



**Controlling the Menace of Cartelization in Pakistan:
Criminalization is a Way Forward**

Zainab Batool Zaidi,¹ & Attia Madni²

Abstract:

The criminal penalties for cartels have helped many jurisdictions around the globe to make rigorous detections into anti-trust violations controlling this menace effectively. The criminal punishments have certain admitted benefits over the civil fines for such violations. The deterrence achieved through criminal sanctions enables the leniency/amnesty programs run successfully. This study, through qualitative content analysis, aims at describing the significance of criminalizing cartels in Pakistan with an overview of the ineffectiveness of existing anti-cartel law in the country. It encompasses the core advantages of adding parallel liabilities i.e. criminal penalties along with civil liabilities for better detection of cartels and the subsequent punishments of all concerned. The writers have described the tools for curbing anti-trust violations through adding parallel liabilities for them in the country. The research concludes that the existing anti-cartel regime (based on civil remedies) in Pakistan is inadequate to curb it down and it is high time to criminalizing cartels in Pakistan. Holding the cartelists criminally liable along with effectuating recovery of fines with effective use of leniency program and settlement procedures is the only way forward for Pakistan.

Keywords: Leniency program, competition policy, cartels, criminalization, anti-trust practices

INTRODUCTION

"The standard formulation on remedy is that it ought to cure past violations and prevent their recurrence. That's what antitrust is all about." Charles James

Cartels are a menace to economic growth, competition policy, and consumer welfare in any society. The former Commissioner for Competition in the European Union refers to the cartels as "cancers on the open market economy" and the Supreme Court in the United States of America denoted them as "the supreme evil of antitrust" (Harding, 2011). To curb the evil of anti-competitive practices and concentration of wealth, Pakistan has enacted its competition laws more than a decade ago intending to provide free competition, enhance economic efficiency and protect consumers from anti-competitive behavior. The evil of cartelization is not the price hike only. The social harm is that certain classes of society can no longer afford the product due to static increased prices and lack of economic efficiency (Darr, 2020).

¹ Holds LLM degree in International Trade Law and is practicing law at **Islamabad** High Court. Email:

² Lecturer, Department of Law, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan. Email: atia.madni@iiu.edu.pk

The benchmark for evaluating the effectiveness of competition laws in any society is to reflect how much deterrence it has casted on the minds of subjects. The law which has failed to achieve the optimum level of deterrence needs to be changed. In Pakistan, the Competition Act of 2010 provides civil and administrative penalties for the cartels.

The powers of the Competition Commission of Pakistan are similar to the enforcement of civil law by the civil courts. The law is no doubt nicely chalked out yet failed to restrict cartel activity in various industrial sectors of the country. Since its inception, the Competition Commission of Pakistan has only recovered 0.09% of the total fines imposed on the undertakings (Abrar, 2015). In the past ten years, the Competition Commission has only one reported and successful case of leniency. The failure of the leniency program is attributed to the lack of effectiveness of the competition policy in the country (Fatima, 2012).

Many jurisdictions in the world have added criminal liabilities for cartels to make their leniency programs efficacious. There has been a vibrant movement towards the criminalization of the cartels in Europe despite the fact that European Laws principally provide civil sanctions for the cartels. Initially, the United States of America was the first criminal cartel enforcement regime penalizing the cartelists with incarnation sentences and criminal fines. During the last two decades, many European States have adopted criminal liabilities in addition to civil liabilities for the cartels. The states like France, United Kingdom, Ireland, Norway, Japan, South Korea, and Australia have adopted criminal measures against the cartels. The common rationale behind adopting the criminal sanctions was that the civil liabilities failed to achieve the ideal deterrence (Brenda, 2010).

