be proper to apply criminal sanctions to mere participation in a cartel without giving regard to the actual effects caused by the activity.

As far as fraud is concerned, it is universally condemned as morally wrong and is also worthy of criminal punishment. The fraudulent aspect of cartel activity relates to the secretive agreement of price fixing by virtue of deception and misrepresentations. Post cartel formation, cartel members fraudulently present themselves deceitfully as independent competitors.

Such fraudulent representation is particularly evident in one popular form of cartel activity: bid-rigging. The entire idea of having competitive bids through a formal process goes for a toss if the bidders have already entered into secret arrangement amongst themselves.

Although, the fact that these morally unacceptable elements are a part of cartel activities does not conclusively imply that cartels should be criminalized. What this does however imply is that morally there is nothing that contradicts the well-established historical perspective that these anti-competitive practices ought to be criminalized.

III.III Why Criminalization?

This question of criminalization is in itself a self-evident question in the case of cartel arrangement since the act of entering into an arrangement is by its nature deliberate and specific. That is to say, cartels are planned and organized by individuals within a corporate arrangement.
but are materialized in the form of corporate conduct. In the terms of criminal jurisprudence, the individual behavior is the *mens rea* of the cartel offence whereas the *actus reus* is located in the corporate action.

The argument of criminalization is reinforced by taking into consideration the efficacy of pecuniary liabilities, which are at present imposed on companies found to be in contravention of the Competition Act, 2002. Also, as a matter of rational calculation, it is highly unlikely that these fines are going to have the same deterrent effect in contrast to standalone criminal punishment provisions. The colluder may take into account the likely gain from the alleged anti-competitive activity and calculate it against the prospective loss through detection and after having done that, may still proceed with the activity.

The American model of introducing criminal sanctions has helped encourage optimism to an extent with respect to the possibilities of deterrence. It is significant to point out that introduction of criminal sanctions require moral as well as retributive justification. Therefore, the basis for persuading criminalization would require a convincing argument that cartel activity is not only a serious deterrent but is also morally offensive at the same time. The American model has based its moral justification on the concept of conspiracy – that cartel behavior is a deliberate, exploitative and a fugitive act of knowingly colluding with others in order to attain illicit gain. The Indian legal framework ought to import similar justifications in its roadmap to criminalization of such offences.

Introducing criminal sanctions within the corporations would create an altogether new level of deterrence. The most common justification for introducing criminal sanctions for cartel conduct is that, for first time offenders, this will ensure effective deterrence in contrast to civil penalties. There has been a general consensus that civil pecuniary penalties do not meet the standard of effective deterrence since the penalties for contravention of law generally fall short when compared to the gains achieved from the violation.²¹

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Although it has been argued time and again that criminal sanctions are always not that effective in increasing deterrence. This, however, may not stand true in the cases of white-collar crime. The reason for the same is that people generally involved in white collar offences would more often be inclined in undertaking a rational cost–benefit analysis of their actions and would therefore carefully factor the severity of the consequences of the potential criminal sanctions, if implemented. This is further strengthened when the possibility of imprisonment is taken into the equation as it might very well affect the reputation and image of the defendant which convincingly outweighs the consequences attached in case of an adverse decision in civil proceedings. This apprehension of imprisonment might abhor the senior executives from getting involved in anti-competitive practices.

Another justification for introducing criminal sanctions is that this will provide for consistency with the other counterparts of white collar offences. It has been argued that ‘hard-core’ cartels is a “form of theft and little different from other white-collar crimes, including insider trading”. Cartel conduct often affects multiple victims resulting into losses running into crores of rupees at times. From this perspective, it is hard to discern as to why theft is subject to criminal law, whereas business executives and organizations are given immunity from criminal liabilities.

