SCOPE FOR INTERSECTION BETWEEN ANTITRUST LAWS AND CORPORATE GOVERNANCE PRINCIPLES VIS-À-VIS CARTELS DETERRENCE IN INDIA

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Competition law and corporate governance seem to analyse the external and internal operations of a firm respectively. This paper seeks to explore the scope for meaningful interaction between the two with respect to cartels. We believe that understanding the issue of cartel from the context of shareholder interest as an agency problem can help shape antitrust policy regarding the same. First, we propose a 'carrot and stick' approach to overhaul the antitrust policy. This involves imposing threat of individual liability through administrative sanctions and improving the predictability of the current antitrust leniency policy. Second, we argue for a shift in approach of CCI in viewing cartels as an agency problem linked to the corporate culture of the firm. Thus, we argue that CCI needs to draw on international experience and incentivise firms to adopt an antitrust compliance policy by promising reduced penalties for companies that implement effective antitrust compliance policy. CCI may also encourage companies to complement the antitrust compliance policy with an internal leniency policy protecting confessors from adverse work related consequences and proving antitrust leniency. Therefore, we believe that an understanding of cartels from corporate governance angle can steer antitrust policy on the track to effective deterrence.

I. INTRODUCTION

Competition law at a normative level seeks to ensure the efficient functioning of the market by facilitating competitive outcomes and proscribing anti-competitive actions.[1] Such anti-competitive actions include anti-competitive agreements (both horizontal and vertical), abuse of dominant position and pre-merger review.[2] Competition law in India has modest origins in the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act') to control monopolies and prohibit restrictive and monopolistic trade practices.[3] The

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1 Goals of Competition Law, 29 (Daniel Zimmer (ed.), 2012).

2 *Id.*

3 *See* Monopolies and Restrictive Trade Practices Act, 1969.

MRTP Act contained provisions which allowed it to prevent any merger and monopoly in public interest, but its enforcement mechanism was toothless, with even 'cease and desist' orders being enforceable only through the court process.[4]

In 1991, India shifted to a neo-liberal order which involved liberalising markets, dismantling of overt government intervention and promoting competition among market players.[5] The MRTP Act which was passed over thirty years prior to 1991, was in contrast with the free market approach and provided for extensive government control over monopolies and mergers.[6] Thus, the MRTP was finally dismantled in 2009, giving way to the dynamic Competition Act, 2002, ('the Competition Act') which created the Competition Commission of India ('CCI'). §18 of the Competition Act enumerates the objectives of competition law which include: eliminating anti-competitive practices; sustaining competition in the market; protecting the interest of consumers and protecting the freedom of market participants.[7]

Around the same period of India's shift to neo-liberal order, the principles of corporate governance gained prominence among various businesses in India.[8] The theoretical basis of corporate governance is a concept known as the 'agency cost.' Even though it is the shareholders of a company who own and set the objectives that the company has to achieve, it is the management that has to devise mechanisms to achieve this objective.[9] Thus, the management effectively acts as the shareholders' agents. Even though managers are expected to implement these objectives, their objectives may often be at variance from that of a shareholder's. This inherent difference in objectives can be illustrated by a scenario where the manager may want to create a name for himself by creating an empire through rapid diversification, but this decision may not be in the long-term interests of the shareholders.[10] This is why Berle and Means, in their seminal work discussing corporate governance, state "distinction between ownership and management leaves room for discretion of the manager which can be abused especially when the shareholding is dispersed."[11] Therefore, there is a cost incurred by the shareholders in separating the management from ownership and this is called the agency cost. Corporate governance

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4 *See* Kumkum Sen, *Toothless MRTP is laid to rest,* Business Standard, September 14, 2009.

5 Chakravarthy S., *MRTP Act metamorphosis into Competition Act,* CUTS International (2009).

6 *Id.*

7 Competition Act, 2002, § 18.

8 Santosh Pande and Kshama V. Kaushik, *Study on the State of Corporate Governance in India: Evolution, Issues and Challenges for the Future,* Indian Institute of Corporate Affairs (2010).

9 A.C. Fernando, Corporate Governance: Principles, Policies and Practices 46 (2006).

10 *Id.*

11 A.A. Berle and G.C. Means, The Modern Corporation and Private Property 112 (1991).

seeks to create monitoring mechanisms that can align the objective of the owners and management to minimise agency costs.[12]

The first effort at recognising corporate governance principles was made by the Confederation of Indian Industries in 1998, when it released voluntary guidelines of corporate governance for listed companies with a turnover more than Rs. 100 crores.[13] However it was felt that voluntary measures would not be effective and hence there was a need to impose a statutory obligation on the companies to follow these guidelines.[14] Early corporate governance reforms in India were suggested by the Kumar Mangalam Birla Committee Report in 1999, which the Securities and Exchange Board of India ('SEBI') accepted by mandating adoption of corporate governance principles though Clause 49 of the Listing Agreement, which came into force in 2003.[15] However, the obligations applied only to listed companies and thus key governance norms were consolidated through the enactment of the Companies Act, 2013, which provides detailed norms for appointment of independent directors and audit committee as well as increased financial disclosures for both listed and unlisted companies.[16]

Thus, both competition law and corporate governance norms, which evolved around the same time in India, have developed at a tremendous pace. At a theoretical level, competition law seeks to address anti-competitive actions of companies in the market and corporate governance norms seek to enforce mechanisms within the company for aligning the shareholders' and management's interests. While it may appear that both laws are unrelated there is increasing scholarship regarding the scope for meaningful interaction between them.[17] This paper seeks to explore the same in the context of cartels,[18]

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12 Corporate Governance in Emerging Markets: Theories, Practices and Cases 360 (Sabri Boubaker & DucKhoung Nguyen, 2014); Research Handbook on Shareholder Power 198 (Jennifer G. Hill & Randall S. Thomas, 2015).

13 *See* Confederation of Indian Industries, *Report on a Desirable Corporate Governance code*, 1 (April 1998).

14 Kumar Mangalam Birla Committee, *Report of the Committee appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla,* (2000), available at http://web.sebi.gov.in/commreport/corpgov.html (Last visited on July 30, 2016).

15 *Id.*

16 *See* Sameer Kochhar, Growth and governance: Essays in honour of Nandan Nilekani, 54 (2014).

17 *See* D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises,* 2009 byu l. rev. 1713 (2009); Spencer Weber Waller, *Corporate Governance and Competition Policy,* 18(4) Geo. Mason L. Rev. 833 (2011); Florence Thepot, *Leniency and individual liability, opening the 'black box' of the cartel,* 7(2) Competition Law Review 221 (2011); Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77 (2008).

18 Cartel is essentially an agreement between firms in the same market that resembles a monopoly whereby through an informal agreement the colluding firms increase the prices or restrict the total output for their mutual benefit and end up harming the consumers and other competitors.

to investigate how understanding cartels from the viewpoint of shareholders can assist in drafting better antitrust policies. Such an approach will help in promoting the interest of both the shareholders and consumers.

Part II of this paper shall discuss the scope for meaningful interaction between competition law and corporate governance in the context of abuse of dominance and pre-merger review. Part III shall discuss the scope for interaction with respect to cartels, whereby the action of individual firms in engaging in a cartel must be viewed as a function of internal corporate policies and culture. This section introduces the reader to the concept of antitrust leniency policy which is gaining traction worldwide and incentivises cartel participants both at individual and corporate level, to report cartels where no investigation has begun, in return for antitrust immunity. Further, the dismal position of detection and prosecution of cartels in India is discussed and supplemented by the flaws of India's antitrust leniency policy i.e. Lesser Penalty Regulations, 2009 ('LPR'). In Part IV, it is argued that one of the central flaws to CCI's cartel deterrence regime is the rare usage of individual sanctions against employees/executives involved in cartels.

It is from this vantage point, that we argue for adoption of a 'carrot and stick' approach[19] with the optimum risk and rewards to deter cartels. The risk of detection can be increased by strengthening the individual sanctions for cartel participation. In Part V, we argue that the above must be achieved by imposing administrative sanctions such as prohibiting the employer from reimbursing the antitrust fines borne by the guilty employee and in exceptional cases prohibiting future employment of the guilty employee. Further, it is argued in Part VI that the reward factor for increasing leniency applications requires a twofold approach by CCI. The first step involves increasing the predictability and transparency of LPR which includes allowing guilty individuals also to benefit from the leniency procedure when the company qualifies for corporate leniency under the LPR.

Further, the second step involves an understanding of cartels from the viewpoint of shareholders as an agency problem whereby the corporate culture and the absence of a clear antitrust policy at the company level contributes to cartel conduct by individuals. Thus, similar to the efforts worldwide, we argue that CCI needs to incentivise companies to adopt antitrust compliance policy to improve the corporate culture *vis-à-vis* antitrust compliance by granting lesser antitrust penalties for companies with effective antitrust compliance policy. Further, CCI can also encourage companies to implement an internal leniency policy grating protection to confessing employees/executives against adverse professional consequences. This encouragement will arise when CCI recognises that that employees who qualified for internal leniency as per the

[19] A 'carrot and stick' approach refers to the policy of offering the right combination of risk (stick) and rewards (carrot) to induce a certain behaviour out of the mule.

company's policy will automatically obtain antitrust leniency if the company is successful in receiving leniency as per the LPR.

II. MEANINGFUL INTERACTION OF CORPORATE GOVERNANCE AND COMPETITION LAW

Competition law evaluates a company by considering it as a 'black box',[20] because the antitrust agencies while evaluating the anti-competitive effects, do not consider the internal mechanisms within a firm.[21] For example, for assessing abuse of dominance, antitrust legislations focus on the economic analysis of the market power of the firm and not on the corporate governance policies regarding management/ownership structure of the firm which also has a role in the firm's anti-competitive behaviour.[22] There have been studies that have focused on the intersection between product market competition and corporate governance policies to investigate whether they are substitutes or complementary in nature.[23] If they are substitutes it would mean that a stronger product market competition would substitute the need for imposing strict corporate governance structures in the firm. Contrarily, these studies have often found a positive relationship between corporate governance structures in the industries that are characterised by high competition.[24] These studies shall be discussed in sub-part A.

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[20] Florence Thepot, *Leniency and individual liability, opening the 'black box' of the cartel,* 7(2) Competition Law Review 221 (2011); Florence Thepot, *The Interaction between Competition Law and Corporate Governance: Opening the 'Black Box',* University College of London, Doctoral Thesis, available at http://discovery.ucl.ac.uk/1456752/ (The author argues that antitrust laws view companies as a 'black' opaque box, because they ignore the internal content of the box i.e. the internal relations/mechanisms operating within the firm. Rather their focus is more towards the company's interaction with external market or competitors).

[21] Florence Thepot, *Leniency and individual liability, opening the 'black box' of the cartel,* 7(2) Competition Law Review 221, 222 (2011).

[22] *See* Spencer Weber Waller, *Corporate Governance and Competition Policy,* 18(4) Geo. Mason L. Rev. 833, 881 (2011); *See e.g.* Indian Competition Act, 2002 (Section 19(4) while determining dominance focuses on economic factors like market share of the enterprise, size of its resources and economic power of the enterprise etc.)

[23] *See* Irena Grosfeld & Thierry Tressel, *Competition and Corporate Governance: Substitutes or Complements? Evidence from Warsaw Stock Exchange* 24 (The William Davidson Institute University of Michigan Business School, Working Paper No. 369, 2001); Competition and Corporate Governance, OECD Hearings, DAF/COMP(2010)30 (2010); Manoj Pant & Manoranjan Pattanayak, *Corporate governance and Competition: A Case study of India* (Centre for International Trade and Development School of International Studies JNU, Discussion Paper 09-02, 2008); Xavier Giroud & Holger M. Mueller, *Corporate Governance, Product Market Competition, and Equity Prices,* 66(2) The Journal of Finance 563 (2011).

[24] Manoj Pant & Manoranjan Pattanayak, *Corporate governance and Competition: A Case study of India* 18 (Centre for International Trade and Development School of International Studies JNU, Discussion Paper 09-02, 2008).

Further, encouraged by this positive relationship between market competition and corporate governance, the scholarship has also focused on considering specific areas of interaction between competition law (which ensures market competition) and corporate governance policies. For example, should merger review under antitrust law only look at the market effect of the transaction, or whether an analysis of the corporate structure is also warranted under merger review?[25] Sub-part B shall outline three major areas of intersection of corporate governance and competition law: abuse of dominance; anti-competitive agreements and merger review. Through an analysis of this intersection the proposition emerges that a broader understanding of agency costs within corporate governance can play a pivotal role in framing effective antitrust polices and vice versa.

A. PRODUCT MARKET COMPETITION AND CORPORATE GOVERNANCE: ARE THEY SUBSTITUTES OR COMPLEMENTS?

At the fundamental level, greater product market competition has a positive correlation with better corporate governance because competition pushes the management to take prudent decisions that are ultimately in the interest of shareholders.[26] Further, the stringency of competition review of an enterprise can have an effect on the patterns of ownership and control of the enterprise.[27] Illustratively, in Warsaw, a 'U' shaped relationship was seen between ownership structure and performance of the enterprises.[28] This was explained by the fact that good competition and corporate governance reinforced each other. Thus both high competition in the market and the resulting thrust on corporate governance mechanisms increased the performance of the firms in the market.[29] Another interesting conclusion was reached in the context of manufacturing firms in the European Union ('EU') where competitive environment

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25 Waller, *supra* note 17, 872.

26 Franklin Allen & Douglas Gale, *Corporate Governance and Competition* 35 (Wharton Financial Institution Center, Working Paper 28, 1999).

27 Angela Wigger, *Towards a market based approach: The privatization and micro-economization of EU antitrust law enforcement* in The Transnational Politics of Corporate Governance Regulation, 98 (HenkOverbeek, Bastiaan van Apeldoorn & Andreas Nölke (eds.), 2007).

28 *See* Irena Grosfeld & Thierry Tressel, *Competition and Corporate Governance: Substitutes or Complements? Evidence from Warsaw Stock Exchange* 24 (The William Davidson Institute University of Michigan Business School, Working Paper No. 369, 2001).

29 Grosfeld & Tressel, *supra* note 28; Hee Sub Byun, JiHyeLee, KyungSuh Park, *How does product market competition interact with Internal Corporate Governance?:Evidence from the Korean Economy* 41(4) Asia Pacific Journal of Financial Studies 377 (2012) (In this study from Korea it was found that product market competition improved effectiveness of board management and maximised the shareholder's rights and transparency in the firm); *c/f* Julia Chou, Lilian Ng,Valeriy Sibilkov & Qinghai Wang, *Product market competition and corporate governance,* 1 Review of Development Finance 114 (It has been argued that even though product market competition has substantial impact on the corporate governance mechanism it acts as a substitute in case of weak governance structure rather than acting as a complement).

was found to cause lower insider ownership and more dispersed stake among outside shareholders.[30] Thus, competition led to the diffusion of stake from inside the enterprise to diverse 'outside' shareholding, because competition obliterated the need for a large shareholder to monitor the agency costs.[31] Closer home, two studies have found the beneficial effect of competition on corporate governance by concluding that higher insider ownership in the firm increased productivity only when there was fierce competition in the product market.[32]

Contrarily, economists have also derived country specific conclusions holding that product market competition can be a substitute to internal governance mechanisms. In the context of public firms in the United States of America ('US') it was found that the Sarbanes-Oxley Act had higher impact on efficiency of firms, in low competition sectors.[33] This is because high competition could obliterate the need for disciplining managers and balancing conflicting incentives through stricter corporate governance policies.[34] A similar conclusion was also reached in the context of EU countries where competitive force by itself ensured the disciplining of managers and in effect substituted corporate governance by addressing the agency costs.[35] This is because in the absence of competition acting as an external disciplining tool, firms increased corporate governance disclosures to be seen as shareholder-friendly.[36] This revealed that government policies regulating competition can have inadvertent effect on the corporate governance policy and disclosures of the firms.[37] Therefore, on the basis of the EU and US based studies highlighted above, it could be argued that regulators should pay more attention to reducing agency costs in less competitive sectors than concern themselves with managerial incentives in more competitive industries.[38]

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30 Jan Bena & Ting Xu, *Competition and Ownership Structure of Closely-Held Firms* 29 (University of British Columbia, Working Paper, 2016) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356526 (Last visited on July 30, 2016).

31 *Id.*

32 Ekta Selarka, *Corporate Governance, Product Market Competition and Firm Performance: Evidence from India in* CORPORATE GOVERNANCE IN EMERGING MARKETS: THEORIES, PRACTICES AND CASES (Sabri Boubaker & DucKhuong Nguyen (eds.)) 68 (The authors find a weak substitution effect of competition law and corporate governance policy in Indian firms and on this basis argue for direct corporate governance reforms instead of relying on existing competition law).

33 Vidhi Chhaochharia et al., *Product Market Competition and Agency Conflicts: Evidence from the Sarbanes Oxley Law* 22 (Johnson School Research Paper No. 18, 2012).

34 *Id.*

35 Manueal Ammann, David Oesch & Markus M. Schmid, *Product Market Competition, Corporate Governance, and Firm Value: Evidence from the EU-Area,* 19(3) 17-18 EUROPEAN FINANCIAL MANAGEMENT JOURNAL (2013).