In the light of foregoing discussion, this article undertakes to analyze the effectiveness of the existing anti-cartel legal framework in Pakistan which is also based on the civil liabilities. The first part of the article highlights the justifications of adding criminal sanctions for cartels. The second part discusses the advantages of criminal liability over civil enforcement and in the last section, given the advantages and justification of criminalizing the cartelization, the researchers evaluate the effectiveness of the existing framework for cartels in Pakistan and subsequently suggest a way forward for Pakistan to control the menace of cartelization in Pakistan.

WHY CRIMINAL SANCTIONS FOR CARTELS?

Professor Albert Levitt opined that no act constitutes crime until it threatens to harm or the possibility to harm society and later has taken steps for the cessation of such act (Levitt, 1922). The notion of crime and punishment are often discussed under different theories of criminal law. The theory of deterrence emphasizes devising a punishment to prevent the recurrence of criminal activity (Whelan, 2013). On the other hand, the retributive theory aims at compensating the victim by compelling the offender to disgorge everything attained through criminal actions. Different scholars and academics have discussed different rationales for the criminalization of cartels. The cartels tend to steal away the benefit of competition and openness in the market. Cartels discourage innovation in the market, limit the choice of consumers over products and tend the consumer abandon certain products due to economic inability (Stephen, 2010). Some have opined that cartelization is akin to cheating and subversion of competition. The cartelists hide their deals and arrangements from the customers. The customers perceive that the price hike is due to an increase in prices of raw material and increased cost of production. Whereas the undertakings in horizontal

integration collude to fix prices and compel the consumer to pay the demanded price. Cartelists have delinquent behavior as their cartel activities are away from public scrutiny. The cartel participants meet secretly at covert locations, use code names, and communicate through private email addresses to cheat the consumers. Some other scholars have opined that besides deterrence, the cartels can be criminalized on the pretext of intentional infringement of law and violation of pre-existing social norms such as prohibition of deception, fraud, delinquency, embezzlement, stealing or cheating (Stephan, 2018). The cartelists tend to articulate an exception on their own by undermining the important social institution of an open market.

EFFECTIVENESS OF CRIMINAL SANCTION OVER THE CIVIL PENALTIES

The term white-collar crime was coined by Professor Edward Sutherland in the year 1939. He defined the white-collar crime as a crime committed by a respectable and high social status person in the course of his occupation. Professor Sutherland considered the white-collar crimes more heinous than robbery, larcenies, burglary committed by low socio-economic class. According to him, the magnitude of loss resulting from embezzlement and frauds of corporations, companies, investment trusts, and public companies are much larger than losses resulting from robbery, theft, and burglary. The key element of almost all the white collar crimes is violation of trust whether the trust was delegated, implied or expressed in the business relationships shared between the corporation and consumers or between the state and the business entity. The violation of trust is often accompanied by misrepresentation. The element of criminality in such offenses is the obtainment of money through pretenses which occur in misrepresentation of financial statements of corporations or advertisements and sale methodologies, manipulated grading of commodities, tax frauds, money laundering, commercial bribery, embezzlement of funds in bankruptcies etc. (Sutherland, 2017).

The narrative of competition laws sends a message about the seriousness of lawmakers in implementing the competition policy to all the key players in the market including the producers, sellers, consumers, and general public.

The scholars are of the view that mere imposition of civil fines for cartels constitutes a minor punishment as compared to imprisonment, thus makes it morally tolerant. In our society, the collusive behavior, cartels, and exploitation of consumers are tolerated. The syntax of the Competition Laws in the country considers the collusive behavior of cartelization as a civil violation (Ahmad, 2018). The abhorrence for collusive and unfair business practices can only be conveyed through criminal sanctions (Stephan, 2017). Cartels are a special kind of crime committed by white-collar men. The white-collar criminals always analyze the cost-benefit analysis of their violation. They would only sign a cartel deal if the cost of cartelization would not outweigh the benefits it may bring to them. No matter how severe the fines could be it would not create deterrence among the cartelists for they will easily pay off the liabilities (Gregory J. Werden, et.all, 2011).