The third argument in support of bringing criminal sanctions with respect to cartelization is to bring India in line with international best practices. Cartels have been recognized as unlawful activities in more than 100 jurisdictions the world over and the sanctions range from pecuniary penalties to criminal imprisonment. With the passage of time, majority of advanced economies, including Australia, the United States, Canada, United Kingdom, Ireland, France,
Germany, Norway, Japan and South Korea, have introduced criminal sanctions along with their existing regimes of civil remedies.\(^{27}\)

The report purposely takes into account the US example for the purposes of justifying criminal sanctions for cartel activities. The US experience is not only important, but is also relevant since the routine use of imprisonment sanctions there have helped reduced American participation in some prominent international cartels (such as Vitamins and Air Cargo cases).\(^{28}\)

The US experience of having criminal antitrust penalties suggests that imposing mere punitive penalties does not ensure a corresponding success.\(^{29}\) There is no more effective deterrent than having the knowledge of being imprisoned if caught. The Sherman Act in the US always treated certain anticompetitive activities as criminal. The sanctions ranged from a fine of up to $5,000 to imprisonment for up to one year. These minimum penalties gradually escalated since the US Congress and Department of Justice felt that despite these fines and penalties, the growth of cartels remained unabated.\(^{30}\)

This technique is equally effective to persuade lower level employees to come forward and cooperate in an investigation since the fear of being imprisoned will push them to supply evidence against their superior employers. Without this fear of being imprisoned, most of the subordinates would be unwilling, either for loyalty or fear, to come and stand against their senior officers. So much so, that this is now an almost standard procedure for the investigators in the US to approach the employees first, whom they believe might have substantial evidence to testify which they might give in exchange of immunity or reduced sentencing.

The broad consensus is that the real threat of imposition has a much greater deterrent effect than the prospect of having individual pecuniary fines. Majority of the countries have concluded that imprisonment is in fact the most effective deterrent and have accredited their


\(^{28}\) Richard Whish and David Bailey, The International Dimension of Competition Law, Oxford University Press at 488 (2012).


leniency programs for the success they have achieved in detecting cartels.  

### III.IV Criminal Sanctions in Australia

This part of the report closely analyzes the Australian framework which has recently introduced criminalization as part of its cartel enforcement mechanism. The reason for inculcating the Australian regime is that just like the Indian model, the Australian Competition and Consumer Commission (“ACCC”) was only empowered to impose civil penalties of up to AUSS$10 million on the corporations. Notwithstanding the fact that the Australian Competition law also provided for individual pecuniary liability, these sanctions did not prove to be effective enough as far as deterrence was concerned. Therefore, in order to further stiffen the sanctions for cartel behaviour, the Federal Government proposed the introduction of criminal sanctions for entities and individuals involved in anti-competitive cartel activity.

(a) Towards Criminalization

Criminalization of cartel conduct became a reality in Australia when the Cartel Conduct Act came into force on 24 July 2009. The Chairman of the ACCC, in June 2001, began advocating the introduction of criminal penalties for ‘hard-core’ cartels as envisaged in Part IV of the Trade Practices Act (“TPA”). The rationale given by the ACCC was unambiguous, that the civil penalties were not enough to deter cartels and therefore the fear of criminal sanctions would be the most effective way to induce compliance with the law. This was principally the main reason, according to the ACCC, that many countries had already initiated criminal sanctions. Second, the ACCC stressed that this conduct is inherently harmful to the society at large and is therefore analogous to other crimes, more particularly criminal offences for dishonesty such as theft and fraud and therefore they ought to be treated alike.

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31 OECD, Competition Committee Policy Roundtable, Cartel Sanctions against Individuals, Israeli Submission, p. 68; Norwegian submission, p. 79; U.S. submission, p. 100 and Canadian Submission. (2003), at p. 49.