36 Basil Al-Nijjar & Rong Ding, *Product market competition and corporate governance disclosure: Evidence from the UK,* 19(1) ECONOMIC ISSUES 73 (2014).

37 *Id.*,89

38 Vidhi Chhaochharia et al., *Product Market Competition and Agency Conflicts: Evidence from the Sarbanes Oxley Law* 22 (Johnson School Research Paper No. 18, 2012); Xavier Giroud & Holger M. Mueller, *Does corporate governance matter in competitive industries?* 95 JOURNAL OF FINANCIAL ECONOMICS 312, 330 (2010).

Both sides of the research suggest something common, i.e. policymakers focused on improving corporate governance must broaden their horizon. This would involve improving the competitiveness in the industry through better appreciation of antitrust law and its interaction with corporate governance mechanisms.[39] This relationship between product market competition and corporate governance could be used beneficially to frame wholesome policies that address both the agency cost and boost competition in the market.

B. INTERACTION BETWEEN COMPETITION LAW AND CORPORATE GOVERNANCE: THE BROADER PICTURE

Competition law is aims at ensuring competitive functioning of the product market and welfare of the consumers in the long run.[40] This is done through three broad provisions that prohibit certain conduct: *first*, abuse of dominance; *second*, entering into anti-competitive agreements; and *third*, review of combinations for their anti-competitive impact on the market.[41] Thus, advancing from the general discussion on the interaction between corporate governance policy and product market competition, we will briefly analyse three specific unexplored areas where competition law and corporate governance interact: *first*, abuse of dominance; *second*, mergers and acquisition; and *third*, collusive behaviour. However, we limit our analysis to enquiry *vis-à-vis* the scope of interaction occurring between antitrust and corporate governance laws with respect to cartels.

Abuse of dominance is prohibited by §4(1) of the Competition Act whereby no entity in a position of strength or dominance in the relevant market can abuse its position thereby affecting its competitors, new entrants and consumers.[42] Thus, an application of this provision requires delineation of the 'relevant market and determination of market power of the entity.'[43] For determination of market power, antitrust agencies worldwide including CCI typically rely on market share, economic power of the enterprise, reliance of consumers on the firm, market structure of the firm and entry barriers in the relevant market etc.[44]

[39] Giroud & Mueller, *supra* note 38, 330.

[40] Hedvig Schmidt, Competition Law, Innovation and Antitrust: An Analysis of Tying and Technological Integration 109 (2009).

[41] A functional Competition Policy of India 56 (Pradeep S. Mehta, 2006).

[42] The Competition Act, 2002, § 4(1).

[43] *See e.g.*, Pankaj Aggarwal, In re, 2015 SCC OnLine CCI 77 : 2015 CCI 108 ¶ 6.1.3; GHCL Ltd., In re, 2014 SCC OnLine CCI 41 : 2014 CCI 51 ¶ 41; S. Chakravarthy, *Competition Act, 2002: The Approach* in A functional Competition Policy of India 59 (Pradeep S. Mehta, 2006).

[44] The Competition Act, 2002, § 19(4).

Evidently, the factors focus on externally analysing the market, but the abuse of dominance is ultimately the result of the company's Board of Director's decisions.[45] Thus, shareholder derivative actions against the Board alleging breach of fiduciary duty needs to focus on the existence of numerous 'red flags' signalling abuse of dominance such as potential investigations/ notices by antitrust agencies and penalty orders passed by antitrust authority in one jurisdiction.[46] The court in *Intel Corpn. Derivative Litigation, In re* [47] held that mere identification of 'red flags' was not enough because constructive knowledge of directors of these red flags need to be proved to impute liability for breach of fiduciary duty.[48] United Kingdom ('UK') has realised this potential for interaction between board decisions and abuse of dominance by incorporating a system of director disqualification for antitrust violations.[49] On finding the company liable for antitrust breach, the Office of Fair Trading may make an application to the competent court to declare the director as unfit for management of the company or any other company for the next fifteen years.[50]

While abuse of dominance judges the impact of one firm's action on the market, competition law also reviews the market impact of combinations involving two or more firms in the form of mergers and acquisitions. §20 empowers CCI to enquire into the appreciable adverse effect created by a combination that crosses the financial threshold stipulated in the Competition Act.[51] Once again, the conditions considered for approving or blocking a merger, deal purely with the anti-competitive and pro-competitive effects of the merger on the market.[52] However, it is the Board's decision that is pivotal in approving the acquisition and while taking this decision, the Board also has to factor in the potential antitrust issues arising from the combination.[53] Scholarly work in the field of corporate governance has argued that value destroying mergers

45 Waller, *supra* note 17, 883.

46 Waller, *supra* note 17, 883. *See* Intel Corpn. Derivative Litigation, In re, 621 F Supp 2d 165, 169 (District Court Delaware 2009).

47 Intel Corpn. Derivative Litigation, In re, 621 F Supp 2d 165 (District Court Delaware 2009).

48 *Id.* 175-76.

49 *See* Enterprise Act, 2002, § 402-03; § 1 provides that "in managing its affairs the office of fair trading shall have due regard to such generally accepted principles of good governance as it is reasonable to regard as applicable to the office of fair trading."; Alan Dignam & John Lowry, Company law 329 (7th ed., 2012); John Ratliff et al., *Let the Punishment Fit the Crime? UK's OFT Publishes Revised Guidance on Disqualifying Directors for Competition Law Infringements,* Wilmerhale, July 15, 2010, available at http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9563 (Last visited on August 10, 2016).

50 Criminalisation of Competition Law Enforcement: Economic and legal implications for the EU members 86 (Katalin J. Cseres et al., 2006).

51 The Competition Act, 2002, § 20.

52 The Competition Act, 2002, § 19(4) (It includes analysis of anti-competitive factors like extent of entry barriers, degree of countervailing power in the market and balancing them with pro-competitive factors like nature and extent of innovation, chance of benefits outweighing adverse impact of the combination).

53 Waller, *supra* note 17, 874.

require for deeper antitrust review from the competition agency.[54] An oft given example of value destroying mergers is the 'merger of equals.'[55] 'Merger of equals' denotes the combination of two firms through the surrender of shares by the shareholders of both companies to receive the securities of the single merged entity.[56] It is said to destroy the shareholder value because managers often over-estimate the value gained from the synergies through the merger or are lured by the prospect of increased compensation packages post-merger.[57] The question that arises in the context of value destroying mergers is whether the competition agencies should consider factors such as value destruction by the merger and resultantly enforce a stricter review for value destroying mergers.[58] Proponents argue that lessons from the interaction between both antitrust and corporate governance laws indicate the need for an increased antitrust review for value-destroying mergers.[59] On this basis they also argue for an increased review under corporate governance laws when the efficiency effects of a combination are weak.[60]

III. INTERACTION BETWEEN COMPETITION LAW AND CORPORATE GOVERNANCE VIS-À-VIS CARTELS

Cartels are another area where there is profound scope for interaction between competition law and corporate governance. Cartels deal with collusive behaviour by firms which have an impact on the market and consumers. §2 of the Competition Act defines cartels as "association of producers/sellers/service providers who by agreement limit or control or attempt to control the production, distribution, sale or price of goods/services."[61] §3 of the Competition Act prohibits anti-competitive agreements "including cartels having an appreciable adverse effect on competition."[62] Such conduct is bad

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[54] Competition and Corporate Governance, OECD Hearings, DAF/COMP(2010)30 6 (2010).

[55] *See* Thomas Lys & Linda Vincent, *An Analysis of Value Destruction in AT&T's Acquisition of NCR*, 39 Journal of Financial Economics 353 (1995); Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 Journal of Economic Perspectives 103 (2001); Sara Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring Firms Returns in the Recent Merger Wave* (National Bureau of Economic Research, Working Paper No. 10200 of 2004); *See also* Matthew Curtin, *A Merger of Equals is more Fragile,* The Wall Street Journal, March 16, 2015, available at http://www.wsj.com/articles/a-merger-of-equals-is-more-fragile-1426554128 (Last visited on August 15, 2016).

[56] Mergers, Acquisition and other Restructuring 262 (Donald M. DePamphilis, 2nd ed., 2003).

[57] Donald C. Langevoort, *The Behavioural Economics of Mergers and Acquisitions* 8-9 (Georgetown Business, Economics & Regulatory Law Research Paper No. 10-17, October 2011); Tim Arango, *How the AOL-Time Warner Merger Went So Wrong,* New York TIMES, January11, 2010.

[58] Competition and Corporate Governance, OECD Hearings, DAF/COMP(2010)30 6 (2010).

[59] Waller, *supra* note 17, 881.

[60] Waller, *supra* note 17 ,881.

[61] The Competition Act, 2002, § 2(c).

[62] The Competition Act, 2002, § 3.

for the markets and consumers because it affects the purchase/sale price of the product or leads to sharing of the market among competitors or limits the supply/production of the product etc.[63] Even though cartels may be ultimately affecting the market, the conduct *per se* is intricately connected to the internal functioning of the constituent companies.[64] For example, in the absence of strong corporate governance or company policy limiting cross-ownership or cross-management, there is an increased possibility of collusive action by common/related directors.[65]

Further, proof regarding cartels is often set out solely on circumstantial evidence like communications among the firms, minutes of meeting held with competitors, minor variations in bid quotations not justified by cost considerations, and prevalence of cross-ownership between participants etc.[66] Therefore, cartels have been extremely difficult to prove and regulators worldwide supplement regular cartel detection and enforcement efforts with a robust leniency policy to attract participants who have information about the cartel.[67] At the outset, we would like to distinguish between antitrust whistleblower policy and a leniency policy. While, the former deals with protections/financial incentives granted to informants to report the existence of cartels, the latter deals with confession by a participating employee/executive regarding the existence/continuance of the cartel.[68] The further sections shall deal with leniency policies and not whistleblower policies.

A. LENIENCY POLICIES AND THEIR ROLE IN CARTEL ENFORCEMENT

Leniency policies adjust the level of penalties or completely do away with them for confessors who report and co-operate with antitrust agencies to unearth the cartel.[69] The rationale behind any leniency policy is

[63] The Competition Act, 2002, § 3.

[64] Florence Thepot, *Leniency and individual liability, opening the 'black box' of the cartel,* 7(2) Competition Law Review 221, 222 (2011).

[65] *See* Sheth & Co., In re, 2015 SCC OnLine CCI 93 : 2015 CCI 12, ¶ 37 (In this case the Competition Commission of India remarked that cross ownership through closely related directors unequivocally pointed towards concerted action in price rigging cartel by cartel participants).

[66] *See* Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna, In re, 2015 SCC OnLine CCI 192 : 2015 CCI 17, ¶5-6; Builders Assn. of India v. Cement Manufacturers' Assn., 2012 SCC OnLine CCI 43 : 2012 CCI 42, ¶ 65.11.

[67] Ex Officio cartel investigations and the use of screens to detect cartels, OECD Policy Roundtables, DAF/COMP(2013)27 5 (2013).

[68] Gaincarlo Spagnolo, *Leniency and Whistle-blowers in Antitrust in* Handbook on Antitrust Economics 259, 278 (Buccirossi, 2008).

[69] *See* Barry J. Rodger and Angus MacCulloch, Competition Law and Policy in the EU and UK 101 (5th ed., 2015); Corporate Leniency Policy, 1993 (United States), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm (It provides for complete leniency from

to provide economic incentives to report cartels and thereby increase the rate of detection of cartels.[70] Although such a policy may sound absurd because it seems to encourage cartels by providing immunity to the wrongdoer, two practical considerations have helped leniency policies gain worldwide acceptance.

First, the high cost of detecting, prosecuting and establishing cartels makes leniency policies an attractive option for enforcers.[71] A typical method of cartel detection and prosecution would involve consumer/competitor's complaint, dawn raids and audits.[72] Further, evidence building against cartel participants would be almost entirely based on either ambiguous economic analysis including suspicious bidding pattern or communication conjectures regarding regular meeting of participants, and travel to common destination etc.[73] This difficulty in detection and evidence-building had led to phenomenally slow rate as well as success of cartel detection in many countries including the US and the EU.[74] A solution to this gloomy situation was envisioned in the US through the enactment of the leniency policy in 1993 and 1994 for corporate bodies and individuals respectively.[75]

These policies changed the pace and manner of cartel detection in the US and their success has been discussed extensively by US Department of Justice officials[76] as well as international bodies like the Organisation for

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corporate fines will be granted to corporations that report illegal activity before the investigation has begun provided six conditions are satisfied); European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006], O.J. C 298/17 and European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases [2002], O.J. C 45/3 (They provides that undertaking that informs the commission of existence of anti-competitive practice of which it is a member, and whose information allows the commission to carry out inspection or find an infringement obtains an immunity from any fines).

70 Use of markers in Leniency programme, OECD Working Party No. 3 on Co-operation and Enforcement, DAF/COMP/WP3(2014)9 ¶ 2.1 (2014).

71 *Id.* ¶2.2.

72 Use of markers in Leniency programme, OECD Working Party No. 3 on Co-operation and Enforcement, DAF/COMP/WP3(2014)9 ¶10 (2014).

73 Prosecuting Cartels without Direct Evidence, OECD Policy Roundtables, DAF/COMP/GF(2006)7¶5 (2006).

74 New Development in UK and EU Competition Policy 127-28 (Roger Clarke & Eleanor J. Morgan, 2006).

75 Corporate Leniency Policy, 1993 (United States), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm; Individual Leniency Policy, 1994 (United States), available at https://www.justice.gov/atr/individual-leniency-policy.

76 Grey R. Spratling, The Corporate Leniency Policy: Answers to recurring questions at ABA Antitrust Section: 1998 Spring Meeting (April 1, 1998), available at http://www.justice.gov/atr/speech/corporate-leniency-policy-answers-recurring-questions (Last visited on August 10, 2016) (Mr. Gary R. Spratling, Deputy Asst. Attorney General, Antitrust Division, U.S. Department of Justice points out that the recent amnesty applications have been key in uncovering and pursuing major domestic and international conspiracies, including some with the broadest impact we have ever seen. In the last six months alone, the Amnesty Program has resulted in nearly a dozen convictions and over $100 million in fines); Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations,* 69, George

Economic Co-operation and Development ('OECD').[77] For example, as early as 1996, just three years after the enactment of the policy, cartel detection had increased twofold and ninety percent of the fines imposed in the fiscal year of 1996 came through leniency applications.[78] This higher rate of detection and imposition of fines as seen in the US has sought to be emulated by many countries through enactment of leniency polices.[79] For example, by 2010 almost fifty jurisdictions had their own cartel leniency policies[80] including Australia, Canada, EU,[81] France, New Zealand,[82] and UK.[83] Further, having access to the testimony of a cartel participant can aid greatly in supplementing the ambiguous circumstantial evidence with direct evidence, further increasing the chance of holding the participants guilty.[84] Thus, leniency policies must be geared to achieve twin goals of reducing the cost of cartel enforcement in the short run and in the long run, they must lead to deterrence of firms from engaging in collusive behaviour.[85]

But, apart from the reduced cost of detection and aiding in establishing cartels, there is a more compelling reasons for regulators to adopt leniency polices. The second practical consideration that makes leniency attractive is the 'race to the enforcer's door' syndrome that it creates among conspirators.[86] This is because they cannot trust their co-conspirators to keep their best interest in mind and any careless conduct could lead to them missing out on a chance to gain complete immunity from any fines.[87] This syndrome can be better explained in economic terminology through analysis of the 'prisoner's dilemma'. A prisoner's dilemma exists when two persons pursue their own self-interest which results in both parties ending up in worse position than if they

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Washington Law Review 789, 799 (2001) (He states that Department of Justice amnesty programme has been the most effective generator of cartel cases and is believed to be the most successful program in US history for detecting large commercial crimes).

77 Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws, OECD Policy Roundtables, DAFFE/COMP(2002)7 ¶ 4 (2002); Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 (2003).

78 Scott D. Hammond, Evolution of Criminal Antitrust Enforcement over the Last Two Decades 3 at 24th Annual National Institute on White Collar Crime, Miami, Florida (February 25, 2010).

79 *Id.,* 3.

80 Scott D. Hammond, Evolution of Criminal Antitrust Enforcement over the Last Two Decades 3 at 24th Annual National Institute on White Collar Crime, Miami, Florida (February 25, 2010).

81 European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases [2002], O.J. C 45/3.

82 Commerce Act, 1986, § 58.

83 Hammond, *supra* note 79, 3.

84 Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel stability,* 31 Journal of Corporation Law 453, 454(2006).

