

CRIMINALIZATION OF CARTEL ACTIVITY – A DESIRABLE GOAL FOR INDIA’S COMPETITION REGIME?

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This article explores the criminalization of cartel regimes in the specific context of the Indian economy. Starting with the assumption that cartelisation is illegal and must be punished in some way, it explores the limitations of mere financial penalties, as has been acutely felt in the European Union. On the other hand, criminal liability, which is of a uniquely personal nature (as opposed to the corporate nature of administrative remedies) has enjoyed widespread success in the United States. As a deterrent, therefore, there is a strong case for criminalising cartel activity. Nevertheless, certain hurdles must be surmounted: notably, the societal attitude towards the offence in question directly affects its implementation, as does enforcement capacity. In the specific context of India, keeping in mind the benefits and burdens outlined above, the authors suggest a gradual move from administrative penalties to criminal liability, using competition advocacy to “cultivate the landscape” for such a change.

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I. INTRODUCTION

The international arena is dominated by a clear consensus, at both political and enforcement levels, on the harmful effects of cartel activity. Cartel agreements eliminate or significantly reduce the competitiveness of markets and have an adverse effect on consumer welfare. Cartel activity has been described as a “*cancer in an open, modern market economy*”, the effects of which are entirely negative¹ and as “*unambiguously bad*”,² interfering with competitive markets and international trade and harming both developed and developing countries.³

Considering these harmful effects, it is unsurprising that controlling cartel activity has been high on the agenda of competition regimes worldwide. Significant resources have been invested in investigation and prosecution, and agencies have been focused on building their enforcement capacity and capabilities. The fight against cartels has highlighted the need to design effective penalties, whether administrative or criminal, which are accompanied by clear and practical leniency and immunity programmes.

The combination of harsh penalties and effective leniency programmes provides the driving force for the majority of cartel investigations. It is generally accepted that deficiencies at either level (penalties or leniency) may undermine successful competition law enforcement. It is in this context that one frequently finds arguments in favour of tougher penalties of a criminal nature for individuals, aimed at increasing the deterrent effect.

This paper explores the concept of criminalization – its benefits and the limitations associated with its implementation. It then reflects on whether criminalization of cartel activity should serve as a worthwhile goal for the Indian competition regime and be considered the next natural development for Indian competition law enforcement.

¹ M Monti, *Why Should We Be Concerned with Cartels and Collusive Behaviour?*, Speech at the 3rd Nordic Competition Policy Conference, Stockholm (Sept. 11-12, 2000).

² ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *HARD CORE CARTELS: RECENT PROGRESS AND CHALLENGES AHEAD* 15 (2003).

³ *Id.* See also the 1998 Organisation for Economic Co-operation and Development [hereinafter “OECD”] Recommendation, which considers hardcore cartels to be “the most egregious violations of competition law [which] injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.” OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (Mar. 25, 1998).

II. THE CASE FOR CRIMINALIZATION

Recent developments in enforcement against cartels are characterised, *inter alia*, by the introduction of tougher and more determined policies.⁴ The trend⁵ towards harsher penalties includes, in some jurisdictions, criminal penalties (custodial sentences) for “hard-core” cartel conduct.⁶ These supplement financial penalties and represent a belief that criminalization of cartel activity and the imposition of custodial sentences increases the deterrent effect of competition regimes, thereby providing a superior tool in the fight against cartels.⁷

To better understand the case for criminalization, one should briefly explore the limitations of an enforcement system in which monetary sanctions applied to cartel members represent the sole penalty for cartel conduct.

In general, high financial penalties, supported by adequate enforcement capacity and a leniency programme, may be able to provide an adequate deterrent effect. Such a deterrent effect depends on two main variants: (a) the likelihood of

⁴ C. Harding, *Business Collusion As a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels*, 14 CRITICAL CRIMINOLOGY 181 (2006).

⁵ Even though the trend develops asymmetrically across the globe, see e.g. A. Ezrachi and J. Kindl, *Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus in CRIMINALISING CARTELS* CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT (C. Beaton-Wells & A. Ezrachi eds., 2011).

⁶ The 1998 OECD Recommendation, *supra*, n. 3, defines a “hard-core” cartel as: “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”.

⁷ C. Beaton-Wells, *Australia’s Criminalization of Cartels: Will it be Contagious?*, presented at the 4th ASCOLA Conference, Washington (June 16-17, 2009) at 38; JP Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence – Mapping a New Field for Global Administrative Law*, U. Oxford Centre for Competition L. & Pol’y, Working Paper CCLP (L) 26 (2009); AB Lipsky, Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 ANTITRUST L. J. 965, 967 (2009) (where the author refers to “the three global antitrust tidal waves”, the third of which is described as “a more recent proliferation of new and more powerful enforcement modes ... and the use of criminal remedies for serious antitrust violations”; B.A. Barnett, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, US Dept. of Justice, Antitrust Division, *Criminalization of Cartel Conduct – The Changing Landscape*, address at the Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide Apr. 3, 2009); OR D.I. Baker, former Assistant Attorney General in charge of the Antitrust Division, US Dept. of Justice, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001)

detection and successful prosecution (determined by the enforcement capacity and success of leniency programmes) and (b) the level of penalty. Pursuant to the optimal deterrence theory, the level of fine discounted by the likelihood of detection and successful conviction should be such as to strip the cartel members of the benefits (profits) they have or would have realised by their participation in the cartel.⁸ When such level is achieved, a rational actor will lack the incentive to engage in cartel activity. While one may never reach the optimal level of enforcement, it provides a valuable reference point when designing enforcement policies.