32 Supra at 24.


The Howard Government had constituted the Trade Practices Act Review Committee ("the Dawsons Committee") which was entrusted with the responsibility of reviewing Australia’s existing competition laws regime. The Dawsons Committee was convinced by the findings of the ACCC and the Committee subsequently issued a report called the *Review of the Competition Provisions of the Trade Practices Act*, wherein criminal penalties were suggested to be implemented concurrently along with the existing civil penalties in the TPA for ‘serious’ cartel offences.\(^{35}\)

The Committee also suggested for an increase in the amount of existing civil pecuniary penalties and also vesting in the courts the power to disqualify individuals found to be in contravention of the TPA. Eventually, in February 2005, the then Treasurer formally announced amendments to the TPA based on the above recommendations thereby introducing criminal sanctions for serious cartel conduct.\(^{36}\) However, a further two and a half years drifted by without any amendments materializing.

In the meanwhile, during the 2007 Federal election campaign, the Labour party, which was in the opposition, promised that they would introduce the criminal cartel penalties within the first twelve months of the their government.\(^{37}\) In January 2008, the newly elected government introduced the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* and this Bill was later passed into law. This shift in the Australian competition law represented a major shift from a fairly benign framework involving civil fines to a system that threatened the stigma of imprisonment.

(b) Cartel Conduct Provisions

The Cartel Conduct Act of Australia aims to focus on the definition of cartel conduct so as to bring in specificity with respect to various aspects. Accordingly, S. 44ZZRD defines a ‘cartel provision’ as a provision of a contract, arrangement or understanding between parties that

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\(^{37}\) ‘Rudd Backs Criminal Penalties for Cartel Behaviour’, *Australian Associated Press* (Brisbane), 18 October 2007.
are, or are likely to be, in competition with each other which has, or is likely to *inter alia* have, the purpose or effect of price-fixing.

S. 44ZZRF of the Australian Cartel Conduct Act lays down the standard for *mens rea* and accordingly criminalizes contracting an arrangement that contains a cartel provision. According to the section,

(1) “A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) The contract, arrangement or understanding contains a cartel provision.

(2) The fault element for paragraph (1) (b) is knowledge or belief.”

Further, S. 44ZZRG takes into account giving effect to such contracts and accordingly imposes criminal sanctions for the same. Needless to say, these provisions have been kept in place in *addendum* the civil penalties envisaged in the Act under Ss. 44ZZRJ and 44ZZRK.

The only distinguishing factor between these two civil and criminal sanctions is that the criminal sanction require ‘fault’ element to be established as a prerequisite. Accordingly, these sections require that the corporation getting into a contract or an arrangement containing a cartel provision knew or believed that the arrangement it was entering into did in fact contain a cartel provision. It is also necessary to prove the offences beyond reasonable doubt and obtain a unanimous verdict of the jury.\(^{38}\)

In addition, Section 45(2) (a) (ii) of the TPA prohibits *making* a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition; and s 45(2) (b) (ii) of the TPA prohibits *giving effect* to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition.

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\(^{38}\) ACCC, *ACCC Approach to Cartel Investigations* (2009)
(c) Administrative Framework: Investigation and Prosecution of Cartel Conduct

The roles of ACCC and the Commonwealth Director of Public Prosecutions (“CDPP”) with respect to their investigating powers in dealing with cartel conduct are predefined by virtue of a Memorandum of Understanding signed between both these agencies.39 According to the said Memorandum, it is the duty incumbent upon the ACCC to investigate each instance of alleged cartel conduct in order to discern whether there is serious infringement involved or not.40 In order to do so, the ACCC needs to take into account the following factors:

(a) **Duration of the conduct:** Whether the conduct of the alleged parties longstanding?
(b) **Detriment to the consumer:** Whether the collusion results in substantial harm to the consumer?
(c) **Past History of the parties:** Whether the alleged parties have had any history of involvement in any kind of cartel conduct?
(d) **Net Value of affected trade:** Whether the affected commerce exceeds $1 million within a span of 12 months?

