

**COMPARATIVE ANALYSIS OF THE CORPORATE LENIENCY
POLICY OF THE SOUTH AFRICAN COMPETITION
COMMISSION**

by

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Summary

Cartels are regarded as the most egregious of competition violations and are a top priority in competition enforcement globally. Detection and prosecution of cartels are however notoriously complicated in view thereof that cartels are operated in secretive collusive circumstances. Competition authorities in developed international jurisdictions have in the last few decades supplemented their enforcement tools by means of so-called 'leniency programs' in order to enhance their ability to detect, prosecute and deter cartel activities.

Leniency programs are based on a game theory known as the prisoner's dilemma which incentivizes cartelists to self-report in exchange for immunity from fines or reduction of fines. Although no global standard leniency program exists and each competition jurisdiction has crafted a leniency program to suit its particular competition needs these programs however exhibit many common characteristics. The Organization for Economic Development (OECD) and the International Competition Network (ICN) has set out features of efficient leniency programs which can be used to benchmark the adequacy and efficiency of particular leniency programs.

South Africa has, in line with prominent international competition jurisdictions, adopted a leniency program, known as the Corporate Leniency Policy (CLP) in 2004, which program was substantially revised in 2008. The CLP has been largely instrumental in various high profile cartel prosecutions in recent years and has also withstood challenges to its validity before the High Court and Supreme Court of Appeal. Currently however it is likely to face a severe challenge should the cartel offence as envisaged in the Competition Amendment Act 1 of 2009 which introduces the extremely controversial section 73A to the Competition Act, be put into effect.

This dissertation explores the rationale behind leniency programs and the features that are common to efficient leniency programs. Its specific focus is the South African Corporate Leniency Policy (CLP) which it discusses in detail in order to ascertain whether the said leniency program requires any further reform in order to enhance its efficiency. During this investigation regard is also had to the challenges to the validity of the policy as well as future developments regarding the controversial introduction of a cartel offence into South African which may severely compromise the efficiency of the CLP. The purpose of the latter investigation is not to bring out a vote on the acceptability or not of the said cartel offence but merely to pre-empt problems that could arise as a result of the impact of the cartel offence and the manner in which it is envisaged to be dealt with in practice – and to suggest a possible solution so as to ensure the continued efficiency of the CLP.

During this investigation the CLP is also comparatively benchmarked against the leniency regimes in Australia and the EU and its compliance with international best practices is

evaluated in order to eventually make recommendations as to its future reform and the interaction between the CLP and the cartel offence.

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Chapter 1 Introduction

1. Cartels as a threat to competition

Competition authorities around the world view cartels as being especially harmful to the economy and regard them as the most egregious of competition transgressions. In this regard Scormagdalia aptly remarks: 'In the course of the so-called "war on cartels", waged on both sides of the Atlantic, cartels have been attributed demeaning epithets such as the "ultimate evil of antitrust", the "most egregious violation of competition law" or the "scourges of competition" – a "most damaging form of anti-competitive practice" calling for a "zero tolerance policy" to "stop money being stolen from customer's pockets"'.¹

Cartels are commonly defined as agreements between rivals to limit production or otherwise vitiate competition.² The Organization for Economic Co-operation and Development (OECD) which has published several reports in the context of cartel enforcement, uses the term 'hardcore cartel' and defines it as follows:³

'A hardcore cartel is an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories or line of commerce.'

According to the OECD cartels offer no legitimate economic or social benefits that might justify them but are inherently harmful as they lead to a reduction in output and an increase in the price of a product or service above market equilibrium level, resulting in consumers having to pay more for the said product or service.⁴ Fingleton, Girard and Williams indicate that

¹ Scormagdalia 'Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees' *The Competition Law Review* (2010) 5. The OECD in its *OECD Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws* (2002) at 76 estimated that on average cartel overcharging amounts to 10% of the affected commerce and cause overall harm of 20% of affected commerce.

² Cosgun 'Criminalising Cartels: Theory and Practice in the UK and Australia' *Global Antitrust Review* (2013) 113 at 116.

³ OECD *Recommendation of Council concerning Effective Action against Hard Core Cartels* (1998) 12.

⁴ OECD *Report on Hard Core Cartels and Sanctions against Cartels Under National Competition Laws* (2002) 76. See also Gray 'Criminal Sanctions for Cartel Behaviour' *Queensland University of Technology Law and Justice* (2008) 364 at 366.

a cartel typically raises prices from the competitive price to something close to a monopoly price.⁵

Cartel enforcement is notoriously complicated. The reason for this is that cartels are excessively collusive, deceptive and secretive, and are conducted through a conspiracy among a group of firms, with the result that it becomes difficult to detect or prove a cartel without the assistance of a member who is part of it. Due to their secretive nature, the detection of cartels pose formidable challenges and cartel investigations often terminate in expensive, long and unsuccessful investigations.⁶

Scormagdalia remarks that it is, however, not their deleterious effects on markets that, from an enforcement point of view, distinguish cartels from any other type of competition infringements, but rather, that it is the inaccessibility of incriminating evidence that characterises a cartel.⁷ He points out that, moreover, irrespective of their clandestine character, the existence of cartels is difficult to prove due to their varying and mutating characteristics.⁸ Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of each individual undertaking may vary and take different forms.⁹ These specifics impose a near unbearable threshold for competition authorities to prove in detail the cartel infringement and to impose an appropriate sanction reflecting the cartelists' real participation.¹⁰ Cartels are thus viewed by competition authorities in a very serious light and are assigned priority in competition law enforcement.¹¹

2. The use of Leniency Programmes in enforcement against cartels

2.1 Introduction

⁵ Fingleton, Girard & Williams 'The fight against cartels: is a 'mixed' approach to enforcement the answer?' *Competition Law Review* (2008) 4.

⁶ Carmeliet 'How lenient is the European Leniency system? An overview of current(dis)incentives to blow the whistle' *Jura Falconis* (2012) 463 at 464.

⁷ Scormagdalia (n1) at 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Cauffman 'The Interaction of Leniency Programmes and actions for damages' *The Competition Law Review* (2011) 181.

Leniency programmes have become a feature of the cartel combating tools of many competition jurisdictions.¹² The concept of a leniency programme in competition law was first introduced by the competition authorities in the United States in 1978.¹³ This programme which was made available to a cartel member who was ‘first to the door’¹⁴ to self-report on cartel activity (provided that it was not the instigator of the cartel) did, however, not initially offer automatic immunity, afforded the authorities considerable prosecutorial discretion and also did not offer amnesty if the competition authorities had already begun with the cartel investigation.¹⁵ The 1978-programme proved to be unsuccessful¹⁶ with the result that a revised version of the US Leniency Policy was introduced in 1993 which provides for automatic leniency, allows for amnesty even after an investigation into cartel activity has begun and provides amnesty to both firms and individuals.¹⁷ With regard to the success of the US programme, Hammond remarks that ‘over the last five years, the Amnesty Program has been responsible for detecting and prosecuting more antitrust violations than all our search warrants, consensual-monitored audio or video tapes and co-operating informants com-

¹² Arp and Swaak ‘Immunity from Fines for Cartel Conduct under the European Commission’s New Leniency Notice’ *The Competition Law Review* (2010) 59

¹³ Werden, Hammond, Scott & Barnett ‘Deterrence and Detection of Cartels: Using all the tools and sanctions’ paper presented at the 26th Annual National Institute on White Collar Crime Conference at Miami, Florida, March 2012 at 14; Kobayashi ‘Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws against Corporations’ *George Washington Law Review* (2001) 715; Moodaliyar ‘Are cartels skating on thin ice? an insight into the South African corporate leniency policy’ 2008 *SALJ* 157 162.

¹⁴ Carmeliet (n 6) at 465 remarks that this ‘winner takes all’ approach incites a race which creates tension and mistrust amongst cartel members.

¹⁵ *Ibid.*

¹⁶ Kobayashi (n 13) remarks that instead of a race to self-report the 1978 Leniency Program ‘produced a crawl’ (719).

¹⁷ Zingales ‘European and American Leniency Programmes: Two Models Towards Convergence?’ *The Competition Law Review* (2008) 5 at 15. Zingales points out that the American Leniency Programme has recognised the importance of providing immunity from criminal fines in order to align the incentives of individuals with those of the company involved in the cartel activity. He mentions that the programme does not offer a hard and fast solution for the down side effect of such an arrangement as the possibilities of follow up antitrust lawsuits in the US are still very high, especially considering that the standard procedure for calculation automatically trebles damages. He, however, points out that the latter situation is mitigated by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. Mo.108-237,118 Stat. 661 (15 U.S.C) which grants the first confessor to cartel activity a mitigation of the damages awarded and a limitation on the operation of the general principle of joint liability. Bloom ‘Despite its great success the EC Leniency Policy faces great challenges’ *European Competition Law Annual* (2006) 543 at 556 points out that the aforesaid Act increases the incentives of cartel members to turn themselves in as it limits their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel members remain fully liable (on a joint and several basis) for U.S. treble damages based on harm caused by the entire conspiracy (557). See also Riley ‘Cartel whistleblowing: Toward an American Model’ (2002) *MJ* 1 for a detailed discussion of the 1993 leniency programme.

bined. It is unquestionably, the single greatest investigative tool available to anti-cartel enforcers.’¹⁸

The apparent success of the US Leniency Program in obtaining evidence to prosecute cartel members, in destabilising existing cartels, and in deterring cartel formation was quickly noted by antitrust authorities elsewhere.¹⁹ As a result, leniency programmes were then gradually adopted as an integral part of antitrust enforcement reform across developed and developing economies. In Europe, the European Commission adopted the first leniency programme on an EU-level as early as 1996 and Belgium, specifically, adopted a leniency programme in 1999.²⁰ Korea, The Czech Republic, France, Ireland, the Slovak Republic, Netherlands, Sweden and the United Kingdom, Brazil, Canada and New Zealand are all among the early adopters.²¹ India adopted in 2003 and Singapore in 2004.²² By contrast, Austria, Germany, Greece, Portugal and Mexico in 2006, Denmark, Italy and Spain in 2007, Lithuania, Slovenia and Cyprus in 2008, Colombia and Estonia in 2010 and China in 2011, were all relative late adopters.²³ A leniency programme was thus to be found on all five continents by 2004 when South Africa initially adopted its own leniency programme as discussed hereinafter.²⁴

2.2 The Rationale behind a Leniency Programme

As indicated, the secretive nature of cartels makes them very difficult to detect and competition authorities increasingly started making use of leniency programmes in order to improve cartel detection and prosecution and also to prevent other firms from engaging in cartel activity. In essence these leniency programmes seek to detect and prevent cartel opera-

¹⁸ Hammond ‘When Calculating the Cost and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag On the Individual’s Freedom?’ Paper presented at the National Institute on White Collar Crime Conference, San Francisco, California, March 2001. See further Klawiter ‘US Corporate Leniency after the Blockbuster Cartels’ *George Washington Law Review* (2003) 16 for a detailed discussion of the various components of the US leniency programme and how the programme operates in practice.

¹⁹ Cauffman (n 11) 181. See also Riley *CEPS Special Report: The Modernisation of EU Anti-Cartel Enforcement: Will the Commission grasp the Opportunity?* available at <http://www.ceps.eu> accessed on 2 October 2014.

²⁰ *Ibid.* The European leniency programme has since been amended twice by the 2002 and 2006 Leniency Notices as discussed in Chapter 4 herein.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* By 2011, all 27 EU Member States had introduced leniency programmes in their antitrust legislation except Malta. In the rest of Europe, Norway and Switzerland (2004), and Iceland (2005) are middle adopters, and Russia (2007) and Croatia (2010) are among the late adopters.

²⁴ The 1997 leniency programme in Korea was the first to be adopted in Asia.

tion by providing leniency in the form of absolution from (immunity/amnesty) or reduction of fines (leniency), to firms that disclose the existence of cartel activity in a specific market or markets and co-operate in the prosecution of other firms involved in such cartel activity.²⁵ Zingales explains the rationale behind leniency programmes as follows:²⁶ 'A cartel can be described as an organization of businesses that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong psychological assumptions exist among cartel members about their reciprocal behaviour. Consequently the leniency programme tries to challenge the strength of these assumptions by pushing for a change in cartel members sentiments: its aim is the destabilization of the organization, and ultimately its detection through confession.'

In essence leniency programmes are based on the concept of 'game theory'.²⁷ Game theory makes use of an abstract model in order to study how rational people make strategic decisions.²⁸ By only providing a fine reduction to the first self-reporting firm, corporate leniency programmes can be seen as a particular game known as the 'Prisoner's Dilemma'.²⁹ This refers to the situation where each subject has a choice of two alternatives whose pay-off depends on an identical choice made by another individual.³⁰ Leslie describes the prisoner's dilemma model as follows:³¹ It starts with the premises that two prisoners have committed two crimes, one major, one minor. The prosecuting authority has sufficient evidence to convict both prisoners on the minor charge, which entails only a minimal amount of jail time, for example one year., however, if the uncooperative prisoner is convicted of the major crime he will be sentenced to ten years in jail. Unfortunately the authorities will not have sufficient evidence of the major crime unless at least one of the prisoners confesses. Because they know this, the authorities can manipulate both the format of the interrogations and the incentives of the prisoners in an effort to convince both prisoners to confess. Fletcher further explains that the assumption is that both prisoners act rationally to maximise their own utility: the prisoners can optimise total utility (utility of prisoner A + utility of

²⁵ Zingales (n 17) at 6.

²⁶ Zingales (n 17) at 8.

²⁷ Regenspurg *The Effectiveness of Corporate Leniency Programs* (2012) 8 available at thesis.eur.nl/.../bachelor%20mandy%20regenspurg%203359 accessed on 23 November 2013.

²⁸ *Ibid.*

²⁹ See Leslie 'Trust, Distrust and Antitrust' *Texas Law Review* (2004) 82.

³⁰ Zingales (n 17) at 9.

³¹ Leslie (n 29) 84.

prisoner B) if they both choose not to confess (cartel members maximise utility by making cartel level profits while not facing criminal or civil fines).³², however, since both prisoners are acting rationally according to their own self-interest, they will both choose to confess because they both receive the highest individual pay-off should they confess and the other prisoner does not confess.³³

Riley remarks that as a result of the advantages of a leniency programme to any cartel member who wants to split, the other cartel members have to keep a sharp and constant lookout for signs that a fellow cartel member is considering the whistle-blowing option.³⁴ If one member begins to behave distantly towards the others, perhaps by sending only junior executives to meetings or not sharing confidential business information with other members of the cartel or simply not turning up at cartel meetings, the other members may start wondering whether this behaviour is a result of the increasingly reluctant member entering a leniency programme.³⁵ The fear that one member of the cartel has either entered the programme or is about to do so generates a 'race to the courthouse' where an 'every undertaking for itself' attitude develops among the cartel members.³⁶

The cartel deterrence theory also provides justification for the use of leniency programmes in cartel enforcement.³⁷ This theory states that a firm will only participate in a cartel if the firm's profits will be higher when participating in a cartel compared to the firm's profits when not participating in cartel.³⁸ Therefore antitrust authorities should introduce leniency programmes in such a way that firms will choose to stay out of a cartel – thus implying that leniency programmes should be efficiently structured to incentivise self-reporting by cartel members.³⁹

The competition authority concerned, can use two broad approaches for cartel deterrence.⁴⁰ The first broad approach entails the use of *ex ante* deterrence mechanisms, which

³² *Ibid.*

³³ *Ibid.*

³⁴ Riley (n 17) at 10.

³⁵ *Ibid.*

³⁶ *Ibid.* As pointed out by Hammond (n 18) at 2 there have been cases where only a few hours have separated leniency applications from members of the same cartel.

³⁷ Regenspurg (n 27) at 8-9. This theory is one of the basic fundamentals of corporate leniency programmes.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.* However, a combination of these two mechanisms is possible.

concentrate on the prevention of collusive behaviour.⁴¹ The second approach entails the use of *ex post* deterrence mechanisms, which focus on sanctions imposed after firms engage in collusive activities.⁴² From a society perspective, it is submitted that the *ex ante* deterrence mechanism would be the most favourable option of the two, as it prevents social welfare destruction from collusive practices and it avoids the high costs associated with the cartel prosecution process.⁴³, however, one could argue that the *ex ante* deterrence mechanism by itself without the use of other complementary mechanisms would not work in practice.⁴⁴ The reason for this is that *ex ante* deterrence requires the competition authorities to do extensive monitoring of firms which can be a very expensive and not always successful process and furthermore, the *ex ante* mechanisms do not put an end to the cartels that already exist. Most competition authorities have therefore developed leniency programmes that are a combination of both *ex ante* and *ex post* mechanisms.⁴⁵

A prime advantage of leniency programmes is that they are key tools to shorten the time necessary for authorities to obtain the relevant information.⁴⁶ Wils credits leniency programmes with improved collection of evidence.⁴⁷ They also yield the following further advantages:⁴⁸

- a) they directly increase the expected probability with which sanctions will be applied;
- b) they have a destabilising effect on potential cartels because the first participant for leniency can escape sanctions which are imposed on other cartel participants;
- c) they facilitate prosecutions because leniency applicants provide access to evidence that might otherwise be unavailable;
- d) they induce cooperating companies to provide useful information on the existence of other cartels.

⁴¹ *Ibid.* Such mechanism only allows leniency to self-reporting before the competition authorities have started their investigation on the cartel activity.

⁴² *Ibid.* Such mechanism allows leniency to self reporting cartel participants even after the competition authorities have started their investigation on the cartel activity.

⁴³ Motta & Polo 'Leniency Programs and Cartel Prosecution' *International Journal of Industrial Organization* (2003) 347-379.

⁴⁴ Regenspurg (n 27) at 9.

⁴⁵ *Ibid.*

⁴⁶ Zingales (n 17) at 6.

⁴⁷ Wils 'Leniency in Antitrust Enforcement: Theory and Practice' *World Competition* (2007) 25 at 18 where he expands in detail on this advantage of leniency programmes.

⁴⁸ Werden, Hammond, Barnett & Scott (n 13) at 15.

Leniency programmes also offer what is described by Riley as the ‘rollover effect’.⁴⁹ This refers to the situation where investigation into one cartel provides leads in the investigation of another.

2.3 Features of efficient leniency programmes

The various competition jurisdictions who have adopted leniency programmes have diverse programmes – a global standard leniency programme does not exist.⁵⁰ Most of these programmes are directed against cartels only and do not cover other competition transgressions., however, the 2003 OECD Competition Committee Report⁵¹ identified certain key features of a successful leniency programme, namely:⁵²

- a) complete immunity from sanctions should be awarded to the first applicant as it maximises the reward for co-operation;
- b) only the first applicant to apply should receive complete immunity and if the programme is extended to subsequent applicants, the gap in the reward should be substantial;⁵³
- c) the programme should have maximum transparency and certainty;⁵⁴
- d) the programme should be available in circumstances in which the competition agency has already begun an investigation;⁵⁵
- e) the competition agency should accord confidentiality to leniency applications and the information resulting therefrom to the maximum extent possible.

⁴⁹ Riley (n 17) at 9.

⁵⁰ The ICN in its *Anti-cartel Enforcement Manual*, Chapter 2, observes that practices depend on the peculiarities of each jurisdiction’s cartel regime, and the features of one leniency policy may not translate directly into another with different legal, competition and public policy considerations.

⁵¹ OECD (2002) (n 4) 22.

⁵² As summarised by Bloom (n 17) 556.

⁵³ This maximises the incentive to be the first to self-report, thus destabilising the cartel. If the returns to the second applicant approximate those that would accrue to the first applicant the result may be that no one would apply.

⁵⁴ Potential applicants should be able to predict as accurately as possible what the outcome of their application will be.

⁵⁵ If the cartel members are aware of an investigation and of the possibility that one of them could benefit from leniency, the stability of their agreement is likely to be severely eroded.

A list of 'Good Practices relating to Leniency Programs' was also published by the International Competition Network (ICN), namely:⁵⁶

- a) leniency applications should be available both where the competition authority is unaware of the cartel and also where it is aware of the cartel but does not have sufficient evidence to prosecute the cartel members;
- b) the use of markers because time is of the essence in making a leniency application;
- c) requiring full and frank disclosure and ongoing cooperation from the leniency applicant;
- d) providing for lenient treatment for second and subsequent cartel members;
- e) keeping the identity of the leniency applicant and information provided by such applicant confidential;
- f) maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for officials involved in the implementation of the leniency programme.

Although there is no clear and failsafe formula for designing a leniency policy, several of the above key elements are thus featured in all successful leniency policies. In essence a successful leniency policy must have both a detecting and deterring function (thus function *ex ante* and *ex post*), in that it reveals the cartels by eliciting information from cartel members and also prevents cartels from forming or continuing.⁵⁷

Moodaliyar elaborates on a number of principles that are vital towards making a leniency policy successful:⁵⁸

⁵⁶ ICN 'Drafting and implementing an effective leniency programme' ICN Anti-Cartel Enforcement Manual(2006) at 12 available at <http://www.internationalcompetitionnetwork.org/capetown2006/FINAL-FormattedChapter2-modres.pdf> accessed on 12 February 2014.

⁵⁷ Motta & Polo (n 43) 347-379.

⁵⁸ Moodaliyar (n 13) 168.

- a) Stringent penalties: Moodaliyar remarks that increasing the penalties for cartel participation has been a major contributor to the success of leniency policies. The primary objective of the punishment is deterrence and sanctions can take various forms, including the payment of a fine or imprisonment of cartel members.⁵⁹ She also points out that some countries have introduced criminal penalties such as imprisonment to curb cartel behaviour and that the risk of individual liability and the fear of facing prison have proved to be a great motivator for cartel members to self-report. She further indicates that in countries where cartels are not criminalised, it is found that the threat and imposition of stringent fines can prove to be quite effective.⁶⁰ In order for the fine to be effective, the resources available to the offender, the profits gained from the illegal conduct and the harm done to competition should be taken into account in order to provide effective deterrence.⁶¹ A cartel member may thus consider that the cost of abandoning the cartel and reporting to the competition authorities is preferable to paying high penalties or facing imprisonment.⁶²
- b) Certainty and transparency: Moodaliyar further stresses that it is imperative that the leniency application process be transparent and based on certain, clearly defined terms. It must be clear as to what the policy offers and the conditions that must be fulfilled in order to qualify for leniency. If applicants cannot confidently predict how an enforcement authority will apply this standard, they may ultimately decide against self-reporting and cooperation, and existing cartels will go unreported and unpunished.⁶³ She indicates that a leniency programme is most likely to be successful if it increases the transparency and predictability of the procedure, reduces the scope of prosecutorial discretion given to the competition authority, and thereby gives potential applicants the confidence to comply with the authorities.⁶⁴

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.* Thus, heavy fines should consistently be imposed to send a strong message to other potential cartel members.

⁶³ *Ibid.* A key feature of the revised leniency policy of the Department of Justice in the US was the introduction of automatic leniency to the first applicant that applies for leniency where the authority is unaware of the cartel. The benefit of full automatic leniency weighs much more than potential fines and criminal sanctions. Many competition authorities such as Canada and the United Kingdom have also seen the benefit of automatic leniency and have revised their policies to include this feature.

⁶⁴ *Ibid.*

c) Increase of the risk of detection: according to Moodaliyar a leniency programme should induce cartel members to confess out of fear that another member might be the first to confess.⁶⁵ Because total amnesty is usually only available to the first applicant to the door, all the other cartel members might be found liable and be penalised heavily.⁶⁶ She indicates that a creative way to increase fear of detection is the ‘marker’ procedure as discussed hereinafter, which entices cartel members (who do not yet have sufficient information and evidence in their possession to make a formal leniency application) to come forward and request a marker for first place in line until they are able to gather evidence to make their formal application for leniency.⁶⁷ It appears to be a safer method of approach for potential leniency applicants, and they are also able to check with the authorities if a marker (applied for by a prior leniency applicant) is already in place.⁶⁸

Designing a leniency programme is thus clearly a dynamic process in that the programme must be revised on a frequent basis and adapted not only to the evolving needs of the competition jurisdiction that it serves, but also to ensure that it is aligned with the key features of other leniency programmes in the global war against cartels. As Joshua remarks:⁶⁹ ‘Of course it is easy to draft a leniency policy that looks good on paper. The effectiveness of a *policy*, in the sense of the written set of rules or principles issued by the agency to govern the leniency process, can, however, only be evaluated in the context of the authority’s leniency *programme*, which includes the internal agency processes and most critically, the way in which it applies and administers its own policy.’

3. The South African Competition Act and the prohibition of cartels

⁶⁵ *Ibid.* The more anxious an applicant is that its cartel participation may be discovered by the authority; the more likely it is to report its wrongdoing in exchange for amnesty.

⁶⁶ As discussed above, the ‘prisoner’s dilemma’ theory can be used to illustrate how the leniency policy creates distrust between cartel members.

⁶⁷ Moodaliyar (n 13) 168.

⁶⁸ *Ibid.*

⁶⁹ Joshua ‘That uncertain Feeling: The Commission’s 2002 Leniency Notice’ *The Competition Law Review* (2010) 164.

South Africa has a comprehensive and carefully developed competition framework in place. The Competition Act 89 of 1998 (hereinafter the 'Competition Act')⁷⁰ regulates and governs certain aspects of competition in the South African consumer market, namely horizontal⁷¹ and vertical⁷² restrictive practices, abuse of dominance,⁷³ price determination⁷⁴ as well as mergers and acquisitions.⁷⁵ The purposes of the Act include *inter alia* promoting and maintaining competition in the Republic in order to provide consumers with competitive prices and product choices.⁷⁶ The Act generally applies to all economic activity within, or having an effect within the Republic.⁷⁷ In terms of the Act the Competition Commission (hereinafter the 'Commission') was created to investigate, control and evaluate prohibited practices.⁷⁸ The Commission may, after conducting an investigation, refer a complaint regarding a prohibited practice to the Competition Tribunal for adjudication.⁷⁹ Tribunal decisions may be taken on appeal or review to the Competition Appeal Court.⁸⁰

Section 4 of the Competition Act regulates the acquisition and abuse of market power through the co-operative acts of competitors.⁸¹ These so-called 'restrictive horizontal practices' occur where competitors⁸² co-operate rather than compete⁸³ and are prohibited by section 4(1) of the Competition Act which provides as follows:

⁷⁰ The Act was adopted in 1998 and certain specified provisions came into effect on 30 November 1998, whilst the remaining provisions of the Act came into effect on 1 September 1999.

⁷¹ S 4.

⁷² S 5.

⁷³ S 8.

⁷⁴ S 9.

⁷⁵ S 12.

⁷⁶ S 2(c).

⁷⁷ S 3. Collective bargaining agreements within the meaning of s 23 of the Constitution, 1996 and the Labour Relations Act 66 of 1995; a collective agreement as defined in s 213 of the Labour Relations Act and concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose is excluded from the scope of application of the Act.

⁷⁸ Moodaliyar (n 13) 157.

⁷⁹ S 50. The Competition Tribunal was established in terms of s 26 of the Competition Act. S 37 provides that decisions of the Tribunal may be reviewed or subject to appeal by the Competition Appeal Court which was established in terms of s 36 of the Competition Act.

⁸⁰ S37.

⁸¹ Sutherland & Kemp *Competition Law in South Africa* (Service Issue 15) 5-3.

⁸² The term 'competitor' is not defined in the Act.

⁸³ Sutherland & Kemp (n 81) 5-3 .

'4(1) An agreement⁸⁴ between, or concerted practice⁸⁵ by, firms, or a decision by an association⁸⁶ of firms, is prohibited if it is between parties in a horizontal relationship and if:

- (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other precompetitive gain resulting from it outweighs that effect; or
- (b) it involves any of the following restrictive horizontal practices: directly or indirectly fixing a purchase or selling price or any other trading condition;⁸⁷ dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;⁸⁸ or collusive tendering.⁸⁹

⁸⁴ The term 'agreement' in terms of section 1 of the Competition Act, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable. The Competition Tribunal has decided in *Pioneer Foods (Pty) Ltd 15/CR/May08* that a firm will be a party to an agreement even though it has not participated on a daily basis or attended all meetings of the firms involved. In *Netstar (Pty) Ltd v Competition Commission 97/CAC/May 10* the Competition Appeal court confirmed that South Africa, like Europe, could regard consensus as the basis for an agreement in Competition law. For a detailed discussion of the concept of 'agreement' see Sutherland & Kemp (n 81) par 5.4.1.

⁸⁵ The term 'concerted practice' is defined in terms of s 1 of the Competition Act as co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement. For a detailed discussion see Sutherland & Kemp (n 81) par 5.4.3.

⁸⁶ Sutherland & Kemp (n 81) at par 5.4.2 point out that firms often come together in associations that protect their mutual interests. These associations of competitors may have pro-competitive benefits but there may be a temptation to utilise them for restricting competition between themselves. They remark that associations of firms are sometimes used to establish and enforce large and complex cartels between members and that members of associations frequently submit to the authority of the associations and they often are, or regard themselves as being, bound to comply with the decisions of the associations. These decisions therefore operate in a similar manner to agreements between, or at least concerted practices by, the firms themselves.

⁸⁷ S 4(1)(b)(i). Sutherland & Kemp (n 81) at par 5.7.1 discusses price fixing in detail and point out that price fixing is regarded as the most heinous of anti-competitive practices. In *American Soda Ash Corporation v Competition Commission 2005 (6) SA 158 (SCA) par 48* the Supreme Court of Appeal stated that 'price fixing necessarily contemplates collusion in some form between competitors for the supply into the market of their respective goods with the design of eliminating competition in regard to price. That is achieved by the competitors collusively 'fixing' their respective prices in some form. (By setting uniform prices, or by establishing formulae or ratios for the calculation of prices, or by other means designed to avoid the effect of market competition on their prices.)'

⁸⁸ S 4(1)(b)(ii). Market allocation is the dividing up of markets between competitors for purposes of exercising market power. For a detailed discussion see Sutherland & Kemp (n 81) par 5.7.2.

⁸⁹ S 4(1)(b)(iii). Also known as 'bid-rigging'. In *United States v Reicher 983 F 2d 168 (10th Cir 1992) 170* collusive tendering was described as 'any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party.' Sutherland and Kemp (n 81) at par 5.7.3 explain that collusive tendering is not defined in the Competition Act but that it takes on two main forms, namely:

- a) Parties may agree that they all will submit bids but that one will submit the lowest bid or will submit the only bid that contains acceptable terms (complementary bidding), in exchange for which it will divide the work or proceeds among the colluders (subcontracting) or in exchange for which the

For purposes of the Competition Act a ‘firm’ is defined to include a person, partnership or a trust.⁹⁰ It should also be noted that the Competition Act distinguishes between two types of prohibitions, namely, *per se* prohibitions and ‘rule of reason’ prohibitions.⁹¹ Section 4(1)(a) contains a so-called ‘rule of reason’ prohibition which refers to those practices that will only be condemned once it has been established on the facts of the case that they affect competition negatively.⁹² On the other hand, section 4(1)(b) which is directed against cartel participation, contains *per se* prohibitions. A *per se* prohibition is a prohibition which is outright illegal, thus once the prohibited conduct is found to have occurred, there can be no justification for it.⁹³

In order to ease the burden of proof on the Competition Authorities, an agreement to engage in a restrictive horizontal practice referred to in section 4(1)(b) is presumed to exist between two or more firms if any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common⁹⁴ and any combination of those firms engages in that restrictive horizontal practice.⁹⁵

If a firm is found guilty of contravening the Competition Act, it may be fined an administrative penalty of up to 10 percent of the firm’s annual turnover.⁹⁶ Victims of cartel activity can

successful firm will again have to submit higher or otherwise objectionable bids in future bidding processes (bid rotation).

- b) Firms may agree that all but one will refrain from submitting a bid (bid suppression). In exchange for making this sacrifice the parties who refrain from bidding may be given the privilege of making uncontested bids in future bidding processes or an undertaking that the successful bidder will withdraw from bidding for a specified other project.

⁹⁰ S 1(xi).

⁹¹ The Competition Act, however, does not use such expressions.

⁹² Sutherland & Kemp (n 81) 5-38, however, in the absence of clarity on both the standards for establishing a contravention and the penalties that would pertain, the deterrence effect on firms considering engaging in exclusionary abuse is relatively weak. See Makhaya, Mkwanaenzi & Roberts ‘How should Young Institutions Approach Competition Enforcement? Reflections on South Africa’s Experience’ *South African Journal of International Affairs* (2012) 43.

⁹³ Neuhoff *et al* *A Guide to the Competition Act* (2006) 12. See also Calvino ‘Public enforcement in the EU: Deterrent Effect and Proportionality of Fines’ *European Competition Law Annual* (2006) 317 at 319 where she discusses the rationale behind *per se* rules.

