Examining the effectiveness of the Corporate Leniency Policy in combating cartels under the Competition Act in South Africa with specific reference to directors' liability.

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DECLARATION

I, **Kamogelo Nyembenya**, declare that '**Examining the effectiveness of the Corporate Leniency Policy in combating cartels under the Competition Act in South Africa with specific reference to directors' liability**', is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being or is to be submitted for another degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced. I authorise the University of the Western Cape to reproduce for the purpose of research only, either the whole or any portion of the contents in any manner whatsoever.

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DEDICATION

This research paper is dedicated to my Heavenly Father who guided and strengthened me throughout my research and to my beloved family.

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ABSTRACT

Examining the effectiveness of the Corporate Leniency Policy in combating cartels under the Competition Act in South Africa with specific reference to directors' liability.

The economy is harmed by the behaviour of a director that engages in anticompetitive behaviour in the sense that consumers may suffer the economic consequences in the form of having lesser buying power. This restricts healthy economic growth, drive up prices and reduce innovation and investment. Section 73A of the competition Amendment Act introduces the criminalization of cartel conduct and will hold directors/managers criminally liable for infringing s4 (1) (b) of the Competition Act. Section 4(1) (b) specifically prohibits firms from engaging in price-fixing, collusive tendering, market allocation which are regarded as egregious forms of activity.

It is for this reason that this study investigates whether directors can be held personally liable for engaging in cartel activities and the effectiveness of the Corporate Leniency Policy which incentives cartel members to self-report in order to obtain immunity from competition law prosecution.

KEY WORDS AND PHRASES

Administrative penalty

Anti-competitive behavior

Cartel conduct

Cartel offence

Competition

Competition Commission

Corporate Leniency Policy

Director's liability

National Prosecuting Authority

Restrictive horizontal practices

LIST OF ABREVIATIONS

CLP	Corporate Leniency Policy
NPA	National Prosecuting Authority
DOJ	United States Department of Justice
SCA	Supreme Court of Appeal
SCCU	Specialised Commercial Crimes Units
GSK	GlaxoSmithKline
HIV	Human Immunodeficiency Virus
TAC	Treatment Action Campaign
AHF	Aids Healthcare Foundation
CCR	Competition Commission Rules
CTR	Competition Tribunal Rules

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1. CHAPTER 1 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1. Introduction

Chapter one of this research paper starts off by discussing the origins of South Africa's competition law. Secondly, the chapter reviews the purpose of competition law and the Competition Act 89 of 1998. Thirdly, the chapter discusses the categories of cartel conduct and the prohibition of restrictive horizontal practices. Fourthly, the chapter discusses the liability imposed on South African companies for cartel offences.

Furthermore, this chapter identifies the research questions, the significance of the research questions, the limitations of this research paper, and the research methodology used through this research paper. Finally, the chapter outline of this research is given.

1.2. The origins of South Africa's competition law

The origins of South Africa's competition law originates from Roman law in the early 20th century (1900-1935).[1] During the early 20th century, South African competition law was characterized by a patchwork of competition law provisions in numerous statutes.[2] Fast forward to 1955, South Africa's first true general competition law can be traced to the Regulation of Monopolistic Conditions Act of 1955,[3] which was reviewed in 1970. Upon review, it became clear that the Regulation of Monopolistic Conditions Act did not prevent the increase of monopolies.[4] As a result, the Maintenance and Promotion of Competition Act of 1979 was enacted to promote competition amongst corporations.[5] The Maintenance and Promotion of Competition Act also established the Competition Board, tasked with administering its

[1] Wilberforce CEL, *The law of restrictive trade practices and monopolies* (1966) 22.
[2] Sutherland P & Kemp K, *Competition law of South Africa* (2013) 7.
[3] Regulation of Monopolistic Conditions Act 25 of 1955.
[4] *http://www.compcom.co.za/about/* (accessed 14 February 2022).
[5] Maintenance and Promotion of Competition Act 96 of 1979.

provisions.[6]

In 1986, the Maintenance and Promotion of Competition Act was amended to give the Competition Board further powers to include the ability to act against new concentrations of economic power, existing monopolies and oligopolies.[7] Despite the amendments, the Maintenance and Promotion of Competition Act[8] was also not effective and led to the Competition Act 89 of 1998. The Competition Act 89 of 1998 has since been amended several times.[9]

1.3. The purpose of competition law and the Competition Act 89 of 1998

Section 2 of the Competition Act provides for the statutory objectives of competition law in South Africa.[10] The Competition Act also establishes three competition authorities to enforce competition law.[11] The first authority is the Competition Commission[12] which is the sole investigator and prosecutor of practices prohibited by the Competition Act. The second authority is the Competition Tribunal[13] which is the court of first instance with regards to conduct falling within the purview of the Competition Act. The third authority is the Competition Appeal Court[14] which has review and appellate jurisdiction in matters governed by the Competition Act.

As a result, the principal purpose of competition law is to ensure free and fair

[6] Maintenance and Promotion of Competition Act 96 of 1979.
[7] Maintenance and Promotion of Competition Act 96 of 1979.
[8] Maintenance and Promotion of Competition Act 96 of 1979.
[9] *www.compcom.co.za* (Accessed on 14 April 2022).
[10] 'Section 2 of the Competition Act outlines the purpose of the Act as follows:
a) to promote the efficiency, adaptability and development of the economy;
b) to provide consumers with competitive prices and product choices;
c) to promote employment and advance the social and economic welfare of South Africans;
d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
f) to promote a greater spread of ownership, in p-articular to increase the ownership stakes of historically disadvantaged persons.'
See also, Neuhoff M (ed) *A Practical Guide to the South African Competition Act* (2017) 5-10.
[11] Section 19 - 43 of the Competition Act 89 of 1998.
[12] Section 19 and 21 of the Competition Act 89 of 1998.
[13] Section 26 and section 27 of the Competition Act 89 of 1998.
[14] Section 36 and Section 37 of the Competition Act 89 of 1998.

competition within markets.[15] Individual businesses or firms seek to maintain their positions in the market and stay ahead of their competitors.[16] In so doing, it is often the norm that these businesses will compete with each other. Within this context, it is therefore important for companies to maintain a healthy competitive environment.[17] It is therefore the role of competition law to ensure that there is free and unfettered competition among businesses.

1.4. Categories of cartel conduct

Section 4(1) (b) (i)-(iii) of the Competition Act identifies three categories of cartel conduct that firms are prohibited from engaging in.[18] First, section 4(1) (b) (i) prohibits directly or indirectly fixing a purchase price or any other trading condition.[19] Fixing prices or other trading conditions to the prejudice of consumers does not correspond with the purpose of competitive prices and efficiency.[20] The primary purpose of fixing prices is to force consumers to pay more for goods and services while limiting competition between companies that engage in cartel behavior so that they can get undeserved monopoly profits. In 2006, there was an alleged bread cartel in the Western Cape between Premier Foods, Tiger Brands and Pioneer Foods.[21] The issue before the Competition Tribunal was whether or not Pioneer Foods was involved in anti-competitive conduct such as price fixing.[22]The Tribunal came to the conclusion that due to that fact that Pioneer Foods had agreed to increase its bread prices together with its competitors, an administration penalty must be imposed.[23] The Tribunal went on to place emphasis on the fact that price fixing is deemed to be

[15] Brassey M, Campbell J, Legh R et al *Competition Law* (2002) Ch 1.
[16] Brassey M, Campbell J, Legh R 'et al' *Competition Law* 1 ed (2002) Ch 1.
[17] *https://www.vdma.co.za/basics-competition-law-south-africa/* (accessed 15 February 2022).
[18] In terms of section 1 (1) (xiii) of the Competition Act 89 of 1998, a juristic person, such as a company, falls within the definition of a 'firm'.
[19] Section 4(1) (b) of the Competition Act 89 of 1998.
[20] Brassey M, Campbell J, Legh R 'et al' *Competition Law 1 ed* (2002) Ch 5 144.
[21] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 at para 2.
[22] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9at para 62.
[23] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 at para 139.

the most egregious offenses under the Competition Act and competitors must avoid fixing prices at all costs.[24]

Secondly, section 4(1) (b) (ii), prohibits the dividing of markets by allocating customers, suppliers, territories or specific types of goods and services.[25] Market allocation is when competitors agree to not compete with each other in specific markets. In other schemes, competitors agree to sell only to customers in certain geographical areas.[26] Parties who divide the markets would obviously benefit because competition would be less, however the consumers would be the ones paying for the benefits in the form of higher prices.[27] Market allocation also restricts consumer choice. In *United States v Topco Association Inc*, Topco functioned as a purchasing agent for the supermarket chain and the bulk of the products were distributed to its members under Topco branding.[28] To be a member of the Topco brand, an approval of 75% from the board of directors was required and if an applicant operated within 100 miles near an existing member then the vote would jump to 85%.[29] The court was of the opinion that such conduct amounted to dividing the market for Topco branded products and such conduct was exclusionary.[30] The court referred to the Sherman Anti-trust Act and held that market allocation is typically one of the prohibited *per se* practices.[31] It was concluded that territorial restrictions must fall.

Collusive tendering is the third *per se* prohibition under the Competition Act.[32] In terms of this prohibition, firms are prohibited from making tenders secretly while sharing information and making arrangements among themselves so as to control the

[24] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 at para 148.
[25] Section 4 of the Competition Act Act 89 of 1998.
[26] Sharms P '*Market Allocation Under Competition* Law' (2014) available at: *https://www.academia.edu/6211402/Market_Allocation_Under_Competition_Law* (accessed 03 March 2022).
[27] Sharms P '*Market Allocation Under Competition* Law' (2014) available at: *https://www.academia.edu/6211402/Market_Allocation_Under_Competition_Law* (accessed 03 March 2022).
[28] *United States v. Topco Assocs., Inc*., 405 U.S. 596 (1972) at page 405.
[29] *United States v. Topco Assocs., Inc*., 405 U.S. 596 (1972) at page 408.
[30] *United States v. Topco Assocs., Inc*., 405 U.S. 596 (1972) at page 405.
[31] Section 1 The Sherman Antitrust Act of 1890.
[32] Section 4(1) (b) (iii) of the Competition Act Act 89 of 1998.

outcome.

