



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

A REVIEW ON THE CRIMINALISATION OF CARTEL ACTIVITY IN SOUTH AFRICA AND THE IMPLICATIONS THEREOF

by

Relebohile Thabane

16287933

Submitted in partial fulfilment of the requirements for the degree

LLM in Mercantile Law

In the Faculty of Law,

University of Pretoria

November 2019

Supervisor: Prof. Van Heerden

ABSTRACT

On 1 May 2016, section 73A of the Competition Amendment Act, no 1 of 2009 (“the Amendment”) came into effect. The Amendment is a turning point for the prosecution of cartels in that it will hold directors and executives criminally and personally liable for contravening section 4(1)(b) of the Competition Act 89 of 1998 (“the Competition Act”). Section 4(1)(b) of the Competition Act prohibits firms in a horizontal relationship from agreeing to engage in price fixing, market allocation and collusive tendering. Cartels are considered the most egregious of conduct in competition law due to their effect on economies and ordinary people and consumers. The purpose of enactment of the Amendment is to serve as a deterrent tool against cartels. The imposition of administrative penalties against companies engaging in cartel conduct has proven to not be enough of a deterrent given the increasing number of cartels nationally and globally. The notion is that companies around the world are run by individuals and thus those individuals who knowingly engage in cartel conduct must be held accountable for their participation in such conduct. As a deterrent, individuals in executive positions will have to weigh the benefits of engaging in cartel conduct against the real risk of losing their personal freedom.

The Amendment in its current form is criticised for firstly, potentially rendering the corporate leniency policy redundant and secondly, potentially infringing on individuals’ constitutional rights. The corporate leniency policy has been instrumental in the uncovering of cartels because it allows companies to self-report on their participation in cartel conduct in exchange for immunity against prosecution. Modifications to the Amendment are suggested to remedy problematic sections of the Amendment before they come into effect. Lessons can be taken from other jurisdictions such as the United States and the United Kingdom which criminalise cartel conduct.

It will be necessary for the Competition Commission to consider individual immunity against criminal prosecution and to clearly outline the process of criminalisation in order to clear the uncertainty regarding constitutionality of the provisions of the Amendment.

ACKNOWLEDGEMENTS

I dedicate this work to my family who have always encouraged me to be my best and reach for the stars. An extra special dedication to my late grandparents who always emphasised the importance of learning, growing and becoming a respectable member of society. I hope they look down on me with pride.

Thank you to my friends for their support and constant encouragement to push harder and be better and for always willing to lend a helping hand when needed.

To my Supervisor Prof. Van Heerden, thank you so much for being responsive, supportive and pushing me.

DECLARATION OF ORIGINALITY

I, Relebohile Thabane declare that this dissertation titled “**A Review on the criminalisation of cartel activity in South Africa and the implications thereof**” is my own work. It is submitted in fulfilment of the LLM in Mercantile Law requirement by the Department of Mercantile Law, University of Pretoria.

R. Thabane

Date

Table of Contents

ABSTRACT	ii
ACKNOWLEDGEMENTS	iii
DECLARATION OF ORIGINALITY	iv
Chapter 1	1
1.1 Introduction.....	1
1.2 The Corporate Leniency Policy	4
1.3 Criminalisation of cartels in South Africa	6
1.4 Criminalisation of cartels in the European Union and the United States of America ..	7
1.5 Research statement and objectives	8
1.6 Methodology.....	9
1.6.1 Outline of chapters	9
Chapter 2	11
2.1 The South African Corporate Leniency Policy	11
2.2 The scope of the corporate leniency policy	12
2.2.1 Introduction.....	12
2.3 The CLP requirements and process	13
2.4 The Criminalisation of Cartel Conduct in South Africa	20
Chapter 3	27
3.1 Introduction.....	27
3.2 The United States experience.....	27
3.2.1 Leniency in the United States.....	28
3.2.2 Criminalisation under the Sherman Act	30
3.3 The United Kingdom experience	34
3.3.1 Leniency in the United Kingdom	35
3.3.2 The UK cartel offence	40
Chapter 4	47
4.1 The burden of proof	47
4.2 Cooperation between the National Prosecuting Authority and the Competition Commission	48
4.3 The right to a presumption of innocence	51
4.4 Self-incrimination.....	54
4.5 The right to a fair trial.....	56
Chapter 5	58

Chapter 1

BACKGROUND TO THE STUDY

1.1 Introduction

South African statutory competition law dates as far back as 1955 when competition was regulated under the Undue Restraint of Trade Act, no.24 of 1955 (“the UTA”). Competition law involves the assessment of the economic climate of markets within a regulatory or legislative framework.¹ The justification for competition law is that certain practices within markets have the potential of causing harm to competition between firms in such markets.² This harm is usually related to the amount of market power a company or companies possess in a particular market.³ The enactment of the UTA sought to investigate potential monopolistic conditions at the instance of the Minister of Trade and Industry (“Minister”).⁴ In terms of section 2(1) of the UTA, ‘monopolistic conditions’ referred to agreements between two or more companies for trading practices and fixing of prices; companies who act independently or in coordination with others; and all trading activities by companies. Further, section 6(1)(b)(i) of the UTA conferred powers on the Minister to terminate any arrangement which it deemed to potentially create monopolistic conditions.

This discretionary power was criticised as it evidently gave the Minister too wide a scope to decide on the outcome of matters.⁵ The UTA also failed to set out clear objectives and principles.⁶ The UTA was furthermore criticised for its lack of guidance on the description of the types of practices that would be considered harmful; it also put too much reliance on companies voluntarily filing complaints for the detection of harmful practices; and finally it was also not

¹ Richard Whish & David Bailey *Competition law* (8 ed 2015) 2.

² Richard Whish & David Bailey *Competition law* (8 ed 2015) 2.

³ Richard Whish & David Bailey *Competition law* (8 ed 2015) 2.

⁴ D. Prins & P. Koornhof “Assessing the nature of competition law enforcement in South Africa” *Democracy and Development* (2014) 2.

⁵ Report of the commission of inquiry into the regulation of monopolistic conditions act of 1955 (1977) 6.

⁶ Report of the commission of inquiry into the regulation of monopolistic conditions act of 1955 (1977) 6.

sufficient that negative publicity was the only consequence of h the Minister's publication of prohibited practices.⁷

As a consequence of the criticism and increasing pressure, in 1975 the then President, appointed a commission of inquiry into the regulation of monopolistic conditions act known as the Mouton Commission to investigate the state of South Africa's competition policy. The outcome of the Mouton Commission of Inquiry was a recommendation for new legislation to be enacted. On 21 June 1979, the Maintenance and Promotion of the Competition Act, no.96 of 1979 ("the MPCA ") was assented to and it came into effect on 1 January 1980. The scope of the MPCA was acquisitions, restrictive practices and monopoly situations. The MPCA did not have *per se* prohibitions however, its definition of restrictive practices alluded to the possibility of cartels being restrictive practices.⁸ Section 10(1)(c) of the MPCA provided that the competition board could, at the request of the Minister of Administration and Economic Co-ordination, undertake an investigation "into any particular type of business agreement, arrangement, understanding, business practice or method of trading in general or in relation to any particular commodity or any class or kind of commodity or any particular area which in the opinion of the board or the

⁷ D. Prins & P. Koornhof "Assessing the nature of competition law enforcement in South Africa" Democracy and Development (2014) 2.

⁸ The MPCA defined restrictive practices in section 1 as:

- (a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or
- (b) any business practice or method of trading, including any method of fixing prices, whether by the supplier of any commodity or otherwise; or
- (c) any act or omission on the part of any person, whether acting independently or in concert with any other person; or
- (d) any situation arising out of the activities of any person or class or group of persons, which restricts competition directly or indirectly by having or being likely to have the effect of –
 - (i) restricting the production or distribution of any commodity; or
 - (ii) limiting the facilities available for the production or distribution of any commodity; or
 - (iii) enhancing or maintaining the price of or any other consideration for any commodity; or
 - (iv) preventing the production or distribution of any commodity by the most efficient and economical means; or
 - (v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or
 - (vi) preventing or restricting the entry of new producers or distributors into any branch of trade or industry; or
 - (vii) preventing or retarding the adjustment of any profession or branch of trade and industry to changing circumstances.

Minister, as the case may be, is commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices;...”.

The MPCA had provisions similar to the UTA in that it did not contain any explicit restrictions against cartels or other restrictive practices. Remedies under section 11 of the MPCA provided that firms who were found to be in contravention of the Act could negotiate an agreement with the Competition Board to cease all restrictive practices. Section 14 of the MPCA also provided alternative sanctions such as imposing fixed maximum prices at which companies could sell commodities or the Minister would make a declaration stating that the conduct was unlawful. This meant that firms would have to cease all participation in the unlawful practice. The MPCA was a step closer to South Africa’s current competition law especially with its amendment in 1986 which clearly set out the prohibition of restrictive practices. It was however criticised for its lack of stringent sanctions and ambiguity around what constituted an unlawful restrictive practice.⁹

The real catalyst for comprehensive regulation of competition law in South Africa was the introduction of the Competition Act, 89 of 1998 [as amended] (“Competition Act”). The Competition Act lists seven purposes in section 2, inter alia to promote consumers with competitive prices and product choices and the promotion of employment and advancing the social and economic welfare of South Africans.

In particular the Competition Act explicitly prohibits *per se* restrictive practices under section 4(1) which provides as follows:

- “4. (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:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;

⁹ D. Prins & P. Koornhof “Assessing the nature of competition law enforcement in South Africa” Democracy and Development (2014) 2.

- (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
- (iii) collusive tendering.”

This means that it is unlawful in terms of the Competition Act for competing firms to agree or have an arrangement to behave in a coordinated manner to fix the prices of products and services or to divide markets or to tender collusively. Such conduct is undertaken by cartels that are prohibited per se.¹⁰ True to their nature, cartels are secretive and are considered to be the most abhorrent anti-competitive behaviour.¹¹ Cartels comprise of competitors agreeing to behave in a coordinated manner with the effect that a group of companies, usually in an oligopoly market, behave like a monopoly. An oligopoly market is a market where one finds few competitors in a sector usually holding a significant market share which ultimately allows them to control the production prices in that particular market.¹² Oligopolies generally have a negative effect on the ability of new firms to enter the market. Cartels are described as monopolies that disguise themselves to look as if they are competitive while in fact, cartel members want to eliminate competition.¹³ The disadvantage to consumers is that these kinds of cartels lower output and increase the prices of products in order to maximize their profits.¹⁴ Given these negative effects of cartels, it would seem that the introduction of criminalisation of cartels was inevitable.

1.2 The Corporate Leniency Policy

As mentioned above, cartels by their nature are secretive and therefore difficult to detect. The global surge in cartels has created challenges for competition

¹⁰ *Per se* prohibitions mean that the “Competition Commission does not have to show any anti-competitive effects and there are no justification grounds available to respondents.” See the Competition Commission and Pioneer Foods (Pty) Ltd 15/CR/Feb07 para.148.

¹¹ The Competition Commission and Pioneer Foods (Pty) Ltd 15/CR/Feb07 para.31.

¹² Lucie Severová, Lenka Kopecká, Roamn Svoboda and Josef Brčák “Oligopoly competition in the market with food products” (2011) 580. Accessed at https://www.agriculturejournals.cz/publicFiles/107_2010-AGRICECON.pdf on 23 February 2019.

¹³ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: An American perspective” (2010) vol 1 *NJECL* 201.

¹⁴ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: An American perspective” (2010) vol 1 *NJECL* 201.

authorities across the world to prevent and stop cartel conduct. Cartel conduct has far reaching negative effects on economies therefore remedying the effects of cartel conduct is not as simple as merely imposing administrative penalties. Because of their egregious nature detection is paramount for uncovering cartels. Further, imposing a “no defence”- rule for cartel conduct and making it punitive ensures the successful prosecution of cartels.¹⁵

Accordingly, as indicated, in terms of the Competition Act, it is a *per se* prohibition for competing firms in a horizontal relationship to agree to engage in conduct which directly or indirectly fixes a selling price; divides markets and customers through allocation; and which entails collusive tendering.¹⁶ The adoption of the South African Corporate Leniency Policy (“CLP”) in 2004 as subsequently amended in 2008, has provided the Competition Commission (“the Commission”) with an internationally aligned tool that is used by cartel members to self-report on their involvement in collusion in exchange for immunity from prosecution and paying an administrative penalty.¹⁷ There are various cartels which the Commission has uncovered over the years through CLP applications¹⁸ received from cartel firms or individuals who self-reported their conduct.¹⁹ The benefit of being a successful CLP applicant is that the firm is exempt from paying an administrative penalty and stands an opportunity to rescue its business reputation with shareholders and the rest of the public when it is portrayed as a self-reporting and cooperative firm. However, with the recent introduction of criminalisation of cartels by means of the cartel offence captured in section 73A of the Act, emphasis has fallen on the fact that the CLP does not exempt people placed in positions of authority at firms from criminal prosecution.²⁰ Notably paragraph 5.9 of the CLP states that the CLP does not

¹⁵ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: An American perspective” (2010) vol 1 *NJECL* 216.

¹⁶ Section 4(1)(b)(i), (ii) and (iii) of the Competition Act, No.89 of 1998, as amended.

¹⁷ Chantal Lavoie “South Africa’s corporate leniency policy: a five-year review” Presented at the third annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa (2009) 3.

¹⁸ Competition Commission annual reports for financial years 2015 to 2018.

¹⁹ Natalia Lopes, John Seth and Emily 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?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa 5 and 6 September (2013) 2.

²⁰ Paragraph 3.1, 3.4 and 5.9 of the CLP.

protect applicants from criminal liability. Further, the cartel offence provision in section 73A specifically states that directors and persons in positions of authority will be held criminally liable if found guilty of the said offence.²¹

1.3 Criminalisation of cartels in South Africa

The criminalisation of cartels in South Africa in accordance with section 73A as introduced by the Competition Amendment Act, No.1 of 2009 came into effect in May 2016.²² This was a huge leap for a developing country such as South Africa, putting it ahead of its African counterparts. When the Competition Act was adopted in 1998, it made no provision for criminal prosecution for cartels but only provided for administrative penalties in terms of section 59 and follow-on civil claims in terms of section 65(9) of the Competition Act. Therefore, the introduction of criminalisation is somewhat of a catalyst for cartel deterrence in that firms were previously nonchalant about colluding, however the introduction of the cartel offence may make firms consider the implications of colluding when weighed up against the possibility of one of its own going to prison.

