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Cartel Enforcement in South Africa

By

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DECLARATION

I declare that this dissertation is my own work and have never been submitted to any University. Furthermore, all the sources that I have used or quoted have been indicated and acknowledged by means of references.

Signed at Pretoria on…….

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SUMMARY

A cartel is formed when competing firms agree to collude and act together instead of competing, all there while maintaining the illusion of competition. In South Africa, cartels are regulated by Competition Act 89 of 1998 (hereinafter the Act). These activities are specifically provided for in section 4(1)(b) of the Act and are *per se* prohibited. The section specifically lists the following activities as cartels practices: price fixing, bid rigging and market allocation. Cartel activities are formed in secret and this renders these activities more dangerous because it is difficult for competition authorities to detect and prosecute them. South African competition authorities consider cartels as the most egregious of all competition law contraventions because of their harmful impact upon consumers, economic development and the market.

Generally, an investigation process is employed by competition authorities to detect and prosecute cartel activities. The investigation process is usually preceded by a validly initiated complaint. The said complaint may be initiated by either, a private person or the Commissioner of the Competition Commission (hereinafter the Commission) in his or her capacity as the Commissioner acting on behalf the Commission. This form of investigation is commonly known as the "traditional investigation process". The traditional investigative process has been less effective in exposing and prosecuting cartel activities. South African competition authorities therefore decided to adopt Corporate Leniency Policy (hereinafter the CLP) to enhance its cartel detection and prosecution powers. The CLP is not contained in the Act but in a separate policy document. The CLP incentivizes cartel members to voluntarily disclose their involvement in cartel activity in exchange for immunity or leniency from prosecution and applicable fines. In terms of the CLP, the first cartel member, to bring cartel existence to the attention of the authorities is exempt from prosecution and prescribed sanctions for their involvement to the cartel activity provided they qualify with the prescribed requirements under the CLP.

Cartel activity trigger financial fines for firms involved in such an activity or criminal liability for natural persons responsible for the firm's involvement into such an activity. In this dissertation, I discuss cartels and effectiveness of the CLP, administrative penalties, private damages and criminal fines as key instruments available to competition authorities against cartels.

Chapter One: Background

1.1 Introduction

Free and fair competition between firms benefit consumers in terms of both choice and fair prices.[1] However, sometimes markets fail to live up to expectations of delivering the best possible outcomes for consumers.[2] Such failure would in most instances be found where harmful conduct is perpetrated by firms that are, (a) too big and are capable of independently abusing their size or (b) collaborating as competitors to engage in collusive activities to the detriment of consumers and other firms in the market.[3] This is the reason why jurisdictions around the world felt the need to introduce competition law to operate in the market in order to protect and advance the interest of consumers as well other firms which could suffer as result of the above practices. Competition law is defined to mean provisions or rules which aim to ensure and sustain a market where vigorous but fair competition will result in the most efficient allocation of economic resources and production of goods and services at the lowest price.[4] In essence, Competition law is designed to create a level playing field where both big and small business (commonly known as "firms") can compete fairly and effectively and thus to the greater benefit of consumers.[5]

1.2 South African Competition Law

Competition law originates from the United States of America with the enactment of the Sherman Act in 1890 that targeted abuses of power by big corporations (Trusts) in an attempt to make markets more competitive.[6] American competition law primarily aimed at limiting potential harmful or anti-competitive conduct and has been adopted by various jurisdictions around the world, including South Africa.[7] In South Africa, competition was previously regulated under the Maintenance and Promotion of Competition Act.[8] In terms of this Act, the Competition Board which was appointed by the Minister of Trade and Industry had all the necessary powers to investigate all

[1] Neuhoff *et al A practical guide to the South African Competition Act* 2017 p 6.
[2] Neuhoff (note 1 above) p 6.
[3] Neuhoff (note 1 above) p 6.
[4] Neuhoff (note 1 above) p 7.
[5] Neuhoff (note 1 above) p 7.
[6] Sutherland and Kemp *Competition Law of South Africa* 2016 p 1 – 3.
[7] Neuhoff (note 1 above) p 7. Sutherland and Kemp broadly believe that Competition Law was enacted to promote broad political, social and economic goals p 1 – 3.
[8] 96 of 1979.

competition matters within the Republic.[9] The 1979 system did however not contain explicit prohibitions.[10] Consequently, overhaul of the 1979 system happened in 1994 with the new political dispensation coming into the picture.[11] The new political dispensation saw a need to regulate competition matters by implementing comprehensive rules aimed at curbing business conduct that prevented efficient and competitive functioning of the South African economy for the greater benefit of the nation.[12] An extensive consultation process which happened immediately after the inception of the new political dispensation in 1994 resulted in the passing of the Competition Act 89 of 1998 (hereinafter referred to as the Act) to regulate all competition matters, and more specifically the horizontal and vertical restrictive practices, abuse of dominance, price discrimination as well as mergers and acquisitions.[13] Section 2 of the Act contains the objectives of the Act which are to:

- promote 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 the world markets and recognise the role of foreign competition in the Republic;
- ensure that small and medium-sized enterprise 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.

Regarding the scope of application of the Act, section 3 of the Act provides that, the Act applies to any economic activity taking place within or having an effect within the Republic of South Africa and that the obligation to enforce the provisions of the Competition Act is placed upon the Competition Commission.

1.3 Cartel practices

[9] Neuhoff (note 1 above) p 7.
[10] Neuhoff (note 1 above) p 7.
[11] Neuhoff (note 1 above) p 7.
[12] Neuhoff (note 1 above) p 7.
[13] Van Heerden C & Botha MM 'Challenges to the South African Corporate Leniency Policy and Cartel enforcement' *TSAR* 2015 p 308.

What are cartel practices? A cartel is an agreement or an understanding among competitors in which they co-operate to influence the price or supply of goods or services and agree not to compete with each other.[14] Zingales described cartels as, 'an organization of businesses that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong psychological assumptions exist among cartel members about their reciprocal behaviour.'[15] Firms find that colluding with each other could at times be a more useful, less problematic, more certain and a more profitable manner of doing business. This begs the question, who needs the untidy, cumbersome, painful and uncertainties-filled circumstances that are part of doing business in a free market where all are supposed to compete fairly and equally?[16]

Cartel practices are contained in Chapter 2 of the Act and includes the following prohibited practices, namely; price fixing, market allocation and collusive tendering as listed in section 4(1)(b).[17] As stated above, cartel practices as contained in section 4(1) (b) of the Act are considered to be the most egregious practices because of their secretive and deceptive nature and their general negative impact on the South African economy.[18]

1.4 Problem statement

Cartel practices are globally known for their deleterious impact on consumers, other firms not involved in the practice, the market as well as the economic development in general. Their enforcement is without any doubt a top priority for various jurisdictions regulating competition and of course, South Africa is no different. In South Africa, cartels are regulated under the Competition Act which came into force in the late 1990's. Today, the Act has been in operation for almost two decades but is still young when compared to other jurisdictions such as Canada, the United States and the European Union which have long been regulating competition.

[14] Lepaku M 'Is price fixing in competitors' agreements analogous to theft?' *Business Jutas Law* 2007 p 135.
[15] Van Heerden C & Botha MM 'Challenges to the South African corporate leniency policy and cartel enforcement' *TSAR* 2015 p 309.
[16] *Ispani (Pty) Ltd v competition Commission* 144/CAC/Aug16CT para 2.
[17] Section 4(1)(b) of Competition Act 89 of 1998.
[18] Section 73A of Competition Amendment Act 1 of 2000.

South African competition law is largely influenced by competition laws from these jurisdictions and our rules specifically governing cartels are regarded as rapidly developing rules. The reason for such rapid development is apparent. It is to grant cartel activities the regulatory attention they deserve and to effectively deter them in the interest of consumers and economic development. Competition authorities (Competition Commission, Competition Tribunal and Competition Appeal Court) which incur, largely, the task of competition law enforcement, have been granted certain powers to combat cartels. In this dissertation I intend to examine as to whether the said powers granted to competition authorities are efficient to fight cartels. I further examine the effectiveness of the key instruments in combating cartel activities.

The South African Corporate Leniency Policy, which plays a vital role in cartel detection and prosecution, administrative penalties, and private damages are the various tools available to South African competition authorities against cartels. Moreover, competition authorities have recently enacted section 73A, which criminalises cartels with the sole aim of enhancing their cartel enforcement powers.

2 Scope and nature of dissertation

In this dissertation, I propose to discuss cartel enforcement in South Africa. This entails a discussion of the three types of cartel conduct contained in section 4(1)(b) of the Act. I will thereafter proceed to discuss the mechanisms or tools employed by competition authorities to enforce the competition laws against cartels. The final chapter of the dissertation will concerns against key enforcement mechanisms and recommendations.

3 Research methodology

This study will mainly consist of academic, desk-based research interrogating relevant policy documents, statutes, books, journal articles and where applicable, case law, on the topic of research.

4 Chapter layout

Chapter One

In Chapter One the topic of the dissertation is introduced. I do so by giving a very brief history of South African competition law, by discussing scope of application of the Act, and also by outlining objectives of the Act and the different practices regulated by the Act. Key terms are explained in this chapter for background purposes and also to make this dissertation understandable to the reader. The chapter also outlines the scope and nature of the dissertation, research methodology and chapter lay-out.

Chapter Two

Though the chapter primarily dwells on the cartel practices contained in section 4(1)(b) of the Act, it also provides discussion of other practices regulated under the same section. The conduct considered as cartel practices in terms of section 4(1)(b) are fixing of prices or trading conditions, market allocation and collusive tendering. Before dwelling on these practices, a broad overview of section 4 is provided by first outlining the difference between the conduct in the section 4(1)(a) from that listed in section 4(1)(b). I further discuss the methods employed by our competition authorities to characterise cartels. In conclusion, the chapter briefly highlight effects of cartel practices on the market, economic development and on the consumers.

Chapter Three

This chapter discusses various mechanisms employed by competition authorities to detect cartels. The discussion is essentially limited to the initiation of valid complaints by both the Commission and private person and the Corporate Leniency Policy as a separate policy adopted to solely assist in bringing cartels to the authorities' attention and enable their prosecution.

Chapter Four

The Act provides various remedial mechanisms available to competition authorities, as well as to firms not involved in a cartel activity and natural persons affected by cartel activities. Cartel activities attracts administrative penalties against firms engaging in same. Other firms and/or natural persons affected by a cartel activity may claim civil damages incurred as result of the cartel activity against firms involved engaging in same. Competition authorities have recently enacted section 73A which hold natural persons that are behind the firms' involvement to a cartel activity criminally liable. These three remedies are accordingly discussed in this chapter.

Chapter Five

This is the last chapter of this dissertation and it outlines concerns against the key cartel enforcement mechanisms and recommendations of the study.

Chapter Two: Cartels

2.1 Introduction

As highlighted in Chapter One, Section 4 of the Competition Act only regulates the relationship between competitors in a horizontal relationship. The focus of this chapter is primarily on the practices listed in section 4(1)(b) of the Act. The heading in section 4 states that it concerns horizontal restrictive practices.[19] Section 4(1) as amended by the Competition Second Amendment Act[20] prohibits certain conduct between parties (firms) in a horizontal relationship.[21] Section 1 of the Act defines a horizontal relationship as one that exists between competitors.[22] The relationship between the firms (commonly known as competitors) will be regarded as a relationship on a horizontal level if the parties concerned operate in the same business line.[23] The definition section of the Act provides no definition for the term "competitor", and, the common view in South African competition law is that firms will be regarded as competitors if they compete in the same market in respect of the same or inter-changeable or substitutable good or services.[24] There is a view that, despite the fact that section 4 of the Act merely speaks of competitors, section 4 should also apply to potential competitors and that the concept "potential competitor" should not be too widely interpreted.[25] Potential competitors are said to include firms which indeed have the ability to be competitors, even if they are not competing at the moment when the purported infringement occurs.[26]

Section 4 reads as follows:

Restrictive horizontal practices prohibited –

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

[19] Sutherland and Kemp (note 6 above) p 5 – 7.
[20] 39 of 2000.
[21] Sutherland and Kemp (note 6 above) p 5 – 7.
[22] Sutherland and Kemp (note 6 above) p 5 – 7.
[23] Sutherland and Kemp (note 6 above) p 5 – 7.
[24] Sutherland and Kemp (note 6 above) p 5 – 7.
[25] Sutherland and Kemp (note 6 above) p 5 – 7.
[26] Sutherland and Kemp (note 6 above) p 5 – 8.