As illustrated above, cartels are considered to be the most egregious violations of anti-competitive practices.[33] Cartels are considered to be the gravest violation because they have the effect of preventing and lessening competition within a market.[34]In essence cartels limit competition that would normally prevail between companies. They injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.[35] When competition is limited, there is removal of pressure on companies to improve the products they sell or find more efficient ways in which to produce them.[36] This ultimately results in higher prices.

Cartels are not easily detectable because they operate in secrecy and can manipulate an economy for years.[37] In deterring anti-competitive behaviors, the Commission prepared and issued the Corporate Leniency Policy. South Africa's leniency policy was first introduced in 2004 and subsequently amended in 2008.[38] For purposes of this research paper, the CLP of 2008 will form the basis of discussion.[39]

1.5. The prohibition of restrictive horizontal practices

Chapter 2 of the Competition Act prohibits anti-competitive practices, namely horizontal restraints, vertical restraints and abuse of dominance.[40] However, the focus of this research paper will be on cartels, which are a species of prohibited restrictive horizontal practices in the form of agreements between, or concerted practices by firms that are competitors.[41] An agreement, in terms of the Competition Act, is

[33] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9.
[34]Brassey M, Campbell J, Legh R et al *Competition Law* (2002) 139.
[35] Brassey M, Campbell J, Legh R et al *Competition Law* 1 ed (2002) 139.
[36] Brassey M, Campbell J, Legh R et al *Competition Law* 1 ed (2002) 139.
[37] John M & Connor J 'Criminalizing cartels-An American perspective' (2010) 1 *New journal of the European Criminal Law* 203.
[38] Notice 195 of 2001, Government Gazette No. 25963 of 6 February 2004.
[39] Chapter 2 of this research paper.
[40] Africa S & Bachmann S 'Cartel regulation in the three emerging BRICS economies: Cartel and Competition policies in South Africa, Brazil and India – A comparative overview' (2011) 45 *International Law Journal* 990.
[41] Section 4 (1) (b) of the Competition Act 89 of 1998.

defined to include a "contract, arrangement or understanding, whether or not legally enforceable".[42] Due to the fact that what amounts to an agreement in terms of the Competition Act does not have to be legally enforceable, the Competition Act acknowledges the fact that parties are unlikely to reduce anti-competitive agreements to writing and that these agreements are likely to exist informally.[43]An example of an agreement that includes a contract is *National Association of Pharmaceutical Wholesalers & others v Glaxo Wellcome (Pty) Ltd & others*, whereby certain pharmaceutical manufactures concluded an agreement between them to establish a distribution company controlled by them, and to grant it exclusive rights to distribute their products.[44] An anti-competitive agreement such as the one mentioned above is not enforceable in a court of law because enforcing it would be against the *boni mores.*[45]

In terms of the Competition Act, a concerted practice is defined as conduct that does not amount to an agreement.[46] This means that there is some form of coordination between firms that is not reduced to an agreement.[47] This coordination is more than a mere parallel conduct which is common in any given industry, for example, when a law firm in Rustenburg raises its basic legal fees, this particular firm sets the pace and therefore it is highly likely that other law firms in Rustenburg will raise their legal fees. For coordinated conduct to violate the Competition Act, the parallel conduct must be accompanied by some evidence of direct or indirect cooperation.[48] In *Re Wood Pulp Cartel Case*, it was held that an advance announcement of prices cannot equate to coordination/concerted practice.[49]

The concept of a 'decision by an association of firms' is not defined in the

[42] Section 1 (1) (i) of the Competition Act 89 of 1998.
[43] Brassey M, Campbell J, Legh R et al in *Competition Law* 1 ed (2002) Ch 5.
[44] CT 68/IR/Jun00.
[45] *SA Metal & Machine Co Ltd v Cape Town Iron & Steel Works (Pty) Ltd and others* 1997 (1) SA 319 (A).
[46] Section 1 (1) (viii) of the Competition Act 89 of 1998
[47] *ICI v The Commission* [1972] CMLR 557 at para 64
[48] Deon P 'Assessing the nature of competition law enforcement in South Africa' available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100007 (accessed 20 August 2022).
[49] *Wood pulp, Osakeyhtiö and ors v Commission of the European Communities* [1993] 4 CMLR 4017 at para 59-65.

Competition Act, however the term is quite clear and it means that firms/companies come together to protect their mutual interest. Associations of companies may have pro-competitive benefits but there are always dangers of using them to engage in cartel behavior like price fixing.[50]

The restrictive horizontal practices prohibited under section 4 fall into two categories: those that are subject to a rule of reason and those that are deemed as *per se* illegal. With the former category, there is a possibility of justification in the form of technological efficiency or other pro-competitive gains that outweigh the anti-competitive effect.[51] With those that are regarded as *per se illegal*, the Competition Act does not allow for any justification.[52] It is under the *per se* prohibition that all cartel practices are evaluated.[53] In other words, firms who participate in cartels cannot raise any justification in the form of technological efficiency or other pro-competitive gains. Numerous cartels have been investigated and prosecuted by the competition authorities of South Africa. [54]

1.6. Liability imposed on South African companies for cartel offences

While firms who engage in cartels have an opportunity to "blow the whistle"[55] on an existing cartel, it must be noted that the immunity granted by the Competition

[50] Deon P 'Assessing the nature of competition law enforcement in South Africa' available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100007 (accessed 20 August 2022).
[51] Section 4(1) *(a)* of the Competition Act 89 of 1998.
[52] Section 4(1) *(b)* of Competition Act 89 of 1998.
[53] Section 4(1) *(b)* of Competition Act 89 of 1998.
[54] See for example, *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa and Others* [2008] ZACT 64; *American Natural Soda Ash Corporation & Another v Competition Commission & Others* 2005 (6) SA 158 SCA; *Competition Commission v Pioneer Foods* 15/CR/Feb07, 50/CR; *Competition Commission v Aveng (Africa) Ltd, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, BRC Mesh Reinforcing (Pty) Ltd* 84/CR/DEC09 para 92, 195-199; *SA Raisins (Pty) Ltd & Another v SAD Holdings Ltd & SAD Vine Fruit (Pty) Ltd* [2000] ZACT 46; *Bezuidenhout v Patensie Sitrus Beherend Ltd* [2000] ZACT 32; *Competition Commission v Engen Petroleum (Pty) Ltd in re Chevron SA (Pty) Ltd, Shell SA (Pty) Ltd, Total SA (Pty) Ltd, Masana Petroleum Solutions (Pty) Ltd, Southern African Bitumen Association, Sasol Ltd, Tosas (Pty) Ltd* Case No: 06/CR/Mar10.
[55] Para 5.8 of the Competition Commission Corporate Leniency Policy of 2008.
'Reporting of cartel activity by individual employees of a firm or by a person not authorized to act for such firm will only amount to whistle blowing and not to an application for immunity under the CLP'

Commission under the CLP of 2008 does not extend to the personal criminal liability which the cartel offence seeks to impute on directors found guilty of causing a firm to engage in cartel conduct.

Section 73A of the Competition Act clearly states that directors of companies who are found guilty of cartel conduct, will be held criminally liable.[56] While there is a need to combat cartel behavior, the criminalization of directors who engage in such activities is harsh and needs to be reconsidered. The criminalization of directors who engage in cartel activities will also drive cartel members back into secrecy, therefore undermine the effectiveness of the leniency policy. A detailed consideration of the liability imposed on directors of companies who engage in cartel activities will be dealt with in Chapter three of this research paper.

1.7. **Research Problem/Questions**

1.7.1. What are the consequences of engaging in cartel behavior?

1.7.2. Is section 73A an effective tool to hold directors accountable for cartel conduct?

1.7.3. Is the CLP of 2008 effective in dealing with director's liability and combating cartels?

1.7.4. Is the National Prosecuting Authority (NPA) equipped to deal with competition law matters?

1.7.5. Is there a relationship between competition law, company law and criminal law?

1.7.6. What is the primary duty of the Competition Commission?

1.7.7. Is there justification for criminalization of cartel activity?

[56] Section 73A of the Competition Act 89 of 1998.

1.8. Significance And Objective Of The Research Questions

This research paper will make an effort to elevate the standards of fair competition and fair trade in South Africa by exploring legislative mechanisms to hold corporations and the directors that engage in cartel behavior accountable.

The business sector has a critical role to play in the progressiveness of a stronger economy for all South Africans and the elevation of the aforementioned standards will improve the operation and governance of fair competition which is critical for a well-run country.

The economic and social well-being of the community as a whole is very much influenced by businesses that operate within and outside the country[57] and therefore it is imperative that these businesses engage with each other fairly. These businesses must be transparent, accountable and responsible businesses and I am of the view that fair and transparent business activities will help minimize cartel behavior.

This contribution will address leniency policies in competition law as a tool to detect, prosecute and deter cartel activity, with the focus on challenges to the CLP and the rights to hold directors personally liable.

1.9. Limitations Of Study

This research paper is restricted to the competition law of South Africa. Notwithstanding my analysis of competition law in South Africa, I will also evaluate foreign jurisdictions for comparative purposes. Specifically, the study aims to focus on cartels. The study aims to examine the effects that cartels have in a developing country such as South Africa. This research also aims to investigate whether the CLP of 2008 is an effective legal instrument to combat cartels. The study also focuses on the director's liability when the company they represent has been found guilty of engaging in cartel behavior.

[57] Section 3 (1) (a) of the Competition Act 89 of 1998.
Application of Act
'*This Act* applies to all economic activity within, or having an effect within, the Republic'

1.10. Research Methodology

Given the purpose of the study, this research paper is of a descriptive and analytic nature setting out the legal framework under which competition law is regulated to prevent anti-competitive behavior, specifically cartels, in South Africa focusing on director's liability. Recent cartels will be identified, and judicial precedent will be utilized in order to demonstrate how South African courts applied and developed competition law.

The methodology adopted in this study involves relevant primary, such as legislation and case law. Secondary sources including articles, books, chapters of books, journal articles, dissertations and newspaper articles are used in order to substantiate arguments throughout this research paper.

1.11. Chapter Outline

This research paper is divided into four chapters. The first chapter is the current chapter. It introduces the research paper, identifies the research questions, the significance and objective of the study, limitations of the study and the research method used throughout this study. Chapter two examines the South African CLP of 2008 and investigates the challenges to the CLP. Chapter three critically analyses the liability imposed on South African companies for cartel offences and holding its directors accountable. Chapter four consists of conclusions and recommendations.