The social harm of cartels is not the price hike but with the increased prices, many of the consumers cannot further afford the product. The cartels are mostly found in the products which do not have substitutes in the market such as sugar, cement, flour, jute, and pharmaceutical industries. The cartels can have material adverse effects on the wellbeing and living standards of the consumers. Various jurisdictions in the world have criminalized the cartels to cater to this harm (Stephan,

2014). Professor Wardhaugh has opined that the open market is a social institution mandated with distributive justice. In every liberal society, civil society is articulated in a way to provide the greatest opportunities and choices to its members for achieving the goals of economic well-being. The right to make important choices and freedom to determine the pursuit of individual well-being is fundamental (Wardhaugh, 2012).

The sophisticated, intricate, and covert nature of cartels makes them difficult to be detected. The Organization for Economic Cooperation and Development (OECD) has recommended that criminal penalties should be imposed on cartelists for better results in detection and effective leniency program (Fatima, 2012). Under the leniency program, the Competition authorities grant full immunity from sanctions or significant reduction in fines which are otherwise imposed on the cartel, in exchange for volunteering the complete disclosure of information on the existence of the cartel. Some jurisdictions even offer the automatic immunity from criminal sanctions for the undertakings which opt for leniency program and make a complete disclosure of the facts before the competition authorities (Wouter, 2008).

THE SIGNIFICANCE OF ADDING CRIMINAL SANCTIONS FOR CARTELS IN PAKISTAN

The Constitution of Pakistan, 1973 obligates the State to promote the social and economic wellbeing of every individual. The state is mandated to secure the well-being of every member of society, to raise the standards of living of every citizen of Pakistan, to prevent concentration of wealth and means of production and distribution at the hands of few to the detriment of the general public (The Constitution of Pakistan, 1973). The Government of Pakistan is mandated to devise effective methods to eradicate economic exploitation. The cartels are exploitative to the fundamental rights of any individual i.e. to raise his standard of livings.

The cartels are deemed to be an invasion of the rights to profess trade without any barrier or discrimination. The cartels tend to throw small enterprises and newcomers out of the competition by way of discriminative and restrictive terms and conditions of the cartel agreements. The cartels monopolize the market for their benefits and the industries which do not participate in cartels are expelled from the market through collusive practices. In the recent past, the Honorable Supreme Court of Pakistan has held that the cartels tend to create exclusive, restrictive, and monopolistic approaches in the market. The cartels are therefore violating the fundamental rights of the individuals enshrined in Article 18 and 19 of the Constitution of Pakistan. Article 18 of the Constitution embodies the idea of freedom of trade or business for every citizen of Pakistan (BOL Medial Network VS Chairman, PEMRA, 2018).

The imposition of criminal sanctions for cartels involves two steps of arguments; one is that the administrative fines or civil fines fail to deter the company or its employees from engaging in cartels. The first step involves the calculation of the size of an ideally deterrent fine to dislodge the benefits of cartels for offenders. Second step is to prove that the lacunas in achieving the optimal deterrence through the existing sanctions can only be filled through the introduction of criminal liability for cartels (Whelan, 2017).

While imposing financial penalties, the Commission pursues two-fold objectives: to deter undertakings from anti-competitive practices, and to reflect the seriousness of the infringement. The quantum of financial penalties depends on the nature and duration of anti-competitive conduct

