THE CALL FOR CRIMINAL SANCTIONS FOR ENFORCEMENT OF COMPETITION LAW AND ITS PRACTICAL CONCERNS

DR. ANEESH V. PILLAI*

ABSTRACT:

The effectiveness of competition law and its enforcement based on fines as well as behavioral and structural remedies has always been a debatable issue. It is argued that such competition law enforcement based on fines and other remedies has less deterrent effect compared to a system based on criminal sanctions. Therefore some of the jurists and authors have proposed that criminal sanctions should be included in the competition law enforcement. This paper seeks to examine the need and effectiveness of criminal sanctions in enforcement of competition law. It discusses the various justifications for the use of criminal sanctions for competition law enforcement such as Utilitarian Justification of Deterrence; Retributivist Non-Consequentialist Justification; Stigma Effect; To ensure the Obligation of Members or Agents of the Company; To Legitimize the Extra Territorial Application of Competition Law; and To Ensure Cooperation among Countries. At the same time this paper also identifies various practical issues involved in the criminal enforcement of competition law such as the problem of defining competition law offences; attribution of mens rea to corporate bodies; attribution of vicarious liability to the body corporate in criminal law; etc. Further the paper attempts to provide some pragmatic solutions for dealing with the various concerns raised by the criminal enforcement of competition law.

I. INTRODUCTION

In the contemporary era, competition law has emerged as one of the most significant branches of law[1]. Its importance can be attributed to the increasing trade, simultaneous changes in the market and the need to regulate such markets. The basic objectives of competition law are; to eliminate anti-competitive practices in the market, to promote competition and to protect the welfare of consumers. Competition law regimes all over the world can be classified into three broad categories depending upon the approach followed by the countries. Firstly, many countries consider competition law as civil wrongs, for example the European Union Competition Law[2]. Secondly, some countries consider

* Faculty of Law, Hidayatullah National Law University, Chhattisgarh.

[1] In USA this branch of law is known as 'Antirust Laws'. However in most of the jurisdictions of the world this branch of law is known as 'Competition Law'.

[2] Wouter P. J. Wils, *Is Criminalization of EU Competition Law the Answer?* (2005). 28 World Competitions, Issue 2, 117-159.

competition law as criminal in nature, for example the US Antitrust Laws[3]. Thirdly, some countries have adopted a mixed approach and consider some of the anticompetitive practices as criminal offence and some anti competitive practices as civil wrongs. For example in the UK most of the anti competitive practices are civil wrongs but cartels are considered as an offence by the UK Enterprise Act, 2002; in Austria, anti competitive practices are civil wrongs but bid rigging is considered a criminal offence. Though countries follow a civil or criminal or mixed approach, there has always been a dispute regarding the civil approach in competition law[4].

The effectiveness of competition law and its enforcement, based on monetary penalty and behavioral and structural remedies, has always been a debatable issue. It is argued that such an enforcement based on fines and other remedies has a less deterring effect as compared to a system based on criminal sanctions. Therefore some of the jurists and authors have proposed that criminal sanctions should be included in the competition law enforcement[5]. At the same time it is to be noted that some countries who had initially adopted criminal sanctions for enforcement of competition law have subsequently decriminalized the same and adopted a civil approach. For example in the Netherlands, the Competition Act, which came into effect in 1997, replaced an earlier system of criminal enforcement by a purely administrative system with only fines for undertakings. Similarly in Austria, the 2002 Competition Law reform replaced a system of criminal enforcement by a system of administrative fines for companies. Also in Luxembourg, the Competition Act, 2004 abolished an earlier competition regime based on criminal enforcement and replaced it by a new regime based on only fines[6]. In view of the increasing importance of competition law in the contemporary times, it is necessary to examine the effectiveness of criminal sanctions for the enforcement of competition law. Thus, this paper seeks to examine the need and effectiveness of criminal sanctions in enforcement of competition law.

---

[3] Federal Trade Commission (USA), *An FTC Guide to the Antitrust Laws* available at http://ftc.gov/bc/antitrust/ factsheets/antitrustlawsguide.pdf (last visited September 30, 2013).