85 P.J. Wouter, *Optimal Antitrust Fines: Theory and Practice,* 29(2) World Competition 183, 195 (2006).

86 Hammond, *supra* note 79, 4.

87 Hammond, *supra* note 79, 4.

had cooperated and pursued the group's interest.[88] The deal is usually offered when police does not have enough evidence to convict both persons, but seeks to create insecurity by offering to both persons the opportunity to confess and co-operate in return for complete immunity or face jail time.[89] Both the persons pursuing their self-interest will prefer to confess than stay silent and face a higher jail time. Further, confession by both persons leads to a situation where they are both worse off than if they had co-operated and not confessed.[90] Thus, through the creation of prisoner's dilemma confession becomes the dominant strategy for both the parties/prisoners.[91]

This is the broad economic strategy used by the law enforcers to extract confession from competing co-conspirators; however, competition agencies apply an identical strategy, but with slight modifications.[92] In a typical prisoner's dilemma, the police have some evidence to convict the two prisoners but are unsure of its sufficiency before the court. Thus, there is some fear in the mind of the prisoners that they might be convicted if they does not confess.[93] Contrastingly, in antitrust cases, agencies want participants to report new cartels that have not been investigated so far, by taking the benefit of the leniency policy.[94] This creates a situation where, due to lack of evidence with the antitrust agencies and lack of incentive to forgo huge profits earned through the cartel, the dominant strategy for each participant is no more confession.[95] In fact applying the calculations of prisoner's dilemma, there is no one dominant strategy in such a situation.[96] Thus, antitrust agencies need to tweak the traditional prisoner's dilemma to ensure that confessing becomes the dominant strategy even when they do not have any evidence about the conspiracy.

Thus, they offer to each participant of the cartel a deal whereby they must be the 'first' to report and co-operate to help agencies build/win the cartel investigation in return for complete leniency.[97] The addition of 'first-in' adds a temporal element to the typical prisoner's dilemma where only confession by both persons was of importance, not when it was done by each of them. Thus, to maximise gains by confessing, a firm will have to confess first and will receive no penalty/fine. To make confession a dominant strategy among all participants, the policy needs to go further and provide descending order of discounts in fines to subsequent confessing participants based on the order of their confession. This mechanism ensures that confession is the dominant

[88] Leslie, *supra* note 84, 455.
[89] *Id.*
[90] Leslie, *supra* note 84, 455.
[91] Thepot, *supra* note 21, 227.
[92] Thepot, *supra* note 21, 226.
[93] Richard S. Gruner, Corporate Criminal Liability and Prevention § 17.06 (2005).
[94] Leslie, *supra* note 84, 465.
[95] *Id.*
[96] Leslie, *supra* note 84, 465.
[97] Leslie, *supra* note 84, 466.

strategy for all firms and exploits the lack of trust between members of the cartels so as to propel a 'race to the enforcer's door.' Thus, the second practical consideration that makes leniency policies attractive to competition agencies is the competitive environment that it creates between co-conspirators ensuring increased rate of detection and fines for cartels, than in the absence of such a policy.[98]

Therefore, cartels are an important competition concern because they shoot up the prices thereby affecting consumers and further productive or distributive inefficiencies affecting non-participating firms. Further, leniency policies have been crucial to the success of cartel detection and enforcement strategy followed by antitrust agencies worldwide. But, a more interesting question would be to ponder over why cartels might also be relevant for companies and their various stakeholders.

B. CARTELS AS A CORPORATE GOVERNANCE CONCERN

As discussed above, corporate governance concerns itself with structures and mechanisms by which a company is directed and controlled.[99] The aim of any corporate governance policy is to have in place structures that "define and distribute rights and responsibilities among various stakeholders of a company including the board, managers, shareholders, and employees etc."[100] Thus, according to the OECD Principles of Corporate Governance a good corporate governance policy is one that ensures the objectives of both the management and shareholders are aligned and should provide proper incentives to align their interests.[101]

The most important instance of agency cost occurs during corporate crimes committed by the management. This is because often shareholders bear the brunt *vis-à-vis* corporate crimes when hefty fines are imposed on the company reducing the valuation or share price of the company.[102] Agency cost in such a situation need not be strictly limited to monetary loss and includes any action that affects the intrinsic value of the firm including its reputation.[103]

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98 *Id.*

99 Sir Adrian CadburyCommittee, *Report of the Committee on the Financial Aspects of Corporate Governance*, December 1, 1992, available at http://www.ecgi.org/codes/documents/cadbury.pdf (Last visited on February 10, 2016).

100 OECD Principles on Corporate Governance, 1999, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En (Last visited on February 20, 2016).

101 OECD Principles on Corporate Governance, 2004, available at http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf (Last visited on February 20, 2016).

102 Research Handbook on the Economics of Criminal Law 181 (Alon Harel & Neith N. Hylton, 2012).

103 Thepot, *supra* note 21, 226.

World infamous accounting scandals like Enron are a reminder that corporate crimes can have a profound effect on shareholders, sometimes even resulting in the ultimate destruction and bankruptcy of the company.[104] Thus, any prudent shareholder would seek to develop appropriate executive compensation and review mechanisms that will keep the management in check and shareholders informed of management practices to minimise this agency cost.[105]

Cartel participation is another type of corporate crime which is sanctioned by competition laws worldwide. A cartel is analogous to other organised corporate crimes, like collusion between management and auditors/regulators etc., because the incentive and costs structure in these crimes are almost similar.[106] The management's incentive to enter into any corporate crime including a cartel is connected to the profit, increased remuneration and increase in share value that it promises. Thus, surprisingly cartelisation may benefit not just the manager but also the shareholders and the corporation in terms of the increased share value. The problem from corporate governance perspective arises because of the unequal distribution of costs associated with this crime. In the absence of harsh individual sanctions, shareholders bear the entire burden of the antitrust fines imposed on the firm and often the responsible manager may have already left the company.[107] Thus, shareholders bearing the cost of managerial misbehaviour with respect to cartels makes it an important corporate governance issue. Further, sometimes even imposing fines on executives will not be sufficient to prevent them from engaging in profit maximising cartels.[108] A harsh sanction would increase the cost thereby creating deterrence for managers/executives from engaging in profitable cartels, even when people within the firm encourage them.

Additionally, without harsh sanctions extending beyond fines, it would often be in the interest of the executive/employee to engage in profit maximising cartels.[109] While there can be various reasons like personal greed for participating in cartels, weak corporate governance mechanisms can be an important propelling factor for cartel participation.[110] For example, weak governance arrangements like high proportion of stock options, managerial compensation incentives and ambiguity on cross-ownerships can incentivise

104 Richard S. Gruner, Corporate Criminal Liability and Prevention § 2.03 (2005).

105 Brian R. Cheffins, *Corporate Governance since the Managerial Capitalism Era* 2-3 (University of Cambridge Legal Studies Research Paper Series, Paper No. 39, 2015).

106 Thepot, *supra* note 21, 226.

107 Thepot, *supra* note 21, 227.

108 Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime,* 5(1) European Competition Journal 19, 24 (2009).

109 Gregory J. Werden et al., Deterrence and Detection of Cartels using all the tools and sanction at 26th Annual National Institute of White Collar Crime, Miami, Florida (March 1, 2012).

110 2nd Economic & Finance Conference, June 3, 2014, Suha Alawi, Corporate Governance and Cartel Formation 16 (2014).

managers to engage in cartels.[111] Another significant instance of weak governance norms encouraging cartels can be the absence of any knowledge among employees/directors about antitrust compliance through the absence of a company level antitrust compliance policy.[112]

Hence, the law regarding the detection and enforcement of cartels also intersects with several issues related to corporate governance. While antitrust law focuses on the prosecution/deterrence of cartels, swift cartel detection within the firm is also a top priority for shareholders, to minimise the agency costs associated with cartel participation. Thus, corporate governance policies can have an 'optimal effect' on the enforcement of antitrust law *vis-à-vis* cartels both in terms of detection through leniency applications and sanctions imposed.[113] This meeting point provides scope for closely co-ordinated development of antitrust and corporate governance policies to achieve deterrence and minimise agency costs at the same time. Thus, preventing cartel engagement for both shareholders and antitrust agencies would mean increased monitoring cost by checking individual actions at each level. In this regard, a shift of the antitrust regime towards individual accountability and encouraging the adoption of antitrust compliance policy at company level would help in substantially reducing agency costs and deterring cartels.

IV. INDIAN LAW'S APPROACH TO PUNISHING CARTELS AND LENIENCY POLICY: NEED FOR THE 'CARROT AND STICK' APPROACH

Any leniency policy needs to have two basic elements to be ensure a 'race to the enforcers door syndrome,' that is crucial for its success: *first*, severe sanction for cartel participants and high detection of cartels; *second*, a transparent, certain and predictable leniency policy. We will now assess how these elements pan out in the Indian context.

As noted earlier, cartels are prohibited under §3 of the Competition Act and are presumed to have an appreciable adverse effect on competition in the market. Various factors are used to determine appreciable adverse effect on competition including entry barriers, foreclosure of competition, consumer harm and pro-competitive efficiencies arising out of the cartel.[114] In terms

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111 Gregory J. Werden et al., Deterrence and Detection of Cartels using all the tools and sanction at 26th Annual National Institute of White Collar Crime, Miami, Florida (March 1, 2012); Thepot, *supra* note 21, 228.

112 *See* William J. Kolasky, Antitrust Compliance Programs: The Government Perspective at Corporate Complaince 2002 Conference, San Francisco (July 12, 2002), available at https://www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective (Last visited on August 10, 2016).

113 Thepot, *supra* note 21, 233.

114 The Competition Act, 2002, § 19(3).

of punishment for anti-competitive agreements, §27 of the Competition Act, provides imposition of financial penalty on the participating firms and persons to the extent of three percent of their annual turnover for the preceding three financial years.[115] The proviso to §27 of the Competition Act, further enumerates higher penalty for cartels, which involves penalty equivalent to "three times the amount of profit made through the cartel or ten percent of the average turnover of the cartel for the preceding three financial years, whichever is higher."[116] Further, §48 of the Competition Act prescribes liability of individuals responsible for the antitrust contravention by the company unless they were not aware or exercised due diligence to prevent such contravention.[117] Thus, in pursuance of §48 read with §27 of the Act, CCI is empowered to levy penalties on both the company and responsible persons including executives and directors of the company.

However, the practical application of these provisions paints an interesting trend. Companies that were found liable of entering into anti-competitive agreements were fined a minimum percentage of their turnover as penalty for engaging in this conduct.[118] Empirical data collected reveals a gap between penalisation of companies and their executives.[119] In cases dealing with §3(3) where the claims were successfully established, the firms were penalised with imposition of financial penalty ranging from three percent to ten percent of annual turnover/profit of the preceding three years.[120] However, individuals responsible for such conduct were rarely traced conclusively and in only a handful of cases were financial penalties imposed on individuals responsible for anti-competitive conduct.[121] We considered thirty-two cases dealing with anti-competitive agreements from 2010-2015 under §3(3) and only in sixteen cases were individuals found to be held liable.[122] Further, within these sixteen cases, in eight cases, CCI is yet to pass final order for imposing penalty through a separate order based on their income statement of the employee/executive.[123] There have been some cases where CCI has recognised the need to penalise individuals who are responsible for the violation.[124] For example, CCI took a pro-active role in directing the Director General to investigate the role of individual office bearers and accordingly imposed penalty on both members directly involved in §3 violation as well as executive members. Further, in *Sandhya Drug Agency, In re* and *Peeveear Medical Agencies* v. *All India*

[115] The Competition Act, 2002, § 27 (b).
[116] *Id.*
[117] The Competition Act, 2002, § 48.
[118] Refer to Appendix.
[119] Refer to Appendix.
[120] Refer to Appendix.
[121] Refer to Appendix.
[122] Refer to Appendix.
[123] Refer to Appendix.
[124] *See* Avirup Bose, *Competition Law violation get personal,* The Business Standard, March 25, 2014.

Organisation of Chemists and Druggists,[125] CCI was dealing with §3 violation by association of enterprises and constituent enterprises, holding:

> "The anti-competitive decision or practice of the association can be attributed to the members who were responsible for running the affairs of the association and actively participated in giving effect to the anticompetitive decision for practice of the association. Therefore, the Commission decides to pass order with respect to office bearers, after the receipt of the requisite information in this regard from the OPs."[126]

Interestingly, similar disparity between company and individual liability can also be noticed with respect to cartel cases under §3. In leading cartel cases including *Express Industry Council of India* v. *Jet Airways (India) Ltd.*;[127] *Cartelization by public sector companies vis-à-vis Rashtriya Swasthya Bima Yojna, In re*;[128] *Alleged cartelization by cement manufacturers, In re*;[129] *Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, In re*;[130] *Builders Assn. of India* v. *Cement Manufacturers' Assn.*,[131] CCI has not levied any penalty on individuals responsible for the cartel behaviour. Further, in *Suo motu case against LPG cylinder manufacturers, In re*, CCI, after making the following observations, held only companies participating in the cartel responsible:

> "The treatment of cartels has been harsh and punitive world-wide. The courts in US have treated cartels as per se infringements of the Sherman Act and as criminal offences punishable by imprisonment of concerned directors. The Enterprise Act, 2002 in the United Kingdom also introduced criminal offences for individuals responsible for cartel activity which could lead to imprisonment of up to five years in addition to fines. In UK debarment from directorship in companies is also one of the possible consequences. Although, the EU law does not provide for criminal sanctions, several

[125] Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2013 CCI 76; Peeveear Medical Agencies v. All India Organisation of Chemists and Druggists, Case No. 30 of 2011.

[126] Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2013 CCI 76, ¶ 21.12; Peeveear Medical Agencies v. All India Organisation of Chemists and Druggists, Case No. 30 of 2011, ¶ 16.2-16.3.

[127] Express Industry Council of India v. Jet Airways (India) Ltd., 2015 SCC OnLine CCI 183 : 2015 CCI 163, ¶ 131

[128] Cartelization by public sector companies vis-à-vis Rashtriya Swasthya Bima Yojna, In re, Suo motu Case No. 4 of 2013, ¶ 65.

[129] Alleged cartelization by cement manufacturers, In re, 2016 SCC OnLine CCI 54, ¶ 187.

[130] Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, In re, 2014 SCC OnLine CCI 16 : 2014 CCI 32, ¶ 62.

[131] Builders Assn. of India v. Cement Manufacturers' Assn., 2012 SCC OnLine CCI 43 : 2012 CCI 42 ¶ 7.4.

> countries in the EU and outside, such as France, Canada, Greece, Japan, Korea and Norway independently have enacted such provisions.
>
> The Commission considering the totality of facts and circumstances of the present case and the seriousness of contravention the commission decides to impose a penalty on each of the contravening company at the rate of 7% of the total amount of penalty on each biding company."[132]

Thus, from the analysis above it is clear that there is an unequal distribution of costs associated with cartels because CCI especially in cartel cases imposes penalty only on the company. This unequal distribution of costs has two profound effects. *First*, it reveals that the allocation of costs of cartels is tilted towards the shareholders and the executives/managers engaged in such conduct have the advantage of taking home substantial benefits from engaging in the cartel.[133] Flowing from this observation is the *second* problem: because the sanction on individuals engaged in this conduct is not severe enough, it dampens the incentive or fear of the executives and employees to report and end the cartels by confessing to the authorities.[134]

Further, even assuming for a moment that the executives do want to confess, India's current leniency policy is riddled with unpredictability which weighs down the benefits of confessing. §46 of the Competition Act, provides CCI with the power to impose lesser penalty if the company makes 'full and true disclosure' before any investigation into the alleged violation has begun under §26 of the Act.[135] In pursuance of this provision, CCI brought into force the Lesser Penalty Regulations in 2009.[136] The LPR provides that the CCI 'may' grant lesser penalty to a cartel member who: *first*, ceases to participate in the cartel,[137] *second*, makes full, true and vital disclosure about the cartel.[138] *Third*, the company is required to provide all relevant documents/evidence, continuous co-operation and comply with any conditions which may be imposed for granting lesser penalty.[139] The lesser penalty imposed reduces progressively based on the order of participants approaching the CCI, the first, second and third participants may be entitled to up to one hundred percent, fifty

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[132] Suo motu case against LPG cylinder manufacturers, In re, 2012 SCC OnLine CCI 12 : 2012 CCI 11, ¶ 15.1-15.3.

[133] *See* Peter Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges 46 (2014).

[134] *See* Peter Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges 46-47 (2014).

[135] The Competition Act, 2002, § 46.

[136] *See* Lesser Penalty Regulations, 2009, available at http://www.cci.gov.in/sites/default/files/regulation_pdf/regu_lesser.pdf (Last visited on August 11, 2016).

[137] Lesser Penalty Regulations, 2009, Regulation 3(1)(a).

[138] Lesser Penalty Regulations, 2009, Regulation 3(1)(b)-(c).

