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THE SOUTH AFRICAN CORPORATE LENIENCY POLICY AS A LEGAL INSTRUMENT IN THE FIGHT AGAINST ANTI-COMPETITIVE BEHAVIOUR

by

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DECLARATION

I declare that this dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SUMMARY

Cartels are regarded as the most egregious of all competition law contraventions because of the harm they inflict on consumer welfare. To add insult to injury cartel enforcement is notoriously difficult because of the secretive nature of cartels. The traditional investigative tools provided by competition law has proved to be inadequate in exposing and prosecuting cartels because these measures can only be applied effectively once a cartel is detected. Thus competition law enforcement agencies have devised an innovative tool to aid in the war against cartels. This tool is the concept of a leniency policy which incentives cartel members to self-report in an attempt to obtain immunity from competition law prosecution.

South Africa has not lagged behind in the war against cartels and has soon after the introduction of the Competition Act decided to adopt the Corporate Leniency Policy. Since its inception the CLP has been increasingly effective in assisting the Commission to detect and break up cartels. However 2016 has eventually seen the introduction of the notorious “cartel offence” (also featured in various established competition jurisdictions) which holds directors and managers criminally liable for causing firms to participate in a cartel or knowingly acquiescing in such conduct. The introduction of this offence poses various problems which have the potential to significantly erode the efficiency of the CLP.

This dissertation therefore attempts to highlight the salient features of the CLP and how it incentivizes self-reporting by cartel members and also how it facilitates the leniency process in the interest of competition and consumer welfare. It subsequently considers the cartel offence and problems occasioned by the introduction of such offence and its interaction with the CLP. In the final instances some conclusions are drawn and recommendations are made regarding the best way forward.

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CHAPTER 1 BACKGROUND TO STUDY

1.1 Introduction

Free markets do not always produce the best outcomes for consumers in terms of socially efficient quantities of goods at socially efficient prices hence government intervention through competition policy and competition law is necessary to create a more level playing field ensuring equal opportunities for all business, stimulating economic efficiency and protecting consumers.[1] This statutory intervention that is designed to promote consumer welfare is especially necessary in those industries that have over many years fallen into a pattern where firms engage in certain restrictive practices aimed at increasing their profit margins but which activities come at the cost of significant harm to consumer welfare. Restrictive horizontal practices occur where competitors co-operate rather than compete.[2] One such area of horizontal restrictive practices that has been identified in many jurisdictions as a major threat to consumer welfare is the forming of cartels that engage in various anti-competitive practices such as price fixing, market allocation and collusive tendering.[3]

A common feature of competition legislation across the globe is that it consistently contains provisions aimed at combatting cartels and their harmful effect on the

[1] Neuhoff *et al A Practical Guide to the South African Competition Act* (2006) 11 (hereinafter Neuhoff).

[2] Sutherland and Kemp Competition Law of South Africa (Service Issue 20) 5-3 (hereinafter Sutherland and Kemp).

[3] Sutherland and Kemp at 5-3 comment that horizontal restrictive practices (that is practices between competitors in a relevant market) enable a number of competitive firms to act like a monopolist. They indicate that the economic and social cost of prohibited horizontal restrictive practices will be the same as that of a single firm monopoly, although the magnitude of loss caused may differ depending on the basis for the exercise of market power.

markets and on consumers as end-users in those markets.[4] South Africa has also stepped up its efforts to protect consumers against the ill-effects of cartel practices and has made significant strides in the war against cartels since the enactment of the Competition Act 89 of 1998.

The statutory framework for the regulation of competition in South Africa is set out in the Competition Act 89 of 1998 ("the Act") which came into operation on 1 September 1999. This Act regulates restrictive horizontal practices, restrictive vertical practices, abuse of dominance and mergers and acquisitions.[5] Its purpose is to promote and maintain competition in South Africa in order to:

- Promote the efficiency, adaptability and development of the economy;
- Provide consumers with competitive prices and product choices;
- Promote employment and advance the social and economic welfare of South Africans;
- Expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- Ensure that small and medium size enterprises have an equitable opportunity to participate in the economy; and
- Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

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[4] Sutherland and Kemp 5-3 to 5-4 refer to price cartels which lie at the heart of section 1 of the US Sherman Act and state that even Chicago scholars, who are critical of many aspects of competition law, believe that these practices should be regulated.

[5] Restrictive Horizontal Practices are regulated by Section 4 of the Act. Restrictive Vertical Practices are regulated by Section 5 of the Act and the Abuse of Dominance provisions are regulated by Section 8 of the Act. Mergers and Acquisitions are dealt with in Chapter 3 of the Act, in sections 11-18.

The Competition Act establishes a three-tiered enforcement system comprising of the Competition Commission, the Competition Tribunal and the Competition Appeal Court.[6] The Competition Commission as primary enforcer of the Competition Act is *inter alia* tasked with investigating the various restrictive practices regulated by the Act.[7] In this context the fight against cartels, branded as being the most egregious of competition contraventions, takes precedence.

A “cartel” can be defined as "an association by agreement between competing firms to engage in price fixing, division or allocation of markets, and/or allocation of collusive tendering"[8]. The operation of a cartel is generally very secretive, collusive and deceptive and it is exactly these features of cartel conduct that cause cartels to pose great enforcement challenges as it usually very difficult for competition authorities to uncover and prosecute cartels. In *Agriwire (Pty) Ltd v The Competition Commission*[9] the court pointed out that "cartel conduct, where ostensible competitors collude to set prices, or terms of trade, or divide market, fix tenders or engage in similar conduct, is one of the most difficult types of anti-competitive behaviour to identify, prove and bring to an end. This is because a successful cartel is conducted secretly and its continued success depends on its members not breaking ranks to disclose their unlawful behaviour to the competition authorities. In a number of jurisdictions, the response of the competition authorities has been to introduce policies that offer either complete or partial leniency to cartel participants, who break ranks and disclose the existence and nature of the cartel, and provide evidence that enables the authorities to pursue and break the cartel, by bringing it before the appropriate tribunal."

1.2 Specific provisions in the Competition Act 1998 relating to cartels

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[6] Chapter 4 of the Act, in parts A, B and C, sections 18-43.

[7] Section 21 of the Competition Act.

[8] Neuhoff 367.

[9] *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* [2011] ZAGPPHC 117 (5 July 2011).

The Competition Act prohibits cartels outright by means of section 4(1) that prohibits certain conduct "between parties in a horizontal relationship"[10] and provides as follows:

"An agreement[11] between, or concerted practice[12] by, firms[13], or a decision by an association of firms[14], is prohibited if it is between parties in a horizontal relationship and if –

[10] As amended by the Competition Second Amendment Act 39 of 2000.

[11] "Agreement" as per s1 of the Competition Act, when used in relation to a prohibited practice," includes a contract, arrangement or understanding, whether or not legally enforceable." See *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May 10 (15/02/2011) par 25 where the Competition Appeal Court defined an agreement as :"actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus." See also *Reinforcing Mesh Solutions (Pty) Ltd v Competition Commission* 119/CAC/May 2013 (15/11/2013) par 18.For a detailed discussion of the concept "agreement" see Sutherland and Kemp 5-16 to 5-24.

[12] S1 of the Competition Act provides that "concerted practice" means "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others. Sutherland and Kemp at 5-35 indicate that in the case of so-called "complex cartels" it is difficult to distinguish agreements from concerted practices as the collusive behaviour will contain elements of both.

[13] In terms of s1 of the Competition Act "firm" includes "a person, partnership or a trust."

[14] Sutherland and Kemp 5-24 state that firms often come together in associations that protect their mutual interests and that members of these associations of firms frequently submit to the authority of the associations and often are, or regard themselves as 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 forms themselves.

4(1)(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 pro-competitive gain resulting from it outweighs that effect;

4(1)(b) if it involves any of the following restrictive horizontal practices:

(i) Directly or indirectly fixing a purchase or selling price or any other trading condition;
(ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
(iii) Collusive tendering.