The question then becomes what this means for leniency applications? The main concern is that criminalisation could potentially have a negative impact on the leniency process by reducing the number of leniency applications received by the Commission. Essentially, this would mean a reduced number of cartels being uncovered and successfully prosecuted by the Commission. The sentiment of this criticism is that it is unlikely that the directors and executives of a firm will be eager to conclude consent agreements and orders on behalf of their firms if the admission of guilt contained in the consent order would mean, on the face of it, that it could be used to potentially criminally prosecute their directors and executives.²³ On the other side of the spectrum is support for the criminalisation of cartels because it increases deterrence, moral condemnation, better international cooperation and individualisation which increases

²¹ Section 73A of the Competition Amendment Act No.1 of 2009.

²² Government Gazette No. 32533, 28 August 2009, Proclamation No. 1 of 2009.

²³ Tsholofelo Letsike "The criminalising of cartels – how effective will the new Section 73A of the competition amendment Act be?" Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa 5 and 6 September (2013) 6.

awareness to the public and minimizes the possibility of harmful cartel conduct.²⁴ With the growing number of cartel prosecutions and investigations over the years²⁵, criminalisation may be a necessary deterrent to stop firms from engaging in collusion.

1.4 Criminalisation of cartels in the European Union and the United States of America

The enactment of the cartel offence in 2016, saw South Africa following in the footsteps of other competition authorities around the world such as the United States (“US”), Australia, Ireland, and other European member states. In the United States, the Sherman Antitrust Act of 1890 (“the Sherman Act”) was America’s first piece of legislation explicitly prohibiting cartel conduct as *per se* illegal. Section 1 of the Sherman Act provided that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”. The US competition law regime obviously puts the US far ahead of South Africa in terms of jurisprudence relating to criminalisation.

An article in 2009 by a Senior Counsel at the US Department of Justice, Belinda Barnett, advocated that the only way to deter firms from committing cartel activity such as price fixing, market allocation and bid rigging was by way of imposing stiff prison sentences.²⁶ The criminalisation of cartel activity in the US has proven to be an important tool for deterrence so much so that in some instances where the US was the largest market for a firm to engage in collusion, those firms opted out of the US market in order to avoid prison sentences.²⁷ Notably the US has an Antitrust Division Corporate Leniency Program (“Antitrust Leniency Program”) which came into effect in August 1993. The Antitrust Leniency Program provides that firms may seek leniency at an early stage should they meet the requirements of the program. In the American

²⁴ Nicole Lee “The criminalisation of cartel activity in South Africa” (2016) 4-6.

²⁵ See Figure A under Chapter 2.

²⁶ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 1. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 23 February 2019.

²⁷ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 1. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 23 February 2019.

context, leniency means that the US Department of Justice will not criminally prosecute directors; officers; employees; nor the firm for taking part in the anticompetitive conduct being reported.²⁸

The European context is a little different in that member states (countries within Europe) are signatories to the Treaty on the Functioning of the European Union (“TFEU”).²⁹ Article 101 of the TFEU prohibits anticompetitive conduct affecting member states such as fixing selling prices; sharing of markets; limiting and controlling production; applying dissimilar conditions to equivalent transactions with other trading parties. The TFEU’s traditional approach to cartels is imposing administrative penalties on firms found guilty of participating in collusion. However, within the TFEU there are member states who impose criminal sanctions against officials of firms that are found guilty of contravening the law.³⁰

1.5 Research statement and objectives

This dissertation will assess what effect the enactment of the cartel offence will have and whether it will achieve its desired outcomes. In particular the dissertation will argue that despite the flaws within the manner that the cartel offence has been formulated, criminalisation is a necessary tool for the deterrence of cartel conduct. It will inter alia consider the track record of the corporate leniency policy; the introduction of the cartel offence and its implications for those individuals who will be held accountable as well as its likely impact on the effectiveness of the corporate leniency policy.

This dissertation will also comprise a comparative study of the approaches the United Kingdom (“UK”) and the United States apply to cartels and the implementation of cartel offences. The UK and the US are used given their significant experience in the context of cartel enforcement and because both

²⁸ Section C of the Department of Justice Corporate Leniency Program.

²⁹ Treaty on European Union and the treaty on the functioning of the European union, official European journal 115, 09/05/2008.

³⁰ Keith Jones and Farin Harrison “Criminal sanctions: An overview of EU and national case law” E-competitions 3. Accessed at http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf on 23 February 2019.

these jurisdictions have introduced cartel offences a considerable number of years ago, allowing them to have gathered considerable experience in these areas that South Africa may draw lessons from.

Finally, the paper engages in a critical analysis of the consequences of implementation of a cartel offence in South Africa when compared to the UK and the US, taking into account the implications for individuals who will be held liable. This analysis will also include considering the advantages, from an enforcement perspective, of introducing criminal sanctions into the cartel enforcement toolkit.

1.6 Methodology

This study will comprise desktop critical doctrinal research drawing on policy documents, legislation, textbooks, journal articles and case law.

1.6.1 Outline of chapters

Chapter 1 contains the background to the study, including a brief history of competition law and finally of the Competition Act, no.89 of 1998, and what has led to the introduction of the cartel offence in South Africa. It also sets out the research question, research methodology and selection of comparative jurisdictions and the chapter lay-out. Chapter 2 provides an overview of the corporate leniency policy, its applicability, scope and relevant case law. The chapter will also provide a breakdown of section 73A that captures the cartel offence and what it will mean for individuals who will be held criminally liable for engaging in cartels. Chapter 3 will comprise a comparative analysis of the UK and US as jurisdictions implementing criminalisation of cartels. America has one of the longest standing regimes for cartel criminalisation whilst the UK is a little more recent since its enactment in 2002. Lessons may be drawn from these jurisdictions for South Africa who is the new kid on the block. Chapter 4 discusses the constitutional implications of the new amendment. There has been some criticism on whether the enactment of the amendment will potentially raise constitutional infringements. On the other end, there are

rebuttals raised to these criticisms. The specific subsections concerned, namely sections 73A (3), (4), (5) and (6) are not yet in effect; however, this discussion provides an idea of what is to be expected should they come into effect at a later stage.

Chapter 5 is the final chapter of the dissertation and contains the conclusions of the study and suggestions for reform.

Chapter 2

THE CORPORATE LENIENCY POLICY AND THE CARTEL OFFENCE IN SOUTH AFRICA

2.1 The South African Corporate Leniency Policy

It is said that competition enforcement is two-fold in nature: firstly, there should be detection and prosecution of cartels and secondly, competition authorities must ensure deterrence of future cartels by implicated and other firms.³¹ One may say that the South African Corporate Leniency Policy (“CLP”) is a tool used for detection and prosecution of cartels while the enactment of criminalisation is a tool to deter cartels. As such the CLP provides a procedure for cartelists to approach the Commission to self-confess on their cartel engagement in order to obtain immunity. When the CLP came into effect in 2004³², in its introduction it stipulated that the CLP will be used to detect, stop and prevent cartel activity.³³ The rationale for the introduction of the CLP was because cartels are notoriously secretive in nature and therefore difficult to detect and investigate.³⁴ Before the enactment of the CLP, the main focus of the Commission was the investigation and assessment of mergers and acquisitions as well as enhancing public awareness of the Competition Act.³⁵

The process contained in the CLP therefore requires and is dependent on firms coming forward and self-confessing on their involvement in cartel conduct. The benefit for self-confessing firms is that if an applicant is “first to the door” and

³¹ Ratshidaho Maphwanya “Cartel likelihood, duration and deterrence in South Africa” *Competition law and economic regulation in Southern Africa: addressing market power in Southern Africa* (2017) 50.

³² The CLP was issued as a guideline by the Competition Commission on 6 February 2004. It does not form part of the Act; however, it is a guideline published in the government gazette in terms of section 79(2)(a) of the Act. Government Gazette no.25963, 6 February 2004, Proclamation No.195 of 2004.

³³ Paragraph 2.5 of the CLP.

³⁴ Chantal Lavoie “South Africa’s corporate leniency policy: a five-year review” Presented at the third annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa (2009) 2-3.

³⁵ Chantal Lavoie “South Africa’s corporate leniency policy: a five-year review” Presented at the third annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa (2009) 2.

meet the conditions of the CLP and is granted immunity then they become exempt an administrative penalty. The CLP however makes it clear that the immunity granted to a firm will not extend to criminal and civil liability.³⁶ This means that although a firm may be exempt from paying an administrative penalty, it may still face criminal and civil action. The downside of a firm not being first at the door when applying for immunity is that those firms implicated by the CLP applicant will have to pay an administrative penalty imposed by the Tribunal upon being found to have engaged in the cartel conduct concerned.

2.2 The scope of the corporate leniency policy

2.2.1 Introduction

The bread cartel case against Pioneer Foods is a good example of where the CLP was used to uncover a cartel and where the Competition Tribunal (“the Tribunal”) explained the importance of the CLP in terms of its ability to enable the uncovering of cartels. This case was especially significant as bread is a staple food for millions of South Africans given the high level of poverty. Therefore, fixing the price of bread nationally affected many consumers and in particular the poor and vulnerable hence the decision in *Competition Commission v Pioneer Foods (Pty) Ltd*³⁷ (“Pioneer Foods”), is very important.

In this case, the Respondents were found to have been involved in fixing the selling price of bread in the country as well as allocating markets in contravention of section 4(1)(b)(i) and (ii) of the Competition Act. Premier Foods (Pty) Ltd was the CLP applicant from which the Commission had received information relating to the cartel. Tiger Food Brands Ltd and Foodcorp Ltd concluded consent order agreements with the Commission which resulted in them paying administrative penalties. Pioneer Foods was the only respondent opposing the Commission’s case.³⁸ When the matter eventually served before the Tribunal, the Tribunal remarked that:

³⁶ Paragraph 5.9 of the CLP.

³⁷ 15/CR/Feb07 and 50/CR/May08.

³⁸ 15/CR/Feb07 and 50/CR/May08 para.6.

“[32] While fighting cartels is viewed as one of the most important areas of activity for competition agencies globally, the ability of agencies to effectively do so is often hampered by the difficulties pertaining to the gathering of direct evidence. This is not surprising given the nature of cartel activity. Competitors engaging in co-ordination rather than competition tend to conduct themselves in secretive and stealthy ways; meeting behind closed doors, ensuring that there is no paper trail, agreeing on signals which they can send to each other and at times cloaking their activities in the guise of normal commercial practices thereby seeking to mislead and divert anti-trust agencies. [33] This is why agencies globally have found creative ways by which to secure evidence of cartel activity, the Competition Commission’s leniency programme being a case in point.”³⁹

This case thus emphasises that the CLP plays a vital role in uncovering and investigating of cartels given their secretive nature. In many cases, firms disguise cartel agreements as commercial agreements in the ordinary course of business. This is precisely what makes it difficult for competition authorities to find evidence proving cartel behaviour. However, the cooperation of a CLP applicant is pivotally important to the Commission in order to successfully prosecute cartel participants.

2.3 The CLP requirements and process

The CLP provides that only a firm which is “first to the door” will be considered for immunity⁴⁰. A firm through a marker application secures its first place in the queue in order to apply for immunity against administrative penalties. This would be the applicant’s first level of contact with the Commission.⁴¹ In the event that an applicant is successfully first to the door, the Commission is required to inform the applicant within a reasonable time.⁴² However, if the Commission

³⁹ 15/CR/Feb07 and 50/CR/May08 para. 32 and 33.

⁴⁰ Paragraph 5.6 of the CLP.

⁴¹ Paragraph 12.1 of the CLP.

⁴² Paragraph 11.1.1.3 of the CLP.

already received a marker application for the same conduct then it is required to inform the applicant within five days of this outcome.⁴³

Once it is established that an applicant is a successful marker applicant, a first meeting is convened with the Commission.⁴⁴ At this first meeting, the applicant must provide the Commission with all evidence at its disposal, whether in writing or verbal, which it relies on for purposes of the CLP application.⁴⁵ Subsequent to the first meeting, if the Commission is satisfied that the applicant has met the requirements set out in the CLP for purposes of immunity then a second meeting with the applicant is reconvened where the applicant will be granted conditional immunity in writing.⁴⁶

The CLP applicant, throughout this process, is required to meet the requirements set out below:

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

⁴³ Paragraph 11.1.1.2 of the CLP.

⁴⁴ Paragraph 11.1.2 of the CLP.

⁴⁵ Paragraph 11.1.2.1 of the CLP.

⁴⁶ Paragraph 11.1.3.1 of the CLP.

- f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and
- g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.⁴⁷

The above requirements serve a purpose in that they ensure that the Commission has a smooth-running process when information gathering occurs. It also ensures that CLP applicants adhere to the Commission's process. CLP applicants remain at the Commission's mercy until such time that prosecution of all cartel participants is concluded. This is why immunity is conditional at the onset. The most important requirement is most likely that all CLP applicants must provide information and evidence that is complete and truthful because ultimately, this is the evidence that the Commission would use against other respondents during prosecution.⁴⁸ Conditional immunity remains in place until such time that the prosecution proceedings are concluded.⁴⁹ Subsequent to closing of legal proceedings, the Commission will grant the CLP applicant total immunity in the form of a written document.⁵⁰ Even with all these mechanisms in place, the Commission has nevertheless faced some challenges in relation to the CLP.

In *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and others*⁵¹, Agri Wire (Pty) Ltd ("Agri Wire"), Cape Gate (Pty) Ltd, Allens Meshco (Pty) Ltd, Hendok (Pty) Ltd, Wire Force (Pty) Ltd, Agri Wire North (Pty) Ltd, Cape Wire (Pty) Ltd, Forest Wire (Pty) Ltd, Independent Galvanising (Pty) Ltd and Associated Wire Industries (Pty) Ltd were found to have been in contravention of section 4(1)(b)(i), (ii) and (iii) of the Competition Act. Consolidated Wire Industries (Pty) Ltd ("CWI") was the CLP applicant who had come forward with information relating to the wire and wire related products cartel.⁵² Agri Wire sought to challenge the legality of the CLP and the lawfulness of the Commission granting CWI conditional immunity to CLP applicants and

⁴⁷ Paragraph 10 of the CLP.

⁴⁸ Paragraph 10.1 (a) of the CLP.

⁴⁹ Paragraph 9.1.1.1 of the CLP.

⁵⁰ Paragraph 9.1.1.2 of the CLP.

⁵¹ [2012] ZASCA 134.