[139] Lesser Penalty Regulations, 2009, Regulation 3(1)(d)-(e).

percent and thirty percent fine reduction respectively.[140] Broadly, the discretion regarding the grant of lesser penalty for 'first in' company depends on factors like the stage of the application, the evidence already with CCI and quality of evidence brought forward by the participant.[141] The amnesty to subsequent participants after the first confession would depend on the 'added value' of evidence brought forward by them.[142]

We feel that India's current policy mirrors the US policy in 1978, which was felt to be utterly insufficient to attract leniency applications. The 1978 policy provided certain pre-determined criteria to be satisfied before an applicant could apply for leniency, but over and above these criteria Department of Justice ('DOJ') was vested with discretion to grant criminal and civil immunities.[143] Further, the grant of immunity could never be applied for after the DOJ had begun investigations.[144] These factors meant that there was only a possibility but no guarantee of antitrust leniency by vesting immense discretion on the DOJ, this was one of the major reasons that prevented firms from confessing.[145] A somewhat similar story is panning out in India's antirust landscape. The basic framework on which the current leniency policy operates is flawed for various reasons. *First*, factors like stage of application and specifically heavy reliance on the quality of information brought by even the first confessing participant, vests CCI with paramount discretion *vis-à-vis* reduction of the penalty. Further, the regulation is not clear that the 'first in' company with information will get the benefit of leniency. A scenario to illustrate this uncertainty would be, when two companies confess and provide information to CCI before submission of report by the Director General.[146]

Additionally, the LPR vests CCI with complete discretion in these cases to decide who gets lesser penalty based on subjective factors including quality of evidence provides.[147] This is in contrast with policies of countries

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140 Lesser Penalty Regulations, 2009, Regulation 4.

141 *Id.*

142 Lesser Penalty Regulations, 2009, Regulation 4.

143 Scott D. Hammond, Cornerstone of an effective leniency program at ICN Workshop on Leniency Programs, Sydney, Australia (November 22-23, 2004).

144 William Kolasky, *Criminalising cartel activity: Lessons from the US experience,* 12 Competition & Consumer Law Journal 207, 212 (2004).

145 Flexibility in Modern Business Law: A Comparative Assessment 109 (Mark Fenwich, Stefan Wrbka, 2016).

146 *See* John Hondoll & Yaman Verma, *Cartel Leniency in India: overview,* Practical law (Reuters), May 1, 2016, available at http://uk.practicallaw.com/2-520-7061?source=relatedcontent (Last visited on September 23, 2016).

147 Lesser Penalty Regulations, 2009, Regulation 3(4).

like US[148] and Australia[149] where the first company to apply and co-operate gets leniency as long as the evidence provided is sufficient to commence cartel proceedings against the other members. Further, Regulation 4(4) of LPR, apart from requiring an applicant to fulfil conditions including ceasing participation, full disclosure and co-operation, also provides that CCI with the discretion to impose any other condition for grant of leniency.[150] This adds a huge layer of uncertainty with regard the grant of leniency because CCI may impose cumbersome conditions which may be difficult to comply such as requiring phone tapping evidence to catch other cartel participants.[151] These uncertainties have been acting as a huge deterrent for the success of leniency policy, with only one firm waiting in line to receive the benefit of leniency.[152]

Thus, both the cartel enforcement *vis-à-vis* individuals and leniency policy are not working holistically in cartel enforcement. In subsequent parts we argue that what India really needs is the 'carrot and stick' approach.

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148 Corporate Leniency Policy, 1993, ¶ A (United States), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm (The provisions does not review quality of evidence etc. But requires satisfaction of the following criteria:

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met if: (i) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (ii)The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;(iii) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (iv)The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (v)Where possible, the corporation makes restitution to injured parties; and (vi) The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity).

149 Australian Competition and Consumer Commission, Immunity & Cooperation policy for cartel conduct, 2014, ¶ 16 (The provisions does not review quality of evidence/subjective factors etc. But requires satisfaction of the following criteria:

A corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where: (a) it applies for immunity under this policy and satisfies the following criteria: (i) the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy (iv) the corporation has not coerced others to participate in the cartel (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives) (vii) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings, and at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.)

150 Lesser Penalty Regulations, 2009, Regulation 4(4).

151 *See* William Kolasky, *Criminalising cartel activity: Lessons from the US experience,* 12 Competition & Consumer Law Journal 207, 211 (2004).

152 *See* Maulik Vyas, *Antitrust regulator CCI may be lenient on cartel whistleblowers,* The Economic Times, February 27, 2014.

A 'carrot and stick' approach refers to the policy of offering the right combination of risk (stick) and rewards (carrot) to induce a certain behaviour out of the mule. Similarly, in this context India needs to beef up its enforcement strategy by coupling rewards for voluntary disclosure and timely cooperation pursuant to the leniency program and company level antitrust compliance policy with severe sanctions that induce such disclosure.

V. ENSURING A HARD STICK TO SCARE THE MULE: ENHACING INDIAN PUNISHMENT REGIME FOR CARTELS

The first limb of improving the enforcement strategy is concerned with implementing severe sanctions for cartel participants. The current law does not sufficiently penalise individuals within the company to deter them from engaging in collusive behaviour. As explained above – this is bad not just for antitrust enforcement in India, but also excessively harsh on the shareholders of the company, who bear the brunt of sanctions. In this context, there are two main methods adopted by antitrust agencies to increase sanctions in addition to the already existing fines: criminalisation of cartels and imposition of administrative remedies.[153] We shall analyse the suitability of the same *vis-à-vis* Indian regulatory landscape.

A. CRIMINALISATION OF CARTELS: IS IT THE RIGHT FIT FOR INDIA?

1. Theoretical justifications for criminalising cartels

Retribution theory and deterrence theory are the two widely recognised moral justifications for imposing criminal sanctions for cartel behaviour.[154] The main objective of the deterrence theory is to prevent people from committing further crimes.[155] According to the proponents of this theory, rationality and economic efficiency must be taken into account while imposing punishment.[156] By assuming that individuals are rational beings, it can be inferred that if the cost borne by committing a crime is higher than the gain,

[153] 6th United Nations Conference to review all aspects of set of Multilaterally agreed equitable principles and rules for the control of restrictive business practice [UNCTAD], November 8-12, Geneva, 2010, *Appropriate sanctions and Remedies,* ¶ 8 TD/RBP/CONF.7/5 (August 30, 2010).

[154] Peter Whelan, *Morality and Its Restraining Influence on European Antitrust Criminalisation,* 12 Trinity College Law Review 42 (2009).

[155] Anthony Ellis, *A Deterrence Theory of Punishment*, 53(212) The Philosophical Quarterly 337 (2013).

[156] Huseyin Cosugun, *Criminalising Cartels: Theory and Practice in the UK and Australia*, 6 Global Antitrust Review 113 (2013).

then rational beings may choose not to commit the crime.[157] By criminalising actions, it seeks to achieve effective deterrence. On the other hand, economic efficiency seeks to maximise the total welfare of the society.[158] It advocates that conduct whose benefits to the society outweigh its costs are efficient and hence only such conduct must be encouraged by the state. Conversely, conduct which is inefficient or whose costs are greater than its benefits is harmful to the society and must be discouraged.[159]

While applying the economic efficiency approach to cartels, it is clear that cartels harm the consumers as a whole for the benefit of a few and also distort the level of competition in the market. Thus, deterrence in this context would require preventing individuals from committing the act of engaging in cartels. Previously, the cost imposed on individuals for cartel behaviour was limited to fines.[160] However, in recent years there has been a trend to impose criminal sanctions, take administrative measures or both since fines alone are not sufficient to deter individuals.[161] There can be three scenarios of cartel formations: initiated solely by employee/executive; initiated by the employer; and finally, those initiated by the employees with the knowledge of the employer.[162] Fines fail to act as effective deterrent in each of the given cases. In cases where the employer initiates the cartel and requests for employee support or when the employee/executive solely initiates the cartel, the gains from cartels *vis-à-vis* the paltry cost imposed, may be sufficient pressure for such employees to engage in cartel. Further, when the employee/executive initiates the cartel with the knowledge of the employer, the latter also enjoys the benefits from the participation in the cartel. Such employers may encourage individuals to continue cartel engagement promising to compensate them when any monetary fines are imposed by antitrust authorities. This clearly indicates that individual fines may not actually deter individuals who have the support of their employer.[163]

Hence, it has been argued consistently that it is necessary to have criminal sanctions in order to increase the potential costs *vis-à-vis* the benefits of cartel engagement. Criminal sanctions would address the situations portrayed by the three scenarios discussed above. This is because the prospect of imprisonment will be a sufficient deterrent for the individual to rationally

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157 *Id.*

158 Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law,* 4 Competition Law Review 8 (2009).

159 *Id.*

160 Gregory C. Shaffer, Nathaniel H. Nesbitt and Spencer Webber Waller, *Criminalizing Cartels: A Global Trend?* in Comparative Competition Law 301 (John Duns, Arlen Duke & Brendan Sweeney, 2015).

161 *Id.*, 302

162 *See generally* Zhijun Cheng, *Cartel Organisation and Antitrust Enforcement* (University of East Anglia, Working Paper 08-21, 2008) (This paper analyses the working of cartels and also describes the ways in which cartels come into existence)

163 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 (2003).

decide against participation in the cartel and to resist corporate pressure to indulge in collusive behaviour.[164] Another reason criminal sanctions deter employers and employees alike is, that imprisonment of a particular employee/ executive of a company damages the reputation of both company and the individual, much higher than a fine would.[165]

The second theory supporting criminalisation of cartels is the retribution theory of justice. This theory is not a consequentialist theory because it does not focus on deterrence, but its main objective is to punish the wrongdoer for his act.[166] The nature of the prohibited act[167] and punishment for breach of moral code are key components of this theory.[168] Hence proponents of this theory claim that acts which tend to cause harm to the society and offend public conscience should be made punishable offences.[169] While applying retribution theory, there is a need to determine why any act deserves condemnation which would require it to be punished.

Culpability, harmfulness and wrongfulness are three such elements which help determine what actions need to be criminalised as per the retribution theory.[170] The first is related to the state of mind of the offender and does not consider the consequences of the act committed.[171] The individuals in most cases are aware that they are intentionally engaging in cartel activities.[172] The second factor looks at the degree to which the crime damages the interest of the society and harming welfare.[173] In this regards, it is obvious that cartels are detrimental to consumer welfare as they result in increased prices for the consumer.[174] Further, they deprive both the consumers and the non-participating competitors of a competitive market environment.[175] The third factor of wrongfulness deals with the violation of any duty or morals per se.[176] It has been argued by the proponents of this theory that cartels are morally reprehensible and thus deserve retribution. To further emphasise this point cartels can

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164 *Id.*

165 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 15 (2003).

166 Herbert L. Packer, The Limits of the Criminal Sanction, 37 (1968).

167 R.A. Duff and David Garland, *Introduction: Thinking about Punishment* in R.A. Duff and David Garland, A Reader on Punishment 4 (1994).

168 Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross 144 (Colin, 1981).

169 Principled Sentencing: Readings on Theory and Policy 170 (Andrew Ashworth and Andrew von Hirsch, 2000)

170 Stuart P. Green, Lying, Cheating and Stealing A moral Theory of White Collar Crime 33 (2006).

171 Stuart P. Green, *Why It is a Crime to Tear the Tag of Mattress: Over criminalisation and the Moral Content of Regulatory Offences*, 46 Emory Law Journal 1533, 1547-8 (1997).

172 *Id.*

173 *Id.* 550

174 *Id.*

175 Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime,* 5(1) European Competition Journal 19, 21 (2009).

176 Green, *supra* note 171, 128.

be compared to theft. Theft essentially involves dishonestly taking something of another from his possession without his consent.[177] This clearly allows the thief to wrongfully gain at the cost of the owner. Similarly, companies cartelising to increase prices, limiting production and rigging bids are essentially charging the consumers more than the competitive prices of the products.[178] Hence they are wrongfully benefiting at the expense of the consumer. Thus, it can be argued that cartel conduct is no better than theft and hence individuals indulging in such conduct should be punished similar to criminal punishments imposed on individuals liable for theft.[179]

Apart from these two theories, there is another compelling reason for adopting harsher individual punishments. This compelling reason is that a harsher individual punishment coupled with a predictable leniency policy could lead to a very strong cartel enforcement structure.[180] US authorities are increasingly relying on corporate leniency programmes to build a strong case against the accused as opposed to the traditional method of cartel detection which is lengthy and expensive.[181] However, if an individual were to disclose evidence about the existence of the cartel then this would destabilise the cartel as all the participants except the confessor would face sanctions.

As elaborated above, individuals would need a high incentive to sacrifice their gain from the cartel and confess to the authorities. Thus, mere individual penalties may not be the high incentive that would force participants to confess. In light of this, criminalisation is seen to be an effective incentive for successful working of the leniency policy. This is because the prospect of serving jail time is unpleasant for businessmen worldwide especially considering the message it sends out to the public.[182] Therefore, the prospect of spending time in jail would encourage individuals to come forth with evidence which would make it easier for the authorities to detect cartels**.** Thus, an effective cartel enforcement policy would require criminalisation of cartels to bolster the implementation of the leniency policy.

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177 The Indian Penal Code 1860, §378

178 Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels, OECD Recommendations and Best Practices, ¶ 2(a), C(98)35/FINAL (25 March 1998).

179 *See* C Renfrew, *The Paper Label Sentence: An Evaluation*, 86 Yale Law Journal 590, 592–93 (1977); Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime,* 5(1) European Competition Journal 19, 21 (2009).

180 Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, OECD Report, 9 (2002), available at https://www.oecd.org/competition/cartels/1841891.pdf (Last visited on September 1, 2016).

181 Jeroen Hinloopen and Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs*, 39 (2) The RAND Journal of Economics 607 (2008); R. Whish and D. Bailey, Competition Law, 51 (2000).

182 *See* A. Linman, *The Paper Label Sentences: A Critique*, 86 Yale Law Journal 63031 (1977); Voula Marinos*, Equivalency and Interchangeability: The Unexamined Complexities of Reforming the Fine*, 39 Canadian Journal of Criminology 27 (1997).

2. Practical justification for criminalising cartels

Besides the strong theoretical justification for cartels, practical justifications are equally overwhelming. The greatest successes of criminalisation of cartels can be seen in the US. From the beginning when the Sherman Act was enacted in 1890, it stipulated a dual regime of criminal and civil penalties for individuals and only civil penalty for companies.[183] Criminal sanctions were to be imposed only in case of 'hard core' cartels including bid rigging, market allocation arrangements and horizontal price-fixing agreements.[184] Thus, cartels were considered to be misdemeanour under the criminal law with up to one year of imprisonment.[185] However, during the initial periods of the 1990s there were only a few cases of criminal prosecution of individuals.[186] In 1974, the Sherman Act was amended to make cartels a felony and increased the maximum period of imprisonment to three years.[187] Thus, during 1975-80s the number of imprisonment increased three times as compared to when cartels were misdemeanour.[188] In May 1999, the DOJ unearthed the Swiss vitamin cartel and for the first time, twelve individuals, including six European executives, were sentenced to serve time in the US prisons for their role in the conspiracy.[189] It was a watershed moment in the US antitrust history, signifying individual accountability for cartel participation especially in a cross-border cartel.[190] There has been no looking back since the latter part of 1990s and as per a DOJ Official Report, the percentage of executives/employees sentenced in cartel cases has been growing successively and in 2009 amounted to almost eighty percent.[191]

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183 William Kolasky, *Criminalising cartel activity: Lessons from the US experience,* 12 Competition & Consumer Law Journal 207, 212 (2004).

184 *Id.*

185 The Sherman Act prohibits not just cartel activity. Section 1 of the Act prohibits all unreasonable restraints on competition effected through concerted conduct. See State Oil Co. v. Khan, 1997 SCC OnLine US SC 88 : 139 L Ed 2d 199 : 522 US 3, 10 (1997). Section 2 of the Act prohibits certain single-competitor exclusionary conduct. *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 2004 SCC OnLine US SC 2 : 157 L Ed 2d 823 : 540 US 398, 407 (2004); Spectrum Sports Inc. v. McQuillan, 1993 SCC OnLine US SC 11 : 122 L Ed 2d 247 : 506 US 447, 456 (1993).

186 In 1921 individuals first reported to prison for having engaged in cartel activity in United States v. Alexander & Reid Co., 280 F 924, 927 (SDNY 1922) (bid rigging by the building contractors); United States v. McDonough Co., 1960 Trade Cases (CCH) ¶ 69,695 (S.D. Ohio, 9 December 1959) (In an order upholding sentences four individuals were each sentenced to 90 days for fixing the prices of hand tools such as shovels and rakes).

187 Antitrust Penalties and Procedures Act, Public Law 93-528, § 3, 88 Stat. 1708.

188 Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime,* 5(1) European Competition Journal 19, 21 (2009).

189 Scott D. Hammond, Evolution of Criminal Antitrust Enforcement over the Last Two Decades 3 at 24th Annual National Institute on White Collar Crime, Miami, Florida (February 25, 2010).

190 Press Release, United States Department of Justice, May 20, 1999, available at https://www.justice.gov/archive/atr/public/press_releases/1999/2450.htm (Last visited on September 3, 2016).

