



UNIVERSITY *of the*
WESTERN CAPE

**COMPETITION LAW AND CARTEL ENFORCEMENT REGIMES IN
THE GLOBAL SOUTH: EXAMINING THE EFFECTIVENESS OF CO-
OPERATION IN SOUTH-SOUTH REGIONAL
TRADE AGREEMENTS**



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ABSTRACT

Competition law and its enforcement have become necessary tools in the face of trade liberalisation. Nowhere is this more evident than in the area of cross-border cartels. The global South is steadily becoming aware of this. With the advent of globalisation and trade liberalisation, individual economies have become intrinsically linked. Anti-competitive conduct in one territory may have an impact in another territory. Therefore, an effective regional competition law framework complements trade liberalisation, especially in light of the principal objective of the South-South regional economic communities: the deepening of regional integration, in order to realise economic development and alleviate poverty.

Cartel practices, such as, market allocation cartels, are in direct contradiction to this primary objective. This is when enforcement collaborations in South-South regional economic communities becomes crucial. The regional legal instruments of the Common Market for Eastern and Southern Africa, the East African Community, the Southern African Customs Union and the Southern African Development Community make provision for enforcement collaborations among Member States. To facilitate collaboration, regional competition authorities have been created to investigate, among other things, cross-border cartels. Within these economic communities, there is a strong case for enforcement collaborations, as evidence shows that the majority of the firms engaging in cartels are the so-called Regional Multinational Corporations. They operate throughout the territories of Member States. Additionally, the international nature of cartels, such as, private international cartels and export cartels, provide an opportunity for South-South co-operation to be utilised. However, this co-operation has not been utilised to the fullest extent, especially with reference to cross-border cartel activities. This has been attributed to various factors, such as, institutional incapacities, resource austerity, the absence of common procedural rules, the lack of adequate investigatory tools, and political ineptitude.

As a solution, this current study makes specific recommendations that are directed at enhancing the effectiveness of South-South collaborations pertaining to cross-border cartel activities.

KEY WORDS

Administrative penalties

Cartels

Competition law

Co-operation

Criminalisation

Developing countries

Enforcement

Leniency policy

Regional trade agreements

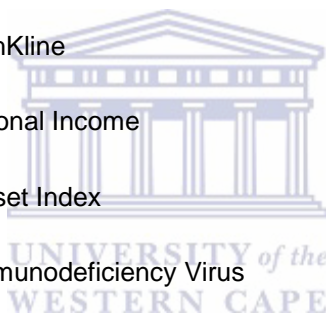
Settlement procedures



LIST OF ABBREVIATIONS

ACF	African Competition Forum
AHF	Aids Healthcare Foundation
AMAI	Alkali Manufacturers Association of India
ANC	African National Congress
AU	African Union
AMU	Arab Maghreb Union
ASEAN	Association of South-East Asian Nations
BPC	Belrusian Potash Company
CA	Competition Authority
CACM	Central American Common Market
CADE	Administrative Council for Economic Defence
CANPOTEX	Canadian Potash Export
CARICOM	Caribbean Community and Common Market
CCOPOLC	Competition and Consumer Policy and Law Committee
CEMAC	Central African Economic and Monetary Community
CLP	Corporate Leniency Policy
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
DSB	Dispute Settlement Body
EAC	East African Community
EACJ	East African Court of Justice
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice

ECN	European Competition Network
ECO	Economic Co-operation Organisation
ECOWAS	Economic Community of West African States
EU	European Union
EUMOA	West African Economic and Monetary Union
EVI	Economic Vulnerability Index
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GSK	GlaxoSmithKline
GNI	Gross National Income
HAI	Human Asset Index
HIV	Human Immunodeficiency Virus
IATA	International Air Transport Association
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IMF	International Monetary Fund
KFTC	Korea Fair Trade Commission
LDC	Least Developed Country
MERCOSUR	Mercado Comum do Sul
MFNT	Most Favoured Nation Treatment
MNC	Multinational Corporation
M RTP	Monopolies and Restrictive Trade Practices
NCA	National Competition Authority



NPA	National Prosecuting Authority
NT	National Treatment
NEI	New Industrial Economics
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
PIC	Private International Cartel
RCA	Regional Competition Authority
REC	Regional Economic Community
RMNC	Regional Multinational Corporation
RTA	Regional Trade Agreement
SAA	South African Airways
SAARC	South Asian Association for Regional Co-operation
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-operation Conference
SAPS	South African Police Service
SCP	Structure Conduct Performance
SEAE	Secretariat for Economic Monitoring
SME	Small to Medium Enterprise
SOE	State Owned Enterprise
SSNIP	Small but Significant Non-transitory Increase in Price
TAC	Treatment Action Campaign
TFEU	Treaty for the Functioning of the European Union
TFTA	Tripartite Free Trade Area
TRIPS	Trade Related Aspect of Intellectual of Property Rights

UNCTAD	United Nations Conference on Trade and Development
WCCFP	Western Cape Citrus Fruit Producers
WGTCP	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organisation



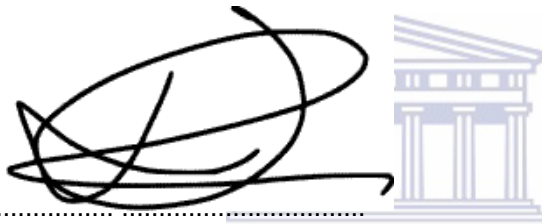
DECLARATION

I declare that **Competition Law and Cartel Enforcement Regimes in the Global South: Examining the Effectiveness of Co-operation in South-South Regional Trade Agreements** is my own work. It has not been submitted before for a degree or examination at any other university. All the sources that I have used, or quoted, have been duly indicated and acknowledged as complete references.

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Date: 09 August 2017

Signature:

A handwritten signature in black ink is written over a dotted line. To the right of the signature is a light blue logo of the University of the Western Cape, featuring a classical building with columns and a pediment.

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DEDICATION

For my father Themba. For my Sinenhlanhla. For my Lihle.



ACKNOWLEDGEMENTS

To God, who determines the end from the beginning.

NaNolo, if I get to be half the mother that you are, I will be satisfied.

Thabo, you are so, so strong. I need you to know that. Keep holding on. Uthandwa yim futhi. Kakhulu!

Dulis Mudimba, "sisi wakhe", you are my family away from home.

Many thanks to Professor Patricia Lenaghan, for her supervision and Professor Riekie Wandrag, for coordinating an amazing curriculum, the LLM Trade in Africa.

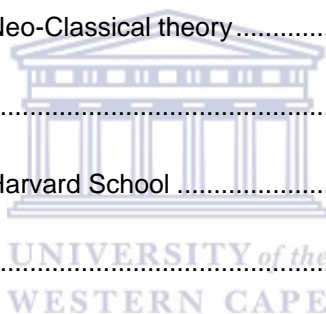
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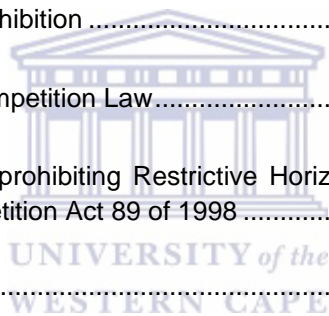
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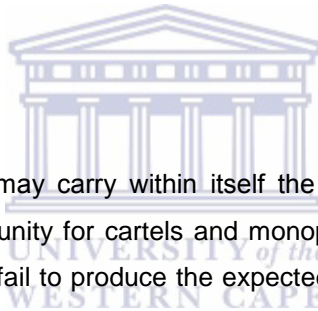
CHAPTER ONE

AN INTRODUCTION TO THE STUDY

'[Competition is a] form of discipline that business units exercise over one another, under pressure of the discipline customers can exercise over the business, by virtue of their power of choosing between the offerings of rival suppliers. Competition presupposes that businesses, which are profit minded, have to become production minded, as a means of earning profits dependably.¹ [It is the state in a given market] in which the individual buyer, or seller, does not influence the price by his purchase, or sales, alternately stated, the elasticity of supply facing any buyer is infinite, and the elasticity of demand facing the seller is infinite.'²

1.1. Competition Law and Free Markets

In a free market economy, competition among businesses is 'the life blood of commerce, it is the availability of the same, or similar, products from more than one source that results in the public paying a reasonable price.'³ The basic premise underpinning competition law is that free markets are the most efficient and fairest, or conversely, the least inefficient and least unfair form of economic organisation.⁴ According to 18th century classical economist, Adam Smith, competition is the 'invisible hand' that leads to the efficient allocation of resources, which ultimately benefit both consumers and producers.⁵



1.2. The Role of Competition Law

However, the competition process may carry within itself the 'seeds for its own destruction' as it creates the environment and opportunity for cartels and monopolies.⁶ If businesses within a market are left in isolation, the market may fail to produce the expected results.⁷ Competition law, therefore,

¹ Clark, J.M. *Competition as a Dynamic Process* (1961) 9; See also Van Heerden, H.J.O. & Neethling, J. *Unlawful Competition* (1994) 3-4.

² Stigler, G. *The Theory of Price* [3rd ed.] (1966) 88.

³ *Taylor & Horne (Pty) Ltd v Dental (Pty) Ltd* 1991 1 SA 412 (A) 421-422.

In *Lorimar Productions Inc & Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc & Others v OK Hyperama Ltd; Lorimar Productions Inc & Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1142G, Van Dikhorst, J. described competition in this manner, "in general terms competition involves the idea of a struggle between rivals endeavoring to obtain the same end. It may be said to exist whenever there is a potential diversion of trade from one to another. For competition to exist the articles or services of the competitors should be related to the same purpose or must satisfy the same need." A similar sentiment was expressed in *Payen Components SA Ltd v Bovis Gaskets CC* 1994 (2) SA 464 (W) 473, where Van Zyl, J. stated that "the nature of competition is that competitors have the same or similar goals, chief among which, at least in the field of trade and industry, is to attract the custom of the same clients of groups of clients."

⁴ Broder, D.F. *A Guide to U.S. Antitrust Law* (2005) 29; Clark, J.M. "Toward a concept of workable competition" (1940) 30, *The American Economic Review* 243; Organisation for Economic Co-operation and Development. *Glossary of industrial organisation economics and competition law* (1993) 22. Available online at <http://www.oecd.org/daf/competition/sectors/2376087.pdf> [Accessed on 10 March 2013].

⁵ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book IV, Chapter IV, para 456.

See also, Article 1 of the Competition Regulations of 2004 of the Common Market for Eastern and Southern Africa (COMESA), which describes 'competition' as "the striving or potential striving of two or more persons or organisations, engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another, which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers."

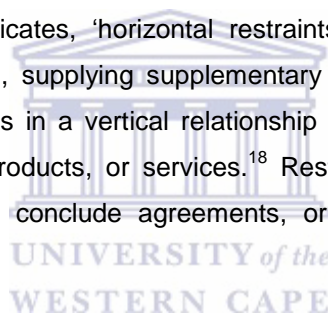
⁶ Van Heerden, H.J.O. & Neethling, J. *Unlawful Competition* (1994) 12.

⁷ Dawar, K. & Mathis, J. "Consumer protection, competition and RTAs: Some lessons for developing countries". In P. Brusick, Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 213.

becomes relevant at this point.⁸ This section of the law safeguards the competition process.⁹ It protects the public from failures within markets and ensures that competition among businesses is fostered, not stifled,¹⁰ so that enterprise development is enhanced.¹¹ The purpose of competition law is not to limit, or stifle, competition, instead, its aim is to promote and strengthen competition, by ensuring that restrictive practices, such as cartels and monopolies, are eliminated.¹² Competition law, therefore, serves as a necessary tool in the face of deregulation, privatisation and trade liberalisation.¹³

Competition law is primarily concerned with three categories of business practices: horizontal and vertical restraints; abuse of dominance; and merger regulation.¹⁴ In South Africa, Chapter 2 of the Competition Act of 1998, as amended in 2009, refers to the horizontal and vertical restraints, as well as abuse of dominance, as 'prohibited practices'.¹⁵ In the Common Market for Eastern and Southern Africa (COMESA), the COMESA Competition Regulations of 2004 also employ the terms 'restrictive businesses practices' and 'prohibited practices', when referring to these practices.¹⁶

Under the first category, there is a distinction between restrictive horizontal practices and restrictive vertical practices. As the term indicates, 'horizontal restraints' involve businesses that are in a horizontal relationship (competitors), supplying supplementary products, or services.¹⁷ Conversely, vertical restraints involve businesses in a vertical relationship (at different levels in the distribution chain), supplying complementary products, or services.¹⁸ Restrictive horizontal practices transpire among competing businesses that conclude agreements, or engage in concerted practices, to



⁸ 'Competition law' must be distinguished from 'competition policy'. Competition policy refers to the overarching framework that covers measures undertaken by a government aimed at encouraging competitive business practices and market structures. This framework includes, but is not limited to trade policy, deregulation, privatisation, and competition law itself. For its part, competition law encapsulates the statutory provisions that are directed at ensuring and sustaining free and fair competition. See Neuhoff, M. *et al. A Practical Guide to the South African Competition Act* (2006) 11; Taylor, M. *International Competition Law: A New Dimension for the WTO?* (2006) 28-30; World Trade Organisation. *Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council* (1998) para 20-22.

⁹ Fox, E.M. "We protect competition, you protect competitors" (2003) 26 *World Competition* 149-165.

¹⁰ *Spectrum Sports Inc. v McQuillan*, 506 U.S. 447, 448 (1993); Dabbah, M. *Measuring the success of a system of competition law: A preliminary view* (2000) 21 *European Competition Law Review* 369-371; United Kingdom Department for International Development. *Competition policy and developing countries* (2001); Hughes, E.J. "The left side of antitrust: What fairness means and why it matters" (1994) 77 *Marquette Law Review* 265.

¹¹ Lipimile, G.K. *Competition policy as stimulus for enterprise development*. In *Competition, Competitiveness and Development: Lessons from Developing Countries* (2004) 171-204; Hartzenberg, T. "Competition policy and enterprise development: Experience from South Africa". In *Competition, Competitiveness and Development: Lessons from Developing Countries* (2004) 207-225; Brusick, P., Cernat, L. & Alvarez, A.M. "Competition, competitiveness and development: Restating the case". In *Competition, Competitiveness and Development: Lessons from Developing Countries* (2004) 323-331.

¹² Van Heerden, H.J.O. & Neethling, J. *Unlawful Competition* (1994) 12.

¹³ Motta, E.P. & Correa, H.C.S. "Competition policy in Mexico". In Lewis D [ed.]. *Building New Competition Regimes* (2013) 1-25.

¹⁴ See Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.2.

¹⁵ Section 4 - Section 9 of the Competition Act 89 of 1998.

¹⁶ Article 16 and Article 19 of the COMESA Competition Regulations of 2004.

¹⁷ Sutherland P & Kemp K *Competition Law of South Africa* (2014) 5.3.

¹⁸ Sutherland P & Kemp K *Competition Law of South Africa* (2014) para 5.3.

prevent, or lessen, competition in a market.¹⁹ There is a distinction between horizontal restraints deemed *per se* illegal, and those evaluated according to the rule of reason. With the former, the horizontal restraints are deemed illegal by the mere fact that they exist.²⁰ There is no inquiry into their anti-competitive effect. The latter principle involves evaluating the anti-competitive effects of the horizontal agreement against any technological, efficiency or other pro-competitive gains that may result.²¹

Similarly, businesses in a vertical relationship (different levels in the distribution chain) may participate in vertical restrictive practices that substantially lessen competition without any pro-competitive gains.²² Vertical restraints receive a much more lenient treatment, as there seems to be an understanding that, in the majority of cases, vertical restraints are pro-competitive and, therefore, should not be subject to the *per se* illegal principle. However, in South Africa, the practice of minimum resale price maintenance, a vertical restraint, is *per se* illegal.²³ This has been the subject of much debate, and the point has been made that minimum resale price maintenance should be regarded as *per se* illegal.²⁴

Regarding the abuse of dominance, a business with a significant market presence (measured according to its market share) abuses its position by unilaterally engaging in exclusionary, or exploitative, anti-competitive conduct. This conduct may include excessive pricing (to the detriment of consumers), refusing to give competitors access to an essential facility (when it is economically feasible to do so), predatory pricing and inducing a supplier (or customer) not to deal with a competitor.²⁵ Mergers and acquisitions, however, are not prohibited by competition law, instead it 'regulates' them by ensuring that they fulfil certain procedural requirements, before they are implemented, depending on their thresholds.²⁶

In certain cases where a practice is prohibited, the possibility of being exempted from the application of competition law is available. South Africa's Competition Act of 1998 makes provisions for exemption procedures.²⁷ The COMESA Competition Regulations of 2004 provide for the 'authorisation' of those practices that, although anti-competitive, have public benefits that outweigh

¹⁹ Section 4(1)(a), section 1(1)(xiii), section 1(1)(c) (xxx) of the Competition Act No. 89 of 1998; *JD Group Ltd v Ellerine Holdings Ltd* [2000] ZACT 35 para 4.2.

²⁰ See sections 3.3.1 and 3.3.2 in Chapter 3.

²¹ See sections 3.3.1 and 3.3.2 in Chapter 3.

²² RSA Competition Act No. 89 of 1998. Section 5, section 1(1)(c)(ii), section 1(1)(c) (xxxi) of the; *Business Electronics Corp. v Sharp Electronics Corp.*, 1988, 485 U.S. 717, 730.

²³ Section 5, section 1(1)(c)(ii), section 1(1)(c) (xxxi) of the Competition Act No. 89 of 1998; *Business Electronics Corp. v Sharp Electronics Corp.* 485 U.S. 717, 730 (1988).

²⁴ See section 3.3.1 in Chapter 3.

²⁵ Section 6- section 9 of the Competition Act 89 of 1998.

²⁶ Section 11 - section 18 of the Competition Act 89 of 1998.
Updated merger thresholds are available online at <http://www.compcom.co.za/merger-thresholds/> [Accessed 11 May 2015].

²⁷ Section 10 of the Competition Act 89 of 1998.

their detrimental effect.²⁸ The East African Competition Act of 2006 exempts joint research and development; specialisation of production and distribution; and standardisation of products and services from the application of competition law.²⁹ In addition, there are certain categories of business practices that are excluded from, and not subject to, competition laws. These include collective labour bargaining, collective agreements, and concerted conduct directed at the realisation of non-commercial socio-economic objectives.³⁰

1.3. The Origins of Modern Competition Law

Competition law has its roots in ancient times.³¹ In 1754 B.C., the Babylonian Code of Hammurabi contained rules that were directed at curtailing monopolies.³² In modern competition law, Canada was the first country to enact a competition law statute, the Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, in 1889.³³ In 1890, the United States enacted its now well-known antitrust statute, the Sherman Act.³⁴ It was aimed at 'protecting the 19th century economic and political liberalism', which was obvious from Senator Sherman's comments that the statute would be 'a bill of rights, a charter of liberty' to safeguard 'the industrial liberty of the citizens' of the United States.³⁵ The statute, therefore, was enacted for the purpose of dealing with restrictive business

²⁸ Article 16(4), and Article 20 of the COMESA Competition Regulations of 2004; Desta, M. "Exemptions from competition provisions in RTAs: A study based on the experience in the agriculture and energy sectors". In P. Brusick, Alvarez, A.M. & Cernat, L. [eds]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 439-460.

²⁹ Section 6 of the East African Community Competition Act of 2006.

For perspectives from other African jurisdictions see, section 32- section 34 of Botswana Competition Act of 2009; section 25- section 30 of Kenya Competition of 2010; Article 21 of Mozambique Competition Law of 2013; section 27- section 32 of Namibia Competition Act of 2003; section 28- section 31 of Seychelles Fair Competition Act of 2009; section 10 of South Africa Competition Act No. 89 of 1998; section 12 of Tanzania Fair Competition Act of 2003; section 18- section 23 of Zambia Competition and Consumer Protection Act of 2010.

³⁰ Section 3(1)(a)- (b), (e) of South Competition Act No. 89 of 1998; section 14 of Tanzania Fair Competition Act of 2003; Article 4 (1)(a) of the COMESA Competition Regulations of 2004; section 4(2)(b) of the East African Community Competition Act of 2006.

³¹ Van Heerden, H.J.O. & Neethling, J. *Unlawful Competition* (1994) 5-12.

³² Shepherd, W.G. & Shepherd, J.M. *The Economics of Industrial Organisation* [5th ed.]. (2007) 19.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.5-2.10, give an account of the history of competition law. They discuss the *Lex Julia de Annona*, enacted during the Roman Republic around 50 B.C., which criminalised any artificial increase in the price of food items, by imposing substantial fines. However, these fines did not seem to have the desired effect, as monopolies continued unabated. In A.D. 301, Diocletian issued an interdict, which set maximum prices of commodities for the entire Roman Empire. After Diocletian was ousted, the Edict of Zeno, by Emperor Zeno, was enacted in A.D. 483. The edict prohibited monopolisation and imposed heavy fines, such as forfeiture of assets, as well as the prospect of being exiled.

³³ (Can.), c. 41.

³⁴ Sherman Act of 1890 15 U.S.C.

There are numerous accounts of the history of America's federal antitrust policy, some more detailed and sophisticated than others. Authors, who have given accounts of the United States' antitrust history, include: Kitner, E. *The Legislative History of the Antitrust Laws* (1978); Thorelli, H.B. *The Federal Antitrust Policy: Origination of an American Tradition* (1955); Rudolf, J.R. *Competition Policy in America, 1888-1892: History, Rhetoric, Law* (1996); Letwin, W. *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1981); Hovenkamp, H. *Enterprise and American Law: 1836-1937* (1991); Freyer, T. *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (1992); Waller, S.W. "The antitrust legacy of Thurman Arnold" (2004) 78 *St. John's Law Review* 569-613; Papadopoulos, A.S. *The International Dimension of EU Competition Law and Policy* (2010) 9-10; and Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2010) 2.4.

³⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.4, citing 21 Congressional Record 2457 (1890), wherein Senator Sherman argued that "if we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity" .

practices by conglomerates, who agreed to fix prices, restrict output, and share markets through 'trusts' in various sectors of the domestic economy.³⁶ The creation of these 'trusts' meant that with a single organisation controlling an entire industry, competition was eliminated, small businesses were pushed out of the market, consumers had no choice from whom to buy, and prices increased. The substantial wealth accumulated by these 'trusts' (which spurred further consolidations) sparked a hue and cry from citizens, especially small businesses.³⁷ The public aversion to these 'trusts' resulted in the field becoming known as the 'antitrust law'. In South Africa and other parts of the world, this area of law is referred to as 'competition law'.³⁸

1.4. Modern Competition Law in the Global South

At the beginning of the 1990s, a surge in the adoption of competition law statutes became apparent. Surveys conducted by the United Nations Conference on Trade and Development (UNCTAD) revealed that 113 countries and trade blocs (from Albania to Zimbabwe) had enacted competition laws, and countries with existing competition laws, reinforced their systems.³⁹ Within 10 years (from 1998-2008), a substantial progress in competition law proliferation was evident. During this decade, 61 countries enacted new competition laws, where previously they had none,⁴⁰ and 63 countries amended/revised their existing competition laws.⁴¹

In the developing world, the drive to adopt competition laws was influenced by additional factors.⁴² For example, South Africa adopted its current competition law statute as part of establishing a new political and democratic order. Prior to this, there had been successive legislation aimed at addressing competition law issues in the various industries.⁴³ During this period, the South African

In his minority judgment in *United States v Trans-Missouri Freight Association* 166 US 290 (1897) 355-356, White, J. confirmed that "[t]he remedy intended to be accomplished by the act of congress was to shield against the danger of contract of combination by a few against the interest of the many and to the detriment of freedom."

³⁶ *Standard Oil Co. v United States*, 221 U.S. 1 (1911); *United States v Addyston Pipe & Steel Co.*, 85 F. 271 6th Cir. (1889); *United States v Trans-Missouri Freight Association* 166 U.S. 290 (1897).

³⁷ *United States v Aluminium Co. of America*, 148 F.2d 416, 28 (2d Cir. 1945); Collins, W.D. "Trusts and the origins of antitrust legislation" (2013) 81. *Fordham Law Review* 2279-2348; Fox, E.M. & Sullivan, L.A. "Antitrust- retrospective and prospective: Where are we coming from? Where are we going?" (1987) 62. *The New York Law Review* 944; Broder, D.F. *A Guide to US Antitrust Law* (2005) 31-38.

³⁸ Throughout this thesis, the terms 'competition law', 'antitrust', and 'antitrust law' are used interchangeably.

³⁹ United Nations Conference on Trade and Development. *Handbook on Competition Systems: Consolidated Report 2001-2012* (2012); Holmes, P. & Cernat, L. "Competition, competitiveness and development: Lessons from developing countries" *United Nations Conference on Trade and Development* (2004) 1-17.

⁴⁰ Jenny, F. "The globalisation of competition enforcement". *Institute of International and European Affairs 14 April 2011* available online at <http://www.iiea.com/events/the-globalisation-of-competition-enforcement> [Accessed 11 February 2012].

⁴¹ Jenny, F. "The globalisation of competition enforcement". *Institute of International and European Affairs 14 April 2011* available online at <http://www.iiea.com/events/the-globalisation-of-competition-enforcement> [Accessed 11 February 2012].

⁴² Kovacic, W.E. "Institutional foundations for economic legal reform in transition economies: The case of competition policy and antitrust enforcement" (2001) 77 *Chicago-Kent Law Review* 265-268.

⁴³ South Africa's competition law history was characterised by piecemeal regulation, where numerous statutes were enacted to address issues, such as, restraints of trade and monopolisation in the different industries. These statutes include, the Cape Meat Trade Act 15 of 1907, the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911, the Profiteering Act 27 of 1920, the Board of Trade and Industries Act 33 of 1924 (repealed by Act 19 of 1944), the Customs Tariff and Excise Duties Act 36 of 1925, the Unlawful Determination of Prices Act 24 of 1931, the Board of Trade and Industries Act 19 of 1944, the Undue Restraint of Trade Act 59 of 1958 (which repealed the Unlawful Determination of Prices

economy was characterised by monopolies and highly concentrated industries because of subsidised state-owned enterprises (SOEs), a consequence of the country's isolation from world markets.⁴⁴ An example that reflects the extent of the high levels of concentrations is, in 1994, five mining conglomerates constituted 84 per cent of the capitalisation of the stock exchange, with one holding 43 per cent.⁴⁵ Some of the effects of that period still exist today.⁴⁶ The Regulation of Monopolistic Conditions Act of 1955 sought to consolidate issues of competition law, specifically monopolies. In principle, although the Act was committed to promoting competition, it failed to condemn monopolies entirely.⁴⁷ As a result, the Mouton Commission was appointed in 1975, to enquire into the problems bedevilling the country's enforcement framework of competition law. In 1977, the Mouton Commission submitted its report.⁴⁸ In the report, several problems were identified. The 1955 Act only applied to existing monopolistic conditions and not to future, or proposed, monopolies;⁴⁹ the exercise of certain intellectual property rights and the activities of agricultural co-operatives were excluded from the application of the Act;⁵⁰ the institutions established by the Act lacked independence;⁵¹ and the rules governing merger regulation were ineffective.⁵² In light of these findings, the Mouton Commission made several recommendations. The establishment of an independent institutional framework⁵³ and the adoption of detailed rules on mergers are two examples.⁵⁴

The Mouton Commission's Report and Recommendations culminated in the enactment of the Maintenance and Promotion of Competition Act of 1979. This Act saw the creation of the Competition Board, an administrative body charged with investigating competition law issues specified in the statute.⁵⁵ However, it soon became clear that the Competition Board had several weaknesses. For example, its recommendations were not binding, some of its investigations were conducted informally (merger clearances were granted privately), and its lack of impartiality (due to the composition of its

Act of 1931), and the Regulation of Monopolistic Conditions Act 24 of 1955; the first comprehensive statute that attempted to address the issue of monopolies. The statute would be in operation for more than two decades.

⁴⁴ Cowen, D. "Survey of the law relating to the control of monopolies in South Africa" (1954). *South African Journal of Economics* 132; Du Plessis, P.G. "Concentrations of economic power in the South African manufacturing industry" (1978) 45. *South African Journal of Economics* 172-182; and Spandau, A. "Towards a new South African competition policy" (1977) 45. *South African Journal of Economics* 183-188.

⁴⁵ Organisation for Economic Co-operation and Development. *Competition law and policy in South Africa - Peer Review* (2003) 10.

⁴⁶ Okeahalam, C.C. *Structure and conduct in the commercial banking sector of South Africa* 4-19. Available online at <http://www.tips.org.za/files/499.pdf> [Accessed 10 November 2014].

⁴⁷ Beachman, A. "Competition policy in Britain and South Africa" (1974) 42. *South African Journal of Economics* 122, quoted in Doig, L. *A Critique of Expected Competition Policy in the New South Africa* (unpublished MComm thesis, Rand Afrikaans University, 1994) 20-21.

⁴⁸ Mouton, D. *et al. 'Report of the Commission of Enquiry into the Regulation of Monopolistic Conditions Act, 1955'* (1977).

⁴⁹ Para 114.

⁵⁰ Para 115.

⁵¹ Para 121-123.

⁵² Para 137-138

⁵³ Para 206, 217, 218, 222.

⁵⁴ Para 211-212.

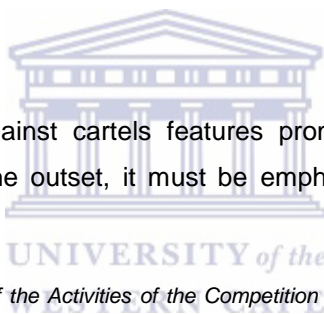
⁵⁵ Section 3 - Section 9 of the Maintenance and Promotion of Competition Act of 1979.

members).⁵⁶ Nonetheless, to its credit, the Competition Board did publish reports of its investigations.⁵⁷ The early 1990s marked the beginning of an era, which culminated in the repeal of the 1979 Act, and the enactment of the current statute, the Competition Act of 1998. This era was marked by a realisation of the dangers of concentrated industries, the continued isolation of the country from international markets and perhaps, most importantly, the African National Congress's (ANC) desire to move away from nationalising domestic industries and allowing the formerly disenfranchised black population to participate in the economy.⁵⁸

Other countries were prompted by international development policies that required market structural reforms and monetary control.⁵⁹ For instance, Indonesia was compelled to enact its competition law statute as a pre-condition for receiving funding from the International Monetary Fund (IMF).⁶⁰ Senegal's competition law reform was due to the World Bank's conditions for the granting of loans.⁶¹ Vietnam and China enacted their competition laws as part of World Trade Organisation (WTO) accession commitments.⁶² For others, the adoption of competition law statutes was done as part of the process of joining Regional Economic Communities (RECs).⁶³ For example, Hungary's competition law reforms were undertaken in anticipation of joining the European Union (EU).⁶⁴

1.5. Competition Law and Cartels

In free markets, the prohibition against cartels features prominently.⁶⁵ A cartel is a species of restrictive horizontal practices. At the outset, it must be emphasised that there are circumstances



⁵⁶ Legh, R.A. *Critical Review and Analysis of the Activities of the Competition Board* (unpublished MBA thesis, University of Witwatersrand, 1994) 40-41.

⁵⁷ For example, "Report 15- Collusion on Prices and Conditions, Market Sharing & Tender Processes"; "Report 16- Acquisition by Argus Printing and Publishing Co Ltd of the Newspaper Interests of Robinson and Company (Pty) Ltd"; and "Report 50- Investigation into Alleged Restrictive Practices by Ster Kinekor Films (Pty) Ltd".

⁵⁸ Legh, R.A. *Critical Review and Analysis of the Activities of the Competition Board* (unpublished MBA thesis, University of Witwatersrand, 1994) 16-17; African National Congress. *The Reconstruction and Development Programme* (1994) 76- 77; Legh, R.A. "A history of South African Competition law". In Brassey, M. et al. [eds.]. *Competition Law* (2002) 58-88; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 3.2.

⁵⁹ McMahon, K. "Developing countries and international competition policy" in Fernandez, J. & Tan, C. [eds.]. *International Law, Economic Globalisation and Development* (2010) 253.

⁶⁰ Sichimba, F. "Senegal" in Mehta, P.S. & Evenett, S.J. [eds.]. *Competition Regimes in the World – A Civil Society Report* (2006) 273.

⁶¹ Sichimba, F. "Senegal" in Mehta, P.S. & Evenett, S.J. [eds.]. *Competition Regimes in the World – A Civil Society Report* (2006) 273.

⁶² Heimler, A. & Jenny, F. "Regional trade agreements". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 185; Sokol, D. "Order without (enforceable) law: Why countries enter into non-enforceable competition policy chapters in free trade agreements" (2008) 83. *Chicago- Kent Law Review* 231- 292.

⁶³ Heimler, A. & Jenny, F. "Regional trade agreements" in Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 199-201; Sengupta, R. & Dube, C. "Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment" Organisation for Economic Co-operation and Development Global Forum on International Investment (2008) 4; McMahon, K. "Developing countries and international competition policy". In Fernandez, J. & Tan, C. [eds.]. *International Law, Economic Globalisation and Development* (2010) 253; Kazorowska, A. "The objectives of the competition policy of the CARICOM Single Market and economy and their importance to the development of a coherent and comprehensive body a substantive competition rules" (2012) 8 *Competition Law Review* 185-207.

⁶⁴ Kovacs, C. & Reindl, A.P. "The evolution of the Hungarian competition regime: Two decades of dynamic change and continuity" in Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 39-56.

⁶⁵ Lipsky, A.B. "Deterring cartel behaviour: Harmonies and disharmonies, problems and solutions" (1992). *Antitrust Law Journal* 563.

when co-operation/ collaboration among competitors, referred to as joint ventures in some jurisdictions, may be beneficial, if it enhances the competition process by creating new and improved products, expands research and development, or improves distribution methods.⁶⁶ It is understood that such horizontal practices are beneficial, and that participating businesses should not be penalised for engaging in these practices, or activities. However, collaborations among competitors have a 'double-edged sword' effect as, while they allow for firms to collaborate and share technology that ultimately enhances competition, without entering into permanent structures, such as mergers, they also provide fertile ground to engage in collusive practices.⁶⁷ Therefore, the challenge for competition authorities (CAs) is to examine joint ventures, judiciously. Section 4(1)(a) of the Competition Act 89 of 1998, which applies to all horizontal concertation, other than cartels, stipulates that, if the horizontal practice, such as a collaboration among competing firms, substantially prevents or lessens competition in a market, a participant firm is allowed to demonstrate that it offers some technological, efficiency, or other pro-competitive gain, which outweighs its anti-competitive effect.

However, unlike the above competitive collaborations, which have the advantage of enhancing efficiency, cartels are assumed to bring no such benefit. With cartels, the collusion among the companies is solely directed towards maximising profits through price fixing, bid rigging, and a division of markets. Cartels are also directly antithetical to free markets because, through collusion, companies are no longer able to act independently, as competition is eliminated.⁶⁸ Cartels and free markets 'are strange bedfellows and cannot co-exist, while a free market engenders competition, a cartel endangers competition'.⁶⁹

Effective cartel deterrence demands the acknowledgment that cartels amount to serious covert economic crimes. Cartels have been likened to 'highway robbery', deserving nothing but 'unequivocal public condemnation'.⁷⁰ Cartels illegally obtain money from their victims, similar to theft.⁷¹ Perhaps, cartels are even more pernicious, as they not only operate covertly, but also, in circumstances where they are exposed because of investigations by CAs, buyers and consumers do not receive compensation, unless they individually institute claims for civil damages. In addition, the after-effects of cartels may endure for a long time, even after the cartel has been exposed.⁷² The attitude towards cartels is also reflected in how they are legally classified. In the United States and South Africa,

⁶⁶ Moodaliyar, K. & Weeks, K. "Characterising price fixing: A journey through the looking glass with ANSAC" (2008) 11. *South African Journal of Economic & Management Sciences* 338-339.

⁶⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.8.

⁶⁸ Dick, A.R. "If cartels were legal, when would firms fix prices?". In Grossman, P.Z. & Efroymson, C. [eds.]. *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (2004) 144; Organisation for Economic Co-operation and Development. *Glossary of industrial organisation economics and competition law* (1993) 18; para 5.1 of South Africa Corporate Leniency Policy of 2008; section 2(c) of India Competition Act of 2002.

⁶⁹ *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp, L.J. 152 MRTPC para 24.2.

⁷⁰ Klein, J.I. *The war against international cartels: Lessons from the battlefield* Fordham Corporate Law Institute, 26th Annual Conference on Antitrust Law and Policy (1999) 2.

⁷¹ European Commission Press Release IP/98/1060 03 December 1998. *Commission strengthens the fight against cartels*. Available online at http://europa.eu/rapid/press-release_IP-98-1060_en.htm [Accessed 11 November 2013].

⁷² See Section 3.9 in Chapter 3.

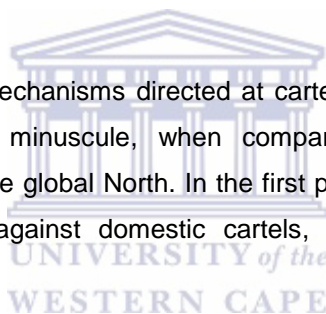
cartels are deemed *per se* illegal by their mere existence.⁷³ The effect of the *per se* illegal rule is that cartels are deemed as inherently and obviously anti-competitive, devoid of any competitive benefits, which connotes that pro-competitive gains cannot be raised as justification for the existence of a cartel.⁷⁴

1.6. Context of and Background to the Research Project

The 21st century, described as a 'cartel laced world',⁷⁵ has seen a widespread consensus that cartels are harmful.⁷⁶ This is an acknowledgment that cartels do not provide legitimate, economic or social benefits to justify their continued existence.⁷⁷ Therefore, the eradication of cartels has dominated the efforts of economists, competition lawyers and CAs, more than any other competition law issue.⁷⁸

To emphasise the serious implications of cartels, South Africa's Competition Act of 1998 requires the imposition of administrative fines on companies that engage in cartel conduct for the first time. This differs from most other prohibited practices, where administrative fines may only be imposed if the conduct is essentially a repeat of previous conduct.⁷⁹ In addition, cartel conduct is also regarded as a criminal offence.⁸⁰

In the global South, enforcement mechanisms directed at cartels are commendable; however, they are still woefully insufficient and minuscule, when compared to the assiduous enforcement mechanisms directed at cartels in the global North. In the first place, countries in the South continue to grapple with enforcing action against domestic cartels, because of their weak institutional



⁷³ See 3.3.1 - 3.3.2 in Chapter 3.

See also, Roberts, S., Klaaren, J. & Moodaliyar, K. "Introduction to special section on competition law and economics" (2008) 11 *South African Journal of Economics and Management Sciences* 248.

⁷⁴ See 3.3.1, and 3.5 in Chapter 3.

⁷⁵ Fear, J. *Cartels and competition: Neither markets nor hierarchies*. Harvard Business School (2006) 2.

⁷⁶ See 3.7 - 3.10 in Chapter 3.

⁷⁷ Organisation for Economic Co-operation and Development. "Issues for trade and competition in the global context" (2004) 5. *Journal of Competition Law and Policy* 15.

⁷⁸ Whish, R. *Competition Law* [5th ed.] (2005) 454, points out that, "[a] particularly noticeable feature of competition policy in recent years...has been that competition authorities generally are taking a much keener interest in the eradication of hard-core cartels. There have been and continue to be fierce debates about many issues in competition policy: for example the appropriate treatment of vertical agreements, abusive pricing by dominant firms, refusals to supply ...However if competition policy is about one thing, it is surely about the condemnation of horizontal price fixing, market sharing and analogous practices."

Baker, J.B. "New horizons in cartel detection" (2001) 69 *George Washington Law Review* 824-828; Allan & Overy, *Global trends in antitrust: Global reflections and forecasts* [Accessed 15 March 2014]. Available online at http://www.allenoverly.com/SiteCollectionDocuments/Global_Antitrust_Trends_in_2013.PDF; United States Leniency Policy available online at www.justice.gov/atr/public/criminal/leniency.html [Accessed 10 January 2014]; Hammond, S.D. *Detecting cartel activity through an effective leniency programme*. United States Department of Justice (2004) 1-2; Kroes, N. "Tackling cartels – A never ending task" *European Commission* SPEECH/09/454, 8 October 2009, Brussels; European Commission *Cartel Statistics* (2014); Anderson, B. & Cuff, R. "Handbook of competition enforcement agencies 2014". *Global Competition Review* (2014) available online at <http://globalcompetitionreview.com/handbook> [Accessed 10 November 2014].

⁷⁹ See 5.6.1 in Chapter 5.

⁸⁰ See 5.7 in Chapter 5.

capacities.⁸¹ These weaknesses are even more pronounced when dealing with international cartels. CAs in the global South are, consequently, faced with jurisdictional hurdles, as well as political pressures, which prevent them from meaningfully investigating cartels.⁸²

The impact of cartels is severe; as cartelised goods become unnecessarily expensive, product choices are reduced, and innovation is eliminated because cartel members are no longer spurred on to innovate, since the cartel shields them from rigorous competition.⁸³ A 1990s study, conducted by the Organisation for Economic Co-operation and Development (OECD), revealed that countries in the global South imported products, affected by international cartels, to the tune of US\$81.1 billion.⁸⁴ These products constituted 6.7 per cent of the imports and 1.2 per cent of the Gross Domestic Product (GDP) of developing countries.⁸⁵ To put this into perspective, this amount was more than the foreign aid that was granted to the developing world in 1997 (US\$39.4 billion).⁸⁶ The status quo in individual countries in the global South reveals similar trends. For example, in South Africa, a precast concrete products cartel perpetrated overcharges of more than 50 per cent.⁸⁷ A price fixing and market allocation, wheat flour cartel perpetrated overcharges of more than 40 per cent with the price of wheat flour.⁸⁸ Because cartels have been exposed in staple products, such as bread and milk,⁸⁹ the subject of cartels has lent itself a human rights perspective. The opinion is that cartels are not only a violation of the Competition Act, but also qualify as a violation of the Bill of Rights, enshrined in the Constitution of 1996. According to South Africa's Human Rights Commission, when cartels occur in

⁸¹ Kunene, T. "Challenges faced by new younger competition agencies in the investigation of cartels". *International Competition Network* (2006). Available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc704.pdf> [Accessed 17 May 2014].

⁸² Levenstein, M. & Suslow, V. "Contemporary international cartels and developing countries: Economic effects and implementation of competition policy" (2004). *Antitrust Law Journal* 803.

⁸³ Chowdury, J. *Private international cartels - An overview*. Consumer Unity Trust Society International Briefing Paper (2006) 2; Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implementation of competition policy" (2004.) *Antitrust Law Journal* 819; Bernheim, B.D. & Whinston, M.D. "Multimarket contact and collusive behaviour" (1990) 21. *RAND Journal of Economics* 2; Organisation for Economic Co-operation and Development. *Issues for trade and competition in the global context* (2004) 15.

⁸⁴ Organisation for Economic Co-operation Development. *Preventing market abuses and promoting economic efficiency, growth and opportunity* (2004) 16, 53-54.

⁸⁵ Organisation for Economic Co-operation Development. *Preventing market abuses and promoting economic efficiency, growth and opportunity* (2004) 16, 53-54.

⁸⁶ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implementation of competition policy" (2004). *Antitrust Law Journal* 814-816.

⁸⁷ Khumalo, J., Mashiane, J. & Roberts, S. "Harm and overcharge in the South African precast concrete products cartel" (2014). *Journal of Competition Law & Economics* 14-16.

In *Competition Commission v Southern Pipeline Contractors (Pty) Ltd & Another* 23/CR/Feb09; *Southern Pipeline Contractors (Pty) Ltd & Another v Competition Commission* [2011] ZACAC 6 the Competition Tribunal and the Competition Appeal Court dealt with this cartel, respectively.

An 'overcharge' is the 'but for' price, a comparison between the price of a cartelised commodity and the price of the same commodity *sans* cartelisation, that is, the monopoly rents gained by cartels.

⁸⁸ Mncube, L. "The South African wheat flour cartel: Overcharges at the mill" (2014) 14. *Journal of Industry, Competition & Trade* 505.

The wheat flour cartel was the subject of investigation in *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9; *Competition Commission v FoodCorp (Pty) Ltd, In re: Competition Commission v Pioneer Foods (Pty) Ltd & Others* [2012] ZACT 103

⁸⁹ *Competition Commission v Foodcorp (Pty) Ltd* 50/CR/May08; *Competition Commission v Clover Industries Limited & Others* [2008] ZACT 46; *Competition Commission v Lancewood Cheese (Pty) Ltd* Case No: 103/CR/Dec06

basic commodities, and are analysed within their social context, cartel participants are akin to 'thieves at the dinner table' of the poor and most vulnerable members of society.⁹⁰

In competition law literature, cartels are also referred to as 'hard-core' cartels or 'naked restraints'. These terms are used to indicate the grievous harm that they cause and to distinguish them from other restrictive horizontal practices.⁹¹ In short, cartel practices are not in the public interest.⁹² Competition Authorities across the global South have awakened to the prevalence and egregious impact of cartels on their economies and consumers.⁹³

1.7. Competition Law and International Trade

Globalisation has resulted in the interdependence of national economies,⁹⁴ which has caused the discussion of competition law and cartels, at international level, to gain traction.⁹⁵ These discussions are based on the presupposition that the liberalisation of trade and competition law are complementary, that they are 'two sides of the same coin'.⁹⁶ Members of the World Trade Organisation (WTO) initially attempted to negotiate the issues surrounding the interaction between international trade and competition law.⁹⁷ Unfortunately, due to the lack of consensus, these negotiations were taken off the WTO's agenda.⁹⁸ However, one thing had been clarified; cartels



⁹⁰ Lewis, D. *Thieves at the Dinner Table: Enforcing the Competition Act* (2012) 207.

⁹¹ Organisation for Economic Co-operation and Development. *Hard core cartels* (2000) 11; Organisation for Economic Co-operation and Development. *Recommendation of the Council concerning effective action against hard core cartels* (1998); Fox, E.M. "Harmonization of law and procedures in a globalized world: Why, what and how" (1991) 60. *Antitrust Law Journal* 593- 594.

⁹² *Union Of India & Others v Hindustan Development Corporation* 1994 AIR 988, 1993 SCR (3) 128 para 2.1

⁹³ Vilakazi, T. *Cartel settlements, leniency and penalties in African jurisdictions* Centre for Competition Regulation and Economic Development (2015) 1-5 available online at <http://www.competition.org.za/review/2015/5/25/cartel-settlements-leniency-and-penalties-in-african-jurisdictions> [Accessed 28 May 2015].

⁹⁴ Stiglitz, J.E. *Globalization and its Discontents* (2002) 9; Friedman, T. *The Lexus and the Olive Tree: Understanding Globalization* (2000) 9; Organisation for Economic Co-operation and Development. *Globalisation: What opportunities and challenges for governments* (1996) 3-4; Organisation for Economic Co-operation and Development. *The policy challenge of globalisation and regionalisation* (1996).

⁹⁵ Article 46 (1) of the Havana Charter; Fox, E.M. "The WTO's first antitrust case- Mexican Telecoms: A sleeping victory for trade and competition" (2006) 9 *Journal of International Economic Law* 275; Fox, E.M. "International antitrust and the Doha Dome" (2003) 43. *Virginia Journal of International Law* 911-932; Fox, E.M. "Antitrust and regulatory federalism: Races up, down, and sideways" (2000) 75. *New York Law Review* 1781- 1807; Fox, E.M. "Competition law and the agenda for the WTO: Forging links of competition and trade" (1995) 4. *Pacific Rim Law and Policy Journal* 1- 36; Mavroidis, P.C. & van Sicken, S.J. "The application of the GATT/ WTO dispute resolution system to competition issues" (1997) 31. *Journal of World Trade* 5-48; Marsden, P. "A WTO rule of reason?" (1998) 19. *European Competition Law Review* 530-538; Singh, A. *Competition and competition policy in emerging markets: International and developmental dimensions*. United Nations Conference on Trade and Development G-24 Discussion Paper Series No. 18 (2002) 8; Fox, E.M. "Global markets, national law, and the regulation of business: A view from the top" (2001) 75. *St. John's Law Review* 383-400; Fox, E.M. "Competition law and the millennium round" (1999). *Journal of International Economic Law* 665-678; Fox, E.M. "Toward world antitrust and market access" (1997) 91. *American Journal of International Law* 1-24.

⁹⁶ Hoekman, B.M. *Competition policy and the global trading system: A developing country perspective*. World Bank Policy Research Working Paper (1997) 1-5; Smith, M.B. *The challenge of international regulatory competition: Trade and competition policy*. American Society of International Law Proceedings (1995) 4.

⁹⁷ Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN (96) DEC. [Accessed 03 May 2012]. Available online at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

⁹⁸ WT/L/579 Decision adopted by the General Council on August 1 2004. [Accessed 07 May 2012]. Available at online http://www.wto.org/english/tratop_e/comp_e/comp_e.htm; Lewis, D. *Thieves at the Dinner Table: Enforcing the Competition Act* (2012) 250.

posed a significant threat to the multilateral trading system.⁹⁹ The WTO noted that cartels were the 'most pernicious' anti-competitive practice, as they negatively impacted on consumer welfare, affected the development prospects of poor countries, and, most importantly, gravitated towards countries that lacked legislative and other mechanisms to deal with them.¹⁰⁰

Several factors were identified as contributing to the proliferation of cartels, namely, the absence of co-ordinated competition law frameworks, statutory exemptions regarding certain anti-competitive conduct, weak enforcement mechanisms, and government policies that encouraged cartels.¹⁰¹ As a solution to the problems and effects presented by cartels, a number of measures were identified, namely, enacting and actively implementing domestic competition laws, backed by effective penalties; establishing adequately empowered CAs with the necessary investigatory powers; and encouraging co-operation among individual CAs.¹⁰²

Notwithstanding, at international level, efforts to address the effects of anti-competitive conduct that transcend territorial borders, are continuing.¹⁰³ Currently, the emphasis is on 'soft law' with the principal thrust being the sharing of common practices and creating best practice models among CAs across the globe.¹⁰⁴ Such organisations include the International Competition Network (ICN), which was formed because of the International Competition Policy Advisory Committee (ICPAC), convened by the United States. ICN is a 'virtual' global forum for antitrust, its recommendations are voluntary, and its mission is to facilitate international co-operation in the enforcement of competition law.¹⁰⁵ The Organisation for Economic Co-operation and Development (OECD) serves as a consultative organisation to provide technical assistance in the training of judicial officers and CAs for countries looking to enact competition law statutes.¹⁰⁶ Under the auspices of the United Nations Conference on Trade and Development (UNCTAD), the Set of multilaterally agreed principles and rules for the control of Restrictive Business Practices of 1980 (the Set, or the UNCTAD Code) was adopted. Although not binding, it is currently the only international agreement dealing with competition law,

⁹⁹ *Provisions on hardcore cartels*' World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002.

¹⁰⁰ *Provisions on hardcore cartels*' World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002 para 7, 8 and 9.

¹⁰¹ *Provisions on hardcore cartels*' World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002 para 13.

¹⁰² *Provisions on hardcore cartels*' World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002 para 16.

¹⁰³ See Section 8.6 in Chapter 8.

¹⁰⁴ Fox, E., Fingleton, J. & Mitchell, S. "The past and future of international antitrust gaps, overlaps and the institutional challenge" (2013). In Lewis, D. (ed). *Building New Competition Regimes* (2013) 163-182; Sokol, D.D. "International antitrust institutions" (2011). In Guzman, A.T. (ed). *Co-operation, Comity, and Competition Policy* (2011) 194-202; Parmentier, J. *The Interface between the WTO and Competition Law: One size does not fit all* (unpublished LLM thesis, University of Cape Town (2013), 19-29 & 65-69.

¹⁰⁵ Information available at <http://www.internationalcompetitionnetwork.org> [Accessed 24 November 2013]; Hollman, H.M., Kovacic, W.E. & Robertson, A.S. "Building global antitrust standards: The ICN's practicable approach". In Ezrachi, A. [ed.]. *Research Handbook on International Competition Law* (2012) 101-7; Hollman, H.M. & Kovacic, W.E. "The International Competition Network: Its past, current and future role" (2011) 20. *Minnesota Journal of International Law* 274.