⁵² [2012] ZASCA 134 para 3.

also challenged the validity of the evidence that was obtained from CWI. Agri Wire also wanted the Supreme Court of Appeal (“SCA”) to make an order setting aside the Commission’s referral to the Tribunal.⁵³ In their arguments, Agri Wire argued that the Competition Act does not confer powers on the Commission to decide which cartel participants it will investigate and make a subject of a referral; to whom it will grant immunity from a referral and possible negative finding including immunity from paying administrative penalties.⁵⁴

The SCA dealt with the contents of the CLP and noted that throughout the writing of the CLP, reference is always made of the Commission when referring to granting of immunity. The SCA cited paragraph 9.1.1.2 of the CLP to be of importance which provides that:⁵⁵

“Conditional immunity therefore precedes total immunity or no immunity. The Commission will give the applicant total immunity after it has completed its investigation and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Appeal Court, as the case may be, provided the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.”⁵⁶

The SCA further noted section 9.1.1.3 which states that the Commission can at any stage until full immunity is granted, revoke the conditional immunity for lack of cooperation and pursue prosecution before the Tribunal.⁵⁷ The CWI and the Commission argued that conditional immunity simply meant that the Commission would not pursue prosecution against CWI. The ultimate decision would be with the Tribunal on whether to grant relief to CWI.⁵⁸ The SCA held that it would not make sense to have a distinction between conditional and total immunity if the Tribunal had the power to revoke and impose an administrative penalty. The SCA held further that the CLP would be ineffective if a party

⁵³ [2012] ZASCA 134 para 2.

⁵⁴ [2012] ZASCA 134 para 5.

⁵⁵ [2012] ZASCA 134 para 7.

⁵⁶ [2012] ZASCA 134 para 7.

⁵⁷ [2012] ZASCA 134 para 7.

⁵⁸ [2012] ZASCA 134 para 8.

seeking leniency had a looming threat over its head that immunity from paying an administrative penalty could simply be revoked by the Tribunal.⁵⁹

On the issue of the legality of the CLP, the SCA held that the Competition Act empowers the Commission to adopt a CLP in that it provides that the purpose of the Competition Act, amongst others, is to promote market transparency and to investigate and evaluate alleged contraventions. On this basis, the SCA held that the Commission was empowered under the Competition Act to adopt and implement the CLP by giving immunity to parties in exchange for information relating to cartels.⁶⁰ Agri Wire contended that even if the adoption of the CLP was permissible, it was impermissible that immunity would be granted by the Commission and that it was the Tribunal who had the power to grant immunity. Agri Wire's argument rested on the following points:

- (a) When the Commission refers a case to the Tribunal it is obliged to refer all cartel participants for their involvement in the cartel and then the Tribunal should decide on the appropriate order; and
- (b) the Competition Act requires the Tribunal to make a determination on the level of cooperation a cartel participant has offered to the Tribunal and Commission and thus this means that it is the Tribunal that decides which cartel participant qualifies for immunity.⁶¹

The SCA rejected this argument. It held that a complaint containing allegations that a cartel exists may be initiated by the Commissioner or a third party.⁶² Further, at the conclusion of an investigation, the Commission may elect to refer all or some of the particulars relating to a complaint and refer the remainder at a later stage. This is a statutory power of the Commission to exclude certain particulars.⁶³ Furthermore, the SCA finally held that even though the Competition Act envisages that the Tribunal may take into consideration the

⁵⁹ [2012] ZASCA 134 para 9.

⁶⁰ [2012] ZASCA 134 para 22.

⁶¹ [2012] ZASCA 134 para 23.

⁶² [2012] ZASCA 134 para 24.

⁶³ [2012] ZASCA 134 para 24.

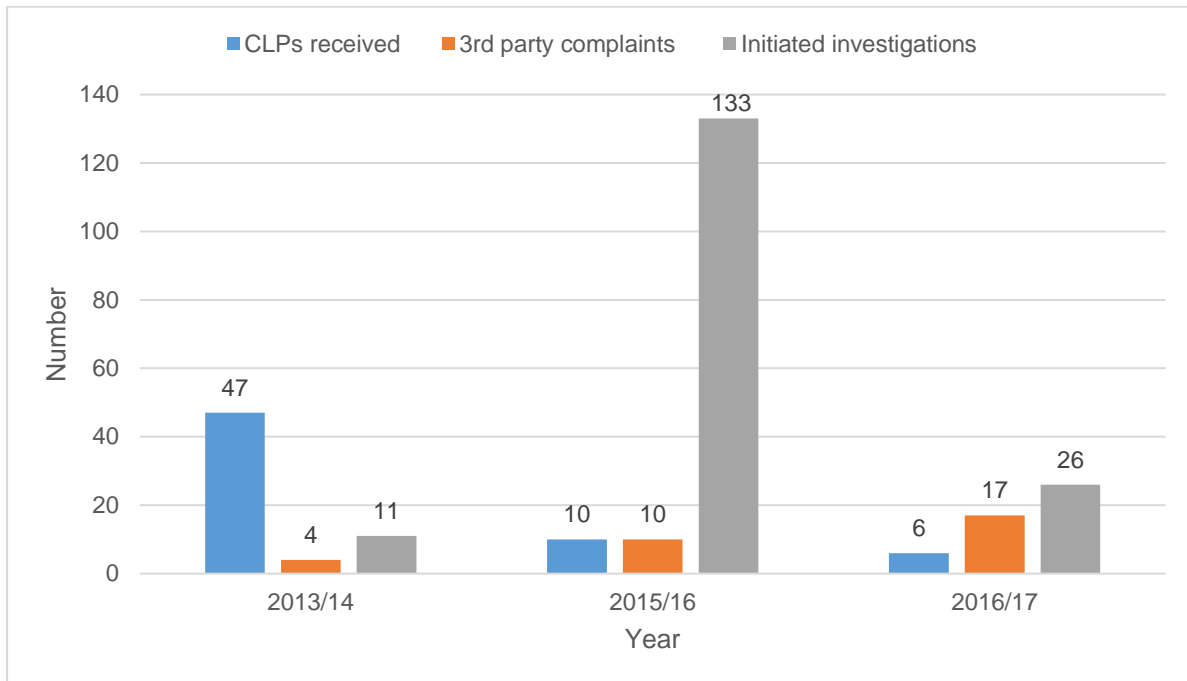
cooperation of a cartel participant, it does not mean that the prerogative to grant immunity lies with the Tribunal.⁶⁴

The *Agri Wire* decision was an important decision in that it cemented the legality of the CLP and the role of the Commission in implementing the CLP as well as the importance of the CLP for purposes of uncovering cartels. So, it stems from the decision that where a CLP applicant satisfies all the requirements for conditional immunity, it is within the Commission's prerogative to grant such party conditional immunity until such time as that prosecution is concluded.

The cases referred to above provide some examples of when and how the CLP process was utilised by the Commission. It also shows some of the challenges faced by the Commission in relation to the CLP. The decision in *Pioneer* touches on the secretive nature of cartels and the role the CLP plays in uncovering those cartels that are usually disguised as practices undertaken in the normal course of running businesses. Statistics issued by the Commission provide information on the number of CLP applications received annually and the number of cartel investigations each financial. Figure A below provides an overview of the information collated by the Commission over the last three (3) financial years according to the Commission's annual reports.

⁶⁴ [2012] ZASCA 134 para 26.

Figure A: Cartel statistics over the last three financial years



Source: Commission's annual reports 2013/14; 2015/16 and 2016/17

The statistics show a gradual increase in the number of investigations over the last three financial years. However, the number of CLP applications are insignificant when compared to the investigations. What can be inferred is that the Commission requires more CLP applications for the uncovering of cartels. With the criminalisation of cartel conduct coming into effect, one of the concerns raised by the Commission and the Tribunal was that such criminalisation was likely to bring a standstill to the existing CLP.⁶⁵ However, Merdian proposes that for the CLP to remain effective it would need to be properly integrated with a new individual immunity policy so that when firms apply for immunity, this would automatically extend to individuals.⁶⁶ The effect of this would be to ultimately incentivise firms to rush to be the first to the door for immunity for purposes of protecting themselves and their staff members.⁶⁷

⁶⁵ Lesley Morphet and Nkondo Hlatshwayo "South Africa: the criminalisation of cartel conduct" *Journal of European competition law & practice* (2017) vol 8 37.

⁶⁶ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" (2013) LLM thesis University of Cape Town 27.

⁶⁷ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" (2013) LLM thesis University of Cape Town 27.

2.4 The Criminalisation of Cartel Conduct in South Africa

The objective of any competition policy regime must be the deterrence of contraventions before they even happen.⁶⁸ As alluded to in Chapter One there is a broad acceptance that cartels are especially damaging to market economies.⁶⁹ To the layman, it is a little more difficult explaining that cartel conduct is wrongful and causes significant harm due to lack of broad public recognition.⁷⁰ However, cartels have had detrimental effects to the outcomes for the poor and vulnerable in developing and third world nations like South Africa.⁷¹ Before the enactment of the cartel offence in South Africa, section 59A of the Competition Act provided for administrative penalties only as the sanction against firms held to be in contravention of section 4(1)(b) of the Competition Act. The Competition Act also provided in section 65 for civil prosecution by those firms and individuals affected by a colluding firm. Due to the negative social and economic effects of cartels, it is however argued that civil sanctions are not enough to address the immorality of cartel activity.⁷² During the announcement of the enactment of the cartel offence, the Minister of Economic Development, Ebrahim Patel, stated that “cartels and abuse of market dominance results in high prices to the disadvantage of ordinary citizens and of economic efficiency and they create quasi-monopoly practices in the economy”.⁷³

The question then is whether criminalisation is an appropriate answer to the deterrence of cartels? There are three reasons generally argued in favour of appropriateness of criminalisation of cartel conduct, mainly:

⁶⁸ Ratshidaho Maphwanya “Cartel likelihood, duration and deterrence in South Africa” *Competition law and economic regulation in Southern Africa: addressing market power in Southern Africa* (2017) 50.

⁶⁹ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 212.

⁷⁰ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” Presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 2.

⁷¹ Nicole Lee “The criminalisation of cartel activity in South Africa” (2016) 3.

⁷² Nicole Lee “The criminalisation of cartel activity in South Africa” (2016) 3.

⁷³ Matthew le Cordeur “Cartel conduct will now land you in jail for 1 years” *Fin24*. Accessed at <http://www.fin24.com/Economy/cartel-conduct-will-now-land-you-in-jail-for-10-years-20160614> on 16 August 2017.

- a) cartel conduct is immoral and therefore criminal: the notion is that criminalisation is appropriate because cartels cause economic harm to consumers.⁷⁴ As previously mentioned, cartels have caused considerable harm to the poor. Criminalisation does not only extend to contact crimes such as murder but may extend to regulatory contraventions too;⁷⁵
- b) there are other less harmful acts which are criminal: The law currently criminalises conduct which is less harmful to society such as theft however, cartels have a larger effect on society leaving multitudes of victims suffering losses well into the billions;⁷⁶ and consumers are left paying higher prices for goods and services and being deprived of their money;⁷⁷ and
- c) criminalisation is necessary for the deterrence of cartel conduct:⁷⁸ the idea here is that criminalisation is necessary to deter executives from taking part in cartel activity. General deterrence tries to dissuade people from taking part in cartel activity by making it clear that there will be severe consequences. Therefore, criminal penalties override civil penalties in their effectiveness in relation to deterrence.⁷⁹

An empirical study of the Office of Fair Trading in the UK in 2010 found that the deterrent effect of criminal penalties outweighed that of administrative

⁷⁴ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 9.

⁷⁵ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 9.

⁷⁶ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 9.

⁷⁷ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 10.

⁷⁸ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 8.

⁷⁹ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium on Economic Crime Jesus College, University of Cambridge (2010) 11.

penalties.⁸⁰ It is further stated that administrative penalties are usually imposed years after conception of a cartel and rarely impact the individuals who were directly affected by the cartel.⁸¹ Taking into account the effects of cartels discussed above and civil sanctions being insufficient and not efficient enough to deter cartel conduct, it would make sense why the South African government decided it necessary to put into effect the amendment on criminalisation of cartel engagement/conduct. It would be prudent to also consider the growing number of cartel investigations as previously shown in Figure A above.⁸²

On 1 May 2016, section 73A of the Competition Amendment Act, no.1 of 2009, (“the Amendment”) came into effect. Section 73A (1) and (2) of the Amendment provides as follows:

- “73A. (1) A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person -
- (a) caused the firm to engage in a prohibited practice in terms of section 4(1)(b); or
 - (b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b).
- (2) For the purpose of subsection (1)(b), ‘knowingly acquiesced’ means having acquiesced while having actual knowledge of the relevant conduct by the firm.”

This Amendment provides that directors or persons with management authority who knowingly acquiesce to cartel conduct will be held criminally liable. This means that a director or person who has management authority who is found to have caused a firm to fix prices, allocate markets or collusively tender will be held criminally liable for contravening section 4(1)(b) of the Competition Act.⁸³

⁸⁰ Andreas Stephan “An empirical evaluation of the normative justifications for cartel criminalisation”, *Legal Studies* vol 37 (2017) 624.

⁸¹ Andreas Stephan “An empirical evaluation of the normative justifications for cartel criminalisation”, *Legal Studies* (2017) vol 37 625.

⁸² Competition Commission annual reports for financial years 2015 to 2018.

⁸³ Nomfundo Manyathi-Jele “The criminalisation of cartel conduct” *De Rebus – SA Attorneys’ Journal Archived Issues* (2016).

The Amendment does not provide a definition for director or a person who has management authority. In the context of the Amendment, section 73A (2) defines “acquiesce” to mean having actual knowledge of the conduct.

The remaining sections of the Amendment are yet to come into effect; however, they provide as follows:

“(3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if -

- (a) the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b); or
- (b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b).

(4) The Competition Commission –

- (a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and
- (b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.”