(a) 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;

(b) 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.

Section 4(1) of the Act highlights a few terms whose meaning require explanation in order to fairly understand section 4(1)(b). These terms are: an "agreement", "concerted practice", "firms", "decision by an association of firms" and "horizontal relationship". The concept of horizontal relationship has already been defined above. Important to note is that agreements, concentrated practices and decisions by an association of firms are three different types of co-operation between firms which are contemplated in section 4.[27] Before it can be said that section 4 applies, it must first be ascertained that at least one of these kinds of co-operation among the firms exists and the aim of this provision or prohibition is accordingly to catch different forms of co-ordination or collusion between firms.[28]

2.2 Firms

The term 'firm' plays a central role in the application of section 4 of the Act. Various practices provided for and regulated in this section must be between the 'firms'.[29] The term "firm" is defined in section 1 of the Act to mean, 'a person, partnership or a trust".[30] The definition of a 'firm' contained in section 1 has however been criticized for providing little assistance in ascertaining the meaning of the term 'firm' for section 4 purposes because it merely provides a list of business forms which may constitute a firm.[31] Sutherland and Kemp submit that for competition law

[27] Sutherland and Kemp (note 6 above) p 5 – 11.
[28] Sutherland and Kemp (note 6 above) p 5 – 11.
[29] Sutherland and Kemp (note 6 above) p 5 – 7.
[30] 89 of 1998.
[31] Sutherland and Kemp (note 6 above) p 5 – 37.

purposes, the term 'firm' should be defined with reference to any economic activity undertaken by any entity.[32] They believe that interpreting the term 'firm' with reference to an economic activity will give effect to section 3(1) of the Act which limits the scope of application of the Act to an economic activity within the Republic or having an effect within the Republic.[33] In accordance with the provisions of section 3(1), section 4 prohibitions apply to any entity (which is a separate economic unit) that conducts economic activity, and as such should be regarded as a firm.[34] Crucial to note is that, in instances where an entity conducts both economic and non-economic activities, the prohibitions contained in section 4(1) will only apply to the extent that such an entity (firm) conducts an economic activity.[35]

2.3 Agreement

In terms of section 1 of the Act 'agreement' is defined with reference to prohibited practices under the Act and includes a contract, arrangement or understanding, whether or not legally enforceable.[36] Sutherland and Kemp remark that the definition of agreement in section 1 of Act is not entirely unproblematic.[37] They are of the view that the use of the word 'includes' in defining the term "firm" is the source of uncertainties regarding the meaning of this term.[38] The two are not clear as to what the word 'includes' imports into the definition of agreement. Campbell holds the view that the word 'includes' signifies that the list of examples of conduct which may constitute agreement is not exclusive.[39] Sutherland and Kemp believe that Campbell's definition of the word 'includes' is correct.[40] Despite the highlighted uncertainty with regard to the meaning of the term 'includes' above, the definition of "agreement" in section 1 of the Act is considered to be very broad and Sutherland and Kemp remark that it is almost impossible to think of any understanding which is not covered by this definition.[41] "Agreement" as defined in section 1 of the Act is wide to an extent that any conduct which may possibly be described as an agreement, will be an agreement

[32] Sutherland and Kemp (note 6 above) p 5 – 37.
[33] Sutherland and kemp (note 6 above) p 5 – 37.
[34] Sutherland and Kemp (note 6 above) p 5 – 37.
[35] Sutherland and Kemp (note 6 above) p 5 – 38.
[36] Section 1 of Competition Act 89 of 1998.
[37] Sutherland and Kemp (note 6 above) p 5 – 17.
[38] Sutherland and Kemp (note 6 above) p 5 - 16.
[39] Sutherland and Kemp (note 6 above) p 5 – 16.
[40] Sutherland and Kemp (note 6 above) p 5 – 16.
[41] Sutherland and Kemp (note 6 above) p 5 – 16.

for the purpose of section 4 even if it cannot be defined as a contract arrangement or understanding.[42] Sutherland and Kemp point out that the broadness of the definition of "agreement" provided for in section 1 of the Act is further affirmed by the irrelevance of the lawfulness requirement for the existence of the agreement contemplated in section 1 of the Act which is in contrary to the common requirements or elements of an agreement in terms of contract law.[43] In terms of contract law, for an understanding between the parties to be regarded as an agreement, such an agreement must be legally enforceable and any understanding between the parties to perform an unlawful act cannot be regarded as an agreement. The Competition Appeal Court (hereinafter Appeal Court) in *Netstar (pty) Ltd v Competition Commission*[44] (hereinafter *Netstar* case) was tasked to define 'agreement' for competition law purposes. The Appeal Court defined 'agreement' to mean actions 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.[45] 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.' The Appeal Court definition of 'agreement' in the *Netstar* case is the preferred one because it is broad, and it regards or considers consensus as the basis for an agreement.[46] An 'agreement' contemplated in the Act and the *Netstar* case may be tacitly or expressly concluded.[47] What is required is that there has to be some plan of future conduct which does not have to reach the specificity of obligations but which can at least be called an arrangement.[48] A firm will be liable for participating in a cartel if it was a party to an agreement even if it does not abide by the outcome, unless it has publicly distanced itself from that concertation.[49]

2.4 Concerted practices

[42] Sutherland and Kemp (note 6 above) p 5 – 16.
[43] Sutherland and Kemp (note 6 above) p 5 – 20.
[44] 97/CAC/May10 15/02/2012.
[45] *Netstar* (note 44 above) para 25.
[46] Sutherland and Kemp (note 6 above) p 5 – 17.
[47] Sutherland and Kemp (note 6 above) p 5 – 17.
[48] Sutherland and Kemp (note 6 above) p 5 - 17.
[49] Sutherland and Kemp (note 6 above) p 5 – 19.

The term 'concerted practices' was coined in United States and is foreign to South African competition law.[50] United States authorities generally regarded all types of co-operations prohibited by the Sherman Act as 'concerted practices'.[51] One of the leading cases where the court was required to define 'concerted practices' was in *Cimenteries CBR SA v Commission*.[52] The court in this case highlighted that a concerted practice in the competition law context exists where the parties have intended to co-ordinate conduct even if the specific terms of the co-ordination have not been worded clearly.[53] In South Africa, the concept of 'concerted practice' is defined in the Act to mean co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.[54]In terms of this definition, concerted practices have got some sense of collective action or practice by the group of firms rather than unilateral practice, and it is really not an easy task to determine exactly when there will be co-ordination or practical co-operation rather than independent conduct.[55] Though it is collective conduct, the Act is very clear that the conduct must however not amount to an agreement between the parties thereto.[56] The Act expressly requires a difference to be drawn between 'concerted practices' and 'agreements' and the fact that the Act requires such distinction could possibly be a sign that a fine lie does exist between the two. Though the difference between concerted practice and an agreement may be perceived to be clear, the Appeal Court in the *Netstar* case confirmed that the distinction between an agreement and concerted practice is important as it appears from their respective definitions.[57] The Court of Appeal held that with regard to 'concerted practices' "the emphasis is on the conduct of the parties. By contrast, an agreement arises from the 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'.[58] In addition, Sutherland and Kemp are of the view that when it comes to a concerted practice, there is an apparent meeting of minds in the background but such meeting is not as

[50] Sutherland and Kemp (note 6 above) p 5 – 17. The duo believes that, the drafters of the South African Competition Act felt that inclusion of the concept 'concerted practice' was required to forestall the possibility of undertakings evading the application of section 4(1) 5 – 32.
[51] Sutherland and Kemp (note 6 above) p 5 – 28.
[52] T-25/95.
[53] Para 1852.
[54] Section 1 of Competition Act 89 of 1998.
[55] Sutherland and Kemp (note 6 above) p 5 – 31.
[56] Section 1 of Competition Act 89 of 1998.
[57] *Netstar* (note 44 above) para 25.
[58] *Netstar* (note 44 above) para 25.

explicit as in the case of an agreement.[59] Sutherland and Kemp have a great appreciation of the difficulty in drawing a distinction between a concerted practice and an agreement contemplated in the Act and they go further to remark that it is tempting to take the view that concerted practices are agreements in their diluted form.[60] The Court of Appeal in the *Netstar* case looked at different factors in drawing a difference between a concerted practice and an agreement and they are similar to those considered by Sutherland Kemp. Sutherland and Kemp highlight that there are cases where competition authorities drew no clear distinction between an agreement and concerted practice.[61] This therefore validates the view that distinguishing an agreement and concerted practice as contemplated in the Act is not an easy exercise. Essential to note is that by contrast to our jurisdiction, European competition authorities merely brush through the distinction between agreements and concerted practices.[62] Sutherland and Kemp state however that the difference between concerted practices and agreements has got no significance as they are both forms of collusive conduct thus closely related.[63] The only important distinction that competition authorities must worry about is the distinction between collusive and non-collusive conduct.[64]

2.5 Decision by association of firms

The phrase 'decision by an association of firms' is not defined in the Act. It is however proposed by Kelly that 'decision by an association' of firms should be understood to refer a body that promotes the interests of a number of firms, like trade and industry associations or professional bodies.[65] It is believed that the legislature primarily provided for these kind of practices because it acknowledges that these associations or bodies, despite having entirely legitimate objectives and potentially yielding pro-competitive benefits, may be used as platforms to establish and enforce cartels.[66] The association must be composed of firms.[67] The Act only mentions decisions of associations of firms

[59] Sutherland and Kemp (note 6 above) p 5 – 30.
[60] Sutherland and Kemp (note 6 above) p 5 – 33.
[61] Sutherland and Kemp (note 6 above) p 5 – 32.
[62] Sutherland and Kemp (note 6 above) p 5 – 33.
[63] Sutherland and Kemp (note 6 above) p 5 – 33.
[64] Sutherland and Kemp (note 6 above) p 5 – 33.
[65] Kelly *et al Principles of Competition Law in South Africa* 2017 p 83.
[66] Kelly *et a*l (note 65 above) 83.
[67] Sutherland and Kemp (note 6 above) p 5 – 26.

but Sutherland and Kemp point out that it must be noted that the provisions of section 4 of the Act will apply to decisions by an association of associations of firms.[68]

2.6 Distinction between rule of reason and *per se* prohibited practices under section 4(1)(b)

An agreement between or concerted practice of firms or decision by an association of firms as discussed above are also known as 'concertations'.[69] A mere concertation is not as such prohibited.[70] Only anti-competitive concertations are prohibited in terms of section 4. Under section 4, the Act essentially contemplates two forms of prohibited concertations, namely: rule of reason and *per se* (also known as cartels) concertations.[71] As pointed out by Sutherland and Kemp the terms "rule of reason" and "*per se"* is not used in the Act.[72] Rule of reason concertations are those that will only be condemned once it has been established from the facts of the case that they affect competition negatively and efficiency,[73] pro-competitive gains[74] or technological gains[75] cannot be raised as a defense.[76] In contrast to rule of reason concertations, *per se* concertations are those that are prohibited on the basis of their existence and with no further examination on the facts of the case and no defense can ever be advanced once they are proven to exist.[77] Competition authorities accordingly regard *per se* practices as presumptively harmful and no evidence may be considered in attempt to justify them.[78] The other key distinguishing factor between rule of reason and *per se* concertations as pointed out by Kelly, is that whereas rule of reason concertations

[68] Sutherland and Kemp (note 6 above) p 5 – 26.
[69] Sutherland and Kemp (note 6 above) p 5 – 44.
[70] Sutherland and Kemp (note 6 above) p 5 – 44.
[71] Sutherland and Kemp (note 6 above) p 5 – 44.
[72] Sutherland and Kemp (note 6 above) p 5 – 44.
[73] Neuhoff *et al* (note 1 above*)* p 64 – 66. Any conduct that lessons competition, but that allows for the utilization of a firm's resources, or for production at a lower cost or that encourages innovation, qualifies as efficiency conduct. Economic efficiency takes three forms; allocative efficiency or technical efficiency and dynamic efficiency.
[74] Neuhoff M et al 66. Pro-competitive gains are defined to mean, 'Any conduct or market structure that leads to lower prices for consumers or assists in opening in markets to competition.'
[75] Neuhoff *et al* (note 1 above*)* p 66. Technological gains are broadly defined as the act of awarding patents or exclusive licenses which encourages innovation and technological logic progress.'
[76] Neuhoff *et al* (note 1 above) p 73.
[77] Neuhoff *et al* (note 1 above)75.
[78] Sutherland and Kemp (note 6 above) p 5 – 45.