⁹⁴ S 4(2)(a). S 4(3) provides that the above presumption may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market.

⁹⁵ S 4(2)(b).

⁹⁶ S 59. In *Competition Commission v Southern Pipeline Contractors and Conrite Walls (Pty) Ltd* 23/CR/Feb09, the Competition Tribunal imposed the maximum penalty allowed in the Competition Act on a member of a cartel in the concrete pipes industry. This is the first time that the Tribunal has imposed a penalty calculated on the basis of the total turnover of a company. In the past the Tribunal limited its penalties to the turnover relating to the products that were the subject of the cartel arrangements. The respondents, Southern Pipeline Con-

also institute follow-on civil claims for damages suffered as a result of such cartel activity.⁹⁷ It is thus clear that the Competition Act contains both *ex ante* provisions in the form of the prohibitions against cartels in section 4(1)(b) which seeks to deter cartel participation as well as the extensive *ex post* administrative sanctions provided by section 59 which penalises cartel participation.

However, the increasingly sophisticated nature of cartels and the secrecy with which cartels tend to operate, constitute a serious impediment to their detection and prosecution. An ever-increasing priority of the Competition Commission is therefore to detect and deter cartel activity due their negative consequences for consumers, industries and the economy while they remain undetected.

The Competition Commission has a wide range of sophisticated investigative powers that enables it to enforce the provisions of the Competition Act. These powers include the authority to enter and search under a warrant⁹⁸ or without a warrant⁹⁹ and to summons any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a

tractors (SPC) and Conrite Walls, previously admitted to colluding with their competitors to fix prices, rig tenders and divide markets but disputed the penalty that the Competition Commission had asked the Tribunal to impose on them, namely 10% of their respective annual turnovers for 2006. In argument SPC had argued that the penalty should not exceed R3,3 million and Conrite R1,3 million. After hearing witnesses and arguments from the Commission, SPC and Conrite, the Tribunal imposed the maximum allowable penalty of 10% of total turnover for SPC, amounting to R16, 8 million. For Conrite walls it imposed a slightly lower penalty of 8% of total turnover, amounting to R6, 1 million. In its judgment the Tribunal noted that the concrete pipes cartel was the most enduring, comprehensive and stable cartels prosecuted to date. It operated in such secrecy that members were referred to by number and not name. The Tribunal also noted that, in estimation, prices of concrete pipes fell between 25-30% after the cartel disbanded in 2007., however, the Competition Appeal Court overruled the Tribunal's decision, criticising the Tribunal for disregarding the legislative framework when determining the penalties. The Tribunal referred to certain factors listed in s 59(3) but not all. The Competition Appeal Court submitted that all the factors must be taken into account in determining the penalty. Finally, the Competition Appeal Court commented that a plain reading of s 59 supports the conclusion that the base year for the determination of the cap is the financial year preceding that in which the penalty is imposed.

⁹⁷ S 65.

⁹⁸ S 46.

⁹⁹ S 47. The Commission often conducts its powers of search and seizure by carrying out 'dawn raids' in order to thwart the destruction of evidence by cartelists. See further s 48 and 49 which sets out the details of the Commission powers to enter and search and the conduct of such entry and search as envisaged by ss 46 and 47. For a detailed discussion of these investigative powers Sutherland & Kemp (n 81) ch 11.

bearing on the subject of an investigation to appear before the Commissioner to be interrogated or to deliver books or documents or produce objects.¹⁰⁰

Despite its sophisticated investigative powers the detection and prosecution of cartels has proven to be very challenging for the Commission due to the complexities surrounding the clandestine operations of cartels.¹⁰¹ In its Annual Report of 2002-2003, the need for the Commission to focus on cartel enforcement and to dedicate more resources and attention thereto was highlighted.¹⁰²

Subsequently, in order to facilitate the process of detecting and prosecuting of cartels, the South African Competition Commission followed international trends and adopted the Corporate Leniency Policy (hereinafter the 'CLP') in 2004, which is discussed in detail in Chapter 2.¹⁰³ The CLP, which is specifically designed to combat cartel activity and does not apply to other anti-competitive practices, has been issued in terms of section 79 of the Competition Act¹⁰⁴ and is set out in a separate policy document and therefore does not have the status of legislation although, as will be addressed in more detail in Chapter 2, the 2009 Competition Amendment Act¹⁰⁵ apparently codifies the policy (but such codification has not yet been put into operation).

The CLP has proven to be increasingly efficient in the enforcement against cartel activity since its adoption. The first CLP application was submitted in 2004 by Comair in respect of its participation in a price-fixing cartel relating to fuel levy charges in the airline industry.¹⁰⁶ However, it was the Commission's cartel investigations into the milk¹⁰⁷ and bread¹⁰⁸ indus-

¹⁰⁰ S 49A.

¹⁰¹ Lavoie 'South Africa's Corporate Leniency Policy: A Five-Year Review' *World Competition* 33(1) (2010) 142. She also points out that the Commission's focus was initially largely on mergers and acquisitions.

¹⁰² See Competition Commission Annual Report 2002-2003, at 5-6.

¹⁰³ GN 628 of 2008 in GG 30164 of 23 May 2008 coming into effect for new applications on the date of publication in the Government Gazette and replacing GN 195 in GG 25963 of 6 February 2004. Par 15 also applies to applications pending at the time the new Policy came into effect, see par 1.2 of the CLP document.

¹⁰⁴ Sutherland & Kemp (n 81) par 5.9.1.1.

¹⁰⁵ Act 1 of 2009.

¹⁰⁶ See Commission's Annual Review Report 2004-2005 at 18.

¹⁰⁷ On the 13 March 2006, the Competition Commission initiated an investigation into the milk industry. Later, the Commission negotiated a settlement agreement with one of the respondents – Lancewood (Pty) Ltd – in the milk cartel prosecution. The other dairy processors involved were: Clover Industries Ltd, Clover SA (Pty) Ltd, Parmalat (Pty) Ltd, Ladismith Cheese (Pty) Ltd, Woodlands Dairy (Pty) Ltd, Nestle SA (Pty) Ltd and Milkwood Dairy (Pty) Ltd. Lancewood admitted that it was involved in price information exchanges as alleged by the Commission. In the Commission's view Lancewood's conduct amounted to a contravention of s 4(1)(b)(i) of the Competition Act and directly or indirectly fixed procurement prices of raw milk or other trading conditions.

tries, assisted by CLP applications, which triggered a tide of CLP applications in other sectors of the economy, such as in the construction industry¹⁰⁹ and the transport¹¹⁰ and energy industry.¹¹¹

A significant number of cartel investigations involving a CLP applicant have led to settlement agreements being reached with at least one of the respondents in a case.¹¹² A few examples include: Tiger and Foodcorp for participation in the bread cartel with Premier Foods as the CLP applicant;¹¹³ Lancewood for participation in the milk cartel with Clover as applicant;¹¹⁴ Infraset (Aveng) for participation in a pre-cast concrete cartel with Rocla as CLP applicant;¹¹⁵ South African Airways for collusion in the airline sector in relation to fuel levy charges with Comair as CLP applicant;¹¹⁶ Sasol for collusion in relation to phosphoric acid supply with Foskor as CLP applicant;¹¹⁷ Air Products South Africa (Pty) Ltd for price fixing and market allocation in relation to the supply of certain gases with Sasol as CLP applicant;¹¹⁸ Lafarge Industries South Africa (Pty) Ltd for price fixing in relation to cement with Pretoria Portland Cement Company Ltd as CLP applicant;¹¹⁹ and Adcock Ingram (Tiger), Dismed and Thusanong for collusion in the pharmaceutical sector with Fresenius Kabi as CLP applicant.¹²⁰

Lancewood faced only one count out of the six that were subject to the Commission's referral. The company paid an administrative penalty in the sum of R100 000 and agreed to cooperate fully with the Commission in its prosecution of the remaining respondents.

¹⁰⁸ In 2007, Premier Foods applied for immunity in relation to its participation in a cartel in the bread sector. settlement was reached with Tiger and subsequently with Foodcorp who agreed to cooperate with the Commission.

¹⁰⁹ A R30 billion construction cartel has been revealed involving 'fixed' projects such as the FNB soccer stadium, the Green Point soccer stadium, the COEGA development in the Eastern Cape as well as the Gautrain. Affidavits from Stefanutti Stocks have allegedly been handed to the Competition Commission for immunity from prosecution.

¹¹⁰ CLP applications have been received from Sasol in relation to piped gas and a range of petroleum products. See Competition News, March 2009, at 5-6.

¹¹¹ Lavoie (n 101) 152.

¹¹² Lavoie (n 101) at 154.

¹¹³ See Commission Press Release of 6 May 2009. The Commission agreed to a reduction in fine in its settlement agreement with Tiger due to its early cooperation in providing information on the bread cartel.

¹¹⁴ See Commission Press Release of 16 January 2009.

¹¹⁵ See Commission Press Release of 13 February 2009.

¹¹⁶ See Commission Press Releases of 24 May 2006 and 5 June 2007.

¹¹⁷ See Commission Press Release of 6 May 2009.

¹¹⁸ See Commission Press Release of 28 February 2013.

¹¹⁹ See Commission Press Release of 8 March 2012.

¹²⁰ See Commission Press Releases of 9 May 2008 and 6 February 2009.

More recently, the Commission reached a settlement with Foodcorp on two separate cartel cases in which it admitted to colluding in the pricing of wheat flour and maize meal.¹²¹ Foodcorp agreed to pay an administrative penalty of R88 500 000.00 which amounted to 10% of the affected turnover of its 2010 milling division.¹²² The settlement was confirmed by the Competition Tribunal on 12 December 2012. Foodcorp admitted that it had contravened the Competition Act, in that during the period between 1999 and 2007 it was represented in a series of meetings between it and its competitors at which agreements were reached to fix selling prices of both milled white maize as well as milled wheat products and the implementation dates of such price increases.¹²³ This was conduct already admitted to by Premier Foods, Tiger Brands and Pioneer Foods.¹²⁴ As part of the settlement agreement, Foodcorp committed to fully cooperate with the Commission in the prosecution of other cartel members by testifying before the Tribunal, and further agreed to develop and implement a compliance programme in addition to the one it entered into in relation to the bread cartel.¹²⁵

The Commission reached settlement agreements with two major oil companies, namely, Engen Petroleum Ltd and Shell South Africa Marketing (Pty) Ltd in which they admitted to having fixed the price of bitumen with other oil companies by collectively determining and agreeing on pricing principles, including a starting reference price and monthly price adjustment mechanism.¹²⁶ Engen agreed to pay a penalty of R28 800 000 and Shell agreed to pay R26 259 480.¹²⁷ The Commission did not seek a penalty from Sasol and its subsidiary, Tosas, which were granted conditional immunity following the leniency application filed with the Commission by Sasol on 12 January 2009.¹²⁸ This case was initiated following information received from Sasol and its subsidiary Tosas in the leniency application.¹²⁹

From the aforementioned it is thus evident that in the context of enforcement against cartels in South Africa, the South African Competition Authorities have followed in the foot-

¹²¹ See Commission Press Release of 13 December 2012.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ See Commission Press Release of 21 February 2012.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

steps of international competition jurisdictions by using the CLP with much success in order to detect, prosecute and deter cartels.

4. Scope of Dissertation

This dissertation will focus on the South African Corporate Leniency Policy (CLP) that is used by the Competition Authorities in competition enforcement in respect of cartels and which serves to aid the competition authorities in the detection, prosecution and deterrence of cartels. The dissertation is premised on the hypothesis that a leniency programme is a necessary tool that supplements the powers of competition authorities in its enforcement of competition legislation against cartels. Accepting that a leniency policy is a necessary enforcement tool against cartels, this investigation focuses on the South African leniency programme as a dynamic tool that needs to grow with and adapt to domestic and international competition demands and challenges. This dissertation will assess the South African CLP in comparative context in order to benchmark it in terms of its compliance with international best practice and how it measures up to the leniency programmes in the selected comparative jurisdictions in order to identify areas for future reform thereof.

Firstly, the dissertation will critically analyse the features and functioning of the CLP by evaluating both substantive and procedural aspects thereof. Secondly, it will analyse court challenges and discuss legislative interventions which, although currently not yet in operation, may challenge the efficiency of the CLP, more specifically the proposed criminalisation of certain conduct regarding cartels as envisaged by the insertion of section 73A into the Competition Act by virtue of the Competition Amendment Act of 2009.¹³⁰ In this regard it should specifically be noted that the focus of this dissertation is the content and structure of the CLP. Therefore, answering the question as to the justification or not of introducing a cartel offence into South African competition law is beyond the scope of this dissertation. What is, however, relevant regarding the introduction of a cartel offence is that, should the cartel offence envisaged by section 73A be put into effect, its practical implementation may seriously impact on the efficiency of the CLP and it is that aspect which will consequently be addressed.

¹³⁰ See the discussion on s 73A in Chapter 3 herein.

In the third instance, the dissertation will present perspectives on leniency policies of competition authorities in selected foreign jurisdictions in order to evaluate the adequacy of the South African CLP. In this regard the features and functioning of the Australian and European Union leniency systems will be analysed and compared. Australia is selected as a comparative jurisdiction for the following reasons: Australia has a sophisticated leniency programme which operates in a bifurcated cartel enforcement regime. In Australia, serious cartel conduct is subject to criminal prosecution and the Australian Immunity Policy makes provision for immunity from civil penalties which is granted by its Competition Authority and immunity from criminal prosecution which is granted by the relevant Prosecuting Authority – thus two different bodies are assigned to deal with the implications of immunity from cartel prosecution, much like the situation would be in South Africa should section 73A which encapsulates the South African cartel offence, as introduced by the Competition Amendment Act of 2009, be put into operation.¹³¹ Insight into the Australian system may thus allow one to draw some conclusions on how to preserve the efficiency of the CLP should it happen that section 73A is put into effect. On the other hand, the European Union on community level at this stage has a well-developed leniency policy but only provides for civil penalties, which is similar to the current position in South Africa due to section 73A not yet having been put into operation,¹³² although there are certain EU member states which have opted to criminalise certain aspects of cartel participation.¹³³ It would thus be a valuable exercise to look at the EU Leniency framework and as it would give one some insight into the features of an effective leniency policy that has a high success rate despite the absence (currently) of criminal sanctions. The trend by some member states to criminalise cartel conduct will, however, briefly be touched upon and the cartel offence introduced by the UK will be briefly elucidated in order to highlight the role of the Office of Fair Trading as singular enforcement authority as opposed to the bifurcated competition enforcement regime in Australia. In the final instance, the advantages and shortfalls of the various leniency programmes and will be considered and recommendations will be made on how the CLP can be improved and refined.

¹³¹ See chapter 3 herein.

¹³² *Ibid.*

¹³³ See chapter 4 herein.

For purposes of delineating the parameters of this dissertation it should further be noted that the concept of cross-border leniency co-operation between competition enforcement authorities will not be investigated. Neither will the concept of ‘fast track settlement’ of cartel cases be discussed in depth although brief mention will be made thereof. The term ‘leniency programme’ is used in this dissertation to describe all programmes which offer either full (100%) immunity (thus amnesty) as well as those which offer a significant reduction (leniency) in penalties that would otherwise have been imposed on a participant in a cartel, in exchange for freely volunteered disclosure of information on the cartel which satisfies the specific criteria prior to or during the investigative stage of the case, and does not cover reductions in the penalty granted for other reasons.¹³⁴

¹³⁴ This useful delineation was borrowed from Bloom (n 17) 545.

Chapter 2 The South African Corporate Leniency Policy

1. The Corporate Leniency Policy of 2004

1.1 Introduction

The South African Corporate Leniency Policy (CLP) was prepared and issued by the Competition Commission in line with leniency policies in other jurisdictions as a guideline to clarify the Commission's policy approach to cartel matters falling within its jurisdiction in terms of the Competition Act.¹³⁵ The Policy was purely aimed at providing guidance and was explicitly stated not to be binding on the Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretions, or their interpretation of the Act.¹³⁶ The CLP sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for immunity.¹³⁷ It outlines a process through which the Commission could grant a self-confessing cartel member, who is first to approach the Commission, immunity or indemnity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions.¹³⁸ The 2004 CLP was revised and amended in 2008 to amplify its efficiency and to incorporate some features into it that was already featured in other international leniency programmes.¹³⁹ The amendments to the CLP became effective on 23 May 2008.

In view thereof that the 2008 revised version of the 2004 CLP is basically just a better worded restatement of the 2004 version with a number of added features, only the 2008 version of the CLP which is currently in use will be discussed in order to avoid protracted and unnecessary repetition.

¹³⁵ Par 1.1 of the 2004 CLP document.

¹³⁶ Par 1.2 of the 2004 CLP document. It must be noted that nothing in the CLP shall preclude the Commission from exercising its discretion or powers granted to it in terms of the Act on matters to which the adopted policy approach may be applicable.

¹³⁷ Par 2.6 of the 2004 CLP document. The granting of immunity thus became an incentive for a firm that participates in a cartel activity to terminate its engagement, and inform the Commission accordingly.

¹³⁸ Par 3.1 of the 2004 CLP document.

¹³⁹ Lavoie (n 101) 143 indicates that after following a review process, undertaken in consultation with stakeholders and interested third parties, the Commission amended the CLP in 2008 with the purpose to optimise the effectiveness thereof.

One of the main respects in which the 2004 CLP needed refinement was in the context of providing legal certainty. The amendments to the CLP therefore sought to remove the discretion which the Commission had in granting immunity so that it would be clear that the Commission would grant immunity if the conditions of the CLP were met.¹⁴⁰ The 2004 CLP was furthermore not applicable to instigators and leaders of a cartel and the policy was therefore amended so that all cartel members are now eligible to apply for immunity under the CLP regardless of whether they were cartel ringleaders or not. Lavoie indicates that the advantage of removing this restriction is that it enables any member of a cartel to come forward and therefore creates greater instability and distrust among cartel members.¹⁴¹

The 2008 CLP amendments further introduced a marker procedure.¹⁴² This procedure enables a potential applicant (who does not yet possess sufficient information and evidence to formally apply for leniency) to request the Commission to reserve its place in the queue of applications whilst it conducts its internal investigation and collects the information necessary to make a formal application for immunity.¹⁴³ Since the marker procedure was introduced, applicants have been taking significant advantage of the procedure, and in fact, Lavoie points out that most CLP applications made since adoption of the marker procedure have been preceded by a marker application.¹⁴⁴ This has also enabled the Commission to detect cartels at an earlier stage.¹⁴⁵

The CLP amendments also introduced an oral statements procedure to enable applicants to orally submit information regarding the alleged cartel.¹⁴⁶ This procedure affords applicants added protection from discovery of documents produced in the context of CLP applications for use in proceedings before other jurisdictions.¹⁴⁷ It is in line with international best practice and is particularly intended to encourage firms participating in cartels of international

¹⁴⁰ *Ibid.* Thus applicants are provided with the necessary transparency and predictability expected from the CLP process.

¹⁴¹ *Ibid.* Removal of this restriction follows international best practice, although some jurisdictions continue to exclude instigators or coercers from the scope of eligible applicants. This has since opened the door to CLP applications from cartel leaders, thus resulting in the detection of cartels which could otherwise have gone undetected.

¹⁴² Par 12 of the 2008 CLP document.

¹⁴³ Lavoie (n 101) 150.

¹⁴⁴ Lavoie (n 101) 151.

¹⁴⁵ *Ibid.*

¹⁴⁶ Par 15 of the 2008 CLP document.

¹⁴⁷ *Ibid.*

dimension to submit applications under the CLP whilst addressing concerns regarding risks of discovery in other jurisdictions.¹⁴⁸ The CLP's oral statements procedure is, however, not as far reaching as the procedure put in place in other jurisdictions which accept paperless applications or an entirely paperless leniency process.¹⁴⁹

Lastly, the CLP amendments clarify that the Enforcement and Exemptions Division of the Commission is the responsible division for receiving and dealing with applications made under the CLP.¹⁵⁰

1.2 The Revised Corporate Leniency Policy of 2008

1.2.1 Introduction

As indicated, the secrecy in which cartels operate makes them very difficult to detect. The aim of the CLP is to detect cartel activity with the assistance of information disclosed by an existing cartel member, to investigate and expose the cartel activity and ultimately stop and prevent such behaviour.¹⁵¹ Thus the CLP strives to uncover conspiracies by giving participating firms incentives to disclose their involvement in a cartel, even before the Competition Commission has begun its investigation into a cartel.¹⁵² At the outset it should be noted that the CLP is not set out in very formal language but that its style may be regarded as rather informal and explanatory, although it must also be remarked that it also contains duplications and unnecessary regurgitations which may impede its reading.

1.2.2 Nature of the CLP

The CLP¹⁵³ applies to cartel conduct as set out in section 4(1)(b) of the Competition Act¹⁵⁴ and comprises a process through which a self-confessing cartel member (whether such car-

¹⁴⁸ Lavoie (n 101) 151. See by comparison the oral statements procedure applicable in the EU as discussed in chapter 4 hereof.

¹⁴⁹ *Ibid.*

¹⁵⁰ Lavoie (n 101) 152.

¹⁵¹ Par 2.5 of the 2008 CLP document. As per par 3.8 of the CLP it is formulated to uncover cartels that would otherwise go undetected and to also make the ensuing investigations more efficient.

¹⁵² Par 2.6 of the 2008 CLP document. It is stated to be a compliance mechanism devised to encourage cartel participants to disclose to the Commission a cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct. Expressed differently, means that if a cartel member realises that such conduct may be a contravention of the Competition Act, it could of its own free will without waiting for the Commission to investigate them, alert the Commission of the cartel activity under the CLP.

¹⁵³ Par 4.1 to 4.3 of the 2008 CLP document sets out the following aspects regarding the interpretation of the CLP document: The definitions and interpretation of words or phrases used in the CLP document are those

tel member was the instigator of the cartel or not), who is first to approach the Commission, will be granted immunity¹⁵⁵ by the Commission for its participation in cartel activity, upon the cartel member fulfilling specific requirements and conditions set out under the CLP.¹⁵⁶ Thus the CLP document states that the CLP does not *automatically* provide immunity to the applicant merely upon confessing to participation in a cartel but extends immunity subject to certain conditions and requirements having been met.¹⁵⁷ Immunity in the context of the CLP means that the Commission would not subject the successful applicant¹⁵⁸ to adjudication¹⁵⁹ before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration.¹⁶⁰ In addition, the Commission would not propose to have any fines imposed on that successful applicant.¹⁶¹ Therefore, a firm involved, implicated or suspected that it is involved in cartel activity would be able to voluntarily come forward of its own accord and confess to the Commission in return for immunity.¹⁶²

The CLP was also adopted in recognition of the fact that not all firms engaging in anti-competitive conduct are aware that such conduct is illegal.¹⁶³ An applicant does not have to show that it was previously unaware that it was contravening the Competition Act.¹⁶⁴, however, the CLP document cautions that a firm which does not apply for immunity when it is

given in s 1 of the Competition Act unless otherwise indicated in the CLP. The term 'immunity' as used in the CLP refers to immunity from prosecution before the Tribunal in relation to the alleged cartel which forms part of the application under the CLP. Any reference to a number of days in the CLP refers to business days.

¹⁵⁴ However, Sutherland & Kemp (n 81) at par 5.9.1.2 are of the opinion that, given the ordinary meaning of 'cartel' and the rationale for the CLP, it would seem possible that some other horizontal collusions under s 4(1)(a) could also fall within the ambit of the CLP.

¹⁵⁵ The words 'immunity', 'leniency', 'indemnity' and 'amnesty' will be used interchangeably.

¹⁵⁶ Par 3.1 of the 2008 CLP document. The 2004 CLP document in par 9.1.2.2 and 9.1.2.3, allowed for immunity to be granted even where all the conditions were not met. However, this provision has not been carried forward into the 2008 CLP.

¹⁵⁷ Par 5.3 of the 2008 CLP document. The applicant must submit to the Commission a separate application which meets the conditions and requirements set out under the CLP.

¹⁵⁸ According to footnote 3 of the 2008 CLP document, 'successful applicant' means a firm that meets all the conditions and requirements under the CLP.

¹⁵⁹ According to footnote 4 of the CLP document, 'adjudication' means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view of getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.

¹⁶⁰ Par 3.3 of the 2008 CLP document.

¹⁶¹ *Ibid.*

¹⁶² Par 3.5 of the 2008 CLP document. Expressed differently, means that if a cartel member realises that such conduct may be a contravention of the Competition Act, it could of its own free will without waiting for the Commission to investigate them, alert the Commission of the cartel activity under the CLP.

¹⁶³ Par 3.7 of the 2008 CLP document.

¹⁶⁴ *Ibid.*

aware that it is contravening the Competition Act runs the risk of another participant in the cartel making an application before it.¹⁶⁵

As indicated above, the 2008 CLP does not require, like the 2004 CLP used to, that the applicant for immunity should not have been the instigator of the cartel. It is expressly stated that immunity is not based on the fact that the applicant is viewed as less of a cartel member than the other cartel members, but rather on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel.¹⁶⁶

1.2.3 Scope of Application of the CLP

The CLP is applicable only in respect of alleged cartels that fall within the scope of section 4(1)(b) of the Competition Act.¹⁶⁷ An important consequence of the limitation of the CLP to such cartel activity is that even where a firm makes a successful application for immunity in respect of cartel activity, if the firm has engaged in related conduct which may otherwise infringe the Competition Act, the firm cannot obtain immunity in respect of such infringements.¹⁶⁸ This means that the CLP does not provide for amnesty plus/leniency plus regime.¹⁶⁹ Accordingly, the Commission can refer a complaint against the applicant to the Competition Tribunal with regard to alleged non-cartel infringements.¹⁷⁰ A clear difficulty faced by any applicant for immunity with potentially related non-cartel liability is that the firm is obliged to provide the Commission with its full cooperation in prosecuting the cartel complaint at the same time as it attempts to defend itself against a prosecution by the Commission.¹⁷¹

¹⁶⁵ *Ibid.*

¹⁶⁶ Par 3.9 of the 2008 CLP document.

¹⁶⁷ Par 5.1 of the 2008 CLP document.

¹⁶⁸ Sutherland and Kemp (n 81) 5-82. Such action was taken by the Commission in the case of *Clover Industries Ltd v Competition Commission* 103/CAC/Dec06. The Tribunal and the Appeal Court in turn rejected the firm's application for dismissal of the referral on the grounds of prejudice.¹⁶⁸

¹⁶⁹ See chapter 1 herein.

¹⁷⁰ *Ibid.* Thus if for instance a firm confesses to prohibited practices which fall outside the scope of s 4(1)(b) of the Competition Act, such as resale price maintenance, the Commission will be able to prosecute the applicant for such conduct as it falls outside the scope of cartel conduct for which immunity can be obtained in terms of the CLP.

¹⁷¹ Sutherland & Kemp (n 81) 5-83.

A firm¹⁷² may apply for immunity in respect of separate and various cartel activities.¹⁷³ The policy, however, does not provide for 'blanket immunity'.¹⁷⁴ This has the result that every contravention will have to form the subject of a separate leniency application and will have to meet the requirements of the CLP separately.¹⁷⁵ For instance, if an applicant is granted immunity in respect of one contravention out of the three that were committed at a certain given time, such immunity does not extend to the other two contraventions.¹⁷⁶ The only exception would be in respect of contraventions that cannot be severed and therefore may be considered as one contravention.¹⁷⁷

Insofar as jurisdiction under the CLP is concerned, it ties in with the jurisdiction provision in section 3 of the Competition Act and therefore, although a cartel does not have to be formed in South Africa, it must at least have an effect within the Republic in order to bring it within the scope of application of the CLP.¹⁷⁸

The CLP is stated to be aimed at cartel activities of which the Commission is not aware; or of which the Commission is aware but in relation to which it has insufficient information, and no investigation has been initiated yet; or in respect of pending investigations and investigations already initiated by the Commission but, having assessed the matter, the Commission is of the view that it has insufficient evidence to prosecute the firms involved in the cartel activity.¹⁷⁹

Sutherland and Kemp point out that the introductory part of the above provision may suggest that these are the underlying reasons for the CLP rather than a strict requirement for immunity.¹⁸⁰, however, it would seem strange that an applicant could obtain immunity even

¹⁷² A firm includes a person, partnership or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person to an extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership. See par 5.7 of the 2008 CLP document.

¹⁷³ Par 5.4 of the 2008 CLP document.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* The Commission, in the CLP, however, acknowledges that it may be very difficult to determine whether a particular contravention starts or ends where an application for immunity concerns more than one contravention.

¹⁷⁸ Par 5.2 of the 2008 CLP document. The CLP will therefore apply irrespective of the fact that the cartel activity takes place outside the Republic.

¹⁷⁹ Par 5.5 of the 2008 CLP document.

¹⁸⁰ Sutherland & Kemp (n 81) 5-82.

where the Commission already had sufficient information and evidence to prosecute the matter efficiently.¹⁸¹

A distinct feature of the CLP is that only one firm may qualify for immunity so that cartel members are encouraged to race (the concept of ‘first to the door’) to the Commission to apply for immunity.¹⁸² It should further be noted that the Commission will only hear an application if the person applying for immunity on behalf of the firm has the authority to do so.¹⁸³ Reporting of cartel activity by individual employees of a firm or by a person not authorised to act for such firm will only amount to whistle blowing and not to an application for immunity under the CLP. The Commission also encourages whistle blowing, as such would also assist the Commission in detecting anticompetitive behaviour.¹⁸⁴

Although the CLP does not provide for the granting of immunity or degrees of immunity to other cartel members that apply for immunity, but who are not ‘first to the door’, it is stated that the Commission may explore other processes outside of the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order.¹⁸⁵ In the event that the matter is referred for adjudication to the Tribunal, the Commission may consider at its discretion asking the Tribunal for favourable treatment¹⁸⁶ of the applicants who were not the first-to-the-door to apply for immunity pursuant to the CLP.¹⁸⁷

It should also be noted that the 2008-CLP expressly provides that immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel that is infringing the Act.¹⁸⁸ This means that the immunity provided by the CLP extends only to administrative fines and that a victim of cartel conduct would therefore, despite the granting of leniency under the CLP to a cartel member, still be able to

¹⁸¹ *Ibid.*

¹⁸² Moodaliyar (n 13) 160.

¹⁸³ Par 5.7 of the 2008 CLP document.

¹⁸⁴ See par 5.8 of the 2008 CLP document.

¹⁸⁵ Par 5.6 of the 2008 CLP document. In terms of par 7.2 of the 2008 CLP document the Commission encourages unsuccessful applicants to cooperate with the Commission and negotiate to settle the matter by means of a settlement agreement or a consent order.

¹⁸⁶ According to footnote 5 of the 2008 CLP document, ‘favourable treatment’ implies substantial or minimum reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given.

¹⁸⁷ Par 5.6 of the 2008 CLP document.

¹⁸⁸ Par 5.9 of the 2008 CLP document.

institute a follow-on civil claim for damages suffered as a result of the cartel conduct.¹⁸⁹ The reference to criminal liability was most probably inserted into the 2008-CLP to cover criminal liability in terms of The Prevention of Organised Crime Act (POCA)¹⁹⁰ and also criminal liability that would follow should the cartel offence as envisaged by the introduction of section 73A to the Competition Act as contained in the 2009 Competition Amendment Act, which section is not yet in operation, become effective.¹⁹¹

1.2.4 Confidentiality

The CLP makes it clear that information submitted during the course of a leniency application will be dealt with on a confidential basis.¹⁹² Disclosure of any information submitted by the applicant prior to immunity being granted during this process will only be made with the consent of the applicant, provided such consent will not be unreasonably withheld by the applicant.¹⁹³

1.2.5 Circumstances when the CLP does not apply

The CLP document states that the CLP will not be applicable in the following instances, namely:

- a) where the cartel conduct in respect of which immunity is sought falls outside the ambit of the Act;¹⁹⁴
- b) where another firm has already made a successful application for immunity under the CLP in respect of the same conduct;¹⁹⁵ or
- c) where the applicant fails to meet any other requirement and condition set out in the CLP.¹⁹⁶

1.2.6 Hypothetical enquiries

Where a firm is unsure whether or not the CLP would apply to particular conduct, it may approach the Commission on a hypothetical basis to obtain clarity.¹⁹⁷ This may be done tel-

¹⁸⁹ It is explained in footnote 6 of the 2008 CLP document that a right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of a matter that affects that person, or in case of an appeal, on the date that the appeal process in respect of that matter is concluded (s 65(9) of the Competition Act).

¹⁹⁰ Act 29 of 2004.

¹⁹¹ Par 6.4. See the discussion in chapter 3.

¹⁹² Par 6.2 of the 2008 CLP document.