Section 73A (3)(a) and (b) of the Amendment provide that a person will only be held criminally liable in the event that a consent order in which the firm makes an admission of guilt for engaging in a prohibited practice is concluded or when the Tribunal or the Competition Appeal Court makes a finding that the firm engaged in a prohibited practice in contravention of section 4(1)(b) of the Competition Act. Further, section 73A (4) of the Amendment prohibits the Commission from seeking or requesting prosecution of any person it deems deserving of leniency. The issue here is that the Commission does not have the power or authority to direct the National Prosecuting Authority (“NPA”) on which

prosecutions to pursue despite the Commission having made submissions advocating for leniency of the individual.⁸⁴

Since the Commission cannot dictate to the NPA whom to prosecute, this in turn means that whilst the CLP can provide immunity from paying administrative penalties, individuals will however not enjoy the same benefit of immunity from criminal prosecution.⁸⁵ Ultimately, the decision on criminal prosecution lies with the NPA. With the looming threat of being held criminally liable, it has been argued that the Amendment will have a chilling effect on the CLP.⁸⁶ In particular, directors of companies may find themselves conflicted when it is time to make a decision on whether to self-report to the Commission and possibly incriminate themselves. This conflict arises because directors are put in a position where they have authority over a firm and make decisions on behalf of the firm.⁸⁷ Furthermore, this will also affect the conclusion of consent orders because directors will want to escape the criminal liability as well. The NPA might be amenable to the Commission's submissions and in any event, the CLP does not guarantee immunity for civil and criminal liability to self-confessing individuals. In his announcement of the Amendment, the Minister of Economic Development, Ebrahim Patel said that the "opposite, of course, will also hold true: to come forward and act as a witness for the state and potentially avoid jail can be a very, very powerful incentive".⁸⁸

Because sanctions through civil proceedings have proven to be insufficient, the real threat of someone possibly being imprisoned provides a sufficient enough deterrent. However, where individuals are found to be involved in cartel

⁸⁴ Jenny Finnigan "Competition amendment act cartel contraventions now crimes" 1. Accessed at <http://www.wylie.co.za/articles/competition-amendment-act-cartel-contraventions-now-crimes/> on 28 August 2017.

⁸⁵ Nicole Lee "The criminalisation of cartel activity in South Africa" (2016) 11.

⁸⁶ Ahmore Burger-Smidt "Criminalisation of cartels: A potential cure with side effects" 5. Accessed at <http://www.global.co.za/criminalisation-of-cartels-a-potential-cure-with-side-effects/> on 1 June 2017.

⁸⁷ Lesley Morphet and Nkondo Hlatshwayo "South Africa: The criminalisation of cartel conduct" *Journal of European competition law & practice* (2017) vol 8 38.

⁸⁸ Dewald van Rensburg "Cartel criminalization slammed" Fin24. Accessed at <http://www.fin24.com/Economy/cartel-criminalisation-slammed-20161016-2> on 24 August 2017.

conduct, they must be held accountable for contravening their employer's competition law compliance policies and imprisoned for committing such acts.⁸⁹

There are additional implications for directors and people with management authority who are found criminally liable. In this regard section 73A (6) provides as follows:

- “(6) A firm may not directly or indirectly-
- (a) pay any fine that may be imposed on a person convicted of an offence in terms of this section; or
 - (b) indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned, or the person is acquitted.”

Section 73A (6) thus prohibits companies from providing financial assistance to directors and or individuals with management authority to meet their legal costs or pay fines imposed by the courts. These individuals are usually in upper management and view cartelization as a means of increasing the firm's profits and a way to climb the corporate ladder by increasing their chances of promotion or higher income.⁹⁰ Criminalisation then pinpoints the source of the illegality.⁹¹ It should be a deterrent that a person stands the risk of personally paying for his/her actions. However, it is argued by Morphet and Hlatshwayo that section 73A (6) takes away the constitutional rights of these individuals to a fair trial and offends the presumption of innocence.⁹² The argument is that the Amendment infringes on these rights if the Tribunal's finding on a matter will be used as used as prima facie evidence for purposes of criminal prosecution which then creates a reverse onus on the accused to prove their innocence;

⁸⁹ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 213.

⁹⁰ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 214.

⁹¹ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 214.

⁹² Lesley Morphet and Nkondo Hlatshwayo “South Africa: the criminalisation of cartel conduct” *Journal of European competition law & practice* (2017) vol 8 37.

including the prohibition on companies from financially assisting directors and executives with their legal costs.⁹³

⁹³ Lesley Morphet and Nkonzo Hlatshwayo “South Africa: the criminalisation of cartel conduct” *Journal of European competition law & practice* (2017) vol 8 37.

Chapter 3

Comparative Analysis

3.1 Introduction

The UK and the United States of America (“US”) criminalise cartel conduct. This chapter provides a comparative analysis of how these two jurisdictions approach cartel enforcement and specifically criminalization of cartel conduct. The chapter will endeavor to reinforce that criminalisation of cartel conduct is an effective deterrent tool and this is mainly shown by the successes of the US criminal prosecution process which has been in existence since 1890. This also provides the South African Competition Commission with the opportunity to take some lessons from these jurisdictions whilst it tries to find its feet around the implementation of the cartel offence.

3.2 The United States experience

The criminalization of cartel conduct in the USA has been in existence since the inception of the Sherman Act.⁹⁴ As mentioned in Chapter One, section 1 of the Sherman Act⁹⁵ prohibits contracts or conspiracies in restraint of trade between several states is illegal. In 2004 the Antitrust Criminal Penalty Enhancement and Reform⁹⁶ increased the maximum fine for individuals from \$350 000 to \$1 million dollars and the jail sentence from three years to up to ten years.⁹⁷ It also provides for fines of up to \$100 million dollars for companies.⁹⁸ The Department of Justice (“DOJ”) oversees the investigation of cartels in the USA and it has both civil and criminal powers to do so.⁹⁹ The US

⁹⁴ William Kolasky “Criminalizing cartel activity: lessons from the U.S. experience” 1. Accessed at <https://www.coleurope.eu>kolasky - criminalizing cartel activity 8-04> on 4 April 2019.

⁹⁵ Sherman Antitrust Act of 1890.

⁹⁶ Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

⁹⁷ Norton Rose Fulbright “Criminal cartel offence in UK: public attitudes” 6. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.

⁹⁸ Eleanor M. Fox “Cartels: A United States story, and a research program for the world” (2006) *Criminalization of competition law enforcement* 240.

⁹⁹ Eleanor M. Fox “Cartels: A United States story, and a research program for the world” (2006) *Criminalization of competition law enforcement* 240.

through the DOJ is hailed to have one of the most robust cartel criminal enforcement regimes in the world.¹⁰⁰ The US takes the stance that cartels exist to destroy competition and do not provide any pro-competitive or efficiency benefits.¹⁰¹ One of the ways through which the USA detects cartels is through its corporate leniency program which is said to be “well-articulated”¹⁰² and has successfully increased the number of cartels detected.¹⁰³

3.2.1 Leniency in the United States

In 1978 the US Antitrust Division introduced a corporate leniency program however due to underutilisation and ineffectiveness, the Antitrust Division revised it and introduced a new corporate leniency program.¹⁰⁴ The new and revised corporate leniency program provides companies and directors, officers and employees with the opportunity to avoid criminal prosecution for antitrust violations.¹⁰⁵ In the US having a leniency program has proved to be critical and has played a major role in the successful prosecution of criminal cartels. As criminal penalties associated with cartel conduct have increased, companies and individuals have more to lose by not being first at the door.¹⁰⁶ It is also important for a successful leniency program to ensure that the grant of immunity extends not only to the firm, but also to all employees who agree to come forward and cooperate with the government’s investigation.¹⁰⁷ However, cooperation from individuals may go two ways, that is, the threat of a substantial jail sentence may motivate an individual to settle quickly and cooperate more

¹⁰⁰ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 239.

¹⁰¹ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 240.

¹⁰² John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 241.

¹⁰³ John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 241.

¹⁰⁴ Scott Hammond “The evolution of criminal antitrust enforcement over the last two decades” Department of Justice 2.

¹⁰⁵ Department of justice “Leniency policy for individuals” 1. Accessed at <https://www.justice.gov/atr/individual-lenency-policy> on 5 April 2019.

¹⁰⁶ William Kolasky “Criminalizing cartel activity: lessons from the U.S. experience” 5. Accessed at <https://www.coleurope.eu>kolasky - criminalizing cartel activity 8-04> on 4 April 2019.

¹⁰⁷ William Kolasky “Criminalizing cartel activity: lessons from the U.S. experience” 6. Accessed at <https://www.coleurope.eu>kolasky - criminalizing cartel activity 8-04> on 4 April 2019.

readily¹⁰⁸ or an individual may choose to refuse to cooperate and fight it out or leave their fate to a jury.¹⁰⁹

The US corporate leniency program, just like in the UK provides that leniency, may be granted to companies and individuals subject to them meeting certain conditions contained in the programmes. The conditions include *inter alia* that at the time that the company self-reports, the Antitrust Division must not have already received information relating to the illegal cartel activity; the self-reporting company took effective action to stop its participation in the cartel; the self-reporting company provides full and continuous cooperation with the Antitrust Division whilst it completes its investigation; an admission by the self-reporting company; the self-reporting company provides some kind of compensation to parties who were affected by the cartel; and the self-reporting company was not the initiator of the cartel and did not coerce anyone else into participating in the cartel.¹¹⁰

The US corporate leniency program also states that in the event that a self-reporting company does not meet the requirements aforementioned, then it will be required to meet a different set of requirements irrespective of whether it is before or after the Antitrust Division has started its investigation.¹¹¹ The conditions are similar to the first scenario, except that the Antitrust Division must not already have evidence pointing to the self-reporting company's participation.¹¹² Of relevance is that the US corporate leniency also grants automatic individual leniency for directors, officers and employees of the self-reporting company provided that they meet the requirements aforementioned and provided they provide complete and continuous cooperation to the Antitrust Division for as long the investigation continues.¹¹³ Alternatively, in the event that

¹⁰⁸ William Kolasky "Criminalizing cartel activity: lessons from the U.S. experience" 8. Accessed at <https://www.coleurope.eu>kolasky - criminalizing cartel activity 8-04> on 4 April 2019.

¹⁰⁹ William Kolasky "Criminalizing cartel activity: lessons from the U.S. experience" 8. Accessed at <https://www.coleurope.eu>kolasky - criminalizing cartel activity 8-04> on 4 April 2019.

¹¹⁰ Department of justice "Corporate leniency policy" 2. Accessed at <https://www.justice.gov/atr/corporate-leniency-policy> on 4 April 2019.

¹¹¹ Department of justice "Corporate leniency policy" 2. Accessed at <https://www.justice.gov/atr/corporate-leniency-policy> on 4 April 2019.

¹¹² Department of justice "Corporate leniency policy" 2. Accessed at <https://www.justice.gov/atr/corporate-leniency-policy> on 4 April 2019.

¹¹³ Department of justice "Corporate leniency policy" 4. Accessed at <https://www.justice.gov/atr/corporate-leniency-policy> on 4 April 2019.

a self-reporting company does not qualify for immunity then the director, officer or employee may approach the Antitrust Division on an individual basis.¹¹⁴

3.2.2 Criminalisation under the Sherman Act

Initially criminalisation under the Sherman Act did not yield great results due to the low number of individual prosecutions that occurred.¹¹⁵ When the USA began prosecuting individuals in the mid-1990s, the international community was not convinced of the serious nature of cartels and their effects.¹¹⁶ The US struggled in gaining international cooperation from other jurisdictions in attempt to prosecute individuals who had participated in international cartels.¹¹⁷ Through improved cooperation with foreign enforcers, the US was able to convince these governments of the serious nature of cartels.¹¹⁸ It was in May 1999 when the US called for the conviction of foreign individuals guilty of being involved in an international cartel that affected the US.¹¹⁹ This was the beginning of many prosecutions for the US when between 1999 and 2000¹²⁰, the Antitrust Division managed to prosecute three foreign executives for their involvement in the vitamin cartel.¹²¹ International cartels grew over time because cartelists believed that in order for the cartel to succeed it would have to be international and with increased use of the internet, this made it easier for cartelists to co-ordinate.¹²² Brent Snyder (“Snyder”), Deputy Assistant Attorney

¹¹⁴ Department of justice “Corporate leniency policy” 4. Accessed at <https://www.justice.gov/atr/corporate-lenency-policy> on 4 April 2019.

¹¹⁵ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 3. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹¹⁶ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 2. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹¹⁷ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 2. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹¹⁸ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 2. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹¹⁹ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 2. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹²⁰ The Department of Justice prosecuted a vitamin cartel case which dated back to 1990. The cartel involved Swiss, German, Canadian and Japanese companies for fixing the price of vitamins and allocating customers. Criminal fines of up to R1 225 000 000 were imposed on F Hoffmann-La Roche Ltd, BASF AG and HLR. The Antitrust Division went on to criminally prosecute US and foreign executives who participated in the vitamin cartel. Accessed at <https://www.justice.gov/atr/selected-criminal-cases-antitrust-division> on 21 November 2019.

¹²¹ Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape” 2. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 4 April 2019.

¹²² John M. Connor, Albert A. Foer & Simcha Udwin “Criminalizing cartels: an American perspective” (2010) vol 1 *NJECL* 241.

General of the Antitrust Division, said an important objective of the Antitrust Division is to ensure that foreign nationals and US accomplices are held accountable for breaking competition laws in the US.¹²³

Snyder also commented that the US Antitrust Division is committed to prosecuting executives found to be involved in cartel activity.¹²⁴ Between 2000 and 2009, the Antitrust Division prosecuted 453 individuals and 220 companies involved in cartel activity.¹²⁵ The high number of prosecuted individuals is also attributable to the fact that there may be a significant number of individuals in a company involved in coordinating the cartel.¹²⁶

In the US, criminalisation of cartels are either criminal or civil in nature.¹²⁷ Criminal cases occur where there has been a clear cartel and civil cases occur for other competition law infringements which are defensible.¹²⁸ The UK is not as clear in that there are requirements which must be met before a criminal case is brought forward. In South Africa, there is a dual system where companies will be civilly prosecuted and individuals criminally prosecuted. At the early stage of an investigation, in cases where the DOJ is uncertain on whether a case involves a cartel or other competition law infringements, the DOJ's policy is to proceed with a criminal investigation.¹²⁹ Once the DOJ decides on a criminal investigation, a formal investigation is invoked which entails initiating proceeding with a grand jury investigation.¹³⁰ A grand jury

¹²³ Norton Rose Fulbright "Criminal cartel offence in UK: public attitudes" 25. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.

¹²⁴ Norton Rose Fulbright "Criminal cartel offence in UK: public attitudes" 25. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.

¹²⁵ Norton Rose Fulbright "Criminal cartel offence in UK: public attitudes" 25. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.

¹²⁶ Norton Rose Fulbright "Criminal cartel offence in UK: public attitudes" 25. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.

¹²⁷ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 78.

¹²⁸ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 78.

¹²⁹ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 79.