in question, mitigating and aggravating aspects, including the deterrent value of the fines imposed. The practices involve hardcore cartel activities such as fixing prices, restricting output, limiting technological process or investment, sharing markets or customers or territories, and bid-rigging/collusive tendering. The Commission's approach is to achieve deterrence and restore market conditions by imposing higher fines (Robertson, 2016). Nevertheless, the Competition Commission of Pakistan has been empowered to impose the fine at a maximum of PKR 75 Million or not more than 10% of the total turnover of the undertakings involved, however, the Commission has never imposed maximum fine. For instance, the penalty imposed in cement cartel case was at the rate of 7.5% of the total turnover of all the participant companies in the year 2006-2007. The lesser penalty was imposed keeping in view that it was the first penalty imposed on cement manufacturers, therefore the same was lesser in quantum (All Pakistan Cement Manufacturers Associations and its member undertakings, 2010). The Competition Commission of Pakistan since its inception in 2007 has imposed financial penalties amounting to PKR 26.621 Billion and has recovered PKR 23.750 Million (Fatima, 2012). The Commission has been able to recover approximately 0.09% of the total fines imposed so far. The main reason for the non-recovery of the fines is that majority of the Commission's orders are pending before the Competition Appellate Tribunal or the Superior Courts of Pakistan (Robertson, 2016).

The recurrence of cartelization in various industrial sectors of Pakistan suggests that the fines have failed to achieve optimal deterrence. On numerous occasions, the cement manufacturing companies were found in the formation of cartels for fixing the prices and market allocations of quotas of cement. The first cement cartel case surfaced in the year 1992 when the devastating flood hit the country, the demand for cement in the market increased due to rehabilitation and reconstruction of houses and buildings. Resultantly, the prices were increased. Thereafter, in the years 1998, 2003, 2006, 2007 and 2008 the cartel behavior recurred in the cement industry. The first three cartel cases were dealt by the Monopoly Control Authority due to absence of Competition Laws in the country, while the last three were dealt with under competition laws. After 2008, no cartel has been detected by the Commission in the cement industry because no study or research in the business dynamics of the cement sector has been undertaken by the Commission (Loughlin, 2014).

The cartel also relapsed in the poultry industry. When the Pakistan Poultry Association fixed the prices of chicken in five relevant markets in the year 2010, a fine of PKR 250 Million was imposed i.e. PKR 50 Million for each count. While keeping in view the role of the poultry sector in the development of a country and market dynamics due to flood in Pakistan, the fine was reduced to PKR 50 Million (10 Million for each count). Moreover, the Commission reprimanded the Poultry Association not to violate the law in the future. Despite lenient view of the Commission in the imposition of fines and written warning issued to the poultry association, the Poultry Association was again found involved in price fixation and market allocation in the year 2015. This time the Commission doubled the quantum of fine but no successful recovery has been made in both cartel cases due to the matter being pending before the superior courts (Competition Commission of Pakistan, 2010). The cartel conduct is deemed as a civil wrong in the country. The civil violations are stayed by the superior courts on finding lacunas and loopholes in the investigations and decisions of the Commission. Whereas, if the criminal penalties are imposed upon cartelization, no injunctive relief or stay of proceedings can be granted by the Courts to stay criminal proceedings given Section 56(f) of the Specific Relief Act of 1877 (Hassan Qaqaya, George Lipimile, 2008).

The competition laws of Pakistan offer leniency arrangements upon full disclosure of facts by the concerned undertaking involved in the cartel. The Commission since its inception has only received one case under the leniency program (Fatima, 2012).

Several inquiry reports made by investigating team of the Commission have been turned down by the Competition Commission of Pakistan. Likewise, the show-cause notices based upon the investigation made by the investigation team of the Commission have been challenged before the superior courts. The Superior Courts have granted a stay in proceedings of the Commission in several cartel cases due to gaps and lacunas in the detection and investigation. For instance, in the year 2015, the Commission issued a show-cause notice to the Pakistan Poultry Association for fixing the prices of the feed of chicken. The notice was turned down by the Honorable High Court, Islamabad. The Honorable Court held that the show-cause notices issued to the Pakistan Poultry Association are vague and have insufficient material to form a prima facie basis for inquiry. The show-cause notice could at best be treated as notice for information for initiation of sector study but not for conducting inquiry (National Feeds Limited Vs Competition Commission of Pakistan, 2016). The shortcoming may be attributed to the ineffectiveness of leniency program in the country.