In line with this rationale, former European Commissioner for Competition law, Neelie Kroes has explained that: *“Unlike our colleagues in Washington, we in the Commission can’t threaten cartelists with a spell in prison – although some of our Member States can – but our very tough attitude to administrative fines aims to achieve a similar deterrent effect.”*⁹

Accordingly, the enforcement tool box in Europe is made up of high financial penalties, together with an effective leniency regime. While high financial penalties imposed on the corporate entity may enhance the deterrent effect, it is important

⁸ See, e.g. W.P.J. Wills, *Optimal Antitrust Fines: Theory and Practice*, 29(2) WORLD COMPETITION 183 (2006); M Motta, *On Cartel Deterrence and Fines in the European Union*, EUR. COMPETITION L. REV. 209, 212 (2008); C. VELJANOVSKI, THE ECONOMICS OF LAW 84-93 (2nd edn., 2006); D. Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, ANTITRUST L.J. SYMPOSIUM ON NEO-CHICAGO ANTITRUST (forthcoming). Theories drawing especially from Gary Becker’s optimal-penalties framework in *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), calculate the ‘optimal’ fine not on the basis of expected cartel gains but rather as a multiple of net harm caused by the cartel and the inverse probability of successful detection and punishment. See, W.P.J. Wills, *supra*, 190-193 (for a discussion of the difference); see also, BH Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 731-733 (2001). Note that there would be significant interconnections between cartel gains and the harm the cartel caused as cartel overcharge represents, on one side, the gains of the cartel and, at the same time, the harm on consumer welfare it caused. For a critique of the “optimal deterrence theory” from the behavioural economics point of view, see, e.g., ME Stucke, *Morality and Antitrust* [hereinafter “Morality”], COLUM. BUS. L. REV. 443, esp. 470-480; or his *Am I a Price Fixer? A Behavioural Economics Analysis of Cartels* [hereinafter “Am I a Price Fixer?”], in CRIMINALISING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

⁹ N. Kroes, Key developments in European competition policy over the two last years, speech at the European American Press Club, Paris, Speech/07/2 (Jan. 8, 2007), at 4.

to bear in mind some of the limitations of administrative fines. Most noticeably, such penalties may be undermined by the ability to externalise their cost. Arguably, financial penalties may lose some of their bite when they apply to the corporation and not the individual.¹⁰

A classic “agency problem” may result, where the managers and the individuals engaged in the cartel activity externalise the “cost” of the penalty since the administrative fine will apply not to them individually, but to the corporation they work for. Since these individuals are not the subjects of the penalty, they only partially internalise the associated cost. That cost is felt instead by the corporation, its shareholders, or even at times its customers. Even in cases where individuals bear some of the cost, it may be viewed as an acceptable financial risk which has a limited effect on the livelihood of the individual. In addition, given the time lag between the implementation of the cartel and its subsequent detection and punishment, if any, the responsible managers may have already left the firm.

Absent other sanctions, in order to maintain the deterrent effect, the financial penalties would have to steadily increase.¹¹ This highlights another limitation of such penalties, namely the impact they may have on the viability of the corporate entity. In order to prevent the collapse of the corporate entity, penalties would have to be capped. To clarify, a significant financial penalty which may in theory provide an adequate deterrent effect, might cause the collapse of the corporate entity, resulting in a structural change in the market. This, in turn, would lead to increased concentration and is likely to generate more harm than good.¹² There would be additional social costs associated with the potential bankruptcy of the

¹⁰ W.P.J. Wills, *Is Criminalization of EU Competition Law The Answer?*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT 60, 81 (K.J. Cseres, M.P. Schinkel & F.O.W. Vogelaar eds., 2006); Baker, *supra*, n. 7, at 705; T. Calvani and T.H. Calvani, *Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?*, 17 COMPETITION & CONSUMER L. J. 119, 130-131 (2009). Note also that fines imposed upon corporations may not strictly speaking be viewed as designed to deter but rather ‘to provide an incentive for the corporation to monitor, detect, and prevent crimes committed by agents acting within the scope of their employment.’ Kobayashi, *supra*, n. 8, at 736.

¹¹ “Where fines are the only sanction, they must bear the entire burden of deterrence, and a priori may need to be higher than in jurisdictions where they are combined with other sanctions”. International Competition Network [hereinafter “ICN”] Cartels Working Group, *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference, Kyoto, (Apr. 2008), at 9.