¹³⁰ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 79.

investigation¹³¹ requires that the Antitrust Division liaise and cooperate with other bodies such as the Federal Bureau of Investigations.¹³²

Initiating a grand jury investigation has some legal consequences because this process determines which evidence will be admissible in subsequent criminal proceedings.¹³³ In order for a grand jury investigation to take place, the Antitrust Division writes a memorandum to the Director of Criminal Enforcement making a request and setting out the basis on which the investigation should take place.¹³⁴ This is unlike in South Africa, where it will be up to the NPA to make a decision on whether to pursue a criminal prosecution and not for the Commission to decide. The information contained in the memorandum will come from the US Antitrust Division's preliminary investigation or from a leniency application which usually provides enough information to establish that there might be a possible criminal infringement.¹³⁵

The memorandum making a request for a grand jury investigation must contain certain information, namely the following:

- “Identify the companies, individuals, industry, and commodity or service involved.
- Estimate the amount of commerce involved on an annual basis.
- Identify the geographic area affected and the judicial district in which the investigation will be conducted.
- Describe the suspected criminal violations, including nonantitrust violations, and summarize the supporting evidence.

¹³¹ A grand jury investigation is where an individual is given notice by way of an indictment informing them that they are believed to have committed a crime, to appear before a grand jury. A grand jury comprises of 16-23 members before which a case is outlined and evidence presented. Witnesses may also be called to testify. Once the proceedings are completed, the grand jury takes a secret vote on whether they believe that the evidence presented before them is enough to prove a crime was committed. These proceedings are sealed and therefore witnesses cannot have legal representatives present. Accessed at <https://www.justice.gov/usao/justice-101/charging> on 19 November 2019.

¹³² Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 79.

¹³³ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 79.

¹³⁴ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 79.

¹³⁵ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 80.

- Evaluate the significance of the possible violation from an antitrust enforcement standpoint.
- Explain any unusual issues or potential difficulties staff has identified.
- Identify the attorneys who will be assigned to the investigation.
- Explain the background of the investigation, including the source of the information.
- Explain the initial steps in staff's proposed investigative plan.
- State whether there have been any past criminal investigations by the Division of the product or service that is the subject of the grand jury request."¹³⁶

Once a grand jury investigation is approved then the grand jury will source information through summonses of people suspected to be involved in the cartel conduct and sometimes, search warrants.¹³⁷ The summons can either be for the production of documents, testimony or exemplars.¹³⁸ During this process, witnesses are not allowed to have any legal representation present and it is only the prosecutors who will have knowledge of what evidence is at hand. All summonsed witnesses who appear before the grand jury have the right to invoke the Fifth Amendment¹³⁹ to prevent them from incriminating themselves.¹⁴⁰

The prosecutors, during the grand jury investigation, control how much evidence is presented before the grand jury.¹⁴¹ The main objective of the

¹³⁶ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 80.

¹³⁷ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 80.

¹³⁸ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 81.

¹³⁹ The Fifth Amendment according to the US Constitution is a right that can be invoked by a witness who wishes to not incriminate themselves in a criminal act. The US Constitution states provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Accessed at <https://constitution.findlaw.com/amendment5.html> on 9 August 2019.

¹⁴⁰ Donald I. Baker "Punishment for cartel participants in the US: A special model?" *Criminalising Cartels – Critical studies of an international regulatory movement* (2011) 40.

¹⁴¹ Donald I. Baker "Punishment for cartel participants in the US: A special model?" *Criminalising Cartels – Critical studies of an international regulatory movement* (2011) 39.

prosecutors is to ensure that individuals who hold the highest office in companies are held accountable for authorising and participating in cartel conduct.¹⁴² The advantage with the grand jury process is that it is designed to give an advantage to the US government, therefore increases their chances of successful prosecutions and strengthens their criminal prosecution system.¹⁴³ Once the grand jury investigation is completed then a decision is made to bring criminal charges in the form of an indictment or not.¹⁴⁴ Thereafter the Antitrust Division must make a determination using its prosecutorial discretion as to which individuals it will proceed to prosecute.¹⁴⁵ The success of the US criminal offence regime is owed to its leniency program mainly due to immunity offered to individuals against criminal prosecution.¹⁴⁶

3.3 The United Kingdom experience

In Europe there is a European Competition Network which is made up of the European Commission (“EU Commission”) and competition authorities of member states which is responsible for the enforcement of the prohibition of anticompetitive conduct in terms of Article 101 of the Treaty on functioning of the European Union (“Article 101”).¹⁴⁷ Article 101 provides as follows:

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

¹⁴² Donald I. Baker “Punishment for cartel participants in the US: A special model?” *Criminalising Cartels – Critical studies of an international regulatory movement* (2011) 40.

¹⁴³ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 83.

¹⁴⁴ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 84.

¹⁴⁵ Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012) 85.

¹⁴⁶ Donald I. Baker “Punishment for cartel participants in the US: A special model?” *Criminalising Cartels – Critical studies of an international regulatory movement* (2011) 40.

¹⁴⁷ Alison Jones and Rebecca Williams “The UK response to the global effort against cartels: is criminalization really the solution?” (2014) *Journal of antitrust enforcement* 5.

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

The EU Commission operates collaboratively with all member states where they make decisions on which cases to investigate, initiate, and determining whether there have been contraventions and which administrative sanctions to impose on contravening firms.¹⁴⁸ It should be noted that whilst the EU Commission prioritizes the investigation of cartels in terms of Article 101¹⁴⁹, it is not all member states who criminalise cartels therefore divergence by member states is recognised.¹⁵⁰ The UK in particular is one of those diverging member states in that it undertakes its own investigative, enforcement and adjudicative processes in line with its competition law whilst also enforcing the EU Commission’s laws.¹⁵¹

3.3.1 Leniency in the United Kingdom

The UK has a leniency programme which came into effect in conjunction with the UK Competition Act 1998 (“UK Competition Act”). The UK’s leniency

¹⁴⁸ Alison Jones and Rebecca Williams “The UK response to the global effort against cartels: is criminalization really the solution?” (2014) *Journal of antitrust enforcement* 5.

¹⁴⁹ Alison Jones and Rebecca Williams “The UK response to the global effort against cartels: is criminalization really the solution?” (2014) *Journal of antitrust enforcement* 5.

¹⁵⁰ Ailsa Sinclair, Vita Juknevičiute and Ingrid Breit “Regulation 1/2003: How has this landmark reform worked in practice?” Competition Policy Newsletter 25. Accessed at https://ec.europa.eu/competition/publications/cpn/2009_2_5.pdf on 11 September 2019.

¹⁵¹ Alison Jones and Rebecca Williams “The UK response to the global effort against cartels: is criminalization really the solution?” (2014) *Journal of antitrust enforcement* 6.

programme (“UK leniency programme”) was brought into effect by the Office of Fair Trading which was dismantled five years ago in 2014. It is the Competition and Markets Authority (“CMA”) which oversees all anti-competitive behaviour. The CMA prosecutes cartels civilly in terms of section 2 of the UK Competition Act and prosecutes them criminally in terms of section 188 of the Enterprise Act 2002 (“the Enterprise Act”). The UK’s leniency programme provides leniency which guarantees criminal immunity for cooperating and current/former employees; immunity or reduced penalties; and individual immunity.¹⁵² The UK leniency programme offers 3 types of leniency, namely, Type A; Type B; and Type C leniency:¹⁵³

- Type A immunity occurs where a company is the first applicant at the door to approach the CMA where there is no pre-existing investigation of the cartel conduct. Once determined, Type A leniency provides corporate immunity which means total immunity from paying any administrative penalties; blanket immunity from any criminal prosecution for all current and former employees and directors who cooperate with the CMA; and immunity from director disqualification.¹⁵⁴ There is one similarity here with the South African leniency policy in that it also provides full corporate immunity from paying administrative penalties - however, the South African leniency policy does not provide immunity from criminal prosecution. Under the UK leniency programme, the applicant is required to meet certain conditions just like in South Africa. These conditions are as follows: the applicant must make an admission of guilt for its infringement; provide information including documentation relating to the cartel conduct; the applicant must maintain cooperation with the CMA until such time that all civil and criminal proceedings are concluded; the applicant must cease all cartel activity; and the applicant must not

¹⁵² Office of Fair Trading “Applications for leniency and no-action in cartel cases” OFT’s detailed guidance on the principles and process (2013) 9.

¹⁵³ Office of Fair Trading “Applications for leniency and no-action in cartel cases” OFT’s detailed guidance on the principles and process (2013) 11.

¹⁵⁴ Office of Fair Trading “Applications for leniency and no-action in cartel cases” OFT’s detailed guidance on the principles and process (2013) 17.

have coerced another company to participate in cartel activity.¹⁵⁵ This Type A immunity ceases to be available in instances where the CMA already has a pre-existing investigation of the cartel conduct; where the CMA has already received a leniency application for the same cartel conduct; and where the CMA already has information sufficient enough for it to establish that there is cartel activity.¹⁵⁶

- Type B immunity occurs in instances where the CMA is already conducting a pre-existing investigation into the reported cartel conduct. Once the CMA grants this leniency, it will mean the following for the applicant: discretionary corporate immunity or a reduction in the administrative penalty; discretionary criminal immunity for current/former employees and directors who cooperate with the CMA; and immunity from director disqualification.¹⁵⁷ Type B immunity is also conditional on the applicant meeting the same conditions as a Type A applicant as previously aforementioned. Type B leniency is discretionary because when considering granting corporate immunity or a reduction in penalties, the CMA will assess the extent of public interest in the matter. So, the CMA does a balancing act which assesses whether granting leniency will be of value to the pre-existing investigation or not.¹⁵⁸ The assessment for discretionary criminal immunity is done separately from that of corporate immunity.¹⁵⁹ The CMA considers the extent of information to be provided by the applicant when assessing the information already available to it.¹⁶⁰ The CMA encourages applicants to make their Type B applications as soon as possible as this may also be at the early stages of the CMA's

¹⁵⁵ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 15-17.

¹⁵⁶ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 18.

¹⁵⁷ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 18-19.

¹⁵⁸ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 19.

¹⁵⁹ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 19.

¹⁶⁰ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 19.

investigation and thus will increase their chances of being granted immunity.¹⁶¹ Type B immunity will not be granted in cases where the CMA has already received a leniency application for the reported cartel conduct and where the CMA already has sufficient information to establish that there is cartel activity.¹⁶²

- The final type of leniency is Type C immunity which occurs when the CMA is already conducting a pre-existing investigation or where the applicant has coerced another company to participate in the cartel.¹⁶³ Type C immunity is similar to Type B immunity in that what is granted is a discretionary reduction in the administrative penalty; discretionary criminal immunity to specific individuals; and protection from director disqualification.¹⁶⁴ Type C immunity is also subject to meeting the conditions previously discussed. It is also a requirement that the information being brought forward must add significant value to the CMA's pre-existing investigation.¹⁶⁵ The CMA does the same assessment analysis as in Type B immunity cases when considering granting immunity.¹⁶⁶ The discretionary criminal immunity is not a blanket one therefore does not extend to every current / previous employee or director. Instead the CMA will consider on an individual-to-individual basis if immunity will be granted to specific individuals.¹⁶⁷

Worth noting is a similarity between the South African leniency policy and that of the UK in that all applicants are required to meet certain conditions as discussed under Chapter 2.¹⁶⁸ A key difference is that the Amendment makes

¹⁶¹ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 19.

¹⁶² Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 20.

¹⁶³ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 19.

¹⁶⁴ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 21.

¹⁶⁵ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 21.

¹⁶⁶ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 21.

¹⁶⁷ Office of Fair Trading "Applications for leniency and no-action in cartel cases" OFT's detailed guidance on the principles and process (2013) 21.

¹⁶⁸ Paragraph 10 of the CLP.

provision for the Commission to make submissions to the NPA requesting leniency for those individuals it deems are deserving. As discussed under Chapter 2, it is accepted that a leniency policy incentivises companies to come forward and self-report on their involvement in cartel conduct. It is accepted that criminalisation coupled with administrative penalties make leniency policies more effective when they are cohesive and offer immunity to individuals.¹⁶⁹ This is one of the criticisms of the South African leniency policy, that it is not well integrated with the criminal sanctions.¹⁷⁰

In the UK context, it is argued that immunity from administrative penalties and criminal prosecution provides companies with some incentive because a company that is granted either Type A or Type B immunity will also obtain immunity from criminal prosecution for its employees and directors.¹⁷¹ Immunity is however dependent on which applicant is first at the door otherwise an applicant will find itself only with the option of Type C immunity.¹⁷² Securing a place for immunity can happen on a no-name basis for Type A immunity where a legal representative, on behalf of an applicant, inquires with the CMA whether Type A immunity is available.¹⁷³ In this instance the CMA would have to be provided with sufficient information to establish a reasonable suspicion of cartel activity and for the applicant to be willing to admit to its involvement in the cartel.¹⁷⁴ Once this is established, the CMA then issues a preliminary marker.¹⁷⁵

¹⁶⁹ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 64.

¹⁷⁰ Corlia van Heerden and Monray Marsellus Botha "Challenges to the South African corporate leniency policy and cartel enforcement" (2015) *TSAR* 327.

¹⁷¹ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 65.

¹⁷² Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 65.

¹⁷³ Slaughter and May "Cartel immunity and leniency programmes in the United Kingdom" 3. Accessed at <https://www.lexology.com/library/detail.aspx?g=6d70ee74-15c5-4df3-8da6-ccbde7b7348d> on 28 April 2019.

¹⁷⁴ Slaughter and May "Cartel immunity and leniency programmes in the United Kingdom" 3. Accessed at <https://www.lexology.com/library/detail.aspx?g=6d70ee74-15c5-4df3-8da6-ccbde7b7348d> on 28 April 2019.

¹⁷⁵ Slaughter and May "Cartel immunity and leniency programmes in the United Kingdom" 3. Accessed at <https://www.lexology.com/library/detail.aspx?g=6d70ee74-15c5-4df3-8da6-ccbde7b7348d> on 28 April 2019.

The same can be done for Type B immunity without having to immediately make an application.¹⁷⁶

3.3.2 The UK cartel offence

The UK cartel offence came into effect on 20 June 2003 through the Enterprise Act¹⁷⁷. The purpose for the enactment was to promote effective deterrence for purposes of cartel enforcement.¹⁷⁸ The UK government accepted that imposing administrative fines has a deterrent effect, however at the time of considering the introduction of a criminal offence, it recognised that the fines which were being imposed at the time were too low to have this effect and that these fines would have to be six to ten times the maximum amount of fines that could be imposed at the time.¹⁷⁹ It was also important for the UK government to ensure that the criminal offence is used against the correct individuals therefore the employees or executives who were at the forefront and maintenance of the cartel would be held accountable.¹⁸⁰ It further considered that if fines are made an alternative to criminal sentences then this would mean that companies could pay the fine on behalf of the employee.¹⁸¹ To avoid this, the UK government wanted to propose custodial sentences.¹⁸² As mentioned under Chapter 2, a company directly or indirectly involved in the cartel conduct may not pay fines

¹⁷⁶ Slaughter and May “Cartel immunity and leniency programmes in the United Kingdom” 4. Accessed at <https://www.lexology.com/library/detail.aspx?g=6d70ee74-15c5-4df3-8da6-ccbde7b7348d> on 28 April 2019.