From the above it is clear that the cartel prohibition in section 4(1)(b), which is the focus of this dissertation, applies only to parties who are in a horizontal relationship, i.e. who are competitors. [15] Before section 4 can apply it will have to be shown that at least one of the forms of co-operation mentioned in the section, namely an agreement, concerted practice or decision, exists.[16] Sutherland and Kemp remark that it is often difficult to interpret the concepts of “agreement”, “concerted practice “ and “decision” but state that it is important to see the wood for the trees: in all three situations the aim is to distinguish independent conduct, or conduct of firms that is unilateral in their self-interest, from concerted or collusive conduct.[17]The essence of the prohibition against cartels can thus be said to lie against collusive conduct that has a detrimental effect on competition in the specific relevant market where the cartel is perpetrated.

As can be seen section 4(1)(b) prohibits three types of conduct, namely price fixing, market allocation and collusive conduct. Price fixing entails collusion between

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[15] S1 of the Competition Act defines a “horizontal relationship" as a “relationship between competitors”.

[16] Sutherland and Kemp 5-11.

[17] See Sutherland and Kemp 5-11 to 5-16 for a detailed discussion.

competitors to replace the independent setting of prices by the market with their own determination of price.[18] Market allocation refers to the dividing up of markets between competitors- the competitors collude by allocating different markets or parts of a market to participants in the collusion to enable them to exercise some market power in their allocated spheres.[19] In *United States v Reicher*[20] it was indicated that collusive tendering can be defined as "[a]ny agreement between competitors pursuant to which contract offers are to be submitted [to] or withheld from a third party. Sutherland and Kemp indicate that collusive tendering is not defined in the Competition Act but it generally takes on three forms, namely:

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

(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 project.

(c) Firms may conclude an agreement to fix the maximum price at which goods are purchased at an auction.

The prohibition against cartel conduct contemplated in section 4(1)(b) is a per se prohibition which means that once the conduct complained of has been proved to

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[18] Sutherland and Kemp 5-57. See further *American Natural Soda Ash Corporation v Competition Commission* 2005 (6) SA 158 (SCA).

[19] Sutherland and Kemp 5-69. See further *Malefo v Street Pole Ads (SA) (Pty) Ltd* 35/IR/May05 par 33.

[20] *United States v Reicher* 983 F 2d 168 (10th Cir 1992) 170.

have occurred, there is no defence available to the respondent due to the egregious nature of the conduct and its harmful effect on competition.[21]

1.3 Problem Statement

Cartels are a major problem for the South African Competition Authorities because of the harm that they pose to consumer welfare coupled with the fact that competition law enforcement against cartels is severely hampered by their secretive nature. In the South African context the harm to consumer welfare has also been experienced by the most vulnerable consumers as they occur in industries that provide consumer goods that are used on a daily basis such as bread and milk.[22]

Cartel activity, due to its most egregious nature, carries severe administrative penalties in terms of the Competition Act. In accordance with section 59 of the Act the Competition Tribunal can impose an administrative fine that may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year if a firm contravenes section 4(1)(b).[23] This severe nature of administrative fines for cartel conduct undoubtedly should have a deterrent effect and should motivate firms to steer away from cartel conduct. Unfortunately, it is submitted, these large fines obviously also has the unintended effect that it may cause cartels to be even more secretive for fear of being exposed and fined. It can further increase moral hazard in the sense that the

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[21] See Sutherland and Kemp 5-44 for an explanation of the difference between "per se" and "rule of reason" prohibitions in the Competition Act.

[22] See for instance *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) regarding the notorious bread cartel that operated in the Western Cape in recent years This cartel was exposed subsequent to the Competition Commission receiving complaints from distributors of bread in the Western Cape. The Competition Commission investigated the matter and following its investigation, concluded that in December 2006, the major bread producers engaged in prohibited price-fixing as a result of entering into an agreement in terms of which they would increase bread prices in the Western Cape by similar amounts at or about the same time. The discounts to be offered to independent distributors had also been reduced and limited to a maximum of seventy five cents per loaf of bread. When some of the independent distributors attempted to change suppliers, they were informed that the bakery would not supply them, as there was an agreement in place between the bakeries not to supply the customers of another bakery.

[23] Section 59(1)(a).This fine can already be imposed the first time section 4(1)(b) is contravened.

cartels continue their risky business strategies because they reason that the large profits they make is worth the risk and that, should they get an administrative fine, they will offset the fine by filtering it through to the consumer market in the form of price increases.

For purposes of enforcing the prohibition against cartels and bringing the perpetrators to boot, the Competition Commission has recourse to the investigative powers provided for in section 46 to 49 the Competition Act. However , these investigative processes is dependent upon the Commission being informed of cartel activity via a complaint initiated by a third party or a complaint initiated by the Commissioner himself after the Commission got wind of cartel activity in a certain relevant market. Unfortunately, because of the secretive nature of cartels, they operate below the enforcement radar meaning that very often the Commission might not be aware of these cartels at all. In many instances the only way that the Commission might become aware of a cartel in a specific industry would be if one of the cartel members actually decided to "split" on the cartel.

In *Competition Commission v Pioneer Foods (Pty) Ltd*[24] the court remarked that horizontal co-operation may be difficult to achieve and, once achieved, also carries the seeds of its own instability and often, destruction. Competition jurisdictions such as the USA and EU have used this inherent flaw in cartels to devise an enforcement tool in the form of a leniency policy that aids the detection and destabilisation of cartels by encouraging cartel members to blow the whistle on a cartel that they are participating in.[25] This leniency policy approach is based on the notion of the

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[24] *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 (03/02/2010) par 34.

[25] Kasturi Moodaliyar "Are cartels skating on thin ice? An insight into the South African Corporate Leniency Policy" 2008 *SALJ* 17. See also Sutherland and Kemp 5-101.

"prisoner dilemma" in game theory which is explained as follows by Sutherland and Kemp:[26]

"Two men are arrested for a crime, although there is very little evidence against them .They are kept apart and a policeman offers both the same deal. If both confess they will receive the same sentence of three years imprisonment. If both refuse to confess they will each be sentenced to two years imprisonment on a trumped-up charge. If one confesses and the other does not, then the one who confesses will receive only a one year sentence, while the other who did not, will go to jail for six years. In these circumstances the optimal decision in the face of uncertainty is to confess. That will be the best strategy for one prisoner whatever the other prisoner does."

Of course cartel members will not just blow the whistle on the cartel in the absence of some or other incentive. Thus it is important for enforcement agencies to be able to offer whistleblowing cartel members something in return that is valuable enough to such cartel member to motivate it to blow the whistle on the cartel.

Although the Competition Act provides the Commission with extensive investigative tools, these processes operate ex post, meaning that they are used only once the Commission suspects or is informed about a cartel. These investigative processes have thus been found to be insufficient to comprehensively address the problem of cartels and the damage they cause to consumers.[27] Accordingly, in order to align the enforcement tools to the avail of our competition authorities with that used internationally by established competition jurisdictions such as the USA and the EU the Competition Commission introduced the Corporate Leniency Policy (CLP) in 2004 as an *ex ante* measure to assist in the detection, prosecution and prevention of cartels. The CLP has been issued in terms of section 79 of the Competition Act and is contained in a policy document issued by the Commission. The policy provides for

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[26]Sutherland and Kemp 5-5.For a detailed discussion of the "prisoner's dilemma" see Stigler "A Theory of Oligopoly" 1964 *Political Economy* 44 and Werden "Economic evidence of the existence of collusion: reconciling antitrust law with oligopoly theory" 2004 *Antitrust Law Jnl* 719.

[27] Kyriacou *Comparative Analysis of the Corporate Leniency Policy of the South African Competition Commission,* LLM Dissertation, University of Pretoria (2015) 8 (hereinafter Kyriacou).

a cartel member who is “first-to-the-door” to blow the whistle on the cartel the chance of immunity from administrative prosecution and fines by the competition authorities. This policy has been instrumental in uncovering various high profile cartels in South Africa.[28]

A major challenge to the CLP is however the recent introduction of a cartel offence into South African competition law.[29]The cartel offence, contained in section 73A of the Competition Act, was introduced into South African competition law via the Competition Amendment Act, Act 1 of 2009, which was assented to on 26 August 2009 and after its implementation was stalled for a considerable period, the cartel offence provision came into operation on 1 May 2016 by Presidential Proclamation[30]

1.4 Nature and scope of dissertation

The aim of this dissertation is to analyse the Corporate Leniency Policy (CLP) as a tool used by the competition to combat cartels. In the course of this analysis, the introduction of the cartel offence as provided for in section 73A of the Competition Act and the challenges it may pose to the efficient functioning of the CLP will be investigated. The purpose of this analysis is to eventually reach conclusions on the advantages and disadvantages of the Policy in its current format and context and to make recommendations for augmenting the CLP as an effective anti-cartel tool.

