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CARTEL PENALTIES IN PAKISTAN'S COMPETITION REGIME: IS CRIMINALIZATION POSSIBLE?

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By imposing financial penalties, the Competition Commission of Pakistan (CCP) aims to deter undertakings from engaging in anti-competitive practices. The number of financial penalties indicates the seriousness of the infringement. In Pakistan's competition regime, an 'Undertaking-focused Penalties' model exists. The emphasis is only on infringements committed by 'undertakings' and not by 'individuals', except where an individual acts as an undertaking. The investigations can only lead to administrative and civil law sanctions. However, individuals can be imprisoned for not complying with an Order of the CCP. The debate to induct criminal enforcement mechanisms in other civil and administrative jurisdictions has started already. As a successful outcome of the debate, a policy shift can be expected. In that case, the individuals may expect to encounter prosecution as a matter of rule rather than an exception. However, several challenges need to be addressed, before employing criminal punishment as a tool to achieve the underlying enforcement objectives of the Competition Act 2010 in practice. This paper analyses whether strong sanctions help to deter cartels and whether it is appropriate to incorporate criminal penalties. It reviews the existing model of penalties adopted by Pakistan's competition regime and discusses the possibility of adopting a different model in the future. It also focuses on the challenges of criminalizing cartel penalties. Many competition jurisdictions have already introduced criminal penalties. It will certainly not take long before this debate of whether to introduce criminal penalties for cartels will commence in Pakistan's competition regime as well.

Keywords: criminal penalties, civil law sanctions, cartel penalties, anti-competitive practices, Competition Commission of Pakistan, financial penalties, infringement, Pakistan's competition regime

Introduction

The Competition Act 2010 (CA 2010) serves as the main statute that aims to promote sustainable economic development in Pakistan. The Competition Commission of Pakistan (CCP) is a principal authority responsible for the implementation of the law. A penalty is a form of sanction that aims to punish wrongdoers. A competition law mechanism ensures that the principal regulatory authority is authorized to impose financial penalties on undertakings or associations of undertakings that have violated the law.

Problem Statement

The financial penalties imposed by the competition authorities must not only have a necessarily 'specific deterrence' to punish the undertakings involved in the violations, but also a 'general deterrence' to prevent other undertakings from being involved in, or maintaining, a behavior that is a contravention of the law. Therefore, deterrence is an obvious aim of sanctions applied in case of violations of competition law. There is a growing belief in many competition jurisdictions around the world that the risk of individual-focused penalties could be a more effective deterrent than the risk of undertaking-focused fines. It is essential to ascertain whether the Pakistan competition regime's existing model of penalties is sufficient to achieve the desired result or if there is a need to adopt a different model in the future. It is desirable to identify the challenges of adopting a different model.

Research Questions

1. Whether strong sanctions help to deter cartels.
2. Whether it is appropriate to incorporate criminal penalties to deter cartels.
3. What are the potential challenges of criminalizing cartel penalties?

Research Objectives

To review the existing model of penalties adopted by Pakistan's competition regime. To discuss the possibility of adopting a different

model in the future and the challenges of criminalizing cartel penalties.

Research Methodology

The methodology used in this article is primarily analytical and a critical approach is adopted when issues regarding criminalization of cartel penalties arise. The research is descriptive and qualitative at first, as the theoretical framework on the criminalization of cartel penalties and their adoption by the developed competition jurisdictions, with special reference to the European Union competition jurisdiction, is studied with the hypothesis that an analytical and critical approach is taken when issues concerning adopting criminal penalties for anti-competitive practices are discussed. Statutes and regulations are used as the primary sources. Secondary sources are also used in the research, such as legal publications, journals, essays, general remarks, and international jurisprudence.

Literature Review

In recent years, a debate has been taking place on whether the focus should be placed on 'individuals' within an undertaking responsible for cartel activities. It is gradually more recognized that punishment for cartel conduct needs to be undertaking-focused as well as individual-focused. (Geradin, Malamataris and Wileur, 2013:342; Wills, 2008:177-188; Wills, 2002:218) The investigative powers of the CCP (the European Commission as well) and the rights of defense are designed keeping in view the administrative system of sanctions. If individuals are subject to penalties either administrative or criminal, the deterrent effect of competition rules enforcement might significantly increase. Moreover, Villarejo states that the inclusion of individual penalties might contribute to the correct behavior of undertakings/companies. (Villarejo, 2011:2) The insertion of individual penalties may also raise awareness of the competition rules among individuals as well as the latter's moral commitment to respect

these rules. (Villarejo, 2011:2) The probability of individuals availing themselves of the benefits of whistleblowing programs and individual leniency programs available in competition jurisdiction would also increase. Thus, the overall cultural perception may undergo a positive change concerning the illegality of infringements of competition law. Penalizing individuals not only has a deterrent effect but also carries a robust ethical implication. For instance, the public would consider a price-fixing agreement immoral like robbery or theft, and a jail sentence for competition law infringement would become the norm. (Tyler, 2006)

However, the effectiveness of individual penalties to create enough deterrence to reduce competition law breaches would depend on the enforcement efficiency of the competition authority, such as the number of penalties imposed upon individuals in a specified time in the given cases. The undertakings might also review their voluntary compliance strategies to ensure that the employees, managers, and directors are fully aware of the provisions of competition law, particularly, the stipulations related to individual sanctions.