2. CHAPTER 2 THE SOUTH AFRICAN CORPORATE LENIENCY POLICY OF 2008

2.1. Introduction

Anti-competitive behavior has an adverse effect on all consumers, but the poor suffer disproportionately from the effects of cartel conduct in commerce and public procurement. High prices, particularly in essential goods and services, force the poor to consume less or none of these goods, hence the CLP is a necessary tool in preventing cartel activities. As a result, this chapter will examine the CLP and investigate the challenges to the CLP.

First, the chapter will briefly discusses the history of immunity procedures for competition law violations. Secondly, the chapter reviews the rationale of the CLP. Thirdly, the chapter examines the nature of the CLP and sets out the requirements of cooperation and procedures that must be complied with in order to obtain leniency. Fourthly, I will discuss the court challenges to the CLP and lastly, I will conclude the chapter.

2.2. Brief history of immunity procedures for competition law violations

The concept of a leniency programme in competition law was first introduced in the United States in 1978 by the United States Department of Justice (DOJ).[58] Under the policy, a firm that reported its participation in anti-competitive behaviour in violation of the Sherman Act was given either partial or complete immunity from subsequent penalties. Therefore, the DOJ in United States administers the leniency programme through its Corporate Leniency Policy for firms and Leniency Policy for Individuals.[59]

In 1993, the policy was significantly revised and since the revision, the corporate leniency policy led to the increase in the number of price fixing cartels being detected

[58] Moodaliyar K 'Are cartels skating on thin ice? An insight into the South African Corporate leniency policy' (2008) *SALJ* 157 162.
[59] *https://www.justice.gov/* (Accessed 28 May 2022).

and prosecuted by the DOJ.[60] In the year that the American immunity procedure was revised, the DOJ collected almost US$23 million worth of fines from firms that engaged in anti-competitive behaviour.[61] Six years later, there was a significant decrease in the amount of fines that the DOJ collected. In 1999, the DOJ collected almost US$1.2 million worth of fines from cartelists.[62] Because of the effectiveness of the policy, the American immunity procedure had a deterrent effect on cartelists. This means that firms participated less in *per se illegal* conduct and thus resulted in the fines collected by the DOJ to decrease in 1999.

The significant decline in the amount of fines collected by the DOJ as illustrated above suggests that the policy is effective in combating cartels. The success of this policy in the United States has prompted a host of other jurisdictions, such as Canada[63], the United Kingdom[64], the European Union[65], Australia[66] and South Africa to adopt similar programmes to combat cartels, in the form of its Corporate Leniency of 2008.

Given the success of the United States leniency programme, South Africa's Competition Commission adopted the CLP of 2008. However, there are significant differences between the two systems and the implications thereof. A difference worth

[60] Ellis J & Wilson W 'Cartels, price fixing and corporate leniency policy: What doesn't kill us makes us stronger'(2012) 2 *Theoretical Economics Letters* available at: *https://www.semanticscholar.org/paper/What-Doesn%E2%80%99t-Kill-us-Makes-us-Stronger%3A-An-Analysis-Ellis-Wilson/64f4a466923cf4a1040db77c84d115522b6390f6* (Accessed 20 May 2022).

[61] Ellis J & Wilson W Cartels, price fixing and corporate leniency policy: What doesn't kill us makes us stronger'(2012) 2 *Theoretical Economics Letters* available at: *https://www.semanticscholar.org/paper/What-Doesn%E2%80%99t-Kill-us-Makes-us-Stronger%3A-An-Analysis-Ellis-Wilson/64f4a466923cf4a1040db77c84d115522b6390f6* (Accessed 20 May 2022).

[62] Ellis J & Wilson W 'Cartels, price fixing and corporate leniency policy: What doesn't kill us makes us stronger'(2012) 2 *Theoretical Economics Letters* available at: *https://www.semanticscholar.org/paper/What-Doesn%E2%80%99t-Kill-us-Makes-us-Stronger%3A-An-Analysis-Ellis-Wilson/64f4a466923cf4a1040db77c84d115522b6390f6* (Accessed 20 May 2022).

[63] Immunity and Leniency Programs regulated by Competition Act of Canada (R.S.C., 1985, c. C-34) .

[64] Competition and Markets Authority leniency policy regulated by Competition Act 1998 (CA98).

[65] Article 101 of the Treaty of the Functioning of the European Union regulates The European Union leniency programme.

[66]The *Competition and Consumer Act 2010* (CCA) regulates The Australian Competition and Consumer Commission's Immunity Policy for Cartel Conduct.

noting is that in the United States, the leniency policy is available to both firms[67] and individuals[68] while in South Africa, the CLP is only available to firms who engage in *per se illegal* conduct. Another difference is that the US allows for either total[69] or partial immunity[70], while South Africa only allows total immunity. In the United States, antitrust violations will result in criminal liability sanctions by individuals. Another difference worth noting is that the United States antitrust division's leniency programme includes both criminal and civil penalties.[71] Whereas in South Africa, the Competition Act imposes administrative penalties on the firm.[72]

2.3. The rationale of South Africa's Corporate Leniency Policy of 2008

The CLP is a compliance mechanism that is used to encourage firms who engage in cartel activities to disclose such activities to the Competition Commission.[73] The purpose of the CLP is to provide a member of a cartel with total immunity from

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[67] Corporate Leniency Policy which is made up of Type A Corporate Leniency Policy and Type B corporate Leniency Policy

[68] Individual Leniency Policy. Cite the US DOJ policy correctly/ fully, for example include the year.

[69] Type A Corporate Leniency Policy is applicable when an investigation has not commenced and must meet the following requirements:

1. It must report illegal activity that the antitrust division has not received information on from another source.
2. It must have taken prompt and effective action to terminate its role in the illegal activity.
3. It reports its actions completely and cooperates with the DOJ.
4. It confesses wrongdoing as a corporate act, not as the isolated confession of an individual.
5. It makes restitution to any injured parties.
6. The corporation was clearly not the leader of the illegal activity and did not coerce others to participate.

[70] Type B Corporate Leniency Policy is applicable if the corporation that is disqualified from Type A leniency but must meet the following conditions:

1. The corporation is the first entity to qualify for leniency with respect to the illegal antitrust activity that is reported.
2. The antitrust Division does not yet have sufficient evidence to obtain a conviction against the corporation.
3. The corporation takes prompt action to terminate its role in the illegal activity.
4. The corporation reports its actions completely and cooperates with the DoJ.
5. The corporation confesses wrongdoing as a corporate act.
6. The corporation makes restitution to injured parties.
7. The antitrust Division determines that granting leniency would not be unfair to others.

[71] *https://www.justice.gov/* (Accessed 28 May 2022).

[72] Section 51(1) *(a)* of the Competition Act 89 of 1998.

[73] Paragraph 3.2 of the Competition Commission Corporate Leniency Policy of 2008.

prosecution and administrative fines and, in return that member must disclose all information and documents relating to a cartel in which it has participated.[74]

As previously mentioned in Chapter One, the purpose of the Competition Act is to promote and maintain competition in the economy and to prevent any form of anti-competitive conduct by a firm or a group of firms.[75] Therefore, the CLP serves as an aid to promote the purpose of the Competition Act, which is to uncover cartels that would be difficult to detect and to make investigations more efficient.[76] It must however be noted that while the CLP aids to make cartel investigations more efficient, it is not without challenges.

2.4. The nature of the South African Corporate Leniency Policy of 2008

The CLP provides a guideline to potential immunity applicants, setting out the requirements of cooperation and procedures that must be complied with in order to obtain leniency. The nature of the leniency policy approach is based on the notion of the 'prisoner dilemma' in game theory. The 'prisoner dilemma' is explained well by Sutherland and Kemp as follows:[77]

> 'Two men are arrested for a crime, although there is very little evidence against them. They are kept apart and a policeman offers both the same deal. If both confess they will receive the same sentence of three years imprisonment. If both refuse to confess they will each be sentenced to two years imprisonment on a trumped-up charge. If one confesses and the other does not, then the one who confesses will receive only a one year sentence, while the other who did not, will go to jail for six years. In these circumstances the optimal decision in the face of uncertainty is to confess. That will be the best strategy for one prisoner whatever the other prisoner does.'[78]

[74] Paragraph 3.4 of the Competition Commission Corporate Leniency Policy of 2008.
[75] Section 2 of the Competition Act 89 of 1998.
[76] Paragraph 3.8 the Competition Commission Corporate Leniency Policy of 2008.
[77] Sutherland P & Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 1-52.
[78] Sutherland P & Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 1-52.

The theory discussed above therefore illustrates that the CLP provides an incentive to cartelists who disclose information to the Competition Commission. To understand the theory better, the following discussion will outline pertinent principles of the CLP while making reference to case law. The principles are: the first to door principle; the confidentiality principle and the immunity principle.

It is important to discuss these principles because the whole purpose of the CLP is to eradicate and prevent cartel activities that harm the economy at large. Specifically, it is important to establish who qualifies for immunity under the CLP, the requirements and conditions that must be satisfied by both the firm seeking immunity and the Competition Commission, whether the process is confidential, and the nature of the immunity that can be granted under the CLP.

2.4.1. FIRST TO THE DOOR

The CLP requires that a firm that is 'first to the door' to admit and provide the Competition Commission with information with regard to any cartel activity may qualify for immunity and as a result, the cartel members are encouraged to race to the Competition Commission in order to be the first to apply for immunity.[79]

Prior to making an application for immunity and in order to protect the applicant's place in the queue of applications for immunity, the applicant may choose to apply to the Commission for a marker.[80] The Commission may grant, at its discretion grant the marker.[81] The applicant will have to provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in the CLP.[82]

[79] Moodaliyar K 'Are cartels skating on thin ice? Insight into the South African Corporate Leniency Policy 2008 *SALJ* 17.
[80] Para 12.1 and para 12.2 of the Competition Commission Corporate Leniency Policy of 2008.
[81] Para 12.2 of the Competition Commission Corporate Leniency Policy of 2008.
[82] Para 10 of the Competition Commission Corporate Leniency Policy of 2008.