attracts penalties on repeated contraventions, *per se* practices attracts penalties upon their very first contravention.[79]

2.7 Characterisation of cartel activities

As stated in paragraph 2.4 above, section 4 provides for two distinct prohibited practices in law and competition authorities are expected to maintain and protect such distinction in order to avoid legal confusion. The distinction between the two categories of restrictive horizontal prohibited practices seem to be straightforward on paper.[80] This begs the question whether this is indeed the case in practice? According to Modaliyar and Weeks there are legal complexities in relation to the characterisation of the *per se* practices specifically listed in section 4(1)(b) of the Act from the rule of reason practices provided for under section 4(1)(a).[81] They state that it is important to be clear on the meaning and character of the phrases describing these prohibited practices before we attempt to categorise them.[82] Section 4(1)(b) specifically provides for fixing of purchase or selling prices, market allocation (division) and collusive tendering.[83] Moodaliyar and Weeks argue that the decision to categorise price fixing, market allocation and collusive tendering together as they appear in section 4(1)(b), suggest that they have been given a specific meaning which in turn confers on them a certain character.[84] The structure of this section is clear, and the wording is concise but again, does that mean that the ordinary literal meaning of the wording in section 4(1)(b) may be used to distinguish practices falling under section 4(1)(b) from restrictive horizontal practices contemplated in section 4(1)(a)? *In American Natural Soda Ash Corporation and Another v Competition Commission and Others*, (hereinafter referred to as *ANSAC* case)[85] the South African Supreme Court of Appeal was given the task of distinguishing between rule of reason and *per se* practices. The Supreme Court of Appeal ruled that, in deciding whether firms are involved in a practices listed in section 4(1)(b) of the Act, the Tribunal must accept evidence relating to the nature, purpose and effect of the horizontal agreement.[86] The Supreme Court of Appeal further

[79] Kelly *et al* (note 65 above) 222.
[80] *American Natura Soda Ash and Others v Competition Commission and Others* 2005 3 All *SA* 1 SCA.
[81] Moodaliyar and Weeks 'Characterising price fixing: a journey through the looking glass with *ANSAC' SAJEMS* 2008 p 3.
[82] Moodaliyar and Weeks (note 81 above) p 3.
[83] Neuhoff *et al* (note 1 above) 73.
[84] Moodaliyar and Weeks (note 81 above) p 3.
[85] 2005 3 All SA 1 (SCA).
[86] *ANSAC* (note 85 above) para 65.

held that two-leg characterisation test must be employed in characterising *per se* prohibited practices.[87] The Supreme Court accordingly held that proper analysis of section 4(1)(b) requires that first, the scope of section 4(1)(b) must be established and such establishment may merely be based on statutory interpretation.[88] Secondly, once the scope of the section has been established, the enquiry may move to whether or not the conduct complained about falls within the ambit of the section in question, and this can be answered by recourse to the relevant evidence.[89] The prohibited practice complained about must be properly characterised as one of the prohibited practices under section 4(1)(b) of the Act.[90] The Supreme Court went on to say the two leg test is a flexible test and that there is in principle no reason why the enquiry should not be conducted in reverse. The enquirer might choose to first identify the true character of the conduct which is the subject of the complaint and only then turn to whether the conduct so characterised constitute any of the prohibited practices contemplated by section 4(1)(1).[91]

In contrast to the test employed in the *ANSAC*-case, the Competition Appeal Court in *Competition Commission v South African Breweries Ltd and Others*[92] held that the legislature did not envisage a judicially constructed rule and that the practices listed in section 4(1)(b) of the Act are *per se* prohibited.[93] The Tribunal therefore held that the characterisation under the Act requires a determination of whether the parties are in a horizontal relationship; and if so, whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of section 4(1)(b).[94] The Competition Appeal Court furthermore held that since characterisation in a sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.[95] Moodaliyar and Weeks thus correctly opine that the characterisation which competition authorities embark on is at all times expected to

[87] *ANSAC* (note 85 above) para 47.
[88] *ANSAC* (note 85 above) para 44.
[89] *ANSAC* (note 85 above) para 45.
[90] *ANSAC* (note 85 above) paras 44 – 45.
[91] *ANSAC* (note 85 above) para 46.
[92] 134/CR/Dec07.
[93] *South African Breweries* (note 92 above) para 36.
[94] *South African Breweries* (note 92 above) paras 36 - 7.
[95] *South African Breweries* (note 92 above) para 37.

be consistent with the policy objective of achieving maximum deterrence of *per se* prohibited practices.[96]

2.7.1 Price fixing

Determination of prices in a market is influenced by input, output and demand in that market. Also, competition law requires that competitors independently determine their prices. Collusion between competitors to replace their independence in setting prices for the market with their determination of price amounts to price fixing and this is prohibited by section 4(1)(b) of the Act.[97] Under section 4(1)(b)(i) an agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves directly or indirectly fixing a purchase or selling price or any other trading condition.[98]

2.7.1 (i) Fixing of purchase or selling price

Collusion between competitors to set prices are thus prohibited. But the question remains: what does the fixing of purchase or selling prices envisaged in section 4(1)(b)(i) of the Act entail? In the *ANSAC* case,[99] the court interpreted the notion of price fixing contemplated in section 4(1)(b) of the Act. It held that, in the context of section 4(1)(b) of the Act, 'price fixing necessarily contemplates collusion in some form between competitors for the supply into the market of their respective goods with the design of eliminating competition in regard to price. That it is achieved by the competitors collusively "fixing" their respective prices in some form, namely "by setting uniform prices, or by establishing formulae or ratios for the calculation of prices, or by other means designed to avoid the effect of market competition on their prices."[100] The Supreme Court of Appeal further cautioned that, despite the fact that price fixing inevitably involves collusive or consensual price determination by competitors, this however does not necessarily mean that price fixing has occurred wherever there is an agreement between competitors that results in their goods

[96] Moodaliyar and Weeks (note 81 above) p 338.
[97] Sutherland and Kemp (note 6 above) p 5 – 57.
[98] Sutherland and Kemp (note 6 above) p 5 – 60.
[99] 2005 6 SA 158 (SCA).
[100] *ANSAC* (note 85 above) para 48.

reaching the market at the same price.[101] The court supported this view by stating that, with reference to the wording of the section, price fixing may be limited to collusive conduct by competitors that is fashioned to avoid competition as opposed to conduct that merely has such an incidental effect.[102]

According to Sutherland and Kemp the definition of price fixing provided in the *ANSAC* case is broad and prohibits any form of collusive setting or determination of prices by competitors. They indicate that it may further be said that the broad definition of price fixing in this case possibly validates the view that price fixing is regarded as the most heinous of anti-competitive practice.[103] Though the most common cases of price fixing concerns fixing of a selling price, Sutherland and Kemp point out that the wording of section 4(1)(b) of the Act actually provides for the prohibition of fixing of a purchase price.[104] They further indicate that fixing of prices can be done by either purchasers or sellers and that fixing of prices will not only occur where minimum prices or specific prices are fixed; but that the fixing of maximum prices also constitute fixing of prices envisaged by the Act and is similarly prohibited.[105] However, they remark that the fixing of maximum selling prices by sellers is often veiled by minimum price fixing or it is at least a means by which firms co-ordinate prices at upper competitive levels.[106] Similarly, the court in *Competition Commission v Association of Pretoria Attorneys*[107] held that an agreed pricing guideline between firms in a horizontal relationship constitute price fixing thus a *per se* prohibited practice.[108] The court founded its base for the above statement on the view that, with regard to pricing guideline, it is often intended that the guideline should harden into ruling prices.[109]

It should further be noted that the fixing of purchase or selling prices prohibited by section 4(1)(b) of the Act can occur either in a direct or indirect form.[110] A direct fixing of purchase or selling price will occur where competitors expressly agree on the price that they will charge or pay.[111] In

[101] *ANSAC* (note 85 above) para 49.
[102] *ANSAC* (note 85 above) para 49.
[103] Sutherland and Kemp (note 6 above) p 5 – 57.
[104] Sutherland and Kemp (note 6 above) p 5 – 57.
[105] Sutherland and Kemp (note 6 above) p 5 – 58.
[106] Sutherland and Kemp (note 6 above) p 5 – 58.
[107] *Competition Commission v Association of Pretoria Attorneys* 33/CR/Jun03 30/07/2003.
[108] *Association of Pretoria Attorneys* (note 107 above) p 5.
[109] Sutherland and Kemp (note 6 above) p 5 – 59.
[110] Sutherland and Kemp (note 6 above) p 5 - 60 – 62.
[111] Sutherland and Kemp (note 6 above) p 5 – 60.

contrast, in the case of indirect price fixing, the firms do not actually or expressly agree on the price that will be charged or paid but they establish a co-ordinated price by indirect means.[112] Sutherland and Kemp state that an output restriction or collusion to control supply or production is a perfect example of an indirect price fixing.[113] They however caution that it may be difficult to draw a line between direct and indirect price fixing and that this is a futile task because both (direct and indirect price fixing) are *per se* prohibited practices and are equally prohibited by the Act.[114] It is in the distinguishing of indirect fixing of prices from practices that are not price fixing at all where considerable restraint from competition authorities will be relevant and required.[115] I fully support this view. The distinction between direct and indirect fixing of purchase or selling price indeed serves no purpose since both practices received equal attention in our law. Competition authorities are required to not regard any conduct as price fixing unless there is a clear link between concertation and the establishment of prices by the firms involved in it.[116] This simply requires that a causal connection between the firms allegedly involved in price fixing and determination of price must be present before authorities speak of price fixing.

2.7.1 (ii) Fixing of trading conditions

The fixing of trading conditions other than price, is prohibited in South Africa.[117] However the prohibition on trading conditions is ambiguous and the Act provides no definition for this term. In *Competition Commission v Patensie Sitrus Beherend Bpk*[118] the Tribunal came close in defining trading conditions contemplated in section 4(1)(b) of Competition Act by remarking that:

> the range of "trading conditions" hit by this sub-section is limited by the contextual cobbling together of price fixing and the fixing of "any trading condition", which in our view, points to aspect of a particular trade or transaction that are intimately related to price, i.e. quantity and quality. Hence for a "trading condition" to be hit by this section of the Competition Act it should be part of the price quantity -quality

[112] Sutherland and Kemp (note 6 above) p 5 – 61.
[113] Sutherland and Kemp (note 6 above) p 5 – 61.
[114] Sutherland and Kemp (note 6 above) p 5 – 61.
[115] Sutherland and Kemp (note 6 above) p 5 – 61.
[116] Sutherland and Kemp (note 6 above) p 5 – 61.
[117] Sutherland and Kemp (note 6 above) p 5 – 66.
[118] *Competition Commission v Patensie Sitrus Beherend Bpk* 37/CR/Jun01.