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[28] Sutherland and Kemp 5-101.

[29] Government Gazette No. 39952, 22 April 2016, Proclamation No. 25 of 2016.

[30] The criminalisation provisions will not operate retrospectively and will only be applicable to cartel conduct that continues or commences after 1 May 2016.

1.5 Delimitation

The focus of this dissertation will be on the CLP and it interaction with the cartel offence. Case law wherein the validity of the CLP was challenged will be briefly mentioned for contextualising purposes and will not be discussed in detail.

1.6 Methodology

The research approach to be followed in this dissertation is the logical-analytical approach. Applicable legislation, case law and contributions by authors will be referred to in order to logically examine the position the South African corporate leniency policy as a legal instrument in the fight against anti-competitive behaviour. The chapters set out below, will be based upon the current mechanisms in place to combat anti-competitive behaviour as read in legislation and case law.

1.7 Brief overview of Chapters

Chapter 1: Introduction

This chapter introduces the problem statement and the relevant provisions of the Competition Act. The concept of "cartel conduct" is examined in greater detail and the purpose of the CLP is discussed.

Chapter 2: The Corporate Leniency Policy

This chapter focuses on the provisions of the CLP document, the requirements for leniency and the various types of immunity that can be applied for.

Chapter 3: The Cartel Offence

In this chapter, a critical analysis of the newly introduced section 73(A) is undertaken and the continued effectiveness of the CLP in light of this section, is provided. The problematic aspects relating to the interaction between the cartel offence and the CLP are discussed, conclusions are drawn and recommendations are made.

CHAPTER 2: THE CORPORATE LENIENCY POLICY

2.1 Introduction

The Competition Commission augmented the limited enforcement tools provided by the Competition Act by introducing and implementing the Corporate Leniency Policy ("CLP") which came into force on 6 February 2004.[31] 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).[32] The CLP was subsequently amended in 2008 to increase its effectiveness.[33] For purposes of this dissertation the 2008 version of the CLP, will form the basis of the discussion.

The CLP has played a significant role in enabling the Commission to uncover cartels operating in significant sectors of the economy, such as the milk and bread industries. The stated purpose of the CLP is to provide a member of a cartel with immunity from prosecution and fines, in return for disclosing any information and documents relating to a cartel in which it has participated. The CLP has limited application as it is only applicable to cartel conduct as per section 4(1)(b) of the Competition Act, and not to any other restrictive practices contravening other sections of the Act.

2.2 The 2008 CLP

[31] Notice 195 of 2004, Government Gazette No. 25963 of 6 February 2004.

[32] 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.[32]

[33] Notice 628 of 2008, Government Gazette No. 31064 of 23 May 2008.

2.2.1 Rationale

The main challenge in cartel enforcement is that the secretive nature of cartels makes them very difficult to detect. The CLP therefor seeks to expose cartels by incentivising whistle-blowing through the reward of immunity from prosecution by the competition authorities, so that the Competition Authorities can investigate and expose the cartel activity and ultimately stop and prevent the cartel behaviour.[34]

2.2.2 Nature of the CLP

The CLP comprises a comprehensive process through which a self-confessing cartel member who is first to approach the Commission, will be granted immunity by the Commission for its participation in cartel activity. Even if the whistleblower was the ringleader of the cartel he can apply for immunity. This immunity is dependent upon the cartel member fulfilling specific requirements and conditions set out under the CLP.[35] Immunity does not follow automatically merely upon confessing to participation in a cartel but in order to ensure that the evidence provided is useful and the co-operation of the whistleblower is secured, immunity is granted subject to certain conditions and requirements having been met.[36]

Immunity in the context of the CLP is however of a limited nature. It means that the Commission will not subject the successful applicant[37] to adjudication[38] before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration.[39] Thus the self-confessing cartel member will not be "prosecuted" before the Tribunal for its involvement in the cartel and will not incur an administrative

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[34] Par 2.5 of the 2008 CLP-document.

[35] Par 3.1 of the 2008 CLP-document.

[36] Par 5.3 of the 2008 CLP-document.

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

[38] See Kyriacou 41. 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.

[39] Par 3.3 of the 2008 CLP-document.

fine.[40] Therefore, the CLP provides the opportunity for a firm involved, implicated or suspecting that it is involved in cartel activity to voluntarily come forward and confess to the Commission in return for immunity.[41]

According to the CLP-document the CLP is also adopted in recognition of the fact that not all firms engaging in anti-competitive conduct are aware that such conduct is illegal.[42] An applicant for immunity however does not have to show that it was previously unaware that it was contravening the Competition Act.[43] The CLP document however cautions that a firm which does not apply for immunity when it is aware that it is contravening the Competition Act runs the risk of another participant in the cartel making an application before it.

As indicated, even the ringleader of a cartel can apply for immunity. The CLP document states that immunity is not based on the fact that the applicant is viewed as less of a cartelist 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.[44] The CLP thus creates a “race to the door” which is designed to destabilise the cartel.

2.2.3 Scope of Application of the CLP

The CLP is applicable in respect of alleged cartels that fall within the scope of section 4(1)(b) of the Competition Act.[45] 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 concluded in South Africa, it must at least have

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[40] *Ibid*.
[41] Par 3.5 of the 2008 CLP-document.
[42] Par 3.7 of the 2008 CLP-document.
[43] *Ibid*.
[44] Par 3.9 of the 2008 CLP-document.
[45] Par 5.1 of the 2008 CLP-document.

an effect within the Republic in order to bring it within the scope of application of the CLP.[46]

It is stated that the CLP will not apply in the following instances, namely:

a) where the cartel conduct in respect of which immunity is sought falls outside the ambit of the Act;[47]
b) where another firm has already made a successful application for immunity under the CLP in respect of the same conduct;[48] or
c) where the applicant fails to meet any other requirement and condition set out in the CLP.[49]

The CLP does not provide for blanket immunity. It only applies to the specific cartel activity in respect of which the applicant confesses and therefor, even where a firm makes a successful application for immunity in respect of specific cartel activity, such immunity does not apply to related conduct which may otherwise infringe the Competition Act. [50] Kyriacou points out that this means that the CLP does thus not provide for an "amnesty plus/leniency plus" regime[51] Accordingly, if during a leniency application other contraventions of the Competition Act are revealed, the Commission can refer a complaint against the applicant to the Competition Tribunal with regard to alleged non-cartel infringements.[52] As pointed out by Kyriacou, 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

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[46] Kyriacou 63. This is a regime in terms whereof the leniency applicant is granted leniency in respect of other contraventions revealed during the course of the leniency investigation to which the leniency applicant did not initially confess. See also par 5.2 of the 2008 CLP-document.

[47] Par 7.1.1 of the 2008 CLP-document.

[48] Par 7.1.2 of the 2008 CLP-document.

[49] Par 7.1.3 of the 2008 CLP-document.

[50] Sutherland and Kemp 5-102.

[51] Kyriacou 64.

[52] *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, 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.

prosecuting the cartel complaint at the same time as it attempts to defend itself against a prosecution by the Commission.[53]

A firm[54] may thus in terms of the CLP apply for immunity in respect of separate and various cartel activities.[55] This means 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.[56] 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 also extend to the other two contraventions.[57] The only exception would be in respect of contraventions that cannot be severed, and therefore may be considered as one contravention.[58]

If the Commission is aware of a cartel and has enough and adequate information to prosecute the cartel then clearly the CLP will not avail an applicant. The CLP caters for the situation where the Commission is not aware of the specific cartel activity; or if the Commission is aware of the cartel activity but lacks sufficient 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.[59]

In terms of the CLP only one firm may qualify for immunity and accordingly cartel members are encouraged to race to the Commission in order to be first to apply for

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[53]Sutherland and Kemp 5-103.

[54] In terms of section 1 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 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.

