

# **A CARTEL OFFENCE IN SOUTH AFRICAN LAW**

by

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It is truly very emotional to be completing this acknowledgement, as I pause and reflect on my academic journey which has both bitter and sweet memories. After a serious academic exclusion experience the Lord revived my passion for law.

In Numbers 23 – 19, the word of God says the following;

*“God is not a man, that he should lie; neither the son of man, that he should repent: hath he said, and shall he not do it? Or hath he spoken, and shall he not make it good?”*

The Lord conveyed a message to me through my beloved Sister **Sharon Matobo “Mantsho” Mathabathe** on the 3<sup>rd</sup> of June 2010 about my academic success, thank you my Sister for having a hearing ear. I experienced transformation since then. It is truly manifesting and Jesus remains King in my life.

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Last but not least I wish to thank the Attorneys Fidelity Fund and Fundi for their financial assistance which led and motivated me to register for this LLM programme.

## DECLARATION OF ORIGINALITY

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### Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
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## SUMMARY

My research concentrates on the implications of cartels and the harm they cause in the South African market. Since the enactment of section 73A of the Competition Act, there have been investigations into the effect on the various markets identified as being at risk. The detection of cartels has been acknowledged as notoriously complex over the years. As complex and egregious as cartels have been viewed to be, I contend and endeavour to prove that stringent laws are required in order to punish offenders, as ultimately it is the consumer who suffers the most. There should therefore be harsh legislation implemented beyond mere administrative penalties being imposed.

The implementation of the Corporate Leniency Policy was a clarion call to those involved in cartels to expose their past behaviour and thus gain immunity for their violations. My exposition on cartels will consider the gaps that the present legislative framework presents. I will consider this by drawing from the investigations conducted and outcomes generated by the Competition Tribunal over the years.

I will expose a gap that might be filled by traits identified from Canadian Competition law and their prosecution of cartel behaviour. I will also consider the present literature which seeks to expose the challenges which cartels have presented to South African competition law. Finally, I will move on to a comparative analysis considering in particular how Canada has dealt with cartels.

**CHAPTER 1: A CARTEL OFFENCE IN SOUTH AFRICAN LAW. 7**

---

|   |          |
|---|----------|
| <b>1.1 BACKGROUND</b>   | <b>7</b> |
| <b>1.2 RESEARCH STATEMENT AND OBJECTIVES</b>                              |          |
| <b>1.3 RESEARCH METHODOLOGY AND SELECTION OF COMPARATIVE JURISDICTION</b> | <b>8</b> |
| <b>1.4 LAY-OUT OF THE RESEARCH</b>  | <b>9</b> |

**CHAPTER 2: THE CORPORATE LENIENCY POLICY 10**

---

|  |           |
|--|-----------|
| <b>2.1 INTRODUCTION</b>                                      | <b>10</b> |
| <b>2.2 THE CLP</b>   |           |
| <b>2.2.1 THE NATURE OF THE CLP</b>                           |           |
| 2.2.2 THE SCOPE OF APPLICATION OF THE CLP                    |           |
| 2.2.3 Circumstances when the CLP DOES NOT APPLY              |           |
| 2.2.4 HYPOTHETICAL ENQUIRIES                                 |           |
| 2.2.5 FORMS OF IMMUNITY                                      |           |
| 2.2.6 FAILURE TO OBTAIN IMMUNITY                             |           |
| 2.2.7 REQUIREMENTS AND CONDITIONS FOR IMMUNITY UNDER THE CLP |           |
| 2.2.8 THE CLP-PROCESS  |           |
| 2.2.9 FIRST CONTACT WITH THE COMMISSION                      |           |
| 2.2.10 MEETINGS AND INVESTIGATION                            |           |
| 2.2.11 APPLYING FOR A MARKER                                 |           |
| 2.2.12 REVOCATION OF IMMUNITY                                |           |
| 2.2.13 THE EFFECT OF AN UNSUCCESSFUL LENIENCY APPLICATION    |           |
| <b>2.53 FINAL REMARKS</b>                                    |           |

**CHAPTER 3: THE CARTEL OFFENCE**

---

|   |  |
|---|--|
| <b>3.1 INTRODUCTION</b>   |  |
| <b>3.2 CHALLENGES POSED BY THE CARTEL OFFENCE</b>               |  |
| 3.2.1 CHALLENGES IDENTIFIED BY KELLY                            |  |
| <b>3.2.2 CHALLENGES IDENTIFIED BY LOPES, SETH AND GAUNTLETT</b> |  |
| 3.2.3 CHALLENGES IDENTIFIED BY JORDAAN AND MUNYAI               |  |
| 3.3 FINAL REMARKS   |  |

**CHAPTER 4: THE CARTEL OFFENCE IN CANADA** **31**

---

**4.1 INTRODUCTION**

**4.2 THE CANADIAN CARTEL OFFENCE** **32**

**4.3 THE CANADIAN LENIENCY PROGRAMME** **34**

**4.5 FINAL REMARKS** **38**

**CHAPTER 5: CONCLUSION AND RECOMMENDATIONS** **39**

---

**BIBLIOGRAPHY**

---

**BOOKS** **41**

**JOURNAL ARTICLES AND REPORTS** **41**

**LIST OF CASES** **42**

**LEGISLATION** **42**

**WEBSITES** **42**

**DISSERTATION/THESIS** **43**

## Chapter 1

## Introduction

### 1.1 Background

The Competition Act 89 of 1998 provides the statutory framework for competition law in South Africa. Section 2 of the Competition Act outlines the purpose of the Act as follows:

‘The purpose of this Act is to promote and maintain competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.’<sup>1</sup>

Given the aforesaid purposes the Competition Act inter alia contains various prohibitions against restrictive horizontal practices (section 4), restrictive vertical practices (section 5) and abuse of dominance (section 8 and 9). Cartels in particular, are widely regarded as the most egregious of competition law contraventions. The Competition Act 89 of 1998 consequently also prohibits cartels under its provisions pertaining to restricted horizontal practices set out in section 4. The Act does not define the concept ‘cartel’ but the provisions of section 4 gives a clear indication of the type of conduct that would qualify as cartel conduct. A ‘cartel’ generally refers to an association of firms who are competitors of each other and who engage in collusive behaviour on a horizontal level.<sup>2</sup>

In particular section 4 provides that: “An agreement between, or concerted practices by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

- (a) it has the effect of substantially preventing, or lessening, competition in a market.  
Unless party to the agreement concerted practice, or decision can prove that any

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<sup>1</sup> Section 2, The Competition Act 89 of 1998.

<sup>2</sup> Monee SL & Afrika SL ‘Prison Beckons directors involved in cartels’ (2008) 16 *Juta Business Law* 13 and 14.

technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or

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

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.”

## **1.2 Research Statement and Objectives**

Over the years the South African Competition Commission, as institution responsible for the primary enforcement of the Act, has used various provisions in the Competition Act<sup>3</sup> together with the highly effective Corporate Leniency Policy (which encourages cartel members to self-report cartel activities to the Commission),<sup>4</sup> as measures in the war against cartels. The war against cartels further intensified in 2016 when the provisions of the 2009 Competition Amendment Act<sup>5</sup> introducing a cartel offence into South African law, came into operation.

The introduction of a cartel offence into South African competition law has however met with substantial criticism and has been said to have the ability to erode the effectiveness of the Corporate Leniency Policy as a tool in combatting cartels. This dissertation will therefore consider what the CLP entails, what the new cartel offence entails and whether there is cause for concern about the South African cartel offence.

## **1.3 Research methodology and selection of comparative jurisdiction**

The research approach in this dissertation will be that of a critical comparative analysis based on policy documents, legislation, text books, journal articles and case law.

From a comparative perspective the influence of other jurisdictions like Canada, Australia and other European countries has impacted the development of the Competition Act, its application in practice and the manner in which its provisions have been interpreted.<sup>6</sup> Accordingly it will be instructive to consider the cartel offence as introduced in Canadian competition law to

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<sup>3</sup> The Competition Act came into effect on the 30 November 1998, and some remaining provisions coming into on 1 September 1999.

<sup>4</sup> The 2004 Corporate Leniency Policy.

<sup>5</sup> Section 73 A of the Competition Amendment Act of 2009.

<sup>6</sup> Neuhoff *et al A Practical Guide to the South African Competition Act* (2017) 7 (hereinafter Neuhoff).



benchmark the South African cartel offence and ponder upon solutions to challenges posed by the South African cartel offence in its current iteration.

#### **1.4 Lay-out of the Research**

Chapter One is the roadmap to the study, it sets out the background to the topic, the research question and objectives, research methodology, selection of comparative jurisdiction and chapter lay-out. Chapter Two provides an overview of the Corporate Leniency Policy as a critical tool in the war against cartels. Chapter Three provides an overview and discussion of the new cartel offence in section 73A and the criticism levelled against this provision. Chapter 4 provides a brief comparative overview of cartel enforcement in Canada and Chapter 5 concludes the study and makes certain recommendations for the way forward.