¹⁹³ *Ibid.*

¹⁹⁴ Par 7.1.1 of the 2008 CLP document.

¹⁹⁵ Par 7.1.2 of the 2008 CLP document.

¹⁹⁶ Par 7.1.3 of the 2008 CLP document.

ephonically or in writing and the firm may choose to remain anonymous if it so wishes.¹⁹⁸ The information provided will be kept confidential.¹⁹⁹ The drawback is, however, that clarification given to a would-be applicant is not binding on the Commission, the Competition Tribunal (hereinafter the 'Tribunal') or the Competition Appeal Court (hereinafter the 'CAC') but serves merely as a guide.²⁰⁰

1.2.7 Different Forms of Immunity Applicable in the CLP

1.2.7.1 Conditional Immunity

After an application for immunity is made, the Commission will grant conditional immunity to create an atmosphere of trust between it and the applicant pending the finalisation of the infringement proceedings.²⁰¹ This is done in writing signalling that immunity has been provisionally granted.²⁰² Total immunity will only be granted to the applicant after the Commission has completed its investigation into the alleged cartel and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Competition Appeal Court, as the case may be, *provided* the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.²⁰³ At any point in time until total immunity is granted, the Commission reserves the right to revoke the conditional immunity if, at any stage, the applicant does not co-operate or fails to fulfil any other condition or requirement set out in the CLP.²⁰⁴

1.2.7.2 Total Immunity

Once the Tribunal or the Competition Appeal Court, as the case may be, has reached a final decision in respect of the alleged cartel, total immunity is granted to a successful applicant

¹⁹⁷ Par 8.1 of the 2008 CLP document.

¹⁹⁸ *Ibid.*

¹⁹⁹ Par 8.2 of the 2008 CLP document.

²⁰⁰ Par 8.3 of the 2008 CLP document.

²⁰¹ Par 9.1.1.1 of the 2008 CLP document. Conditional immunity precedes total immunity or no immunity, see par 9.1.1.2 of the 2008 CLP document.

²⁰² *Ibid.*

²⁰³ Par 9.1.1.2 of the 2008 CLP document.

²⁰⁴ Par 9.1.1.3 of the 2008 CLP document.

who has fully met all the conditions and requirements under the CLP.²⁰⁵ Once total immunity is granted revocation will no longer be possible.²⁰⁶

1.2.7.3 No Immunity

No immunity is granted in those instances where the applicant fails to meet the conditions and requirements set by the CLP.²⁰⁷ If immunity is not granted, the Commission is at liberty to deal with the applicant as provided for in the Competition Act.²⁰⁸ It may thus either prosecute the unsuccessful applicant for the cartel conduct or it may consider a settlement agreement or a consent order, or where a matter is referred to the Tribunal, ask for a reduction of fine in respect of the unsuccessful applicant.²⁰⁹

1.2.8 The Requirements and Conditions for Immunity under the CLP

An applicant will qualify for immunity under the CLP if it meets the following conditions and requirements:

- a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;²¹⁰
- b) the applicant must be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view, to institute proceedings in relation to a cartel activity;²¹¹
- c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the CAC are completed;²¹²

²⁰⁵ Par 9.1.2.1 of the 2008 CLP document. Par 9.1.2.2-9.1.2.3 of the 2004 CLP allowed for immunity to be granted even where all the conditions were not met. However, this has not been carried forward into the new CLP.

²⁰⁶ *Ibid.*

²⁰⁷ Par 9.1.3.1 of the 2008 CLP document.

²⁰⁸ Par 9.1.3.2 of the 2008 CLP document.

²⁰⁹ *Ibid.* An applicant that does not meet all the requirements but wishes to be considered for some form of favourable treatment may thus also approach the Commission in terms of par 9.1.3.3 for a possible settlement of the matter.

²¹⁰ Par 10.1(a) of the 2008 CLP document.

²¹¹ Par 10.1(b) of the 2008 CLP document.

²¹² Par 10.1(c) of the 2008 CLP document.

- d) the applicant must immediately stop the cartel activity or act as directed by the Commission;²¹³
- e) the applicant must not alert other cartel members or any other third party that it has applied for immunity;²¹⁴
- f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity;²¹⁵ and
- g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.²¹⁶

1.2.9 The CLP-Procedure

The procedure set out in the CLP is aimed at ensuring efficient facilitation of the CLP in terms also of transparency and predictability, but the Commission is given the discretion to exercise some flexibility where necessary to achieve the desired outcome.²¹⁷ The procedure is as follows:

1.2.9.1 First Contact with the Commission

The applicant must make an application for immunity in writing²¹⁸ to the Manager of the Enforcement and Exemptions Division of the Commission²¹⁹ so that the Commission can determine whether or not the applicant is 'first to the door' with regard to particular cartel activity.²²⁰ The application must contain information that is substantial enough to enable the Commission to identify the relevant cartel conduct and the cartel participants in order to establish whether or not an application for immunity has been made in respect of the same conduct.²²¹ The applicant need not disclose its identity at this stage.²²²

²¹³ Par 10.1(d) of the 2008 CLP document. Sometimes the Commission might direct the applicant to carry on with the cartel activity so as not to arouse the suspicion of the other cartel members until a stage is reached where the Commission is satisfied that it has enough evidence on which to successfully prosecute the cartel.

²¹⁴ Par 10.1(e) of the 2008 CLP document.

²¹⁵ Par 10.1(f) of the 2008 CLP document.

²¹⁶ Par 10.1(g) of the 2008 CLP document.

²¹⁷ Par 11.1 of the 2008 CLP document. For instance, where the process refers to a meeting, the Commission may in certain circumstances choose to use other forms of communicating with the applicant without having a meeting.

²¹⁸ Although the CLP does provide for an oral statements procedure, applications cannot be made orally.

²¹⁹ Par 11.1.1.1 of the 2008 CLP document. This may be done by facsimile, electronic mail or hand delivery.

²²⁰ Sutherland & Kemp (n 81) 5-82.

²²¹ *Ibid.*

²²² *Ibid.*

The Commission must advise the applicant in writing or by telephone within five days, or within a reasonable period, after receipt of the application, whether or not it is not the 'first to the door'.²²³ The applicant must thereafter within five days, or within a reasonable period after receipt of such advice from the Commission, make an arrangement for the first meeting with the Commission.²²⁴

1.2.9.2 First Meeting with the Commission

The purpose of the first meeting with the Commission is to determine whether the applicant's case would qualify for immunity under the CLP.²²⁵ The applicant must bring all the relevant information, evidence and documents at its disposal, whether written or oral, relating to the cartel activity for consideration by the Commission.²²⁶ The applicant must also reveal its full identity and answer all the questions that the Commission may ask in relation to conduct being reported or matters relating thereto.²²⁷ At this stage the Commission will evaluate the evidence and it will have sight of documents but will not yet be allowed to make copies of documents.²²⁸ The Commission must within five days, or within a reasonable time, after the date of the first meeting decide whether or not the applicant's case qualifies for immunity and inform the applicant accordingly in writing.²²⁹ If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, arrangements for a second meeting will be made.²³⁰ If, however, the Commission decides that the applicant does not meet the conditions and requirements of the CLP, it must advise the applicant that it will not receive immunity.²³¹

1.2.9.3 Second Meeting with the Commission

The purpose of the second meeting is to discuss and grant conditional immunity to the applicant pending finalisation of any further investigations by the Commission into the matter and final determination by the Tribunal or the CAC, as the case may be.²³² At this stage the applicant will be required to bring forward any other relevant information, evidence and

²²³ Par 11.1.1.2 and 11.1.1.3 of the 2008 CLP document.

²²⁴ *Ibid.*

²²⁵ Par 11.1.2.2 of the 2008 CLP document.

²²⁶ Par 11.1.2.1 of the 2008 CLP document.

²²⁷ *Ibid.*

²²⁸ Par 11.1.2.2 of the 2008 CLP document.

²²⁹ *Ibid.*

²³⁰ Par 11.1.2.3 of the 2008 CLP document.

²³¹ Par 11.1.2.4 of the 2008 CLP document.

²³² Par 11.1.3.1 of the 2008 CLP document.

documents that it may still have in its possession or under its control, whether written or oral.²³³ The Commission will now be able to make copies of all documents provided.²³⁴ Confidentiality of all information, evidence and documents will, however, be maintained except insofar as it is used in proceedings before the Tribunal in terms of the Competition Act.²³⁵ Conditional immunity will be granted by means of a written conditional immunity agreement concluded between the applicant and the Commission.²³⁶

1.2.9.4 Investigations, Analysis and Verification

After the granting of conditional immunity, the Commission will move forward with its investigations relating to the cartel activity.²³⁷ During its investigation the Commission will analyse and verify information or documents given by applicant against any existing or discovered information and/or documents.²³⁸ At this stage the Commission may use all methods and tools provided for in the Act, including to interview, subpoena, search or summon any firm(s) that it believes could assist in connection with the matter.²³⁹

Once the Commission has completed its investigation and is satisfied that it has sufficient information to institute proceedings, it will inform the applicant in a final meeting.²⁴⁰ Should the Commission, however, not be satisfied it can call a meeting with the applicant either to

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ Par 11.1.3.3 of the 2008 CLP document, see also par 6.2 and 8.2. In *Competition Commission of South Africa v Arcelormittal South Africa Ltd* (680/12) [2013] ZASCA 84 (31 May 2013) the Supreme Court of Appeal had to deal with a claim to confidentiality in respect of information submitted during a leniency application by Scaw South Africa (Pty) Ltd in respect of a steel cartel. The court indicated at par 28 (with reference to *Pioneer Foods (Pty) Ltd v Competition Commission in re: Competition Commission v Tiger Brands Ltd t/a Albany and another, Competition Commission v Pioneer Foods (Pty) Ltd t/a Sasko and another* [2009] 1 CPLR 239 (CT)) that the information obtained from leniency applicants under the CLP is intended for the purpose of litigation against the remaining firms alleged to be part of the cartel. It remarked (at par 31) that the leniency application was 'in substance, Scaw's witness statement in the contemplated legislation' and that the document was therefore privileged in the hands of the Commission.' *In casu*, however, the court eventually held that the Commission waived such privilege by making comprehensive reference to information contained in the leniency application during litigation against the other cartel members.

²³⁶ Par 11.1.3.2 of the 2008 CLP document. Par 11.1.5 of the 2004 CLP allowed for the granting of total immunity before this point.

²³⁷ Par 11.1.4.1 of the 2008 CLP document.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Par 11.1.4.2 of the 2008 CLP document.

revoke the conditional immunity or to solicit further documents or information so as to enable it to complete the investigation.²⁴¹

1.2.9.5 The Final Meeting

The purpose of the final meeting between the Commission and the applicant is to inform the applicant that the Commission intends to institute proceedings in relation to the alleged cartel and to request the applicant to continue to cooperate fully and expeditiously in the proceedings.²⁴² As indicated, conditional immunity will continue to apply until the Tribunal or the CAC, as the case may be, has reached a final decision regarding the matter.²⁴³ Should the applicant, however, wish to withdraw its application at this stage, it runs the risk of being dealt with in terms of the Competition Act.²⁴⁴

1.2.10 The Placing of a Marker

It is essential for a successful leniency application that a firm is the first to the door to self-report to the Commission regarding its cartel activity. Prior to making an application for immunity pursuant to par 11.1 of the CLP, a prospective applicant may, however, choose to apply to the Commission for a marker in order to protect its place in the queue for immunity.²⁴⁵ This will usually be the case where the prospective applicant is still in the process of gathering sufficient evidence and information for purposes of its leniency application. The marker application is made in writing to the Manager of the Enforcement and Exemptions Division of the Commission²⁴⁶ and must state that it is being made to request a marker, must provide detail regarding the applicant's name and address, the alleged cartel conduct and its participants and justify the need for a marker.²⁴⁷

The Commission may grant a marker at its discretion and on a case-by-case basis.²⁴⁸ In granting the marker, the Commission will determine the period of time within which the applicant must provide the necessary information, evidence and documents needed to

²⁴¹ *Ibid.* Presumably the Commission can also solicit further information without a meeting as the applicant is under a duty to cooperate. Sutherland & Kemp (n 81) 5-82. See also par 11.1 on the flexibility of procedures.

²⁴² Par 11.1.5.1 of the 2008 CLP document. Par 11.1.5 of the 2004 CLP provided that the purpose of such meeting was to grant total immunity.

²⁴³ *Ibid.* The applicant must wait until the Tribunal or CAC has finally resolved the matter before total immunity can be granted.

²⁴⁴ Par 11.1.5.2 of the 2008 CLP document. In such case the applicant will lose all immunity.

²⁴⁵ Par 12.1 of the 2008 CLP document. This is referred to as a 'marker application'.

²⁴⁶ *Ibid.* This may be done by facsimile, electronic mail or by hand delivery.

²⁴⁷ *Ibid.*

²⁴⁸ Par 12.2 of the 2008 CLP document.

meet the conditions and requirements set out in par 10 of the CLP.²⁴⁹ If the applicant at a later stage submits an application for immunity along with the necessary information, evidence and documents within the time limit determined by the Commission, such application for immunity and information, evidence and documents will be deemed to have been provided on the date when the marker application was granted by the Commission.²⁵⁰

1.2.11 Revocation of Immunity

Revocation in respect of conditional immunity may take place in writing at any time²⁵¹ if the applicant fails to meet the conditions and requirements of the CLP, including in the event of lack of cooperation by the applicant, provision of false²⁵² or insufficient information, misrepresentation of facts and dishonesty.²⁵³ The CLP furthermore makes reference to section 73(2)(d) of the Competition Act which provides that a person commits an offence when he/she knowingly provides false information to the Commission.²⁵⁴ If conditional immunity is revoked, the applicant will again be treated in the same way as a firm receiving no immunity and the Commission may decide to pursue the matter in terms of the relevant provisions of the Competition Act.²⁵⁵

1.2.12 The Effect of an Unsuccessful Leniency Application

Failure to meet the conditions and requirements set out in the CLP, including lack of cooperation, dishonesty, providing insufficient evidence or false information, will result in an unsuccessful application, the effect of which would include the following:²⁵⁶

- a) the Commission would be at liberty to investigate the matter and refer it for adjudication in terms of the provisions of the Competition Act;²⁵⁷

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Par 13.1 and 13.2 of the 2008 CLP document.

²⁵² The applicant may also incur criminal liability for providing false information, see par 13.4 of the 2008 CLP document.

²⁵³ Par 13.3 of the 2008 CLP document. This list is clearly not a *numerous clauses*.

²⁵⁴ Par 13.4 of the 2008 CLP document. Thus, an applicant whose immunity has been revoked by the Commission based on the provision of false information, will be liable to penalties stipulated in s 74(1)(b) of the Competition Act, if convicted of such an offence.

²⁵⁵ Par 13.5 of the 2008 CLP document.

²⁵⁶ Par 14.1 of the 2008 CLP document.

²⁵⁷ Par 14.1.1 of the 2008 CLP document.

- b) the Commission may, depending on the matter, ask for a lenient sanction when referring a matter to the Tribunal in respect of a firm whose application has been unsuccessful;²⁵⁸
- c) the Commission and/or the unsuccessful applicant may initiate negotiations for a settlement agreement or a consent order, which may also result in reduction of a fine²⁵⁹ that may be imposed in terms of the Competition Act.²⁶⁰

1.2.13 Acceptance of Oral Statements

When submitting its written application for immunity or its marker application, the applicant may apply to the Commission to request that information regarding the alleged cartel be provided orally.²⁶¹ It is explained in the CLP document that this procedure affords applicants added protection from discovery of documents produced in the context of CLP applications for use in proceedings before other jurisdictions.²⁶² The oral statements procedure is a discretionary process and the Commission may, on a case-by-case basis, accept or refuse a request for oral submissions.²⁶³ Subject to par 12.1 of the CLP-document, the applicant will nevertheless be required to provide the Commission with all existing written information, evidence and documents in its possession regarding the alleged cartel.²⁶⁴

Oral statements will be recorded and transcribed at the Commission's premises.²⁶⁵ The applicant may review the technical accuracy of the recording and transcript and correct the content of its oral statements within a reasonable time to be determined at the discretion of the Commission.²⁶⁶ Upon expiry of the time period, the oral statements, corrected as the case may be, will be deemed to be approved and will amount to restricted information

²⁵⁸ Par 14.1.2 of the 2008 CLP document. S 59(3)(f) allows the Tribunal to consider cooperation with the Commission when it imposes a fine.

²⁵⁹ The percentage by which the fine will be reduced is not specified.

²⁶⁰ Par 14.1.3 of the 2008 CLP document.

²⁶¹ Par 15.1 of the 2008 CLP document.

²⁶² Lavoie (n 101) 151. It does not, however, replace the need to submit a written application for immunity.

²⁶³ Par 15.1 of the 2008 CLP document.

²⁶⁴ *Ibid.* This procedure is not, however, as far reaching as those put in place in other jurisdictions which allow paperless applications or an entirely paperless leniency process, see the EU Leniency Notice (2006) OJ C 298 32 and the OFT Guidance Note (2008) 803 3.18.

²⁶⁵ Par 15.2 of the 2008 CLP document.

²⁶⁶ *Ibid.*

forming part of the Commission's records pursuant to the Rules for the Conduct of Proceedings in the Competition Commission.²⁶⁷

12.14 Fast Track Settlement Procedure

The Competition Commission has recently introduced a fast track settlement procedure subsequent to investigations regarding collusion and bid-rigging in the construction industry relating to the construction of the 2010 FIFA World Cup stadiums.²⁶⁸ The purpose of this procedure is to operate alongside the Corporate Leniency policy and to:²⁶⁹

- a) incentivise firms to admit their anti-competitive conduct by proposing a settlement on financially advantageous terms;
- b) ensure that all firms truthfully and comprehensively disclose their anti-competitive conduct;
- c) strengthen the Commission's evidence against those firms that are not taking advantage of this settlement process;
- d) minimise the legal costs associated with, and speedily resolve, the complaints and cases arising from these complaints; and
- e) set the construction industry on a new competitive trajectory, which will promote efficiency, adaptability and development of the construction sector and the economy as a whole.

The settlement invitation *inter alia* provides that the applicant for settlement will have to pay a certain stipulated percentage of its turnover, based in its market share in certain delineated sectors of the construction industry.²⁷⁰

Although the fast track settlement process is mentioned for the sake of completeness, a discussion thereof is beyond the scope of this dissertation. It should, however, be pointed out that this process is not a standard process of general application to all instances where an investigation subsequent to a leniency application leads the Commission to conclude that

²⁶⁷ *Ibid.* Published in GN 22025 in GG 428 on 1 February 2001.

²⁶⁸ Competition Commission *Invitation to firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act* (1 February 2011) available at www.compcom.co.za accessed on 12 October 2014(hereinafter Settlement Invitation)

²⁶⁹ Settlement Invitation at 2.

²⁷⁰ Settlement Invitation at 7.

cartel activity took place. It is a specific settlement invitation relating only to the specific cartel activity that occurred with regard to the World Cup stadiums. The fine reductions in terms of this settlement agreement are not of general application and are not cast in stone – thus should the Commission enter into other settlements in accordance with this fast track settlement process the terms of that settlement and the fine reductions applicable may differ from those mentioned in the settlement process regarding the World Cup stadiums. This settlement process does not substitute the leniency process but is implemented subsequent to a leniency application and an investigation into prohibited conduct and basically serves to assist the Commission in dealing with the case as soon as possible instead of embarking on a road of protracted litigation. It enables firms to have the administrative fines that would have been imposed upon them reduced in return for their co-operation in closing the case. It can thus not be regarded as imposing definite fine reduction bands in South African competition law as the reductions may differ from case to case – thus making it difficult to predict what the fine reductions in a given case may be unless the Commission sets it out in specific detail.

1.2.14 Conclusion

In developing the CLP, the Commission has done a review and comparison of leniency policies adopted by other competition authorities, including in the European Union (EU), Canada, Australia, United Kingdom (UK) and United States of America (USA).²⁷¹ The CLP was designed to be consistent with the legal and regulatory framework that exists in South Africa.²⁷² It was found that the general requirements for granting immunity were substantially the same and consistent in all the jurisdictions reviewed.²⁷³ The CLP is therefore based on those general requirements.²⁷⁴ It was envisaged that a leniency of the nature adopted by the Commission in the CLP would lead to detection and expeditious finalisation of cases that otherwise would have been difficult, if not impossible, to crack.²⁷⁵

²⁷¹ Par 16.1 of the 2008 CLP document. The Commission found, after reviewing and comparing these policies and how they have been implemented, that leniency policies in almost all jurisdictions concerned have proved to be one of the most effective tools to deal with cartels.²⁷¹

²⁷² Par 16.3 of the 2008 CLP document.

²⁷³ Par 16.4 of the 2008 CLP document.

²⁷⁴ *Ibid.*

²⁷⁵ Par 16.7 of the 2008 CLP document.

Finally, it is to be noted that the 2009 Competition Amendment Act²⁷⁶ apparently seeks to ‘codify’ the CLP. In the Explanatory Memorandum that accompanied the Competition Amendment Bill²⁷⁷ it was indicated that ‘in order to encourage voluntary disclosure of anti-competitive conduct by the involved firms, the Competition Commission seeks a legal foundation for excusing “whistle blower” firms who provide essential information to an investigation’.²⁷⁸ Sections 1 and 8 of the Competition Amendment Act respectively address the definition of ‘deserving of leniency’ and provide that the Competition Commission may certify that any particular respondent is deserving of leniency. In terms of section 1 of the Amendment Act ‘deserving of leniency’ is described as follows: ‘[W]hen used with respect to a firm contemplated in section 50, or a person contemplated in section 73A, means the firm or person has provided information to the Competition Commission, or otherwise cooperated with the Commission’s investigation of an alleged prohibited practice in terms of section 4(1)(b) to the satisfaction of the Commission.’ It should be noted that section 1 of the Amendment Act contains a further proposed amendment which defines the word ‘respondent’ to mean ‘a firm against whom a complaint of a prohibited practice has been initiated or submitted [our emphasis] in terms of this Act’. However, the aforesaid amendments have to date not been put into effect, basically as a result of the controversial introduction of the cartel offence as discussed in chapter 3 hereinafter. The result is that currently the CLP does not have the status of legislation.

²⁷⁶ Competition Amendment Act 1 of 2009.

²⁷⁷ Competition Amendment Bill B13D-2008, now Competition Amendment Act 1 of 2009.

²⁷⁸ Par 2.5 of the Explanatory Memorandum.

Chapter 3 Challenges to the Corporate Leniency Policy

1. Court Challenges to the Corporate Leniency Policy

1.1 High Court: *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission*²⁷⁹

A challenge to the CLP was brought before the North Gauteng High Court by way of a review application in the above matter, the facts of which were briefly as follows: The applicants and the third up to the twelfth respondents were competitors in the manufacture and distribution of wire and wire-related products in South Africa and elsewhere.²⁸⁰ During July 2008 the third respondent, Consolidated Wire Industries (Pty) Ltd, applied to the Commission for conditional immunity under the CLP in exchange for evidence revealing that, together with the applicants and the fourth up to the twelfth respondents, it had been engaged in cartel conduct prohibited by section 4(1)(b)(i), (ii) and (iii) of the Competition Act.²⁸¹ The Commission granted the third respondent conditional immunity in terms of the CLP.²⁸² The Commission then initiated a complaint and undertook an investigation of alleged contraventions of section 4(1)(b) of the Competition Act.²⁸³ On the strength of the information and evidence provided by the third respondent, the Commission was of the view that the applicants and the third up to the twelfth respondents had engaged in conduct prohibited by section 4(1)(b)(i), (ii) and (iii) of the Competition Act involving price fixing, allocation of markets and collusive tendering and subsequently referred a complaint regarding such conduct to the Tribunal.²⁸⁴

Before the High Court the applicants sought an order:

- (a) reviewing and setting aside the decision by the Commission granting the third respondent conditional immunity in terms of the CLP;

²⁷⁹ [2011] ZAGPPHC 117 (5 July 2011)

²⁸⁰ Par 9 of the judgment. All references hereinafter under this specific heading to any paragraphs are to paragraphs of the North Gauteng High Court judgment unless specifically indicated otherwise.

²⁸¹ *Ibid.*

²⁸² Par 10.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

- (b) declaring that the evidence obtained by the Commission from the third respondent pursuant to the CLP was unlawfully obtained and was inadmissible;
- (c) alternatively to (b) above, an order declaring that the initiation and referral of the complaint to the Tribunal were unlawful and fell to be set aside.²⁸⁵

The Commission indicated in its answering affidavit that the CLP is a policy adopted by the Commission to encourage cartel members to blow the whistle on cartel conduct, and that the effective prosecution of cartels would simply not be possible without the incentive created by the CLP.²⁸⁶ It made it clear in its answering affidavit that invariably the applicant for leniency or the party that has been granted conditional immunity is cited as a party in the referral to the Tribunal.²⁸⁷ The Commission therefore submitted that its evidence was obtained pursuant to, and in accordance with, a lawful measure or policy adopted by the Commission.²⁸⁸ It further contended that the grant of conditional immunity is an interim decision as the Commission may yet determine at the end of referral proceedings in the Tribunal that the information given by the third respondent was incomplete or untrue and decide not to grant the third respondent final immunity.²⁸⁹ It was also contended that the Commission grants final immunity at the end of the referral proceedings in the Tribunal and that the grant of final immunity is, in essence, the final decision by the Commission not to seek relief against the leniency applicant.²⁹⁰

The applicants contended that the Commission had no authority in terms of the Competition Act to grant such conditional immunity to a participant in conduct prohibited by section 4(1) (b) and, because it had no such authority, it also had no authority or right in terms of the Competition Act to make such a promise to the third respondent.²⁹¹ The applicants further contended that in failing to seek relief against the third respondent in its referral of the complaint to the Tribunal while it sought relief against the applicants and the fourth up to the twelfth respondents, the Commission acted selectively as it has no authority in terms of

²⁸⁵ Par 1. In the referral of the complaint to the Tribunal the applicant stated that no relief was being sought against the third respondent as it had applied for and was granted conditional immunity by the Commission.

²⁸⁶ Par 13.

²⁸⁷ Par 15.

²⁸⁸ Par 16.

²⁸⁹ Par 17.

²⁹⁰ Par 15. The Commission also contended the jurisdiction of the High Court to hear the application. The court eventually found that it did not have jurisdiction but nevertheless considered the legitimacy of the CLP as a precaution in case it was wrong on the jurisdiction issue.

²⁹¹ Par 30.

the Competition Act to prosecute some of the participants in prohibited conduct and not prosecute others.²⁹² They also contended that because the Commission had no authority to grant the third respondent conditional immunity, the initiation and referral of the complaint to the Tribunal was unlawful because it occurred as a result of unlawful conduct on the part of the Commission in that it promised the third respondent something it had no authority to promise (i.e. conditional immunity) and granted the third respondent conditional immunity when it had no authority to do so under the Competition Act.²⁹³

The court held that in dealing with the question whether or not the Commission had authority to grant the third respondent conditional immunity, the first step is to determine exactly what in essence the granting of conditional immunity as envisaged in the CLP means.²⁹⁴ It indicated that 'immunity' in the context of the CLP has two elements to it, namely, that the Commission will not subject the party concerned to adjudication before the Tribunal for its involvement in conduct prohibited by section 4(1)(b) of the Competition Act and that the Commission will not seek any fines to be imposed by the Tribunal on such party.²⁹⁵ The court further indicated that the citing in referral proceedings before the Tribunal of a participant as a respondent in conduct prohibited by section 4(1)(b) does not on its own amount to subjecting such party to adjudication if the Commission does not seek the imposition of a fine on such a party.²⁹⁶

The court sought to find the meaning of the term 'immunity' by examining the contents of paragraphs 5.9 and 9 of the CLP.²⁹⁷ It held that 'immunity' has the very narrow meaning that the party that is granted immunity is free from being subjected to adjudication before the Tribunal and, more importantly, that the Commission will not propose to the Tribunal that any fine be imposed on such party.²⁹⁸ The Tribunal is not, however, bound to the decision of

²⁹² *Ibid.*

²⁹³ Par 31. Consequently the applicants also sought to have an order made that the evidence obtained by the Commission from the third respondent was obtained unlawfully and was inadmissible because it was provided by the third respondent after being induced to do so by an unlawful promise by the Commission.

²⁹⁴ Par 49.

²⁹⁵ *Ibid.*

²⁹⁶ Par 50. The court found that the fact that such party is cited as a respondent in the referral proceedings has the advantage that that such party is brought before the Tribunal together with the other participants in conduct prohibited by s 4(1)(b) and this would enable the Tribunal to have such party before it in case it should reject the Commission's proposal that no fine be imposed or no order at all be made against such party.

²⁹⁷ Par 51-53.

²⁹⁸ Par 55.

the Commission not to prosecute the applicant for leniency or ask for the imposition of a fine on such applicant.²⁹⁹ Thus, if the Commission cites such a party in referral proceedings before the Tribunal but does not in the referral ask the Tribunal to impose a fine on such party, that does not constitute subjecting that party to adjudication within the meaning of that term as used in the CLP and still accords with conditional immunity as that term is used in the CLP.³⁰⁰

The court held that the promise or undertaking that the Commission gives to a beneficiary of the CLP is, for all intents and purposes, a promise or undertaking not to seek the imposition of a fine on such party.³⁰¹ It remarked that it could not see that such a party would be seriously opposed to an order by the Tribunal declaring that it had contravened section 4(1)(b) as long as the Tribunal does not impose a fine on such party.³⁰² The court went on to say that if immunity under the CLP is said to be conditional immunity, it simply means that that the Commission's promise is made provisionally pending the finalisation of the matter and on condition that such party continues to fulfil the requirements and condition stipulated in the CLP.³⁰³ The court further stated that nothing in the CLP provides that the Tribunal is obliged not to impose a fine on a party if the Commission asks it not to.³⁰⁴

The court then sought to answer the question whether the Commission was entitled to promise a party that has participated in conduct prohibited by section 4(1)(b) that it will not

²⁹⁹ Sutherland & Kemp (n 81) 5-82.

³⁰⁰ *Ibid.*

³⁰¹ Par 57. The court highlighted this because such a party admits or confesses its own contravention of s 4(1)(b) of the Act both to the Commission and, once there is a referral to the Tribunal, to the Tribunal as well.

³⁰² *Ibid.* Furthermore, there would be no basis for the granting of an interdict restraining such party from continuing with conduct prohibited by s 4(1)(b) because such a party would already have given an undertaking to the Commission that it will not continue with such conduct because that is one of the requirements or conditions for immunity under the CLP.

³⁰³ Par 58. It remarked that conditional immunity is, to some extent, like an interim order that is granted by the High Court pending the return day. If, on the return day, the applicant shows that it has met the requirements for the final relief, the rule is confirmed but, if the applicant has failed to show that it meets the requirements for final relief, the rule is discharged. In the case of conditional immunity, if at the end of the referral proceedings the party concerned has met the requirements for permanent immunity, permanent immunity is granted; and if it has not met the requirements, permanent immunity is not granted.

³⁰⁴ *Ibid.* The court indicated that even if there was something in the CLP to that effect, it would not in law have been binding on the Tribunal; and accordingly, there is acknowledgment that the Tribunal has the final authority whether or not a fine is imposed on a respondent before the Tribunal. The court held that it is clear that the granting of conditional immunity by the Commission in terms of its CLP is not the granting of immunity in the normal sense of the term because par 3.3 of the CLP does not define immunity in the sense of giving the Commission the final say on what happens or does not happen to the party concerned. Par 3.3 defines immunity in such a way that it includes the Commission not asking the Tribunal to impose a fine on the party concerned.

seek any relief against it in referral proceedings before the Tribunal and will accordingly, not ask the Tribunal to impose any fine upon it for its involvement in such conduct.³⁰⁵ It found that the submission for the Commission that in effect such authority derived from the provisions of the Competition Act that contemplates that the Commission can be a party to a consent order made by the Tribunal indeed had merit.³⁰⁶ The court indicated that if the Commission can be a party to an agreement that can later be made a consent order, it obviously also can in terms of the Competition Act promise a party in the position of the third respondent that it will ask the Tribunal not to impose a fine on such a party if the latter gives it full co-operation such as is required under the CLP.³⁰⁷ The court then stated that at the end of the referral proceedings, if the third respondent or a party in its position, has met all the conditions and requirements for immunity under the CLP, the Commission will ask the Tribunal not to impose a fine on such party and, if the Tribunal accepts that, it will not impose a fine on such party.³⁰⁸

³⁰⁵ Par 63.

³⁰⁶ Par 64. It referred to s 49B of the Competition Act in terms whereof the Commissioner has the power to initiate a complaint against an alleged prohibited practice, and to s 21(1)(f) in terms whereof the Commission is responsible to negotiate and conclude consent orders in terms of s 49D.