> nexus of the concerned transaction or trade. This naturally includes an agreement that seeks to limit output, but it would also likely include the fixing of a discount structure or repayment condition.[119]

Initially, the Act did not provide for the prohibition on fixing of trading condition.[120] The prohibition on fixing of trading conditions came into being as a result of the extension of the prohibition placed on price fixing.[121] This extension of the price fixing prohibition to cover or include fixing of trading conditions was adopted from the Treaty on the Functioning of European Union (TFEU).[122] The fixing of trading conditions is equivalent to price fixing and thus a *per se* prohibition.[123] Sutherland and Kemp point out that although concertation to set trading conditions may be anti-competitive, there will be many cases where the fixing of such conditions by competitors will be pro-competitive and this will for an instance be the case where competitors set standards.[124] Fixing of purchase or selling price or trading conditions is a *per se* prohibited practice and is no different from other outright prohibited practices (to be discussed below) in the sense that it will not be possible for the firms that are parties in the practices in question to argue that they were charging a reasonable price, or that they were stabilising the prices, or that they were trying to ensure the viability of a competitor.[125]

2.7.2 Market allocation

Prices can be controlled in ways other than direct price fixing agreements but also indirectly by an agreement among firms not to compete with one another, in other words through market allocation.[126] Market allocation is specifically provided for in section 4(1)(b)(ii) of the Act. Just like fixing of purchase or selling price, market allocation is a *per se* prohibited practice.[127] Market allocation is the dividing up of markets between competitors.[128] Though market allocation is a *per se* prohibited practice like the fixing of purchase or selling price, it has nothing to do with the setting

[119] *Patensie Sitrus Beherend* (note 118 above) Para 35.
[120] Neuhoff state that trading condition includes credit terms, delivery charges, delivery schedules, minimum quantities, interest charges or anything which affects the economics of the transactions, p 82.
[121] Sutherland and Kemp (note 6 above) p 5 – 66.
[122] Article 101(1)(a) of Treaty on the Functioning of European Union.
[123] Sutherland and Kemp (note 6 above) p 5 – 67.
[124] Sutherland and Kemp (note 6 above) p 5 – 66-7.
[125] Sutherland and Kemp (note 6 above) p 5 – 59.
[126] Neuhoff *et all* (note 1 above) p 84.
[127] Sutherland and Kemp (note 6 above) p 5 – 68.
[128] Sutherland and Kemp (note 6 above) p 5 – 68.

of a price.[129] Market allocation concerns a situation where competitors allocate different markets, or parts of a market, to participants in the collusion to enable such competitors to exercise some market power in their allocated spheres.[130] Market allocation provided for in section 4(1)(b)(a) takes various forms, namely, allocation of customers, suppliers, territories, or specific types of goods or services.[131] These four forms of market allocation are separately discussed below:

a) The first form of market allocation is allocation of customers. In South Africa, competitors may not collude to allocate customers. This will for an example occur in a situation where competitors agree that a certain class of customers will be served only by a particular firm i.e firm A and B agree that firm A will supply to state institutions while firm B will supply to private companies.[132]
b) The second form of market allocation is the allocation of suppliers. Firm A and B (who are competitors) may not agree that firm A will take supplies of wood only from supplier X and that firm B will only take supplies from supplier Y.[133]
c) The third form of market allocation occurs when the competitors collude to divide territories. This kind of market allocation is regarded as the most common form of market allocation and occurs where firm A and firm B (competitors) agrees that firm A will only supply products in area Y while firm B will only supply the very product in area Z.[134] There is a view that an agreement between competitors not to advertise in the allocated area of a competitor should be a *per se* prohibited market allocation.[135]
d) The last form of market allocation is the allocation of a product. This kind of market allocation occurs for an example where firm A and firm B (competitors operating in the same geographical area) agree that firm A will produce red soccer balls while firm B will only produce blue soccer balls.[136] This type of market allocation can also occur where firm A and firm B agree that firm A will only sell Black Label beer while firm B will only sell Castle Lager beer.

[129] Sutherland and Kemp (note 6 above) p 5 – 68.
[130] Sutherland and Kemp (note 6 above) p 5 – 69.
[131] Sutherland and Kemp (note 6 above) p 5 – 69.
[132] Sutherland and Kemp (note 6 above) p 5 – 69.
[133] Sutherland and Kemp (note 6 above) p 5 – 70.
[134] Sutherland and Kemp (note 6 above) p 5 – 70.
[135] *Blackberry v Sweeney* 7th Cir 1995.
[136] Sutherland and Kemp (note 6 above) p 5 – 70.

All four different practices amongst competitor discussed above are *per se* prohibited practices and are considered to be forms of market allocation. It is important to note that the *per se* prohibition on market allocation is not only limited to market allocation that occurs between competitors but is extended to 'potential competitors.'[137]

2.7.3 Collusive tendering

The Act does not define the term 'collusive tendering'.[138] However, Sutherland and Kemp define collusive tendering as any agreement between competitors pursuant to which contract offers are to be submitted (to) or withheld from a third party.[139] According to this definition, collusive tendering will most probably occur where firms agree to bid either high or low depending on what role they will play. Collusive tendering constitutes an anti-competitive activity as it results to market allocation[140] and it occurs in the following three main forms:

2.7.3 (i) Complementary tendering

This form of collusive tendering occurs when firms (competitors) submit bids but agree that one of them will submit the lowest bid or will submit the only bid that contains acceptable terms in exchange for which it will divide the work or proceeds among itself and the other colluders, or in exchange for which the successful firm will again have to submit higher or otherwise objectionable bids in the future bidding process.[141]

2.7.3 (ii) Bid suppression

Bid suppression occurs where several competitors do not tender or withdraw from the tendering process and, in exchange for this sacrifice, the parties who refrain or withdrew from the bidding may be given the privilege of making uncontested bids in future bidding processes.[142]

[137] Sutherland and Kemp (note 6 above) p 5 – 68.
[138] Sutherland and Kemp (note 6 above) p 5 – 75.
[139] Sutherland and Kemp (note 6 above) p 5 – 75.
[140] Neuhoff *et al* (note 1 above) p 89.
[141] Sutherland and Kemp (note 6 above) p 5 – 75.
[142] Sutherland and Kemp (note 6 above) p 5 – 75.

2.7.3 (iii) Bid rotation

Bid rotation as the last form of market allocation occurs where all potential competitors agree to submit tenders but only one of them submits the lowest and winning tender.[143] An example would be where two firms that are competitors, firm A and B, are involved in the supply of coal to power stations. A power station is in need of coal and advertise a tender to supply it with the coal. In response to the advertisement, firm A and B come to an agreement that firm A will put in a bid at a price that will effectively allow firm B to win the tender for the supply of coal to the power station. In return, firm B will allow firm A an opportunity win the next tender.[144]

2.8 Effects of cartels

Cartels are *per se* prohibited because they have negative impact (most likely) on the market, consumers and economic development.[145] The negative impact of cartels on the abovementioned areas and ordinary consumers is discussed below.

2.8(i) Effects of cartel activities on consumers

The impact of elimination of competition upon consumers was highlighted in the *Pioneer* case. The Tribunal in the said case held that the damage to competition by cartelist's conduct negatively affected consumers in the form of higher prices, less choice and inferior services.[146] Having such dire consequences upon consumers, it is a general know fact that standard of living among consumers within our societies is no uniform. Some are poor, and some are rich. It is therefore a logic that the higher prices, less choice and inferior services would impact more upon the poorer than the rich.[147] I further submit that the violation of competition through involvement into cartel activities undermines the primary objective of the Constitution of the Republic of South Africa, which is to narrow the gap between the rich and the poor.

[143] Sutherland and Kemp (note 6 above) p 5 – 75.
[144] Neuhoff *et al* (note 1 above) p 90.
[145] Makhubele D 'Fighting over breadcrumbs: Cartels and the competition Act 89 of 1998' 2014 *De Rebus* p 21.
[146] *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb07 para 160.
[147] *Pioneer* (note 146 above) para 160.

2.8(ii) Effects of cartel activities on the market

On the market, cartel practices have an exclusionary effect which further results in competition elimination. The collusive behaviour or conduct of cartelists kicks out off the market all unparticipating firms which are their competitors. The kicking out of competitors in the market results in the cartelist operating alone like monopolists in a specific market and makes it very difficult for other firms (which are not participating to the cartel practice) to enter and compete in that same market.[148]

2.8.3 Cartels impact on economic development

The exclusionary effect highlighted in paragraph 2.6.1 leads to foreclosure. Cartel activities makes it difficult for the small companies in the same industry to grow.[149] Makhubele believe that this was clearly outlined by the Tribunal in *Competition Commission v Pioneer Foods (Pty) Ltd*,[150] where the Tribunal held that Pioneer and its competitors granted discount for bread to consumers and agents and fixed the price of bread and toaster bread. Pioneer and its competitors enjoyed dominance in the bread market in South Africa.[151] This resulted in economic development being negatively affected in that the consumers were channelled by the cartel not to use the services and products of other bread companies thus these companies were forced to close.[152]

2.9 Final remarks

Market allocation, price fixing and collusive tendering as defined in this chapter are *per se* prohibited. One of the major justifications for categorising specifically the three practices is their harmful impact on economic development, consumers and the market as stated in this chapter. However, the scope of the section is limited. One must always note that section 4(5) of the Act makes two exceptions with regard to firms engaging in one or more of the *per se* practices under

[148] Sutherland and kemp (note 6 above) p 5 – 3.
[149] Makhubele (note 145 above) p 22.
[150] 15/CR/Feb07.
[151] Makhubele (note 145 above) p 22.
[152] Makhubele (note 145 above) p 22.

section 4(1)(b). First, the section provides that the *per se* prohibition on agreements between or concerted practice among the firms to fix prices, allocate the markets or collusive tendering will not apply if it is between a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them.[153] Secondly, concerted practices or agreements between firms are not subject to the *per se* prohibition under section 4 if they exist among the constituent firms within a single economic unity similar in structure to those referred to paragraph (a) of section 4(5)(a).[154]

[153] Section 4(5)(a).
[154] Section 4(5)(b).

Chapter three: Prosecuting cartel activities in South Africa

3.1 Introduction

Competition authorities around the world consider cartel activities as the most egregious conduct between competing firms which requires special treatment from competition authorities.[155] In this regard, South African competition authorities are no different. What renders cartels so egregious is not only their negative impact in the market upon consumers or in economic development, but their deceptive nature which makes it almost impossible for competition authorities to track, detect and prosecute them.[156] Cartels are consequently a top priority for competition authorities around the world and various jurisdictions have developed and implemented sophisticated mechanisms to track, detect and prosecute them.[157] In this chapter, I discuss mechanisms available to and employed by South African competition authorities to detect, investigate and prosecute cartel activities.

3.2 Mechanisms employed by competition authorities to uncover cartels

Given that cartel activities are regarded as the most deceptive practices, the question is how do the competition authorities uncover or detect cartels, taking into consideration their deceptive character? There are basically two mechanisms afforded or available to competition authorities to uncover cartel activities. The first mechanism is a variety of enforcement provisions offered by various sections of the Act. The second mechanism is the Corporate Leniency Policy (CLP) which is contained in a separate policy document. CLP is considered to be a key mechanism used by competition authorities to uncover, prosecute and deter cartels. The discussion of these two methods to uncover cartels follows below starting with the enforcement provisions offered by the Act.

3.2.1 Section 4(2) presumption

[155] Lopes N *et al* '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?' (2013) p 1. Accessed on 30th of June 2018 from http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf.
[156] Lopes N *et al* (note 155 above) p 1.
[157] Sutherland and Kemp (note 6 above) p 5 – 45.

The point of departure in uncovering deceptive and sophisticated cartel practices as listed and itemized in section 4(1)(b) of the Act, is section 4(2) of the Act.[158] The section presumes existence of cartel conduct. The presumption is a rebuttable one.[159] As indicated by Sutherland and Kemp, the legislature has provided a presumption to make it easier for competition authorities to prove that cartel conduct has occurred.[160] Section 4(2) of the Act provides that, 'an agreement to engage in a horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if -

(a) any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
(b) Any combination of those firms engages in that restrictive horizontal practice.'

The section 4(2) presumption will apply in two distinct instances and in both instances, there must be a link between the relevant firms. Firstly, the link will be established where one firm has a significant interest in the other firm.[161] Sutherland and Kemp state that it is not clear what constitutes an "interest" for purposes of this section and therefore they propose that the interest contemplated in this section could be a legal and direct interest.[162] However, with regard to significance of the interest, they believe that interest concerned would only be regarded as significant if it enables one firm to have some influence in the other firm.[163]

Secondly, the link will be established where the firms concerned have a common director or substantial shareholder.[164] The term "director" is defined in section 4(4) of the Act to mean: 'for the purpose of subsection (2) and (3), director means; (a) a director of a company as defined in the Companies Act, 1973; (b) a member of a close corporation as defined in the Close Corporations Act, 1984; (c) a trustee of a trust; or (d) a person holding an equivalent position in a firm.' Sutherland and Kemp believes that the definition of director as per section 4(4) is wide and they state that to think of the definition of a director as defined in Companies Act[165] will be of no help because the

[158] Furthermore, competition authorities are encouraged to look at the market conduct of firms to determine as to whether there are reasons for suspicion and to assist them in prosecuting collusive behaviour.
[159] Section 4(3) of Competition Act 89 of 1998.
[160] Sutherland and Kemp (note 6 above) p 5 – 98.
[161] Sutherland and Kemp (note 6 above) p 5 – 98.
[162] Sutherland and Kemp (note 6 above) p 5 – 98.
[163] Sutherland and Kemp (note 6 above) p 5 – 98. It will further not be enough if one firm is merely an important client or supplier of the other firm.
[164] Sutherland and Kemp (note 6 above) p 5-98.
[165] 61 of 1973.