## Chapter 2: The Corporate Leniency Policy

### 2.1 Introduction

As observed by Letsike, it must be borne in mind that the nature of cartels, given their destructive attributes, reveals a sophisticated form of theft and deception, which ultimately and always has a negative effect on the general economy.<sup>7</sup> The person to suffer most from exploitative behaviour in the form of cartel behaviour is however the consumer, whose welfare is not taken into account since the purpose of a cartel is to increase prices to its advantage so as to increase its profits, which behaviour is detrimental to both general and productive efficiency.<sup>8</sup>

Simply put, cartel behaviour entails rivalry among firms with regards to profit margins and outputs which trigger unbalanced competition and ultimately raises prices that the consumer must pay. There can never be balanced competition when consumers are not given a choice regarding prices for goods and services sold to the public. Therefore the egregious nature of a cartel lies in denying the consumer a wide array of options and better prices and as such it inflicts harm on consumers, especially if the cartel activity relates to matters such as fixing of prices of items for general daily consumption such as bread and milk.<sup>9</sup> In South Africa, the fixing of prices by cartelists accordingly affect the household needs of poor South Africans particularly harshly.<sup>10</sup>

It is for this reason that many believe that the criminalization of cartels will bring to book many offenders and that once cartel conduct is criminalised firms will generally recuse themselves from such acts. The fundamental challenge with cartel behaviour is that it is secretive hence the gathering of evidence is one of the greatest weapons in the state armoury in the war against cartels.<sup>11</sup>

However it should be noted that, although South Africa did not have a particular cartel offence before the introduction of section 73A by the 2009 Competition Amendment

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<sup>7</sup> Letsike T 'The criminalising of cartels – How effective will the new section 73A of the Competition Amendment Act be?' (2013) Seventh Annual Competition Commission, Competition tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa 5.

<sup>8</sup> Luke Kelly 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 322.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Mncube L 'On Market Power and Cartel Detection: The South African Flour Cartel' (2013) *Studies in Economic and Econometrics*, Volume 37 55.

Act, the South African Competition Authorities nevertheless had some tools at its disposal that it could utilise in the war against cartels. Apart from the provisions in the Competition Act that is aimed at prohibiting cartels and enabling cartel enforcement, the Competition Commission has since 2004, adopted a successful Corporate Leniency Policy to aid the detection of cartels.

## 2.2 The Corporate Leniency Policy

The South African Corporate Leniency Policy (CLP) was prepared and issued by the Competition Commission in line with leniency policies in other jurisdictions, including the EU, Canada, Australia, the United Kingdom (UK) and the US.<sup>12</sup> The CLP was however not merely a cut-and paste exercise but was designed to be consistent with the legal and regulatory framework that exists in South Africa.<sup>13</sup> The 2004 CLP was revised and amended in 2008 to amplify its efficiency and to augment it with features that were already existent in other international leniency programmes.<sup>14</sup>

The Policy was initially purely aimed at providing guidance and was explicitly stated not to be binding on the Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretions and duties, or in their interpretation of the Act.<sup>15</sup> However the CLP was recently codified under section 49E of the 2018 Competition Act<sup>16</sup>.

### 2.2.1 Nature of the CLP

The CLP applies to cartel conduct as set out in section 4(1)(b) of the Competition Act which, as indicated, covers the per se prohibitions against price fixing, market division and collusive tendering.<sup>17</sup> In essence the CLP provides a process through which a cartel member that self-reports on its cartel involvement, will be granted immunity by the Commission for participation in cartel activity subject to fulfilling specific requirements and conditions set out under the CLP.<sup>18</sup>

Notably an applicant is not *automatically* granted immunity upon confessing to membership of a cartel, but immunity is subject to certain conditions and requirements

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<sup>12</sup> Par 16.1 of the 2008 CLP.

<sup>13</sup> Par 16.3 of the 2008 CLP.

<sup>14</sup> Lavoie at 143, These amendments to the CLP became effective on 23 May 2008.

<sup>15</sup> Par 1.2 of the 2004 CLP..

<sup>16</sup> Competition Amendment Act 18 of 2018.

<sup>17</sup> Par 4.1 to 4.3 of the 2008 CLP.

<sup>18</sup> Par 3.1 of the 2008 CLP.

being met.<sup>19</sup> It is specifically stated that immunity in the context of the CLP means that the Commission will not subject the successful applicant<sup>20</sup> to adjudication<sup>21</sup> before the Tribunal for its involvement in the specific cartel activity which it has reported under the CLP. The Commission will also not propose to have any administrative fines levied on such an applicant. This means that a firm involved, implicated or suspecting that it is involved in cartel activity would be able to voluntarily come forward and confess to the Commission in return for immunity.<sup>22</sup>

Since its amendment in 2008 the CLP allows for immunity to be extended even to the ringleader of a cartel if such ringleader is “first to the door” to self-report.<sup>23</sup>

### **2.2.2 Scope of Application of the CLP**

It is however important to bear in mind that even where a firm makes a successful application for immunity in respect of cartel activity, if the firm has engaged in related conduct which may otherwise infringe the Competition Act, the firm cannot obtain immunity in respect of such infringements.<sup>24</sup>

Accordingly, the Commission can refer a complaint against the applicant to the Competition Tribunal in respect of alleged non-cartel infringements or in respect of other cartel infringements that the applicant has not reported to the Commission under the CLP.<sup>25</sup> An applicant for immunity that faces potentially related, non-cartel liability might thus encounter the problem that it is obliged to provide the Commission with its full cooperation in prosecuting the cartel complaint at the same time as it attempts to defend itself against a prosecution by the Commission.<sup>26</sup>

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<sup>19</sup> Par 5.3 of the 2008 CLP.

<sup>20</sup> According to footnote 3 of the 2008 CLP, ‘successful applicant’ means a firm that meets all the conditions and requirements under the CLP.

<sup>21</sup> According to footnote 4 of the CLP, ‘adjudication’ means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view of getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.

<sup>22</sup> Par 3.5 of the 2008 CLP.

<sup>23</sup> Par 3.9 of the 2008 CLP. It is expressly stated that immunity is not based on the fact that the applicant is viewed as less involved than other members, but rather on the fact that the applicant is the first to approach the Commission with information and evidence.

<sup>24</sup> Sutherland and Kemp *Competition Law in South Africa* 5-82.

<sup>25</sup> *Ibid.* Thus if for instance a firm confesses to prohibited practices which fall outside the scope of s 4(1)(b) of the Competition Act, such as resale price maintenance, the Commission will be able to prosecute the applicant for such conduct as it falls outside the scope of cartel conduct for which immunity can be obtained in terms of the CLP.

<sup>26</sup> Sutherland and Kemp 5-83.

A firm<sup>27</sup> may apply for immunity for separate and various cartel activities.<sup>28</sup> The policy, however, does not provide for 'blanket immunity'.<sup>29</sup> This means that in respect of every contravention a separate leniency application will have to be brought that will need to meet the requirements of the CLP individually.<sup>30</sup>

Notably the CLP is aimed at cartel activities which the Commission is not yet aware of; or which the Commission is aware of but in relation to which it has insufficient information, and has not yet initiated an investigation. It may also be applied where pending investigations have already been initiated by the Commission but, having assessed the matter, the Commission's opinion is it has insufficient evidence to prosecute the firms involved.<sup>31</sup> The CLP permits only one firm to qualify for immunity (in respect of each individual cartel transgression) therefore members are encouraged to "race" to the Commission to apply for immunity.<sup>32</sup> The Commission will however only hear an application if the person applying for immunity on behalf of the firm has the necessary representative authority.<sup>33</sup>

Although the CLP does not provide for the granting of immunity or degrees of immunity to other cartel members that apply, but who are not 'first to the door', it does not mean that the Commission may not treat other cooperating firms more leniently than would otherwise be the case. In terms of the CLP the Commission may explore other processes outside of the CLP and could eventually consider the reduction of a fine, a settlement agreement or a consent order.<sup>34</sup> In the event that the matter is referred for adjudication by the Tribunal, the Commission has the discretion, should it decide to do

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<sup>27</sup> A firm includes a person, partnership or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person to the extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership. See par 5.7 of the 2008 CLP.

<sup>28</sup> Par 5.4 of the 2008 CLP.