¹² Wills, *supra*, n. 8, at 204-205.

punished corporation.¹³ Inability to pay may also decrease the actual deterrent effect.¹⁴ Capping the level of penalty may eliminate these unwanted side-effects, but would also result in sub-optimal deterrence.¹⁵

Reflecting on the “enforcement equation” and the relationship between the likelihood of detection (including punishment) and the level of fines, the limitations of financial penalties become evident. It is in this context that criminal sanctions for individuals involved in cartel activity may be of value. Criminalization, when it involves imprisonment, has the potential to bypass agency problems and bring home the message that those involved in cartel activity will pay a *personal price* for their involvement. It also resolves the difficulties associated with the level of financial penalties and their impact on the economic viability of the corporation. Indeed, the primary reason for introducing criminalization as a sanction was reported by the ICN to be the increase in “*effective deterrence by focusing the attention of company managers on the extreme personal consequences of participating in cartels.*”¹⁶ The loss of freedom provides a significant deterrent for the individual involved, which cannot be matched by financial penalties.¹⁷ Furthermore, such individual sanctions are more likely to register with the shareholders and result in a change of management, further impacting the economic viability of cartel members.¹⁸

¹³ Wills, *supra*, n. 10, at 81; Wills, *supra*, n. 8, at 196-197; Calvani and Calvani, *supra*, n. 10, at 129-130; See also VELJANOVSKI, *supra*, n. 8, at 91-93 (for a summary of possible negatives, or unwarranted side-effects, of too high fines). For a more reserved view on negative consequences of high penalties see Motta, *supra*, n. 8.

¹⁴ VELJANOVSKI, *supra*, n. 8, at 92.

¹⁵ For the sake of completeness, one should add that in the “deterrence story”, all financial penalties including administrative fines as well as payments under private civil antitrust suits (and possibly also other negative effects, such as loss of shares market value) shall be taken into account when assessing overall deterrence (Kobayashi, *supra*, n. 8, at 732-733). In addition, if one takes into account that in a global economy most cartels cross state-borders, cartel members face multiple sanctions from the jurisdictions involved (Kobayashi, *supra*, at 733; A.K. Klevorick and A.O. Sykes, *United States courts and the optimal deterrence of international cartels: a welfarist perspective on Empagran*, J. COMPETITION L. & Eco. 309, 324-326 (2007). And yet, it has been noted that even the sum of all sanctions imposed by various affected jurisdictions do not disgorge all gains of an international cartel. J.M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels*, Staff Paper 04-08, Dept. of Agric. Eco., Purdue University (July 2004).

¹⁶ *Supra*, n. 11, at 9.

¹⁷ Baker, *supra*, n. 7, at 705.

¹⁸ The perception of criminally charging an individual with a cartel offence need not, however, be viewed so harshly by shareholders. *Note, e.g.*, what happened to BA managers charged with the cartel offence under UK’s Enterprise Act in the subsequently withdrawn BA investigation. It has been reported that after being

The increased deterrent effect has an impact on the whole enforcement equation. Not only does it deter individuals from entering into cartel activity in the first place, it also incentivises them to seek leniency from the competition agency once participation in anti-competitive activity has begun. In addition, by targeting individuals within corporations, the criminal regime may create a rift between them, thus further destabilising the cartel agreement.¹⁹

In line with the deterrent rationale, US officials have hailed the criminalisation of cartel activity as the decisive instrument to ensure effective cartel enforcement. Some have argued that “the most effective deterrent for hard core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences.”²⁰ Similarly, it has been said that the “use of criminal law processes and penalties against individual wrongdoers has been one of the most successful and important features of US antitrust enforcement.”²¹ The sheer commitment to, and advocacy of, criminal antitrust enforcement, is illustrated by comments made by Baker, who noted that “[w]ell over ninety-nine percent of all prison time served by antitrust violators worldwide has been served in US prisons for Sherman Act Section 1 violations.”²² The sentencing record in the United States echoes these views. US Department of Justice Antitrust Division sentencing statistics reflect a steady trend toward higher corporate fines and longer jail sentences.²³ They also highlight increased focus on individual accountability and increased frequency of prosecution.²⁴

charged, one BA executive remained with the company and was even promoted and received significant share options in the company. A. Stephan, *The Trial that will Make or Break the UK Cartel Offence Begins Today: The British Airways Four* available at <http://www.competitionpolicy.wordpress.com> (Apr. 11, 2010); A. Stephan, *The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal* [hereinafter “The Battle”], in CRIMINALISING CARTELS, CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

¹⁹ Baker refers to such situations as “a ‘dog eat dog’ environment and the prosecutors love it.” Baker, *supra* n. 7, at 708.

²⁰ Barnett, *supra* n. 7, at 1.

²¹ Baker, *supra* n. 7, at 713.

²² Baker, *supra* n. 7, at 710. A similar point is made in Calvani and Calvani, *supra*, n. 10, at 125: “only the United States imposes significant custodial sentences with regularity.”

²³ Baker, *supra* n. 7; see also S.D. Hammond, DEPUTY ASSISTANT ATTORNEY GENERAL FOR CRIMINAL ENFORCEMENT, ANTITRUST DIVISION US DEPT. of Justice, *Recent Developments, Trends, and Milestones In The Antitrust’s Division’s Criminal Enforcement Program*, presented by the A.B.A. Section of Antitrust Law, 56th Annual Spring Meeting (Mar. 26, 2008), at 18-20; Sokol, *supra*, n. 8.

