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DISSERTATION

INCORPORATION OF A CORPORATE LENIENCY POLICY UNDER THE FINANCIAL SECTOR REGULATION ACT AS A MEANS TO LIMITING INSIDER TRADING

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INDEX

1. CHAPTER 1: INSIDER TRADING, A SOUTH AFRICAN LAW PERSPECTIVE .. 18

1.1 Introduction 18

1.2 Legislative Overview 21

1.3 Important Definitions 23

1.4 Offences and Defences 25

1.5 Regulation of Insider Trading 29

1.6 Criminal Sanctions 37

1.7 Liability for insider trading 40

1.8 Enforcement Procedures 42

1.9 Conclusion 45

2. CHAPTER 2: THE CLP AND REGULATION OF CARTELS UNDER THE COMPETITION ACT NO. 89 OF 1998 47

2.1 Introduction 47

2.2 Process 50

2.3 Investigation powers of the Commission 51

2.4 Conclusion 59

3. CHAPTER 3: THE IMPACT OF THE CORPORATE LENIENCY PROGRAM ON CARTEL FORMATION, A SOUTH AFRICAN PERSPECTIVE 60

3.1 Introduction 60

3.2 Focus on some of the priority sectors in which commission gained most success in terminating cartels via the implementation and enforcement of the CLP and the economic benefits gained therefrom: 62

3.3 Brief summary of some of the most recent cartels which the commissions successfully disbanded in sectors other than those discussed herein above 76

3.4 Conclusion 79

4. CHAPTER 4: INDEMNITY TO INDIVIDUALS FROM CRIMINAL PROSECUTION UNDER THE CLP AND ITS APPLICATION TO INSIDER TRADING 81

4.1 Introduction 81

4.2 The Section 73A Cartel Offence 83

4.3 Conclusion: 98

5. CHAPTER 5: INTERPRETATION OF SECTIONS 156 AND 117 OF THE FSRA AND THE APPLICATION OF A LENIENCY POLICY/PROGRAM TO INSIDER TRADING 99

5.1 Interpretation of Sections 156 and 117 of the FSRA and discussion of potential issues and/or shortcomings 100

5.2 Application of CLP to Insider Trading 105

5.3 Criminal Liability considerations 107

FOREWORD

> *"Lawgivers make the citizen good by inculcating habits in them, and this is the aim of every law-giver; if he does not succeed in doing that, his legislation is a failure. It is in this that a good constitution differs from a bad one."*[1]

According to Aristotle Nicomachean ethics (350bc), the ancient Greek philosopher and scientist quoted above, the only way which habits can be inculcated is when laws are not merely initiated but are also enforced. This can be substantiated by the research work reviewed by the author in the preparation of this dissertation, wherein various authors noticed a striking change in the prevailing attitudes to market abuse (whether in the form of cartel conduct an/or insider trading), new policies and approaches among listed corporates and their advisors, and, according to most market participants, a sharp reduction in the perceived incidence of market abuse was reported once legislation was not merely initiated, but was in fact effectively implemented and enforced. A great example thereof can be found in the South African Competition Law with the introduction of the Corporate Leniency Policy (the "CLP"). The Competition Commission managed to disband and deter some of the most significant and longest standing cartels that ever existed as a result of the proper implementation and enforcement of the CLP, which lead the transgressor to self - report to the Commission of such conduct and in the process the transgressor provides its cooperation to the Commission, not only in ousting the other cartel members, but also to disclose any and all other transgressions of the firm itself and/or any of its subseries to the Commission. This leniency policy lead to hundreds of similar settlements reached by the Commission clearly indicating that a good constitution can inculcate good habits in citizens.

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[1] Bowles S (2008) Aristotle Nicomachean and appearing in, Machiavelli's Mistake: Why Policies Designed for 'Wicked Men' Fail <http://tuvalu.santafe.edu/~bowles/Lecture3.pdf>, (accessed 7-10-2018) *Journal of Public Economics* 92, 8.

Although there are very few reported cases of insider trading in South Africa,[2] insider trading as a form of market abuse tends to discourage corporate investment and reduce market efficiency which has a vast negative impact on not only foreign investment in South Africa, but also local investment, and negatively affects our economy as a whole. Therefore it is important that our legislatures act proactively rather than reactively and ensure the enhancement and protection of corporate investment in South Africa through the promulgation of sufficient legislation and corporate investment policies.

Under the Competition Act No. 89 of 1998 (the "Competition Act"), one of the most significant forms of market abuse is known as a cartel. A cartel, as in the case of insider trading, also tends to discourage competition in the market, discourage corporate investment and reduces market efficiency which has a vast negative impact on, not only foreign investment in South Africa but, also local production and investment, and negatively affects our economy as a whole.

The Competition Commission (the "Commission") has up to date been very successful in limiting and/or reducing cartels through the incorporation and implementation of a mechanism what is known as; - 'the Corporate Leniency Policy' (the "CLP"). In terms of the CLP, transgressors of cartels are afforded an opportunity to self-report under the Competition Act in an attempt to obtain immunity from prosecution for participation in a cartel. As will be discussed in Chapter 2 of this dissertation, the CLP under the Competition Act only provides immunity to the first transgressor who self-report of a cartel, but the Commission has a discretion to reduce the penalty of any voluntary reporter, despite such reporter not being first in line to report. The author will deal with some such

[2] FSB Press Release - Report by the Directorate of Market Abuse, 29 March 2018 <https://www.fsb.co.za/NewsLibrary/Press%20Release%20-%20Report%20by%20the%20Directorate%20of%20Market%20Abuse.pdf> (accessed 20-10-2018) *Financial Services Board*. The FSB Press Release provides a detailed list of current pending insider trading cases in South Africa and its status.

successful incidents of reported cases under the CLP and will also discuss the positive effects that the incorporation of the CLP had on the efficiency of competition in the market.

Notwithstanding the fact that there are various differences between the competition market and the financial markets of South Africa, and notwithstanding that there are significant legal and economic differences between the regulation of cartels under the competition law regime in comparison to insider trading under the financial markets regime of South Africa, the consequences resulting from both are very similar, in that insider trading tends to discourage corporate investment and reduce market efficiency, and whereas cartels also discourage market participation by smaller entities and reduces competition and efficiency of the market. In both instances market prices are influenced by only a few role players ("insiders") who hold the necessary information ("inside information") and the insiders breach a fiduciary duty or other relationship of trust and confidence placed in them in order to influence the market. Therefore, the author found it necessary to determine whether the incorporation of a CLP under the Financial Sector Regulation Act No 9 of 2017 (the "FSRA") would serve the same purpose and achieve the same results as the CLP has done so far under the Competition Act, specifically in relation to insider trading as a form of market abuse.

In Chapter 4, the author considers the criminal prosecution of individuals under the auspices of the Competition Act and the need for the legislator to offer immunity to individuals from criminal prosecution who self-report under the auspices of the CLP in order to ensure and protect the future sustainability of the CLP.

In Chapter 5, the author provides the authors own interpretation of section 156 and section 117 of the FSRA,[3] and discuss, in the authors opinion, some of the potential issues and/or shortcomings that section 156 might have in comparison to those discussed in Chapter 4 in relation to the CLP and discuss how some of these issues can be/should be addressed to avoid the potential concerns raised in Chapter 4 in relation to the CLP. In conclusion the author considers under what circumstances the CLP, or a leniency policy similar to that of the CLP, could find application to insider trading and highlights the significant effect which criminal prosecution, and/or the indemnity therefrom for individuals, could have in the implementation of such a leniency programme for insider trading.

[3] Due to the fact that at the time of drafting this thesis the FSRA has only been in effect for a few months, it seems that, according to the authors research, there is very little, if at all, commentary on these two specific sections and therefore the assumptions made and the conclusions drawn in this chapter 5 are based on the authors own opinions and interpretation of these sections.

DECLARATION

I, Philippus Rudolph de Wet, declare that this research report is my own work except as indicated in the references and acknowledgements. It is submitted in partial fulfilment of the requirements for a Master degree in Corporate Law at the University of the Pretoria, South Africa. It has not been submitted before for any degree or examination at this or any other university.

P.R. de Wet

Signed at Pretoria on the …………………………….. day of ……………………………………… 2018

DEDICATION

To the Lord, my creator, who blessed me with fantastic parents, health, knowledge, means, resources and privileges that has made it possible for me to be where I am today, and for the opportunity to have attended this Masters.

To my wife, Lisa de Wet, for her sacrifice, patience and loyalty throughout the two years which I have conducted this Masters.

To my firm, VDT Attorneys Inc. who funded my studies and supported me in the furtherance of my studies.

To Professor Botha for his support and guidance in finalisation of this dissertation.

RESEARCH PURPOSE

The purpose of this dissertation is to consider the need and justification for the incorporation of a Corporate Leniency Policy, or similar leniency policy, for transgressors of insider trading to self-report under the Financial Sector Regulations Act No. 9 of 2017 in an attempt to obtain immunity from prosecution for insider trading.

STRUCTURE OF THIS DISSERTATION

This Dissertation will consist of the following 5 chapters:

Chapter 1: Insider Trading, a South African Law Perspective

This chapter will mainly focus on the South African Law position and provide a background of what inside information is, what constitutes insider trading and why insider trading is deemed to be unlawful. The author will discuss the prosecution and liability for insider trading, sanctions and justifications for and remedies against insider trading in South Africa and the effectiveness thereof and in general provide information with regard to the current legal regime regulating the financial markets in South Africa and how the functions of the Financial Services Board ("FSB") has recently been replaced and taken over by the Financial Conduct Authority ("FCSA") established in terms of the Financial Sector Regulation Act No. 9 of 2017.

Chapter 2: The Corporate Leniency Policy ("CLP") and Regulation of Cartels under the Competition Act No. 89 of 1998

This Chapter provides a competition law overview on cartel activities, explaining what exactly a cartel is and how cartels are currently being regulated under the South African Competition Law regime, with a specific focus on the adoption and implementation of the CLP on limiting/reducing cartel activity in South Africa.

Chapter 3: The Impact of the Corporate Leniency Programme on Cartel Formation, a South African Perspective

This chapter provides an overview on some of the most significant work done by the Competition Commission (the "Commission") during the past 15 years and discusses some of the most significant cases settled by the Commission through the successful implementation and enforcement of the CLP. This chapter focuses

on the most important sectors which the Commission first identified as the most crucial sectors which requires proper competition regulation and in some instances discusses the economic benefits obtained after the successful enforcement of the CLP in these sectors, and lastly also briefly refers to various other matters/sectors in which the Commission managed to successfully disband cartels.

Chapter 4: Indemnity to Individuals from criminal prosecution under the CLP

In this Chapter the author discusses the challenges, both Constitutional and practical challenges, faced by the legislator of the Competition Act, by the introduction of criminal liability for individuals (corporate managers/directors) of companies who were involved in cartels and who reported to the Commission under the CLP, and also mentions certain commentary against the incorporation of such criminal liability.

Chapter 5: Interpretation of Sections 156 and 117 of the FSRA and the application of a leniency policy/programme to insider trading

In Chapter 5 the author provides the authors own interpretation of section 156 and section 117 of the FSRA, and discuss, in the authors opinion, some of the potential issues and/or shortcomings that section 156 might have in comparison to those discussed in Chapter 4 in relation to the CLP and discuss how some of these issues can be/should be addressed to avoid the potential concerns raised in Chapter 4 in relation to the CLP. In conclusion the author considers under what circumstances the CLP, or a leniency policy similar to that of the CLP, could find application to insider trading and highlights the significant effect which criminal prosecution, and/or the indemnity therefrom for individuals, could have in the implementation of such a leniency programme for insider trading.

RESEARCH METHODOLOGY AND LIMITATIONS

The research will be conducted via a literature study of the most significant primary and secondary sources such as statutes, case law, text books, law journals and electronic sources pertaining to the problem as stated on insider trading.

This dissertation will not necessarily focus on the shortcomings of the current existing regulation of insider trading as a form of market abuse in South Africa, nor will it focus on the question of whether insider trading should be regulated at all. This dissertation will also not focus on the various tests and screening methods applied in both the Financial Markets Act No. 19 of 2012 (the "FMA") or the Competition Act No. 89 of 1998 for the detection of insider trading and cartels respectively, however some of these shortcomings might be mentioned to emphasise the importance of having a good corporate governance system that could prevent market abuse, the need in South Africa for further mechanisms of prevention of insider trading as a form of market abuse, and the need for this study to determine whether the incorporation of the CLP in South Africa financial markets could prove to be a valuable tool in eradicating insider trading by inculcating good habits in citizens through the implementation and proper enforcement of the CLP, or similar leniency programme, under the FSRA.

Furthermore, the author does not have any practical experience in dealing with insider trading cases and also does not specialise in the field of Competition Law, but the author has a general understanding of the concept and conduct associated with both market abuse under the Competition Act and the abuse of insider trading under the FMA and noticed that the results and consequences of the lack of proper regulation thereof has a severe negative impact on the economy as a whole, distorts economic growth and participation and investment in the market.

In both instances it seems that the challenges which the authorities face in these industries are primarily the difficulty of detecting such conduct. The Commission, through the adoption, enforcement and successful implementation of the CLP has gained significant success in terminating some of South Africa's largest and most sophisticated cartels, as will be discussed below, and as will be seen, the successful detection of most of these cartels was as a result of a cartel participant who self-reported (the "Discloser") to the Commission under the auspices of the CLP. After having so self-reported, the Discloser, in order to obtain full leniency under the rules of the CLP was required to co-operate with the Commission to expose the entire cartel, its workings and all the technical information required by the Commission to take down the entire cartel, freeing the Commission from having to apply very difficult, time consuming and costly screening exercises, investigations and detection methods in trying to detect these cartels themselves.

It is on this basis that the author is of the opinion that the implementation, enforcement and proper regulation of such a CLP, or similar leniency programme, under the auspices of the financial markets would be a significant tool/mechanism to deter insider trading, especially given the fact that insider trading is very difficult to detect,[4] thus the proper implementation an enforcement of a properly constituted CLP, or similar leniency programme, could potentially motivate and inculcate a habit of self-reporting by transgressors of insider trading under the rules of the FSRA.

Due to the afore mentioned limitations, there might be certain legal and/or practical aspects that will or might not be considered in this dissertation by the author and as a result these research findings could be criticised in that they were not

[4] According to, "Why Insider Trading Is Hard to Define, Prove and Prevent" <http://knowledge.wharton.upenn.edu/article/why-insider-trading-is-hard-to-define-prove-and- prevent/> (accessed 28-10-2018) *Knowledge@Wharton*, insider trading does not leave clear tracks, like a bloody victim or empty safe, so cases can go undetected. *"It's hard to know how much criminal conduct goes on in the world, especially in the white collar world where there's a lot of protection of secrets,"* says Alan Strudler, professor of legal studies and business ethics at Wharton.

supported by sufficient resources and interpretations of the abuse discussed but rather be influenced by the authors mere opinion/s on the subject, and as a result, lacks a strong accurate basis of empirical data regarding the frequency or degree of occurrence of insider trading activity in the South African financial markets and the viability of the adoption of a CLP, or similar leniency programme, but be that as it may, the author maintains that the aforesaid research finding could be employed because it usefully exposes the inherent challenges involving the prosecution and/or detection of market abuse practices in South Africa due to the fact that, and as far as the authors research could tell, other enforcement approaches like incentives, bounty rewards, unlimited criminal penalties and whistle–blower immunity are not currently used, or if applied, has a limited effect on the fight against insider trading in South Africa.

Although whistleblowing protection[5] offered by the Protected Disclosures Act[6] (the "PDA"), and Section 159 of the Companies Act[7] has an extended reach to other areas of law, such as competition law, where it may supplement the CLP in the detection and deterrence of cartel activity, the CLP specifically states that reporting

[5]According to, "Insider Trading: - What is Insider Trading" https://www.investopedia.com/terms/i/insidertrading.asp (accessed 29-10-2018) *Investopedia*, insider trading is the buying or selling of a security by someone who has access to material non-public information about the security. Insider trading can be illegal or legal depending on when the insider makes the trade. It is illegal when the material information is still non-public.

[6] Act No. 26 of 2000. The preamble of the PDA provides that, criminal and other irregular conduct of state and private bodies are detrimental to good, effective, accountable and transparent governance in corporate bodies and organs of state, and also emphasises open and good corporate governance while pointing to criminal and irregular conduct that can endanger the economic stability of the Republic and that has the potential to cause social damage. Furthermore, according to this preamble, the purpose of the PDA is to create a culture that will facilitate the disclosure of information by employees relating to criminal and other irregular conduct they encounter in the workplace. According to Section 2 of the PDA, it is the objective of the PDA to make provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers and/or other employees in the employ of their employers; to provide for the protection of those employees who make disclosures which are protected in terms of the act and to provide for matters connected therewith.

[7] Act No. 71 of 2008. Section 159(1)-(3) of the Companies Act provides for the protection of employees who blow the whistle. This section provides additional protection and does not substitute the protection as is provided for by the PDA. In terms of Section 159(1)(b), the Companies Act further applies to a disclosure by an employee, as defined in the PDA irrespective of whether the PDA would otherwise apply to that disclosure. Any provision in a company's memorandum of incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of Section 159 of the Companies Act as is set out in Section 159(2).

of cartel activity by individual employees of a company or by a person not authorised to act for such a firm will amount to whistleblowing only and not to an application for immunity under the CLP by such firm.[8] Mere whistleblowing by employees regarding cartel involvement of their employing firm is expressly stated to fall outside the scope of such protection, as its purpose is merely to expose cartel activity and not to obtain immunity under the CLP for the company so involved.[9]

The CLP gives protection for authorised disclosures with the specific objective of obtaining leniency from the Commission from prosecution for cartel conduct.[10] Where a company itself decides to authorise a person, for example a director on behalf of the company, to blow the whistle on the company's participation in cartel activity in an attempt to gain immunity under the CLP, the company is afforded an opportunity to be treated leniently in accordance with the CLP.[11]

Thus, in the chapters to follow, the author discusses some of the most significant legislation regulating insider trading in South Africa (Chapter 1). In Chapter 2, the author discusses cartels under the Competition Law regime and explains what exactly a cartel is, how cartels are currently being regulated by the competition authorities. In Chapter 3, the author discusses some of the most significant cartels that ever existed and how the competition commission, through the implementation and enforcement of the corporate leniency policy, managed to disband some of these significant cartels. In Chapter 4 the author highlights the issues pertaining to criminal prosecution under the corporate leniency policy and explains the need to

[8] Section 5.8 of the Corporate Leniency Policy. According to Section 5.8 of the CLP, the Commission does however, still encourage whistleblowing, and as such would also assist the Commission in detecting anticompetitive behaviour.
[9] Section 5.8 of the CLP.
[10] Section 5.7 of the CLP.
[11] Refer to Botha & van Heerden "The Protected Disclosures Act 26 of 2000, the Companies Act 71 of 2008 and the Competition Act 89 of 1998 with Regard to Whistle-Blowing Protection: Is There a Link?" 2014 *TSAR* 337 for a complete discussion on the link between the Companies Act No. 71 of 2008, the PDA and the Competition Act with regard to whistleblower protection.

avoid these pitfalls should a leniency programme be adopted in the financial market sector and then the author ends off in Chapter 5 by looking at the interpretation of section 156 and section 117 of the FSRA, and discuss, in the authors opinion, some of the potential issues and/or shortcomings that section 156 might have in comparison to those discussed in Chapter 4 in relation to the CLP and discuss how some of these issues can be/should be addressed to avoid the potential concerns raised in Chapter 4 in relation to the CLP. In conclusion the author considers under what circumstances the CLP, or a leniency policy similar to that of the CLP, could find application to insider trading and highlights the significant effect which criminal prosecution, and/or the indemnity therefrom for individuals, could have in the implementation of such a leniency programme for insider trading.