Discussion

A cartel under CA 2010 is an administrative and civil offense. The CCP, by imposing financial penalties, aims to ensure the prevention of undertakings from participating in anti-competitive practices. The financial penalty also confirms the seriousness of the infringement. (Fining Guidelines, point 3) The Pakistan competition regime highlights contravention of competition law committed by 'undertakings' and does not focus on 'individuals' unless individuals act as undertakings. Therefore, undertaking-focused punishment is a salient feature of the competition enforcement model of Pakistan's competition regime. Undertaking-focused investigations lead only to administrative and civil law sanctions. However, individuals can be imprisoned for

not complying with an Order of the CCP. (CA 2010, § 38 (5); General Enforcement Regulations 2007, Regulation 38 (6)) In practice, there is no evidence that any individual was sentenced to imprisonment.

No doubt, imprisonment is a powerful deterrent to people who can form a cartel. As Liman wrote, "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 in jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations". (Liman, 1977:630-31; OECD, 2011:10 & Wills, 2001:28)

In the case of Pakistan, the European Union competition rules were taken as a model. So, analyzing the EU competition rules confirms that the EU competition rules prohibit cartel activity under Article 101(1) Treaty on the Functioning of the European Union (TFEU). Article 103 TFEU emphasizes the role of regulations and directives issued by the European Commission. The regulations and directives are required to be devised to ensure maximum compliance with the provisions of Article 101(1) TFEU by making stipulations for fines and periodic penalty payments. The words 'criminal law sanctions' are not used. Article 103 TFEU contains its procedure which comprises a European Commission's proposal to the Council for appropriate regulations/directives. The Council subsequently consults the European Parliament and acts in this regard. Thus, Regulation 1/2003 introduced a decentralized system giving the power to enforce EU competition rules to certain entities. These entities which are responsible for enforcing the EU competition rules can impose severe fines on undertakings that violate cartel provisions. These institutes are the European Commission, the national competition authorities of the Member States, and the national courts. However,

Regulation 1/2003 does not harmonize the penalties that may be imposed for violations of competition rules.

The European Commission, the Member States' national competition authorities, and the national courts may impose fines on undertakings, but the Member States are permitted to propose and enforce other penalties for contraventions of competition rules. (Regulation 1/2003, considerations 8 and 16) Hence, the Member States are allowed (but are not compelled) to introduce individual sanctions for violations of competition rules. There are several types of individual sanctions which include: fining individuals, imprisonment of individuals, and banning individuals from leading a company by issuing director disqualification orders. (Mändmaa, 2014:45-46; Wills, 2008:185-188) Wills considers fines on individuals as the third-best option. (Wills, 2008:187)

Some EU Member States (France, Germany, Estonia, Hungary, Cyprus, Malta, Poland, United Kingdom, and Ireland) have adopted criminal sanctions in their national laws for cartel conduct. (Jones & Harrison, 2014:3) For instance, in the United Kingdom, a person guilty of a cartel offense is liable to imprisonment for a term of 5 years maximum and/or to a fine, (Enterprise Act 2002, § 190 (1) (a)), and in Ireland, (Competition (Amendment) Act 2012 (Ireland), § 8(1)(b)(ii); Wardhaugh, 2012) to imprisonment for a term of a maximum of 10 years for individuals who enter into cartels. Similarly, in Estonia, individuals can be subjected to up to 3 years imprisonment as a punishment for competition offenses, (The Estonian Penal Code, Artt: 399-402; Holmes and Dave, 2004:411), and in France, individuals can face imprisonment for up to 4 years. Jones and Harrison do not consider the criminalization of penalties as an effective enforcement tool in various EU jurisdictions as the empirical data suggests that the criminal penalties are rarely imposed on individuals in all Member States. (Jones & Harrison, 2014:3) Riley also