[55] Par 5.4 of the 2008 CLP-document.

[56] *Ibid*.

[57] *Ibid*.

[58]*Ibid*.

[59] Par 5.5 of the 2008 CLP-document.

immunity.[60] It is important to note that the Commission will only hear an application if the person applying for immunity on behalf of the applicant firm has the authority to do so.[61] Where individual employees of a firm or a person that are not authorised to act for such firm reports cartel activity it will only amount to whistle blowing and not to an application for immunity under the CLP.[62]

The CLP has only one "winner" namely the firm who was first to the door to successfully report on the cartel activity. However those self-confessing firms who were not first to self-report and who are implicated in the cartel activity are not completely without recourse. 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.[63] 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 treatment[64] of the applicants who were not the first-to-the-door to apply for immunity pursuant to the CLP.[65]

The immunity provided by the CLP does not cover all forms of liability and does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.[66] Thus a victim of cartel conduct would, despite the granting of leniency under the CLP to a cartel member, still be able to institute a follow-on civil

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[60] Moodaliyar, K *Are cartels skating on thin ice*? Insight into the South African Corporate Leniency Policy 2008 *SALJ* 17.

[61] Par 5.7 of the 2008 CLP-document.

[62] See par 5.8 of the 2008 CLP-document.

[63] 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.

[64] 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.

[65] Par 5.6 of the 2008 CLP-document.

[66] Par 5.9 of the 2008 CLP-document.

claim for damages suffered as a result of the cartel conduct. [67] As pointed out by Kyriacou, 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)[68] and also criminal liability that would follow pursuant to the cartel offence as per section 73A of the Competition Act, as discussed hereinafter.[69]

2.2.4 Confidentiality

Confidentiality is of utmost importance during the leniency process as it may for instance happen that other cartel members, upon hearing that they have been split upon, may seek to destroy important documentation that the Competition Commission requires in prosecuting the various cartel members. According to the CLP information submitted during the course of a leniency application will be dealt with by the Competition Authorities on a confidential basis.[70] Disclosure of any information submitted by the applicant prior to immunity being granted will only be disclosed with the consent of the applicant, provided such consent will not be unreasonably withheld by the applicant.[71]

2.2.5 Hypothetical enquiries

As indicated many firms may be involved in cartel conduct without realising that they are actually contravening the Competition Act. 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 get clarity.[72] This may be done telephonically or in writing and

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[67] 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).

[68] Act 121 of 1998.

[69] Par 6.4.

[70] Par 6.2 of the 2008 CLP-document.

[71] *Ibid*.

[72] Par 8.1 of the 2008 CLP-document. See also *Competition Commission of South Africa v Arcelormittal (SA) Ltd* [2013] ZASCA 84 (31 May 2013).

the firm may choose to remain anonymous if it wishes to.[73] The information provided will be kept confidential.[74] Unfortunately such clarification given to a prospective 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.[75] This means that if afterwards it ,for instance, transpires that the non-binding opinion given by the Commission was incorrect, (for example it stated that the activity that the prospective applicant was participating in , did not constitute cartel activity as envisaged by section 4(1)(b)) and the said prospective applicant subsequently did not rush to be first to the door with a leniency application), the said prospective applicant may be severely prejudiced as a result of having relied on the non-binding opinion. It is thus submitted that it would be prudent for a prospective applicant to not only rely on such a non-binding opinion but to also acquire legal advice regarding whether the conduct that he participates or participated in, constitutes cartel activity as per section 4(1)(b) of the Act.

2.2.6 Forms of Immunity

The CLP makes provision for different forms of immunity, namely:

(a) Conditional Immunity

The Commission will grant conditional immunity to an applicant in order to create an atmosphere of trust between itself and the applicant pending the finalisation of the enforcement proceedings.[76] Conditional immunity is granted in writing indicating that such immunity has been provisionally granted.[77] The CLP –document states that at any point in time until total immunity is granted, the Commission reserves the right to

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[73] *Ibid*.

[74] Par 8.2 of the 2008 CLP-document.

[75] Par 8.3 of the 2008 CLP-document.

[76] 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.

[77] *Ibid*.

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.[78]

(b) Total Immunity

Total immunity will only be granted to the applicant after the Commission has completed its investigation into the alleged cartel and after it has 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.[79] 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 thus granted to a successful applicant who has fully met all the conditions and requirements under the CLP.[80] Total immunity cannot be revoked by the Competition Commission and, as Kyriacou remarks, it thus provides legal certainty to the leniency process.[81]

(c) No Immunity

Applying for leniency under the CLP implies a continuous obligation on the applicant to cooperate with the Commission. The Commission will decline to grant immunity in those instances where the applicant fails to continuously meet the conditions and requirements set by the CLP.[82] If immunity is not granted, the Commission is at liberty to deal with the applicant as provided for in the Competition Act.[83] It can then decide either to prosecute the unsuccessful applicant for its participation in the cartel conduct or it may consider entering into a settlement agreement or a consent order with the said applicant, or where a matter is referred to the Tribunal, it may ask for a

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[78] Par 9.1.1.3 of the 2008 CLP-document.

[79] Par 9.1.1.2 of the 2008 CLP-document.

[80] 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.

[81] Kyriacou 112.

[82] Par 9.1.3.1 of the 2008 CLP-document.

[83] Par 9.1.3.2 of the 2008 CLP-document.

reduction of the administrative fine that may be imposed upon the unsuccessful applicant if for instance that applicant co-operated with the Commission and provided it with useful evidence.[84]

Much controversy was generated by the judgment of Zondo J in the High Court matter of *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* [85]to the effect that it is eventually the Tribunal who decides whether an application for leniency should be afforded immunity. However, on appeal the Supreme Court of Appeal in *Agri Wire (Pty) Ltd v The Competition Commissioner*[86] pointed out that it was clear from the CLP that it was the Competition Commission who granted leniency to an applicant and not the Tribunal.

2.2.7 Requirements and Conditions for Immunity under the CLP

To qualify for immunity under the CLP an applicant must meet 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;[87]
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;[88]
c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation

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[84] *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.

[85] [2011] ZAGPPHC 117 (5 July 2011).

[86] [2012] ZASCA 134 (27 September 2012)

[87] Par 10.1(a) of the 2008 CLP-document.

[88] Par 10.1(b) of the 2008 CLP-document.

should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the CAC are completed;[89]

d) the applicant must immediately stop the cartel activity or act as directed by the Commission;[90]

e) the applicant must not alert other cartel members or any other third party to the fact that it has applied for immunity;[91]

f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity;[92] and

g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.[93]

2.2.8 The CLP-Procedure

The CLP-procedure is stated to be aimed at ensuring efficient facilitation of the CLP in terms also of transparency and predictability. It is however not a totally rigid procedure and the Commission is given the discretion to exercise some flexibility where necessary to achieve the desired outcome.[94] The procedure comprises the following stages:

(a) First Contact with the Commission

The first point of contact with the Commission by an applicant who seeks immunity is with the Enforcement and Exemptions Division. The applicant is obliged to make an

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[89] Par 10.1(c) of the 2008 CLP-document.

[90] 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.

[91] Par 10.1(e) of the 2008 CLP-document.

[92] Par 10.1(f) of the 2008 CLP-document.

[93] Par 10.1(g) of the 2008 CLP-document.

[94] 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.

application for immunity in writing[95] to the Manager of the Enforcement and Exemptions Division of the Commission[96] so that the Commission can determine whether or not the applicant is 'first to the door' with regard to particular cartel activity.[97] The application must contain information 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.[98] The applicant is not required to disclose its identity at this stage.[99]

The Commission will then advise the applicant in writing or by telephone within five (5) days, or within a reasonable period, after receipt of the application, whether or not it is not the 'first to the door' with its leniency application.[100] The applicant must thereafter within five (5) days, or within a reasonable period, after receipt of such advice from the Commission, make an arrangement for a first meeting with the Commission.[101] Clearly when the applicant makes this arrangement it will disclose its identity having been give the assurance that it is "first-to-the-door" and that it has a reasonable prospect of obtaining immunity if it complies with the necessary requirements and conditions set by the CLP.