1. CHAPTER 1: INSIDER TRADING, A SOUTH AFRICAN LAW PERSPECTIVE

1.1 Introduction[12]

According to the Organization for Economic Co-operation and Development ("OECD"),[13] hard-core cartels are the most egregious violation of competition law. The conduct raises prices and restricts supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others and in the process injures consumers in many countries. A cartel is a form of monopoly,[14] and through secret collusion, cartels try to achieve the same level of market power as that of a monopoly. A cartel is therefore formed with the goal of limiting competition to increase profits and the adverse economic effects caused by such cartels are similar to the harm monopolies cause in that they create deadweight losses, redistribute wealth from the customers to the cartel operators and reduce innovation.[15]

According to Sutherland and Kemp,[16] (herein after referred to as "Sutherland"), the hallmark of cartels is that they are collusive, deceptive and secretive, and are conducted through a conspiracy among a group of firms, and accordingly, the result of this secretive collusion is that it is extremely difficult to detect or prove the existence of a cartel without the assistance and co-operation of a member who is part of the cartel. Sutherland[17] points out that amnesty and whistleblowing programmes are essential to the detection and prosecution of cartel behaviour, as

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[12] The author limited the discussion of this chapter to only the most recent legislation that came into existence after the commencement of the Companies Act 61 of 1973 subsequent to the 1989 amendments. For a complete discussion on the full history of the regulation of insider trading in South Africa, refer to, Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER* 27.

[13] "Cartels and anti-competitive agreements" <http://www.oecd.org/competition/cartels/> (accessed 28-10-2018) *OECD*.

[14] A monopoly means the domination of a market by a single entity who is free to price at a profit maximizing point.

[15] "Cartels and anti-competitive agreements" http://www.oecd.org/competition/cartels/ (accessed 28-10-2018) *OECD*.

[16] Sutherland and Kemp *Competition Law in South Africa* 15 ed (2006) 5-80.

[17] Sutherland and Kemp *Competition Law* 5-80.

they "*may provide information about collusion in the smoke-filled rooms where collusion is achieved*".

According to Lindenfield,[18] insider trading is not a typical crime, and the perpetrator is not a typical criminal. Lindenfield[19] quoted Criminologist Susan Shapiro[20] who wrote that:

> *White-collar crime challenges the more banal kinds of explanations of criminal activity. To say that poverty "causes" crime for instance, fails utterly to account for widespread lawbreaking by persons who are extraordinarily affluent. To suggest that criminals lack "self-control" similarly ignores offenders such as anti-trust violators and insider traders whose lives and achievements represent models of success through the exhibition of self-control.*

Edwin H. Sutherland[21] contended that white-collar crime is more serious than other crime because it creates distrust and therefore is more damaging to society. Sutherland stated that: -

> *The financial loss from white-collar crime, great as it is, is less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale. Other crimes produce relatively little effect on social institutions or social organization.*

Due to the nature of the crime of insider trading, its regulation has provoked widespread debate amongst regulators and academics alike. Some critiques hold the view that insider trading should be regulated for moral reasons, to preserve the integrity of the market and to protect issuers of securities. Others argue that it is

[18] Lindenfield *Insider Trading In The United States, Canada And The United Kingdom* (LLM Thesis, McGill University, 2000) 2-3.
[19] *Ibid*.
[20] Shapiro *White Collar Crime: Classic and Contemporary Views* 3 ed. (1995).
[21] Sutherland "White-Collar Criminality" 1940 *American Sociological Review* 1.

not for lawmakers to dictate morality and that insider trading should be permitted because it improves the efficiency of the market and offers benefits to issuers.[22]

According to Kruger,[23] the disadvantages associated with insider trading in its illegal form and as a supposed legalised market mechanism, promotes inefficiency in the functioning of a free economic market, it negatively impacts on the privacy of parties and lowers investor confidence in an economic market, and ultimately destroys competition in the market.

The author holds the view that insider trading, as in the case of cartels, tends to discourage corporate investment and reduce market efficiency which has a vast negative impact on not only foreign investment in South Africa, but also local investment, and negatively affects our economy as a whole, and therefore, proper regulation, enforcement and implementation of effective legislation should be encouraged in an attempt to discourage insider trading in the market. The author is of the view that the incorporation of a corporate leniency policy ("CLP"), or similar leniency policy, could potentially prove to be an effective tool in the fight against insider trading in South Africa.

In the discussion to follow, the author will provide a background on some of the existing legislation regulating insider trading in South Africa and mention some of its flaws and/or shortcomings and in conclusion argues that the incorporation of a CLP, or a leniency policy similar to the CLP discussed in Chapters 2 and 3 below in respect of the Competition law sector in South Africa, could potentially prove to be an effective tool in the fight against insider trading in South Africa.

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[22] See Kruger *The Regulation of Insider Trading on the JSE: A Comparative Study with Hong Kong* (LLM – Thesis, NWU, 2014) 7 for a discussion on the various arguments and critiques in favour of and those against insider trading.

[23] Kruger *The Regulation of Insider Trading on the JSE: A Comparative Study with Hong Kong* (LLM – Thesis, NWU, 2014) 11.

1.2 Legislative Overview[24]

Prior to the enactment of the Insider Trading Act[25] ("ITA"), the offence of insider trading was regulated in terms of the criminal provisions of the Companies Act No. 61 of 1973 (the "1973 Act")[26] which required such an offence to be proven "beyond reasonable doubt". The onus of proof beyond reasonable doubt is a very strict and difficult test to pass and therefore the successful prosecution of insider trading, which in itself is already almost impossible to detect, needless to state proven beyond reasonable doubt, was not very successful under the 1973 Act.[27] The 1973 Act was amended several times up and to 1990 when the Securities Regulation Panel ("SRP") was established in terms of the 1989 Companies Amendment Act[28] and was given the function of supervising dealings in securities, which included the supervision of the insider trading provisions.[29]

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[24] The author limited the discussion of this chapter to only the most recent legislation that came into existence after the commencement of the Companies Act 61 of 1973 subsequent to the 1989 amendments. For a complete discussion on the full history of the regulation of insider trading in South Africa, refer to, Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER* 27.

[25] Act No. 135 of 1998.

[26] The Companies Amendment Act No. 78 of 1989 also sought to regulate the Prohibition of use of fraud, deceit or artifice in dealings in securities. Section 440F stated as follows: -

"(1) Any person who, directly or indirectly, in connection with the purchase or sale of any security- (a) employs any device, scheme or artifice to defraud any person; (b) makes any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engages in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, shall be guilty of an offence. (2) Any action specified in paragraph (a), (b) or (c) of subsection (1) includes- (a) any director, past director or officer of a company or any person connected with a company having knowledge of any information likely, when published, to affect the price of securities of that company, dealing, except for the proper performance of the functions attaching to his position with that company, in such securities before the expiration of a period of not less than 24 hours after such information has been publicly announced for the first time on a stock exchange or in a newspaper or through the medium of the radio or television or by any other means; (b) any other person, having directly or indirectly received from any person mentioned in paragraph (a) such information, so dealing, on the basis of such information, in such securities at a time when the said person mentioned in paragraph (a) may in terms of that subsection not so deal in such securities. (3) Any person who contravenes subsection (1), or subsection (2) as applied by subsection (1), shall, subject to any defence that may be available to him, be liable to any person for any loss or damage suffered by him as a result of such contravention. (4) The provisions of this section shall not apply to dealings in members' interests in close corporations."

[27] Chitimira "A Historical Overview of the Regulation of Market Abuse in South Africa" 2014 *PER* 949.

[28] Act No. 78 of 1989

[29] Ibid.

Later on the Minister of Finance assigned the task of investigating the insider trading provisions and the making of recommendations to the Policy Board of the Financial Services Board (the "FSB") which lead to the King Task Group publishing its final report on Insider Trading Legislation in October 1997 along with a report concentrating mainly on which body should regulate insider trading in South Africa.[30] In January 1999, Section 440F[31] of the 1973 Act was repealed and new provisions regulating insider trading became law with the passing of the ITA.[32] This was the position until 1 February 2005 when the Security Services Act[33] ("SSA") came into operation.[34] The SSA prohibited insider trading and imposed provisions for civil liability and provides for a much easier onus of proof mechanism, "on a balance of probabilities", as opposed to the strict onus of proof, "beyond reasonable doubt", as was the prior case and was needed to be proven in terms of our criminal law.[35]

The SSA regulated 2 forms of market abuse namely insider trading and manipulative trading practices[36] which was in line with international standards.[37] However, and after the world financial crisis in 2008, it was decided that existing policy should be expanded and that instead of substantially amending the SSA, a new piece of legislation should be introduced, the result was the introduction of the Financial Markets Act[38] ("FMA").[39] The FMA was assented to by the President on 30 January 2013 and came into force on 3 June 2013.[40] Up and until the 1st April 2018, insider trading was regulated under the provisions of Chapter 10 of the

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30 Loubser Notes on Securities 53.
31 Refer to Fn 26.
32 Loubser Notes on Securities 53 - 54.
33 Act No. 36 of 2004.
34 Loubser Notes on Securities 54.
35 Ibid.
36 Ibid 52.
37 In the case of Pather v Financial Services Board 2018 1 SA 161 (SCA) the court found that the Enforcement Committee (the "EC") (established in terms of the SSA) is not precluded from imposing an administrative penalty for a contravention or failure to comply with the SSA. It held that the criminal jurisdiction and the administrative penalty jurisdiction of the EC co-exist in terms of the legislative scheme.
38 Act No. 19 of 2012.
39 Loubser Notes on Securities 52 - 53.
40 Government Gazette No. 36485 published on the 13th May 2013.

FMA.[41] With the introduction of the Financial Sector Regulations Act,[42] as discussed in paragraph 1.5 below, all forms of market abuse which were previously regulated by the FMA, inclusive if insider trading, is currently regulated by the FSRA.[43]

1.3 Important Definitions

In order to understand the regulation of insider trading as discussed herein below, it is important to understand what exactly insider trading is, what an insider is and what exactly constitutes inside information and therefore the author will deal with only some of the most important definitions[44] in this paragraph 1.3.

"Inside Information"[45] - Before information would qualify as inside information the person must know that he has inside information as defined in Section 77 of the FMA, and for such inside information to be an insider trading offence under Section 78 of the FMA, it must satisfy the following criteria:-

The information must be specific and precise, thus it must not be a rumour or mere speculation, and the information must not have been made public.[46] The following, none exhaustive list of circumstances, has been incorporated as a list under the FMA in an attempt to clarify whether information has been made public or constitutes public information:[47]

- *"if it is published in accordance with the rules of the relevant regulated market; or*

[41] Sections 77 to 88 of the FMA.
[42] Act No. 9 of 2017.
[43] "Bye Bye FSB, Hello FSCA" <https://www.werksmans.com/legal-updates-and-opinions/bye-bye-fsb-hello-fsca/> Werksmans (accessed 03-02-2019).
[44] The definitions listed are the only ones which the author is of the opinion are relevant for purposes of this Thesis and is therefore not the only definitions provided for the FMA.
[45] Section 77 of the FMA.
[46] Loubser Notes on Securities 67 - 68.
[47] Ibid.

- *if it is contained in records which by virtue of any enactment are open to inspection by the public; or*
- *if it can be readily acquired by those likely to deal in any listed securities to which the information relates; or*
- *if it can be readily acquired by those likely to deal in any listed securities of an issuer to which the information relates; or*
- *if it is derived from information which has been made public.*"[48]

"Insider"[49] - The information must have been obtained or learnt as an "insider". An insider means a person who would have access to inside information of the company to whom the inside information relates. This includes persons such as: - directors; employees; agents or shareholders of an issuer of securities listed on a regulated market to which the inside information relates, or a person who has inside information through having access to such information by virtue of employment, office or profession, or where such person knows that the direct or indirect source of the information was a person contemplated herein above.[50]

The author will later on in paragraph 1.7 deal with whether or not a juristic person (a "corporate") could be deemed to be an insider who is able to 'deal' (as per the definition below) in inside information.

"Deal" - The FMA[51] defines "deal" as:

"includes conveying or giving an instruction to deal."

Loubser[52] states that: - "*Under the English law regime, the concept of "dealing" is defined to cover the acquisition or disposition of securities either as a principal for*

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[48] Loubser *Notes on Securities* 68.
[49] Section 77 of the FMA.
[50] Loubser *Notes on Securities* 68 - 69.
[51] Section 77 of the FMA.
[52] Loubser Notes on Securities 69.

one's own account or as an agent for another, as well as directly or indirectly procuring an acquisition or disposal of securities[53] *by any other person. It is therefore assumed that the word "deal" under the FMA would include the buying and selling of securities even though the definition does not state this clearly.*[54]

1.4 Offences and Defences

"Dealing" - Section 78 of the FMA prohibits three different types of "dealing": 1. dealing for one's own account[55] (hereinafter referred to as the "Self-Dealing Offence"); 2. Dealing for any other person[56] (herein after referred to as the "Third Party Dealing Offence"); and 3. Dealing for an insider[57] (the "Insider Dealing Offence").

"Self-Dealing Offence" - It is an offence for an insider who knows that he has inside information, to deal directly or indirectly, or through an agent for his own

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[53] Section 1 of the FMA provides a very long and broad list of the term "securities" and states that a security includes all of the following:

- listed and unlisted: -
- shares, depository receipts and other equivalent equities in public companies, other than shares in a share block company as defined in the Share Blocks Control Act No. 59 of 1980;
- debentures, and bonds issued by public companies, public state-owned enterprises, the SA Reserve Bank and the Government
- derivative instruments;
- notes;
- participatory interests in a collective investment scheme as defined in the Collective Investment Schemes Control Act, 2002 and units or any other form of participation in a foreign collective investment scheme approved by the Registrar of Collective Investment Schemes in terms of s 65 of that Act;
- instruments based on an index;
- units or any other form of participation in a collective investment scheme licensed or registered in a country other than the Republic;
- the securities contemplated above that are listed on an external exchange;
- an instrument similar to one or more of the securities contemplated in the first three bullets of this list that are prescribed by the registrar to be a security for the purposes of this Act; and
- rights in the securities referred to in the first 4 bullets referred above.

[54] Loubser *Notes on Securities* 69.

[55] Section 78(1)(a) of the FMA.

[56] Section 78(2)(a) of the FMA.

[57] Section 78(3)(a) of the FMA.

account in the securities listed on a regulated market to which the information relates or which are likely to be affected by it.[58]

"An insider could however still escape liability if it can be proved, on a balance of probabilities, that the insider only became an insider after he had given the authorised user an instruction to deal and the instruction was not changed in any manner after he became an insider; and/or he was acting in pursuit of a transaction in respect of which all the parties to the transaction had possession of the same inside information, trading was limited to the parties mentioned above, and the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information."[59]

"Third Party Dealing Offence" - In terms of Section 78(2)(a) of the FMA it is an offence for an insider who knows that he or she has inside information to deal directly or indirectly or through an agent on behalf of another person in the securities listed on a regulated market to which the information relates or which are likely to be affected by it. This means that it is an offence for an insider to deal on behalf of another person, whether this person may or may not be an insider himself or herself.[60]

If the insider can prove, on a balance of probabilities, that he complied with any of the exclusions listed in Section 78(2)(b) of the FMA which provides that he: -

1. *"is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time;*[61]

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[58] Section 78(1)(a) of the FMA.
[59] Loubser Notes of Security 57.
[60] Ibid 58 – 59.
[61] Section 78(2)(b)(i) of the FMA.

2. *only became an insider after he had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he became an insider;*[62]

3. *was acting in pursuit of a transaction in respect of which all the parties to the transaction had possession of the same inside information trading was limited to the parties mentioned above, and the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information."*[63]

"Insider Dealing Offence" - A further dealing offence which was not included in the SSA was introduced by the FMA under Section 78(3)(a). In terms of Section 78(3)(a) of the FMA, any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market and which relates to inside information that the insider had, or which are likely to be affected by it, who knew that such person was an insider, commits an offence.[64]

The dealing offence differs from the third party dealing offence and the self-dealing offence referred to herein above in that the person who is doing the dealing for another person, whether such dealing is done directly or indirectly, does not have to be an insider himself, he merely needs to know that the person for whom he is dealing is indeed an insider as per the definition herein above. In all other offences listed in the FMA, the dealing is done by the insider himself.[65]

[62] Section 78(2)(b)(ii) of the FMA.
[63] Section 78(2)(b)(iii) of the FMA.
[64] *Loubser Notes on Securities 62.*
[65] *Loubser Notes on Securities 62.*

In terms of Section 78(3)(b) of the FMA, the authorised user defence and the transaction defence as discussed herein above would also be applied as defences in respect of this new "Insider Dealing Offence".[66]

"Improper disclosure of inside information" - The FMA makes it an offence for an insider, who knows that he has inside information, to disclose that information to another person. If however it can be proved, on a balance of probabilities, that the information was disclosed because it was necessary to do so for the proper performance of the functions of his/her employment, office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that it was also disclosed at the same time that the information was inside information, then same would qualify as a legal and justifiable defence.[67]

"Encouraging and discouraging" - In terms of Section 78(5) of the FMA, it is an offence for an insider who knows that he or she has inside information to encourage or to cause another person to deal or to discourage or to stop another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it.[68]

It would be for the courts to decide whether certain conduct amounts to encouragement or discouragement based on the facts and circumstances in relation to each specific matter, and from the interpretation of this Section 78(5) of the FMA, it seems that for an offence to be committed under this section, it is probably not necessary for the inside information to be disclosed as such, or for the person to act on the encouragement, or to refrain from acting on the discouragement. Based further on the above listed defences provided for the

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[66] Loubser *Notes on Securities* 62.
[67] Ibid.
[68] Ibid 73.

various offences, it also seems that there are no defences specific to this prohibition.[69]

1.5 Regulation of Insider Trading

As mentioned above, prior to the introduction of the ITA, the SRP [which regulated affected transactions but have been replaced by the Takeover Regulation Panel ("TRP") as a result of the coming into effect of the new Companies Act[70] (the "2008 Act")] had the responsibility of supervising the insider trading provisions which were at the time contained in the 1973 Act. The King Task Group recommended that the FSB should be the body to take on the responsibility of administering the insider trading regulations. This recommendation became law with the passing of the ITA.[71]

The FSB was responsible for the supervision of compliance with the market abuse provisions, and although the FSB no longer had the power to institute court proceedings similar to those provided for in the now repealed Section 77 of the SSA,[72] the FSB still had the power to investigate the various forms of market abuse (insider trading, deceptive trading practices and publications of false and/or misleading statements).[73]

Since the introduction of the Financial Sector Regulation Act No. 9 of 2017 ("FSRA") which was signed into law in August 2017, and which commenced on the 1 April 2018, the FSB have effectively been replaced by the Financial Sector Conduct Authority ("FSCA") established in terms of the FSRA.[74] The introduction

[69] Loubser Notes on Securities 63.
[70] Act No. 71 of 2008.
[71] Loubser *Notes on Securities* 54.
[72] This is because an equivalent of Section 77 of the SSA has not been included in the FMA.
[73] Loubser *Notes on Securities* 72.
[74] "Bye Bye FSB, Hello FSCA" <https://www.werksmans.com/legal-updates-and-opinions/bye-bye-fsb-hello-fsca/> Werksmans (accessed 03-02-2019).

of the FSRA is in line with the path towards implementing the Twin Peaks model ("Twin Peaks")[75] of financial sector regulation in South Africa.[76] Twin Peaks is a model for the regulation of the financial sector and will cause a fundamental change in the regulation of South Africa's financial sector.[77] Twin Peaks will see to the creation of two new regulators to come into operation namely; -the Prudential Authority ("PA") and the Financial Sector Conduct Authority ("FSCA"). The Prudential Authority will be housed in the South African Reserve Bank (SARB), and the FSB will be transformed into a dedicated market conduct regulator namely the Financial Sector Conduct Authority.[78] SARB will be responsible for protecting, maintaining and enhancing financial stability as the resolution authority.[79]

Twin Peaks implementation in South Africa has two fundamental objectives and that is to: -

- "*to strengthen South Africa's approach to consumer protection and market conduct in financial services, and*
- *to create a more resilient and stable financial system*."[80]

The purpose and objective of the PA will be to promote and enhance the safety and soundness of regulated financial institutions, i.e. the banks.[81] The purpose and objective of the FSCA will be to protect financial customers through supervising

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[75] Twin Peaks originates from Australia in 1998 and has since then been adopted by the Netherlands, Belgium, New Zealand and the United Kingdom and now also South Africa in 2018. Twin Peaks aims to make the financial sector safer and make it work more effectively in the interests of all South Africans, by reducing potential threats to financial stability and better protecting customers by ensuring that financial institutions treat their customers fairly.
[76] Bye Bye FSB, Hello FSCA" <https://www.werksmans.com/legal-updates-and-opinions/bye-bye-fsb-hello-fsca/> Werksmans (accessed 03-02-2019).
[77] "New Twin Peaks Regulators Established" < http://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March2018_FINAL.pdf> National Treasury (accessed 03-02-2019).
[78] Ibid.
[79] Ibid.
[80] "What Is Twin Peaks?" < https://www.iob.co.za/what-is-twin-peaks/> IOBA (accessed 03-02-2019).
[81] Bye Bye FSB, Hello FSCA" <https://www.werksmans.com/legal-updates-and-opinions/bye-bye-fsb-hello-fsca/> Werksmans (accessed 03-02-2019).

market conduct, such market conduct regulation include investment funds and investment managers.[82]

As noted above, SA currently adopted an integrated approach to financial regulation in terms whereof the FSB acted as a *"super-regulator"* with the dual responsibility of regulating both the conduct of financial market participants such as investment managers and also the prudential soundness of financial institutions like banks.[83]

Successful implementation of the FSRA will be largely dependent on the definite and clear co-ordination and co-operation between the different regulatory authorities to be established in terms of the FSRA.[84]

A governance system will be established which will include a number of oversight Committees who will be responsible to ensure proper and effective co-ordination and co-operation within the Twin Peaks framework, as well as with other regulatory authorities which fall outside of the Twin Peaks umbrella, such as the National Credit Regulator (NCR).[85]

As mentioned above, the FSCA has effectively taken over the role of the FSB and became the dedicated market conduct authority established in terms of Section 56 of the FSRA. The functions of the FSCA are set out in Section 58 of the FSRA. Section 58(1)(a) determines that the FSCA "*must regulate and supervise, in accordance with the* ***financial sector law****, the conduct of financial institutions*."