¹⁷⁷ Markus Merdian “The criminalisation of cartel conduct in South Africa and the United Kingdom” LLM thesis University of Cape Town 35.

¹⁷⁸ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 3. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁷⁹ United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para 7.13 and 7.14.

¹⁸⁰ United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para. 7.27.

¹⁸¹ United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para. 7.36.

¹⁸² United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para 7.36.

imposed on an individual.¹⁸³ However, the Amendment does provide for the imposition of a fine as an alternative to a prison sentence.¹⁸⁴

Section 188 of the Enterprise Act provides that:

“an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

- a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
- b) limit or prevent supply by A in the United Kingdom of a product or service,
- c) limit or prevent production by A in the United Kingdom of a product,
- d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,
- e) divide between A and B customers for the supply in the United Kingdom of a product or service, or
- f) be bid-rigging arrangements.”

The cartel offence has two main elements: there must be proof of an agreement with another person to commit the cartel conduct as listed above and the second, is that the individual must have concluded the agreement dishonestly.¹⁸⁵ The idea behind the introduction of the dishonesty requirement was that a jury before a court which would have to decide on whether there was an agreement between individuals to collude would require competition expertise that the jury would not necessarily have.¹⁸⁶ The notion is that it would be easier for a jury to determine whether a person acted dishonestly however, the difficulty with the dishonesty requirement is that a person could raise a

¹⁸³ Section 73A (6)(a) of the Competition Amendment Act, No.1 of 2009. It should be noted that these parts of the Amendment are yet to come into effect.

¹⁸⁴ Section 74 (13)(b) of the Competition Amendment Act, No.1 of 2009. It should be noted that these parts of the Amendment are yet to come into effect.

¹⁸⁵ Herbert Smith Freehills “UK: the cartel offence under the Enterprise Act 2002”. Accessed at <http://www.mondaq.com/uk/x/21437/Antitrust+Competition/The+Cartel+Offence+under+the+Enterprise+Act+2002> on 28 April 2019.

¹⁸⁶ United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para. 7.30.

defence that he or she believed they were acting in accordance with the law.¹⁸⁷ This is different from the South African cartel offence which provides that a finding of collusion will be used as prima facie evidence for purposes of criminal prosecution.¹⁸⁸ The standard for establishing dishonesty was set out in *R v Ghosh*¹⁸⁹ which held that for a conviction to be successful, a jury must apply a two-stage approach, namely:

Stage 1: whether according to the ordinary standard of a reasonable and honest person, what was done was dishonest; and

Stage 2: whether the defendant by that standard realised that what he/she was doing was dishonest.¹⁹⁰

Because the second part of the test allows a defendant to raise a defence that he or she did not believe that they were acting differently from what an honest and reasonable person would do, this would ultimately mean that the test would not be passed.¹⁹¹ The defence is unlikely to succeed if the agreement between the individuals was for a short period or the CMA is unable to produce evidence proving illegality or concealment of cartel meetings.¹⁹² However, Stephen argues, relying on Harding and Joshua¹⁹³ that individuals who made an effort to conceal an agreement must have realised that they were acting dishonestly.¹⁹⁴ The criticism of the dishonesty requirement is that historically cartels were not

¹⁸⁷ United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: a world class competition regime” para. 7.31.

¹⁸⁸ Section 73A (5) of the Competition Amendment Act, No.1 of 2009.

¹⁸⁹ 1982 2 ALL ER 689.

¹⁹⁰ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 9. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁹¹ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 9. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁹² Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 10. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁹³ C. Harding and J. Joshua “Regulating cartels in Europe: A study of legal control of corporate delinquency” *CLJ* (2004) Vol 63 51.

¹⁹⁴ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 10. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

viewed as a contravention of any British laws and therefore would make it difficult to convince jurors that cartel conduct is objectively dishonest.¹⁹⁵ As a result of the requirement, it was difficult for prosecutors to bring forward more cases because of the uncertainty of the outcome of the test.¹⁹⁶

In order to increase the prospects of successfully prosecuting these cases and improve deterrence, the UK government sought to remove the dishonesty requirement in its entirety.¹⁹⁷ It considered four options, namely: a) guidelines for prosecutors; b) distributing a list of allowed conduct; c) using the secrecy element; or d) excluding agreements that were made openly.¹⁹⁸ Through the Enterprise and Regulatory Reform Act 2013¹⁹⁹ (“ERRA13”), the UK government opted to replace the dishonesty requirement and instead define the requirement to exclude agreements made openly.²⁰⁰ To meet this requirement, it would have to be shown that the agreement was either disclosed to customers or published in the London Gazette.²⁰¹ The purpose of this is to show that in their nature, cartel agreements are known to be made in secret between its members.²⁰² This would also mean that jurors do not have to make a finding based on complex economic evidence and instead on something factual.²⁰³ It is necessary to note that cartel agreements that were made openly are still a contravention under the UK Competition Act.²⁰⁴ The ERRA13 also brought into

¹⁹⁵ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 10. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁹⁶ Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP) 10-11. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.

¹⁹⁷ Huseyin Cosgun “Criminalising cartels: theory and practice in the UK and Australia” *Global Antitrust Review* (2013) 134.

¹⁹⁸ Huseyin Cosgun “Criminalising cartels: theory and practice in the UK and Australia” *Global Antitrust Review* (2013) 134.

¹⁹⁹ The Enterprise and Regulatory Reform Act 2013.

²⁰⁰ Markus Merdian “The criminalisation of cartel conduct in South Africa and the United Kingdom” LLM thesis University of Cape Town faculty 43.

²⁰¹ Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” *Kluwer Competition Law* (2017) vol 40 9.

²⁰² Markus Merdian “The criminalisation of cartel conduct in South Africa and the United Kingdom” LLM thesis University of Cape Town 43.

²⁰³ Huseyin Cosgun “Criminalising cartels: theory and practice in the UK and Australia” *Global Antitrust Review* (2013) 134.

²⁰⁴ Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” *Kluwer Competition Law* (2017) vol 40 9.

effect section 188B of the Enterprise Act which provides for three defences which may be raised by defendants before a court. These defences include: a) the defendant did not have any intent to not disclose the agreement to customers; b) the defendant did not have any intent to not disclose the agreement to the CMA; and c) the defendant can prove that before conclusion of the agreement it sought legal advice from legal advisers on the legality of its terms before implementation.²⁰⁵ The CMA defined “professional legal advisers” to include both external and in-house legal advisers irrespective of where their qualification originates from.²⁰⁶ The insertion of the defences are however criticised for creating uncertainty in respect to the cartel offence and undermining its effectiveness.²⁰⁷ It is argued that the defences create the opposite effect of deterrence which was the main purpose of enacting the cartel offence.²⁰⁸ The suggestion is for the UK to reconsider how to effectively legitimise individual sanctions as well as for the CMA to start using its powers for director disqualification.²⁰⁹

The UK leniency programme makes reference to section 204 of the Enterprise Act which confers powers on the CMA to approach a court to issue a competition disqualification order to an individual who was a director and contravened competition law.²¹⁰ The order may direct that a director be disqualified for a period up to 15 years.²¹¹ The order will not be sought by the CMA until such time that administrative penalties are imposed on the company in breach.²¹² It is suggested that competition disqualification orders have a more deterrent effect than the cartel offence because the public perceived them to be

²⁰⁵ Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” Kluwer Competition Law (2017) vol 40 9.

²⁰⁶ Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” Kluwer Competition Law (2017) vol 40 9.

²⁰⁷ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 10.

²⁰⁸ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 10.

²⁰⁹ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 10.

²¹⁰ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 10.

²¹¹ Diana Guy “The UK’s experience with criminal law sanctions” Criminalisation of competition law enforcement (2006) 253.

²¹² Diana Guy “The UK’s experience with criminal law sanctions” Criminalisation of competition law enforcement (2006) 254.

more important.²¹³ An empirical study was carried out in 2014 which showed results from a public survey which sought to find out the attitudes of the British population towards collusion and cartel enforcement in Britain.²¹⁴ The study showed that 75% of the British population believed that individuals who contravene competition laws by price fixing deserved to be disqualified as opposed to 27% who believed that they should be imprisoned.²¹⁵

Unlike South Africa, the UK has a prescribed manner that it adopts to prosecute individuals. In terms of the UK cartel offence, a sentence of up to five years may be imposed or alternatively, an unlimited fine.²¹⁶ Under the UK regime, prosecutions are brought either by the CMA or Serious Fraud Office (“SFO”). The CMA and SFO concluded a memorandum of understanding which lays out the basis on which the two bodies will cooperate with one another when investigating or prosecuting individuals.²¹⁷ The CMA does the initial investigation into the alleged cartel activity and if it finds that the case may involve serious or complex fraud then it refers the matter to SFO which will either accept the case or request the CMA to make further inquiries.²¹⁸ In the case that the SFO accepts a case from the CMA then it may request additional staff from the CMA for assistance with its investigation.²¹⁹ This is different from the Amendment which has not made provision for a memorandum of understanding between the Commission and the NPA nor is there certainty on whether the NPA will have the expertise to handle cartel investigations. The criminal and civil investigations are usually done simultaneously however, the CMA will not make a final decision on the civil investigation until such time that the criminal prosecution is completed.²²⁰ The South African Amendment also envisages that the Commission will first have to complete its investigation and

²¹³ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 11.

²¹⁴ Andreas Stephen “Survey of public attitudes to price fixing and cartel enforcement in Britain”. Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256114/CCP+Working+Paper+07-12.pdf> on 9 November 2019.

²¹⁵ Jonathan Galloway “Securing the legitimacy of individual sanctions in UK competition law” Kluwer Competition Law (2017) vol 40 11.

²¹⁶ Richard Whish & David Bailey *Competition law* (8 ed 2015) 459.

²¹⁷ Richard Whish & David Bailey *Competition law* (8 ed 2015) 459.

²¹⁸ Richard Whish & David Bailey *Competition law* (8 ed 2015) 459.

²¹⁹ Richard Whish & David Bailey *Competition law* (8 ed 2015) 459.

²²⁰ Diana Guy “The UK’s experience with criminal law sanctions” *Criminalisation of competition law enforcement* (2006) 253.

an order made by the Tribunal before the criminal investigation commences and a decision is made by the NPA.

The UK, just like South Africa, faced some criticism on the legitimacy of its cartel offence. The UK government itself identified these shortcomings and attempted to reform the laws. In 2016, the CMA only had three unchallenged convictions through the cartel offence.²²¹ It is suggested that the more successful prosecutions by the CMA, the more “legitimate” the cartel offence will become.²²²

²²¹ Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” Kluwer Competition Law (2017) vol 40 16.

²²² Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” Kluwer Competition Law (2017) vol 40 15.

Chapter 4

THE IMPLICATIONS OF SECTION 73A ON INDIVIDUALS

4.1 The burden of proof

Section 73A of the Amendment creates three thresholds the NPA will be expected to prove.²²³ The thresholds are listed as follows:

- a) To establish that the individual being prosecuted is a director or person with management authority;
- b) The individual caused the firm to engage in the prohibited practice; or
- c) The individual knowingly acquiesced in the firm engaging in the prohibited practice.

A director or individual with management authority who engages in cartel activity would be behaving criminally and therefore, failing to meet their fiduciary duties.²²⁴ The Amendment requires that the NPA establish that an individual is a director or someone with management authority. As pointed out under Chapter 4²²⁵ does not define what a person with management authority is and this could therefore prove difficult for the NPA to prove to the courts.²²⁶ Secondly, the Amendment also requires that the NPA show that the individual caused the involvement.²²⁷ It is assumed that the elements of causation would be the same as those under criminal law, that is, it would be proven beyond a reasonable doubt.²²⁸ The main issue in proving causation is however that it is unclear what kind of evidence would be required to prove causation.²²⁹ Will the courts require direct, tangible evidence such as a written cartel agreement? This might be problematic when taking into account the definition of 'agreement'

²²³ Nicole Lee "The criminalisation of cartel activity in South Africa" (2016) 10-11.

²²⁴ Zandile Ramalohlanye "An assessment of the suitability of the criminal cartel offence in South African competition law" (2013) LLM dissertation University of Cape Town 49.

²²⁵ Section 73A (1) of the Competition Amendment Act, No.1 of 2009.

²²⁶ Nicole Lee "The criminalisation of cartel activity in South Africa" (2016) 10-11.

²²⁷ Nicole Lee "The criminalisation of cartel activity in South Africa" (2016) 10.

²²⁸ Zandile Ramalohlanye "An assessment of the suitability of the criminal cartel offence in South African competition law" (2013) LLM dissertation University of Cape Town 49.

²²⁹ Nicole Lee "The Criminalisation of cartel activity in South Africa" (2016) 10.

in accordance with the Competition Act or will the courts accept indirect evidence such as attendance to a cartel meeting.²³⁰ This is yet to be determined by the courts.

The third element to proven by the NPA is that the individual knowingly acquiesced in the firm engaging in the prohibited practice. This would mean that the NPA will have to prove that the individual had actual knowledge of the firm's conduct.²³¹ The provision is interpreted as meaning that the individual must have agreed and had full knowledge of the conduct.²³² The drafting of this last element is criticised for being too narrow and thus leaving room for individuals to simply deny or refute having actual knowledge or agreeing to the conduct.²³³ This would be easier to do in the event that there is no direct evidence proving the individual's knowledge.²³⁴ Lack of direct evidence may thus make it difficult for the NPA to prove these elements beyond a reasonable doubt and therefore make their job harder.²³⁵

4.2 Cooperation between the National Prosecuting Authority and the Competition Commission

Section 73A (4)(a) of the Amendment provides that the Commission may not seek or request the prosecution of a person if the Commission certifies that the person to be deserving of leniency. Section 73A (4)(b) of the Amendment further states that the Commission may makes submissions to the NPA in support of leniency for any person it certifies is deserving of leniency. As previously stated, the NPA has sole jurisdiction of criminal prosecutions and therefore, whilst the Commission may make submissions on behalf of persons certifying that they are deserving of leniency, the NPA is not bound by these

²³⁰ Nicole Lee "The Criminalisation of cartel activity in South Africa" (2016) 10.