<sup>29</sup> Kyriacou Comparative Analysis of the Corporate Leniency Policy of the South African Competition Commission (LLM Dissertation, University of Pretoria, 2014)

<sup>30</sup> *Ibid.* For example, if an applicant has committed three distinct contraventions but then subsequently applies for and is granted immunity in respect of only one contravention out of the three then such immunity does not also extend to the other two contraventions. The only exception would be in respect of seemingly distinct contraventions that cannot be severed from each other, and which may accordingly be considered as one contravention.

<sup>31</sup> Par 5.5 of the 2008 CLP.

<sup>32</sup> Moodaliyar K "Are cartels skating on thin ice?" 2013 *South African Law Journal* 160.

<sup>33</sup> Par 5.7 of the 2008 CLP. The CLP specifically indicates that reporting of cartel activity by individual employees of a firm or by a person not authorised to act for such firm will only amount to whistle blowing and not to an application for immunity under the CLP. The Commission however encourages whistle blowing as it would also assist the Commission in detecting anticompetitive behaviour.

<sup>34</sup> Par 5.6 of the 2008 CLP.

so, of asking the Tribunal for favourable treatment<sup>35</sup> of those applicants who were not the first-to-the-door to apply for immunity pursuant to the CLP.<sup>36</sup>

Unfortunately immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel.<sup>37</sup> This means that the immunity provided by the CLP applies only to administrative fines. Therefore a victim of cartel conduct would still be able to institute a follow-on damages claim in a civil court for damages inflicted as a result of cartel conduct of a firm that was granted immunity under the CLP.<sup>38</sup>

Information submitted during the course of a leniency applications is kept confidential and the CLP accordingly states that such information will be dealt with on a confidential basis.<sup>39</sup>

### **2.2.3 Circumstances when the CLP does not apply**

In certain instances the CLP will not apply and cartel members cannot obtain immunity, namely:

- (a) Where the cartel conduct, in respect of which immunity is sought, falls outside the scope of the Competition Act;<sup>40</sup>
- (b) Where another firm has already made a successful application for immunity under the CLP in respect of the same conduct;<sup>41</sup> or
- (c) Where the applicant fails to meet any other requirement and condition that the CLP stipulates.<sup>42</sup>

### **2.2.4 Hypothetical enquiries**

Where a firm is unsure whether or not the CLP would apply to particular conduct, it may approach the Commission on a hypothetical basis to get clarity.<sup>43</sup> It can do so

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<sup>35</sup> 'Favourable treatment' implies substantial or minimum reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given. See footnote 5 of the 2008 CLP.

<sup>36</sup> Par 5.6 of the 2008 CLP.

<sup>37</sup> Par 5.9 of the 2008 CLP.

<sup>38</sup> For more on damages actions see s65 of the Competition Act 89 of 1998.

<sup>39</sup> Par 6.2 of the 2008 CLP.

<sup>40</sup> Par 7.1.1 of the 2008 CLP.

<sup>41</sup> Par 7.1.2 of the 2008 CLP.

<sup>42</sup> Par 7.1.3 of the 2008 CLP.

<sup>43</sup> Par 8.1 of the 2008 CLP.

telephonically or in writing and the firm may choose to remain anonymous if it wants to. The information provided in relation to a hypothetical enquiry will be kept confidential.<sup>44</sup> However such clarification does not bind the Commission, the Competition Tribunal or the Competition Appeal Court ('CAC') but serves merely as a guide, meaning that these entities may eventually decide otherwise about the issue in respect of which the clarification was given.<sup>45</sup>

### **2.2.5 Forms of Immunity**

Initially after the applicant has applied for leniency and subject to meeting the necessary requirements, the Commission will grant conditional (provisional) immunity to create an atmosphere of trust between it and the applicant pending the finalisation of the infringement proceedings,<sup>46</sup> in writing.<sup>47</sup>

Total immunity is granted only after the Commission has completed its investigation into the alleged cartel and referred the matter to the Tribunal, and once a final determination has been made by the Tribunal or the Competition Appeal Court. This is subject thereto that the applicant meets the conditions and requirements as set out in the CLP on a continuous basis.<sup>48</sup> The CLP further explicitly states that at any point in time, until total immunity is granted, the Commission reserves the right to revoke the conditional immunity should the applicant fail to co-operate or fail to fulfil any other condition or requirement set out in the CLP.<sup>49</sup> Total immunity is therefore granted only to a successful applicant who has fully met all the conditions and requirements under the CLP.<sup>50</sup> Such total immunity cannot be revoked.<sup>51</sup>

### **2.2.6 Failure to obtain immunity**

No immunity is granted where the applicant fails to meet the conditions and requirements set by the CLP.<sup>52</sup> In such event the Commission is at liberty to deal with the applicant as provided for in the Competition Act.<sup>53</sup> It may either decide to prosecute the unsuccessful applicant for the cartel conduct or it may consider a settlement

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<sup>44</sup> Par 8.2 of the 2008 CLP.

<sup>45</sup> Par 8.3 of the 2008 CLP.

<sup>46</sup> Par 9.1.1.1 of the 2008 CLP..

<sup>47</sup> *Ibid.*

<sup>48</sup> Par 9.1.1.2 of the 2008 CLP.

<sup>49</sup> Par 9.1.1.3 of the 2008 CLP.

<sup>50</sup> Par 9.1.2.1 of the 2008 CLP.

<sup>51</sup> *Ibid.*

<sup>52</sup> Par 9.1.3.1 of the 2008 CLP.

<sup>53</sup> Par 9.1.3.2 of the 2008 CLP.

agreement or a consent order, or where a matter is referred to the Tribunal, ask for a reduction of the fine in respect of the unsuccessful applicant.<sup>54</sup>

### **2.2.7 Requirements and Conditions for Immunity under the CLP**

In order to qualify for immunity under the CLP the leniency applicant must comply with the following conditions and requirements:

- a) The applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;<sup>55</sup>
- b) The applicant must be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission to institute proceedings in relation to a cartel activity;<sup>56</sup>
- c) The applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be offered continuously until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the CAC are completed;<sup>57</sup>
- d) The applicant must immediately stop the cartel activity or act as directed by the Commission;<sup>58</sup>
- e) The applicant must not alert other cartel members or any other third party to the fact that it has applied for immunity;<sup>59</sup>
- f) The applicant must not destroy, falsify or conceal information, evidence or documents relevant to any cartel activity;<sup>60</sup> and
- g) The applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly in any other way.<sup>61</sup>

### **2.2.8 The CLP-Process**

The CLP-process is aimed at ensuring efficient facilitation of the CLP in terms of transparency and predictability. The Commission however has the discretion to

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<sup>54</sup> *Ibid.* An applicant that does not meet all the requirements but who wants to be considered for some form of favourable treatment may thus also approach the Commission in terms of par 9.1.3.3 .

<sup>55</sup> Par 10.1(a) of the 2008 CLP.

<sup>56</sup> Par 10.1(b) of the 2008 CLP.

<sup>57</sup> Par 10.1(c) of the 2008 CLP.

<sup>58</sup> Par 10.1(d) of the 2008 CLP.

<sup>59</sup> Par 10.1(e) of the 2008 CLP.

<sup>60</sup> Par 10.1(f) of the 2008 CLP.

<sup>61</sup> Par 10.1(g) of the 2008 CLP.



exercise some flexibility where necessary to achieve the desired outcome.<sup>62</sup> The CLP process is as follows:

### **2.2.9 First Contact with the Commission**

The applicant must apply for immunity in writing to the Manager of the Enforcement and Exemptions Division of the Commission.<sup>63</sup> The Commission will then determine whether or not the applicant is 'first to the door' with regard to particular cartel activity.<sup>64</sup> The application must contain information substantial enough to enable the Commission to identify the relevant cartel conduct and the cartel participants in order to establish whether or not an application for immunity has been made in respect of the same conduct. At this stage it is not required of the applicant to disclose its identity.<sup>65</sup>

The Commission must advise the applicant in writing or by telephone within five (5) days, or within a reasonable period, after receipt of the application, whether or not the applicant qualifies as being the 'first to the door'.<sup>66</sup> The applicant must thereafter within five (5) days, or within a reasonable period, after receipt of such advice from the Commission, make an arrangement for the first meeting with the Commission.<sup>67</sup>

### **2.2.10 Meetings and investigation**

The Commission has a first meeting with the applicant for purposes of ascertaining whether the applicant's case would qualify for immunity under the CLP.<sup>68</sup> The applicant must bring all relevant information, evidence and documents at its disposal (written or oral) relating to the activity due for consideration by the Commission.<sup>69</sup> The applicant must also reveal its full identity and answer all the questions by the Commission in relation to the conduct being reported or ancillary matters. At this stage, while the Commission evaluates the evidence it will have possession of documents but will not yet be allowed to make copies.<sup>70</sup>

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<sup>62</sup> Par 11.1 of the 2008 CLP.