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[82] Ibid.
[83] Ibid.
[84] "Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry" < https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/$FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf> (accessed 03-02-2019) EY.
[85] Ibid.

(own emphasis). 'Financial Sector Law' includes in its definition[86] "*a law listed in Schedule 1 to the FSRA."* The FMA is specifically listed in Schedule 1. Schedule 2[87] outlines the jurisdiction of the responsible authorities in respect of the Financial Sector Laws in terms whereof the FMA is specifically allocated to the FSCA.

Schedule 4[88] indicates that sections 74, 75, 76, 77, 78 and 82 of the FMA is amended by Sections 53 – 58 of the FSRA. Sections 77 and 78 specifically relate to insider trading as a form of market abuse and is now regulated by the FSRA.

Section 135[89] contains the powers of the FSCA and determines that: -

> *"(1) A financial sector regulator[90] may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator—*
>
> *(a) reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority; or*
>
> *(b) reasonably believes that an investigation is necessary to achieve the objects referred to in section 251 (3) (e) pursuant to a request by a designated authority in terms of a bilateral or multilateral agreement or memorandum of understanding contemplated in that section.*
>
> *(2) The responsible authority may investigate any matter relating to an* ***offence or contravention referred to in sections 78, 80 and 81 of the Financial Markets Act, including insider trading in terms of the Insider Trading Act, 1998 (Act No. 135 of 1998),*** *and the offences referred to in Chapter VIII of the Securities*

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[86] Section 1 of the FSRA.
[87] Schedule 2 of the FSRA.
[88] Schedule 4 of the FSRA.
[89] Act No. 9 of 2017.
[90] The financial sector regulator specifically includes the PA and the FSCA, refer to Section 1 of the FSRA for a definition of a financial sector regulator.

> *Services Act, 2004 (Act No. 36 of 2004), committed before the repeal of those Acts."*

Section 135 therefore specifically allocates investigative powers in respect of the 3 forms of market abuse under the FMA (insider trading, prohibited trading practices and false, misleading and/or deceptive statements), to the powers and functions of the 'responsible authority'. Section 1[91] defines who the responsible authority is and this definition must be read with the provisions of section 5.[92] Section 5 of the FSRA defines the responsible authority in relation to a financial sector law as identified in Schedule 2, and as mentioned above, the responsible authority for the FMA as allocated in Schedule 2 is the FSCA.

Section 3 of the regulations to the FSRA ("FSRA Regulations") makes provision for transitional management until such time as the FSCA becomes fully functional, by the incorporation of a transitional management committee who will see to the functions of the FSCA and facilitate the disestablishment of the FSB with the least disruption possible.[93] Any decision taken by this transitional management committee during the transitional period referred to above will be regarded as having been taken by the FSCA.[94]

It is interesting to note that included in the powers of the responsible authority is the discretion and power to enter into a leniency agreement with transgressors of a financial sector law.[95]

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[91] Act No. 9 of 2017.
[92] Ibid.
[93] Regulation 3(1)(a) of the Regulations to the FSRA.
[94] Regulation 3(1)(c) of the Regulations to the FSRA.
[95] Section 156 of the FSRA provides that: - Leniency agreements.—(1) The responsible authority for a financial sector law may, in exchange for a person's co-operation in an investigation or in proceedings in relation to conduct that contravenes or may contravene that law, enter into a leniency agreement with the person, which may provide that the responsible authority undertakes not to impose an administrative penalty on the person in respect of the conduct.
(2) A leniency agreement with a person may provide that the agreement also applies to—

The introduction of Section 156[96] is commendable and lies at the very heart of this thesis. The legislator seems to have gained invaluable knowledge from the pitfalls of leniency policies in other jurisdictions and/or spheres of the law, especially with regard to the application of such leniency policy in whether it should apply to both corporates and individuals and/or whether the individuals behind the corporate should also be offered indemnity, as is the case in the competition law leniency policy to be discussed in Chapters 2 and 3 to follow. This section 156 makes it very clear that this section not only applies to the person (both natural and/or juristic person[97]) who has transgressed the financial sector law, but should also apply to specified persons in the service of, or acting on behalf of, the person, or specified partners and associates of the person.[98]

However, it seems that this section 156 in the FSRA is the only section that deals with leniency. There is no indication in the FSRA or this section 156 of how exactly the process of leniency will work, and it seems as if the regulatory authority is given quite broad discretionary powers whether or not to grant any leniency at all depending on the circumstances in every case and whether leniency can be justified. As will be discussed in Chapters 2 and 3 to follow, the importance of a

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(a) specified persons in the service of, or acting on behalf of, the person; or
(b) specified partners and associates of the person.
(3) The responsible authority may not enter into a leniency agreement with a person unless it is satisfied that it is appropriate to do so, having regard, among other matters, to—
(a) the nature and effect of the contravention concerned;
(b) the nature and extent of the person's involvement in the contravention; and
(c) the extent of the person's co-operation.
(4) The responsible authority that enters into a leniency agreement must publish it, unless the responsible authority determines that the publication may—
(a) create an unjustifiable risk to the safety of a person; or
(b) prejudice an investigation into a contravention of a law.
(5) The responsible authority that enters into a leniency agreement may, by notice to the person with whom it entered into the agreement, terminate the agreement—
(a) if the person agrees;
(b) if the person gave the responsible authority false or misleading information in relation to entering into the agreement;
(c) if the person has failed to comply with the agreement; or
(d) in circumstances specified in the agreement.

96 Fn 95.

97 The definition for "person" in section 1 of the FSRA includes both a natural and/or juristic person.

98 Section 156(2)(a)(b) of the FSRA.

'fear element' being present in order to ensure the effective application of the leniency procedure requires, in the authors opinion, a mechanism to advance and encourage transgressors to come clean and apply for leniency and to create a sense of urgency for such a transgressor to do so, which cannot be successfully obtained if all applicants could potentially qualify for leniency. The window of opportunity to come forward and apply for immunity should be short lived and only the first to the door should be able to qualify for such leniency. This would create a sense of urgency and fear and as will be seen in Chapter 3 below and which resulted in the Competition Commission achieving great success in disbanding some of the most significant cartels that ever existed. It does not seem as if the FSRA specifically provides for such mechanism as the regulating authority will have broad discretionary powers to grant any person leniency, whether or not such person is the first or very last to the door.

The author appreciates the fact that there can surely not be a "one size fits all" leniency policy to cater for all forms of market abuse, especially not now with the extensive reach and functions of the FSCA across all financial sector laws with the incorporation of the FSRA, and therefore it might very well be that, with the introduction of this section 156 and the broad discretionary powers now granted the "responsible authorities" in respect of each financial sector law as mentioned above, that we will see various leniency policies being established for every specific form of market abuse that is tailor made to the specific abuse in order to assist these authorities in the proper regulation of the specific market abuse. In this regard, refer to the broad powers granted to the FSCA to provide and implement '*conduct standards*' as is contemplated in terms of section 106 of the FSRA.[99]

[99] 106. Conduct standards.—(1) The Financial Sector Conduct Authority may make conduct standards for or in respect of—
(a) financial institutions;
(b) representatives of financial institutions;
(c) key persons of financial institutions; and
(d) contractors.

The author is therefore of the opinion that, at least for as far as insider trading is concerned and for as far as the author is of the view that insider trading in many ways closely relates to the crime of a cartel, the leniency program84(10)me applied in our competition law could potentially find successful application also in the fight against insider trading and there is furthermore a lot which the regulating authorities can learn and take away from the pitfalls and successes of the Commission during the establishment and incorporation of the CLP.

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(2) A conduct standard must be aimed at one or more of the following:
(a) Ensuring the efficiency and integrity of financial markets;
(b) ensuring that financial institutions and representatives treat financial customers fairly;
(c) ensuring that financial education programs, or other activities promoting financial literacy are appropriate;
(d) reducing the risk that financial institutions, representatives, key persons and contractors engage in conduct that is or contributes to financial crime; and
(e) assisting in maintaining financial stability.
(3) Without limiting subsections (1) and (2), a conduct standard may be made on any of the following matters:
(a) Efficiency and integrity requirements for financial markets;
(b) measures to combat abusive practices;
(c) requirements for the fair treatment of financial customers, including in relation to—
(i) the design and suitability of financial products and financial services;
(ii) the promotion, marketing and distribution of, and advice in relation to, those products and services;
(iii) the resolution of complaints and disputes concerning those products and services, including redress;
(iv) the disclosure of information to financial customers; and
(v) principles, guiding processes and procedures for the refusal, withdrawal or closure of a financial product or a financial service by a financial institution in respect of one or more financial customers, taking into consideration relevant international standards and practices, and subject to the requirements of any other financial sector law or the Financial Intelligence Centre Act, including—
(aa) disclosures to be made to the financial customer; and
(bb) reporting of any refusal, withdrawal or closure to a financial sector regulator;
(d) the design, suitability, implementation, monitoring and evaluation of financial education programs, or other initiatives promoting financial literacy;
(e) matters on which a regulatory instrument may be made by the Financial Sector Conduct Authority in terms of a specific financial sector law;
(f) matters that may in terms of any other provision of this Act be regulated by conduct standards; and
(g) any other matter that is appropriate and necessary for achieving any of the aims set out in subsection (2).
(4) A conduct standard may declare specific conduct in connection with a financial product or a financial service to be unfair business conduct if the conduct—
(a) is or is likely to be materially inconsistent with the fair treatment of financial customers;
(b) is deceiving, misleading or is likely to deceive or mislead financial customers;
(c) is unfairly prejudicing or is likely to unfairly prejudice financial customers or a category of financial customers; or
(d) impedes in any other way the achievement of any of the objectives of a financial sector law.
(5) (a) In relation to a credit provider regulated in terms of the National Credit Act, a conduct standard may only be made in relation to a financial service provided in relation to a credit agreement and matters provided for in section 108.
(b) A conduct standard referred to in paragraph (a) may only be made after consultation with the National Credit Regulator.

1.6 Criminal Sanctions

In terms of Section 109 of the FMA, a person who has been found to have contravened any of the provisions in Sections 78, 80(1)(a) or 81(1) of the FMA was guilty of an offence and could be charged a fine not exceeding fifty million rand or face 10 years imprisonment or both. In the event that the Director of Public Prosecutions decided not to criminally prosecute such a person for an alleged offence as stated above, the FSB was authorised to prosecute such person under the provisions of Section 84(10) of the FMA in a competent court.[100]

There seems to have been wide spread debate and uncertainty as to whether a crime could be committed by a juristic person, and if so, how the elements of a crime could be applied to a juristic person.[101] The conduct of insider trading is a crime and an insider is eligible of being fined or imprisoned or both. In order to access whether a juristic person could be held criminally liable for the crime of insider trading, it would need to be tested whether or not the elements of the crime of insider trading could be applied to a juristic person.[102] The concern with criminal liability of a juristic person is to determine who the actual transgressor is. Is it the juristic person who has committed the crime, or is it in fact the body of persons, or only one of them, who sit behind the juristic person, such as the board of directors for instance, who has committed the crime?

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[100] Loubser Notes on Securities 71.
[101] It is beyond the scope of this thesis to determine the criminal liability of corporates for all forms of market abuse and therefor this thesis will only focus on the criminal liability of corporates in respect of insider trading as a form of market abuse. It is also beyond the scope of this dissertation to determine whether or not a juristic person could be held criminally liable at all as such a discussion would also require a thesis on its own.
[102] C J Olifant *Liability of Companies for Market Abuse (LLM Thesis, University of Johannesburg, 2015)* 4.

Firstly it would need to be determined whether liability in respect of the FSRA could be attributed to a company, or rather put more specifically, whether the conduct of insider trading could be attributed to a company.

It is trite principle in our law that a company can be held vicariously liable for the actions of its employees.[103] A Juristic person can never act on its own accord as it always functions through its board, thus the people, directors, managers in control of the corporate are responsible for the actions of the corporate.[104]

Section 332 of the Criminal Procedure Act No. 51 of 1977 currently regulates corporate criminal liability in South Africa and provides that: -

> *"Section 332. Prosecution of corporations and members of associations. —*
>
> *(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law—*
>
> *(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and*
>
> *(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."*

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[103] L. Kobrin "Vicarious liability: Easy to understand, difficult to adjudicate" http://www.derebus.org.za/vicarious-liability-easy-understand-difficult-adjudicate/ (accessed 05-02-2019) May 2017, De Rebus.
[104] *Fn 326.*

Most crimes also require an element of knowledge to be present by the perpetrator, meaning that the perpetrator should have knowledge of the fact that the conduct is a crime, as is the case with insider trading, the insider must "know" or "knowingly" participate in the crime.[105] Refer to paragraph 23 above.

Due to the fact that a company does not have a mind of its own, the actions of a company are based on the collective mind of its board who controls the company and all its actions.[106]

Although section 276 of the FSRA only deals with administrative penalties, section 276 of the FSRA provides for the liability of juristic persons and states that: -

"(1) If—

(a) a financial institution[107] commits an offence in terms of a financial sector law; and

(b) a member of the governing body of the financial institution failed to take all reasonably practicable steps to prevent the commission of the offence,

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[105] C J Olifant *Liability of Companies for Market Abuse (LLM Thesis, University of Johannesburg, 2015)* 21.
[106] Ibid.
[107] Section 1 of the SSRA clearly defines a financial institution broad enough to also include juristic persons. Section 1 defines a financial institution as follows: -
"financial institution" means any of the following, other than a representative:
(a) a financial product provider;
(b) a financial service provider;
(c) a market infrastructure;
(d) a holding company of a financial conglomerate; or
(e) a person licensed or required to be licensed in terms of a financial sector law;".

the member of the governing body commits the like offence, and is liable on conviction to a penalty not exceeding the penalty that may be imposed on the financial institution for the offence.

(2) If—

(a) a key person of a financial institution engages in conduct that amounts to a contravention of a financial sector law; and

(b) the financial institution failed to take all reasonably practicable steps to prevent the conduct,

the financial institution must be taken also to have engaged in the conduct."

The definition of a financial sector law as discussed above, clearly includes the FMA and as a result includes insider trading, therefore it is evident that section 276 stated above applies to insider trading, and should a company (who is a juristic person), commit an offence in terms of a financial sector law, whether by or through a member of its governing body or a key person, then the company must be taken also to have engaged in the conduct and therefore it seems that a company is capable of insider trading and would subsequently not only be held liable under the provisions of section 276 above for an administrative penalty, but could also be held criminally liable under the provisions of Section 332 of the Criminal Procedure Act No. 51 of 1977.

1.7 Liability for insider trading

The FMA no longer empowered the FSB to bring a civil action against a person who contravenes the insider trading provisions of the FMA due to the fact that, and as was mentioned herein above, an equivalent of Section 77 of the SSA was not included in the FMA, despite the fact that the bringing of a civil action, as a possibility under the FMA, was originally lauded as setting international

precedent.[108] Arguments are that the civil action was available to the FSB but it was not really used, neither were the available criminal sanctions properly enforced.[109]

According to Loubser,[110] contraveners however did not go unpunished. By threatening with civil action, the FSB managed to extract large, out of court settlements, from persons who were found to be insider trading. All the money retrieved from the aforesaid settlements by the FSB was distributed to persons who had dealt in the same securities at the time and who incurred loss and/or damages as a result thereof.[111]

In 2005 with the introduction of the SSA, the FSB utilised administrative sanctions and referred contraventions of the insider trading provisions to the Enforcement Committee (the "EC"). Such referrals were however done under the auspices of

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[108] *Loubser Notes on Securities 67.*
[109] *Loubser Notes on Securities 67.*
[110] *Loubser Notes on Securities 72.*
[111] In the matter of *Zietsmanv Directorate of Market Abuse* 2016 1 SA 218 (GP) involved an appeal to the High Court against a finding of the FSB and is one of a very few reported judgements in South Africa dealing with insider trading. Although, in this matter, the charges of insider trading were brought under the SSA, which has since been repealed by the FMA, this judgement remains relevant as the definition of "inside information" and the offence of "insider trading" are identical in both acts.
In this case the Appellants contended that they did not believe or "know" that they had inside information as contemplated in the SSA and accordingly did not contravene the insider trading provisions of the SSA due to the fact that information was, amongst other things, not "specific or precise" information as the loan was merely approved in principle, no loan agreement had been concluded in writing, there were conditions precedent to the loan and there was uncertainty whether Listco would ultimately be able to access the funds; and the information was not "likely to have a material effect" on the price or value of Listco's shares. The court however compared the facts of this case with the law on insider trading in Europe and the United Kingdom, and the court rejected the Appellants' contentions and held that: -

- a circumstance or event need not be in final form in order for the information relating to such circumstance or event to qualify as "specific and precise". Information relating to circumstances or an event in an intermediate phase could still be specific and precise and therefore constitute inside information;
- whether information is price sensitive is determined with reference to the reasonable investor and whether he would regard the information as relevant to a decision to deal in such securities; and
  a genuine and bona fide belief that known information is not inside information will not constitute a defence if such belief is not based on reasonable grounds. Accordingly, the court found that the Appellants were guilty of insider trading and imposed a fine of R1million.

the Financial Institutions Protection of Funds Act 28 of 2001 (hereinafter referred to as the "FIPFA".)[112]

A contravention of the insider trading provisions in the FMA can still be criminally prosecuted or referred to the EC or for the imposition of an administrative sanction. In terms of Section 82 of the FMA, the maximum amount of the administrative sanction that could be imposed on a person who contravened the insider trading provisions is found in Section 78 of the FMA. Although the procedure to be followed and the factors to be taken into account by the EC in imposing such a sanction are largely regulated by the FIPFA, the EC must also consider the provisions of Section 82 of the FMA as it sets out the maximum administrative penalty that may be imposed by the EC.[113]

With the introduction of the FSRA, the FSCA is set to take over the role and functions of the EC and the FSB. In order to ensure a well-managed and non-disruptive transition to the new model, certain provisions of the FSRA will be phased in over time, therefore the entire act has not yet come into effect and all the respective bodies have yet to be appointed and/or established.[114]

1.8 Enforcement Procedures

Previously Chapter 11 of SSA made provision for the enforcement procedures. Enforcement procedures are currently largely regulated by FIPFA (as amended by the Financial Services Laws General Amendment Act 22 of 2008 and 45 of 2013, read with the provisions of the FMA).[115]

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[112] *Loubser Notes on Securities 72.*

[113] Loubser *Notes on Securities*72.