Globally, the leniency programs are active tools to gather information and evidence against the cartelists. The cartels are believed to be self-destructive for the possibility that the members often cheat and unleash the cartels with the fear of detection. The effective tools of detection create an atmosphere of culpability. For the same reason, the effective leniency programs are considered a major instrument of evidence collection from the conspirators. The successful leniency programs destabilize the cartels. The cartelist exposes its co-conspirator before the authority by disclosing all information on cartels. Conversely, the leniency programs may stabilize the cartels when the detection probabilities change and the firms anticipate the penalties to be low as compared to prospective benefits of the cartels. The effect of leniency also depends on market concentration and whether the fines are proportional to the cartel benefits and heterogeneity of the monetary sanctions imposed by the authority (Miler, 2009).

For any leniency program to work there must exist the potential threat of detection and punishment and the same can be achieved through the criminalization of cartels. As the commitment to abate the criminal sanction would allow the companies self-report the conduct (Loughlin, 2014).

Whereas in Pakistan, the fines imposed on cartelization are quite relative and can easily be perceived by the undertakings. For instance, in the year 2009 in the cartel case of petroleum products whereby the Liquefied Petroleum Gas Association of Pakistan (LPGAP) and Jamshoro Joint Venture Limited has made certain arrangements to fix the price of LPG in the country, the lesser penalty was imposed on LPGAP amounting to Rupees 40 Million keeping in view the concerned undertaking did not have any history of cartelization (Jamshoro Joint Venture Limited Vs. Sui Southern Gas Company Limited , 2016). In the year 2010 in the cartel case of edible oil industry Commission imposed the penalty of PKR 50 Million (Pakistan Vanaspati Manufacturers Association, 2011). In the same year the Commission imposed fine of PKR 50 Million in the poultry cartel case. (Competition Commission of Pakistan, 2010). The relativity of fines makes cost-benefit analysis

easier for the cartelists. The anticipation of penalties and litigation costs by the cartelists take away the element of deterrence from the penalties.

The investigating team of Competition Authority probed into the cartel case in the telecom sector wherein four big cellular companies were found involved in collusive behavior in the service market. The Commission inquired into the service market of cellular companies.³ On the news item services, the Commission called upon the information from the involved companies. An informant under the reward of informant scheme applied to the Commission and provided the documentary proofs to the commission. The evidence included emails shared between the management of the concerned companies thereby discussing the date and agenda of meetings which was to fix the rate of balance inquiry, missed call alerts at a specific rate. Moreover, twenty-four individuals (employees) of these companies were also found involved in fixing the rate of balance inquiry and missed call alert service. The Enquiry Committee recommended the Commission issue show-cause notices to the CEO's of these companies. Unfortunately, no further progress, in this case, has been reported by the Commission to date (Mir, 2010).

Under the Section 38 of the Competition Act, 2010, the Commission can impose monetary sanctions on any undertakings, the director, officer, or employee of the undertaking. The cartels are usually provoked by the middle management who takes risks for its undertaking under the expectation of promotion, bonuses on salary, or other benefits. Such individuals save their backs under the corporate veil. The cartels are usually harbored and indemnified by the undertaking for which they had made such collusive deals. The monetary sanctions imposed on such cartelists are easily borne out by the concerned undertaking. Therefore, it can be easily averred that the monetary sanctions target the businesses whereas cartels are made by individuals. On the other hand, the criminal sanctions target both; the undertaking and the individual. If the criminal sanctions such as imprisonment are added as parallel punishment for cartels in Pakistan, the individuals would avoid taking risk for the undertakings as incarnation can only be borne out by the individual (Loughlin, 2014).