²⁴ For example, figures for 2009 indicate that 80% of defendants were sentenced to jail, for a total of 25,396 days. See Barnett, *supra*, n. 7; S. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, presented at the 24th Annual National Institute on White Collar Crime, Miami (Apr. 8-11, 2010).

As alluded to above, these trends and the success of the criminal regime in the US have led to growing international receptiveness to criminalisation. The high profile cases in the US, from the prosecution of the Lysine Cartel²⁵ to the Vitamins Cartel,²⁶ have served as significant ambassadors to the criminalization agenda, embedding it in the international arena. Debate at multinational level echoes these norms. For example, the 1998 Organisation for Economic Co-operation and Development Recommendation on hard core cartels calls for “effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in [hard core] cartels.”²⁷ Similarly the ICN Cartel Working Group has considered the drafting of criminal cartel legislation and building relationships with criminal prosecutors to ensure commitment to effective enforcement.²⁸

III. CHALLENGES

While the proposition that criminalization of cartel activity provides for a most effective deterrent is persuasive, it represents only part of the criminalisation story. Discussion of the criminalization of cartels needs to move beyond deterrent policies and take into account a wide range of variants which may impact the success of a criminal regime and, in turn, competition law enforcement.

A. *The social context: “top down” and “bottom up” approaches*

To better understand the challenges in moving toward criminalization, it is useful to distinguish between the “top down” and “bottom up” approaches. A “bottom up” approach derives from social disapproval of cartel activity, and consensus on the need to eradicate such behaviour. As such, it represents an organic development of society’s perception of a certain activity. The decision to criminalize an activity reflects the social consensus, and is backed by public belief as to the wrongfulness of the activity. On the other hand, a “top down” approach is driven by the deterrent argument, using it to justify government-led

²⁵ The factual circumstances of the Lysine Cartel and its investigation are well described in K. EICHENWALD, *THE INFORMANT. A TRUE STORY* (2000) or J.B. LIEBER, *RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND* (2000).

²⁶ For a detailed examination of the Vitamins Cartel see J.M. Connor, *The Great Global Vitamins Conspiracies, 1985–1999*, available at www.ssrn.com/abstract=1120936 (Apr., 2008).

²⁷ OECD, *Recommendation of the Council*, *supra* n. 3, § IA, Point 1(a).

²⁸ *Cartel Working Group Work Plan 2009–2010*, Presented at the 8th Annual ICN Conference (June 3-5, 2009).

criminalization of cartel activity. The activity is deemed “criminal” to facilitate deterrence and improve enforcement. In the majority of jurisdictions, the above mentioned trend or movement towards criminalization of cartel activity appears to correspond to the “top-down” rather than to the “bottom-up” approach.²⁹ Consequently, it represents an extension of the competition law enforcement regime and the deterrent rationale.

A top-down approach, although sensible from a competition law perspective, often faces resistance when implemented. It is crucial to acknowledge that although rooted in competition law, the debate reaches the general sphere of criminalization. As such, it feeds from the domestic social perception of both cartel activity and criminal conduct. The perception of the morality of the conduct in question is of paramount importance in advancing a criminal regime.³⁰ Effective penal sanctions “*should be reserved for conduct that is truly and unambiguously blameworthy.*”³¹ “Wrongfulness” of certain conduct cannot be equated with its “harmfulness”, even though there are certain obvious interconnections.³² Accordingly, the fact that hard core cartels are treated as grossly harmful does not of itself suffice to successfully criminalise them.³³ Similarly, the fact that jail sentences may contribute to the deterrent effect of an antitrust enforcement system against cartels, does not alone justify the imposition of criminal sentences.³⁴ Admittedly, by labelling certain conduct as criminal, the legal system indicates

²⁹ Harding, *supra* n. 4, at 200.

³⁰ This is not surprising if one takes into account inherent connections between morality and criminal law. In this regard see, e.g., J.C. Coffee Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. REV. 193, 233–8 (1991); Stucke, *Morality*, *supra* n. 8, at 531–4; or more generally, A. Duff, *Theories of Criminal Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (E.N. Zalta ed., Fall 2008 edn., 2008), available at <http://plato.stanford.edu/archives/fall2008/entries/criminal-law/>; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY Ch. 1 (1968).

³¹ S.P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 1 (2006); See also, D. Husak, *The Criminal Law as Last Resort*, 24(2) OXFORD J. LEGAL. STUD. 207 (2004).

³² GREEN, *supra* n. 31, at 39–47.

³³ See, e.g., the discussion in R. Williams, *Cartels in the Criminal Law Landscape*, in CRIMINALISING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

³⁴ Duff, *supra* n. 30, at § 5. See also Stucke, *Morality*, *supra* n. 8, at 538–9. In any event, the argument of increased deterrence has been questioned by some: see, e.g., A.P. Reindl, *How strong is the case for criminal sanctions in cartel cases?*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, *supra* n. 10, at 110, 114–125; P. Massey, *Criminalization and leniency: will the combination favourably affect cartel stability?*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, *supra* n. 10, at 176, 184; OECD, *Third Report on the Implementation of the 1998 Recommendation 27* (2005); Stucke, *Morality*, *supra* n. 8, at

that such conduct is worthy of censure.³⁵ Yet, absent corresponding national moral beliefs, such labelling would yield little benefit and may result in moral conflict and ambiguity.³⁶

Therefore, while criminalization of cartel activity may be advantageous from an enforcement perspective, its implementation cannot take place in a vacuum. It is crucial to take stock of domestic perspectives on cartels, white-collar crime and the role of criminal law within society. An attempt to implant a criminalization regime into a non-receptive environment risks leading to “unenforced criminalization”, the social cost of which may be higher than a lack of criminalization to begin with.