[114] "New Twin Peaks Regulators Established" <http://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March2018_FINAL.pdf> National Treasury (accessed 03-02-2019).

[115] Loubser Notes on Securities 78.

Until very recently with the introduction of the FSRA, the enforcement procedure in respect of the market abuse provisions were largely still regulated by the FIPFA, despite the coming into force of the FMA.[116] The Directorate still had the power to refer a matter to the EC for a determination and the imposition of an administrative sanction as is contemplated under Section 6A (2) of the FIPFA (as amended by the FMA).[117] The Registrar also had the authority and power to refer any contravention of the FMA to the EC as is determined in terms of Section 99 of the FMA.[118] All enforcement proceedings are now regulated by the responsible authorities in respect of section 170 FSRA.[119]

"Enforcement Committee" - In terms of Section 10(3) of the Financial Services Board Act 97 of 1990 ("FSB Act"), the FSB established an Enforcement Committee ("EC"). Members of the EC must be persons with appropriate experience and knowledge of the field of financial markets and insider trading and must include legal professionals such as advocates and attorneys.[120]

The responsibility of the EC is to enforce compliance with laws regulating the provision of financial services. Matters referred to the EC is heard by a panel of at least three members of the EC who will then deal with the matter as is required in

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[116] Ibid.
[117] Ibid.
[118] Loubser Notes on Securities 78.
[119] Section 170 of the FSRA: - *"Enforcement.—(1) The responsible authority that makes an administrative penalty order may file with the registrar of a competent court a certified copy of the order if—*
(a) the amount payable in terms of the order has not been paid as required by the order; and
(b) either—
(i) no application for reconsideration of the order in terms of a financial sector law, or for judicial review in terms of the Promotion of Administrative Justice Act of the Tribunal's decision, has been lodged by the end of the period for making such applications; or
(ii) if such an application has been made, proceedings on the application have been finally disposed of.
(2) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court."
[120] Loubser Notes on Securities79.

terms of Section 10A(2)(a)(ii) of the FSB Act, and a majority decision by the panel will be considered to be a decision of the EC.[121]

A written settlement agreement may be concluded between the applicant and the respondent either prior, during or even after the referral of a matter to the EC, which settlement agreement must be filed with the chairperson of the EC in order to be made an order of the EC as is required in terms of Section 6B(7) of FIPFA.[122]

These functions will now be transferred to the FSCA as mentioned above.

"Administrative Sanctions" - If the EC determines that the respondent contravened the law, it may, despite the provisions of any law, impose any one or more of the stipulated administrative sanctions listed in Section 6D (2) of the FIPFA. The test is based on a balance of probabilities.[123]

Read with the provisions of Section 6D (2) of FIPFA above, Section 82(1) of the FMA[124] provides further details regarding the imposition of an administrative sanction and the extent of administrative sanction that can be imposed for contraventions of Sections 78(1); 78(2) and 78(3) of the FMA.

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[121] Ibid.
[122] Loubser Notes on Securities80.
[123] Ibid.
[124] Section 82(1) provides that: -
"*Liability resulting from insider trading.—*
(1) Subject to subsection (3), any person who contravenes section 78 (1), (2) or (3) of this Act is liable to pay an administrative sanction not exceeding—
(a) the equivalent of the profit that the person, such other person or such insider, as the case may be, made or would have made if he or she had sold the securities at any stage; or the loss avoided, through such dealing;
(b) an amount of up to R1 million, to be adjusted by the Authority annually to reflect the Consumer Price Index, as published by Statistics South Africa, plus three times the amount referred to in paragraph (a);
(c) interest; and
(d) cost of suit, including investigation costs, on such scale as determined by the Authority."

Section 82(2) of the FMA also regulates the administrative sanction that may be imposed for contraventions of Sections 78(4) and 78(5) of the FMA and states that the offender may be held liable for an administrative sanction calculated in terms of Section 82(1) of the FMA, but with reference to the profit made or loss avoided by the person to whom the information was disclosed or who was encouraged or discouraged.[125]

Administrative penalties are now regulated by Section 167 of the FSRA.[126]

1.9 Conclusion

It is evident that careful reconsideration has been given to the introduction of the offences and defences relating to market abuse under the SSA. The further expansion of these contraventions, defences and offences under the FMA is also commendable and definitely assisted in achieving the object of enhancing confidence in the South African financial markets. It is however evident, and although the CLP was and is not flawless and faces various challenges in South Africa,[127] that an equivalent of the Corporate Leniency Policy (the "CLP") under the Competition Law regime of South Africa does not exist in the financial markets regime, despite the fact that the FSRA has now incorporated, what seems to be a

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[125] Luiz & Van der Linde 2013*SAMLJ* 458 474.

[126] Section 167 of the FSRA states that: - "Administrative penalties.—(1) The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator,….."

[127]It is beyond the scope of this dissertation to discuss the various challenges and constitutional issues the CLP faced and faces in South Africa, but for a comprehensive discussion of these challenges, see Van Heerden & Botha "Challenges to the South African Corporate Leniency Policy and Cartel Enforcement" 2015 *TSAR* 308 for a discussion of the most significant challenges the CLP faced, and still faces today in South Africa; also Kelly "The Introduction of a ''Cartel Offence'' into South African Law 2010 *Stellenbosch LR* 321, for a discussion on the constitutional issues the CLP faces in South Africa; and Kyriacou *Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM - Thesis,* UP, 2014) 40-53.

leniency provision/mechanism in the FSRA, no real provision is made for a proper leniency programme similar to what has been done in the competition sector.

The following chapters 2 and 3 will focus on the Competition Law of South Africa and discuss details with regard to the introduction of a CLP, its workings and also deal with some of the most significant work done by the Competition Commission through the enforcement of the CLP. Chapter 4 considers issues around the extension of leniency to individuals to be exempt from any criminal prosecution from cartels and in conclusion (chapter 5) the author states, why he is of the opinion that the introduction of the equivalent of the Competition Commission's CLP, or a similar leniency programme in the financial sector could possibly prove to be a valuable tool to deter insider trading.

2. CHAPTER 2: THE CLP AND REGULATION OF CARTELS UNDER THE COMPETITION ACT NO. 89 OF 1998

2.1 Introduction

The Competition Commission (the "Commission") was established in terms of the Competition Act No. 89 of 1998 (the "Competition Act"). The role of the Commission is to, *inter alia*, investigate, control and evaluate restrictive practices and abuse of dominance.[128] The overriding purpose of the Competition Act is to promote and maintain competition in the economy, and to prevent any form of anti-competitive behaviour and/or conduct by a firm or a group of firms arising from agreements.[129]

In its fight against market abuse, with specific focus on cartel conduct (as defined below), the Commission established a corporate leniency policy (the "CLP") in order to provide for and implement the facilitation of a process through which entities participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution.

The relevant section of the Competition Act for purposes of the CLP is section 4(1)(b), which regulates restrictive horizontal practices and reads as follows:

> *"4. 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-*
>
> *(b) it involves any of the following restrictive horizontal practices:*

[128] Section 4, 5, 8 and 9 of the Competition Act.
[129] Kyriacou L *Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission* (LLM thesis, University of Pretoria 2014) 2.

> *(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."*

The aforementioned Section 4 of the Competition Act is particularly aimed at eradicating and preventing cartel activity that is harmful to the economy at large, especially cartels. A cartel involves an agreement or concerted practice between two or more competitors to engage in fixing prices and/or trading conditions, dividing markets and/or collusive tendering. By artificially limiting competition that would normally prevail between them, firms avoid exactly the kind of pressures that lead them to innovate, both in terms of product development and production methods. This results ultimately in high prices and reduced consumer choice.

Cartel operations are often collusive, deceptive and secretive of nature, and is conducted through a conspiracy among a group of entities, in such a way that it is almost impossible to detect or prove such abusive conduct without the assistance of a member - an 'Insider' **(own emphasis is used to draw a comparison to the behaviour between a member of a cartel to that of an Insider under the FMA as discussed herein above in Chapter 2)** who is part of such a cartel.[130]

By implementing the afore said Section 4 of the Competition Act the Commission endeavours to detect, stop, and prevent cartel behaviour and developed the CLP to facilitate the process through which entities participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity

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[130] Kyriacou L *Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission* (LLM thesis, University of Pretoria 2014) 2.

from prosecution. The CLP sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for immunity, and this way the granting of immunity becomes a great incentive for an entity that is involved in a cartel to end its participation, inform the Commission in exchange for immunity.

A lawful defence for conduct under Section 4(1)(a) of the Competition Act is if the party can prove that some form of technological, pro-competitive or efficiency gain exists which outweighs the anticompetitive effect. This implies that a "rule of reason" test can be applied in the assessment of horizontal anticompetitive conduct under Section 4(1) of the Competition Act.[131] Contrary to Section 4(1) of the Competition Act, Section 4(1)(b) of the Competition Act specifically prohibits any agreement, concerted practice or decision that involves direct or indirect price fixing and/or fixing of any other trading condition, division of markets through the allocation of suppliers, territories, customers or specific types of goods or services, or collusive tendering.[132] Such restrictive horizontal practices are deemed 'per se' offences and will not be allowed to reply on the rule of reason analysis.[133] In terms of Section 59 of the Companies Act, any Party/Parties who contravene the provisions of Section 4(1)(b) could be found liable for an administrative penalty equal to 10% of the company's annual turnover generated in, into or from South Africa in its preceding financial year.[134]

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[131] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

[132] Ibid.

[133] Ibid.

[134] Cartel conduct is prohibited in terms of Section 4 of the Competition Act. While the Competition Act does not expressly refer to "cartels", Section 4 prohibits certain conduct by firms or associations of firms in a horizontal relationship. Section 4(1)(a) prohibits an agreement or concerted practice between, or a decision by an association of firms in a horizontal relationship which has the effect of substantially preventing or lessening competition unless any technological, pro-competitive or efficiency gains which outweigh the anticompetitive effect can be proven. As such, Section 4(1) allows for an application of a 'rule of reason' analysis in the assessment of horizontal anticompetitive conduct. Section 4(1)(b) prohibits any agreement, concerted practice or decision if it involves the following restrictive horizontal practices:

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

The Competition Act applies to any economic activity within, or having an effect within, the Republic.[135] In the context of section 4, the Competition Act also apply to agreements concluded outside South Africa, but which have an effect within South Africa. In the case of foreign firms that have no local office or physical presence in the Country, it may be difficult in practice for competition regulators to act against entities that are domiciled outside of South Africa and whose conduct has an effect in South Africa.[136]

As mentioned above, cartel operations are often collusive, deceptive and secretive, and is conducted through a conspiracy among only a group of firms and/or persons, and as such it becomes extremely difficult to detect and/or prove without the assistance of a member ('insider') who is part of the cartel. In its fight and endeavours to detect, stop, and prevent cartel behaviour, the Commission has, in line with other international jurisdictions, developed the CLP in order to facilitate immunity applications from Disclosers and the CLP sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for such immunity. The granting of immunity becomes an incentive for a firm that participates in a cartel activity to terminate its participation, and inform the Commission accordingly.[137]

2.2 Process

There is no standard or one uniform format for a leniency application prescribed by the Competition Act. The applicant may meet with the Commission to orally disclose orally the nature of the conduct and show the Commission the relevant documents (without giving the Commission copies). Where the Commission then

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These prohibited practices are deemed *per se* offences as conduct falling within the provisions of Section 4(1)(b) are not subject to a rule of reason analysis.

[135] Section 3 of the Competition Act.

[136] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

[137] The Corporate Leniency Policy (the "CLP") established in terms of the Competition Act No. 89 of 1998.

believes that there has been a contravention of section 4(1)(b) of the Competition Act that has not already been brought to its attention, it will call on the entity to schedule a formal oral submission (which is usually recorded by the Commission) in order to provide all known information about the conduct.

Once a claim for confidentiality has been lodged with the Commission, the Commission is obliged to treat such information as confidential until the Tribunal or Competition Appeal Court ("CAC") determines otherwise.[138] The information submitted to the Commission will remain confidential until such time as the Commission would prosecute its complaint against the remaining cartel members in the Tribunal as is provided for in terms of the CLP, read with sections 44 and 45 of the Competition Act. Tribunal hearings and records are transparent and usually accessible and open to the public.

There are however some limitations in respect of access to information that is classified as "restricted information" in terms of the Rules for the Conduct of Proceedings in the Commission,[139] and the strict rules of evidence applicable to proceedings in the civil courts[140] will also apply to damages claims made by private litigants. Evidence submitted by the Commission in the course of a Tribunal or CAC hearing become part of the public record and may be used by private litigants in civil actions.

2.3 Investigation powers of the Commission

Standard of proof:

The onus will lie with the Commission to prove, on a balance of probabilities, similar to the standard of proof in civil law matters that the conduct complained of has

[138] Sections 44 and 45 of the Competition Act.
[139] Published in terms of Section 27(2) of the Competition Act.
[140] Published in terms of the Civil Proceedings Evidence Act No. 25 of 1965.

indeed occurred, it will however not be necessary for the Commission to demonstrate that anticompetitive effects flow from the conduct.[141]

In terms of Chapter 5, Part B of the Competition Act, the Commission has the power to conduct unannounced visits and searches at the premises of entities who are alleged of cartel activity and such searches are known as "dawn raids". The Competition Act provides a further mechanism by which an investigator may enter and search premises with a warrant, or in limited circumstances without a warrant.[142] A judge or magistrate may issue a warrant to enter and search any premises if, from information on oath or affirmation, there are reasonable grounds to believe that a prohibited practice has taken place, is taking place or is likely to take place on or in those premises, or anything connected with an investigation in terms of the Competition Act is in the possession of a person who is on or in those premises, subject to the provisions of Sections 46 – 49 of the Competition Act.[143]

During the inspection officials of the Commission hold extensive powers under the Competition Act and are authorised to enter premises, examine and copy documents (both in hard and electronic format), seal business premises and interview staff in order to obtain information on suspected infringements. The Commission may attach and remove any documentation or article and may use or require the assistance of any person on the premises to use any computer system to search any data contained in or available to that computer system, reproduce any record from the data and/or seize any output from that computer for

[141] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).
[142] Ibid.
[143] Ibid.

examination and copying.[144] In most cases the Commission's investigators copied the hard drives of the computers of key personnel.[145]

The above listed powers of the Commission are however not unfettered and are subject to claims of privilege as is set out in Section 49 of the Competition Act.[146]

The Commission is entitled to interview company employees on site. The Commission will summons or invite individual employees to respond to questions from the Commission, who must answer fully and truthfully. The Commission may summons or invite any such person who is believed to be able to furnish information or to have possession or control of documents relevant to the investigation, to appear before the Commission where the Commission may interrogate the individual and/or request that relevant documents in such person's control be produced.[147]

The general rule is that self-incriminating questions need not be answered by any individual. The only criminal proceedings in which self-incriminating information may be used are those relating to perjury. Section 56 of the Competition Act

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[144] Section 48(1)(g) of the Competition Act.

[145] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

[146] In terms of Section 49(5) of the Competition Act a person may refuse, during a search, to permit the inspection or removal of an article or document on the ground that it contains privileged information. Privilege may be legal professional privilege or litigation privilege. If the person being subjected to the search and seizure claims privilege, the investigators conducting the search may, in terms of Section 49(6) of the Competition Act, request that the registrar or sheriff of the High Court having jurisdiction, attach and remove the article or document for safe custody, until the court determines whether or not such article or document is, in fact, privileged. It is furthermore a specific requirement of this Section 49 that the owner of the premises, or the person in control thereof, must be furnished with a receipt for such article or document removed and such article or document must be returned as soon as possible after achieving the purpose for which it was removed.

[147] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

however provides that the Tribunal may order a witness appearing before the Competition Tribunal (Tribunal) to answer any question or produce an article or document, even where such evidence is self-incriminating.[148]

In some of the most significant cases resolved by the Commission, the Commission has largely relied on information supplied by leniency applicants under the CLP framework. Information including documentary evidence and witness testimony obtained from leniency applicants has, to date, seem to have been the most effective source of information for the Commission in its prosecution of cartel conduct as will be seen from Chapter 3 herein below.[149]

Leniency:

Only a firm that is first to apply to the Commission may apply and qualify for leniency offered, the principle of "First-in-the-door", also known as the/a "Discloser".[150] The Discloser may apply for immunity by providing complete and truthful disclosure of all information available to it; offering full, expeditious and continued co-operation to the Commission (such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the CAC are completed); immediately ceasing the cartel activity or acting as directed by the Commission; not alerting former cartel members that it has applied for leniency; not acting to destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and not making a misrepresentation concerning the material facts of any cartel activity or act dishonestly.[151]

[148] Ibid.
[149] Ibid.
[150] Article 5.6. of the CLP.
[151] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

Leniency applications must contain sufficient information to allow the Commission to accurately and successfully identify the cartel conduct and participants. The CLP does not allow for blanket immunity and an applicant is required to specify the cartel conduct in respect of which it seeks leniency. The leniency applicant must submit to the Commission all relevant information, evidence (whether written or oral) and documents relating to the cartel activity.[152]

Firms who are not first to the door to apply for leniency are not eligible for immunity. Only when conditional immunity (referred to below) is granted to a firm who is the first to the door to apply for immunity and such conditional immunity is subsequently withdrawn, will the firm who is second or later to the door be able to qualify for immunity. There is however still a benefit to firms who come second or later in that they may still negotiate with the Commission in order to try and secure a reduction in the fines which would otherwise be levied, notwithstanding that there might already be a successful leniency applicant.[153] The Commission acknowledges the possibility that the later applicant/s may hold information and/or bring further unknown conduct to the attention of the Commission, which might have not previously been disclosed by the applicant first to the door. This would allow for leniency in respect of the new conduct now disclosed to be afforded to the later applicant.[154]

The CLP distinguishes between three types of immunity:[155]

> *“**Conditional immunity** – temporary immunity afforded to an applicant while the Commission is still in the process of conducting its investigation. This type of immunity precedes total immunity or no immunity;*

[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Article 9 of the CLP.