191 Scott D. Hammond, Evolution of Criminal Antitrust Enforcement over the Last Two Decades 3 at 24th Annual National Institute on White Collar Crime, Miami, Florida (February 25,

The number of convictions has increased during time and this has been used to argue that criminalisation has not produced enough deterrence as expected.[192] However, this data is due to the fact that criminalisation of cartels has helped in boosting the number of leniency applications received by DOJ resulting in higher individual convictions. For example, in 1993, the US overhauled its leniency programme to provide criminal immunity to employees and executives who came forward with information regarding their cartel engagement. The enforcers have used criminal sanctions as an effective mechanism to convince the lower level employees to provide evidence against their superiors for complete immunity or reduced penalty.[193] For example it is common for the DOJ officials to first approach the lower level employees, who have played some role in the cartel and offer them immunity in return for evidence against their employers and other co-conspirators.[194]

Illustratively, in *United States* v. *Archer-Daniels-Midland Co.*[195] ('ADM Lysine case'), concerning the price-fixing regarding additive lysine, the employee even agreed to wear wire device to collect evidence from the cartel participants in return for immunity.[196] Thus, by garnering confession from enough employees, the DOJ builds a strong case to put before the grand jury, for the imprisonment of the executives and imposition of high sanctions on the company. Without criminal sanctions, employees may not be forthcoming enough to provide evidence, either due to loyalty or due to the fear of backlash from their current employers as well as other cartel participants. Thus, there is no deterrent that is more effective than the fear of individuals being imprisoned.[197]

Further, even though the convictions have risen due to better detection and inflow of leniency applications, overall there is less domestic cartel activity as compared to the past.[198] Even global cartel conspirators have increasingly forayed in European and Asian markets but stayed away from US

2010).

192 Mark Furse, The Criminal Law of Competition in the UK and in the US: Failure and Success 39 (2012).

193 William Kolasky, *Criminalising cartel activity: Lessons from the US experience,* 12 Competition & Consumer Law Journal 207, 211 (2004).

194 *Id.*

195 United States v. Archer-Daniels-Midland Co, 866 F 2d 242 (8th Cir 1988).

196 William Kolasky, *Criminalising cartel activity: Lessons from the US experience,* 12 Competition & Consumer Law Journal 207, 211 (2004).

197 T. Barnett, Assistant Attorney General, Antitrust Division (USA), Seven Steps to Better Cartel Enforcement, at the 11th Annual Competition Law & Policy Workshop, European Union Institute (2 June 2006) (The Assistant Attorney General in charge of the Antitrust Division observed: "Our investigators have found that nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison--nothing is a greater deterrent").

198 T. Calvani, *Enforcement of Cartel Law in Ireland*' in 2003 Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law & Policy 6 (B.E. Hawk, 2004).

due to the costs of criminal sanction.[199] Thus, criminal sanction has led to considerable deterrence in US irrespective of what critics argue. Another important factor that has helped criminalisation in the US to reach the present level of success has been the use of tailor made enforcement tools by the DOJ.[200] Instead of solely relying on the police, the DOJ has powers of general detection and powers of search and seizure including search of private homes.[201] Further, there are sentencing guidelines which provide guidance to both companies and judges regarding maximum and minimum exposure as well as mitigating circumstances.[202] Thus, US is a success model in terms of the increased detection of cartels through imposing criminal sanctions on individuals.

3. Can criminalisation of cartels work in India?

An important question that arises in this context is the suitability of this model to India. Such questions have also been raised in the context of the EU and commentators have highlighted four considerations that must underline the decision to criminalise cartels. These are: "(1) dedicated investigator and prosecutor (2) sufficient powers of investigation (3) judges who are willing to convict (4) broad political and public consensus that cartels deserve severe punishment."[203]

First, there is a need for a dedicated body for investigating and prosecuting cartels and sufficient powers of investigation. In the US, the DOJ Antitrust Division has a criminal enforcement section solely dedicated for this process.[204] Further, during interrogation, they are regularly assisted by the special agents of the Federal Bureau of Investigation ('FBI') who bring a wealth of experience with the best investigative techniques.[205] The lack of these is the main reason why many EU states have de-criminalised cartel enforcement.[206]

The Act grants power to the Director-General for search and seizure only after obtaining a warrant from the Magistrate, which often becomes

199 EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 289 (Claude Ehlermann and Isabela Atanasiu, 2007).

200 Woulter P.J., *Is Criminalisation of EU Competition Law the Answer,* 28(2) WORLD COMPETITION 117, ¶ 122 (2005).

201 Federal Rules of Criminal Procedure, Rules 4 and 42 read along with Executive Order 6166.

202 Woulter P.J., *Is Criminalisation of EU Competition Law the Answer,* 28(2) WORLD COMPETITION 117, ¶ 127 (2005).

203 Woulter P.J., *Is Criminalisation of EU Competition Law the Answer,* 28(2) WORLD COMPETITION 117, 146 (2005).

204 *Id.* ¶ 123-125.

205 T. Calvani, *Enforcement of Cartel Law in Ireland*' in 2003 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE INTERNATIONAL ANTITRUST LAW & POLICY 6 (B.E. Hawk, 2004).

206 Woulter P.J., *Is Criminalisation of EU Competition Law the Answer,* 28(2) WORLD COMPETITION 117, 147 (2005).

cumbersome.[207] This is probably why CCI has not yet adequately used the existing provisions of search and seizure to investigate cases of the contravention of the Act.[208] Further, in spite of CCI chief's request[209] for powers of search without warrant and dawn raids common, the Parliamentary Panel has opposed the grant of these powers, arguing that CCI is only in its infancy.[210] These powers have been enumerated in the 2012 Amendment Bill including the application of the Code of Criminal Procedure ('CrPC') to these actions, but the Bill is yet to be passed.[211] Thus, in the current context of civil penalties, the watchdog has been granted only curtailed powers of investigations. Under these circumstances, due to lack of political will, it becomes almost questionable if India can mimic a DOJ-equivalent criminal investigation body dedicated to prosecution and with the broad investigative powers.

Additionally, as per the OECD Report on criminalising cartels, the choice regarding the type of sanctions imposed on individuals, depends on the member's legal and cultural experience, previous enforcement pattern and the relationship shared by antitrust agencies with courts/prosecutors.[212] Thus, criminalisation will involve prosecution of cases with the assistance of the public prosecutors and the cases would be heard in an ordinary criminal court as against CCI or Competition Appellate Tribunal ('COMPAT') In this regard, the dismal state of public prosecutors in India is well known.[213] The system faces multiple problems, including poor quality of prosecutors, their lackadaisical attitude towards cases, lack of funding from the state, propensity to engage in corruption and grossly inadequate numbers.[214] Further, if the authority to prosecute is given to prosecutors it may deeply undermine the faith of corporates as well as individuals with regard to the leniency policy.[215] This will invariably happen unless there is effective co-operation between the competition agency

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207 The Competition Act, 2002, §41(3).

208 Payel Chatterjee and Simone Reis, *Revisiting the Competition Act, 2002- Introduction of the New Competition (Amendment) Bill, 2012,* 6(1) India Law Journal, available at http://indialawjournal.com/volume6/issue_1/article2.html (Last visited on April 15, 2016).

209 *New CCI chief advocates search & seizure powers for DG (I)*, The Economic Times, November 31, 2011, available at http://articles.economictimes.indiatimes.com/2011-11-07/news/30369595_1_search-and-seizures-competition-act-abuse-of-dominant-market (Last visited on April 15, 2016).

210 *Par panel against giving CCI chief search and seizure powers*, Business Standard, February 18, 2014, available at http://www.business-standard.com/article/economy-policy/par-panel-against-giving-cci-chief-search-and-seizure-powers-114021800543_1.html (Last visited on 15th April 2016).

211 The Competition (Amendment) Bill, 2012, available at http://www.prsindia.org/billtrack/the-competition-amendment-bill-2012-2571/ (Last visited on April 15, 2016).

212 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 (2003).

213 *See* Law Commission of India, *Report on Public Prosecutors Appointment*, Report No. 197 (July 31, 2006).

214 *Id.*

215 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 9 (2003).

and prosecutors, which seems unlikely given the current public prosecutorial system.

Further, the criminal courts are already overburdened with cases and there is gross delay in disposal of cases, most stretching for decades.[216] This dismal state has prompted the courts several times to emphasise that 'justice delayed is justice denied,' but delay is still the rule rather than exception.[217] Especially in cartel cases, delay can be fatal to the prosecution's case, with probability of witness tampering and destruction of evidence.[218] In this context, relying on our already overburdened criminal justice system with cartels becomes unviable. Further, there is no overwhelming public movement supporting the need for criminalisation of cartels.[219] In the absence of the four factors enumerated above, criminalising cartels would cause more confusion than deterrence. There is a need to analyse the suitability of other alternatives to criminalisation of cartels.

B. ADMINISTRAIVE REMEDIES: A SOUND SOLUTION FOR INDIAN LEGAL LANDSCAPE

While in the US, condemnation of cartels has been forceful, the European approach signifies a preference towards a 'softer' approach to regulation broadly known as administrative remedies. Administrative remedies can range from fines to provisions for disqualification of directors in case of 'hard core' cartels. As per the OECD Report, it has been agreed by most countries that mere financial penalty on individuals is insufficient for ensuring deterrence, as companies may reimburse the wrongdoers.[220] Thus, administrative remedies as known in common parlance extend beyond fines and are additional measures designed to achieve deterrence.

At the outset, it must be noted that certain countries like Canada and Australia have a combination of both criminal and administrative remedies and both are not mutually exclusive. But, considering the unviability of criminal sanctions against individuals (as substantiated above), it is contended by us that

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216 *See* Law Commission of India, *Report on expeditious investigation and trial of criminal cases against influential public personalities,* Report No. 239 (March 2012) (According to the data compiled by National Crime Records Bureau relating to the year 2010, over 1.78 crore cognizable criminal cases, including cases registered under IPC and special/local laws were pending for trial at the beginning of 2010 in various criminal courts).

217 *Id.*

218 Prosecuting Cartels without direct evidence, OECD Policy Roundtables, DAF/COMP/GF(2006)7 10 (2006).

219 This is because, all laws related to competition such as the MRTP and the Competition Act have been enacted based on recommendations of government appointed committees. Further this was not done because the public demanded it which was the case in the USA.

220 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 8 (2003).

clear and enforceable administrative remedies will emerge as more successful in achieving deterrence and individual accountability. This is because there are various practical benefits of imposing increased administrative remedies as against criminalising cartels. *First*, these measures would require antitrust agencies to adhere to the standard of preponderance of probability rather than meeting the high standard of 'beyond reasonable doubt' burden in criminal cases.[221] *Second*, in terms of detection, administrative remedies do not require the antitrust agency to expend vast resources/technical staff as compared to a scenario where cartel is criminalised.[222] Thus, the total probability of punishments may be higher in case of administrative remedies than criminalisation due to higher burden of proof and resource crunch.[223] Therefore, we believe that as against having criminal punishments which are delayed or never enforced by courts due to insufficiency of evidence, administrative remedies coupled with predictable leniency policy will work as a better cartel deterrent in India.

However, it must be noted that for the success of all these remedies, CCI needs to take efforts to unearth the individuals associated with cartels, and consistently impose monetary penalties on them as prescribed by the Competition Act. Thus, CCI must be granted increased investigating powers of dawn raids and investigation without warrant in certain cases. In light of these benefits, unviability of criminalisation and the ease of enforcing administrative remedies, we illustrate certain remedies that India can implement.

1. Prohibition on employer from reimbursing the employees/ executives

Many countries have often faced situations where fines imposed on individuals have had negligible deterrence effect. This has been due to formal/informal agreements between the employer and employee/executives, who were promised indemnification for fine liability for corporate crimes including cartels.[224] This situation affects not just the effectiveness of antitrust enforcement, but also aggravates the corporate governance risks. These arise because, by reimbursing the fine, the entire cost of sanction is borne by the principal instead of the agent, posing a fresh agency cost of separation of ownership and management.[225] Thus, the onus of individual sanctions must be borne by the individual as it helps incentivise the agents to efficiently pursue the principal's

[221] Donald I Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging*, 69 Geo. Wash. L. Rev. 693, 699 (2000-2001).

[222] *Id.*

[223] Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova E., David, E. et al., *An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis* 89 (UCL Faculty of Laws, CLES Research paper series 3, 2014).

[224] Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 17 (2003).

[225] Florence Thépot, *The Effectiveness of Antitrust Enforcement Instruments: A Matter of Agency Relation* 28 (UCL Centre for Law, Economics and Society, Research Paper Series 1, 2015).

goals as against their self-interests.[226] This has been done increasingly by various jurisdictions, by prohibiting employers from indemnifying their employees or executives *vis-à-vis* the civil fines imposed on them. We argue that they will be most efficient if done through amendments in the Competition Act. Discussed below are Australia and New Zealand who already have this system in place.

a. International experience regarding prohibition on employer from reimbursing employees/executives

In Australia, the mandate of enforcing competition law has been given to the Australian Competition and Consumer Commission ('ACCC'). The legislation regulating competition in various sectors is the Trade Practices Act, 1974 ('the TP Act'). Though the TP Act was forward-looking in many ways, there were various flaws that were sought to be reviewed by the Committee of Inquiry for the Review of the Trade Practices Act ('Dawson Committee').[227] In 2003, the Dawson Committee came out with a comprehensive report which considered various issues including criminalisation of 'hard core cartels',[228] increased monetary penalties, incentivising confession from employees as well as encouraging compliance programmes. An important question before the Committee was 'whether corporations should be allowed to indemnify their officers against civil penalties imposed for breach of antitrust law.'[229] It recommended that corporations must be prohibited from indemnifying their employees or directors or agency, either directly or indirectly, with respect to civil penalties for antitrust infringements.[230] In 2005, the Australian Government increased the penalties only for corporations engaging in anti-competitive activities including cartel.[231] However, post 2005, there was an increasingly growing voice for higher individual fines and accountability especially for cartel. In this vein, in the landmark case of *Australian Competition and Consumer Commission* v. *Visy Industries Holdings Pty Ltd.,* the Federal court noted that:

> "Critical to any anti-cartel regime is the level of penalty for individual contraveners. We tend to overlook the fact that

[226] *Id.* 11.

[227] Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, Review of the Competition Provisions of the Trade Practices Act, 163 (May 9, 2002) ('Dawson Review'); Competition and Corporate Governance, OECD Hearings, DAF/COMP(2010)30 6 (2010).

[228] Hard Core Cartels, OECD Reports 6 (2000) (This report defines hard core cartels as anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets).

[229] Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, Review of the Competition Provisions of the Trade Practices Act, 161 (May 9, 2002).

[230] *Id.*

[231] *See* Richard Feely, *Proposed amendments to the Trade Practices Act, 1974,* 30 Young Lawyer Journal 5, 6 (2005), available at http://www.austlii.edu.au/au/journals/VicYngLawyersJl/2005/5.pdf (Last visited on August 16, 2016).

> corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets."[232]

Thus, finally, the Trade Practices Amendment (Australian Consumer Law) Act, 2010, criminalised cartels and increased the level of individual penalties.[233] Additionally, it adopted the Dawson Committee's recommendation regarding indemnification of officers. Thus, §77A provides that "a body corporate should not indemnify officers, whether by agreement or payment through interposed entity, for fines and legal costs borne."[234] In a subsequent OECD meeting, Australia has also noted that enforcing this prohibition through regular auditing has been relatively easier than criminal enforcement.[235]

However, §77A has caused some confusion when read with the existing provisions of the Australian Corporation Act, 2001.[236] This is because the Corporation Act provides for 'good faith' and 'honest mistake of fact' exceptions to indemnification, which are absent in the Trade Practices Act.[237] Thus, under Australian corporate law, if it can be shown that the agent acted in honest faith placing genuine reliance on legal advice, they should be indemnified for the fines as well as the cost of defending the claim.[238] Further, the prohibition on indemnifications is arguably quite limited under the amendment.[239] It is argued that the prohibition must extend not just to payment of money, but also to any extra benefit including additional leave/benefits, sponsored vacations, and higher retirement benefits etc.[240] Further, complete prohibition on indemnification especially legal costs may act as a huge disincentive to employees and sometimes denying them access to justice.[241] Thus, it has been argued that they must be amended to allow indemnification when the employee is successful in defending charges against him/her.

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232 Australian Competition and Consumer Commission v. Visy Industries Holdings Pty Ltd. (No. 3), 2007 FCA 1617, ¶ 307-308.

233 Trade Practices Amendment (Australian Consumer Law) Act, 2010.

234 Trade Practices Amendment (Australian Consumer Law) Act, 2010, §77A.

235 Cartel Sanctions against Individuals, OECD Policy Roundtables, DAF/COMP(2004)39 45 (2003).

236 Bent Fisse, *The Dawson Review: Enforcement and Penalties,* 26(1) University of New South Wales Journal 53, 55 (2003).

237 Corporation Act, 2001, §199A(2) (Australia).

238 Bent Fisse, *The Dawson Review: Enforcement and Penalties,* 26(1) University of New South Wales Journal 53, 55 (2003).

239 *Id.*

240 *Id.*

241 Submission to the Competition Policy Review Panel, Truman Hoyle Lawyers, June 10, 2014, ¶ 1.3., available at http://competitionpolicyreview.gov.au/files/2014/06/Truman_Hoyle.pdf (Last visited on September 12, 2016).