In terms of the gap between public perception and law, which may stem from a “top down” approach, one may learn from a study conducted in the UK, where criminal sanctions for cartel offences are in place. The study showed that only 11 per cent of interviewed Britons were of the view that individuals responsible for the operation of cartels should be imprisoned.³⁷ Only 7 per cent thought price fixing comparable to theft, whereas the significant majority, 65 per cent, simply did not know to what other “criminal” practice it can be compared.³⁸ Arguably, this absence of social acceptance undermines the ability of the competition agency to successfully implement a criminal enforcement regime. The experience with criminal prosecutions, or lack thereof, for cartel conduct in

470-480. See also, R.H. Lande and J.P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, available at <http://ssrn.com/abstract=1565693> (Mar. 5, 2010) (where the authors argue that there is evidence that private antitrust litigation deters anticompetitive behaviour more than Dept. of Justice criminal enforcement). See also, Stucke, *Am I a Price Fixer?*, *supra* n. 8, and C. Parker, *Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality*, in *CRIMINALIZING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT*, *supra* n. 5.

³⁵ GREEN, *supra*, n. 31, at 46.

³⁶ GREEN, *supra*, n. 31, at 46. A similar point is made, from a sociological perspective in D.J. Galligan, *LAW IN MODERN SOCIETY* 228 (2007): “One of the assumptions on which ideas about criminal law are based is the essentially harmonious relationship between social relations and norms on the one hand, and legal definitions of crime on the other hand. On this assumption, criminal law has its origins in social relations, and is then taken over and supported by state law and its agencies. Law takes over both the definition of crime and its enforcement, but does so in a way aimed at maintaining close links with social relations from which it originates. Without close congruence between the two, the legitimacy of the criminal law and the state’s capacity to enforce it would be severely limited.”

³⁷ A. Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5 *COMPETITION L. REV.* 123, 133 (2008).

³⁸ *Supra*, n. 37, at 136–7.

the UK shows that merely introducing a criminal cartel offence is far from sufficient to bring about efficient criminal enforcement against cartels. The collapse of the British Airways trial this year is a significant recent example of the unfavourable track record of the new UK competition regime, insofar as criminal enforcement against cartels is involved.³⁹

The UK example is not unique. One can identify other criminal cartel regimes which have exhibited limited implementation. Such has been the case in France, Ireland, Norway, Japan, Korea, Estonia, Slovakia, Czech Republic, Russia and Canada, where prosecution has either been entirely non-existent or has resulted in limited sentencing or at times even in suspended sentences, or community service.⁴⁰

These difficulties highlight the challenges and limitations in transferring the cartel criminalisation agenda from one jurisdiction to another. Successful criminal regimes, most notably that in force in the US, were not born overnight and are not easily replicated.⁴¹ The regime is the result of persistent treatment of cartel violations as extremely grave offences by the US authorities, leading to the development of an “internal norm” that deems certain antitrust violations to be worthy of criminal condemnation.⁴² This norm persuades and affects legislators, the courts, business officials, and members of broader society that “*wrongdoers deserve conviction and stout punishment*.”⁴³ US aptitude has been cemented by a number of factors: successful criminal prosecution over a long period of time, backed by committed political support⁴⁴ and favourable media coverage.⁴⁵

³⁹ For a discussion of UK developments, see, J. Joshua, *DOA: Can the UK Cartel Offence be Resuscitated?* in CRIMINALIZING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

⁴⁰ CRIMINALIZING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5 and the other sources referred to therein.

⁴¹ See, e.g., Baker, *Punishment for Cartel Participants in the United States: A Special Model?*, in CRIMINALIZING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5. See also, D.J. GERBER, GLOBAL COMPETITION LAW MARKETS AND GLOBALIZATION viii, 158 (2010).

⁴² W.E. Kovacic, *Competition policy and cartels: the design of remedies*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, *supra*, n. 5, at 50. The internalisation of criminal nature of hard core cartels is recognised also by Harding, *supra*, n. 4, at 237.

⁴³ Kovacic, *id.* at 50.

⁴⁴ The importance of political support for criminalization of cartels is stressed, e.g., by Beaton-Wells, *supra*, n. 7, at 42.