³⁰⁷ Par 67. The court further added that there is no reason why such an agreement cannot be said to be an agreement as contemplated by s 49D(1) and s 58(1)(b).³⁰⁷ After all, the agreement contemplated in s 49D(1) and s 58(1)(b) is not even required to be in writing, thus it can even be an oral agreement.

³⁰⁸ *Ibid.* In terms of s 58(1)(a)(iii) read with s 59 of the Competition Act the imposition of a fine lies within the discretion of the Tribunal. The court satisfied itself that the Tribunal will be acting within its discretion if, in an appropriate case, it decides not to impose a fine on a party which is a respondent before it if such party has helped the Commission in a manner such as is contemplated in the CLP of the Commission. The court further stated that the Commission and such party can at the end of the referral proceedings hand up an agreement that no fine is to be imposed on such party and ask the Tribunal to make it a consent order and the Tribunal may, in its discretion, make it an order of the Tribunal. The court then referred to s 49D(2) which reads as follows: 'After hearing a motion for a consent order, the Competition Tribunal must -

(a) make the order as agreed to and proposed by the Competition Commission and the respondent;
(b) indicate any changes that must be made in the draft order before it will make the order; or
(c) refuse to make the order.'

The court indicated that the reference in s 49D(2)(a) to an 'order as agreed to and proposed by the Commission and respondent' is important because in par 3.3 of the CLP the second element of immunity is that the Commission will not propose the imposition of a fine on a party which has applied for immunity and has met all the conditions and requirements for such immunity under the Commission CLP. The court added that there is nothing in either the provision of subsection (1) or subsection (2) to s 49D that suggests that the intention of the Legislature was that s 49D should apply only in those cases where there was only one wrongdoer who was a respondent in referral proceedings. The court further added that if the intention of the Legislature was that s 49D applies only in those cases where there is only a single respondent in proceedings, it would have said so in a clear language. Consequently the court held that s 49D applies whether one is dealing with a single wrongdoer or a number of joint wrongdoers who are respondents in referral proceedings before the Tribunal, and thus there is no doubt whatsoever that the Commission does have authority to make the promise it made in this case.

With regard to the allegation of selective prosecution, the court held that a prohibited practice in which a number of participants had taken part does not cease to be a prohibited practice simply because the Commissioner initiates a complaint about such practice in relation to only some and not all the participants in the practice.³⁰⁹ The court further held that in its view under the Competition Act, the exclusion of one participant from relief or adjudication does not turn a prohibited practice into something other than a prohibited practice.³¹⁰ The court then indicated that If the applicants and the fourth and further respondents want the Tribunal to impose a fine upon the third respondent, they must go to the Tribunal, participate in the referral proceedings and make representations to the Tribunal to the effect that in the exercise of its discretion it must impose a fine on the third respondent as well if it imposes a fine upon them.³¹¹

In respect of the matter of immunity, the court held that paragraph 3.3 of the CLP contemplates that one of the elements of immunity under the CLP is that in subsequent referral proceedings before the Tribunal the Commission proposes not to ask the Tribunal to impose a fine on a party which was granted conditional immunity and which meets all the requirements for permanent immunity.³¹² The court remarked that such a party will automatically obtain permanent immunity if, by the time the Tribunal issues its decision or judgment, the Commission has not asked it to impose a fine on such party and the Tribunal does not in its decision impose a fine on such party.³¹³

Subsequently, the court dismissed the application with costs. The applicants thereafter lodged an appeal with the Supreme Court of Appeal.

1.2 The Supreme Court of Appeal: *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission and others*³¹⁴

³⁰⁹ Par 70.

³¹⁰ Par 71. The court remarked that in any event in this case the Commission cited the third respondent in the referral proceedings but simply did not ask for any relief against it.

³¹¹ It will then be up to the Tribunal how it exercises its discretion after hearing argument on all sides.

³¹² Par 73.

³¹³ *Ibid.* The court indicated that once the Tribunal has issued its decision that does not include a fine for such party, the Commission cannot, thereafter, ask the Tribunal to impose a fine on such party nor can it start referral proceedings against it relating to the same prohibited conduct in respect of which the Tribunal has already adjudicated.

³¹⁴ [2012] ZASCA 134 (27 September 2012).

Before the Supreme Court of Appeal, the appellants argued that the Commission is a creature of statute which has only those powers conferred upon it under the Competition Act, and that the Competition Act does not permit the Commission to be selective in deciding which participants in a cartel it investigates and makes the subject of a reference to the Tribunal, nor does it authorise the Commission to grant immunity from a referral and a possible adverse adjudication, including the imposition of an administrative penalty, in consideration for the furnishing of information under the CLP.³¹⁵ The appellants further argued that if the Commission refers a complaint concerning participation in a cartel to the Tribunal, it is obliged to refer the complaint in respect of all participants and to seek relief against all of them.³¹⁶ Furthermore, it was contended that the most that the Commission can do to ameliorate the position of a 'whistle blower' is to ask the Tribunal to take its co-operation into account in assessing the amount of any administrative penalty, as it is entitled to do under section 59(3)(f) of the Competition Act.³¹⁷

The court discussed the contents of the CLP as well as its functioning and purpose.³¹⁸ It pointed out that a conspicuous feature of the CLP is that, wherever it refers to immunity being granted, it identifies the Commission as the party that grants immunity.³¹⁹ It further indicated that as conditional immunity is granted *prior* to any reference to the Tribunal, only the Commission can grant conditional immunity.³²⁰

The court, however, found that despite these explicit provisions, both the Commission and the third respondent in the court *a quo* sought to argue that under the CLP all that the Commission undertook to do was not to seek relief against the third respondent in the referral proceedings before the Tribunal and it was submitted that in the end result, after taking account of the Commission's stance, the Tribunal would take the final decision whether to grant relief against the third respondent.³²¹ According to the court this argument flies in the face of the provisions of the CLP that state expressly that it is the Commission that

³¹⁵ Par 5. All references hereinafter under this specific heading to any paragraphs are to paragraphs of the Supreme Court of Appeal judgment unless specifically indicated otherwise.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ Par 6.

³¹⁹ Par 7.

³²⁰ *Ibid.* It referred to par 9.1.1.3 of the CLP which warns that, at any stage until total immunity is granted, the Commission reserves the right to revoke the grant of conditional immunity for lack of co-operation and pursue a prosecution before the Tribunal.

³²¹ Par 8. The court referred to par 3.3 and the footnote on the meaning of 'adjudication'.

grants immunity.³²² It remarked that the CLP nowhere suggests that the entitlement to total immunity is dependent on the Tribunal, acting within its own unfettered discretion, not imposing a penalty on the applicant for immunity.³²³

The court stated that the central issue in this case was whether the CLP is lawful and whether the Act permits the Commission to refer a complaint to the Tribunal in respect of cartel behaviour, without citing and seeking relief against all the members of the cartel.³²⁴ It indicated that the High Court accepted the argument that, in providing for conditional immunity to whistle blowers, the CLP does no more than embody an undertaking by the Commission that it will not seek an order from the Tribunal imposing an administrative penalty on the party afforded immunity.³²⁵ It pointed out that the High Court erroneously held that notwithstanding the granting of such immunity, the Tribunal was not precluded from making an order imposing an administrative fine on the 'whistle blower'.³²⁶

The court remarked that there was no real debate in the court *a quo* as to whether the Competition Act in general terms empowers the Commission to adopt a CLP in such terms.³²⁷ However, it stated that there can be no doubt that this is so because the purpose of the Competition Act is to promote competition in South Africa, and to that end the Commission is empowered to promote market transparency and to investigate and evaluate alleged contraventions of the Competition Act, under which cartels fall.³²⁸ Breaking up of cartels serves to promote market transparency, as cartel behaviour is the antithesis of transparency in the market place.³²⁹ Thus it concluded that investigating contraventions of the

³²² Par 9.

³²³ *Ibid.* According to the court, the distinction drawn between conditional immunity and total immunity makes no sense if the Tribunal is entitled to ignore the Commission's grant of conditional immunity and impose administrative penalties upon the party to whom such immunity had been granted. The court went on to state the following: 'it would be small comfort to the recipient to know that it had received total immunity if it had nonetheless been ordered to pay ten per cent of its annual turnover during the years of the cartel's existence as an administrative penalty. We venture to suggest that the CLP would be far less effective, if not entirely useless, if it contained a disclaimer to the effect that the Commission would not seek an order against the party seeking leniency, but that the Tribunal would be free to impose such administrative penalty as the Act permitted against them. Hard-headed businessmen, contemplating barring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the cooperation that the Commission seeks from them.'

³²⁴ *Ibid.*

³²⁵ Par 21.

³²⁶ *Ibid.*

³²⁷ Par 22.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

Competition Act must entitle the Commission to put in place measures that will enable it to perform this function.³³⁰ Therefore the court held that the Commission was empowered under the Competition Act to adopt and implement the CLP by giving conditional and total immunity to parties who make disclosure and provide evidence that enables it to pursue cartels and bring them to an end.³³¹

The court further indicated that Agri Wire contended that, whilst the adoption of the CLP may have been permissible in general terms, it was impermissible for it to provide that immunity would be granted by the Commission and that the granting of immunity is a prerogative of the Tribunal when exercising its powers in determining an appropriate penalty under section 59 of the Competition Act.³³² The court rejected this contention and held that the fact that the Tribunal can take a party's cooperation into account in determining an administrative penalty does not have as a corollary that the Commission may not grant immunity.³³³ Accordingly, the court held that the challenges to the CLP; the grant of conditional immunity to the third respondent; the admissibility of the evidence obtained from the third respondent by way of the grant of conditional immunity and the validity of the referral were all without merit.³³⁴ The court therefore held that the application was correctly dismissed by the court *a quo*, albeit for different reasons, and thus the appeal was also dismissed with costs.³³⁵

1.3 Discussion

The High Court incorrectly concluded that it is the Tribunal and not the Commission, that has the final say about immunity under the CLP. Sutherland and Kemp remark that on the interpretation of the High Court, the concept of immunity against adjudication, in particular,

³³⁰ *Ibid.* According the court, that is the whole purpose of the CLP.

³³¹ *Ibid.*

³³² Par 23. The court further indicated that Agri Wire relied on this argument for two propositions: First it said that when the Commission refers a complaint to the Tribunal under s 51 of the Competition Act it is obliged to refer the entire complaint and that means, in the context of cartel behaviour, that it is obliged to refer all members of the cartel to the Tribunal for the latter to adjudicate upon their conduct and determine what order should be made and what penalty imposed. It complained that otherwise the playing fields were not level and the party that obtained leniency would be unfairly advantaged. Secondly it said that the provisions of s 59(3)(f) require the Tribunal to take into account the degree to which a participant in a cartel has co-operated with the Commission and the Tribunal and that this indicates that it is the Tribunal, and not the Commission, that must determine whether any immunity should be granted.

³³³ Par 26.

³³⁴ *Ibid.*

³³⁵ *Ibid.*

and the concept of immunity against the imposition of a fine, has a very narrow meaning which means that the Tribunal is not bound by the views of the Commission that the leniency applicant should not be fined but the Tribunal will at most attach 'considerable weight' to the views of the Commission.³³⁶ They are of the view that the High Court has made matters worse by suggesting that other parties who object to immunity may apply to participate in proceedings in an attempt to convince the Tribunal to impose a fine on a party who received immunity.³³⁷ Clearly such an approach will erode the integrity of the CLP as it will make a mockery of the grant of immunity by the Commission.

The Supreme Court of Appeal, however, correctly pointed out that it is the Commission who grants immunity and concluded that the power to grant immunity in terms of the CLP was founded in the Commission's statutory mandate to promote competition through promotion of market transparency. Sutherland and Kemp criticise the judgment of the Supreme Court of Appeal in this regard as they indicate that the fact that the Supreme Court of Appeal removes the discretion of the Tribunal, thus providing wider protection to leniency applicants, is not without problems for the following reasons:³³⁸ first, the aforementioned justification of the court is terse and not entirely convincing as it is doubtful whether section 50(3) (which allows the Commission to refer parts of complaints in the instance where a complaint is not initiated by it) can be used as justification for the proposition that it is possible in all cases. In Sutherland and Kemp's opinion it would seem that the opposite is true. Secondly, they indicate that the court did not really address the issue whether the Commission could conclude agreements with parties against whom complaints were made and they remark that such an agreement will probably have to be the subject of a consent order in terms of section 49D of the Competition Act before it will acquire legal force. They indicate that the effect is that without a consent order a person who has been granted immunity will still be open to prosecution through a referral by the complainant³³⁹ or the making of a new complaint by an aggrieved party³⁴⁰. They therefore state that the judgment of the Supreme Court of Appeal should be accepted subject to the qualification that the Commission should obtain consent orders for parties who have received immunity.

³³⁶ Sutherland & Kemp (n 81) par 5.9.1.3.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Where an outside party complained.

³⁴⁰ Where the Commission initiated a complaint.

They further remark that it may be necessary for the person who has received immunity to include further terms in its consent order, such as a provision regarding liability to the complainant.³⁴¹ They indicate that if a consent order is concluded between the Commission and other respondents and damages are awarded to the complainant, the complainant will not be able to claim further damages from the respondents.³⁴² However, nothing in the Competition Act seems to preclude damages claims, in these situations, against immune firms who were not parties to the consent order or by persons who were not complainants.³⁴³

1.4 Possible future constitutional challenges to the CLP

The CLP has weathered the challenges against it in the *Agri Wire* matters. However, it is submitted that this does not necessarily mean the end of any further court challenges to the CLP. It is submitted that the possibility exists that litigants in future may seek to challenge the CLP on the basis that the apparently selective treatment of cartelists contravenes the equality provision in section 9 of the Constitution³⁴⁴. If it is found that the CLP indeed infringes upon the right to equality it is submitted that such a challenge may, however, pass constitutional muster on the basis that no less restrictive means exist in terms whereof the objective of detecting and prosecuting cartels may be achieved and that this is in line with international anti-cartel enforcement practices.³⁴⁵

2. Pending Legislative Challenges to the Corporate Leniency Policy

2.1 Introduction

Letsike describes the rationale behind criminalisation of cartel conduct as follows: cartel activity reduces the competition on a given market and has the potential to reduce or elimi-

³⁴¹ Sutherland & Kemp (n 81) par 5.9.1.3.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ S9 of the Constitution of the Republic of South Africa, 1996 states that everyone is equal before the law and has the right to equal protection and benefit of the law.

³⁴⁵ S36 of the Constitution of the Republic of South Africa, 1996 provides as follows:

'36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

- a) the nature of the rights;
- b) the importance and purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose;
- e) less restrictive means to achieve the purpose.'

nate the gains that such competition secures.³⁴⁶ It may be likened to a sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer.³⁴⁷ Rosochowicz's basic thesis as regards competition law enforcement dictates that some rules are created for a specific purpose, separate from moral judgment or punishment.³⁴⁸ Regulatory laws typically punish certain conduct because the conduct 'goes against common goals of society', not because the conduct at hand is morally wrong.³⁴⁹ However, a shift towards 'moralisation', however gradual, must be acknowledged.³⁵⁰ Letsike points out that the global trend of including criminal liability in antitrust law is apparent, and that via the 2009 Competition Amendment Act as discussed below, South Africa seems to be following suit.³⁵¹

Baker, who is a big proponent of introducing criminal liability for cartel participation, reports having been told by a very senior executive that 'as long as you are only talking about money the company can at the end of the day take care of me ... but once you begin about taking away my liberty, there is nothing that the company can do for me'.³⁵² Werden *et al* are also proponents of the view that the sanction of imprisonment of individuals enhances deterrence of cartels.³⁵³ They point out that the threat of a prison sentence provides individuals involved in cartel activity with the single greatest incentive to self-report through a leniency application and thereby escape sanctions.³⁵⁴ They are of the opinion that eliminating criminal liability for cartel participation would significantly undermine cartel deterrence in

³⁴⁶ Letsike *The Criminalising of Cartels – How Effective Will the New Section 73A of the Competition Amendment Act be?* (2013) 5.

³⁴⁷ Whelan 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' *Competition Law Review* (2008) 28.

³⁴⁸ Rosochowicz *Deterrence and the relationship between public and private enforcement of competition law* available at www.ibanet.org/Document/Default.aspx?DocumentUid...22C2. accessed on 9 October 2014.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.* It cannot be denied that there are arguments in favour of such an addition. Such arguments highlight the deterrence effect that criminal sanctions will have. These deterrence incentives purportedly operate to introduce a threat to the individual who plays the decisive role as to whether his firm is to participate in cartel activities. In theory, this individual, under threat of individual criminal sanction, would be more likely to be deterred from participating in the conduct when it affects him personally than when the only threat (apparently) is to the economic circumstance of his firm. Thus it could be argued that criminal liability could be a 'complementary deterrent', in addition to compensatory fines on firms.

³⁵² Baker 'The use of criminal remedies to deter and punish cartels and bid-rigging' 69 *George Washington Law Review* (2001) 693 at 705.

³⁵³ Werden, Hammond, Barnes & Scott (n 13) 7.

³⁵⁴ *Ibid.* They remark that even when full immunity is no longer available, the threat of a prison sentence provides an incentive to an individual involved in cartel activity to cooperate with the prosecutor in exchange for a reduction in sentence.

several distinct ways:³⁵⁵ First, criminal liability has a deterrent effect different to that of monetary sanctions because a criminal conviction has a stigmatising effect. Second, the deterrent effect of monetary sanctions imposed through civil damages actions would be greatly diminished without assistance from criminal enforcement – this is because criminal enforcement against companies involved in cartels detects the cartels, establishes the liability of the defendants and provides valuable evidence for proving damages. Even if criminal fines and damages are insufficient to make cartel activity unprofitable for any of the companies competing in a market, they argue that deterrence nevertheless can succeed if the threat of imprisonment prevents individuals within those companies from committing acts necessary to effectuate a cartel.³⁵⁶

Bloom, however, aptly remarks on the ability of criminal sanctions to incentivise self-reporting under leniency programmes:³⁵⁷ “But clearly, this incentive only applies where there is a criminal leniency programme – and there is no risk that the discretion of a public prosecutor to pursue a case could undermine certainty for defendants that they will not be prosecuted if they apply for amnesty.”

2.2 The Section 73A Cartel Offence

Criminal liability for directors or managers of a firm who cause or allow the firm to participate in a cartel is envisaged by the 2009 Competition Amendment Act which introduces the very controversial section 73A to the Competition Act.³⁵⁸ The introduction of the ‘cartel offence’ into South African competition law is government’s response to public calls to punish individuals responsible for involving their firms in cartel conduct, particularly in the light of investigations into cartels in basic food industries such as bread and milk.³⁵⁹ To date the said section 73A has not been put into effect as its implementation is shrouded in controversy. However, the fact remains that it has been enacted and as remarked by Letsike above, there appears to be a global trend towards criminalisation of cartel participation as a measure to clamp down on cartels. Although some remarks may be made regarding the advantages of

³⁵⁵ Werden, Hammond, Barnes & Scott (n 13) 9.

³⁵⁶ Werden, Hammond, Barnes & Scott (n 13) 19. They point out that success in cartel deterrence might require only that one individual in one substantial competitor decline to commit the unlawful acts needed to effectuate the cartel.

³⁵⁷ Bloom (n 17) 56.

³⁵⁸ S12 of the Competition Amendment Act 1 of 2009.

³⁵⁹ Lavoie (n 101) 155. See also Kelly ‘The Introduction of a ‘Cartel Offence’ into South African Law’ *Stellenbosch Law Review* (2010) 321 .

criminalising cartel conduct, this discussion is not intended to provide an answer to the question whether cartel participation should be criminalised – such a comprehensive study is a topic on its own and beyond the scope of this dissertation. This discussion merely serves to point out that should the cartel offence contained in section 73A be put into effect it may pose substantial challenges to the continued efficient use of the CLP.

Section 73A, which introduces the South African cartel offence, provides for directors or persons in a position of management authority, causing its firm to participate in cartel activity, or knowingly acquiescing³⁶⁰ in such conduct, to be liable to a fine of up to R500,000 or imprisonment not exceeding 10 years, or both.³⁶¹ It further provides that a person may be prosecuted for an offence in terms of the section 73A only if the firm which is participating in the cartel, has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b) of the Competition Act; or the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited cartel practice.³⁶² In terms of section 73A(4) the Competition Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Commission has certified that the person is deserving of leniency in the circumstances. The Commission may, however, make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted of an offence in terms of section 73A, if the Competition Commission has certified that the person is deserving of leniency³⁶³ in the circumstances.³⁶⁴ Section 73A(5) provides that in any court proceedings against a person in terms of section 73A, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b) is *prima facie* proof of the fact that the firm engaged in that conduct. It furthermore provides that a firm whose director or manager is guilty of the said cartel offence may not directly or indi-

³⁶⁰ For the purpose of subsection (1)(b), 'knowingly acquiesced' means having acquiesced while having actual knowledge of the relevant conduct by the firm.

³⁶¹ S 73A and 74.

³⁶² S 73A(3).

³⁶³ In terms of s1 of the Competition Amendment Act 1 of 2009 'deserving of leniency' is defined as follows: 'when used with respect to a firm contemplated in s 50, or a person contemplated in s 73A, means that the firm or person has provided information to the Competition Commission, or otherwise co-operated with the Commission's investigation of an alleged prohibited practice in terms of s 4(1)(b) to the satisfaction of the Commission.'

³⁶⁴ S 73A (4)(b).

rectly pay any fine that may be imposed on a person convicted of such offence.³⁶⁵ The firm may also not indemnify, reimburse, compensate or otherwise defray the expenses that a person incurred in defending against a prosecution in terms of the section, unless the prosecution is abandoned or the person is acquitted.³⁶⁶

The 2009 Competition Amendment Act took quite long to be signed into law *inter alia* because a number of constitutional questions were raised regarding the validity of section 73A. The content of section 73A(5), particularly, caused great unease but the subsection has nevertheless been retained unchanged.³⁶⁷ The said section which provides that an acknowledgement in a consent order or a finding by the Tribunal that a firm has engaged in a prohibited practice is *prima facie* proof that the firm had engaged in such conduct, was interpreted by some commentators as creating a reverse onus³⁶⁸ on the accused which is inconsistent with section 35 of the Constitution that deals with an accused person's right to remain silent.³⁶⁹ Concerns raised by section 73A(5) are that it infringes the right to a fair trial, the right to be presumed innocent as well as the right to adequate time and facilities to prepare a defence.³⁷⁰

Kelly points out that another potentially contentious constitutional issue can be found in section 73A(6)(b) which provides that the firm may not pay any fine of its director or manager found guilty of the cartel offence. He states that the intention behind this provision appears to be that under no circumstances is the firm to bail out those in charge of shareholder funds when they face charges for cartelisation, which seems entirely sensible.³⁷¹ Kelly remarks that there might be an issue with such a broad prohibition. In a privately held company the owners may be both the shareholders and decision-makers.³⁷² Furthermore, the company may be their only source of revenue.³⁷³ To prevent them from agreeing amongst

³⁶⁵ S 73A (6)(a).

³⁶⁶ S 73A (6)(b).

³⁶⁷ *Ibid.*

³⁶⁸ The onus for rebutting the Tribunal's conclusions rests with the accused in the criminal proceedings.

³⁶⁹ The Constitution of the Republic of South Africa, 1996. S 35(1) of the Constitution reads as follows: 'Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent (b) to be informed promptly – (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person.'

³⁷⁰ Letsike (n 346) 9-11.

³⁷¹ Kelly (n 359) 332.

³⁷² *Ibid.*

³⁷³ *Ibid.*

themselves to borrow money from the company to fund a defence may infringe their fair trial rights.³⁷⁴

Section 73A(4), however, appears to have the potential to be the most problematic and to most severely impact on the efficiency of the CLP: it requires a dual role of prosecution between the Commission and the National Prosecuting Authority by requiring the National Prosecuting Authority to be the body that is responsible for the criminal prosecution, and the Commission being responsible for making submissions to the National Prosecuting Authority in support of leniency of a person certified as deserving of leniency.³⁷⁵ Although it may be appropriate that imprisonment fits the offence of price-fixing, Kelly, however, remarks that it introduces immense complexity at both the investigative and prosecutorial stages.³⁷⁶ Imprisonment can only be imposed by the courts following a successful prosecution by the National Prosecuting Authority.³⁷⁷ The inability of the National Prosecuting Authority (who has no experience in prosecuting competition matters) to successfully prosecute complex white collar crimes will, however, be problematic.³⁷⁸ Kelly warns that even the threat of personal liability would probably reduce the likelihood of companies admitting to price-fixing, thus requiring the Commission to prosecute conspiracies without the assistance of inside informants who are usually complicit in the impugned conduct, but who could not be extended immunity from prosecution without the agreement of the prosecutors and ultimately the courts.³⁷⁹

Notwithstanding the Amendment Bill itself not having been referred to the Constitutional Court prior to its enactment for a decision on its constitutionality, it should be noted that section 79(4)(b) of the Constitution provides for constitutional review prior to a Bill becoming

³⁷⁴ *Ibid.* S 35(3)(f) of the Constitution of the Republic of South Africa.

³⁷⁵ Lavoie (n 101) 156.

³⁷⁶ Kelly (n 359) 328 points out that it is likely that within the National Prosecuting Authority it will be the relatively small Specialised Commercial Crimes Unit that will have the responsibility for prosecuting individuals under s 73A. Currently the majority of work conducted by the unit entails investigating and prosecuting fraud., however, their mandate extends to enforcing an array of corporate statutory offences that range from provisions in the Companies Act 71 of 2008 to the Counterfeit Goods Act 37 of 1973. It is of real concern to Kelly that in practice the Specialised Commercial Crimes Unit, with no formal structures to facilitate coordination with the Competition Commission, will simply not have the resources or expertise to prosecute cartel offences.

³⁷⁷ Lewis 'Commission's Critics Wrong in Criticising Cartel Fines' available at <http://www.iol.co.za/business/opinion/commission-s-critics-wrong-in-criticising-cartel-fines-1.1540414> accessed on 13 June 2014.

³⁷⁸ *Ibid.* White-collar crime is financially motivated nonviolent crime committed for illegal monetary gain.

³⁷⁹ *Ibid.*

ing an Act as well as after the Act has been promulgated.³⁸⁰ It is therefore not unlikely that should section 73A be put into operation without any further amendments to address the above constitutional concerns, it may become the topic of various challenges to its constitutionality.

Lopes, Seth and Gauntlett are not enthusiastic about the cartel offence in terms of section 73A: they point out that the United States of America, being the birthplace of modern anti-trust law incorporative of individual criminal liability and the most prominent success story to date, has travelled a long road to get to where it is today.³⁸¹ Initially, the Sherman Act made provision for individual criminal liability; however, this liability was vague and overly broad, and as such disregarded. It is only in recent years, pursuant to the amendment and clarification of those provisions, that individual criminal liability has not only been cemented in US antitrust law, but has found a viable and pragmatic enforcement system for the prosecution of individual cartel offences.³⁸² A significant difference between the United States of America and South Africa, however, is that whilst the Sherman Act has always, albeit vaguely, provided for individual criminal liability, the Competition Act never has, and was never intended to be the vehicle for such a provision.³⁸³ Further in the United States the Department of Justice is responsible for both the civil and criminal enforcement of competition law – thus it does not have the challenge of two different institutions having to find a way to cooperate efficiently.³⁸⁴

Lopes, Seth and Gauntlett refer to the intentional omission of a criminal liability provision at the time that the Competition Act was initially promulgated and argue that one must consider whether the Competition Act requires such a provision to give effect to its objectives, as the original drafters of the Competition Act (when the contents of sections 49A(3)³⁸⁵ and

³⁸⁰ S 172 of the Constitution of the Republic of South Africa, 1996.

³⁸¹ Lopes, Seth & Gauntlett *Cartel Enforcement, the CLP and Criminal Liability – Are Competition Regulators Hamstrung by the Competition Act from Co-operating with the NPA, and is this a Problem for Competition Law Enforcement?* Seventh Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa 5 and 6 September 2013.

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ S 49A (3) of the Competition Act deals with the summoning of persons by the Commission and provides: 'No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings except in criminal proceedings for perjury or in which the person is tried for an offence

56³⁸⁶ of the Competition Act are considered) clearly contemplated that conduct prohibited therein could comprise criminal activity.³⁸⁷

They further caution that it should be borne in mind that the Competition Commission is an administrative agency whose function is to administer and enforce an economic statute, the Competition Act.³⁸⁸ It has a completely different role from that of the National Prosecuting Authority, which has to prosecute all general crimes or offences in terms of its enabling legislation and on the basis of its own prosecutorial policy.³⁸⁹ The provisions of the Competition Amendment Act, which deals with personal criminal liability and the relationship between the National Prosecuting Authority and the Competition Commission, therefore raise complex questions as to the possible overlap in the functions of the National Prosecuting Authority and those of the Competition Commission and the suitability of using criminal law sanctions in competition law.³⁹⁰

Jordaan and Munyai point out that the Competition Amendment Act has also blurred the lines as regards the distinct legal personalities of the company and its director, and by fostering compliance with the substantive provisions of the Competition Act through criminal sanctions, the Competition Amendment Act has further created confusion regarding the legal relationship between prosecutions under the Competition Act and those under the Criminal Procedure Act 51 of 1977.³⁹¹ Despite the National Prosecuting Authority enjoying exclusive authority to conduct criminal prosecutions under section 73A, Jordaan and Munyai indicate that it is important to bear in mind that the Competition Commission is not powerless

contemplated in section 72 or section 73(2)(d) and then only to the extent that the answer or statement is relevant to prove the offence charged.'

³⁸⁶ S 56 of the Competition Act deals with witnesses at a hearing of the Competition Tribunal and provides :

'(1) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question.

(2) The law regarding a witness' privilege in a criminal court of law applies equally to a person who provides information during a hearing.

(3) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

(4) Section 49A (3) applies to evidence given by a witness in terms of this section.'

³⁸⁷ *Ibid.*

³⁸⁸ Lopes, Seth & Gauntlett (n 381) 4.

³⁸⁹ Jordaan & Munyai 'The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998' *SA Merc LJ* (2011) 201.

³⁹⁰ *Ibid.*

³⁹¹ Jordaan & Munyai (n 389) 201. However, others submit that the imposition of personal liability in itself is not problematic.

in relation to such criminal prosecutions.³⁹² They point out that it has to be remembered that it is only after the Competition authorities have made their own substantive determination that a prohibited practice has occurred, that the legal authority to prosecute a director under section 73A will exist.³⁹³ According to Jordaan and Munyai the provisions of section 73A make it clear that it is primarily up to the Commission to determine whether or not the criminal prosecution of a director is suitable.³⁹⁴ In their opinion it lies within the Commission's discretion to request the National Prosecuting Authority to institute criminal proceedings against a director, and it is unlikely that the National Prosecuting Authority would institute criminal proceedings unless the Competition Commission has made a request or recommendation to it for the initiation of such prosecution.³⁹⁵

Nevertheless, Jordaan and Munyai remark that it should also be borne in mind that the National Prosecuting Authority is an independent body charged with instituting criminal prosecutions on behalf of the State, free of interference and influence.³⁹⁶ It is therefore theoretically possible, although it would be very exceptional, for the National Prosecuting Authority to criminally prosecute a director against the advice or recommendation of the Commission that the director deserves immunity or leniency.³⁹⁷ Still, even if in exceptional circumstances the National Prosecuting Authority decides to go ahead with the prosecution of a director, Jordaan and Munyai argue that the role and influence of the Commission in the ensuing criminal prosecution may not be completely diminished: they argue that nothing in law prevents the Commission from making a recommendation to the court that the director deserves immunity or leniency.³⁹⁸

Despite differences in opinion regarding the suitability of a cartel offence in South African competition law, all the above South African authors are in agreement that should section 73A come into effect, it is clear that the CLP process will be significantly affected. It is also feared that subjecting individuals to criminal liability will embroil the competition authorities

³⁹² *Ibid.* In fact, the authority of the Commission in the conduct of the criminal prosecution may be more significant than it is thought to be.

³⁹³ *Ibid.*

³⁹⁴ S 73A(4).