The CDPP lays down two ‘pillars’ so as to prosecute cartel offences:

(a) Is there sufficient evidence available with reasonable prospects of conviction; and
(b) Whether it is in the interests of public to prosecute the case.41

With respect to criminal sanctions, both ACCC and the CDPP regard them as ‘non-negotiable’. Therefore, a party is not permitted to ‘settle’ the dispute when a criminal prosecution is invoked.42

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39 Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct (2009) (hereinafter “MOU”)
40 Ibid., cl. 2.3
42 Supra at 38 cl. 21
(d) Administrative Framework: Immunity Policy

Considering the fact that most of the cartels are generally carried out secretly, the ACCC strongly stresses on its *Immunity Policy for Cartel Conduct* in order to detect them.\(^{43}\) The procedural framework for the same is governed by an agreement between the ACCC and the CDPP. Accordingly, all the requests pertaining to seek immunity from both civil as well as criminal proceedings are received and assessed by the ACCC.\(^{44}\) After considering the application, the ACCC further sends it to CDPP with the recommendation in case of an application for seeking criminal immunity.

Although CDPP enjoys independent discretion with respect to granting immunity, Annexure B (‘Immunity from Prosecution in Serious Cartel Offences’) to the *Prosecution Policy of the Commonwealth* stipulates that the CDPP, while exercising this discretion, must apply the same criteria set out in the ACCC’s *Immunity Policy for Cartel Conduct*.\(^{45}\) The discretion is therefore not absolute.

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\(^{43}\) ACCC, *ACCC Immunity Policy for Cartel Conduct* (2009)

\(^{44}\) *Supra* at 39 cl. 7.2.

IV. INVESTIGATION TECHNIQUES IN DETECTING CRIMINAL CARTELS

IV.I Criminalization of Cartels in the U.S. Allows Use of Enhanced Investigational Tools and Processes

Another reason for emphasizing on the US model, as part of this report is that the US DOJ stresses heavily on the use of enhanced investigation tools and processes in order to effectuate successful detection of cartels. The drafters of Sherman Act were mindful of this and therefore clearly intended to inculcate effective institutional arrangements and enforcement tools that are generally not available to their counterparts elsewhere in the world.

This is one of the major reasons that despite there being in place an attractive antitrust statute in many jurisdictions including India, the competition authorities generally are faced with a comparatively daunting task while detecting cartels.

An important point to cogitate upon is that the civil and criminal enforcement functions in the US were combined in the hands of the Attorney General after the enactment of the Sherman Act in 1890. This kind of arrangement is not common in rest of the other jurisdictions. Accordingly, the DOJ Antitrust Division is self-empowered to make its own prosecution decisions and there is no prerequisite of the local US Attorney to refer the case to a jury or bring it in his own jurisdiction.

Elsewhere in the world, the responsibilities for enforcement of civil and criminal cartel penalties are entrusted with separate bodies. Generally, the civil enforcement and investigational responsibilities are vested with administrative agency, whereas the responsibility for bringing a criminal case lies with the public prosecutor’s office. This segregation of responsibilities might have some significant consequences. The most important being the dilution of the competition agency’s influence vis-à-vis the corporations likely to involve in cartel activities. The obvious implication of this would be that these public prosecutors would be likely to be more cautious in bringing criminal sanctions against antitrust conspiracies – given the higher standard of proof, unfamiliarity with competition law issues, other priorities.
IV.II Criminal Sanctions: The ‘Standard of Proof’ Requirement

The standard of proof determines the requirements which must be satisfied for facts to be regarded as proven.\(^4^6\) It has been a common notion which seems to suggest that the standard of proof applied in civil proceedings is one which is based on balance of probabilities.\(^4^7\) In India, the general standard of proof applicable in criminal cases is that the offence needs to be established “beyond reasonable doubt”. However, this does not hold true for many jurisdictions.

In order to appreciate the debate as to what standard needs to be applied if cartels are treated as criminal offences, it is important to understand that the standard required to establish a criminal offence “beyond reasonable doubt” is not also prevalent in many jurisdictions. For instance, French law does not follow this principle of “beyond any reasonable doubt”. It is pertinent to note that this evaluation of the French system has often been criticized on the grounds that the system vests excessive discretion in the judge and therefore the judge is absolutely at the liberty to apply any standard of proof since he or she decides only according to her personal conscience.