²³¹ Nicole Lee "The Criminalisation of cartel activity in South Africa" (2016) 10.

²³² Zandile Ramalohlanje "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 50.

²³³ Zandile Ramalohlanje "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 50.

²³⁴ Nicole Lee "The Criminalisation of cartel activity in South Africa" (2016) 11.

²³⁵ Zandile Ramalohlanje "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 50.

submissions.²³⁶ The powers of the NPA are vested in section 179 of the Constitution²³⁷ and the NPA Act. The other criticism is that whilst the NPA has sole jurisdiction it raises some concerns around the NPA's expertise in competition law matters, the ability to coordinate cartel cases and the availability of state resources.²³⁸ With this in mind some publications have reported that it may become necessary for the NPA and Commission to conclude a memorandum of understanding regarding the processes to be adopted for the prosecution of these individuals.²³⁹

The implications of section 73A is that there will be a dual process between the Commission and the NPA.²⁴⁰ It is argued that the dual process mechanism may be a nightmare for the investigative and prosecutorial phases²⁴¹ because the NPA has a poor rate of successfully prosecuting complex commercial crimes coupled with criminalisation putting a freeze on CLPs and ultimately, forcing the Commission to prosecute companies without the assistance of inside informants.²⁴² Unlike in the United States where the Department of Justice is responsible for both the civil and criminal prosecution of cartels, in the South African context, the cartel offence requires the Commission to first make a finding that a firm has contravened the Competition Act in the form of an admission of guilt contained in a consent agreement or for the Tribunal to make

²³⁶ Corlia van Heerden and Monray Marsellus Botha "Challenges to the South African corporate leniency policy and cartel enforcement" (2015) *TSAR* 327.

²³⁷ Constitution of the Republic of South Africa, 1996.

²³⁸ Corlia van Heerden and Monray Marsellus Botha "Challenges to the South African corporate leniency policy and cartel enforcement" (2015) *TSAR* 327.

²³⁹ Natalia Lopes, John Seth and Emily 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?" Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 8.

²⁴⁰ Zandile Ramalohanye "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 51.

²⁴¹ Tsholofelo Letsike "The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?" Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 11.

²⁴² Tsholofelo Letsike "The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?" Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 12.

a finding that the firm indeed contravened the Competition Act.²⁴³ After this process, the NPA will then undertake its own criminal investigation. This then becomes an issue when the two courts reach different findings.²⁴⁴ On the other hand, in recent years it may be argued that the NPA has had a successful rate for commercial crime convictions given the statistics provided in the NPA's annual report for 2017/18 which provided a breakdown as tabulated below²⁴⁵:

Figure B:

Financial Year	2017/18	2016/17	2015/16	2014/15	2013/14
Conviction Rate	94.1%	92.1%	94.1%	94.3%	93.9%

The statistics in Figure B do not provide a breakdown of successful convictions for complex commercial crimes therefore it would be prudent to be wary of what the make-up of the statistics is. It might also be necessary to be aware that the NPA's prosecutions of commercial crimes stems from well-established crimes and laws, mainly comprising of prosecutions of fraud, whereas competition law is still relatively new. Therefore, the concern is that criminal prosecutions of cartelists require well trained prosecutors in competition law matters.²⁴⁶ As it stands, the NPA lacks expertise in this area of law which leaves room for many errors during these proceedings.²⁴⁷ In his reaction to the introduction of criminalisation in South Africa, the former chairperson of the Tribunal, David Lewis, said "[O]ur society and legislature doesn't have a strong culture of competitive legislation. The criminal justice system is already too overburdened to give it the priority it deserves."²⁴⁸ Because of the current resource constraints it is unlikely that the specialised commercial crimes unit within the NPA will have

²⁴³ Tsholofelo Letsike "The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?" Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 12.

²⁴⁴ Zandile Ramalohanye "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 51.

²⁴⁵ Annual Report National Director of Public Prosecutions 2017/18 49.

²⁴⁶ Luke Kelly "The introduction of a 'cartel offence' into South African Law" *Stellenbosch LR* (2010) 328.

²⁴⁷ Luke Kelly "The introduction of a 'cartel offence' into South African Law" *Stellenbosch LR* (2010) 328.

²⁴⁸ Luke Kelly "The introduction of a 'cartel offence' into South African Law" *Stellenbosch LR* (2010) 328.

the necessary expertise and resources to prosecute competition matters.²⁴⁹ In the inverse, it may be argued that the Commission itself does not have the necessary expertise to prosecute criminal cases.²⁵⁰ Expertise inevitably becomes a concern in both scenarios. Some prosecutors may consider competition law matters unimportant when they are inundated with other cases concerning crimes involving crimes which involve violence.²⁵¹

Further, there are concerns that the government may convince or instruct the NPA to not pursue particular cases when in the case of the Commission, it does not have that authority.²⁵² The possible remedy to these concerns would be for the cartel offence to confer wider investigative and prosecutorial powers to the Commission as in the UK and United States or alternatively, for there to be a more detailed outline of what the processes will entail.²⁵³ But this may be in the pipeline if the NPA and Commission ultimately conclude a memorandum of understanding. A memorandum of understanding could possibly ensure that there is early coordination between the NPA and the Commission.²⁵⁴

4.3 The right to a presumption of innocence

Section 35(3)(h) of the Constitution provides that a every accused person has the right to be presumed innocent. Section 73A (5) of the Amendment provides as follows:

“73A (5) In any court proceedings against a person in terms of this section, 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

²⁴⁹ Luke Kelly “The introduction of a ‘cartel offence’ into South African Law” *Stellenbosch LR* (2010) 328.

²⁵⁰ OECD Round Tables “Cartel sanctions against individuals” (2003) 24.

²⁵¹ OECD Round Tables “Cartel sanctions against individuals” (2003) 23.

²⁵² OECD Round Tables “Cartel sanctions against individuals” (2003) 23.

²⁵³ Luke Kelly “The introduction of a ‘cartel offence’ into South African Law” *Stellenbosch LR* (2010) 328.

²⁵⁴ Luke Kelly “The introduction of a ‘cartel offence’ into South African Law” *Stellenbosch LR* (2010) 328.

practice in terms of section 4(1)(b), is prima facie proof of the fact that the firm engaged in that conduct.”

The question to ask here is whether the above provision has the effect of violating the accused’s section 35(3)(h) constitutional right to be presumed innocent. Given that there is no existing memorandum of understanding between the NPA and the Commission it is not clear what the implications of this provision will be. However, the current reading and drafting of the provision has been criticised for possibly being a violation of constitutional rights.

The criticism of the above provision is that it shifts the burden of proof onto the director or person with management authority to show that the firm did not engage in cartel activity beyond a reasonable doubt.²⁵⁵ With that said, a reverse onus is not presumed to be automatically unconstitutional.²⁵⁶ The Constitutional Court a two-step approach in determining whether a reverse onus is unconstitutional:²⁵⁷

- a) It must be determined whether the provision violates the accused’s presumption of innocence and that the accused’ guilt be proven beyond a reasonable doubt;²⁵⁸ and
- b) It must be determined whether the provision provides a valid limitation of the accused’s rights.²⁵⁹

The first-step of the two-step approach must determine whether there is a real risk that someone will be proven guilty despite there being evidence showing a reasonable doubt.²⁶⁰ Section 73A (5) states that a consent agreement will be

²⁵⁵ Nicole Lee “The Criminalisation of cartel activity in South Africa” (2016) 12.

²⁵⁶ Nicole Lee “The Criminalisation of cartel activity in South Africa” (2016) 12.

²⁵⁷ Tsholofelo Letsike “The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 10.

²⁵⁸ Tsholofelo Letsike “The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 10.

²⁵⁹Tsholofelo Letsike “The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 10.

²⁶⁰ Zandile Ramalohanye “An assessment of the suitability of the criminal cartel offence in South African competition law” (2013) dissertation University of Cape Town 54.

presumed as prima facie evidence that the firm engaged in cartel activity. It is said that there is a real risk of conviction because a director or person with management authority faces the possibility of being convicted despite them having evidence showing reasonable doubt that they did not engage in cartel activity.²⁶¹ This is on the basis that a presumption of guilt is created.

The second-step to this approach is to determine whether the provision constitutes a justifiable limitation of rights. This is determined in accordance with section 36(1) of the Constitution. The test for limitation of rights requires that the following factors be established: i.) the purpose of the limitation; ii.) the importance of the provision; and iii.) the accused faces a real risk of being convicted.²⁶²

It is argued that the purpose of creating a reverse onus was for proceedings before the Tribunal and Competition Appeal Court only and not for purposes of proceedings before a criminal court.²⁶³ This purpose is not considered legitimate because the accused is still entitled to a right to a trial before an ordinary court.²⁶⁴ This illegitimate purpose, when coupled with the risk of conviction, do not justify the limitation placed on the right to be presumed innocent.²⁶⁵

On the other hand, there are opposite views in favour of the provision. The argument is that the presumption contained in section 73A (5) is there to lessen the burden on the NPA from having to re-establish and prove that the firm indeed engaged in a prohibited practice before deciding to prosecute directors or people with management authority.²⁶⁶ The process is such that the Commission first establishes that the firm committed a prohibited practice and once that is done, the NPA is responsible for the criminal prosecution of the

²⁶¹ Nicole Lee “The Criminalisation of cartel activity in South Africa” (2016) 13.

²⁶² Nicole Lee “The Criminalisation of cartel activity in South Africa” (2016) 13.

²⁶³ Zandile Ramalohanye “An assessment of the suitability of the criminal cartel offence in South African competition law” (2013) dissertation university of Cape Town, school of advanced legal studies 55.

²⁶⁴ Tsholofelo Letsike “The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 10.

²⁶⁵ Nicole Lee “The Criminalisation of cartel activity in South Africa” (2016) 14.

²⁶⁶ Luke Kelly “The introduction of a ‘cartel offence’ into South African law” *Stellenbosch LR* (2010) 331.

individuals.²⁶⁷ The only presumption created is that firm indeed contravened section 4(1)(b) of the Competition Act and therefore the accused cannot raise a defence stating that the firm did not engage in cartel activity.²⁶⁸ Further, it is also argued that the provision does not create a reverse onus because the NPA will still be required to prove, beyond a reasonable doubt, other elements of the crime such as causality.²⁶⁹ As such the provision does not create a reverse onus on the accused and only serves to avoid the Commission and NPA duplicating findings relating to establishing whether a firm engaged in cartel activity.²⁷⁰

4.4 Self-incrimination

Section 35(3)(j) of the Constitution provides that an accused has the right to not be compelled to give self-incriminating evidence. This right is further entrenched by the Competition Act under section 49A (3) which provides that when someone is issued a summons any self-incriminating answer or statement will be inadmissible against the person in criminal proceedings. The wording of section 73A (5) is criticised because it creates the risk that when people volunteer or provide information relating to a cartel for purposes of leniency or a consent order, that information could potentially be used against them in criminal proceedings.²⁷¹ The Competition Act provides a condition to the right to not self-incriminate because it only affords this right to people who have been issued a summons. The question then becomes, what happens to those people who provide information to the Commission voluntarily or in terms of the CLP? The criticism here is that because there is no real understanding on how cooperation between the Commission and the NPA will play out, there is a risk that individuals will not have the security of knowing whether or not any

²⁶⁷ Luke Kelly "The introduction of a 'cartel offence' into South African law" *Stellenbosch LR* (2010) 331.

²⁶⁸ Luke Kelly "The introduction of a 'cartel offence' into South African law" *Stellenbosch LR* (2010) 331.

²⁶⁹ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 32.

²⁷⁰ Luke Kelly "The introduction of a 'cartel offence' into South African law" *Stellenbosch LR* (2010) 331.

²⁷¹ Zandile Ramalohlanye "An assessment of the Suitability of the Criminal Cartel Offence in South African Competition Law" (2013) dissertation University of Cape Town 55.

self-incriminating information provided will be used against them.²⁷² There is no telling which direction the NPA will take because as previously stated, the NPA is not bound by any decisions taken by the Commission. So, the critique here is that section 49A of the Competition Act conflicts with section 73A (5) of the Amendment and thus a recommendation is made that it is necessary for amendments to be made to section 49A in order to address the conflicts.²⁷³

The other criticism is the effect that section 73A (5) will have on the CLP. The CLP is mainly premised on companies coming forward and self-reporting their involvement in cartel activity.²⁷⁴ So when a firm successfully applies for leniency and subsequently other implicated firms are summonsed by the Commission to make submissions relating to the cartel, this means that whatever information was made available to the Commission during those proceedings will be used by the NPA to criminally prosecute individuals.²⁷⁵ As it stands, the CLP does not provide immunity from criminal prosecution and therefore individuals inevitably face the risk of being criminally prosecuted. In order to address this risk, it would be necessary for certain amendments to be made to the CLP stating that leniency will automatically extend to individuals who are directors or people with management authority.²⁷⁶ The idea is that once these amendments are effected, this will give individuals some comfort knowing that in exchange for information, they will have the security of immunity against criminal sanctions.²⁷⁷

²⁷² Natalia Lopes, John Seth and Emily 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?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 10.

²⁷³ Corlia van Heerden and Monray Marsellus Botha “Challenges to the South African corporate leniency policy and cartel enforcement” (2015) *TSAR* 328.

²⁷⁴ Section 2.5 of the CLP.

²⁷⁵ Natalia Lopes, John Seth and Emily 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?” Presented at the seventh annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 11-12.

²⁷⁶ Corlia van Heerden and Monray Marsellus Botha “Challenges to the South African corporate leniency policy and cartel enforcement” (2015) *TSAR* 331.

²⁷⁷ Corlia van Heerden and Monray Marsellus Botha “Challenges to the South African corporate leniency policy and cartel enforcement” (2015) *TSAR* 331.