Companies Act also does not appropriately define the term director.[166] In the Companies Act definition section, the term 'director' is defined to mean, 'a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.'[167] They therefore propose that the term "director" must still be determined with reference to the common law.[168] Accordingly, a *de facto* director who is involved in the management of the company in the way that a director normally would be, will covered by section 4(2) even if he has not been formally so appointed.[169] Lastly, a sufficient link for the purposes of the presumption will exist where the firms have a substantial shareholder in common.[170] Just like in the case of the required interest, the presumption will only apply where the shareholding in all relevant firms is substantial, and a shareholder will only be regarded as being substantial shareholder if such a shareholder has some influence in the other firm concerned.[171]

Moreover, paragraph (b) of section 4(2) (which can be fairly described as the second part of the presumption) suggest that even where a link has been established between firms, the presumption will apply only if any combination of those firms 'engages' in that restrictive horizontal practice.[172] The restrictive horizontal practices contemplated in this paragraph are; price fixing, market allocation and collusive tendering listed in section 4(1)(b) of the Competition Act. Sutherland and Kemp however state that section 4(2)(b) of the Act, which is the second part of the presumption, has not only been viewed as a limitation on the presumption but also as making it impossible to establish when the presumption will apply.[173] Therefore, one can say the application of this presumption is impossible and can only be imagined because it is really not clear as to when it applies as per the wording of the provision. As it has been said above, the section 4(2) presumption is a rebuttable one and may be rebutted by either a firm, director or shareholder in terms of section 4(3) of Competition Act.[174] In terms of section 4(3), the firm, director or shareholder concerned may rebut the presumption by proving that a reasonable basis exists that the presumed practice is

[166] Sutherland and Kemp (note 6 above) p 5 – 98.
[167] Section 1 of the Companies Act 71 of 2008.
[168] Sutherland and Kemp (note 6 above) p 5 – 99.
[169] Sutherland and Kemp (note 6 above) p 5 - 98 – 99.
[170] Section 4(2)(a) of the Act.
[171] Sutherland and Kemp (note 6 above) p 5 – 99.
[172] Section 4(2)(b) of Competition Act 89 of 1999.
[173] Sutherland and Kemp (note 6 above) p 5 – 100. I support this view. Presumption means that there is no need to prove actual existence of the presumed practice.
[174] Section 4(3) of Competition Act 89 of 1998.

a mere normal commercial response to conditions prevailing in that market.[175] However, it seem as there is no point in rebutting the presumption since it is not clear as to when the presumption will apply.

3.2.2 Initiation of a complaint

It is imperative to note that the section 4(2) presumption is not the only way in which the cartels may be brought to the competition authorities' attention under the Act. Cartels may also be uncovered through a complaint initiated in terms of section 49B of Act.[176] Section 49B of the Act provides for two different forms of complaints.[177] The two complaints provided for in section 49B are basically a complaint initiated by the Commissioner and a complaint initiated by any private person. The legislature draws a clear distinction between a complaint initiated by the Commission (in terms of section 49B(1)) and a complaint submitted by a private person (in terms of section 49B(2)).[178] While the latter has to be in the 'prescribed form', no formalities are prescribed for the former.[179] The Supreme Court of Appeal in *Woodlands Dairy v Milkwood Dairy*[180] confirmed that, section 49B(1) of the Act grants the Commissioner exclusive jurisdiction to initiate a complaint of any alleged prohibited conduct.[181] The Supreme Court of Appeal explained in *Competition Commission v Yara* that, since there are no formalities required, section 49B(1) seems to demand no more than a decision by the Commission to open a case.[182] Such a decision may be formal or informal, and even tacit.[183] Though there are no prescribed formalities for the section 49B(1) complaint, the Supreme Court of Appeal in the *Yara* case further proposed that such a complaint can only be initiated on the basis of "reasonable suspicion".[184] The reasonable suspicion concerned could possibly exist, as a matter of principle, where and when the commissioner has, at the very least, been in possession of information concerning an alleged practice which, objectively speaking,

[175] Section 4(3) of Competition Act 89 of 1998.
[176] Section 49B(3) of Competition Act 89 of 1998
[177] *Competition Commission v Yara (SA)(Pty) Ltd* (784/12) [2013] *ZASCA* 107 (13 September 2013) para 21.
[178] *Yara* (note 177 above) para 21.
[179] *Yara* (note 177 above) para 21.
[180] (105/2010) 2010 ZASCA 104 (10 September 2010).
[181] *Woodlands* (note 180 above) para 13.
[182] *Yara* (note 177 above) para 21.
[183] *Yara (*note 177 above) para 21.
[184] *Yara* (note 177 above) para 26.

could give rise to a reasonable suspicion of the existence of a prohibited practice and without which information, there could not be a rational exercise of the power.[185]

The section further permits any member of the public to initiate a complaint against any alleged prohibited practice, in the prescribed form.[186] As confirmed in the *Yara* case, the formalities in relation to a complaint, only apply to a complaint initiated by a private person (meaning any member of the public).[187] The complaint needs to be initiated in terms of Form CC1 prescribed by section 21(4) and section 49B(2)(b) of the Act.[188] A complainant will be required to provide the following information on the Form CC1: its name; the name of the party being complained about; a brief description of the practice that has given rise to the complaint; a statement indicating whether the conduct is still continuing and if not, the date on which the conduct ceased and a written submission setting out, in detail, the cause for the complaint, how it arose, the parties involved, relevant dates and any other information that may be relevant to the complaint.[189] Section 49B(2) further affords an opportunity to any member of the public to submit information concerning an alleged prohibited practice to the Competition Commission.[190] The Competition Commission is then empowered to initiate a complaint on the basis of the information submitted.[191] Just like section 49B(1), section 49B(2)(a) grants the Commission power to initiate complaint against any alleged prohibited practice on the basis of the information submitted to it by any private person. A complaint could further emanate from an action before a civil court in circumstances where a party to those proceedings raises conduct that is prohibited under the Act and in such cases, the court may refer[192] the complaint directly to the Competition Tribunal.[193] In a

[185] *Woodlands* (note 180 above) para 13.
[186] Section 49B(2)(b) of Competition Act 89 of 1998.
[187] *Yara* (note 177 above) para 15.
[188] *Yara* (note 177 above) para 15.
[189] Neuhoff M *et a*l (note 1 above) p 358.
[190] Section 49B(2)(a) Competition Act 89 of 1998. Important to note is that a private person will not have the status of an applicant in instances where he provides the Commission with the necessary information pertaining to an alleged cartel activity.
[191] Neuhoff M *et al* (note 1 above) p 355.
[192] Referral to be discussed below.
[193] Neuhoff M *et al* (note 1 above) p 355. Though the wording of the Act expressly grants the Commissioner an exclusive power to initiate a complaint against any alleged prohibited practice, Supreme Court of Appeal in *Yara* case held that, 'the Commissioner does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of the complaint the Tribunal. And it can clearly so on the basis of information submitted by an informant or because of what it gathers form media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent'.

nutshell, a complaint is either initiated by a private person or a Commissioner of the Competition Commission, acting on behalf of the Commission.[194]

3.2.3 Investigation and referral

Section 49B(3) of the Act dictates that, 'upon receiving a complaint in terms of this section, the Commissioner 'must' direct an inspector to investigate the complaint as quickly as practicable'. Sutherland and Kemp confirm that a validly initiated complaint is a prerequisite for subsequent investigation. Accordingly they state that the, 'Commissioner can only make an investigation after it has initiated or received a valid complaint pursuant to section 49B'.[195] The purpose of investigation is to consider the conduct described by the complainant and to determine whether or not a prohibited practice has been established.[196] The Supreme Court of Appeal in the *Yara* case outlined the complaint and referral process and held that the purpose of initiating a complaint is to trigger investigation which might eventually lead to a referral.[197] The process of complaint investigation by the Commission is a necessary prerequisite to any referral because it is for the Commission to protect the public interest if it considers a prohibited practice to have been established.[198] The investigation process is completed once the Competition Commission has issued a decision on the outcome of the complaint investigation.[199] There are two possible outcomes of the investigation. The outcome may either be that a prohibited practice has occurred, or that no prohibited practice occurred. On completion of its enquiry, and having found a prohibited practice, the Commission must refer the matter to the Competition Tribunal for adjudication.[200] If the Competition Commission's investigation outcome is that no prohibited has occurred, the Commission is required to issue a notice of non-referral in the prescribed manner.[201] In the case where the Competition

[194] Section 67 prescribed a period of time within which a complaint against a cartel activity may be initiated. Under this section, a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. The ordinary reading of the section suggest that it intends to preclude the initiation of a complaint more than three years after the practice ceased. The section also provides that a complaint may not be referred to the Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section under the Act relating to the same conduct.
[195] Sutherland and Kemp (note 6 above) 11-10.
[196] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002) para 25.

[197] *Yara* (note 177 above) para 24.
[198] *Glaxo* (note 196 above) para 28.
[199] Neuhoff M *et al* (note 1 above) p 365.
[200] *Glaxo* (note 196 above) para 25.
[201] Neuhoff M *et al* (note 1 above) 365.

Commission issues a notice of non-referral, the complainant may directly refer the complaint to the Tribunal for adjudication.[202]

3.3 Corporate Leniency Policy (CLP)

The CLP is a policy that sets out the conditions under which a corporate entity may be granted immunity from the imposition of an administrative penalty, for its participation in a cartel activity.'[203] As stated in the previous chapters, a cartel operation is often collusive, deceptive and secretive,[204] and is conducted through a conspiracy among a group of firms. This makes it difficult for competition authorities to detect or prove the existence of a cartel without the assistance of a member who is party to it.[205] In its endeavors to detect, prosecute, and prevent cartel activities, the Commission has, in line with other international jurisdictions, adopted the CLP[206] to facilitate the process through which firms participating in cartel activity are encouraged to disclose information on the cartel's activity in return for immunity.[207] Immunity in the context of the CLP means that the Commission would not subject the successful leniency applicant[208] to adjudication before the Tribunal or Competition Appeal Court, as the case may be, for its involvement in the cartel activity.[209] In terms of CLP, the self-confessing cartel member, who is first to approach the Commission to disclose its involvement into a cartel, is exempt from prosecution for its involvement in that cartel activity, thus no administrative penalty may be imposed against it.[210] The CLP therefore serves as an aid for the efficient detection and investigation of cartels, as well as effective prosecution of firms involved in cartel operations.[211] The CLP is fashioned to uncover cartels that would otherwise 'go undetected' and to also make the ensuing investigation more efficient.[212] It is therefore clear that the CLP is a mechanism which encourages voluntary disclosure of the cartel members about their involvement in a cartel activity in exchange of immunity. The CLP as a separate policy document that is set out separately from the Act, has been considered a vital

[202] Section 51(1) of Competition Act 89 of 1998.
[203] Neuhoff *et al* page (note 1 above) p 545.
[204] Kelly (note 65 above) 235.
[205] GN 628 of 23 May 2008: Competition Commission: Corporate Leniency Policy May 2008 para 2.4.
[206] Luke Kelly believes that introduction of CLP was the greatest development in South African competition law.
[207] CLP (note 205 above) para 2.5. The CLP was first adopted by the Commission in 2004 and it revised it in 2008 to address its shortcomings.
[208] Successful applicant, in this context, means a firm that meets all the conditions and requirements set-out under para 10 of the CLP.
[209] CLP (note 205 above) para 3.3.
[210] Kelly L *et al* (note 65 above) p 236.
[211] CLP (note 205 above) para 3.6.
[212] CLP (note 205) para 3.8.

and effective tool in destabilizing cartels and gathering the necessary information to detect and prosecute cartel cases.[213]