It is of paramount importance to understand that the person applying for immunity must have the authority to do so.[83] Having authority to apply for immunity means that when one applies for immunity, they are not just an ordinary employee but an individual who has a fiduciary duty towards the firm. Having a fiduciary duty means that an individual has entered into a legal relationship with the firm that he or she works for and therefore obligates one to act solely in the interest of the firm.[84]

An individual who would owe a firm a fiduciary duty would be a director. It is therefore important that such an individual has the authority to act on behalf of the firm so that leniency can be awarded to the firm as a whole. Where an individual such an ordinary employee does not have the authority to act on behalf of the firm, then the activity will not amount to an application for immunity because the CLP does not grant immunity to individuals. However, the activity will only amount to whistle blowing.[85]

Applicants who wish to assist the Competition Commission in combating cartel activities but are not the 'first to the door' are not completely without recourse. In *Blinkwater Mills (Pty) Ltd v Competition Commission*, the Competition Tribunal dismissed an application by Blinkwaters Mills (Pty) Ltd to set aside the conditional immunity granted by the Competition Commission to Tiger Consumer Brands Ltd.[86] The Competition Commission had granted full immunity to Premier Foods (Pty) Ltd for its involvement in a maize milling cartel and conditional immunity was granted to the first applicant through the door before they granted conditional immunity to Tiger Consumer Brands Ltd.[87]

[83] Paragraph 5.7 of the Competition Commission Corporate Leniency Policy of 2008.
[84] Arcangeli M K *The prevention of conflict of interest as a fiduciary duty in South African Company Law* (unpublished LLM thesis, University of Pretoria, 2020) available at: https://repository.up.ac.za/handle/2263/77487 (Accessed 28 May 2022).
[85] Paragraph 5.8 of the Competition Commission Corporate Leniency Policy of 2008.
[86] *Blinkwater Mills (Pty) Ltd v Competition Commission* [2016] 2 CPLR 901 (CT) Para 92.
[87] *Blinkwater Mills (Pty) Ltd v Competition Commission* [2016] 2 CPLR 901 (CT) Para 103.

Blinkwaters Mills (Pty) Ltd proclaimed that since Premier Foods (Pty) Ltd had already been granted immunity, the Competition Commission acted beyond its authority by granting Tiger Consumer Brands Ltd conditional immunity.[88] However, the Competition Tribunal reasoned that Premier Foods (Pty) Ltd was not able to provide the Competition Commission with complete information to allow it to proceed against the other respondent firms that had engaged in cartel activities.[89] The Competition Tribunal held that the Competition Commission acted sensibly and the most important objective that the Competition Commission has is to prosecute as many cartelists as possible.[90]

2.4.2. CONFIDENTIAL INFORMATION

The CLP process is undertaken on a confidential basis.[91] Section 1 of the Competition Act defines confidential information.[92] From the definition one can see that there are four requirements that must be met in order for information to qualify as 'confidential information' under the Competition Act.[93] The requirements are as follows:

2.4.2.1. The information must relate to the trade, business or industry of a firm;

2.4.2.2. The information must belong to the firm claiming that information is confidential;

2.4.2.3. The information must have economic value and

2.4.2.4. The information must not be publicly available or known to the public.

[88] *Blinkwater Mills (Pty) Ltd v Competition Commission* [2016] 2 CPLR 901 (CT) Para 55.
[89] *Blinkwater Mills (Pty) Ltd v Competition Commission* [2016] 2 CPLR 901 (CT) Para 80.
[90] *Blinkwater Mills (Pty) Ltd v Competition Commission* [2016] 2 CPLR 901 (CT) Para 82.
[91] Paragraph 6.2 of the Corporate Leniency Policy of 2008.
[92] Section 1 of the Competition Act 89 of 1998 - "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others."
[93] Section 1 of the Competition Act 89 of 1998.

In the case of *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others*, Scaw South Africa (Pty) Ltd as the applicant did not make any effort to bring the information within the ambit of the definition, but merely described the consequences of the information being disclosed.[94] The consequence was that disclosure of the information could cause irreparable harm if it became available to competitors or other third parties.[95] According to Scaw South Africa (Pty) Ltd, the fact that the information belong to a private entity meant that the information was private and confidential.[96] However, nothing was stated about the nature and economic value of the information. The court therefore held detailed reasons supporting the confidentiality claim, with reference to the nature and economic value of the information, will have to be given by the party claiming confidentiality.[97]This means that the four requirements for confidential information, as stipulated by the Competition Act must be fully met in order to claim that information is confidential.

Section 44(1) *(a)* of the Competition Act articulates that information submitted to the Competition Commission or Competition Tribunal may be identified as confidential.[98] A confidential claim regarding information provided to the Competition Commission or Competition Tribunal must be substantiated by reasons as to why the information is confidential and such claim must be in writing and in the prescribed form.[99] The Competition Commission will protect any confidential information received from a

[94] *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA) paragraph 43.
[95] *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA) paragraph 43.
[96] *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA) paragraph 43.
[97] *Competition Commission of South Africa v Arcerlormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA) paragraph 43
[98] Section 44(1) (a) of the Competition Act 89 of 1998.
[99] Section 44(1) (b) of the Competition Act 89 of 1998.

leniency applicant, unless the leniency applicant grants its consent for such a disclosure.[100]

Regardless of what the CLP states, the Competition Commission has often received requests by respondents to gain access to the documents that are confidential which have been lodged in support of a leniency application.[101]

2.4.3. THE IMMUNITY ENVISAGED UNDER THE CORPORATE LENIENCY POLICY

The policy sets out the benefits, procedure and requirements for cooperation with the Competition Commission in exchange for immunity.[102] Given the procedure and the requirements, the CLP does not automatically provide immunity to the applicant.[103] Only successful applicants who cooperate and meet the requirements of the CLP will be granted immunity. The granting of immunity becomes an incentive for a firm that participates in a cartel activity to terminate its participation, and inform the Competition Commission accordingly.[104]

It is noteworthy to mention that the CLP makes provision for different forms of immunity. First, we have conditional immunity that the Competition Commission grants before the finalisation of the leniency process. Once an investigation is complete, then total immunity can be granted.[105] Total immunity is when all the requirements and procedures have been met.[106]

When immunity is granted, it means that the Competition Commission will not refer the applicant before the Competition Tribunal for adjudication and such an applicant will not be subjected to administrative fines. However, the

[100] Paragraph 6.2 of the Competition Commission Corporate Leniency Policy of 2008.
[101] Kariga R & Nelly Sakata N "Accessing the competition commission's secrets" available at: *http://www.compcom.co.za/wp-content/uploads/2014/09/PAPER-Accessing-the-Commissions-Secrets* (Accessed 15 June 2022).
[102] Paragraph 2.6 of the Competition Commission Corporate Leniency Policy of 2008
[103] Paragraph 5.3 of the Competition Commission Corporate Leniency Policy of 2008.
[104] Paragraph 2.6 of the Corporate Leniency Policy of 2008.
[105] Paragraph 9.1.1.2 of the Corporate Leniency Policy of 2008
[106] Paragraph 9.1.2.1 of the Corporate Leniency Policy of 2008.

applicant is likely to be party to a claim for civil damages by private parties.[107] The applicant is likely to be party to a claim for civil damages because in terms of the Competition Act, a party can petition a civil court to award compensation for loss arising out of a prohibited practice.[108]

In *Competition Commission and South African Airways (Pty) Ltd*, the Competition Tribunal clarified the importance of awarding civil damages where losses were sustained as a result of a prohibited practice.[109] In the case mentioned above, we can see that affected parties may approach courts in the event that they sustain losses, however, affected parties can only approach courts once the Competition Tribunal has made a finding that indeed there was prohibited conduct.[110] This means that if the Competition Tribunal does not make such a finding, then the affected party will not be able to approach the High Court of South Africa to pursue a civil claim.

If and when the Competition Tribunal has made a finding that there was prohibited conducted, then the complainant that seeks to pursue a claim in the High Court of South Africa will have to prove that there was a *nexus* between the prohibited conduct and the harm suffered.[111] It is therefore clear that the conventional principles with regard to the assessment of damages and causation of loss will apply. It is also clear that the CLP does provide for blanket immunity.[112]

This means that immunity that has been granted by the Competition authorities does not guarantee that the firm that engages in *per se illegal* conduct will be able to avoid all the consequences for its conduct.

[107] Moodaliyar K 'Are cartels skating on thin ice? Insight into the South African Corporate Leniency Policy 2008 *SALJ* 17.
[108] Section 62(5) of the Competition Act 89 of 1998.
[109] *Competition Commission and South African Airways (Pty) Ltd*,
[110] *Competition Commission and South African Airways (Pty) Ltd* [2006] ZACT 88 Paragraph 32.
[111] *Competition Commission and South African Airways (Pty) Ltd* [2006] ZACT 88 Paragraph 32.
[112] Paragraph 5 of the Corporate Leniency Policy of 2008.

2.5. Court challenges to the Corporate Leniency Policy of 2008

There have been cases where the CLP has been challenged. In *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others*, *Consolidated Wire Industries (Pty) Ltd (CWI)*, a member of a large group of companies operating generally in the steel industry undertook an audit to identify anti-competitive conduct in the company.[113] Pursuant to this audit, CWI reported to the Competition Commission that it had been involved in cartel activity relating to the setting of prices, dividing markets and fixing of tenders.[114] CWI also reported that Agri Wire (Pty) Ltd and eleven other companies were involved in the said cartel activities. The Competition Commission granted CWI conditional leniency and referred the matter to the Competition Tribunal.[115] Conditional immunity is given to an applicant at the initial stage of the application so as to create a good atmosphere and trust between the applicant and the Commission pending the finalization of the infringement proceedings. [116]

Agri Wire (Pty) Ltd and eleven others challenged the referral to the Competition Tribunal on the grounds that the CLP was not authorised by any law and that the evidence obtained against it had been obtained unlawfully.[117] Agri Wire (Pty) Ltd and eleven others also argued that if the Competition Commission identifies cartel activity, then it is obligated to report and pursue all members of the cartel and may not selectively decide which participants to prosecute.[118]

The Supreme Court of Appeal (SCA) rejected this argument on the basis that one of the primary duties of the Competition Commission is to break up cartels in order to

[113] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 3.
[114] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 3.
[115] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 3.
[116] Paragraph 9.1.1.1 of the Competition Commission Corporate Leniency Policy of 2008.
[117] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 5.
[118] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 5.

promote market transparency and investigate contraventions of the Competition Act.[119] Therefore, for the Competition Commission to conduct effective investigations and prosecution, it needs to put in place measures that will enable it to achieve these objectives and that granting immunity to a confessing cartel participant does not amount to selective prosecution.