Some of these changes in Australia had profound effects on the cartel enforcements in its neighbouring country, New Zealand. In New Zealand, the Commerce Act, 1986, is the primary competition legislation that is enforced by the Commerce Commission in different sectors. In 2010, Australia came out with the highly influential Dawson Committee Report, based on which the 2010 amendment brought about sweeping changes in the cartel enforcement.[242] As a result, during 2009-10, its legislature was increasingly pressured to re-evaluate the success of their own cartels' enforcement strategy.[243] This was felt necessary in light of the objectives of protecting the consumer from harm as well as improving the competition and productivity in certain cartel prone sectors.[244]

Thus, the Commence (Cartels and other matters) Amendment Bill, 2011, criminalised hard core cartels and made substantial changes to the penalty regime.[245] The amended §80A reflects a prohibition on body corporate and interconnected bodies, against indemnity of pecuniary penalty for present and former employee, agent, servant and director, *vis-à-vis* both fines and legal costs.[246] The proposed amendment was adopted in full and is reflected in the Commerce Act, 1986, and any such indemnity granted is declared as void. An indemnity is stated to include "relieving or excusing from liability, whether before or after the liability arises."[247] This is an interesting provision because it prevents undertakings from refunding offenders both *ex ante* and *ex post*.[248] *Ex ante* reimbursement would resemble a risk premium and would include situations where the employer pays the expected fines including legal costs upfront as a part of the executives' pay package.[249] *Ex post* reimbursement could include not just direct financial payment but also wage and bonus increases (assuming that the offender continues to be employed with the employer).[250] Further, §80B provides for increased penalties in case of contravention of §80A, whereby the body corporate can be asked to pay penalty determined by the court, not exceeding two times the value of indemnity given.[251]

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[242] *See* Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, Review of the Competition Provisions of the Trade Practices Act (May 9, 2002).

[243] *See* Commerce (Cartels and Other Matters) Amendment Bill, 2011 (The general policy statement of this New Zealand Bill highlights the changes made by Australia in 2009 to over-haul its cartel regime which made the government of New Zealand also rethink its approach).

[244] *Id.*

[245] Commence (Cartels and other matters) Amendment Bill, 2011.

[246] The Commence Act, 1986, §80A .

[247] *Id.*

[248] Eleonore Michels, *The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support,* Global Antitrust Review 53, 57 (2014).

[249] Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49(5) William and Mary Law Review 1621, 1654 (2008).

[250] Eleonore Michels, *The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support,* Global Antitrust Review 53, 57 (2014).

[251] The Commerce Act 1986, §80A.

In South Africa, competition law is enforced by the Competition Commission of South Africa ('CCSA') through the Competition Act, 1998. The main concern held when the CCSA emerged was the high level of concentration in the South African market.[252] However, within a few years of operation of the Competition Act, 1998, these concerns remained due to various lacunae in the law as well as its implementation.[253] To fill these lacunae in the operation of the law, the Competition Amendment Bill, 2009, was proposed. Even though the Bill was passed and incorporated into the Competition Act, 1998, only some portions (excluding provisions on cartels) have been implemented by CCSA.[254] Apart from suggesting higher fines and criminalisation of sanctions, the Competition Amendment Act, 2009, has incorporated certain broad provision regarding indemnification which merit a closer analysis. The Competition Amendment Act, 2009, provides that "companies will be prohibited from directly or indirectly paying any fine imposed on a manager or director who is convicted of an offence, or from indemnifying, reimbursing, compensating or otherwise defraying the expenses of that person, unless the prosecution is abandoned or the director is acquitted."[255] This provision has the following improvements over §77A of the Australian TP Act. *First*, it prohibits, directly or indirectly, paying the actual fine imposed on the individual. *Second*, it includes 'indemnification, re-imbursement, compensating or otherwise defraying expenses', these words cover a broad range of agreements, to compensate for actual fines/loss as well as foreseeable losses such as for loss of employment benefits.[256] Such a broad provision would even include large severance package or higher retirement benefits for the offending officer.[257]

b. Indian scenario and need for amending the Competition Act

The Indian Companies Act, 1956, provided in §201 that a company can indemnify its directors for any liability incurred in the payment of civil fines only if he is discharged of any liability.[258] Further, §201(1) declares void any provision in the articles of association or any agreement to indemnify

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252 Competition Law and Policy in South Africa, OECD Peer Review 7 (2003).

253 Competition Commission and Competition Tribunal (South Africa), Unleashing Rivalry 3 (September 3, 2009), available at http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf (Last visited on September 5, 2016).

254 Rudplh Raath, *Competition amendment act paves the way to private healthcare and other market enquiries,* Competition E-Bulletin (March 10, 2013), available at http://www.werksmans.com/virt_e_bulletins/competition-amendment-act-paves-the-way-to-private-healthcare-and-other-market-inquiries/ (Last visited on September 5, 2016).

255 *Construction probe highlights risks for cartel execution,* Norton Rose Fullbright, February 2013, available at http://www.nortonrosefulbright.com/knowledge/publications/75238/construction-probe-highlights-risks-for-cartel-executives (Last visited on September 5, 2016).

256 Florence Thépot, *The Effectiveness of Antitrust Enforcement Instruments: A Matter of Agency Relation* 28-29 (UCL Centre for Law, Economics and Society, Research Paper Series 1, 2015).

257 *Id.*

258 The Companies Act, 1956, § 201.

the director, against any civil liability arising out of breach of trust or negligence.[259] However, the Indian Companies Act, 2013, does not have any restriction on indemnification equivalent to §201 of the Companies Act, 1956.[260] Due to this conspicuous absence it can be argued that there is no restriction on companies to indemnify directors under the current law.[261] It is against this context that we propose solution suitable in India. India must amend Competition Act to reflect the following provision:

> Any company or its affiliates/subsidiaries must not indemnify, reimburse, compensate or defray any payment, made by present or former employee, director, or executive, in respect of the fines imposed by the CCI or COMPAT for contravention of the Competition Act, 2002. Further, the company or its affiliates/subsidiaries must not indemnify, reimburse, compensate or defray expenses, borne by present or former employee, director, or executive, in respect of the legal costs associated with defending or settling the claim, unless the claim has been withdrawn or the concerned person has been completely discharged of the allegations.
>
> Any such indemnification either through the articles of association or agreements are void. Further, any contravention of this provision will empower the CCI or COMPAT, in appropriate cases, to impose appropriate penalty not exceeding two times the penalty imposed under §27 of the act, to be shared equally by the concerned person and the company.
>
> Explanation 1 – the term indemnity, compensation, reimbursement and defraying include payment made before and after the liability arises.
>
> Explanation 2 – payment includes higher remuneration/bonus package, increased sponsored leaves, higher retirement/severance packages and any other additional benefit granted which is capable of being measured in monetary terms.[262]

This provision would combine the various benefits of legislations discussed above and will also incorporate certain criticisms of the provisions. In light of the current provision, the employee/director may not be willing to

259 The Companies Act, 1956, § 201(1).

260 Umakant Vatotill, *Director Liability under the new Regime,* IndiaCorpLaw Blog, June 16, 2014, available at http://indiacorplaw.blogspot.in/2014/06/director-liability-under-new-regime.html (Last visited on July 2, 2016).

261 *Id.*

262 *See* the relevant provisions of Australian, New Zealand and South African competition law explained in Part (a) above.

commence cartel actions even when there is support of the employer. This is because over and above the fine, the reimbursement agreements with the employer, whether prior to or after imposition of the antitrust fines, may be detected and aggravate the chances of further monetary penalty. Further, the ambit of benefits that can be used to compensate is broad enough to accommodate most methods of employer-employee indemnification. However, the enforcement of this provision will involve efforts from the Director-General to keenly investigate into the employment contract, pattern of bonus and other benefits granted, other company documents, and balance sheets of the company etc.[263] Therefore, the financial penalty imposed clubbed with the restriction on reimbursement from the employer becomes a legitimate cost, which would invariably outweigh the benefits of profit maximising cartels. This would ensure the creation of desired deterrent effect that antitrust law seeks to achieve and increase the effectiveness of punishments. Further, as is argued below, combining this measure with the threat of prohibition of future employment in the industry, may cause risk averse employees to further stay away from cartel behaviour.

2. Prohibition on future employment through director disqualification

The second administrative remedy that is gaining traction globally is prohibition on directors to represent/work for any company, if found engaging in cartelisation.[264] Globally many countries including UK,[265] Australia,[266] Hong Kong,[267] have provisions for disqualifying director for competition breaches. Though it may not be as effective as imprisonment it is considered as the "defensible second best" to deter cartels.[268] The genesis of director disqualification can be traced to the insolvency regime where the director of an insolvent company was found unfit and disqualified from managing any company for up to five years.[269] Under §7 of Company Director's Disqualification Act, 1986, insolvency practitioners must report the director who is suspected of conducting affairs of the company in an unfit manner.[270] The provision was

[263] Florence Thépot, *The Effectiveness of Antitrust Enforcement Instruments: A Matter of Agency Relation* 30 (UCL Centre for Law, Economics and Society, Research Paper Series 1, 2015).

[264] *See* Paul Hughes, *Director's personal liability for cartel activity under UK and EC Law-A Tangled Web,* 11 E.C.L.R. 632, 642 (2008).

[265] Enterprise Act, 2002, § 204.

[266] Competition and Consumer Act, 2010, § 86E.

[267] Hong Kong Competition Ordinance, 2012, § 101 (Directors including executive, non-executive, independent directors and even shadow directors may be disqualified for up to five years if (1) their conduct contributed to the breach, (2) had reasonable ground to suspect of the breach but took no steps to prevent it (3) did not know but should have know of the infringement).

[268] European Competition Law Annual 2006: Enforcement of prohibition of Cartels 302 (Claus-Dieter Ehlermann and Isabela Atanasiu (ed.), 2007).

[269] *See* Company Director's Disqualification Act, 1986, § 6.

[270] The Reforms of United Kingdom Company Law 210 (John De Lacy (ed.), 2002).

very success and nearly ninety-four percent of all cases prosecuted resulted in disqualification orders.[271]

Director disqualification as an individual sanction also spilt over into the securities law and competition law regime. For example, the Sarbanes-Oxley Act, 2002, sought to ease the process of the American Securities and Exchange Commission to disqualify a director/officer in a public company who demonstrates "unfitness" as against the previous requirement of "substantial unfitness."[272] In 2002, the Enterprise Act (UK) envisioned the possibility of the Office of Fair Trading ('OFT') applying to court for director disqualification[273]

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[271] *Id.* 211.

[272] Global Governance and the Quest for Justice, Vol II: Corporate Governance 53 (Sorcha Macleod (ed.), 2006).

[273] Enterprise Act, 2002, § 204 (It provides the following:

"(1) The Company Directors Disqualification Act 1986 (c. 46) is amended as follows.

(2) The following sections are inserted after section 9 (matters for determining unfitness in certain cases)—

(1) The court must make a disqualification order against a person if the following two conditions are satisfied in relation to him.

(2) The first condition is that an undertaking which is a company of which he is a director commits a breach of competition law.

(3) The second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.

(4) An undertaking commits a breach of competition law if it engages in conduct which infringes any of the following—
   (a) the Chapter 1 prohibition (within the meaning of the Competition Act 1998) (prohibition on agreements, etc. preventing, restricting or distorting competition);
   (b) the Chapter 2 prohibition (within the meaning of that Act) (prohibition on abuse of a dominant position);
   (c) Article 81 of the Treaty establishing the European Community (prohibition on agreements, etc. preventing, restricting or distorting competition);
   (d) Article 82 of that Treaty (prohibition on abuse of a dominant position).

(5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—
   (a) must have regard to whether subsection (6) applies to him;
   (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
   (c) must not have regard to the matters mentioned in Schedule 1.

(6) This subsection applies to a person if as a director of the company—
   (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
   (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
   (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.

(7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.

(8) For the purposes of subsection (4)(a) or (c) references to the conduct of an undertaking are references to its conduct taken with the conduct of one or more other undertakings.

(9) The maximum period of disqualification under this section is 15 years.

(10) An application under this section for a disqualification order may be made by the OFT or by a specified regulator.

for his/her involvement in breach of UK/EU Competition law.[274] These orders are referred to Competition Disqualification Orders ('CDO') under the Enterprise Act, 2002.[275] The court will pass an order provided two conditions are satisfied: *first*, the company commits a breach of competition law; *second*, his/her conduct must make him/her unfit for managing any company. The second requirement of unfitness depends on whether the director's conduct contributed to the breach; or he/she had reasonable grounds to suspect the same but took no steps to prevent it; or he/she ought to have known of the breach.[276]

Further, a CDO will not be applied against a director whose company is benefiting from antitrust leniency except in two scenarios.[277] *First*, when director has been removed/ceases to act as a director in the company owing to their conduct in the cartel; *second*, director does not co-operate in the leniency process.[278] This ensures that keeping their own interest in mind, directors will seek to convince their companies to approach the OFT as a part of the leniency programme.[279] The Enterprise Act was enforced in 2003 and in December 2007, OFT announces its first invocation of the disqualification provision. Three directors of a UK company were disqualified from acting as directors due to their involvement in global marine hose cartel.[280] Further, in a survey commissioned by the OFT, director disqualification was considered to be the second-most effective deterrent for breach of competition law behind criminal sanctions.[281]

Emboldened by the Enterprise Act, 2002 the OFT has floated a controversial proposal to further incentivise directors to take more responsibility in ensuring antitrust compliance.[282] This has been done by proposing that OFT will pursue vigorously directors who 'ought to' have known about the

(11) Section 60 of the Competition Act 1998 (c. 41) (consistent treatment of questions arising under United Kingdom and Community law) applies in relation to any question arising by virtue of subsection (4)(a) or (b) above as it applies in relation to any question arising under Part 1 of that Act."

274 *See* Paul Hughes, *Director's personal liability for cartel activity under UK and EC Law-A Tangled Web,* 11 E.C.L.R. 632, 642 (2008).

275 European Competition Law Annual 2006: Enforcement of prohibition of Cartels 301 (Claus-Dieter Ehlermann and Isabela Atanasiu (ed.), 2007).

276 Enterprise Act, 2002, § 204(6).

277 Office of Fair Trading, *Director disqualification orders in competition cases,* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf (Last visited on July 10, 2016).

278 *Id.*

279 *Id.*

280 *See* Christopher Hutton, *UK flexes its criminal enforcement muscle,* Kluwer Competition Blog, January 32, 2014.

281 Office of Fair Trading, *The deterrent effect of competition enforcement by the OFT,* November 2007, available at http://webarchive.nationalarchives.gov.uk/20140402141250/http:/www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf (Last visited on July 10, 2016).

282 *The OFT revised director disqualification guidance: deterring directors or competition law breaches?,* Linklaters, February 2010.

antitrust breach which will involve analysis of his/her relationship with breaching staff, general skill/experience etc.[283] Further, it also seeks to apply CDOs against directors of companies that apply for leniency subsequent to the 'first-in'.[284] Many criticise this bold step by OTF due to the absence of any guidance as to where OFT will believe a director 'ought to' have known about the cartel behaviour.[285]

Taking the cue from OFT, the ACCC also sought to make amendments to the Trade Practices Bill to impose stricter personal liability in the form of director disqualification for antitrust breach.[286] Even the Dawson Committee Report[287] recommended that ACCC must be given an option to hold directors accountable by disqualifying them. Finally in 2010, the Competition and Consumer Act provided for director disqualification in §86E by stating that:

> "On application by the Commission, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) the Court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of Part IV; and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> In determining under subsection (1) or (1A) whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate."[288]

While there have been director disqualification orders previously for egregious consumer law violations[289] the first disqualification for anti-

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283 *Id.* 3.
284 *Id.* 3.
285 *Id.* 4.
286 Kristina Barbov, *Tougher penalties for anti-competitive conduct and new search and seizure powers for ACCC,* available at http://www.findlaw.com.au/articles/414/tougher-penalties-for-anti-competitive-conduct-and.aspx (Last visited on July 11, 2016).
287 Bent Fisse, *The Dawson Review: Enforcement and Penalties,* 26(1) UNIVERSITY OF NEW SOUTH WALES JOURNAL 53, 55 (2003).
288 Competition and Consumer Act, 2010, § 86E.
289 *See* Australian Competition & Consumer Commission v. Scott, 2013 FCA 88; Australian Competition & Consumer Commission v. Safe Breast Imaging Pty Ltd. (No. 2), 2014 FCA

trust violation was in 2014.[290] The Federal Court in *Australian Competition & Consumer Commission* v. *Renegade Gas Pty Ltd.* disqualified the managing director for three years for his involvement in the cartel behaviour of the company.[291] The companies in dispute had entered into a cartel arrangement to not supply LPG cylinder for forklift to each other's customers and one of the reliefs sought by ACCC included director disqualification.[292] The Federal Court held that the managing director acted irresponsibly being completely deficient in his appreciation of competition law and ordered for disqualification with a view to protect public and act as a deterrent.[293]

Recently, in 2016 ACCC succeeded in securing director disqualification against directors of Coalgate-Palmolive.[294] The company was held to have colluded with Unilever to control the prices of laundry detergent.[295] The Federal court noted that "disqualification is a consequence imposed both to prevent future occurrences as well as to deter such conduct from persons involved in managing a corporation."[296] In this case the director consented to ACCC's request for 7 year disqualification because he was directly in communication with the head of Unilever.[297] However, one of the biggest criticisms of the Australian position has been that the section is too vaguely worded with respect to determination of when a director is "unfit" for disqualification.[298] It requires consideration of the director's conduct and "other matters court considers appropriate."[299] As compared to the Enterprise Act, it leaves too much to the discretion of the court regarding granting of the disqualification order.[300] However, cases have referred to the jurisprudence of Corporations Act, 2001, in Australia *vis-a-vis* banning of officers.[301]

998; Australian Competition & Consumer Commission v. South East Melbourne Cleaning Pty Ltd., 2015 FCA 25.