<sup>63</sup> Par 11.1.1.1 of the 2008 CLP document. This may be done by facsimile, electronic mail or hand delivery.

<sup>64</sup> Sutherland and Kemp 5-82.

<sup>65</sup> *Ibid.*

<sup>66</sup> Par 11.1.1.2 and 11.1.1.3 of the 2008 CLP.

<sup>67</sup> *Ibid.*

<sup>68</sup> Par 11.1.2.2 of the 2008 CLP.

<sup>69</sup> Par 11.1.2.1 of the 2008 CLP.

<sup>70</sup> Par 11.1.2.2 of the 2008 CLP.

The Commission must within five (5) days, or within a reasonable time, after the date of the first meeting decide whether or not the applicant's case qualifies for immunity and inform the applicant accordingly in writing.<sup>71</sup> If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, then it will arrange for a second meeting with the applicant.<sup>72</sup> If however the Commission decides that the applicant does not meet the conditions and requirements of the CLP, it must advise the applicant that it will not grant immunity.<sup>73</sup>

The purpose of the second meeting is to discuss and grant conditional immunity to the applicant pending finalisation of any further investigations by the Commission into the matter and final determination by the Tribunal or the CAC.<sup>74</sup> At this stage the applicant will be asked to produce any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral.<sup>75</sup>

All information, evidence and documents will however be kept confidential except insofar as it is used in proceedings before the Tribunal in terms of the Competition Act.<sup>76</sup> Conditional immunity will be granted by means of a written conditional immunity agreement concluded between the applicant and the Commission.<sup>77</sup>

After the granting of conditional immunity, the Commission will continue with its investigations.<sup>78</sup> During such investigations the information or documents given by the applicant will be analysed and verified against any existing or discovered information and/or documents.<sup>79</sup> After finalisation of the investigation and if the Commission is satisfied that it has sufficient information to institute proceedings, it will inform the applicant in a final meeting.<sup>80</sup> If the Commission is not satisfied it can call a meeting

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<sup>71</sup> *Ibid.*

<sup>72</sup> Par 11.1.2.3 of the 2008 CLP.

<sup>73</sup> Par 11.1.2.4 of the 2008 CLP.

<sup>74</sup> Par 11.1.3.1 of the 2008 CLP.

<sup>75</sup> *Ibid.*

<sup>76</sup> Par 11.1.3.3 of the 2008 CLP.

<sup>77</sup> Par 11.1.3.2 of the 2008 CLP.

<sup>78</sup> Par 11.1.4.1 of the 2008 CLP.

<sup>79</sup> *Ibid.*

<sup>80</sup> Par 11.1.4.2 of the 2008 CLP.

with the applicant either to revoke the conditional immunity or to solicit further documents or information so as to enable it to complete the investigation.<sup>81</sup>

The purpose of the final meeting between the Commission and the applicant is to inform the applicant that the Commission intends to institute proceedings against the alleged cartel and request the applicant to continue to cooperate fully and expeditiously in the proceedings.<sup>82</sup> Conditional immunity will continue to apply until the Tribunal or the CAC has reached a final decision regarding the matter.<sup>83</sup> However if the applicant wishes to withdraw its application at this stage, it runs the risk of being dealt with in terms of the Competition Act.<sup>84</sup>

### **2.2.11 Applying for a Marker**

Sometimes it happens that a firm wishes to apply for leniency but, for example, it does not yet have all the evidence that would support such an application. The CLP caters for this eventuality by providing for a marker procedure. The marker procedure entails a prospective applicant choosing to apply to the Commission for a marker in order to protect its place in the queue for immunity.

The marker application must identify that it is being made to request a marker, must provide details of the applicant's name and address, the alleged cartel conduct and its participants and justify the need for a marker.<sup>85</sup> The Commission may grant a marker at its discretion and on a case-by-case basis.<sup>86</sup> The Commission will further determine the time period within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in par 10 of the CLP.<sup>87</sup> Such time period is determined on a case-by-case basis. If the applicant subsequently submits an application for immunity along with the necessary information, evidence and documents, within the time limit determined by the Commission, this will then be deemed to have been provided on the date when the marker application was granted by the Commission.<sup>88</sup> The marker procedure thus preserves the applicant's 'first at the door' status.

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<sup>81</sup> *Ibid.*

<sup>82</sup> Par 11.1.5.1 of the 2008 CLP. .

<sup>83</sup> *Ibid.*

<sup>84</sup> Par 11.1.5.2 of the 2008 CLP.

<sup>85</sup> *Ibid.*

<sup>86</sup> Par 12.2 of the 2008 CLP.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

### **2.2.12 Revocation of Immunity**

The Commission can revoke conditional immunity at any time<sup>89</sup> if the applicant fails to meet the conditions and requirements of the CLP, including in the event of lack of cooperation by the applicant, provision of false<sup>90</sup> or insufficient information, misrepresentation of facts and dishonesty. The revocation of conditional immunity means that the applicant will be treated in the same way as a firm that did not receive immunity. The Commission is then at liberty to decide to pursue the matter in terms of the relevant provisions of the Competition Act.<sup>91</sup>

### **2.2.13 The Effect of an Unsuccessful Leniency Application**

If the applicant fails to meet the conditions and requirements set out in the CLP, including lack of cooperation, dishonesty, providing insufficient evidence or false information, the leniency application will fail. The effect thereof inter alia be:<sup>92</sup>

- a) The Commission would be at liberty to investigate the matter and refer it for adjudication in terms of the provisions of the Competition Act;
- b) The Commission may, depending on the matter, ask for a lenient sanction when referring a matter to the Tribunal in respect of a firm whose application has been unsuccessful;
- c) The Commission and/or the unsuccessful applicant may initiate negotiations for a settlement agreement or a consent order, which may also result in reduction of a fine imposed in terms of the Competition Act.

## **2.3 Final remarks**

The CLP has over the past couple of years since it was put into operation served as the most effective tool in the war against cartels and gave rise to various raids, cartel investigations and settlements. In general the Competition Commission has made significant progress in its enforcement against cartels as appears from the table below that shows such enforcement activity for the period 2015 to 2017:<sup>93</sup>

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<sup>89</sup> Par 13.1 and 13.2 of the 2008 CLP.

<sup>90</sup> The applicant may also incur criminal liability for providing false information, see par 13.4 of the 2008 CLP document.

<sup>91</sup> Par 13.5 of the 2008 CLP.

<sup>92</sup> Par 14.1 of the 2008 CLP.

<sup>93</sup> Available at <https://www.compcom.gov.za> (accessed on 28 November 2019)



**Table 1: Cartels assessed in South Africa with possible regional dimensions, 2015-2017**

| Industry                       | Firms involved in SA cartel     | Possible countries affected | Raid/referral/settlement | Year |
|--------------------------------|---------------------------------|-----------------------------|--------------------------|------|
| Wet peels and citrus peel pulp | Beefcor (Pty) Ltd               | Botswana, Mozambique        | referral                 | 2017 |
|                                | Cape Fruit Processors (Pty) Ltd |                             | referral                 | 2017 |
| Bricks                         | Corobrik                        | Africa                      | referral                 | 2017 |
|                                | Era Bricks (Pty) Ltd            |                             | referral                 | 2017 |
|                                | Eston Brick and Tile (Pty) Ltd  |                             | referral                 | 2017 |
|                                | De Hoop Brickfields (Pty) Ltd   |                             | referral                 | 2017 |
|                                | Clay Industry CC                |                             | referral                 | 2017 |
|                                | Kopano Brickworks Ltd           |                             | referral                 | 2017 |