This, however, is not true since the principle of intime conviction, the one which forms the basis of the French law, does not entail the adoption of any specific standard of proof.\(^4^8\) In other words, what is required from the judge is to be “intimately” and individually persuaded of something.\(^4^9\)

Notwithstanding the fact that the German system on the standard of proof is based on the personal conviction of the judge, it has less subjective overtones and the judge cannot solely be persuaded with a mere assessment of probabilities.\(^5^0\) The prevailing opinion seems to suggest that as of now the standard is not sufficiently rigorous as understood in the traditional sense of “beyond reasonable doubt.”

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\(^{47}\) Ibid.

\(^{48}\) Michele Taruffo, La prueba de los hechos, 2nd ed., Trotta, 2005, at p. 394

\(^{49}\) Ibid.

\(^{50}\) Code of Criminal Procedure, Article 261: “Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung”. In the event that the court is not fully convinced that the defendant committed the offence, the defendant must be given that benefit of doubt.
Moreover, circumstantial evidence is also admitted in criminal cases. Therefore, there is no reason as to why the corporations and individuals cannot be held guilty purely on the basis of circumstantial evidence. In the US, articulate efforts on providing guidance on issues of what standards to apply while adducing evidence in cartel cases began with the Polypropylene case. In that case, Judge Vesterdoff in his capacity as an Advocate General advocated a higher standard of proof. According to him, these competition cases ought to be treated as criminal cases. However, he stressed on the fact that the criminal nature of these offences does not prevent the Commission and the courts from taking an “overall view of the evidence” and therefore using circumstantial evidence in order to prosecute the offenders in the event of unavailability of direct evidence.

Another important observation was made in the Aalborg case wherein the Court reaffirmed the secretive nature of cartel offences. It follows that it would be normal for such activities to take place in a clandestine manner. Therefore, the existence of such practices must be inferred from a number of coincidences and indicia which, taken together, may constitute evidence of an infringement.

IV.III Lessons from the US: Need for Special Investigating Tools in India

If hard-core cartels are considered truly criminal in nature and treated at par with other criminal offences, then it is crucial that the investigators should be given appropriate tools to detect and prosecute these criminal activities.

Therefore, if these hard core infringements are to be dealt with in the same manner as other crimes as theft and fraud, it is imperative that the powers to investigate that are usually available with the police need to be given to the investigating authority in the Commission to successfully detect these infringements.

51 “Classic criminal proceedings allow for the use of circumstantial evidence and recourse to principles derived from experience.” Opinion of the Advocate General in T-Mobile Netherlands
53 Ibid., at II-954.
Since cartel agreements are usually carried out secretly, there is hardly any evidence available that a crime has been committed. Such crimes can therefore relatively be carried out perniciously. There is hardly any concern about the outcome of the investigation since the crime may not be detected at all in the first place and therefore never be investigated.

This is essentially the underlying objective that such hard-core anticompetitive practices require rigorous investigation tools in order to maintain a closer scrutiny of the offence being carried out. Some of the essential features of investigation procedures that need to be revisited with having special regard to discovering cartel offences have been discussed briefly hereunder:

(a) General Powers of Search and Seizure

For any investigation to be carried out effectively, it is absolutely essential to provide the investigating agency with powers of search and seizure. Evidence is required to connect a suspect with the commission of an offence. In the case of hard-core cartels, evidence could be in the form of documents such as minutes of meetings, e-mails, diary entries etc. An examination of scene of crime is the greatest hub in order to collect such evidence. For instance, meeting between the “competitors” could have taken place at hotel rooms and the records of the bookings of these rooms might be useful in proving that the meetings actually took place.\(^5^5\)