The SCA held that it is extremely difficult to detect or prove the existence of a cartel and the rationale of the CLP is to encourage participants to disclose information to enable the Competition Commission to tackle cartel activity.[120] As a result, the SCA found that the Competition Commission correctly interpreted the Competition Act and that the Competition Act does empower the Competition Commission to adopt and enforce a policy such as the CLP.[121] The SCA reasoned that the purpose of the Competition Act as set out in section 2 is to promote competition in South Africa and to that end the Competition Commission is empowered to promote market transparency, to investigate and to evaluate alleged contraventions of the Competition Act including prohibited cartel activity.[122]

The SCA also examined the functions of the Competition Commission and held that the Competition Commission is entitled to put in place measures that will enable it to combat cartels effectively.[123] Likewise, it is the whole purpose of the CLP to put in place effective measures that aim to combat cartels and as such it follows that the Competition Commission must be taken to be empowered under the Competition Act to adopt and implement a policy such as the CLP. Therefore the SCA clarified that

[119] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 22.
In the High Court judgment is the same case, the court stated that the applicants' contention that the initiation and referral of the complaint is unlawful because the Competition Commission selectively prosecuted them is bad and falls to be rejected. The High Court also emphasised that the Competition Commission has acted within its authority and have done nothing wrong in law.
[120] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 6.
[121] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 22
[122] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 22.
[123] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 22

the Competition Commission has the power and the ability to grant conditional immunity[124] and it therefore appears that the CLP is legal document. Although the CLP or immunity is not specifically mentioned in the Competition Act, it remains a policy document published in the Government Gazette by the Competition Commission at its own initiative in terms of section 79 of the Competition Act.[125]

Given the fact that the CLP document serves as an important tool in combating cartels, it is important to critically analyse the nature of the CLP as a tool.

2.6. Conclusion

Cartel conduct has been a deep rooted concern and cartels remain harmful as they lead to high prices and unfair competition in the markets. In the United States, the Supreme Court has labelled cartel conduct as the 'supreme evil of antitrust'.[126] As seen above, South African competition Authorities have been very active and energetic in pursuing cartels. As part of their strategies to combat cartels and keeping up with international trends, the South African authorities adopted the CLP. The CLP is a policy under which the Competition Commission grants a self-confessing cartel member, who is first to approach the Competition Commission, immunity. The Competition Commission's CLP aims to demoralise or prevent the formation of cartels and to eradicate harmful and unfavourable cartel conduct. As seen above, the CLP is therefore based on certain requirements. The CLP can be hailed as a revolutionary policy that has added a new and better enforcement in South Africa. The CLP is aligned with international standards in the context of competition leniency, thus preserving its value and relevance as a primary tool in the war against cartels. Given the effectiveness of the South African CLP, the CLP itself raises a few concerns that are problematic. As a result, the next chapter will investigate the challenges to the South African CLP.

[124] *Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others* [2012] ZASCA para 26.
[125] Section 79 of the Competition Act 89 of 1998.
[126] *Verizon Communications Inc V Law Offices of Curtis* LLP 540 US 398, 408 (2004).

3. CHAPTER 3 THE LIABILITY IMPOSED ON SOUTH AFRICAN COMPANIES FOR CARTEL OFFENCES AND HOLDING ITS DIRECTORS PERSONALLY ACCOUNTABLE

3.1. Introduction

The Sherman Act was enacted in 1890 and cartels have always been criminalised from the time that the Sherman Act was enacted.[127] However over the years there has been a global trend towards the criminalisation of cartel activity that can be detected around the world.[128] Initially the criminalisation of cartel activities was once observed in the United States and it has now become an international practice with countries as diverse as Israel[129], Brazil[130], Australia[131] and South Africa pursuing a policy of cartel criminalisation.

This chapter explores the implications of the section 73A of the Competition Act, which has introduced the imposition of criminal liability for directors of firms found guilty of hard core cartels.

The chapter first discusses the justification for criminal sanctions for competition law violations with reference to the utilitarian and retributive theories. Secondly the chapter outlines section 73A of the Competition Act. Thirdly, the chapter discusses the concerns raised by section 73A of the Competition Amendment Act, effective prosecution, section 73A(4) of the Competition Act, lessons we can learn from the US DOJ , settlement agreements and consent orders.

Fourthly the chapter discusses the constitutional implication of section 73A of the Competition Act, namely the self-incrimination that arises from leniency applications, the right to be presumed innocent and legal representation. Lastly, the chapter provides a conclusion.

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[127] Section 2 of the Sherman Anti-Trust Act 1890.
[128] *https://www.shsconferences.org/articles/shsconf/abs/2021/03/shsconf_glob20_03011/shsconf_glob20_03011.html* (Accessed 02 October 2022).
[129] Section 47 of the Economic Competition Law 5748-1988.
[130] Article 4, item II of Law No. 8,137/1990.
[131] Section 88 Australian Consumer and Competition Commission 2010

3.2. The justification for criminal sanctions for competition law violations.

In the case of *Verizon Communications v. Law Offices of Curtis v Trinko*, the court held that cartel activity[132] represents the "supreme evil of antitrust"[133] and strikes "a killer blow at the heart of healthy economic activity".[134] Given the potential negative effects of cartels, such as increased prices for consumers[135] one can make the argument that the criminalisation of cartels in South Africa by section 73A was long overdue. However, it has been over a decade since the amendment was introduced but, there has not been a single prosecution of the cartel offence.

Criminal law is known as the strongest form of official punishment and it is a way of sending a strong message to the community that the act committed or omitted is unacceptable.[136] The introduction of criminal law in the competition law arena needs adequate justification. There are two possible theoretical justifications for the criminalisation of cartel activity and the first one is the utilitarian theory which is known as the economical deterrence effect. The second justification is the retributive theory which has to do with morality.

3.2.1. The utilitarian theory: The deterrence effect.

The utilitarian theory of deterrence holds that punishment can only be justified if it leads to the prevention or reduction of future crime.[137] The utilitarian theory points out that suffering is a pain which should be avoided and that punishment could not be justified unless a specific social benefit or utility can be derived from its imposition.[138] The utilitarian theory is thus a

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[132] See Chapter 1.4 for definition of cartel activies.
[133] *Verizon Communications v Law Offices of Curtis V Trinko* (2004) 540 US Para 408.
[134] Kroes N 'Delivering on the Crackdown: Recent Developments in the European Commission's Campaign against Cartels 'Available at https://ec.europa.eu/commission/presscorner/detail/en/IP061705 (Accessed on 25 August 2022).
[135] Carlton D & Perloff M *Modern Industrial Organization* 4 ed (2005) Ch 1.
[136] Maculan E & Gil A 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts' (2020) 40 *Oxford Journal of Legal Studies* 132.
[137] Walker N 'Punishment, Danger and Stigma: The Morality of Criminal Justice' (1983) 8 *American Bar Foundation Research Journal* 468.
[138] Whelan P 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law'Available at:

consequential theory and this means that it is a theory that evaluates whether or not an act or conduct is lawful by what its consequences are. It can be said that the theory looks to the preventive consequences of sentences.[139]

It can be argued that the existence of criminal cartel sanctions is motivated by economic losses and that the criminal sanctions thus aims to deter economic losses.[140] This motivation can be labelled as the economic deterrence theory. This theory attempts to achieve economic efficiency in order to maximise the total welfare of society.[141] Good business behaviour is seen as efficient, and if the businesses welfare benefits are greater to society than its costs, then such behaviour should therefore be encouraged. By contrast, inefficient business behaviour where costs outweigh the benefits, then such business behaviour should be prohibited.[142]

The deterrence theory is further differentiated between specific and general deterrence.[143] The former aims to deter, through punishment, the individual or director himself from re-offending or engaging in anti-competitive behaviour again.[144] While the latter aims to deter the public from committing the offence by showing the consequence of the crime committed, in other words the legal punishment of engaging in anti-competitive behaviour.[145]

Clarke argues that if the legislator introduces criminal sanctions instead of mere civil penalties for cartels, the deterrence of potential offenders from

https://www.academia.edu/1943419/A_Principled_Argument_for_Personal_Criminal_Sanctions_as_Punishment_under_EC_Cartel_Law (Accessed 24 July 2022).

[139] Ashworth A *Sentencing and Criminal Justice* 6 ed (2015) Ch 3.

[140] Baker D 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *The George Washington law review* 671.

[141] Baker D 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *The George Washington law review* 671.

[142] Block M & Sidak J 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Every Now and Then?' (1980) 68 *Georgetown Law Journal* 131.

[143] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 76.

[144] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 76.

[145] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 76.

engaging in cartel conduct will be more effective, compared to the deterrence by civil penalties, which results in a benefit for society as a whole by reducing the rate of the offence.[146] Thus criminalisation is justified.[147] Therefore the general deterrence approach prevails and provides the main justification in the context of cartel criminalization.[148] It can therefore be argued that the aspect of deterrence is therefore the main function in criminalising cartel conduct.[149]

3.2.2. The retributive theory.

The retributive theory of criminal law states that a person should suffer because of the crime committed and the suffering should be in proportion to the crime committed.[150] The retributive theory pinpoints the moral wrong of an offence and justifies punishment because a person is responsible for his or her actions and must therefore receive what he or she deserves when the person has made a choice that the society considers as wrong.[151] Clarke argues that cartel conduct is morally reprehensible and that it is a deliberate activity which causes economic harm to consumers and therefore the criminalisation of this conduct is appropriate.[152]

It has been established that cartels cause significant economic harm to consumers and a business which engages in anti-competitive behaviour is

[146] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 76.
[147] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 76.
[148] Werden G 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 5 *European Competition Journal* 19.
[149] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 324.
[150] Gray A 'Criminal sanctions for cartel behaviour' (2008) 8 *Queensland University of Technology Law and Justice Journal* 371.
[151] Whelan P 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law 'Available at https://www.academia.edu/1943419/A_Principled_Argument_for_Personal_Criminal_Sanctions_as_Punishment_under_EC_Cartel_Law (Accessed 24 July 2022).
[152] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 78

considered to be immoral.[153] Competition law is regulatory in nature and its goal is to ensure consumer welfare, meaning that society should get the best product possible to the most appropriate price.[154] By regulating the competition through the means of competition law a country shows its willingness to intervene in economic and social activities to facilitate the achievement of this goal which is considered to be valuable to society.[155]