³⁹⁵ Jordaan & Munyai (n 389) 202.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.* They remark that such a gesture on the part of the Commission would go a long way towards restoring the confidence of the business community in its corporate leniency programme, which is already considered to be under threat as a result of the introduction of personal criminal liability for directors in our competition law.

in needless litigation and require them to work much harder to detect and prosecute cartels in future.³⁹⁹

It is clear that under section 73A the Commission has a central role to play in criminal prosecutions instituted under section 73A, and this will inevitably require a certain degree of cooperation between the Commission and the National Prosecuting Authority.⁴⁰⁰ It is, however, problematic that the Competition Commission and the National Prosecuting Authority are given little guidance as to the level of practical cooperation that can or should exist between them.⁴⁰¹ In this regard Lopes, Seth and Gauntlett validly point out that aside from section 3(1A)(1) of the Competition Act, which provides for 'negotiations' between the competition authorities and other industry-specific regulatory agencies in respect of the

³⁹⁹ Irvine 'Cartel busting – is introducing criminal liability for managers the answer?' *World Competition* (2009) 1. Despite the negative contentions of introducing criminal liability, Irvine remarks that there are arguments in favour of criminal sanctions being introduced such as: (i) A decision to act in breach of antitrust rules will often be based on a cost benefit analysis. Managerial incentives are often difficult to reconcile with corporate profit maximisation objectives. Managers may strive for objectives other than firm profits, including personal monetary gain, status, expensive business trips, lush company cars and dinners as well as discretionary powers over decision making for which the company incurs the unnecessary costs. Corporate penalties may therefore not constitute the appropriate sanction, because it is the individuals within the corporation who take the decisions and hence actually commit the corporate crimes. (ii) To prevent company liability acting as a shield behind which managers can hide and collude to their personal advantage, direct intervention from the authorities against the individuals responsible, in the form of individual fines, disqualification orders or even jail sentences may provide a more effective deterrence. (iii) By targeting the actual decision maker, competition authorities could bypass ineffective corporate governance mechanisms of compliance and indirect punishment within the firm in cases where otherwise only corporate antitrust fines would be levied. (iv) The identification, branding or even formal disqualification of these managers would weed the offenders out of the management pool. (v) By making a clear and targeted intervention, thus separating management responsible from owners and employees with no involvement in the anti-competitive acts, individual sanctions could be efficiently paired with corporate leniency and compliance programmes. The business community would be further encouraged to have good compliance mechanisms in place so as to document the internal responsibility and place the blame in the event of a discovery. (vi) Criminal prosecution of individuals will bring antitrust violations to the public eye as a serious form of white collar crime. Raising awareness of the fact that anti-competitive behaviour generates social welfare losses is likely to reduce violations generally.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.* However, the Commission's own past experience suggests that there are likely to be few problems in this regard. The Commission has already established some memorandums of understanding or guidelines on cooperation with other institutions in areas of concurrent or complementary jurisdictions, and these appear to be working well. There is little reason to believe that the Commission will not be able to make a similar arrangement with the National Prosecuting Authority on matters concerning the implementation of s 73A. However, the fundamental protections afforded in terms of s 49A (3) and the constitutional right against self incrimination are clearly incapable of being circumvented in terms of any proposed agreement between the two authorities.

management of concurrent jurisdiction, the Competition Act goes no further in outlining any attempt at cooperation with the National Prosecuting Authority.⁴⁰²

The South African competition authorities themselves are also critical of section 73A. In his address at the Bowman Gilfillan Africa competition law seminar, Mr Norman Manoim, chairperson of the Competition Tribunal, said that the United States Department of Justice has been trying to persuade other jurisdictions to adopt criminal law provisions for hard core cartel activities.⁴⁰³ He suggested that certainly in developing countries, the adoption of criminal sanctions against cartel activities is not a good idea, as developing countries are not yet ready.⁴⁰⁴ In a speech in 2002, Dave Lewis, a former Chairperson of the Competition Tribunal also observed that he did not think 're-criminalising' our statute would be a good idea.⁴⁰⁵ He remarked that criminalising competition law (sic) in South Africa was always going to present some challenges in practice, especially in view of the fact that the competition (amendment) process has arguably been treading a path that will lead to an inevitable collision with the Constitution.⁴⁰⁶

The introduction of criminal liability will add a new dimension to competition law enforcement, in that, despite our already over-burdened criminal justice system, the jurisdiction of the National Prosecuting Authority and criminal courts will extend to the enforcement of criminal sanctions against directors or managers who cause or allow cartel participation.⁴⁰⁷ In such a case, it will require that a manner of co-operation be developed between all relevant authorities for the effective implementation of both cartel enforcement under the

⁴⁰² Lopes, Seth & Gauntlett (n 381) 5 indicate that his is not surprising having regard to the fact that the Competition Act is quasi-civil in nature and specifically contemplates the inadmissibility of self-incriminating statements made to the Commission and Tribunal.

⁴⁰³ Letsike (n 346) 12.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Lewis Competition Law Enforcement in South Africa* (18 Mar 2002), available at <http://www.Lexisnexis.co.za>. The phrase 're-criminalising our statute' probably referred to some of our previous competition statutes, such as the Undue Restraint of Trade Act, which singled out for criminal prosecution the practice of resale price maintenance, to this day still one of the most widespread anti-competitive conducts and prohibited outright by the current Competition Act.

⁴⁰⁶ Jordaan & Munyai (n 389) 203.

⁴⁰⁷ Lavoie (n 101) 156 points out that the Commission has no ability to grant any form of criminal immunity. The National Prosecuting Authority is a separate and independent state authorised body, which has the sole discretion and mandate as regards the prosecution of criminal conduct perpetrated in South Africa. The idea that the Commission could ever be afforded the power to effectively usurp the functions of the National Prosecuting Authority and grant total immunity from criminal prosecution for cartel conduct is rendered an absurdity by s 179 of the Constitution, which provides for the establishment of a single National Prosecuting Authority, with sole authority to institute criminal proceedings on behalf of the State.

Competition Act and criminal prosecution of individuals.⁴⁰⁸ The need for streamlining of ‘dual proceedings’ will therefore arise.⁴⁰⁹ This may eventually prove to be a very daunting task which may put the efficiency of the CLP as a mechanism to lure cartelists out of their ‘smoke-filled’ rooms, at serious risk.

The advantage of such dual system would arguably be that the National Prosecuting Authority responsible for investigating and prosecuting criminal infringements has extensive experience in criminal cases.⁴¹⁰ The disadvantages which currently outweigh the advantages are, however, that the National Prosecuting Authority does not have any experience in competition law enforcement and/or the capacity to investigate or prosecute cartels, the Competition Tribunal does not have to follow the Commission’s recommendations on reductions in fines, and immunity from criminal sanctions cannot be provided by the Commission which could deter leniency applications.⁴¹¹

The CLP will only remain effective if firms and individuals are offered a CLP process which provides sufficient clarity and assurances regarding the risk of criminal prosecution of individuals in the event of a CLP application.⁴¹² The Commission does not have jurisdiction to guarantee an individual’s immunity from criminal prosecution, therefore some form of assurance, in the form of a co-operation agreement or guidelines, between the Competition Commission and the National Prosecuting Authority will need to be offered to CLP applicants, otherwise the risk of criminal sanctions will inhibit leniency applications and will make the CLP superfluous.⁴¹³ In addition to the risk that an applicant for immunity under the CLP faces of not receiving such immunity against administrative fines, the directors of such an applicant will face the possibility of being prosecuted for an offence and as it is the directors of a firm who take the decision whether to apply for leniency under the CLP, not many of

⁴⁰⁸ *Ibid.*

⁴⁰⁹ This is the position under Australian competition law – see chapter 4 herein: A dual administration proceeding is where one authority prosecutes the firm for cartel activities under a civil law standard, and another prosecutes the individual under a criminal standard for criminal activity.

⁴¹⁰ Letsike (n 346) 13.

⁴¹¹ *Ibid.*

⁴¹² Lavoie (n 101) 156.

⁴¹³ *Ibid.*

them will be willing to take such a risk.⁴¹⁴ Clearly, there is no greater deterrent of cartel activity than the risk of imprisonment for corporate officials.⁴¹⁵

In essence, individuals must be offered some form of protection or guarantee against criminal prosecution or fines which will encourage them to come forward and self-report on their cartel participation. Should the Commission issue a certificate that an individual is deserving of leniency, it is not likely to provide individuals and firms with sufficient comfort as jurisdiction for criminal prosecution will not lie with the competition authorities.⁴¹⁶ It is for this reason that it is essential that an understanding be reached among all relevant authorities to provide individuals, willing to approach the Commission with information regarding its firm's participation in a cartel, with certainty and transparency as regards effective protection from criminal prosecution.⁴¹⁷

Lopes, Seth and Gauntlett further point out that the Commission currently makes extensive use of the procedure set out in section 49A of the Competition Act, which allows the Commission to summons any person believed to have information the Commission needs to conduct an interrogation.⁴¹⁸ That person must respond to the Commission's questions, unless their answer is self-incriminating.⁴¹⁹ Thus if criminal liability as envisaged by section 73A were to be introduced, almost every question would be potentially self-incriminating and

⁴¹⁴ See s 74(a).

⁴¹⁵ Griffin 'The Modern Leniency Program After 10 Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program' (2003) available at <http://www.usdoj.gov/atr/public/speeches/201477.htm> accessed on 17 March 2014.

⁴¹⁶ Lavoie (n 101) 156.

⁴¹⁷ *Ibid.*

⁴¹⁸ Irvine (n 399) 1. S 49A(1) outlines a process whereby the Commissioner may summons any person who is believed, *inter alia*, to 'be able to furnish any information on the subject of the investigation', to provide such information during the course of the investigation. A person is required to answer truthfully and to the best of his ability, but is not obliged to answer any question if to do so would be self-incriminating. Furthermore, any self-incriminating answer given or statement made to the Commissioner is 'inadmissible as evidence against the person who gave the answer or made the statement in criminal proceedings'.

⁴¹⁹ Any person summonsed to provide evidence to the Commission who has made a self-incriminating statement as regards his or her conduct is afforded protection from criminal prosecution or enforcement arising from the statement in question, as it is entirely inadmissible in any criminal proceedings by virtue of the above provision. This section gives effect to a fundamental constitutional entitlement (the right not to be compelled to give self-incriminating evidence) without compromising the ability of the Commission to gather evidence against and prosecute a firm engaged in cartel conduct in terms of the Competition Act. See Lopes, Seth & Gauntlett (n 381) 5.

most directors will exercise their right not to answer.⁴²⁰ This will have the effect of limiting the information provided to the Commission in such inquiries.⁴²¹

It is further to be noted that the Commission has been able to settle almost all complaints relating to cartel activity after concluding consent orders with the respondents in terms of section 49D of the Competition Act.⁴²² This enables the Commission to process cases swiftly and punish offending firms without having to incur the substantial expenses and delays associated with running a full hearing before the Tribunal.⁴²³ Lopes, Seth and Gauntlett remark that it seems fairly obvious that directors and executives will be less willing to conclude consent orders on behalf of their firms, if an admission by a firm that it has participated in a cartel (which is an essential feature of a consent order) may be used as the basis for securing a later criminal conviction against those very same directors, executives or senior managers who have made the admissions on behalf of their firms.⁴²⁴

During the course of the construction cartel investigation,⁴²⁵ a number of firms were invited by the Commission to settle their cases through disclosure of their own and other firms' involvement in the bid-rigging activities under investigation. As such, where parties freely and voluntarily provided information to the Commission, not having been summoned to do so, Lopes, Seth and Gauntlett validly point out that it would appear that this information could ostensibly be used by the National Prosecuting Authority in pursuing criminal prosecutions under the various broad corruption offences contained in the Prevention of Organised Crime Act.⁴²⁶ Certain of the individuals making such statements appreciated this fact, which no doubt lead to their apparently approaching the National Prosecuting Authority with affi-

⁴²⁰ *Ibid.* The Amendment Act contemplates the introduction of personal criminal liability for specified classes of individuals involved in cartel conduct, but that it does not at all contemplate the effect that this has on s 49A(3) of the Competition Act (which is not amended by the Amendment Act). Where a person has been subpoenaed, and discloses self-incriminating information during the course of an investigation, all statements made therein are necessarily inadmissible in any criminal proceedings, including those instituted in terms of s 73A. The inexorable conclusion is that these sections are at loggerheads with one another for a very specific reason – s 49A(3) advances the constitutional right of an individual against self-incrimination; s 73A unfortunately gives rise to grave constitutional concerns.

⁴²¹ *Ibid.*

⁴²² *Ibid.* S 49D provides that if, during or after the completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order.

⁴²³ *Ibid.*

⁴²⁴ Lewis *Thieves at the Dinner Table: Enforcing Competition Rules in South Africa* (2012) 212.

⁴²⁵ A variety of infrastructural projects including the Coega Harbour Project and the construction of the FIFA World Cup stadia.

⁴²⁶ Act 24 of 1999. Lopes, Seth & Gauntlett (n 381) 5.

davits seeking amnesty from possible criminal prosecution by offering to make full disclosure to the National Prosecuting Authority.⁴²⁷

Lopes, Seth and Gauntlett also mention another interesting issue, actually of equal importance as the 'hype' about section 73A: the Prevention of Organised Crime Amendment Act,⁴²⁸ and the Prevention and Combating of Corrupt Activities Act,⁴²⁹ have been in place for some time, and surprisingly, the risk facing senior management and directors has largely gone unnoticed.⁴³⁰ While immunity applicants escape the substantial administrative penalties which the Commission might otherwise have imposed, they remain exposed to significant fines and the possibility of imprisonment, and this exposure arises because certain cartel behaviour amounts to fraud, corruption or racketeering and therefore attracts criminal liability.⁴³¹ The aforesaid authors caution that firms also need to bear in mind that, while the Commission can only reach back three years from the date on which cartel activity ceased, the National Prosecuting Authority can reach back thirty years.⁴³² Cartel activity has to constitute fraud, corruption or racketeering for the National Prosecuting Authority to exercise its jurisdiction and thus the significance of the Competition Amendment Act is that it will criminalise certain cartel behaviour which does not fall foul of current legislation.⁴³³

It is submitted that the introduction of criminal liability will certainly deter cartel activity. However, it can also have the effect of encouraging more secretive cartel activity, in which case the CLP would be the only effective tool for detection of cartels conducted by firms undeterred by the threat of criminal liability.⁴³⁴ For this reason the CLP remains a vital and instrumental tool in combating cartel activity and thus it cannot be afforded that its effective-

⁴²⁷ *Ibid.* Whilst the above may prove to be a feasible solution insofar as future cooperation between the two bodies are concerned, the exact manner in which the two bodies are envisaged to cooperate regarding criminal prosecutions remains uncertain, especially as the Commission may only co-operate with the NPA in circumscribed instances. Leaving aside the precise manner of such cooperation for the time being, the impact upon the Commission's objectives in encouraging and seeking disclosure of cartel activities where the real threat of criminal prosecution arises from voluntary statements made to the competition authorities may well be deleterious.

⁴²⁸ Act 2 of 2004.

⁴²⁹ Act 12 of 2004.

⁴³⁰ Seggie 'Many Businesses Unaware Criminal Liability for Certain Cartel Behaviour Already Exists' 29 July (2011) available at www.engineeringnews.co.za/.../criminal-liability-for-certain-cartel-behaviour-already-exists-2011-07-29

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ *Ibid.*

⁴³⁴ Lavoie (n 101) 156.

ness be jeopardised by the introduction of criminal liability that has not been properly thought through and may result in a catch 22-situation where although the CLP is the appropriate mechanism to facilitate self-reporting of cartel activity and destabilising of cartels, it becomes too risky for cartelists to apply for immunity under the CLP.⁴³⁵

⁴³⁵ *Ibid.*

Chapter 4 Leniency Programmes in comparative perspective

1. Introduction

Cartels have become pervasive in recent decades, victimising both businesses and consumers around the world. It is not surprising therefore that such a broad variety of enforcement mechanisms have been introduced across a multiplicity of jurisdictions in order to deal with this universally understood competition plague. The issue of how best to uncover and prosecute cartels and employ preventative measures to dissuade the formation of cartels is a central preoccupation of competition law enforcement authorities across the globe.⁴³⁶

As indicated, leniency programmes represent an effective tool that competition authorities can employ against cartels and the significant growth in such programmes reflects their considerable benefits as the most effective tool in the fight against cartels. Due to the secrecy in which cartels operate, leniency programmes have proven critical to discovering and punishing cartels and to break up cartels and deter cartel participation. Many countries have adopted some form of leniency system.⁴³⁷ All leniency programmes, however, are not created equally. They can be structured in different ways, which can affect their efficacy. Despite the success of such programmes universally, it is submitted that the door should not be opened for complacency concerning the possibility of further improving particular leniency programmes which have proven to be efficient and so to optimise its efficiency.

Specifically, many similarities and differences exist between the substantive and procedural aspects of leniency systems. In order to assess and improve a leniency system, it is imperative to compare its features and functioning to efficient leniency systems in other jurisdictions, which will in turn, allow for its modification and improvement according to the jurisdiction's specific needs. In order to benchmark the CLP and investigate aspects where it may be lacking or can be improved, the Australian and European leniency systems as discussed below will be used as a comparative mirror.

2. Australia's Leniency System

⁴³⁶ Beaton-Wells 'Anti-Cartel Advocacy – How has the ACCC fared?' 2011 (3) *Sydney Law Review* 735.

⁴³⁷ See chapter 1 above.

2.1 Introduction

Australian competition law developed slowly during the 1950s and 1960s and remained a minor factor in the Australian society and economy until the 1990s.⁴³⁸ Prior to 1965 restrictive trade practices were common in Australia and were regarded as ‘normal business behaviour’.⁴³⁹ Under the Restrictive Trade Practices Act⁴⁴⁰ collusive practices were prohibited only if they had not been registered on an official register of restrictive agreements between competitors.⁴⁴¹ The Trade Practices Act of 1974 took a different approach and prohibited contracts, arrangements or understandings between competitors which had the effect, or likely effect, of substantially lessening competition.⁴⁴² Australian competition law changed rapidly in 1995 with the creation of the Australian Competition and Consumer Commission (ACCC).⁴⁴³ The Australian Government and the ACCC have been active advocates for anti-cartel law and have taken the impact of cartels on the Australian economy and Australian consumers very seriously.⁴⁴⁴ Enforcement of cartels is a key priority of the ACCC, which also described cartels as ‘a cancer eating at the economy’.⁴⁴⁵

The current legal framework for competition law in Australia is provided by the Competition and Consumer Act of 2010 (previously the Trade Practices Act).⁴⁴⁶ Australia has a parallel regime of civil prohibitions and criminal offences for cartel conduct.⁴⁴⁷ This regime only took effect on 24 July 2009, and prior to this parallel regime of civil prohibitions and criminal offences for cartel conduct, Australian laws prohibited cartel conduct on a civil basis only.⁴⁴⁸ In

⁴³⁸ Gerber *Global Competition: Law, Markets and Globalization* (2010) 61.

⁴³⁹ Beaton-Wells ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal’ *Melbourne University Law Review* (2007)680.

⁴⁴⁰ Act 111 of 1965.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.* See also Uthmeyer & Merrett ‘When Thieves Fall Out: Australia’s Leniency System’ *International Business Lawyer* (2004) 1.

⁴⁴³ *Ibid.* See further Round & Hanna ‘Curbing Corporate Collusion in Australia: The Role of section 45A of the Trade Practices Act’ 29 *Melbourne University LR* (2005) 242.

⁴⁴⁴ Samuel ‘Cartel enforcement in the spotlight – a major focus for Australia and internationally’ *Competition Law International* (2006) 3.

⁴⁴⁵ Cass-Gottlieb & Edgerton ‘Application of the Australian Trade Practices Act and ACCC immunity to international cartel conduct’ *Competition Law International* (2006) 8.

⁴⁴⁶ Act 51 of 1974 as amended. Prior to 1 January 2011, it was known as the Trade Practices Act of 1974.

⁴⁴⁷ Henrick & Henry *the Asia-Pacific Antitrust Review* something wrong here Australia: Cartels *Global Competition Review* 2013 also available at <http://globalcompetitionreview.com/reviews/51/sections/175/chapters/1964/australia-cartels/> accessed on 12 May 2014. See also Marshall ‘Criminalisation of cartel conduct: compelling compliance with anti-collusion laws’ *JALTA* (2010) 11.

⁴⁴⁸ *Ibid.*

addition to criminal fines, civil patrimonial penalties and disqualification orders, cartel conduct may also result in follow-on actions for private damages.⁴⁴⁹ As discussed in more detail below, Australia also has an Immunity Policy (which includes an Amnesty Plus regime) that serves as an important mechanism in the detection of cartels.⁴⁵⁰

Australia's parallel regime of civil prohibitions and criminal offences for cartel conduct is administered by the ACCC that attends to civil enforcement whereas criminal prosecutions may only be undertaken by the Commonwealth Department of Public Prosecutions (hereinafter referred to as the CDPP).⁴⁵¹ Thus two different authorities with different areas of jurisdiction are actively involved in the Australian war against cartels: the ACCC as primary competition authority and the CDPP as primary criminal prosecuting authority.

2.2 Prohibitions on Cartel Conduct

Sections 45(2)(a)(ii) and 45(2)(b)(ii) of the 1974 Trade Practices Act⁴⁵² prohibited any provisions of contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.⁴⁵³ In 1977, section 45A was added.⁴⁵⁴ Under section 45A(1) an actual or proposed provision of a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect of fixing, controlling or maintaining, or providing for fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to certain goods or services, is deemed to have had the required anti-competitive effect.⁴⁵⁵

It is prohibited for a corporation or individual to make or give effect to a contract, arrangement or understanding that contains a 'cartel provision'.⁴⁵⁶ A 'cartel provision' is defined by the Competition and Consumer Act⁴⁵⁷ as a provision of a contract, arrangement or understanding between actual or potential competitors that has:

⁴⁴⁹ *Ibid.* See further Beaton-Wells & Tomasic 'Private Enforcement of Competition Law: Time for an Australian Debate' *UNSW LJ* (2012) 648.

⁴⁵⁰ Samuel (n 444) 5. Henrick & Henry (n 443) 8.

⁴⁵¹ *Ibid.*

⁴⁵² The Trade Practices Act 1974 (Cth).

⁴⁵³ See the discussion by Round & Hanna (n 443) at 243.

⁴⁵⁴ Per s 10 of the Trade Practices Legislation Amendment Act 1992 (Cth).

⁴⁵⁵ For the history of s 45A see Round & Hanna (n 443) at 243.

⁴⁵⁶ S 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK of the Competition and Consumer Act of 2010.

⁴⁵⁷ S 44ZZRD of the Competition and Consumer Act of 2010.

- a) the purpose or likely effect of fixing, controlling or maintaining a price or a component of a price; or
- b) the purpose of preventing, restricting or limiting production, capacity or supply; allocating customers, suppliers or territories; or rigging bids.

From the above it is clear that a key concept in the Australian definition of cartel conduct is that of a contract, arrangement or understanding. While none of these terms is defined in the Competition and Consumer Act, for a contract, arrangement or understanding to be established the courts have required there to be a meeting of minds and a commitment by one or more parties to act in a certain way.⁴⁵⁸ Where there is little or no direct evidence of the alleged contract, arrangement or understanding, an arrangement or understanding can be inferred from conduct and the circumstances, including parallel conduct, joint action, collusion, similar pricing structures, or opportunities for the parties to reach an understanding.⁴⁵⁹

There are some exceptions to the prohibition on cartel conduct such as contractual joint ventures, agreements solely between related corporate bodies, and conduct that has been authorised on public benefit grounds by the ACCC.⁴⁶⁰ In addition, there are provisions that provide that where cartel conduct also constitutes resale price maintenance or exclusive dealing, or where a cartel agreement provides, directly or indirectly, for the acquisition of shares or assets, such conduct will not be subject to the parallel civil and criminal regime of prohibitions on cartel conduct.⁴⁶¹ These types of conduct fall outside the cartel provisions and are regulated by other provisions of the Competition and Consumer Act.

The ACCC has wide investigatory powers. The Competition and Consumer Act gives the ACCC the power to require persons to provide information, produce documents or appear before it where it has reason to believe that they are capable of providing information or documents relating to a contravention or possible contravention of the Act.⁴⁶² Such persons can be required to give evidence under oath or affirmation when they appear and they can-

⁴⁵⁸ *Ibid.* It is insufficient that parties merely hold independent beliefs, or if there is a mere hope that something will be done.

⁴⁵⁹ *Ibid.* See *TPC v David Jones* (1986) 13 FCR 446.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.* These are known as anti-overlap provisions.

⁴⁶² S 155.

not resist answering questions or providing documents on the basis that doing so may result in self-incrimination.⁴⁶³ The information so obtained is inadmissible in evidence against the person in criminal proceedings, including for prosecution of cartel conduct, and a person also does not have to provide documents that are subject to legal professional privilege.⁴⁶⁴ In addition, the ACCC is able to obtain search warrants, which empower it to enter and search premises unannounced and seize or make copies of material.⁴⁶⁵ It may also obtain telephone interception and surveillance warrants, but only for the purposes of investigating a criminal contravention of the Competition and Consumer Act.⁴⁶⁶

The ACCC has made public statements about its enforcement policy which suggest that, as a matter of policy, the enforcement procedures and penalties for cartel conduct will depend on the nature of the conduct in question.⁴⁶⁷

The penalty regime in Australia has evolved over the years. On 21 January 1993, the civil pecuniary penalty for corporations was set at \$10 million for each contravention of the Act, and \$500 000 for individuals.⁴⁶⁸ With this substantial amount of pecuniary penalties in place, one would think that it would substantially deter cartel participation, but it was certainly not sufficient to eradicate cartel collusion. As a result, on 21 January 2007, for breach of section 45(2) of the Trade Practices Act, the statutory maximum penalties were increased to allow for greater deterrence.⁴⁶⁹ The Trade Practices Amendment Act⁴⁷⁰ increased civil penalties for corporations from a maximum of \$10 million to the greater of \$10 million, or where the value of the benefit can be ascertained, three times the value of the illegal benefit or where the value of the illegal benefit cannot be ascertained, 10% of the turnover of the twelve months ending at the end of the month in which the contravention occurred.⁴⁷¹ An individual may be liable as an accessory and may incur a civil penalty of up to \$500 000.

2.3 The Australian Leniency Programme

⁴⁶³ *Ibid.*

⁴⁶⁴ S 155(7) and (7B).

⁴⁶⁵ Henrick & Henry (n 447) 8.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Round & Hanna (n 443) 243.

⁴⁶⁹ Beaton-Wells & Tomasic (n 449) 662.

⁴⁷⁰ Act No.1 of 2006.

⁴⁷¹ S 44ZZRF(3) of the Trade Practices Act of 1974.

The ACCC initially offered certain incentives such as recommendations to court for a reduced penalty to cartel members who self-reported under the 2002 Cooperation Policy for Enforcement Matters (Cooperation Policy).⁴⁷² The first programme (known as the Immunity Policy) issued by the ACCC in respect of cartel conduct came into operation in 2003 and was revised in 2005.⁴⁷³ The Commission described the 2003 immunity policy as the primary source of disclosure of cartel activity and the most effective and least costly mechanism for detecting cartel conduct.⁴⁷⁴ The 2003 Immunity Policy provided full immunity from ACCC-initiated prosecutions for the first individual or company to apply in relation to cartel conduct of which the ACCC was unaware, provided certain conditions were satisfied.⁴⁷⁵ These conditions included full cooperation, cessation of the cartel conduct, satisfying the ACCC that the applicant was neither the ringleader nor had coerced others into the cartel, and an undertaking on behalf of the applicant to make restitution where possible.⁴⁷⁶ Leniency provided to a company was extended to cooperative officers and employees – also known as ‘derivative immunity’.⁴⁷⁷

Following consultation with the business community, the legal profession and other interested parties, the ACCC released a revised Immunity Policy for Cartel Conduct in August 2005 which introduced the following key changes to the existing policy:⁴⁷⁸

- a) an increase in certainty about the level and timing of immunity: full immunity was now made available to the first applicant to report *prior* to the ACCC obtaining legal advice that it has sufficient evidence to commence proceedings in relation to the conduct;
- b) the introduction of a marker system pursuant to which an initial application may be made based on a general description of the conduct, with additional information to be provided within 28 days, or longer with the consent of the ACCC;
- c) confirmation that the ACCC would accept oral rather than written applications; and

⁴⁷² Samuel (n 444) 5.

⁴⁷³ *Ibid.*

⁴⁷⁴ Beaton-Wells (n 439) 757.

⁴⁷⁵ Cass-Gottlieb & Edgerton (n 445) 8.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

- d) removal of the requirement for restitution in order to maximise the incentive to self-report.⁴⁷⁹

The Immunity Policy interacted with the Cooperation Policy, which applied to second and subsequent applicants for leniency.⁴⁸⁰ This entailed that an applicant under the Cooperation Policy may as a result enjoy complete or partial immunity from action by the ACCC and make submissions to the court for reduced penalties or administrative settlement in lieu of litigation.⁴⁸¹

In terms of the current Immunity Policy a corporation or individual will be eligible for conditional immunity from ACCC-initiated civil proceedings where it applies for immunity and satisfies the following conditions:⁴⁸²

- (a) the corporation is or was a party to a cartel; and
- (b) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the Competition and Consumer Act;
- (c) the corporation is the first entity to apply for immunity in respect of the cartel under the policy;⁴⁸³
- (d) the corporation has not coerced others to participate in the cartel and was not the clear leader (ringleader) in the cartel;
- (e) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel;
- (f) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives); and

⁴⁷⁹ See *Beaton-Wells & Tomasic* (n 449) 667 where they remark that the reasons given for the decision to remove the requirement of restitution from the policy are not compelling.

⁴⁸⁰ *Cass-Gottlieb & Edgerton* (n 445) 8 at 9.

⁴⁸¹ *Cass-Gottlieb & Edgerton* (n 445) 8 at 12. They, however, point out that the benefits of such cooperation agreements have been severely undercut by cases which confirmed that the courts were not bound to agreements between the ACCC and respondents as to the level of penalties to be imposed for contraventions in terms of the Act.

⁴⁸² Paragraph 8(a) (i-vii) of the immunity policy. See also *Cass-Gottlieb & Edgerton* (n 445) 8 at 12.

⁴⁸³ *Samuel* (n 444) at 6 indicates that the Immunity Policy provides that if the first applicant to apply for immunity is unwilling or unable to meet all the requirements for immunity, a subsequent applicant may still qualify for immunity. This maximises the incentive for applicants to cooperate fully with the ACCC because the first applicant knows that if it fails to satisfy the requirements for conditional immunity its place will be taken by a co-conspirator and the first applicant will then be vulnerable to prosecution.

(g) the corporation undertakes to provide full disclosure and cooperation to the ACCC.⁴⁸⁴

In addition, in order to qualify for immunity under the Immunity Policy, it is required that at the time the ACCC receives the application, the ACCC should not have received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Competition and Consumer Act arising from the conduct in respect of the cartel.⁴⁸⁵

Samuel points out that it is required of the immunity applicant not to disclose that it has applied for immunity without informing the ACCC.⁴⁸⁶ Immunity applicants need to be mindful that disclosure of the fact that they have applied for leniency may jeopardise ACCC investigations, particularly covert ones.⁴⁸⁷ Thus Samuel posits that it should be possible to manage the timing of disclosure that a leniency application has been made so as not to put the investigation at risk.⁴⁸⁸ He therefore cautions that immunity applicants who unnecessarily disclose information about ACCC investigations may lose their immunity.⁴⁸⁹

If the applicant meets the leniency requirements, the ACCC will grant conditional immunity to the applicant and later final immunity after the resolution of any proceedings against cartel participants for conduct in relation to the cartel.⁴⁹⁰ If, after the granting of conditional immunity or final immunity, the ACCC forms the view on reasonable grounds that the applicant does not or did not satisfy the conditions for immunity or conditional immunity, it may

⁴⁸⁴ Samuel (n 444) at 6 remarks in this regard: 'Full cooperation is likely to be costly, onerous and time-consuming. An immunity applicant must provide all evidence and information in their possession, or available to them wherever it is located, and at their own expense.'

⁴⁸⁵ Par 8(b) of the immunity policy.

⁴⁸⁶ Samuel (n 444) at 6. See, however, the exceptions mentioned by Samuels (at 6) with regard to companies listed on the Australian Stock Exchange.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.* He indicates that in some instances making public statements could be completely inconsistent with the obligation to cooperate and may in fact jeopardise the protection otherwise afforded under the Immunity Policy.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Par 11 of the immunity policy. In certain circumstances and at its discretion, the ACCC may grant final immunity at an earlier stage.

revoke the grant of conditional immunity or final immunity.⁴⁹¹ In this event the ACCC will provide the applicant with an opportunity to respond.⁴⁹²

If an individual or corporation cooperates with the ACCC investigation into a cartel despite being ineligible for immunity because another individual or corporation has already been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters.⁴⁹³ The degree of leniency that may be granted depends on the particular circumstances of the case and the level of cooperation provided by the subsequent applicant(s).⁴⁹⁴

As indicated, the Immunity Policy also features a marker system which allows an applicant to hold its place in the 'immunity queue' for a limited period of time in order to allow it to complete internal investigations before perfecting its immunity application.⁴⁹⁵ The ACCC's Immunity Policy further includes an Amnesty-Plus regime for cartelists who are not eligible for immunity in a cartel already being investigated by the ACCC but who provide the ACCC with evidence of a second cartel, of which the ACCC was not previously aware.⁴⁹⁶ If they satisfy the ACCC's amnesty plus policy, they gain immunity from prosecution for both cartels.⁴⁹⁷

The information provided by immunity applicants may be used in civil proceedings and/or criminal prosecutions and may be shared with the CDPP.⁴⁹⁸ The ACCC will receive information in support of an application for immunity on the basis that the ACCC will not use the information as evidence in proceedings against the applicant in respect of the relevant cartel.⁴⁹⁹ Where the applicant is a corporation, the ACCC will also receive the information on

⁴⁹¹ Par 12 of the immunity policy.