In order to ensure that the evidence is not tampered with, it is important that the investigating authority is given certain powers with respect to search and seizure. For e.g. the investigating authority should be given the power to conduct unannounced searches. This should be done in order to minimize the opportunity to destroy the evidence and the possibility to interfere with witness. With respect to seizure of documents, the investigating authorities should be given the power to seize original physical documents and also documents from electronic sources of storing including computers, telephones, and portable tablets. The information sought from these devices will help them uncover plethora of secret information with respect to any

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\(^5^5\) Heating Oil, Ford Car Dealers and Citroën Car Dealers cartel cases, the Irish Competition Authority uncovered evidence that meetings of all three cartels had taken place in numerous hotels throughout the State. In the Heating oil case, evidence available with the Commission was that the cartel members had arranged a seminar on competition law issues.
ongoing or potential cartels.

(b) Power to Search Private Homes

According to the Irish Competition Authority, individuals play a pivotal role in the commission of cartel offences. It is in fact the individuals who are running the corporate undertaking involved in any anti-competitive practice. Therefore, according to the authority, these individuals who act as facilitators in the cartel offence ought to be prosecuted equally for abetting the price-fixing crime.

In order to establish the liability of these individuals, it is necessary that the investigating authorities be vested with the powers to search their private homes. These searches could be an equally enriching source of evidence in cartel detection investigations. It is safe to assume that if such searches would not be allowed, conviction of some individuals would not be carried out owing to lack of coherent evidence.

However, it should also be borne in mind that such searches should only be carried out in exceptional circumstance. That is to say when there are reasonable grounds of suspicion about the individual having been part of the alleged activity or about the evidence being available at that premises.

(c) Powers of General Detection

Apart from the abovementioned techniques, there are many other aspects that are essential while conducting a criminal investigation. These can vary from taking witness statements to interviewing suspects. The Investigating Authority might at times need to gather information from secondary sources such as telephone companies (in order to obtain evidence of telephone records between suspects), banks (in order to keep track of financial records of the suspects). Proactive investigation techniques such as electronic surveillance in the form of wire or phone tapping could also be deployed although doing this might invoke certain constitutional issues.
V. LENIENCY POLICY AS A REMEDY TO CARTELIZATION

V.I US Leniency Program

The US DOJ successfully implemented the American Corporate Leniency Program in 1993. Although there was a Leniency Program in place in US since 1978, the program had not achieved desirable success as it attracted a very few applications owing to the excessive discretion available with the Commission. This discretionary character substantially deterred the success rate of the detection of cartels.\(^{56}\) The new model took note of these issues and accordingly introduced a number of key provisions.

The first and the foremost feature of the 1993 model was introducing sanctions for automatic amnesty for the first company to have brought the evidence before the investigation for detection of cartel has been initiated. This immunity extends to all members of the company allegedly related to the cartel activity including all directors, officers and employees with respect to criminal prosecution as well as any pecuniary liabilities.\(^{57}\) The subsequent informant is also entitled to alternative amnesty in relation to cooperation provided subsequent to the start of the investigation.\(^{58}\) These immunities are however subject to certain conditions:

(a) Complete cooperation with the investigation;
(b) Immediate termination of involvement with the cartel activity;
(c) Retribution to the parties to the maximum extent possible;
(d) The applicant company must not have coerced the other party to enter into the concerned cartel activity.

\(^{57}\) This type of Leniency is often referred to as ‘Type A Leniency’. For detailed guidelines see Department of Justice Corporate Leniency Policy, available at www.justice.gov/atr/public/guidelines/0091.htm.
\(^{58}\) Also referred to as ‘Type B Leniency’. Another type of leniency programme that is available for corporations is the Type B leniency. Although the benefits accrued under Type B leniency are not as great, it is available even after the investigation has been commenced. Christopher Harding and Julian Joshua, ‘Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency’, Oxford University Press, Ed. 2007
In addition to the above general conditions, the applicants seeking ‘alternate amnesty’ are also subject to certain other specific conditions, some of which are subject to the evaluation of DOJ:

(a) The DOJ must not have evidence ‘likely to result in sustainable conviction’
(b) The amnesty given to the party must not be unfair to others;
(c) Timing of the application; and
(d) The act must not be an individual confession. It must, therefore, be a ‘truly corporate act’. 59

In addition to the aforementioned Corporation Leniency Program, the US Competition Law also provides for the Individual Leniency Policy. This policy applies to a director, officer, or employee of a corporation engaged in an anti-competitive practice and any of the above officers come forward on his own to report a violation. If, however, the corporation applies for leniency, the individual officers of the corporation may only be granted immunity under the Corporate Leniency Policy. Under the Individual Leniency Policy, the individuals coming forward to make an application are subject to three conditions:

(a) That at the time of individual coming forward to make an application, the Division has not received any information about the alleged activity from any other source;
(b) That the individual who comes before the Division to give information, provides complete and continuing cooperation to the Division throughout the ongoing investigation; and
(c) That the individual who has agreed to give information did not him/herself coerce another party to enter into that arrangement and that he was not the ‘ringleader’.

This 1993 model saw a significant increase in the number of applications. Certain immunity from criminal liability definitely proved to be an ‘irresistible model’ under the US regime. This model was further extended by the DOJ in 1999 in the form of ‘Amnesty Plus’ programme. Accordingly, if a company is not the first one to bring evidence of any collusion in

59 Ibid.
relation to cartel activity in one market, but is however the first one to bring evidence of an illegal activity in another market, in addition to the obvious automatic amnesty for the latter (the ‘amnesty’ aspect, it will also be given preferential treatment in any plea bargaining with respect to the first prosecution. (the ‘plus’ aspect).

The success of DOJ can be attributed to its three pillars:

(a) **Certainty in the offer to amnesty**: The first applicant or the first ‘whistleblower’ gets absolute immunity from civil as well as criminal sanctions automatically.

(b) **Effectiveness in the criminal aspect**: The American model is based on the premise of winning the ‘race to the courtroom door’. Prospect of criminal immunity generates a wave of nervousness in the other cartel members also so as to tempt them to win this race.

(c) **Only the first whistleblower gets complete immunity**: The above ploy is reinforced by this aspect.

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60 Excerpts from Gary R Spratling, ‘Making Companies and Offer They Shouldn’t Refuse’, at his address at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (Feb. 1999) See also Joshua at 58.
The above figure, according to Harding and Joshua, comprehensively represents ‘a prisoner’s dilemma’\textsuperscript{61} – whether to bring the information now in order to claim immunity, or how quickly, or else risk losing it altogether. The underlying premise of introducing such a model is to encourage expediency. This model proved to be a basis for many other jurisdictions as well.

The US Leniency Program has had a significant effect on enforcement. The US Government Accountability Report of 2011 reaffirms this enforceability which states that out of the 173 criminal cartel cases filed by the Division between 2004 and 2010, 129 cases involved a successful leniency applicant.\textsuperscript{62} The success of this model proved to be a basis for similar programmes being adopted in as many as 50 other jurisdictions.

\textsuperscript{61} Supra at 58.
These developments mark some major shifts in legal methods: a shift from competition law to criminal law. This shift is a matter of interest for both competition as well as criminal lawyers. Having moved into the domain of criminal law, the use of leniency programs then present questions for criminal jurisprudence and penal theory: questions pertaining to the problems of evidence and criminal prosecution. Notwithstanding the fact that leniency programmes lay down a strategy which provide certain immunities to the applicants, it comes at a cost to its practical basis. The entire practical thrust of leniency programmes compromises some core values of criminal jurisprudence, by excusing a major offender who eventually emerges to be a clear ‘winner’ out of the whole situation.

However, it should be noted that in practice, this is usually subject to some retributive concerns: a ‘ringleader’ or the instigator of the offence is not given any immunity. Also, the immunity is not available to the members who coerced other members to enter into a cartel arrangement.