> ***Total immunity** – once a final decision (by the Tribunal or the CAC, as the case may be) has been reached in respect of the alleged cartel, total immunity may be granted to the first to the door applicant that has complied with all the requirements of the CLP; and*
>
> ***No immunity** – an applicant may not be granted immunity in circumstances where it fails to meet the requirements of the CLP. The CLP does not provide for an immunity plus regime."*[156]

Marker Procedure:

Transgressors of a cartel who are seeking to blow the whistle on a cartel in an attempt to apply for leniency, do not necessarily have all the information and/or documentary proof at its disposal and therefore would still like to retain its spot in the queue for leniency. The amendments to the CLP introduced what is referred to as a "*marker*" and incorporated a marker procedure.[157] This new marker procedure now enables an applicant to reserve its place in the queue of applications whilst the applicant conducts its further internal investigation into the cartel in order to collect the necessary information to be able to blow the whistle on the cartel and for immunity with the Commission.[158] The marker procedure is relatively common in also other jurisdictions.[159]

The marker application must to be made in writing to the Commission and the Commission has discretion whether or not to grant such a marker As part of the requirements for the written application, the marker applicant must identify its

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[156] Wood, Labuschagne, Verster and Lötter "Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter" (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

[157] Article 12 of CLP.

[158] Lavoie C "South Africa's Corporate Leniency Policy: A Five-Year Review" (2010) 33 World Competition 141.

[159] For example, in the European Commission leniency programme a marker system was introduced in 2006 for the current notice on immunity from fines and reduction of fines in cartel cases (the "2006 Leniency Notice"). Prior to 2006 no marker option was available under the European Commission leniency programme.

name and address, the alleged cartel conduct, the participants involved and the applicant should further provide justifiable grounds for the need for a marker. This information is necessary in order for the Commission to be able to determine any potential overlap with other CLP (or marker) applications and, if there is any such overlap, to determine the precedence and order of priority as between applications.[160]

The marker procedure seeks to encourage early detection and disclosure of cartel conduct and now provides a potential applicant with the means and confidence to approach the Commission as soon as it suspects that it may be involved in cartel conduct as the applicant is not expected at the time o fthe application to be in a position to admit that its conduct contravenes the Act.[161]

Settlements:

Cartel participants may approach the Commission with a view to negotiating a settlement agreement. The Commission may conclude a settlement agreement which must be considered and approved by the Tribunal. While there have been a few exceptions, the Commission has required that all settlement agreements contain an admission of guilt.[162]

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[160] Lavoie C “South Africa's Corporate Leniency Policy: A Five-Year Review” (2010) 33 World Competition 141.

[161] Ibid.

[162] Wood, Labuschagne, Verster and Lötter “Chambers Legal Practice Guides – Cartels 2015 South Africa Chapter” (https://www.bowmans.com/insights/competition/2015-chambers-legal-practice-guides-cartel-enforcement-south-africa/).

Sanctions:

The Tribunal must decide whether the conduct of an entity amounts to an infringement of the Competition Act and if so, the appropriate sanction to be applied when a complaint is referred to it by the Commission.[163]

A complaint is either lodged with the Commission, or the Commission initiates a complaint of its own accord. The Commission is to investigate the alleged cartel conduct and has a year in which to complete its investigation and assessment. Once the Commission has finalised its investigation and believes that it has gathered sufficient information, it refers the compliant for adjudication by the Tribunal.[164]

In the case of an infringement of the general prohibition in terms of section 4(1)(a) of the Competition Act, the Tribunal may impose administrative penalties for cartel conduct, only if the conduct is substantially a repeat infringement of the same conduct by the same firm previously found to be a prohibited practice. In the case of specific prohibitions in terms of section 4(1)(b) of the Competition Act such as price fixing, market sharing or collusive tendering, the Tribunal may impose a fine for a first time offense.[165]

A fine imposed may not exceed 10% of the firm's annual turnover generated in, into or from South Africa in the firm's preceding financial year.[166] The Tribunal however also has the authority and discretion to order the divestiture, or order the firms involved to supply a third party on terms reasonably required to bring to an

[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.

end the prohibited practice or it may even declare an agreement or part thereof to be null and void.[167]

2.4 Conclusion

In developing the CLP, the Commission has done a review and comparison of leniency policies adopted by other competition authorities, including in the European Union (EU), Canada, Australia, United Kingdom (UK) and United States of America (USA). The Commission indicated that after having reviewed and compared these policies and how they have been implemented, it appears that leniency policies in almost all jurisdictions concerned have proved to be one of the most effective tools to deal with cartels, and the South African CLP has been customised to be in line with and suitable for the legal and regulatory framework that exists in South Africa.[168]

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[167] Ibid.
[168] Article 16 of the CLP.

3. CHAPTER 3: THE IMPACT OF THE CORPORATE LENIENCY PROGRAMME ON CARTEL FORMATION, A SOUTH AFRICAN PERSPECTIVE

3.1 Introduction

Better educated and alerted authorities, more specialised methods of detection and cooperation by transgressors lead to greater detection and prevention of cartels over the past 10 years, not only in South Africa, but from a global perspective too.[169]. To mention only a few statistics, during the period of April 2007 to March 2012 there were over 350 applications under the Commission's Corporate Leniency Policy (CLP).[170] A significant number of these applications were related to the construction industry and largely involved bid rigging and allocation of specific contracts. A lessor substantial number of these applications related to price fixing and market division in other sectors of the economy.[171] In the most recent annual report issued by the Commission,[172] for the financial year ending 2018, the Commission handled almost double the number of cases (146 cartel cases) in comparison to only 86 during the previous financial year.[173] Today hundreds of applications have been properly adjudicated and/or settled with the Commission.[174]

The effectiveness of a leniency policy relies largely on the existence of a credible and/or continuous threat that a cartel might be uncovered.[175] To ensure such a

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169 Roberts "Screening for cartels – insight from the South African experience" (https://www.competition policyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf).

170 "15 Years of Competition Enforcement – A People's Account" http://www.compcom.co.za/the-15-year-review/ (accessed 10-06-2018) *Competition Commission South Africa*.

171 Roberts "Screening for cartels – insight from the South African experience" (https://www.competition policyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf).

172 "Competition Commission Annual Report 2017/2018" <http://www.compcom.co.za/wp-content/uploads/2014/09/CCSA_AR2017_18e.pdf> (accessed 06-10-2018) *Competition Commission South Africa*.

173 *Ibid*.

174 Roberts "Screening for cartels – insight from the South African experience" (https://www.competition policyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf).

175 Ibid.

credible threat the Commission has decided to target industries and markets where significant anticompetitive behaviour is detected and decided to initiate investigations in these sectors in order to try and become much more proactive rather than reactive in its approach to cartel detection.[176]

Food and agro-processing, construction and infrastructure products, intermediate industrial products and banking were the four priority sectors which were earmarked by the Commission and in terms whereof the focus of the Commission largely resorted to cartel detection in these sectors.[177] The author will deal with some of the most important/influential cases in these sectors which the Commission managed to successfully disband and also refer to the economic benefits gained from such successful termination of these cartels.[178]

The Corporate Leniency Policy (the "CLP") was introduced by the Competition Commission (the "Commission") during the year of 2004, however, according to Roberts[179] there were very few applications until 2007. Roberts[180] ascribes the reason therefore to the fact that firstly, leniency was not automatic. The decision whether or not to grant leniency to an instigator of a cartel was entirely in the discretion of the Commission.[181] It was only during 2008 with the amendment of the CLP[182] that this discretion of the Commission was removed and under the amended CLP, applicants were allowed to first apply for a marker (refer to Chapter 2), and thereafter apply for conditional leniency.[183]

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[176] Ibid.
[177] Ibid.
[178] "15 Years of Competition Enforcement – A People's Account" <http://www.compcom.co.za/the-15-year-review/> (accessed 10-6-2018) *Competition Commission South Africa*.
[179] Roberts "Screening for cartels – insight from the South African experience" (https://www.competitionpolicyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf).
[180] Ibid.
[181] Ibid.
[182] Notice 628 of 2008, Government Gazette No. 31064 of 23 May 2008.
[183] Roberts "Screening for cartels – insight from the South African experience" (https://www.competitionpolicyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf).

Secondly, it was only during 2007 that the Commission decided to adopt a much more proactive approach towards cartel enforcement through the implementation of basic screening techniques together with the incorporation of a settlement system which incentivised transgressors to disclose cartel conduct in other sectors as part of the settlement arrangement with the Commission in its application for leniency.[184]

3.2 Focus on some of the priority sectors in which commission gained most success in terminating cartels via the implementation and enforcement of the CLP and the economic benefits gained therefrom:

As mentioned above, in line with the prioritisation framework adopted in 2007 as part of taking a more proactive approach to enforcement, the Commission identified sectors and cases based on the broad criteria of: impact on low-income consumers; likelihood of anti-competitive conduct; and government's economic development priorities, and on this basis the four priority sectors which were identified by the Commission were: - food and agro-processing; construction and infrastructure products; intermediate industrial products; and banking.

In the discussion to follow, the author will focus on the food and agro-processing with specific focus on the bread cartel (the "Bread Cartel"), the construction and infrastructure products sector with specific focus on the Cement industry (the "Cement Cartel") and the FIFA World Cup Soccer 2010 construction cartel (the "Construction Cartel") and lastly the foreign exchange / banking sector cartel (the "Bank / Foreign Exchange Enquiry").

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[184] Ibid.

The Bread Cartel:[185]

Up and until the 1990's, the bread industry was strictly regulated in South Africa. Some of these strict regulations included the establishment of a quota system, determining of product specifications such as weight, height and width per loaf, setting of prices and volumes and the allocation of markets for distribution. Bread producers established an association for the bread industry which was known as the Chamber of Baking ("the Chamber") whereby regular meetings took place amongst the bread producers.[186]

Despite the fact that the statutory restriction on competition in the bread industry was done away with by the deregulation of this industry, bread producers continued to utilise the Chamber as a forum for considering all the various issues which the producers use to do under the previous regime.[187]

Although deregulation made way for small independent bakeries to provide for at least 40% of the domestic market, major role players such as the likes of Blue Ribbon Bakeries, Albany Bakeries and Sunbake Bakeries continued to dominate the domestic market.[188]

Premier Foods, under the Blue Ribbon brand, Tiger Brands, under the Albany brand and Pioneer Foods under the Sasko and Duens brands, were all involved in a cartel investigation by the Commission which took place during December 2006 in the Western Cape.[189] Premier Foods applied for leniency with the

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[185] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9. (Case Summary).
[186] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9. (Case Summary).
[187] *OECD Report "Serial offenders – why some industries seem prone to endemic collusion"* <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)23&docLanguage=En> (22-09-2018).
[188] *Ibid.*
[189] Keleme *Cartel Detection in South African Bread Market: A Review of the Studies by the Competition Commission and National Agricultural Marketing Council* (LLM - Thesis, UP, 2014) 27.

Commission during the investigation and fully co-operated with the Commission in its role in the bread cartel.

Premier Foods disclosed the details of all the other bread producers who formed part of the cartel, shared sensitive information with the Commission on how these cartelist worked together in fixing prices, dividing markets, allocating tenders and regulated certain trading conditions, not only locally but in various parts of the Country.[190]

Premier Foods explained that cartel agreements were entered into to ensure proper co-ordination at both national and regional levels and which contained reciprocal reinforcing conditions.[191] This information lead the Commission to initiate a second investigation into the alleged bread cartel in all other parts of the Country where the cartel operated. Shortly after having instituted the second investigation, Tiger Brands voluntary reported to the Commission and re-affirmed all of the information and details which Premier Foods provided to the Commission.[192]

In addition to the information what Premier Foods had already disclosed to the Commission, Tiger Brands provided additional evidence which even further implicated the bread cartel in allegations of price fixing of flour and maize meal. Tiger Brands was imposed a fine of R98 million for its role in the bread cartel which represented about 5.7% of its turnover from baking for the financial year 2006.[193]

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[190] Ibid.
[191] *OECD Report "Serial offenders – why some industries seem prone to endemic collusion"* <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)23&docLanguage=En> (22-09-2018).
[192] Ibid.
[193] *Ibid.*

Foodcorp subsequently also entered into a settlement agreement with the Commission and was imposed a fine of R45 million which represented roughly 6.7% of its turnover for baking operations for the financial year 2006.[194]

Initially Pioneer Foods denied that it was at all involved in a bread cartel and opposed the actions of the Commission. The Tribunal had however found and ruled that Pioneer Foods had indeed engaged in price fixing of bread products, both in the Western Cape province as well as in the other parts of the Country where the cartel was operating and was imposed a fine of R196 million when Pioneer Foods finally conceded that it had indeed acted in collusive conduct which is in contravention of section 4(1) (b) of the Competition Act, that it cooperated with its competitors in fixing the price of standard bread, offered discounts to agents or resellers, fixing the price of toaster bread and lastly also admitted having participated in market sharing arrangements.[195]

Impacts of disbanding the bread cartel:[196]

In addition to the hundreds of millions of rand in fines paid by the firms involved in the bread cartel as mentioned herein above, the disbandment also lead to the establishment by the National Treasury, of a fund with the fines, which is managed by Industrial Development Corporation.[197] The purpose of the fund is to finance entrants and smaller firms in the sector affected by exclusionary conduct of cartels and attempt to lowering the barriers of entry caused by the cartel members in an attempt to try and protect their position.[198]

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194 *Ibid.*
195 *Ibid.*
196 "15 Years of Competition Enforcement – A People's Account" <http://www.compcom.co.za/the-15-year-review/> (accessed 10-6-2018) *Competition Commission South Africa*.
197 Ibid.
198 Ibid.

Pioneer entered into a pricing commitment with the Commission which resulted in the reduction of roughly R160 million in Pioneer's gross profit in comparison to the previous financial year, which on its turn lowered the price of standard white and brown loaves of bread for retailers by an average of 30 (thirty) cents, over and above any other promotional discount which Pioneer already offered to retailers. This discount amounted to an average reduction in the price of flour of R350 per ton.[199]

The Commission sets out to, amongst other things, provide consumers with competitive prices and product choices and ensure access to the market for small and medium-sized enterprises to enable them to have an equal opportunity to participate in the economy.[200] Bread being an essential product for millions of people in South Africa caused this matter to attract wide media attention and which also served to make consumers more aware of the Commission and how the proper implementation and enforcement of the Competition Act can protect and benefit them as consumers and is the public now starting to see that they can complain to the Commission and their voices will be heard.[201]

The Cement Cartel:

Since the 1940's up until the 1950's, round about 1955 exactly, cement producers in South Africa were allowed to conduct the manufacture and distribution of cement under the auspices of a "lawful cartel". These so called "lawful cartels" were regulated through a set of institutional arrangements[202] designed to operate these

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[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] These institutional arrangements included the Cement Distributors (South Africa) (Pty) Ltd ("CDSA"), Cape Sales (Pty) Ltd ("Cape Sales") and the South African Cement Producers Association ("SACPA"). As part of these institutional arrangements, NPC, Slagment and Ash Resources (Pty) Ltd were jointly owned by PPC, AfriSam and Lafarge.

cartels. It was in 1955 however that this exemption was withdrawn by the Competition Board, the predecessor to the Commission.[203]

Due to the fact that this was the manner in which these cartels operated for so many years in the cement industry, cement producers were afforded a grace period until the end of September 1996 to terminate these so called lawful cartel arrangements.[204] During May 1995, cement producers, in anticipation of this termination, set various agreements and arrangements in place in terms whereof they allocated market shares in the cement industry.[205] The essential terms of these arrangement resulted in only the largest role player to receive the greatest part of the market share, effectively resulting in PPC being allocated a market share of roughly 42 – 43%, Afrisam with a market share of roughly 35 – 36%, and Lafarge 22 – 23%.[206]

Since 1995 the Commission continuously investigated the cement cartels, instituted various investigations into these cement cartels, dawn raided the premises of the various cement producers, which in turn lead to certain settlement agreements with some of the biggest role players in the cement industry such as, Afrisam and Lafarge, who admitted having entered into unlawful price fixing, indirect price fixing, division and allocation of market shares with PCC, however PCC managed to successfully defend these claims on legal grounds.[207] It was only in June 2008 when the Commission initiated further investigation into cement producers alleging that various cement producers, including PPC, had entered into restrictive horizontal agreements, and the Commission by raiding the premises of

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[203] *OECD Report "Serial offenders – why some industries seem prone to endemic collusion"* <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)23&docLanguage=En> *8* (accessed 22-09-2018).
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Ibid 9.

these cement producers that PPC, during 2009, applied for leniency and admitted to the existence of a cartel amongst PCC, Afrisam, Lafarge and NPC.[208]

An application for leniency under the CLP by a company with the name of Rocla (who is a subsidiary of Murray and Roberts) during 2007, for the first time alerted the Commission of cartel conduct in the cement industry specifically relating to precast concrete pipes, culverts and manhole cartels.[209] Rocla provided comprehensive details to the Commission in how it had engaged in anti-competitive conduct in the form of price fixing, market allocation and collusive tendering which lead to the Commission subsequently initiating an investigation into these markets during March 2008 where the Commission found that this cartel had been in operation since 1937, largely in and around Gauteng, Kwazulu- Natal and the Western Cape.[210]

The aforesaid investigation by the Commission revealed invaluable information and detail on how exactly this cartel functioned and operated, how exactly members of the cartel went about fixing prices and discount offerings, rigged bids, allocated markets and tenders which eventually lead to all the firms involved in this cartel, except for one, to admit their involvement in the cartel and in terms whereof various fines were imposed on them by the Commission.[211]

The Construction Cartel:

Probably one of the most significant cases where the Commission applied the CLP and achieved great success by having entered various settlement agreements with

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[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid. Details of these fines can be seen from the annual report of the Commission for the year ending 2011/2012 at: The Commission's 2011/2012 Annual report page 10 available at: http://www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-AR11-12-LOW-RESWITH-HYPERLINKS.pdf>.

transgressors of cartel conduct in the construction and engineering industry, was during the FIFA World Cup Soccer 2010 hosted in South Africa.[212]

> *"In preparation for the millions of people looking to attend the world cup soccer, South Africa had to, among other things, expedite its infrastructure rollout programme which involved, inter alia, mega construction projects simultaneously taking place in the country at least six years prior to the commencement of the world cup. New stadia, road networks, and railway lines were being constructed, and refurbishment of old buildings and roads were undertaken on a mammoth scale as there was hope that such a great demand for resources and manpower would alleviate South Africa's high unemployment rate, even if only for a brief moment.*"[213]

Roughly six months after the 2010 World Cup ended, the Commission launched a Construction Fast- Track Settlement Project (CSP), inviting firms in the construction sector to settle collusive practices in bidding for projects in the public and private sectors. This CSP followed after the Commission's investigation which was initiated in 2009, which uncovered widespread anticompetitive conduct through various collusive arrangements involving at least 300 different projects and tenders that were subject to bid rigging.[214]

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[212] "15 Years of Competition Enforcement – A People's Account" <http://www.compcom.co.za/the-15-year-review/> (accessed 10-6-2018) *Competition Commission South Africa* 18.
[213] Ibid.
[214] Ibid.

According to a media release published by the Commission during February 2011, the Commission investigated 65 bid rigging cases in the construction sector implicating over 70 projects with an estimated value of R29 billion[215].

The afore said figures grew as the investigation continued and according to an article published in Creamers Media Engineering News dated the 14th June 2013,[216] the Commission fined 15 major construction firms a collective R1.46-billion for rampant collusive tendering related to projects concluded between 2006 and 2011. According to this article, the companies that incurred the largest penalties for collusive practices were: Wilson Bayley Holmes Ovcon (WBHO), which was fined R311.29-million for 11 projects, Murray & Roberts, which was fined R309.05-million for 17 projects, Stefanutti Stocks, which was fined R306.89-million for 21 projects, and Aveng, which was fined R306.57-million for 17 projects.[217]

These penalties were the result of the Construction Fast-Track Settlement Process, initiated by the Commission in February 2011[218], in which firms were incentivised to make a full and truthful disclosure of bid-rigging in return for penalties lower than what would be sought by the Commission should it pursue legal action. Rather than facing protracted legal action, which would result in substantial legal ramifications and heftier penalties, firms that participated in the process were only held liable for penalties that constituted a percentage of yearly turnover for the 2010 financial year. The Commission received applications from

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215 "Competition Commission Invites Construction Firms to Settle" <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed 15-09-2018) *Competition Commission South Africa.*

216 "Construction Majors Fined R146bn for Collusion" <http://www.engineeringnews.co.za/article/construction-majors-fined-r146bn-for-collusion-2013-06-24> (accessed 15-09-2018) Creamer Media's Engineering News.