pointed out that not even a single case existed where an individual was charged for acting as an undertaking. (Riley, 2010:205) There are many reasons for rarely imposing criminal sanctions on individuals. Furse states that 'lack of harmonization and control at the EU center' are the reasons (specifically in the UK and Ireland) for the failure of 'credible and sustained enforcement'. (Furse, 2012:223) Jones and Harrison deem that the competition authorities and the courts are reluctant to impose penalties on individuals for crimes that may be beneficial for the company eventually. In their opinion, competition authorities and courts lack experience in this regard because the system has not provided them with the opportunity to train themselves as prosecutors and judges in criminal courts respectively. The overall cultural factors can also constitute the reasons not to impose criminal penalties as individuals involved in cartel activities are not as necessarily unacceptable as to permit a conviction. (Jones & Harrison, 2014:3) So, in Pakistan and within the EU, the imposition of penalties on undertakings (undertaking-focused penalties) is an established feature of their competition enforcement model.

Challenges Of Criminalizing the Cartel Penalties: An Analysis

An amendment to the Competition Act 2010 would be necessary to adopt a criminal law penalty system in Pakistan's competition regime. The role of the CCP is to ensure credible and sustainable enforcement of CA 2010. The CCP, currently, is confronting some difficult challenges, such as financial constraints, limited staff strength, lack of awareness regarding competition law, slow disposal of appeals in competition cases before courts, and recovery of penalties. It is, therefore, not viewed as "an appropriate time to incorporate criminal penalties", although this was demanded by the finance minister to enable the CCP to impose a jail sentence along with fines on the owners or directors of undertakings involved in

cartelization. (Chaudhry, 2011). At the EU institutions level, various experts (Whelan, 2014; OECD, 2009:5-47; Whelan, 2013:535-561; Whelan, 2013:143-164; Wills, 2005:117-159) have discussed the adoption of a criminal law penalty system through an amendment of the TFEU. For instance, Wills and others discuss various possibilities in this regard. Simonsson argues that resourceful Member States should introduce cartel criminalization if they deem fit and ensure credible and sustainable enforcement) Hakopian discusses three possibilities. He argues that the first possibility is amending Article 83 TFEU. He suggests utilizing regulations as a specific legal basis to introduce 'substantive criminal law procedures' at the 'EU level'. (Hakopian, 2010:172) This is because, at present, Article 83 TFEU provides, indeed, only for the use of directives. It does, however, not specifically deal with competition law measures. Hakopian's second possibility is the amendment of Article 103(2)(a) TFEU with a similar aim to introduce criminal penalties at the EU level. In this regard, he suggests that the terminology "criminal law sanctions" needs to be incorporated into the list of "fines and periodic penalty payments" mentioned in the provision.

(Hakopian, 2010:172 & Wills, 2002:234) Article 103 TFEU specifically deals with the introduction of various competition law procedures and allows for the usage of both regulations and directives in this regard. According to Hakopian, the third possibility is to insert a new provision highlighting a cartel infringement as a criminal offense and to include a definition in the TFEU of "criminal cartel offense" encompassing the constituent elements of the offense to ensure that the addition of criminal punishment achieves its goals while maintaining its legitimacy. He suggests that such an addition in the definition clause may alternatively be used to introduce a completely fresh provision that grants the EU the competence to criminalize

cartel punishments in the competition enforcement system. (Hakopian, 2010:172) There is a consensus that there are legal and practical difficulties in criminalizing cartel penalties in Pakistan (in the EU competition rules as well). Lowe pointed out that criminalization would require a complete overhaul of the enforcement agency's (the CCP, in the case of Pakistan) investigative powers and procedures. (Lowe, 2009:6-7) Indeed, the nature and severity of the sanctions of each competition enforcement system, whether it is administrative or criminal, are closely linked to the investigative powers of the competition authority, the standard of proof exercised in establishing and deciding the case, the procedural defenses available to the parties concerned and the structure of the enforcement authority as well. Therefore, all these aspects must be balanced while designing a criminal competition enforcement system. (Villarejo, 2011:3) Criminalization of penalties further requires a foundation of a criminal court which necessitates that the principle of separation of powers should be adopted. The competition authority cannot function as an investigative agency and a decision-making authority as well. This would ensure the enforcement of the criminal penalties effectively. Lowe questioned if the additional deterrence would validate such key modifications. (Lowe, 2009:6-7 & Wills, 2002:234) He suggested that undertakings/companies themselves can introduce individual 'sanctions' against their managers and employees who commit infringements of competition rules. For instance, managers and employees could be fired from their jobs and could be sued for damages if they participate in illegal anti-competitive practices. (Lowe, 2009:7) Further, Villarejo specified that the insertion of individual penalties in the system renders enforcement more difficult custodial sanctions which have severe consequences.