¹⁰⁶ Best practice Roundtables on Competition Policy' Organisation for Economic Co-operation and Development available online at <http://www.oecd.org/competition/roundtables.htm> [Accessed 21 January 2014].

which also provides technical assistance to countries in the developing world,¹⁰⁷ through its Intergovernmental Group of Experts on Competition Law and Policy.¹⁰⁸

1.8. Competition Law and Enforcement Collaborations in Regional Economic Communities in the Global South

There is an increasingly distinct trend among developing countries to include competition law provisions in their Regional Trade Agreements (RTAs). In addition, there seems to be an escalation in the inclusion of enforcement collaborations, regarding the implementation of regional competition law. Animating this trend is the realisation that, although competition law is national, business transactions are becoming increasingly international.¹⁰⁹ Additionally, countries in the South are usually more prone to suffer harm from restrictive business practices, such as cartels.¹¹⁰

Regional economic communities (RECs) in the South, therefore, have become a viable platform on which cross-border anti-competitive practices can be handled.¹¹¹ For example, the Common Market for Eastern and Southern Africa (COMESA) Competition Regulations of 2004 govern restrictive practices (such as cartels) and have established a Competition Commission, as well as a Board of Commissioners for the Common Market, to facilitate enforcement collaborations of regional competition rules.¹¹² Members of the Southern African Development Community (SADC) are obliged to implement measures that prohibit unfair business practices and promote competition in the Community.¹¹³ SADC members also have a co-operation mechanism in the enforcement of the competition laws of the individual States, in terms of the Declaration on Regional Co-operation on Competition and Consumer Policies of 2009.¹¹⁴ Members of the Southern African Customs Union (SACU) are also enjoined by the SACU Agreement of 2002, to enact domestic competition laws and to collaborate in the enforcement thereof.¹¹⁵ In the East African Community (EAC), cartels are governed by the EAC Competition Act of 2006 and enforced by the EAC Competition Authority.¹¹⁶

However, when examining the competition law provisions in these RTAs, it seems that, although 'they are eager to ink', they are not ready to implement their commitments.¹¹⁷ It is submitted that, if these

¹⁰⁷ United Nations General Assembly "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (1980).

¹⁰⁸ Information available online at <http://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx> [Accessed 12 May 2014].

¹⁰⁹ See Chapter 8.

¹¹⁰ Heimler, A. & Jenny, F. "Regional trade agreements". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 183.

¹¹¹ See Chapter 8.

¹¹² See 3.7 in Chapter 3, 4.6 of Chapter 4 and 8.8 in Chapter 8.

¹¹³ See 3.7 in Chapter 3 and 4.6.3 of Chapter 4.

¹¹⁴ See 8.8.3 in Chapter 8.

¹¹⁵ Article 40 of the SACU Agreement of 2002.

¹¹⁶ See 8.8.2 in Chapter 8.

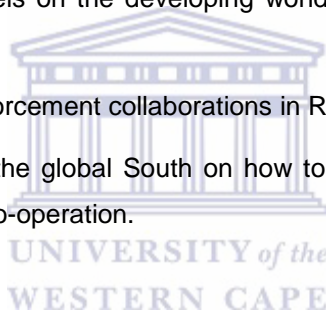
¹¹⁷ Cernat, L. "Eager to ink, but ready to act? RTA proliferation and international co-operation on competition policy." In Brusnick, P., Alvarez, A.M. & Cernat, L. [ed.]. *Competition Provisions in Regional Trade Agreements: How to Assure*

competition law provisions, specifically those dealing with cartels, are properly drafted and implemented, they will be beneficial to the global South, because RTAs provide a viable platform for enforcement collaborations.¹¹⁸ In the EAC, the absence of a functioning regional competition authority (RCA) has meant that, even though the same anti-competitive practices affect consumers in Member States, the investigation of these practices has been confined to national boundaries by individual NCAs.¹¹⁹

1.9. The Objectives of the Research Project

The broad aim of this research project is to investigate the effectiveness of South-South co-operation within RECs, as a vehicle of enforcement against cartels. The specific objectives of the research are to:

- Examine the economic theories and objectives underpinning competition law in RECs.
- Examine substantive rules regarding cartels and the enforcement thereof by NCAs and RCAs.
- Examine the impact of cartels on the developing world, with specific reference to domestic and international cartels.
- Investigate the extent of enforcement collaborations in RECs concerning cross-border cartels.
- Make recommendations to the global South on how to deal with cartels, within the existing framework of South-South co-operation.



1.10. Problem Statement

Due to globalisation, the developing world continues to be impacted not only by domestic cartels, but by international cartels, as well. In response to this, these countries have enacted and amended their competition laws, both at domestic and regional levels; however, they have not been able to deal with cartels effectively.

1.11. Research Question

From the viewpoint of the developing world, the following question, 'Does the solution to the problems posed by cartels lie in South-South co-operation?' becomes relevant, in light of the continued proliferation of voluntary international and regional institutions that deal with competition law. Should the existence of these organisations be taken as an indication that South-South mechanisms remain a sustainable option?

Development Gains (2005) 1-36; Sokol, D. "Order without (enforceable) law: Why countries enter into non-enforceable competition policy chapters in free trade agreements" (2008) 83. *Chicago- Kent Law Review* 231-292.

¹¹⁸ See Chapter 8.

¹¹⁹ Olingo, A. "East African consumers victims of monopolies and cartels." *The East African* 09 February 2015. Available online at <http://www.theeastafrican.co.ke/business/EA-consumers-victims-of-monopolies-and-cartels/-/2560/2616250/-/be98nf/-/index.html> [Accessed 13 March 2015].

1.12. Choice of Jurisdictions

In order to achieve a meaningful analysis and understanding of competition law, this thesis examines specific jurisdictions, from both the global South and the global North. This implies that the competition law statutes, as well as court decisions on the interpretation and application of competition laws, form a substantial part of this study. To offer perspectives from the developed world, this current thesis utilises antitrust jurisprudence from the United States, as it is at the forefront of the enforcement of competition law, and was among the first countries to enact competition legislation, when it adopted the Sherman Act in 1890.¹²⁰ Regarding competition law and its enforcement, some have referred to the United States as the 'mother of all competition law systems',¹²¹ the 'god-head of competition law',¹²² and the 'progenitor of antitrust law'.¹²³ The United States has more than a century's experience of enforcing competition law. In addition, judicial precedents from the United States are routinely referred to, and relied upon, by developing countries, when deciding competition law cases.¹²⁴

The EU is chosen primarily for the wealth of experience, intellectual insights and knowledge that can be gained from analysing its competition law. More specifically, the EU offers regional perspectives that are particularly useful for this current research, which explores competition law enforcement at the regional level in the South. In addition, jurisdictions applying EU competition law rules constitute the largest group in the world.¹²⁵ Additionally, EU competition law has influenced the drafting of substantive provisions in domestic competition laws and RTAs in the global South.¹²⁶

Foreign law is especially helpful to countries in the global South, still developing their domestic competition law frameworks, and steadily coming to grips with this area of law. Besides, in essence, their competition laws are based on statutes from the global North.¹²⁷ However, a word of caution is necessary when resorting to foreign laws and precedents. While these can certainly be helpful, they should only serve as guidelines, at best.¹²⁸ Therefore, the provisions of the domestic law must not be substituted with wholesale adherence to foreign law.¹²⁹

¹²⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.10.

¹²¹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 2.10.

¹²² Lewis, D. *Thieves at the Dinner Table: Enforcing the Competition Act* (2012) 244.

¹²³ Gerber, D.J. "Competition law" (2002) 50. *The American Journal of Comparative Law* 267.

¹²⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.2.

¹²⁵ Foster, S.E. "While America slept: The harmonisation of competition law based upon the European Union model" (2001) 15 *Emory International Law Review* 467-519.

¹²⁶ See 3.5, 3.7 in Chapter 3.

¹²⁷ See 3.5, 3.7 in Chapter 3.

¹²⁸ Section 1(3) of South Africa Competition Act of 1998.

¹²⁹ *Standard Bank Investment Corporation Ltd v Competition Commission & Others, Liberty Life Association of Africa Ltd v Competition Commission & Others* 2000 (2) SA 797 (SCA) para 30 warned that 'the ransacking of the legal libraries of the world may ... lead to no more than more paper, more costs, more delays, and even more confusion, without any commensurate benefit. There is also sometimes a positive danger in resorting to foreign law - that it should only be half understood, because the person going to it does not sufficiently understand the foreign system'; in *Competition Commission*

For the offering of perspectives from the developing world, this current thesis utilises the domestic competition laws of South Africa, India, and Brazil. As this is a South African thesis, the basis in all issues will be South African competition law. Additionally, India and Brazil were selected, as their enforcement of competition law has been effective, predominantly.¹³⁰ For its part, South Africa has been quite active in the enforcement of its domestic competition law, as revealed in this thesis. Therefore, the laws of India and Brazil provide for a comparative analysis. However, the choice of these jurisdictions does not preclude a discussion of other jurisdictions as, and when, it may become necessary to emphasise certain issues, or simply to highlight specific points.

For a discussion on South-South co-operation in the enforcement of competition law, within the framework of RECs, this current thesis focuses on COMESA, EAC, SACU and SADC. The choice is motivated by the fact that there is overlapping of membership in these RECs, for example, Swaziland belongs to three of the RECs,¹³¹ while three of the RECs, namely, COMESA, EAC and SADC, are currently negotiating a Tripartite Free Trade Area (TFTA).¹³² The fact that SACU is not part of the TFTA is immaterial, as all SACU Members are also Members of SADC, which naturally means that they also form part of the TFTA, by default. Therefore, in essence, all members of the four RECs are also members of the proposed TFTA.¹³³ Additionally, this current thesis encompasses the domestic competition laws, and the NCAs of countries belonging to the four RECs will be considered. Their inclusion is based on the understanding that a proper discussion and analysis of South-South regional co-operation is best served by first understanding the individual domestic frameworks.

1.13. Significance and Motivation of the Research Project

In this study, the terms 'developing world', 'developing countries' and the 'global South' are used interchangeably to refer to both developing countries and least-developed countries (LDCs), in the strict sense. According to the World Bank, developing countries are those countries with a Gross National Income (GNI) of US\$11.905 and below, per capita, per year.¹³⁴ In addition, the United Nations recognises another category, namely LDCs, which are characterised by low-income levels,

and South African Airways (Pty) Ltd [2005] ZACT 50 para 137, the Competition Tribunal, in pointing out that some competition law terms may have different meanings to those assigned in South Africa, rightly warned against excessive reliance on foreign law; Kahn-Freund O 'On uses and misuses of comparative law' (1974) 37 *Modern Law Review* 27, warns that 'any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection... its use requires a knowledge not only of the foreign law [itself], but also of its social, and above all its political, context... [otherwise] the use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.'

¹³⁰ Farina, E. "Brazilian Competition Policy System." In Hawk, B.E. [ed.]. *International Antitrust Law and Policy: Fordham Competition Law 2005* (2005) 1-10; India Competition Commission Orders. Available online at <http://www.cci.gov.in/orders-commission/98> [Accessed 19 December 2014].

¹³¹ See 8.4 - 8.5 in Chapter 8.

¹³² Draft Agreement Establishing the COMESA-EAC-SADC Tripartite Free Trade Area (as revised in December 2010). 12 June 2011 Communique: Second COMESA-EAC-SADC Tripartite Summit, the proposed TFTA's estimated GDP is US\$1.0 trillion, which makes up 60 per cent of Africa's GDP.

¹³³ See Chapter 8.

¹³⁴ The International Statistical Institute <http://www.isi-web.org/component/content/article/5-root/root/81-developing> (accessed on 10 February 2014).

due to structural inadequacies, which, in turn, inhibit sustainable development.¹³⁵ Three criteria are used to identify LDCs, namely, the GNI per capita, the human asset index (HAI), the economic vulnerability index (EVI) and population.¹³⁶ The focus on the developing world is motivated by the fact that much of the writing and research on the enforcement of competition law, especially on cartels, focuses on and emanates from developed countries. Therefore, this current study aims to alleviate the dearth of knowledge on the perspectives of the developing world, by contributing knowledge on the area of cartels. The focus is also on the global South because of the low levels of economic development, when compared to countries in the global North, institutional framework problems, and intricate government regulation, all of which have a considerable bearing on the enforcement of competition law and their economic development. The value of this current study is contained therein. It investigates all these issues in order to evaluate how RECs in the global South have fared in dealing with both domestic and international cartels.

1.14. The Research Procedure and Methodology

This current research project utilises the qualitative method of research. It consults primary and secondary sources on economics, competition policy, and competition law, in order to ensure a balanced analysis of the research questions. Principally, the research is deskbound and, therefore, draws extensively on existing literature on the subject matter. The literature includes domestic legislation, case law, books, journal articles, discussion papers, recommendations, internet websites, and press releases.

1.15. Preview of Chapters

This study is comprised of the following nine chapters. **Chapter 1** is the present chapter.

PART A: THE THEORETICAL FRAMEWORK FOR COMPETITION LAW

Chapter 2: Economic Doctrine and the Objectives of Competition Law

Firstly, a discussion of orthodox theories in economics is offered in this chapter. The aim is to provide a theoretical basis through which the principles of competition law in RTAs can be understood. Secondly, the objectives of competition law that RTAs have used, and must use, when enforcing their competition laws, are explored.

PART B: THE SUBSTANTIVE RULES GOVERNING CARTELS, THE INSTITUTIONAL, ENFORCEMENT AND REMEDIAL STRUCTURES

Chapter 3: The Substantive Rules Governing Cartels

¹³⁵ 'LDC Information: The criteria for identifying least developed countries' United Nations Development Policy and Analysis Division available online at http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml#criteria (accessed on 12 September 2013).

¹³⁶ 'LDC Information: The criteria for identifying least developed countries' United Nations Development Policy and Analysis Division available online at http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml#criteria (accessed on 12 September 2013).

This chapter comprises the substantive principles of competition law. The competition law statutory provisions and case law concerning cartels are examined. Domestic and regional laws, as well as decided cases are utilised.

Chapter 4: The Enforcement Institutional Framework

The domestic and regional institutions charged with the enforcement of competition law are investigated in this chapter.

Chapter 5: Public Enforcement and Cartels.

This chapter comprises the enforcement and remedial mechanisms employed by domestic and regional competition law authorities regarding cartel conduct.

PART C: THE INTERNATIONAL NATURE OF CARTEL CONDUCT

Chapter 6: Private International Cartels

This chapter comprises investigations into specific private international cartels (PICs). Their impact on the economies of, and consumers in the global South, are also explored.

Chapter 7: Export Cartels

Specific export cartels are examined in this chapter. The researcher considers how NCAs in the global South have dealt with export cartels operating in their territorial borders. In addition, the impact of export cartels in the developing world is also examined.

PART D: CARTELS IN SOUTH- SOUTH REGIONAL ECONOMIC COMMUNITIES

Chapter 8: Cross-border Cartel Activity and South-South Regional Co-operation

The chapter investigates Cross-border collaborations in cartel enforcement in COMESA, EAC, SACU, and SADC are investigated in this chapter.

PART E: CONCLUSIONS AND RECOMMENDATIONS

Chapter 9: Final Concluding Remarks and the Way Forward

In this chapter, the dual role of summarising the findings of the study, as well as suggesting the way forward, regarding South-South enforcement collaborations in the matter of cartel conduct, is discussed.

PART A:
THE THEORETICAL FRAMEWORK
FOR COMPETITION LAW



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CHAPTER TWO

ECONOMIC DOCTRINE AND THE OBJECTIVES OF COMPETITION LAW

"It [competition] appears in every social order, under which men have lived; in the conflicts of tribes for unhappy hunting grounds; of holy men, for the glory of saying the most prayers; of barons for castles on the Rhine; of merchant adventurers for the spoils of the East; and of capitalists, to bag the largest profits..."¹³⁷ "[Competition law] is aimed at preserving free and unfettered competition, as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."¹³⁸ "We want our businesses to be efficient, effective, lithe, inventive, and adaptable to change. We want an environment that will create incentives for businesses to strive the hardest they can in these directions. If businesses successfully do so, they will deliver to buyers and, ultimately, consumers, what they need, want, and are able to pay for, including the range of choice they desire; entrepreneurs are likely to have economic opportunity; ... likely to be competitive in the world; the economy is likely to be strong and grow; and the people in general are likely to be better off."¹³⁹

2.1. Overview

A proper understanding of modern competition law requires that the theoretical framework of the subject matter be examined, which is the objective of this chapter. It serves as an excursion, albeit brief, into the economic doctrine underpinning competition law. Economic doctrine and literature have always influenced the interpretation and application of competition law.¹⁴⁰ Certainly, the question of *whether* economics should be instrumental in competition law enforcement has long been settled; however, competition authorities (CAs), lawyers, and courts alike still have to decide *how* economics should be used; that is, in light of the numerous theories in the field of economics, deciding on which of these to use. To resolve this matter, and for purposes of creating an intellectual foundation, as well as a conceptual framework for analysing competition law, several schools of economic thought are considered in this chapter. In addition, how these have influenced, and continue to influence, the interpretation and application of competition law, are also explored. In this chapter, the researcher examines the Classical theory, the Neo-Classical theory, the Harvard School, the Chicago School, and the Post-Chicago thinking. The advantage of merging economics with the law is that it allows for the reformation of legal analysis, when investigating prohibited practices, such as cartels, because 'if the economic foundations of antitrust analysis are infirm, competition law topples'.¹⁴¹ The researcher also includes a discussion of the objectives of competition law in this chapter and answers the basic question, "What are the goals of competition law?"

¹³⁷ Hamilton, W.H. "Competition". In Seligman, E.R. [ed.]. *Encyclopaedia of the Social Sciences* (1937) 142.

¹³⁸ *Northern Pacific Railway Co. v. United States* 356, U.S. 1, 4 (1958).

¹³⁹ Fox, E.M. "Against goals" (2013) 81. *Fordham Law Review* 2159-2160

¹⁴⁰ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 58-60; Sun, S. "Schools of antitrust – a parallelogram of force" (2012) 78. *Antitrust Law Journal* 37-42; Sullivan, L.A. *Handbook of the Law of Antitrust* (1977) 1-2.

¹⁴¹ Posner, R.A. "The economic approach to law" (1975) 53. *Texas Law Review* 764; Evan, L. "The role of economics in modern competition policy". *International League of Competition Law Congress* (2008) 2-3; Muris, T.J. "Improving the economic foundations of competition policy" (2003) 12. *George Mason Law Review* 2-5; Brannon, L. & Ginsburg, D.H. "Antitrust decisions of the U.S. Supreme Court, 1967 to 2007" (2007). *Competition Policy International* 3-4.

2.2. The Classical Theory and Adam Smith's 'An Inquiry into the Nature and Causes of the Wealth of Nations'

The Classical theory has its genesis in the 1750s, at a time when Scottish economist and moral philosopher, Adam Smith, advocated, among other things, a free market economy in his work "An inquiry into the Nature and Causes of the Wealth of Nations" (hereinafter referred to as *The Wealth of Nations*), first published in 1776. Smith's exposition is the starting point, when examining the principles underlying competition law, because in it he "systematised earlier thinking on the subject, and more importantly, elevated competition to the level of a general organising principle of economic society".¹⁴²

In *The Wealth of Nations*, Smith advocates free markets. He recognises that trade benefits all market participants; that the market is an automatic, self-regulating, and self-correcting mechanism, which efficiently allocates resources, but, unfortunately, offers considerable opportunities for participants to collude, simultaneously.¹⁴³ Smith postulates the "invisible hand" theory and equates competition to a force, prompting economies to achieve the best possible outcomes with the available resources. According to Smith:

"Every individual... neither intends to promote the public interest, nor knows how much he is promoting it... he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention."¹⁴⁴

Smith, therefore, proposes a connection between the pursuit of self-interest and economic welfare, which implies that, in the process of pursuing their own interests, individuals would invariably promote the public interest, without setting out to do so.

2.2.1. The Classical theory and free markets

According to the Classical theory, the market is an inevitable system, where sellers, in their natural pursuit of profit, direct their resources to where the demand and the price are highest.¹⁴⁵ In so doing, they efficiently utilise their resources without the need for central direction. In these circumstances, the market is able to correct itself without the need for government intervention. In their efforts to gain patronage, competitors would underbid, or overbid, each other. If there were numerous competitors in a market, they would sell their products cheaper, due to greater

¹⁴² McNulty, P.J. "A note on the history of perfect competition" (1967). *Journal of Political Economy* 396.

Although Smith's treatise has generally been regarded as the formal commencement of classical economics, other economists also strongly argued in favour of free markets. These include: Ricardo, D. *On principles of Political Economy and Taxation* (1817); Malthus, T. *An Essay on the Principle of Population* (1789), *Principles of Political Economy* (1820), *The Measure of Value* (1823), and *The definition of Political Economy* (1827); Mill, J.S. *Elements of Political Economy* (1821); Senior, N.W. *An Outline of the Science of Political Economy* (1836).

¹⁴³ Butler, E. *The Condensed Wealth of Nations and the Incredibly Condensed Theory of Moral Sentiments Adam Smith* (2011) 4.

¹⁴⁴ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter II para 26.

¹⁴⁵ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter 7, para 1-8, 9-21; Butler, E. *The condensed Wealth of Nations and The incredibly Condensed Theory of Moral Sentiments* (2011) 19.

competition. The more competitors there are, the lesser the chances that they would collude to raise prices.¹⁴⁶ Smith described such a state as follows:

“The trades which employ but a small number of hands run most easily into such combinations [collusive behaviour]. If this capital is divided between two different grocers, their competition will tend to make both of them sell cheaper, than if in the hands of one only; and if it were divided among twenty, their competition would be just so much the greater, and the chances of their combining together in order to raise just so much the less.”¹⁴⁷

Economists of the Classical persuasion were of the opinion that healthy competition thrived where there was freedom to trade, in the absence of government intervention.¹⁴⁸ In simple terms, the basic tenet of the Classical theory was, trust the market. Classical economists believed that enterprises ‘would be driven by the winds of competition to follow efficient and competitive paths.’¹⁴⁹ This meant that, with freedom of trade:

“Markets work well; the forces of competition or potential competition are strong; businesses act in the interests of consumers; government intervention is generally clumsy, inefficient, and misinformed, and “free markets” will always cure a market problem faster and better than antitrust intervention.”¹⁵⁰

The prominence of individual freedom in classical economics influenced English¹⁵¹ and American judges to decide that restraint of trade agreements would only be recognised if there had ‘been sufficient consideration to make it a proper and a useful contract’.¹⁵² Because *laissez-faire* proponents saw competition as a self-regulating, long-term dynamic process, in which firms compete against each other to gain market dominance, they did not perceive the need for regulation. They attributed the achievement of market dominance to superior skill, technology and innovation. Attempts by a dominant firm to raise prices would attract other firms to take advantage of the profitable opportunities. A process of creative destruction, therefore, would ensue, leading to the erosion of a firm’s monopoly, rendering government intervention unnecessary, as competitive forces would correct the market.¹⁵³ Classical economists, therefore, were not against market dominance achieved through innovation and competitive processes. Instead, they were wary of, and even opposed to, state-sanctioned monopolies. In advocating for freedom of trade, Smith was particularly critical of monopolies granted by the government, as evidenced by the following excerpt:

¹⁴⁶ Stigler, G.J. “Perfect competition, historically contemplated” (1957) 65. *Journal of Political Economy* 1-2.

¹⁴⁷ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter II para 126.

¹⁴⁸ Van Cayseele, P. & Van den Bergh, R. “Antitrust law”. In Bouchaert, & De Geest, G. [eds.]. *Encyclopaedia of Law and Economics* (1999) 469; Stucke, M.E. “Behavioural economists at the gate: Antitrust in the twenty-first century” (2007) 38. *Loyola University Chicago Law Journal* 513-591.

¹⁴⁹ Fox, E.M. “Against goals” (2013) 81. *Fordham Law Review* 2158.

¹⁵⁰ Fox, E.M. “Against goals” (2013) 81. *Fordham Law Review* 2160..

¹⁵¹ Bloxam, G.A. “Letters patent for inventions: Their use and misuse’ (1957) 5. *Journal of Industrial Economics* 157-179; *Case of Monopolies- Darcy v Allein*(1602) 77 ER 1260; Section 1, 4, 6-9 of the Act Concerning Monopolies and Dispensations with Penal Laws and the Forfeiture thereof 1623, 21 Jac. 1, c. 3.

¹⁵² Hovenkamp, H. “The Sherman Act and the classical theory of competition” (1989) 74. *Iowa Law Review* 1027.

¹⁵³ McConnell, C.R., Brue, S.L. & Flynn, S.M. *Economics: Principles, Problems, and Policies* [18th ed.] (2009) 4-7, 197.

“There must be freedom of trade; the economic unit must be free to enter or leave any trade. The exclusive privileges or corporations which exclude men from trades, and the restrictions imposed on mobility by the settlement of provisions... are examples of such interferences with free competition.¹⁵⁴ A monopoly granted either to an individual or a trading company has the same effect as a secret in trade or manufacturers. The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate. The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion, indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will consent to give: the other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.”¹⁵⁵

Another prominent classical economist, John Stuart Mill, in his treatise, *On Liberty*, published in the last half of the 19th century, while strongly advocating for freedom of trade, pointed out that:

“[A]gain, trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society ... both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty. Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraints, qua restraints, [are] an evil.”¹⁵⁶

With reference to the above excerpt from Mill’s publication, it appears that classical economists were critical of businesses practices and agreements, which placed an unreasonable restraint on the individual liberty of tradespeople to carry out their livelihoods.¹⁵⁷ They distinguished between restraints of trade and agreements directed at regulating trade, with the former being the object of their opprobrium.¹⁵⁸

2.2.2. A caveat

While the Classical School favoured economic freedom, its adherents, nonetheless, admitted that, in certain sectors, the involvement of, and regulation by government was essential. Smith acknowledged that there were exceptions to the general rule of non-interference.¹⁵⁹ He also conceded that competition was, by no means, an unmitigated blessing. The Classical School generally preferred competition, not because it was dogma or a moral absolute, but because it concluded, based on observations and analysis, that it was for the general good of the public.

¹⁵⁴ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter II, para 146.

¹⁵⁵ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter 7, para 26-27.

¹⁵⁶ Mill, J.S. *On Liberty* (1859) Chapter V para 4.

¹⁵⁷ The English *Dyer’s* case (1414) 2 Hen. V, fol. 5, pl. 26; *Mitchel v Reynolds* P Wms 181, 24 E.R. 347 (Q.B. 1711); *United States v Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

¹⁵⁸ *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1967] 1 ALL ER 699 (HL) 727, 731H-732E.

¹⁵⁹ Butler, E. *The condensed Wealth of Nations and The incredibly Condensed Theory of Moral Sentiments* (2011) 59-67.

2.3. The Neo-Classical Theory

The Neo-Classical theory shifted from the business behavioural approach, as espoused by classical economists. It emphasised the market structure and defined the 'market' as, the place where commodities are exchanged.¹⁶⁰ It presented a paradigm shift, which involved mathematical analyses, to explain the competition process. The problem with the Classical theory (as identified by neo-classical economists) is that the market price is not always necessarily indicative of the 'value' of a product, since people are inclined, at times, to pay more for a product than it was 'worth'.¹⁶¹ The Neo-Classical theory was founded on the following three basic assumptions: individuals have rational choices among outcomes; individuals maximise utility, while firms maximise profits; and individuals act independently, based on full and relevant information.¹⁶² Consequently, Neo-Classical economists developed the 'price theory', in terms of which they argued that the market price of a product is a result of the interface between supply and demand.¹⁶³

2.3.1. The model of 'perfect competition'

The distinguishing mark of the Neo-Classical theory was its idea of 'perfect competition'. A perfectly competitive market is characterised by a large number of firms (each holding a relatively small share of the market), product homogeneity (identical or same product), perfect information among buyers about the product being sold, and the price that each firm charges. Firms are price takers, as they have no control over the market price of their product, and maintain freedom of entry and exit (absence of barriers to entry).¹⁶⁴ In a perfectly competitive market, there is effective allocation of resources (referred to as allocative efficiency). This is influenced by consumers' needs. Supply and demand determine the price and quantity of goods sold. Every firm will produce a product for as long as the cost of producing a single unit (marginal cost) is equal to the revenue that will be realised from the sale of an additional unit (marginal revenue)¹⁶⁵

In *The Theory of Political Economy*, Jevons emphasises 'community of knowledge', and proposes that perfect competition exists when traders have perfect knowledge of the conditions relating to price, output, as well as other pertinent information relating to market conditions.¹⁶⁶

¹⁶⁰ High, J. "Neo-classical period". In High, J. [ed.]. *Competition* (2001) 87, 122.

¹⁶¹ Weintraub, E.R. "Neoclassical Economics". *The Concise Encyclopaedia of Economics*. [Accessed 01 November 2011]. Available online at <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>.

¹⁶² Weintraub, E.R. "Neoclassical Economics". *The Concise Encyclopedia of Economics*. [Accessed 01 November 2011]. Available online at <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>.

¹⁶³ Kregel, J.A. "Neoclassical price theory, institutions, and the evolution of the securities market organisation" (1995). *Economic Journal* 459-470.

¹⁶⁴ Hovenkamp, H. "The Sherman Act and the classical theory of competition" (1989) 74. *Iowa Law Review* 1025; Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 39-42; Bain, J.S. *Industrial Organisation* (1968) 252; Stigler, G.J. *The Organisation of Industry* (1968) 67.

¹⁶⁵ Screpanti, E. and Zamagni, S. *An Outline of the History of Economic Thought* [2nd ed.] (2005) 183.

¹⁶⁶ Jevons, W.S. *The Theory of Political Economy* [5th ed.] (1957) 85-87.

In the publication, *Mathematical Psychics*, Edgeworth concurs with Smith's sentiments, by acknowledging that 'the first principle of economics is that every agent is actuated by self-interest'.¹⁶⁷ Edgeworth also provides a thorough and methodical description of perfect competition.¹⁶⁸ In contrast, Marshall, in *Principles of Economics*, is cautious about the neo-classical theory's model of perfect competition, particularly regarding the 'perfect knowledge' assumption.¹⁶⁹ Subsequently, in *Industry and Trade*, Marshall acknowledges that in real-world markets, perfect competition does not exist; instead, real-world markets are characterised by 'monopoly' elements, which are not necessarily bad, because their tenure are not indefinite. He highlights that:

"Though monopoly and free competition are ideally wide apart, yet in practice they shade into one another by imperceptible degrees... there is an element of monopoly in nearly all competitive business and nearly all the monopolies, that are of any practical importance in the present age, hold much of their power by an uncertain tenure, so that they would lose it ere long, if they ignored the possibilities of competition, direct and indirect ... Absolute monopolies are of little importance in modern business compared with those which are "conditional" or "provisional", that is, which hold their sway only on the "condition" that, or "provided" that, they do not put prices much above the levels necessary to cover their outlays with normal profits... many monopolies which seem absolute are yet to some extent liable to be assailed by indirect routes and are incomplete and subject to the "condition" that the monopolist makes no such extreme use of his power as will induce others to force way through obstacles and set up effective competition."¹⁷⁰

2.3.2. The shortcomings of the Neo-Classical theory

The distinguishing feature of the Neo-Classical theory was its concept of 'perfect competition'. This very distinction also became the basis of some of the criticisms levelled against it. The principal criticism was that perfect competition did not exist; that it was an ideal situation, which did not occur in the real world, implying that the elements of perfect competition were also fallible. Secondly, the assumption of perfect competition depending on a large number of small firms, each producing negligible quantities, was problematic, when considering the fact that, in the real world efficient markets are characterised by large firms, because of economies of scale; therefore, in the real world, markets are oligopolistic.¹⁷¹ Thirdly, in real-world markets, products are always differentiated from each other, not homogenised.¹⁷² Fourthly, barriers to entry are always present.¹⁷³ In the real world, market participants rarely have perfect information about price, output, or other such information about the market, because obtaining

¹⁶⁷ Edgeworth, F.Y. *Mathematical Psychics* (1871) 16.

¹⁶⁸ Edgeworth, F.Y. *Mathematical Psychics* (1871) 17.

¹⁶⁹ Marshall, A. *Principles of Economics* 8 ed (1920) 540.

¹⁷⁰ Marshall, A. *Industry and Trade* 4 ed (1923) 396-398.

¹⁷¹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 1-19 - 1-20; Whish, R. *Competition Law* 5 ed (2005) 99, 504-509, an oligopolistic market is one dominated by relatively few sellers, high barriers to entry, little product differentiation and price transparency, so that changes in prices among competitors is easily observable.

¹⁷² Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* 2 ed (1999) 36-37.

Product differentiation refers to the ways in which producers, or manufacturers seek to differentiate, or separate their products from those of their competitors.

¹⁷³ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* 2 ed (1999) 39-42.

this information may come at prohibitive costs, while the perfect competition model assumed that there are no costs attached to accessing information.¹⁷⁴ Finally, the market cannot operate wholly devoid of monopoly elements.¹⁷⁵ Therefore, according to the theory of 'second best', attempting to use the perfect competition paradigm to explain how real-world markets operate is not the solution; real-world markets can only fit the perfect competition model imperfectly.¹⁷⁶

2.4. The Harvard School

The tenets of the Neo-Classical theory, particularly its model of perfect competition, were met with criticism, such as being 'unrealistic and simplifying assumptions about human nature'.¹⁷⁷ The proponents of the Harvard School were similarly dissatisfied with the Neo-Classical theory's assumptions and were particularly concerned with the regulation of competition. Over time, the Harvard School exerted considerable influence on antitrust decisions in the United States.¹⁷⁸

One of its prominent proponents is Chamberlin, in his work *The Theory of Monopolistic Competition*. He challenges the 'homogenous product' premise of the Neo-Classical theory and argues that, in the real world, competition is seldom free of monopolistic tendencies.¹⁷⁹ As a solution to the issues arising out of the perfect competition model, Chamberlin developed the model of 'monopolistic competition'. Under monopolistic competition, product differentiation (through price, nature of product, and advertising) enables a supplier to charge a greater price for the product, than perfect competition allows.¹⁸⁰ In addition, product differentiation also serves to curb collusive practices, because, if products are different, it becomes that much more difficult for firms to reach consensus on prices and output.¹⁸¹ Robinson is another proponent of monopolistic competition. Like Chamberlin, she argues that the assumptions of the Neo Classical theory's perfect competition model did not exist in the real world.¹⁸²

According to Kaysen and Turner, the process of competition is essential because it serves as a control mechanism within a market, to curb the accumulation of unchecked private economic power.¹⁸³

¹⁷⁴ Stigler, G.J. "The economics of information" (1961) 69. *Journal of Political Economy* 213-214.

¹⁷⁵ Chamberlin, E. *The Theory of Monopolistic Competition* (1933) 5.

¹⁷⁶ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 38-39; Lipsey, R.G. & Lancaster, K. "The general theory of second best" (1956-1957) 24. *Review of Economic Studies* 11-32.

¹⁷⁷ Stucke, M.E. "Behavioural economists at the gate: Antitrust in the Twenty-First Century" (2007) 38. *Loyola University Chicago Law Journal* 513-514.

¹⁷⁸ Elhauge, E. "Harvard, not Chicago: Which antitrust school drives recent U.S. Supreme Court decisions?" (2007) 3. *Competition Policy International* 59-77.

¹⁷⁹ Chamberlin, E. *The Theory of Monopolistic Competition* (1933) 3.

¹⁸⁰ Chamberlin, E. *The Theory of Monopolistic Competition* (1933) 71-72.

¹⁸¹ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* 2 ed (1999) 36-37.

¹⁸² Robinson, J. *The Economics of Imperfect Competition* (1933).

¹⁸³ Kaysen, C. & Turner, D.F. *Antitrust Policy: An Economic and Legal Analysis* (1959) 4-5, 11-23.

Mason is credited with developing the 'structure-conduct-performance' (SCP) paradigm or test, with which he sought to draw a connection between market structure and its consequences.¹⁸⁴ Structure refers to the characteristics, or composition of a market; conduct refers to firms' actions in the market; and performance refers to the economic results in a market. The SCP test is based on the understanding that the performance of a market, is a direct result of the conduct of market participants (sellers and buyers), and, in turn, their conduct is determined by market structure.¹⁸⁵ It became the distinguishing feature of the Harvard School¹⁸⁶ and also the subject of its criticism. Mason suggests that 'effective competition' is a desirable form of competition, and that its effectiveness can be judged through its ability to act as a mechanism for controlling the power a single firm exercises, or in terms of the performance of firms in the relevant market.¹⁸⁷ Mason's effective competition is based on Clark's concept of 'workable competition', in which he (Clark) links the conduct and performance of firms in markets.¹⁸⁸

According to the SCP paradigm, one can predict certain types of business practices and their consequences based on the structure of the market. For instance, firms, in markets characterised by high concentration and high barriers to entry, will be more prone to engage in oligopolistic practices, which results in economic inefficiency, in the form of output restriction and monopolistic pricing.¹⁸⁹ The SCP paradigm offers a solution or explanation to this problem – regulate the structure of the market, instead of the conduct, because the former is the underlying cause of the latter.

The SCP paradigm, therefore, addresses what is perceived to be the underlying cause (market structure) and not the symptoms (anti-competitive conduct and its consequences), with the intention that, once the structure is corrected, everything else will fall into place. In its report, South Africa's Mouton Commission appears to have been influenced by the SCP paradigm, because it deems that the three criteria – structure, behaviour, and performance – are to be taken into account, when determining the impact of markets on the public interest.¹⁹⁰

¹⁸⁴ Mason, E. "The current status of the monopoly problem in the United States" (1949) 62. *Harvard Law Review* 1265-1285.

While it has been credited to Mason, the SCP paradigm can be traced to Cournot's *Researches in Mathematical Principles of the Theory of Wealth* (1838). In this work, Cournot expounded on the theory of oligopolistic pricing, in which firms would seek to coordinate their behaviour within a given market.

¹⁸⁵ Van Cayseele, P. & Van den Bergh, R. "Antitrust law". In Bouchaert, & De Geest, G. [eds]. *Encyclopaedia of Law and Economics* (1999) 473.

¹⁸⁶ Bain, J.S. "Economies of scale, concentration, and the condition of entry in twenty manufacturing industries" (1954) 44. *American Economic Review* 15- 39; Bain, J.S. "Relation of profit rate to industry concentration: American Manufacturing" (1951) 65 *Quarterly Journal of Economics* 293-324.

¹⁸⁷ Mason, E. "The current status of the monopoly problem in the United States" (1949) 62. *Harvard Law Review* 1266; Bain, J.S. "Workable competition in oligopoly: Theoretical considerations and some empirical evidence" (1950) 40. *The American Economic Review* 46.

¹⁸⁸ Clark, J.M. "Toward a concept of workable competition" (1940) 30. *The American Economic Review* 241-256.

¹⁸⁹ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 42.

¹⁹⁰ Mouton, D. *et al.* "Report of the Commission of Enquiry into the Regulation of Monopolistic Conditions Act, 1955" (1977) para 199.

2.4.1. The shortcomings of the Harvard School

The SCP paradigm is described as having a 'troubled life' because it is an extreme form of 'antitrust structuralism'.¹⁹¹ Most of the criticism against the Harvard School comes from economists of the Chicago School. They assert, firstly, that markets characterised by high concentration, are a result of economies of scale, and altering such market structures will only do more harm than good. Secondly, firms in highly concentrated markets are still competitive, if there were no barriers to entry, and, thirdly, the SCP paradigm wrongly classifies certain businesses as anti-competitive, when they are not.¹⁹² Sosnick disagrees with the SCP hypothesis on the basis that performance can not be judged by exploring structure and conduct only, as there are other market forces in operation, and the SCP hypothesis seems to be ignorant of the fact that monopolies affect all markets.¹⁹³

The SCP premise is also criticised for not being formally developed for useful application to existing markets,¹⁹⁴ and that the 'workable competition' concept is no different from the 'perfect competition' model postulated by the Neo-Classical theory.¹⁹⁵ It is also criticised for its 'vagueness', as the constituent parts of the market structure, such as the number of firms, their relative size, the possibility of a dominant firm, and mobility of resources, are not addressed.¹⁹⁶ Other critics argue that the workable competition concept does not specify 'how much competition is required to satisfy its pragmatic demands', alternatively stated, what levels of competition are sufficient to qualify as 'workable'?¹⁹⁷ Critics took issue with the basic premise of the workable competition concept, as well as what they perceived to be the workable competition's fixation with market performance.¹⁹⁸ Some critics even suggested an alternative to 'workable competition' – move away from emphasising market structure, and instead, utilise the market's overall performance to correct market failures.¹⁹⁹

2.5. The Chicago School

Posner, a prominent advocate of the Chicago School, highlights that the Chicago School did not launch as a 'full-blown philosophy of antitrust'; instead, it was due to economists analysing antitrust case law that, eventually and in hindsight, the Chicago School developed into a general theory in

¹⁹¹ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 42.

¹⁹² Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 42-46

¹⁹³ Sosnick, S.H. "A critique of concepts of workable competition" (1958) 72. *Quarterly Journal of Economics* 396, 399.

¹⁹⁴ Stocking, G.W. "On the concepts of workable competition as an antitrust guide" (1956-1957) 2. *Antitrust Bulletin* 10.

¹⁹⁵ Stigler, G.J. "Report on antitrust: Discussion" (1956) 46. *American Economic Review* 504-506.

¹⁹⁶ Stocking, G.W. "The rule of reason, workable competition and monopoly" (1955) 64. *Yale Law Journal* 1109-1110.

¹⁹⁷ Adams, W. "The rule of reason, workable competition or workable monopoly" (1954) 63. *Yale Law Journal* 364, 365

¹⁹⁸ Adams, W. "The rule of reason, workable competition or workable monopoly" (1954) 63. *Yale Law Journal* 366, 368-369

¹⁹⁹ Markham, J.W. "An alternative approach to the concept of workable competition" (1950) 40. *American Law Review* 360-361; Easterbrook F 'Workable antitrust policy' (1986) 84 *Michigan Law Review* 1696 – 1713.

competition law analysis.²⁰⁰ The Chicago School, which emerged because of perceived flaws in the prevailing thinking in economic analyses,²⁰¹ rose to prominence, informing legal thinking in economics, and continuing to influence competition law decisions of the United States' Supreme Court.²⁰²

The Chicagoans are against the notion that "big business is bad".²⁰³ Contrary to popular belief, they assert that highly concentrated industries, although presenting many opportunities for collusion, are not "unmitigated evil".²⁰⁴ The premise of their argument is that the "goal of antitrust is to perfect the operation of competitive markets", to promote both productive and allocative efficiency and that, since business interactions require some level of co-operation, courts must not penalise all such co-operation. Instead, they must seek to find a balance between competition and collaboration.²⁰⁵ For the Chicagoans, the fact that firms are profit maximisers must be taken into account when judging the antitrust significance of a firm's conduct.²⁰⁶

Although there are disagreements even among the Chicagoans themselves,²⁰⁷ the basic premise that binds them together is; they believe that the markets have the ability to correct themselves sans government intervention. According to Hovenkamp, the Chicago's antitrust policy is "pro-market and largely anti-government intervention".²⁰⁸ Like the Classical School, the Chicagoans have faith in the ability of the market to correct itself, and for them, "the best antitrust policy was one of doing as little as possible", except in cases of naked restraints.²⁰⁹ Its supporters argue that certain anti-competitive practices, such as monopolies, are self-destructive, because monopoly rents, in the long term, attract new entrants into the market.²¹⁰ In fact, regarding monopolies, Easterbrook contends that monopoly

²⁰⁰ Posner, R.A. "The Chicago School of antitrust analysis" (1979) 127. *University of Pennsylvania Law Review* 926; Director, A. & Levi, E.H. "Law and the future: Trade regulation" (1956) 51. *Northwestern University Law Review* 282-283; Page, W.H. "The Chicago School and the evolution of antitrust: Characterization, antitrust injury, and evidentiary sufficiency"(1989) 75. *Virginia Law Review* 1221- 1231; Kaplow, L. "Extension of monopoly power through leverage" (1985) 85. *Columbia Law Review* 515- 519; McGee, J.S. "Predatory price cutting: The Standard Oil (N.J.) case" (1958) 1. *Journal of Law and Economics* 137-169.

²⁰¹ Goldschmid, H.J., Mann, H.M. & Weston, J.F. *Industrial Concentration: The New Learning* (1974).

²⁰² Brannon, L. & Ginsburg, D.H. "Antitrust decisions of the U.S. Supreme Court, 1967 to 2007" (2007). *Competition Policy International* 14-15; Stucke, M.E. "Behavioural economists at the gate: Antitrust in the Twenty-First Century" (2007). *Loyola University Chicago Law Journal* 536-579.

²⁰³ Kobayashi, B.H. & Muris, T.J. "Chicago, Post-Chicago, and beyond: Time to let go of the 20th century" (2012) 78. *Antitrust Law Journal* 147-148.

²⁰⁴ Hovenkamp, H. "Chicago and its alternatives: After Chicago" (1986) *Duke Law Journal* 1021.

²⁰⁵ Easterbrook, F. "The limits of antitrust" (1984) 63 *Texas Law Review* 1, 4.

²⁰⁶ Posner, R.A. *Antitrust Law* (2001) [2nd ed.] ix.

²⁰⁷ For example, compare Bork, R. *The Antitrust Paradox: A Policy at War With Itself* (1993) 221-222 and Posner, R.A. *Antitrust Law: An Economic Perspective* (1978) 112.

²⁰⁸ Hovenkamp, H. "Post-Chicago antitrust: A review and critique" (2001). *Columbia Business Law Review* 266.

²⁰⁹ Hovenkamp, H. "Post-Chicago antitrust: A review and critique" (2001). *Columbia Business Law Review* 267.

²¹⁰ Easterbrook, F. "The limits of antitrust" (1984) 63. *Texas Law Review* 5.

Easterbrook does concede that the 'long run' might be a long time coming and that during this time, society will bear the cost of monopoly rents.

rents might actually not even be enjoyed by the monopolists, but by someone else, for example, government coffers through tax, and ordinary pension contributors through their investment stock.²¹¹

Because economists of the Chicago School view efficiency as the principal goal of national policy and law, they criticise the courts' penchant for the *per se* illegal principle and the government's jaundiced viewpoint on mergers.²¹² Their criticism is based on the understanding that, if a restrictive practice results in efficiency gains, then it should not be declared illegal. For the Chicagoans, co-operation among firms is sometimes beneficial and even necessary for firms to survive.²¹³ Therefore, such co-operation need not be penalised.

Although the Chicago School make use of the Neo-Classical School's 'price theory',²¹⁴ it also utilises the economics of information,²¹⁵ the theory of the firm,²¹⁶ the theory of public goods,²¹⁷ the economics of price discrimination,²¹⁸ the theory of natural monopoly,²¹⁹ as well as the game theory.²²⁰ It is the School's use of empirical economics, which distinguishes it.²²¹ For this, Hovenkamp describes the Chicago School as "the most coherent, elegant ideology that antitrust has ever experienced", which gives antitrust analyses 'a purity of vision that few legal disciplines ever attain.'²²² The influence of the Chicago School has been experienced in the global South too. For example, the Competition Commission and the Competition Tribunal of South Africa rely on the tenets of the Chicago School.²²³

2.5.1. The shortcomings of the Chicago School

The Chicago School is accused of "over-selling" itself and "overshooting the mark", as it ignores the possibility that firms in highly concentrated markets are more prone to engage in restrictive practices.²²⁴ It is also criticised for its assumption that markets are static, as opposed to

²¹¹ Easterbrook, F. "Workable antitrust policy" (1986) 84. *Michigan Law Review* 1704.

²¹² Easterbrook, F. "The limits of antitrust" (1984). *Texas Law Review* 18; Director, A. & Levi, E.H. "Law and the future: Trade regulation" (1956) 51. *Northwestern University Law Review* 283-296; Posner, R.A. "The rule of reason and the economic approach: Reflections on the Sylvania decision" (1977) 45. *University of Chicago Law Review* 1-20; Bork, R.H. "The rule of reason and the *per se* concept: Price-fixing and market divisions" (1966) 75. *Yale Law Journal* 775-847.

²¹³ Easterbrook, F. "Workable antitrust policy" (1986) 84. *Michigan Law Review* 1700-1702.

²¹⁴ Posner, R.A. "The Chicago School of Antitrust Analysis" (1979) 127. *University of Pennsylvania Law Review* 928, in which Posner highlights that the Chicago antitrust analyses were not motivated by "antipathy to government intervention, but resulted simply from viewing antitrust policy through the lens of price theory".

²¹⁵ Stigler, G.J. "The economics of information" (1961) 69. *Journal of Political Economy* 213.

²¹⁶ Coase, R.H. "The Nature of the Firm" (1937) 4. *Economica* 386-405.

²¹⁷ Telser, L.G. "Why should manufacturers want fair trade?" (1960) 3. *Journal of Law and Economics* 86-105.

²¹⁸ Stigler, G.J. "A note on block booking". In Stigler, G.J. *The Organisation of Industry* (1968) 165-167.

²¹⁹ Demsetz, H. "Why regulate utilities?" (1968). *Journal of Law and Economics* 55-65.

²²⁰ Stigler, G.J. "A theory of oligopoly" (1964) 72. *Journal of Political Economy* 44-61.

²²¹ Muris, T.J. "Economics and antitrust" (1997) 5. *George Mason Law Review* 303-305.

²²² Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001). *Columbia Business Law Review* 258, 269.

²²³ For example, *Trident Steel (Pty) Ltd & Dorbyl Limited* 2001] ZACT 2 para 41- 92; *Mondi Ltd & Kohler Cores and Tubes* [2002] ZACT 40.

²²⁴ Pitofsky, R. *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis in U.S. Antitrust* (2008) 52-54; Piraino, T.A. "Reconciling the Harvard and Chicago Schools: A new antitrust approach for the 21st century"

dynamic.²²⁵ The Chicago School's insistence on efficiency being the principal goal of competition law is also criticised on the basis that it ignores other objectives,²²⁶ for example, consumer welfare,²²⁷ and the promotion of innovation.²²⁸

2.6. Economic Theory after Chicago

The Chicago School is lauded for doing away with the perception that 'big business is bad', and the indiscriminate application of the *per se* illegal principle, and limiting it to specific situations, for example, in cases of naked restraints. One of the lasting features of the Chicago School is its identification of the importance of efficiency and consumer welfare in competition analyses.²²⁹ However, Chicagoans oversimplify market conditions by failing to consider that markets are actually more complex and varied than acclaimed.²³⁰ Sutherland and Kemp assert that, while economists of the Chicago School made strides in developing competition law analyses, they tended to superficially address the actual characteristics of markets, in order to prove their arguments.²³¹

After Chicago, economists have attempted to refine and sharpen the economic analyses of the Chicagoans.²³² For example, there have been concerted attempts to analyse concepts used by Chicagoans, such as dynamic efficiency and innovation.²³³ Explicit attempts have been made to draw the link between competition and innovation.²³⁴ However, economic theory post-Chicago should not be seen as 'a throwback of an earlier era', but as an attempt by economists seeking to address those situations that the Chicagoans had not anticipated, or foreseen, or even admitted,²³⁵ for example, the fact that markets were complex and more varied than the Chicagoans envisaged.²³⁶

Subsequently, there has been a refinement of the economics of competition law, post-Chicago.²³⁷ Economists do not profess faith in the ability of the markets to correct themselves, and as such, they

(2007) 82. *Indiana Law Journal* 346-347; Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001). *Columbia Business Law Review* 258.

²²⁵ Hovenkamp, H. "Antitrust after Chicago" (1985) 84, *Michigan Law Review* 256-260.

²²⁶ Hovenkamp, H. "Antitrust policy and the social cost of monopoly" (1993) 78. *Iowa Law Review* 371-386; Hovenkamp, H. "Antitrust after Chicago" (1985) 84. *Michigan Law Review* 244-249.

²²⁷ Fox, E.M. "Consumer beware Chicago" (1985) 84. *Michigan Law Review* 1714-1720.

²²⁸ Fox, E.M. "Antitrust Welfare: The Brodley Synthesis" (2010) 90. *Boston University Law Review* 1375-1383.

²²⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²³⁰ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 2.2b.

²³¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²³² Kobayashi, B.H. & Muris, T.J. "Chicago, Post-Chicago, and beyond: Time to let go of the 20th century" (2012) 78. *Antitrust Law Journal* 148.

²³³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²³⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2010) 1.9.

Brodely, J.F. "The economic goals of antitrust: Efficiency, consumer welfare, and technological progress" (1987). *New York University Law Review* 1020; Fox, E. "Antitrust welfare- the Brodley synthesis" (2010). *Boston University Law Review* 1020.

²³⁵ Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001). *Columbia Business Law Review* 258-259.

²³⁶ Hovenkamp, H. *Federal Antitrust Policy: The Law of Competition and its Practice* [2nd ed.] (1999) 2.2b.