217 Ibid.

218 The details of this Fast –Track Settlement Process were set out in, "Competition Commission Invites Construction Firms to Settle" <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed 15-09-2018) *Competition Commission South Africa*.

21 firms in the construction industry, including the country’s top six construction firms, which covered instances of collusion or anticompetitive behaviour in over 300 public- and private-sector projects worth an estimated R47-billion.[219]

Of the 21 firms that applied for settlement, 18 firms were found liable to settle, while three firms were found exempt from settlement as they were the first to apply and thus qualified for conditional immunity. Of the 18 firms found liable, the commission reached settlement with 15, while an agreed penalty had yet to be finalised with Group Five, Construction ID and Power Construction at the time this article was published by Creamers Media Engineering News.[220]

According to the afore said article,[221] other companies to have reached a settlement for collusive tendering were Basil Read (R94.94-million), Esorfranki (R155 850), G Liviero (R2.01-million), Giuricich (R3.55-million), Haw & Inglis (R45.31-million), Hochtief (R1.32-million), Norvo (R714 897), Raubex (R58.83-million), Rumdel (R17.13-million), Tubular Technical Construction (R2.63-million) and Vlaming (R3.42-million).[222]

Bank / Foreign Exchange Enquiry:

In May 2015, the Competition Commission of South Africa (the “CCSA”) lodged an investigation into cartel conduct by major banks in the foreign currency exchange market affecting the South African Rand. The CCSA alleges that certain banks have colluded to fix prices in currency pairs involving the Rand. The banks alleged

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[219] Ibid.
[220] *Ibid.*
[221] Ibid.
[222] “Construction Majors Fined R146bn for Collusion” <http://www.engineeringnews.co.za/article/construction-majors-fined-r146bn-for-collusion-2013-06-24> (accessed 15-09-2018) *Creamer Media’s Engineering News*.

to be involved in the collusive arrangement, called the “ZAR domination” include BNP Paribus, BNP Paribus South Africa, CitiGroup Inc., Citigroup Global Markets (Pty) Ltd, Barclays Bank Plc, Barclays Africa Group Ltd, JP Morgan Chase & Co, JP Morgan South Africa, Investec Ltd, Standard New York Securities Inc. and Standard Chartered Bank. The above traders in foreign currencies were under investigation for directly or indirectly fixing prices on bids, offers and bid-offer spreads with regard to spot, futures and forwards currency trades.[223]

The CCSA alleges that this conduct is in breach of section 4(1)(b)(i) of the Competition Act and is anti-competitive in nature. The conduct which is the subject of the investigation was allegedly carried out through exchange of competitively sensitive information on the electronic messaging platforms used for currency trading, which enabled the Banks to coordinate their trading activities when quoting customers who buy or sell currencies. This coordination has the effect of eliminating competition among the Banks, as it enabled them to charge an agreed price for a specific amount of currency. The conduct under investigation has the effect of distorting foreign exchange prices and artificially inflating the cost of trading in foreign currency, in relation to the Rand.[224]

Several investigations have taken place on a global scale by various competition authorities into cartel conduct in foreign exchange markets. Barclays, JP Morgan, Citigroup, Royal Bank of Scotland and UBS were issued serious penalties amounting to $5.7 billion in the United States and United Kingdom, following their involvement in the manipulation of the foreign exchange markets.[225]

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[223] "Competition Commission probes 11 Traders of Foreign Currencies for Price Fixing" <http://www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-probes-11-traders-of-foreign-currencies-for-price-fixing.pdf> *Competition Commission South Africa* 27.
[224] Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).
[225] "Five banks fined over foreign exchange scandal" https://www.theguardian.com/business/live/2015/may/20/greece-june-repayment-ecb-support-live-updates#block-555c93b0e4b0920abfc30edb (accessed 06-10-2018) *The Guardian*.

According to this (Dube, 2015) report by the Centre for Competition Regulation and Economic Development ("CCRED"), there are various difficulties in detecting these practices in forex markets. As part of ensuring efficient and transparent markets, an important aspect of financial markets is the ability to collect and publicise information. However, this sharing of information can result in arrangements which closely mirror anticompetitive information sharing and price fixing, especially in cases where one bank uses this information to determine the strategy of the other bank. Therefore, in the forex space, there is a very fine line between bank collusion and market research, which raises the question of how banks do market research or intelligence research without colluding?[226]

The aforesaid question therefore implies a role for financial regulators in regulating the exchange of competitively sensitive commercial information. This follows the concern that the disclosure and receipt of non-public pricing information by competitors is likely to contravene competition law especially in instances where competitors are caused to change the way they conduct business in future based on the information received,[227] especially given the advancements in technology which enhances the possibility and ease of information sharing as in the case of electronic messaging platforms.

In the UK the Financial Conduct Authority (the "FCA") issued their largest financial penalty in history to Barclays Bank for manipulating the foreign exchange rate which amounted to roughly just more than 280 million pounds. Barclays was found to have been involved in inappropriate sharing of information and manipulation of

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[226] Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

[227] McGrath, B., Reddy, T., and Proctor, C. "Too much information! Recent competition law cases in the banking sector." 2014 *JIBFL*.

the spot foreign currency exchange rate.[228] Barclays was found guilty of sharing information with other banks using electronic messaging systems, facilitating price fixing through helping traders to determine each other's trading strategies. Barclays made massive unlawful profits by manipulating the price of currency rates in the market, through ensuring that the price at which the bank agreed to sell a particular currency to the market, exceeded the average rate at which the bank had bought the same currency in the market,[229] and subsequently the FCA found Barclays guilty of inappropriate sharing of confidential information in the spot foreign currency exchange market, as the disclosure of such information gave other market participants additional information with regard to Barclays' trading activities, which altered their behaviour.

In June 2015, the UK financial regulators and the Fair and Effective Markets Review (the "FEMR"), introduced legislative change in response to the above challenges and legislative changes meant to prohibit the manipulation of foreign exchange markets. In addition they also set up a market standards body whose task it was to oversee the banks' operations. The afore said additional laws were meant to tighten existing loopholes and regulatory gaps which previously made it possible for the banks to manipulate the foreign exchange market.[230]

Another country who also carried out several investigations into collusion affecting foreign exchange markets with a particular emphasis on the spot market for trading U.S. dollars and Euros during 2015 was the United States Department of Justice (the "USDOJ"). These investigations lead to the prosecution of five major banks being: - Citicorp; JPMorgan Chase & Co.; The Royal Bank of Scotland; UBS AG

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[228] "FCA fines Barclays £284,432,000 for forex failings" <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings> (accessed 10-06-2018) *Financial Conduct Authority*.

[229] Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

[230] Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

and Barclays PLC, by the U.S. Criminal and Antitrust division.[231] The afore listed banks all together account for 25% of annual dollar-euro exchange rate transactions in the US.[232] The banks admitted to parent-level guilty pleas, and were issued unprecedented criminal penalties of more than $2.5 billion and three years' probation by the USDOJ, during which time the authorities were to monitor the banks' efforts to effectively implement compliance programmes.[233]

At the time of publication of the (Dube, 2015) report by the CCRED, the Competition Commission of South Korea was undertaking investigations into price fixing of foreign exchange rates by global banks involving Bank of America, Citigroup, JP Morgan Chase, Royal Bank of Scotland and UBS.[234] The afore said investigation was instigated due to the commission's allegations that foreign currency price fixing by global banks negatively affected South Korean firms.[235] The central focus of the investigation was on determining whether the manipulation of the price of US dollars and Euros, including in derivative markets, negatively affected South Korean financial institutions and firms.

The price of foreign currencies plays a significant role in all sectors of the economy and significantly affects all consumer groups and producers. Price fixing cartels have the effect of eliminating smaller players in the market and heightening barriers to entry due to the fact that such cartels facilitate the creation of market

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231 "Five Major Banks Agree to Parent-Level Guilty Plea" <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> (accessed 10-10-2018.) *The United States Department of Justice*.

232 Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

233 Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018.

234 Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

235 Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

power for players in the financial market and the maintenance of such positions for long periods of time. More so, the manipulation of exchange rates artificially inflates prices for local firms and manufacturers who source their key industrial inputs from international markets, which on its turn has the effect of raising costs of production or could even lead to rationing the amount of output produced. These practices in financial markets have the effect of increasing price of products and services, including various financial products and services, and which is to the detriment of consumers[236].

3.3 Brief summary of some of the most recent cartels which the commissions successfully disbanded in sectors other than those discussed herein above[237]

133 cartel investigations were initiated by the Commission during the 2015/16 financial year of which the majority of these investigations involved the automotive components sector.[238] 22 out of a total of 38 cartel investigations that were completed, were referred to the Tribunal for prosecution, and the remaining 16 were not prosecuted.[239] Ten of the prosecutions resulted in the Commission receiving ten CLP applications out of which the Commission granted four of them leniency. The remaining six were still under assessment as at year end.[240] Amongst the aforesaid 133 cartels investigated, some of the most significant cases were:-[241]

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[236] Dube "A quarterly Review by the Centre for Competition Regulation and Economic Development. Global Foreign Exchange Price Fixing" <https://www.competition.org.za/review/2015/8/5/global-foreign-exchange-price-fixing> (accessed 10-6-2018).

[237] Due to the significant number of cartel cases investigated by the Commission, the author only focused on some of the major cartel cases investigated by the Commission during the financial year ending 2016 for purposes of this clause 3.3.

[238] "Competition Commission Annual Report 2015/2016" <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf> > (accessed 09-22-2018) *Competition Commission South Africa* 34.

[239] Ibid.

[240] Ibid.

[241] "Competition Commission Annual Report 2015/2016" <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf> (accessed 09-22-2018) *Competition Commission South Africa* 34 - 35–.

Automotive components cartel:[242]

The investigations into the automotive components cartel focused specifically on the manufacturers of automotive components and included 119 investigations into the automotive components sector.[243] The Commission found these companies guilty of collusion when bidding for tenders to supply car parts such as car safety-system products, airbags, seat belts and steering wheels to original equipment manufacturers, such as BMW, Mercedes Benz, Toyota, Ford and Nissan. By the end of 2015/2016 financial year end, the Commission had initiated 237 cartel investigations across 92 automotive components.[244]

The automotive industry is continuously under investigation. Some of the firms involved entered into settlement agreements with the commission such as, Toyoda Gosei, the Japanese manufacturer and supplier of car safety-system products, including airbags, who have signed a settlement agreement with the Competition Commission and agreed to pay a penalty totalling R6.16million for price fixing, dividing markets and collusive tendering.[245] In 2017, Autoliv admitted being involved in at least 15 instances of prohibited practices, including price fixing, market division, collusive tendering and the exchange of commercially sensitive information with its competitors and subsequently entered into a settlement agreement with the Commission in terms whereof Autoliv agreed to pay a fine of R149.96m for engaging in such prohibited anti-competitive practices.[246]

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[242] "Competition Commission Annual Report 2015/2016" http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf> (accessed 09-22-2018) *Competition Commission South Africa* 36.
[243] *Ibid.*
[244] Ibid.
[245] "Auto component firm agrees to pay R6.16m penalty for price fixes" <https://www.iol.co.za/business-report/companies/auto-component-firm-agrees-to-pay-r616m-penalty-for-price-fixes-15843966> Business Report (accessed 02-02-2019).
[246] Ibid.

Liquefied petroleum gas cartel:[247]

A number of LPG companies entered into an agreement and/or engaged in a concerted practice to fix the price paid as a deposit fee, and have simultaneously increased such fee for LPG cylinders by first-time buyers of LPG. This arrangement is in contravention of the Competition Act and the Commission initiated a cartel investigation into these LPC companies.[248] According to a media release statement by the Competition Commission,[249] the Commission referred this matter to the Competition Tribunal for prosecution of five LPG companies for cartel conduct and the Commission sought the Tribunal to impose an administrative penalty of 10% of the annual turnover of each of these LPG companies.[250]

Media Cartel:[251]

The media industry is yet another remarkable industry in which the Commission had managed to successfully enter various settlement agreements with, with some of the most significant role players, such as the likes of SABC, the parent companies of the Sunday Times, Media24, the local parent company of Business Insider South Africa, and 26 other media companies, who was referred for prosecution on price fixing.[252] The Competition Commission started investigating the media sector in 2011 and found that media companies had used the non-profit company Media Credit Coordinators ("MCC") to offer similar discounts and

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[247] "Competition Commission Annual Report 2015/2016" <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf>(accessed 09-22-2018) *Competition Commission South Africa* 38.

[248] Ibid.

[249] "Liquefied petroleum gas companies to be prosecuted for price fixing" < http://www.compcom.co.za/wp-content/uploads/2018/01/LPG-Cylinder-Press-Release.pdf> Competition Commission Media Statement 18-10-2018 (accessed 02-02-2019).

[250] Ibid.

[251] "Competition Commission Annual Report 2015/2016" http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AR2015-16-text.pdf (accessed 09-22-2018) Competition Commission South Africa 60.

[252] De Wet "Three media companies have agreed to pay R41 million to settle anti-competition charges – and now the Competition Commission is coming for everyone else" <https://www.businessinsider.co.za/competition-commission-comes-for-media-companies-2018-2> (accessed 16-09-2018).

payment terms to advertising agencies that place advertisements with MCC members. MCC accredited agencies were offered a greater than non-members. In 2016 the Commission offered media companies a choice to settle or face prosecution by the Competition Tribunal who can levy fines of up to 10% of annual turnover.[253]

Three other companies, Caxton, The Star and DSTV Media have also agreed to settle with the Commission and paid a total of R41 million in penalties and contributions to a development fund.[254]

3.4 Conclusion

The number and extent of cartel conduct uncovered in South Africa in the past 10 – 15 years has definitely been far greater and had much far reaching effect than anyone could ever have imagined.[255]

It is however commended that the Commission has achieved great success with, not only the incorporation, but the proper enforcement and implementation of the CLP. In most of the cases, once the firms became aware of the fact that the Commission is launching an investigation into the practices of the firms in a specific industry, some of the firms became concerned, or even scared if you wish, and decided to self - report of their cartel conduct to the Commission in an attempt to obtain full leniency. The Commission with the power at hand, requires such applicant to provide full co-operation as part of the terms of the settlement agreement, which relieves a significant amount of pressure from the Commission, saves a tremendous amount of time and money it would have cost the Commission

[253] Ibid.
[254] Ibid.
[255] Roberts "Screening for cartels – insight from the South African experience" (https://www.competitionpolicyinternational.com/assets/Columns/CartelColumnSRScreeningSept2012.pdf) 6.

to conduct a full investigation, probe and subsequently litigate in order to bring these cartel members to justice, seeing that the Commission now has the informant who is willing to blow the whistle on all the other cartelists. Such information seems to have had a knock-on effect, especially in the sectors discussed herein above, where following such an applicant to self-report, once the transgressor/s is/are identified by a leniency applicant, the firm identified of such conduct then also elected to identify other subsidiaries of that firm who is, or might be, involved in prohibited conduct and also applied for leniency for that firm or the entire group.

Self - reporting by applicants however poses certain constitutional issues and is not as straight forward as it might seem. In Chapter 4 to follow, the author looks at certain constitutional issues which came about with the introduction of criminal liability of individuals who self-reported to the Commission and the importance of the implementation and proper enforcement of a dual system between the Commission and the National Prosecuting Authority in order to ensure the integrity and future sustainability of the leniency programme.

4. CHAPTER 4: INDEMNITY TO INDIVIDUALS FROM CRIMINAL PROSECUTION UNDER THE CLP AND ITS APPLICATION TO INSIDER TRADING

4.1 Introduction

Various critics[256] are favour the view that the criminal sanctioning of individuals enhances the deterrence of cartels. They argue that criminal sanction such as imprisonment provides individuals involved in a cartel with great incentive to self-report through a leniency application in order to escape criminal sanction. They furthermore hold the view that even when full immunity is no longer available to such a transgressor, the fear of such an individual of being imprisoned is enough incentive for the individual to fully cooperate with the authorities in the hope of not being imprisoned or at least obtain a reduced sentence.[257]

Some critics[258] are even of the opinion that the elimination of criminal liability for cartel participation would significantly undermine cartel deterrence due to the stigmatising effect that criminal liability has compared to that of monetary sanctions.[259] Without assistance from criminal enforcement for establishment of liability of transgressors of a cartel and the valuable evidence for proving damages in respect of civil claims which comes from such criminal investigation and findings, the deterrent effect of monetary sanctions imposed through civil damages actions would be greatly diminished.[260]

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256 Frisch *Introducing Cartel Sanctions to Individuals: the Impact on Cartel Discoveries of the Revised Leniency Guidelines of the Netherlands* (LLM – thesis, Erasmus University Rotterdam 2016) .

257 *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 52.

258 Werden, Hammond & Barnett "Detection and Deterrence of Cartels: Using all the Tools and Sanctions" presented at the 26th Annual National Institute on White Collar Crime, Miami, Florida, 1 March 2012 <https://www.justice.gov/atr/file/518936/download> (accessed: 28-10-2018)

259 *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 52.

260 *Ibid 52-53.*

The aforesaid critics are clearly in favour of imposing criminal sanctions for individuals who partake in a cartel and hold the view that the threat of imprisonment prevents individuals from committing acts necessary to effectuate a cartel and therefore they argue that deterrence nevertheless can succeed.[261]

According to Letsike[262] the rationale for the criminalisation of cartel conduct is that cartel activity reduces the competition on a given market and reduces and/or even entirely eliminates competition in the market and subsequently the gains/growth that such competition secures in the market. It may be linked to a sophisticated form of theft involving the deceitful acquisition of wealth rightly belongs to the consumer.[263] A global trend of including criminal liability in antitrust law is apparent as can be determined from the proposed amendments to the Competition Act in the 2009 Competition Amendment Act[264] (the "2009 Competition Amendment Act") as discussed herein below, it seems that South Africa is following suit.[265]

There are however various critics, as will be discussed herein below, especially from a South African perspective, who are of the opinion that the imposition of criminal liability for cartel conduct poses a great threat to the future existence and sustainability of the Corporate Leniency Policy[266] of South Africa (the CLP) due to the fear of individuals of being criminally sanctioned when they self - report to the

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[261] Werden, Hammond and & Barnett *"*Detection and Deterrence of Cartels: Using All the Tools and Sanctions" presented at the 26th Annual National Institute on White Collar Crime, Miami, Florida, 1 March 2012 <https://www.justice.gov/atr/file/518936/download> (accessed: 28-10-2018) 19, points out that success in cartel deterrence might require only that one individual in one substantial competitor decline to commit the unlawful acts needed to effectuate the cartel.

[262] Letsike "The criminalising of cartels – how effective will the new Section 73A of the Competition Amendment Act be?" Presented at Competition Commission, Competition Tribunal, Mandela Institute & University of Johannesburg Seventh Annual Competition Law, Economics & Policy Conference, Johannesburg, 5 September 12, <http://www.compcom.co.za/seventh-annual conference-on-competition-law-economics-policy/>, (accessed 28-10-2018) 5.

[263] Whelan "A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law" 2008 *Competition Law Review* 7 28.

[264] Competition Amendment Act No. 1 of 2009.

[265] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 52.

[266] The Corporate Leniency Policy established in terms of the Competition Act No. 89 of 1998.

authorities under the CLP and which on its turn undermines the deterrence of cartels which, that is in fact the main purpose of the CLP.