⁴⁹² *Ibid.*

⁴⁹³ Anti-cartel Enforcement Template *Cartels Working Group* Sub Group 2: Enforcement Techniques *International Competition Network* Australia 2 November 2012. The ACCC's Cooperation Policy for Enforcement Matters provides this mechanism.

⁴⁹⁴ *Ibid.* Factors indicating when such leniency will be granted include the value and importance of the evidence, whether prompt and effective action was taken to terminate involvement in contravening conduct, and the applicant's willingness to provide full and frank disclosure and cooperation.

⁴⁹⁵ Par 9 of the immunity policy.

⁴⁹⁶ Henrick & Henry (n 447) 9.

⁴⁹⁷ *Ibid.* The individual or corporation must receive conditional immunity in respect of the second cartel in order to comply.

⁴⁹⁸ Par 60 of the guidelines.

⁴⁹⁹ Par 61 of the guidelines.

the basis that it will not use the information against entities or employees for the period of which they have the benefit of derivative immunity.⁵⁰⁰

It is a condition of accepting information on such a basis that if a grant of immunity or conditional immunity is subsequently revoked because an applicant failed to satisfy the requirements for immunity or conditional immunity, the ACCC will be entitled to use such information against the immunity applicant in any obstruction proceedings in respect of section 155(5) of the TPA and/or proceedings relating to sections 137.1, 137.2 or 149.1 of the Criminal Code Act 12 of 1995.⁵⁰¹ The ACCC will not share confidential information provided by the immunity applicant, or the identity of the applicant, with regulators in other jurisdictions without the consent of the applicant, but will seek consent as a matter of course, unless required otherwise by law.⁵⁰²

Anyone who suffers loss or damage as a result of cartel conduct can recover the amount of their loss or damage in a private action.⁵⁰³ The ACCC also has the power to commence representative proceedings on behalf of a group that has suffered loss or damage as a result of cartel conduct.⁵⁰⁴ A limitation period of six years applies to all civil actions for cartel conduct, starting from the point in time at which the cause of action accrues.⁵⁰⁵

2.4 The Australian cartel offence

The need to criminalise cartel conduct in Australia was *inter alia* highlighted by Ladd, who remarked that due to the widely accepted view that cartels are extremely harmful to both business and consumers, they must be deterred, detected and defeated.⁵⁰⁶ The then chairman of the ACCC, Allan Fels, asserted that hard-core collusion ought to be seen as equiva-

⁵⁰⁰ *Ibid.* The information provided by a marker holder to satisfy the requirements of conditional immunity will be considered by the ACCC to be information provided in support of an application for immunity.

⁵⁰¹ Par 62 of the guidelines.

⁵⁰² Par 63 of the guidelines. Information obtained from sources other than the immunity applicant, including information obtained as a result of inquiries arising from information provided by the applicant, will not be subject to this limitation and will, in appropriate circumstances, be shared where permitted by law.

⁵⁰³ S 82 of the Trade Practices Act of 1974. Private litigants can also obtain declarations, injunctions and ancillary orders. See *Beaton-Wells & Tomasic* (n 449) 648.

⁵⁰⁴ *Henrick & Henry* (n 447) 8.

⁵⁰⁵ *Ibid.* While it is not settled law in Australia, it can be argued that, the cause of action only accrues, and the loss or damage is only suffered, when the claimant becomes aware of the cartel. See *Energex Ltd v Alstom Australia Ltd* (2004) 225 ALR 504, 520-3.

⁵⁰⁶ Ladd 'Cartel criminalization- where Australia stand we stand' available at www.bellgully.co.nz/areas/index.asp accessed on 12 August 2014 .

lent to theft or fraud and should be regarded as a white-collar crime.⁵⁰⁷ The central justification for introducing criminal sanctions in Australia was the obvious need for greater deterrence since the Australian economy was particularly vulnerable to the operations of cartels.⁵⁰⁸ The ACCC considered that an effective regime that encompasses criminal sanctions, especially the threat of imprisonment, is more likely to deter cartel participation and act as an incentive to approaching the Commission for leniency.⁵⁰⁹ The ACCC also noted the growing international commitment to criminal enforcement against cartels.⁵¹⁰ Criminal sanctions were thus viewed as the ‘silver bullet’ required to address the weak deterrent effect of the civil sanctions regime.⁵¹¹

In an effort to move towards criminal enforcement against cartels, the Australian government constituted the Trade Practices Act Review Committee (the Dawson Committee) which released the ‘exposure draft’ of the Trade Practices (Cartel Conduct and Other Measures) Bill of 2008.⁵¹² The Bill proposed the introduction of criminal sanctions for cartel conduct in Australia and outlined two criminal offences, namely:

- (a) it would be an offence to make a contract or an arrangement, or arrive at an understanding *with the intention of dishonestly obtaining a benefit* where
- (b) the contract arrangement or understanding contains a cartel provision.⁵¹³

The distinction between the criminal and civil regimes was based on the dishonest intent of the person making the contract, arrangement or understanding, therefore dishonesty was the main element separating the two regimes.⁵¹⁴ Cass-Gottlieb and Edgerton point out that to satisfy the aforesaid criminal offence it must be proven beyond reasonable doubt that the intended conduct to obtain the gain was dishonest according to the standards of ordi-

⁵⁰⁷ Beaton-Wells (n 439) 682. See also Marshall (n 447) 11.

⁵⁰⁸ Beaton-Wells (n 439) 681.

⁵⁰⁹ Pearson ‘Criminalisation of Cartel Conduct in Australia’ 2008(4) *Competition Law International* 18.

⁵¹⁰ Beaton-Wells (n 439) 737.

⁵¹¹ Beaton –Wells & Tomasic (n 449) 664.

⁵¹² Low & O’Carroll ‘Added complexity – recent developments in criminal cartel law’ 2008 (4) *Competition Law International* 34.

⁵¹³ Gray ‘Criminal sanctions for cartel behavior’ *Queensland University of Technology Law and Justice Journal* (2008) 365. See also Cosgun (n 2) 113 for a detailed discussion of the Australian cartel offence and the defences thereto.

⁵¹⁴ Pearson (n 509) 20. The element of ‘dishonesty’ on the Australian offence emanates from the statutory definition of ‘dishonesty’ in the Australian Commonwealth Criminal Code Act and the Corporations Act, Acts 12 of 1995 and 50 of 2001 respectively.

nary people *and* that the defendant knew that the conduct was dishonest according to those standards.⁵¹⁵

Criminalisation of cartel conduct became a reality in Australia when the Trade Practice (Cartel Conduct and Other Measures) Act came into effect on 1 July 2009.⁵¹⁶ Section 44ZZRF of this Act makes it an offence to make a contract or arrangement, or arrive at an understanding, that contains a cartel provision and it is also an offence to give effect to a contract or arrangement that contains a cartel provision.⁵¹⁷

It should be noted that the Australian cartel offence applies only with respect to 'serious cartel conduct'. If the conduct is considered to be 'serious cartel conduct', the ACCC will seek to have the parties prosecuted criminally by the CDPP, while less serious conduct will only be pursued under civil penalty provisions. Conduct will be considered by the ACCC to be serious cartel conduct if it:⁵¹⁸

- a) caused, or has the potential to cause, large scale or serious economic harm;
- b) was long-standing;
- c) had a significant impact on the market in which it occurred;
- d) caused, or could have caused, significant detriment to the public or a class of the public;

⁵¹⁵ Cass-Gottlieb & Edgerton (n 445) 10. They indicate that this will require the prosecution to demonstrate, for example, that the defendant was deceptive, concealed facts that there were a duty to disclose, or engaged in conduct that the defendant knew was not right. Low & O'Carroll (n 512) 30 at 34, however, caution that it may be challenging to develop proof beyond a reasonable doubt of a dishonest intent in anti-competitive dealings among competitors. In addition to this general difficulty the Australian offence require proof of two separate mental elements: a meeting of minds that constitutes the illegal agreement and added to that, the *Papotto v the State of Western Australia* [2005] WASCA 234 and *R v Gosh* [1982] QB 1053 test of dishonesty. According to them such heavy standard creates a particular challenge for the investigator and will be a very significant threshold for a prosecutor in taking the fundamental decision to lay charges. They posit that it may turn out that the evidence if a co-conspirator, along with cogent corroboration, might invariably be the minimum requirement to establish the commission of the offence and that in those circumstances, a strategy of non-cooperation by all the targets of an investigation would raise the stakes for Australian law enforcement agencies. Thus they are of opinion that the requirement of dishonesty is likely to result in delay and considerable difficulty in the conduct of investigations.

⁵¹⁶ Uthmeyer 'Australia: the criminalisation of cartels: cartel bill becomes law' available at www.mondag.com/australia/82318/Trade+Regulation+Practices/The+Criminalisation+Of+Cartel+Cartel+Bill+Becomes+Law accessed on 15 April 2014.

⁵¹⁷ Gray (n 513) 364 points out that the latter provision applies retrospectively.

⁵¹⁸ *Ibid.*

- e) caused, or could have caused, significant loss or damage to one or more customers of the alleged participants;
- f) involved a person or company that has previously been found to have participated in or has admitted to participating in a cartel; or
- g) affected A\$1 million of commerce within a 12-month period, or involved A\$1 million of bids, in the case of bid rigging, within a 12-month period.

If the conduct is found to be serious as aforesaid, the ACCC will investigate it before referring it to the CDPP, which will then conduct any criminal prosecution.⁵¹⁹ If the CDPP decides not to prosecute, the ACCC may still decide to pursue civil penalties against the accused.⁵²⁰ As indicated above, a limitation period of six years applies to civil contraventions but there is no limitation period for criminal contraventions.⁵²¹

Criminal penalties of up to \$220 000 per offence or up to ten years imprisonment for each offence are available for individuals found to be involved in the cartel offences in section 44ZZRF and section 44ZZRG.⁵²²

2.5 Co-operation between ACCC and CDPP

As indicated above, the responsibility for enforcement of Australia's new cartel regime is divided between two agencies: assigning investigation, instigation of civil proceedings and referral for prosecution to the ACCC, and criminal prosecution, including both the decision to prosecute and the carriage of the prosecution, to the Commonwealth Director of Public Prosecutions ('CDPP').⁵²³

Marshall points out that operationally the cartel conduct regime depends on four interrelated instruments, namely, the Memorandum of Understanding between the CDPP and the

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.* A criminal prosecution requires proof of additional elements and the prosecution must meet a higher standard of proof.

⁵²¹ *Ibid.* This 'limitation period' is comparable to a 'prescription period'.

⁵²² See s 44ZZRF(2) and (3), s 44ZZRG(2) of the Act.

⁵²³ Beaton-Wells 'Australia's Criminalisation of Cartels: Will it be Contagious?' Paper presented at the 4th ASCOLA Conference Washington 16-17 June 2009. This is to be compared with an integrated model in which the same agency performs both investigatory and prosecutorial functions and makes all of the relevant decisions pertaining to these functions, like the US Department of Justice.

ACCC regarding Serious Cartel Conduct (July 2009),⁵²⁴ the ACCC's Approach to Cartel Investigations (July 2009),⁵²⁵ the ACCC's Immunity Policy for Cartel Conduct (July 2009) and the CDPP's Annexure to the Prosecution Policy of the Commonwealth (November 2008).⁵²⁶

Beaton-Wells remarks that this bifurcated enforcement model reflects the value attributed to independence and consistency in prosecutorial decision-making across the full spectrum of federal criminal offences in Australia.⁵²⁷ In the regulatory context in Australia, separation of the investigatory and prosecutorial functions is seen as having the benefit of utilising the domain-specific expertise and experience of a regulator in investigating potential offences, whilst retaining independence and consistency in the ultimate decision to prosecute by assigning this responsibility to the centralised stand-alone prosecutions agency.⁵²⁸

At the same time, however, Beaton-Wells concedes that there is potential for inefficiency as a result of having two agencies with traditionally divergent cultures, priorities and perspectives involved in enforcement.⁵²⁹ Thus, as determined by the International Competition Network, the effectiveness of the bifurcated system will depend largely on the extent to which there is a 'shared philosophy about the seriousness of cartel conduct, shared priorities in prosecuting cartel activity and open and constant communication' between the two agencies.⁵³⁰

The ACCC and CDPP is therefore facilitated by means of a variety of instruments, more specifically the Memorandum of Understanding between the ACCC and the CDPP as well as guidelines issued by the ACCC as to how it will conduct its investigations in order to ensure the efficient regulation of the relationship and their respective functions. The guidelines set out the basis on which the ACCC will determine matters to be 'serious' cartel conduct ap-

⁵²⁴ Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct (2009).

⁵²⁵ ACCC Approach to Cartel Investigations (2009).

⁵²⁶ Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process – Annexure B: Immunity from Prosecution in Serious Cartel Offences (2008)(hereinafter the Guidelines).

⁵²⁷ *Ibid.*

⁵²⁸ Australian Law Reform Commission *Principled Regulation: Federal Civil and Administrative Penalties in Australia* Report 95 March 2003 [9.44]–[9.45].

⁵²⁹ Beaton-Wells (n 523) 4.

⁵³⁰ *Ibid.*

appropriate for criminal investigation, and supplement the Memorandum of Understanding between the ACCC and the CDPP.⁵³¹

3. The Leniency Programme of the European Union

3.1 Introduction

Monti indicates that the European Community's commitment to promoting competitive markets was a significant step when the EEC Treaty (also known as the Treaty of Rome) was concluded in 1957 because European economies had seen high levels of state control, legal cartels and protectionist policies.⁵³² With the entry into force of the Lisbon Treaty on 1 December 2009, the EC Treaty was amended and renamed the Treaty on the Functioning of the European Union (TFEU).⁵³³ This led to a renumbering of the provisions that were initially contained in the EC Treaty.⁵³⁴ Article 101 (previously Article 81 of the EC Treaty) of the TFEU as set out below, prohibits anti-competitive agreements and concerted practices.⁵³⁵

Leniency is a cornerstone of the enforcement policy of the European Commission and the National Competition Authorities (hereinafter referred to as the 'NCAs').⁵³⁶ The European Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases⁵³⁷ (The Leniency Notice) sets out the current framework for the European Union's leniency programme.⁵³⁸ Besides EU competition rules all Member States have adopted national competition rules closely patterned on EU Competition law.⁵³⁹ As a result of Regulation 1/2003⁵⁴⁰ which became effective on 1 May 2004 a decentralised system applies in the EU where national competition authorities and national courts are at the forefront of the enforcement of

⁵³¹ *Ibid.*

⁵³² Monti *EC Competition Law* (2007) 1.

⁵³³ Elhauge & Geradin *EC Competition Law* (2 ed) 49.

⁵³⁴ *Ibid.*

⁵³⁵ European Union *Consolidated version of the Treaty on the Functioning of the European Union* 13 December 2007 2008/C 115/01, available at <http://www.refworld.org/docid/4b17a07e2.html>. See also Ezrachi *EU Competition Law: An Analytical Guide to the leading cases* (3 ed)(2012) 50.

⁵³⁶ Carmeliet (n 6) 463. See also Sandhu 'The European Commission's Leniency Policy: a success?' *European Competition Law Review* (2007) 148.

⁵³⁷ Leniency Notice *OJ* 2006 C298/11.

⁵³⁸ Par 1 of the Leniency Notice of 2006. The previous Leniency Notice of 2002 (2002/C 45/03) was amended. The goal of this amendment was to make leniency applications more predictable and consequently, more attractive. The Leniency Notice of 2006 has introduced a marker system and allowed certain oral statements from applicants.

⁵³⁹ Elhauge & Geradin (n 533) 52.

⁵⁴⁰ Treaty on the Functioning of the European Union (TFEU), *OJ* C83, 30.3.2010.

the EU competition rules.⁵⁴¹ The European Commission now focuses its investigations on sectors 'where there are only a few players, where cartel activity is recurrent, or where abuse of market power are generic'.⁵⁴² The Commission's Directorate General for Competition (hereinafter referred to as the 'DG Comp') is responsible for enforcing EU competition rules and administers the EU leniency programme.⁵⁴³

The EU Leniency system has been hailed as quite a success story with almost 60% of cartel infringements being discovered through leniency applications.⁵⁴⁴

3.2 Prohibitions on cartel conduct

The EU competition prohibitions apply to 'undertakings'.⁵⁴⁵ Neither the EU Treaty nor Regulation 1/2003 contains any definition of undertakings⁵⁴⁶ but the EC Court of Justice has held that 'in competition law, the term "undertaking" must be understood as designating an economic unit...even if in law that economic unit consists of several persons, natural or legal'.⁵⁴⁷

In the EU, horizontal agreements (and more generally all agreements between competitors) have to be examined under Article 101 TFEU (previously Article 81 of the EC Treaty) which provides:⁵⁴⁸

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ Kmiecik and Burton *Cartel Leniency in the EU: Overview* 1 May 2013 at www.practicallaw.com/leniency-mjg accessed on 3 March 2014.

⁵⁴⁴ Carmeliet (n 536) 463.

⁵⁴⁵ Ezrachi (n 535) points out (at 1) that the TFEU is silent on the meaning of the term 'undertaking', leaving it to the European courts to develop and establish its contents and realm. To ensure the full effectiveness of the competition provisions the courts have adopted a functional approach, applying the term to entities engaged in economic activities regardless of their legal status and the way in which they are financed. For a discussion of the concept of 'single economic entity' see further Ezrachi at 2-31.

⁵⁴⁶ Wils 'Is Criminalisation of EU Competition Law the answer?' *World Competition* (2005) 117.

⁵⁴⁷ *Hydrotherm v Compact* [1985] ECT 3016 par 11.

⁵⁴⁸ Elhauge & Geradin (n 533) 77.

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the substance of such contracts.'

Article 101(2) provides that any agreements or decisions prohibited pursuant to Article 101(1) shall be automatically void. However, Article 101(3) states that the provisions in Article 101(1) may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings and any concerted practices or category of concerted practices, which contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. It is further provided that such agreements, decisions or concerted practices should not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the aforesaid objectives and should not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.⁵⁴⁹

Article 105 TFEU grants the Commission extensive investigative powers. Article 21 of Regulation 1/2003 empowers the Commission to order inspections in places other than the undertaking's own premises on a reasonable suspicion that books or other records related to the business and to the subject matter of the inspection, which could be relevant in establishing a serious violation of the EU competition rules, are being kept there.

Fines represent the main EU legal instrument to remedy and deter violations of competition law: the European Commission can impose fines for contravention of Article 101 of up to 10% of the worldwide turnover in the preceding business year on an undertaking.⁵⁵⁰ It is al-

⁵⁴⁹ Article 101(3) TFEU. Elhauge & Geradin (n 533) 58.

⁵⁵⁰ *Ibid.* See Article 23 of Regulation 1/2003.

so possible for persons who have suffered damages as a result of cartel conduct to institute civil recovery proceedings.⁵⁵¹

3.3 The EU Leniency Programme

The EU, inspired by the success of the US leniency system, introduced its first leniency policy which applies to ‘undertakings’⁵⁵² in 1996 and initially struck the balance by not granting automatic immunity, preferring to confer only a ‘reduction’ of fines of at most 75% to the firm that first handed over decisive evidence of the cartel existence and lowering this percentage to between 50 and 75% if the cartel investigation had already started.⁵⁵³ A drawback of the 1996 EU Leniency Policy was that it was heavily reliant on the applicant’s ability to provide ‘decisive evidence’.⁵⁵⁴ Under the 1996 Leniency Notice the European Commission did not guarantee complete immunity, even if an undertaking was first to self report and such applicant was guaranteed at the most a 75% reduction of the fine that would otherwise be imposed.⁵⁵⁵ Arp and Swaak indicate that although the 1996 Leniency Notice provided for the possibility of no fines for a successful applicant, the reality was that in practice the Commission never granted ‘full immunity’ with the exception of three cases decided towards the end of 2001.⁵⁵⁶ The 1996 Leniency Notice also provided for no upfront commitments by the Commission regarding whether an applicant would receive the favourable treatment it sought or any favourable treatment at all.⁵⁵⁷

The EU Leniency Policy was revised in 2002⁵⁵⁸ with a key innovation of introducing the concept of automatic immunity to the first applicant, irrespective of whether or not the investigation had already commenced.⁵⁵⁹ Such first applicant who provided suitable evidence received full immunity from fines whether or not it had instigated the cartel (although not if it

⁵⁵¹ *Ibid.*

⁵⁵² Wils (n 47) 12-14 points out that as the European Commission currently has no powers to impose penalties on individuals other than undertakings, the grant of immunity to an undertaking does not concern its directors or employees, and there exists no immunity policy for employees.

⁵⁵³ European Union Corporate Leniency Policy [1996] OJ C 45/3. Zingales (n 21) 28. See also Billiet ‘How lenient is the EC Leniency Policy? A matter of certainty and predictability’ *European Competition Law Review* (2009) 14 and Wils (n 47) 25.

⁵⁵⁴ Moodaliyar (n 13) 162.

⁵⁵⁵ Arp and Swaak (n 12) 60.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.* See further Riley (n 17) 13 for criticism of the 1996 Leniency Notice.

⁵⁵⁸ Zingales (n 17) 27.

⁵⁵⁹ Zingales (n 17) 28. Morgan ‘Controlling Cartels – Implications of the EU Policy Reforms’ *European Management Jnl* (2009) 27.

had coerced other firms to join).⁵⁶⁰ The policy change also encompassed requiring confessors to pass a higher and specific test: the amount of evidence to be provided had to be such as to enable the European Commission to launch an investigation or to issue a statement of objection for infringement of Article 81 of the EU Treaty (now Article 101 TFEU).⁵⁶¹ It also provided for written confirmation of conditional immunity early in the amnesty process.⁵⁶² Joshua criticised the 2002 Leniency notice not only for its lack of transparency in the decision-making process which the Commission engages in but also lamented the absence of a marker procedure and the fact that the programme did not offer amnesty plus to self-confessing cartellists.⁵⁶³ He suggested that the 2002 Leniency Notice be amplified by *inter alia* discarding the requirement for an evidential threshold, increasing certainty by allowing for a marker and also enhancing the incentives to self-report by a formal leniency/amnesty plus system.⁵⁶⁴

A further revised EU Leniency Policy was introduced in 2006.⁵⁶⁵ This revised policy introduced a number of significant changes to the 2002 Leniency Policy while retaining both the possibility of full immunity for the first firm to self-report before the commencement of an investigation by the Commission, and the previous scale of reduction of fines available to informants (including those coercing others not to join the cartel) after investigations had commenced.

In terms of the 2006 Notice on Immunity and Reduction of Fines in Cartel Cases (The Leniency Notice) the Commission will grant immunity from any fine that otherwise would be imposed on an undertaking that discloses to the Commission its participation in a cartel affecting the EU, provided the undertaking is the first to submit information and evidence which, in the Commission's view, will allow the Commission to either⁵⁶⁶ carry out a targeted

⁵⁶¹ *Ibid.* The key aspects of the 2002-leniency policy were summarised in the European Commission (2002) XXXIIInd Report on Competition Policy.

⁵⁶² Arp and Swaak (n 12) 60. See also Joshua (n 69) 520 where he criticises the lack of transparency of the 2002 Leniency Notice by remarking: 'It is not just the elastic formulation of the 8(a) and 8(b) tests that create uncertainty. Adding to the discombobulating effect is a lack of transparency in the *process*. Instead of the unambiguous 'fork in the road offered by the US system, the Notice invites the applicant to enter a poker game in which the Commission sees the other side's cards but keeps its own close to its chest.'

⁵⁶³ Joshua (n 69) 520 - 523.

⁵⁶⁴ Joshua (n 69) 537. See also Zingales (n 17) 5 for a detailed discussion of the 2002 Leniency Notice.

⁵⁶⁵ Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C298, 2006.

⁵⁶⁶ Par 8(a) and (b) of the Leniency Notice of 2006. Immunity may be granted to the first applicant irrespective of whether or not the investigation has already started. This was not present in the Leniency Notice of 1996

inspection in connection with the alleged cartel⁵⁶⁷ or find an infringement of Article 101 TFEU in connection with the alleged cartel.⁵⁶⁸

In either case, an applicant for immunity must co-operate genuinely,⁵⁶⁹ fully, expeditiously and on a continuous basis with the Commission, including:⁵⁷⁰

- (a) promptly providing the Commission with all relevant information and evidence relating to the cartel that comes into the applicant's possession or is available to it;⁵⁷¹

(OJ 1996/C207/04), where the only thing an undertaking could receive after the investigation had begun, was a reduction of a fine (50-75%).

⁵⁶⁷ As long as the Commission does not already have sufficient evidence to decide to carry out an inspection in connection with the cartel, or has not already carried out an inspection. The assessment of the threshold will have to be carried out *ex ante*, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

⁵⁶⁸ Provided that the Commission does not already have sufficient evidence to find an infringement and no undertaking has been granted conditional immunity from fines in connection with the cartel.

⁵⁶⁹ This requires in particular that the applicant provides accurate, not misleading, and complete information.

⁵⁷⁰ Par 12(a) of the Leniency Notice of 2006.

⁵⁷¹ In terms of the Leniency Notice of 2002, the amount of evidence had to be such that it would enable the Commission to launch an investigation or issue a statement of objection for infringement of article would not qualify as suitable evidence. The only clear benchmark on the weight of evidence, is the degree of corroboration required from other sources to make the information reliable 'will have an impact on the value of that evidence'. This implies that the amount of unconfirmed evidence has to be much higher than the amount of compelled evidence in order to qualify for leniency, so that it will be very difficult for an undertaking to invent alleged evidence around some poor amount of evidence. The EU differs to the US in that one cannot rely on the possibility to give some information as a 'proffer' so that at the same time, the other applicants are maintained in the queue. See Zingales (n 17) 43.

⁵⁷¹ That is, a written communication which the Commission has to address to undertakings before adopting a decision that negatively affects their rights.

⁵⁷¹ Despite the Commission holding the discretionary power to determine whether or not the integrity has been preserved, the Leniency Notice of 2006 provides applicants with the benchmark of 'reasonably'. Thus, an undertaking will know that as long as it acts under this guide of reasonability, it will not have to worry about informing the Commission of the way it intends to exit the cartel.

⁵⁷¹ Par 12(b) of the Leniency Notice of 2006. The condition in this provision creates a mechanism designed to avoid a potential adverse effect, e.g. other participants will easily foresee a forthcoming inspection and therefore dispose of some evidence fearing dawn-raids.

⁵⁷¹ Par 12(c) of the Leniency Notice of 2006.

⁵⁷¹ Par 13 of the Leniency Notice of 2006. Where an applicant for immunity has acted as a coercer, a reduction in the fine nonetheless remains available, provided the applicant meets the conditions to qualify for a reduction. The existence of such a feature provides the benefit, for the principle that the 'workability' of a fine is more critical than its amount, that it prevents a misuse of leniency: a widespread grant of immunity would decrease the fear of punishment, thereby having an adverse effect on deterrence. See Zingales (n 17) 38. The Leniency Notice of 2006 does not contain any example of what would or would not qualify as suitable evidence. The only clear benchmark on the weight of evidence, is the degree of corroboration required from other sources to make the information reliable 'will have an impact on the value of that evidence'. This implies that the amount of unconfirmed evidence has to be much higher than the amount of compelled evidence in order to qualify for leniency, so that it will be very difficult for an undertaking to invent alleged evidence around some poor amount of evidence. The EU differs to the US in that one cannot rely on the possibility to

- (b) remaining at the Commission's disposal to promptly answer any request that may contribute to the establishment of the facts;
- (c) making current and, if possible, former employees and directors available for interviews with the Commission;
- (d) not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
- (e) not disclosing the fact or any of the contents of its application before the Commission has issued a statement of objections⁵⁷² in the case.

The applicant is further required to end its involvement in the cartel immediately following its application for immunity, unless in the Commission's view, it is reasonably⁵⁷³ necessary to preserve the integrity of the inspections.⁵⁷⁴ In addition the leniency applicant must not have coerced other undertakings to join the cartel or to remain in it.⁵⁷⁵

While the Commission enjoys broad discretion in determining whether evidence is 'sufficient' to launch an inspection, the 2006 Leniency Notice clarifies that the applicant must provide at least a corporate statement and contemporaneous evidence.⁵⁷⁶ A corporate statement is described as a written or oral statement including a detailed description of the alleged cartel arrangement; name and address of the applicant and all other alleged cartel participants; name, position, office location (including where necessary, home address) of all individuals known to have participated in the cartel) and an indication of other competi-

give some information as a 'proffer' so that at the same time, the other applicants are maintained in the queue. See Zingales (n 17) 43.

⁵⁷² That is, a written communication which the Commission has to address to undertakings before adopting a decision that negatively affects their rights.

⁵⁷³ Despite the Commission holding the discretionary power to determine whether or not the integrity has been preserved, the Leniency Notice of 2006 provides applicants with the benchmark of 'reasonably'. Thus, an undertaking will know that as long as it acts under this guide of reasonability, it will not have to worry about informing the Commission of the way it intends to exit the cartel.

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⁵⁷⁶ Cleary Gottlieb *EU Competition Law Update* Brussels December 15, 2006 available at www.cgsh.com/antitrust_and_competition accessed on 2 May 2014.

tion authorities that will be contacted about the cartel. As regards the information in respect of the cartel, the corporate statement must include a detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning, the product or services concerned, the geographic scope, the duration and the estimated market volumes affected by the cartel, the specific dates, locations, content of and participants in alleged cartel contracts and all relevant explanations in connection with the pieces of evidence provided in support of the application.⁵⁷⁷ Contemporaneous evidence is described as any other available evidence on the alleged cartel, in particular contemporaneous documentary evidence. In exceptional circumstances the Commission may agree that some of this information may be provided at a later stage if that is necessary to avoid jeopardizing the effectiveness of its inspections.⁵⁷⁸

The 2006 Leniency Notice codified the European Commission's practice with respect to oral corporate statements.⁵⁷⁹ Oral corporate statements are recorded and transcribed at the Commission's premises and the applicant is then given the opportunity to check the technical accuracy of the recording and, if need be, to make any corrections.⁵⁸⁰

The European Commission will provide guidance on a hypothetical basis to an undertaking that wishes to establish whether it may be eligible for immunity under the leniency programme but it will not provide informal guidance on a confidential basis as to the availability of immunity or a fine reduction when there is no clear intention on the undertaking's part to make an immunity application.⁵⁸¹ However, an undertaking considering applying for immunity may, through its external counsel, submit information and evidence relating to the cartel to the Commission in hypothetical terms, without revealing its name or the names of the other parties involved in the cartel and the Commission may then provide a non-binding advisory opinion.⁵⁸²

⁵⁷⁷ Zingales (n 17) 52.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Cleary Gottlieb (n 576) 4. This procedure has been developed to avoid that potential applicants are dissuaded from making leniency applications due to fear of creating a 'discoverable' corporate statement that could be used against them in private litigation principally in the United States.

⁵⁸⁰ *Ibid.* Ultimately the applicant is required to listen to the entire recording and check the accuracy of the written transcript.

⁵⁸¹ Kmiecik & Burton *Cartel* (n 543) 1.