²³⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

are more open to the possibility of government intervention.²³⁸ They acknowledge that some market structures and collaborative practices among firms could have anti-competitive consequences.²³⁹ For example, practices that would have been deemed innocuous under the Chicago School would be deemed harmful under Post-Chicago thinking.²⁴⁰ Others have even argued that perhaps economists should revert to the economic analysis that preceded the Chicago School, to allow for the greater complexities involved in the present day.²⁴¹

There have been new understandings and developments under Post-Chicago thinking, such as industrial organisation economics and its use of the game theory.²⁴² There has also been a refinement of the Harvard School's structure-conduct-performance paradigm, for example, highly concentrated markets are not automatically indicative of a lack of competition.²⁴³ Post-Chicago, economists have refined the economics of competition, for example, the theory of contestable markets, which investigates potential competition and the entry of new firms into a market,²⁴⁴ by using 'network effects' on markets that explore the effect a single person, using a good or service, has on the perceived value of that product, or service for others.²⁴⁵ Therefore, the more the product is used by others, the more its value increases.²⁴⁶ In order to exploit this, firms usually attract "early adopter" consumers, who will further attract other consumers to the product or service.²⁴⁷ There has also been a much more explicit inclusion of transaction cost in antitrust analyses,²⁴⁸ as the fact that, under the Neo-Classical theory, adherents proceeded on the premise of perfect competition, is recalled.²⁴⁹ Post-Chicago economics lay emphasis on the inadequacy of the notion of perfect information, on the basis

²³⁸ Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001). *Columbia Business Law Review* 267.

²³⁹ Salinger, M.A. "Vertical mergers and market foreclosure" (1988) 103. *Quarterly Journal of Economics* 345-356; Waterson, M. "Vertical integration, variable proportions and oligopoly" (1982) 92. *Economic Journal* 129-144.

²⁴⁰ Sullivan, L.A. "Post-Chicago economics: Economists, lawyers, judges, and enforcement officials in a less determinate theoretical world" (1995) 63. *Antitrust Law Journal* 680-681.

²⁴¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9, citing Baker, J.B. "A preface to post-Chicago antitrust". In Cucinotta *et al.* [eds.]. *Post-Chicago Developments in Antitrust Law* (2002) 68-69, 70-71, who highlights that, "[d]uring the 1970s and 1980s, the decades in which the courts were adopting the Chicago Bible, chapter and verse, economists were developing new theoretical insights and empirical tools that are now presenting a challenge to those received doctrines."

²⁴² Kobayashi, B.H. "Game theory and antitrust: A post mortem" (1997) 5. *George Mason Law Review* 411-421; Werden, G.J. "Economic evidence on the existence of collusion: Reconciling antitrust law with oligopoly theory" (2004). *George Antitrust Law Journal* 719.

²⁴³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9, citing Baker, J.B. "A preface to post-Chicago antitrust". In Cucinotta *et al.* [eds.]. *Post-Chicago Developments in Antitrust Law* (2002) 68-69, 70-71, who highlights that, "[d]uring the 1970s and 1980s, the decades in which the courts were adopting the Chicago Bible, chapter and verse, economists were developing new theoretical insights and empirical tools that are now presenting a challenge to those received doctrines."

²⁴⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9, citing Baker, J.B. "A preface to post-Chicago antitrust". In Cucinotta *et al.* [eds.]. *Post-Chicago Developments in Antitrust Law* (2002) 68-69, 70-71.

²⁴⁵ Katz, M.L. & Shapiro, C. "Network externalities, competition, and compatibility" (1985) 75. *The American Economic Review* 424-440; Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2010) 1.9; Liebowitz, S.J. & Margolis, S.E. "Network externalities (effects)" Available online at <https://www.utdallas.edu/~liebowit/palgrave/network.html> [Accessed 10 August 2016].

²⁴⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁴⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁴⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁴⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

that firms will incur costs in the process of accessing information.²⁵⁰ Transaction costs, therefore, influence the way firms behave in the market.²⁵¹ The premise of the Neo-Classical theory that market participants are rational profit maximisers has also been debunked. Post-Chicago economists have utilised psychology tools to explain the behaviour of market participants.²⁵²

Post-Chicago analyses have also influenced antitrust decisions in the United States²⁵³ and in South Africa, as well.²⁵⁴ Despite its ambitions, some have argued that the post-Chicago antitrust was nothing 'more than another swing in antitrust's ideological pendulum' that is a move back to antitrust structuralism, in the form of government intervention.²⁵⁵ In addition, it has not adequately solved the on-going debate about what exactly constitutes consumer welfare²⁵⁶ – Is it merely concerned with the interests of the consumer, or is it total welfare.²⁵⁷ Should consumers be prioritised over all else,²⁵⁸ and is it realistic to paint consumers as perpetual hapless victims of big business, requiring constant protection from the exploitative practices of the latter?²⁵⁹ The precise meaning of dynamic efficiency has not been defined adequately.²⁶⁰ Sutherland & Kemp assert that, most of the time, post-Chicago thinking is quite complex, so that its application tends to depend on the circumstances of the case, making it difficult to predict what the result will be, especially in contested antitrust proceedings.²⁶¹

2.7. The Objectives of Competition Law

The goals of competition law play a pivotal role in providing guidance on the interpretation and application of competition law. When considering these objectives, the statutory instrument, as well as economic doctrine, might require exploring. For instance, according to the Chicago School, the singular purpose of antitrust law is the realisation of economic efficiency,²⁶² to the exclusion of the so-called 'distributive goals', such as promoting small businesses.

²⁵⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵³ For example, *Eastman Kodak Co v Image Technical Services* 504 U.S. 451 (1992); *SMS Systems Maintenance Services v Digital Equipment Corp.* 188 F.3d 11 (1st Cir. 1999); *Alcatel USA v DGI Technologies* 166 F.3d 772, 781-783 (5th Cir. 1999); and *Brokerage Concepts v U.S. Healthcare*, 140 F.3d 494, 513-16 (3d Cir. 1998).

²⁵⁴ *Mondi Kohler Cores & Tubes* 06/LM/Jan02

²⁵⁵ Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001). *Columbia Business Law Review* 267.

²⁵⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁵⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁶⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁶¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.9.

²⁶² See 2.5, 2.5.1 in this Chapter.

A survey of competition laws around the world clarifies the fact that the primary objectives of these statutes are effective market governance and the promotion of free and unfettered competition.²⁶³ In fact, market governance is seen by some as the sole objective of competition law, while others retain the opinion that, even though the primacy of market governance is justified, other goals must not be ignored.²⁶⁴

Because of these differences, disagreements are rife among economists and competition law practitioners regarding the goals of competition law.²⁶⁵ For instance, McChesney and Shughart argue that competition law statutes are nothing more than “political bargains in which special interest groups purchase protection from the forces of unfettered competition benefitting both themselves and politician-suppliers of protectionism at the expense of other groups”.²⁶⁶ It is submitted that this sentiment is too simplistic and is a disservice to some of the serious objectives of competition law. Fox, however, offers a moderate view by suggesting that, although the enactment of competition laws may be initiated by private power and firms seeking a level playing field, the reality that competition laws are also fundamentally informed by other considerations cannot, and should not be ignored.²⁶⁷ For example, in South Africa, the Preamble of the Competition Act 89 of 1998 cites the need to correct the economic injustices perpetrated during the apartheid era.

Despite the lack of consensus on the objectives of competition law, there are traditional goals that have gained pride of place and been accepted around the world, with modifications. Others appear to be unique to specific countries, for example, those that are influenced by social, political and historical considerations.²⁶⁸

The OECD distinguishes between three categories of objectives; the first being “core-competition” objectives, which include protecting the competition process, promoting economic efficiency and consumer welfare. The second is ‘public interest’ or ‘populist’ objectives, for example, promoting employment, social welfare, specific sectors in the economy, national ownership and the economic

²⁶³ Adams, W. & Brock, J.W. “Antitrust and efficiency: A comment” (1987). *New York University Law Review* 1116-1117.

For example, section 3 of Tanzania Fair Competition Act of 2003; Article 170 of Brazil Constitution; Article 1 of Brazil competition statute, Law 12.529 of 2011; the Preamble of Zimbabwe Competition Act of 1996; Article 3(b) of the Treaty for the Functioning of the European Union; Protocol 27 on the Internal Market and Competition of the Treaty for the Functioning of the European Union.

²⁶⁴ Brassey, M. *et al. Competition Law* (2002) 1-2.

²⁶⁵ Kirkwood, J.B. & Lande, R.H. “The fundamental goal of antitrust: Protecting consumers, not increasing efficiency” (2008). *Notre Dame Law Review* 191.

²⁶⁶ McChesney, F.S. & Shughart, W.F. *The Causes and Consequences of Antitrust* (1995) 2.

²⁶⁷ Fox, E.M. “Equality discrimination, and competition law: Lessons from and for South Africa and Indonesia” (2000). *Harvard International Law Journal* 579-580, 593.

²⁶⁸ Parret, L. “Shouldn’t we know what we are promoting? Yes, we should! A plea for solid and comprehensive debate about the objectives of EU competition law and policy”. *European Competition Journal* (2010) 340.

participation of previously excluded persons; and thirdly, the so-called “grey-zone” objectives, such as curbing the concentration of market power.²⁶⁹

It is possible for a competition law statute to encompass all of the above categories of objectives, simultaneously. In such circumstances, the CAs should find a way of balancing the objectives and dealing with the conflicts on a case-by-case basis. South Africa is an example of a country that follows the multifarious purpose approach. In terms of section 2 of the Competition Act of 1998, the principal goals of the statute are as follows:

- to promote and maintain competition, in order to promote efficiency and the development of the domestic economy,²⁷⁰
- to promote consumer welfare in the way of competitive prices and product choices;²⁷¹
- to promote employment and advance citizens’ social and economic welfare;²⁷²
- to enhance the country’s competitiveness in global markets;²⁷³
- to safeguard the economic participation of small and medium-sized enterprises (SMEs);²⁷⁴ and
- to increase the economic participation of historically excluded persons.²⁷⁵

The 2009 Amendment to the Competition Act added two more objectives, namely, the need to address business practices that interfere with the competitive process;²⁷⁶ and to ensure the uniform implementation of competition law principles within all sectors of the economy.²⁷⁷ The provisions contained in section 2 are similar to the provisions in section 1.1 of Canada’s Competition Act,²⁷⁸ and in turn, the South Africa’s Competition Act of 1998 seems to have influenced Namibia’s Competition Act of 2003.²⁷⁹

²⁶⁹ ‘The objectives of competition law and policy and the optimal design of a competition agency’ (2003) *Organisation for Economic Co-operation and Development Journal of Competition Law and Policy* 2-4.

²⁷⁰ Section 2(a).

²⁷¹ Section 2 (b).

²⁷² Section 2 (c).

²⁷³ Section 2 (d).

²⁷⁴ Section 2 (e).

²⁷⁵ Section 2 (f) and section 3(2).

²⁷⁶ Section 2 (g).

²⁷⁷ Section 2 (h).

²⁷⁸ Section 1.1 of Canada Competition Act R.S., 1985, c. C-34 .

²⁷⁹ Section 2 of Namibia Competition Act of 2003.

2.7.1. Protecting the competition process

The overarching goal of competition law is to promote and protect the competition process.²⁸⁰ Because “monopoly is a canker that eats into a free enterprise economy”, the principal aim of competition law is to maintain open markets and prevent monopolistic practices.²⁸¹ All the other objectives are hinged on this primary goal. This objective is connected to the primary question that always confronts policy makers and practitioners in competition law, namely, “What is competition?” As already indicated, competition is a feature of free markets that ensures the availability of products from more than one source, at reasonable prices.²⁸² Competition is a “form of discipline” that firms exercise over one another in a bid to gain patronage from their customers.²⁸³ Therefore, it is this understanding that informs the practical application of this objective.

2.7.2. Promoting economic efficiency

The Chicago School saw the primary goal of competition as the achievement of economic efficiency.²⁸⁴ Numerous competition law statutes around the world cite economic efficiency as a primary objective.²⁸⁵ A market is inefficient when the end could have been achieved with less means, or that the means employed could have been better utilised to achieve more.²⁸⁶

Economists recognise three forms of efficiency – allocative efficiency, productive efficiency, and dynamic efficiency. Allocative efficiency exists where resources are allocated to areas where they will be fully utilised,²⁸⁷ in such a way that ‘it is not possible to make anyone better off without making someone worse off’, in what is referred to as ‘Pareto’ optimality.²⁸⁸ Productive efficiency demands that the production of goods must be at the lowest cost possible.²⁸⁹ The effect of competition in a market ensures that producers will not sell above cost (for fear that

²⁸⁰ Kaysen, C. & Turner, D.F. *Antitrust Policy: An Economic and Legal Analysis* (1959) 14-16.

For example, Article 1 of China’s Anti-Monopoly Law of 2008; section 1 of India’s Competition Act of 2002; and Article 1 of Panama’s Law on Rules for Protecting Competition and Other Measures of 2007.

²⁸¹ *Pretoria Portland Cement Company Ltd & Another v Competition Commission and Others* [2002] ZASCA 63 para 54.

²⁸² See 1.1 in Chapter 1.

²⁸³ See 1.1 in Chapter 1.

²⁸⁴ Bork, R.H. *The Antitrust Paradox: A Policy at war with itself* (1993) 427; Posner, R.A. *Antitrust Law* [2nd ed.] (2001) ix.

²⁸⁵ ‘Sixth United Nations Conference to Review All Aspects of the Set Principles and Rules for the Control of Restrictive Business Practices’ United Nations Conference on Trade and Development (2010) 1-10.

²⁸⁶ Heyne, P. “Efficiency”. *The Concise Encyclopaedia of Economics*. [Accessed 03 November 2012]. Available online at <http://www.econlib.org/library/Enc/Efficiency.html>

²⁸⁷ Hovekamp, H. *Economics and Federal Antitrust Law* (1985) 45-49.

²⁸⁸ Whish, R. “Competition Law” [5th ed.] (2005) 2-4; Hovekamp, H. *Economics and Federal Antitrust Law* (1985) 45-49.

It should be noted that ‘dynamic efficiency’ did not originate with the Neo-Classical School. Instead, it can be traced to another economic school of thought, the Austrian School of Economics, whose genesis can be traced back to 1871, when one of its proponents, Carl Menger, published his work, *Principles of Economics*. Other proponents of the Austrian School include, Ludwig von Mises, Friedrich Hayek and Joseph Schumpeter.

See 2.7.3 in this Chapter on the discussion of innovation as an objective of competition law.

²⁸⁹ Hovekamp, H. *Economics and Federal Antitrust Law* (1985) 45-49.

their customers will switch to other producers or other producers will enter the market) and they will not sell below cost (for fear that they will not realise profits). The result is that competition compels producers to incur the least possible costs, in order to earn profits and, ultimately, attain equilibrium. Finally, dynamic efficiency refers to the development of improved goods and services through innovation because of free and unfettered competition.²⁹⁰

2.7.3. Promoting innovation

From an innovation perspective, competition is an 'evolutionary process of variation and selection of new ideas', therefore, the presence of a large number of independent firms in a market allows for innovation through the development of new products and services, as well as the forging of new markets.²⁹¹ Joseph Schumpeter, an Austrian economist, wrote extensively on the relationship between competition and innovation, described dynamic competition as 'the perennial gale of creative destruction', which 'incessantly revolutionises the economic structures from within, incessantly destroying the old one, and incessantly creating a new one'.²⁹² Alternatively stated, he viewed competition as a dynamic process. Schumpeter's deviation from what he viewed 'the traditional conception of the modus operandi of competition', namely 'price competition', was note-worthy.²⁹³ His focus was on innovation, which he referred to as 'quality competition'.²⁹⁴ According to Schumpeter, what counted was competition concerning:

"[T]he new commodity, the new technology, the new source of supply, the new type of organisation...competition which commands a decisive costs or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives"²⁹⁵

In Schumpeter's opinion, the presence of a large number of independent firms in a market allows for innovation through the development of new products and services.²⁹⁶ However, Schumpeter was not opposed to the presence of monopolies. Unlike the Neo-classical's model of perfect competition, which frowned upon monopolies, market power, barriers to entry and differentiation, Schumpeter argued that these very anathemas among the Neo-Classical

²⁹⁰ Information available online at <http://www.economicshelp.org/microessays/costs/dynamic-efficiency/> [Accessed 10 November 2012].

See 2.7.3 of this chapter on the discussion of innovation as an objective of competition law.

²⁹¹ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 83; Kerber, W, "Competition, innovation and maintaining diversity through competition law". In Drexler, J., Kerber, W. & Podszun, R. [eds.]. *Competition Policy and the economic approach: Foundations and limitations* (2011) 195; Hovenkamp, H. "Competition for innovation" (2012). *Columbia Business Law Review* 799-833; Hovenkamp, H. "Antitrust and the movement of technology" (2012) 19. *George Mason Law Review* 1119-1146; Hovenkamp, H. "Antitrust and innovation: Where we are and where we should be going" (2011) 77. *Antitrust Law Journal* 749-756; Hovenkamp, H. "Innovation and the domain of competition policy" (2008) 60. *Alabama Law Review* 103-131; Hovenkamp, H. "Restraints on innovation" (2008) 29. *Cardozo Law Review* 246-260.

²⁹² Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 83.

²⁹³ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 84.

²⁹⁴ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 84.

²⁹⁵ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 84.

²⁹⁶ Clark, J.M. *Competition as a Dynamic Process* (1961) 178-211.

economists spurred innovation.²⁹⁷ Therefore, he deviated from the Neo-Classical theory's static competition. He also deviated from the Harvard School's excessive preoccupation with the structure of the market and concentration.²⁹⁸ According to Schumpeter, market power and monopoly motivated firms to be innovative, in that the prospect of firms gaining market power through innovation, spurred them on to even greater heights of innovation.²⁹⁹ According to Sutherland and Kemp, the prospect in gaining market power serves as, "the pot of gold at the end of the innovation rainbow", in that the sinking of investments, during the innovation process, was palatable, as firms would be rewarded with increased shares of the market.³⁰⁰

In dynamic competition, restrictive practices that are aimed at preserving the status quo in a market are dealt with by innovations.³⁰¹ In the 'perennial gale of creative destructive creation', restrictive practices 'steady the ship' by lessening the impact confronting firms in the process of innovating, as they try to safeguard or hedge their investments.³⁰²

Schumpeter recognised that certain restrictive practices, such as cartels, curtail innovation. In these circumstances, according to Schumpeter, regulation was required, as long as it not did amount to blanket regulation on monopolies.³⁰³ Schumpeter argued against the notion that monopolisation had a 'soporific effect'; instead, he contended that 'a monopoly position is in general no cushion to sleep on, as it can be gained, so it can be retained only by alertness and energy'.³⁰⁴ In the final analysis, Schumpeter deviated from the emphasis of a static market, as well as fixation on market structure, espoused by the Neo-Classical and Harvard economists, respectively.³⁰⁵ He also ignited a debate, which continues to this day, about whether large firms or monopolies are better innovators than smaller firms are.³⁰⁶

2.7.4. Promoting consumer welfare

Consumer welfare is a common objective of competition law.³⁰⁷ The term "consumer welfare" was introduced in competition law parlance by Bork, of the Chicago School persuasion.

²⁹⁷ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 87.

²⁹⁸ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 1.7.1.

²⁹⁹ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 87.

³⁰⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 1.7.1.

³⁰¹ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 87.

³⁰² Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 1.7.1.

³⁰³ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 91.

³⁰⁴ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 102.

³⁰⁵ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 87-90; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 1.7.1.

³⁰⁶ Schumpeter, J. *Capitalism, Socialism and Democracy* [3rd ed.] (1942) 87-90; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 1.7.1.

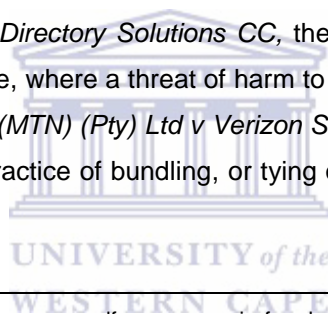
³⁰⁷ "The benefit of competition policy for consumers" United Nations Conference on Trade and Development (2014) 1- 17; Hovenkamp, H. "Implementing antitrust welfare goals" (2013) 81. *Fordham Law Review* 2471-2496; Stucke, M.E. "Should competition policy promote happiness" (2013) 81. *Fordham Law Review* 2575-2645; Lande, R.H. "A traditional and textualist analysis of the goals of antitrust: Efficiency, preventing theft from consumers and consumer choice" (2013) 81. *Fordham*

Consumer welfare consists of lowering prices, increasing output, and providing a variety of choice and quality of goods and services for the consumer, by creating an atmosphere that enhances technological advancements and innovation.³⁰⁸ Bork postulated that:

“[C]onsumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit, [therefore] consumer welfare in this sense is merely another term for the wealth of the nation”.³⁰⁹

However, Bork seems to equate efficiency with consumer welfare.³¹⁰ This is quite unfortunate because it could cause confusion in competition law analyses.³¹¹ Competition laws in the global South recognise consumer welfare as an objective.³¹² The importance of consumer welfare is also evidenced by the fact that the titles of some competition law statutes also include the phrase ‘consumer protection’, or certain portions of the statute are specifically devoted to consumer protection, or the CAs also serve as consumer protection agencies.³¹³

A number of South African competition law cases have adopted the position that competition law ought to be concerned with consumer welfare. In *Wal-Mart Inc/Massmart Holding Ltd*, the Competition Tribunal concluded that consumer welfare is the “primary mandate” of competition law.³¹⁴ In *Trudon (Pty) Ltd v Directory Solutions CC*, the Competition Appeal Court held that competition law must intervene, where a threat of harm to consumer welfare exists.³¹⁵ In *Mobile Telephone Network Holdings (MTN) (Pty) Ltd v Verizon South Africa (Pty) Ltd*, the Competition Tribunal concluded that the practice of bundling, or tying of products, in certain circumstances,



Law Review 2349-2403; Zimmer, D. “Consumer welfare, economic freedom and the moral quality of competition law – comments on Gregory Verden and Viktor Vanberg”. In Drexl, J., Kerber, W. & Podszun, R. [eds.]. *Competition Policy and the Economic Approach: Foundations and Limitations* (2011) 72; Motta, N. *Competition policy: Theory and Practice* (2004) 18.

³⁰⁸ *Sixth United Nations Conference to Review All Aspects of the Set Principles and Rules for the Control of Restrictive Business Practices* United Nations Conference on Trade and Development (2010) 3.

³⁰⁹ Bork, R. *The Antitrust Paradox: A Policy at War With Itself* (1993) 93.

³¹⁰ Bork, R. *The Antitrust Paradox: A policy at War With Itself* (1993) 427.

Bork seems to equate consumer welfare with economic efficiency when he says ‘competition must be understood as the maximisation of consumer welfare or, if you prefer, economic efficiency’.

³¹¹ Brodley, J.F. “The economic goals of antitrust: Efficiency, consumer welfare and technological progress” (1987). *New York University Law Review* 1032; Fox, E.M. “ ‘Antitrust welfare’ - The Brodley synthesis” (2010) 90. *Boston University Law Review* 1377-1379; Kirkwood, J.B. “The essence of antitrust: Protecting consumers and small suppliers from anticompetitive conduct” (2013) 81. *Fordham Law Review* 2425-2469; Blair, R.D. & Sokol, D.D. “The rule of reason and the goals of antitrust: An economic approach”. *Antitrust Law Journal* (2012) 473, 476; Wright, J.D. & Ginsburg, D.H. “The goals of antitrust: Welfare trumps choice” (2013) 81. *Fordham Law Review* 2405-2423; Akman, P. ‘Consumer welfare’ and Article 82 EC: *Practice and rhetoric*. Centre for Competition Policy Working Paper 08-25 (2008).

³¹² Article 1 of Brazil competition law statute, Law 12.259 of 2011; the Preamble of India Competition Act of 2002; the Preamble of Malawi's Competition and Fair Trading Act of 1998; section 3(d) of Tanzania's Competition Act of 2003; Dawar, K. & Mathis, J. “Consumer protection, competition and RTAs: Some lessons for developing countries”. In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 216- 229.

³¹³ In 2010, Zambia's Competition and Fair Trading Act of 1994 was repealed by the Competition and Consumer Protection Act of 2010. The Competition Commission that had been established by the 1994 Act was renamed and reconstituted as the Competition and Consumer Protection Commission. Furthermore, the new Act also established the Competition and Consumer Tribunal.

³¹⁴ [2011] ZACT 41 para 115.

³¹⁵ [2010] ZACAC 1 para 38.

might benefit the consumer through lowering prices.³¹⁶ In *Competition Commission v Pioneer Foods (Pty) Ltd*, the Competition Tribunal was clear in condemning the bread cartel on the basis that cartels were not only *per se* illegal, but that in this particular case, the cartel practices were particularly unacceptable and reprehensible, because they affected the poorest of the poor, for whom standard bread was the staple food.³¹⁷ According to *Competition Commission v South African Airways (Pty) Ltd*, when assessing the anti-competitive effects of an exclusionary practice, its impact on consumer welfare must be taken into account.³¹⁸

However, caution must be exercised to avoid over-emphasising the objective of maximising consumer welfare, as it may result in firms exiting the industry, or subsidising their operations, due to the decreased profits.³¹⁹ In addition, the decrease in profits acts as a disincentive for companies to invest, innovate and introduce new products into the market.³²⁰ Besides, competition law best serves consumer welfare by intervening in the market, when anti-competitive practices undermine the competition process, and not when the process merely fails to maximise consumer welfare.³²¹ The solution, therefore, rests in regarding consumer welfare as a long-term goal.³²² In fact, the 'maximising' of consumer welfare is a misnomer, in that consumer welfare is not the singular motivation to be elevated and maximised above all else. Alternatively stated, competition law is not aimed at ensuring consumers' welfare, to the exclusion of other considerations.³²³

2.7.5. Promoting small and medium enterprises

The promotion of small and medium enterprise (SMEs) in competition law statutes is common, especially in the global South.³²⁴ The criteria for businesses to qualify as SMEs vary across jurisdictions.³²⁵ SMEs play a crucial role in the alleviation of unemployment levels; they increase citizens' participation in the economy; they allow for the equitable distribution of the

³¹⁶ [2009] ZACT 17 para 51.

³¹⁷ [2010] ZACT 9 para 158.

³¹⁸ [2005] ZACT 50 para 132.

³¹⁹ Motta, N. *Competition policy: Theory and practice* (2004) 20.

³²⁰ Motta, N. *Competition policy: Theory and practice* (2004) 20-21.

³²¹ Werden, G. "Consumer welfare and competition policy". In Drexler, J., Kerber, W. & Podszun, R. [eds.]. *Competition Policy and the Economic Approach: Foundations and Limitations* (2011) 36.

³²² Motta, N. *Competition policy: Theory and practice* (2004) 21.

³²³ Fox, E.M. "Against goals" (2013) 81. *Fordham Law Review* 2159, citing Justice Scalia's decision in *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko* 540 U.S. 398, 415 (2004).

³²⁴ Organisation for Economic Co-operation and Development. *Policy Roundtable: General cartel ban - Criteria for exemption for small and medium-sized enterprises* (1996) 1-63.

³²⁵ In Zambia, the Zambia Development Agency Act of 2006, in section 3, defines SMEs as "any business whose total investment (excluding land and buildings), annual turnover and the number of persons employed by the enterprise does not exceed the numerical value or number prescribed". The Micro Small and Medium Enterprise Development Policy of 2009 define SMEs based on four criteria, namely: total fixed investments; sales turnover; number of employees; and legal status. The Policy sets out the specific thresholds for these indicators.

In South Africa, section 1(xv), (xvi) of the National Small Business Act of 1996 offers a definition of SMEs. A Schedule to the Act sets out the criteria for classifying SMEs, namely: number of employees, total annual turnover, and total gross asset value.

nation's wealth; and those involved in manufacturing, add value to local raw materials.³²⁶ Special attention is paid to SMEs, as they often struggle to compete against established conglomerates that have created vertical linkages over the years, which effectively act as barriers to entry for emerging SMEs. Some jurisdictions surpass these efforts and confer some level of protection for SMEs, for example, in Brazil, the Constitution provides for the preferential treatment of SMEs under Brazilian laws, provided their headquarters and management are in Brazil.³²⁷ It is submitted that these actions may amount to protectionism, which contradicts the other objectives of competition law, for example, economic efficiency, where such preferential treatment afforded to SMEs are not competitive.

In the South African context, issues pertaining to SMEs are significant, particularly when considering the historical structure of the South African economy, formerly characterised by highly concentrated markets owing to the country's exclusion from world markets, which resulted in an overly protected economy.³²⁸ However, care should be taken, when interpreting the objectives pertaining to SMEs, as well as the other provisions of the Act, bearing in mind that the Competition Act is primarily concerned with the broad objectives of promoting and maintaining competition.³²⁹ All the other objectives depend on this primary goal.³³⁰ One of these objectives is the need to ensure that there is equitable participation of SMEs in the South African economy.³³¹ Alternatively stated, competition is promoted and maintained in order to enhance the participation of SMEs in the South African economy.

In addition to being an objective of competition law, the participation of SMEs in the economy is also one of the factors that must be taken into account in certain circumstances, for example, when evaluating mergers, South Africa's CAs must consider whether to approve a merger based on public interest.³³² As part of considering public interest, the CAs must consider the impact that the merger will have on the competitiveness of SMEs, or firms controlled by historically disadvantaged persons.³³³ The interests of SMEs are also considered under exemption applications.³³⁴ Where a firm applies for exemption from the application of Chapter 2 of the Act, the Competition Commission has the discretion to grant the exemption, if it

³²⁶ Kaira, T. "The role of SMMEs in the formal and informal economy in Zambia: The challenges involved in promoting them and including them in competition regulation". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 142-143.

³²⁷ Article 170 (IX), Article 179 of the Constitution of Brazil.

³²⁸ *The Reconstruction and Development Programme* (1994) 76-77, 92-93; Ministry in the Office of the President for General Information *White Paper on Reconstruction and Development* (1994) 4-82; Hartzenburg, T. "Competition policy and enterprise development: the role of public interest objectives in South Africa's competition policy". In Cook, L., Fabella, R. & Lee, C. [eds.]. *Competitive Advantage and Competition Policy in Developing Countries* (2007) 14.

³²⁹ See section 2.7.1 in this Chapter.

³³⁰ See section 2.7.1 in this Chapter.

³³¹ Section 2(e) of the Competition Act of 1998.

³³² Section 12A(3) of the Competition Act of 1998.

³³³ Section 12A(3)(c) of the Competition Act of 1998.

³³⁴ Section 10(3) of the Competition Act of 1998.

contributes to any of the several objectives, for example, enhancing the competitiveness of SMEs, or firms controlled by historically disadvantaged persons.³³⁵

However, caution should be exercised when the interests of SMEs are mentioned in other parts of the Competition Act, other than in the objectives contained in section 2 of the Act. Although there seems to be conflation, the appearance of SMEs under the objectives of competition law in section 2 of the Competition Act is different to its appearance under merger regulation and exemption applications in section 10 and 12A of the Act, respectively.³³⁶ When used in section 2 of the Competition Act, the interests of SMEs ought to be seen as a consequence of promoting and protecting the competition process.³³⁷ In merger regulation and exemption applications, it is used as a way of balancing the application of the Act, in order to protect the interest of SMEs, where they have been harmed by the competitive conduct, which the Act primarily aims to promote and maintain.³³⁸

In circumstances pertaining to merger regulation and exemption applications, a consideration of the interests of SMEs is always preceded by full competition law analyses. For instance, merger evaluation involves two stages.³³⁹ In the first stage, an analysis of the core-competition issues, as set out in section 12A(2), is performed, as well as an examination of whether the merger is likely to lessen, or prevent competition, substantially, with reference to the evidence and argument presented before by the parties.³⁴⁰ In the second stage, if the merger is likely to prevent or lessen competition, substantially, the CAs have to consider any technological, efficiency or pro-competitive gain, which will be greater than, and offset the effects of any prevention, or lessening of competition. In addition, the CAs should consider whether the merger could/could not be justified on substantial public interest grounds.³⁴¹ Although public interest issues may not be considered in the first stage, in practice, it is not always possible to make a clear distinction between the two stages, implying that the competition analysis cannot be separated from the public interest factors.³⁴² For instance, at times public interest issues have to be considered under the first stage (competition analysis).³⁴³ According to the Tribunal,

³³⁵ Section 10(3)(b)(ii) of the Competition Act of 1998.

³³⁶ For example, in *Anglo American Ltd/ Kumba Resources*, 46/LM/Jun02 04/09/2003 para 155, a party opposing a merger unsuccessfully sought to equate the promotion of SMEs under section 12A(3)(c) with the objective of promoting SMEs under section 2(e) of the Competition Act.

³³⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.10, 10.4.

³³⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 1.10, 10.4.

³³⁹ *Medicross Healthcare Group (Pty) Ltd v Competition Commission* [2006] ZACAC 3 para 19.

³⁴⁰ *Medicross Healthcare Group (Pty) Ltd v Competition Commission* [2006] ZACAC 3 para 19-22; *Mondi Ltd & Kohler Cores & Tubes v Competition Tribunal* [2003] 1 CPLR (CAC) 33

³⁴¹ *African Media Entertainment Ltd v David Lewis NO & Others* [2008] ZACAC 4 para 12.

³⁴² *Medicross Healthcare Group (Pty) Ltd v Competition Commission* [2006] ZACAC 3 para 19, 23-24

³⁴³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.4. *Nasionale Pers Ltd & Educational Investment Corporation Ltd* Case No. 45/LM/Apr00 24.

while the competition and public interest analyses are not to be conflated, they cannot be 'hermetically sealed' from each other either.³⁴⁴

Additionally, the objectives of the Competition Act speak "broadly to the overall impact of the legislation on society, including the indirect benefits that the legislation may bring, they are not meant to be given effect to in interpreting an operational section, such as section 12A(3)(c), which has language carefully chosen for a limited purpose which cannot be read away." The same process ought to be followed, when faced with similar interests that are regarded as both objectives, as well as factors to be considered in the public interest inquiries of mergers. For example, the promotion of employment and enhancing the global competitiveness of domestic companies are regarded as both objectives of competition law, as well as public interest factors to be considered under merger regulation.³⁴⁵

The contribution of SMEs must not be underestimated, as their entry into a market provides an "equilibrating function"³⁴⁶ by increasing competition, innovation and providing consumers with more product, or service, choices.³⁴⁷ Granted, the impact of SMEs entering a market may initially be inconsequential; however, studies have revealed that their market share increases significantly over time, indicating that they provide competition for the bigger market players.³⁴⁸ Therefore, it is important to adopt policies that allow SMEs to enter and flourish in specific markets, as their entry generates competition and increases variety.³⁴⁹

Certainly, there is merit in promoting greater economic participation of SMEs, through various policies and laws, as well as including the promotion of SMEs as an objective of competition law. However, this may be problematic when SMEs are artificially assisted, even though they are not performing at efficient levels of production.³⁵⁰ This hardly resonates with the efficient allocation of resources, as it would be the inefficient allocation of scarce resources. Many competition law purists have objected to the inclusion of SMEs' interests as one of the objectives of competition law. They argue that such a task is more suited to, and can be more

³⁴⁴ *Telkom SA Ltd/ Business Connections Group Ltd* 51/LM/Jun06 para 300.

³⁴⁵ Section 2(c)- (d) and section 12A(3)(b), (d) of the Competition Act of 1998.

³⁴⁶ Audretsch, D. "Small firms, innovation and competition". In Nuemann, M. & Weigand, J. [eds.]. *The International Handbook of Competition* (2004) 88.

American writers state this objective conversely as "limiting big business".

Kaysen, C. & Turner, D.F. *Antitrust Policy: An Economic and Legal Analysis* (1959) 17-18; and Orbach, B. & Campbell-Rebling, G. "The antitrust curse of bigness" (2012). *Southern California Law Review* 605-656.

³⁴⁷ Organisation for Economic Co-operation and Development. "Policy Roundtables: General cartel ban- Criteria for exemption for small and medium sized enterprises" (1996) 6.

³⁴⁸ Audretsch, D. "Small firms, innovation and competition". In Nuemann, M. & Weigand, J. [eds.]. *The International Handbook of Competition* (2004) 88.

³⁴⁹ Audretsch, D. "Small firms, innovation and competition". In Nuemann, M. & Weigand, J. [eds.]. *The International Handbook of Competition* (2004) 89.

³⁵⁰ Motta, N. *Competition policy: Theory and Practice* (2004) 22.

effectively pursued by, sector regulators, trade associations or the application of industrial policy.³⁵¹

In *Nationwide Poles (Pty) Ltd v Sasol (Oil) (Pty) Ltd*, the Competition Tribunal indicated that, although competition law purists tend to frown upon the inclusion of non-economic elements in antitrust analyses, certain factors, such as fairness and equity for SMEs, are an integral part of the Competition Act. In addition, their inclusion does not conflict with, or detract from, the Act's objectives in any way. The Tribunal expressed the position as follows:

“While incorporating considerations of equity into antitrust analysis maybe an anathema to an antitrust approach that insists on the sole claim of a “pure” consumer welfare standard, one that is solely referenced by a reduction in output or increase in price, the utilisation, in selected, though important, instances is not alien to our Act and practice.... Moreover, SMEs are specifically given consideration in exemption proceedings, whereby they are afforded immunity from prosecution under the exemption provisions under section 10 of the Act. The mere fact that equity considerations sit uncomfortably in competition economics orthodoxy is no warrant for ignoring our legislature's express desire that they play a role in our decisions.”³⁵²

The above statements by the Tribunal should be understood in their context and the public interest factors, such as those pertaining to SMEs, should not necessarily be equated to the objectives of the Competition Act. The *Nationwide Poles* case dealt with the abuse of dominance. More specifically, the above statements were made about the practice of price discrimination. The legislature's prohibition of the practice of price discrimination is motivated by the need to ensure that SMEs are able to enter into the market and compete against established incumbents.³⁵³ Additionally, the reference to broad equity objectives does not imply that the Act espouses a blanket prohibition on price differentiation, or on the practice of discounting, even where it favours large firms over small firms.³⁵⁴ Instead, the Act specifies certain elements that must be present, in order for the practice to qualify as prohibited price discrimination. The Act also provides several ‘defences’ that can be relied on by a dominant facing a charge of engaging in price discrimination.³⁵⁵

³⁵¹ Kampel, K. “The role of South African competition law in supporting SMEs”. In Cook, P., Fabella, R. and Lee, C. [eds.]. *Competitive Advantage and Competition Policy in Developing Countries* (2007) 241.

³⁵² [2005] ZACT 17 para 83- 85, and 87.

The Tribunal highlighted that “the element of equity that underpins certain of the Act's concerns to protect small business – and it is precisely the element of ‘protection’ that most offends antitrust orthodoxy – should not detract from the substantive competition considerations that accord small business a special place in antitrust history and its contemporary practice ... it is the oft-proclaimed mantra ‘protect competition, not competitors’ that is usually invoked by those seeking to deny small business a special place in antitrust considerations. As with many frequently repeated pieces of rhetoric, this one contains more than a grain of truth and serves as a valuable cautionary for antitrust authorities who are regularly confronted by competitors opportunistically seeking to invoke competition legislation to advance their own narrow interests even when the conduct of their opponents is manifestly pro-competitive or pro-consumers. Moreover, the South African legal and political economy context favours competition enforcement that is concerned to protect the market mechanism from conduct that has the effect of undermining it. The expressed concerns of the South African law-makers and the policy planners support this finding. This is powerfully manifest, inter alia, in an industrial policy that places the development of SMEs at the centre of attempts to improve the working of the market mechanism. This conclusion is grounded not only in an examination of the general industrial policy context in which concern for SME development looms large but also in an examination of the Act itself.”

³⁵³ Para 81.

³⁵⁴ Para 89-90.

³⁵⁵ In terms of section 9(1), the practice of price discrimination is directly linked to a dominant firm. In addition, the price discrimination must have the likelihood of substantially preventing or lessening competition. Furthermore, section 9(2)

2.8. Economic Doctrine and the Objectives of Competition Law in Regional Economic Communities

Regional Economic Communities (RECs) are also influenced by economic doctrine in the implementation process of their regional competition laws. Some also follow a multifarious approach to the objectives of competition law. Regarding economic doctrine, the EAC Competition Act of 2006 recognises the importance of freedom to trade.³⁵⁶ The COMESA Competition Regulations of 2004 recognises the need for economic efficiency.³⁵⁷

Concerning the objectives of regional competition law, the COMESA Competition Regulations of 2004 regard competition law as complementary to the liberalisation of trade. The Competition Regulations recognise that restrictive business practices can potentially hinder economic development, trade liberalisation, and economic efficiency, which erode the gains of regional integration. In addition, with the growing interdependence of economies, there is an increased likelihood of cross-border anti-competitive practices.³⁵⁸ The Competition Regulations also acknowledge that markets in the region must operate efficiently, that there is a need to have common standards governing anti-competitive practices in the Common Market, and cartel activities, such as price fixing and market allocation in the Common Market, are incompatible with fair competition and consumer welfare.³⁵⁹ The Regulations place considerable emphasis on consumer welfare and, consequently, empower the COMESA Competition Commission to function as a consumer protection agency, as well.³⁶⁰

In the East African Community, Member States recognise the need to safeguard the freedom to compete; to guard against the creation of barriers to entry, as markets are opened up because of trade liberalisation; to protect the interests of SMEs; and eliminate discriminatory practices among businesses, based on nationality. Member States also recognise the need to promote consumer welfare; to advance innovation; to enhance economic integration among Member States; to develop the competitiveness of the Community in global markets; and to improve the attractiveness of the Community, as an investment destination.³⁶¹ In addition, a portion of the EAC Competition Act is devoted to consumer protection.³⁶² The EAC Competition Authority is tasked with not only enforcing regional competition law, but also protecting the interests of consumers in the Community.³⁶³

provides "defences" for price differentials, for example, price differential will not qualify as prohibited price discrimination, if the dominant firm can show that its conduct was done, in good faith, to meet the terms offered by a competitor, or is motivated by differences in the cost of manufacture, distribution, sale, promotion or delivery of the goods or services supplied to different purchasers.

³⁵⁶ Section 3(a)(i) of the EAC Competition Act of 2006.

³⁵⁷ Article 2 of the COMESA Competition Regulations of 2004.

³⁵⁸ Preamble, Article 2 of the COMESA Competition Regulations of 2004.

³⁵⁹ Preamble, Article 2 of the COMESA Competition Regulations of 2004.

³⁶⁰ Article 27-34 of the COMESA Competition Regulations of 2004.

³⁶¹ Section 3 of the EAC Competition of 2006.

³⁶² Section 28- section 36 of the EAC Competition of 2006.

³⁶³ Section 28- section 36 of the EAC Competition of 2006.

In SADC, members are enjoined to implement measures in the Community directed at preventing unfair business practices and promoting competition.³⁶⁴ The Preamble of the SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009 recognises the important role that competition and consumer policies play in the realisation of economic growth and development, economic efficiency, and the alleviation of poverty in the Community. Additionally, the Preamble acknowledges that deeper regional integration among members requires the adoption and implementation of their competition laws, in line with members' integration agenda and commitments, as laid out in the SADC's legal instruments.³⁶⁵

2.9. A Charge against the Multifarious Purpose Approach

The multifarious purpose approach to the goals of competition law may incorporate inherent risks, for example, political interference and compromise, unpredictable application of the law, as well as over-extending the mandate of CAs, which may further hamper their effectiveness. The United States has been particularly forceful in maintaining the position that competition law should not be concerned with public interest objectives, but should concern itself with fulfilling "core-competition" goals.³⁶⁶

In South Africa, Reekie has been especially critical about the inclusion of non-economic goals of competition in section 2 (c)-(f) in the Competition Act 89 of 1998.³⁶⁷ Regarding the objective of promoting employment, Reekie argues that competition law is an ill-suited instrument, for example, he argues that seeking to promote employment will negatively affect the attainment of economic efficiency, and consumer welfare.³⁶⁸ Reekie highlights other weaknesses in the Act. According to Reekie, the undefined 'social' welfare objective in section 2(c) of the Competition Act will not only result in the unpredictable application of the Act, but also conflict with section 2 (a)-(b) objectives. In addition, the need to 'expand opportunities' in world markets should be addressed under international trade law, not competition law, and although the promotion of SMEs is compatible with section 2 (a) and (b), it must be done efficiently in a manner that does not impose barriers to entry.³⁶⁹

Reekie further suggests that the promotion of greater ownership stakes among South Africa's historically disadvantaged persons can be best achieved through the elimination of those legal instruments that perpetuated the discrimination, or through other means, for instance, the reallocation of resources through state measures, not competition law.³⁷⁰ To support his line of reasoning, Reekie appeals to Bork, an economist of the Chicago School, who, in defence of core-competition goals,

³⁶⁴ Article 25 of the SADC Protocol on Trade of 1996.

³⁶⁵ Article 3(1) of the SADC Protocol on Trade of 1996; SADC Regional Indicative Strategic Development Plan (2003); Ndlovu, P.N. "The state of trade liberalisation in goods in SADC" (2012) 2 *Southern African Development Community Law Journal* 192.

³⁶⁶ *National Society of Professional Engineers v United States* 435 U.S. 679, 692 (1978).

³⁶⁷ Reekie, W.D. "The Competition Act, 1998: An economic perspective" (1999) *South African Journal of Economics* 258-288.

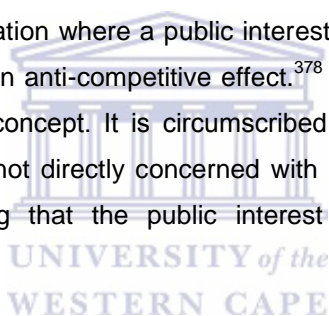
³⁶⁸ Reekie, W.D. "The Competition Act, 1998: An economic perspective" (1999) *South African Journal of Economics* 259, 286.

³⁶⁹ Reekie, W.D. "The Competition Act, 1998: An economic perspective" (1999) *South African Journal of Economics* 259.

³⁷⁰ Reekie, W.D. "The Competition Act, 1998: An economic perspective" (1999) *South African Journal of Economics* 260.

argued that 'the *whole* task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare'.³⁷¹ Bork continues that 'antitrust... has nothing to say about the ways prosperity is distributed'.³⁷² Reekie's criticisms are also supported by Hovenkamp, who argues that competition law is ill suited as a tool of transferring wealth and the promoting SMEs.³⁷³

As previously stated, when used in section 2 of the Competition Act, the interests of SMEs ought to be seen as a consequence of promoting and protecting the competition process.³⁷⁴ When used in other contexts, namely in merger regulation and exemption applications, it is used as a way of balancing the application of the Act, to protect the interest of SMEs, where they have been harmed by the competitive conduct, which the Act is primarily committed to promote and maintain.³⁷⁵ In these circumstances, a consideration of the interests of SMEs is always preceded by full competition law analyses.³⁷⁶ When used in merger evaluation, the interests of SMEs are viewed as a factor to be considered, while establishing whether the merger can/cannot be justified on public interest grounds.³⁷⁷ This means that the public interest may pull the merger evaluation in opposing directions, as the Act allows public interest to resurrect a merger that would harm competition and, simultaneously, contemplates a situation where a public interest ground may justify the prohibition of a merger, even if it does not have an anti-competitive effect.³⁷⁸ Under merger evaluation, the 'public interest' is not an infinitely elastic concept. It is circumscribed by the Competition Act's provision, mainly because competition law is not directly concerned with public interest.³⁷⁹ The public interest must be merger specific, meaning that the public interest is only considered, when it is a



³⁷¹ Bork, R.H. *The Antitrust Paradox: A Policy at War with Itself* (1993) 91.

³⁷² Bork, R.H. *The Antitrust Paradox: A Policy at War with Itself* (1993) 90.

³⁷³ Hovenkamp, H. "Post-Chicago Antitrust: A review and critique" (2001) *Columbia Business Law Review* 269.

³⁷⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.11.

See also 2.7.5 in this Chapter.

³⁷⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.11.

See also 2.7.5 in this Chapter.

³⁷⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.11.

See also 2.7.5 in this Chapter.

³⁷⁷ Section 12A(1)(b)

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.11, point out that section 12A(1) is badly phrased because it does not clarify if the public interest is to be considered, where a merger has been found to substantially lessen competition, but can nonetheless be approved on the grounds that its pro-competitive gains offset the negative impact. The use of "can or cannot be justified" in section 12A(1)(a)(ii) and section 12A(1)(b) also seem to suggest that a merger may be prohibited only if it is also against the public interest and that approval of a merger cannot be granted, unless one can justify it under the public interest, regardless of the merger's competitive effects, that is, whether it is anti-competitive or pro-competitive. But, as they highlight, the Tribunal in *Harmony Gold Mining Company and Goldfields* [2005] ZACT 29 para 31 held that this is not this case.

³⁷⁸ *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 para 214.

³⁷⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.11.

See also 2.7.5 in this Chapter.

consequence of the merger.³⁸⁰ It is not the task of the CAs to correct general weaknesses in the economy through merger evaluation.³⁸¹

There are compelling reasons for the inclusion of the public interest in the application of competition law in developing countries, such as South Africa. For example, given its political history, there is no reason why the Competition Act should not take due consideration of the previously excluded sections of South Africa's citizens.³⁸² Indeed, there is nothing amiss with a competition law encompassing distributive goals, or non-economic goals, such as those pursued by the Competition Act of 1998, in light of the country's history.³⁸³

Additionally, efficiency goals are neither the end all, nor the panacea, in the application of competition law. Besides, developing countries have the prerogative to implement their competition laws in a manner that redresses the injustices of the past, in order to achieve equitable distribution of the country's wealth, taking into account the historical and social context of the country.³⁸⁴ Countries in the global South, therefore, must have room to tailor their competition laws in a way that best suits their contexts and levels of economic development. However, a word of caution must be noted here; competition law cannot be regarded as the singular solution to addressing inequalities in an economy.³⁸⁵

Additionally, prudence must be exercised when applying public interest issues in competition law analyses, as excessive deference to it may result in an interpretation that will transform the Competition Act "from an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle for redistribution".³⁸⁶ Besides, it could not have been the intention of the legislature to confer such power on unelected institutions, such as the Competition Commission and the Competition Tribunal.³⁸⁷

³⁸⁰ *Walmart Stores Inc and Massmart Holdings Ltd* 73/LM/De10 para 32.

³⁸¹ *Walmart Stores Inc and Massmart Holdings Ltd* 73/LM/Dec10 para 32.

³⁸² Fox, E.M. "Equality discrimination, and competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard International Law Journal* 593.

³⁸³ Schwartz, L.B. " 'Justice' and other non-economic goals of antitrust" (1979) 127. *University of Pennsylvania Law Review* 1076-1081; Fox, E.M. "The mordenization of antitrust: A new equilibrium" (1981) 66. *Cornell Law Review* 1140-1192; Hovenkamp, H. "Distributive justice and the antitrust goals" (1982) 52. *George Washington Law Review* 1- 32.

³⁸⁴ Chua, A. "Markets, democracy and ethnicity: Toward a new paradigm for law and development" (1998). *Yale Law Journal* 63-78, 105-107; Chua, A. "The paradox of free market democracy: Rethinking development policy" (2000). *Harvard International Law Journal* 287-379; Fox, E.M. "Economic concentration, efficiencies and competition: Social goals and political choices" 1977 (47). *Antitrust Law Journal* 882-887; Fox, E.M. "The kaleidoscope of antitrust and its significance in the world economy: Respecting the differences". In Hawk, B.E. [ed.]. *International Antitrust Law and Policy: Fordham Corporate Law 2002* (2002) 597- 603.

³⁸⁵ Fox, E.M. "Equality discrimination, and competition law: Lessons from and for South Africa and Indonesia" (2000). *Harvard International Law Journal* 588.

³⁸⁶ *Anglo American Ltd/ Kumba Resources Ltd/ Industrial Development Corporation (intervening)* (46/LM/Jun02) [2003] ZACT 45 para 156.

³⁸⁷ *Anglo American Ltd/ Kumba Resources Ltd/ Industrial Development Corporation (intervening)* (46/LM/Jun02) [2003] ZACT 45 para 156.

Although the objectives of competition law tend to be varied, it is possible for them to co-exist harmoniously. Additionally, although a multifarious approach to the objectives, as espoused in the Competition Act of 1998, may result in conflicts, for example public interest *vis-à-vis* economic efficiency, in general, the Competition Act of 1998 is in line with well-tested principles of competition law.³⁸⁸

2.10. Concluding Remarks

Economic doctrine certainly plays an important role in the interpretation and application of competition law. However, economic theory is not static. It is always evolving, as evidenced by the weaknesses identified in each of the schools of thought, which were followed by attempts to correct the perceived flaws, in order to arrive at a better understanding of economic doctrine and its application to/in competition law. Therefore, it is important to guard against the notion, that economics, specifically the theories discussed in this chapter, are the 'be all and end all' of competition law analyses, particularly for developing countries faced with the need to ensure that all citizens participate in, and benefit from, the economy.³⁸⁹ The dominant perception, therefore, should not be that economic doctrine is unimportant and plays no role in the interpretation and application of competition law. Instead, what is meant is that economic doctrine does not always provide the answers to the application of competition law.