3.4 Forms of immunity under the CLP

For a cartel member that is first through the door to confess about its involvement into a cartel activity in exchange for immunity under the CLP, such a member must apply to the Commission for immunity and qualify with all the prescribed requirements and conditions *as per* CLP.[214] There are three possible outcomes for an immunity application. Upon receipt of an immunity application, the Commission may either grant conditional immunity, total immunity or reject the immunity application.[215] Conditional immunity is afforded in writing and at the very beginning of the proceedings or application with an aim of fostering a healthy relationship between the immunity or leniency applicant and the Commission pending finalisation of the of the proceedings.[216] Conditional immunity is a revocable form of immunity and revocation of this form of immunity may occur at any time if it can be shown that the applicant subsequently does not comply with the immunity requirements.[217] Important to note is that under section 73(2) of the Act, a person commits an offence when he or she knowingly supplies the Commission with false information and this is also a ground for revocation of conditional immunity.[218] It is further specified that the applicant whose immunity has been revoked by the Commission on the basis of providing false information to the Commission will incur penalties prescribed under section 74(1)(b) of the Act if convicted for such an offence.[219]

In contrast to conditional immunity, total immunity is granted after the Commission has finalised its investigations and prosecutions and after the Tribunal or Competition Appeal Court has made its ultimate determination.[220] Total immunity will be granted to the applicant who has, through the proceedings, continuously qualified fully with immunity requirements and conditions as per CLP.[221] Total immunity is normally granted once the matter has been finalized with the other affected

[213] Kelly L *et al* (note 65 above) p 236.
[214] CLP (note 204 above) para 9.1.1.2.
[215] Van Heerden and Botha 'Challenges to the South African corporate leniency policy and cartel enforcement' *TSAR* 2015 p 317.
[216] Van Heerden and Botha (214) p 317.
[217] CLP (note 205 above) para 13.
[218] CLP (note 205 above) para 13.4.
[219] CLP (note 205 above) para 13.4.
[220] Van Heerden and Botha (note 215 above) p 317.
[221] Van Heerden and Botha (note 215 above) p 317.

parties, whether by an agreement or by way of final determination by either Tribunal or Competition Appeal Court.[222] Also, the Commission may decide not grant any immunity.[223] The Commission will refuse to grant immunity in instances where the immunity applicant fails to comply with the prescribed requirements or conditions under the CLP.[224] Moreover, in the case where immunity is refused, the Commission is permitted to investigate and prosecute the immunity applicant regarding the cartel activity.[225] The CLP does not afford blanket immunity to the immunity applicants.[226] Immunity contemplated under the CLP is afforded in respect of separate and different cartel activities provided that the applicant, in each and every contravention of section 4(1)(b) reported, meets all the prescribed requirements and conditions.[227] Unlike conditional immunity, the CLP is silent about revocation of unconditional immunity thus it safe to accept that this form of immunity is irrevocable.

3.5 Scope of application of the CLP

The CLP itself makes it apparent that its scope is limited. The CLP's scope of application seem to be influenced by the scope of application of the Competition Act as it currently applies to cartel activities entered into, or which have an effect within South Africa.[228] The CLP further applies to specific cartel activities, namely: (a) a cartel activity which the Commission is not aware of; (b) cartel activity which the Commission is aware of but has insufficient information about, and no investigation has been initiated yet; and (c) cartel activities in which the investigation has already been initiated but the Commission has insufficient evidence to prosecute firms involved in such cartel activity.[229] The Commission has in the past rejected immunity applications in respect of cartel activities where, at the time of receipt of the application, the Commission is already aware of the cartel activity or had sufficient information to prosecute.[230] With regard to leniency or exemption from the application of section 4(1)(b), leniency is granted to the firm that is first through the door to confess about the cartel activities. However, if other cartel members wish to come clean on their involvement in cartel activity that already has an immunity applicant, the Commission is at liberty

[222] Neuhoff *et al* (note 1 above) p 549.
[223] Van Heerden and Botha (note 215 above) p 317.
[224] Neuhoff *et al* (note 1 above) p 549.
[225] Van Heerden and Botha (note 215 above) p 317.
[226] Van Heerden and Botha (note 215 above) p 316.
[227] Van Heerden and Botha (note 215 above) p 316.
[228] Neuhoff *et a*l (note 1 above) p 546.
[229] Kelly L *et al* (note 65 above) p 238.
[230] Kelly L *et al* (note 65 above) page 238.

to explore other processes other than those under the CLP which may result in the reduction of a fine that was going to be imposed.[231] In *Blinkwater v Competition Commission*,[232] the Commission remarked that under certain circumstances the Commission may grant a firm that is second through the door leniency under the CLP.[233] The Tribunal held that the Commission would likely grant leniency in such instances where the first leniency applicant is not in a position to provide the Commission with satisfactory evidence to prosecute the cartel activity concerned.[234]

3.6 Requirements and conditions for immunity under the CLP

Requirements and conditions for immunity under CLP are contained in paragraph 10 of the CLP. It is provided that the immunity applicant under CLP will qualify for immunity if it meets the following conditions and requirements:

(a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;
(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;
(c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the Appeal Court are completed;
(d) the applicant must immediately stop the cartel activity or act as directed by the Commission;
(e) the applicant must not alert other cartel members or any other third party that it has applied for immunity;
(f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and

[231] CLP (note 205 above) para 5.6.
[232] CR087Mar10SAM021May11.
[233] *Blinkwater* (note 232 above) paras 80-83.
[234] *Blinkwater* (note 232 above) paras 80-83.

(g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.[235]

An immunity applicant that complies with the above requirements and conditions as provided in the CLP will qualify for total immunity. However, it important to note that immunity granted under CLP is strictly limited to administrative penalties and any person who incur damages as result of a cartel activity in respect of which the Commission has granted immunity for under the CLP may still approach other courts for civil or criminal recourses.[236] Insofar as the CLP process is concerned, upon receipt of the leniency application, the Commission together with the leniency applicant, will commence with internal investigations of the alleged cartel activity and thereafter refer it to the Tribunal for adjudication.[237]

3.7 Adjudication

It has been indicated above that the outcome on investigation of alleged cartel activity should ultimately be referred either to Tribunal for adjudication if (by means of the investigations) the Commission has established that cartel activity occurred. It is irrelevant as to whether a cartel has been established as a result of an investigation triggered on the basis of complaints initiated under section 49B or on the basis of investigations conducted under CLP. In the end, the complaint about cartel activity must be referred to the Competition Tribunal for adjudication. Generally, the orders that may be granted by the Tribunal for contravention of the Act are entrenched in sections 58 to 60.[238] The scope of this dissertation is however limited to orders that may be prescribed by the Tribunal for contravention of section 4(1)(b) of the Act. It is clear from the orders that may be granted for contravention of the section in question and a number of complaints that have been brought before the Tribunal, that the most favored order for any breach of section 4(1)(b) is an administrative penalty as provided for in section 59 of the Act.[239] Worth noting is that, firms or individuals who suffered damages as a result of a cartel activity may claim damages from a the cartelists in a civil court after they have received a certificate from the Tribunal in terms of section 65 indicating that a finding of prohibited conduct was made by the Tribunal. Moreover, section 73A of the Competition Act now criminalises cartel conduct. With effect from 1 May 2016, price fixing,

[235] CLP (note 205 above) para 10.1.
[236] CLP (note 205 above) para 5.9.
[237] CLP (note 205 above) para 5.6.
[238] *Pioneer* (note 146 above) para 139.
[239] Sutherland and Kemp (note 6 above) p 12-10(2).

market division and collusive tendering between actual and potential competitors can result in criminal liability for directors or managers of the firms involved in such conduct.[240] This means that administrative penalties, private damages and criminal fines are key orders against harmful cartel activities.

3.8 Conclusion

Initiation of a valid complaint against alleged cartel activity under section 49B of the Act and investigation of cartel activities through the CLP are the two prevalent way in which cartel activities are brought before competition authorities. However, the number of cartel activities brought before competition authorities has increased since the adoption of CLP. Therefore, adoption of the CLP was a brilliant move from our competition authorities to enhance cartel enforcement.

[240] Manyathi-Jele N 'Criminalisation of cartel conduct' July 1st 2016 accessed on 23 September 2018 from: http://www.derebus.org.za/criminalisation-cartel-conduct/.

Chapter four: Prescribed sanctions (orders) for cartel activities

4.1 Introduction

The Act generally makes provision for various remedies or orders for contravention of its provisions.[241] Generally, orders prescribed for contravention of any provision of the Act are entrenched in section 58 to 60 .[242] However, as indicate in the previous chapters, this chapter strictly discusses cartel deterrence measures provided for in the Act to prevent firms from engaging in cartel activities so as to ensure that the objectives of the Act are achieved.

At the conclusion of an inquiry into an alleged contravention of the Act's cartel's provision, the Competition Tribunal is expected to make an appropriate order to address contravention of the cartel provisions. These orders provided for by the Act for contravention of cartel provisions, as alluded to in the previous chapter, are administrative penalties, private damages and criminal sanctions. The primary purpose of these orders is to act as a deterrent not only against offending firms but also to firms that may consider engaging in such activities.[243] The three said orders are accordingly discussed in more detail below.

4.2 Administrative penalties

In South Africa, administrative penalties are imposed for a specified set of prohibited practices,[244] and their application in almost all cartel cases suggest that they are regarded as the most appropriate deterrent against cartels.[245] Administrative penalties are provided for in section 59 of the Act and are the most enforcement remedy. The Competition Tribunal is granted the exclusive power to impose an administrative penalty against a firm or group of firms in contravention of section 4(1)(b) of the Act, the cartels provision.[246] The said penalty may not exceed ten percent of the firm's annual turnover in the Republic and its exports from the Republic during the firms

[241] Kelly (note 65 above) page 220.
[242] *Pioneer* (note 146 above) para 139.
[243] Aproskie and Goga 'Administrative penalties – Impact Alternatives' *Journal of Economic and Financial Sciences* 2011 p 133.
[244]Aproskie and Goga (note 243 above) p 133. The use of the word 'only' in subsection 1 indicates that administrative penalties are indeed imposed against specific prohibited practices.
[245] Jordaan and Munyai 'The Constitutional Implication of the new section 73A of the competition Act 89 of 1998' *SA Mercantile Law Journal = SA Tydskrif vir Handelsreg* 2011 p 199. Jordaan and Munyai further believe that administrative penalties in South Africa are considered to be that kind of a punishment that would most likely hit firms where they would feel it most.
[246] Section 59(1)(a) and (b).

preceding financial year.[247] The Act further mandates the Competition Tribunal to, when determining upon an appropriate penalty, consider certain factors as *per* section 59(3).