V.II Lessons from the US: Implementing the ‘Irresistible Offer’ Method

The Leniency Program in the US has been the most revolutionary development ever since its inception and has played a major role in the Antitrust Division’s successful prosecution of criminal cartels. Ever since criminal sanctions have strengthened, companies and individuals are more at a loss by not ‘winning the race’ of reporting the cartel conduct. Rather than hoping that their cartel conduct goes unnoticed, companies become more willing to self-report in a hope that they are the first ones so that they could claim advantage.

Even if we do have criminal sanctions in place in India in the near future, the chances of applying for leniency are minimal owing to the fact that the chances of getting amnesty are completely at the discretion of the Commission. This was a major weakness with the original Amnesty Policy in the US in 1978 also. Under the 1978 policy, the grant of amnesty was discretionary and therefore hardly attracted any leniency applications. The Antitrust Division took note of the same and significantly revised the policy in 1993 – amnesty made certain; amnesty available after the investigation had started and amnesty available to corporations as
well as the members therein. The effect was such that where the Division was receiving roughly one application per year, the post 1993 policy saw the number of applications increase multifold.\footnote{J M Griffin, The Modern Leniency Program After Ten Years: ‘A Summary Overview of the Antitrust Division’s Criminal Enforcement Program’, ABA Section of Antitrust Law Annual Meeting, 12 August 2003.}

One important lesson to be learnt from the US Leniency Program is that in addition to granting immunity to the applicant from prosecution, it also ensures that applicant no longer faces any prospect of liability in any inevitable follow-on suits and is only liable for civil damages. This goes on to incentivize the applicant even further considering the potential civil exposure with joint and several liability and additional damages.

Another important lesson worthy of admiration is that the entire procedure is paperless. Given the fact that the grant of amnesty does not in itself protect the recipients from liability that they could incur in private damage actions, companies would be abhorred from participating if they felt that there was a considerable risk that the evidence they provide to the DOJ might be used against them elsewhere in the civil suits. In order to negate this, the Division does not require written evidence in order to grant amnesty. An oral proffer by the company’s attorney would suffice.

Needless to say, another important feature that has been critical to its success is that a grant of amnesty extends not only to the company, but also to all employees who agree to come forward and cooperate with the government’s investigation.

Effective leniency programs have therefore become an indispensable aspect of detection and ultimate prosecution of anti-competitive practices. These programs can only be successful if they have overwhelming incentives to offer to cartel members so that they could betray the cartel. If the incentives are discretionary, and especially when they are confined to threat of pecuniary fines, it is highly unlikely that these programs could prove to be effective. The prospect of fines alone to the top management may not be sufficient enough to push them to apply for leniency. It is only the threat of criminal sanctions in the form of incarceration...
supplemented by automatic amnesty to the applicant that could prove to be a strong incentive for the management to break faith with the cartel activity.
VI. CONCLUSION

As a concluding remark, it is tempting to say, that there are sound reasons for treating hard-core infringements of competition law as crimes. Unlike other anti-competitive infringements, cartels bear the indicia of a purely criminal conduct considering their secretive nature and the motivation of cartelists to increase their profits at the expense of general consumers. The criminalization of cartel behavior reflects the universally acknowledged moral reprobation of conspiracy, deceit and fraud.

The incentives attached to criminalization are perennial. Criminal sanctions in India are sure to have a general deterrent effect that is otherwise weak since the only sanction is in the form of pecuniary fines. However, once these criminal sanctions have been imposed, one must be cognizant that the investigation, detection and prosecution of such conspiracies becomes a more difficult task. Likewise, there are higher evidential burdens to overcome. Therefore, it is equally important to understand that an attractive leniency program is the cornerstone of effective cartel enforcement. There is enough empirical data available that shows that the number of cartel discoveries increases where the leniency provisions guarantee amnesty to the applicants. Given the fact that cartels are difficult to uncover, leniency provisions, if implemented wisely, can prove to be an asset since they make it possible to obtain otherwise secretive information.