Nobel Prize Winner for economics, Paul Krugman gives a convincing argument that economists do make mistakes.³⁹⁰ Global history and the economic crises are proof of this, as economic doctrine can only do so much. This is when the objectives of competition law could be utilised to 'cure' the pitfalls of economic doctrine. For competition law to remain relevant, it must encompass 'non-economic' objectives, as 'to obtain oil for the lamp from economists is to gain no assurance of a steady flame'.³⁹¹ Besides, since 'competition law is not an area of law in which there is much scope for absolute concepts or sharp edges',³⁹² other considerations must influence this area of law.

The varying objectives show how the global South can tailor their competition laws to suit their unique circumstances and needs, for example, those objectives promoting SMEs, employment and advancing social and economic welfare, as well as ensuring equal participation of citizens in the national economy. There is also a connection between the objectives of competition law and cartels. Principally, cartels are inimical to the central goal of competition law – the protection and promotion of the competition process. Because of collusion among cartel participants, firms are no longer

³⁸⁸ Fox, E.M. "Equality discrimination, and competition law: Lessons from and for South Africa and Indonesia" (2000). *Harvard International Law Journal* 586.

³⁸⁹ Fox, E.M. "Economic development, poverty, and antitrust: The other path" (2007) 13. *Southwestern Journal of Law and Trade in the Americas* 101- 125.

³⁹⁰ Krugman, .P "How did economists get it so wrong?" The New York Times Magazine 02 September 2009. Available online at http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html?_r=0 [Accessed 13 January 2015].

³⁹¹ Sullivan, L.A. *Handbook of the Law of Antitrust* (1977) 9.

³⁹² Cases 1035/1/1/04 and 1041/2/1/04 *Racecourse Association & British Horseracing Board v OFT* [2005] CAT 29, 167.

competitors, and no longer act independently of each other. This has a negative impact on the other goals. Innovation is reduced, if not eliminated, consumer welfare is harmed, economic efficiency is not realised, and SMEs are pushed out of the market. While the goals of competition law are varied, especially those influenced by political and historical considerations, it is submitted that this is not necessarily a bad thing. Instead, it attests to the dynamic nature of competition law, as well as how it is able to adapt to, and address, other considerations, provided the 'core-competition' objectives be preserved.



PART B:
THE SUBSTANTIVE RULES
GOVERNING CARTELS, THE INSTITUTIONAL,
ENFORCEMENT AND REMEDIAL STRUCTURES



CHAPTER THREE

THE SUBSTANTIVE RULES GOVERNING CARTELS

"People of the same trade seldom meet together even for the merriment and diversion, but the conversation ends up in the conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed or would be consistent with liberty and justice. But although the law cannot hinder people in the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less render necessary."³⁹³

3.1. Overview

In this chapter, the researcher examines the substantive rules that prohibit collusion among competitors, which, in competition law, has a specific meaning.³⁹⁴ At the beginning of the chapter, a discussion on the identification of the relevant market in competition law analyses ensues, specifically focussing on horizontal restraints. Thereafter, the *per se* illegal principle is examined, as well as the rule of reason and their respective applications to horizontal restraints. The prohibition of cartels through the analysing of domestic statutory provisions concerning cartels follows, starting with section 4 of the Competition Act 89 of 1998, South Africa. For perspectives on regional economic communities and cartels in the global South, Article 16 and Article 19 of the COMESA Competition Regulations of 2004 is considered, as well as section 5 and section 6 of the EAC Competition Act of 2006. To provide comparative analyses, the United States' antitrust legislation that governs horizontal restraints, section 1 of the Sherman Act of 1918 is examined. Article 101(1) of the TFEU is deliberated for the purpose of offering comparative analyses and providing regional perspectives. Finally, price fixing, market division and collusive tendering cartels are explored.

3.2. Defining the Relevant Market in Competition Law Analyses

In competition law analyses, when assessing the anti-competitive effects of a prohibited practice, namely, restrictive horizontal practices, restrictive vertical practices and abuse of dominance, or evaluating proposed mergers, it is usually necessary to first identify the relevant market, in which the prohibited practice has occurred.³⁹⁵ The European Court ruled that, depending on the type of practice under consideration, a failure to define the relevant market properly could have dire consequences.³⁹⁶

³⁹³ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book IV, Chapter VIII, 145, para 27.

³⁹⁴ Campbell, J. "Restrictive horizontal practices". In Brassey, M. [ed.]. *Competition Law* (2002) 142; Pearmain, D. "What's in a word: Collusion without deception, fraud or secrecy" (1998) 6. *Juta Business Law* 42-44; In *SA Metal & Machinery Co Ltd v Cape Town Iron and Steel Works (Pty) Ltd & Others* 1997 (1) SA 319 (A) 326D-E, Viviers, J.A., speaking to a scrap metal price-fixing agreement ruled that "no element of deception, fraud or secrecy" is required, it will suffice that parties agree to "act jointly" or "act in concert".

³⁹⁵ *United States v E.I. du Pont de Nemours & Co* 351 U.S. 377, 593 (1956); Clark, J. & Khemani, R.S. "Market definition and assignment of market shares". In *A Framework for Design and Implementation of Competition Law and Policy* (1999) 10-18; Whish, R. *Competition Law* [5th ed.] (2005) 23-25.

³⁹⁶ Case 6/72- *Europemballage Corporation & Continental Can Co Inc v Commission of the European Communities*.

According to UNCTAD, the relevant market refers to:

"[T]he general conditions under which sellers and buyers exchange goods, [it also] implies the definition of boundaries that identifies groups of sellers and buyers of goods, within which competition is likely to be restrained. It requires the delineation of the product and geographical lines, within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn, in the short term, if the restraint or abuse increased prices by a not insignificant amount."³⁹⁷

The value of demarcating the relevant market is that it is:

"... [A] tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition law is applied. [Its] main purpose ... is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and preventing them from behaving independently of effective competitive pressure."³⁹⁸

Sutherland and Kemp similarly explain the purpose of identifying the relevant market in the following manner:

"The central aim of the market definition is to identify in a systematic way all of those firms that constrain the price at which the product under investigation is sold. This will include all firms that supply a product sufficiently substitutable to constrain the pricing of the product under investigation ('the product market'), that are located in a region close enough to constrain the pricing of the product of the product under investigation ('the relevant geographic market')."³⁹⁹

Therefore, the process of defining the relevant market encapsulates two aspects, namely the product and geographic components.⁴⁰⁰ It follows a purposive approach, which means that it cannot be separated from the competitive conduct under consideration, as well as the particular circumstances in the market, in which the firm participates.⁴⁰¹ Several aides are used to identify the relevant market, as the discussion below reveals; however, it bears mentioning that, while such tools are employed in the process of identifying the relevant market, precision is not required.⁴⁰² In addition, it would seem that the importance of first settling the relevant market would depend on the nature of the competitive conduct under investigation. For instance, regarding merger regulation, South Africa's competition authorities (CAs) indicate that the identification of the relevant market is axiomatic, as the effects of a merger on competition must be preceded by a defined relevant market.⁴⁰³ However, at times, the

³⁹⁷ "Model law on Competition". *United Nations Conference on Trade and Development* (2010) Chapter II.

³⁹⁸ "Notice on the definition of the relevant market for the purposes of community competition law". *European Commission Official Journal of the European Communities* 1997 C 372/03 para 2.

³⁹⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.1.

⁴⁰⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.1, 10.5; Article 1 of the COMESA Competition Regulations of 2004; section 2 and section 5(5) of the EAC Competition Act of 2006; section 72 of Botswana Competition Act of 2009.

⁴⁰¹ *Competition Commission v South African Airways (Pty) Ltd* [2005] ZACT 50 para 33-44.

⁴⁰² *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 para 151; *Mondi Ltd & Kohler Cores & Tubes* 06/LM/Jan02 para 37.

⁴⁰³ *Medicross Healthcare v Competition Commission* 55/CAC/Sep05 para 25, 38-39; *African Media Entertainment v David Lewis* NO 68/CAC/Mar07 para 39; *JD Group & Profurn* 28/CAC/May para 12-13.

identification of the relevant market may be unnecessary, for example, when it is quite clear what the competitive, or anti-competitive, effects of the merger will be.⁴⁰⁴

Depending on the practice under consideration, parties may argue for a broad or narrow definition of the relevant market. For instance, in merger evaluation, the merging parties usually argue in favour of a wider relevant market, while the opposing parties to the merger tend to argue in favour of a narrower market.⁴⁰⁵ At times, however, parties to a merger may argue for a narrower market to show that they do not belong in the same market.⁴⁰⁶ In cases involving abuse of dominance, respondent firms usually argue for a broadly defined market because the broader the market is, the smaller the firm's market share will be, and the lesser probability of the firm being found to be dominant.⁴⁰⁷

3.2.1 The relevant product market

The product market comprises all those products that are regarded as interchangeable, or substitutable, by the consumer, due to the products' characteristics, prices and intended use.⁴⁰⁸

The issue is not whether the products are similar or resemble each other, instead, the issue is whether the products can fulfil the same purpose and whether they offer a cost-effective alternative. Alternatively stated, the concern is 'those characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products'.⁴⁰⁹

Cross elasticity of demand, also referred to as reasonable interchangeability, involves a determination of the effect of a price increase on the quantities demanded of a certain product. It serves to define the relevant product market. Where there is high cross elasticity, even a slight price increase of a product will prompt consumers to switch to another product, which is an indication that the products in question belong in the same product market.⁴¹⁰ The opposite is true. Where there is low cross elasticity, the products are regarded as belonging in separate product markets.⁴¹¹

⁴⁰⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.5.

⁴⁰⁵ *Bromor Foods (Pty) Ltd & National Brands Ltd* 19/LM/Feb00 para 8-9; *Nestle (SA) Pty Ltd & Pets Products (Pty) Ltd* 21/LM/Apr01 para 25; *Multichoice Subscriber Management (Pty) Ltd & Tiscali* 72/LM/Sep04 para 8-9

⁴⁰⁶ *Primedia Ltd v Competition Commission* 39/AM/May06 para 71; Sutherland P & Kemp K *Competition Law of South Africa* (2014) 10.5.

⁴⁰⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.1.

⁴⁰⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.5.1

Section 2(t) of India Competition Act of 2002; Article 3 of Egypt Law on the Protection of Competition and the Prohibition of Monopolistic Practices of 2005; 'Notice on the definition of the relevant market for the purposes of community competition law' European Commission Official Journal of the European Communities 1997 C 372/05 para 7.

⁴⁰⁹ Case 6/72 *Continental Can Co Inc* para 32.

⁴¹⁰ "Model law on competition". United Nations Conference on Trade and Development (2010) Chapter II para 20.

⁴¹¹ "Model law on competition". United Nations Conference on Trade and Development (2010) Chapter II para 20.

Although the identification of the relevant product market is “notoriously difficult”,⁴¹² there are techniques that can aid the process. One of these is the “hypothetical monopolist’ test, developed by the United States in the 1982 Horizontal Merger Guidelines. According to the hypothetical monopolist test, a firm that offers substitutable products is examined to determine whether they would have the ability to control the price if, hypothetically speaking, they were a monopolist.⁴¹³ If the outcome is in the negative, then it means that other firms that are not part of the hypothetical monopolist, have the ability to influence the price.⁴¹⁴ The test is repeated until the hypothetical monopolist is able to control the price of the product under investigation.⁴¹⁵

The hypothetical monopolist test makes use of the “small but significant non-transitory increase in price” test (SSNIP) to determine whether the products under consideration belong in the same market.⁴¹⁶ The SSNIP test explores whether consumers of a specific product would readily switch to available substitutes because of a hypothetical small (between 5 and 10 per cent), but permanent price increase in the products and areas under investigation.⁴¹⁷ Alternatively stated, the SSNIP test investigates the “demand-side substitution”, that is, whether customers would readily switch to another product, from another geographical region, because of the price increase. The test also investigates the “supply-side substitution”, that is, the number of suppliers from other geographical regions, who will be motivated to switch to supplying the relevant product, because of the price increase.⁴¹⁸ The test does not require that the hypothetical monopolist lose all, or even the majority of its customers, due to the price increase. The inquiry is simply whether the hypothetical monopolist has lost a sufficient number of customers to make its operations less profitable, subsequent to the price increase, in comparison to its profits, prior to the price increase.⁴¹⁹

The hypothetical monopolist test is fallible. An often cited criticism is the ‘cellophane fallacy’, so called after *United States v El du Pont de Nemour & Company*, a case decided by the Supreme Court of the United States, in which it applied the SSNIP test to a monopolisation

⁴¹² *Bromor Foods (Pty) Ltd & National Brands Ltd* [2000] ZACT 13 para 8- 9.

⁴¹³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2, 10.5.1.

⁴¹⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2, 10.5.1.

⁴¹⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2, 10.5.1.

⁴¹⁶ ‘Horizontal Merger Guidelines’ (1992), revised in 1997 United States Department of Justice and the Federal Commission. Available online at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [Accessed 14 January 2014].

⁴¹⁷ “Notice on the definition of the relevant market for the purposes of community competition law”. *European Commission Official Journal of the European Communities* 1997 C 372/05 para 17; “Model law on competition”. *United Nations Conference on Trade and Development* (2010) Chapter II para 21.

⁴¹⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2.

⁴¹⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2, 10.5.1.

allegation.⁴²⁰ The principal criticism of the hypothetical monopolist test is its error in attempting to equate a monopolist's inability to raise a price above the current price, with its inability to have already raised the price above competitive levels.⁴²¹ The criticism is that the SSNIP test fails where the monopolist has already raised prices above the competitive level, so that when applying the test, the conclusion would be that consumers would switch to another product, thereby making the price increase unprofitable.⁴²² The conclusion, in these circumstances, will be that the monopolist lacks the ability to constrain prices.⁴²³ However, this is not enough, as it does not identify those products that are substitutes at the competitive price.⁴²⁴ In South Africa, the Competition Tribunal has made reference to the cellophane fallacy in cases dealing with abuse of dominance.⁴²⁵

The SSNIP will also fail to yield results, due to insufficient data. In such cases, it merely serves as a framework for analysis.⁴²⁶ To remedy this weakness, several other methods could be used, for example, evidence of substitution in the recent past, submissions from industry experts, information solicited from customers and competitors, analysis of marketing studies and consumer surveys, investigating the existence of barriers, using quantitative tests, or statistical techniques.⁴²⁷ The physical characteristics of the goods, their price, as well as consumer preferences can also be used to determine if the products are substitutable and, therefore, belong to the same product market.⁴²⁸

3.2.2. The relevant geographic market

The relevant geographic market refers to the physical area, or location, in which the firms in question participate in the supply and demand of the substitutable products, wherein the conditions of competition are sufficiently homogenous.⁴²⁹ The geographic market must be understood 'to refer to that geographic area to which consumers can practically turn for

⁴²⁰ 351 US 377 (1956), in this case the United States Department of Justice instituted a lawsuit in terms of the Sherman Act of 1890, against Du Pont, a manufacturer of cellophane (a plastic wrapping material), on the basis that the company had monopolized the cellophane market.

⁴²¹ Stocking, G.W. & Mueller, W.F. "The cellophane case and the new competition" (1955). *The American Economic Review* 29-63.

⁴²² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.3.

⁴²³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.3.

⁴²⁴ Bishop, S. & Walker, M. *The Economics of EC Competition Law* (2002) 99.

⁴²⁵ *Nationwide Poles v Sasol Oil (Pty) Ltd* [2005] ZACT 17 para 51; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa & Another* [2007] ZACT 21 para 56- 59.

⁴²⁶ "Merger Guidelines Workbook" International Competition Network (2006) 15-31. [Accessed 10 January 2015]. Available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>.

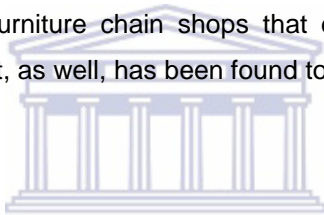
⁴²⁷ Whish, R. *Competition Law* [5th ed.] (2005) 33-34; Lexecon. *An introduction to quantitative techniques in competition Analysis* 1-44. Available online at http://ecp.crai.com/ecp/assets/quantitative_techniques.pdf [Accessed 10 January 2014].

⁴²⁸ Section 19(7) of India's Competition Act of 2002; *Distillers Corporation (SA) Ltd/ Stellenbosch Farmers Winery Group Ltd*, [2003] ZACT 36 para 38-44.

⁴²⁹ "Notice on the definition of the relevant market for the purposes of Community competition law" *European Commission Official Journal of the European Communities* (1997) C 372/05 para 8; Case 27/76 - *United Brands v Commission* para 10-11.

alternative sources of product and in which the antitrust defendant faces competition'.⁴³⁰ It is 'the area of effective competition in which the seller operates, and to which the purchaser can practicably turn to for supplies'.⁴³¹ It is both pragmatic and factual.⁴³² Its reach can be national, regional or international.⁴³³ The process of determining the geographical boundaries can prove to be a difficult task, and factors, such as transport costs, regulatory constraints, cross-border trade, import competition, strategic internal company documents, location or views solicited from industry experts will be taken into account.⁴³⁴ The process of identifying the relevant geographic market also utilises the hypothetical monopolist test to identify the relevant geographical region supplied by the firms under consideration.⁴³⁵ This process involves looking at whether the hypothetical monopolist exercises control over the geographic region, over which it would profitably inflate prices.⁴³⁶

In South Africa, the CAs often have to decide whether the relevant market is local, regional or national.⁴³⁷ A firm may operate in both the local and national market, for instance, the Tribunal has found that private hospitals that charge national prices, as negotiated with medical aid schemes, also compete locally for customers to utilise the services they offer.⁴³⁸ The geographic market of large furniture chain shops that develop their brands nationally, and operate in the localised market, as well, has been found to be national.⁴³⁹



⁴³⁰ *JD Group & Ellerines Holdings Ltd* 98/LM/Jul00 17.

⁴³¹ *United States v Philadelphia National Bank* 374 U.S. 321 (1963).

⁴³² *Brown Shoe Co. v United States* 370 U.S. 336-339 (1962).

⁴³³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.5.2.

⁴³⁴ *Boart Longyear & Huddy (Pty) Ltd/ Huddy Rock Tools (Pty) Ltd* 2004 [ZACT] 2; *South African Raisins (Pty) Ltd & Another & SAD Holdings Ltd & Another* [2000] ZACT 46; *Phodoclinics (Pty) Ltd & Others / Protector Group Medical Services (Pty) Ltd & Others* [2007] ZACT 17 para 37; in *Patensie Sitrus Beherend Beperk v Competition Commission* [2003] ZACAC 4, the geographic market was found to be the valley of the Gamtoos River, a river in the Eastern Cape Province of South Africa on the basis that transport costs to outside suppliers would increase transports costs by more than 12%.

See also section 19(6) of India Competition Act of 2002.

⁴³⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2.

⁴³⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 7.7.4.2.

⁴³⁷ In *JD Group Limited/ Ellerine Holdings Limited* [2000] ZACT 35 page 18, involving a merger in the retail furniture and appliances market, the Competition Tribunal ruled that because the parties set their price and trading conditions nationally, the geographic market in the sale of furniture on credit terms to consumers was national; in *Massmart Holdings Ltd/Moresport Ltd* [2006] ZACT 40 para 156-160, another merger case, the Competition Tribunal concluded that the relevant geographic market was national, on the basis that the parties to the merger both had a national pricing policy. However, the Tribunal was quick to point out that national pricing is not the deciding factor in deciding that the geographic market is national.

In *Tongaat-Hulett Group Ltd / Transvaal Suiker Bpk* [2000] ZACT 47 para 34, a large merger in the South African sugar industry, the Tribunal highlighted that an inquiry into the relevant market in the sugar industry "centers on the interplay between domestic producers and consumers of sugar, on the one hand, and the production and consumption of sugar in the rest of the world, on the other hand. In short, we are required to decide whether South African sugar production and consumption takes place within an international market or whether it is contained within the boundaries of a domestic market effectively isolated from the vagaries and consumption elsewhere, from, in other words, the vagaries of international trade. Are South African producers properly viewed as proverbial big fish in a small pond, or tiny minnows in a veritable ocean?"

⁴³⁸ *Phodoclinics (Pty) Ltd & Protector Group Medical Services (Pty) Ltd (in Liquidation)* 122/LM/Dec0 para 25- 30, 117.

⁴³⁹ *JD Group Limited/ Ellerine Holdings Limited* [2000] ZACT 35 page 17-18, 24; *Massmart Holdings Ltd & Moresport Ltd* 62/LM/Jul055 para 158-160.

To determine the reach of the geographic component of the relevant market, CAs would consider fluctuations in currency exchange rates, tariff and non-tariff barriers, economies of scale regarding logistical, transport and warehousing costs, regulatory restrictions,⁴⁴⁰ and import competition.⁴⁴¹ It bears mentioning that the existence of import competition does not necessarily mean that the geographic market is international because there are limitations on the extent to which imports can constrain national market conditions.⁴⁴² In addition, intermittent import competition does not suggest that the geographic market is international.⁴⁴³ Comparisons between local and international prices will be taken into account in deciding the international reach of the geographic market, as well as import statistics and trade flows into the country.⁴⁴⁴

3.2.3. The relevant market and horizontal restraints

Regarding horizontal restraints, the investigation of the relevant market is slightly different because of the nature of horizontal practices. In South Africa, section 4 to the Competition Act 89 of 1998, the principal provision that governs horizontal restrictive practices, prohibits agreements, or concerted practices, by firms “in a horizontal relationship”, which is deemed to be a relationship that exists between competitors.⁴⁴⁵ According to the Competition Tribunal, a horizontal relationship exists where the parties “are in the same line of businesses”.⁴⁴⁶ Although the Competition Act does not define the term “competitors”, the Competition Appeal Court has indicated that, “firms will be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitutable goods or services”.⁴⁴⁷ From these definitions, it would seem that the process of identifying the relevant market, when dealing with restrictive vertical practices, is obviated since the parties are competitors, meaning that they operate in the same market.

According to the Competition Tribunal, the geographic element of the relevant market is not necessary when deciding if the firms in question are competitors within the interpretation of the

⁴⁴⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.5.2.

⁴⁴¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.7.1.6.

In *Trident Steel (Pty) Ltd / Dorbyl Ltd* 89/LM/Oct00 para 30, import competition was considered in predicting the effect of a merger.

⁴⁴² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.7.1.6.

For example in *Tiger Brands Ltd/ Langerberg Food International Ashton Canning Co Pty Ltd* 46/LM/May05 para 47-53, where the Tribunal concluded that imports did not sufficiently constrain the national market. The factors considered by the Tribunal were that imports only accounted for 1%, that in comparison with the international market, the South African market was small and even then, the South African firm focused its efforts on exports, and finally, local firms had an advantage in terms of strong branding, which imports did not have.

⁴⁴³ *Trident Steel (Pty) Ltd / Dorbyl Ltd* 89/LM/Oct00 para 27; *Tiger Brands Ltd/ Langerberg Food International Ashton Canning Co Pty Ltd* 46/LM/May05 para 23.

⁴⁴⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 10.5.2.

See also, *Trident Steel (Pty) Ltd / Dorbyl Ltd* 89/LM/Oct00 para 30.

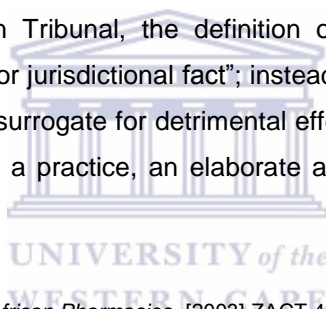
⁴⁴⁵ Section 1(xiii) of the Competition Act 89 of 1998.

⁴⁴⁶ *Competition Commission v United South African Pharmacies* [2003] ZACT 4 page 8.

⁴⁴⁷ *American Natural Soda Ash & Another v Competition Commission & Others* [2002] ZACAC 5 para 24.

Competition Act.⁴⁴⁸ While this may be true in some cases, this line of reasoning is not entirely correct because it misunderstands certain horizontal restraints, such as market allocation, and fails to take into account the existence of potential competitors, that is, firms that have the ability to be competitors, even though they might not necessarily be competitors at the time.⁴⁴⁹ Additionally, even if firms do not participate in the same geographic market, the prohibition on restrictive horizontal practices in section 4 ought still to apply, where the firms under investigation operate in the same product market.⁴⁵⁰ In *Venter v Law Society of the Cape of Good Hope*, the complainant alleged that a rule of a professional association, the Law Society of the Cape of Good Hope, contravened section 4. The complainant argued that the product market was the legal services market for Road Accident Fund claims and the geographic market was regional, because the rule was binding on all attorneys practising in the Western Cape region.⁴⁵¹ Although it may be clear that, for the majority of cases, the parties are competitors; at times, it may not be so clear-cut. In the latter circumstances, the issue of the relevant market will be contested.⁴⁵² In such a situation, the relevant product market must be examined even more closely, to determine if the firms are actually competitors.⁴⁵³

According to the Competition Tribunal, the definition of the relevant market must not be elevated “to the status of a prior jurisdictional fact”; instead, the process of defining the relevant market must be viewed as a “surrogate for detrimental effects”.⁴⁵⁴ Therefore, if a firm can show the anti-competitive effects of a practice, an elaborate analysis of the relevant market is not



⁴⁴⁸ *Competition Commission v United South African Pharmacies* [2003] ZACT 4 page 8, according to the Tribunal, ‘Neither the language of the Act nor the logic of how the section works requires that there be allegations that the respondents operate in the same geographical market in order to be considered competitors. Take for instance, the prohibition on dividing markets by allocating territories, set out in section 4(1)(b) such a practice could never be instituted against those who divided markets before they were in one another’s markets. By definition, having divided territories, they are not in the same geographic market...’

⁴⁴⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.3.

⁴⁵⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.3.

⁴⁵¹ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 9- 10, para 62-63, the rule in question, the ‘no-touting’ rule, prevented practicing attorneys from entering into agreements, arrangements, or scheme of operations aimed at securing work for an attorney, solicited by an unqualified person, and/ or that an unqualified person would receive payment for professional work, unless such an unqualified person is in the full time employ of the attorney. The rule essentially prevented members from entering into agreements, or arrangements, aimed at soliciting legal work through an unqualified person. The complainant alleged that the effect of the rule was that attorneys were precluded from making use of the most efficient form of soliciting. The complainant also argued that the impact of the rule was that it prevented an attorney from utilising efficient solicitation from individuals, who were deemed unqualified. Consequently, the prohibition meant that attorneys could not compete with one another. Therefore, the argument went, the Rule contravened either section 4(1)(a) or section 4(1)(b) or both. Before the Tribunal, the first issue to be determined was whether the ‘no-touting rule’ was subject to section 4(1) and then, if the finding was in the affirmative, to decide whether it was governed by the rule of reason or the *per se* illegal rule, under section 4(1)(a) and section 4(1)(b), respectively.

For a discussion on how the Tribunal dealt with the application of section 4(1)(a) and section 4(1)(b) in *Venter*, see sections 3.3.1 – 3.3.2 in this Chapter.

⁴⁵² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.3.

⁴⁵³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.3.

⁴⁵⁴ *Competition Commission v United South African Pharmacies* [2003] ZACT 4 page 7.

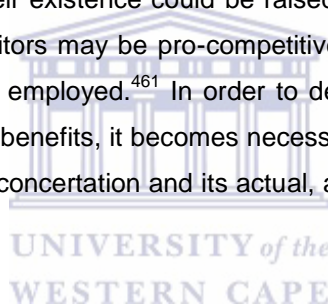
On these points the Tribunal relied United States authorities such as *FTC v Indiana Federation Dentists* 476 U.S 447, 1986 at 460, where the Court rules that ‘since the purpose of the inquiries into market definition ... is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as the reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental...’

required.⁴⁵⁵ The Tribunal had previously reached a similar conclusion, albeit in the context of restrictive vertical practices.⁴⁵⁶

3.3. The Basic Rules that govern Horizontal Restraints

Generally, all horizontal restraints that do not have any efficiency gains are prohibited. However, there is a general distinction between horizontal restraints that are evaluated in terms of the *per se* illegal rule and those governed by the rule of reason. The latter allows for a consideration of the effects and justifications connected to them, while the former does not.⁴⁵⁷ Both these principles have their origins in the United States' antitrust law jurisprudence.⁴⁵⁸ The *per se* illegal prohibition is reserved for naked restraints, in the form of price fixing, market divisions, collusive tendering, and, to a certain extent, the vertical practice of minimum resale price maintenance.⁴⁵⁹

In the United States, it was decided that specific horizontal restraints, such as price fixing, were to be regarded *per se* illegal, because experience revealed that they had significant anti-competitive consequences, without any redeeming features.⁴⁶⁰ Practices falling in this category were *per se* prohibited and no justification for their existence could be raised. Additionally, it was realised that, at times, concertations among competitors may be pro-competitive and, therefore, require that a more reasoned and fuller examination be employed.⁴⁶¹ In order to decide whether the concertation could reasonably produce pro-competitive benefits, it becomes necessary that the specific circumstances of the firms involved, the nature of the concertation and its actual, as well as probable consequences be considered.⁴⁶²



⁴⁵⁵ *Competition Commission v United South African Pharmacies* [2003] ZACT 4 page 7.

⁴⁵⁶ *Natal Wholesalers Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd & Others* 98/IR/Dec00 para 57 where the Tribunal ruled that 'we do not share the respondent's view that a formal market definition is a necessary precursor to an enquiry into an alleged restrictive practice. We concur with the claimant that the purpose of defining a relevant market is to identify the exercise of market power defined in the Act as 'the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers' and that market definition is only a tool for estimating market power, not a scientific test.'

⁴⁵⁷ *Nationwide Poles v Sasol (Oil)Pty Ltd* [2005] ZACT 17 para 94-96

⁴⁵⁸ In *National Society of Professional Engineers v United States* 435 US 679 (1978) 692, the Court ruled that '[t]here are ...two...categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality – they are illegal 'per se'. In the second category are agreements whose competitive effect can only be evaluated by analysing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.'

⁴⁵⁹ See preceding discussion of the *per se* illegal rule under 3.3.1 of this Chapter.

⁴⁶⁰ For example, *United States v Topco Associates Inc* 405 US 596 (1972) 607-608; *National Society of Professional Engineers v United States* 435 US 679 (1978) 692; *Arizona v Maricopa County Medical Society* 457 US 332 (1982) 344; *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984) 100-102; *Broadcast Music Inc v Columbia Broadcasting System* 441 US 1 (1979) 2; *State Oil Co v Kahn* 522 US 3 (1997).

⁴⁶¹ For example, *Board of Trade of City of Chicago v United States* 246 US 231 (1918).

⁴⁶² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing Hovenkamp, H. *Federal Antitrust Policy* (1999) 251-251, 238 where he points out that in such circumstances the "true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

Without expressly using the phrases “rule of reason” or “*per se* illegal rule”, the Competition Act 89 of 1998 codifies the rule of reason and the *per se* illegal rule.⁴⁶³ South African competition case law has also adopted this terminology.⁴⁶⁴ On these issues, foreign law and jurisprudence, such as that of America, has proved both valuable and informative, as well as instructive, when it comes to the interpretation and application of the competition law of South Africa (as in other parts of the global South). However, the Competition Appeal Court has rightly cautioned against uncritical adoption of United States’ terminology and concepts.⁴⁶⁵

This is certainly correct in light of the unique position of the Competition Act of 1998, which must be distinguished from the American position under the Sherman Act of 1890. In the United States, the Sherman Act of 1890 is couched in broad language and “leaves much to the imagination of the courts”.⁴⁶⁶ Section 1 of the Sherman Act simply stipulates that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.” Section 1, therefore, does not make mention of the two rules, expressly. However, notwithstanding the general terms of section 1 of the Sherman Act (or maybe even because of section 1’s general language), the United States law on horizontal restraints recognises that certain conduct must be *per se* prohibited and others, judged in terms of the rule of reason.⁴⁶⁷ This means that the categories of practices, judged according to the *per se* illegal rule, are those, which have been arrived at by courts on a case-by-case basis over time, because they are, by nature, anti-competitive and have no pro-competitive benefits.⁴⁶⁸ Therefore, in the United States, the process of determining which practices are evaluated under the *per se* illegal rule, has been a “judge led”, or “court led” process, as it is through decided case law that judges decide which restrictive horizontal practices are deemed *per se* prohibited.

However, in South Africa, section 4 of the Competition Act 89 of 1998 is phrased differently. While not expressly using the rule of reason, or the *per se* illegal terminology, the South African legislature has

⁴⁶³ *Competition Commission v Patensie Sitrus Beherend Beperk; Bezuidenhout & Another v Patensie Sitrus Beherend Beperk* [2002] ZACT 18 para 34-35.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6.

⁴⁶⁴ See for example, *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 27,33, 47, 148; *Competition Commission v RSC Ekusasa Mining (Pty) Ltd* [2012] ZACT 82 para 143; *Competition Commission v South African Breweries Ltd & Others* [2015] ZACAC 1 para 31; *American Natural Soda Ash Corporation & Another v Competition Commission* 2005 (6) SA 158 SCA para 37.

⁴⁶⁵ In *Netstar (Pty) Ltd & Another v Competition Commission & Another* 97/CAC/May10 [2011]ZACA 1 para 29 relying on Sutherland P & Kemp K *Competition Law of South Africa* (2014) 2.1, 2.4, the Competition Appeal Court warned that ‘there are dangers in the uncritical adoption of the American terminology of a “rule of reason” approach to describe the scope of section 4(1)(a). Unlike the Sherman Act...which is “widely for formulated and it leaves much to the imagination of the courts”, the South African statute is precise in describing what constitutes a horizontal or vertical restrictive practice. If each case is examined in the light of the statutory requirements, there is less prospect of falling into error.

⁴⁶⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 2.4.

⁴⁶⁷ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 72.

⁴⁶⁸ For example, Easterbrook, F.H. “Is there a ratchet in antitrust law?” 60 *Texas Law Review* (1982) 705-717; *United States v Topco Associates Inc* 405 US. 596 (1972) 607-608; *National Society of Professional Engineers v United States* 435 US 679 (1978) 692; *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979) 2; *Arizona v Maricopa County Medical Society* 457 US 332 (1982) 344; *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984); *State Oil Co v Kahn* 522 US 3 (1997).

made a statutory distinction between the categories of horizontal agreements that are governed by each of these principles. Section 4(1)(a) of the Competition Act applies to horizontal restraints whose anti-competitive effects are weighed against any pro-competitive gains that may result from the practice. In contrast, section 4(1)(b) specifically enumerates those categories of practices for which a firm may not raise pro-competitive, or other efficiency enhancing benefits. These are price fixing, market divisions, and collusive tendering.⁴⁶⁹ These are regarded as *per se* illegal and there can be no weighing of their anti-competitive consequences against any pro-competitive gains that participating firms may raise. Because of the clarity of the statute, at least in identifying the practices that are deemed *per se* illegal, the CAs, as well as courts interpret and apply the provisions of the Competition Act in a manner that is in keeping with the intention of the legislature. Sutherland and Kemp make the argument that the *per se* illegal categorisation certainly has value, as it eliminates unnecessary use of resources to embark on a rule of reason examination concerning practices that are patently restrictive and for which no justification can be raised.⁴⁷⁰ However, they quickly stress that such rigid categorisation is unhelpful, especially considering that the origin of the *per se* illegal principle in the United States was developed by courts, overtime, with the benefit of experience and hindsight, which showed that certain practices were restrictive and did not have pro-competitive gains.⁴⁷¹ This signified that, over time, the types of practices categorised *per se* illegal changed⁴⁷² and it was not (and still is not) possible to make a “clean-cut” distinction between *per se* illegal practices and those judged according to the rule of reason, because some practices fall somewhere between these two principles.⁴⁷³ Even in the United States, courts have been moving away from a literal approach to the *per se* illegal rule.⁴⁷⁴ They have also been cautious of applying the *per se* illegal prohibition to practices that are unfamiliar to competition law analyses.⁴⁷⁵ In order to avoid the pitfalls of applying the *per se* illegal rule to pro-competitive conduct, they have developed a “quick-look” rule of reason.⁴⁷⁶ At times, a closer examination of market conditions has been undertaken in deciding whether a practice should be judged *per se* illegal, or evaluated according to the rule of reason.⁴⁷⁷

⁴⁶⁹ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 73.

⁴⁷⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6.

⁴⁷¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6.

See also *Venter v Law Society of the Cape of Good Hope & Others* [2013] ZACT 103 para 73.

⁴⁷² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing cases from the United States' Supreme Court, such as, *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979) 2.

⁴⁷³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing Hovenkamp, H. “Competitor collaboration after California Dental Association”. *University of Chicago Legal Forum* (2000) 149, 150, who argues that “[i]n between these two extremes lies a range of conduct and structural possibilities that may require something more than *per se* disposal, but something less than a full blown rule-of-reason inquiry.”

⁴⁷⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979) 8-9.

⁴⁷⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979); Shulman, M.R. “The quick look rule of reason: Retreat from binary antitrust analysis”. *Sedona Conference Journal* (2001) 94.

⁴⁷⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing *NCAA v Board of Regents of the University of Oklahoma* 468 US 85 (1984); *National Society of Professional Engineers v United States* 435 US 679 (1978) 692.

See also 3.3.2 in this Chapter for a further discussion of the “quick look” approach.

⁴⁷⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing *California Dental Association v Federal Trade Commission* 119 S Ct 1604 (1999) 692 1618.

The result, therefore, is that there is no longer a clean cut distinction between conduct judged *per se* illegal, or reevaluated under the rule of reason.⁴⁷⁸

3.3.1. The *per se* illegal prohibition

Where a restraint falls into the *per se* illegal category, a court is not required to consider any pro-competitive benefits that a firm might raise, because of the practice.⁴⁷⁹ Restraints evaluated under the *per se* illegal principle, are illegal without having to prove that the parties have market power,⁴⁸⁰ or that the restraint has anti-competitive consequences (the anti-competitive effect is presumed due to the nature of the restraint),⁴⁸¹ or that there can be any pro-competitive benefits that may arise from the practice.⁴⁸² Alternatively stated, the existence of such a practice is enough to violate competition law because, by its very nature, it lacks any redeeming virtue. The value of the *per se* illegal principle is that it not only creates certainty and clarity as to the types of practices that are illegal, but the principle also saves time and resources by eliminating the need for protracted investigations.⁴⁸³

In South Africa, the *per se* illegal prohibition is reserved for naked restraints, that is, cartel practices.⁴⁸⁴ Section 4 of the Competition Act 89 of 1998, prohibits agreements between firms, or concerted practices by firms, or a decision by an association of firms, if it is between parties in a horizontal relationship.⁴⁸⁵ In addition, if such agreement, concerted practices, or decision by an association of firms involves⁴⁸⁶ direct or indirect fixing of the purchase or selling price, or

⁴⁷⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6, citing *California Dental Association v Federal Trade Commission* 119 S Ct 1604 (1999) 692 1618.

⁴⁷⁹ *State Oil Co v Khan* 522 U.S. 3, 10 (1997), *per se* illegal agreements as those “have such predictable and pernicious anti-competitive effect, and such limited potential for pro-competitive benefit”.

⁴⁸⁰ *Federal Trade Commission v Superior Court Trial Lawyers Association* 493 US 411 (1990) 435.

⁴⁸¹ But in *Competition Commission v USA Citrus Alliance* 67/CR/Jul05, it appears the consideration of anti-competitive consequences was deemed necessary for purposes of establishing jurisdiction.

⁴⁸² *Competition Commission v RSC Ekusasa Mining (Pty) Ltd* 65/CR/Sep09 para 144.

⁴⁸³ *Northern Pacific Co v United States* 356 U.S. 1, 5 (1958), “there are certain agreements or practices which because of their pernicious effect on competition and lack any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”.

⁴⁸⁴ But in *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others*, 08/CR/Mar01 para 158, the Competition Tribunal held that minimum resale price maintenance (a vertical restraint) constitutes a “species of price fixing”, such that it must be judged in terms of the *per se* illegal principle, meaning that pro-competitive defences cannot be raised. But in para 173, the Tribunal cautioned that, even though resale price maintenance is regarded as a species of price fixing, it ought to not be equated with hard-core price fixing, market allocation or collusive tendering.

See also the Competition Appeal Court’s ruling in *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission* 33/CAC/Sep03.

See, for example, Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 6.6 argue that “there is no reason why all vertical restrictions should not be judged according to the rule of reason. No type of vertical restriction is so irredeemable that it can be regarded as *per se* void as soon as some basic requirements are met. Accordingly, the *per se* prohibition of minimum resale price maintenance in South Africa is not justifiable.”

See also, Mdluli SK “Minimum Resale Price Maintenance in South Africa: Rule of Reason or Per se Prohibition?” (unpublished LLM thesis, University of the Western Cape) (2016).

⁴⁸⁵ Section 4(1).

⁴⁸⁶ Section 4(1)(b).

any other trading condition,⁴⁸⁷ dividing markets through the allocation of customers, suppliers, geographic territories or specific types of goods or services,⁴⁸⁸ or collusive tendering,⁴⁸⁹ it is also prohibited by the Act. Once it has been proved that any of these practices enumerated in section 4(1)(b)(i)-(iii) has occurred, there is no avenue by which the firms involved can seek to argue any pro-competitive gains or efficiencies attached, in order to redeem the restrictive practice. In *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa and Others*, the Competition Tribunal stated that:

“...those who set themselves the task of impugning agreements thus described in section 4 (1)(b) do not have to establish any deleterious impact on competition. All that has to be established is the existence of any agreement embodying the features detailed in section 4(1) (b) ... Quite plainly the Act requires no showing other than that the agreement in question conforms to the content specified in section 4(1) (b) ...”⁴⁹⁰

In *Competition Commission v Pioneer Foods*, the Competition Tribunal held that price fixing agreements and market allocation agreements are the most egregious violations of the Competition Act and are rightly deemed *per se* illegal. There is, therefore, no need to show any anti-competitive effects thereof and no grounds of justification can be raised in defence of cartels.⁴⁹¹

According to South Africa's Supreme Court of Appeal in *American Natural Soda Ash Corporation & Another v Competition Commission & Others*, if a practice is found to fall under section 4(1)(b), there can be no further inquiry as to whether the conduct is justified, and evidence to that end is neither relevant nor admissible.⁴⁹² However, an important question that must be answered, when faced with section 4(1)(b) violations, is whether the *per se* illegal practice, such as, price fixing, has in fact occurred. This process is referred to as “characterisation”⁴⁹³ in the United States, during which it is established whether the conduct complained about, properly fits the description of the conduct described in section 4(1)(b).⁴⁹⁴ According to the Supreme Court in *American Natural Soda Ash Corporation*, care has to be exercised, not to conflate two separate issues; a) could evidence be tendered to show whether

⁴⁸⁷ Section 4(1)(b)(i).

⁴⁸⁸ Section 4(1)(b)(ii).

⁴⁸⁹ Section 4(1)(b)(iii).

⁴⁹⁰ [2008] ZACT 64 para 17.

⁴⁹¹ 15/CR/Feb07, 50/CR para 31, 33, 35.

Para 148-149, “hard core cartels, as contemplated in section 4(1)(b) of the Act are *per se* offences. There is no need for the Commission to show any anti-competitive effects and there is no justification grounds available to respondents. So egregious an offence is this, that harm to competition and harm to consumers is presumed by its mere existence. Moreover the extent of loss suffered or damage caused is presumed to be extensive.”

⁴⁹² *American Natural Soda Ash Corporation & Another v Competition Commission & Others* 2005 (6) SA 158 SCA para 37

According to the Supreme Court, “it is clear that the juxtaposition with section 4(1)(a) that section 4(1)(b) is aimed at imposing a ‘per se’ prohibition: one, in other words, in which the efficiency defence expressly contemplated in sub-para (a) cannot be raised. The reason for the blunt terms of sub-para (b) is plain. Price fixing is inimical to economic competition, and has no place in a sound economy...The fact that price-fixing has occurred is by itself sufficient to brand incapable of redemption.”

⁴⁹³ *American Natural Soda Ash Corporation & Another v Competition Commission & Others* 2005 (6) SA 158 SCA para 39.

⁴⁹⁴ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 72.

a section 4(1)(b) conduct had occurred; and b) could evidence be tendered to show efficiency gains for section 4(1)(b) violations.⁴⁹⁵ An inquiry, therefore, into whether efficiency gains could be raised for *per se* illegal violations, before determining whether indeed conduct falling within the purview of section 4(1)(b) has actually occurred, is premature.⁴⁹⁶ Only once the conduct has been characterised, for example, as price fixing, market division or collusive tendering, can any evidence relating to pro-competitive gains be excluded. Alternatively stated, care must be taken not to put the proverbial cart before the horse.⁴⁹⁷

In terms of section 10 of the Competition Act of 1998, *per se* illegal agreements may be rescued through exemption. Section 10 provides a “lifeline” in the way of exemptions for prohibited practices. The Competition Commission will grant such an exemption *only* (emphasis added) if the prohibited practice contributes to improving exports, advancing the competitiveness of SMEs or those owned by historically individuals, preventing the deterioration of an industry or the prohibited practice was implemented for purposes of economic stability.⁴⁹⁸

The EU does not make use of the *per se* illegal rule. Instead, Article 101(1) of the TFEU prohibits agreements, decisions by associations of firms and concerted practices, which may affect trade between Member States and have as their *object* or *effect* the restriction of competition within the Common Market (emphasis added). Article 101(1) specifically mentions direct or indirect fixing of prices or trading conditions, output restrictions, sharing of markets or sources of supply. According to EU courts and the Commission, these specified practices are regarded as having their *object*, the restriction of competition as stipulated in Article 101(1) of the TFEU; therefore, it is not necessary to prove that they have the effect of doing so.⁴⁹⁹ Which suggests that it is helpful to think of the Article 101(1) position, in terms of two “boxes”; “box 1” is the “*object* box”, which applies to agreements that have as their *object* the restriction of competition; and “box 2” is the “*effect* box”, which applies to agreements that have as their

⁴⁹⁵ Para 39- 40.

⁴⁹⁶ Para 41- 55.

According to *Broadcast Music Inc., v Columbia Broadcasting System Inc.* 441 U.S. 1, 9 (1978) “when two partners set the price of their goods or services they are literally ‘price-fixing’, but they are not *per se* in violation of the Sherman Act. It is necessary to characterise the challenged conduct as falling within or without that category of behaviour to which we apply the label ‘*per se* price fixing’. That will often, but not always, be a simple matter”.

⁴⁹⁷ See 7.6.1.3 in Chapter 7 for further discussion of the Supreme Court’s decision in the ANSAC case.

⁴⁹⁸ Section 10 (3)(b) (i)- (iv).

Section 10(4)-(9) outlines the procedure for the granting, refusal and revocation of exemptions.

⁴⁹⁹ Whish, R. *Competition Law* [5th ed.] (2005) 110- 112, 469.

EU Community courts and the Commission have consistently affirmed this. For example, in *TACA* [1999] 4 CMLR 1415 para 381, the Commission stated that “[t]here is no need to wait to observe the concrete effects of an agreement once it appears that it has the object the prevention, restriction or distortion of competition.”

Other cases in which this has been affirmed include: Cases T-25/95 *Cimenteries CBR SA v Commission* para 837, 1531, and 2589; Case T-202/98 *Tate & Lyle v Commission* para 72-74; *VdS v Commission* Case 45/ para 39.

effect the restriction of competition.⁵⁰⁰ An analysis of the impact of the agreement on the Common Market is necessary, even when dealing with an agreement that is regarded as having its *object*, the restriction of competition.⁵⁰¹ This means that, where an agreement has been categorised as having its *object*, the restriction of competition, the parties to the agreement, for instance a price fixing agreement, cannot argue that the fixing of prices does not constrain competition.⁵⁰² However, the parties have the avenue of arguing that, from a quantitative perspective, their agreement does not appreciably affect competition, or trade between Member States, as they lack the market power to appreciably affect Community competition, or trade.⁵⁰³ According to Whish, while “boxing” appear to be a simple proposition, it is not so, as two requirements, in terms of Article 101(1), must be fulfilled, namely that the agreement or practice must *appreciably* restrict competition and it must have an *appreciable effect on trade* between Member States.⁵⁰⁴ This is not the same as saying that the agreement under investigation, such as price fixing, does not restrict competition, which argument cannot be made in the first place, regarding horizontal restraints.⁵⁰⁵

Community Courts have indicated that the “*object box*’ is reserved for certain, particularly pernicious, types of agreements prohibited by Article 101(1), which are clearly inimical to the objectives of the Community.⁵⁰⁶ Horizontal agreements that fall into the “*object box*” are agreements to fix prices, to share markets, and to limit output.⁵⁰⁷ Therefore, in terms of Article 101, all agreements, or practices that have, as their object, the restriction, or distortion of competition in the Common Market, namely, price fixing, output restriction, and market allocation, are prohibited and regarded as a violation of Community competition law and

⁵⁰⁰ Whish, R. *Competition Law* [5th ed.] (2005) 112.

⁵⁰¹ Whish, R. *Competition Law* [5th ed.] (2005) 110.

⁵⁰² Whish, R. *Competition Law* [5th ed.] (2005) 111, parties to a price fixing agreement cannot argue that the agreement does not restrict competition because “the law had decided, as a matter of policy, that [price fixing] does; given that generically, price fixing is considered to have as its object the restriction of competition.”

⁵⁰³ Whish, R. *Competition Law* [5th ed.] (2005) 111.

⁵⁰⁴ Whish, R. *Competition Law* [5th ed.] (2005) 110.

⁵⁰⁵ Whish, R. *Competition Law* [5th ed.] (2005) 111.

⁵⁰⁶ Whish, R. *Competition Law* [5th ed.] (2005) 112.

However, such agreements can be permitted, if they fulfil the exemption criteria in Article 101(3). See 3.3.2 of this Chapter.

⁵⁰⁷ Whish, R. *Competition Law* [5th ed.] (2005) 113-114.

Whish also includes other horizontal agreements in the “*object box*”, namely agreements to limit sales, to exchange price information and agreements for collective exclusive dealing. He also includes vertical agreements in the “*object box*”, namely, agreements to fix minimum prices and agreements to impose export bans.

Whish, however, concedes that this “*boxing*’ may, at times, be an over simplification of EU competition law. He cites case law examples where a violation falling in the “*object box*” was evaluated under the “*effect box*”. For example, in *Erauw-Jacquery Sprl v La Hesbignonne Societe Cooperative* Case 27/87, where the ECJ concluded that an export ban, in the context of a specific type of agreement, did not have, as its object, the restriction of competition. Therefore, Whish argues, the ‘*boxing*’ may require refinement by Community Courts to exclude from the “*object box*” some agreements that are not so obviously restrictive of competition. Whish also stresses that this refinement and re-categorisation process is natural, is to be expected, and is similar to the position in the United States, where courts are, from time to time, called upon to decide whether an agreement should be judged *per se* illegal, or under the rule of reason. The refinement process, therefore, does not in any way call into question the basic underlying ‘*object or effect*’ distinction under Article 101(1).

automatically void, without having to determine what their effects are on competition.⁵⁰⁸ The word “object” does not mean the subjective intention of the parties, when entering into the agreement; instead, it means the objective meaning and purpose of the agreement, when evaluated in light of the economic context in which it is to be applied.⁵⁰⁹ In *Competition Authority v Beef Industry Development Society and Barry Brothers*, the European Court of Justice (ECJ) concluded that, ‘there is no need to take account of its actual effects once it appears that its object is to prevent, or distort competition within the Common Market’.⁵¹⁰ According to *European Night Services v Commission*, agreements “containing obvious restrictions of competition, such as price fixing, market allocation or the control of outlets” are agreements that have as their object, the restriction of competition.⁵¹¹ The *Consumer Detergents* case, involved a price fixing cartel, in which the firms restricted their promotional activities, and exchanged sensitive information on prices and trading conditions, thereby facilitating their price fixing collusion.⁵¹² The Commission took the view that it was unnecessary to consider the actual effects of an agreement, where its objective is the prevention, restriction or distortion of competition in the Common Market.⁵¹³

Whish concedes that the EU’s distinction between the “*object*” and “*effect*” restraints bears similarities with the United States’ *per se* illegal principle and the rule of reason analysis.⁵¹⁴ However, there is one major difference between the two jurisdictions. There is no equivalent of this in the United States.⁵¹⁵ In the EU, even if an agreement has as its *object*, the restriction of competition, and therefore, violates Article 101(1) *per se*, parties can still argue for exemptions. If the criteria set out in Article 101(3) are satisfied, namely, that the agreement contributes to improved production or distribution of goods, promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit, it could be exempted. In addition, the agreement should not impose restrictions that are unwarranted to the realisation of these objectives, on the firms in question, or afford the firms in question, the possibility of eliminating competition of a substantial part of the products in question. While Article 101(3) is available to agreements with *objects* to restrict competition, the Commission has regularly declined to grant exemptions to price fixing agreements because these cartels fall into “the category of manifest infringements under Article [101(1)], which is almost always impossible to exempt under Article [101(3)] because of the total lack of benefit to the consumer”.⁵¹⁶ A similar stance can be found

⁵⁰⁸ Article 4(c) of the Commission Regulation No.1218/2010 on the Application of Article 101(3) of the Treaty for the Functioning of the European Union to Certain Categories of Specialisation Agreements.