[290] *See* Ryan Mcmonnies, *First disqualification order in a competition matter,* Global Compliance News, December 3, 2014, available at http://globalcompliancenews.com/australia-disqualification-orders-20141203/

[291] Australian Competition & Consumer Commission v. Renegade Gas Pty Ltd., 2014 FCA 1135 (October 24, 2014).

[292] Australian Competition & Consumer Commission v. Renegade Gas Pty Ltd., 2014 FCA 1135 (October 24, 2014).

[293] *Id.* ¶ 236.

[294] Australian Competition & Consumer Commission v. Colgate-Palmolive Pty Ltd. (No. 2), 2016 FCA 528 (May 16, 2016).

[295] *Id.*

[296] Australian Competition & Consumer Commission v. Colgate-Palmolive Pty Ltd. (No. 2), 2016 FCA 528 (May 16, 2016).

[297] *Id.*

[298] Australian Cartel Regulation: Law, Policy and Practice in an international context 467(Caron Beaton-Wells and Brent Fisee (eds.), 2011).

[299] *Id.*

[300] *Id.*

[301] *See* Australian Competition & Consumer Commission v. Halkalia Pty Ltd. (No. 2), 2012 FCA 535, ¶ 110 (This was the first time § 86E was invoked and the court used the principles developed under corporation act for banning of officers to assist itself in deciding whether the order for director disqualification should be granted).

In India there is no power for disqualification of directors for antitrust violation similar to UK or Australia. §164 of Companies Act, 2013, which applies to both public and private companies provides for disqualification in case of unsound mind, personal insolvency, conviction in an offence, order of disqualification passed by a court/tribunal etc.[302] However, the Competition Act does not empower CCI to approach the court for seeking orders for disqualifying directors for antitrust violation even though §48 provides for individual liability for contravention of competition law.[303] Thus, to give full effect to the object of §48, CCI should be given the power to order disqualification of directors for antitrust violation.

Modelling such a provision on §204 of the UK Enterprise Act may be suitable as has done by many countries including Hong Kong and Lithuania.[304] It amended the Company Director Disqualification Act, 1986, giving the courts power to decide the question of whether CDOs should be issued against directors for antitrust breach.[305] Thus, similarly the Competition Act should be amended to allow CCI to seek director disqualification if following two conditions are met: *first*, company is liable for antitrust breach (including cartels); *second*, the director is found "unfit."[306] Unfitness may arise due to (1) direct contribution to the breach; (2) knowledge of the breach but no steps taken to prevent the same; or (3) lack of knowledge but the director 'ought to' have known of the breach.[307] With the Indian competition law's increasing focus towards personal liability, and global adoption of disqualification provisions, the present is the right time for deterring directors/officers by imposing the consequence of disqualification for antitrust violation.

Thus, the administrative remedies of prohibition on employer reimbursement of employee/director participating in cartel and threat of director disqualification will create a strong 'stick' needed to proscribe cartel behaviour. The next step, after creating such a fear of sanction would be to strengthen and clarify the leniency policy to push cartel participants to make confessions/disclosures.

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302 Companies Act, 2013, § 164.

303 *India-Individual Liability under the Competition Act,* available http://www.conventuslaw.com/archive/india-individual-liability-under-the-competition-act/ (Last visited on August 3, 2016).

304 *See* Vibhav Choukse, *Disqualified by Competition Law, is your job in jeopardy?* Economic Times, November 23, 2015.

305 Enterprise Act, 2002, § 204.

306 *See* Enterprise Act, 2002, § 204(1).

307 *See* Enterprise Act, 2002, § 204(6). Gregory J. Werden et al., Deterrence and Detection of Cartels using all the tools and sanctions at 26th Annual National Institute of White Collar Crime, Miami, Florida (March 1, 2012)

VI. ATTRACTING THE MULE WITH A JUICIER CARROT: OVERHAULING THE ANTITRUST LENIENCY POLICY IN INDIA

Overhauling the rewards system for cartel participants in India would involve a twofold approach. The corporate and individual leniency regime in India needs to be geared towards increasing its predictability and transparency from the viewpoint of potential applicants. However, we argue that for ensuring effective deterrence it is essential that CCI shift its focus to viewing cartels from the viewpoint of shareholders as an agency problem. This would involve viewing cartel participation as linked to the corporate culture of the firm that condones antitrust violations and does not provide an environment conducive to reporting such a conduct. It is in this spirit that CCI needs to incentivise companies to adopt antitrust leniency policy which can ensure deterrence among employees and reporting of cartel participation.

A. STRENGTHENING THE EXISTING LPR WITH RESPECT TO INDIVIDUAL AND CORPORATE LENIENCY

The strength of antitrust leniency hinges on the predictability and transparency of the leniency regime, which is lacking in the current LPR.[308] As highlighted above, the primary problem with the LPR is the excessive discretion granted to CCI to decide the fate of leniency applicant which adversely affects the transparency and predictability of the entire regime.[309] LPR vests CCI with similar discretion to decide leniency applications for both 'first in' and subsequent applicants which includes the quality of evidence brought forward, stage of application etc.[310] Further, CCI can impose any further restriction on successful applicants considering the 'facts and circumstances.'[311] The second issue with LPR is the ambiguity it leaves regarding individual leniency applications. LPR defines the term 'applicant' to means "any enterprise, which

[308] *See* Scott D. Hammond, Cornerstone of an effective leniency program at ICN Workshop on Leniency Programs, Sydney, Australia (November 22-23, 2004).

[309] See Part IV.

[310] Lesser Penalty Regulations, 2009, Regulation 3(4)

"*(1) An applicant, seeking the benefit of lesser penalty under section 46 of the Act, shall – (4) The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to – (a) the stage at which the applicant comes forward with the disclosure; (b) the evidence already in possession of the Commission; (c) the quality of the information provided by the applicant; and (d) the entire facts and circumstances of the case."*

[311] Lesser Penalty Regulations, 2009, Regulation 3(3)

"(1) An applicant, seeking the benefit of lesser penalty under section 46 of the Act, shall - (3) Without prejudice to sub-regulations (1) and (2), the Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case."

is/was a member of a cartel."[312] The Competition Act defines an 'enterprise' to include persons engaged in any activity relating to production, storage, supply, distribution etc.[313] Although LPR envisages confession by individuals, it does not address a situation of whether the employees will benefit from the leniency secured by the company or if the company will secure leniency if one of its employees secures leniency.[314]

The solution to these problems is amending the LPR to improve its predictability and transparency. The U.S Corporate Leniency Policy provides six grounds to be satisfied for leniency before an investigation has begun which are as follows:

1. "At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity"[315]

For subsequent applicants the US Corporate Leniency Policy provides many additional conditions; for example, the division while granting

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312 Lesser Penalty Regulations, 2009, Regulation 2(b).

313 Competition Act, 2002.

314 *See* Corporate Leniency Policy, 1993 (United States), available at http://www.usdoj.gov/atr/public/guidelines/0091.html; Individual Leniency Policy, 1994 (United States), available at https://www.justice.gov/atr/individual-leniency-policy (The US corporate and individual leniency policy together remove ambiguity by stating that individuals can confess under the Individual Leniency Policy and that employees of a company that qualifies for corporate leniency shall be given leniency if they confess and co-operate with the DOJ).

315 *See* Corporate Leniency Policy, 1993 (United States), Part A, available at http://www.usdoj.gov/atr/public/guidelines/0091.html.

leniency shall consider the stage at which applicant comes forward, whether the corporation coerced others to participate in the cartel etc.[316] Similarly, in Australia, the ACCC's Leniency Policy provides conditions for 'first-in' leniency which are identical to the six requirements to be met in the US.[317] Subsequent confessors are said to be 'co-operators' eligible to fine deductions under the policy and factors considered in assessing their applications include the significance of evidence provided, whether they approached ACCC in a timely manner.[318]

The logic of both ACCC and DOJ Corporate Leniency policy is that 'first-in' applicants should be subject to lesser conditions especially in terms of review of the quality of evidence brought forward.[319] However, Regulation 3 of LPR clubs all the conditions required for 'any' leniency applicant, which ensures that even the first applicant's success is dependent on subjective factors left to the discretion of CCI.[320] Thus, LPR needs to be amended such that for 'first in' applicants the discretion of CCI to impose further conditions is removed and the application of subjective factors like quality of evidence, stage of application, mentioned in Regulation 3(4) are excluded. Further, LPR needs to clarify that the executives/employees of the company that has secured leniency will also be given leniency provided they confess and assist CCI throughout investigation.[321] This will ensure that individuals can apply for leniency

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[316] *Id.*

[317] Australian Competition and Consumer Commission, Immunity & Cooperation policy for cartel conduct, 2014, ¶ 16 (The provisions does not review quality of evidence/subjective factors etc. But requires satisfaction of the following criteria:

A corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where: (a) it applies for immunity under this policy and satisfies the following criteria: (i) the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy (iv) the corporation has not coerced others to participate in the cartel (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives) (vii) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings, and at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.)

[318] Australian Competition and Consumer Commission, Immunity & Cooperation policy for cartel conduct, 2014, ¶ 77.

[319] *See* compare ACCC and DOJ first and subsequent applicant conditions.

[320] Lesser Penalty Regulations, 2009, Regulation 3.

[321] *See* Corporate Leniency Policy, 1993 (United States), Part C, available at http://www.usdoj.gov/atr/public/guidelines/0091.html

(Leniency for Corporate Directors, Officers, and Employees-If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they independent of their corporation, if conditions similar to those required for corporate leniency applicants is satisfied.[322]

B. COMPANY ANTITRUST COMPLAINCE POLICY: USING CORPORATE GOVERNANCE TOOLS TO SHAPE ANTITRUST POLICY

However, in many instances even transparency and predictability of the leniency policy may not be sufficient to secure a confession from employees/directors.[323] This is because even if the executive receives amnesty from the civil antitrust sanction, there are severe professional repercussions which may deter confession.[324] The focus of antitrust law must shift from the current notion of focusing solely on antitrust practices by a company to evaluating the arrangement from the vantage point of shareholders as well.[325] This shift has the advantage of ensuring that the regulator has a holistic view of cartel practice going till the root of such practice, *i.e.*, corporate culture that condones and ignores cartel participation.[326] Therefore, a macro-level antitrust leniency policy is necessary but not sufficient for the success of leniency and there must be focus on the micro-level policy at the company level. We propose the use of antitrust compliance and internal leniency policy as means to achieve the goals of antitrust compliance and honing the corporate governance policies to better align the interest of executives and the corporation. Antitrust compliance policies envisage familiarising the employees with antitrust violations, ensuring compliance with the same and may even include punishments for failing to follow the compliance policy.[327]

The desirability of such a model was discussed in detail by Donald Klawiter and Jennifer Driscoll.[328] They propose the adoption of a formal antitrust compliance policy by every company that details out the Dos and Don'ts *vis-à-vis* antitrust laws and envisions 'zero-tolerance' and penalties for

admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually).

322 *See* Individual Leniency Policy, 1994 (United States), available at https://www.justice.gov/atr/individual-leniency-policy

323 *See* Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77 (2008).

324 *Id.*

325 *See* Brent Snyder, Compliance is a culture, Not just a policy at International Chamber of Commerce-US Council of International Business Joint Antitrust Compliance Workshop, New York, United States (September 9, 2014).

326 *Id.* 5.

327 Kai Huschelrath, Competition Policy Analysis: An Integrated Approach 125 (2009).

328 *Id.*

violation including forfeiture of severance package, corporate benefits etc.[329] This policy must offer 'leniency' to the confessing employees/executives from adverse consequences in their professional environment, for example, termination, demotion, financial forfeiture.[330] The policy can specify conditions required to be met for qualifying for 'internal leniency' which could be similar to US corporate/individual leniency policy. These include but may not be limited to the employee's conduct in terminating his/her participation in the cartel, full candour and co-operation in reporting, agreeing to make non-financial restitution to the company, like participation in future compliance training to educate other workers.[331] Further, for subsequent confessors, after the commencement of investigation by CCI, additional conditions for securing leniency may be imposed, such as the quality of evidence brought forward, and proportional reduction in penalties imposed by the company may be granted.[332]

Importantly, companies should be allowed to innovate in framing such policies. They may design the policy to reward the whistle-blower monetarily in terms of a percentage of the bonuses clawed back from the offending employee/executive.[333] Further, this internal leniency policy must allow the confessing employee and co-operating executives to benefit from individual leniency granted by CCI only if the company successfully receives leniency.[334] Thus, the reporting employee will be protected both from the adverse antitrust and professional consequences. These internal policies will add another layer of threat to destabilise a cartel, *i.e.*, threat of co-workers reporting and benefiting from the internal leniency policy.

However, this proposal is not without certain limitations. The first challenge to implementing such a policy is that it should not be viewed as the company's effort to support cartel activities by providing leniency to its confessing employees.[335] To avoid such concerns it is important for the company to assure its shareholders and the public that it is not condoning antitrust violation, but the leniency is a necessary tool to combat anti-competitive conduct.[336] Another important challenge is that such an internal leniency policy

[329] *See* Amanda Knapp, *Does your Compliance Policy matter to the Antitrust Division,* Corporate Compliance Insights, February 12, 2014, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf (Last visited on June 30, 2016).

[330] *See* Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77 (2008).

[331] *See* Individual Leniency Policy, 1994 (United States), available at https://www.justice.gov/atr/individual-leniency-policy

[332] Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77, 80 (2008).

[333] *See* Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion 200 (Caron Beaton-Wells and Christopher Tran (ed.), 2015).

[334] *Id.*

[335] *See* Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77, 80 (2008).

[336] *Id.*

can become a tool for manipulation by executives who may try to 'game the system.' This would typically involve the employee/executive joining the cartel believing that he/she has a 'safety net' to confess and obtain leniency when the economic benefits of the cartel dwindle.[337] However, in reality such concern is misplaced because 'waiting and watching approach' is a high risk strategy as he/she does not know whether a co-conspirator will confess.[338] In any case the internal leniency policy can provide discretion to the company to deny benefits of leniency or reduced penalty if there is 'credible evidence' regarding the gaming of the system.[339] The third challenge is one that all whistle-blower policies have to overcome, the possibility of frivolous reporting/misuse of the policy.[340] Such concerns can be allayed by stating in the policy that false/vexatious reporting will make the employee amenable to fines/suspension as is common in most whistle-blower laws.[341]

Both corporate governance and antitrust laws in India do not even address the aspect of an effective antitrust compliance programs by companies. The only aspect of antitrust compliance that the current corporate governance mechanism reflects is a whistleblower policy.[342] However, even whistleblowing provisions were not primary concerns of the early corporate governance reforms in India as suggested by the Kumar Mangalam Birla Committee Report in 1999.[343] It was only in 2003 that the issue surfaced in light of the report of committee on corporate governance chaired by N.R. Narayana Murthy ('Narayana Murthy Committee').[344] The report recommended that companies must have an internal whistleblower policy whereby a person who observes "an unethical or improper practice" be able to approach the independent audit committee and the company must ensure that the employees are informed of

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337 *See* Martin Duch, *The impact of Leniency Program on Cartel Enforcement: Law and Economics analysis of Leniency Program and its impact on Detecting Cartels,* available at http://www.academia.edu/13441437/The_Impact_of_Leniency_Program_on_Cartel_Enforcement (Last visited on July 15, 2016).

338 Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77, 81 (2008).

339 *Id.*

340 *See* Sudipto De, *Protecting the whistle-blower,* Business Standard, September 21, 2014, available at http://www.business-standard.com/article/opinion/protecting-the-whistle-blower-114092100733_1.html (Last visited on July 25, 2016).

341 *See* Sarbanes-Oxley Act, 2002, 18, U.S.C. 1514, Section 806; Peter Yeoh, *Whistleblowing laws: Before and after Sarbanes-Oxley,* 12(3) International Journal of Disclosure and Governance 254 (2015) (The author highlights the concern with the current Sarbanes Oxley Act provisions regarding whistle blower provision *vis-à-vis* the fear of frivolous claims or claims arising out of ambiguous behavior).

342 *See* Companies Act, 2013, § 177(9) read with Companies (Meetings of Board and its Powers) Rules, 2014, Rule 6.

343 Kumar Mangalam Birla Committee, *Report of the Committee appointed by the SEBI on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla,* (2000), available at http://web.sebi.gov.in/commreport/corpgov.html (Last visited on July 30, 2016).