Where poverty levels are high and there are businesses engaging in anti-competitive behaviour like price fixing and the right of consumer choice is taken away, it becomes necessary to criminalise hard core cartel conduct.[156] However, a violation of such a regulatory law, which protects economic interests, might not carry a strong moral condemnation as more traditional crimes like murder do.[157] Consequently the retributive theory seems to be inappropriate in the context of regulatory laws like competition law.[158]

3.3. Section 73A of the Competition Amendment Act 1 of 2009.

On the 28th of August 2009, the former president of South Africa, Jacob Zuma assented to the Competition Amendment Act No 1 of 2009.[159] Even though the former President assented to the amendment, some parts of section 73A have not yet come into force while other parts of section 73A have entered into force. Section 73A is titled "Causing or permitting a firm to engage in prohibited practice" and reads as follows:

[153] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 *Journal of Financial Crime* 78.
[154] Rosochowicz PH 'The appropriateness of criminal sanctions in the enforcement of competition Law' (2004) 25 *European Competition Law Review* 754.
[155] Rosochowicz PH 'The appropriateness of criminal sanctions in the enforcement of competition Law' (2004) 25 *European Competition Law Review* 754.
[156] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.
[157] Rosochowicz PH 'The appropriateness of criminal sanctions in the enforcement of competition Law' (2004) 25 *European Competition Law Review* 753.
[158] Rosochowicz PH 'The appropriateness of criminal sanctions in the enforcement of competition Law' (2004) 25 *European Competition Law Review* 754.
[159] http://www.gpwonline.co.za/Gazettes/Pages/Government-Gazette.aspx (accessed 05 June 2022).

"(1) A person commits an offence if, while being a director of a firm or while having 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 purposes of subsection (1) (b), knowingly acquiesced means having acquiesced while having actual knowledge of the relevant conduct by the firm.

(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

(5) In any court proceedings against a person in terms of this section, an acknowledgment in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4 (1) (b) is prima facie proof of the fact that the firm engaged in that conduct.

(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."[160]

3.4. Concerns raised by section 73A Competition Amendment Act 1 of 2009

The introduction of criminal sanctions for cartel conduct in South Africa is a significant improvement that provides emphasis on deterrence to cartel conduct and it is important to implement the section 73A in a way that compliments and integrates with existing efforts to combat cartels.[161] However, the employment of criminal cartel sanctions is not without its problems and thus cartel criminalisation presents significant theoretical, legal and practical challenges that need to be overcome in order to ensure its effectiveness, efficiency and legitimacy. Below, this chapter will critically analyse the problems associated with section 73A.

3.4.1. Effective prosecution

Criminalising cartels brings in a different body to cartel enforcement, namely the National Prosecuting Authority (NPA).[162] The NPA has exclusive jurisdiction over the enforcement of section 73A and thus the NPA is vested with the authority to prosecute anti-competitive behaviour that directors engage in.[163] The NPA's powers are entrenched in the Constitution of South Africa[164] and the National Prosecuting Authority Act, which confers the NPA with the power to institute all criminal prosecutions on behalf of the state.[165] It therefore becomes important that the CLP and provisions that deal with criminal liability be consistent with each other. The inquiry that arises is whether the Competition Commission's duties and

[160] Section 73A of the Competition Amendment Act 89 of 1998.
[161] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 324.
[162] Para 2.3 of the Corporate Leniency Policy of 2008.
[163] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 200.
[164] Section 179(1) and (2) Constitution of South Africa, 1996.
[165] Section 20(1) of the National Prosecuting Authority Act 32 of 1999.

functions will overlap in the functions of the NPA.[166] It is worth mentioning that the Competition Commission is an administrative agency and its primary purpose is to administer and enforce the Competition Act. The Competition Commission will therefore will remain responsible for the cartel enforcement mechanisms already provided for under the Competition Act[167] because the Competition Act has characteristics of being a quasi-civil piece of legislation with the objective of achieving socio-economic objectives rather than criminal prosecution of individuals.[168] This involvement of the NPA in enforcing the Competition Act, a function which has primarily been the preserve of the Competition Commission raises several concerns.

The NPA has a fairly small Specialised Commercial Crimes Units (SCCU) and will most likely have the responsibility of prosecuting individuals under section 73A.[169] However, the NPA's resources regarding SCCU are limited.[170] Furthermore the range of duties of these units is already quite extensive and covers a wide area of commercial crimes.[171] In addition, there is no formal framework provided to facilitate coordination between the SCCU and the NPA with the Competition Commission.[172] The lack of resources is the reason why there are reasonable doubts that exist with regard

[166] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 201.
[167] Jordaan LMunyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 201.
[168] Tjiane GM A cartel offence in South African Law (Unpublished LLM thesis, University of Pretoria, 2019) 27.
[169] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 201.
[170] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 325.
[171] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 327
[172] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 328

to the resources and the expertise in practice to allow an effective prosecution of offences under section 73A Competition Act.[173]

Given that both the Competition Commission and the NPA have different functions and roles, it becomes important for both the Competition Commission and the NPA to develop effective cooperation mechanisms and work together to combat cartel activity. However, Kelly remarks that the greatest fear with exclusive jurisdiction to the NPA over cartel enforcement in terms of section 73A is that the NPA has no expertise in handling competition law and cartel enforcement.[174] Another issue is that the NPA has no experience in competition law enforcement. It must be noted that the Competition Commission's granting of immunity to a leniency applicant does not translate into automatic absolution from criminal prosecution by the NPA and Lavoie expresses concerns of expertise, coordination and the manner in which the NPA will prosecute individuals.[175]

The problem above can however be improved by giving the Competition Commission a greater power to investigate and prosecute offenders but this would, as argued elsewhere, require an amendment of the relevant provisions in the Constitution, the Competition Act and the National Prosecuting Authority Act and this might be time consuming.[176] Another improving measure which might also be easier to realise would be to provide a detailed structure for how to coordinate the work between the NPA and the Competition Commission.[177] Due to the fact that the Competition Commission has already established several coordination guidelines and

[173] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 328.
[174] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 328.
[175] Lavaoi C *South Africa's Corporate Leniency Policy: A five year review* (2014) available at www.compcom.co.za/.../clp-paper-conference-Chantal-Lavoie.docx (Accessed 14 August 2022).
[176] Jordaan L& Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 211.
[177] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 328.

memoranda of understanding with other institutions, it seems likely that such an agreement is achievable.[178]

3.4.2. Section 73A (4) of the Competition Act

Section 73A (4) is an indication of how immunity from criminal prosecution is intended to operate. The section prohibits the Competition Commission from seeking prosecution of any person whom it certifies deserving of leniency.[179] We can therefore see that it is the Competition Commission intention to issue certificates to directors and managers who support leniency applications. This intention does not change the fact that criminal offences are prosecuted by the NPA and that the decision about whether or not to prosecute a director or a manager for a cartel offence is that of the NPA, and not the Competition Commission.

It is important to note that although section 73A(4)(b) permits the Competition Commission to make submissions to the NPA supporting leniency for someone prosecuted in terms of the section, the submissions made by the competition commission are not conclusive.[180] The NPA will have the discretion to decide whether or not to grant leniency to any person prosecuted for an offence in terms of this section, but only if the Commission has certified that such person is deserving of leniency.[181]

The bottom line is that any firm that applies for leniency, exposes its directors and managers to criminal charges for cartel conduct and its participation in a cartel infringing the Competition Act.

3.4.3. Lessons from the US DOJ.

[178] Jordaan & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 203.
[179] Section 73A (4) Competition Act 89 of 1998.
[180] Section 73A (4) Competition Act 89 of 1998.
[181] Section 73A (4) Competition Act 89 of 1998.

Since the enactment of Sherman Act in 1890, cartels have been crimes punishable by imprisonment in the United States and since South Africa considers the criminalization of cartels, some lessons can be learnt from the US DOJ.

Certainty profoundly shapes one's behaviour and a criminal enforcement system in competition law will only work effectively if there is a legislated sentencing regime that provides sufficient level of certainty as to who may qualify for immunity or a lesser criminal sentence, what one needs to do to qualify for immunity or lesser criminal sentence and the level of cooperation that will be required.[182] It is recommended that the sentences be short so that individuals and companies do not become discouraged and cooperate with the government's investigation.[183]

The US follows the "first in the door" rule which makes it more important for companies to have an effective anti-competitive compliance programme.[184] Implementing a compliance programme will assist companies to uncover any anti-competitive behaviour that may be happening in the company. A company with an effective anti-competitive compliance program can hope to be in a position to be the first in the door.[185]

The US shows that criminal sanctions are important for the effective enforcement of competition law regulations and discourages anti-competitive behaviour.[186] Generally, no one wants to spend time in jail and be removed from society, so the introduction of criminal sanctions serve as a more effective and powerful deterrent to participating in anti-competitive

[182] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 208.
[183] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 208.
[184] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 208.
[185] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 217.
[186] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 211.

behaviour. In the US, it is standard practice to offer lower-level employees, immunity, or reduced sentences in exchange to testify against their employers.[187] South Africa, has a similar system called plea bargaining. Plea bargaining has been recognised in the justice system of South Africa after the enactment of section 105A in the Criminal Procedure Act.[188] Plea bargaining permits prosecutors, accused and their counsel to arrange and arrive at a concession on confession and punishments.[189]

3.4.4. Settlement agreements and consent orders.

In *Netcare Hospital Group (Pty) Ltd & Another v Manoim N.O. & Others*, the Competition Appeal Court noted that consent orders are also known as "settlement procedures" or "plea agreements".[190] A consent order establishes that there is an infringement and requires an admission of guilt from the parties, however in South Africa admission of guilt is not a requirement for a settlement agreement.[191] Although, consent orders need not contain the admission of guilt, they are accepted as an appropriate order.[192]The purpose of a settlement procedure is to resolve disputes and aims to bring about speedy resolution of disputes without entering into lengthy investigations and litigation.[193]

[187] Kolasky K 'Criminalising cartel activity: Lessons from the US experience' (2004) 12 *Competition & Consumer Law Journal* 211.
[188] Section 105A of the Criminal Procedure Act 51 of 1977.
Section 105A provides that a prosecutor who is authorised in writing the National Director of Public Prosecution (The NDPP) and an accused who is legally represented may, before pleading to a charge, negotiate and enter into a plea agreement.
[189] Majozi NL *Plea Bargaining in South Africa and England* (Unpublished LLM thesis, University of Pretoria, 2019) 9.
[190] *Netcare Hospital Group (Pty) Ltd & Another v Manoim N.O. & Others* [2008] ZACAC 1 para 25;
[191] *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT.
[192] *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 paras 24, 40, 44-47.
[193] *Netcare Hospital Group (Pty) Ltd & Another v Manoim N.O. & Others* [2008] ZACAC 1 para 25;

Over the years, the Competition Commission has negotiated numerous consent agreements with companies in various industries, including aviation, construction and pharmaceutical industries.[194] A classic example of pharmaceutical industry that negotiated a consent agreement with the Competition Commission is the *GlaxoSmithKline* (GSK) case series. The GSK case series involved the South African subsidiary of the British multinational pharmaceutical manufacturer GSK.