⁵⁰⁹ Cases T-374/94.

⁵¹⁰ Case C-209/07 para 16.

⁵¹¹ Whish, R. *Competition Law* [5th ed.] (2005) 110.

⁵¹² Case COMP/39579 *Consumer Detergents*.

⁵¹³ Para 44.

⁵¹⁴ Whish, R. *Competition Law* [5th ed.] (2005) 112.

⁵¹⁵ Whish R *Competition Law* 5th ed (2005) 112-113.

⁵¹⁶ Whish, R. *Competition Law* [5th ed.] (2005) 476, citing the Commission 10th Report on Competition Policy para 115.

in the Commission Regulations on specialisation agreements, as well as research and development agreements, which both provide that block exemption will not be extended to agreements that contain obvious restrictions on competition, for example, price fixing, output restriction, as well as market and customer allocation.⁵¹⁷ Whish argues that, as a matter of principle and law, there is nothing preventing parties to an agreement, for example, price fixing, from arguing that the elements of Article 101(3) are satisfied, even though it is unlikely that they will succeed.⁵¹⁸ That being said, there have been exceptional circumstances where the Commission has permitted agreements, which could restrict price competition.⁵¹⁹ Whish points out that these cases dealt with the limitation of price competition in the services, not in the goods sector.⁵²⁰

3.3.2. The rule of reason prohibition

The rule of reason allows a firm the opportunity to show that a prohibited practice brings with it pro-competitive benefits.⁵²¹ The effect of the rule of reason is that restraints, which substantially prevent or lessen competition in a market, may still be declared legal, if it can be shown that they result in pro-competitive benefits that outweigh their anti-competitive effects.⁵²² In *Continental TV Inc v GTE Sylvania*, the United States Supreme Court defined the rule of reason as a principle that proceeds on a case-by-case basis, where “the fact finder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition”.⁵²³ This involves balancing the pro-competitive benefits and the anti-competitive effect to see which one outweighs the other.

The rule of reason applies to all other restraints, namely, horizontal restraints,⁵²⁴ vertical restraints (with the exception of minimum resale price maintenance),⁵²⁵ and certain abuses of

⁵¹⁷ Article 5 of Regulation 2658/2000 on Specialisation Agreements; and Article 5 of Regulation 2659/2000 on Research and Development Agreements.

⁵¹⁸ For example, in *Uniform Eurocheques* IV/30.717, the Commission granted individual exemption to an agreement where the parties fixed the commissions for cashing Eurocheques on the basis that it would allow consumers, using such cheques, to know that they would be charged a uniform amount throughout the Common Market; in *Reims II* OJ L275, 1999, p17, [2000] 4 CMLR 704, the Commission granted individual exemption to an agreement between major postal operators in the Common Market on the basis that this would improve efficiency; in *Visa International- Multilateral Interchange Fee* OJ L318, 2002, p17, [2003] 4 CMLR, the Commission, pointing out that not all agreements concerning prices would be classified as a cartel and therefore inherently non-exemptible, granted individual exemption to a multilateral interchange fee agreed upon between ‘acquiring’ and ‘issuing’ banks within the Visa system; in *AuA/LH* OJ [2002] L 242/25, [2002] 4 CMLR 487 the Commission granted individual exemption between Austrian Airlines and Lufthansa on the basis that it would result in important synergistic effects and attractive connections for consumers, it would also result in cost savings, improved network connection, better planning of frequencies, a higher load factor, improved organisation of sales system and ground handling services, potential for new sales channels such as e-ticketing and access, on Austrian Airlines’ part, to a more superior and sophisticated air miles scheme; in *IFPI ‘Simulcasting’* OJ [2003] 107/58, the Commission granted individual exemption to a scheme that would result in pro-competitive benefits and contributed to technical and economic progress in the field of collective management of copyright and neighboring rights.

⁵¹⁹ Whish, R. *Competition Law* [5th ed.] (2005) 476.

⁵²⁰ Whish, R. *Competition Law* [5th ed.] (2005) 476-477.

⁵²¹ *Chicago Board of Trade v United States*, 246 U.S. 231, 238 (1918); *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

⁵²² Section 4 (1)(a) of the Competition Act 89 of 1998.

⁵²³ 433 U.S. 36, 49 (1977).

⁵²⁴ Section 4(1)(a) of the Competition Act 89 of 1998.

dominance.⁵²⁶ Section 4(1)(a) of the Competition Act 89 of 1998 encapsulates the rule of reason regarding horizontal restraints. An agreement between, or concerted action by, competing firms, or a decision by an association of such firms, is prohibited if it has the effect of substantially preventing, or lessening, competition in a market. However, an exemption is possible if a party to the agreement, concerted action, or decision can show that it results in any technological, efficiency or other pro-competitive benefits that outweigh the anti-competitive effect.⁵²⁷ The South African rule of reason has two components; the agreement, decision of an association of firms, or concerted practice must prevent or lessen competition; and a party to any of such concertation must be unable to prove the existence of any technology, efficiency or other pro-competitive gains that may outweighs the anti-competitive effects thereof.⁵²⁸

In *Venter v Law Society of the Cape of Good Hope*, the Competition Tribunal gave an exposition of the rule of reason.⁵²⁹ Citing decisions from the United States, the Tribunal indicated that restraints analysed under the rule of reason are those “whose competitive effects can only be evaluated by analysing the facts particular to the business, the history and the reason why it was imposed”.⁵³⁰ In attempts to avoid prolonged inquiries into the effect of a practice and bog down the analysis, the application of the rule of reason has become nuanced, over the years.⁵³¹ Instead of a “full-blown” analysis of the evidence, American courts have gradually come to prefer the so-called “quick look” approach, which eschews elaborate industry analyses, in favour of an intermediate enquiry that demonstrates the anti-competitive nature of the restraint.⁵³² Although arguments have been made that, the “quick look” approach creates a third test in evaluating horizontal restraints, its values lie in the fact that it shifts the evidential onus. For instance, if a “quick look” shows that the restraint is anti-competitive, the burden may then shift to the respondent firm to rebut the conclusion, where it is *prima facie* evident or prior experience of that restraint, or economic theory shows its anti-competitive effect.⁵³³ Where it is not patently or intuitively obvious that the restraint has an anti-competitive effect, and there is no previous experience that such a restraint would obviously have an anti-competitive effect,

⁵²⁵ Section 5(1) of the Competition Act 89 of 1998.

⁵²⁶ Section 8(c)-(d)(i) – (v) of the Competition Act 89 of 1998.

⁵²⁷ Section 4 (1) (a) the Competition Act 89 of 1998.

It bears mentioning that, in terms of section 4(5), the prohibition in section 4(1) does not apply to agreements or concerted practices engaged in by a company, its wholly owned subsidiary (as envisaged by section 1(5) of the Companies Act of 1973), a wholly owned subsidiary of that subsidiary, any combination of them, or the constituent firms in a single economic entity. It bears mentioning that the Companies Act of 1973 has since been repealed by the Companies Act of 2008. Under the current Companies Act, provisions on subsidiary companies can be found in section 3.

⁵²⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.6.

⁵²⁹ 24/CR/Mar12.

⁵³⁰ Para 74, citing *National Society of Professional Engineers* (1978) 435 U.S. 679 at 692.

⁵³¹ Para 74.

⁵³² Para 76.

⁵³³ Para 76-77, the Tribunal was quick to caution that the shifting of the burden should not be equated to the second leg of the rule of reason, which explores the justification that the respondent firm may raise in defence of a section 4(1)(a) restraint.

the 'quick look' approach will not be utilised.⁵³⁴ In these circumstances, the restraint will be considered, based on a full-blown rule of reason analysis, by examining the evidence presented by the complainant.⁵³⁵ If a complainant fails to tender evidence to allow for the rule of reason analysis, the complainant will be regarded as having failed to make out a case under section 4(1)(a) of the Competition Act, regarding the anti-competitive effect of the restraint.⁵³⁶

The nature of the rule of reason means that it cannot be applied to cartels, which by their nature lack pro-competitive gains. In *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa & Others*, the Competition Appeal Court distinguished between the *per se* illegal rule and the rule of reason in this way:

"Section 4(1)(a) and 4(1)(b) are distinguishable from one another by the requirement contained in the former to undertake the assessment of the balance between the anti- and pro-competitive consequences of the agreement. By arguing that section 4(1)(b) allows an efficiency defence-which implies a requirement to show the anti-competitive consequences without which there would be nothing against which to balance the pro-competitive gain- [is] effectively arguing for obliterating the distinction between the two sections in the Act. Section 4(1)(b) unambiguously purports to prohibit, without recourse to further investigation, three categories of horizontal agreements. All other species of horizontal agreement only fall to be prohibited on a showing ...that the agreement in question lessens or prevents competition and, then, only provide that the parties to the agreement cannot produce evidence of pro-competitive gains outweigh the demonstrated diminution of competition."⁵³⁷

Granted, the distinction made in statutory provisions between practices that are *per se* illegal and those that must be judged according to the rule of reason has its advantages. However, in practice, the distinction between the two categories is not always clear-cut.⁵³⁸ Even in circumstances where a horizontal restrictive practice 'literally' amounts to price fixing, an efficiency defence could be raised, if present.⁵³⁹ It would seem as if the rule of reason applies in all cases, the only difference being *when* it is applied. In some cases, the rule is applied earlier than it is with others. Therefore, with these seemingly contradicting viewpoints, perhaps the solution lies in distinguishing between horizontal concertations among firms that are in a

⁵³⁴ *Venter v Law Society of the Cape of Good Hope* 24/Mar12 para 84.

⁵³⁵ *Venter v Law Society of the Cape of Good Hope* 24/Mar12 para 85-90, upon employing the rule of reason, the Tribunal was dissatisfied with the evidence given by the complainant. For instance, the complainant's expert witness did not have any particular knowledge of the legal services industry, was not an economist in the true sense, could not make any definitive statement as to the effect that the 'no touting' rule might have, and was even frank enough to admit that he could not understand exactly what was meant by it. The expert witness did highlight, however, that smaller firms, such as the complainant's sole-proprietorship, needed to focus their marketing, as they relied on a direct marketing relationship with their customers. In essence, the evidence, tendered before the Tribunal, went no further than stating how some firms that provided Road Accident Fund claims, may be foreclosed because of the "no-touting" rule. Even if this were so, there was no evidence at all of its impact.

⁵³⁶ Para 91-93, 95-96, there was no evidence as to how many forms might be affected, why they did not have other alternatives for low cost marketing that did not violate the 'no-touting' rule, how so-called touts were rewarded and whether this cost was passed on to the consumer or absorbed by the practitioner, whether firms employing touts are more cost effective than firms who did not, and most importantly whether the foreclosure of this channel has an effect on their fees in the manner alleged by the complainant. Thus, without evidence or even a *prima facie* case for the respondents to rebut, the complainant had failed to make out his case under section 4(1)(a). Thus, the Tribunal could not make a finding that the "no-touting" rule violated the Competition Act.

⁵³⁷ [2002] ZACAC 5 para 28.

⁵³⁸ See earlier discussion on this point under 3.3 in this Chapter.

⁵³⁹ *NCAA v Board of Regents of the University of Oklahoma* 468 U.S. 85, 104 (1984).

productive business relationship and those firms that are unrelated.⁵⁴⁰ With the former, their coordinated activities, which result in efficiency gains that outweigh their anti-competitive effects, may justify the application of the rule of reason, while the latter must be judged according to the *per se* illegal principle.⁵⁴¹

Co-ordinated activities or collaborative arrangements among competitors, sometimes referred to as joint ventures in other jurisdictions, require special attention, as they involve distinct economic entities that co-ordinate their activities on research, production, purchasing, marketing promotion, and distribution.⁵⁴² Collaborative arrangements allow competitors to take advantage of economies of scale to produce improved and affordable products, reduce information or transaction costs, and promote investment. However, they provide the opportunity for anti-competitive conduct, for example, the participating firms may charge supra competitive prices, and also collude in other areas, as they will no longer be able to act independently, thereby eliminating competition.⁵⁴³

In order to address these problems, CAs must consider the important question of whether the collaborative arrangement will exercise market power, by studying market concentration.⁵⁴⁴ CAs have to be wary of co-operation arrangements that promote exclusivity among participants, to the exclusion of other competitors, where the independence of the participants is eliminated, where there are significant monetary interests that eliminate competition among the participants, and where joint decisions are taken, for example, the setting of prices. In addition, they also have to be wary of the arrangements where the exchange of information is

⁵⁴⁰ Elhaage, E. & Geradin, D. *Global Competition Law and Economics* [2nd ed.] (2011) 75-76.

⁵⁴¹ Elhaage, E. & Geradin, D. *Global Competition Law and Economics* [2nd ed.] (2011) 75-76.

⁵⁴² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2010) 5.8.1, citing Hovenkamp, H. *Federal Antitrust Policy* (1999) 197.

In South Africa, the Competition Commission has distinguished joint ventures (in the context of mergers) from collaborative arrangements. With joint ventures, the parties need not be competitors. With collaborative arrangements, they are concluded between actual or potential competitors, and the practices are neither cartels nor mergers. Joint ventures result in the creation of a new and separate business entity under the joint control of independent parent firms. Alternatively stated, a joint venture is a separate business enterprise, over which two or more independent firms exercise joint control and is created for a specific purpose. Like collaborative arrangements, joint ventures may be distinguished into various types, according to their purpose, for example, research and development, production, distribution, purchasing, advertising, or promotion and networking. However, in practice, it is often difficult to draw a clear distinction between mergers and collaboration arrangements, which, in turn, makes it difficult to determine whether one is dealing with a merger or a restrictive practice. To solve this difficulty, the Commission has indicated that the distinguishing feature between the two is that restrictive practices influence the competitive conduct of firms, by lessening or eliminating competition, but the firms remain independent. On the other hand, a joint venture brings about a lasting change in the structure of the merging firms, resulting in the firms surrendering their economic independence. Therefore, the Commission has taken the view that the Act's merger provisions must be applied to joint venture transactions, depending on the threshold. However, the Commission has also indicated that not all joint venture transactions will constitute a merger, as this will depend on how they are structured. A joint venture that does not result in a change of control or anti-competitive conduct will not necessarily invoke the provisions of the Act. Since the Competition Act's merger provisions are concerned with change of control, it is only those joint ventures that result in a change of control and meet the merger threshold that must be notified. Alternatively, a joint venture that does not result in a change of control may be analysed under Chapter 2 of the Act, which deals with prohibited practices, namely horizontal and vertical restraints, as well as abuse of dominance.

See Competition Commission "Issue 3- Practice Note on the Application of Merger Provisions of the Competition Act 89 of 1998 to Joint Ventures". Available online at <http://www.compcom.co.za/practice-notes/> [Accessed 11 December 2016].

⁵⁴³ Sutherland, P. & Kemp K *Competition Law in South Africa* (2014) 5.8.1.

⁵⁴⁴ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.8.1, citing Hovenkamp, H. *Federal Antitrust Policy* (1999) 197.

not accompanied by safeguards, to ensure that sensitive information is not shared, and the duration of the joint venture, as longer ventures tend to have an impact on competition, compared to joint ventures with a shorter or limited time span.⁵⁴⁵

In *Competition Commission v Uitenhage & Despatch Independent Practitioners Association*, the Tribunal held that collaboration arrangements in the healthcare provision sector that limited the independence of its participants, were in violation of section 4(1)(a) of the Competition Act.⁵⁴⁶

The EU does not subscribe to the rule of reason. As previously stated, Article 101(1) prohibits agreements, decisions by associations of firms and concerted practices that may affect trade between Member States and have, as their *object* or *effect*, the restriction of competition in the Common Market.⁵⁴⁷ In all other cases, the lawfulness of an agreement under Article 101(1), falls under the “*effect* box” and must be judged according to its anti-competitive effects, which process takes into account a wide-ranging analysis of the market in question,⁵⁴⁸ as per the “*object*” and “*effect*” boxes postulated by Whish.⁵⁴⁹ This is not the same as the rule of reason, which weighs the pro and anti-competitive effects of the agreement, practice, and decision by an association of firms or concerted action. Instead, this process involves demonstrating that the conduct under investigation would have a restrictive effect on competition. Alternatively stated, there must be an extensive analysis of an agreement in its market context, in order to determine its effects. This means taking into account the actual conditions of the market, in which the firms operate, the products or services covered by the agreement, and the economic context, in which the firms conduct their business endeavours.⁵⁵⁰ The contextual analysis considers factors, such as the relevant product and geographic markets, the existence of barriers to entry that may prevent new entrants, or whether the agreement has a foreclosure effect.⁵⁵¹ Because of this analysis, Community Courts have ruled that restrictive agreements or contractual restrictions are not necessarily anti-competitive,⁵⁵² depending on their nature and

⁵⁴⁵ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.8.1, citing Hovenkamp, H. *Federal Antitrust Policy* (1999) 197.

⁵⁴⁶ 58/CR/Aug02.

⁵⁴⁷ See 3.3 in this Chapter.

⁵⁴⁸ Whish, R. *Competition Law* [5th ed.] (2005) 112.

See also 3.3.1 in this Chapter.

⁵⁴⁹ See 3.3 in this Chapter.

⁵⁵⁰ *European Night Services v Commission* Cases T-374/94 para 136.

In *Brasserie de Haecht v Wilkin* Case 23/67 page 415, the ECJ highlighted that “it would be pointless to consider an agreement, decision or practice by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate, and could only be examined apart from the body of effects, whether cogent or not, surrounding their implementation. Thus in order to examine whether it is caught by Article [101(1)] an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition. The existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade.”

⁵⁵¹ *Delimitis v Henninger Brau AG* Case C-234/89 para 13-14, 16-18, 19-27.

⁵⁵² Whish, R. *Competition Law* [5th ed.] (2005) 117.

the prevailing circumstances.⁵⁵³ For example, a restriction may be necessary to enable parties to the agreement, to achieve a legitimate commercial goal, such as the penetration of a new market, or the sale of a business.⁵⁵⁴ In such cases, the restriction in the agreement will not be found in violation of Article 101(1).

In the EU, there have been calls by some to incorporate the rule of reason.⁵⁵⁵ Those who oppose this proposal, rightly indicate that EU competition law is different, in many ways, from the United States' antitrust law, not least among these is the divide in Article 101(1) and Article 101(3), which has no equivalent in the Sherman Act.⁵⁵⁶ In addition, EU competition law is directed at promoting and maintaining a Common Market, which is not the case for the United States.⁵⁵⁷ Community Courts and the Commission have indicated that, even though, in most cases, it is necessary to demonstrate that an agreement will have an anti-competitive effect, this should not be taken as motivation that the United States' rule of reason, in the manner it is applied in the United States, should then be incorporated in EU competition law.⁵⁵⁸ In *Metropole Television v Commission*, the Court of First Instance explicitly dismissed the contention that Article 101(1) embodies the rule of reason.⁵⁵⁹ Opponents of the incorporation of the rule of reason in EU law, assert that the weighing of the pro-competitive and anti-competitive effects of the agreements is performed, when deciding if the agreements satisfy the Article 101(3) criteria, and not as part of the rule of reason.⁵⁶⁰ While, at times, Community Courts have been flexible in interpreting Article 101(1), this should not be construed as them having adopted the rule of reason.⁵⁶¹ Instead, this is an indication that Community Courts should not engage in abstract analyses, when faced with restrictive practices, but rather in full market analyses.⁵⁶²

3.4. The Prohibition of Cartels in Competition Law

Competitors have long since realised that there is strength in joining forces, instead of competing against each other. By forming a cartel, firms can control an entire market, or a significant portion

⁵⁵³ Whish, R. *Competition Law* [5th ed.] (2005) 117-118.

⁵⁵⁴ Whish, R. *Competition Law* [5th ed.] (2005) 117-118.

⁵⁵⁵ Whish, R. *Competition Law* [5th ed.] (2005) 124.

⁵⁵⁶ Whish, R. *Competition Law* [5th ed.] (2005) 124-125.

⁵⁵⁷ Whish, R. *Competition Law* [5th ed.] (2005) 124-125.

⁵⁵⁸ Whish, R. *Competition Law* [5th ed.] (2005) 125.

⁵⁵⁹ Case T-112/99 para 72, where the Court pointed out that "[a]ccording to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article [101(1)] of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that Article. It should, however, be observed, first of all, that contrary to the applicant's assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgements to the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition is doubtful."

⁵⁶⁰ Para 74.

⁵⁶¹ Para 76.

⁵⁶² Para 74.

thereof, through price fixing, dividing the market, or collusive bidding, while maximising profits for cartel participants.⁵⁶³ Consequently, more than any other business practices, competition law is concerned with horizontal agreements, as through them, firms are able to collude and co-ordinate their business activities, and behave as a monopolist would.⁵⁶⁴

As a species of horizontal restraints,⁵⁶⁵ cartels are particularly pernicious because, unlike other combinations, such as mergers, collaborative arrangements, joint ventures and some types of vertical agreements that hold the promise of increasing a firm's efficiency and allowing it to compete proficiently in a market, cartels cannot claim the same. Cartels are rightly regarded as the most objectionable types of anti-competitive practices. South Africa's Competition Tribunal has equated cartels to a "cancer to competition and harmful to consumers and economic development", therefore, "fighting cartels is one of the most important areas of activity of any competition authority, and, of all restraints on competition, cartels contradict most radically the principle of a market economy based on competition".⁵⁶⁶

Firms will readily collude if the cost of forming and maintaining the cartel is relatively lower than the envisaged gains.⁵⁶⁷ Similarly, cartels tend to flourish in markets where price increases are unlikely to result in increased competition from firms that are not cartel members.⁵⁶⁸ Market structures also contribute to the formation of cartels, as certain market conditions provide the perfect atmosphere for the proliferation of cartels, for example, highly concentrated markets.⁵⁶⁹ Barriers to entry similarly create an atmosphere for the formation of cartels.⁵⁷⁰ The size of the 'fringe' will also determine the success of a cartel. The 'fringe', is a term that refers to firms that are not large enough to be part of the cartel, but provide a substantial portion of the market's production.⁵⁷¹ As a result, where the "fringe" is small, the atmosphere may be ripe for the formation of a cartel. The opposite is also true. If the "fringe" is substantial, then a cartel is unlikely to succeed, because the "fringe" holds a substantial portion of the production, which means it will have the ability to affect prices.

⁵⁶³ Spar, L.D. "Of co-operation, competition and cartels" In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 2.

⁵⁶⁴ *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752 (1984) 768-769.

⁵⁶⁵ See para 1.5 in Chapter 1.

⁵⁶⁶ *Competition Commission v Pioneer Foods* [2010] ZACT 9 para 31.

⁵⁶⁷ "Study of cartel laws in select jurisdictions - Lessons for the Competition Commission of India". Consumer Unity and Trust Society (2008) 15.

⁵⁶⁸ "Study of cartel laws in select jurisdictions - Lessons for the Competition Commission of India". Consumer Unity and Trust Society (2008) 15.

⁵⁶⁹ Spar, L.D. "Of co-operation, competition and cartels" In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 4; Connor, J.M. "What can we learn from the ADM global price conspiracies". *Purdue University Staff Paper* 98-14 (1998) 19.

⁵⁷⁰ Verified Complaint, *United States v SGL Carbon Aktiengesellschaft Civil Action No. 03-52*. Available online at <http://www.justice.gov/atr/cases/f200900/200935.html> [Accessed 10 November 2013]; Spar, L.D. "Of co-operation, competition and cartels". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 5.

⁵⁷¹ Spar, L.D. "Of co-operation, competition and cartels". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 5.

At the turn of the 21st century, the OECD published studies indicating that cartels were not being taken as seriously as they ought to be.⁵⁷² Harding identifies another issue that influences how CAs deal with cartels; it is the question of deciding whether enforcement actions regarding cartels are simply economic, or whether there are contributory political issues.⁵⁷³

3.5. Domestic Statutory Provisions prohibiting Restrictive Horizontal Practices and Cartels: A case study of Section 4 of the Competition Act 89 of 1998

When exploring the prohibitions on restrictive horizontal practices, in general, and cartels, in particular, the starting point is always to consult the statutory provisions. Recall that, cartels are regarded as *per se* illegal under the Competition Act 89 of 1998.⁵⁷⁴ In terms of section 4(1)(b), an agreement, or concerted practice, or decision by an association of firms, is prohibited, if it is between parties that are in a horizontal business relationship and it involves direct or indirect price fixing (or any other trading conditions); or division of markets by allocating customers, suppliers, territories, or specific types of goods or services; or collusive tendering.⁵⁷⁵ This is the *per se* prohibition of cartel practices.⁵⁷⁶

All other horizontal agreements, concerted practices, and decisions of an association of firms not *per se* prohibited, are judged under the rule of reason.⁵⁷⁷ Therefore, all horizontal restraints not falling under the *per se* prohibition are only a violation of the Competition Act, if they have the effect of substantially preventing or lessening competition and unless a party to the restraint can show any technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effects thereof.⁵⁷⁸ As already noted, in terms of section 4, the contravention is that the horizontal restraint must take the form of an agreement, a concerted practice or a decision by an association of firms.⁵⁷⁹

3.5.1. An 'agreement'

Regarding horizontal restraints, such as cartels, the term 'agreement' means more than simply "the state of sharing the same opinion".⁵⁸⁰ The term includes a contract, an arrangement or an understanding, whether or not it is legally enforceable, and need not be put down in writing.⁵⁸¹

⁵⁷² *Report on hard-core cartels*. Organisation for Economic Co-operation and Development (2000) 20.

⁵⁷³ Harding, C. "The anti-cartel enforcement industry: Criminological perspectives on cartel criminalization". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 360, citing Amato, G. *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997) 3.

⁵⁷⁴ See 3.3.1 in this Chapter.

⁵⁷⁵ See 3.3.1 in this Chapter.

⁵⁷⁶ See 3.3.1 in this Chapter.

⁵⁷⁷ See 3.3.2 in this Chapter.

⁵⁷⁸ Section 4(1)(a) of the Competition Act of 1998. See also 3.3.2 of this Chapter.

⁵⁷⁹ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 26.

⁵⁸⁰ *Little Oxford Dictionary* (2006).

⁵⁸¹ For example, section 2(b)(i)- (ii) India Competition Act of 2002; section 2 of Tanzania Fair Competition Act of 2003; Article 19(2) of COMESA Competition Regulations of 2004; section 2 of EAC Competition Act of 2006; section 1(1)(ii) of South Africa Competition Act of 1998; section 2 of Seychelles Fair Competition Act of 2009

An agreement must be unambiguous, in terms of what the parties have set out to do, although it is not required that all issues must have been formalised, or firmly agreed upon. Where the purported agreement is an “inchoate, loose and fragmented” arrangement, it will not suffice.⁵⁸² There must be “a conscious commitment to a common scheme designed to achieve an unlawful objective”.⁵⁸³ Ultimately, an agreement naturally requires that there be concurrence between, at the very least, two parties, which amounts to a faithful expression to carry out the *prohibited practices*.⁵⁸⁴ According to *Netstar (Pty) Ltd & Others v Competition Commission & Another*, an agreement can be a contract between parties, as evidenced by a meeting of the minds, that is, consensus ad idem, in that the parties to the contract are clear about the rights accruing to them and obligations expected from them.⁵⁸⁵

An agreement will also exist if there is an “arrangement” or “understanding” among members of the cartel.⁵⁸⁶ This is aimed at ensuring that all the conceivable ways, through which firms collude, are captured in the prohibition of cartels. If not, firms would simply frame their collusion in a manner that does not amount to a legally enforceable contract.⁵⁸⁷ Again, this is a proper way of framing the issue, because if the agreement is required to be enforceable, then firms would escape liability, as cartels are prohibited and, therefore, unenforceable in the first place.⁵⁸⁸ Recall that in the EU, agreements or practices, whose objective is to restrain competition in the Common Market, are automatically void.

However, in South Africa, the position is unique, in the sense that agreements prohibited by the Competition Act, are not automatically void. They are only void or unenforceable upon a declaration from either the Competition Tribunal or the Competition Appeal Court to that effect.⁵⁸⁹ Therefore, such declarations from the Tribunal or the Appeal Court are essential.

The existence of an agreement between competitors does not require that there be evidence of daily coordination, or even attendance at every meeting⁵⁹⁰, as firms may also try to cloak their cartel agreements in various ways. For example, sometimes, through what appears to be

⁵⁸² Case T-9/99 *HFB Holdings & Others v Commission* para 196.

⁵⁸³ *Monsanto Co., v Spray-Rite Servs. Corp.*, 465 U.S. 752, 768 (1984).

⁵⁸⁴ Case T-41/96 *Bayer AG v Commission*; Case C-338/00 *Volkswagen AG v Commission* para 63-65; *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp LJ 152 MRTPC para 24.2.

⁵⁸⁵ [2011] ZACAC 1 para 24-25; Christie RH *The Law of Contract in South Africa* 6 ed (2011) 23 -26.

⁵⁸⁶ *In Re British Basic Slag Ltd's Agreement* [1963] 2ALL ER 807, 814; Case- T41/96 *Bayer AG v Commission of the European Communities*; *Top Performance Motors Ltd v Ira Berk Queensland (Pty) Ltd* (1975) ATPR 40-004

⁵⁸⁷ Section 30(4) of Swaziland Competition Act of 2007; section 2 of Botswana Competition Act of 2009

⁵⁸⁸ *SA Metal & Machine Co Ltd v Cape Town Iron & Steel World (Pty) Ltd & Others* 1997 (1) SA 319 (A); Christie RH *The Law of Contract in South Africa* 6 ed (2011) 375-391.

⁵⁸⁹ Section 65(1) of the Competition Act 89 of 1998.

⁵⁹⁰ *Competition Commission v Pioneer Foods* [2010] ZACT 9 para 34.

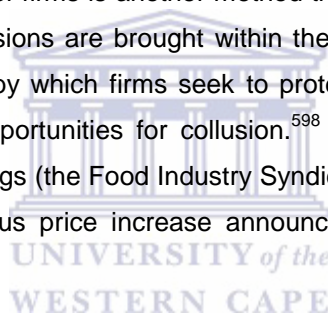
innocuous, innocent acceptable commercial practices.⁵⁹¹ Therefore, CAs have to be penetrative, in order to determine the exact intention and purpose of such a practice.

In *Chemifarma v Commission (Quinine)*, a “gentlemen’s agreement” was judged as sufficient to support an Article 101 violation.⁵⁹² An oral agreement, which existed over a long period of time, notwithstanding the fact that it was not legally binding, and that not all firms had participated in all aspects of the cartel, satisfied the requirement of “agreement”.⁵⁹³ An informal verbal agreement has the same status as a formal, written agreement.⁵⁹⁴

The joint expression by enterprises to conduct themselves in a particular manner in the relevant market qualifies as an “agreement”, for example, the common intention among firms setting prices and sales targets.⁵⁹⁵ Being a passive participant at a meeting, in which an agreement was concluded, and the failure by a firm to oppose the agreement, has been held to result in antitrust liability.⁵⁹⁶

3.5.2. “Decisions by associations of firms”

A decision by an association of firms is another method that can be used by firms to engage in cartel practices.⁵⁹⁷ Such decisions are brought within the ambit of the prohibition because an association is a mechanism by which firms seek to protect their mutual interests and, at the same time, provide many opportunities for collusion.⁵⁹⁸ In Brazil, a bread price-fixing cartel used trade association meetings (the Food Industry Syndicate of Brasilia) as a cover to discuss cartel terms, and simultaneous price increase announcements. The implementation by the



⁵⁹¹ *Competition Commission v Pioneer Foods* [2010] ZACT 9 para 32-34.

⁵⁹² Case 41/ 69.

⁵⁹³ Case T-7/89 *SA Hercules Chemicals NV v Commission*; Case C-51/92 *Hercules Chemicals NV v Commission*.

⁵⁹⁴ Case T-7/89 *SA Hercules Chemicals NV v Commission*; Case C-51/92 *Hercules Chemicals NV v Commission*.

⁵⁹⁵ Case T-9/89 *Huls AG v Commission*; Case T-11/89 *Shell International Chemical Company Ltd v Commission*; Case T-56/02 *Bayerische Hypo- und Vereinsbank AG v Commission*.

⁵⁹⁶ *Competition Commission v Aveng (Africa) Ltd, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, BRC Mesh Reinforcing (Pty) Ltd* Case No: 84/CR/DEC09 para 92, 195-199; Case C-199/92 *Huls v Commission*; Case C- 113/04 *Technische Unie BV v Commission*; and Cases C-403/ 04 & 405/04 *Sumitomo Metal Industries Ltd & Nippon Steel Corp v Commission*.

⁵⁹⁷ For example, *Competition Commission v Astral Operations Ltd* 015891, a consent order granted by the Tribunal revealed how the South African Poultry Association and its members (poultry farmers) had not only engaged in cartel practices, in the form of price fixing and market allocation, but had also entered into exclusive supply agreements and typing; *Competition Commission v Dorper Sheep Breeders Society of South Africa* [2013] ZACT 82 dealt with the association’s Rules, which restricted members of the Society to conduct private sales of dorper sheep only within the province or region in which that member resides, or that member’s farm was situated. In terms of the specific rule under investigation, members of the Society were required to request permission from the Society before they could conduct private sales of dorper sheep outside the province or region in which they resided, or their farms were located. Upon investigation, the Competition Commission concluded that this amounted to market allocation, as prohibited by section 4(1)(b)(ii) of the Competition Act; in *Competition Commission v Southern African Bitument Association, In re: Chevron SA (Pty) Ltd & Others* [2011] ZACT 61 the respondent firms, operating through the Association, engaged in price fixing, by agreeing to a mechanism to calculate the wholesale list selling price, and developing, as well as implementing the bitumen price adjustment factor with regards to the sale of base bitumen and bituminous products; *Competition Commission v Senwes Ltd* [2013] ZACT 34 involved the exclusionary conduct of a former co-operative, now public company, of differential pricing, which prevented competing grain traders from expanding in the downstream market for grain trading;

⁵⁹⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

individual firms was also declared illegal.⁵⁹⁹ “Decisions” by associations of firms can occur in various forms. For example, non-binding recommendations on prices by an association,⁶⁰⁰ setting dealer margins,⁶⁰¹ benchmark tariffs for healthcare services by an association,⁶⁰² recommendations by an association⁶⁰³ (as long as members are bound to comply with the recommendation), provisions in the constitution of an association,⁶⁰⁴ and an agreement by an association of firms, have been held to qualify as decisions.⁶⁰⁵ In the United States, while regard is given to the policy considerations that underpin restraints on competition that might exist in professional rules, courts have, nonetheless, ruled that professional rules are not immunised from consideration under the antitrust laws.⁶⁰⁶

Firms that join associations usually submit themselves to the authority of these associations and, in most instances, firms, consequently, view themselves as being bound by the rules promulgated by the association, with the result that the decisions taken by these associations are akin to agreements between firms, or even concerted practices among the firms.⁶⁰⁷ Therefore, because trade associations can be used as a vehicle for firms to engage in cartel practices, they must be viewed carefully.⁶⁰⁸ Firms cannot rely on an association, in the hope of escaping the prohibition of cartels, by trying to argue that the decisions were taken by the association.⁶⁰⁹ Although the association may not be classified as a firm, as required under

⁵⁹⁹ Administrative Process No. 08012.004039/2001-68. *Defendants: Panificadora e Confeitaria Eulálio – ME, Panificadora da Paz, Panificadora e Lanchonete Shallom, Panificadora Pão de Sal, Panificadora Pão de Ouro, Panificadora Lua da Serra Ltda, Pão d'Itália, Panificadora Serranê Delícias do Trigo, Panificadora Pão da Casa, Panificadora de Itália, Panificadora Martins, Pão Nosso, Panificadora e Merceria Belo Pão, Panificadora e Confeitaria Candanga Ltda – ME, Panificadora São Francisco, Panificadora Pão Francês, Panificadora Pão da Casa, Panificadora e Confeitaria São Conrado.*

⁶⁰⁰ Case 8/ 72- *Vereeniging van Cementhandelare v Commission* para 19.

⁶⁰¹ *Competition Commission v Appointed Dealers of Subaru Represented by the Subaru Dealers Council Ltd* [2005] ZACT 97.

⁶⁰² *Competition Commission v Board of Healthcare Funders of Southern Africa* 07/CR/Feb05; *Competition Commission v Hospital Association of South Africa* 24/CR/Apr04; *Competition Commission v South African Medical Association* 23/CR/Apr04.

⁶⁰³ *Competition Commission v Institute of Estate Agents of South Africa* 09/CR/Nov04; *Competition Commission v the USA Citrus Alliance* 06/CR/Jul05

⁶⁰⁴ In *Venter v Law Society of the Cape of Good Hope* [2013] ZACT 103, the Tribunal, relying on European competition law, stated that “[t]he concept of a decision includes the rules of the association in question, decisions binding upon the members and recommendations, and in fact anything which accurately reflects the association’s desire to coordinate its members’ conduct in accordance with its statutes. Agreements implemented within the framework of the association concerned may be analysed either as ‘decisions’ of that association or ‘agreements’ between members.”

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2 assert that the above statements by the Competition Tribunal should not be taken to mean that there should be an agreement before there can be a decision by an association of firms. Instead, what the Tribunal meant was that in certain circumstances there could be both an agreement and a decision by an association of firms.

⁶⁰⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶⁰⁶ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 35, citing *Fox EM Cases and Materials on U.S. Antitrust in global Context* 3rd ed 76, 110 and *Goldfarb v Virginia State Bar* [1975] USSC 159, 412 US 773 (1975).

⁶⁰⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶⁰⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

See also 6.5 in Chapter 6.

⁶⁰⁹ *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.

competition law, its decisions will be viewed as those of a firm, although the agreements it concludes with firms will not be viewed as agreements between firms.⁶¹⁰ Sutherland & Kemp suggest that firms that are members of an association may very well find themselves liable for competition law violations, because of competition law infringements by the association.⁶¹¹

While the Competition Act does not define the phrase 'association of firms', some have suggested that sectoral associations will be included, as will the governing bodies of professions,⁶¹² state institutions entrusted with regulating specific industries, and national bodies with public law status.⁶¹³ Sutherland & Kemp highlight that an 'association of firms' means more than a voluntary association in the strict legal sense.⁶¹⁴ The fact that the association is not formally constituted and has no legal personality does not absolve cartel participants from competition law liability.⁶¹⁵ The association need not be for-profit,⁶¹⁶ nor does it have to carry out economic or commercial activity.⁶¹⁷

In *Venter v Law Society Cape of Good Hope & Others*, the complainant argued that a rule by the respondent, the Cape of Good Hope Law Society, (an association of legal practitioners), constituted a decision of an association and, therefore, subject to section 4 of the Competition Act.⁶¹⁸ In response, the respondents argued that the rules of a law society, made pursuant to legislation enacted by parliament to govern the legal profession (the Attorneys Act 53 of 1979), do not amount to a decision of an association of firms, as they were of a public regulatory nature.⁶¹⁹ The Tribunal was not persuaded by this line of argument. According to the Tribunal, the fact that the rules are made by a regulatory authority does not exclude, or place them

⁶¹⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶¹¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2, indicate that, at times, it is unclear from the Tribunal's decisions whether it is the association or the firms, who were held liable for the administrative penalty, for example, *Competition Commission v Hospital Association of South Africa* 24/CR/Apr04.

⁶¹² It must be noted that Schedule 1 of the Competition Act makes provision for the exemption of professional rules.

⁶¹³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶¹⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶¹⁵ Case 395/ 96 - *Compagnie Maritime Belge v Commission* para 32.

⁶¹⁶ *Competition Commission v Board of Healthcare Funders of Southern Africa* 07/CR/Feb05.

⁶¹⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.2.

⁶¹⁸ 24/CR/Mar12 para 27.

See 3.2.3 in this Chapter on the discussion of the rule in the *Venter* case.

⁶¹⁹ 24/CR/Mar12 para 28-29, the respondents' argument was based on several grounds. First, that the Rules were not decisions, as they had been made pursuant to a statutory mandate, and that since a law society is given regulatory powers over its members by an Act of Parliament and this conferred on its rules a public character that rendered them something akin to regulation, not decisions of an industry association. Section 58(a) of the Attorneys Act 53 of 1979 empowers the Law Society to "regulate the exercise of the profession" and more specifically, in terms of section 74 of the Attorneys Act, the Law Society is empowered to make rules as to, among other things, "conduct which on the part of any practitioners...shall constitute unprofessional or dishonourable or unworthy conduct". The respondent further argued that their claim that the public nature of the rules was enhanced by the fact that the Attorneys Act required that the Rule under examination "...shall be made with the approval of the Chief Justice of South Africa, and if the Chief Justice is of the opinion that the interests of justice of the public would be adversely affected by the provisions of any such rule, with the approval of the State President." Therefore, since the Chief Justice is neither a competitor, nor a member of the association of firms, his approval of the rules, without which they would lack legal effect, transforms what may have been a decision of an association of firms, to rules approved by a judicial officer charged with protecting the public interest.

beyond the purview of the Competition Act.⁶²⁰ According to the Tribunal, the two notions, public regulation and a decision of an association of firms are not mutually exclusive.⁶²¹ In addition, contrary to the arguments by the respondents, the Competition Act intended that public regulation, as envisaged by the Attorneys Act, be subject to competition law principles.⁶²² Section 4(1) was directed at avoiding possible anti-competitive agreements coming into operation between competitors under the guise of professional associations.⁶²³ Since, section (4)1's reference to a decision by an association of firms, mirrors the language of Article 101(1) of the TFEU, the Tribunal, while cautioning against indiscriminate reliance on foreign law, relied on European competition law, and ruled that professional rules were contemplated in the meaning of decision of associations of firms.⁶²⁴ Additionally, a decision does not acquire immunity because it is subsequently approved by a public authority and a trade association does not fall outside of the prohibition of horizontal restraints, as it is given statutory functions. The public law status of a national body, such as a lawyers' association, does not preclude the application of the prohibition of horizontal restraints.⁶²⁵

3.5.3. "Concerted practices"

It is not a requirement that all forms of collusion must present themselves in the form of an agreement or a decision by an association of firms.⁶²⁶ Therefore, where the practice under investigation does not qualify as an agreement or a decision by an association of firms, it may qualify as a "concerted practice".⁶²⁷

The Competition Act of 1998 makes a distinction between agreements and concerted practices. The latter are "cooperative, or co-ordinated conduct between firms, achieved through direct or indirect contact that replaces their independent action, but which does not amount to an

⁶²⁰ 24/CR/Mar12 para 35.

In fact, section 3(1A)(a) of the Competition Act, stipulates that where an industry, or sector thereof, is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated by the Competition Act, the Act must be construed as establishing concurrent jurisdiction in respect of that conduct. In addition, the Competition Act provides that the Commission may negotiate agreements with regulatory authorities on how such concurrent jurisdiction is implemented.

⁶²¹ 24/CR/Mar12 para 35.

⁶²² 24/CR/Mar12 para 36-45, 53-60.

⁶²³ 24/CR/Mar12 para 57 citing Which R & Bailey D *Competition Law* 7th ed (2012) 110-11, who assert that it is precisely because professional rules are made binding on all their members, who typically in a profession are numerous, that they constitute a most effective mechanism for effecting collusive arrangements.

⁶²⁴ 24/CR/Mar12 para 49-52, the Tribunal pointed out that "the concept of a 'decision' includes the rules of the association in question, decisions binding upon the members and recommendation, and, in fact, anything which accurately reflects the association's desire to coordinate its members' conduct in accordance with its statutes. Agreements implemented within the framework of the association concerned may be analysed either as 'decisions' of that association or 'agreements' between the members", citing Roth, P. [ed.]. *Bellamy and Child-European Community Law of Competition* [5th ed.] (2012) para 2-032.

⁶²⁵ 24/CR/Mar12 para 58.

⁶²⁶ *United States v General Motors Corp.*, 383 U.S. 127, 142- 143 (1996).

⁶²⁷ Section 1 of Namibia Competition Act of 2003; section 2 of Botswana Competition Act of 2009; section 2 of Seychelles Fair Competition Act of 2009; Article 1, Article 16(2) of COMESA Competition Regulations of 2004; section 2 of EAC Competition Act of 2006.

agreement”.⁶²⁸ Therefore, from the definition alone, the two modes of collusion are mutually exclusive.⁶²⁹ It is submitted that while this distinction is important, it should not be given undue emphasis because, whether a violation is contained in an “agreement”, or presents itself as a “concerted practice”, liability will still arise, regardless. The only difference is that a much more cautious approach is necessary when dealing with concerted practices.

Regarding the definition of concerted practices, as defined in the Competition Act of 1998, many lessons can be learnt from the EU, where the phrase originated.⁶³⁰ It seems that “concerted practices” were included in Article 101 in order to circumvent the possibility of undertakings evading the application of the Article 101 prohibition.⁶³¹ The same reasoning has been applied to section 4 of South Africa’s Competition Act.⁶³² The *Dyestuff* case was the first case before the European Court of Justice (ECJ), which specifically dealt with the meaning of “concerted practices”.⁶³³ While the firms sought to argue that the prices were because of the oligopolistic nature of the market, the Commission relied on their concerted practices to infer that the undertakings under investigation had engaged in price fixing. In supporting the Commission’s decision, the ECJ clarified that:

“Article 101 (ex Article 85) draws a distinction between the concept of ‘concerted practice’ and that of ‘agreements between undertakings’ or ‘of decisions by associations of undertakings’; the object is to bring within the prohibition of that Article, a form of coordination between undertakings, which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitute practical co-operation between them for the risks of competition’. By its very nature then, a ‘concerted practice’ does not have all the elements of a contract but may *inter alia* arise out of coordination, which becomes apparent from the behaviour of the participants. Although parallel behaviour may not, by itself, be identified with ‘concerted practice’, it may, however, amount to strong evidence of such practice, if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilise prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the Common Market and the freedom of consumers to choose their suppliers. Therefore, the question whether there was a concerted action can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question”.⁶³⁴

⁶²⁸ Section 1(1)(vi) of South Competition Act of 1998.

⁶²⁹ In direct contrast, in terms of section 2(b)(i) of India Competition Act of 2002, the definition of “concerted action” is part of the definition of an agreement. Alternatively stated, a “concerted action” is one of the forms by which an agreement can present itself, as envisaged in the Act, and for purposes of determining whether a horizontal restrictive practice has taken place.

⁶³⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3 highlight that, although the concept of “concerted practice” is a European innovation, in fact, its origins can be traced to the United States, where its antitrust law refers to contracts, combinations and conspiracies prohibited by the Sherman Act, as “concerted actions”.

⁶³¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3, citing EU decisions, such as *Advocate General Mayras ICI v Commission* 48/69 [1972] ECR 665, 671 and *Rhone-Poulenc v Commission* T-1/89 para 102.

⁶³² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3.

⁶³³ Cases 48/69- *Imperial Chemical Industries v Commission* para 64- 67, 118.

⁶³⁴ Cases 48/69- *Imperial Chemical Industries v Commission* para 64- 67, 118.

A few years later, in yet another seminal decision, the ECJ was again confronted with the issue of concerted practices in *Suiker Unie v Commission* (the *Sugar Cartel* case).⁶³⁵ The ECJ ruled that proof of an actual plan to carry out a prohibited practice by competitors was not required because the prohibitions in Article 101 were directed at any direct or indirect contract between firms, whose object or effect was to influence their conduct in the market.⁶³⁶

Because a concerted practice falls short of an agreement, CAs must tread carefully, in order to distinguish cartel behaviour from innocent parallel business activities, lest the latter are needlessly penalised. This means that the legal meaning of concerted practices must be clearly understood. This is especially true in oligopolistic markets where each individual firm, in order to continue being active in a market, takes its cue from the prevailing market conditions, specifically its competitors.⁶³⁷ This is known as “conscious parallelism”, sometimes referred to as “tacit coordination”, or “co-ordinated effects”.⁶³⁸ The ECJ was particularly aware of this in *Zuechner v Bayerische Vereinsbank AG* when it highlighted that the inclusion of concerted practice and the requirement of independence among competitors “does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors”.⁶³⁹

Although it is difficult to determine, precisely, what qualifies as co-ordinated conduct among competitors, guidance may be gained from EU precedents.⁶⁴⁰ For instance, a common will, mental consensus, a meeting of minds, or a concordance of wills are indicative of co-ordinated practice.⁶⁴¹ According to the Competition Appeal Court in *Netstar (Pty) Ltd & Others v Competition Commission & Another*, concerted practices do not require that there be an arrangement or consensus among the firms.⁶⁴²

The European Commission and Union Courts have recognised the problem that is presented by complex cartels with numerous participants, which may be in force for long periods. In such circumstances, it becomes difficult to require that there be an agreement in order to bring the conduct in question within the purview of Article 101. In such cases, concerted practices will

⁶³⁵ Cases 40/73.

⁶³⁶ Para 174; Case 172/80- *Zuchner v Bayerische Vereinsbank AG*.

⁶³⁷ Whish, R. *Competition Law* [5th ed.]. (2005) 99, 504-509.

⁶³⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2000) 5.4, citing *Brooke Group Ltd v Brown & Williamson Tobacco* 509 US 209 227 (1993).

⁶³⁹ 172/80 para 14, however, the ECJ was quick to stress that “it does however strictly preclude any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”

⁶⁴⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3.

⁶⁴¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3.

⁶⁴² [2011] ZACAC 1 para 26.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.4.3 highlight that in the *Dyestuff* case, the ECJ indicated that parties must also “knowingly co-operate”, which they argue is to a certain extent superfluous.

suffice. According to *NV Limburgse Vinyl*, with its complex infringements that span many years involving equally numerous parties, it will be near impossible to classify each agreement in terms of which the undertakings acted.⁶⁴³ Additionally, because cartel participants will destroy any incriminating evidence and correspondence, CAs may be left to rely on inferences and circumstances to arrive at a conclusion that there are collusive practices at play.

3.5.3.1. *The relevance of plus factors*

Without more, parallel conduct on its own is not sufficient.⁶⁴⁴ The mere fact that competitors consciously increase their prices around the same time is not sufficient to substantiate an allegation of cartel conduct.⁶⁴⁵ Such simultaneous price increases can be used as circumstantial evidence of the existence of collusion.⁶⁴⁶ Provided there is additional evidence, the so-called “plus factors”, without which conscious parallelism, will not suffice.⁶⁴⁷ The “plus factors” include the presence of a motive to engage in a restrictive practice, correspondence between the parties, and whether it made economic sense to engage in the co-ordinated behaviour.⁶⁴⁸ Other “factual enhancements” that may indicate concerted conduct include, ongoing investigations by CAs,⁶⁴⁹ conducive market conditions that make collusion easier, as well as evidence of actual meetings and correspondence between alleged cartel participants.⁶⁵⁰

In *Builders Association of India v Cement Manufacturers’ Association & Others*, the Competition Commission of India relied on circumstantial evidence. This evidence included simultaneous price increases, under-utilisation of capacity despite increase in demand, dispatch parallelism, high operating costs, regular contact among competitors through their trade association, solicitation of sensitive information from the competitors by the trade association and circulation of the same, as well as a standardised product (cement).⁶⁵¹

⁶⁴³ Case T-305/94 695-698.

⁶⁴⁴ *In re Travel Agent Commission Antitrust Litigation* 583 F.3d 896, 903, 904 (6th Cir. 2009), where meetings between airline executives were ruled as inconclusive proof of a conspiracy, because their conduct “was not only compatible with, but, indeed, was more likely explained by, lawful, un-choreographed free-market behavior”.

⁶⁴⁵ *Theatre Enters. Inc. v Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *Bell Atlantic Corp v Twombly* 550 U.S. 556 (2007).

⁶⁴⁶ *American Tobacco Co. v United States*, 328 U.S. 781, 810 (1946).

⁶⁴⁷ *Theatre Enters. Inc. v Paramount Film Distribution. Corp.*, 346 U.S. 541 (1954).

⁶⁴⁸ *City of Long Beach v Standard Oil Co. of Cal.*, 872 F.2w 1401, 1409 (9th Cir. 1989) relied on inferences based on the firms’ simultaneous refusal to pay the stipulated price with the knowledge that the price would rise if any of them paid the stipulated price; *Interstate Circuit Inc. v United States*, 306 U.S. 208, 59 S.Ct. 467, 474 (1939) relied on circumstantial evidence showing that the actions of the distributors was contrary to what one would expect of normal profit-maximising firms unless there had to be an understanding or agreement between the firms.

⁶⁴⁹ *In re Automotive Parts Antitrust Litigation*, 2014 WL 1746121 (E.D. Mich. 30 April 2014).