In Pakistan, different law enforcement agencies are working to investigate and eradicate white-collar crimes. Therefore, if the cartels are characterized as white-collar crime it would not demand an entirely new modus operandi to enforce the sanctions. There are various laws in Pakistan dealing with unfair trade practices, market manipulations, abuses, and frauds. For instance, the

³Four cellular companies were involved in price fixing arrangement; Pakistan Mobile Communication Limited (Mobilink), Telenor Pakistan (Pvt.) Limited, Pak Telecom Mobile Limited (Ufone) and CMPak Limited (Zong).

³It is market abuse employed to disrupt and outpace the other market participants by creating an illusionary exchange pessimism by withdrawing or cancelling many orders or by creating false optimism demand by placing many offers in the market for certain commodity. The spoofers participate in the bids with the intention to cancel their orders before these are fulfilled. It can impact the rise or fall of the price of share in market and can be very profitable for the spoofers.

v. It is a kind of market abuse whereby the deliberate attempt is made to create artificial, false, misleading appearance as to price of the commodity, product, security or currency whereby the free and fair market operation is disrupted.

Securities and Exchange Commission of Pakistan, a financial regulatory agency aims to develop the corporate sector and capital market on sound principle and foster economic growth in the country, has the power to lodge criminal cases against various market abuses such as insider trading, spoofing, market manipulationⁱⁱ etc. Moreover, the corporate frauds, corruption, receiving of kickbacks from the contractors/third parties, tax evasion, and delinquent behavior of directors or employees of companies towards the creditors or shareholders, non-maintenance of proper accounts of the company are treated as corporate crimes and punishments like incarceration and fines are imposed likewise. The Companies Act of 2017 criminalizes various fraudulent and delinquent acts of the companies and provides for individual criminal sanctions for involved directors and shareholders. Therefore, the cartels being one of delinquent, fraudulent and abusive market practice can be criminalized as a corporate crime in the same manner (Darr, 2020).

In a country, if the conduct of any corporate entity amounting to defrauding the creditors exposes its directors and employees to criminal charges; there remains no rationale as to why the fraudulent or collusive deals between the companies which tend to fix the prices, unreasonably restrains the free trade and competition and ultimately steal away the fruits of competition from the consumers should not be criminalized. Another important reason is the criminal sanctions such as imprisonment bring bad reputation to the undertaking involved in cartels. Moreover, it also sets the print and electronic media in motion. The media gives coverage to such matters as of prime significance. The reason why Pakistan lagged behind in deterring and controlling the cartelization is lack of media coverage. The Competition Commission and superior judiciary have taken a lenient view of cartels and cartelists. The lack of political and public will has made the country endure the cartels (Ahmad, 2018).

CONCLUSION

The cartelists control the market for their own benefits and pave great barriers for small enterprises to enter the realm of competition. The cartelization is inimical for the balance of trades for any country which imports or exports cartelized products. The monopolization at national or international level damages the enterprises and trade in the country. The trend of criminalization of cartels is being witnessed globally based on the fact that the civil penalties imposed on undertakings are not sufficient to create any deterrence. The common rationale behind the emerging trend is to deter the cartelists and to better avail the leniency and amnesty schemes.

Given the benefits, the criminalization of cartelization is inevitable for a country like Pakistan. Firstly; the undertakings have made enormous benefits from the cartel deals and such benefits cannot be disgorged to the victims who are mostly the consumers. Secondly, the civil penalties have statutory limitations; the Commission cannot go beyond that limit which gives a clear idea to cartelists for cost-benefit analysis of penalties. The trade abuses and market abuses have been made criminally liable under the Securities Act, 2015 and Securities and Exchange of Pakistan, 1997, then why not the practice of bid rigging, placing restrictive conditions on the undertakings, fixing prices, market and distribution allocations are made criminally liable? If the delinquent acts of a director or employee of the company towards the share-holders make him liable to criminal prosecution then what is holding back the lawmakers in the country to criminalize the delinquent, collusive behavior of cartelists who are stealing away the choices from the consumers and ousting

the competition from the market. It is the need of time to deal with cartelization with firmness to save the economy and concentration of wealth in the hands of few.

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