⁴⁵ Kovacic, *supra*, n. 42, at 50-53; Baker, *supra*, n. 7, at 694-696, 705-713; Hammond, *supra*, n. 23; Barnett, *supra*, n. 7. See also, W.E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience*, in CRIMINALISING CARTELS. CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

B. *The Substantive Context: Designing the Cartel Offence*

A further obstacle to implementation is presented by designing substantive provisions which govern the criminal offence. Of paramount importance in this respect is the definition of the cartel offence.⁴⁶ The definition may be framed so strictly that it would materially hinder any prospects of successful criminal prosecution. This seems to be the case with the UK cartel offence and its much discussed “dishonesty” requirement.⁴⁷ On the other hand, if the “cartel offence” is defined too broadly or vaguely, it may lead to over-deterrence. This has two negative potential effects: (a) possible mischaracterisation of certain practices as hard core cartels⁴⁸ and (b) reluctance on the part of criminal prosecution authorities to enforce the offence, viewing the prosecution on the basis of such a vague definition unfair.⁴⁹ Potential shortcomings in cartel offence definition may be at least partially overcome by consistent use of the discretion of the respective prosecuting authority⁵⁰ and wise selection of cases that would be subject to criminal investigation and prosecution.⁵¹ This would, however, be a long distance run, as US experience shows.⁵²

⁴⁶ OECD, *supra*, n. 34, at 29.

⁴⁷ In detail, *see*, J. Joshua, *supra*, n. 39.

⁴⁸ Kobayashi, *supra*, n. 8, at 734-735; M.K. Block and J.G. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L. J. 1131, 1136-1139 (1980).

⁴⁹ This point is obviously interconnected with the social and moral issues mentioned above. Unless there is a genuine sense of the criminal delinquency of hard-core cartels on the side of (at least) criminal prosecuting authorities and the professional community involved, reluctance for criminal prosecution of cartels would likely emerge. Harding, *supra*, n. 4. This was, for instance, the case in the Czech Republic prior to the 2009 Criminal Code, where no criminal case was brought despite the theoretical possibility of sanctioning cartel conduct under the heading of ‘serious violation of rules of business relations’ crime. The new Czech Criminal Code, effective as of Jan. 1, 2010, contains a specific cartel offence (§. 248(1)(2) of the Code). Yet, the definition of that offence has many shortcomings that would most likely (together with other factors) lead to its non-enforcement. J. Kindl, *Některé problémy zavedení trestného cinu kartelu v novém trestním zákoníku* [Some problems of introduction of cartel offence into the new Criminal Code], 17 PRAVNÍ ROZHLEDY 622 (2010).

⁵⁰ OECD, *supra*, n. 34, at 29; Kobayashi, *supra*, n. 8, at 734.

⁵¹ For importance of appropriate case selection, *see*, e.g., Calvani and Calvani, *supra*, n. 10, at 137; or Stephan, *The Battle*, *supra*, n. 18.

⁵² Baker, *supra*, n. 41.

⁵³ For the importance of institutional design, *see*, e.g., Kovacic, *supra*, n. 42.

C. The Institutional and Procedural Context: Enforcement Capacity

Linked to the above challenges are difficulties associated with the institutional and procedural context in which cartel criminal prosecution takes place in a given jurisdiction.⁵³ There are significant differences in agency expertise and experience in prosecuting cartel offences. Enforcement capacity plays a prominent role in the successful prosecution of cartels according to criminal law standards.⁵⁴ Characteristics of the US “criminal” cartel prosecution regime are quite unique, which further increases the difficulty of their successful replication elsewhere.⁵⁵ Such characteristics include, but are not limited to: (a) a special prosecution authority, like the Department of Justice and Antitrust Division, that has discretion to decide which cases to prosecute as civil and which as criminal, a developed plea-bargaining system, a grand jury system, comprehensive corporate as well as individual amnesty programmes, and the availability of effective criminal investigation tools.⁵⁶ Even if substantive norms were similar to the US in a certain jurisdiction, the difference in institutional and procedural design would lead to strikingly different results as regards criminal enforcement. For instance, it may make a great difference if competition law is enforced by a specialised agency endowed with criminal enforcement powers, such as the Department of Justice in the US) or by non-specialised public prosecutors for whom a complex competition case might be an entirely novel experience. In addition, if the system does not allow for plea-bargaining and resulting settlements, the eventual criminal enforcement track-record would be considerably different.⁵⁷

Adding the foregoing considerations to the abovementioned doubts about the lack of empirical evidence as to the increased deterrent effect of criminal sanctions⁵⁸ may mean that the case for criminalization looks much less attractive.

⁵⁴ ICN Cartels Working Group, *Report to the ICN Annual Conference on ‘Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, 1 BUILDING BLOCKS FOR EFFECTIVE ANTI-CARTEL REGIME 29 Vol. 1 (June 6-8, 2005).

⁵⁵ For the main developments of the US system see e.g., D.I. Baker, *An Enduring Antitrust Divide Across the Atlantic over whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists*, 5(1) EUR. COMPETITION J.145 (2009), and Baker, *supra*, n. 41. See also, GERBER, *supra*, n. 41, at Ch. 5.

⁵⁶ Baker, *supra*, n. 41.

⁵⁷ Note, e.g., that “over 90 percent of the corporate defendants charged with an antitrust offence have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division’s criminal investigations.” S.D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, address at the ICN Workshop, Paris (Oct. 17, 2006).

⁵⁸ *Supra*, n. 33.