(b) First Meeting with the Commission

The fact that an applicant is "first-to-the-door" with a leniency application does not guarantee that the applicant will be granted immunity. Determining whether such an applicant is eligible for immunity is facilitated through meetings with the Commission. The purpose of the first meeting with the Commission is accordingly to find out

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

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

[97] Sutherland and Kemp 5-109.

[98] *Ibid*.

[99] *Ibid*.

[100] Par 11.1.1.2 and 11.1.1.3 of the 2008 CLP-document.

[101] *Ibid*.

whether the applicant's case would qualify for immunity under the CLP.[102] 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.[103] The first meeting is very much a fact finding enquiry: the applicant must disclose its full identity and answer all the questions that the Commission may ask in relation to the conduct being reported or matters relating thereto.[104] At this stage the Commission will evaluate the evidence provided by the applicant and it will have sight of documents but will not yet be allowed to make copies of documents.[105] Within five (5) days, or within a reasonable time, after the date of the first meeting the Commission must decide whether or not the applicant's case qualifies for immunity and it must inform the applicant accordingly in writing.[106] If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, it will arrange with the applicant for a second meeting.[107] If however the Commission decides that the applicant does not meet the conditions and requirements of the CLP, then the applicant must be advised that it will not receive immunity in respect of the specific cartel.[108] In such instance the Commission would then be at liberty to take further action against the applicant in terms of the Competition Act.

(c) 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.[109] The second meeting has a "cooperative nature" and basically sets out the detail of

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[102] Par 11.1.2.2 of the 2008 CLP-document.

[103] Par 11.1.2.1 of the 2008 CLP-document.

[104] *Ibid*.

[105] Par 11.1.2.2 of the 2008 CLP-document.

[106] *Ibid*.

[107] Par 11.1.2.3 of the 2008 CLP-document.

[108] Par 11.1.2.4 of the 2008 CLP-document.

[109] Par 11.1.3.1 of the 2008 CLP-document.

the co-operation that the Commission requires from the applicant. At this stage the applicant will be required to bring forward any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral.[110] The Commission will be able to make copies of all documents provided.[111] 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.[112] Conditional immunity will be granted to the applicant by means of a written conditional immunity agreement concluded between the applicant and the Commission.[113]

(d) **Investigations, Analysis and Verification**

After the granting of conditional immunity, the Commission will make progress with its investigations relating to the cartel activity.[114] During its investigation the Commission will analyse and verify information or documents provided by the leniency applicant against any existing or discovered information and/or documents.[115] During its investigation the Commission may use the full range of investigative 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.[116]

Once the Commission has completed its investigation and is satisfied that it has sufficient information to institute proceedings, it will inform the applicant accordingly during a final meeting.[117] Should the Commission however not be satisfied that it has

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[110] *Ibid*.

[111] *Ibid*.

[112] Par 11.1.3.3 of the 2008 CLP-document, see also par 6.2 and 8.2.

[113] 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.

[114] Par 11.1.4.1 of the 2008 CLP-document.

[115] *Ibid*.

[116] *Ibid*.

[117] Par 11.1.4.2 of the 2008 CLP-document.

sufficient information to institute proceedings, it can call a meeting with the applicant either to revoke the conditional immunity that was previously granted to the applicant or to solicit further documents or information so as to enable it to complete the investigation.[118] Thus, depending on how weak or strong the Commission's case against the cartel is at this stage it can either have the result that the CLP process is terminated through revocation of immunity or it can mean that the applicant is afforded yet another opportunity to present more information in its bid to obtain total immunity.

(e)The Final Meeting

Continued and complete cooperation by the applicant is pivotal to ensure a successful prosecution by the Commission against the cartel, especially given that the Commission would use the applicant to testify in the proceedings before the Tribunal once the matter is referred. The purpose of the final meeting between the Commission and the applicant is therefore to inform the applicant that the Commission intends to institute proceedings in relation to the alleged cartel and to formally request the applicant to continue to cooperate fully and expeditiously in the proceedings.[119] The CLP provides that conditional immunity will continue to apply until the Tribunal or the Competition Appeal Court, as the case may be, has reached a final decision regarding the matter.[120] The applicant is also warned that should it however wish to withdraw its application at this stage, it runs the risk of being dealt with in terms of the Competition Act.[121]

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[118] *Ibid*. See also par 11.1 on the flexibility of procedures.

[119] Par 11.1.5.1 of the 2008 CLP-document.

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

[121] Par 11.1.5.2 of the 2008 CLP-document. In such case the applicant will lose all immunity.

2.3. The Placing of a Marker

Cartel members who wish to blow the whistle on the cartel in order to obtain immunity under the CLP may however not always have all the necessary evidential material at their disposal the moment they decide to self-confess. In order to encourage use of the CLP process the Commission has, in line with international jurisdictions, introduced a marker procedure into the CLP during the 2008 amendments in order to assist those firms who wanted to self-report on participation in a cartel but for instance was in the process of gathering evidence and information before it could make a formal application. Accordingly it is provided that prior to making a formal application for immunity pursuant to par 11.1 of the CLP, a prospective applicant may choose to apply to the Commission for a "marker" in order to protect its place in the queue for immunity.[122] The marker application is made in writing to the Manager of the Enforcement and Exemptions Division of the Commission.[123] It must identify 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.[124] Thus the granting of a marker by the Commission carries serious implications as it basically preserves the position of the applicant as "first-to-the-door" to the exclusion of other applicants who may actually at that stage have better information than the marker applicant but who has not yet applied for leniency under the CLP. Given the significant consequences of granting a marker application it is submitted that the Commission needs to be appraised of sufficient information to actually justify the granting of the marker.

In order to provide more clarity on the aspect of markers the CLP expressly states that a marker application is not granted automatically but that the Commission has a discretion to grant a marker on a case-by-case basis.[125] The applicant for a marker

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[122] Par 12.1 of the 2008 CLP-document. This is referred to as a 'marker application'.

[123] *Ibid*. This may be done by facsimile, electronic mail or by hand delivery.

[124] *Ibid*.

[125] Par 12.2 of the 2008 CLP-document.

appears to have quite a brief window of opportunity within which to apply for a marker: the Commission will determine the period of time relevant to the specific case, within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in par 10 of the CLP.[126] The effect of the granting of the marker is that 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.[127] Thus by obtaining a marker a firm would be able to secure its place as "first–to-the-door" in the queue for leniency. However the implication of the marker procedure is clearly also that the marker applicant should be in a position to provide the necessary information and evidence within the shortest time reasonably possible.

2.4 Revocation of Immunity

To ensure the continued cooperation by the applicant throughout the investigation of the cartel and its subsequent prosecution it is provide that conditional immunity may be revoked by the Commission in writing at any time[128] if the applicant fails to meet the conditions and requirements of the CLP. Revocation may occur due to lack of cooperation by the applicant, provision of false or insufficient information, misrepresentation of facts and dishonesty.[129] 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.[130] It is unclear if a leniency applicant who has received

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[126] *Ibid*.

[127] *Ibid*.

[128] Par 13.1 and 13.2 of the 2008 CLP-document.

[129] Par 13.3 of the 2008 CLP-document. This list is clearly not a *numerus clausus*. 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.

[130] Par 13.5 of the 2008 CLP-document.

conditional immunity that was subsequently revoked may approach the Commission again if in the meantime no other cartel member came to the fore to self-report on the cartel. It is however submitted that it is highly unlikely that such firstmentioned cartel member should then again be able to qualify for immunity as the Commission would then already have been alerted to the existence of the cartel and may conduct its own investigation and prosecute the cartel accordingly.

2.5. The Effect of an Unsuccessful Leniency Application

The CLP document states that 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 an unsuccessful leniency application (which is basically the same as revocation of immunity) includes the following:[131]

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;[132]
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 but who co-operated with the Commission in its cartel investigation[133]
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 fine[134] that may be imposed in terms of the Competition Act.[135]

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[131] Par 14.1 of the 2008 CLP-document.

[132] Par 14.1.1 of the 2008 CLP-document.

[133] 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.

[134] The percentage by which the fine will be reduced is not specified.

[135] Par 14.1.3 of the 2008 CLP-document.