In the discussion to follow, the author deals with some of the major challenges the legislator had to face when incorporating criminal sanctioning for individuals under the Competition Act. The author also mentions certain critique against the incorporation of such criminal liability, and without discussing the constitutionality and/or effectiveness of the criminalisation of insider trading under the Financial Markets Act, as such a comprehensive study is beyond the scope of this dissertation, the author states why he is of the opinion that the proper implementation and enforcement of a CLP under the financial markets regime in South Africa, if ever so implemented, should coincide with individual immunity to directors and/or corporate managers, and/or any other individual for that matter, who self - report to the authorities of insider trading conduct, in order to ensure the integrity, sustainability, continued existence and effectiveness of the CLP and to effectively deter the conduct of insider trading in South Africa.

4.2 The Section 73A Cartel Offence

Section 73A of the Competition Amendment Act,[267] (herein after “Section 73A”), introduced cartel activity as a criminal offence under the South African competition law, known as the “cartel offence”. Section 73A, provides for directors, or persons in a position of management authority, causing its firm to participate in cartel activity, or knowingly participating in such conduct, to be liable to a fine of up to R500,000 or imprisonment not exceeding 10 years, or both.[268]

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[267] Act No. 1 of 2009.
[268] Section 73A and 74 of the Competition Act.

A person may be prosecuted for an offence in terms of this Section 73A only if the firm who participated in the cartel, acknowledged, in a consent order contemplated by Section 49D,[269] that it engaged in a prohibited practice in terms of section 4(1)(b) of the Competition Act,[270] or if the Competition Tribunal, or the Competition Appeal Court, made a finding that the relevant firm engaged in a prohibited cartel practice.[271]

The Competition Commission (the "Commission") may not seek or request the prosecution of a person for an offence in terms of Section 73A if the Commission has certified that the person is deserving of leniency in the circumstances[272] and the Commission may make submissions to the National Prosecuting Authority (the "NPA") in support of leniency for any person prosecuted of an offence in terms of Section 73A, provided the Commission has certified that the person is deserving of leniency[273] under the circumstances.[274]

In terms of Section 73A (5)[275] an acknowledgment in a consent order contemplated in section 49D[276] by the firm, or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b), is a *prima facie* proof of the fact that the firm engaged in that conduct. In terms of Section 73A (6)(a),[277] a firm of any director and/or manager who is found guilty of the said cartel offence may not directly or indirectly pay any fine that may be imposed on a person convicted of such offence,[278] and unless the prosecution is abandoned or the person is acquitted,[279] the firm may

[269] the Competition Act.
[270] the Competition Act.
[271] Section 73A (3) of the Competition Act.
[272] Section 73A (4) of the Competition Act.
[273] Section 1 of the Competition Amendment Act, 2009.
[274] S 73A (4)(b) of the Competition Act.
[275] the Competition Act.
[276] the Competition Act.
[277] the Competition Act.
[278] the Competition Act.
[279] S 73A (6)(b) of the Competition Act.

also not indemnify, reimburse, compensate or otherwise defray the expenses that the director/manager incurred in defending against a prosecution in terms of this section.

Clarification of several concerns regarding the validity and constitutionality of Section 73A, caused a significant delay in the enactment and the promulgation of the (the "2009 Competition Amendment Act"). It was particularly the content of Section73A (5),[280] which caused great uncertainty and unease on this issue but the subsection has nevertheless been enacted as in its current form.[281]

Section 73A (5) (supra) which provides that an acknowledgment by a firm in a consent order or a finding by the Tribunal that such a firm engaged in a prohibited practice is *prima facie* proof that the firm had engaged in such conduct, was interpreted as creating a reverse onus on the accused for rebutting the Tribunal's conclusions in the criminal proceedings, which in itself is inconsistent with the provisions of Section 35 of the Constitution[282] that gives an accused person's the right to remain silent and not to incriminate one self.[283] Section 73A(5) therefore infringes on a person's right to a fair trial, the right to be presumed innocent as well as the right to adequate time and facilities to prepare a defence.[284]

One of the other contentious constitutional issues related to Section 73(a)(6)(b) which provides that the firm may not pay any fine of its director/manager or other

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[280] the Competition Act.

[281] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 55.

[282] Constitution of the Republic of South Africa Act No. 108 of 1996.

[283] Section 35(1) of the Constitution provides as follows:
"Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent (b) to be informed promptly – (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person."

[284] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 55.

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person within the firm, found guilty of the cartel offence.[285] According to Kelly,[286] the purpose of this provision is to protect shareholders as the firm is, under no circumstances, allowed to "bail out" any of its directors and/or corporate managers with the funds of shareholders when it is in fact the very same directors and/or corporate managers who are charged with the conduct.[287] The rationale behind this is quite obvious seeing that the sole purpose of a company is to make profit for its Shareholders which is inherently the sole obligation and requirement of the Directors in managing the business affairs of the company. However, there are various cases where the shareholders (owners) are also the directors of the company, such as in the case of owner managed companies and in such a case the afore said prohibition contemplated by Section 73(a)(6)(b), would prevent them from agreeing amongst themselves to borrow money from the company to fund a defence and which might infringe on their constitutional right to a fair trial as listed above in terms of Section 35 of the Constitution.[288]

The most problematic and probably the most contentious issue, which is relevant to the main theme of this Dissertation, the CLP, was the issues surrounding the provisions of Section 73A (4),[289] due to the detrimental impact this section might have had, and still might have, on the efficiency and the future sustainability of the CLP.[290] In terms of Section 73A (4), a dual role of prosecution between the Commission and the NPA is established which requires the NPA to be the body that is responsible for the criminal prosecution, and the Commission being the body responsible for making submissions to the NPA in support of leniency of a person certified as deserving of leniency.[291]

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[285] *Ibid.*
[286] Kelly 2010 *Stellenbosch LR* 328.
[287] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 55.
[288] the Constitution.
[289] Competition Amendment, 2009 Act.
[290] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 56.
[291] Ibid.

The introduction of this dual functionality and co-operation between the two departments introduces and immense complexity at both the investigative and prosecutorial stages seeing that it is likely that within the NPA it will be the relatively small Specialised Commercial Crimes Unit that will have the responsibility for prosecuting individuals under Section 73A.[292] Currently the majority of work conducted by the unit entails investigating and prosecuting fraud, however, their mandate extends to enforcing an array of corporate statutory offences that range from provisions in the Companies Act 71 of 2008 to the Counterfeit Goods Act 37 of 1973. It is of real concern that in practice the Specialised Commercial Crimes Unit, with no formal structures to facilitate coordination with the Competition Commission, will simply not have the resources or expertise to prosecute cartel offences.[293]

Imprisonment can only be imposed by the courts following a successful prosecution by the NPA.[294] The NPA has no experience in prosecuting competition matters, needless to say their inability to successfully prosecute much more complex maters such as cartel transgressions under the Competition Act and other white collar crimes which will most definitely pose serious challenges and difficulties to implement.[295] Furthermore, there is also the threat that personal criminal liability could potentially reduce the likelihood of companies to self – report of certain cartel activities, which would require the Commission to self-pursue the likelihood of such cartels without the assistance of inside informants. These informants are usually detrimental to the success of the Commission investigation as such informants are usually complicit in the alleged conduct and could not be

[292] Merdian M *The Criminalisation of Cartel Conduct in South Africa and The United Kingdom* (LLM thesis, 2012-2013 University of Cape Town) 25.
[293] Kelly 2010 Stellenbosch LR 328.
[294] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 56.
[295] *Ibid.*

granted immunity from criminal prosecution without the agreement of the prosecutors and the courts.[296]

Critiques such as Lopes, Seth and Gauntlett[297] were not in favour of the introduction of the cartel offence. According Lopes, Seth and Gauntlett, in comparison with the United States of America (the "US"), who was the first country under the modern antitrust law to have incorporated criminal liability of individuals for cartel conduct and who have over the past few years managed to have found a viable and pragmatic enforcement system for the prosecution of individual cartel offences, South Africa, as a third world country, is not ready for the introduction of such rigid regime yet.[298]

Under the Sherman Act,[299] the US authorities has always provided for individual criminal liability.[300] Furthermore, in the US, the Department of Justice is responsible for both the civil and criminal enforcement of competition law.[301] The South African Competition Act[302] was never intended to be the vehicle for the provision of criminal liability, and the dual functioning of the NPA with the Commission is a concept that is still many years away from successful implementation due to the lack of resources, experience and knowledge, especially in a third world country such as South Africa.[303] Compared to the US, one could understand how the US have managed to successfully implement the

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[296] *Ibid.*

[297] Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> *(accessed 06-10-2018).*

[298] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 57.

[299] The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C.) is a United States antitrust law passed by Congress under the presidency of Benjamin Harrison, which regulates competition among enterprises.

[300] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 57.

[301] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 57.

[302] the Competition Act.

[303] Ibid.

criminalisation of individuals under their anti – trust laws as the US does not have the challenge of two different institutions having to find a way to cooperate efficiently within the scope of the limitations which SA face.[304]

Lopes,[305] with reference to the provisions of Sections 49(1)(3)[306] and 56[307] of the Competition Act, furthermore highlights the possibility that the drafters of the Competition Act intentionally omitted a provision of criminal liability when drafting the act and as such indicates that one must consider whether the Competition Act even requires such a provision in order to give effect to the objectives of the act, as the afore said sections clearly indicate that the drafters realised that the conduct prohibited in these sections could comprise of criminal activity.[308]

As an administrative agency, the function of the Commission is to administer and enforce a the Competition Act which is deemed to be an economic statute.[309] The NPA on the other hand is expected to prosecute all general crimes or offences in terms of its enabling legislation and on the basis of its own prosecutorial policy.[310]

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[304] Ibid.

[305] Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018).

[306] Section 49A (3) of the Competition Act provides that: -

"No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer of made the statement in criminal proceedings except in criminal proceedings or perjury or in which the person is tried for an offence contemplated in section 72 or section 73(2)(d) and then only to the extent that the answer or statement is relevant to prove the offence charged."

[307] Section 56 of the Competition Act deals with witnesses at a hearing of the Competition Tribunal and provides: -

"(1) Every person giving evidence at a hearing of the Competition Tribunal must answer any relevant question. (2) The law regarding a witness' privilege in a criminal court of law applies equally to a person who provides information during a hearing. (3) The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so. (4) Section 49A (3) applies to evidence given by a witness in terms of this section."

[308] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 57.

[309] Ibid.

[310] Jordaan & Munyai "The Constitutional implications of the new section 73A of the Competition Act 89 of 1998" 2011 *SAMLJ* 197 201.

The incorporation of personal criminal liability under Section 73A therefore raises the question of the suitability of using criminal law sanctions in competition law,[311] the treatment of overlapping functions of the Commission vs that of the NPA and how such overlapping provisions and potential conflicts are to be dealt with.[312]

The 2009 Competition Amendment Act[313] has created great confusion regarding the legal relationship between prosecutions under the Competition Act and prosecution under the Criminal Procedure Act 51 of 1977.[314] Despite the NPA enjoying exclusive authority to conduct criminal prosecutions under Section 73A, the Commission is not powerless in relation to such criminal prosecutions. It is only after the competition authorities have made their own substantive determination that a prohibited practice has occurred, that the legal authority to prosecute a director under Section 73A will exist.[315] The provisions of Section 73A make it clear that it is primarily up to the Commission to determine whether or not to prosecute a director on criminal charges and the Commission has the discretion to request the NPA to institute criminal proceedings against a director. It is unlikely that the NPA would institute criminal proceedings unless the Commission has made a request or recommendation to it for the initiation of such prosecution.[316]

It is the responsibility of the NPA to, as an independent body, instituting criminal prosecutions on behalf of the State, and such function must be exercised free from any external influence and/or interference from any other government and/or institutional influence.[317] It is highly unlikely, with the exclusion of exceptional

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[311] *Ibid.*
[312] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 58.
[313] Competition Amendment Act, 2009.
[314] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 58.
[315] *Ibid.*
[316] Jordan & Munyai 2011 *SAMLJ* 201.
[317] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria)* 59.

circumstances, that the NPA would criminally prosecute a director or corporate manager against the advice or recommendations of the Commission when that director or corporate manager, according to the recommendations of the Commission, deserves immunity or leniency, however, in theory, it is still possible that the NPA could criminally prosecute such a person.[318]

Thus, although the NPA may still decide to prosecute a director, the role and influence of the Commission in the process of criminal prosecution is not entirely disregarded as the court may still take into consideration any recommendation from the Commission which may still persuade the court to grant immunity and/or leniency.[319]

As mentioned before, the recommendation on the part of the Commission is detrimental for the co-operation between the Commission and the NPA and would go a long way towards, firstly establishing a sense of clarity with regard to potential conflicts between the role of the NPA vs that of the Commission, and secondly, in restoring the confidence in the corporate leniency programme, which is already considered to be under threat as a result of the introduction of Section 73A.[320]

In addition to the afore mentioned concerns in relation to Section 73A, there is also the concern that the subjecting of individuals to criminal liability will embroil the competition authorities in a tremendous amount of costly litigation which would further embroil and complicate the proper detection and prosecution of cartels.[321]

Aside from section 3(1A)(1) of the Competition Act, which provides for negotiations between the competition authorities and other industry-specific regulatory

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[318] *Ibid.*
[319] *Ibid.*
[320] Ibid.
[321] Jordan & Munyai 2011 *SAMLJ* 201.

agencies in respect of the management of concurrent jurisdiction, the Competition Act goes no further in outlining any attempt at cooperation with the NPA,[322] which, as stated above, could cause great uncertainty and dispute with regard to the jurisdiction, role, functions and responsibilities of the respective departments, which creates great uncertainty in the market.[323]

The effectiveness and future sustainability of the CLP is therefore dependent on the Commission and the NPA offering some form of clarity and assurances, to both firms and individuals who willingly self - report of cartel conduct via the CLP process, that individuals involved in the conduct, whether directly or via the firm, will be fully exempt from any and all criminal liability.[324] Currently, the Competition Act does not allow for the Commission to provide firms and/or individuals such guarantee, and is it therefore necessary for the Commission and the NPA to, in joint co-operation, provide and/or lay down certain rules and guidelines amongst themselves in order to afford and guarantee CLP applicants absolute security and assurance that no criminal prosecution shall be impugned on an individual who so self–reports under the CLP, otherwise the risk of being criminally sanctioned will inhibit leniency applications and will make the CLP superfluous.[325]

The responsibility of running and administering the business of the company lies with the directors.[326] All corporate decisions are made by the directors and the

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[322] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 61*.

[323] Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018)5, indicate that this is not surprising having regard to the fact that the Competition Act is quasi-civil in nature and specifically contemplates the inadmissibility of self-incriminating statements made to the Commission and Tribunal.

[324] Lavoie 2010 *World Competition* 141.

[325] *Ibid*.

[326] Section 66(1) of the Companies Act provides that: -

"*The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.*

directors owe a fiduciary duty to the company. Thus, it is the directors of every firm who self–reports under the CLP who stand a great risk of being criminally prosecuted which, if not carefully considered and if proper guidelines and co-operation provisions between the Commission and the NPA are not laid down with absolute clarity, the directors of a firm who is considering to take the decision whether to apply for leniency under the CLP or not would most surely rather take the risk of not being caught out as opposed to face criminal charges.[327]

There is off course the opposing argument that there is no greater deterrent of cartel activity than the risk of imprisonment for corporate officials.[328]

Lopes[329] highlight the deterrence effect that criminal sanctions will have as follows: -

> "*These deterrence incentives purportedly operate to introduce a threat to the individual who plays the decisive role as to whether his firm is to participate in cartel activities. In theory, this individual, under threat of individual criminal sanction, would be more likely to be deterred from participating in the conduct when it affects him personally than when the only threat (apparently) is to the economic circumstance of his firm. Thus it could be argued that criminal liability could be a "complementary deterrent", in addition to compensatory fines on firms."*

[327] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 62.*

[328] *Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018) 15.*

[329] Ibid.

However, and as mentioned above, it does not seem likely that, at least not in the near future for South Africa, that our NPA will consist of the necessary knowledge, resources and expertise to properly, just and thoroughly criminally prosecute individuals for cartel conduct, nor will the Commission and the NPA be able to establish a working relationship of such a nature where co-operation between the two government components operate at the level of which he US anti-trust does due to the significant different roles that each of these government components fulfil under the South African Constitution.[330]

The author is therefore of the view that individuals must be offered some form of protection or guarantee against criminal prosecution or fines which will encourage them to come forward and self-report on their cartel participation. Due to the fact that the decision and jurisdiction to decide whether or not criminal prosecution will follow the Commission's certificate of leniency to an individual lies with the NPA, the current provisions of Section 73A is not likely to provide individuals and firms with sufficient comfort that it will be fully indemnified from any criminal liability and therefore it is for this reason that it is essential that an understanding be reached among all relevant authorities to provide individuals, willing to approach the Commission with information regarding its firm's participation in a cartel, with certainty and transparency as regards effective protection from criminal prosecution.

As mentioned in Chapter 3 herein above, it is evident that the Commission managed to settle the most significant cartel cases after concluding consent orders with the respondents in terms of section 49D of the Competition Act.[331] This enables the Commission to process cases swiftly and punish offending firms

[330] the Constitution.

[331] Section 49A of the Competition Act provides that if, during or after the completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order.

without having to incur the substantial expenses and delays associated with running a full hearing before the Tribunal.

As discussed in Chapter 2, an essential feature of a consent order is that these directors and/or managers are required to admit that it participated in a cartel. The author contends that it is more than likely that none of the settlement agreements contemplated in Chapter 3 above would have been readily easy to obtain should such admission later on have been capable of being used for criminal conviction against the very same director admitting to the conduct on behalf of their firms.[332]

During the course of the construction cartel investigation (discussed in Chapter 3), a number of firms were invited by the Commission to settle their cases through disclosure of their own and other firms' involvement in the bid-rigging activities under investigation. These parties voluntarily provided information to the Commission without the Commission having to summon them to do so. To this extend Lopes[333] states that the information so voluntary provided could ostensibly be used by the NPA in pursuing criminal prosecutions under the various broad corruption offences contained in the Prevention of Organised Crime Act.[334] The author can only assume that, as stated by Lopes,[335] that some of the individuals who partook in the construction cartels discussed in Chapter 3 above, in making such statements were aware of the fact that any such disclosures might potentially have been utilised against them in criminal prosecution, and therefore, probably

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[332] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 64.*

[333] Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018) 5.

[334] Act No. 24 of 1999.

[335] Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018) 5.

with the advice of legal counsel, lead to their apparently approaching the NPA with affidavits seeking amnesty from possible criminal prosecution by offering to make full disclosure to the NPA.[336]

Section 49A[337] allows the Commission to summons any person believed to be in possession of information the Commission requires in order to conduct an interrogation.[338] The interrogee is obliged to respond to any and all questions of the Commission, unless the answer would be self-incriminating.[339] An interrogee who has made a self-incriminating statement will be afforded protection from criminal prosecution or enforcement arising from the self-incriminating statement in question, as it is entirely inadmissible in any criminal proceedings by virtue of the afore said section 49A.[340] Section 49A therefore gives effect to: - "*a fundamental constitutional entitlement (the right not to be compelled to give self-incriminating evidence) without compromising the ability of the Commission to gather evidence against and prosecute a firm engaged in cartel conduct in terms of the Competition Act.*"[341]

Thus, the introduction of criminal liability by Section 73A, causes the answering by a self-reporting director/corporate manager to almost every question of the Commission to be potentially self-incriminating and most directors will most likely exercise their right to remain silent, which on its turn will have the effect of limiting the information provided to the Commission in such inquiries.[342] Section 73A

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336 Ibid.
337 the Competition Act.
338 *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 63-64.*
339 *Ibid.*
340 Ibid.
341 Lopes "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?" <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> (accessed 06-10-2018) 4.
342 *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 64.*

introduces personal criminal liability for individuals involved in cartel conduct, but it fails to consider the effect that this has on Section 49A(3) of the Competition Act in that, where a person has been subpoenaed, and discloses self-incriminating information during the course of an investigation, all statements made therein are necessarily inadmissible in any criminal proceedings, including those instituted in terms of Section 73A.[343] The unavoidable conclusion is that these two sections are contradicting one another on the basis that Section 49A (3) advances the constitutional right of an individual against self-incrimination,[344] and therefore the introduction of Section 73A unfortunately gives rise to grave constitutional concerns.[345]

One last aspect/concern which the author which to raise in relation to the introduction of Section 73A and the potential threat the section poses to the future existence of the CLP, is that the Prevention of Organised Crime Amendment Act,[346] and the Prevention and Combating of Corrupt Activities Act,[347] have been in effect for a period of time preceding the introduction of Section 73A, however, many senior managers and directors seem to have gone undetected and/or avoided having been criminally prosecuted under the provisions of afore said acts.[348] Although immunity applicants under the CLP might be able to escape the administrative penalties by the Commission, these applicants, or at least the individuals behind the applicants, still runs the risk of being fined significant fines together with the possibility of imprisonment, as a result of the fact that certain cartel behaviour would amount to fraud, corruption or even racketeering which is deemed to attract criminal liability.[349]

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[343] *Ibid.*
[344] Section 35 of the Constitution.
[345] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 64.*

[346] Act No. 2 of 2004.
[347] Act No. 12 of 2004.
[348] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 65.*
[349] Ibid.