[4] Allan Fels, *International Perspective Competition Policy Asia Pacific Region Regional Economic Development policy to Planning to Investment Opportunities in Vietnam Hanoi,* available at http://www.accc.gov.au/system/ files/International%20Perspective%20Competition%20Policy.doc. (last visited September 30, 2013).

[5] *Supra* Note 1. Also See ANGUS MACCULLOCH, BARRY RODGER, COMPETITION LAW AND POLICY IN THE EC AND UK, 394 (Routledge – Cavendish, 4th Edn.-2009); KATALIN J. CSERES, MAARTEN PIETER SCHINKEL, FLORIS O.W. VOGELAAR, CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES, (Edward Elgar Publishing Limited, U.K. 2006) ; Julie Clarke, *The Increasing Criminalization Of Economic Law – A Competition Law Perspective*, (2012) 19 Journal of Financial Crime, Issue 1, 76 – 98; Gurgen Hakopian, *Criminalisation of EU Competition Law Enforcement – A Possibility After Lisbon?*, (2010) Comp. L. R, Vol. 7 (1) 157-173.

[6] K. J. CSERES et.al, CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, 73-74 (Edward Elgar Publishing Ltd., 2006).

II. COMPETITION LAW AND ITS ENFORCEMENT

Competition law may be considered as a set of rules and judicial decisions developed by governments and judicial institutions in order to promote competition in the market as well as prevent those practices which adversely affect the competition in the market and are also against the welfare of the consumer in the market. During the past two decades the number of countries that have adopted competition law framework has grown exponentially[7]. In fact many of the developing countries have adopted and developed competition law in response to the increasing liberalization and for reforming their markets in order to streamline it with the changing practices in the market. India had also adopted the policy of economic liberalization in the last quarter of 1980 and introduced a number of economic reforms. As a result the Indian markets started growing and not only the domestic players expanded but foreign market players also entered into Indian market. In order to cope up with these changes in the market the Indian Government adopted the Competition Act, 2002[8].

The Competition Act contains various provisions to deal with practices which affect the competition in the market such as anti-competitive agreements, abuse of dominant position by dominant firms and regulation of business combinations. Like any other competition law regime, the Competition Act also contains the penalty provisions for infringement of its provisions. The penalties provided under the Competition Act are of two types *i.e*. Monetary Penalty and Criminal Liability[9]. Monetary penalty is imposed under the Competition Act for entering into anti competitive agreements; for abuse of dominance and for entering into combinations having an adverse effect on competition in Indian market. The criminal liability under the Competition Act arises only when there is a non-compliance of an order passed under the Act[10]. It is to be noted that there is no criminal liability under this Act for any of the anti competitive practices.

---

[7] Michal S. Gal, *The Ecology Of Antitrust Preconditions For Competition Law Enforcement In Developing Countries In Competition, Competitiveness And Development*, UNCTAD, Geneva, 20-38 (2004).

[8] The Competition Act, 2002 was enacted by the Parliament of India in the year 2002 as part of liberalization and on recommendation of high powered Raghvan Committee Report, 2000. It replaced the Monopoly and Restrictive Trade Practices Act, 1969. The Act received the assent of the President in 2003. The Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007 and again by the Competition (Amendment) Act, 2009.

[9] See, Mehak Gupta, *Penalties for Infringement of Competition Law,* Internship Project Report, Competition Commission of India, New Delhi, July 2012, http://cci.gov.in/images/media/ResearchReports/Penalties%20for%20infringement%20of%20Competition%20Laws.pdf (last visited Sept. 30, 2013)

[10] *See*, § 42 & §48

III. NEED FOR CRIMINAL SANCTIONS FOR COMPETITION LAW ENFORCEMENT

The use of criminal law for the prevention of malpractices in the market and protection of the interests of consumers is not a new idea. Even in ancient India, the malpractices in market were considered as an offence and one can find an elaborate discussion in the Vedas[11]. During such period four broad types of relevant criminal offences were prominent: adulteration of food stuffs, charging of excess prices, fabrication of weights and measures and sale of forbidden articles. For all these offences, statutory measures and punishments were discussed in prominent texts like Manusmriti, Naradasmriti and Kautilya's Arthasastra[12]. The history of other countries also shows that criminal sanction was used for preventing malpractices in the market. For example, in Austria, the seller of adulterated goods had to swallow all of the adulterated products publicly and in France in the 16th century there was a law under which people were allowed to throw eggs at those who had sold eggs of lower quality[13]. Thus criminal law has been used for the detecting, preventing and punishing the malpractices in the market place.