| Industry                      | Firms involved in SA cartel                 | Possible countries affected            | Raid/referral/settlement | Year |
|-------------------------------|---|--|--------------------------|------|
| Fire Protection Services      | Afrion Property Services CC                 | Africa                                 | settlement               | 2017 |
|                               | Belfa Fire (Pty) Ltd                        |  | referral                 | 2017 |
|                               | Cross Fire Management (Pty) Ltd             |  | referral                 | 2017 |
|                               | Fireco Gauteng (Pty) Ltd                    |  | settlement               | 2017 |
|                               | Fireco (Pty) Ltd                            |  | referral                 | 2017 |
|                               | Fire Protection Systems (Pty) Ltd           |  | referral                 | 2017 |
|                               | Tshwane Fire Sprinklers CC                  |  | referral                 | 2017 |
|                               | ANS Fire Protection Services CC             |  | raid                     | 2017 |
|                               | Arksun Fire Equipment CC                    |  | raid                     | 2017 |
|                               | BH Fire Protection Services CC              |  | raid                     | 2017 |
|                               | Belfa Coastal Cape                          |  | raid                     | 2017 |
|                               | Belfa Coastal Natal                         |  | raid                     | 2017 |
|                               | Bhubesi Fire Projects (Pty) Ltd             |  | raid                     | 2017 |
|                               | Chubb Fire and Security (Pty) Ltd           |  | raid                     | 2017 |
|                               | Country Contracts CC                        |  | raid                     | 2017 |
|                               | Eagle Fire Control CC                       |  | raid                     | 2017 |
|                               | Fire and General CC                         |  | raid                     | 2017 |
|                               | Fire Check CC                               |  | raid                     | 2017 |
|                               | Fire Control Systems KwaZulu-Natal CC       |  | raid                     | 2017 |
|                               | Fire Design CC                              |  | raid                     | 2017 |
|                               | Fire Sprinkler Installations CC             |  | raid                     | 2017 |
|                               | FireCo (Pty) Ltd (FireCo Cape)              |  | raid                     | 2017 |
|                               | FireCo (Pty) Ltd (FireCo KZN)               |  | raid                     | 2017 |
|                               | Jasco Fire Solutions (Pty) Ltd (Jasco Cape) |  | raid                     | 2017 |
|                               | OVG Fire Management (Pty) Ltd (OVG Cape)    |  | raid                     | 2017 |
|                               | QD Fire Cape CC                             |  | raid                     | 2017 |
| Specifire (Pty) Ltd           | raid  | 2017                                   |                          |      |
| Whip Fire Projects (Pty) Ltd  | raid  | 2017                                   |                          |      |
| Ramsin Industrial Supplies CC | raid  | 2017                                   |                          |      |
| Chemicals                     | Investchem (Pty) Ltd                        | Africa (incl. Botswana, Zimbabwe, etc) | settlement               | 2017 |
|                               | Akulu Marchon (Pty) Ltd                     |  | settlement               | 2017 |
| Meat                          | Karan Beef (Pty) Ltd                        | Africa                                 | raid                     | 2017 |
|                               | Sparta Foods (Pty) Ltd                      |  | raid                     | 2017 |
|                               | Chalmar Beef (Pty) Ltd                      |  | raid                     | 2017 |
|                               | Beefmaster Kimberley (Pty) Ltd              |  | raid                     | 2017 |
|                               | Morgan Beef (Pty) Ltd                       |  | raid                     | 2017 |
|                               | Beefcor (Pty) Ltd                           |  | raid                     | 2017 |
|                               | Midland Meat (Fabvleis)                     |  | raid                     | 2017 |



| Industry           | Firms involved in SA cartel                       | Possible countries affected                          | Raid/referral/settlement | Year |
|--------------------|---|--|--------------------------|------|
| Edible oils1       | Wilmar Continental Edible Oils and Fats (Pty) Ltd | Mozambique, Zimbabwe, Malawi, Zambia, BLNS countries | raid                     | 2016 |
|                    | Willowton Oil and Cake Mills                      |  | raid                     | 2016 |
|                    | FR Waring Holdings (Pty) Ltd                      |  | raid                     | 2016 |
|                    | Africa Sun Oil Refineries (Pty) Ltd               |  | raid                     | 2016 |
|                    | Epic Foods (Pty) Ltd                              |  | raid                     | 2016 |
| Edible oils2       | Unilever  | Africa   | referral                 | 2017 |
|                    | Sime Darby Hudson Knight (Pty) Ltd                |  | settlement               | 2016 |
| Cargo freight      | Hamburg Sud South Africa (Pty) Ltd                | Southern Africa                                      | raid                     | 2016 |
|                    | Maersk South Africa (Pty) Ltd                     |  | raid                     | 2016 |
|                    | Safmarine (Pty) Ltd                               |  | raid                     | 2016 |
|                    | Mediterranean Shipping Company (Pty) Ltd          |  | raid                     | 2016 |
|                    | Pacific International Line South Africa (Pty) Ltd |  | raid                     | 2016 |
|                    | CMA CGM Shipping Agencies South Africa (Pty) Ltd  |  | raid                     | 2016 |
| Rail maintenance   | Plasser Railway Company                           | Southern Africa                                      | referral                 | 2016 |
|                    | Railway Mechanised Maintenance Company            |  | referral                 | 2016 |
|                    | Lennings DEC Rail Services                        |  | referral                 | 2016 |
| Gear pumps         | Hudaco Trading                                    | Southern Africa, Botswana, Zambia, Zimbabwe          | referral                 | 2016 |
|                    | Fermel  |  | referral                 | 2016 |
| Security services  | Raite Security Services and Consulting            | Africa   | settlement               | 2016 |
|                    | Today's Destiny Trading and Projects              |  | settlement               | 2016 |
| Packaging paper    | Mpact Limited                                     | Sub-Saharan Africa                                   | raid                     | 2016 |
|                    | New Era Packaging (Pty) Ltd                       |  | raid                     | 2016 |
| Telecoms equipment | ZTE SA  | Angola   | referral                 | 2016 |
|                    | ZTE Mzanzi  |  | referral                 | 2016 |

| Industry  | Firms involved in SA cartel                                   | Possible countries affected   | Raid/referral/settlement | Year |
|---|---|---|--------------------------|------|
| Wooden products                                 | PG Bison  | Zimbabwe, Zambia, Malawi, Tanzania, Mozambique, Kenya, Uganda, Angola, DRC, BLSN countries                          | raid                     | 2016 |
|   | Sonae Novobord  |   | raid                     | 2016 |
| Glass fitment and repair services               | PG Glass  | Angola, Malawi, DRC, Zambia, BLSN countries   | raid                     | 2016 |
|   | Glassfit  |   | raid                     | 2016 |
| Liquefied Petroleum Gas (LPG) and gas cylinders | African Oxygen Limited  | Angola, Kenya, Malawi, Mozambique, Nigeria, Seychelles, Zambia, Zimbabwe, Tanzania, Uganda, Senegal, BLSN countries | raid                     | 2015 |
|   | Oryx Oil South Africa (Pty) Ltd                               |   | raid                     | 2015 |
|   | EasiGas (Pty) Ltd   |   | raid                     | 2015 |
|   | Liquefied Petroleum Gas Safety Association of Southern Africa |   | raid                     | 2015 |
|   | KayaGas (Pty) Ltd   |   | raid                     | 2015 |
|   | Totalgaz Southern Africa (Pty) Ltd                            |   | raid                     | 2015 |
| Plastic pipes                                   | DPI Plastics  | Sub-Saharan Africa  | referral                 | 2015 |
|   | Ubuntu Plastics (Pty) Ltd                                     |   | referral                 | 2015 |
|   | Sangio Pipes (Pty) Ltd  |   | referral                 | 2015 |
|   | Dawn Consolidated Holdings (Pty) Ltd                          |   | referral                 | 2015 |

94

The above list in particular suggests that there have been active on-going investigations by the South African competition authorities and that an active war has been waged against cartels employing the self-reporting device created by the CLP. In fact without the self-reporting incentivised by the CLP many of these cartels would have gone undetected by the Competition Authorities thus emphasising the importance of the CLP in the war against cartels.

<sup>94</sup> Bosiu T 'Cartels Investigated in South Africa: Possible Impact in the Region' URL: [https://www.competition.org.za/review/2017/12/20/cartels-investigated-in-south Africa-possible impact in the region](https://www.competition.org.za/review/2017/12/20/cartels-investigated-in-south-Africa-possible-impact-in-the-region) last accessed 24 March 2019.



## Chapter Three                      The Cartel Offence

### 3.1 Introduction

Section 73A sets out the South African cartel offence. It provides for directors or persons in a position of management authority, causing their firm to participate in cartel activity, or knowingly acquiescing<sup>95</sup> in such conduct, to be liable to a fine of up to R500,000 or imprisonment not exceeding 10 years, or both.<sup>96</sup> Notably a person may be prosecuted for an offence in terms of the section 73A only if the firm which is participating in the cartel, has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b) of the Competition Act; or the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited cartel practice.<sup>97</sup>

Section 73A(4) stipulates that the Competition Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Commission has certified that the person is deserving of leniency in the circumstances. The Commission may however make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted of an offence in terms of section 73A, if the Competition Commission has certified that the person is deserving of leniency<sup>98</sup> in the circumstances.<sup>99</sup> In any court proceedings against a person in terms of section 73A, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b) is *prima facie* proof of the fact that the firm engaged in that conduct.<sup>100</sup> A firm whose director or manager is guilty of the said cartel offence may however not directly or indirectly pay any fine that

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<sup>95</sup> For the purpose of subsection (1)(b), 'knowingly acquiesced' means having acquiesced while having actual knowledge of the relevant conduct by the firm.

<sup>96</sup> S 73A and 74.

<sup>97</sup> S 73A(3).