⁵⁸² *Ibid.* A hypothetical application must include: details of the product or service concerned by the cartel, the estimated duration of the cartel and a detailed description of the evidence available for disclosure. The

The Commission can also grant an immunity applicant a marker⁵⁸³ to allow the applicant to gather the information and evidence necessary to secure immunity.⁵⁸⁴ In order to succeed in securing a marker, the applicant must provide the following information: its name and address; the parties to the cartel; the affected products; the affected territories; the cartel's duration; the nature of the cartel conduct; any information on any past or possible future leniency applications to any other competition authorities in or outside the EU in relation to the cartel; and the reasons why the granting of the marker is necessary.⁵⁸⁵ Where a marker is granted, the Commission will set a deadline for the applicant to perfect the marker by supplying the information and evidence necessary to secure immunity.⁵⁸⁶ If the marker is perfected on time, the information and evidence provided to perfect the marker is deemed to have been submitted on the date when the marker was granted.⁵⁸⁷

The EU Leniency Policy not only provides for the granting of full immunity to a successful applicant who is first to the door to self-report but also provides for various instances of fine reductions (partial leniency) to other applicants who do not qualify for such full immunity. An undertaking that does not qualify for immunity, may benefit from a reduction in the fine that would otherwise be imposed if it provides the Commission with evidence of the alleged infringement that represents significant 'added value'⁵⁸⁸ with respect to the evidence already in the Commission's possession.⁵⁸⁹ The Commission will consider contemporaneous written evidence that directly relates to the cartel to have greater value than later evidence that only indirectly relates to the cartel.⁵⁹⁰ Directly incriminating evidence will have greater value than circumstantial evidence and, finally, evidence that can be relied upon without

applicant can also provide the Commission with redacted versions of documentary evidence that the applicant would submit with its application for immunity.

⁵⁸³ This procedure secures the applicant's position ahead of any subsequent applicant.

⁵⁸⁴ Par 15 of the Leniency Notice of 2006.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.* This provision can be criticised in that it is not defined for how long the marker can be guaranteed, nor when the requirement of revealing enough information can be considered fulfilled. This creates uncertainty.

⁵⁸⁷ *Ibid.* Markers are, however, not available for applications to reduce fines.

⁵⁸⁸ Evidence is considered to be of significant added value if it improves the Commission's ability to prove the existence of the cartel.

⁵⁸⁹ Par 23 and 24 of the Leniency Notice of 2006.

⁵⁹⁰ Par 25 of the Leniency Notice of 2006. Similarly, in the assessment of the added value of evidence submitted, the Commission will consider the degree of corroboration from other sources that is required to rely on the evidence provided.

further corroboration, which is referred to as ‘compelling evidence’, will have greater value than evidence which requires corroboration.⁵⁹¹

An applicant seeking a fine reduction must, additionally, fulfil the following conditions which are basically similar to that required of an applicant who applies for amnesty (full leniency to the first applicant):⁵⁹² It must co-operate genuinely, fully, expeditiously and on a continuous basis with the Commission and must end its involvement in the cartel immediately after it has applied for a fine reduction, unless the Commission directs otherwise to preserve the integrity of inspections and the applicant must not have destroyed, falsified or concealed evidence of the cartel or have disclosed the fact or any of the contents of its contemplated application, except to other competition authorities.

The Commission may reduce fines to qualifying applicants within the following bands:⁵⁹³

- a) A reduction of 30% to 50% for the first undertaking that provides evidence of significant added value.
- b) A reduction of 20% to 30% for the second undertaking that provides evidence of significant added value.
- c) A reduction of up to 20% for subsequent undertakings that provide evidence of significant added value.

An undertaking wishing to apply for immunity from fines must make such application to the DG Comp.⁵⁹⁴ If an applicant is no longer eligible for immunity, it can still increase its pro-

⁵⁹¹ *Ibid.* In the Cleary Gottlieb *EU Competition Law Update* (n 576) 3 it is indicated that the introduction of a category of ‘compelling evidence’ has some important implications: *Ex post facto* testimony from current or former employees is not in itself ‘compelling’. This may influence leniency decisions in circumstances where, besides employees’ recollections, little or no contemporaneous corroborating evidence is available. In addition, where a company provided evidence that exacerbated the gravity or duration of the cartel infringement, the 2002 Leniency Notice provided that the Commission would not take this evidence into account in setting fines. The 2006 Leniency Notice, however, expressly limits immunity from fine increases only to companies providing ‘compelling evidence’ of aggravating facts.

⁵⁹² Par 30(b) of the Leniency Notice of 2006.

⁵⁹³ Par 26 of the Leniency Notice of 2006. The Commission has discretion to determine the level of reduction to be granted within each of these bands, based on when the applicant submits evidence and the extent to which the evidence represents significant added value relative to the evidence already in the Commission’s possession.

⁵⁹⁴ Par 14 of the Leniency Notice of 2006. The Leniency Notice of 2006 does not define any specific time when an application for leniency should be made, thus applicants that are contemplating submitting an immunity

spects of securing a significant fine reduction by submitting a fine reduction application as early as possible.⁵⁹⁵

Applications for immunity or a fine reduction must be made formally, either in writing or orally, and as indicated above, must comprise a corporate statement and all relevant information and evidence about the cartel that is available to the applicant.⁵⁹⁶ Where the Commission has received an immunity application, it will verify whether the applicant has fulfilled all the conditions for immunity under the Leniency Notice of 2006.⁵⁹⁷ If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence will meet the conditions for immunity, and inform the undertaking accordingly.⁵⁹⁸ Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.⁵⁹⁹ If the application does not fulfil the conditions for immunity, the Commission will notify the applicant in writing.⁶⁰⁰ In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it for a reduction of fine.⁶⁰¹

The Commission will not consider other applications for immunity from fines in respect of a specific cartel before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally

application should do so as soon as possible to maximise their chances of being granted immunity, as only the first applicant meeting the relevant conditions will be eligible for immunity.

⁵⁹⁵ Par 27 of the Leniency Notice of 2006. As mentioned earlier, by making an early application, applicants can secure a position in a higher reduction band and be better placed to supply the Commission with evidence of significant added value.

⁵⁹⁶ Par 16 of the Leniency Notice of 2006. Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally. Such corporate statements must contain: a detailed description of the cartel arrangement, the names and addresses of the applicant and all the other parties involved in the cartel, the names, positions and office locations of all individuals involved in the cartel and any information on any past or possible future leniency applications to any other competition authorities in or outside the EU in relation to the cartel.

⁵⁹⁷ Par 18 of the Leniency Notice of 2006.

⁵⁹⁸ Par 19 of the Leniency Notice of 2006.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Par 20 of the Leniency Notice of 2006. The undertaking concerned can, at this stage, withdraw the evidence disclosed or request that its application be considered for a fine reduction.

⁶⁰¹ *Ibid.* This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

or by requesting a marker.⁶⁰² If at the end of the administrative procedure, the undertaking has met the conditions set out in the Leniency Notice, the Commission will grant it immunity from fines in the relevant matter.⁶⁰³ Alternatively, if the undertaking has not met the required conditions, the undertaking will not benefit from any favourable treatment.⁶⁰⁴

It must be noted that the EU leniency programme does not provide for a Leniency Plus/Amnesty Plus system.⁶⁰⁵ Thus, if an applicant that does not qualify for leniency for the initial matter under investigation, but discloses information about a second cartel, and meets the leniency programme's requirements, it will not receive leniency for the second offence or greater leniency with respect to the first offence.

Information acquired by the Commission in respect of a leniency application will be protected only as long as the applicant does not communicate it to third parties.⁶⁰⁶ This can be seen to compliment the rule that requires an investigation to be started by the Commission regarding the confessed cartel in which disclosure could potentially jeopardise the investigation itself, by making other participants able to foresee the inspection and act consequently.⁶⁰⁷

During the course of the investigative procedure up until the issue of the statement of objections, the Commission will keep the identity of leniency applicants confidential.⁶⁰⁸ When the Commission issues a statement of objections, the identities of the leniency applicants will only be revealed to the addressees of the statement of objections.⁶⁰⁹ The identities of the leniency applicants will be made known to the general public when the Commission issues its final decision on the case.⁶¹⁰

⁶⁰² Par 21 of the Leniency Notice of 2006.

⁶⁰³ Par 22 of the Leniency Notice of 2006.

⁶⁰⁴ *Ibid.* However, if the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

⁶⁰⁵ In contrast to the position in Australia.

⁶⁰⁶ Zingales (n 17) 53. In South Africa, confidentiality of all information, evidence and documents will be maintained except insofar as it is used in proceedings before the Competition Tribunal in terms of the Competition Act.

⁶⁰⁷ *Ibid.* It is extremely important to keep leniency applications confidential otherwise it may potentially result in other participants destroying evidence.

⁶⁰⁸ Par 12(a) of the Leniency Notice of 2006.

⁶⁰⁹ Kmiecik & Burton (n 543) 1.

⁶¹⁰ *Ibid.* Access to the Commission's file is only granted to the addressees of the statement of objections for the purposes of judicial or administrative proceedings concerning the application of the EU competition rules.

During the access-to-file procedure in the leniency application process, the statement of objections' addressees are given access to all documents obtained, produced or assembled by the Commission during the proceedings.⁶¹¹ However, access to documents that contain business secrets and other confidential information may be partially or totally restricted, with access instead being given to a non-confidential version of the documents in question.⁶¹²

3.4 Settlement of cartel cases

A discussion of the EU leniency programme will be incomplete without a brief reference to the settlement procedure recently employed by the Commission to deal with cartel cases. Despite being hailed as a great success, Carmeliet, however, remarks that a problem facing the EU leniency system is that it was not framed to accommodate a large number of leniency applicants, which resulted in a major backlog of leniency applications.⁶¹³ In June 2008, the Commission introduced a new procedure for settling cartel cases, which is intended to compliment the Leniency Notice of 2006 and the Fining Guidelines.⁶¹⁴

The settlement programme, offered at the DG Comp's discretion at the end of an investigation, is distinct from the leniency programme and provides cartel members the opportunity to assess evidence and avoid litigation by settling their cases in exchange for a reduction in fines otherwise imposed.⁶¹⁵ The procedure is available in cases where the Commission has initiated proceedings with a view to adopting an infringement decision and imposing fines but has not yet issued a formal settlement offer.⁶¹⁶ Pursuant to the settlement procedure, the parties are expected to acknowledge their participation in and liability for the cartel and

⁶¹¹ *Ibid.* Except for internal Commission documents, including communications between the Commission and other competition authorities.

⁶¹² *Ibid.* Furthermore, access to corporate statements submitted by leniency applicants is restricted to access on the Commission's premises. The statement of objections' addressees can examine corporate statements on the condition that they commit not to make any mechanical or electronic copies of their contents.

⁶¹³ Carmeliet(n 6) 464.

⁶¹⁴ Commission Regulation 622/2008, 2008 O.J. (L 171) 3. Slaughter & May *The EU Competition Rules on Cartels: A Guide to the Enforcement of the Rules Applicable to Cartels in Europe* (2012) 22. The aim of the procedure is to simplify and speed up the administrative procedure for investigations, thereby freeing up the Commission's resources and enabling it to pursue more cases. See also Kelley 'Settling for settlement: The European Commission's New Cartel Settlement Procedure' (2010) *Washington University Global Studies Law Review* 699.

⁶¹⁵ Kelley (n 614) 701.

⁶¹⁶ *Ibid.* Settlements may, however, be explored at an earlier stage if requested by the undertakings under investigation.

reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty.⁶¹⁷ In return for such cooperation, the parties are rewarded with a 10% reduction in fines and a cap on the multiplier that may be applied to the fine for a specific deterrence.⁶¹⁸

3.5 The ECN Model Leniency Programme

As a consequence of the decentralisation process through EU Regulation 1/2003, national competition authorities of the 27 EU Member States have the power, within their respective territories, to enforce the EC competition rules, in addition to their respective national competition laws.⁶¹⁹ This is subject to the qualification that the Commission has not initiated proceedings covering the same breach.⁶²⁰ As a result of Regulation 1/2003 member states can also adopt their own leniency programmes.⁶²¹

The European Commission co-operates with EU member states' national competition authorities through the European Competition Network (ECN).⁶²² These relations are governed by the Commission's Notice on Co-operation within the network of competition authorities.⁶²³

In 2006 the ECN issued the ECN Model Leniency Programme,⁶²⁴ which was revised in 2012, in respect of corporate leniency to undertakings involved in secret cartels. For purposes of this dissertation the reference to the ECN Model Leniency programme is not intended to evolve into a full-scale discussion of inter-member state co-operation with regard to leniency. However, the ECN Model Leniency Programme is important because it is meant to trigger soft harmonisation of the leniency programmes in the EU and sets out principal ele-

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.* Cumulative to any leniency.

⁶¹⁹ Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the EC Treaty, [2003] O.J. L1/1.

⁶²⁰ *Ibid.* Article 11(6).

⁶²¹ Carmeliet (n 6) 465. See also Morgan (n 559) 3.

⁶²² Kmiecik & Burton (n 543). The purpose of the ECN Model Leniency Programme is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN.

⁶²³ *OJ 2004 C101/43.*

⁶²⁴ ECN Model Leniency Programme (as revised in 2012) available at [reference missing](#) accessed on 19 October 2014.

ments which should eventually be common to all leniency programmes in the EU.⁶²⁵ The ECN Model Leniency Programme indicates that an undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme.⁶²⁶ It establishes two evidential thresholds for granting immunity: Type 1A – for the first undertaking that provides the competition authority with sufficient evidence to enable it to carry out targeted inspections in connection with an alleged cartel and Type 1B – for the first undertaking that submits evidence which in the competition authority’s opinion may enable a finding of an infringement of Article 81 EC (now Article 101 TFEU).⁶²⁷ Immunity is no longer available under Type 1B if it has already been granted under Type 1A.⁶²⁸

With regard to immunity from fines for Type 1A it is stipulated that the competition authority will grant an undertaking immunity from any fine which would otherwise have been imposed provided:

- a) the undertaking is the first to submit evidence which in the Competition Authority’s view, at the time it evaluates the application, will enable it to carry out targeted inspections⁶²⁹ in connection with an alleged cartel;
- b) the Competition Authority did not, at the time of the application, already have sufficient evidence to adopt an inspection decision or seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and
- c) the conditions attached to leniency are met.⁶³⁰

In the explanatory notes to the ECN Model Leniency Programme it is stated that the assessment of the threshold in a Type 1A situation will be carried out *ex ante*, without taking into account whether a given inspection has or has not been successful or whether an inspection has or has not been carried out.

⁶²⁵ ECN Model Leniency Programme Explanatory Notes par 7 and 8 available at [reference missing](#) accessed on 19 October 2014.

⁶²⁶ Par 8 of the ECN Model Leniency Programme.

⁶²⁷ ECN Model Leniency Programme Explanatory Notes (n 625) par 16. Immunity is available under a lower threshold in Type 1A compared to Type 1B in order to create an incentive for cartel participants to leave the cartel and to report infringements which are not yet known to the competition authorities.

⁶²⁸ ECN Model Leniency Programme Explanatory Notes (n 625) par 17.

⁶²⁹ I.e. ‘dawn raids’.

⁶³⁰ Par 5 of the ECN Model Leniency Programme.

With a view to enabling the Competition authority to carry out targeted inspections, the undertaking should be in a position to provide it with information regarding the name and address of the legal entity submitting the leniency application and the details of the other parties to the cartel.⁶³¹ It should also provide a detailed description of the alleged cartel, including the affected products, the affected territories and the duration and nature of the alleged cartel conduct.⁶³² It should further provide evidence of the alleged cartel in its possession or under its control (particularly any contemporaneous evidence) as well as information on any past or possible future applications to any other competition authorities outside the EU in relation to the alleged cartel.⁶³³

In Type 1B cases (where no undertaking has been granted conditional immunity from fines before the Competition Authorities carried out an inspection or before it had sufficient evidence to adopt an inspection decision or seek a court warrant for an inspection) the Competition Authority will grant an undertaking immunity from any fine which would otherwise have been imposed if.⁶³⁴

- a) the undertaking is the first to submit evidence which in the Competition Authorities view enables the finding of an infringement of article 81 (now Article 101 TFEU) in respect of an alleged cartel;
- b) at the time of the submission of the leniency application, the Competition Authorities did not have sufficient evidence to find an infringement of article 81 as aforesaid; and
- c) the conditions attached to leniency are met.

The ECN Model Programme provides for so-called Type 2 applications, namely, that undertakings that do not qualify for immunity may otherwise benefit from a reduction of any fine that would have been imposed.⁶³⁵ To qualify for a reduction an undertaking must provide the competition authority with evidence of the alleged cartel which, in the view of the competition authority, represents significant added value relative to the evidence already in its

⁶³¹ Par 6 of the ECN Model Leniency Programme.

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ Par 7 of the ECN Model Leniency Programme.

⁶³⁵ Par 9 of the ECN Model Leniency Programme.

possession at the time of the application.⁶³⁶ It is explained that the concept of ‘significant added value’ refers to the extent to which the evidence strengthens, by its very nature and/or its level of detail, the competition authority’s ability to prove the alleged cartel.⁶³⁷ In order to determine the appropriate level of reduction of the fine, the competition authority will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etcetera undertaking to apply) and its assessment of the overall value added to its case by that evidence.⁶³⁸ It is further provided that reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine that would otherwise have been imposed.⁶³⁹ If a Type 2 applicant submits compelling evidence which the competition authority uses to establish additional facts which have a direct bearing on the amount of the fine, it will be taken into account when setting any fine to be imposed on such applicant.⁶⁴⁰

In order to qualify for leniency under the ECN Model Leniency Programme the applicant must satisfy the following cumulative conditions:⁶⁴¹

- a) it must end its involvement in the alleged cartel immediately following its application save to the extent that its continued involvement would, in the competition authority’s view, be reasonably necessary to preserve the integrity of the competition authority’s inspections;
- b) it cooperates genuinely, fully and on a continuous basis from the time of its application with the competition authority until conclusion of the case, which cooperation includes
 - (i) providing the competition authority promptly with all the relevant information and evidence that comes into its possession or under its control;
 - (ii) remaining at the disposal of the competition authority to reply promptly to any requests that, in the competition authority’s view, may contribute to the establishment of relevant facts;

⁶³⁶ Par 10 of the ECN Model Leniency Programme.

⁶³⁷ *Ibid.*

⁶³⁸ Par 11 of the ECN Model Leniency Programme.

⁶³⁹ *Ibid.*

⁶⁴⁰ Par 12 of the ECN Model Leniency Programme.

⁶⁴¹ Par 13 of the ECN Model Leniency Programme.

- (iii) making current and, to the extent possible, former employees and directors available for interviews with the competition authorities;
- (iv) not destroying, falsifying or concealing relevant information and evidence ; and
- (v) not disclosing the fact or any of the content of the leniency application before the competition authority has notified its objections to the parties, unless otherwise agreed with the competition authority.

When contemplating making an application to the competition authority but prior to doing so, the applicant must not have destroyed evidence which falls within the scope of the application.⁶⁴² It must also not have disclosed, directly or indirectly, the fact or any of the content of the application to other competition authorities or any competition authority outside the EU.⁶⁴³

3.6 Developments regarding the introduction of a cartel offence in the EU

Cartel conduct is not criminalised at EU level.⁶⁴⁴ However, Article 5 of Regulation 1/2003 provides that ‘the competition authorities of the EU Member States shall have the power to apply articles 81 [now Article 101 TFEU] and 82 [now Article 102 TFEU] of the Treaty in individual cases.’⁶⁴⁵ For this purpose, acting on their own initiative or on a complaint, they may take...decisions...imposing fines, periodic penalty payments or any other penalty provided for in their national law.’⁶⁴⁶

Wils points out that Member States can thus in their national law provide for administrative or civil fines on companies for violations of Articles 81 (now Article 101 TFEU) and 82 (now Article 102 TFEU) of the Treaty, or criminal fines, or fines on individuals, of an administrative, civil or criminal nature, or imprisonment or indeed ‘any other penalty’.⁶⁴⁷ However,

⁶⁴² Par 13.3 of the ECN Model Leniency Programme.

⁶⁴³ *Ibid.*

⁶⁴⁴ Hakopian ‘Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?’ *The Competition Law Review* (2010)157 at 159 indicates that the old Article 83 EC gave the Community the competence to adopt legislation (both regulations and directives) to give effect to the prohibitions laid down in Article 81(1) EC, but stated that this would be done ‘by making provision for fines and periodic penalty payments’. It has therefore been argued that the EC lacked the power to adopt criminal sanctions in competition law, for instance by the German government before the European Court of Justice in *Federal Republic of Germany v Commission of the European Communities* [1992] ECR I-05383 par 16 and 17.

⁶⁴⁵ See also *Scormagdalia* (n 1) 15.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Wils (n 546) 16. He indicates the fact that ‘any other penalty’ also covers penalties on individuals, including imprisonment is further confirmed by Article 12(3) of Regulation 1/2003 which refers to natural persons.

Hakopian points out that the wording of Article 83 (now Article 103 TFEU) excludes the possibility of instituting a criminal system of competition law enforcement at the level of the EU institutions.

A number of Member States have since introduced cartel offences.⁶⁴⁸ A discussion of the national competition legislation of these member states and the specific cartel offences introduced by them are beyond the scope of this dissertation. However, for completeness sake mention ought to be made of the cartel offence introduced by the UK as it was a leader among the EU member states in the sphere of criminalisation of cartel participation and has the toughest sanctions for cartel offences.⁶⁴⁹ Competition law in the UK is regulated in terms of Chapter 40 of the Enterprises Act of 2002.⁶⁵⁰ The Office of Fair Trading in the UK is responsible for enforcement of the national competition laws. For purposes of the present discussion only the nature of the cartel offence in UK legislation and the enforcement thereof will be highlighted.

The UK cartel offence is provided for in Part 6 of Chapter 40 of the Enterprises Act.⁶⁵¹ The forms of agreement that fall within the parameters of the cartel offence are: direct and indirect price fixing; limitation of production or supply; market sharing and/or bid rigging.⁶⁵² In order for the successful prosecution of individuals two thresholds need to be met: proof of dishonesty and proof of an actual agreement to cartelize a market.⁶⁵³

Successful prosecution for a cartel offence can lead to a term of imprisonment of up to five years and/or an unlimited fine.⁶⁵⁴ In addition it is possible for the OFT to seek disbarment of a company director implicated in the offence for a period of 15 years.⁶⁵⁵ Kelly, however, points out that unlike the position in South Africa, the Office of Fair Trading in its capacity as

⁶⁴⁸ Cosgun (n 2) 114.

⁶⁴⁹ Morgan(n 532) 1.

⁶⁵⁰ Enterprise Act 2002.

⁶⁵¹ See Stephan 'The UK Cartel Offence: Lame duck or black mamba?' available at ssrn.com/abstract=1310683 accessed on 3 November 2014 and Stephen 'Four Key Challenges to the successful criminalization of cartel laws' *Journal of Antitrust Enforcement* (2014) 1.

⁶⁵² S188(2) of the Enterprise Act.

⁶⁵³ S188 (1) of the Enterprise Act. In *R v Gosh* [1982] QB 1053 a two pronged test was established: First it has to be established whether, objectively viewed, the defendant was acting dishonestly, according to the standard of reasonable and honest people. Secondly it has to be established whether the defendant realised that what it was doing was dishonest according to this standard.

⁶⁵⁴ S190(1)(a) of the Enterprise Act.

⁶⁵⁵ S204 of the Enterprise Act.

competition authority is also empowered to attend to criminal prosecution in respect of the cartel offence.⁶⁵⁶ He further indicates that what is of considerable interest is the manner in which the Enterprise Act deals with concomitant issues relating to criminal sanctions in respect of the cartel offence: it goes beyond simply setting out the elements of the offence and the sanctions in the event of successful prosecution but contains detailed regulations in respect of the powers of the Office of Fair Trading to conduct investigations, searches, seizures of evidence, covert surveillance and the power to issue ‘no action’ letters.⁶⁵⁷ The ‘no action’ letters are intended to ensure that the introduction of criminal sanctions for the cartel offence does not detract from the success of the UK leniency programme.⁶⁵⁸ The Office of Fair Trading has explained the use of ‘no action’ letters as follows: ‘The OFT considers that it is in the interest of economic well-being of the United Kingdom to grant immunity from prosecution to individuals who inform competition authorities of cartels and then cooperate fully.’

All aspects of no-action letters are properly regulated in terms of the Enterprise Act, such as the conditions that have to be met for obtaining immunity from the Office of Fair Trading as well as the circumstances in which immunity may be revoked. An individual seeking a ‘no-action’ letter must admit participation in a cartel, undertake to provide information relating to the cartel’s activities and pledge continuous and complete cooperation throughout the investigation.⁶⁵⁹ It is also required that the individual must not have instigated the cartel.⁶⁶⁰

The powers of the Office of Fair Trading in respect of investigation, search and surveillance are also extensively regulated in terms of Chapter 6 of the Enterprise Act and the Office of Fair Trading has issued guidance on how it intends to exercise these powers.⁶⁶¹

From the brief exposition above it is clear that the UK has proper command of the enforcement of its competition laws and prosecution of cartel offences in tandem with its leniency programme. The EU Leniency programme, however, at this stage operates without the con-

⁶⁵⁶ Kelly (n 359) 324.

⁶⁵⁷ *Ibid.* See in particular s 190 (4) of the Enterprises Act.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ OFT Notice 513, April 2003 on ‘The Cartel Offence, Guidance on the Issue of No-Action Letters for individuals’.

⁶⁶⁰ *Ibid.*

⁶⁶¹ OFT Notice 515 April 2003 on ‘Powers for Investigating Criminal Cartels’. In terms of s 192(1) of the Enterprise Act these investigative powers become operative when, objectively, reasonable grounds exist for suspecting that a cartel offence has been committed. See also ss 193, 294 and 198.

straints that the criminal prosecution of cartels may impose upon a leniency programme and the practical interaction of a leniency programme with a criminal regime. At this stage the future of introducing a cartel offence at EU-level is not certain. As pointed out by Wils such a step is not improbable.⁶⁶² It can also be surmised that should a EU cartel offence materialise in future it is not unlikely that the European Commission will be tasked with both civil and criminal enforcement of the competition laws, including the prosecution of cartel offences.

⁶⁶² Wils (n 546) 49.

Chapter 5 Conclusion and Recommendations

1. Introduction

Carmeliet aptly remarks that for a leniency system to be effective ‘everything stands or falls with incentives to reveal a cartel’ because ‘any rational cartelist will weigh the advantages and disadvantages of blowing the whistle’.⁶⁶³ These incentives are revealed by features such as the transparency of the particular leniency system, the ease with which it can be accessed and of course the guarantee of leniency that is sufficient to present a trade-off for disclosing the existence of a cartel and securing the utmost co-operation from leniency applicants. Carmeliet further indicates that a well-designed leniency programme makes it difficult for cartelists to develop an organisational structure in which they can create and maintain cartels.⁶⁶⁴ The OECD therefore stated that ‘the key to an effective leniency programme is that there should be a high degree of predictability, transparency and certainty, together with a low burden of proof, heavy penalties and an emphasis on priority’.⁶⁶⁵

1.1 Brief Comparison between the South African, Australian and European Leniency Programmes

The following table summarises and illustrates the key features and core aspects of the above jurisdictions:

Country/Jurisdiction	Australia	European Union	South Africa
Legal Framework	Trade Practices Act of 1974 replaced by the Competition and Consumer Act of	Article 101 of the Treaty on the Functioning of the Euro-	Section 4(1)(b) of the Competition Act of 1998.

⁶⁶³ Carmeliet (n 6) 463 and 467.

⁶⁶⁴ Carmeliet (n 6) 466.

⁶⁶⁵ OECD Report on Leniency Programmes available at http://www.oecd.org/LongAbstract/0.3425.en_2649_40381615_2474436_119666_1_1_00html accessed on 16 October 2014.

	2010.	pean Union.	
Sanction for Cartel Activity	Civil and criminal.	Civil only at EU-level.	Civil only. If section 73A of the Competition Amendment comes into force, there will be criminal sanctions as well.
Basis for Leniency Programme	2009 Immunity Policy. Immunity from criminal prosecution determined by the CDPP prosecutor.	2006 Leniency Notice.	2008 Corporate Leniency Policy.
Recipient of Leniency	Corporations and individuals including directors, officers and employees. Not ringleader of the cartel.	Undertakings. Not individuals. Must not have coerced others to participate in the cartel.	Firms and individuals, however, not employees. Even if ringleader of the cartel.
Conditions for Leniency	Total immunity available to first applicant if the ACCC has not received legal advice that is has sufficient evidence to proceed with the case. Must not have been a clear leader of the	Total immunity if approach Commission before it has sufficient evidence to adopt an inspection decision or already has carried out an inspection in relation to the conduct.	Must be the first applicant. Honest and full disclosure of evidence. Full and continuous co-operation. Stop the cartel conduct immediately or

	cartel.	Applicant must provide evidence which allows the Commission to carry out a targeted inspection.	<p>act as directed by the Commission.</p> <p>Must not alert third parties or participants of the application.</p> <p>Must not destroy or conceal relevant evidence.</p> <p>Must not act dishonestly.</p> <p>In order to receive conditional and total immunity, the Commission must be unaware of the cartel or must be aware of the cartel but has insufficient evidence.</p>
Marker System	Yes.	Yes.	Yes.
Oral Applications	Yes.	Yes.	Yes, however, the Commission has discretion and documentary evidence in applicant's possession has to be provided if required.

Confidentiality Requirement	Information to be kept confidential, however, may be used in civil proceedings.	Confidential as long as the applicant does not communicate it to third parties.	Information must be kept confidential unless the applicant consents to disclosure.
Reduction of Fines (other participants)	If the applicant cooperates the ACCC may recommend to the court or the DPP a reduced fine or sentence.	If there is evidence of significant 'added value', there are certain reduction bands and requirements. Settlement procedure.	Settlement agreement or consent order if applicant cooperates with the Commission. The Commission may ask the Tribunal for a lenient sanction.
Leniency Plus	Yes. May receive immunity from both cartels.	No.	No.
Fines	For corporations, the greater of: (i) \$10 million, (ii) 3 times the gain from cartel conduct, or (ii) where the gain cannot be ascertained, 10% of annual turnover. For individuals:	Fining Guidelines (value of sales of goods/services is the starting point).	Up to 10% of its annual turnover.

	(i) criminal – 10 years imprisonment or \$340 000, (ii) civil – \$500 000.		
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1.2 South Africa

As discussed in chapter 2 above, the 2004 CLP was amended in 2008 with a view of reforming it to be in line with international practice. The distinctive features of the CLP and cartel enforcement in South Africa are briefly as follows:

Cartel activity in South Africa is sanctioned by civil (administrative) penalties⁶⁶⁶ with the legal framework being section 4(1)(b) of the 1998 Competition Act. Firms are entitled to apply for immunity in terms of the CLP, including the ringleader of the cartel.⁶⁶⁷ Conditional and thereafter total immunity is granted by the Commission to an applicant that provides full cooperation if the Commission is unaware of the cartel activity or where the Commission is aware of the cartel activity but has insufficient evidence to prosecute. The CLP provides for a marker system as well as an oral application process. The CLP upholds confidentiality of information submitted unless the applicant consents to disclosure. Should an applicant fail to meet the conditions for immunity, such as not being first to the door with the leniency application, the Commission may ask the Tribunal to impose a more lenient sanction. Furthermore, settlement agreements or consent orders may be utilised should an applicant fail to meet the conditions but cooperates with the Commission. However, the CLP does not contain a Leniency-Plus programme with regard to ‘second’ cartels.⁶⁶⁸ The maximum fine for cartel conduct is 10% of the firm’s annual turnover.

1.2.1 The Advantages of the CLP

⁶⁶⁶ Up to 10% annual turnover as per s 59 of the Competition Act. S 73A introduced by the Competition Amendment Act, which provides for the criminalisation of cartel activity, has not yet come into effect.

⁶⁶⁷ S1 of the Competition Act. A firm includes a person, partnership or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person to the extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership.

⁶⁶⁸ As indicated in chapter 1 herein, a Leniency-Plus programme provides an applicant that does not qualify for immunity in respect of an initial matter under investigation, who discloses a second cartel and meets the requirements, with leniency for the second offence and lenient treatment with respect to the first offence.

The first observation that needs to be made with regard to the CLP is that it is clear from the lay-out of the policy document and the language employed, that the Commission intended to create a document that would provide comprehensive guidance to prospective leniency applicants as to what the CLP entails, what its scope of application is, which conditions have to be met in order to qualify for leniency and what the process will entail. The document indeed makes it clear that the leniency process is a process which runs over a period of time and that the leniency applicant will have to provide continuous co-operation to the Commission in order to facilitate the effective prosecution of the cartel. It is submitted that the document can be said to be accessible enough in terms of what it indicates to be the 'rewards' of leniency as envisaged therein, to lure cartelists towards the Commission in a race to self report. The fact that the leniency programme is not limited to 'serious' cartel conduct as envisaged by the Australian competition legislation, but generally applies to cartel conduct as prohibited by section 4(1)(b) of the Competition Act has the advantage that it may incentivise even small and less serious cartels to self report and thus inhibit such cartels from developing in large, serious cartels causing a wider range of harm.

As indicated by the OECD, the requirement that the leniency applicant must be first to the door is a strategically sound feature of an efficient leniency programme as it has the effect of creating distrust and thus destabilising the cartel. This destabilising effect is strengthened by allowing even the ringleader of a cartel to qualify for leniency as it is evident that should the ringleader of a cartel self report it will have the utmost destabilising effect on the cartel.