These factors that the Tribunal is tasked to consider when determining an appropriate penalty are as follows:(a) the nature, duration, gravity, and extent of the contravention; (b) any loss or damage suffered as the result of the contravention; (c) the behavior of the respondent; (d) the market circumstances in which the contravention took place; (e) the level of profit derived from the contravention; (f) the degree of which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and (g) whether the respondent has previously been found in contravention of this Act.[248] The fine payable in terms of section 59 must be paid to the National Revenue Fund as contemplated in section 213 of the Constitution of the Republic of South Africa.[249]

The Competition Tribunal has been called to interpret section 59 of the Act and impose the most appropriate administrative penalty on several occasions. Looking at the various cases where an administrative penalty has been imposed, it is clearly not an easy task for the Tribunal to impose an appropriate penalty. In the *Pioneer* case, the Tribunal held that the decision of the competition authorities to impose an administrative penalty is purely an exercise of its discretion and that such discretion must always be rational and justifiable.[250] The Tribunal also remarked that the determination of a base (annual) turnover of which the relevant percentage is to be applied, is the point of departure in establishing an appropriate penalty.[251] While section 59(2) expressly provides that the penalty may be imposed on the firm's annual turnover in the Republic, including its exports, the Competition Tribunal in practice has calculated such penalty on the basis of 'affected turnover',[252] i.e. that portion of the turnover of the firm derived from the product market in which it acted anti-competitively.[253] Sutherland and Kemp seem to be in support of this view and they

[247] Section 59(2).
[248] Section 59(3)(a) – (g).
[249] Section 59(4).
[250] *Pioneer* (note 146 above) paras 139-142.
[251] *Pioneer* (note 146 above) para 140.
[252] Sutherland and Kemp (note 6 above) provide that affected turnover is a measure that has often been used by competition authorities, including the Tribunal, in calculating fines p 12-17.
[253] *Pioneer* (note 146 above) para 140.

propose that 'affected turnover' should be used as a baseline in the initial calculation of the appropriate penalty.[254]

The interpretation of section 59(1) and (2) in the *Pioneer* case seems to be in line with the interpretation of the very section in *Competition Commission v Federal Mogul (Pty) (Ltd)* (hereinafter *Federal* case).[255] In the *Federal Mogul* case, the Tribunal elected to calculate the administrative penalty based on the threshold on the turnover in the infringing line of business only, rather than on the total annual turnover as provided for in the Act.[256] The court reasoned that at times, the allegedly prohibited practice has got no relationship to the firm's total annual turnover as the relationship between the contravention and the total business to which that turnover may be attributed to, may be remote.[257] Conceivably, this would be because firms often do business in more than one product market and it would be appropriate to correlate the penalty to that firm's attempt to extend its market power through anti-competitive arrangements in that particular product market.[258] The Tribunal has however cautioned that this does not mean that the statute does not permit imposition of penalty on the firm's total annual turnover.[259] The Tribunal stated that the wording of the Act is clear, it includes the firms total annual turnover in the Republic including its exports and in appropriate cases, one can expect that the Tribunal would impose such a penalty on the 'total annual turnover'.[260] *As per* section 59(3), when deciding on an appropriate penalty, the Tribunal must consider the factors listed in paragraph (a) to (g) of the subsection. The court, in the *Pioneer* case, opined that the purpose of the factors listed in section 59(3)(a)- (g) is to provide the Tribunal with guidelines in exercising its discretion to impose an administrative penalty in terms of section 59(1) and (2) of the Act.[261] It further held that the factors need to be considered in order to assess aggravating and mitigating factors and strike a balance between deterrence and over-enforcement.[262] The factors should be considered with reference to the merits of each case before the Tribunal and will bear no uniform weight (effect) depending on the facts of each case.[263]

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[254] Sutherland and Kemp (note 6 above) p 12 – 13.
[255] *Competition Commission v Federal Mogul (Pty) Ltd and others* 2003 CPLR 464 (CT).
[256] *Federal* (note 255 above) para 169.
[257] *Federal* (note 255 above) para 171.
[258] *Federal* (note 255 above) para 273.
[259] *Pioneer* (note 255 above) para 142.
[260] *Pioneer* (note 146 above) para 142. See also *Federal* (note 255 above) para 171.
[261] *Pioneer* (note 255 above) para 147.
[262] *Pioneer* (note 146 above) para 147.
[263] *Pioneer* (note 146 above) para 147.

To avoid applying different methods which could result in inconsistencies and uncertainties when imposing administrative penalties, the Tribunal has, since the decision of Competition Appeal Court in *Southern Pipeline Contractors v Competition Commission,*[264] developed a new method of calculating administrative penalties.[265] The new method employed by the Tribunal entails the following six steps;

- Step one: the Tribunal determines the affected turnover in the relevant year of assessment.
- Step two: the Tribunal calculates the base amount being that proportion of the affected turnover relied upon.
- Step three: where the contravention exceeds one year, the Tribunal multiplies the amount in step two by the duration of the contravention.
- Step four: if the figure from step three exceeds the cap provided for by section 59(2), the Tribunal rounds off the figure to the amount of the cap.
- Step five: the Tribunal considers the factors that might mitigate or aggravate the amount reached in step four, by way of a discount subtracted from, or a premium added to that amount.
- Step six: if the figure from step five exceeds the cap provided for in section 59(2), the Tribunal adjusts the figure downwards so that it does not exceed the cap.[266]

Sutherland and Kemp seem to be in support of the newly developed method of determining an appropriate administrative penalty. This approach is however always required to serve the purpose of an administrative penalty as highlighted in the *Pioneer* case. The Tribunal in the *Pioneer* case correctly held that the purpose of imposition of administrative penalties is deterrence and that such deterrence must be correlated to the harm caused by the prohibited practice concerned.[267] Sutherland and Kemp believe that the imposition of an administrative penalty should not seek to destroy the business of the offending party.[268]

[264] *Southern Pipeline Contractors v Competition Commission* (2011) 2 CPLR 239 (CAC).
[265] Sutherland and Kemp (note 6 above) p 12 – 13.
[266] Sutherland and Kemp (note 6 above) p 12 - 14.
[267] *Pioneer* (note 146 above) para 143. The Tribunal further remarked that, the damage caused by hard-core cartels is always presumed to be extensive and that respondents engaging in such activity, absent any mitigating factors deserves the maximum penalty provided for in section 59 of the Act.
[268] Sutherland and kemp (note 6 above) p 12.10(2).

4.3 Private damages

It has been stated already that cartel activities have a serious impact on consumers and other firms in the market (competitors), but as it is the norm, money paid by firms involved in cartel activities pursuant to a consent order and an administrative penalties imposed by the Tribunal and/or Competition Appeal Court does not go to firms or consumers affected, but to the National Revenue Fund administered by Treasury.[269] Does that mean other firms and consumers adversely affected by cartel activities are not afforded any protection under the Act? Fortunately, section 65(6) makes provision for a claim of damages or loss as a consequence of a prohibited conduct and reads as follows:

> 'a person who has suffered loss or damages as a result of a prohibited practice: (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); and (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form – (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act; (ii) stating the date of the Tribunal or Competition Appeal Court finding; and (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.'

South African courts have only in a few instances been called upon and requested to apply this section. Perhaps this is the reason that Munyai claims that the lasts developed[270] area of South African competition law is the rules relating to civil claims of damages arising from a prohibited conduct as provided for in the Act.[271] In *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd*[272] (hereinafter referred to as the *Nationwide* case), the court was tasked to apply section 65(6) of the Act. In this case, the court held that it is a common cause that section 65(5) of contemplates a claim for loss or damages suffered as a result of prohibited conduct (prohibited conduct used in this paragraph cover cartels as well).[273] The section allows or enables those found to have engaged

[269] Munyai S P 'Claims for damages arising from conduct prohibited under the Competition Act, 1998' *De Jure* 2017 p 19.
[270] With regard to development and effective enforcement of South African private enforcement, Munyai believes that the effective enforcement of the Competition Act will require prioritization of our private enforcement regime to ensure that private firms can successfully claim and recover damages suffered as a result of anti-competitive conduct 22.
[271] Munyai (note 269 above) p 18.
[272] 2016 ZAGPJHC 213.
[273] *Nationwid*e Airlines (note 272 above) para 11.

in prohibited anti-competitive conduct to be liable for damages to any person[274] harmed by that conduct.[275] The liability for damages comes into existence on the date of the decision of the Tribunal or, where there is an appeal, on the date that the appeal process is concluded.[276] Imperative to note is the fact that civil courts are vested with an absolute jurisdiction over matters related to claims for damages or loss resulting from anti-competitive conduct.[277] Though granted exclusive authority to deal with all matters related to claims of damages or loss in terms of section 65(5) of the Act, the authority of civil courts is limited to the assessment of the amount or awarding of damages because all the other relevant considerations that precede this exercise must have already been addressed by the competition authorities.[278] Civil courts have no authority to examine the merits of competition disputes.[279] Assessment of damages and awarding of damages under section 65(5) are primarily dependent on prior findings by the Tribunal or Competition Appeal Court[280] and it must always be borne in mind that the said findings are binding on the civil courts in the sense that when petitioned by a person or firm claiming competition damages armed with a certificate from Tribunal or Competition Appeal Court confirming that the conduct constituting the basis for the civil claim has been found to be a prohibited practice, the civil court are bound such a finding.[281]

It has been stated above that the exercise of the civil court's jurisdiction is strictly limited to assessment of amount of damages suffered by a claimant as result of defendant's conduct and or awarding of such damages.[282] However, for a court to be able to do such an assessment of an amount of damages and awarding of damages, a causal connection between a prohibited anti-competitive conduct must be proved on the balance of probabilities.[283] This was confirmed by the court in *Children's Resource Centre Trust v Pioneer Food*[284]where it ruled that anyone who has suffered damages or loss as a result of prohibited anti-competitive conduct is required to show a

[274] This is confirmed by Kelly L (in his or her book titled Principles of Competition Law in South African) that the claim for damages under section 65(6) is not limited to persons involved in complaint referral proceedings before the Competition Tribunal or Competition Appeal.
[275] *Nationwide Airlines* (note 271 above) para 11.
[276] Section 65(9)(a) of the Act.
[277] Section 65(7) of the Act.
[278] Munyai (note 269 above) p 25.
[279] Munyai (note 269 above) p 25.
[280] Munyai (note 269 above) p 26.
[281] Munyai (note 269 above) p 29.
[282] Munyai (note 269 above) p 30
[283] Makhubela D 'Fighting over breadcrumbs: Cartels and the Competition Act 89 of 1998' *De Rebus* 2014 p 3.
[284] (50/2012) 2012 ZASCA 182 (29 November 2012).

causal link between such loss and prohibited anti-competitive conduct and this is consistent with what the Act is making provision for.[285] Taking into account the fact that civil courts are bound by the findings of the Tribunal or Competition Appeal Court in performing their two fold task, it is safe to say the said causal link required for a successful claim of competition damages must be demonstrated in the Tribunal or Competition Appeal Court's certified findings. This is confirmed by the view that it is unthinkable that competition authorities would make their decisions without having considered whether there was anti-competitive, and therefore illegal, conduct which has caused harm to either competitors or consumers.[286]

To finally award damages suffered as a result of a prohibited anti-competitive conduct, civil courts are required to first assess or quantify damages suffered and the question of whether damages has been suffered as a result of an anti-competitive conduct is a complex one.[287] Courts employs various methods to assess damages arising from anti-competitive conduct.[288] The South African Supreme Court of Appeal in the *Pioneer foods case* adopted the English method of quantifying damages suffered as result of a prohibited anti-competitive conduct.[289] In contrast to the method employed by Supreme Court of Appeal, the High Court in the *Nationwide case,* accepted that a delictual claim should be utilized to claim competition damages.[290] The High Court in the *Nationwide* case made a very powerful statement and remarked that, what a court essentially has to do in quantifying competition damages is to compare the performance of the claimant before and after the prohibited anti-competitive conduct period to try and reach some estimation of how it would have performed absent such conduct.[291]

4.4 Criminal fines

After a lengthy process from 2009, section 73A of the Act eventually came into force from the 1st of May 2016.[292] Read in conjunction with section 74, section 73A of the Act criminalizes cartels and prescribes criminal sanctions for a director of a firm or person in managerial position in a firm engaged in cartel activity. The two measures, namely administrative penalties and private damages

[285] *Children's Resource Centre Trust* (note 284 above) para 70.
[286] Munyai (note 269 above) p 30.
[287] *Children's Resource Centre Trust* (note 284 above) para 59.
[288] *Nationwide Airlines* (note 272 above) para 52.
[289] Para 59.
[290] Para 12.
[291] *Nationwide Airlines* (note 272 above) para 53.
[292] Sutherland and Kemp (note 6 above) p 12-24.

discussed above are applied exclusively to firms engaged in a cartel activity and not to natural persons linked to such firms.[293] In contrast to this, criminal liability contemplated in section 73A is directed at persons linked to the firms engaged in a cartel activity, namely directors or persons in managerial positions.[294] The wording of this section is precise. The section directly speaks to prohibited practices contained in section 4(1)(b) of the Act (cartels). The section basically highlights circumstances in which a director of a firm or a person with management authority in the firm will commit an offence for competition law purposes. According to section 73A of the Act, only in two instances will a director of a firm or a person with management authority in the firm commit an offence. Firstly, a director of a firm or someone occupying a managerial position in a firm will be committing an offence if he or she caused a firm to be involved in cartel activity contemplated in section 4(1)(b) of the Act.[295] Secondly, this section provides that a director of a firm or a person occupying a managerial position in a firm will be committing an offence if knowingly acquiesced[296] in the firm engaging in a cartel activity.[297] The director of a firm or someone in a managerial position in the firm who allegedly have done either of the two, will face criminal prosecution. However, such person's prosecution will be subject to existence of at least one of the circumstances listed in section 73A(3) of the Act. A person may only be prosecuted for an offence in accordance with section 73A if the relevant firm has acknowledged in a consent order that it engaged in such a cartel activity, or, the Competition Appeal Court has found that the relevant firm engaged in such a cartel activity.[298]