<sup>98</sup> In terms of s1 of the Competition Amendment Act 1 of 2009 'deserving of leniency' means: 'when used with respect to a firm contemplated in section 50, or a person contemplated in section 73A, means that the firm or person has provided information to the Competition Commission, or otherwise co-operated with the Commission's investigation of an alleged prohibited practice in terms of s 4(1)(b) to the satisfaction of the Commission.'

<sup>99</sup> S 73A (4)(b).

<sup>100</sup> S73A(5).

may be imposed on a person convicted of the cartel offence.<sup>101</sup> The firm may also not “indemnify, reimburse, compensate or otherwise defray” the expenses of a person incurred in defending against a prosecution in terms of the section, unless the prosecution is abandoned or the person is acquitted.<sup>102</sup>

## 3.2 Challenges posed by the cartel offence

### 3.2.1 Challenges identified by Kelly

Much criticism has been levied against the cartel offence but it has nevertheless been introduced into our law. In particular section 73A(5) which provides that an acknowledgement in a consent order or a finding by the Tribunal that a firm has engaged in a prohibited practice is *prima facie* proof that the firm had engaged in such conduct, was criticised. This subsection was interpreted by Kelly as creating a reverse onus<sup>103</sup> on the accused contrary to section 35 of the Constitution of the Republic of South Africa, 1996, that comprises an accused’s right to remain silent.<sup>104</sup> Kelly further regarded section 73A(6)(b) which states that the firm may not pay any fine of its director or manager found guilty of the cartel offence as possibly unconstitutional. He remarks that the intention behind this provision appears to be that under no circumstances is the firm to bail out those in charge of shareholder funds when they face charges for cartelisation, which seems entirely sensible.<sup>105</sup> According to Kelly there might be an issue with such a broad prohibition because in a privately held company the owners may be both the shareholders and decision-makers and also, the company may be their only source of revenue.<sup>106</sup> Kelly states that to prevent them from agreeing amongst themselves to borrow money from the company to fund a defence may possibly infringe their fair trial rights.<sup>107</sup>

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<sup>101</sup> S 73A (6)(a).

<sup>102</sup> S 73A (6)(b).

<sup>103</sup> The onus for rebutting the Tribunal’s conclusions rests with the accused in the criminal proceedings.

<sup>104</sup> The Constitution of the Republic of South Africa, 1996. S 35(1) of the Constitution reads as follows: ‘Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent (b) to be informed promptly – (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person...’

<sup>105</sup> Kelly (n 356) 332.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.* S 35(3)(f) of the Constitution of the Republic of South Africa.

The criticism against section 73A that is most worrisome is that section 73A(4) has been criticised as having the potential to impact negatively on the efficiency of the CLP. Section 73A(4) requires a dual role of prosecution between the Commission and the National Prosecuting Authority (NPA). It requires the NPA to be the body that is responsible for the criminal prosecution, and the Commission being the body that is responsible for making submissions to the NPA in support of leniency of a person certified as deserving of leniency.<sup>108</sup> Kelly's opinion is that the subsection introduces "immense complexity" at both the investigative and prosecutorial stages.<sup>109</sup> He pointed out that imprisonment can only be imposed by the courts following a successful prosecution by the NPA but the inability of the NPA (caused by its lack of experience in prosecuting competition matters) to successfully prosecute complex white collar crimes is likely to cause problems.<sup>110</sup> Kelly warns that the threat of personal liability would probably reduce the likelihood of companies admitting to cartel engagement in the form of price-fixing, and that the result will be that the Commission will have to prosecute conspiracies without the assistance of inside informants.<sup>111</sup>

### 3.2.2 Challenges Identified by Lopes, Seth and Gauntlett

Lopes, Seth and Gauntlett also criticise the introduction of the cartel offence into South Africa competition law. They point out that the US, being the birthplace of modern antitrust law, has travelled a long road to get to where it is today.<sup>112</sup> Only in recent years, individual criminal liability became cemented in US antitrust law, and led to a viable and pragmatic enforcement system for the prosecution of individual cartel offences.<sup>113</sup> According to Lopes, Seth and Gauntlett a significant difference between the US and South Africa is however that whilst the US Competition Act, the Sherman Act, has always, provided for individual criminal liability, the Competition Act never has, and was never intended to be the vehicle for such a provision.<sup>114</sup> They also point

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<sup>108</sup> Lavoie 156.

<sup>109</sup> Kelly 328.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> Lopes, Seth and Gauntlett *Cartel Enforcement, the CLP and Criminal Liability – Are Competition Regulators Hamstrung by the Competition Act from Co-operating with the NPA, and is this a Problem for Competition Law Enforcement?* Seventh Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa 5 and 6 September 2013 (hereinafter Lopes, Seth and Gauntlett).

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

out that in the US the Department of Justice is responsible for both the civil and criminal enforcement of competition law – so the problem of two different institutions having to find a way to co-operate efficiently does not present itself in the US.<sup>115</sup>

Lopes, Seth and Gauntlett warn that it should be remembered that the Competition Commission is an administrative agency whose function is to administer and enforce an economic statute, the Competition Act.<sup>116</sup> Its role is completely different from that of the NPA, which has to prosecute all general crimes or offences in terms of its enabling legislation and on the basis of its own prosecutorial policy.<sup>117</sup> The provisions of the Competition Amendment Act, which deals with personal criminal liability and the relationship between the NPA and the Competition Commission, therefore raise complex questions as to the possible overlap in their functions and the suitability of the use of criminal law sanctions in competition law.<sup>118</sup>

Lopes, Seth and Gauntlett argue that it is problematic that aside from section 3(1A)(1) of the Competition Act, which provides for ‘negotiations’ between the competition authorities and other industry-specific regulatory agencies in respect of the management of concurrent jurisdiction, the Competition Act goes no further in outlining any attempt at co-operation between the Commission and the NPA.<sup>119</sup>

Lopes, Seth and Gauntlett further point out that the Commission currently makes extensive use of the procedure set out in section 49A of the Competition Act, which allows the Commission to summons any person believed to have information the Commission needs to an interrogation. That person must respond to the Commission’s questions, unless their answer is self-incriminating.<sup>120</sup> Thus the cartel offence means that almost every question would be potentially self-incriminating and most directors will exercise their right not to answer. Lopes, Seth and Gauntlett also hold the view that it seems fairly obvious that directors and executives will be less willing to conclude consent orders on behalf of their firms, if an admission by a firm that it has participated

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<sup>115</sup> *Ibid.*

<sup>116</sup> Lopes, Seth and Gauntlett 4.

<sup>117</sup> Jordaan and Munyai *The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998 SA Merc LJ (2011) 201* (Hereinafter Jordaan and Munyai).

<sup>118</sup> *Ibid.*

<sup>119</sup> Lopes, Seth and Gauntlett 5.

<sup>120</sup> *Ibid.*

in a cartel (which is an essential feature of a consent order) may be used as the basis for securing a later criminal conviction against those very same directors, executives or senior managers who have made the admissions on behalf of their firms.<sup>121</sup>

### **3.3.2 Challenges identified by Jordaan and Munyai**

Jordaan and Munyai also commented on the cartel offence. They indicate that the 2009 Competition Amendment Act has blurred the lines in respect of the distinct legal personalities of the company and its director, and by fostering compliance with the substantive provisions of the Competition Act through criminal sanctions, the Competition Amendment Act has further created confusion regarding the legal relationship between prosecutions under the Competition Act and those under the Criminal Procedure Act 51 of 1977.<sup>122</sup> They state that even though the NPA has exclusive jurisdiction in respect of criminal prosecutions, it is important to bear in mind that the Competition Commission is not powerless in relation to such criminal prosecutions.<sup>123</sup> They point out that it is only after the Competition authorities have made their own substantive determination that a prohibited practice has occurred, that the legal authority to prosecute a director under section 73A will exist.<sup>124</sup>

According to Jordaan and Munyai the provisions of section 73A make it clear that it is primarily up to the Commission to determine whether or not the criminal prosecution of a director is suitable.<sup>125</sup> The Commission has the discretion to request the NPA to institute criminal proceedings against a director, and Jordaan and Munyai opine that it is unlikely that the NPA would institute criminal proceedings unless the Competition Commission has made a request or recommendation to it for the initiation of such prosecution.<sup>126</sup>

Jordaan and Munyai further indicate that it should also be noted that the NPA is an independent body charged with instituting criminal prosecutions on behalf of the State, free of interference and influence.<sup>127</sup> In their opinion it is therefore theoretically

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<sup>121</sup> Lewis *Thieves at the Dinner Table: Enforcing Competition Rules in South Africa* (2012) 212.

<sup>122</sup>Jordaan and Munyai "The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998" (2011) *SA Mercantile Law Journal* 201 (hereinafter Jordaan and Munyai).

<sup>123</sup> *Ibid.*

<sup>124</sup>*Ibid.*

<sup>125</sup> S 73A(4).