The reach of the CLP is wide as it is available not only with regard to cartels of which the Commission is unaware of but also those of which the Commission is aware of but cannot prosecute for want of information or evidence. This wide application of the CLP thus enhances the Commission's ability to prosecute cartels. The reach of the CLP is further broadened as it indicates that the leniency applicant is not required to show that it was previously unaware that it was contravening the Competition Act. It is submitted that it is very likely that cartelists would be unsure as to what the position is if they had known all along that they were contravening the Act and thus the aforesaid explicit statement adds to the certainty of the process.

The CLP document expressly states that the CLP does not provide blanket immunity and explains the meaning of this statement. This provides certainty to prospective applicants that a leniency application will have to be filed in respect of every cartel contravention. The CLP document further makes it clear that it will only hear the leniency application if the person applying for leniency on behalf of the firm is authorised to do so. This makes it clear that the Commission will not entertain unauthorised whistleblowing.

Leniency applicants may mistakenly be under the impression that if they come clean on their cartel activity by applying for leniency under the CLP they will be absolved from any fine or claim of any nature whatsoever. The CLP provides certainty as to the type of leniency by expressly indicating that such leniency only extends to administrative fines and not to criminal and civil liability. It thus does not compromise the entitlement of victims of cartel activity to claim damages occasioned by such activity. Further certainty regarding the application of the CLP is also added by the express statements in the CLP document regarding the circumstances in which the CLP does not apply.

The granting of leniency in two distinct stages, namely, first the grant of conditional immunity and then at the end of the prosecution proceedings, the granting of final immunity, is advantageous as it facilitates and incentivises the continuous co-operation of the leniency applicant who would not wish to jeopardise its chances of obtaining final immunity by non-complying with the requirements and conditions laid down by the CLP. It is submitted that no leniency programme can be effective unless the granting of immunity is conditional upon compliance with the co-operation requirements of the programme and final immunity is the delayed award for such co-operation. The provision in the CLP for revocation of conditional immunity also ensures the efficiency of the leniency process as the leniency applicant is obliged to comply with the leniency requirements as long as the threat of revocation remains. Revocation is also a powerful mechanism for punishing non-compliant leniency applicants.

The CLP also makes it abundantly clear that leniency applicants confess to cartel participation at their own peril. A firm seeking to self report would obviously first consult the CLP document and the said document states in no uncertain terms that applicants who wish to self report on cartel participation cannot be eligible for immunity under the CLP for a variety

of reasons, namely, either because it is not first to the door, or because the Commission already has sufficient information in its possession to prosecute the cartel or because, even though the applicant was first to the door, it failed to meet the requirements set by the CLP for immunity. In the latter regard it is, as stated above, clear that even if the leniency applicant was first to the door and obtained conditional immunity, such immunity is conditional upon its continued co-operation and can be revoked.

The CLP further provides certainty as to the unsuccessful outcome of a leniency application: both where the leniency application is not successful, for instance because the applicant was not first to the door as well as where conditional immunity was granted and revoked, the effect is the same: the Commission will be entitled to prosecute the applicant in respect of the cartel participation.

The CLP is applicable when the Commission is unaware of the cartel and also when it is aware of the cartel, but does not have sufficient evidence to prosecute. This is in line with the ‘good practices relating to leniency policies’ provided by the International Competition Network (hereinafter referred to as the ‘ICN’) and provides the advantage that it assists the competition authorities to detect and prosecute cartels which it did not know to exist or otherwise to prosecute cartels of whose existence it was aware but lacked the necessary evidence and information to justify a prosecution.⁶⁶⁹

In line with the ICN Good Practices Guidelines, the CLP requires that complete and truthful disclosure of evidence be furnished by the applicants in order to obtain full immunity. This requirement ensures that a firm cannot give lacklustre evidence and expect full immunity in return. Clearly the quality and completeness of the evidence and information will materially influence the ability of the competition authorities to secure a successful prosecution of the cartel. Furthermore, the Commission protects the confidential information and identity of the applicant, unless the applicant consents to waiving this confidentiality. This encourages firms to come forward without the fear of such information being disclosed to other participants in the cartel. It also decreases the possibility that other cartel participants may destroy information that is material to the Commission’s cartel investigation.

⁶⁶⁹ ICN *Drafting and Implementing an Effective Leniency Policy* Anti-Cartel Enforcement Manual (2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf> accessed on 2 February 2014.

The introduction of a marker procedure is consistent with international best practice and optimises the efficiency of the CLP process by encouraging early disclosure of cartel conduct and by providing a means for potential applicants to approach the Commission as soon as it suspects that it may be involved in cartel conduct.⁶⁷⁰ As indicated, since the marker procedure was introduced, applicants have been taking significant advantage of the procedure.⁶⁷¹ In fact, most CLP applications made since adoption of the marker procedure have been preceded by a marker application.⁶⁷² This has also enabled the Commission to detect cartels at an earlier stage.

The CLP also makes provision for an oral statements procedure. This process is intended to encourage firms participating in cartels of international dimension to submit applications under the CLP whilst addressing concerns regarding risks of discovery in other jurisdictions. This procedure is in line with the ICN best practices and can be found in most leniency programmes in foreign jurisdictions. It is further submitted that should the cartel offence introduced by the 2009 Competition Amendment Act eventually be put into effect the oral statements procedure will most probably be used by applicants in an attempt to minimise their risk of criminal prosecution.

The CLP provides that the Enforcement and Exemptions Division of the Commission is the responsible division for receiving and dealing with applications made under the CLP.⁶⁷³ This ensures that applications are sent to a single point of contact, thus facilitating the task of receiving and dealing with applications.

Under the CLP, all cartel members are eligible for immunity, including instigators and leaders of a cartel as long as they are first to the door. This enables any member of a cartel to self-report and therefore creates greater instability and distrust among cartel members, resulting in the detection of cartels which would otherwise have gone unnoticed. It is submitted that should a leniency policy require that a leniency applicant not be a cartel ringleader, it may be difficult for an applicant to prove that it was not the instigator, if the leading roles of the cartel participants have changed over time and it is unclear who the instigator is. It is also sub-

⁶⁷⁰ The applicant is not expected at the stage of the marker to be in a position to admit that its conduct contravenes the Act.

⁶⁷¹ Lavoie (n 101) 151.

⁶⁷² *Ibid.*

⁶⁷³ Par 17.1 of the 2008 CLP document.

mitted that strategically extending the opportunity to ringleaders of cartels may have considerable merit as the cartel may otherwise go undetected because smaller cartel participants may be wary to report on the cartel due to ill consequences and exclusion from profit that they fear the ringleader may be able to visit upon them. Thus, the liberal approach taken by the CLP in allowing even ringleaders of cartels to access the programme and not having a requirement that a leniency applicant should not have coerced other firms to participate in the cartel widens the accessibility of the leniency programme and thus enhances the possibilities of detection of cartels.

The CLP, although it does not expressly provide for partial immunity bands, provides that should an applicant fail to meet the requirements for immunity, the applicant may enter into a settlement agreement or agree to a consent order with the Competition Commission. Furthermore, the Commission may ask the Tribunal to impose a lenient sanction on an applicant that has cooperated but has failed to obtain immunity. This settlement procedure is in line with international best practice and is an increasingly effective tool in detecting and prosecuting cartel conduct. As indicated, the majority of leniency applicants and other cartel participants have entered into such settlement agreements. It is submitted that the added incentive created by the possibility of obtaining a reduced fine as a result of co-operation in a cartel investigation subsequent to an unsuccessful leniency application yields the advantage that an unsuccessful leniency applicant who knows that it is likely to be prosecuted may give valuable cooperation to the Commission and thus increase the efficiency with which the cartel is prosecuted and destructed.

1.2.2 The Shortfalls of the CLP

The CLP lacks an express statutory basis. The Competition Act makes no specific provision for the CLP, save to refer to the Commission's responsibilities and to its general power to adopt guidelines.⁶⁷⁴ Although the 2009 Competition Amendment Act amends the Competition Act in order to strengthen the effective enforcement of the Act, by making provision for the CLP and thus effectively codifying it, and by authorising the Commission to grant immunity to firms 'deserving of leniency', the provisions of the Amendment Act dealing with the afore-

⁶⁷⁴ Lavoie (n 101) 150.

said changes have not yet been put into effect thus giving rise to challenges to the validity of the CLP.⁶⁷⁵

It should also be noted that the CLP's oral statements procedure is not as far reaching as the procedure put in place in other jurisdictions which accept paperless applications⁶⁷⁶ or an entirely paperless leniency process. However, it is submitted that this may change over time as experience with implementing this procedure grows.

As indicated, the CLP does not offer leniency or even a clear reduction in penalties, such as those prevalent in the EU leniency system, to the second or third applicant. There is thus no guarantee that an unsuccessful leniency applicant who cooperates in the prosecution of a specific cartel will receive a fine reduction, and also no certainty regarding the percentage of such reduction. It is possible that these applicants may have valuable evidence which would strengthen the Commission's case, but they will not want to disclose it if they are not going to receive any form of leniency or if the 'reward' for their co-operation is negligible. Although the CLP indicates that other cartel members who have self reported but were not first to the door may receive lenient treatment outside the confines of the CLP if they cooperate, it is submitted that the effectiveness of the CLP is hamstrung by the lack of clear indicators of fine reductions to subsequent parties who self-report on their cartel participation.

Furthermore, the CLP does not offer a Leniency/Amnesty-Plus programme, thus an applicant that does not qualify for immunity in respect of an initial matter under investigation, but discloses a second cartel and meets the requirements, does not receive leniency for the second offence and lenient treatment with respect to the first offence. The incorporation of a Leniency Plus-feature in immunity programmes is in line with recent trends in international practice and the lack thereof will certainly discourage firms from blowing the whistle in respect of a 'second' cartel. It should be borne in mind that the introduction of a Leniency/Amnesty Plus-regime may assist the competition authorities in 'killing two birds with one stone' and will yield significant advantages as it will save valuable time and resources.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ As per the discussion in Chapter 4 this is the case in the EU.

It also seems that the Commission may require what has been termed in the European jurisdictions as ‘decisive evidence’ from the applicant before it qualifies for total immunity.⁶⁷⁷

An applicant may not want to come forward if it is uncertain as to the standard of evidence in its possession.

Insofar as its grammatical text and lay-out is concerned, the CLP contains many irrelevant provisions and many provisions and words are repetitive in meaning. This makes the leniency document cumbersome and may give rise to ambiguity and uncertainty.

1.3 Australia

As discussed in chapter 4, the distinctive features of the Australian Immunity Policy and cartel enforcement are briefly as follows:

Cartel activity in Australia is sanctioned by civil and criminal penalties with the legal framework being the 2010 Competition and Consumer Act. Corporations and individuals are entitled to apply for immunity in terms of the Immunity Policy, excluding the ringleader of the cartel. Conditional and thereafter total immunity is granted by the ACCC if the ACCC has not received legal advice that it has sufficient evidence to proceed with the case. If the cartel conduct amounts to serious cartel conduct, the ACCC will refer the matter to the DPP who will make an independent decision with regard to immunity from criminal prosecution. The Immunity Policy provides for a marker system as well as an oral application process. Although the Immunity Policy upholds confidentiality of information submitted, it may be used in civil or criminal proceedings. Should an applicant fail to meet the conditions for immunity, the ACCC may recommend to the court or DPP a reduced fine or sentence. Greater leniency is offered to those who cooperate in terms of its Cooperation Policy. The Immunity Policy Guidelines make provision for an Amnesty/Leniency-Plus programme. Thus an applicant, who does not qualify for immunity in respect of one cartel, may receive immunity in respect of a ‘second’ cartel and a lenient sanction in respect of the first.

1.3.1 The Advantages of the Australian Immunity Policy

⁶⁷⁷ Moodaliyar (n 17) 175. This is a difficult concept that other jurisdictions have grappled with and ultimately removed from their policies.

Conditional and thereafter total immunity is granted by the ACCC if the ACCC has not received legal advice that it has sufficient evidence to proceed with the case. This is in line with the 'good practices relating to leniency policies' provided by the ICN.⁶⁷⁸

The ACCC will receive information in support of an application for immunity on the basis that it will not use the information as evidence in proceedings against the applicant in respect of the relevant cartel. Where the applicant is a corporation, the ACCC will also receive the information on the basis that it will not use the information against entities or employees for the period of which they have the benefit of derivative immunity. This is in line with the disclosure and confidentiality requirements of the ICN Good Practices Guidelines.

The oral statements and marker procedure are in line with the standards of the ICN. As indicated, they have proven to be effective since the adoption of the policy.

The ACCC's Immunity Policy includes an Amnesty-Plus regime for cartelists who are not eligible for immunity in a cartel already being investigated by the ACCC but who provide the ACCC with evidence of a second cartel, of which the ACCC was not previously aware. If they satisfy the ACCC's amnesty plus policy, they gain immunity from prosecution for both cartels. This is a tool which is found in many other jurisdictions and is in line with the ICN Good Practices Guidelines.

Australia has a parallel regime of civil prohibitions and criminal offences for cartel conduct. The responsibility for enforcement of Australia's cartel regime is divided between two agencies: assigning investigation, instigation of civil proceedings and referral for prosecution to the ACCC, and prosecution, including both the decision to prosecute and the carriage of the prosecution, to the Director of Public Prosecutions. This 'dual' model is practically facilitated by cooperation agreements between the ACCC and CDPP.

If an individual or corporation cooperates with the ACCC investigation into a cartel despite being ineligible for immunity, because another individual or corporation has been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a re-

⁶⁷⁸ ICN *Drafting and Implementing an Effective Leniency Policy* Anti-Cartel Enforcement Manual (2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf> accessed on 2 February 2014.

duced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters. This is in line with the ICN Good Practices Guidelines.

1.3.2 Disadvantages of the Australian Immunity Policy

The Australian Immunity Policy does not offer leniency or even a clear reduction in penalties to the second or third applicant. It is possible that these applicants may have valuable evidence which would strengthen the ACCC's case, but they will not want to disclose it if they are not going to receive any form of leniency.

Immunity may not be granted if the applicant was the clear leader of the cartel. This does not enable any member of a cartel to self-report and therefore does not create greater instability and distrust among cartel members. It is submitted that allowing the ringleader of a cartel to apply for leniency would be a most suitable strategy for creating distrust and destabilizing the cartel. In addition, it may be difficult for an applicant to prove that it was not the instigator, if the leading roles of the cartel participants have changed over time and it is unclear who the instigator is.

The Immunity Policy lacks clarity and certainty in certain respects. Firstly, it is submitted that the factors taken into account by the ACCC for cooperation discounts, including the 'value added' concept are very vague. Secondly, the process for the withdrawal of immunity is unclear. Corporations or individuals will not want to come forward if the entire process is not clear and transparent.

1.4 The European Union

As discussed in chapter 4, the distinctive features of EU cartel enforcement and the European Leniency Notice (including the ECN Model Leniency Programme which is basically similar to the 2006 Leniency Notice) are briefly as follows:

At EU-level, cartel activity is currently sanctioned by civil penalties only with the legal framework being the Treaty on the Functioning of the European Union (TFEU) although there are certain member states that have criminalised cartel activity in their national legislation. Undertakings are entitled to apply for immunity in terms of the 2006 Leniency No-

tice, except those who coerced others to join the cartel. The Commission will grant immunity from any fine that otherwise would be imposed on an undertaking that discloses to the Commission its participation in a cartel affecting the EU, provided the undertaking is the first to submit information and evidence which, in the Commission's view, will allow the Commission to either carry out a targeted inspection in connection with the alleged cartel or find an infringement of Article 101 TFEU in connection with the alleged cartel. Certain conditions for leniency have to be met, *inter alia* full and continuous co-operation with the competition authorities. The Leniency Notice provides for a marker system as well as an oral application process.

The Leniency Notice upholds confidentiality of information submitted only as long as the applicant does not communicate it to third parties. Apart from immunity to a firm that is first to the door and complies with the conditions for immunity, provision is also made for lenient treatment of certain other cartel offenders who may qualify for certain fine reductions: An undertaking that does not qualify for immunity may benefit from a reduction in the fine that would otherwise be imposed if it provides the Commission with evidence of the alleged infringement that represents significant 'added value'⁶⁷⁹ with respect to the evidence already in the Commission's possession. A settlement procedure is available to complement the Leniency Notice and the Fining Guidelines.

1.4.1 Advantages of the EU Leniency System

As indicated, the Commission will grant immunity from any fine that otherwise would be imposed on an undertaking that discloses to the Commission its participation in a cartel affecting the EU, provided that the undertaking is the first to submit information and evidence which, in the Commission's view, will allow the Commission to either carry out a targeted inspection in connection with the alleged cartel or find an infringement of Article 101 TFEU in connection with the alleged cartel.

The Leniency Notice upholds confidentiality of information submitted only as long as the applicant does not communicate it to third parties. During the course of the investigative procedure up until the issue of the statement of objections, the Commission will keep the

⁶⁷⁹ Evidence is considered to be of significant added value if it enhances the Commission's ability to prove the cartel.

identity of leniency applicants confidential. This provision for confidentiality is also compliant with the ICN Good Practices Guidelines.

An undertaking that does not qualify for immunity, may benefit from a reduction in the fine (in accordance with certain fine reduction bands) that would otherwise be imposed if it provides the Commission with evidence of the alleged infringement that represents significant 'added value' with respect to the evidence already in the Commission's possession. This gives an undertaking the confidence to come forward knowing that should they not be the first to the door, they can still receive a reduction in fine. It thus enhances the certainty component of the leniency system and has the benefit that it can incentivise undertakings to divulge valuable information and evidence to the Commission which aids in the detection and prosecution of cartels.

The oral statements and marker procedure are in line with good practices identified by the ICN and have proven to contribute to the efficiency of the EU leniency system.

A settlement procedure is available to compliment the Leniency Notice and the Fining Guidelines. This settlement procedure is an increasingly effective tool in detecting and prosecuting cartel conduct.

1.4.2 Disadvantages of the EU Leniency Notice

Carmeliet remarks that one of the main problems with the current leniency programme in the EU is the fact that applicants argue that the outcome of the process is not sufficiently predictable.⁶⁸⁰

An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor. This, however, does not enable any member of a cartel to self-report and therefore does not create greater instability and distrust among cartel members. In addition, it may be difficult for an applicant to prove that it did not coerce other undertakings to join the cartel as other cartel members who do not wish the said undertaking to obtain immunity might be incentivised to allege that the said undertaking did indeed coerce them to participate in the cartel. According to

⁶⁸⁰ Carmeliet (n 6) 469.

Carmeliet there is a very real risk that undertakings that are queuing to confess will declare to the European Commission that the first applicant instigated the other participants, thereby preventing the first applicant from obtaining immunity.⁶⁸¹

The Leniency Notice provides that an undertaking, which is ineligible for full immunity, may be eligible for a reduction of a fine if the undertaking provides evidence that represents significant 'added value'. Griffin and Sullivan point out that while it is understandable that the Commission would not want to offer fine reductions for little or no evidence, this evidentiary standard can act as a barrier to leniency applicants coming forward.⁶⁸² What exactly is meant by 'significant added value' is not all that clear. Carmeliet indicates that this 'fall back option' encourages and fuels a race between undertakings since any chances for the next applicant to add significant value considerably diminish with every submission.⁶⁸³ She points out that the challenge is, however, that the European Commission does not determine whether the evidence constitutes any significant added value until it issues its final prohibition decision. On top of these considerations, she posits that another problematic issue is that a party who applied for leniency at a later stage than the first applicant can possibly leapfrog ahead of the first applicant by providing information that contains more significant and essential added value.⁶⁸⁴ It is submitted that the process by which it is determined that such value has been provided should include upfront certainty of outcome to the applicant. Without this certainty, an undertaking which provides as much evidence as possible and cooperates fully with the Commission could find itself in a worse position than if it had not approached the regulator for leniency.

The Commission makes it clear in the Leniency Notice that corporate statements, including oral corporate statements, made by a leniency applicant may be used by the Commission as evidence. The significant downside of this is that a third-party litigant could use the detailed information that has been provided by the leniency applicant, which is contained in the Commission's decision, against the leniency applicant. In light of this risk, it is submitted that

⁶⁸¹ *Ibid.*

⁶⁸² Griffin & Sullivan 'Recent Developments in Leniency Policy and Practices in Canada, the European Union and the US' paper presented at the American Bar Association Advanced International Cartel Workshop in San Francisco, 30 January - 1 February 2008 available at aei.pitt.edu/14570/1/Modernisation_Final_e-version.pdf accessed on 29 September 2014.

⁶⁸³ Carmeliet (n 6) 470. See also Verma & Billiet 'Why would cartel participants still refuse to blow the whistle under the current EC leniency policy?' *Global Antitrust Law Review* (2009) 1.

⁶⁸⁴ *Ibid.*

many undertakings considering seeking leniency will be deterred from approaching the Commission.

Griffin and Sullivan further caution that under the 2006 Leniency Notice, the approach by the Commission to notify an undertaking in writing that leniency will not be available to it adds the additional risk of civil liability and may well deter leniency applicants who are in any way not sure that they will obtain leniency.⁶⁸⁵

Griffin and Sullivan also regard the EU marker system as ‘unusable’ by applicants as they are of opinion that it is discretionary and that the detailed evidence requirements in relation to a marker application are unprecedented anywhere in the world where a marker system is employed.⁶⁸⁶ As a consequence they caution that leniency applicants are likely to be doubly deterred from applying for a marker by its discretionary nature and by the evidence requirements.⁶⁸⁷

2. ICN Best Practices

The following table illustrates the ICN’s best practices for leniency policies and encapsulates whether the Australian, EU and South African jurisdictions reasonably comply with such practices:

ICN best practice for leniency policies	Australia	European Union	South Africa
To make leniency available both where the agency is unaware of the cartel and where the agency is aware of the cartel but the agency does not have sufficient evidence to pro-	Yes.	Yes.	Yes.

⁶⁸⁵ Griffin & Sullivan (n 682) 20.

⁶⁸⁶ Griffin & Sullivan (n 682) 21.

⁶⁸⁷ *Ibid.*

ceed to adjudicate or prosecute.			
To use markers in the leniency application process because time is of the essence in making a leniency application. It is also good practice to grant extensions to marker periods where an applicant is making a good faith effort to complete its application in a timely manner.	Yes.	Yes.	Yes.
For the requirements for leniency to include full and frank disclosure and ongoing cooperation by the applicant, and if applicable, the applicant's directors, officers and employees.	Yes.	Yes.	Yes.
It is good practice to provide for lenient treatment (less than full leniency) for second and subsequent cooperating cartel members.	Yes, however, only on recommendation. Amnesty-plus system in place.	Yes, reduction bands.	Yes, however, only on recommendation or settlement agreements/ consent orders.
To ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel.	Yes.	Yes.	Yes.

<p>To keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver the agency is required by law to disclose the information, or the leniency applicant discloses its application.</p>	<p>Yes, however, may be used in civil/criminal proceedings.</p>	<p>Yes, however, only as long as the applicant does not communicate it to third parties.</p>	<p>Yes.</p>
<p>To have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for officials involved in the implementation of the leniency programme.</p>	<p>Yes.</p>	<p>Yes, however, could provide more certainty.</p>	<p>Yes, however, could provide more certainty.</p>
<p>To ensure that certainty for applicants is maintained where investigation involving leniency applicants are closed.</p>	<p>No.</p>	<p>No.</p>	<p>No.</p>
<p>In a bifurcated system, where different authorities are responsible for the investigation and prosecution of cartels, respectively, for authorities to</p>	<p>Yes.</p>	<p>N/A.</p>	<p>N/A.</p>

have consistent leniency policies, shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity and open and constant communication.			
In a parallel system it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential applicants.	Yes.	N/A.	N/A.
For competition authorities to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so what conditions, if any, have been imposed. This may assist coordination between agencies.	No.	No.	No.
To encourage leniency applications through education and awareness campaigns.	Yes.	Partly.	Partly.

3. Recommendations

The CLP's track record to date has been impressive. Since its adoption, it has proved to be a formidable tool for cartel detection and enforcement. The CLP is a cornerstone of the South African cartel enforcement process and its existence is now widely known in all sectors of

the economy as an accessible tool available to all cartel members, even ringleaders. Although the CLP appears to be well-aligned with the leniency programmes in leading competition jurisdictions such as Australia and the EU, many challenges still face the CLP and room for improvement is evident.

3.1 Recommendations regarding reform of the CLP

As indicated above the CLP, although it has evolved in terms of its alignment with international best practices, still has some 'disadvantages' compared to the leniency programmes in Australia and the EU. It is therefore submitted that the efficiency of the CLP can be strengthened by introducing the following reforms to the Policy which will enhance its standard of certainty and improve its accessibility:

- a) The introduction of specific fine reduction bands available to self-confessing cartelists that are not first to the door but who can provide evidence that will add significant value (as per the Commission's discretion) in a cartel investigation. In this regard it is proposed that the fine reductions should mirror the fine reduction bands in the EU as discussed in Chapter 4, namely:
 - (i) A reduction of 30% to 50% for the first undertaking that provides evidence of significant added value.
 - (ii) A reduction of 20% to 30% for the second undertaking that provides evidence of significant added value.
 - (iii) A reduction of up to 20% for subsequent undertakings that provide evidence of significant added value.
- b) The introduction of the following specific requirements that the statements made by leniency applicants will have to meet, namely (as per the 2006 EU Leniency Notice): a detailed description of the alleged cartel arrangement; name and address of the applicant and all other alleged cartel participants; name, position, office location (including where necessary, home address) of all individuals known to have participated in the cartel) and an indication of other competition authorities that will be contacted about the cartel. As regards the information in respect of the cartel, the statement must include a detailed description of the alleged cartel arrangement, including

for instance its aims, activities and functioning; the product or services concerned, the geographic scope, the duration and the estimated market volumes affected by the cartel, the specific dates, locations, content of and participants in alleged cartel contracts and all relevant explanations in connection with the evidence provided in support of the application.

- c) That the following specific requirements be introduced for information that should be supplied when applying for a marker: the name and address of the applicant, the names and addresses of the alleged parties to the cartel and the affected products and territories.⁶⁸⁸
- d) That a general deadline be imposed by which applicants for marker applications must submit the necessary information and evidence, namely 30, days from the date on which a marker was first applied for. Should the information not be supplied timeously the marker applicant will forfeit its marker.
- e) The introduction of an Amnesty/Leniency Plus regime to provide for leniency in respect of related cartels.
- f) The grammatical aspects of the CLP document should be revisited in order to ensure that it employs plain language and is free from duplications, ambiguities and irrelevant information.
- g) Renaming of the CLP: as the leniency policy applies to firms and thus extend to individuals and corporate entities its title should be aligned with its wide scope. It is therefore suggested that it be renamed the 'South African Competition Commission's Leniency Policy'.

As indicated, the Competition Act makes no specific provision for the CLP, save to refer to the Commission's responsibilities and to its general power to adopt guidelines. It is recommended that the provisions of the Competition Amendment Act which codifies the CLP be put into effect.

3.2 Recommendations regarding the CLP and the cartel offence

Carmeliet remarks that a significant pitfall of leniency programmes appear to be the lack of deterrence occasioned by the use of such a programme, hence the global move towards

⁶⁸⁸ These requirements are less onerous than those in the EU but will nevertheless provide clarity as to what level of basic information is expected at the marker stage.

criminalisation of certain aspects of cartel participation.⁶⁸⁹ As discussed above, the current penalty under the South African Competition Act for participating in a cartel is up to 10 percent of the firm's annual turnover. This in itself may not be a sufficient deterrent for cartel members to stop their activities because they may consider that it is more profitable to operate the cartel and view the administrative penalties they may incur as mere 'running costs' which they will eventually filter through to consumers in the form of increased prices for their products. Many competition authorities have already imposed criminal sanctions for cartels. As discussed in chapter 3, the new section 73A of the Competition Act as introduced by the 2009 Competition Amendment Act, provides for such criminalisation. However, this section has not yet come into operation. Should it come into operation, the implementation of a *sui generis* cartel offence will come into force and with it the criminal enforcement related to such offence, which at this stage, given the current text of section 73A and the uncertainties surrounding how the practical implementation of the section will force, appears to be rife with problems. It is submitted that section 73A in its current format has the potential to seriously erode the efficiency of the CLP. Should the cartel offence as envisaged by section 73A therefore come into force, it is recommended that, besides refining and amending the said section to address the apparent constitutional concerns raised by Kelly, a system similar to the Australian dual cartel enforcement system be implemented. This will require the National Prosecuting Authority to work together with the Competition Commission. The Commission should always be first to investigate the alleged cartel and should the Commission then establish contravention of the cartel prohibitions set out in section 4(1)(b) of the Competition Act, the matter will be handed over to the National Prosecuting Authority, after which the Commission will make a recommendation as to immunity from criminal prosecution. The Commission will grant immunity from civil proceedings and the National Prosecuting Authority from criminal proceedings. It is submitted that the decisions of these two authorities regarding civil and criminal immunity respectively, should be made known to the applicant at the same time, as is the case in the Australian Regime.

The downside to criminalising certain cartel-related activity is unfortunately that other government departments such as the Department of Justice would have to play a significant role in prosecuting cartels. This may lead to time delays in liaising between the different au-

⁶⁸⁹ Carmeliet (n 6) 466.

thorities, and also especially if the case is placed on court rolls that are notorious for heavy backlogs.⁶⁹⁰ Furthermore, as mentioned in Chapter 3, the National Prosecuting Authority has no experience to date in dealing with competition, and specifically cartel matters. The Competition Commission has significantly more experience and expertise in handling such matters, and many disagreements may arise between the two authorities. Implementing such a system efficiently in a third world country will be lot more difficult than in a first world country where the criminal courts are not so overburdened.

Agreements and a memorandum of understanding will therefore have to be reached between the two authorities as it will otherwise be impossible to facilitate effective cooperation between these entities. It is thus submitted that prior to the implementation of the cartel offence as envisaged by section 73A the Competition Authorities and the National Prosecuting Authority enter into a Memorandum of Understanding regarding the nature and extent of their future cooperation. In order to create more certainty for leniency applicants a user-friendly guide document ought to be made available to the public so that they can acquaint themselves with the advantages and risks involved in self-reporting regarding cartels under this new bifurcated enforcement regime and how the dual enforcement process will function. It is submitted that the English Criminal Cartel Enforcement Model, where the Office of Fair Trading is solely tasked with civil and criminal enforcement against cartels, although apparently effective, does not provide a more suitable solution for the South African situation: the practical reality in South Africa is that should section 73A come into force it will be dealt with by two separate institutions with separate jurisdictions and, however attractive the idea of having one enforcement authority for civil and criminal enforcement of competition law may appear, it is submitted that a wholesale transplant of a system such as that in force in the UK will not readily be entertained by the South African legislature who will respect the exclusive criminal jurisdiction of the National Prosecuting Authority.

Should the envisaged section 73A not come into effect (which is unlikely as the international trend appears to be towards criminalisation of different aspects of cartel activity or cartel-related activity and South Africa may find itself in a precarious and prejudicial position if car-

⁶⁹⁰ Our criminal justice system is already overburdened with too many matters. Another method of implementing the criminalisation of cartels is that the cartels should be prosecuted in a specialised competition-law or commercial-crimes court. This, however, will also have its problems and disadvantages.

tel conduct is criminalised everywhere else but here) it is recommended that individuals should be liable to pay fines, based on their involvement in the cartel. Individuals who know that they could be personally liable for fines worth millions of rand would be more hesitant to engage in cartel activities, or, if they are already engaged in such activities, they might reconsider their involvement and rather self report under the CLP. Fines imposed should be stringent enough to convey an effective deterring message to other cartels. The risk of a heavy fine should outweigh cartel members' benefit from their involvement in the cartel. Thus, absent a cartel offence, fines imposed upon individuals may cause more cartelists to opt to apply for leniency under the CLP.

4. Conclusion

As is the case in many other jurisdictions, the CLP has changed the face of cartel enforcement in South Africa. Its usefulness is beyond question. The essence of a leniency programme is, however, that it is a 'living instrument' meaning that it should remain dynamic and relevant within the context of cartel enforcement and that it should therefore develop and grow with the ever-increasing demands of the competition jurisdiction that it serves as well as with global demands. The CLP must therefore be kept continuously under review and be amended where necessary to ensure that it remains an effective tool for cartel enforcement in the light of the changing legal, regulatory or economic environment. This requires the Commission to continuously engage with applicants and to strive to achieve transparency, predictability and consistency in its approach whilst maintaining sufficient flexibility in the process. It is a dynamic tool that should be honed to perfection in order to maximise its efficiency in the war against cartels.

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