The *GlaxoSmithKline* (GSK) case series dealt with alleged abuse of dominance, in the form of excessive pricing of antiretroviral medication for Human Immunodeficiency Virus (HIV) infected individuals.[195] The case had been initiated by two separate complainants which were the Treatment Action Campaign (TAC), a South African non-governmental organization involved in healthcare activism[196] and the Aids Healthcare Foundation and Others (the AHF complainants).[197] The GSK case series is important because the Competition Tribunal and the Competition Appeal Court had to determine the time limits for the making of consent orders.

TAC initiated their compliant in September 2002 and the AHF complainants initiated their compliant in January 2003. The AHF complainant and the TAC complainant agreed to join their complaint together because both complaints concerned the same conduct by GSK. In October 2003, the Competition Commission informed the complainants that it had taken the decision to refer the matter to the Competition Tribunal in terms of section 49D and section 58(1) (b) of the Competition Act which deal with the

[194] https://www.bowmanslaw.com/insights/competition-law-consent-agreements/ (Accessed 30 June 2022).
[195] *Mpho Mkathnini and Others and Glaxosmithkline SA (Pty) Ltd / Glaxo Group Ltd* [2004] ZACT 48; *GlaxoSmithKline South Africa (Pty) Ltd / Glaxo Group Ltd and Mpho Makhathnini / Nelisiwe Mthethwa / Musa Msomi / Elijah Paul / Musoke Tom Myers / Aids Healthcare Foundation Ltd* [2006] ZACT 23; *GlaxoSmithKline South Africa (Pty) Ltd / Glaxo Group Ltd and Mpho Makhathnini / Nelisiwe Mthethwa / Musa Msomi / Elijah Paul / Musoke Tom Myers / Aids Healthcare Foundation Ltd* [2006] ZACT 23; *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 Para 11 .
[196] http://www.tac.org.za/about_us (Accessed 30 June 2022).
[197] http://www.aidshealth.org/#/archives/countries/za (Accessed 30 June 2022).

powers of the Competition Commission to enter into settlement agreements that and the Tribunal's authority to confirm such settlement agreements as consent orders.[198] The Competition Commission may conclude a settlement agreement with the respondent firm to, however, the Competition Tribunal must confirm the agreement to make it a formal consent order.[199]

It must first be noted that a settlement agreement is not a consent order. The settlement agreement is an agreement that gets incorporated in terms of the draft order and only the draft order may be made by the Competition Tribunal beyond the term of the settlement agreement.[200] A settlement agreement between the Competition Commission and a respondent is binding only to the extent that the parties agree to apply to the Competition Tribunal to make the order agreed to by the parties.[201] Further terms of the agreement which are incorporated in the proposed consent order become legally enforceable once the Competition Tribunal make the order.[202]

The Competition Act does not dictate the contents of a consent order however, section 49D of the Competition Act provides that the contents of a complainant may include an award of damages that is favourable to the complainant.

Section 73A(3) of the Competition Act states that for a director to be prosecuted for an offence in terms of section 73A, their firm must have acknowledged in a consent order that it has contravened section 4(1)(b).[203] The consent order serves as *prima facie* proof in criminal proceedings against the director.[204] The Competition Act further establishes that the consent order may include an award of damages in favour of the

[198] Section 49D and section 58(1) (b) of the Competition Act 89 of 1998.
[199] Section 49D and section 58(1) (b) of the Competition Act 89 of 1998.
[200] *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO* 62/CAC/Apr06 2728 Para 12.
[201] *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO* 62/CAC/Apr06 2728 Para 58.
[202] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 54.
[203]Section 73A (3) of the Competition Act 89 of 1998.
[204] Roberts W and Lital A 'When leniency is uncertain: Competition Law' (2009) 9 *Without Prejudice* 6.

complainant.[205] Although the Competition Act does not explicitly dictate the contents of the consent order, the Competition Commission Rules (CCR) and the Competition Tribunal rules (CTR) provides details of what a draft consent order must entail. The CCR provide that "the Commission must affix to the referral a draft order, setting out the section of the Act that has been contravened, setting out the terms agreed to by the Commission and the respondent, including, if applicable, the amount of damages agreed to by the respondent and the complainant, and signed by the Commission and the respondent indicating their consent to the draft order".[206]

It must be noted that the Competition Tribunal cannot grant automatic approval or authorisation to a settlement agreement, without proper consideration.[207] In *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others*, the Competition Appeal court emphasised that the Competition Tribunal cannot grant a consent order without hearing any evidence.[208] The Competition Tribunal must satisfy itself that the settlement agreement is a rational one and its terms protect the public interest.[209] If the settlement agreement is not a rational agreement and does not protect the public interest then the Competition Tribunal can exercise its discretion and refuse to grant the consent order.[210]

It goes without saying that that the introduction of criminal sanctions may have a negative effect on the Commission's ability to conclude settlement agreements. It seems fairly obvious that directors will be less willing to

[205] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 54.
[206] Section 24(4) of the Competition Tribunal Rules of 2001 and Section 18(2) of the Competition Commission Rules of 2001.
[207] *Competition Commission V Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 Para 14.
[208] *Competition Commission VNetcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 Para 16.
[209] *Competition Commission v Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd* Case No: 27/CR/Mar07 para 32.
[210] *Competition Commission v Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd* Case No: 27/CR/Mar07 para 32.

conclude consent orders on behalf of their firms. If an admission by a firm that it participated in a cartel is to be used, the admission may be used to secure a criminal conviction against directors of the firm.[211]

It has been argued that directors that admit in the consent order to the firm's participation in the cartel conduct may not be liable for criminal conviction because of the distinction between the firm and its directors known as the separate legal entity. The separate legal entity makes it impossible to hold individual members of the firm liable for acts performed by the company.[212] It can also be argued that directors of firms cannot be held criminally liable because criminalisation of cartel conduct is not an objective of the Competition Act.[213]

It can therefore be noted from section 73A that a director may be prosecuted for an offence only if the 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) of the Competition Act.

3.5. **Constitutional implications**

The introduction of section 73A into the Competition Act also raises several concerns about its compatibility with the South African Constitution of which some aspects will be briefly addressed, namely the right against self-incrimination, the right to be presumed innocent, and the right to representation.

3.5.1. Self-incrimination for leniency applicants.

The Competition Commission encourages directors that have engaged in a prohibited practice to come forward and report unlawful cartel conduct in

[211] Lewis D *Thieves at Dinner Table – Enforcing the Competition Act* (2012) 227.
[212] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 200.
[213] Tjiane GM Acartel offence in South African Law (Unpublished LLM thesis, University of Pretoria, 2019) 39.

order to apply for leniency,[214] however the issue that arises is whether the evidence that has been given to the Competition Commission can be used in subsequent criminal proceedings. Section 35(3)(j) of the Constitution states that no accused person can be compelled to give self-incriminating evidence and this is one of the fair trial rights that exist from the moment of inception of the criminal process, namely form the moment of arrest.[215] Section 49A of the Competition Act also states that any person summoned by the Competition Commission to provide evidence and has made a self-incriminating statement in relation to his/her conduct is granted protection from criminal prosecution as such evidence is inadmissible in criminal proceedings.[216]

It is clear that when a director comes forward voluntarily to the Competition Commission in order to apply for leniency, there is no criminal process and therefore the director is not eligible for the right against self-incrimination. Therefore, should a director provide incriminating evidence in an administrative proceeding, that evidence may not be used in subsequent criminal proceedings because that would amount to prejudicing the accused's right to not incriminate himself or herself.[217] This was proved in the case of *Ferreira v. Levin,*[218] where the Constitutional Court held that a person appearing before a liquidation inquiry may be compelled to produce direct self-incriminating evidence but that evidence may not be used in a subsequent criminal trial.[219]

[214] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 210.
[215] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal 210*.
[216] Section 49A (3) of the Competition Act 89 of 1998.
[217]Jordaan L &Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 211.
[218]*Ferreira v Levine, Wilkens, Cooper, Van der Merwe, Master of the Supreme Court, Vryenhoek & Powel* CCT 5/1995.
[219] *Ferreira v Levine, Wilkens, Cooper, Van der Merwe, Master of the Supreme Court, Vryenhoek & Powel* CCT 5/1995 Para 268.

To enjoy the protection of section 35 (3) (j) of the Constitution, the director must be charged in a subsequent criminal proceeding and the prosecution must seek to use the evidence which was gained in the previous interrogation outside of the criminal process in the subsequent trial.[220] Accordingly the right to a fair trial is protected by the use of immunity in respect of evidence arising out of the previous interrogation which was outside of the criminal process.[221]

Another issue that arises with regard to coming forward to the Competition Commission, is that the Competition Commission does not compel the applicant to answer questions truthfully but it is up to that director to convince the Competition Commission that he or she deserves leniency. Once the director has given the Competition Commission evidence, it is then up to the Competition Commission to take the matter with the NPA. This might indicate that the use of evidence in subsequent trials by the NPA is easily conceivable without violating the fair trial rights of the applicant.[222] As mentioned above, the use of such information in subsequent criminal proceedings might discourage individuals from applying for leniency.[223]

Therefore, when a director who provides self-incriminating information to the Competition Commission while being summoned, and that information is then used by the Competition Tribunal to make a finding against a firm, that information is admissible in a criminal trial. The finding of the Competition Tribunal which is based on self-incriminating information is now *prima facie* proof of a commission of an offence against a director. The right not to self-incriminate is violated as a result.