(Villarejo, 2011:3) He exemplified that individuals under threat of criminal sanctions would likely have a higher probability of obstructing inspections and destroying evidence. (Villarejo, 2011:4) Wills favors individual sanctions for more effective cartel enforcement. (Wills, 2008:185-188) Quoting Scott Hammond, the threat of criminal sanctions against individuals has facilitated the US Department of Justice to deter a considerable figure of global cartels from expanding their activities into the United States as the senior executives of the companies were fearful of getting arrested and serving a jail sentence in the United States. (Wills, 2008:184) Wills points out that public punishment does not only achieve the goal of creating deterrence for those infringing the competition rules but also supports generating a plausible risk of punishment for those who are likely to commit breaches based on estimated revenue benefits. Individual punishments secure ethical outcomes as well as send a strong message to the public regarding the inevitability of obeying the law and strengthening their moral responsibility to adhere to the rules. (Wills, 2006:31)

There must be a robust normative framework justifying the existence of criminal cartel sanctions. Villarejo suggested that criminalization can only be effective when the legislation initiating criminal offenses is sufficiently implemented. This entails several requisites, such as the existence of a self-sufficient, independent, and dedicated enforcement authority. The enforcement authority is required to have adequate investigative powers that are provided by the law. It also includes that the obligatory rights of due process, available to the accused, are fully respected. The law does not entail ambiguity and the principle of legal certainty is applied in letters and spirit. The judges in the courts are willing to convict the accused if proven guilty. The existence of an immunity or leniency program for individuals is

essential as well. He also pointed out that if leniency to individuals is unavailable, corporate leniency applications may be reduced, leading to the under-enforcement of competition rules. (Whelan, 2014) Thus, an accurate initiative, such as a leniency policy for individuals, is needed to be introduced to ensure that imposing criminal penalties for competition law infringements not only achieves its aims but also maintains its legitimacy. The CCP correctly considers that there are some fundamental challenges in criminalizing cartel activity. The appellate forums of the country are not acquainted with CA 2010 and the 'onus of proving one guilty would shift' if criminal penalties were introduced. (Chaudhry, 2011) To hold individuals liable for the infringement of competition rules, it will require establishing the fact of violation of competition law beyond a reasonable doubt. If criminal sanctions are adopted, a list of infringements that should be sanctioned with imprisonment and those who fall within the scope of different types of sanctions would be required. Thus, it is clear from the above discussion that there is no consensus to criminalize competition law penalties to date and that many crucial challenges need to be addressed if criminal punishment is to be used as an efficient tool to increase the effectiveness of enforcement of competition law.

Conclusion And Recommendations

This paper raised the question of whether strong sanctions help to deter cartels and whether it is appropriate to incorporate criminal penalties. The CCP aims to deter undertakings from engaging in anti-competitive practices by imposing financial penalties. The number of financial penalties indicates the seriousness of the infringement. Pakistan's competition regime has adopted an undertaking-focused punishment model. The emphasis is only on infringements committed by 'undertakings' and not by 'individuals', except where an individual acts

as an undertaking. The investigations can only lead to administrative and civil law sanctions. However, individuals can be imprisoned for not complying with an Order of the CCP.

Several challenges need to be addressed, before employing criminal punishment as a tool to achieve the underlying enforcement objectives of CA 2010 in practice. Legal changes are required to establish a criminal competition enforcement system which includes a complete change of the CCP's structure and its investigative powers and procedures. There will be a modification in the standard of proof that the CCP currently achieves in deciding cases and enhancement of procedural safeguards are also imminent. There must also be a separation of the CCP's investigative and decision-making powers. It can be argued that the introduction of criminal sanctions could harm leniency programs, especially in cases where the leniency applicants themselves are responsible for the infringement.

The argument can probably be counterbalanced by introducing criminal penalties that should be coordinated with a leniency program and successful leniency applicants should not be prosecuted for contravention of competition law. Therefore, a more suitable solution should be found. For example, in the EU, the statements and documents obtained through leniency applications are ruled out to be used to pursue criminal offenses as Notice on Immunity from Fines and Reduction of Fines in Cartel Cases aims to protect the leniency applicants against self-incrimination. It is, therefore, concluded that there is no clear consensus about the employment of criminal punishment in competition law to date. However, the competition authorities are going through a process of evolution. The debate to induct criminal enforcement mechanisms in other civil and administrative jurisdictions has started already. As a successful outcome of the debate, a policy shift can be expected. In that case, the

individuals may expect to encounter prosecution as a matter of rule rather than an exception. Many competition jurisdictions have reached the next step as they have already introduced criminal penalties for cartel conduct along with civil liability. One may expect that it will certainly not take long when this debate of whether to introduce criminal penalties for cartels will commence in Pakistan's competition regime as well.

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