In modern times the markets have expanded and the detection and prevention of malpractices or anti competitive practices is not easy. However, most of the countries have developed a competition law system to deal with such malpractices based on monetary penalties. In this context it is to be noted that the competition law based on monetary penalty suffers from a serious weakness. This is because generally a potential violator of competition law would calculate tentatively the amount of financial profit he would make from his anti competitive practice and also calculate approximately the amount of monetary penalty he may incur if caught by law. Though the exact fine amount is difficult to calculate, the potential violator may calculate the approximate amount by looking into the practice of competition authorities. Thus if the net financial profit is more compared to the monetary penalty he would not hesitate to adopt the anti competitive practices. The companies or the traders are able to pay the fine or compensation, because it is only a negligible amount compared to the amount they have obtained from engaging anti competitive practices. Though there are various instances of the Competition Commission of India ('CCI') imposing crores of rupees as fine on violators[14], it is to be noted that such amounts are negligible for companies. For instance, the CCI in its 2012 order, had

---

[11] Dr. A. Rajendra Prasad, *Historical Evolution of Consumer Protection and Law in India: A Bird's Eye View*, 11 JOURNAL OF TEXAS CONSUMER LAW 132- 136 (2008).

[12] V. BALAKRISHNA ERADI, CONSUMER PROTECTION JURISPRUDENCE, (LexisNexis, Nagpur, 2005) pg.

[13] MAN CHAND KHANDELA, CONSUMER PROTECTION IN INDIA, 10 (Shyam Prakashan, Kanpur 2001).

[14] For example, Competition Commission of India has imposed a penalty of Rs. 1,773.05 crore on Coal India Ltd for abusing its dominant position as a fuel supplier, available at http://www.thehindu.com/business/cci-slaps-rs1773-cr-penalty-on-cil/article5444989.ece, (last visited on 17.02.2014).

imposed a fine on Aditya Birla Group's Ultratech Cements (Rs 1,175 crore), Ambuja Cements (Rs 1,164 crore) and ACC (Rs 1,148 crore). The fine was fixed at 50% of their profit during 2009-10 and 2010-11[15]. This example shows that even if cores of rupees are imposed as fine it will not adversely affect the violator since they are making very high profits and have large assets. . Thus in most cases the violator is happy to pay this negligible amount and may consider it as a license amount to continue or proceed with their anti competitive practices. Therefore to remedy this weakness it is suggested that the Competition Act should criminalize anti competitive practices and provide criminal sanction such as imprisonment. There are various arguments put forward by jurists in order to support the inclusion of criminal sanctions in Competition Act

1. The Utilitarian Justification of Deterrence

The Utilitarian Justification of Deterrence is based on the assumption that criminal sanctions have more deterrent effect than a civil sanction. This is the most common justification for introducing criminal sanctions for anticompetitive behavior. It is argued that for first time offenders, this will ensure effective deterrence in contrast to civil penalties. There has been a general consensus that pecuniary penalties do not meet the standard of effective deterrence since these penalties fall short when compared to the gains achieved from the violation[16].

According to the utilitarian principle propounded by Bentham, the law should be such that it promotes the greatest happiness of greatest number. As per Bentham all human action is subject to two sovereign masters: the pursuit of pleasure and the avoidance of pain[17] and hence the legislature may opt to use instruments of pain and pleasure for achieving its social goals. Thus application of this theory to competition law would mean that the punishment for anti competitive practices, although it causes pain, can be justified because it incapacitates the offender. It specifically deters offenders from future crimes, promotes general deterrence, and may reform the offender. The US Antitrust laws are based on this justification[18]. The US experience has shown that imprisonment is a very effective

---

[15] See, http://timesofindia.indiatimes.com/business/india-business/Tribunal-upholds-CCIs-630cr-fine-on-cement-companies/articleshow/20116121.cms, (last visited February 17, 2014).