Important to note is that National Prosecuting Authority (hereinafter referred to as the NPA) enjoys exclusive jurisdiction to conduct prosecutions under section 73A of the act.[299] This view is sourced from the Constitution[300] and National Prosecuting Authority Act,[301] which provides that there is a single national prosecuting authority in the Republic with the power to institute all criminal prosecutions on behalf of the state.[302] It is further important to note that though prosecutions are

[293] Jordaan L and Munyai P 'The Constitutional implications of the New section 73A of the Competition Act 89 of 1998' *SA Merc Law Journal* 2011 p 199.
[294] Jordaan and Munyai (note 293 above) p 199.
[295] Section 73A(1) (a).
[296] The term 'knowingly acquiesced' is defined in in section 73(2) of the Act and is defined to mean; 'having acquiesced while having actual knowledge of the relevant conduct by the firm'.
[297] Section 73A(1) (b).
[298] Section 73A(3)(a) – (b).
[299] Jordaan and Munyai (note 293 above) p 201.
[300] Constitution of the Republic of South Africa, 1996.
[301] 32 of 1998.
[302] Jordaan and Munyai (note 293 above) p 201.

carried out by the NPA, competition authorities do not lose their relevance in the prosecution process since it is only after the competition authorities have made their own determination that a prohibited practice has occurred and that the legal authority to prosecute a person concerned under section 73A will vest in the NPA.[303] With effect from 9 June 2016, the penalty provision, section 74, makes an individual who commits such an offence liable to a fine up to R500 000 (Five Hundred Thousand Rand) and/or imprisonment of up to ten years.[304] To date, section 73A has however not yet been tested before the courts. Sutherland and Kemp believe that section 73A is a controversial section and that it is likely that the first person to be prosecuted under this provision will challenge its constitutionality.[305]

4.5 Conclusion

With the adoption of CLP as the key cartel detection weapon and power to impose both, monetary and criminal sanctions against cartels, South African competition authorities are placed in the same position as other experienced competition authorities in international jurisdictions such as United States, Canada and European Union[306] which have influence in South African competition law. One can therefore comfortably pronounce that South African competition authorities have the necessary tools to deter cartels to the advantage of consumers and economic development.

[303] Jordaan and Munyai (note 293 above) p 202.
[304] Sutherland and Kemp (note 6 above) p 12 – 25.
[305] Sutherland and kemp (note 6 above) p 12 – 25.
[306] Sutherland and Kemp (note 6 above) p 2-3.

Chapter Five: Concerns regarding the key cartel enforcement mechanisms

5.1 Introduction

The previous chapter discussed orders available to competition authorities, firms not involved in cartel activities and natural persons negatively affected by cartels as provided for under the Act, namely; administrative penalties, private damages and criminal sanctions. Any firm or natural person, as the case may be, found to be in contravention of the *per se* horizontal prohibited practices will likely attract one or more of these orders. It is however submitted that the application of these orders creates public interest concerns. This chapter discusses the challenges or concerns in respect of these three orders. The discussion of the challenges against each of the three orders is preceded by discussion of challenges and concerns facing the CLP which is, as indicated in the previous chapters, an instrumental tool employed by competition authorities for detection and prosecution of cartels.

5.2 Concerns against CLP

The CLP has been a focal point in the area of cartel enforcement in South African since its adoption. The CLP has been hailed for its fair contribution in cartel detection and prosecution in South Africa.[307] However, a number of concerns have been raised against the CLP. The CLP has been heavily criticised for granting only limited exemption or leniency to firms engaged cartel activity. Exemption from prosecution under the CLP is only to a certain extent limited to prosecutions by competition authorities.[308] It should be borne in mind that the CLP does not provide immunity against civil claims regarding damages suffered as a result of cartel conduct, which compounds the risk for the firms participating in a cartels.[309] The CLP further does not protect individuals against statutory criminal sanction provided for under the newly enacted section 73A of the Act.[310] Individuals related to a firm involved in certain types of cartel conduct may be guilty of the general offence of corruption, as expressed in various provisions of parts 1 – 4 of the Prevention and Combatting of Corrupt Activities Act.[311] The inability of the CLP to provide protection in the above

[307] Kelly *et al* (note 65 above) p 236.
[308] Lopes N *et al* (note 155 above) p 10.
[309] Van Heerden and Botha (note 215 above) p 327.
[310] Van Heerden and Botha (note 215 above) p 327.
[311] Lopes N *et al* (note 155 above) p 10.

situations possibly affect effectiveness of the CLP in cartel detection and prosecution.[312] Clearly, it is not enough that the Commission may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted in respect thereof because such submission can never even fetter the discretion of the National Prosecuting Authority as well as the common law from prosecuting the firms for crime of fraud.[313] The limited leniency granted by the CLP possibly affects, negatively, the effectiveness of this policy.

Thus, it can be expected that firms that participate in cartel activity will be reluctant to 'bare all' given the scope of the risk involved.[314] Van Heerden and Botha remark that for the individuals such as directors and managers it appears to be not so much the possible imposition of a criminal fine that is viewed with dread but the possibility of a lengthy period imprisonment and the stigma attached thereto, and it is thus this risk of incarceration which poses the greatest threat to disclosure under the CLP, because it will ultimately be the directors or managers of a firm that will decide whether to apply for leniency on behalf of such firm.[315] Accordingly Van Heerden and Botha are of the view that the lack of a proper operational structure and the lack of certainty that section 73A poses to a whistle-blower who has received immunity under the CLP; that its directors and managers who caused or acquiesced in its cartel participation will also receive immunity from criminal prosecution by the NPA, or to a prospective leniency applicant who has the misfortune of not obtaining some form of lenient treatment outside the confines of the CLP, may destroy the cartelists appetite for self-reporting.[316]

5.3 Concerns against administrative penalties

The primary aim of administrative penalties against cartelists is to deter not only cartelists but also other firms that might, in the future, consider partaking in cartel activities. Administrative penalties have since their inception been central in cartel deterrence. However, authors have raised various concerns in respect of imposition of administrative penalties against firms engaged in cartel activities. The concerns regarding administrative penalties revolves around the penalties'

[312] Lopes N *et al* (note 155 above) p 2.
[313] Lopes N *et al* (note 155 above) p 2.
[314] Van Heerden and Botha (note 215 above) p 327.
[315] Van Heerden and Botha (note 215 above) p 327.
[316] Van Heerden and Botha (note 215 above) p 328.

effectiveness in deterring cartels. Lopes *et al* remark that administrative penalties are believed to be less effective as large cartelists may merely discount them as part of their operational costs and may simply be recovered by firm in the form of higher prices put to consumers.[317] This literally means that it is the consumers and not the cartel members who incur administrative penalties. The very same consumers that the Act seeks to protect against deleterious cartels. Van Jaasrveld asserts that administrative penalties offer less benefits to consumers and other firms suffered as result of cartels as the monies paid to the Commission by cartelist goes to the National Revenue Fund.[318]

It is further pointed out by Aproskie and Goga that as much as an administrative fine could possibly affect consumers, such fines could equally have potentially severe consequences on the finance of a firm. This could happen in two ways: First, the extreme possible impact of the fine on the offending firm would be that the fine would be sufficiently large to result in bankruptcy or insolvency such that the firm ceases to operate as going concern, thus force the firm's exit on the market.[319] Secondly, the fine may impact the firm's finance to such an extent that the firm's investment decisions are affected. The firm may simply have insufficient capital to engage in investment that it would otherwise have or be forced to consider possibly suboptimal funding mechanisms like debt financing at unfavorable terms such that investment is delayed, downscaled or ultimately not made.[320]

5.4 Concerns against private damages

This aspect of South African competition law is regarded as the most underdeveloped of competition law. It has no clear rules on how consumers and other affected firms go about claiming damages they have incurred as a result of prohibited anti-competitive practices. Private damages are further criticised for not accommodating class actions for a group of firms or individuals suffered damages as result of a cartel activity.

5.5 Concerns against criminal fines

[317] Van Heerden and Botha (note 215 above) p 329.
[318] Van Jaarsveld 'Administrative penalties as they relate to consumer redress' *Comparative and International law journal* 2012 p 275.
[319] Aproskie and Goga (note 243 above) p 4.
[320] Aproskie and Goga (note 243 above) p 4.

As stated, section 73A of the Act introduced the imposition of individual criminal liability for directors and managers of the firm engaged in a cartel activity.[321] The introduction of criminal sanctions in competition law is regarded as being controversial.[322] Though the section has not yet been practically tested before any court, the section has already been the subject of various critiques.[323] Section 73A creates a statutory cartel offence by providing that a person commits an offence if, while being a director of a firm or while engaged 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 one or more per se prohibited practices under section 4(1)(b) of the Act.[324] By creating the possibility of criminal prosecution and conviction for directors and managers of the firm involved in a cartel activity, section 73A is a threat to the self-reporting concept which is advocated for under the CLP.[325] The section has the potential to hinder firms which participate in a cartel from blowing the whistle on their fellow cartel members as it may become too risky for such firms to self-report on their cartel involvement.[326] It is furthermore pointed out that the Act is essentially concerned with monetary penalization of firms for derogation from its substantive provisions rather than seeking to act directly against those individual employees of a firm implicated in alleged cartel activity.[327] It is vital to note that the Act is maintained to be a quasi-civil piece of legislation intended to achieve broad socio-economic and redistributive policy objectives rather than the individualised prosecution of criminal conduct which coincides with certain types of cartel conduct contemplated in the Act.[328]

As indicated, the right to prosecute the statutory offence provided for in section 73A vest with the National Prosecuting Authority (NPA).[329] By granting the NPA exclusive right to prosecute competition law matters, the Act creates potential confusion with regard to prosecution under the Act and those under the Criminal Procedure Act.[330] The NPA is an independent institution and has the obligation of prosecuting general crimes or offences in terms of enabling legislation and on the basis of its own procedural policy and no relation exists between NPA and Competition

[321] Lopes N *et al* (note 155 above) p 2.
[322] Kelly et al (note 65 above) p 3.
[323] Lopes N *et al* (note 155 above) p 321.
[324] Van Heerden and Botha (note 215 above) p 326.
[325] Van Heerden and Botha (note 215 above) p 327.
[326] Van Heerden and Botha (note 215 above) p 327.
[327] Lopes N *et al* (note 155 above) p 6.
[328] Lopes N et al (note 155 above) p 6.
[329] Jordaan and Munyai (note 245 above) p 201.
[330] 51 of 1977.

Commission.[331] Unfortunately as pointed out by Van Heerden and Botha, the NPA also has got no experience in dealing with competition matters, and this has been shown in various competition matters that ended up before ordinary courts.[332]

The criminal sanction provided for under section 73A is directly and strictly applied against the directors or managers of the firm engaged in a cartel activity.[333] This section has therefore been criticised of undermining the distinction which exists between the firm and its directors and managers (employees in general) which makes it impossible for employees of the firm to be personally liable for deeds of the company except under exceptional circumstances.[334] Van Heerden and Botha point out that creating possible personal criminal liability for directors or managers of the firm for the firm's involvement to a cartel activity was just an oversight from the side of the drafters of the Act.[335] Although not yet enforce, the section is furthermore criticised of being a threat to the directors' or managers' right to fair trial protected under section 35 of the Constitution.

5.6 Recommendations

The provisions relating to administrative penalties and private enforcement of cartel damages must accordingly be amended in order to ensure that consumers, who are often harmed by cartels, are always compensated by cartelists. Such amendments should further require that competition authorities monitor cartelists after proceedings and ensure that they do not shift the fines to consumers through charging high prices for the supply of goods and services.

It is further submitted that the Act and the Constitution should be amended accordingly to enable competition authorities to exclusively deal with all competition matters, including prosecutions of directors or managers of the firm involved in cartel activity as per section 73A of the Act. The provisions relating to criminal fines further need to be amended to ensure that they do not interfere with the effectiveness of the CLP. Such amendments will ensure effective enforcement and development of South African competition law.

[331] Jordaan and Munyai (note 245 above) p 201
[332] Van Heerden and Botha (note 215 above)327.
[333] Jordaan and Munyai (note 245 above) p 200.
[334] Van Heerden and Botha (note 215 above) p 200.
[335] Van Heerden and Botha (note 215 above) p 200.

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