2.6 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.[136] The CLP Document indicates that the procedure of oral statements is a development that has been taken over from established international competition jurisdictions and its apparent purpose is to provide leniency applicants with added protection from discovery of documents produced in the context of CLP applications for use in proceedings before other jurisdictions. The Commission has the discretion to, on a case-by-case basis, accept or refuse a request for oral submissions.[137] Subject to par 12.1 of the CLP-document[138], 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.[139]

The process regarding oral submissions is that oral statements will be recorded and transcribed at the Commission's premises.[140] The applicant may review the technical accuracy of the recording and transcript and correct the content of its oral statements within a reasonable time period to be determined at the discretion of the Commission.[141] 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 forming part of the Commission's records pursuant to the Rules for the Conduct of Proceedings in the Competition Commission.[142]

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[136] Par 15.1 of the 2008 CLP-document.

[137] Par 15.1 of the 2008 CLP-document.

[138] Par 12.1 of the 2008 CLP –document

[139] *Ibid*.

[140] Par 15.2 of the 2008 CLP-document.

[141] *Ibid*.

[142] *Ibid*. Published in GN 22025 in GG 428 on 1 February 2001.

2.7 Discussion

The CLP has within a relatively short period of time become increasingly efficient in prosecuting cartels: Lavoie indicates that the South African economy is considered to be highly concentrated and that such economies are conducive to collusion[143]. Despite this position, only a small percentage of complaints made under the Competition Act related to collusive practices during the period before the introduction of the CLP.[144] In the years prior to the introduction of the CLP, the Competition Commission was in the difficult position of attempting to prosecute cartels without the help of an insider involved in the cartel and the fact that only a few complaints about collusive behaviour were made is indicative of the fact that cartels are perversely secretive and difficult to detect. Obtaining sufficient evidence to prosecute cartel members successfully therefore proved extremely difficult. The number of Corporate Leniency Applications have dramatically increased from 5 applications received by the Competition Commission in 2013/2014, to an astonishing 121 in 2014/2015. [145]

The CLP is an internationally aligned enforcement tool available to the Commission to detect and prosecute secretive cartels by means of incentivizing self-reporting in exchange for immunity from prosecution before the Tribunal. The fact that cartels are exposed and prosecuted whereas it was previously difficult to expose their clandestine existence and operations clearly also have a deterrent effect on other firms considering whether they should engage in cartel conduct. Although the cartel member who revealed the existence of the cartel to the Commission is absolved from paying an administrative fine as part of its immunity reward, the other members of the cartel who are “prosecuted’ before the Competition Tribunal” receive hefty

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[143]Lavoie "South Africa's Corporate Leniency Policy: A Five-Year Review" *World Competition* (2010) 33 (1) 141 – 162 (Hereinafter Lavoie).

[144] Lavoie 142.

[145] Competition Commission South Africa *2014-2015 Annual Report,* 30.

administrative fines in accordance with section 59 of the Act. These large fines send a clear message to all market participants that cartel behaviour will not be tolerated by the competition authorities. The bad press that the cement cartel that operated during the building of the Soccer World Cup stadions received and the news of the huge fines imposed by the Tribunal for this behaviour most certainly caused some other firms to think very carefully about whether they were willing to risk their reputation and also incur massive fines by engaging in egregious cartel conduct.

By granting immunity only to the firm that is first to the door with a compliant leniency application the CLP sows the seeds of distrust and ensures that the cartel members scramble to the Commission in a frenzy, volunteering information and hoping that they are the first to self-report. Given that the CLP is a confidential process and that the leniency applicant is obliged not to disclose detail of such self-reporting to the other cartel members the policy enables the gathering of further information volunteered by cartel members who are not aware that the cartel has already been exposed and also serves to preserve vital evidence that may otherwise be destroyed by fearsome cartel members. The CLP also conserves precious enforcement energy as the Commission is provided with information and evidence that might otherwise taken them many precious hours to obtain- and accordingly the Commission is able to use these “saved hours” towards prosecuting other firms who are engaged in competition law contraventions.

The Corporate Leniency Policy also appears to be an enforcement tool with clear parameters: it sets out in detail exactly what is expected of a prospective applicant and contains clear, well-structured and flexible processes to facilitate the efficient “processing” of the leniency application. It is aimed at extracting sufficient evidence regarding the cartel from the leniency applicant and, given that the ultimate aim of the policy is to place the Commission in a position where it can successfully prosecute the cartel through a referral to the Tribunal, it requires the continued co-operation of the leniency applicant in the referral process. Final immunity is withheld until such co-operation in the prosecution of the cartel has been obtained thus making sure that

the leniency applicant stays incentivised to co-operate through the whole process of exposing and prosecuting the cartel in accordance with the Competition Act.

The CLP is however not a “get out of jail free”-card as the immunity granted to successful leniency applicants are sufficient to incentivize self-reporting but does not negate the fact that victims of cartel conduct have a right to recover damages from cartelists by means of follow on civil actions. Accordingly the CLP does not negate this right as it only provides the successful leniency applicant with immunity from incurring an administrative fine but not with immunity against civil prosecution by cartel victims. It can thus be regarded as a responsible enforcement tool that observes the rights of other interested parties such as cartel victims.

It is also noteworthy that the CLP, although it does not provide immunity to self-reporting cartel members who are not first–to–the door with sufficient information and evidence, encourages even those unfortunate cartel members to come forward and participate in the process of prosecuting the cartel by volunteering information and evidence in exchange for reduced fines. The provision that is made to approach the Commission on a hypothetical basis to enquire whether certain information constitutes cartel conduct also provides firms with the opportunity, if the answer is in the affirmative, to consider whether they should enter the leniency process and thus also serves to encourage co-operation with the Commission in the detection and prosecution of cartels.

2.8. Conclusion

The war against cartels is fought on a global scale and cartel enforcement is a priority in all established competition jurisdictions. Competition authorities across the globe has introduced policies that offer either complete or partial leniency to cartel participants, who break ranks and disclose the existence and nature of the cartel, and provide evidence that enables the authorities to pursue and destabilize the cartel. The South African Competition Commission has joined this innovative global trend in competition enforcement approximately six years after the Competition Act came into force and by doing so have carefully scrutinised the developments

regarding leniency policies in established competition jurisdictions to ensure that it adjust to South African CLP in line with important developments in the leniency policies of leading competition jurisdictions. The CLP can thus be said to be a living document that is flexible in nature and, most importantly, that can be amended rather easily and without the red tape and delay that would have accompanied its amendment had it been provided for by means of inserting a statutory provision in the Competition Act.

The CLP can be hailed as a groundbreaking policy that has added a new and better dimension to cartel enforcement in South Africa. It has provided the Competition Commission with significant bargaining power and has incentivised early detection and break-up of cartels. In this sense it fulfils both an ex ante and an ex post function as it aids not only the detection but also the deterrence of cartels. Given that it is a flexible policy contained in a policy document that lends itself to easy amendment it can be expected that the South African competition authorities will keep this policy aligned with international trends in the context of competition leniency, thus preserving its value and relevance as a primary tool in the war against cartels.

CHAPTER 3: THE CARTEL OFFENCE AND ITS IMPACT ON THE CLP

3.1 Introduction

The CLP has faced a number of challenges since it was brought into existence. The validity of the policy was challenged in court in the matter of *Agri Wire (Pty) Limited and Another v Commissioner of the Competition Commission and Others*[146]. On appeal the Supreme Court of Appeal in *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others*[147] however upheld the validity of the policy as a valuable tool in cartel enforcement. However, it is submitted that a far greater challenge may present itself in the form of the cartel offence introduced by the 2009 Amendment Act and inserted as section 73A to the Competition Act which, after a long delay, has now finally been put into operation.

3.2 The cartel offence

3.2.1 Introduction

South African competition law is very dynamic and generally tends to evolve quickly in line with developments and trends in established competition jurisdictions such as the US and EU.[148] The notion of a cartel offence is well-established in these international jurisdictions and this development, as could be expected, also spilled over to South African competition law. Section 73A which encapsulates the South African cartel offence is entitled "Causing or permitting firm to engage in prohibited practices" and provides as follows:

"(1) A person commits an offence if, while being a director of a firm or while engaged

[146] (7585/2010) [2011] ZAGPPHC 117 (5 July 2011).
[147] (660/2011) [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA) (27 September 2012)
[148] Neuhoff 133.

or purporting to be engaged by a firm in a position having management authority within the firm, such person caused the firm to engage in a prohibited practice in terms of section 4(1)(b) or knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b)."