[16] Kush Makkar, *Combating Cartels in India: Justifying Criminalization,* Internship Project Report, Competition Commission of India, New Delhi, July 2012, , available at http://www.cci.gov.in/images/media/ ResearchReports/cartels.pdf, visited on 17.02.2014.

[17] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (John Bowring ed., 1843).

[18] Susan Beth Farmer, *Real Crime: Criminal Competition Law,* available at http://www.luc.edu/media/lucedu/ law/ centers/antitrust/pdfs/publications/newsviews/farmer.pdf, (last visited September 30, 2013)

deterrent for potential antitrust offenders. It was pointed out by Arthur Liman that, "For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail; and thus the threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations."[19]

2. The Retributivist Non-Consequentialist Justification[20]

This argument is based on the retributive theory of punishment, which means that a crime is not aimed merely at the sufferer but is in affront to the community itself which should avenge the wrong and see that retribution overtakes the wrongdoer. It means that the criminal should meet his reward by an equivalent suffering[21]. Thus according to this argument the offenders deserve punishment because they are morally culpable. The persons or enterprises engaging in anti competitive practices have done a wrong against an individual as well as against the society and hence they have to be rewarded with punishments for such wrongs[22]. It is also argued that the anti competitive practices are against the society as a whole like a crime, thus criminal sanctions should be made available for such practices.

3. Stigma Effect

It is considered that the imposition of criminal sanctions carries a stigma. This is because criminal acts and its punishments receive wide publicity. The hostile response of the society and the consequential impact on the family and friends would help to deter the likeminded persons from committing and repeating such crimes. Prison sanctions send a more deterring message as it ensures negative publicity in business community. The criminal sanctions thus have a stigma effect when compared to civil penalties[23].

---

[19] BRENDAN J. SWEENEY, THE INTERNATIONALIZATION OF COMPETITION RULES, 109 (Routledge, USA, 2010).

[20] See for more, LEO ZAIBERT, PUNISHMENT AND RETRIBUTION, 140 (Ashgate Publishing Co. 2006); and Mitchell N. Berman, *Two Kinds of Retributivism*, in R. A. DUFF & STUART GREEN (Ed.), PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, (Oxford Scholarship Online, 2011).

[21] V. D MAHAJAN, *JURISPRUDENCE AND LEGAL THEORY*, 146 (Eastern Book Co., Lucknow, 5th edn. 2005).

[22] *Supra* note 15.

[23] *Supra* note 1.

4. Fines on Corporations will not ensure the Obligation of Members or its Agents

Another argument which supports the criminalization of anti competitive practices is based on the ground that mere imposition of fine on company or corporation will not ensure obligation of members or its agents. This is because the company or corporations have a distinct personality from the members and in many cases it is only the company or corporation which is the legal or artificial person that incurs the liability and the members go free. Also by the time the anti competitive practice is detected, the member or agent or manager of the company/corporation may have left it or joined some other company or corporation. Thus the monetary penalties to a company/corporation would not ensure a responsible behavior by the individual member or manager in a company. Therefore, if there is a criminal liability imposed on such individual members or manager for anti competitive practices they would behave in a more responsible manner and thereby the rate of anti competitive practices can be reduced.

5. To Legitimize the Extra Territorial Application of Competition Law

In the contemporary times due to the developments in international trade, the anti competitive practices have no territorial limits. Business practices of multinational companies can affect the market conditions of more than one country. As a result the modern competition law has to provide for extra territorial application if there is an adverse effect in the market. The Competition Act provides for an extra territorial application under Section 32[24]. However, it is to be noted that the Competition Act is only a civil law. The application of civil competition law by one country in the territory of another country is not permissible under international law. This is because under international law every state is equal and sovereign, so no state can enforce its civil law in the territory of another country.