⁶⁵⁰ *In re Online Travel Company (OTC) Hotel Booking Antitrust Litigation*, 2014 WL 626555 (N.D. Tex. 18 February 2014.)

⁶⁵¹ Case No. 29/ 2010.

Ultimately, when confronted with instances of “conscious parallelism”, competition law must “limit the range of permissible inferences, from ambiguous evidence”. Allegations of cartel conduct must do more than simply rely on inferences; it must proffer evidence “that tends to exclude the possibility that the alleged conspirators acted independently”.⁶⁵² In the *Wood Pulp Cartel* case, the ECJ, seeking to limit the extent of the prohibition on concerted practices, ruled that advance price announcements by undertakings did not qualify as concerted practices, unless such an inference was the only plausible explanation of the undertakings’ conduct.⁶⁵³

The inclusion of concerted practices as a mode, by which a cartel may occur, does not prevent undertakings from acting intelligently and adapting their behaviour to that of their competitors. Therefore, because parallelism can be attributed to the oligopolistic nature of the market, the penalisation of concerted practices must be accompanied by a rigorous economic analysis and direct evidence of collusive conduct.⁶⁵⁴

3.6. Brazil and India

India’s Competition Act of 2002 (as amended), prohibits enterprises, persons, or associations thereof, from entering into agreements, in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes, or is likely to cause, an appreciable adverse effect on competition in India.⁶⁵⁵ Such agreements, if entered into, are regarded as void.⁶⁵⁶ Any agreement entered into, or practice carried on (including cartels), by an enterprise, or persons, or association thereof, engaged in identical, or similar trade of goods, or provision of service, which directly, or indirectly, determines the purchase or sale price, limits or controls production, supply markets, technical development, investments or provisions of services, shares the market or source of production, or provision of services, by way of allocation of geographical area of the market, or type of goods or services, or number of customers in the market, or any other similar way, directly or indirectly, results in bid rigging.⁶⁵⁷ These categories shall be presumed to have an appreciable adverse effect on competition.⁶⁵⁸ However, this prohibition does not apply to joint ventures aimed at

⁶⁵² *Bell Atlantic v Twombly*, 550 U.S. 544, 553 (2007); *Matsushita Electronics Industries Co. v Zenith Radio Corp.*, 457 U.S. 574, 588 (1986).

In Brazil, Japan, Russia, and South Korea mere parallel conduct, on its own, will not suffice- “Roundtable on prosecuting cartels without direct evidence of agreement, contribution from Brazil”, Organisation for Economic Co-operation and Development (3 February 2006); ‘Roundtable on prosecuting cartels without direct evidence of agreement, contribution from Japan’, Organisation for Economic Co-operation and Development (24 January 2006); ‘Roundtable on prosecuting cartels without direct evidence of agreement, contribution from Korea’, Organisation for Economic Co-operation and Development (08 February 2006); ‘Roundtable on prosecuting cartels without direct evidence of agreement, contribution from Russia’, Organisation for Economic Co-operation and Development (15 December 2005).

⁶⁵³ Joined Case C-89/85, C- 104/85, C- 114/85, C- 116/85, C- 117/85, C- 125/85 - *In Re Wood Pulp Cartel: A Ahlstrom Oy & Others v The Commission* para 57- 68.

⁶⁵⁴ Para 71, 126- 128.

⁶⁵⁵ Section 3(1) of the Competition Act of 2002.

⁶⁵⁶ Section 3(2) of the Competition Act of 2002.

⁶⁵⁷ Section 3(3)(a)-(d) of the Competition Act of 2002.

⁶⁵⁸ Section 3(3) of the Competition Act of 2002.

increasing efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.⁶⁵⁹

Brazil's Competition Law regards agreements among competitors to manipulate or adjust the price of goods or services; output restriction; market allocations by means of, among other things, the distribution of customers' suppliers, regions or periods; and prices, conditions, privileges or refusals to participate in public bidding, as violations of the economic order.⁶⁶⁰

3.7. The Statutory Provisions in COMESA, EAC and SADC

In COMESA, what is important is the objective of the agreement, and the form in which it presents itself. As long as its objective is the prevention, restriction or elimination of competition in the Common Market, such an agreement will be prohibited and void.⁶⁶¹

In terms of the COMESA Treaty, agreements or concerted practices between undertakings that may affect trade between Member States, and have, as their objective, the prevention or restriction of competition in the Common Market, are prohibited and, consequently, void.⁶⁶² COMESA seems to follow the *per se* illegal rule, with regards to specific prohibited practices.⁶⁶³ These prohibited practices include, price fixing, collusive tendering, and market allocation.⁶⁶⁴ However, this prohibition does not apply where the agreement, or practice, is aimed at achieving pro-competitive gains.⁶⁶⁵ Because the COMESA Competition Regulations resemble Article 101 of the TFEU, guidance can be sought from there.⁶⁶⁶

The East African Community Competition Act of 2006 prohibits concerted practices that have, or are intended to have an anti-competitive effect, such as, price fixing, collusive tendering, and market divisions.⁶⁶⁷ Exemptions of such agreements are possible, where they are directed at achieving pro-competitive goals, for example, improving production or distribution.⁶⁶⁸

⁶⁵⁹ Section 3(3) of the Competition Act of 2002.

⁶⁶⁰ Article 36(3) of the Brazilian System for Protection of competition Law 12.529 of 2011.

⁶⁶¹ Article 16(3) of the COMESA Competition Regulations of 2004; "A guide to anti-competitive business practices." COMESA Competition Commission. Available online at http://www.comesacompetition.org/?page_id=498 (Accessed on 10 August 2015).

⁶⁶² Article 55(1) of the COMESA Treaty; Article 16 (1)-(3) of the COMESA Competition Regulations of 2004.

⁶⁶³ Rule 31 of COMESA Competition Rules of 2004.

⁶⁶⁴ Article 19(3)(a)- (c) of the COMESA Competition Regulations (2004).

⁶⁶⁵ Article 16 (4) of the COMESA Competition Regulations (2004).

⁶⁶⁶ See the discussion 3.3. 3.3.1, 3.3.2 of the EU position in of this Chapter.

⁶⁶⁷ Section 5(1)- (2)(a)- (d) of the EAC Competition Act of 2006.

⁶⁶⁸ Section 6(3)-(5) of the EAC Competition Act of 2006.

3.8. Price-fixing Cartels

For the most part, individual firms are free to increase prices, even to supra-competitive levels.⁶⁶⁹ They just cannot do so jointly, in concert with their competitors. Price fixing cartels are the ‘object of special solicitude under the antitrust laws’,⁶⁷⁰ a “threat to the central nervous system of the economy”.⁶⁷¹ While all anti-competitive practices are ultimately directed at influencing the price of a product or service, collusion will only qualify as price fixing if it is directed at avoiding price competition.⁶⁷² As the consequence of every price fixing cartel is the elimination of competition,⁶⁷³ price fixing cartels are “inimical to economic competition and have no place in a sound economy, all countries with laws protecting economic competition prohibit the practice without more”.⁶⁷⁴ Price fixing cartels go against the heart of competition, as, in a free market, the market itself must determine prices.⁶⁷⁵ Even economic doctrine, such as the Chicago School, supported the prohibition of price fixing cartels.⁶⁷⁶ It bears mentioning that, although in the majority of cases, the fixing of prices is done by sellers, who fix selling prices; purchasers can also fix the purchase price, where purchasers coordinate their activities, and behave like a monopsonist, regarding the purchase price.⁶⁷⁷

At their simplest, price fixing cartels involve at least two competitors, who collude to set the price for a particular product or service.⁶⁷⁸ According to the Competition Act 89 of 1998, the fixing of prices can be either direct or indirect, or it can be through fixing trading conditions, which then affect price.⁶⁷⁹



⁶⁶⁹ In South African competition law, one of the circumstances where unilateral increasing of prices is prohibited, would be in cases where it is done by a dominant firm and amounts to excessive pricing, to the detriment of consumers. Section 7 read with section 8(1) of the Competition Act are the operative provisions.

⁶⁷⁰ *United States v General Motors Corp.*, 384 U.S. 127, 148 (1966).

⁶⁷¹ *United States v Socony- Vacuum Oil Co.*, 310 U.S. 150, 224-226 (1940).

⁶⁷² In *American Natural Soda Ash Corporation & Another v Competition Commission & Others* 2005 (6) SA 158 SCA para 49, the Supreme Court indicated that “[w]hile price fixing inevitably involves collusive or consensual price determination by competitors, it does not follow that price fixing has necessarily occurred whenever there is an arrangement between competitors that results in their goods reaching the market at a uniform price. The concept of ‘price fixing’, both in lay language and in the language that the Act uses, may, for example, be limited to collusive conduct by competitors that is designed to avoid competition, as opposed to conduct that merely has that incidental effect.”

⁶⁷³ *United States v Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927).

⁶⁷⁴ *American Soda Ash Corporation & Another v Competition Commission & Others* 2005 6 SA 158 (SCA) para 37.

⁶⁷⁵ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.7.1.

⁶⁷⁶ According to the Competition Appeal Court in *Clover Industries Limited & Another v Competition Commission & Others* 78/CAC/Jul08 page 6 SA 158 (SCA) page 12 “[t]he most egregious form of anti-competitive behaviour is cartel behaviour. Whatever the difference between the Chicago and the ordoliberal schools of competition law, on one issue there is unanimity: the prohibition of price fixing and cartel behaviour. Price fixing must be rooted out.”

⁶⁷⁷ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.7.1.

⁶⁷⁸ According to the Supreme Court of Appeal in *American Soda Ash Corporation & Another v Competition Commission & Others* [2005 6 SA 158 (SCA) para 48, “[p]rice-fixing necessarily contemplates collusion in some form between competitors for the supply into the market of their respective goods with the design of eliminating competition in regard to price. That is achieved by the competitors collusively ‘fixing’ their respective prices in some form (by setting uniform prices, or by establishing formulae or ratios for the calculation of prices, or by other means designed to avoid the effect of market competition on their prices).”

⁶⁷⁹ Section 4(1)(b)(i) of the Competition Act of 1998

See also Australian case, *Trade Practices Commission v Nicholas Enterprises (Pty) Ltd (No 2)* (1979) ATPR 40-126; and European Commission Case C- 333/94- *Tetra Pak International SA v The European Commission*.

Direct price fixing agreements do not present many problems. They occur when participant firms explicitly agree on the price. Direct price fixing can take the form of setting mutually acceptable prices⁶⁸⁰ by providing guidelines on pricing,⁶⁸¹ where one competitor sets a price that is followed by another competitor.⁶⁸² Setting the base price upon which all price negotiations will be based,⁶⁸³ coordinating the dates, times and amounts of price increases,⁶⁸⁴ or exchanging price information,⁶⁸⁵ as well as entering agreements not to deviate from published prices,⁶⁸⁶ offering discounts and credit terms,⁶⁸⁷ and jointly setting recommended prices, are all forms of direct price fixing.⁶⁸⁸ Similarly, agreements to increase gross margins, through increasing mark-ups and eliminating discounts, were held to amount to price fixing by India's Competition Commission.⁶⁸⁹

Indirect price fixing occurs when parties does not expressly collude on the prices, but instead collude on supply, output, or production, which all ultimately amount to price fixing, albeit in an indirect manner.⁶⁹⁰ As the price fixing in these circumstances is not direct, CAs must take care to ensure that they do not unnecessarily penalise practices that should not be classified *per se* illegal.⁶⁹¹ However, regardless of whether the price fixing is done directly or indirectly, both instances are deemed *per se* illegal.

Section 4(1)(b)(i) also stipulates that price fixing can also be done through fixing "any other trading condition". This is similar to EU provisions, except that in the EU, there is no inclusion of the *per se* illegal rule.⁶⁹² The question, therefore becomes, "What qualifies as a 'trading condition'?" While the concept of "trading condition" is susceptible to a wide range of meanings, it has been suggested that this phrase should not be interpreted widely.⁶⁹³ It must not be interpreted in a way that is broad, such that any restriction that competitors may impose on each other's conduct, becomes a trading

⁶⁸⁰ Case IV/33.884 - *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie*

⁶⁸¹ *Competition Commission v Association of Pretoria Attorneys* 33/CR/Jun03.

⁶⁸² *Competition Commission v New Reclamation Group* 37/CR/Apr08

⁶⁸³ *Glaxo Wellcome (Pty) Ltd v Terblance* 03/CAC/Oct00

⁶⁸⁴ The bread cartel cases revealed the extent of the coordination in *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 para 58-71; *Competition Commission v Tiger Consumer Brands (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2009] ZACT 34. Coordination was also revealed in a cartel involving generic paving blocks *Competition Commission v Cast Industries (Pty) Ltd* [2013] ZACT 60; a wire mesh cartel *Reinforcing Mesh Solutions (Pty) Ltd v Competition Commission* 119/CAC/May 2013 [2013] ZACAC 4

⁶⁸⁵ Case C- 194/99, *Thyssen Stahl*.

⁶⁸⁶ Case IV/30.064 *Cast Iron and Steel Rolls*

⁶⁸⁷ *Competition Commission v Aveng Africa Ltd* 24/CR/Feb09

⁶⁸⁸ Case IV/ 35.961 *Pre-Insulated Pipes*

⁶⁸⁹ *Competition Commission v Saloojee's Cycles CC; In re Competition Commission v Fritz Pienaar Cycles (Pty) Limited & Others (019448)* [2014] 84.

⁶⁹⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2010) 5.7.1.

⁶⁹¹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2010) 5.7.1.

⁶⁹² The relevant excerpt of Article 101(1) of the TFEU stipulates that "[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations or undertakings or concerted practice... and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions.'

⁶⁹³ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 67.

condition.⁶⁹⁴ Instead, it must be interpreted in a manner that takes into account the context and the need to narrowly interpret section 4(1)(b), taking into account that no defences are admitted for price fixing.⁶⁹⁵ For a trading condition to fall foul to section 4(1)(b), it should form part of the 'price-quantity-quality nexus' of the practice in question.⁶⁹⁶

The fixing of trading conditions is regarded in the same way as price fixing.⁶⁹⁷ The fixing of trading conditions may be especially prevalent in oligopolistic markets, where there is minimal price competition.⁶⁹⁸ An agreement between competitors that involves price protection clauses must be categorised as the fixing of a trading condition and, therefore, be evaluated in terms of the *per se* illegal principle.⁶⁹⁹ Sutherland and Kemp emphasise the dangers of including the fixing of trading conditions under the *per se* illegal prohibition. One of these dangers is that the fixing of trading conditions among competitors may indeed be pro-competitive, for instance, the setting of standards, which must be evaluated under the rule of reason.⁷⁰⁰

Whatever economic justification there may be for a price fixing cartel, competition law does not allow an inquiry into its reasonableness.⁷⁰¹ Such agreements are banned simply because of their impact on the competition process. Therefore, it will not help the firms to argue that their fixed prices were not exorbitant, nor will it help them to argue that their actions were motivated by the desire to save a competitor, or stabilise the market.⁷⁰² Fixing prices to counter price volatility, or market instability,

⁶⁹⁴ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 67.

⁶⁹⁵ In *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 67, 69-70, the Tribunal highlighted that "we would suggest that it must be interpreted, both in its contexts and with an appreciation of the need to interpret the restrictions in section 4(1)(b) of the Act, narrowly, given that they admit no defence, unlike section 4(1)(a) of the Act. The term 'trading condition' is the last phrase in a sub-paragraph that deals with price collusion. While the term is intended to be broader than price, one must be cautious in interpreting it in a manner that is so wide, any restriction, competitors may impose on one another's conduct, becomes a trading condition...The use of the qualifier 'other' that precedes 'trading condition suggests, at the very least, that it is in some way similar, albeit not identical, to the notion of price. At the very least, it must constitute a term on which a firm trades, or offers to trade, with its customers, or refuses to offer, as a term to customers." Ultimately, the Tribunal held that the rule challenged by the complainant did not meet these criteria. Rather, it was a prohibition on the use of a certain class of persons to perform a certain function. This did not qualify as a trading term, in some nature akin to price. Therefore, the 'no-touting' rule was not a trading condition and hence was not a contravention of the prohibition on price fixing in section 4(1)(b)(i) of the Competition Act.

⁶⁹⁶ *Competition Commission v Patensie Sitrus Beherend Beperk* Case No: 37/CR/Jun01 para 35, the Tribunal indicated that "the range of 'trading conditions', hit by this sub-section is limited by the contextual cobbling together of price fixing and fixing of 'any other trading condition', which, in our view, points to aspects of a particular trade/ transaction that are intimately linked to price, i.e. quantity and quality. Hence, for a 'trading condition' to be hit by this section of the Act, it should be part of the price-quantity-quality nexus of the concerned transactions/trade. This naturally includes an agreement that seeks to limit output but it would also likely include the fixing of a discount structure or repayment condition."

⁶⁹⁷ *Competition Commission v Oceana Group Ltd & Another* [2012] ZACT 40 para 2.3.1.6 dealt with competitors in the fishing industry, in which they not only fixed the raw fish pricing formula, but also agreed on trading conditions, "voorskof" and "agterskof" payments, which were essentially agreements in respect of advance and catch up payments, and the payment of canned fish bonus.

⁶⁹⁸ Sutherland, P. & Kemp, K *Competition Law of South Africa* (2014) 5.7.1.

⁶⁹⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.7.1.

⁷⁰⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.7.1.

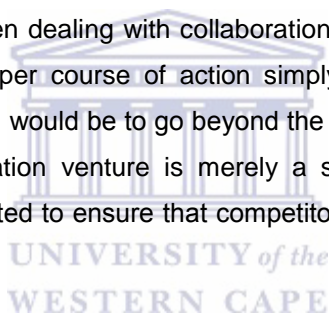
⁷⁰¹ *United States v Trenton Potteries Co* 2713 US 392 (1927); *United States v Socony- Vacuum Oil Co.*, 310 U.S. 150, 212-213, 224-226 (1940).

⁷⁰² *United States v Socony-Vacuum Oil* 310 U.S. 150 (1940) 213; *Competition Commission v Lafarge Industries South Africa (Pty) Ltd* Case No: 23/CR/Mar12; *Competition Commission v Aveng Africa Ltd & Others* Case No: 84/CR/DEC09; *Competition Commission v Sasol Chemical Industries Limited* Case 48/CR/Aug10; *Competition Commission v Apollo Tyres South Africa (Pty) Ltd* Case No: 56/CR/Aug10

have similarly been deemed *per se* illegal.⁷⁰³ Therefore, the rule of reason cannot be applied to price fixing. However, it needs to be mentioned that, in South Africa, even though the rule of reason does not apply to price fixing, firms may apply for an exemption in terms of section 10 of the Competition Act.⁷⁰⁴

It is immaterial whether the price fixed, was the minimum price,⁷⁰⁵ or maximum price,⁷⁰⁶ because, either way, price fixing agreements are “of bad consequence and ought to be discountenanced”.⁷⁰⁷ Price fixing need not be permanent; it could be temporary.⁷⁰⁸ Prices can be fixed, even if all that is proposed is an increase to a specified figure, without any provision as to when, or by what machinery, or what amount, a further change may be implemented.⁷⁰⁹ Regular price increases subsequent to meetings among manufacturers, during which they shared information on market share, production and prices, were held to amount to price fixing.⁷¹⁰ Brazil’s Administrative Council for Economic Defence (CADE) has ruled that a coordination mechanism among drugstores to establish a rotation system for specific days of the week, in which each drugstore would offer discounts on their products, constituted a price fixing cartel.⁷¹¹

Caution must also be exercised when dealing with collaboration ventures, or joint sales agencies. In such cases, it may not be the proper course of action simply to classify the practice as *per se* prohibited. A more prudent approach would be to go beyond the terms of the competitors’ agreement, to determine whether the collaboration venture is merely a sham, a cloak for what is in reality collusive practices, deliberately created to ensure that competitors’ goods or services are sold on the



⁷⁰³ Case COMP/ 39230 - *Rio Tinto Corporation & Others v Commission*; Case 45/69-*Boehringer Mannheim v Commission* (1970) ECR 769.

⁷⁰⁴ See 3.3.1 in this Chapter.

⁷⁰⁵ Case COMP/ C. 38279/F3- *PO /Viandes Bovines Francaises*; *Competition Commission v Lancewood Cheese (Pty) Ltd* 103/ CR/Dec06.

⁷⁰⁶ Cases IV/ 33.126 and 33.322- *Cement*.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.7.1 highlight that the prohibition of the fixing of a maximum price “may seem strange at first blush: is it not beneficial to all, if firms concert to reduce a price that they charge to customers...? However, horizontal fixing of maximum selling prices by sellers is often veiled minimum price fixing or it is at least a means by which firms coordinate price at *supra*-competitive levels. Why otherwise would firms fix maximum selling prices?”

⁷⁰⁷ *R v Norris* (1759) 96 ER 1189.

⁷⁰⁸ In the Australian case, *Radio 2 UE Sydney (Pty) Ltd v Stereo FM (Pty) Ltd* (1982) 62 FLR 437, Lockhart, J. explained the position in this manner, “the fixing of a price ... does not necessarily connote an element of permanency, but generally suggests the settling or determining of a price for a period of time that is not instantaneous or merely ephemeral. A person can fix a price for his goods knowing that he may wish to vary it at some future time, but generally not so soon as would to business people be regarded as merely momentary or transitory.”

⁷⁰⁹ *Trade Practices Commission v Parkfield Operations* (1985) ATPR 40- 526

⁷¹⁰ Case IV/C/33.833- *Cartonboard*; Genesove, D. & Mullin, W.P. *Rules, communication and collusion: Narrative evidence from the Sugar Institute case*. National Bureau of Economic Research Working Paper (2001) 1-62.

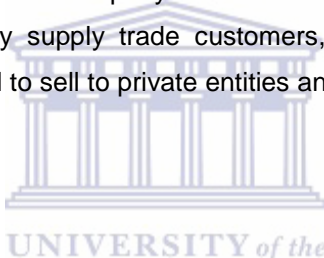
⁷¹¹ Administrative Process No. 08012.004365/2010-66. *Defendants: Farmácia Frei Rogério (Drogaria Oglari Ltda ME), Farmácia Santa Bárbara (Santos & Niles Ltda ME), Farmácia Vital (Farmácia e Drogaria Sordi Ltda), Farmácia Nossa Senhora Aparecida (Righes & Filhos Ltda e Drogaria Nossa Senhora Aparecida Ltda ME), Farmácia Atual (Léa de Fátima Ferreira & Cia Ltda ME), Farmácia Graciosa (Graciosa Drogaria e Perfumaria Ltda), Farmácia Sul Brasil (Farmácia Sul Brasil Ltda), Farmácias Moderna (Farmácia Tambosi Ltda ME), Farmácias Moderna (A S Tambosi & Cia Ltda), Farmácias São João (Brasfarma Comercial de Medicamentos Ltda).*

market at non-competitive prices.⁷¹² It has been suggested that not all joint sales agencies must be evaluated according to the rule of reason.⁷¹³

3.9. Market Allocation Cartels

Such cartels usually present themselves in the form of territorial divisions, where competing firms confine themselves to separate geographic areas.⁷¹⁴ Customers, too, can be divided in a similar manner, in what is called customer allocation.⁷¹⁵ When it comes to customer allocation, competitors collude to sell to specified categories of customers. For example, one company sells to commercial users, another commits to sell to consumers, one commits to supply trade customers only, another commits to supply retailers only, and another commits only to supply public institutions.⁷¹⁶ Similarly, competing firms can agree that each of them focus on different products, or line of commerce.

Cartels among competitors to divide the market or customers are *per se* illegal.⁷¹⁷ Market allocation cartels are not limited to actual competitors, but potential competitors.⁷¹⁸ Section 4(1)(b)(ii) of the Competition Act prohibits four categories of market allocation. First, the Act prohibits competitors from allocating customers,⁷¹⁹ for example, one company sells to commercial users, another commits to sell to consumers, one commits to only supply trade customers,⁷²⁰ another commits to only supply retailers, or one firm will be restricted to sell to private entities and another commits only supply public



⁷¹² *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa, Botswana Ash (Pty) Ltd, Chemserve Technical Products (Pty) Ltd & Minister of Trade and Industry* [2005] ZASCA 42 para 52-55.

⁷¹³ *American Natural Soda Ash Corporation & Another v Competition Commission & Others* [2005] ZASCA 42 para 52-55.

⁷¹⁴ Elhauge, E. & Geradin, D. *Global Competition Law and Economics* [2nd ed.] (2011) 141.

⁷¹⁵ Elhauge, E. & Geradin, D. *Global Competition Law and Economics* [2nd ed.] (2011) 141.

⁷¹⁶ Elhauge, E. & Geradin, D. *Global Competition Law and Economics* [2nd ed.] (2011) 141.

⁷¹⁷ *Competition Commission v DPI Plastics* 15/CR/Feb09 involving a cartel to fix prices, divide markets and collude over tenders, in respect of various types of plastic pipes; *Competition Commission v Astral Operations Limited* 015891, a participant in a poultry products market allocation cartel; *Competition Commission v Glass South Africa (Pty) Ltd* 017293, a market allocation cartel in the supply and wholesale of flat glass, laminated glass and toughened glass; *Competition Commission v Oceana Group Ltd & Another* 50/CR/May 12, involving a non-compete agreement and market allocation agreement in respect of suppliers; *Competition Commission v NWK Ltd* 43/CR/Jun11, where a firm agreed not to compete on the South African Future Exchange, regarding its output at a particular time; *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 para 103, 129, a bread market allocation cartel, which also included a non-poaching agreement.

⁷¹⁸ *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd* 95/IR/Oct05; *Competition Commission v Zip Heaters (Australia) (Pty) Ltd* 17/CR/Feb07;

⁷¹⁹ *Competition Commission v Egoli Gas* 016402; *Competition Commission v Bridgestone SA (Pty) Ltd* 92/CR/Dec09; *Competition Commission v Sasol Chemical Industries Ltd* 31/CR/May05; *Competition Commission v Aveng (Africa) Ltd* 24/CR/Feb09; *Competition Commission v Adcock Ingram critical Care (Pty) Ltd, Tiger Brands Limited* 20/CR/Feb08; *Competition Commission v Thusanong Healthcare (Pty) Ltd* 20/CR/Feb08; *Competition Commission v Larfage Industries (Pty) Ltd* 23/CR/Mar12;

⁷²⁰ *Competition Commission v Sasol Chemical Industries Ltd* 31/CR/May05, where one of the participating firms in the market allocation cartel also undertook not to enter the wholesale market; *Reinforcing Mesh Solutions (Pty) Ltd v Competition Commission* 119/CAC/May03, where the terms of the market allocation agreement divided customers into three categories: in-house; preferred; and free for all customers; *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 para 89, 96, 129, a bread cartel among bakeries, in which some of the cartel participants would only supply bread to informal traders (hawkers, spaza shops and the like) in certain geographic areas, while other firms would only supply formal traders (national retail chain stores, national retail forecourts and the like) in certain geographic areas. For as long as the firms stayed out of territories they had previously been present in, for as long as they, in fact, continued not to compete in those areas, the cartel would remain in force.

institutions.⁷²¹ Secondly, the Act prohibits supplier allocation.⁷²² Thirdly, the Act prohibits geographic market allocation, which allows for each cartel member to have exclusivity in a particular geographical area and often, attached to that, is the condition that none of the cartelists will encroach on each others' territories.⁷²³ Fourthly, allocation, in terms of the specific type of goods or services, where competing firms can agree that each of them focus on different products or line of commerce.⁷²⁴ With market allocation cartels, the participants are able to behave like a monopolist and exercise market power in the segment of the market that had been allocated to them.⁷²⁵ However, since market allocation is *per se* prohibited in the Competition Act, firms do not have the option to argue that they do not possess market power, even if that is the case.⁷²⁶

Indirectly, market allocation cartels also constitute price fixing, because once a firm is assured of a certain market or a segment thereof, it has the liberty to determine what price it will charge. Therefore, in a sense, all cartel practices are at their core concerned with manipulating prices to the benefit of the cartel members involved. Perhaps, market divisions are even more damaging than price fixing cartels, because, while firms do not fix prices, or monitor each other's prices, all they simply have to do, is ensure that each firm sells in its allocated territory.

3.9.1. Market allocation cartels and economic regional integration

Within the framework of RECs, market and customer allocation cartels usually occur where each producer concentrates on its "home market" (country of origin) and not conduct business in the other Member States. Such market divisions are particularly condemned, as they are an affront to the founding principle in regional integration, namely the establishment and

⁷²¹ *Competition Commission v Air Products South (Pty) Ltd* 016279; *Competition Commission v Spring Lights Gas (Pty) Ltd* 52/CR/Aug10.

⁷²² *Competition Commission v New Reclamation Group* 37/CR/Apr08; *Competition Commission v Oceana Group Ltd & Another* 50/CR/May12.

⁷²³ *Competition Commission v FoodCorp (Pty) Ltd* 50/CR/May08; *Competition Commission v Spring Lights Gas (Pty) Ltd* 52/CR/Aug10; *Competition Commission v Aveng Africa Ltd* 24/CR/feb09; *Competition Commission v Egoli Gas* 016402; *Competition Commission v Dorper Sheep Breeders Society of South Africa* 017301; *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 para 88, where participant firms in a bread cartel concluded an agreement, in which they would not compete with one another in certain specified geographic areas of the country. Pursuant to this, one of the firms would close down one of its bakeries to allow another firm to expand its operations in that geographical area, and in exchange the firm promised to refrain from operating in another area to allow a fellow participant to have wide reign. There was also the purchasing of the bakeries of some of the firms by the other firms in the cartel. While these appeared to be the sale of assets in the ordinary course of business, there were three aspects that indicated that they were, in fact, a manifestation of a wider market division between the parties, namely, that all agreements were conditional upon each other; that they were all in favour of parties, who were existing competitors in the bread industry; and, in two of these purchases, the sellers paid the purchaser a purchase price.

⁷²⁴ *Competition Commission v Thusanong Healthcare (Pty) Ltd* 20/CR/feb08 and *Competition Commission v Adcock Ingram Critical Care (Pty) Ltd* 20/CR/Apr08, where the participating firms divided the private hospital market by allocating, not only customers, but also specific types of goods and services among themselves; *Competition Commission v Sasol Chemical Industries Ltd* 31/CR/May05, a collusion to the effect that Sasol became the exclusive supplier of limestone ammonium nitrate to the wholesale market; *Competition Commission v Aveng Africa Ltd* 24/CR/feb09, a precast concrete cartel, in which the participants allocated each other specific types of products; *Competition Commission v Primkop Airport Management (Pty) Ltd* 016691, where the parties agreed not to compete with each other in the market for certain public commercial airport services. The cartel also included the closing of an airport for certain categories of commercial air traffic and to mitigate the negative financial impact, certain payment were to be made; *Competition Commission v CBC Fasteners (Pty) Ltd* 113/CR/Nov07, where each party would, for a specified period, manufacture specific goods, and that for a specific period, each party would only supply specific customers.

⁷²⁵ *Malefo v Street Pole Ads (SA) (Pty) Ltd* 35/IR/May05 para 33.

⁷²⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.8.2.

maintenance of a common market between Member States.⁷²⁷ Such was the case in the *Peroxygen Products* cartel, where the dominant producers of organic peroxides participated in a “home market” agreement, in which each firm bound itself to operate in its own home market and not poach on other members’ home markets.⁷²⁸ *Soda-ash–Solvay/ ICI*, also involved a market sharing agreement among natural soda ash producers, in which the participating firms committed to eliminate competition among themselves, by confining their soda-ash activities in the Community to their traditional home markets.⁷²⁹ In the *Cement* cartel case, an agreement on “non-transshipment of cement to home markets” was found to be in violation of Article 101 (1)(c) of the TFEU.⁷³⁰

3.10. Collusive Bidding Cartels

Collusive bidding, also referred to as collusive tendering, or bid rigging, occurs when firms collude to reduce or eliminate competition for bids by manipulating the process of bidding.⁷³¹ Instead of competing with each other, they will allow one among them to “win” the tender and, over time; they may take turns on who emerges as the “winner”.⁷³² Without defining what collusive tendering is, section 4(1)(b)(iii) of the Competition Act 89 of 1998 regards collusive tendering as *per se* prohibited.⁷³³ The *per se* prohibition of collusive tendering has a special significance in South Africa. It is not only aimed at promoting efficiency, adaptability of the national economy, competitive prices, and more product choice for consumers,⁷³⁴ but it is also aimed at creating a fair, equitable and transparent tender system, as required by the Constitution of 1996.⁷³⁵

Collusive bidding can take on several forms. “Cover bidding” occurs when the participating firms nominate the bid-winner among themselves, and the rest of the firms submit non-competitive bids with terms, or prices that are higher, or too high to be accepted, which will give the impression that the

⁷²⁷ Case IV/33. 133-A *Soda-Ash-Solvay IC*; Case IV/E-1/35.860 *Seamless Steel Tubes*

⁷²⁸ Case IV/ 30. 907

⁷²⁹ Case IV/33. 133-A *Soda-Ash-Solvay IC*

⁷³⁰ Cases IV/ 33.126 and 33.322 - *Cement* para 45.

⁷³¹ Section 2 of Botswana Competition Act of 2009; Section 2 of EAC Competition Act of 2006; explanation note in section 3 of India Competition Act of 2002.

⁷³² *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011) 13-16.

⁷³³ *Competition Commission v DPI Plastics* 15/CR/Feb09 para 165-167,174,182, collusive tendering in respect of various types of plastic pipes; *Competition Commission v Aztec Components CC, Lamda Test Equipment CC* 018036, 018280, where competitors in the market for the supply of production equipment that measures and test links on long distance network during commissioning, network repairs, maintenance and upgrade. They met and discussed commercially sensitive information relating to a tender. The firms, subsequently, reached an understanding that each firm would submit bids in response to the tender in question, that each would provide the required technical solutions in their bids in such a way that their respective bids comprised of a combination of products supplied by both firms. They also agreed on the pricing for products associated with their respective bids and the final bid prices; *Competition Commission v N17 Toll Operators (Pty) Ltd* 019265, a collusive bidding cartel in the construction industry, in which the parties agreed on a losers’ fee, which would be payed to the losing bidder by the winning bidder;

⁷³⁴ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 5.7.3.

⁷³⁵ Section 217 of the Constitution of the Republic, 1996.

pre-determined bid-winner is offering favourable terms.⁷³⁶ “Bid-suppression” occurs when all firms, except one does not bid, so that the firm that bids will inevitably win the tender. “Bid-withdrawal” occurs when a winning bid is withdrawn, so that a pre-arranged firm wins the bid. “Bid-rotation” takes place when firms take turns to submit bids, while “non-conforming bids” occur when firms intentionally submit bids with unfavourable terms and conditions that will not be accepted, thereby ensuring that a specific firm wins the bid.⁷³⁷

Regardless of the manner in which collusive tendering occurs, the effect is still the same; the elimination of competition among bidders and the consequent overcharging of government coffers and private institutions. Collusive tendering not only results in overcharging, it also affects other issues, other than competition on price. Collusive tendering eliminates innovation among firms, and consequently, consumer welfare is negatively impacted. In addition, there is a correlation between corruption and collusive tendering, especially where there is little, or no transparency in the procurement processes.⁷³⁸

Collusive tendering is a particular scourge in terms of the provision of goods and services by government in areas such as, health services, education, public safety, and other public infrastructure.⁷³⁹ Collusive tendering in public procurement processes also undermines a country’s prospects for economic development and severely affects the most disadvantaged in society, as they rely on these public services.⁷⁴⁰ In South Africa, collusive bidding was particularly prevalent in the construction sector, during the period preceding the 2010 World Cup Soccer Tournament.

Competition Commission v WBHO was one such bid-rigging cartel, in which Wilson Bayly Holmes (WBHO), Southern Africa’s biggest construction company, disclosed its collusion with other construction companies to submit cover bids in numerous projects, which included tenders for the construction of soccer stadia, the construction and upgrade of roads, and residential units.⁷⁴¹ *Competition Commission v Concrete Units (Pty) Ltd & Others* involved collusive bidding among several firms (which included two SOEs) in the pre-cast concrete industry, where they co-ordinated their quotes, shared and allocated contracts among themselves, in order to maintain the position not only in South Africa, but in the whole of the Southern African region.⁷⁴² South Africa’s CAs have also

⁷³⁶ *Competition Commission v WBHO Construction (Pty) Ltd* [2013] ZACT 74 para 3.3; *Competition Commission v ATC (Pty) Ltd* Case No: 020081 para 2.5.

⁷³⁷ *Guidelines for fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2010) 2-3.

⁷³⁸ *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011) 55.

⁷³⁹ *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011) 10-11.

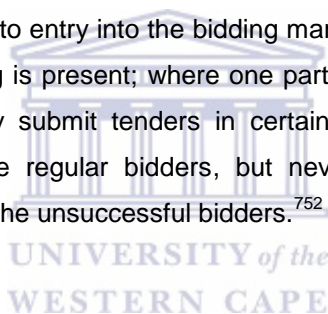
⁷⁴⁰ *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011) 10-11.

⁷⁴¹ *Competition Commission v WBHO Construction (Pty) Ltd* [2013] ZACT 74 para 5.1- 5.10.

⁷⁴² [2010] ZACT 26; *Southern Pipeline Contractors & Another v Competition Commission* [2011] ZACAC 6.

uncovered collusive tendering in the deep sea transportation,⁷⁴³ and the furniture removal sectors.⁷⁴⁴ In order to maintain their bid rigging cartels, participants devised ways to ensure adherence to their cartel commitments, for example, the payment of a “loser’s fee” by the winning bidder to the losing bidders.⁷⁴⁵ Where collusive tendering occurs in the public procurement sector, the tax payer often bears the brunt, especially because, in most governments, public procurement accounts for a significant portion of the domestic budget. Bid rigging also impacts a country’s GDP. In 2010, estimates indicated that among countries in the global South, public procurement accounted for at least 15 per cent of the national budget.⁷⁴⁶ In India, where collusive bidding is presumed to have an appreciable impact on competition,⁷⁴⁷ public procurement accounts for 30 per cent of its GDP.⁷⁴⁸ In the EU, public procurement accounts for 11 per cent of its GDP.⁷⁴⁹

CAs must adopt a proactive stance, as opposed to being reactive, regarding collusive bidding. This can be done by specifying thresholds, which can be used to “flag” particular public procurement bids.⁷⁵⁰ The OECD’s Guidelines for Fighting Bid Rigging in Public Procurement provides a checklist of possible factors, which may be indicative of collusive tendering. For instance, there are higher chances that firms will engage in bid rigging where there are a few bidders, the products are standardised, and there are barriers to entry into the bidding markets.⁷⁵¹ Other factors may also serve as indicators that collusive tendering is present; where one particular supplier always happens to be the lowest bidder; some firms only submit tenders in certain geographic areas; unexpected bid withdrawals; where some firms are regular bidders, but never win any bids; and regular sub-contracting by the winning bidder to the unsuccessful bidders.⁷⁵²



⁷⁴³ *Competition Commission v Wallenius Wilhelmsen Logistics ASC* Case No: CO084Jul15; *Competition Commission v Nippon Yusen Kabushiki Kaisha Ltd* Case No: CO054Jun15 “Another shipping liner admits liability for price fixing, market allocation and collusive tendering”. *Competition Commission Media Releases*. Available online at <http://www.compcor.co.za/wp-content/uploads/2015/01/Another-shipping-liner-admits-liability-for-price-fixing-market-allocation-and-collusive-tendering.pdf> [Accessed 05 September 2015].

⁷⁴⁴ *Competition Commission v Patrick Removals (Pty) Ltd* Case No: 019703; *Competition Commission v Crown Relocations (Pty) Ltd* Case No: 019810; *Competition Commission v JH Retief Transport CC* Case No: 019844; *Competition Commission v Matthee Furniture Removals CC* Case No: 019794; *Competition Commission v Transfreight International CC* Case No: 019877; *Competition Commission v De Wet Human Transport CC t/a Viking Transport* Case No: 019802; *Competition Commission v Joel Transport (Pty) Ltd* Case No: 019885; *Competition Commission v Superdoc Thirteen CC t/a Lowe Line Furniture Removals* Case No: 019828.

⁷⁴⁵ For example, in *Competition Commission v Cycad Pipelines (Pty) Ltd* [2014] ZACT 100.

⁷⁴⁶ *Guidelines for fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2010) 1-2.

⁷⁴⁷ Explanation note in section 3 of India Competition Act of 2002.

⁷⁴⁸ Singh, P.S. *Enhancing value in public procurement*. Conference on Competition, Public Policy and Common Men. Competition Commission of India 16 November 2009.

⁷⁴⁹ *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011) 55.

⁷⁵⁰ Moon, J. *Public procurement and competition policy in Korea*. United Nations Conference on Trade and Development. Intergovernmental Group of Experts in Competition Law and Policy (2012).

⁷⁵¹ *Guidelines for fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2010) 3.

⁷⁵² *Guidelines for fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2010) 12-14.

Minister of Commerce, Government of India v M/S Puja Enterprises & Others involved a bid-rigging cartel among shoe manufacturers, wherein the firms submitted identical rates and, in addition, restricted output and allocated markets among cartel members.⁷⁵³ The Competition Commission of India, accordingly found the cartel to be in violation of the Competition Act. Similarly, *Western Coalfield Limited v SSV Coal Carriers Pvt Ltd & Others* involved a bid-rigging cartel among firms in the provision of ancillary services, including sand and coal transportation, wherein the firms submitted identical quotes, well above the average estimated costs.⁷⁵⁴ Other bid rigging cartels were uncovered among explosives manufacturers,⁷⁵⁵ and pharmaceutical manufacturers.⁷⁵⁶

In recognition of the impact and incidence of collusive tendering, Brazil's Secretariat of Economic Monitoring (SEAE) has a special department, whose mandate is to investigate collusive tendering in public procurement, while at the same time developing a knowledge base on how to identify and deal with bid rigging.⁷⁵⁷ Several bid-rigging cartels have been uncovered; one involving transportation companies in the collection, transportation of solid waste and hospital waste,⁷⁵⁸ and another in the air-cargo transportation industry.⁷⁵⁹

In the EU, the case of *Kone Oyj & Others v Commission*, involved a bid-rigging cartel among global leaders in the manufacturing and installation of elevators and escalators.⁷⁶⁰ The participants rigged bids, allocated contracts for sale, installation, and maintenance of elevators and escalators, fixed prices, and exchanged confidential business information. Through non-conforming bids, the cartel members also tendered fake bids, thereby paving the way for the selected firms to win the bids. What is particularly egregious about this cartel is the fact that, even though it has since been uncovered, its effects will likely continue for the next two to five decades, because the maintenance of elevators and escalators is often done by the same installing companies.

3.11. Concluding Remarks

The foregoing discussion has shown how firms are able to engage in cartel practices, be it price fixing, market allocation, or collusive tendering. What is common in the jurisdictions discussed is that cartels are a supreme evil and accordingly, must be condemned. The use of the *per se* illegal statute regarding cartels is an express acknowledgment of this. Because of the general stance towards

⁷⁵³ Ref. Case No. 01/2012 of DGS & D.

⁷⁵⁴ Case No. 34 of 2015.

⁷⁵⁵ *Explosive Manufacturers Welfare Association vs Coal India Limited & its Officers* Case No. 04/2010; *In re: Alleged Cartelization by Cement Manufacturers* Case No. RTPE 52 of 2006.

⁷⁵⁶ *M/s Santuka Associates Pvt. Ltd. vs All India Organization of Chemists and Druggists & Others* Case No. 20/2011; *Varca Druggist & Chemist & Others. vs Chemists and Druggists Association*, GOA Case No. MRTP C-127/2009/DGIR4/28.

⁷⁵⁷ *Policy Roundtables Collusion and Corruption in Public Procurement*. Organisation for Economic Co-operation and Development (2010) 71.

⁷⁵⁸ Administrative Process No. 08012.011853/2008-13- *Defendants: Coletare Serviços Ltda, Simpex Serviços de Coleta Transporte e Destino Final de Resíduos Ltda and Wambass Transportes Ltda.*

⁷⁵⁹ Administrative Process No. 08012.010362/2007-66.

⁷⁶⁰ Case C-510/11.

cartels, it should not be difficult for regional RTAs, such as COMESA and EAC to engage in collaborations to monitor cross-border cartel activities. Of the cartels discussed, market and customer allocations are of particular relevance to RECs, as they are in direct contrast to the underlying aim of RTAs – the achievement of integration through trade. The result of market and customer allocations is the division of markets, thereby undermining the *raison d'être* for RECs – economic integration. Collusive tendering is also relevant to RECs, as firms can use this type of cartel to focus on their 'home markets', thereby segmenting the common market, and once again, in direct contrast to the principal aim of RECs – to achieve a common market through regional integration.



CHAPTER FOUR

THE ENFORCEMENT INSTITUTIONAL FRAMEWORK

"Good institutional design is a critical component of good competition policy and competition law enforcement. The design of the institutions is like the design of a house: it must facilitate life within the house. Good institutional design takes into account the family's values and empowers life within its walls. Designs cannot be conjured in the abstract; they must fit the family that lives in the house, its aspirations, possibilities, and practical limits. Therefore, the good architect lives with the family before conceptualising the design ... [however] even good houses do not last forever. Environments and conditions change, needs change, and flaws appear at the seams of the plaster. This is the second level of the architect's work. Again the solution is contextual. Building a new house with all modern equipment might be prescribed by outsider advice-givers; but the family might be better satisfied with wise and fitting renovations to the house they have lived in for years... [nonetheless] in the globalising, integrating, and networking world, all houses should have windows that open and a front and a back porch."⁷⁶¹

4.1. Overview

In this chapter, the specialised institutions are specifically addressed, both the national competition authorities (NCAs) and the regional competition authorities (RCAs), who are involved in the enforcement of competition law, at the domestic and regional level, respectively. The design of these institutions is important. Not only is the creation of public, independent institutions required, but also the necessary political will and commitment, the availability of human resources (expertise in the area of competition law), legal reforms, as well as competition law advocacy. In addition, research and studies, sufficient investigatory powers of the institutions tasked with enforcing the law, an assurance of the independence of these institutions, a functional judiciary, and synergies with other law enforcement agencies,⁷⁶² are of utmost importance, as well.

4.2. The Institutional Design in the Global South

In the absence of a properly thought out process, which takes into account the context in which the agencies will operate, as well as choosing the best possible option, the result will be an ineffective institutional framework.⁷⁶³ This does not mean that the legislature must predict all eventualities. What it does mean is that, at the very least, whatever institutional design is chosen, it must be flexible enough to allow for incremental changes that may be necessary with time and practice,⁷⁶⁴ as well as the possibilities that the powers and jurisdiction of these institutions can be challenged.⁷⁶⁵

⁷⁶¹ Fox, E.M. "Antitrust and institutions: Design and change" (2010) 41 *Loyola University Chicago Law Journal* 487-488.

⁷⁶² Kovacic, W.E. "Institutional foundations for economic legal reform in transition economies: The case of competition policy and antitrust enforcement" (2001) 77. *Chicago-Kent Law Review* 265- 315; Buccirosi, P. *et al. Deterrence in competition law. Governance and the Efficiency of Economic Systems* Discussion Paper (2009) 2-28.

⁷⁶³ Fox, E.M. "Antitrust and institutions: Design and change" (2010) 41. *Loyola University Chicago Law Journal* 476-477; Gal, M. "The ecology of antitrust: Preconditions for competition law enforcement in developing countries" In *Competition, Competitiveness and Development: Lessons from Developing Countries* (2004) 21-52.

⁷⁶⁴ Fox, E.M. "Antitrust and institutions: Design and change" (2010) 41. *Loyola University Chicago Law Journal* 485-487.

⁷⁶⁵ For instance, in *Ericsson v Competition Commission of India W.P. (C) 464/2014*, a matter dealing with licensing fees for essential patents, in which the appellants argued that the Intellectual Property Board was the appropriate forum, not the Competition Commission; in *DLF Ltd v Competition Commission of India & Others*, Civil Appeal No. 6328 of 2014, a matter involving the realty sector and allocation of apartments, was argued to fall under the jurisdiction of the National Consumer Redressal Forums; and in *Indian Oil Corporation v Competition Commission of India W.P. (C) 8211/2010*, where state-owned oil companies alleged to have violated section 3 of the Competition Act of 2002, argued that the jurisdiction in the matter lay with the Petroleum and Natural Gas Regulatory Board, not the Competition Commission.

This is, especially, relevant to countries in the global South, most of who are still in the early stages of designing and implementing their institutional frameworks. Whatever institutional design a country opts for, such a design must maintain certain salient features, for example, transparency, legal certainty as to the applicable procedure and rules, due process, fairness and capable officials.⁷⁶⁶

In the global North, several factors have contributed to successful enforcement: the availability of resources; academic infrastructure; accessibility of information networks, which allow for the dissemination of information; professional associations involved in competition law; effective judicial systems; clear legal rules; and political environments that allow for the enforcement of competition law.⁷⁶⁷ Conversely, the global South is plagued by problems, that hamper its enforcement track record: resource austerity; lack of home-grown expertise; frail academic infrastructure; relatively weaker professional associations and consumer groups; judicial systems that are not well versed in the area of competition law; and the lack of political support for competition law reforms and enforcement institutions.⁷⁶⁸ In addition, the work of NCAs in the global South is sometimes hampered by well-resourced firms (and their lawyers), who exploit procedural loopholes to frustrate the work of these institutions.⁷⁶⁹

4.3. The Institutional Framework in the Global South

The importance of the context in which competition laws are adopted and these institutions are created cannot be overemphasised.⁷⁷⁰ In South Africa, the country was faced with a new democratic order, a market characterised by widespread vertical integration, interlocking directorships, a competition law statute not equal to its tasks, ministerial override in the enforcement of competition law, political lobbying, and widespread disregard for the enforcement framework created by the Maintenance and Promotion of the Competition Act of 1979. All of these informed the current institutions created by the Competition Act 89 of 1998.⁷⁷¹

4.4. The Domestic Institutional Framework: A Case of South Africa

South Africa is the most active country in competition law enforcement on the African continent. Its institutional capacities are comparable to those in the global North. For example, in 2008, the Competition Commission was ranked in the same category as the NCAs of Canada, Denmark,

⁷⁶⁶ Fox, E.M. "Antitrust and institutions: Design and change" (2010) 41. *Loyola University Chicago Law Journal* 473, 485-487; Kovacic, W.E. "Designing and implementing competition and consumer protection reforms in transitional economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe" (1995) 44. *DePaul Law Review* 1215-1224.

⁷⁶⁷ Kovacic, W.E. "Getting started: Creating new competition policy institutions in transitioning economies" (1997-1998) 23. *Brook Journal of International Law* 406-416.

⁷⁶⁸ Kovacic, W.E. "Getting started: Creating new competition policy institutions in transitioning economies" (1997-1998) 23. *Brook Journal of International Law* 417-430.

⁷⁶⁹ Bleazard, J. "Pigeon- holed by precedent: form versus substance in the application of South African competition law". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 83-100.

⁷⁷⁰ See 1.4 in Chapter 1.

⁷⁷¹ Explanatory Memorandum: Competition Bill 1998 61-62.

Finland, Italy, Japan, The Netherlands, New Zealand, and Spain.⁷⁷² In 2011, the Competition Commission received the Global Competition Review's 'Agency of the Year Award in Asia-Pacific, Middle-East & Africa', and ranked in 12th position out of 139 NCAs, in the same year.⁷⁷³

Chapter 4 of the Competition Act of 1998 outlines the three principal institutions involved in the interpretation, application, and enforcement of the Act. These are the Competition Commission,⁷⁷⁴ the Competition Tribunal,⁷⁷⁵ and the Competition Appeal Court.⁷⁷⁶ In the Act, there is a clear devolution of power between the three institutions charged with the responsibility of enforcing its provisions. The decisions, judgments, or orders from the three institutions have the same status as those of the High Court.⁷⁷⁷

Although the Act emphasises the independence of the three institutions, they are neither stand-alone, nor separate from the existing judicial framework and law enforcement agencies. They are connected, for instance, after the Competition Appeal Court; an appeal may lie to the Constitutional Court.⁷⁷⁸ The services of the South African Police Service (SAPS) may be engaged through the involvement of police officers in the Competition Commission's investigative work, when conducting searches and seizures.

4.4.1. The Competition Commission

The Competition Commission is the legislature's investigator and prosecutor of first choice. It is an administrative body, tasked with the primary duty of ensuring the enforcement of the Competition Act.⁷⁷⁹ The Competition Commission is the starting point for the enforcement of the Competition Act. Its functions are outlined, in detail, in section 21 of the Competition Act. It is an independent institution,⁷⁸⁰ tasked with implementing measures aimed at promoting market transparency,⁷⁸¹ and developing public awareness of the provisions of the Competition Act.⁷⁸²

⁷⁷² *Ten Years of Enforcement by the South African Competition Authorities: Unleashing Rivalry 1999-2009*. Competition Commission of South Africa Annual Report (2009) 3 available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/10year.pdf> [Accessed 10 September 2013].