<sup>126</sup> Jordaan and Munyai 202.

<sup>127</sup> *Ibid.*

possible, (although they concede that it would be very exceptional) for the NPA to criminally prosecute a director against the advice or recommendation of the Commission that the director deserves immunity or leniency.<sup>128</sup> Even if in exceptional circumstances that the NPA decides to go ahead with the prosecution of a director, they are of the opinion that the role and influence of the Commission in the ensuing criminal prosecution may not be completely diminished. According to them nothing in law prevents the Commission from making a recommendation to the court that the director deserves immunity or leniency.<sup>129</sup>

Kyriacou remarks that it is clear that under section 73A the Commission has a central role to play in criminal prosecutions instituted under section 73A, and this will inevitably require a certain degree of cooperation between the Commission and the National Prosecuting Authority.<sup>130</sup> He states that it is however problematic that the Competition Commission and the NPA are given little guidance as to the level of practical cooperation that can or should exist between them.<sup>131</sup>

### 3.4 Final remarks

It is clear from this chapter that the introduction of the cartel offence will most certainly have a deterrent effect as no director or manager of a firm would want to risk going to prison for up to 10 years. Consequently they will likely try and steer clear of cartel activity. However, there will always still be those cartel members, who, true to the secretive nature of these cartels, will just take greater measures to keep their conduct under the radar of the regulators. Because the CLP only provides them reprieve against administrative fines but not against criminal prosecution it is very unlikely that they will in future consider advising their firms that it is better to self-report via the CLP. It thus seems very likely that the effectiveness of the CLP as a prime tool to detect cartels may be compromised by the cartel offence.

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.* They remark that such a gesture on the part of the Commission would go a long way towards restoring the confidence of the business community in its corporate leniency programme, which is already considered to be under threat as a result of the introduction of personal criminal liability for directors in our competition law.

<sup>130</sup> *Kyriacou 122.*

<sup>131</sup> *Ibid.*

It is submitted that the introduction of criminal liability will certainly deter cartel activity. However, it can also have the effect of encouraging more secretive cartel activity, in which case the CLP would be the only effective tool for detection of cartels conducted by firms undeterred by the threat of criminal liability.<sup>132</sup> For this reason the CLP remains a vital and instrumental tool in combating cartel activity and thus it cannot be afforded that its effectiveness be jeopardized by the introduction of criminal liability that has not been properly thought through and may result in a catch 22-situation where although the CLP is the appropriate mechanism to facilitate self-reporting of cartel activity and destabilizing of cartels, it becomes too risky for cartelists to apply for immunity under the CLP.<sup>133</sup>

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<sup>132</sup> Lavoie (n 101) 156.

<sup>133</sup> *Ibid.*

## Chapter Four: The cartel offence in Canada

### 4.1 Introduction

The Canadian Competition Act also provides for a cartel offence in sections 45 to 47.<sup>134</sup> Competition law enforcement in Canada falls within the mandate of the Canadian Competition Bureau, headed by the Commissioner of Competition. The Bureau investigates alleged anti-competitive conduct in contravention of the Competition Act. In cases where the Act provides for criminal sanctions, the Competition Bureau refers the matter to the Department of Public Prosecution. Kay indicates that in practice, discussions and negotiations regarding criminal matters are conducted on behalf of the Canadian Competition Authorities by representatives of both the Competition Bureau and the Department of Public Prosecution. Notwithstanding this practical arrangement, the Department of Public Prosecution has the final legal authority in respect of criminal prosecution issues.<sup>135</sup>

### 4.2 The Canadian Cartel Offence

The current Canadian cartel offence came into effect on 12 March 2010 and is captured in sections 45 to 47 of the Competition Act. Section 45 contains the so-called “conspiracy offence” and is Act titled ‘Conspiracies, agreements or arrangements between competitors’<sup>136</sup> and provides as follows:

‘(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

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<sup>134</sup> R.C.S., 1985, c C -34.

<sup>135</sup> Kay KL “Canadian Cartel Law: Canada Ups the Ante in 2010” paper presented at 2010 CBA Competition Law Spring Conference, May 2010, Toronto, Ontario available at <http://www.stikeman.com> (accessed on 28 October 2019).

<sup>136</sup> A competitor is defined in s 45(8) of the Canadian Competition Act to include ‘a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement.’



(c) to fix, maintain, control, prevent, lessen or eliminate the production and supply of the product.’

In accordance with section 45(2) every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding 25 million Canadian dollars. The court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence. The onus of proof is beyond a reasonable doubt.<sup>137</sup> In terms of section 45(4) no person shall be convicted of the cartel offence under section 45(1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if it is established on a balance of probabilities that:

‘(i) it is ancillary to a broader and separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the object of that broader or separate agreement or arrangement; and the broader and separate agreement or arrangement considered alone does not contravene section 45(1).’

Section 54(4) thus provides for a defence in relation to the cartel offence.

In addition section 46 prohibits a corporation from implementing a “directive, instruction, intimation of policy or other communication” from a person outside of Canada to give effect to a “conspiracy, combination, agreement or arrangement” that would have contravened section 45 if it had occurred in Canada. It is required that the communication must come from a person “in a position to direct or influence the policies of the corporation”.

Section 47 provides for a bid rigging offence and criminalises agreements to submit pre-arranged bids or that provide that one or more of the parties will not submit a bid or will withdraw a bid.

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<sup>137</sup> S45(3) of the Canadian Competition Act.

Both the conspiracy cartel offence and the bid rigging cartel offences are per se offences.<sup>138</sup>

### 4.3 The Canadian Leniency Programme

Sections 45 to 47 of the Canadian Competition Act are linked to the Bureau's Immunity and leniency programs.<sup>139</sup>

The Immunity Program began in 2000 and the Leniency Program began in 2010.<sup>140</sup> The purpose of the Immunity Program and the Leniency Program is to uncover and stop criminal anti-competitive activity prohibited by the Canadian Competition Act and to deter others from engaging in similar behaviour. Immunity is an extraordinary grant by the Crown not to prosecute whilst leniency is a discretionary decision by the Crown to recommend a reduction in the sanctions to be imposed by a court.<sup>141</sup>

The programs are administered jointly by the Director of Public Prosecution and the Commissioner of the Competition Commission. Under the programs the Competition Bureau is responsible for investigating alleged wrongdoing and making recommendations to the Public Prosecution Service of Canada (PPSC) to grant immunity and leniency. The PPSC, under the direction of the Director of Public Prosecutions, is responsible for deciding whether to enter into an immunity or plea agreement with an applicant in accordance with the principles set out in the Public Prosecution Service of Canada Deskbook.<sup>142</sup>

A party (business organizations, individuals and employees) implicated in unlawful conduct that may violate the Canadian Competition Act's criminal provisions may apply for immunity in terms of the Bureau's immunity program.<sup>143</sup> The "first in" – principle applies. A party who does not qualify for immunity but who cooperates with

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<sup>138</sup> Hofley, Krane and Dickinson "Cartels, Enforcement, Appeals and Damages Actions" (2018) *Global Legal Insights* 17.

<sup>139</sup> Canadian Competition Bureau Immunity and Leniency Programs available at [competitionbureau.gc.ca/eic/ste/cb-bc.nsf/en-04391.html](http://competitionbureau.gc.ca/eic/ste/cb-bc.nsf/en-04391.html) (accessed on 7 December 2019). Immunity and See also Parbhoo MB 'The Effectiveness of The Competition Commission's Leniency Policy in Encouraging Cartel Members to Disclose Their Anti-Competitive Practices: A Comparative Analysis' LLM Dissertation, University of Witwatersrand, 2019, at 20 (hereinafter Parbhoo).

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> Par 8 read with par 14 of the Immunity Program.

the Bureau's investigation may however be eligible for a recommendation for lenient treatment.<sup>144</sup>

The Immunity Program requires that a party come forward and report to the Bureau as soon as it believes it is implicated in an offence. The Bureau will then grant an "immunity marker" with respect to particular conduct to the first party only.<sup>145</sup> It is not necessary for a party to have gathered a complete record of the information required when it makes its first contact with the Bureau. As the application process progresses and before an immunity agreement is finalised the Commissioner and the Director of Public Prosecutions will carefully examine the applicant's request for immunity and its subsequent cooperation to make sure that it complies with the requirements of the Immunity Program.<sup>146</sup>

The applicant for immunity must provide complete, timely and ongoing cooperation, at its own expense, throughout the investigation by the Bureau and the subsequent prosecution. Immunity will only be granted to an applicant if:

(a) the Bureau is unaware of an offence and the applicant is first to disclose all the elements of the offence; or

(b) the Bureau is aware of the offence and the applicant is first to come forward before the Bureau has gathered sufficient evidence to justify and referral to the Director of Public Prosecutions.<sup>147</sup>

An applicant is required to stop participating in the illegal activity in order to qualify for immunity. The applicant must also not have coerced others to be party to the illegal activity.<sup>148</sup> A recommendation for immunity will only be made when the disclosed conduct constitutes an offence under the Competition Act and is supported by evidence that is credible and reliable and that demonstrates all the elements of the offence. Thus, where the applicant is the only party involved in the offence it will not

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<sup>144</sup> Par 15 of the Immunity Program.