At international level civil jurisdiction of a state is based on territoriality i.e. every state has jurisdiction only on those individuals who are within its territory and cause of action arises within their territorial limit[25]. Thus no state can exercise jurisdiction on a cause of action arising in another country. However under the criminal jurisdiction extra territorial jurisdiction is permissible on various

[24] §32 provides that: The Commission shall, notwithstanding that - (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.

[25] *Report of the Task Force on Extraterritorial Jurisdiction,* available at www.ibanet.org/Document/Default.aspx? Document Uid=ECF39839*,* (last visited September 30, 2013).

principles such as active nationality, passive nationality, and protective principle. Among these principles, the principle of passive nationality and protective principle can be used as a justification for the extra territorial application of competition law if such competition law is criminal in nature. The principle of passive nationality confers jurisdiction on the basis of nationality of the victim. Thus if an Indian national suffered harm or loss due to the anti competitive practices India can exercise its criminal jurisdiction to such country where the act is committed. So the extra territorial application of criminal competition law can be justified on the ground of protective principle.

Protective principle allows states to exercise jurisdiction if the crime has an effect on the safety and welfare of such country. Thus the countries can exercise jurisdiction on any anti competitive practices committed anywhere in the world if it affects the safety and welfare of such country. It is generally considered that an effective competitive market is a sine qua non for a welfare state. Thus any practice which has an adverse effect on such market can be considered as an act against the welfare of the state. A country's safety is based on its economic stability and anti competitive practices can cause damage to the economy of the country. Thus it can be seen that by using the protective principle extra territorial application of criminal competition law can be justified. Therefore it is argued that to legitimize the extra territorial application of competition law it is necessary to criminalize the anti competitive practices.

6. To Ensure Cooperation among Countries

Further it is argued that if there are criminal sanctions, it would ensure cooperation among the states to prosecute such offenders. This is because at international law there is no system extradition for a civil act. But in case of a criminal case such transfer can be facilitated by way of Extradition Treaties between the countries. In 2010 UK extradited Mr. Ian Norris to USA for price fixing [26].

Thus the criminalization of competition law offers the above advantages. However at the same time it raises various practical concerns.

IV. PRACTICAL CONCERNS IN THE CRIMINALIZATION OF COMPETITION LAW

The most important concern is with respect to the definition of offence under the competition law. The question which arises is whether each and every anti competitive practice can be considered as an offence? Or only some practices can be considered as offence? And what criteria should be followed while considering anti competitive practice as an offence.

---

[26] See, "*Former Morgan Crucible Chief Ian Norris Sentenced To 18 Months in Us Jail*", THE TELEGRAPH, Dec 10, 2010.

The second major concern is that in order to constitute a crime both 'actus reus' and 'mens rea' are essential. *Actus reus* is the physical act involved in a crime and *mens rea* is the guilty mind for committing such an act. In competition law the element of *actus reus* can be proved by establishing an anti competitive agreement or an abusing practice on the part of the accused. However proof of *mens rea* or guilty intention is a herculean task. This is because the accused in an anti competitive practice is primarily a corporate personality[27]. Hence, the question which arises here is whether the intention of the manager or employee or an agent of company/ body corporate can be attributed to such a legal person?

A further concern which arises is that an anti competitive practice can be performed by a manager/employee/or an agent of a body corporate. In such a case the question is who can be held criminally liable or in other words who can be considered as an accused? This is because generally the anti competitive practices are carried out in the name of a company/body corporate. The decision for such practices is taken at management level; but they are carried out by the employees. Therefore the question is whether manager or employee should be considered as an accused in such case or whether the company can also be considered as an accused.

The fourth major concern is that in most of the countries that follows a civil competition law including India, the proceedings are initiated by the enforcement agency i.e. Competition Commission and it imposes the monetary penalty. Thus the Competition Commission can be both the aggrieved party and the decision maker at the same time. However, if the competition law is criminal in nature such enforcement is not acceptable. This is because India follows an adversarial system for prosecution in criminal matters, thus both prosecutor and judge should not be the same person. Moreover, such a trial will violate the fundamental right to fair trial of an accused.