⁷⁷³ Van Der Merwe, "SA's Competition Commission Receives International Accolades". *Engineering News* 8 February 2011 available online at <http://www.engineeringnews.co.za/article/sas-competition-commission-receives-international-accolades-2011-02-08> [Accessed 14 December 2013].

⁷⁷⁴ Section 19- 25, section 40-43.

⁷⁷⁵ Section 26-35, section 40-43.

⁷⁷⁶ Section 36-39.

⁷⁷⁷ Section 64(1).

⁷⁷⁸ Prior to 2013, appeals could, and were made to the Supreme Court of Appeal. However, the Constitution Seventeenth Amendment Act 72 of 2012, materially altered this position by ousting the Supreme Court's jurisdiction over competition law matters. The Amendment is discussed in further detail, later in Chapter 4 of the current study.

⁷⁷⁹ To streamline its work, the Commission is divided into "divisions", namely, the mergers and acquisitions division, the enforcement and exemptions division, the cartels division, the legal services division, as well as the policy and research division. In addition to these divisions, which focus on the core functions of the Commission, there are also ancillary divisions, namely, public relations, corporate services, and finance. Information available online at <http://www.compcom.co.za/who-are-we/#> (accessed 10 November 2011) [Accessed 14 December 2013].

⁷⁸⁰ Section 20.

⁷⁸¹ Section 21 (1)(a).

Regarding practices prohibited by the Act, the Competition Commission is authorised to investigate and evaluate such alleged prohibited practices.⁷⁸³ Where required to do so, the Commission can also consider exemption applications.⁷⁸⁴ In addition, the Commission is empowered to approve (with or without conditions) mergers referred to it.⁷⁸⁵ It can negotiate and conclude settlement agreements;⁷⁸⁶ and refer its investigations on prohibited practices to the Competition Tribunal, or appear before it.⁷⁸⁷ Therefore, the Commission is the 'claimant *cum* prosecutor' serving the public interest in all matters pertaining to competition law addressed in the Competition Act.⁷⁸⁸ The Competition Commission's procedures are governed by the Rules of Conduct of Proceedings in the Competition Commission (hereinafter referred to as the Competition Commission Rules of Procedure).⁷⁸⁹ The Commission is also empowered to negotiate agreements with regulatory authorities for the purpose of consistency in the application of the Competition Act, and in the exercise of jurisdiction over competition matters in the relevant industry or sector.⁷⁹⁰ The Competition Act makes provision that, in time, the Commission can review legislation and public regulations, and report its findings to the Minister of Industry and Trade, concerning any provisions that allow uncompetitive behaviour.⁷⁹¹ Finally,

⁷⁸² Section 21 (1)(b).

⁷⁸³ Section 21 (1)(c).

⁷⁸⁴ Section 21 (1)(d).

The Commission is empowered to grant exemption to prohibited practices, because they are directed at achieving specific objectives laid out in the Act. An exemption means that firms engaging in a prohibited practice will neither face prosecution by the Commission before the Tribunal for the duration of the exemption. There are three categories of exemptions envisaged in the Competition Act. Sutherland & Kemp refer to these categories as "public interest exemptions", "intellectual property exemptions", and "professional association exemptions". See Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 11.3.4.1

Section 10(1)-(3) makes provision for "public interest exemptions" on the basis that the prohibited practice or agreement, or categories thereof, for which an exemption is being sought, is aimed at achieving any of the objectives specified in the Act. These objectives are maintaining or promotion of exports, promoting the competitiveness of small business or firms, controlled or owned by historically disadvantaged individuals, preventing a decline in an industry, or achieving economic stability of an industry, as designated by the Minister of Trade and Industry, in consultation with the relevant Minister of that industry. Additionally, the Commission must consider whether, in addition to achieving these objectives, the restriction on competition brought by the agreement, practice, or categories thereof, is indeed necessary to achieve the specific objective.

Section 10(4) makes provision for 'intellectual property exemptions', where a prohibited practice or agreement relates to the exercise of intellectual property rights. Section 10(4) mentions specific intellectual property statutes for which the intellectual property rights can seek exemption. However, the list of statutes mentioned in section 10(4) is not exhaustive as the statutes mentioned therein are just examples.

Regarding exemptions of professional associations, they are dealt with in terms of Schedule 1 of the Act. Part A of Schedule 1 makes provision for exemption applications of professional associations, whose rule(s) contain a restriction that has the effect of substantially lessening or preventing competition within a market. These exemptions are granted for a specific period.

⁷⁸⁵ Section 21 (1)(e).

⁷⁸⁶ Section 21 (1)(f). See also section 5.3 of Chapter 5 of this current thesis.

⁷⁸⁷ Section 21 (1)(g).

⁷⁸⁸ *Competition Commission v Pioneer Foods (Pty) Ltd* Case No 91/CAC/Feb10 para 11.

⁷⁸⁹ Published in Government Notice 22025 in Government Gazette Vol. 428 of 01 February 2001.

The Rules were enacted in terms of section 21(4) of the Competition Act 89 of 1998, which provides that the Minister of Industry and Trade may adopt regulations to govern matters pertaining to the functioning of the Commission.

⁷⁹⁰ Section 21 (1)(h).

In terms of section 21(1)(i)-(j), the Commission is also authorised to participate in the proceedings of any regulatory authorities as well as give advice and receive advice from any regulatory authority.

⁷⁹¹ Section 21 (1)(k).

the Competition is also granted broad powers to deal with any matter that may be referred to it by the Tribunal.

Although not explicitly stated in the Act, the Commission (through its legal services division) offers, what it refers to as “advisory opinions”, written guidance on the application and interpretation of the Competition Act, as well as the approach that the Commission is likely to adopt, regarding certain merger transactions, agreements or practices.⁷⁹² Advisory opinions are given by the Commission upon request from a party (usually law firms) seeking guidance, and upon payment of a specified fee.⁷⁹³ There is no format, with which these requests must comply.⁷⁹⁴ The Commission’s advisory opinions are not binding on the Commission, the Competition Tribunal or the Competition Appeal Court.⁷⁹⁵ The Commission can also issue so-called “clarifications” upon request. The aim is for the Commission to clarify provisions of the Act, usually sought by individuals.⁷⁹⁶ The Commission’s advisory opinions and clarifications are neither reviewable, nor appealable.⁷⁹⁷

4.4.1.1. Administrative investigations before the Competition Commission

Targeted investigations into specific allegations of a prohibited practice can be initiated through three routes. These expressly are laid out in the Competition Act 89 of 1998. First, the Competition Commission can, *ex officio*, initiate a complaint by taking a decision to commence an investigation into an alleged prohibited practice.⁷⁹⁸ Secondly, any person can simply submit information to the Commission regarding an alleged prohibited practice, in any manner or form.⁷⁹⁹ Thirdly, any person, that the Act refers to as a “complainant”, can submit a complaint against an alleged prohibited practice to the Commission in the prescribed format.⁸⁰⁰ These three routes pertain to specific allegations of prohibited practices, referred to as ‘targeted investigations’.

⁷⁹² Summary: *Advisory Opinions*. Competition Commission of South Africa. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Apr-05-Summary-Advisory-Opinions.pdf> [Accessed 11 May 2013].

⁷⁹³ Summary: *Advisory Opinions*. Competition Commission of South Africa. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Apr-05-Summary-Advisory-Opinions.pdf> [Accessed 11 May 2013]; Competition Commission Annual Report (2009-2010) 21-22.

Rule 10.4 of the Rules of the Conduct of the Proceeding in the Competition Commission currently stipulates a fee of R2 500.

⁷⁹⁴ All that is required is a letter laying out the facts, regarding which an advisory opinion is being sought, addressed to the Commission’s Registry.

⁷⁹⁵ Summary: *Advisory Opinions*. Competition Commission of South Africa. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Apr-05-Summary-Advisory-Opinions.pdf> [Accessed 11 May 2013].

⁷⁹⁶ Competition Commission Annual Report (2009-2010) 21-22.

⁷⁹⁷ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.3.2.

⁷⁹⁸ Section 49B(1).

Although, section 49B(1) of the Competition Act provides that the Commission, by virtue of its office, “may initiate a complaint against an alleged prohibited practice”, in practice, the Commission does not really “initiate a complaint”, rather it launches investigations into alleged prohibited practices

⁷⁹⁹ Section 49B(2)(a).

⁸⁰⁰ Section 49B(2)(b).

Section 1(1)(iv) defines a complainant as “a person who has submitted a complaint in terms of section 49B(2)(b)”.

Depending on the outcome of these investigations, the Commission, or the complainant, may make a complaint referral to the Tribunal for adjudication. There is also the possibility of a referral to a civil court.⁸⁰¹ In the first decade of becoming operational, the competition authorities tended to follow a flexible approach towards the initiation, referral, and adjudication of complaints, however, this was to change when firms began launching legal challenges to exercise their powers.⁸⁰²

At the outset, it bears mentioning that, prior to the Commission launching an *ex officio* investigation, or initiating an investigation, based on a complaint submitted by a complainant, the alleged practice must pass the “jurisdictional test”, for the application of the Competition Act as laid out in section 3 (1). This section provides that the Act applies to all economic activity within, or having an effect within, South Africa.⁸⁰³

The Competition Act places limitations on the initiation of all targeted complaints. A complaint in respect of a prohibited practice, may not be initiated more than three years after the practice has ceased.⁸⁰⁴ The Commission will not pursue a complaint against a firm “under the same, or another section of the Act”, regarding “substantially the same conduct” that has already been decided upon by the Competition Tribunal (the common

While the Competition Act does not define the term “complaint”, Rule 3(4)(g)(i)-(ii) of the Competition Commission Rules, defines the term to mean either a matter initiated by the Commissioner *ex officio* or a matter that has been submitted to the Commission by the complainant.

⁸⁰¹ See 4.4.2 of this Chapter.

⁸⁰² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.1.1, chart the development in the procedures of the competition authorities, regarding these developments.

For example, the Competition Commission could initiate *ex officio* investigations into prohibited practices, in broad terms, or even industry wide investigations, without naming the specific respondent firms alleged to be involved in those practices. During these industry wide investigations, the Commission would rely on its powers of entering and searching. Where the complaint had been submitted by a private party, the Commission would seek numerous extensions (contrary to the statutory stipulation that only a single extension of 1 year can be given). When the complaint was referred to the Competition Tribunal, the Commission could join as a further respondent, or even add a cause of complaint that did not appear in the original complaint. However, from 2010, the Commission’s approach would begin facing legal challenges, and rightly so. One of these challenges went as far as the Supreme Court of Appeal and the Constitutional Court. In *Senwes Ltd v Competition Commission* (SCA) 118/2010 para 51-57, one of the issues to be considered by the Supreme Court was whether the Competition Tribunal was entitled to go beyond the terms of a referral submitted to it by the Competition Commission. The Supreme Court of Appeal decided that the Tribunal had no authority to consider issues that were not contained in the referral. This was overturned by the Constitutional Court in *Competition Commission v Senwes Ltd* [2012] ZACC 6 where the Constitutional Court ruled that once a complaint has been referred to the Tribunal, the Act empowers the Tribunal to adopt an inquisitorial approach in its hearings and was, as such, not confined to hearing only those matters raised in the complaint referral. Following this decision by the Constitutional Court, the Supreme Court was faced with an appeal concerning the issue of whether a complaint referral to the Tribunal by the Commission and an amendment to that referral had complied with the procedural requirements in *Competition Commission v Yara (South Africa) (Pty) Ltd* (SCA) 784/12 para 3, 9, 25, 31, where the Supreme Court departed from its somewhat stringent approach and decided in line with the Constitutional Court in *Senwes*.

⁸⁰³ In *American Natural Soda Ash Corporation (ANSAC) & Another v Competition Commission & Others* 577/2002 SCA, where ANSAC sought to argue that the effect contemplated by the Competition Act is one that must be adverse, whose adverse nature must be established before it can be said that the Competition Act applies. Because neither the Commission, nor the complainant, alleged that the ANSAC Agreement had caused negative or deleterious effects in the Republic, ANSAC argued that the complainant, accordingly, must be dismissed. In other words, ANSAC was essentially arguing that the Supreme Court should overturn the decisions of the Competition Tribunal and the Competition Appeal Court. However, the Supreme Court of Appeal, upheld the Competition Tribunal and Competition Appeal Court’s rulings and confirmed that the word *effect*, “necessarily embraces both the benign and the malign”. See 7.6.1 of Chapter 7 for a fuller discussion of the ANSAC case and section 3(1) of the Competition Act.

⁸⁰⁴ Section 67(1).

law “double jeopardy” principle).⁸⁰⁵ This means that, should the Tribunal be seized with the same matter, regarding the same firm, for which it has already decided on, the firm can successfully argue that the matter is *res judicata*, that is to say, the matter is already judged. Another limitation is the abuse of dominance. Where the complaint alleges a practice that amounts to abuse of dominance, the Competition Act’s provisions require that the annual turnover of the respondent must exceed ZAR5 million.⁸⁰⁶ According to *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty)*, a valid complaint must be based on a reasonable suspicion of the alleged prohibited practice, so that it does not turn into a “fishing expedition”.⁸⁰⁷

4.4.1.2. “Ex officio” investigations

By virtue of its office, the Competition Commission may initiate a complaint against an alleged prohibited practice by taking a decision to launch an investigation into the alleged prohibited practice.⁸⁰⁸ Although the Competition Act makes provision for the Commission to initiate investigations, it does not prescribe the format that such investigations, initiated by the Commission, must take. That is, the Act does not make provision for the formal or substantive requirements that must be complied with, when an investigation is being initiated by the Commission. Fortunately, the Supreme Court of Appeal has clarified the issues concerning the prerequisites of valid *ex officio* investigations. In *Competition Commission v Yara (South Africa) (Pty) (Ltd) & Others*, the Supreme Court of Appeal laid out the formalities that must accompany a valid complaint initiated by the Commission.⁸⁰⁹ Per the Supreme Court, taken literally, the Commission ‘initiating a complaint’ is an awkward concept because the Commission does not really “initiate” or start a complaint.⁸¹⁰ Instead, it simply starts the process by directing an investigation, which process may lead to a referral of that complaint to the Tribunal.⁸¹¹ Therefore, the Act demands no more than a decision by the Commission to open a case.⁸¹² That decision

⁸⁰⁵ Section 67(2); *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd* [2003] ZACT 43 para 52.

⁸⁰⁶ Section 6 the Competition Act.

⁸⁰⁷ [2010] ZASCA 104 para 20, 23-26.

⁸⁰⁸ Section 49B(1).

⁸⁰⁹ SCA 2013 (6) SA 40 (SCA).

An earlier decision in *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty) v Competition Commission* [2010] ZASCA 104 para 13, speaking to complaints “initiated” by the Commission, the Supreme Court indicated that, although the Competition Act does not specify any jurisdictional requirements for *ex officio* complaints, as a matter of principle, the Commission “must at the very least have been in possession of information ‘concerning an alleged practice’ which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power.” According to the Supreme Court, this is consistent with the provisions of s 49B(2)(a), which stipulate that anyone can provide the Commission with information concerning a prohibited practice, without submitting a formal complaint.

⁸¹⁰ SCA 2013 (6) SA 40 (SCA) para 21.

⁸¹¹ SCA 2013 (6) SA 40 (SCA) para 21, Commission can start this process on the basis of information submitted by an informant, or because of what it gathers from media reports, or because of what it discovers during the course of an investigation into a different complaint and/ or against a different respondent.

⁸¹² SCA 2013 (6) SA 40 (SCA) para 21.

can be informal and it can even be tacit.⁸¹³ This decision is to trigger an investigation, which might eventually, or not, culminate in a referral to the Competition Tribunal.⁸¹⁴ This is merely a preliminary step of a process that does not affect the rights of a respondent firm.⁸¹⁵

Conversely, this decision and the investigation that follows, is not to offer the suspect firm an opportunity to put its case.⁸¹⁶ The Commission is not even required to give notice of its investigations to a suspect,⁸¹⁷ or in the least, engage with a suspect on the questions of whether the Commission's suspicions are legitimate.⁸¹⁸ However, in practice, when the Commission has "initiated" *ex officio* investigations, it has done so through what is referred to as an "initiation statement", which is then communicated to the firms concerned.⁸¹⁹ Because an initiation by the Commission requires no more than an informal, or even tacit, decision to set the process in motion, the question of whether the Commission can introduce a new 'complaint' initiated by it becomes irrelevant. In such circumstances, the Commission must decide to initiate a new 'complaint', and if appropriate, refer that 'complaint' to the Competition Tribunal for adjudication.⁸²⁰

After initiating a 'complaint', the Commission can issue a notice calling on members of the public, who have been affected, or are being affected, by the prohibited conduct under investigation, to file a complaint, as well, regarding that specific practice.⁸²¹ The Commission may also consolidate two or more complaints under a common investigation, if they concern the same firm as potential respondent.⁸²² Where there has been such consolidation, each of the complaints must continue to be separately identified by its own complaint number,⁸²³ and each person, who submitted one of those complaints to the Commission, remains the complainant with respect to the complaint

⁸¹³ SCA 2013 (6) SA 40 (SCA) para 21.

⁸¹⁴ SCA 2013 (6) SA 40 (SCA) para 21.

⁸¹⁵ SCA 2013 (6) SA 40 (SCA) para 22-24.

⁸¹⁶ SCA 2013 (6) SA 40 (SCA) para 22-24.

⁸¹⁷ SCA 2013 (6) SA 40 (SCA) para 22-24.

⁸¹⁸ SCA 2013 (6) SA 40 (SCA) para 22-24, 26, the Supreme Court was quick to highlight that its judgment should not be taken as authorising a formal investigation, without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the Commission of its obligation to provide those grounds, when challenged to do so. In fact, the Commission has, in some cases, been ordered to discover internal documents pertaining to its decision to refer a complaint, where the respondents have sought the review of the Commission's decision to refer the complaint for adjudication. See *Computicket (Pty) Ltd v Competition Commission* 20/CR/Apr10 para 35-38; *Competition Commission v Computicket (Pty) Ltd* 118/CAC/Apr12.

⁸¹⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.1.3.

⁸²⁰ SCA 2013 (6) SA 40 (SCA) para 28.

⁸²¹ Rule 17(1) of the Rules for the Conduct of the Proceedings of the Competition Commission.

⁸²² Rule 17(2) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸²³ Rule 17(3)(a) of the Rules for the Conduct of Proceedings in the Competition Commission .

that they submitted.⁸²⁴ After referring one of these consolidated complaints to the Competition Tribunal, or issuing a notice of non-referral in respect of it, the Commission may continue to investigate any of the remaining consolidated complaints, subject only to the time limits set out in section 50 of the Act.⁸²⁵ These provisions also apply to complaints by private persons (complainants).⁸²⁶

Other than the targeted investigations into prohibited practices, or the consideration of mergers submitted before it, the Commission is empowered to conduct general inquiries to determine the conditions within the market, the so-called “market inquiries”.⁸²⁷ These are formal inquiries, initiated by the Commission itself, or upon request by the Minister of Trade and Industry, where the Commission has reason to believe that any feature, or combination of features, of a market for any goods or services, exhibits practices which prohibit, or interfere with the competition process, or simply to uphold the Act’s objectives.⁸²⁸ They are conducted “in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular firm”.⁸²⁹ It must be noted that, prior to the Amendment, the Commission already had the authority to conduct general inquiries.⁸³⁰ The Amendment formalises market inquiries by laying out the procedures governing market inquiries, as well as, the Commission’s powers and obligations to conduct the said market inquiries. The Amendment outlines the procedures that must be complied with, for example, a market inquiry must be preceded by a notice published in the Government Gazette⁸³¹ and issues of confidentiality of information.⁸³² These procedures also stipulate that the Competition Act’ provisions on entering and searching premises, with or without a warrant, the powers to enter and search, and the conduct of entry and search, do not apply to market inquiries. Finally, the issuing of summonses on individuals, whom the Commission has reason to believe can furnish information, or possess or control any book, document, or other material that pertains to the subject matter of the market

⁸²⁴ Rule 17(3)(b) of the Rules for the Conduct of Proceedings in the Competition Commission .

⁸²⁵ See 4.4.1.3 in this Chapter.

⁸²⁶ Rule 17(3)(c) of the Rules for the Conduct of Proceedings in the Competition Commission .

⁸²⁷ This provision, laid out in section 43A- 43C of the Competition Act of 1998, was inserted in terms of Chapter 4A, by section 6 of the Competition Amendment Act 1 of 2009, and came into force in April 2013. Market inquiries are not unique to South Africa. Countries around the African continent, similarly, make provision for market inquiries in their competition law statutes. For example, section 49-51 of Botswana Competition Act of 2009; and section 39 – section 41 of Zambia Competition and Consumer Protection Act of 2010.

⁸²⁸ Section 43B(1)(i)-(ii).

⁸²⁹ Section 43A, section 43B(1).

⁸³⁰ Section 43B(1) of the Competition Act is to the effect that the Commission “acting within its functions set out in section 21(1), ...may conduct an inquiry at any time...”

Further, prior to the Amendment, the Commission had conducted a market inquiry into the banking sector. Information available online at <http://www.compcom.co.za/banking-enquiry/> [Accessed 11 November 2015].

⁸³¹ Section 43B(2), (4), (5).

⁸³² Section 43B(3)(a).

inquiry, is also included.⁸³³ At the conclusion of a market inquiry, the Commission must publish its findings in the Government Gazette and submit a report to the Minister of Trade and Industry.⁸³⁴ The report to the Minister may include recommendations on new policy, the amendment thereof, recommendations for new legislation, or regulations, or recommendations to specific regulatory authorities.⁸³⁵ At the completion of a market inquiry, several courses of action are available to the Competition Commission. First, the Commission may initiate a complaint and conclude a settlement agreement with the respondent firm, with or without a further investigation.⁸³⁶ Secondly, the Commission may initiate a complaint against any firm and conduct further investigations, as provided for by the Act.⁸³⁷ Thirdly, the Commission may initiate a complaint followed by a referral, forthwith, to the Tribunal, without further investigation.⁸³⁸ Fourthly, the Commission may take any action it is empowered to in terms of the Act, as recommended in the market inquiry.⁸³⁹ Alternatively, the Competition Commission may choose to take no further action.⁸⁴⁰ Several market inquiries have since been initiated, for example, the liquefied petroleum gas market inquiry,⁸⁴¹ the retail sector market inquiry,⁸⁴² and the private healthcare sector market inquiry.⁸⁴³

4.4.1.3. Complaints by private parties

The Competition Act adopts a generous approach to complaints or the submission of information by private parties, in the sense that *any person* can submit a complaint, or information, without having to show a direct, personal or present interest. Such interest(s) only become relevant in the Competition Tribunal's adjudicatory processes.⁸⁴⁴ A private party (the complainant) may submit a complaint, in the prescribed format, to the Competition Commission alleging that a prohibited practice has been committed.⁸⁴⁵ Alternatively, a private party can simply submit information, in any manner or form, to the

⁸³³ Section 43B(3)(c), section 49A, and section 43B(3)(e) read with section 72 and section 73.

Section 43B(3)(d), section 49A read with section 54(b), (e), and (f).

⁸³⁴ Section 43B(6), section 43C.

⁸³⁵ Section 43C(1)(a)-(b).

⁸³⁶ Section 43C(3)(a).

See 5.4 of Chapter 5.

⁸³⁷ Section 43C(3)(b).

⁸³⁸ Section 43C(3)(c).

⁸³⁹ Section 43C(3)(d).

⁸⁴⁰ Section 43C(3)(e).

⁸⁴¹ Information available online <http://www.compcom.co.za/lpg-inquiry/> [Accessed 11 November 2014].

⁸⁴² Information available online at <http://www.compcom.co.za/healthcare-inquiry/> [Accessed 16 July 2015].

⁸⁴³ Information available online at <http://www.compcom.co.za/healthcare-inquiry/> [Accessed 16 July 2015].

⁸⁴⁴ See 4.4.2 of this Chapter.

⁸⁴⁵ Section 49B(2)(b)

Section 1(1)(iv), which defines a complainant as "a person who has submitted a complaint in terms of section 49B(2)(b)."

Commission, upon which the Commission may decide whether to launch an investigation.⁸⁴⁶

A complaint must be submitted using a prescribed form.⁸⁴⁷ The status of complainant brings several legal consequences. First, it confers on a complainant the right to make a referral to the Tribunal for adjudication of the complaint, where the Commission declines to make a referral.⁸⁴⁸ It also confers upon a complainant the legal standing to seek interim relief.⁸⁴⁹ In addition, a complainant reserves the right to consent to an award for damages, as part of a consent order.⁸⁵⁰ However, a complainant faces the possibility of paying costs, if, at the conclusion of the proceedings, the Tribunal does not make a finding against the respondent firm, where the referral was made by the complainant.⁸⁵¹ A complainant may at any time, before the Commission has referred the complaint to the Tribunal, withdraw the complaint.⁸⁵² A withdrawal means that a complainant loses all the rights of a complainant. However, even if there has been such a withdrawal, the Commission may continue to investigate the complaint, as if the Commission had initiated it.⁸⁵³ Further, the complainant's co-operation with the Commission may be requested, should the Commission elect to continue with investigations, even after the withdrawal.⁸⁵⁴

Where there is only submission of information, the procedure is informal, as the Act simply says the information can be submitted "in any manner or form". A person who submits information may request that the Commission treat their identity as restricted

⁸⁴⁶ Section 49B(2)(a).

⁸⁴⁷ Form CC1 requires the identification of the person submitting the complaint; the name of the person, whose conduct is the subject of this complaint; and a description of the complaint in a concise statement of the conduct that is the subject of the complaint. The complainant must also attach to this form any relevant documents, as well as a typed statement describing the conduct that is the subject of this complaint, which statement must include the names of each party involved in the conduct; the dates on which the conduct occurred; a statement indicating when and how the complainant became aware of this conduct; and other information that the complaint may consider to be relevant. In the form, the complainant must also indicate whether the conduct is still continuing, if not, the complainant must indicate when the conduct ended.

Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/CC1-Complaint-Form.pdf>

Rule 11(1) of the Rules for the Conduct of Proceedings in the Competition Commission, the complaint must have a degree of specificity, in that it must identify the particulars of the alleged prohibited practices, because, if the commission elects to refer the matter to the Tribunal for adjudication, it will be limited to those particulars.

According to *Competition Commission v Yara (South Africa) (Pty) Ltd* (SCA) 784/12 para 13, 18, this is meant to protect the legislature's preference of the Commission as its investigator and prosecutor of choice.

⁸⁴⁸ Section 51(1).

⁸⁴⁹ Section 49C(1).

⁸⁵⁰ Section 49D(3).

See 5.4 in Chapter 5.

⁸⁵¹ Section 57(2)(a).

Conversely, section 57(2)(b) stipulates that, if the Tribunal has made a finding against the respondent, the Tribunal may award costs against the respondent, in favour of the complainant, if the referral has been made by the complainant.

⁸⁵² Rule 16(1) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸⁵³ Rule 16(2) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸⁵⁴ Nuehoff M (ed) *A Practical Guide to the South African Competition Act* (2006) 242.

information, that is, their identity may not to be revealed.⁸⁵⁵ If a person has requested for anonymity, that is, that the Commission treat their identity as restricted information, the Commission must accept that request and a person's identity will be treated as restricted, unless the person subsequently waives their request in writing.⁸⁵⁶ The consequence of such a waiver is that a person then attains the position of a complainant and enjoys the rights accruing to complainants, as well as the duties.⁸⁵⁷

Initially, the Competition Appeal Court was of the view that the intention of a party would play an important role when, not only establishing whether the party was simply an informant, or a complainant, but also, trying to establish the contents on the complaint, or the information supplied.⁸⁵⁸ However, the Supreme Court of Appeal has toned down on this position and ruled that intention of a party only played a role to the extent that it is necessary to decide if the party intended to submit a complaint, or was simply an informant.⁸⁵⁹

If the Commission makes a complaint referral, based on a complaint by a complainant, but in the referral, the Commission includes particulars that are not canvassed in the complaint; the Commission must show that it initiated an *ex officio* complaint about the additional particulars.⁸⁶⁰ Such initiation can be as an informal or even tacit decision, and in this regard, the Competition Act does not mandate formalities.⁸⁶¹

4.4.1.4. Powers of the Competition Commission

Once the Commission *ex officio* initiates a complaint, or upon receipt of a complaint from a complainant, the Commissioner is enjoined to direct an inspector to investigate 'as quickly as practicable'.⁸⁶² The investigation will involve gathering information and conducting searches and seizures. To carry out the investigation, the Commissioner may appoint persons to assist the inspector.⁸⁶³

⁸⁵⁵ Rule 14(1)(b)(i) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸⁵⁶ Rule 14(1)(b)(ii) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸⁵⁷ Rule 14(1)(b)(i) of the Rules for the Conduct of Proceedings in the Competition Commission.

⁸⁵⁸ *Clover Industries (Pty) Ltd v Competition Commission* 78/CAC/Jul08; *Yara South Africa (Pty) Ltd v Competition Commission* 93/CAC/Mar10 para 24-25, 30-35.

⁸⁵⁹ *Competition Commission v Yara South Africa (Pty) Ltd* SCA 2013 (6) SA 40 (SCA) para 16, where the Supreme Court held that "once it is determined that what was submitted was indeed intended to be a complaint, it makes no difference at whom the complaint was aimed. If what was submitted amounts to a complaint that A and B were involved in, it makes no difference that the complainant's quarrel was only with A and not with B. Ordinary language dictates that it also constitutes a complaint of a prohibited practice against B."

⁸⁶⁰ *Competition Commission v Yara South Africa (Pty) Ltd* SCA 784/12 para 17, 21.

⁸⁶¹ *Competition Commission v Yara South Africa (Pty) Ltd* SCA 784/12 para 21, 28-31.

⁸⁶² Section 49B(3).

⁸⁶³ Section 49B(4).

4.4.1.4.1. Requests for information

The Commission's investigations normally commence with a written request for information (sometimes information requests can be oral) directed to the respondent firm(s).⁸⁶⁴ The respondent is given 14 days within which to respond to the request, and can be extended by the Commission, upon good cause shown.⁸⁶⁵ Where there is a complainant, the Commission can also direct an information request to the complainant.⁸⁶⁶ While respondents and complainants must be truthful when responding to information, they are under no legal obligation to answer self-incriminatingly.⁸⁶⁷

During targeted investigations (both *ex officio* or those initiated by a complainant), the Commissioner may issue summonses to individuals believed to have information or possess material, such as books, documents or other objects that might have a bearing on the investigation, to produce such material, or appear before the Commissioner, or a person authorised by the Commissioner, for interrogation.⁸⁶⁸ However, while Act empowers the Commissioner or persons authorised by the Commissioner, to interrogate and require the production of documents, this power does not apply to privileged information.⁸⁶⁹

A summons for interrogation must specify the time and place at which the interrogation will take place.⁸⁷⁰ Similarly, a summons to deliver or produce any book, document or other specified object, must state the time and place at which delivery should take place.⁸⁷¹ A person commits an offence if, without just cause, s/he fails to appear at the time and place specified in the summons, or to remain in attendance,⁸⁷² or attends as required, but refuses to be sworn in, or take an affirmation, or fails to produce a book, document or other item in their possession or under their control,⁸⁷³ as ordered.

A person questioned by an inspector conducting an investigation, or by the Commissioner or a person authorised by the Commissioner, must truthfully

⁸⁶⁴ Neuhoff, M. *A Practical Guide to the South African Competition Act* (2006) 245.

⁸⁶⁵ Neuhoff, M. *A Practical Guide to the South African Competition Act* (2006) 245.

⁸⁶⁶ Neuhoff, M. *A Practical Guide to the South African Competition Act* (2006) 245.

⁸⁶⁷ See 4.4.1.6 on the criminalisation of certain conduct that obstructs or interferes with the implementation of the Competition Act.

⁸⁶⁸ Section 49A(1).

⁸⁶⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.3.5.

⁸⁷⁰ Section 49A(1)(a).

⁸⁷¹ Section 49A(1)(b).

⁸⁷² Section 71(1)(a).

⁸⁷³ Section 71(1)(b)(i)-(ii).

answer the question to the best of his/her ability.⁸⁷⁴ However, while truthfulness is required, a person under interrogation is under no obligation to answer self-incriminating questions.⁸⁷⁵ Such self-incriminating information shall be deemed inadmissible in criminal proceedings, except in criminal proceedings for perjury, or an offence in terms of the Competition Act, regarding the failure to answer fully or truthfully, or knowingly providing false information to the Commission, and then only to the extent that the answer or statement is relevant to prove the offence charged.⁸⁷⁶ Upon receipt of such information, the Commission will decide whether to initiate a complaint about the alleged practice and, subsequently, whether to make a referral to the Tribunal. If the Commission does not make a referral, an information supplier has no legal standing to make a referral to the Tribunal.

Summonses issued compelling witnesses to appear for interrogation, or to avail documents under their control, must fall within the ambit of the complaint (whether initiated by the Commission or by a complainant).⁸⁷⁷ The summons must not be broadly stated, instead, it must sufficiently describe the conduct, which is the subject of the investigation.⁸⁷⁸ The summons's validity must be apparent *ex facie*, that is, its clarity should not depend on a request for further particulars.⁸⁷⁹ A summons that is broadly framed, and fails to refer to the specific prohibited practice with 'some particularity as to its nature', will be declared void.⁸⁸⁰

Although not a pleading, a sufficiently particular summons should adequately guide those to whom it is addressed, as to the boundaries of the request for documentation.⁸⁸¹ A summons must pass, what the Competition Appeal Court refers to as, the 'intelligibility test', that is, there must be a balance struck between the legitimate purpose of the Commission to fulfil its legislative mandate to investigate alleged anti-competitive conduct and the constitutional right to privacy.⁸⁸² In addition, a reasonably well informed reader, who has knowledge of the Competition Act's provisions, must not encounter difficulty in divining the ambit of the implications of the summons.⁸⁸³ A summons that fails to meet this standard

⁸⁷⁴ Section 49A(2).

⁸⁷⁵ Section 49A(2).

⁸⁷⁶ Section 49A(3).

⁸⁷⁷ *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission)* [2010] ZASCA 104 para 34-36.

⁸⁷⁸ *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission)* [2010] ZASCA 104 para 26-41.

⁸⁷⁹ *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission)* [2010] ZASCA 104 para 31.

⁸⁸⁰ *Woodlands Dairy Pty (Ltd) v Competition Commission* para Case No: 103/CR/Dec para 48, 52,68.

⁸⁸¹ *Woodlands Dairy Pty (Ltd) v Competition Commission* Case No: 103/CR/Dec para 68.

⁸⁸² *Woodlands Dairy Pty (Ltd) v Competition Commission* Case No: 103/CR/Dec para 68.

⁸⁸³ *Woodlands Dairy Pty (Ltd) v Competition Commission* [2009] ZACAC 3 para 50-54.

will be regarded as vague and will be set aside.⁸⁸⁴ It must be noted that, although the summons must not be vague or overly broad, the Commission, nonetheless, can validly request documents pertaining to a broad timeframe and geographical area, if it is reasonable and justifiable, taking into account the needs of the investigation.⁸⁸⁵ An argument by a firm that such requests will result in increased costs will not be accepted.⁸⁸⁶

The Tribunal is not a court and, therefore, it cannot make a preservation order about evidence obtained, pursuant to invalid summonses.⁸⁸⁷ Consequently, the information (documents and information from interrogations) gained, as a result of such summonses, must be returned to the firm in question.⁸⁸⁸ Persons issued with summonses have been cautioned that, where the validity of the summonses are being questioned, they should be wary about furnishing the Commission with further documents in the discovery process, because, in the event of the summonses being declared void, the documents already availed to the Commission, may still be used by the Commission.⁸⁸⁹ However, if the initiation of a complaint is declared invalid in its entirety, the subsequent referral may also be set aside in its entirety.⁸⁹⁰ In such a case, the Commission will be ordered to return, immediately, all documents, transcripts, and affidavits gained because of the impugned interrogation.⁸⁹¹

4.4.1.4.2. Investigating and search powers

During an investigation, the Commissioner may appoint persons to assist the inspector(s).⁸⁹² The Commission, through its inspectors, is empowered to enter and search premises, and where necessary, seize items.⁸⁹³ Only police officers may assist inspectors in conducting searches. These powers, which are similar to those used in criminal law proceedings, have been the subject of much debate and discussion, in light of the fact that the institutions created by the Competition

⁸⁸⁴ *Woodlands Dairy Pty (Ltd) v Competition Commission* [2009] ZACAC 3 para 50-54.

⁸⁸⁵ *Media24 Ltd & Another v Competition Commission & Others* [2010] ZACT 44.

⁸⁸⁶ *Media24 Ltd & Another v Competition Commission & Others* [2010] ZACT 44.

⁸⁸⁷ *Woodlands Dairy Pty (Ltd) v Competition Commission* [2009] ZACAC 3 para 56.

Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission [2010] ZASCA 104 para 2-3.

⁸⁸⁸ *Woodlands Dairy Pty (Ltd) v Competition Commission* [2009] ZACAC 3 para 56.

⁸⁸⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.3.5.

⁸⁹⁰ *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission* [2010] ZASCA 104 para 47.

⁸⁹¹ *Woodlands Dairy Pty (Ltd) & Milkwood Dairy (Pty v Competition Commission* [2010] ZASCA 104 para 47.

⁸⁹² Section 49B(4).

⁸⁹³ Sections 46- section 49.

Act, are of an administrative nature, but seem to enjoy “criminal law” powers.⁸⁹⁴ An investigation must not go beyond the ambit of the complaint initiated or received by the Commission.⁸⁹⁵ Regarding entering and searching premises for the purposes of investigation, the Competition Act makes a distinction between those conducted under a warrant, and those without a warrant.

4.4.1.4.3. Authority to enter and search with a warrant

Section 46 of the Competition Act authorises the Commission, through its inspectors, assisted by police officers, to enter and search any premises, in terms of a warrant issued by a High Court judge, or a regional magistrate, under whose jurisdiction the premises to be entered and searched are located.⁸⁹⁶ The warrant is issued upon an oath, or affirmation that a practice, prohibited by the Competition Act, has been committed, is being committed, or is likely to be committed, in the said premises. Alternative grounds could be that some material connected to an investigation by the Commission is in the possession of, or under the control of, a person, who is in those premises.⁸⁹⁷ The latter grounds of granting a warrant must be narrowly interpreted, especially, in light of the constitutional right to privacy.⁸⁹⁸

The warrant, which may be issued at any time, must specifically identify the premises to be entered and searched, and empower the inspector (or police officer) to conduct the search.⁸⁹⁹ A section 46 warrant expires under the following circumstances: upon its execution; upon its cancellation by the relevant High Court judge or regional magistrate; when its *raison d'être* no longer exists; or after one month from its issue.⁹⁰⁰ In the interests of ensuring that warrants are clear and precise, the issuing judge or magistrate must ensure that the warrant is tailored for the occasion and should not simply be taken from stock.⁹⁰¹ Therefore, warrants, like summonses, must not be overly broad or vague.⁹⁰²

⁸⁹⁴ Prins, D. *Competition law enforcement proceedings in South African Law: A re-assessment* (University of Cape Town Unpublished LLM thesis 2013); Prins, D. & Koornhorf, P. “Assessing the nature of competition law in South Africa” (2014). *Law Democracy and Development Journal* 136-163; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.4.6.5

⁸⁹⁵ *Woodlands Dairy (Pty) Ltd v Competition Commission* [2010] ZASCA 104 para 16-20, 34-36; *Competition Commission v Yara (South Africa) (Pty) Ltd*[2013] ZASCA 107 para31-35..

⁸⁹⁶ Section 46(1), in terms of section 1(xix), the term ‘premises’ must be taken to include ‘land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container’.

⁸⁹⁷ Section 46(1)(a)- (b).

⁸⁹⁸ *Pretoria Portland Cement Company Ltd & Another v Competition Commission & Others* [2002] ZASCA 63 para 71, 73.

⁸⁹⁹ Section 46(2)(a)-(b).

⁹⁰⁰ Section 46(3)(a)-(d).

⁹⁰¹ Section 46(1)(a)- (b).

⁹⁰² Section 46(1)(a)- (b).

While a warrant need not be preceded by a hearing for the firm (and its premises) to be searched,⁹⁰³ an irregular or unlawful warrant may be declared invalid, subsequently. All material seized during its execution must be returned, and where appropriate, a court may issue an order prohibiting the Commission and its employees from disclosing the information gained from the now impugned warrant.⁹⁰⁴

Before a warrant is executed, the person executing it must immediately provide their identification. For an inspector this is a certificate of appointment, and must be shown to any person affected by the entry and search, who requests to see it.⁹⁰⁵ An inspector must furnish a copy of the warrant to the owner of the premises, or the person in control of the premises, alternatively, a copy of the warrant can be affixed in a prominent place on the premises.⁹⁰⁶ The person executing the warrant should also furnish a copy of the affidavit upon which the Commission was granted the warrant.⁹⁰⁷

A certain measure of decorum must be observed when a warrant is being executed.⁹⁰⁸ For instance, a warrant must be executed during the day, although the issuing judge or magistrate may allow that it be executed at night, if it is reasonable in the circumstances.⁹⁰⁹ The authorised persons, whether they are inspectors or police officers, are authorised to enter and search the specified premises.⁹¹⁰ The Supreme Court of Appeal has made it clear that it will not tolerate the granting and execution of warrants in a manner that blatantly violates the rule of law and the fundamental rights enshrined in the Constitution.⁹¹¹

⁹⁰³ *Janse van Rensburg & Another v Minister of Trade & Industry & Another* 2000 (11) BCLR 1235 (CC) para 22.

⁹⁰⁴ *Pretoria Portland Cement Company Ltd & Another v Competition Commission & Others* [2002] ZASCA 63 para 74.

⁹⁰⁵ Section 24(4), 46(6)(a)(i)-(ii).

⁹⁰⁶ Section 46(6)(a)(i)-(ii).

Pretoria Portland Cement Company Ltd & Another v Competition Commission & Others [2002] ZASCA 63 para 53-56, 71.

⁹⁰⁷ *Pretoria Portland Cement Company Ltd & Another v Competition Commission & Others* [2002] ZASCA 63 para 58-59; *Janse van Rensburg & Another v Minister of Trade & Industry & Another* 2000 (11) BCLR 1235 (CC) para 35.

⁹⁰⁸ Section 46(6)(b).

⁹⁰⁹ Section 46(4).

⁹¹⁰ Section 46(5), and section 46(6).

⁹¹¹ In *Pretoria Portland Cement Company Ltd & Another v Competition Commission & Others* [2002] ZASCA 63 para 53-56,71,73-74, a search warrant was conducted in the presence of television film crew from the national broadcaster and another independent broadcaster. Evidence tendered in court revealed that the incumbent Commissioner, had actually conducted television interviews right on the appellants' premises, much to the Supreme Court's chagrin. In addition, despite appellants' request, the investigating inspectors had not handed over a copy of the warrant. The investigating inspectors went on to unlawfully remove computer hardware from the appellants' premises. Furthermore, in seeking a warrant before the issuing judge, the Commission had been economical with the truth, as evidenced by it withholding certain relevant information. The Supreme Court was also concerned about the violation of the appellants' right to privacy. The Court highlighted that, "the Commission has important work to do, but it is not to frighten the horses. Once one is satisfied that there has been a serious breach of those duties, there is no call for a delicate severance of the various constituents of the Commission's acts. It should be made to start with a clean slate. The execution was bad because it involved *inter alia* a gross, and as yet inadequately explained, invasion of privacy by taking along the TV media. Notionally, an unlawful

Where the execution of the warrant is met with resistance, the Competition Act authorises the police officers assisting the inspectors to use reasonable force, such as breaking a door or window of the premises, in order to overcome the resistance.⁹¹² However, before such force is used, the police officer must first verbally and audibly request access into the premises, and state the purpose of the entry. However, if there is a reasonable belief that, by doing so, it will give the person a chance to destroy or dispose of material, such, as a documents or articles, the object of the search,⁹¹³ forced entry is allowed. Where forced entry into premises, in the absence of the owner or person in control of the premises, results in damages, the Commission may be required to provide compensation.⁹¹⁴

4.4.1.4.4. Authority to enter and search without a warrant

Circumstances may sometimes dictate that the Commission's inspectors enter and search premises *sans* warrant, the so-called "dawn raids". The Competition Act allows for such entering and searching of premises without a warrant, provided the premises are not a private dwelling.⁹¹⁵ Entering and searching without a warrant must be based on a reasonable belief that circumstances exist for which a warrant may be issued, but that the present situation and the delay seeking a warrant would 'defeat the object or purpose of the entry and search'.⁹¹⁶ Before entering to search the premises, inspectors must identify themselves,⁹¹⁷ and obtain permission to enter the premises.⁹¹⁸ As with entering and searching under a warrant, searches conducted without a warrant must be conducted during the day and if justified and reasonable in the circumstances, they can be conducted at night.⁹¹⁹ The accompanying police officer may use reasonable force where entry into the premises is being resisted.⁹²⁰ Any damage caused in the process of entering and searching may be compensated by the Commission.⁹²¹

execution will not by itself, inevitably taint a warrant that is itself regular. In this case, however, the Commission's affidavits show that media accompaniment was a component of the plan very early on." Accordingly, the Supreme Court upheld the appeal and ordered that the warrants issued against the appellants be set aside, that the Commission return, post-haste, all documents, records, data and other property seized under the warrants; and an interdict against the Commission and its employees that it not disclose information gained pursuant to the warrants.

⁹¹² Section 49(7).

⁹¹³ Section 49(8).

⁹¹⁴ Section 49(9).

⁹¹⁵ Section 47(1), according to section 1(xxiii), the phrase 'private dwelling' must be taken to mean 'any part of a structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used wholly for the purpose of, a residence'.

⁹¹⁶ Section 47(2)(b).

⁹¹⁷ Section 47(2).

⁹¹⁸ Section 47(2)(a).

⁹¹⁹ Section 47(3).

⁹²⁰ Section 49(7)-(8).

⁹²¹ Section 49(9).

Whether the entering and searching of premises is done with, or without a warrant, the same set of powers applies to both.⁹²² In either circumstance, the authorised inspector (assisted by a police officer) may make entry into the premises; search the said premises and search any person on the premises, if there is a reasonable justification that the person has in their possession, material that pertains to the investigation. They may also inspect articles or documents on the premises that relates to the investigation; make copies or excerpts of books or documents on the premises, pertaining to the investigation; use computer systems on the premises, analyse and make copies of the data generated, as well as attach (for examination and safe keeping) anything that pertains to the investigation.⁹²³ Any statements made to the inspector during this process may be subject to the rule against self-incrimination.⁹²⁴

The entry and search of premises must be done in a manner that respects decency, order, as well as the constitutional rights to dignity, freedom, security and privacy.⁹²⁵ For example, only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.⁹²⁶ Before being questioned, the persons on the premises must be notified of their right to legal representation.⁹²⁷ Additionally, a person must be afforded the opportunity to exercise that right.⁹²⁸

Items removed from the premises being searched must be duly recorded and “returned as soon as practicable”, once the purpose for which the items were removed has been realised.⁹²⁹ Persons on the premises may refuse the removal of articles or documents, on the basis that that they contain legally privileged information.⁹³⁰ Where legal privilege is raised, an inspector may request that the registrar or sheriff of the High Court, with the requisite jurisdiction, to attach and remove the said material for safekeeping, until the court has made a determination on the privileged status of the material.⁹³¹

⁹²² Section 48(1).

⁹²³ Section 48(1)(a)- (h) and section 48(3).

⁹²⁴ Section 48(2).

⁹²⁵ Section 49(1).

⁹²⁶ Section 49(2).

⁹²⁷ Section 49(3)(a).

⁹²⁸ Section 49(3)(b).

⁹²⁹ Section 49(4)(a)-(b).

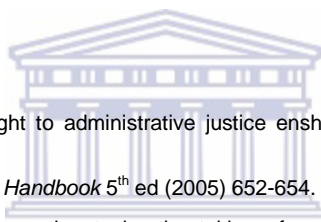
⁹³⁰ Section 49(5).

⁹³¹ Section 49(6).

4.4.1.5. Administrative law principles and the Competition Commission

The principles of administrative law, as laid out in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), apply to certain functions of the Commission.⁹³² For the Commission's conduct to fall within the ambit of administrative law, it must qualify as administrative action, as defined in the PAJA.⁹³³ In addition, the PAJA, specifically, requires decisions, which qualify as administrative action, to be procedurally fair, and outlines the components of such procedural fairness, depending on whether the administrative action affects specific individuals, or general members of the public.⁹³⁴

From the definition, certain decisions by the Commission are regarded as administrative action, while others are not. For example, a decision by the Commission regarding a small or intermediate merger, or a decision by the Commission to grant or refuse an exemption application, are regarded as administrative action, within the meaning of the PAJA. This is because these decisions have a "direct external legal effect", in the sense that the decisions are a final, albeit reviewable, determination of a person's rights and obligations.⁹³⁵



⁹³² PAJA gives effect to the constitutional right to administrative justice enshrined in section 33 of the Constitution of the Republic of South Africa, 1996.

See Currie I & de Waal J *The Bill of Rights Handbook* 5th ed (2005) 652-654.

⁹³³ Section 1 of PAJA, defines administrative action to be the taking of a decision, or failure to take a decision, of an administrative nature by an organ of state, or a natural or juristic person, in terms of an enabling legislation, which adversely affects the rights of a person and has a direct external legal effect. Certain decisions are excluded from the definition of an administrative action; for example, a decision to institute or continue prosecution, any decision, or failure to take a decision, in terms of the Promotion of Access to Information Act of 2000, or a decision, or failure to take a decision, in terms of section 4(1) of PAJA (section 4 of PAJA deals with issues of procedural fairness, where an administrative action affects the public).

⁹³⁴ Section 3 and section of PAJA address the requirement of procedural fairness, regarding administrative action that affects specific individuals, or the general public, respectively.

See also Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.3.7.

⁹³⁵ *TWK Agriculture Limited v Competition Commission & Others* (67/CAC/Jan07) [2007] ZACAC 3; *A.C. Whitcher (Pty) Ltd v Competition Commission & Others* (84/CAC/JAN09) [2009] ZACAC 2; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.3.7; Hoexter, C. *Administrative Law in South Africa* [2nd ed.] (2012) 229-234; Currie, I. & de Waal, J. *The Bill of Rights Handbook* [5th ed.] (2005) 662.

A decision by the Commission, regarding a small or intermediate merger, is deemed administrative action because it is final and affects the rights of a firm. Section 13(1)(a)-(b) of the Competition Act does not require the Commission to be notified of small mergers. These can be implemented without the approval of the Commission. However, section 13(3) provides that, within six months of the implementation of a small merger, the Commission may require the parties to the merger to notify the Commission, if, in the opinion of the Commission, the merger substantially prevents or diminishes competition, or that it cannot be justified on public interest grounds. In these circumstances, section 13(4) is to the effect that a party to a merger may not proceed to implement the merger, until it has been approved by the Commission, with or without conditions. In terms of section 13(5), the Commission must consider the merger as required by section 12A and, thereafter, issue a certificate, in the prescribed format, either approving the merger (with or without conditions), prohibiting the implementation of the merger (if it has not been implemented), or declaring the merger to be prohibited. The Commission's actions in this regard, are not preliminary; they are certainly final and have an impact on the rights of parties, for instance, the parties to the merger. Regarding intermediate mergers, section 14 provides that they must be reported to the Commission, which is empowered to consider them, in terms of section 12A. Thereafter, having evaluated the merger, the Commission must issue a certificate, in the prescribed format, approving the merger (with or without conditions), or prohibiting the implementation of the merger. As with small mergers, the Commission's actions in this regard, are not preliminary, they are certainly final and have an impact on the rights of parties, for instance, the parties to the merger. Regarding exemption applications, the Commission is empowered to consider them, in terms of section 10 of the Competition Act. Upon receiving an exemption application, the Commission must grant a conditional or unconditional exemption, for a specified period, provided the application fulfils the requirements, as laid out in the Act. Alternatively, the Commission may also refuse to grant an exemption. The Commission's decisions regarding exemption applications are final, and affects the rights of parties, therefore, rightly qualifying as administrative action.

Conversely, certain decisions by the Commission are not regarded as administrative action, within the meaning of the PAJA because they do not have a “direct and external legal effect”, in the sense that no final determination of rights or obligations has taken place.⁹³⁶ Examples of these are, the Commission’s decision to refer a matter to the Competition Tribunal for adjudication,⁹³⁷ the Commission’s recommendation to the Tribunal regarding a large merger, and the Commission’s advisory opinions.⁹³⁸ However, even though these decisions, such as referrals to the Tribunal, do not amount to administrative action, and therefore, cannot be reviewed in terms of the PAJA, they can, nonetheless, be set aside based on the principle of legality.⁹³⁹

4.4.1.6. Criminal offences

To further support the enforcement of the Competition Act, Chapter Seven of the Act creates several offences, all aimed at addressing issues of the obstruction of justice. In terms of the Competition Act, it is a criminal offence to disclose information deemed

⁹³⁶ Hoexter, C. *Administrative Law in South Africa* [2nd ed] (2012) 231.