From a prescription point of view, it is evident to mention that although the Commissions jurisdiction to pursue legal action against cartels prescribes within three years from the date on which cartel activity ceased,[350] the NPA's jurisdiction to prosecute on criminal charges will not prescribe for a period of thirty years.[351]

4.3 Conclusion:

Section 73A, the introduction of criminal liability under the Competition Act, will without a doubt have a great effect and will go a long way in the deterrence of cartel activity.[352] The counter argument remains in that it could potentially also lead to more secretive cartel activity being conducted by transgressors, which leaves the Commission only with the hope to rely on the effectiveness of the CLP as mechanism to try and detect cartels conducted by firms who are undeterred by the threat of criminal liability and who would merely see a penalty of this nature as a mere "slap on the wrist".[353]

It is for this reason that the CLP remains a vital and instrumental tool to be utilised by the Commission in its fight in combating cartel activity and thus its effectiveness and future sustainability cannot and should not be jeopardised by the introduction of Section 73A allowing for the criminal prosecution of directors and/or corporate managers who are willing to self – report under the auspices of the CLP, as this may result in the situation where, although the CLP is the appropriate mechanism to facilitate self - reporting of cartel activity and the destabilisation of cartels, the CLP will be of no use and/or effect seeing that individuals who sit behind these cartels will be too afraid to apply for immunity under the CLP due to the possibility of being criminally prosecuted.[354]

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[350] The Prescription Act No. 68 of 1969.
[351] *Kyriacou L Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 65.*
[352] Kyriacou L *Corporate Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM thesis, 2014, University of Pretoria) 65.*
[353] *Ibid.*
[354] *Ibid.*

5. CHAPTER 5: INTERPRETATION OF SECTIONS 156 AND 117 OF THE FSRA AND THE APPLICATION OF A LENIENCY POLICY/PROGRAMME TO INSIDER TRADING

In the preceding Chapters, the author has discussed the legal framework in respect of two forms of market abuse, one, a cartel that resorts under the competition law sector of South Africa and which is currently regulated by the Competition Act No. 89 of 1998 (the "Competition Act"), and the other, insider trading which is a form of market abuse in respect of the financial markets sector of South Africa and that is currently regulated by the Financial Sector Conduct Authority ("FCSA") in terms of the Financial Sector Regulations Act No. 9 of 2017 (the "FSRA"). (Refer to the discussion in Chapter 1 in this regard for all relevant definitions in relation to the FSRA).

In Chapter 2 and 3 the author discussed the introduction of a Corporate Leniency Policy (the "CLP") under the Competition Act and in Chapter 3 dealt with some of the most significant cases investigated and instituted by the Competition Commission (the "Commission") under the CLP.

Chapter 4 deals with some of the challenges faced as a result of the incorporation of criminal liability for individuals involved in cartels and who seek leniency under the provisions of the CLP.

In Chapter 5 the author provides the author's own interpretation of section 156 and section 117 of the FSRA,[355] and discusses, in the author's opinion, some of the potential issues and/or shortcomings that section 156 might have in comparison to

[355] Due to the fact that at the time of drafting this thesis the FSRA has only been in effect for a few months, it seems that, according to the authors research, there is very little, if at all, commentary on these two specific sections and therefore the assumptions made and the conclusions drawn in this chapter 5 are based on the authors own opinions and interpretation of these sections.

those discussed in Chapter 4 in relation to the CLP and discusses how some of these issues can be/should be addressed to avoid the potential concerns raised in Chapter 4 in relation to the CLP. In conclusion the author considers under what circumstances the CLP, or a leniency policy similar to that of the CLP, could find application to insider trading and highlights the significant effect which criminal prosecution, and/or the indemnity therefrom for individuals, could have in the implementation of such a leniency programme for insider trading.

5.1 Interpretation of Sections 156 and 117 of the FSRA and discussion of potential issues and/or shortcomings

The author is of the view that the incorporation of Section 156 in the FSRA seems to be a step in the right direction towards the incorporation of a leniency policy/programme for the financial markets sector. What is also positive is that this section allows for leniency to be offered to both juristic persons as well as to the individuals who sit behind these juristic persons.[356] This section however only seem to apply in two instances: -

1. Where the regulating authorities have already commenced investigations into certain conduct;[357] or
2. Where proceedings in relation to conduct have already commenced.[358]

This entails that the regulating authority should already be aware of the conduct and furthermore should have commenced with its investigations into such conduct or have commenced with proceedings, which the author has assumed are legal proceedings.

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356 Section 156(2) of the FSRA.
357 Section 156(1) of the FSRA: - "….The responsible authority for a financial sector law may, in exchange for a person's co-operation in an investigation….."
358 Section 156(1) of the FSRA: - "….or in proceedings in relation to conduct that contravenes or may contravene that law.

As mentioned before, the detection of insider trading and other forms of market abuse, as in the case of cartels, are very hard and difficult to detect. The purpose of the CLP was therefore to assist the Commission in not having to put in all the effort and hard work to try and detect these cartels but rather to incentivise the participants to self-report to the Commission in an attempt to obtain leniency. As is evident from the discussions under chapter 3, the Commission has managed to extract large settlements with these participants as a result of the successful incorporation and implementation of the CLP and which lead to the disbandment of some of the most significant cartels which the Commission, without the assistance and co-operation of the cartel members under the provisions of the CLP, would most likely never have even detected. It does not seem as if section 156 will have the same effect as the CLP in that, persons who are currently actively involved in market abuse conduct will much rather wait and see if whether the regulating authorities will ever catch onto them and if so, they have an opportunity to negotiate leniency with the regulation authorities in exchange for immunity from prosecution. This does not inculcate good habits in citizens[359] but rather makes them chancers.

The author is of the opinion that the difference between this section 156 of the FSRA and the CLP is that the CLP tries to inculcate good habits in citizens, whether it be out of fear from being prosecuted if not the first to the door to report, or whether it be out of creating the feeling of guilt, the CLP has a proven track record of bringing transgressors to justice, changing the minds and attitude of role-players in the market in how to, or how not to act, in accordance with the rules of the CLP and to self–report to the Commission of conduct by the participants without the Commission having to really institute significant investigations into a specific matter.

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[359] See Fn. 1.

Due to the fact that insider trading is extremely difficult to detect, perhaps much more difficult than cartels, the author is of the view that the incorporation of a CLP, or similar leniency programme for market abuse in the financial sector, could potentially render the same effect as the CLP did in respect of the Competition sector, which would inculcate good habits in citizens and hopefully move them to self-report to the regulating authorities of specific conduct in respect of a financial sector law, easing up the costly and time consuming investigations which the regulating authorities would need to institute, not to mention the expensive screening exercises that would need to be conducted in an attempt to try and prosecute transgressors of insider trading.

A further issue the author wishes to raise is the fact that the decision whether or not to grant a potential applicant leniency, seems to be entirely relied on the discretion of the regulation authority. This is evident from the use of the words "*may*" and "*it is satisfied*" as emphasised in footnote 360.[360]

Leniency, in terms of the Competition law sector, is not a discretionary grant of leniency, at least not for the applicant who is first to the door.[361] The only requirement is for the applicant to provide its full co-operation with the Commission and the applicant would qualify for total immunity from prosecution of such

[360] In terms of Section 156(1) the responsible authority for a financial sector law **may** (own emphasis), in exchange for a person's co-operation in an investigation or in proceedings in relation to conduct that contravenes or may contravene that law, enter into a leniency agreement with the person, which **may** (own emphasis) provide that the responsible authority undertakes not to impose an administrative penalty on the person in respect of the conduct.
(2) A leniency agreement with a person **may** (own emphasis) provide that the agreement also applies to—
(a) specified persons in the service of, or acting on behalf of, the person; or
(b) specified partners and associates of the person.
(3) The responsible authority **may not** (own emphasis) enter into a leniency agreement with a person unless **it is satisfied** (own emphasis) that it is appropriate to do so, having regard, among other matters, to—
(a) the nature and effect of the contravention concerned;
(b) the nature and extent of the person's involvement in the contravention; and
(c) the extent of the person's co-operation.
[361] Section 3 of the CLP.

conduct. Section 156 of the FSRA does not provide any clarity and/or surety to potential applicants who wish to self-report to the regulating authorities of a transgression, or potential transgression, of a financial sector law, that they will qualify for leniency as such decision lies solely with the specific regulating authority to decide. The concern raised is obvious in that a potential applicant will now need to trust and hope that, given the specific circumstances, the regulating authority would grant the applicant leniency, but there is no certainty that the regulating authority will in fact do so. This uncertainty will most likely, in the author's opinion, result in a potential applicant rather not reporting the transgression out of fear and/or uncertainty of not being offered leniency.

In order for the regulating authorities to be able to extract successful settlement agreements under the provisions of section 156, serious consideration by the regulators will need to be given to the afore mentioned issues and how these need to be addressed and whether it could not potentially be addressed by the incorporation of a proper CLP, or similar programme.

Another issue that will need to be considered is the matter of criminal indemnity. Section 117 of the FSRA ("Reporting Standards") in subsection 3 provides for criminal indemnity to a person who reports of any transgression of a financial sector law and in terms whereof, any information being submitted as part of such disclosure to regulating authorities, will be inadmissible in any criminal proceedings. This section, in the author's view and interpretation of the section, indemnifies the person who decides to self-report of certain conduct and/or market abuse under the FSRA or any of the financial sector laws (as defined in Section 1 of the FSRA) to the regulating authorities. It is however not certain whether this section 117 can be linked to the leniency provisions in section 156, or whether

there is any link at all. It is further not certain whether the licensee[362] includes both natural person and a juristic person and whether the assumption can be drawn that subsection 3 then implies that a juristic person could be criminally prosecuted.

As mentioned in Chapter 1, it is beyond the scope of this thesis to consider whether or not juristic persons could be and/or should be held criminally liable for corporate crimes as such requires a thesis on its own. What is however of importance to this thesis is to determine whether criminal indemnity should be offered to those individuals who sit behind the corporates who are found guilty of an offence in respect of a financial sector law, especially insider trading as a form of market abuse. Therefore, the question to be answered is whether or not criminal indemnity should be offered to the individuals who sit behind corporates who are found guilty of insider trading and how criminal prosecution of these individuals might affect the successful implementation of a CLP, or similar leniency programme in the financial markets sector, especially in relation to insider trading.

Therefore, for purposes of the author's interpretation of section 117(3) above, the author has assumed that a licensee can be both a natural and/or juristic person, and therefore section 117(3) applies to both natural and juristic persons. Based on this interpretation, it seems that, should a licensee, who is a juristic person, wish to report to the regulating authorities of a conduct by the specific licensee that is contradicting to a financial sector law, and should any individual, i.e. director, employee and/or manager of such licensee, be criminally prosecuted as a result of such conduct, it seems that any information that formed part of the licensee admission to the regulation authority would be inadmissible in any criminal proceedings as a result of section 117(3). The same applies in the event of the licensee being a natural person.

[362] See section 112 of the FSRA for a definition of licensee.

If the aforesaid interpretation is indeed correct, section 117(3) already provides significant clarity to potential applicants who seek to self-report of any contravention, or potential contravention, of a financial sector law and which would go a long way in assisting the regulating authorities in the implementation of the leniency provisions of section 156 in that it would allow for much easier settlement being reached with the authorities as the potential transgressors will have the comfort of knowing that any disclosure in the process by them will be inadmissible in any criminal proceedings.

5.2 Application of CLP to Insider Trading

Although their might be significant differences between the conduct of a cartel vs that of insider trading in that cartels usually require cooperation by more than one party, as opposed to insider trading that is usually conducted by an individual who does not necessarily require the cooperation of other parties. When one however has regard to the various defences against insider trading as discussed in Chapter 1 (see paragraph1.4) above and consider the different offences and defences for dealing in inside information, it is evident that an insider and insider trading and the dealing in inside information can come in many forms, for example dealing for one's own account[363] (the "Self-Dealing Offence" referred to in paragraph 1.4), dealing for any other person[364] (the "Third Party Dealing Offence" referred to in paragraph 1.4), and dealing for an insider[365] (the "Insider Dealing Offence" referred to in paragraph 1.4), all these types of dealings, especially the second and third types of dealings, in many ways are very similar to a cartel.

[363] Section 78(1)(a) of the FMA.
[364] Section 78(2)(a) of the FMA.
[365] Section 78(3)(a) of the FMA.

In addition, and when considering the fact that the Self - Dealing Offence can in fact be conducted by a juristic person as established in paragraph 1.6 above, in that the dealing for one's own account is not necessarily done by an individual in his/her personal capacity, but rather the dealing is done by a company as instructed by its board or perhaps by an employee for instance, such conduct by the company would also seem very closely related to the situation discussed in respect of cartel conduct in Chapter 4 and the criminal prosecution of individuals who sit behind the company who is conducting the crime.

Furthermore, in order to be able to deal for another person ("Third Party Dealing Offence"), or to deal for an insider ("Insider Dealing Offence") requires some form of co-operation by at least two persons (this can be natural or juristic persons). These persons would be deemed the only ones who are in possession of such information and would be the only ones who stand to gain some form of economic benefit from dealing in such inside information. It is therefore for all the above stated reasons that the author contends that the conduct of insider trading, under these mentioned circumstances, seem very closely related to the conduct of a cartel, and therefore argues that it seems viable for the regulators in respect of the FSRA to consider the adoption of a leniency policy and/or programme in terms of the FSRA which is similar to the CLP in respect of the Competition Act for cartels, in an attempt to combat insider trading.

The author appreciates the fact that there can surely not be one set list of requirements for all different instances in which the leniency in section 156 would find application, as this section seems to cover a broad range of financial sector laws (as defined in the FSRA) and therefore covers a broad spectrum of potential transgressions in terms of which the regulating authorities would be entitled to grant leniency, therefore, given the broad discretionary powers of the regulating authorities, especially in relation to section 106 of the FSRA in terms whereof further conduct standards can be determined by them, it seem that there is enough

reason for the regulating authorities to consider broader leniency provisions which are specific to a certain type of transgression under the respective financial sector laws and could perhaps lead to separate/different leniency policies/programmes or other solutions being made available for all other form of market abuse.

5.3 Criminal Liability considerations

As the author contended in Chapter 4, criminal liability under the Competition Act, will without a doubt have a great effect and will go a long way in the deterrence of cartel activity. The counter argument however remains in that it could potentially also lead to more secretive cartel activity being conducted by transgressors, which leaves the Commission only with the hope to rely on the effectiveness of the CLP as mechanism to try and detect cartels conducted by firms who are undeterred by the threat of criminal liability and who would merely see a penalty of this nature as a mere “slap on the wrist”.

As established above, insider trading is a criminal offence and can be criminally conducted by both natural and/or juristic persons. The significant amount of money that an insider (specifically a juristic person) stands to gain from a specific inside trade compared to a criminal penalty that the juristic person stands to pay in relation thereof, should it be found guilty of insider trading, most likely outweighs the small criminal penalty that such a juristic person stands to pay and would therefore be undeterred by the threat of criminal liability.

Criminal prosecution remains a vital and instrumental tool to be utilised by the regulating authorities to combat insider trading. It is however not certain, provided the interpretation of the author as set out in paragraph 1.6 in relation to section 117(3) of the FSRA is indeed correct, how criminal liability of insider trading will now be affected given the fact that no information disclosed in the process under section 117 will be admissible in criminal prosecution. Furthermore, it seems as if

schedule 4 of the FSRA has amended section 109 of the FMA, which prescribed a penalty of R50mil or imprisonment for the conduct of insider trading, [366] in that section 109 is now amended (the act does not use the word "replaced") by section 76 of the FSRA.[367] Section 76 of the FSRA does not in any way deal with offences and penalties as in the case of section 109,[368] and therefore the author has assumed that section 109 of the FMA still applies as amended by section 76 of the FSRA.

It seems as if section 117(3) of the FSRA now overrides, or would at least affect, the provisions of section 109 of the FMA in that, in the event of a contravention by a person of a financial sector law who self-reports to the regulating authorities of such contravention, any information disclosed to the regulating authorities by that person, would be deemed to be inadmissible in any criminal proceedings and therefore could not possibly lead to a guilty conviction for imprisonment. If this interpretation is indeed correct, the author is of the opinion that it could surely not have been the intention of the legislator to decriminalise insider trading as a form of market abuse, or any of the other forms of market abuse or any other contravention of any financial sector law that is deemed to be a criminal offence for that matter, however the author finds himself unable to draw any other conclusion at this stage.

Although the author in Chapter 4 supports criminal indemnity to be provided to individuals who sit behind a cartel when applying for leniency under the CLP, the author acknowledges the important role which criminalisation of insider trading has had in the financial markets sector over the years and is not necessarily in favour of completely doing away with criminal liability for insider trading, however the

[366] See the first paragraph under paragraph 36 in this regard.
[367] Schedule 4 states that: - *74 to 77. Amend sections 105,108, 109 and 110 of the Financial Markets Act, No. 19 of 2012, respectively.
[368] Section 76 of the FSRA deals with Co-operation and collaboration between financial sector regulators and Reserve Bank.

author favours the sentiment of inculcating good habits in citizens to comply with the law and as such the author believes that the principle of *"the first – to – the – door to report shall gain total immunity"* should also be applied in respect of insider trading crimes. Total immunity must include immunity from both civil and criminal prosecution, as such the author believes would provide for great incentive for contraveners to self–report to the regulating authorities, whether it be out of fear of knowing that they might be criminally prosecuted if they are not first to report, or just due to a guilty conscious, the method seems to have achieved great success in the Competition law sector. It is very likely that more than one person is/can be involved in the crime of insider trading, therefore providing enough incentive for at least one of the insiders to self-report, would assist the regulating authorities to uncover the remaining participants too. Criminal prosecution and/or indemnity therefrom for second and/or last comers should remain the discretion of the regulating authorities.

This said, and given the broad powers of the regulating authorities as are now determined by the FSRA, the author believes that a leniency policy, or similar programme for insider trading, would go a long way in assisting the regulating authorities in its fights against insider trading, and the incorporation of a leniency policy, or similar programme for other forms of market abuse, would just further strengthen the hand and bargaining power of the regulating authorities to prevent and/or at least lesson the conduct of market abuse in the financial market sector. It is through the successful incorporation and implementation of policies and/or leniency programmes such as these that law-givers inculcate good habits in citizens and which defines a good constitution from a bad constitution as rightfully stated by Aristotle.

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