The final concern is with respect to the proof of anti competitive practices. This is because the standard of proof required in a criminal case is very high compared to the proof required in a civil case. In a civil case the penalty can be imposed on a violator on the basis of balance of probability; however in criminal case in order to impose sanction the case has to be proved beyond any reasonable doubt. Hence in order to impose a criminal sanction in a competition law case, the guilt of the accused should be proved beyond any reasonable doubt. However it is a herculean task to prove the guilt of the

[27] Lori Cornwall Mark Katz, *Criminal Fundamentals: Horizontal Agreements between Competitors,* available at http://www.dwpv.com/images/CriminalFundamentalsHorizontalAgreementsBetweenCompetitors.pdf. , (last visited September 30, 2013).

accused in a competition law case[28]. This is because compared to a traditional crime the competition law crimes are carried out by business experts in the four walls of their business house and therefore does not leave any evidence against them. Moreover in competition law cases investigation is done by either commission itself or an agency like director general[29] appointed by the commission. It is to be noted that the members of the commission or such other agency engaged in investigation generally are not trained in investigation of crimes. Thus it can be argued that the collection of evidence and proving the guilt of an accused in a criminal competition case is very difficult.

V. THE WAY FORWARD

Competition law is the main tool in the hands of government to create competition in the market and to eliminate practices which have an anti competitive effect. However the achievement of such objectives is not an easy task. Therefore in order to ensure the effectiveness of competition law and to achieve its objectives, criminalization of competition law is suggested. The criminal law tries to establish that a criminal act will not end as a profitable enterprise but it would be an ill bargain to the offender. The temptation to conserve or promote one's selfish interest is at the bottom of every crime. The criminal law by imposing an adequate penalty on the offender as a consequence of his crime, seeks to create an artificial counter motive to avoid the path of crime. To this end it inflicts physical evils on the offender, which vary in proportion to the gravity of the offence or magnitude of its temptation. Such evils are imprisonment, fine and confiscation of property etc[30]. In order to ensure an effective criminal law framework for competition law enforcement, it is necessary to address the practical concerns discussed above. The following suggestions can be considered for dealing with those concerns and for establishing an effective criminal law framework for competition law enforcement.

1. The anti competitive practices which are considered as *per se illegal* by various competition law jurisdictions can be considered as offences under competition law[31].

2. Mens Rea should be attributed to the company/ body corporate. Recently, the Supreme Court of India in *Iridium India Telecom v. Motorola Inc*[32] has confirmed that companies can be prosecuted for

---

[28] Dr. Péter Mezei, *"Wanted: Antitrust Criminals": Criminalization of Cartel Law with A Special View to Hungary* available at *www.bpugyvedikamara.hu/download.php?id 120560* (last visited September 30, 2013)

[29] *See* §16 Competition Act, 2002.

[30] *Supra* note 12 at 71; Aneesh V. Pillai, *Criminal Law: A Tool for Consumer Protection in India*, 1 (6) INDIAN JOURNAL OF APPLIED RESEARCH, 131 (2012)

[31] The practices like, Price Fixing; Cartels; Sharing of Market; Bid Rigging or Collusive Bidding; and Controlling of Production, Supply, Markets, Technical Development, Investment or provisions of Services. (*See* §. 3(3) of Competition Act, 2002)

[32] Iridium India Telecom v. Motorola Inc (2011) 1 SCC 74.

offences involving *mens rea*. The Court in *Iridium* case has approved that the intention of the directing mind and will of a company is attributed to the company.

3. Vicarious Liability should be imposed to the company and other personas who are involved in such activities. Though vicarious liability is not a general rule in criminal law, a statute can impose vicarious liability. Thus all the persons who are involved at the decisional level and the level of execution should be considered as criminally liable.

4. A separate court should be established for conducting the trial of criminal competition cases and trained prosecutors should be appointed for competition law cases.

5. A proper market investigation body should be established with adequate number of trained investigators for the investigation of competition law cases.

****