In addition, it is crucial to remain alert to the interplay between criminal and administrative regimes and the need to carefully balance the two as well as the various immunity programmes. Accordingly, if criminal elements are to be added to existing administrative enforcement, the jurisdiction should ensure that these do not undermine the functionality of the existing regime.⁵⁹

IV. REFLECTIONS ON CARTEL ENFORCEMENT IN INDIA

Reflecting on the challenges discussed above and the limited success of criminalization outside the US, it is easier to appreciate why many jurisdictions have refrained from criminalizing cartel activity. This reticence may be a reflection of doubts as to the relationship between competition law and criminal law, the severity of cartel agreements and their equivalence with more recognisable offences (the most common analogy being theft), or the merit in imposing individual punishment.⁶⁰ These doubts may stem from the domestic political reality and may reflect the role competition law plays in some societies or the powers of the national competition agency. Additionally, in some jurisdictions, deep-rooted principles governing criminal procedure (such as the principle of mandatory prosecution) may represent an obstacle to the use of effective competition enforcement techniques (such as leniency programmes or plea bargaining), which would otherwise be available in an administrative procedural context.⁶¹

While the criminalization of cartel activity can potentially provide an effective deterrent, its introduction ought to be considered in context, taking into

⁵⁹ Simply introducing a criminal cartel offence may, for instance, undermine corporate leniency programmes unless accompanied by an amnesty programme for the individuals concerned. After all, it is usually corporate managers who make the decision on applying for corporate leniency, and they may be reluctant to do so if it risks exposing them to custodial sanctions.

⁶⁰ P Lewisch, *Enforcement of Antitrust Law: The Way from Criminal Individual Punishment to Semi-Penal Sanctions in Austria*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, *supra*, n. 10, at 301–303

⁶¹ See, e.g., C. Vollmer, *Experience with Criminal Law Sanctions for Competition Law Infringements in Germany*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, *supra*, n. 10, at 257. The article mentions that it is the case in Germany where the use of leniency policy in respect of criminal offences is much disputed, including on the basis of constitutional requirements of equality and fair trial. The same may also hold true with respect to other jurisdictions. It is, e.g., the case in the Czech Republic. Reindl, *supra*, n. 34, at 118–19, mentioned similar concerns with regard to the Swedish and British legal systems and “almost certainly” also in respect of other European jurisdictions.

account the legal, social and political dimensions. These should help establish the adequate timing for a possible move toward criminalization.

In India, the competition law regime has transformed in recent years, following the coming into force of the Competition Act 2002 in May 2009.⁶² S. 3 of the Act lays down the provision governing hard core cartel activity and other anti-competitive agreements. S. 27 outlines the penalties applicable when the competition provisions are violated. These financial penalties are generally capped at 10 per cent of the average annual turnover for the past three years.⁶³ With respect to cartel activity, the Section further stipulates that the Commission may impose upon cartel members *"a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher."*⁶⁴ The new regime clearly places great significance on the fight against cartels, putting in place a clear and high financial penalty. This, together with the leniency programme⁶⁵ outlined in s. 46, sets incentives for disclosure and provides for an effective "carrot and stick".⁶⁶

In adopting this administrative model, India has joined a large number of jurisdictions which do not consider anti-competitive cartel activities to merit criminalization.⁶⁷ Like the EU, India strives to achieve deterrence through the

⁶² The Competition Act 2002 was notified in May 2009.

⁶³ § 27(b), Competition Act 2002; Compare with the European regime under Council Regulation 1/2003, Article 23, 1 O.J 1-25 (Jan. 4, 2003).

⁶⁴ § 27(b), Competition Act 2002.

⁶⁵ While the programme only came into force in August 2009, it displays all the characteristics which should assist in destabilising cartels. Similar to the European model, the programme provides a marker system, full immunity for the first whistle blower and discretionary reductions for subsequent cartel members who come forward; § 46, Competition Act 2002; *Cartel Policies*, 1 I.B.L.J. 63-86 (2010).

⁶⁶ Naturally, cartel enforcement sits high on the agenda of India's Competition Commission. Indeed, a number of cartels have already attracted the attention of the Commission. These include the commencement of investigations into possible cartel activity involving: Karnataka's film industry chamber and India's leading oil marketing companies supplying Air India. See Competition Commission of India, *News and Articles*, available at http://www.cci.gov.in/index.php?option=com_news for further details.

⁶⁷ Note that only about half of the jurisdictions covered by *The International Comparative Legal Guide to: Cartels & Leniency 2010* (Global Legal Group 2010) provide for criminalisation of cartels (i.e. for the possibility to impose custodial sentences upon individuals).

imposition of increasingly large fines against companies involved in cartel activities.⁶⁸

While the legal framework is in place, its successful implementation depends on the enforcement capacity of the recently established Competition Commission. In this regard, it is important to note that past experience in competition enforcement under the old Monopolies and Restrictive Trade Practices Act 1969 was predominantly centred on consumer protection.⁶⁹ A steep learning curve awaits the new enforcers of competition law. The new Act establishes the mechanism to impose high fines. However, as discussed above, their real effectiveness may be limited in nature. A move toward a criminal regime and the introduction of tougher individual penalties may thus seem, at first blush, a viable solution.⁷⁰ The limited body of experience in competition cases may impact enforcement capacity and also implies limited social awareness of competition policy. The latter often results in limited social support for the criminalization of cartel activity, which undermines attempts to instil criminalization with a “top-down” approach. The theoretical desirability of cartel criminalization should not be confused with its practical sustainability. It is proper to recall that there are costs resulting from non-enforcement of a criminal sanction. Once introduced, these sanctions provide a focal point to the industry. Failure to enforce sanctions sends a negative signal, undermining the deterrent effect by suggesting that the competition agency does not view the activities as harmful enough. Such mixed signals may undermine competition advocacy and ought to be avoided.