[220] Cheadle H, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2011) 10.
[221] Cheadle H, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2011) 10.
[222] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 329.
[223] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review*329.

3.5.2. The right to be presumed innocent

Section 73A (5) of the Competition Act provides that in any court proceedings against a director in terms of this section, an acknowledgement in a consent order contemplated in section 49(D) of the Competition Act by the firm or finding by the Tribunal or Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1) (b), is *prima facie* proof of the fact that the firm engaged in that conduct. It can be argued that section 73A (5) of the Competition Act creates a reverse onus for directors whose firms are found guilty of cartel conduct by the Competition Tribunal or Competition Appeal Court. In *S v Coetzee*,[224] the court held that in criminal proceedings, the onus of proof is on the State.[225] This means that the state must prove all the elements of a crime beyond a reasonable doubt. The Constitutional Court further held that it is unconstitutional to reverse onus because it affects the accused's right to a fair trial.[226]

As already mentioned above, section 73A (5) of the Competition Act creates a reverse onus. A reverse onus in a criminal proceeding refers to a shift in the burden of proof from the State proving its case to an accused person to disprove the State's case. The provisions of section 73A (5) are problematic because it removes the duty of the prosecutor to prove all the elements of the crime allegedly committed. This means that if a director who is accused of causing or knowingly acquiesced in the firm engaging in a prohibited practice, the prosecutor will not be required to proof this element of causing a firm to engage in *per se* prohibited conduct as the Competition Tribunal or the Competition Appeal Court would have already made a finding in this regard. A director will therefore not have an opportunity of creating a reasonable doubt in the State's case in respect of this element, because the Competition Tribunal or the Competition Appeal Court findings are regarded as *prima facie* proof of engaging in *per se* prohibited conduct. It

[224] CCT 50/95.
[225] *S v Coetzee* CCT 50/95 Para 8.
[226] *S v Coetzee* CCT 50/95 Para 17.

follows that section 73A (5) of the Competition Act as well as section 35 (3) of the Constitution is not consistent with each other.

3.5.3. Section 73A (6) *(b)* Competition Act – legal representation

The purpose of section 73A (6) *(b)* of the Competition Act is to prevent a firm from shielding the director from the consequences of the violation of section 73A (1) Competition Act, in order to maintain the deterrence effect of the threat of the penalty.[227] In a case where a company is the only source of revenue meaning that if the company is privately held and the owner of the company is the accused director as well as the sole shareholder, the accused director would not be allowed to take money from the company to fund his own defence meaning inter alia choosing a particular lawyer.[228]

The objective of the above mentioned provision is reasonable because competition litigation is complex, time-consuming and expensive. It requires teams of lawyers and economists because of its difficulty and ambiguity. For example, the Competition Commission spent 10 years seeking to prosecute the American Natural Soda Ash Company.[229] Although this objective is thoroughly reasonable, the implementation through section 73A (6) *(b)* of the Competition Act raises the question if this is consistent with the fair trial rights of the accused.[230]

This section is unclear and several interpretations are possible.[231] It might be possible to construe the second half sentence of section 73A (6) (b) "unless the prosecution is abandoned or the person is acquitted" in a way that the accused may first obtain funds to meet his legal costs and has to pay

[227] Section 73A (6) *(b)* Competition Act 89 of 1998.
[228] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.
[229] *American Natural Soda and another v The Competition Commission of SA and others* [2008] 2 CPLR 207 (CT).
[230] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 331.
[231] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.

them back if he or she is sentenced, or in a way that the accused has to meet his or her own legal costs but can be compensated by the firm if he or she is acquitted.[232]

Nevertheless the latter construction seems to be more reasonable concerning the ratio of this section and concerning its enforceability.[233] The question whether section 73A(6)(b) Competition Act is in any case consistent with the South African Constitution goes beyond the scope of this paper and it is likely that its constitutionality might be questioned in future litigation.[234]

3.6. Conclusion

It is argued that directors who breach competition laws are often motivated by a cost-benefit analysis and that they strive to maximise profit objectives which can drastically affect the real income of the poor.[235] It is also argued that cartel conduct may be likened to a "sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer".[236] In these instances administrative fines do not constitute an appropriate sanction capable of deterring potential offenders. Another primary justification given for the criminalisation of cartel conduct is that "fear of criminal sanctions and jail in particular will deter potential offenders".[237] The idea of criminalising cartel conduct is great in the sense that it will have a deterrent effect which the competition authorities aims for. However, in order for this new sanction to have a real deterrence value that the competition authorities aim for, there would have to be successful implementation to prosecute the directors and managers that engage in anti-competitive practices. This means that a thorough

[232] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.
[233] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.
[234] Kelly L 'The Introduction of a "Cartel Offence" into South African Law' (2010) 21 *Stellenbosch Law Review* 333.
[235] Jordaan L & Munyai PS 'The Constitutional Implications of the New Section 73A of the Competition Act of 1998' (2011) 23 *South African Mercantile Law Journal* 198.
[236] Whelan P 'A principled argument for personal criminal sanctions as punishment under EC cartel Law' *Competition Law Review* 28.
[237] Wells B and Parker C 'Justifying criminal sanctions for cartel conduct: a hard case' *Journal of Antitrust Enforcement* 204.

and nuanced framework for criminal sanctions within competition law that complements and integrates well with the existing legislation will have to be regulated without infringing on the rights that are guaranteed by the Constitution. Imposing criminal sanctions against directors and managers would have to be carefully considered and justified. And perhaps a less constricting option that would achieve the same purpose exists. The director who knowingly acquiesced the company to engage in cartel conduct may be declared delinquent in terms of section 162 of the Companies Act as it is less intrusive.[238] It goes without saying that directors who engage in anti-competitive behaviour cannot go unpunished. Directors therefore have the burdensome responsibility of ensuring their firms compliance with competition law in order to protect not only their firms but themselves from unnecessary litigation.

[238] Section 162 of the Companies Act 71 of 2008.

4. CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

As the preceding chapters have shown, competition law is an important tool in the hands of government and aims to promote the efficiency, adaptability and development of the economy.[239] Competition law also aims to provide consumers with competitive prices and product choice. [240] However, over the years companies have continued to engage in cartel conduct. The cases investigated and prosecuted by the competition authorities attest to this.[241] A cartel exists when businesses agree to act together instead of competing against one another. [242] The harm caused by cartels is significant and greater emphasis should be placed on the deterrence of cartel conduct. [243]

The CLP is currently one of the main enforcement instruments of competition law against hard core cartels.[244] The CLP enables the competition law authorities to obtain crucial information from wrong doers. [245] The CLP also enables the competition law authorities to gather more and better elements of proof on cartel infringements and allows the authorities to obtain such information at a much quicker rate by availing immunity to the firm that is the first through the door with information and cooperation that meets the CLP requirements. [246]

However it can be argued that the CLP provides an easy way for cartelists to escape punishment in the sense that the imposition of a fine often defeats the purpose of the CLP which is to bring those in violation of the law to justice. Therefore, in order to ensure the effectiveness of competition law and to achieve its objectives, the criminalization of cartel conduct is a step in the right direction.

The introduction of criminal sanctions against individuals may be an effective alternative solution if implemented in the correct manner and will have a deterrent effect as no director or manager of a firm would want to risk going to prison for a period of ten years. It must

[239] See 1.2-1.5 of Chapter 1 of this Research Paper.
[240] See 1.2-1.5 of Chapter 1 of this Research Paper.
[241] See 1.5 of Chapter 1 of this Research Paper.
[242] See 1.4 of Chapter 1 of this Research Paper.
[243] See 1.4 of Chapter 1 of this Research Paper.
[244] See Chapter 2 of this Research Paper.
[245] See Chapter 2 of this Research Paper.
[246] See Chapter 2 of this Research Paper.

also be noted that this new liability also has the effect of encouraging more secretive activities and thus has the potential of jeopardizing the effectiveness of the CLP and contains vague evidentiary thresholds around the powers of the competition commission and NPA. Many authors criticise the introduction of criminalisation as some provision can be regarded as unconstitutional. [247]

While there is a need for section 73A,[248] despite the various constitutional issues, it provides direction for the Competition Commission to hold those actually responsible for cartel conduct accountable. It must be emphasised that cooperation between the Competition Commission and the NPA needs to be dealt with in a way that does not infringe the Constitution. This means that the entire Competition Act will have to be assessed and amended holistically in order to ensure that the Competition Act does not infringe the fundamental constitutional rights of individuals and most importantly to ensure that it reads as a singular cohesive piece of legislation.

If the constitutional concerns and the procedural concerns are reformed, then there would remain no reason as to why the introduction of criminal sanctions in the Competition Act should not be implemented.

In order to establish an effective criminal law framework for competition law enforcement with regard to the cartel offence, the following could be done:

- South Africa has a Specialised Commercial Crime Unit which is tasked with investigating and prosecuting organised commercial crimes. It is recommended that this Unit can work hand in hand with the NPA and the Competition Commission to achieve a positive result regarding cartel offences. This means that the relationship between the different authorities will have to be regulated so that each authority knows exactly what their role is in order to produce a combined effect that is far greater than the sum of their separate effects.

[247] See 3.4 of Chapter 3 of this Research Paper.
[248] See 3.2 of Chapter 3 of this Research Paper.

- Instead of placing the ultimate onus on the NPA, which is to prove beyond a reasonable doubt, the Competition Commission can be given a greater role in the enforcement of section 73A so that there is optimum utilisation of resources.
- The Competition Commission should be established with adequate number of trained investigators for the investigation of competition law cases.
- The Competition Act should make provision for the offending corporation to recover or recoup the administrative penalty from directors under various provisions relating to that director's recklessness.
- The CLP will also have to be amended to ensure that leniency is extended to criminal prosecutions and ensure that leniency is available not only to firms but also to the directors. In the absence of the extension of the above protection, directors who have been involved in cartel conduct are less likely to make self-incriminating statements to the Competition Commission in leniency applications.

  This also means that a firm which engages in cartel conduct will not make use of the CLP and this will not advance the objectives of the Competition Act which includes a unique focus on specific dimensions of public interest such as employment, small business development as well as black economic empowerment.

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