<sup>145</sup> Par 16 of the Immunity Program.

<sup>146</sup> Par 21 of the Immunity Program.

<sup>147</sup> Par 22 and 23 of the Immunity Program.

<sup>148</sup> Par 24 and 25 of the Immunity Program. An applicant will be ineligible where there is clear evidence of coercive behaviour, either express or implied.

be eligible for immunity.<sup>149</sup> Subsequent applicants who are party to the cartel offence may seek a leniency marker under the Bureau's Leniency Program.

If immunity is granted to an applicant the Bureau will not commence civil proceedings against an applicant in relation to the same or substantially the same facts that constituted the basis of an immunity grant. Throughout the Bureau's investigation and subsequent prosecution the applicant must provide timely and ongoing cooperation. Such cooperation must at a minimum include:<sup>150</sup>

(a) that the applicant will keep its application for an immunity marker, its subsequent cooperation and the grant of immunity confidential;

(b) that the applicant reveal any and all conduct of which it is aware or becomes aware that may constitute an offence under the Canadian Competition Act and in which it may have been involved

(c) that the applicant provides full, complete and truthful disclosure of all information that is not privileged as well as evidence and records that is in its possession or under its control or available to it;

(d) that the applicant will take all lawful measures to secure the cooperation of current directors, officers and employees suspected of involvement in the offence for the duration of the investigation and subsequent prosecution.

If a company qualifies for a recommendation for immunity then all current directors, officers and employees who admitted their knowledge of or participation in the offence and who are willing to provide complete, timely and ongoing cooperation also qualify for the same recommendation for immunity as the applicant.<sup>151</sup>

The Immunity Process entails 4 steps: Step 1 is the initial contact with the Bureau and the request for immunity.<sup>152</sup> Step 2 comprises the so-called "proffer". A "proffer" is a detailed statement provided by the applicant within 30 calendar days after granting of an immunity marker, in which the applicant describes the unlawful conduct it was

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<sup>149</sup> Par 27 and 29 of the Immunity Program.

<sup>150</sup> Par 34 of the Immunity Program.

<sup>151</sup> Par 35 of the Immunity Program.

<sup>152</sup> Par 44 to 55 of the Immunity Program.

involved in.<sup>153</sup> On the basis of the conduct described in the Bureau's recommendation (which is based on the proffered information) the Director of Public Prosecutions will then, as step 3, issue a GII (Grant of Interim Immunity) to the applicant. The purpose of the GII is to facilitate the Bureau's investigation by formalising the legal framework within which an immunity applicant will disclose records and make witnesses available. The GII is a conditional immunity agreement and it sets out the applicant's ongoing obligations that must be fulfilled in order for the Director of Public Prosecutions to finalise the immunity agreement. The GII indicates who is covered by the agreement, how the information provided by the immunity recipient will be treated and under what circumstances the agreement can be revoked. The immunity applicant's obligations under the GII are to provide complete and timely and ongoing cooperation and full, complete and truthful disclosure throughout the Bureau's investigation and any subsequent prosecution.<sup>154</sup>

Step 4 of the immunity process entails the final grant of immunity. In such event the Bureau will make a recommendation to the Director of Public Prosecutions once the applicant for immunity has satisfied the obligations under the GII. If after review, the Director of Public Prosecutions accepts the recommendation the Director will then grant the immunity and communicate it by way of a letter of confirmation.<sup>155</sup>

In addition to the Immunity Program the Bureau's Leniency Program is intended to provide a predictable and transparent manner to resolve liability for parties who contravened the cartel offence provisions in the Competition Act (including conspiracy and bid rigging) when an immunity marker is not available to such a party.<sup>156</sup> In such instance the Commission will recommend to the Director of Public Prosecutions that leniency in sentencing be granted to that party if:

(a) the party has terminated its participation in the cartel and agreed to cooperate fully and timely at its own expense with the Bureau's investigation and any subsequent prosecution of other cartel members by the Director; and

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<sup>153</sup> Par 56 to 72 of the Immunity Program.

<sup>154</sup> Par 73 to 75 of the Immunity Program.

<sup>155</sup> Par 103 of the Immunity Program.

<sup>156</sup> Par 107 of the Leniency Program.

(b) the party has demonstrated that it was a party to the offence and agrees to plead guilty to involvement in the cartel.<sup>157</sup>

#### **4.4 Final remarks**

Canada has a long history of criminalising certain competition law transgressions and it can thus be assumed that this jurisdiction also has had ample opportunity to develop their approach to enforcement against cartels and dealing with the current cartel offence. That Canada takes a hard stance against cartels is also clear from the very hefty fines of up to 25 million Canadian dollars and up to 14 years imprisonment that can be imposed. Nevertheless Canada is also on par with other competition jurisdictions that have leniency programs. Notably Canada has two separate programs in this regard namely an Immunity Program in terms whereof a business or individual that is “first: in” can obtain full immunity from criminal prosecution if it meets the requirements of the program. Businesses or individuals who do not qualify for such immunity can nevertheless still obtain leniency under the Bureau’s Leniency Program.

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<sup>157</sup> Par 117 of the Leniency Program.

## **Chapter 5: Conclusion and Recommendations**

### **5.1 Conclusions**

South Africa has a relatively young competition Act compared to a jurisdiction such as Canada which got its first competition legislation in the 1880s. Other than Canada which is a developed country South Africa is still a developing jurisdiction. Nevertheless it appears that the drafters of South African Competition Act has taken lessons from other jurisdictions such as Canada hence we also have prohibitions against cartels which are regarded as inherently egregious conduct. As pointed out the South African Competition Commission has skilfully devised a corporate leniency policy (CLP) after having had regard to leniency policies in various other jurisdictions. The CLP which avails immunity to the firm that is first through the door with information and cooperation that meets the policy's requirements has been instrumental in uncovering various cartels in South Africa in the past couple of years.

Being a competition jurisdiction that seeks to keep up with trends in other competition jurisdictions South Africa also recently introduced a cartel offence. As indicated many authors criticise this offence for various reasons that range from certain of its provisions that can be regarded as unconstitutional to the criticism that the cartel offence may severely affect the effectiveness of the CLP. In fact it is submitted that given the way that the South African cartel offence is constructed chances are very likely that directors and managers who might be afraid of prosecution for the cartel offence may discourage their firms from splitting on the cartel under the CLP. This may even spell the end of the effectiveness of the CLP. It is clear that the main problem in this regard is the fact that the newly introduced South African cartel offence does not give power to the Competition Commission to really influence the outcome of a decision by the National Prosecuting Authority (NPA) to prosecute a director or manager for the cartel offence. It is further worrisome that the NPA has no expertise in dealing with cartels and it is submitted that directors and managers could rightly be worried about ending up in jail for cartel involvement because the CLP does not protect them against criminal prosecution.

## 5.2 Recommendations

It has been shown that Canada is a jurisdiction with a long history of competition legislation and criminalisation of cartels. It has recently in 2010 introduced amended cartel offence provisions. Notably in Canada the legislative framework seems to be more geared for dealing with the cartel offence. This is because the cartel offence provisions in the Competition Act operate properly in tandem with the Bureau's Immunity and Leniency Programs. In particular the Canadian Immunity program differs from the South African CLP in that it is available to a wider group of persons and not like in South Africa, only to the firm and not the individuals such as directors and managers. It is also available for a wider range of competition transgressions whereas the CLP is available only for contraventions of section 4(1)(b) of the South African Competition Act. Most importantly however an applicant who gets immunity under the Canadian Immunity Program gets immunity from criminal prosecution.

Therefore it is recommended that as a first step in dealing with the problems that may be occasioned by the South African cartel offence, the CLP must be amended to retain its effectiveness. This will require an amendment to the effect that the CLP is available not only to firms but also to individuals and also that immunity under the CLP is extended to criminal prosecution in respect of the cartel offence.

It is further recommended that the South African Competition Commission and the NPA also take lessons from the Canadian Competition Bureau and the Director of Public Prosecutions and the good working relationship that they appear to have. Hopefully by considering how these two authorities work together in Canada without allowing the cartel offence to compromise the effectiveness of the Immunity and Leniency Programs in Canada, the South African authorities may be able to figure out a better way to deal with their joint mandate for battling cartels.



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