344 N.R. Narayana Murthy Committee, *Report of the Committee Appointed by the SEBI on the Corporate Governance under Chairmanship of Shri N.R. Narayana Murthy* (2003) 20 available at http://www.sebi.gov.in/commreport/corpgov.pdf (Last visited July 30, 2016).

this mechanism.[345] The 2009 Voluntary Guidelines issued by the Ministry of Corporate Affairs also encouraged companies to establish mechanisms for employees to report suspected fraud etc.[346]

Finally, the Companies Act, 2013, and Clause 49 of Listing Agreement[347] adopted the recommendations of the Narayana Murthy Committee with respect to whistleblower provisions. §177 of the Companies Act, 2013, requires the constitution of audit committees to oversee the financial reporting and disclosure process to ensure transparency and benefit both the company and its stakeholders.[348] §177(9) enumerates that every listed company or such class of companies as may be notified shall establish a vigil mechanism for employees and directors to blow the whistle at illegal or unethical conduct.[349] The Companies Act, 2013, read with the Companies (Meetings of Board and its Power) Rules, 2014, also provides that these vigil mechanisms should provide for adequate safeguard against victimisation of the whistleblowers and provide for direct access to the chairperson of the audit committee in exceptional cases.[350] Presently, only listed companies are mandated to have a whistleblower policy, but the companies act is entirely silent on an antitrust compliance policy and any internal leniency policy. These policies are different from a whistleblower policy as they usually involve reporting or confession by a cartel participant and not reporting by innocent employees.

Even the Competition Act has no provisions mandating or providing incentives for companies to adopt an antitrust compliance policy. The only effort to bolster companies to adopt such a policy has been through circulation of informal advocacy booklets explaining that a strong compliance policy "may temper the severity of punishment given by CCI in an antitrust case."[351] In contrast to this position, countries worldwide provide different incentives for companies to adopt an antitrust compliance policy; US companies can get reduced penalty when the company has an effective antitrust compliance policy.[352] The US Federal Sentencing Compliance Guidelines provide that the fine imposed

345 *Id*.

346 Corporate Governance Voluntary Guidelines 2009, Ministry of Corporate Affairs, December 14-21, 2009, available at http://www.nfcgindia.org/pdf/CG_Voluntary_Guidelines_2009_Final.pdf (Last visited on July 30, 2016).

347 Clause 19 of SEBI Listing Agreement provides the need for establishing a whistle-blower policy as a non-mandatory requirement to be complied with by listed companies.

348 *See* Companies Act, 2013, § 177 (1).

349 Companies Act, 2013, § 177 (9).

350 *See* Companies Act, 2013, § 177 (10); Companies (Meetings of Board and its Powers) Rules, 2014, Rule 6.

351 Competition Commission of India, Competition Compliance Programme for Enterprise, Advocacy Booklet, page 5, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf.

352 *See* William J. Kolasky, Antitrust Compliance Programs: The Government Perspective at Corporate Complaince 2002 Conference, San Francisco (July 12, 2002), available at https://www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective (Last visited on August 10, 2016).

for antitrust violation may be reduced by the existence of an effective compliance program by the offending organisation.[353] Further, as recent as 2015, the DOJ has imposed lesser penalties for companies who had in place or implemented a rigorous antitrust compliance immediately after the investigation commenced.[354] The DOJ also provided a non-exhaustive list of best practices in an antitrust compliance policy, including training of senior management and all employees and testing of their awareness of antitrust issues before and after the training; prior approval requirement before and reporting after contact with competitors where possible; ensuring enforcement of the policy through disciplinary measures etc.[355]

In Australia, the Corporate Trade Practices and Compliance Programme, 2005 ('2005 Guidelines') provides guidance on how to frame an effective antitrust leniency policy. The 2005 Guidelines enumerate model compliance programmes tailor made for different organisations such as Small and Medium Enterprises.[356] Similar to the US Federal Sentencing Guidelines, the ACCC immunity and co-operation policy provides that in determining the civil penalties for the confessing member of a cartel, the ACCC will factor in whether the corporation has a corporate culture conducive for compliance with antitrust law.[357] Further, ACCC also provides a mechanism for companies to draft their own compliance policy and receive ACCC's comments and approval through the formal administrative undertakings.[358] The ACCC's orders against a cartel participant can also include directions to the corporation to establish a compliance and training program for employees and directors.[359] Thus, in effect the ACCC's focus on compliance programs seeks to achieve twofold purpose of ensuring that corporations are able to demonstrate the existence of

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353 *See* US DOJ Sentencing Guidelines Manual, 2015, § 8B2.1.

354 *See Kathryn M. Felton, J. Bruce Mc Donald, Paula W. Render and Ryan C. Thomas, DOJ Sentencing Memorandum emphasizes importance of instituting antitrust compliance programs in face of government intervention, available at http://www.mondaq.com/unitedstates/x/436392/Cartels+Monopolies/DOJ+Sentencing+Memorandum+Emphasizes+Importance+of+Instituting+Antitrust+Compliance + Programs+in+Face+of+Government+Investigation (Last visited on July 30, 2016).*

355 *See* Unites States of America v. Kayaba Industry Co., U.S.D.C., 2015, DOJ Sentencing Memorandum, available at http://f.datasrvr.com/fr1/315/17035/KYB_Sentencing_Memo.pdf (Last visited on August 15, 2016) (In this case the DOJ recommend a significantly reduced penalty for the defendant because they implemented an effective antitrust compliance policy immediately after the commencement of the DOJ investigation. In this memorandum the DOJ highlights the features of the defendant's policy which make it rigorous and effective and can be taken as a guidance by companies when drafting their policy).

356 *See* small business guide to trade practices compliance programs, April 27, 2006, available at https://www.accc.gov.au/media-release/small-business-guide-to-trade-practices-compliance-programs (Last visited on August 15, 2016).

357 Australian Competition and Consumer Commission, Immunity & Cooperation policy for cartel conduct, 2014, ¶ 78.

358 Australian Competition and Consumer Act, 2010, § 87B.

359 Australian Competition and Consumer Act, 2010, § 86C.

corporate culture to comply antitrust laws to ACCC as well as the company's shareholders.[360]

Therefore, it is imperative for CCI to encourage and incentivise all companies including small enterprises to adopt effective compliance programs. This will be the first step forward in acknowledging the intersection between antitrust law and corporate governance policies in curbing cartel conduct. The second step would be in encouraging companies to adopt internal antitrust leniency policy which are substantially different from whistle-blower policy because the employee/executive reporting the conduct has himself/herself participated in the illegal cartel.[361]

Further, CCI must clearly enumerate that similar to the corporate whistle-blower policy, the internal leniency policy must protect the employee/executive from adverse professional consequences and must incorporate the protections explained above to prevent misuse of the policy. CCI's encouragement for companies to adopt internal leniency could come in the form of enabling mechanisms to seek CCI approval and comments on their compliance and internal leniency policy and ensuring lesser penalty to companies with active antitrust compliance and leniency programs. CCI should also recognise that employees who qualified for internal leniency as per the company's policy will automatically obtain antitrust leniency if the company is successful in receiving leniency as per the LPR. Thus, we hope that through this paper an approach of understanding cartels as a corporate governance issue can aid significantly in plugging the loopholes in the current cartel antitrust regime in India.

VII. CONCLUSION

Competition law and corporate governance regimes have been viewed as serving different purposes and address the problems of different stakeholders, *i.e.*, shareholders and consumers. However, there is increasing scholarship arguing for the meaningful interaction of both laws whereby the competition policy views anti-competitive actions from the viewpoint of shareholder interest because such conduct is inherently linked to the internal functioning of the company, which is regulated by corporate governance norms. This paper has focused on the scope for this meaningful interaction in the context of cartel deterrence and detection, whereby an appreciation of corporate governance principles can help shape antitrust policy.

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360 *See* Guide to corporate trade practices compliance programs, December 9, 2005, available at https://www.accc.gov.au/media-release/guide-to-corporate-trade-practices-compliance-programs (Last visited on August 20, 2016).

361 *See* Donald C. Klawiter & Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Leniency for Executives,* 22(3) Antitrust 77, 80 (2008).

We have proposed for the use of carrot and stick approach to strengthen cartel detection and deterrence. This can be achieved when CCI increases the fear and threat of detection by imposing administrative sanctions on individual offenders in the form of prohibition on future employment of directors/employees and director disqualification for engaging in cartel conduct. This effort has to be complemented with overhauling of the corporate and individual leniency regime to increase its predictability and transparency to potential applicants. However, we argue that for ensuring effective deterrence it is essential that CCI shift its focus to viewing cartels from the viewpoint of shareholder as an agency problem, which is linked to the corporate culture of the firm that condones antitrust violations and does not provide an environment conducive to reporting such a conduct. In this vein, CCI needs to draw from experience of other countries and incentivise companies to adopt an antitrust compliance policy through reduced penalty for companies having effective compliance program. Further, CCI can also encourage companies to implement an internal leniency policy grating protection to confessors against adverse professional consequences by recognising that that employees who qualified for internal leniency as per the company's policy will automatically obtain antitrust leniency if the company is successful in receiving leniency as per the LPR.

We believe that they have focused on only one aspect of the interface between antitrust law and governance norms: with regard to cartels. Similarly, even with respect to abuse of dominance and pre-merger review, we believe there is work to be done to ensure that understanding of corporate governance norms can assist in designing a more holistic and effective antitrust policy.

SR. NO.	CASE NAME	CASE NO., NATURE OF ORDER	FINE IMPOSED ON INDIVIDUALS	FINE IMPOSED ON COMPANIES	ORDER	APPEAL TO THE COMPAT
1.	*P.K. Krishnan, In re*, 2015 SCC OnLine CCI 187	28/2014	10% of Average income of 3 financial years on office bearers of OP-3	10% of average turnover of 3 financial years on OP-3	http://www.cci.gov.in/sites/default/files/282014.pdf	CCI's order overturned
2.	*Express Industry Council of India* v. *Jet Airways (India) Ltd.*, 2015 SCC OnLine CCI 183 (CARTEL CASE)	30/2013		1 % of average turnover of 3 financial years on OP-1-3	http://www.cci.gov.in/sites/default/files/302013.pdf	Case remanded back to CCI
3.	*Crown Theatre, In re*, 2015 SCC OnLine CCI 149	16/2014	7% of average income of two financial years of opposite party(OP) 1,3% of average income of OP-2\	7% of average turnover of two financial years on both OPs	http://www.cci.gov.in/sites/default/files/162014.pdf	CCI's order overturned
4.	*Shamsher Kataria, In re*, 2015 SCC OnLine CCI 114	3/2011		2% of total turnover only on Hyundai of three financial years	http://www.cci.gov.in/sites/default/files/03201127.pdf	
5.	*Kannada Grahakara Koota, In re*, 2015 SCC OnLine CCI 113	58/2012		10% on OP-1, 8% on OP-2 and OP-4	http://www.cci.gov.in/sites/default/files/582012.pdf	

6.	Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna, In re, 2015 SCC OnLine CCI 192 (CARTEL CASE)	Suo Motu Case No. 02/2014		2% on all concerned companies	http://www.cci.gov.in/sites/default/files/022014S.pdf	
7.	*Sheth & Co. In re*, 2015 SCC OnLine CCI 95 (CARTEL CASE)	Suo motu Case No. 4/2013	To be passed by separate order on a later date	3% of average turnover of 3 years on all parties	http://www.cci.gov.in/sites/default/files/04201327_0.pdf	
8.	*Bio-Med (P) Ltd., In re*, 2015 SCC OnLine CCI 89	26/2013	To be passed by separate order on a later date	3% of average turnover of 3 years on OP-2 and OP-3	http://www.cci.gov.in/sites/default/files/262013_0.pdf	
9.	Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 35	61/2012		10% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/61-2012_0.pdf	
10.	Shivam Enterprises, In re, 2015 SCC OnLine CCI 27	43/2013	5% of average income of three financial years on office bearers	10% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/432013_0.pdf	

11.	Rohit Medical Store, In re, 2015 SCC OnLine CCI 19	72/2012	8% of average income of three financial years on office bearers	10% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/78201227_0.pdf	
12.	Swastik Stevedores (P) Ltd., In re, 2015 SCC OnLine CCI 13	42/2012	5% of average income of three financial years on office bearers	8% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/422012_0.pdf	
13.	Cinemax India Ltd., In re	62/2012	To be passed by separate order on a later date	3% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/622012_0.pdf	
14.	P.V. Basheer Ahamed v. Film Distributors Assn.	32/2013	To be passed by separate order on a later date	5% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/322013_0.pdf	Order of CCI upheld
15.	Indian Sugar Mills Assn., In re, 2014 SCC OnLine CCI 141 (CARTEL CASE)	38/2011	5% of average income of three financial years on office bearers	5% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/382011_0.pdf	
16.	Collective boycott/refusal to deal by the Chemists & Druggists Assn., In re, 2014 SCC OnLine CCI 134	5/2013		10% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/052013_0.pdf	

17.	Suo motu case against LPG cylinder manufacturers, In re 2012 SCC OnLine CCI 12 (CARTEL CASE)	3/2011		8% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/LPGMainfeb2.pdf	Remanded to CCI
18.	*Peeveear Medical Agencies* v. *All India Organization of Chemists and Druggists*	30/2011	To be passed by separate order on a later date	10% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/302011_1.pdf	
19.	*Ministry of Commerce, Govt. of India* v. *Puja Enterprises*	32/2013	To be passed by separate order on a later date	5% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/322013_0.pdf	
20.	*Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, In re*, 2014 SCC OnLine CCI 16 (CARTEL CASE)	3/2012		2% of average turnover of last three financial years	http://www.cci.gov.in/sites/default/files/032012_0.pdf	CCI's order overturned
21.	*Aluminium Phosphide Tablets Manufacturers, In re*, 2012 SCC OnLine CCI 26 (CARTEL CASE)	Suo-Motu Case no. 02/2011		9% of average turnover of last three financial years (overruled by COMPAT), fine was imposed on relevant turnover	http://www.cci.gov.in/sites/default/files/Case2of2011MainOrder_0.pdf	

22.	*Alleged Cartelization by Cement Manufacturers, In re*, 2016 SCC OnLine CCI 54 (CARTEL CASE)	52/2006		10% of gross turnover for 2009-10 + 3 times the net profit 2009-10	https://indiankanoon.org/doc/147562510/	CCI's order overturned
23.	*Sandhya Drug Agency, In re*, 2013 SCC OnLine CCI 84	41/2011	To be passed by separate order	10% of average turnover of last three financial years, no fine against AIOCD as fine was imposed for similar wrong	http://www.cci.gov.in/sites/default/files/412011_0.pdf	Order of CCI upheld
24.	*Builders Assn. of India, In re*, 2016 SCC OnLine CCI 46 (CARTEL CASE)	29/2010		0.5% of net profit for last two financial years for each cement manufacturer	http://www.baionline.in/media/data/Cement%20Cartelisation%20&%20BAI.pdf	CCI's order overturned
25.	*A Foundation for Common Cause & People Awareness, In re*, 2012 SCC OnLine CCI 22 (CARTEL CASE)	43/2010		5% of average turnover for last three years (COMPAT Overturned)	https://indiankanoon.org/doc/81173350/	
26.	*Uniglobe Mod Travels (P) Ltd., In re*, 2011 SCC OnLine CCI 62	3/2009		Rs. 1 lakh on all parties	https://indiankanoon.org/doc/191666926/	

27.	*FICCI-Multiplex Assn. of India* v. *United Producers/ Distributors Forum*, 2011 SCC OnLine CCI 33 (CARTEL CASE)	1/2009		Rs. 1 lakh on all parties	http://www.cci.gov.in/sites/default/files/FICCIOrder260511_0.pdf	
28.	*Bengal Chemist and Druggist Assn., In re*, 2014 SCC OnLine CCI 38	1/2013	office bearers who directly responsible for running its affairs and play lead role in decision making @10% and on the executive committee members @7%, of their respective turnover/ income/receipts based on the financial statements	10% average turnover of three financial years	http://www.cci.gov.in/sites/default/files/022012_0.pdf	CCI's order partially upheld
29.	*Arora Medical Hall, In re*, 2014 SCC OnLine CCI 18	60/2012	10% average turnover of three financial years	10% average turnover of three financial years	http://www.cci.gov.in/sites/default/files/602012_0.pdf	
30.	*Reliance Big Entertainment (P) Ltd., In re*, 2013 SCC OnLine CCI 74	78/2011		10% average turnover of three financial years	http://www.cci.gov.in/sites/default/files/782011_0.pdf	

31.	*Cinergy Independent Film Services (P) Ltd., In re*, 2013 SCC OnLine CCI 1	56/2011		10% average turnover of three financial years	http://www.cci.gov.in/sites/default/files/562011_0.pdf	
32.	*Kerala Cine Exhibitors Assn., In re*, 2015 SCC OnLine CCI 99	Case No. 45 of 2012	7% of annual income of last three years on office bearers of Op-1 and 3% of annual income of last three years on office bearers of OP-2	7% of average turnover on Opposite party-1 3% of average turnover on opposite party-2	http://www.cci.gov.in/sites/default/files/06201245_0.pdf	CCI's order upheld