For the purpose of subsection (1)(b), section 73A(2) provides that 'knowingly acquiesced' means having acquiesced while having actual knowledge of the relevant conduct by the firm. It is further provided that subject to section 73A(4) as explained hereinafter, a person may be prosecuted for an offence in terms of this section only if the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b)[149] or if the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm has engaged in a prohibited practice in terms of section 4(1)(b).[150]

Section 73A(4)(a) states that the Competition Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Competition Commission has certified that the person is deserving of leniency in the circumstances and that the Commission may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.[151]

It is also provided 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

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[149] Section 73A(3)(a) of the Act.

[150] Section 73A(3)(b) of the Act.

[151] Section 73A(4)(b) of the Act.

proof of the fact that the firm engaged in that conduct .[152]

A firm may not directly or indirectly pay any fine that may be imposed on a person convicted of an offence in terms of this section [153] or indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted.[154]

3.2.2 Problematic aspects relating to the interaction between the cartel offence and the CLP

A glance over the provisions establishing the cartel offence as stated above, is most certainly enough to instil a bout of fear regarding the continued efficiency of the CLP in this new dispensation where directors and managers of firms engaged in cartel activity can be criminally prosecuted as opposed to the previous dispensation where the firm that perpetrated the cartel activity was penalised through large administrative fines and little resort appears to have been had to other legislation such as POCA to pursue individuals responsible for cartel activity. The previous “laxity” in criminally pursuing individuals responsible for allowing a firm to engage in cartel activity can most probably be ascribed to the notion that cartel activity is viewed by many as an economic transgression and not really a crime. Nevertheless, the cartel offence and its likely impact on the CLP has elicited responses from various authors.

Kelly[155] discusses a number of problematic issues pertaining to the implementation of section 73A, including potential coordination issues, threshold issues and possible constitutional issues.[156] He refers to section 73A(3) which requires that the

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[152] Section 73A(5) of the Act. Prima facie proof is preliminary proof that can be rebutted by the person accused of having committed the cartel offence.

[153] Section 73A(6)(a) of the Act.

[154] Section 73A(6)(b) of the Act.

[155] Kelly, ‘The introduction of a "Cartel Offence" into South African Law’ (2010) *Stellenbosch LR* at 321-333.

[156] *Ibid*

Competition Tribunal or Competition Appeal Court make a finding that section 4(1)(b) of the Competition Act has been infringed or the relevant firm must have acknowledged that in infringement has occurred. [157] The National Prosecuting Authority (NPA) further has the exclusive jurisdiction to prosecute matters in accordance with section 73A.[158] According to Kelly the effect of this provision bestowing sole authority for criminal prosecution on the NPA is that an authority that has no expertise in the handling of competition law matters, will be tasked with handling cartel enforcement. [159] This raises a number of concerns, including in respect of the expertise, coordination of cartel cases and the availability of state resources. [160] Given all of these concerns, Kelly opines that it is further likely that the small Specialised Commercial Crimes Unit within the National Prosecuting Authority, will be tasked to prosecute individuals under section 73A.[161] This Unit is currently tasked with investigating and prosecuting matters that relate to fraud and is also mandated to enforce a number of statutory offences, in accordance with the Companies Act[162], as well as matters relating to the Counterfeit Goods Act[163] and thus it can be said to have quite a significant work load and not necessarily one that clothes it with expertise in handling competition matters. Kelly further remarks that the biggest concern relating to the involvement of the NPA in competition matters, is that it does not have the resources, expertise or formal structures to facilitate coordination with the Competition Commission, in order to prosecute cartel offences.[164]

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[157] *Ibid*.

[158] *Ibid*.

[159] *Ibid*.

[160] *Ibid*.

[161] *Ibid*.

[162] Act 71 of 2008.

[163] *Ibid*. The Counterfeit Goods Act 37 of 1997.

[164] *Ibid*.

Kelly is also concerned about how section 73A relates to the corporate leniency policy.[165] As explained in Chapter 2, in terms of the CLP, the Competition Commission has the authority to grant immunity from prosecution to a firm who is first through the door in admitting its involvement in cartel activity and that also co-operates with the Commission in the prosecution of the other cartel members.[166] However, as pointed out by Kelly, the final discretion as to the granting of leniency relating criminal charges instituted by the NPA, vests with the NPA. In terms of section 73A(4)(a), the Competition Commission is prevented form requesting the NPA not to proceed with the prosecution of an individual, even if the Commission has certified that the individual is deserving of leniency.[167] All that Competition Commission may do is to make representations to the NPA in support of granting an individual leniency, which is to be prosecuted in accordance with the provisions of section 73A.[168]

Kelly is of opinion that there could also be potential "threshold issues", in the implementation of section 73A.[169] In order for the NPA to successfully prosecute persons under this section, he points out that they would need to prove the threshold of causation and the threshold of acquiescence as set out in section 73A(2).[170] Section 73A(1)(a) specifically requires that causation needs to be proved, by providing evidence that a person , whilst being a director or manager of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within such firm, caused the firm to engage in a prohibited practice in terms of section 4(1)(b), namely price fixing, market allocation and

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[165] *Ibid*.

[166] *Ibid*.

[167] *Ibid*.

[168] *Ibid*.

[169] *Ibid* .

[170] *Ibid*.

collusion or any one of the aforementioned.[171] According to Kelly it would therefore appear that causation is to be dealt with in accordance with the applicable principles of conventional criminal law which means that causation must be proven beyond reasonable doubt and the potential issue would therefore be for the courts to decide what evidence constitutes causation. [172] Kelly remarks that it is unclear whether or not proof of a mere attendance at cartel meeting will suffice to constitute 'acquiescence" for such purpose, or whether the courts will require evidence of an actual cartel agreement entered into by the individual.[173]

The other threshold issue identified by Kelly, relates to section 73A(1)(b), in terms of which the NPA could prosecute an individual if it can be proven that they "knowingly acquiesced" in the firm engaging in a prohibited practice.[174] Kelly opines that this aspect will be very difficult to prove, as it is unclear what precisely the prosecution will need to show to establish the individual's "acquiescence". [175] Given that this provision refers to "actual knowledge" in by the individual that is being prosecuted in terms of section 73A, Kelly is of the view that it appears to rule out the possibility of drawing inferences based on what a director of a company "ought" to have known about the activities of the company under his watch.[176] Thus it would not be too difficult for an individual to dispute the existence of actual knowledge if there is no direct evidence available to the prosecution in this regard. Kelly also suggests that a director of a company could dispute allegations of acquiescence, by alleging that a single director out of a group of directors could not have acquiesced as he/she had consistently objected to the firm's involvement in cartel activities. According to Kelly be very challenging for South African courts to develop standards around these ambiguous

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[171] *Ibid*.

[172] *Ibid*.

[173] *Ibid*.

[174] *Ibid*.

[175] *Ibid*.

[176] *Ibid*.

thresholds. [177]

Kelly also points to problems surrounding the constitutionality of the provisions of section 73A. He indicates the provisions of section 73A(5) appears to create a reverse onus. However he points out that the use of presumptions establishing reverse onuses in statutes is controversial and the constitutional court has in the past repeatedly struck down statutory presumptions that create such reverse onuses. [178] According to Kelly section 73A(5) has presumably been included in order to prevent the NPA from having to re-establish an infringement in terms of section 4(1)(b) when prosecuting an individual under section 73A. He further opines that it can possibly be argued that section 73A(5) does not create a reverse onus, but that it operates to eliminate a potential defence by an individual. The onus however still remains on the NPA to prove the "knowing acquiescence" on the part of the individual charged with the cartel offence, beyond a reasonable doubt and the individual is therefore not required to discharge the presumption thus making section 73A(5) less problematic than it may appear at first glance [179]

Kelly further points out that section 73(A)(6)(b), in terms of which the firm may not bail out anybody in charge of shareholder funds when they face charges for engaging in a prohibited practice, is also problematic as it can have the effect that a sole shareholder in a company facing charges under section 73A cannot obtain any assistance from the company to assist in funding his/her legal costs, but could possibly be reimbursed by the company if acquitted of the charges.[180] Thus Kelly indicates that section 73A(6) could raise constitutional issues which could be the subject of future litigation. [181]

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[177] *Ibid*.