4.5 The right to a fair trial

In assessing the unconstitutionality of the provisions provided in the Amendment, section 73A (6) is said to be an infringement of the accused's the right to a fair trial as contained in section 35(3) of the Constitution. The right to a fair trial is not limited to only that but also includes the listed rights under section 35 of the Constitution. Section 73A (6) provides as follows:

“A firm may not directly or indirectly–

- (a) pay any fine that may be imposed on a person convicted of an offence in terms of this section; or
- (b) indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted.“

The meaning of this provision is that companies should not under any circumstance bail out individuals who are responsible for shareholders funds when they face criminal prosecution.²⁷⁸ The problem here is that in some instances the owners of companies may be shareholders and decision makers or the firm may be their only source of income.²⁷⁹ So essentially this means that a director or person with management authority will be prevented from reaching some kind of agreement with the firm in order for it to cover the legal costs.²⁸⁰ Section 73A (6) is also interpreted to mean that it will not be possible for individuals to pledge the assets of a firm as security to raise funds for their prosecution.²⁸¹ It is argued that in an instance where a firm is privately owned and the owner requires funding, he or she will be prohibited from taking funds

²⁷⁸ Luke Kelly “The introduction of a ‘cartel offence’ into South African law” *Stellenbosch LR* (2010) 332.

²⁷⁹ Luke Kelly “The introduction of a ‘cartel offence’ into South African law” *Stellenbosch LR* (2010) 332.

²⁸⁰ Luke Kelly “The introduction of a ‘cartel offence’ into South African law” *Stellenbosch LR* (2010) 332.

²⁸¹ Luke Kelly “The introduction of a ‘cartel offence’ into South African law” *Stellenbosch LR* (2010) 332.

out of his or her own firm.²⁸² This is argued to potentially infringe on a person's right to have legal representation.²⁸³ The case of *Fraser v Absa Bank* held that the right to legal presentation does not mean that the legal representation must be of the accused's choosing irrespective of the financial situation because the state can provide legal presentation.²⁸⁴

The second part of section 73A (6) is somewhat conditional in that it provides that a firm cannot pay for an accused's legal costs unless the case is abandoned, or the individual is acquitted. An interpretation of section 73A(6)(b) could possibly mean that a firm will be permitted to make a loan to a person to cover their legal costs and should the accused be convicted then he or she would have to pay back the firm.²⁸⁵ On the other hand, it also interpreted to mean that a person will personally cover their legal costs and in the event that the court acquits the accused or abandons the case then the firm would reimburse the individual.²⁸⁶ Because section 73A(6) has not come into effect yet, it is not possible to definitively say that the provision raises constitutional questions however, it is likely that constitutionality of the section may be raised once it comes into effect.²⁸⁷

²⁸² Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 33.

²⁸³ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 33.

²⁸⁴ (2007) (3) BCLR 219 (CC) para.68.

²⁸⁵ Luke Kelly "The introduction of a 'cartel offence' into South African law" *Stellenbosch LR* (2010) 332.

²⁸⁶ Luke Kelly "The introduction of a 'cartel offence' into South African law" *Stellenbosch LR* (2010) 332.

²⁸⁷ Markus Merdian "The criminalisation of cartel conduct in South Africa and the United Kingdom" LLM thesis University of Cape Town 34.

Chapter 5 Conclusion

Cartels are the most harmful infringements of competition law; they affect economies and the livelihoods of many people even the most vulnerable such as the poor. In order for criminalisation of cartel conduct to be successful in South Africa, there is a need for the leniency policy and criminal prosecution to be complementary. As it stands, the two are disharmonious. The main principle for criminalisation of cartel conduct is for it to act as an effective deterrent tool and this can only be achieved if the South African competition laws and policies are reformed.

The South African CLP in its current format will not assist the Commission in detecting and prosecuting cartels because of the uncertainty around criminal immunity for individuals. Whilst South African competition law has made significant strides over the years, the enactment of the cartel offence will continue those strides. Administrative penalties failed to provide the necessary deterrent effect and as such criminalisation became essential. It will be necessary for the Commission to follow in the footsteps of the US and UK by considering incorporating individual immunity against criminal prosecutions in cases where a CLP applicant is granted immunity. To encourage cooperation and companies self-reporting on their involvement in cartel conduct, the Commission must also consider offering those individuals who are employees of companies who want to enter in settlements and consent agreements with leniency letters which will be presented to the NPA. These leniency letters will allow the Commission to request the NPA to be lenient to individuals who opted to enter into consent agreements with the Commission. This will foster an attitude amongst corporates to be the first at the door and report cartels to the Commission.

With that said, the Commission must consider how it will provide certainty to corporates and individuals on how it envisions criminalisation playing out. There is suggestion that the Commission and the NPA conclude a memorandum of understanding which will clearly outline the responsibilities of each body and at what stage the NPA's participation will be required.²⁸⁸ The Commission should also consider

²⁸⁸ Natalia Lopes, John Seth and Emily Gauntlett "Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the competition act from co-operating with the NPA, and is

drafting guidelines for practitioners on the processes which will be adopted when criminal immunity is sought. The UK provides an insightful look into the challenges surrounding criminalising cartel conduct and what is required for the legitimacy of criminalisation.

Providing clarity on the processes to be adopted will also remove the critique around the constitutionality of the provisions contained in the Amendment. I agree that in its current state the Amendment has the potential of raising constitutional challenges and thus removing its credibility. A memorandum of understanding may address the issues around the consent agreement being prima facie evidence and the possible infringement on the right to not self-incriminate. It would be wise to consider the stance in the US where witnesses have the right to raise the fifth amendment during criminal investigations. This could be balanced out with the equivalent in South Africa under section 35(3)(h) of the constitution which provides that an accused person has the right to remain silent. Should the Commission decide on this, it would be in a position to assure corporates that all information provided through the settlement and leniency processes will not be used against them and rather that the NPA will undertake its own investigation where it deems it necessary.

The South African government is faced with resource constraints therefore how will government upskill the NPA with competition law? Given that the NPA has previously not dealt with competition law matters, it may be necessary to consider placing NPA on secondments to the Commission or to have teams placed within the Commission so that they are well equipped to undertake cartel conduct investigations. This could make cooperation between the NPA and Commission easier. This will also have the potential of preventing any mistakes happening during investigations. So, whilst it is accepted that criminalization of cartel conduct is an effective deterrent tool however, the Commission will have a lot to reconsider and review.

this a problem for competition law enforcement?" Presented at the seventh annual competition commission, competition tribunal and mandela institute conference on competition law, economics and policy in south Africa 5 and 6 September (2013) 8.

Bibliography

Articles and journals:

1. D. Prins and P. Koornhof “Assessing the nature of competition law enforcement in South Africa” *Law, Democracy and Development* (2014).
2. Lesley Morphet and Nkonzo Hlatshwayo “South Africa: the criminalisation of cartel conduct” *Journal of European Competition Law & Practice* (2017).
3. Lucie Severová, Lenka Kopecká, Roamn Svoboda and Josef Brčák “Oligopoly competition in the market with food products” 2011 580. Accessed at https://www.agriculturejournals.cz/publicFiles/107_2010-AGRICECON.pdf on 23 February 2019.
4. John M. Connor, Albert A. Foer and Simcha Udwin “Criminalizing cartels: An American perspective”.
5. Chantal Lavoie “South Africa’s corporate leniency policy: a five-year review” presented at the third annual competition commission, competition tribunal and Mandela institute conference on competition law, economics and policy in South Africa (2010).
6. Natalia Lopes, John Seth and Emily 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?”. Accessed at <http://www.compcom.co.za/wp-content/uploads/2014/09/Cartel-Enforcement-Paper-Final-2013-08-20.pdf> on 20 August 2018.
7. Tsholofelo Letsike “The criminalising of cartels – how effective will the new Section 73A of the competition amendment Act be?” Accessed at <http://www.compcom.co.za/seventh-annual-conference-on-competition-law-economics-policy/> on 20 August 2018.
8. Chantal Lavoie “South Africa’s corporate leniency policy: A five-year review” (2010). Accessed at : <http://www.compcom.co.za/presentations-third-annual-competition-conference/> on 20 April 2018.

9. Belinda A. Barnett “Criminalization of cartel conduct – the changing landscape”. Accessed at <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> on 23 February 2019.
10. Nicole Lee “The criminalisation of cartel conduct in South Africa” (2016).
11. Keith Jones and Farin Harrison “Criminal sanctions: an overview of EU and national case law” E-competitions. Accessed at http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf on 23 February 2019.
12. Ratshidaho Maphwanya “Cartel likelihood, duration and deterrence in South Africa” Competition law and economic regulation in Southern Africa: addressing market power in Southern Africa (2017).
13. Markus Merdian “The criminalisation of cartel conduct in South Africa and the United Kingdom” (2013) LLM thesis University of Cape Town.
14. Julie Clarke “The increasing criminalization of economic law – a competition law perspective” presented at 28th International Symposium of Economic Crime 2010, Jesus College, University of Cambridge.
15. Matthew le Cordeur “Cartel conduct will now land you in jail for 1 years” Fin24. Accessed at <http://www.fin24.com/Economy/cartel-conduct-will-now-land-you-in-jail-for-10-years-20160614> on 16 August 2017.
16. Andreas Stephan “An empirical evaluation of the normative justifications for cartel criminalization”, Legal Studies (2017).
17. Andreas Stephen “The UK cartel offence: lame duck or black mamba?” ESRC Centre for Competition Policy (CCP). Accessed at <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> on 28 April 2019.
18. Nomfundo Manyathi-Jele “The criminalization of cartel conduct” De Rebus – SA Attorneys’ Journal Archived Issues (2016). Accessed at <http://www.derebus.org.za/criminalisation-cartel-conduct/> on 20 April 2017.
19. Scott Hammond “The evolution of criminal antitrust enforcement over the last two decades” Department of Justice.

20. C. Harding and J. Joshua “Regulating cartels in Europe: A study of legal control of corporate delinquency” CLJ (2004) Vol 63.
21. Jenny Finnigan “Competition Amendment Act cartel contraventions now crimes”. Accessed at <http://www.wylie.co.za/articles/competition-amendment-act-cartel-contraventions-now-crimes/> on 28 August 2017.
22. Ahmore Burger-Smidt “Criminalisation of cartels: A potential cure with side effects”. Accessed at <http://www.global.co.za/criminalisation-of-cartels-a-potential-cure-with-side-effects/> on 1 June 2017.
23. Dewald van Rensburg “Cartel criminalization slammed” Fin24. Accessed at , <http://www.fin24.com/Economy/cartel-criminalisation-slammed-20161016-2> on 24 August 2017.
24. William Kolasky “Criminalizing cartel activity: lessons from the U.S. experience”. Accessed at https://www.coleurope.eu>kolasky_-criminalizing_cartel_activity_8-04 on 4 April 2019.
25. Norton Rose Fulbright “Criminal cartel offence in UK: public attitudes”. Accessed at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world--q2-2016.pdf?la=en&revision=b9603d3d-536c-458f-b475-8a7cc9c2836b> on 12 April 2019.
26. Department of Justice "Leniency policy for individuals". Accessed at <https://www.justice.gov/atr/individual-lenency-policy> on 5 April 2019.
27. Department of Justice “Corporate leniency policy”. Accessed at <https://www.justice.gov/atr/corporate-lenency-policy> on 4 April 2019.
28. Ailsa Sinclair, Vita Juknevičute and Ingrid Breit “Regulation 1/2003: How has this landmark reform worked in practice?” Competition Policy newsletter. Accessed at https://ec.europa.eu/competition/publications/cpn/2009_2_5.pdf on 11 September 2019.
29. Office of Fair Trading “Applications for leniency and no-action in cartel cases” OFT’s detailed guidance on the principles and process (2013). Accessed at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf on 11 September 2019.

30. Slaughter and May “Cartel immunity and leniency programmes in the United Kingdom”. Accessed at

<https://www.lexology.com/library/detail.aspx?g=6d70ee74-15c5-4df3-8da6-ccbde7b7348d> on 28 April 2019.

31. United Kingdom secretary of state for trade and industry “White paper: productivity and enterprise: A world class competition regime”.

32. Herbert Smith Freehills “UK: The cartel offence under the Enterprise Act 2002”. Accessed at

<http://www.mondaq.com/uk/x/21437/Antitrust+Competition/The+Cartel+Offence+under+the+Enterprise+Act+2002> on 28 April 2019.

33. Corlia van Heerden and Monray Marsellus Botha “Challenges to the South African corporate leniency policy and cartel enforcement” TSAR Volume 2, 2015.

34. Huseyin Cosgun “Criminalising cartels: Theory and practice in the UK and Australia” Global Antitrust Review.

35. Jonathan Galloway “Securing the legitimacy of individual sanction in UK competition law” Kluwer Competition Law.

36. Zandile Ramalohlanye “An assessment of the suitability of the criminal cartel offence in South African competition law” (2013) LLM dissertation University of Cape Town.

37. Luke Kelly “The introduction of a ‘cartel offence’ into South African law” Stellenbosch Law Review (2010).

Books:

38. Eleanor M. Fox “Cartels: A United States story, and a research program for the world” *Criminalization of competition law enforcement* (2006).

39. Mark Furse *The criminal law of competition in the UK and in the US: Failure and Success* (2012).
40. Donald I. Baker "Punishment for cartel participants in the US: a special model?" *Criminalising Cartels – Critical studies of an international regulatory movement* (2011).
41. Richard Whish & David Bailey *Competition law* (8 ed 2015).
42. Alison Jones and Rebecca Williams "The UK response to the global effort against cartels: Is criminalization really the solution?" *Journal of antitrust enforcement* (2014).
43. Diana Guy "The UK's experience with criminal law sanctions" *Criminalization of competition law enforcement* (2006)

Reports:

44. Report of the commission of inquiry into the regulation of monopolistic conditions act of 1955 (1977).
45. Competition Commission Annual Reports 2013/14, 2015/16 and 2016/17.
46. Annual Report National Director of Public Prosecutions 2017/18.
47. OECD Policy roundtables "Cartel sanctions against individuals" (2003).

Cases:

48. The Competition Commission and Pioneer Foods (Pty) Ltd 15/CR/Feb07 and 50/CR/May08
49. Agri Wire (Pty) Ltd and another v Commissioner of the Competition Commission and others (2012) ZASCA 134
50. R v Ghosh 1982 2 ALL ER 689
51. Fraser v Absa Bank (2007) (3) BCLR 219 (CC)

Legislation and Policies:

52. Competition Amendment Act, no.1 of 2009
53. South African Corporate Leniency Policy (2004)
54. The Competition Act, no. 89 of 1998, as amended
55. Constitution of the Republic of South Africa, 1996
56. Undue Restraint of Trade Act, no.24 of 1955
57. Maintenance and Promotion of the Competition Act, no.96 of 1979
58. The Sherman Antitrust Act of 1890
59. Treaty on the functioning of the European Union
60. Antitrust Division Corporate Leniency Program (1993)
61. Antitrust Criminal Penalty Enhancement and Reform Act of 2004.
62. The Enterprise and Regulatory Reform Act 2013.