Competition advocacy is therefore what is required to cultivate the landscape for any future move toward criminalization. Until society is receptive to such change, other mechanisms may be utilised to increase the deterrent effect and bypass agency problems, for instance, the use of a “director disqualification regime” under which individuals guilty of participating in a cartel are excluded for several years from the management of any corporation. Examples of this may

⁶⁸ See, e.g., N. Kroes, former European Commissioner for Competition Policy, *Tackling Cartels — A Never-Ending Task*, speech at Anti-Cartel Enforcement: Criminal and Administrative Policy Panel Session (Oct. 8, 2009); or N. Kroes, *Reinforcing the Fight against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a More Competitive Europe*, presented at the Commission/IBA Joint Conference on EC Competition Policy (Mar. 8, 2007).

⁶⁹ Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4(3) J.COMPETITION L. & ECO. 610, 609-638 (2008); Aditya Bhattacharjea, *Of Omissions and Commissions: India's Competition Laws*, 45(35) ECON. & POL. WKLY. 31 (Aug. 28, 2010).

⁷⁰ S.N. Hariharan, *Legal Control of Cartels*, available at http://cci.gov.in/images/media/ResearchReports/law_soumya_20090114122922.pdf

be found in the UK,⁷¹ Ireland,⁷² New Zealand, Brazil and Russia.⁷³ Such a regime, especially when combined with fines imposed directly upon individuals within the corporation, can provide a further deterrent and supplement the existing administrative regime.⁷⁴ Note however that its success depends on careful design and systematic implementation. Absent the latter, unenforceability would undermine the deterrent effect and might reduce it to empty threats.⁷⁵

Another avenue would be to further strengthen the leniency programme, possibly with the introduction of a bounty scheme. Such bounty schemes (i.e. systems where rewards are provided to cartel informants) exist, for example, in the UK.⁷⁶ Looking beyond domestic efforts, it is important to bear in mind that the new regime operates as part of a web of competition authorities, joined in their efforts to curtail cartel activity. With respect to cross border cartel activity, the domestic deterrent effect is supplemented by other jurisdictions. While this benefit is necessarily limited in nature, as it only applies to international activity which generates harm elsewhere, it gains relevance with the increase in international trade and provides a valuable back wind to domestic enforcement efforts.⁷⁷

⁷¹ §§ 9A to 9E of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002. See, in this regard, Office of Fair Trading, Guidance Document (OFT510) *Director disqualification orders in competition cases* (2010).

⁷² § 160(1) of the Companies Act 1990. See, in this regard, K. O'Connell, *Deemed Disqualification Orders*, presented at the 10th Annual National Prosecutors' Conference, (May 23, 2009).

⁷³ *Supra*, n. 11, at 10.

⁷⁴ This line of enforcement against individuals was suggested as the most promising way forward in dealing with individual wrongdoers in the EU by Baker, *supra*, n. 55, at 195. See also, J. Fingleton, M-B. Girard & S. Williams, *The fight against cartels: is a 'mixed' approach to enforcement the answer?*, in INTERNATIONAL ANTITRUST LAW AND POLICY: FORDHAM COMPETITION LAW 9 (B. Hawk ed., 2006) where the authors also suggest that cartel criminalisation should only take place once an agency has an established track record in its more standard tasks (as administrative/civil enforcement, mergers etc.).

⁷⁵ For example, to the authors' knowledge to-date, the Office of Fair Trading has not brought any applications for a director disqualification order for a cartel prohibition violation. See also N. Kar, *Competition disqualification orders: directors beware*, available at <http://plc.practicallaw.com/0-502-8824> (July 28, 2010). Note, however, that convicts in the Marine Hose cartel received director disqualification orders of 7 and 5 years in addition to custodial sentences. See *R. v. Whittle and Others*, [2008] EWCA Crim. 2560.

⁷⁶ The OFT is prepared to offer financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity. See <http://oft.gov.uk/OFTwork/cartels-and-competition/cartels/rewards> for further details.

⁷⁷ For an international perspective on (criminal) cartel enforcement see CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra*, n. 5.

CONCLUDING REMARKS

Whereas the difficulty in achieving optimal deterrence provides for a convincing argument in favour of the criminalization of cartel activity, such a move is not easily implemented. The criminalization of cartels cannot be limited to a technical discussion on how to best deter cartel behaviour. One must also consider the jurisdictional conditions required for a successful criminal regime, including the social context of criminal enforcement, the design of substantial provisions, and the institutional and procedural nexus.

The introduction of criminalization should therefore follow a very careful consideration of the domestic landscape. While valuable in principle, it may be necessary to delay its introduction in order to ensure successful implementation in the long term. Until then, the enforcement equation may be better enhanced by the use of alternative personal sanctions, such as financial penalties and director disqualification orders. Similarly, the detection rate may be improved with the introduction of bounty schemes.