[178] *Ibid*.

[179] *Ibid*.

[180] At 328.

[181] *Ibid*.

Lopes, Seth and Gauntlett also criticises the introduction of the section 73A cartel. They question whether or not the introduction of section 73A into the Competition Act is a necessary policy goal in the context of cartel enforcement and in light of the Competition Act itself.[182] These authors are of the view that the incorporation of section 73A gives rise to severe constitutional concerns which are at odds with the balance of the Competition Act.[183] They point out that the enforcement goals which form a core part of the Competition Act, together with the policy framework informing the Competition Act, remains one in which the focus is the eradication and exposure of cartel conduct, as opposed to the penalisation of the individuals involved.[184] Lopes, Seth and Gauntlett accordingly point out that the introduction of the provisions of section 73A into the Competition Act, which section has as its main purpose, the prosecution of individuals, is fundamentally at odds with the other provisions of the Act. Therefore, they are of the view that the Act will need to be comprehensively overhauled in order to ensure adherence to fundamental constitutional rights. [185]

They further remark that there is a global trend of including criminal liability provisions in antitrust law and that South Africa seems to be following suit in the belief that including criminal sanctions for cartel offenders, will serve as a deterrent to potential offenders.[186] In theory, the individual who is under threat of criminal sanctions being imposed would be more likely to be deterred from participating in such conduct, if it affects him personally, as supposed to a situation where it is only his firm's financial position that is at risk. Accordingly Lopes, Seth and Gauntlett remark that the

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[182] 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 – 6 September 2013 at 1-18.

[183] At 15.

[184] *Ibid*

[185] *Ibid*

[186] At 18.

inclusion of criminal liability imposed upon the relevant individual, could therefore serve as a "*complementary deterrent*", in addition to the administrative fines imposed on firms who engage in cartel conduct.[187]

They however point out, that there are various other criminal offences, such as fraud, in terms of which individuals who have been involved in certain cartel activities, may be prosecuted, hence the deterrent which section 73A seeks to serve, is therefore already to be found in other legislation and/or the common law and these offences cast a wider net than those contemplated in section 73A.[188] They further remark that the CLP has proven to be a successful tool and the Competition Commission has been very successful in uncovering cartels and cartel activity, without the threat of criminal liability being provided for in terms of section 73A.[189] Their point of view is that consumer welfare and the protection of competition, is of primary importance, when having regard to the purpose of the Competition Act. Any shift in policy which may occur and accordingly result in the prosecution and punishment of individuals involved in cartel conduct, therefor needs to be carefully considered.[190] Lopes, Seth and Gauntlett accordingly conclude that the incorporation of section 73A into the Competition Act, is unnecessary and that its incorporation into the Competition Act, will necessitate a holistic amendment of the Act.[191]

Jordaan and Munyai also contributed to the debate about the desirability and implications of the cartel offence .[192] They remark that the insertion of section 73A into the Act, has created confusion in respect of prosecutions to be conducted in

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[187] *Ibid*.

[188] At 16.

[189] *Ibid*.

[190] At 17.

[191] *Ibid*.

[192] Jordaan, L Munyai, PS “The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998” (2011) 23 *SA Merc LJ* 197-213.

terms of the Criminal Procedure Act[193] and those under the Competition Act.[194]

Their argument is that the Competition Commission has an entirely different role from that of the NPA because the Commission is an administrative agency whose function is to administer and enforce an economic statute, whereas the NPA has to prosecute all general crimes or offences in terms of its enabling legislation, and based on its own prosecutorial policy. Accordingly there could potentially therefore be an overlap between the functions of the NPA and the Competition Commission which also raises concerns in respect of the suitability of the use of criminal law sanctions in competition law.[195] Despite the NPA having exclusive power to conduct criminal prosecutions under section 73A, Jordaan and Munyai are however of the view that the Competition Commission is not entirely powerless in relation to such criminal prosecutions.[196] They argue that it is only after the competition authorities have made their own determination that a prohibited practice has occurred, that the legal authority will exist to prosecute a director of a company. Thus the determination of prohibited conduct by the competition authorities will precede and inform the decision by the NPA to prosecute an individual in terms of section 73A. They point out that the provisions of section 73A make it very clear, that the suitability of a criminal prosecution of a director of a company as a sanction, primarily stands to be determined by the Commission.[197]

It is notable however, that it is also their opinion that the introduction of criminal sanctions in the context of competition law, will negatively impact upon efficiency of the CLP. They state that the criminalisation of competition law in South Africa will

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[193] Act 5 of 1971.

[194] *Ibid*.

[195] *Ibid*.

[196] At 202.

[197] *Ibid.*

inevitably result in a conflict with the provisions of the Constitution. [198] They indicate that in terms of the provisions of section 73A(5), a presumption is created that has an impact on the onus of the burden of proof. Any finding by the Competition Tribunal or Competition Appeal Court that a company has engaged in a prohibited practice or any acknowledgment to such effect in a consent order by a firm, will constitute prima facie proof that the company did engage in the conduct.[199] Once this has been established, the presumption is triggered in the criminal proceedings against the director or manager of the company. The question is then raised, whether the offence created by the implementation of section 73A, infringes on the constitutional rights of the director or manger to a fair trial in accordance with the provisions of the Constitution.[200]

Jordaan and Munyai are however in favour of the cartel offence as they indicate that the social and economic implications that cartels have in South Africa, justify the introduction of criminal sanctions into the Competition Act. [201] They further argue that section 73A does not amount to an infringement of any particular constitutional right and even if there is a *prima facie* infringement of these rights, that such infringement is justifiable in our society in accordance with the limitation clause contained in section 36 of the Constitution.[202]

3.3 Conclusion

It indeed appears as if the newly introduced cartel offence may regrettably have a chilling effect on leniency applications and erode the efficiency of the CLP. It is submitted that it is highly probable that directors and managers of companies will be less willing and less incentivized to use the CLP process to obtain immunity and

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[198] At 203.

[199] At 206.

[200] At 207.

[201] At 213.

[202] The Constitution of the Republic of South Africa, 1996.

otherwise to consent orders on behalf of their firms, if an admission by a firm that it participated in a cartel could be used as the basis to secure a later criminal conviction against those very same directors and managers. They may argue that entering into the leniency process may put them at severe risk of having their freedom deprived for a long period of time and of course, the stigma of imprisonment may not sit well with them. If the implementation of the cartel offence is not seamlessly put into effect the CLP is at risk of becoming a dead mascot insofar as cartel enforcement is concerned.

It is therefore imperative that the NPA and the Competition Commission put their heads together to come up with a memorandum of agreement as to how to facilitate the introduction of the cartel offence without undoing all the good work that has been done by the CLP in the context of South African Competition Law enforcement. One may of course express the opinion that the introduction of the cartel offence is an unnecessary evil given that there is existing legislation which can address criminal conduct by directors and managers of firms. That argument however is water under the bridge as the cartel offence is now part and parcel of the Competition Act. How effective this implementation will be remains to be seen given the NPA's lack of expertise in cartel prosecution and also the lurking constitutional issues that may give rise to a plethora of court cases and even further amendments of the Competition Act to facilitate the smooth introduction of the offence. It would probably be a good idea for the NPA to at least attempt to get some personnel from the Competition Commission with significant experience in cartel enforcement to assist the NPA in setting up a dedicated cartel prosecutions unit.

It is disturbing to think that a mechanism that worked as well as the CLP may now lose its efficiency as a result of the introduction of a further "tool" aimed at deterring cartel activity that creates seemingly unresolvable tension with the CLP. However, as has been remarked throughout this dissertation, the introduction of the CLP as well as the subsequent introduction of the cartel offence into our competition law is in step with international developments. Hopefully these international jurisdictions that gave birth to these concepts and have been grappling with it for much longer than our

competition authorities may also come up with solutions that would preserve the effectiveness of the CLP whilst also putting the cartel offence to good use in the war against cartels.

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