In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) para 14, the court indicated that a local authority’s decision lacked the finality required to attract rights to administrative justice because the decision was a “preliminary or interlocutory step having no immediate effect on the parties’ rights.”

See also *Grey’s Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA) para 23.

⁹³⁷ *Simelane NO & Others v Seven-Eleven Corporation SA (Pty) Ltd & Another* [2003] 1 All SA 82 (SCA).

According to *Norvatis SA (Pty) Ltd & Others v Competition Commission & Others* CT 22/CR/B/Jun 01 para 41, 50, 55-61, in order to decide whether a decision by the Commission qualifies as administrative action, one must examine the decision making process in its entirety. There is no express provision in the Act that compels the Commission to afford a firm under investigation the opportunity to be heard prior to a referral of a complaint to the Tribunal. It is also important to draw a distinction between investigative and determinative action. The decision by the Commission to make a referral falls in the former category. In terms of section 21 of the Competition Act, the Commission is empowered to investigate and evaluate alleged prohibited practices, and in terms of section 50(2), make a referral to the Tribunal of those complaints, which the Commission has deemed prohibited practices. The Commission is an investigative body, and by referring a complaint to the Tribunal, it is merely instituting the first procedural step “on the road to a hearing”. If a firm is prejudiced by the complaint referral, this can be remedied through the processes of the Tribunal laid out in the Act and the Tribunal’s Rules. For instance, after a complaint has been referred to the Tribunal, the Tribunal’s procedural rules make provision for parties to access material evidence adverse to them. Parties are given a hearing to dispute such adverse evidence, to which the Commission must be able to substantiate its claims, or allegations, or else its case would fail. Section 50(2) states that the Commission shall refer a complaint to the Tribunal “if it determines that a prohibited practice has been established” (emphasis added). Although, some may argue that the use of the word “determines” indicates that a complaint referral by the Commission is a determinative function, the Tribunal indicated that such a viewpoint is simply an overemphasis of form over substance. The substance of the matter is that, based on its investigations, the Commission must determine whether or not a prohibited practice has occurred. If the Commission’s determination is that a prohibited practice has occurred, it cannot impose a sanction, such as a fine or any other sanction. It must refer the complaint to the Tribunal. A referral is not determinative of the complaint. It simply means that the respondent firm appears before the Tribunal in a hearing, where the firm will have a chance to answer the allegation that it has engaged in a prohibited practice. In the event that the Commission does not refer, the non-referral is not determinative of the complaint. Section 51(1) provides that a complainant, whose complaint has not been referred to the Tribunal by the Commission, has the option to refer the complaint directly to the Tribunal. A referral by the Commission is certainly crucial. It commences the adjudicative process. However, it is not determinative of the complaint itself. The respondent firm will have the opportunity to be heard, to state its case before the Tribunal. It is the decision of the Tribunal that will be determinative of the complaint in its entirety. For this reason, the Act and the Tribunal’s Rules entitle the respondent firm the principles of natural justice.

⁹³⁸ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.3.7.

⁹³⁹ According to the Supreme Court in *Competition Commission v Telkom SA Ltd* [2010] 2 All SA 433 (SCA) para 12, it is important to note that, even if a decision by the Commission does not qualify as administrative action and, therefore, not eligible to be reviewed under the PAJA (for example, the decision to refer a matter to the Tribunal), it may, nonetheless, be set aside on the basis of the principle of legality. This principle requires that the “no public power may be exercised and no function performed beyond that conferred by law”. This means that the decision by the Commission to refer a complaint to the Tribunal must be authorised by the law.

See *Computicket (Pty) Ltd v Competition Commission* (118/CAC/APR12) [2012] ZACAC 7 para 8-11.

confidential by the Act,⁹⁴⁰ to hinder the administration of the Act,⁹⁴¹ to fail to attend a hearing, when summoned,⁹⁴² to fail to answer fully or truthfully,⁹⁴³ and to fail to comply with the Act.⁹⁴⁴ As for the appropriate penalties, the Competition Act prescribes that a criminal court can impose either imprisonment, or fines, or both, should the court find that the above conduct has been committed.⁹⁴⁵ While they are not competition law violations in the strictest sense, treating these types of conduct as criminal offences goes a long way to safeguard the effectiveness of the work of NCAs. Without imposing personal liability on individuals obstructing the application of competition laws, the enforcement activities of South Africa's NCAs would be severely hamstrung. For example, individuals would simply ignore summonses; individuals would also ignore orders handed down by NCAs; individuals would easily make false statements, tender false evidence, or withhold crucial information, without fear of any consequences.⁹⁴⁶

4.4.2. The Competition Tribunal

Once a targeted investigation has been completed, the next step is for the Competition Commission to decide whether to make a complaint referral to the Tribunal for adjudication. As per the Competition Tribunal in *SAPPI Fine Papers (Pty) Ltd v Competition Commission*, a complaint referral must disclose a course of action upon which the complaint is based.⁹⁴⁷

The Competition Tribunal is a juristic person, endowed with jurisdiction through the Republic, is a Tribunal of record and must exercise those powers prescribed in the Competition Act.⁹⁴⁸ As a specialist adjudicative body, the Competition Tribunal is tasked with adjudicating any conduct prohibited in terms of Chapter Two of the Competition Act, such as cartels, and to impose any remedy as provided in terms of the Competition Act.⁹⁴⁹ It can also adjudicate on any matter that is provided in terms of the Act and make any order, as provided in terms of the Act.⁹⁵⁰ It has the jurisdiction to hear appeals from, or review any decision of the Competition Commission referred to it in terms of the Act.⁹⁵¹ In addition, the Tribunal may make any ruling, or order that

⁹⁴⁰ Section 69.

⁹⁴¹ Section 70.

⁹⁴² Section 71.

⁹⁴³ Section 72.

⁹⁴⁴ Section 73.

⁹⁴⁵ Section 74.

In terms of section 75, a Magistrates' Court has the jurisdiction to impose any penalty stipulated in the Competition Act.

⁹⁴⁶ *Obstruction of justice in cartel investigations*. International Competition Network (2006) 2-18.

⁹⁴⁷ 62/CR/Nov01 para 29-52; *Competition Commission v Yara (South Africa) (Pty) Ltd* [2013] ZASCA 107.

⁹⁴⁸ Section 26 (1)(a)-(d).

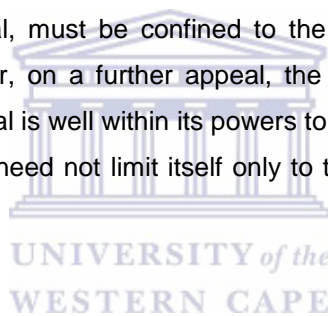
⁹⁴⁹ Section 27 (1)(a).

⁹⁵⁰ Section 27 (1)(b).

⁹⁵¹ Section 27 (1)(c).

is necessary, or incidental to its functions, in terms of the Competition Act.⁹⁵² The Tribunal's procedures are governed by rules, enacted in terms of section 27(2) of the Competition Act, the Rules for the Conduct of Proceedings in the Competition Tribunals (hereinafter, referred to as the Competition Tribunal Rules of Procedure).⁹⁵³ Although the Tribunal must conduct its hearings in line with its Rules,⁹⁵⁴ in circumstances where the Rules do not make provision for an issue facing it, the Tribunal is permitted to follow a procedure that does not prejudice the parties.⁹⁵⁵ In these circumstances, the Tribunal has the discretion to consider the High Court rules, although it is not bound to do so.⁹⁵⁶ As a creature of statute, the Tribunal has no inherent jurisdiction, and in line with the rule of law and the principle of legality, it can only exercise those powers that have been conferred upon it by the Competition Act.⁹⁵⁷

In *Senwes Ltd v Competition Commission*, the Supreme Court of Appeal held that the Tribunal can only adjudicate on those matters referred to it and that the hearings of the Tribunal must be limited to those issues, as raised in the complaint referral (with the possibility of a valid amendment or extension). In addition, the evidence presented before the Tribunal must similarly be confined to issues raised in the complaint referral, and, ultimately, that the decision handed down by the Tribunal, must be confined to the subject matter, as contained in the complaint referral.⁹⁵⁸ However, on a further appeal, the Constitutional Court took a different view, and held that the Tribunal is well within its powers to adopt an inquisitorial approach in the proceedings and, as such, it need not limit itself only to those matters raised in the complaint



⁹⁵² Section 27 (1)(a).

⁹⁵³ Published in Government Gazette Notice 22025 in Government Gazette Vol 428 on 01 February 2001.

See section 27(2) read with section 21(4) of the Competition Act.

⁹⁵⁴ Section 27 (2) read with section 52(1).

⁹⁵⁵ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.4.2.

See also Rule 55 of the Competition Tribunal Rules of Procedure.

⁹⁵⁶ Rule 55(2) of the Competition Tribunal Rules of Procedure.

According to *Allens Mescho (Pty) Ltd & Others v Competition Commission & Others Cape gate (Pty) Ltd v Competition Commission & Others* (63/CR/Sep09) [2010] ZACT 37 para 6, where the Tribunal indicated, as an administrative tribunal, to proceed informally, but to do so in a manner that is procedurally fair. The Tribunal also warned against uncritical borrowing of High Court rules *in toto*, as this may prove impractical.

In *National Association of Pharmaceutical Wholesalers & Others v Glaxo Wellcome & Others* 45/CR./Jul01 para 55, the Tribunal ruled that its complaint referral proceedings "are *sui generis* and cannot be classified as either action or application proceedings as they have aspects of each. Like trial proceedings the pleadings may be supplemented by evidence, but unlike trial proceedings the pleadings are in affidavit form and contain some if not all the evidence that may be led in proceedings. It may well be in some cases the matter can be resolved entirely on the papers and in this respect they resemble High Court application procedures, but unlike those proceedings (except where there is a referral to oral evidence in exceptional cases) hearings are not necessarily confined to the pleadings and additional documentary and oral evidence is typically adduced."

According to *Agri Wire (Pty) Ltd & Another v Competition Commission & Others* 2013 (5) SA 484 (SCA) para 15, the Tribunal Rules are subordinate to the Competition Act; they do not supersede the Competition Act. According to *Mainstreet 2 (Pty) Ltd t/a New United & Others v Norvatis (SA) (Pty) Ltd* 25/IR/C/Aug00 page 5-6, the Tribunal has no power to declare its rules as invalid.

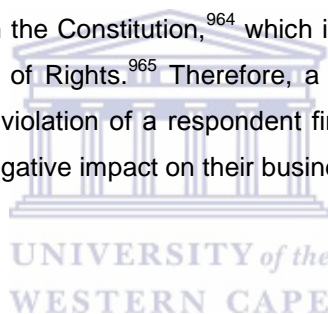
⁹⁵⁷ *Competition Commission of South Africa v Senwes Limited* [2009] ZACT 8; *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* [2011] ZACAC 1 para 61.

⁹⁵⁸ [2011] ZASCA 99 para 51-57.

referral.⁹⁵⁹ In *Competition Commission v Yara (South Africa) (Pty) Ltd*, the Supreme Court, speaking to complaint referrals made pursuant to *ex officio* 'complaints' initiated by the Commission, held that a referral does not need to be confined to the parameters of the original [*ex officio*] complaint.⁹⁶⁰

The period, within which the Commission must make a complaint referral, depends on whether the complaint was initiated *ex officio*, or whether it was initiated by a complaint submitted by a complainant. For its part, the Tribunal must publish, by way of a notice, all referrals made to it in the Government Gazette.⁹⁶¹

With *ex officio* complaints, the Competition Commission may refer the complaint to the Competition Tribunal for adjudication,⁹⁶² at any time, after initiating the complaint. Therefore, the Act does not place a time limit, expressly, on the referral of complaints that are initiated by the Commission, *ex officio*. However, a respondent need not fear an indefinite investigation period because, not only does the Act require the Commission to "direct an inspector to investigate the complaint as *quickly as practicable*",⁹⁶³ but it also requires being interpreted in a manner that is consistent with the Constitution,⁹⁶⁴ which interpretation must promote the spirit, purport and object of the Bill of Rights.⁹⁶⁵ Therefore, a drawn-out, unending investigation is impermissible, as it will be a violation of a respondent firm's fundamental rights, such as the right to privacy, and have a negative impact on their business, as well.⁹⁶⁶



⁹⁵⁹ *Competition Commission v Senwes Ltd* (CCT 61/11) [2012] ZACC 6 para 48-50. According to the Constitutional Court, "[t]he fact that section 52(1) expressly states that the Tribunal must conduct a hearing into every matter referred to it does not necessarily mean that the Tribunal has no power to entertain a matter not included in the referral...[w]hile it is true that the Tribunal can exercise only those powers given to it by the Act, the flaw in the approach by the Supreme court of Appeal...lies in the fact that it conflates matters of jurisdiction and procedure...[a]ccordingly, the construction given to section 52(1) by the Supreme Court of Appeal is at odds with the scheme of the Act, including the structure of section 52, when read in its entirety. This section gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal. Most importantly, it also authorises the tribunal to adopt an inquisitorial approach to a hearing. Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry."

⁹⁶⁰ 2013 (6) SA 404 (SCA) para 27.

The so-called "referral rule" regarding referrals, based on *ex officio* complaints, has undergone a process of transformation. In *Competition Commission v Lungefoam (Pty) Ltd* 103/CR/Seo08 para 47, 52, 59-60, where the Tribunal held that, in a referral, while the Commission is not limited to the particulars of the practice, or even the parties named in the complaints upon its initiation, the Commission is nonetheless limited regarding the prohibited practice specified at the initiation of the complaint; in *Woodlands Dairy (Pty) Ltd v Competition (SCA) 105/2012*, *Lungefoam (Pty) Ltd v Competition Commission* 102/CAC/Jun10, the Supreme Court of Appeal and the Competition Appeal Court took the view that the Commission could only refer a complaint regarding the prohibited practice specified in the complaint initiation, and only against those firms specified in the complaint.

⁹⁶¹ Section 51(3).

In terms of section 50(4), a notice must include details as to the identity of the respondent and the nature of the prohibited practice that has been referred to the Tribunal.

⁹⁶² Section 50(1).

⁹⁶³ Section 49(3).

⁹⁶⁴ Section 1(2)(a).

⁹⁶⁵ Section 39(2) of the Constitution of the Republic of South Africa, 1996 .

⁹⁶⁶ *Omnia Fertilizer Limited v Commission & Others* 51/CAC/Jun05 para 13

See Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.5.1.

Regarding complaints submitted by a complainant, the Competition Commission must refer the complaint to the Competition Tribunal, within one year after the complaint was submitted, if its investigations have established that a prohibited practice was committed.⁹⁶⁷ The Commission and the complainant may mutually agree to extend the one-year period.⁹⁶⁸ Where the one-year period has been extended by mutual consensus, before it expires, the Commission may make an application to the Tribunal for a further extension, presumably because the complainant would have withheld their consent to a further extension.⁹⁶⁹ The Act does not make provision as to how a complainant's consent to an extension(s) must be conducted.⁹⁷⁰ Notwithstanding the lack of statutory guidance, the Competition Tribunal, on several occasions, has made it clear that the Commission should seek to adopt a clear system, or approach, as to how extensions are negotiated with the complainant. These extensions should not be granted on an *ad hoc*

⁹⁶⁷ Section 50(2)(a).

⁹⁶⁸ Section 50(4)(a).

According to the Competition Appeal Court in *Omnia Fertiliser Limited v Competition Commission & Others* 51/CAC/Jun05, section 50(4) envisages multiple extensions, as agreed upon by the complainant and the Commission; in an earlier decision in *Sappi Fine Papers (Pty) Ltd v Competition Commission* 62/CR/Nov02 para 22-28, the Tribunal had, similarly, ruled that there was nothing in the Act precluding multiple extensions and because the purpose of section 50(4) is the protection of the complainant, it may agree to multiple extensions. The Tribunal specifically indicated that “[t]he real explanation for the time cap on the Commission, imposed by section 50, was not to protect a respondent from a complainant. The complainant has no right to proceed with its own complaint referral unless it has a certificate of non-referral from the Commission. If the Commission is dilatory in its investigative function, a complainant might wish to bring the case itself, but it cannot do so without a certificate of non-referral. In addition, without a decision from the Tribunal declaring the conduct in question, a restrictive practice, it cannot bring a case for damages in a civil court. What the legislature intended was to impose some restriction on the Commission's prerogative to bring a complaint referral in its own good time- it was, therefore, meant to balance the Commission's public right to be the preferred prosecutor, with a private right of a complainant to get its dispute heard. For this reason, the complainant can refuse to agree to an extension and the Commission has to apply to the Tribunal for extension.”

In *Competition Commission v Allen Mescho (Pty) Ltd* 09/CR/Jan07 para 7, 25, 27, the Tribunal accepted that a complainant could extend the investigation period by as much as fifteen times (as was the case here), the extension of the investigation period was meant to protect the complainant, who, therefore, could bargain for multiple extensions with the Commission. If the investigation period expires and there has been no extension, the Commission's power to pursue the matter will lapse, in which case, the complainant will have to make a complaint referral to the Tribunal, or alternatively, the complainant can submit the complaint anew with the Commission, provided it has not prescribed.

⁹⁶⁹ Section 50(4)(b).

Initially, in *Sappi Fine Papers (Pty) Ltd v Competition Commission* 62/CR/Nov01 para 26; *GlaxoSmithKline South Africa (Pty) Ltd v Makhathini* 97/CR/Nov04 para 24; *Omnia Fertilizer Limited v Commission & Others* 51/CAC/Jun05 para 12-14, both the Competition Tribunal and the Competition Appeal Court had decided that, if the complainant refused an extension request of the stipulated one year period, the Commission could approach the Tribunal and seek an extension, notwithstanding the unwillingness of a complainant.

But in *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO*, 62/CAC/Apr06, the Competition Appeal Court held that on a proper interpretation of the extension provision, where the Commission is making an application to the Tribunal for an extension, such an application is not with regards to the extension of the original one year period. Instead, such an application concerns circumstances, where there has already been a prior extension, and the complainant has refused any further extension. Per the Competition Appeal Court, this means that, if the Commission is seeking an extension of the initial one-year period and the complainant is not agreeable to this, the Act does not allow the Commission to side step the complainant's refusal to seek an extension from the Tribunal, thereby overriding the complainant's refusal. Alternatively stated, the Tribunal has no jurisdiction to grant an extension, when the complainant has refused the extension of the original one-year investigation period.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.5.1 correctly highlight that the Appeal Court's reasoning allows a complainant to stall settlement negotiations between the Commission and a respondent firm, because an order from the Tribunal is necessary to make the settlement agreement a consent order. Such applications for consent orders are made to the Tribunal, during the period allowed for the Commission to make a referral or non-referral of the complaint. Therefore, if a complainant refuses to extend the initial one year period, the Commission may find itself unable to reach a settlement agreement regarding a complaint.

In *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO*, 62/CAC/Apr06, the Competition Appeal Court took the view that the legislature should consider amending this, to prevent a complainant from scuppering the Commission's settlement negotiations.

⁹⁷⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.5.1.

basis, and the Commission should keep and maintain records of all its extension negotiations. The Commission, as a proxy that represents the public interest, must conduct itself on this issue, in a manner that fosters certainty for both the complainant and the respondent, who must not endure an unending investigation.⁹⁷¹ Other than seeking an extension, whether by mutual consent or application to continue with its investigations, the Commission can directly issue a notice of non-referral to the complainant.⁹⁷²

With complaints initiated by a complainant, a complaint referral, filed by the Commission, may include all the particulars submitted by the complainant, or only some of the particulars submitted by the complainant, or add further particulars to those submitted by the complainant.⁹⁷³ Where the Commission has not referred some of the particulars submitted by the complainant, it must issue a notice of non-referral regarding those particulars that it has not referred for adjudication.⁹⁷⁴ The complainant is allowed to file a complaint referral directly to the Tribunal for adjudication, regarding those particulars of the complaint for which the Commission has issued a non-referral notice.⁹⁷⁵ This is because, if the Commission has not referred the complaint, in its entirety, to the Tribunal for adjudication, or has not issued a non-referral notice within the stipulated one year (or an extension thereof), the Commission shall “be regarded as having issued a notice of non-referral”.⁹⁷⁶ In these circumstances, the complainant may refer the matter directly to the Tribunal, within 20 business days after the issue, or deemed issue, of the non-referral notice by the Commission.⁹⁷⁷ In its referral, the complainant cannot add further particulars that were not included in the original complaint submitted to the Commission. Should the complainant desire to add further particulars, they must initiate a new complaint regarding those new particulars.⁹⁷⁸ The Competition Appeal Court has ruled that, where the conduct in question, violates more than one provision of the Competition Act, a complainant is not prevented from adding more sections of the Act, which were not included in the original

⁹⁷¹ *Competition Commission v Allen Mescho (Pty) Ltd* 09/CR/Jan07 para 25, 30,32; *Competition Commission v Geomatic Quarry Sales (Pty) Ltd* 76/CR/Nov09 para 29-33.

⁹⁷² Section 50(2)(b).

⁹⁷³ Section 50(3)(a)(i)-(iii).

⁹⁷⁴ Section 50(b).

The non-referral notice regarding those particulars that have not been referred to the Tribunal, must be in Form CC 8.

⁹⁷⁵ Section 51(1).

In *Barnes Fencing Industries (Pty) Ltd & Another v Iscor Ltd (Mittal SA)* 08/CR/Jan07 para 39, the Tribunal mentioned the fact that, in such circumstances, the complainant can refer those portions of the complaint to the Tribunal because the particulars “would not be on all fours” with the Commission’s case.

⁹⁷⁶ Section 50(5).

⁹⁷⁷ Section 51(1).

⁹⁷⁸ According to the Competition Appeal Court in *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 para 25-30, the Act does not permit a complainant to circumvent the Commission’s investigative procedures by adducing or adding ad hoc complaints to the referral; in *Competition Commission v Yara (South Africa) (Pty) Ltd* (SCA) 784/12, the Supreme Court of Appeal re-affirmed this position by holding that there must be a correlation between the complaint submitted by the complainant/s and the complaint eventually referred to in the referral. Where the complaint is referred by the original complainant and not by the Commission, the purpose of this requirement is to protect the legislature’s preference of the Commission, as its investigator and prosecutor of first choice. This preference dictates that the private complainant is not allowed to bypass the Commission “by keeping part of the complaint in its pocket, as it were, then to introduce for the first time after a non-referral.”

complaint, as long as the additional sections are supported by the conduct in the original complaint.⁹⁷⁹

As stipulated in the Competition Act, all referrals, whether made by the Commission or by a complainant, must be made in the prescribed format.⁹⁸⁰ The Competition Tribunal Rules makes provision for the formalities and time limits that govern the initiation of complaint proceedings, for example; ⁹⁸¹ form of complaint referral;⁹⁸² answer, reply, and amending complaints; ⁹⁸³ completion of complaint file;⁹⁸⁴ the conduct of complaint hearings;⁹⁸⁵ pre-hearing conferences;⁹⁸⁶ and settlement conference procedures.⁹⁸⁷

In some circumstances, a referral may be made by a party to an action in a civil court that has referred the matter to the Tribunal. If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited by the Competition Act, the civil court must not consider that issue on its merits.⁹⁸⁸ Where the issue is one that has been decided upon by the Competition Tribunal or the Competition Appeal Court, the civil court must apply the determination of the Tribunal or the Appeal Court.⁹⁸⁹ In all other circumstances, the civil court must refer that issue to the Tribunal to be considered on the merits,⁹⁹⁰ if the civil court is satisfied that the issue has not been raised in a frivolous or vexatious manner⁹⁹¹ and that the resolution of that issue is required to determine the final outcome of the action.⁹⁹² With civil

⁹⁷⁹ *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 para 15-24, 33.

However, Sutherland, P. & Kemp, K. caution that the Competition Appeal Court's decision must be tempered with decisions from the Supreme Court of Appeal and the Competition Appeal Court itself, indicating that a certain level of specificity is required during the complaint initiation phase, for example *Woodlands Dairy (Pty) Ltd v Competition Commission* (SCA) 105/2010; and *Netsar (Pty) Ltd v Competition Commission* 99/CAC/May10.

⁹⁸⁰ Section 50(1), section 51(1), section 51(2),(2)(a).

In terms of Rule 14(1)(a) of Competition Tribunal Rules of Procedure, a complaint referral made by the Commission must be filed in Form CT 1(1).

Rule 14(1)(b) of the Competition Tribunal Rules of Procedure, a complaint referral made by the complainant must be filed in Form CT 1(2).

⁹⁸¹ Rule 14 of the Competition Tribunal Rules of Procedure.

⁹⁸² Rule 15 of the Competition Tribunal Rules of Procedure.

⁹⁸³ Rule 16-18 of the Competition Tribunal Rules of Procedure.

⁹⁸⁴ Rule 19 of the Competition Tribunal Rules of Procedure.

⁹⁸⁵ Rule 20 of the Competition Tribunal Rules of Procedure.

⁹⁸⁶ Rule 21-22 of the Competition Tribunal Rules of Procedure.

⁹⁸⁷ Rule 23-25 of the Competition Tribunal Rules of Procedure.

⁹⁸⁸ Section 65(2).

⁹⁸⁹ Section 65(2)(a).

⁹⁹⁰ Section 65(2)(b)

⁹⁹¹ Section 65(2)(b)(i).

⁹⁹² Section 65(2)(b)(ii).

An example of a referral made by a civil court is the case of *Leonard & Others v Nedbank Limited & Others* 84/CR/Aug07, a case that had been instituted in the High Court by a bank, Nedbank, against certain principal debtors of amounts loaned to them, and secured by mortgage bonds, which amounts they allegedly failed to pay. In the High Court, competition issues were raised, namely, tying, failure to notify a merger and collusive practices.

court referrals, the party to the lawsuit raising the competition issue is regarded as the complainant in the Tribunal. This party, therefore, must file a complaint referral, as provided for in the Competition Tribunal's Rules of Procedure.⁹⁹³ When a matter appears before the Tribunal, via a referral by a civil court, the Tribunal does not decide on the dispute that is before the civil court, instead, the Tribunal decides on the legality of the conduct referred to it, in terms of the Act.⁹⁹⁴ This referral must be made in the prescribed manner.⁹⁹⁵ Currently, there are no time limits for referrals made pursuant to an order by a civil court, where the civil proceedings raised issues about a practice prohibited by the Act.

The Competition Tribunal is not a court of law and does not function in the way that a civil court functions. The Tribunal does not strictly adhere to rules of procedure, as an ordinary court, for example, it is not bound by rules of evidence and it eschews rigid formalities in its procedures, in favour of flexible rules of procedure to govern its proceedings.⁹⁹⁶ The Tribunal is a specialised administrative tribunal, whose primary role is to serve and safeguard the public interest, as far as the interpretation and implementation of the Competition Act is concerned.⁹⁹⁷ Because the Tribunal is a specialist administrative tribunal, its decisions are administrative action and are subject to the normal rules of administrative law, as contained in the common law and given legislative expression in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁹⁹⁸ As an administrative tribunal, it must conduct its hearings in public, expeditiously and in keeping with the dictates of natural justice.⁹⁹⁹ While the Tribunal must conduct its proceedings in public, a hearing may be conducted in chambers, if the circumstances so require.¹⁰⁰⁰ Further, the Tribunal may order that a hearing be conducted away from the public, or that specific person must not attend the hearing, if the evidence being presented is

Another example is *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12, a case that dealt with the question of whether a rule of a professional association, the Law Society of the Cape of Good Hope, contravened section 4(1) of the Competition Act, that is, the prohibition of horizontal restraints. The rule under investigation was the so-called "no touting" rule contained in the Cape of Good Hope Law Society's Rule, which, essentially, prevented members from entering into agreements aimed at soliciting legal work through an unqualified person. The matter first appeared in the High Court, (see *Law Society of the Cape of Good Hope v Johan Venter* Unreported Case, Number 17292/10, Western Cape High Court), whereupon Mr Venter argued that the Rule violated the Competition Act, specifically section 4(1). Thereafter, the High Court referred the matter to the Competition Tribunal.

⁹⁹³ Rule 14(1), 15(1)

See also Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.5.3.

⁹⁹⁴ *Venter v Law Society of the Cape of Good Hope & Others* 24/CR/Mar12 para 3.

⁹⁹⁵ Rule 14(1)(c) of the Competition Tribunal Rules of Procedure, a complaint referral made by a party to an action in a civil court must be filed in Form CT 1(3).

⁹⁹⁶ Section 52 and section 55.

⁹⁹⁷ *Competition Commission v Senwes Ltd* [2012] ZACC 6.

⁹⁹⁸ *Patensie Sitrus Beherend Bpk v Competition Commission* 16/CAC/Apr02 page 30.

⁹⁹⁹ Section 52(1)-(2)(a).

¹⁰⁰⁰ Section 52(2A)(a).

In terms of section 52(2A)(b), if the interests of justice or expediency so require, the Chairperson can order that a hearing be conducted via telephone or video conference.

confidential information, if it is necessary for the conduct of the hearing, or for reasons that are justifiable in civil proceedings before the High Court.¹⁰⁰¹

The Tribunal's hearings may be conducted informally or inquisitorially.¹⁰⁰² However, even though it is not bound by strict procedural rules, it functions, nevertheless, in a manner that is similar to an ordinary court, in that it settles disputes between the Commission, or a complainant, and the respondent, who is alleged to have engaged in conduct that is prohibited by the Competition Act. This involves the exchange of pleadings,¹⁰⁰³ discovery, the calling of witnesses, oral statements, and the right to cross-examine parties in its proceedings. The Tribunal can summon any person to appear before it for interrogation at a specified time and place.¹⁰⁰⁴ It can also summon a person to produce any book, document or item that is necessary to the hearing before it.¹⁰⁰⁵ These summonses must be issued in the prescribed format and are served by the sheriff, in terms of the High Court Rules.¹⁰⁰⁶ While a witness, summoned to produce any document or thing at the Tribunal's proceedings, must hand it over to the Tribunal's registrar as soon as possible after service of the summons, a witness may claim that the document or thing is protected by legal privilege.¹⁰⁰⁷ The Tribunal can accept oral submissions and any information from parties, who appear before it.¹⁰⁰⁸ It can also issue an order prohibiting the publication of any evidence placed before it.¹⁰⁰⁹ The Competition Act and the Tribunal Rules of Procedure allow for legal representation.¹⁰¹⁰ The Tribunal has specific rules, which stipulate that the representative must notify the Tribunal.¹⁰¹¹

As already indicated, since the Competition Tribunal is an administrative tribunal, its decisions are administrative action. In terms of the Constitution, everyone is guaranteed the right to

¹⁰⁰¹ Section 52(3)(a)-(c).

¹⁰⁰² Section 52(2)(b).

In inquisitorial proceedings, the adjudicator enters into the arena and actively participates by putting questions to the parties, in order to obtain evidence necessary for its judgment.

¹⁰⁰³ The pleading stage, where parties exchange documents, precedes proceedings before the Tribunal. Pleadings contain statements by the parties regarding the facts of the case and not the applicable legal principles. The facts, upon which the parties agree and those on which they disagree, are presented in the form of pleadings, so that the dispute between the parties is clearly identified. The purpose of pleadings is to narrow down the disputes between the parties to a more concise version, and, also, to allow the Tribunal to be familiar with the case beforehand.

¹⁰⁰⁴ Section 54(a)-(b).

¹⁰⁰⁵ Section 54(c).

¹⁰⁰⁶ Rule 47 of the Rules for the Conduct of the Proceedings of the Competition Tribunal.

The summonses are issued in Form CT 13.

¹⁰⁰⁷ Rule 47(4) of the Rules for the Conduct of the Proceedings of the Competition Tribunal.

¹⁰⁰⁸ Section 54(e)-(f).

¹⁰⁰⁹ Section 54(d).

¹⁰¹⁰ Rule 44 of the Rules for the Conduct of the Proceedings of the Competition Tribunal.

¹⁰¹¹ Rule 44 of the Rules for the Conduct of the Proceedings of the Competition Tribunal.

Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.4.6.2, such a representative need not be a legal practitioner, admitted to practice in terms of South African law.

unprejudiced administrative action that is lawful, reasonable and procedurally fair.¹⁰¹² In addition, everyone whose rights have been adversely affected by an administrative action has the right to be given written reasons.¹⁰¹³ This means that the Tribunal's decisions are also governed by the administrative law statute, the PAJA. This means that the Tribunal's hearings must be procedurally fair. In terms of the PAJA, procedural fairness, requires, among other things, that a person be given adequate notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations, and a clear statement of the administrative action.¹⁰¹⁴

At the end of its hearing, the Tribunal must make any order that the Act permits.¹⁰¹⁵ All rulings by the Tribunal must be substantiated by written reasons.¹⁰¹⁶ Subject to the duty to protect confidential information, the Tribunal must allow parties to the proceedings and members of the public to access the record of the hearing.¹⁰¹⁷

The Competition Act envisages the common law principle of “double jeopardy” by providing that the Commission will not pursue a complaint against a firm “under the same or another section of the Act” regarding “substantially the same conduct” that has already been decided upon by the Competition Tribunal.¹⁰¹⁸ This means that should the Tribunal be seized with the same matter, regarding the same firm, for which it has already decided on, the firm can successfully argue that the matter is *res judicata*, that is, the matter is already judged.

4.4.3. The Competition Appeal Court

The Competition Appeal Court is a special appellate body within the enforcement framework of the Competition Act. The Competition Appeal Court is a court of record, has jurisdiction throughout the Republic and has the same standing status as the High Court.¹⁰¹⁹ As a creature of statute, the Competition Appeal Court's powers, obligations and jurisdiction derive from, and must fall within the four corners for the Competition Act.¹⁰²⁰ Its procedures are governed by the Rules for the Conduct of Proceedings in the Competition Appeal Court (hereinafter referred to as the Competition Appeal Court Rules of Procedure). Where the Rules do not make provision for a specific issue before it, the Competition Appeal Court has the discretion to follow another

¹⁰¹² Section 33(1) of the Constitution of the Republic of South Africa, 1996.

¹⁰¹³ Section 33(2) of the Constitution of the Republic of South Africa, 1996.

¹⁰¹⁴ Section 3 of the Promotion of Administrative Justice Act 3 of 2000; *Patensie Sitrus Beherend v C ompetition Commission & Others* [2003] ZACAC 4.

¹⁰¹⁵ Section 52(4).

¹⁰¹⁶ Section 52(4).

¹⁰¹⁷ Section 52(5).

¹⁰¹⁸ Section 67(2); *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd* [2003] ZACT 43 para 52.

¹⁰¹⁹ Section 36(1) (a)-(c) and section 166(e) of the Constitution of the Republic of South Africa, 1996.

¹⁰²⁰ *Old Mutual Properties (Pty) Ltd v Competition Tribunal* 21/CAC/Jul02 page 3.

procedure, provided it does not disadvantage a party.¹⁰²¹ Undue formalism that results from strict adherence to its rules of procedures, must be avoided, especially, when such formalistic approach is to be balanced against the objectives of the Competition Act and the interests of justice.¹⁰²²

It has the jurisdiction to review any decisions of the Competition Tribunal,¹⁰²³ consider appeals arising from the decisions of the Tribunal,¹⁰²⁴ regarding its final decisions (other than consent orders),¹⁰²⁵ or any interim or interlocutory orders that may, in terms of the Act, be taken on appeal.¹⁰²⁶ The Competition Appeal Court shares exclusive jurisdiction with the Competition Tribunal, in respect of matters pertaining to the interpretation and application of the Act's provisions on prohibited practices (restrictive practices, abuse of dominance, and exemption applications), merger evaluation, as well as the investigation and adjudication procedures.¹⁰²⁷

Any person affected by a decision of the Competition Tribunal, may lodge an appeal against, or apply to the Competition Appeal Court to review that decision, if the Appeal Court is to consider that appeal or review that matter.¹⁰²⁸ The Competition Appeal Court's review jurisdiction is subject to the Competition Act and the common law principles on judicial review, which reflect the Constitution of 1996 and constitutional principle of legality.¹⁰²⁹ Sutherland & Kemp suggest that an application for review should only be heard after an appeal, under the Competition Act,

¹⁰²¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.2.

¹⁰²² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.2.

See also, *Schering (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* 11/CAC/Aug01 page 16-17

¹⁰²³ Section 37(1)(a)

¹⁰²⁴ Section 37(1)(b)

¹⁰²⁵ Section 37(1)(b)(i)

According to the Competition Appeal Court, a "final decision" is one that satisfies the appellability, as applied in the High Court, in that the order is final, is definitive of the rights of the parties and disposes of a substantial part of the relief sought in the main proceedings. See, *Telkom SA Ltd v Orion Cellular (Pty) Ltd* 38/CAC/Jan04, *Trudon (Pty) Ltd v Directory Solutions CC* 96/CAC/Apr10.

In *Telkom SA Ltd v Orion Cellular (Pty) Ltd* 38/CAC/Jan04, the Appeal Court ruled that questions, as to procedures that are essentially concerned with how the principal dispute between the parties must be litigated, for instance, a decision on the confidentiality of information, do not amount to a final decision.

¹⁰²⁶ Section 37(1)(b)(ii)

The only interim measures by the Tribunal that can be taken on appeal are those pertaining to issues of the confidentiality of information (section 45(2)), and interlocutory orders issued by the Tribunal in complaint proceedings under section 49C(7), (8),

See *Telkom SA Ltd v Orion Cellular (Pty) Ltd* 38/CAC/Jan04.

¹⁰²⁷ Section 62(1)(a)

¹⁰²⁸ Section 61(1)

Such appeals or reviews must comply with the procedural requirements laid out in the Competition Appeal Court Rules of Procedure.

¹⁰²⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.5.

See also *Glaxo Wellcome (Pty) Ltd v Terblanche* NO 03/CAC/Oct00; *Pharmaceutical Manufacturers' Association of South Africa; In Re Exparte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

See also, *Schering (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* 11/CAC/Aug01 page 16-17

has been heard.¹⁰³⁰ However, in practice, there have been instances where the Competition Appeal Court has considered both reviews and appeals simultaneously.¹⁰³¹ A party, lodging an appeal, or a review application, regarding an order of the Tribunal, can also apply to the Appeal Court that the operation and execution of the Tribunal's order be suspended, pending the appeal or review process.¹⁰³²

The Competition Tribunal and the Competition Appeal Court also share exclusive jurisdiction regarding the Competition Commission's functions, as set out in section 21(1), the Competition Tribunal's functions, as laid out in section 27(1), and the Appeal Court's appellate and review jurisdiction, outlined in section 37 of the Competition Act.¹⁰³³ These are the so-called "section 62(1) matters"; regarding which, the Appeal Court's jurisdiction is final and exclusive.¹⁰³⁴

This shared exclusive jurisdiction, however, does not extend to certain areas. In these areas, the Appeal Court has original jurisdiction, as a court of first instance, namely, in the so-called "section 62(2) matters" (matters pertaining to the jurisdiction of the Competition Commission and the Competition Tribunal).¹⁰³⁵ The Appeal Court also has original jurisdiction in constitutional issues arising out of the Competition Act,¹⁰³⁶ and issues pertaining to whether a certain matter falls within its shared exclusive jurisdiction with the Competition Tribunal.¹⁰³⁷ The Competition Appeal Court's jurisdiction over 'section 62(2) matters', therefore, is not exclusive, or final.¹⁰³⁸

The Competition Appeal Court has the power to render any judgment, or make any order, confirming, amending or setting aside a decision made by the Tribunal, or to remit the matter back to the Tribunal for further consideration.¹⁰³⁹ However, it must be noted that the Appeal Court's power to override the Tribunal's decision is not unlimited.¹⁰⁴⁰ According to *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission*, the Appeal Court should not easily interfere with the Tribunal's decision, except where it is clear that the Tribunal has exercised its powers capriciously, applied the wrong legal principle, exhibited bias in its

¹⁰³⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.5.

¹⁰³¹ For example, *Allens Mescho (Pty) Ltd & Others v Competition Commission & Others* 135/CAC/Jan15.

¹⁰³² Section 38(2A)(d)

See also, *Glaxo Wellcome (Pty) Ltd v Terblanche* 03/CAC/Oct00 page 9-10, 15.

¹⁰³³ Section 62(1)(b)

¹⁰³⁴ Section 62(3)(a), section 62(4).

¹⁰³⁵ Section 62(2)(a).

¹⁰³⁶ Section 62(2)(b).

¹⁰³⁷ Section 62(2)(c).

In terms of section 62(1)(a)(i) –(i), (b), the Appeal Court has exclusive jurisdiction regarding certificates issued by the Minister of Finance in matters involving transactions governed by the Banks Act 94 of 1990.

¹⁰³⁸ Section 62(3)(b).

¹⁰³⁹ Section 37(2).

¹⁰⁴⁰ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.4.

judgement, or there are no substantial reasons for its decisions.¹⁰⁴¹ Because the Tribunal is a specialist arbiter, the Appeal Court will not easily interfere with its policy considerations, for example, in merger decisions.¹⁰⁴² The Appeal Court may also make an order regarding the payment of costs against any party in the hearing, or against any person, who represented a party in the hearing, according to the requirements of law and fairness.¹⁰⁴³ Like the Tribunal, the Competition Appeal Court has the power to rescind, or vary its orders.¹⁰⁴⁴ The Competition Appeal Court is also vested with partial final appellate jurisdiction.¹⁰⁴⁵

4.4.4. The Supreme Court of Appeal

According to *National Union of Metals v Fyr's Metals*, any statutory provisions that purport to vest final appellate jurisdiction in an appeal court, other than the Supreme Court must be evaluated in the light of the Constitution.¹⁰⁴⁶ This case was decided before the Constitution Seventeenth Amendment Act 72 of 2012, which came into force in August 2013. Prior to the Amendment, the Supreme Court had also ruled that it had the jurisdiction to consider 'section 62(1) matters', notwithstanding that the Competition Act stipulates that the Competition Appeal Court's jurisdiction was final over section 62(1) matters.¹⁰⁴⁷ However, some cogently argued that the Competition Appeal Court should be the final arbiter in competition matters. They viewed the involvement of the Supreme Court in competition matters as being problematic for a number of reasons. The argument was made that the involvement of the Supreme Court means that the Court is deciding on specialised matters, for which it has no expertise; that this lengthens the litigation period, which creates legal uncertainty. During this time the parties are in 'legal limbo' as they await the Supreme Court's ruling and, in some cases, where the Supreme Court refers the matter back to the specialist tribunal, even more time lapses before a matter is concluded.¹⁰⁴⁸ The *American Natural Soda Corporation* case took nearly a decade to resolve, earning its moniker as the 'Methuselah' of competition legal proceedings.¹⁰⁴⁹ For its part, the Supreme Court was mindful of the pivotal role played by specialised bodies, such as

¹⁰⁴¹ 33/CAC/Sep03

¹⁰⁴² *Schumann Sasol (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd* 10/CAC/Aug01 page 13-14

¹⁰⁴³ Section 61(2).

¹⁰⁴⁴ Section 66.

¹⁰⁴⁵ Section 62(4), and section 63 (1) (a) (i)- (ii), section 63 (2)(a) - (b), and section 63(3)- (8).

¹⁰⁴⁶ [2005] ZASCA 39 para 5-33.

¹⁰⁴⁷ *American Natural Soda Ash Corporation v Competition Commission* 2005 (6) SA 158 (SCA) para 8-14. The Supreme Court held that section 62 must be interpreted in a manner that is consistent with the Constitution. That the finality conferred on the Competition Appeal Court must be subordinate to the appellate powers the Constitution confers upon the Supreme Court of Appeal. On this basis, the Supreme Court had jurisdiction to consider appeals of section 62(1) matters.

¹⁰⁴⁸ Moodaliyar, K. "The impact of the ANSAC judgments on competition analysis" (2006) 18 *South African Mercantile Law Journal* 368, 371-372.

¹⁰⁴⁹ *American Natural Soda Ash Corporation & Another v Botswana Ash (Pty) Ltd & Others* 49/CR/Apr00 para 1.

The reference to Methuselah can be found in Genesis 5:27 of the Hebrew Bible, according to which Methuselah is an individual, who lived for nearly 1000 years.

those established by the Competition Act, as well as how important it was to safeguard their functions.¹⁰⁵⁰

However, the Constitution Seventeenth Amendment Act 72 of 2012 made inroads in the former position that appeals from the Competition Appeal Court could be made to the Supreme Court of Appeal. Prior to the Amendment, the provisions in the Constitution, dealing with the Supreme Court's jurisdiction, stipulated that the Supreme Court, in addition to being the highest appellate court in all matters, except constitutional matters,¹⁰⁵¹ also had the jurisdiction to decide on any other matter that may be referred to it in circumstances defined by an Act of Parliament.¹⁰⁵² The Amendment has since changed this position, by essentially creating an exception to the final appellate jurisdiction of the Supreme Court.¹⁰⁵³ According to the Amendment, since the Constitution envisages that the Supreme Court's jurisdictions may be in matters that have been specifically outlined in an Act by Parliament, it is also competent for legislation to oust the Supreme Court's jurisdiction.¹⁰⁵⁴ The text of the Amendment is clear. It stipulates that the Supreme Court may decide on appeals in any matter arising before the High Court, or a court with a status similar to that of the High Court, except in respect of labour and competition law matters, as may be determined by an Act of Parliament.¹⁰⁵⁵ What this now means is that the Supreme Court no longer has jurisdiction to consider appeals on competition matters. The Amendment effectively ousts the Supreme Court's jurisdiction. The Competition Appeal Court is, therefore, now the final arbiter in competition law matters. Constitutional Court judgments handed down after the Amendment came into operation, confirm this position. In *National Union of Public Service & Allied Workers obo Mani & Others v National Lottery Board*, Froneman J held, albeit *orbiter dictum*, that, as a result of the Seventeenth Constitution Amendment, the right of appeal against a judgement of a specialist appeal court (in this case it was the Labour Appeal Court) to the Supreme Court of Appeal, no longer exists.¹⁰⁵⁶

4.4.5. The Constitutional Court

There is, however, the possibility that South Africa's highest court in the land, the Constitutional Court, may have jurisdiction, when the constitutionality of the Competition Act is challenged, or some of its provisions are in violation of the Constitution, the powers of the three institutions

¹⁰⁵⁰ *American Soda Ash Corporation & CHC Global (Pty) Ltd v Competition Commission of South Africa, Botswana Ash (Pty) Ltd, Chemsolve Technical Products (Pty) Ltd & Minister of Trade and Industry* [2005] ZASCA 42 para 19.1, 19.3, 21, 22, 55, and 59.

¹⁰⁵¹ Section 168 (3) of the Constitution of the Republic, 1996.

¹⁰⁵² Section 168 (3)(a)- (c) of the Constitution of the Republic, 1996.

¹⁰⁵³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) para 11.5.7.

¹⁰⁵⁴ Section 4 of the Constitution Amendment Act 72 of 2012.

¹⁰⁵⁵ Section 4 of the Constitution Amendment Act 72 of 2012.

¹⁰⁵⁶ 2014 (3) SA 544 (CC) para 40

While this was a labour law matter and the relevant provisions of the Labour Relations Act are quite different from those in the Competition Act, the Supreme Court of Appeal has rightly indicated that the underlying principle espoused by the Constitutional Court is the same, when it comes to the, now ousted, jurisdiction of the Supreme Court in Competition Law matters - *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185 para 10.

(the Competition Commission, the Competition Tribunal and the Competition Appeal Court) are constitutionally challenged.¹⁰⁵⁷ An appeal against a decision of the Competition Appeal Court can be made to the Constitutional Court,¹⁰⁵⁸ regarding the so-called “section 62 matters”. However, the Competition Appeal Court has original jurisdiction over these matters involving the jurisdiction of the Competition Commission and the Competition Tribunal,¹⁰⁵⁹ about constitutional issues arising out of the Competition Act,¹⁰⁶⁰ as well as determining whether certain matters fall within its shared exclusive jurisdiction with the Competition Tribunal.¹⁰⁶¹ According to the Constitutional Court, the scope and proper exercise of the powers of the Tribunal and the Commission are constitutional matters.¹⁰⁶² Prior to the Seventeenth Constitution Amendment, the Supreme Court of Appeal also had jurisdiction to consider these appeals.¹⁰⁶³ As previously mentioned, this is no longer the case, as appeals to the Constitutional Court are subject to the necessary leave to appeal.¹⁰⁶⁴

4.5. The Domestic Frameworks in COMESA, EAC, SACU and SADC Members

Combined, the four RECs have a total number of 39 Member States. Of these, 19 belong to COMESA, five belong to the EAC, five belong to SACU, and 15 to SADC.¹⁰⁶⁵ With the exception of some, the majority of the States hold multiple-membership in each of these four RECs. Consequently, the actual number of countries in these RECs is 26, namely Angola, Botswana, Burundi, Democratic Republic of Congo, Comoros, Djibouti, Egypt, Ethiopia, Eritrea, Kenya, Lesotho, Libya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Seychelles, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

Among Members of the four RECs, the domestic competition laws establish NCAs responsible for enforcing the law and a broad mandate in competition advocacy. The functions and powers of these institutions are clearly spelt out in the law. These institutions come in several variations. Some NCAs, simultaneously, serve as investigators, prosecutors and adjudicators, when enforcing their domestic

¹⁰⁵⁷ Section 167 of the Constitution of the Republic of South Africa, 1996; *Competition Commission v Senwes Limited* [2012] ZACC 6; *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission* [2003] ZACAC 9

¹⁰⁵⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.7, also highlight that, previously, the Constitutional Court only heard competition appeals, if such appeals concerned a constitutional matter. However, section 3 of the Constitution Seventeenth Amendment Act 72 of 2012 has since changed. It now provides that the Constitutional Court may also consider any other matter, if the Constitutional Court itself “grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance, which ought to be considered by the Court.”

¹⁰⁵⁹ Section 62(2)(a).

¹⁰⁶⁰ Section 62(2)(b).

¹⁰⁶¹ Section 62(2)(c).

In terms of section 62(1)(a)(i) –(i), (b), the Appeal Court has exclusive jurisdiction regarding certificates issued by the Minister of Finance in matters involving transactions governed by the Banks Act 94 of 1990.

¹⁰⁶² *Competition Commission v Senwes* [2012] ZACC 6 para 16-17; *Competition Commission v Yara South Africa (Pty) Ltd* [2012] ZACC 14; *Competition Commission v Lungefoam (Pty) Ltd* [2012] ZACC 15 para 16.

¹⁰⁶³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.5.7.

¹⁰⁶⁴ Section 63 addresses issues pertaining to the leave to appeal.

¹⁰⁶⁵ See 8.4 in Chapter 8.

competition law.¹⁰⁶⁶ Others follow the approach of South Africa; they have a separate investigating body, a separate adjudicating body, separate appellate courts, as well as the involvement of ordinary courts and other law enforcement agencies.¹⁰⁶⁷ Regardless of the institutional design selected, their functions are the same. These NCAs are authorised to carry out investigations, to conduct searches and seizures, to subpoena and summon witnesses, to compel the availing of evidence, to make orders, and to criminalise conduct that interferes with their work.

Country	Empowering Statutory Provision	Name/ Title of NCAs
Botswana	Section 4- 19 of the Competition Act of 2009	Competition Authority and the Competition Commission
Kenya	Section 7- section 20, section 31- section 40, section 71- section 77 of the Competition Act of 2010	Competition Authority Competition Tribunal
Malawi	Section 4- section 18 of the Competition and Fair Trading Act of 1998	Competition and Fair Trading Commission
Madagascar	Law on Competition of 2005	Competition Council
Mozambique	Article 5- Article 6 and Article 8, Article 36- Article 39, Article 51- Article 52 of Competition Law of 2013.	Competition Regulation Authority
Mauritius	Section 4- section 32, section 51- 65, section 67- section 69 of Competition Act of 2007.	Competition Commission
Namibia	Section 4- section 22, section 33- section 41 of the Competition Act of 2003	Competition Commission
Seychelles	Section 4- section 6, section 32- section 37, section 41- section 47, section 50- section 52 of Fair Competition Act of 2009.	Fair Trading Commission Fair Trading Tribunal
Swaziland	Section 6-1 section 7, section 38- 43 of Competition Act of 2007	Competition Commission
Tanzania	Section 61-95 of the Fair Competition Act of 2003	Fair Competition Commission Fair Competition Tribunal National Consumer Advocacy Council
Zambia	Section 67- 78 Competition and Consumer Protection Act of 2010	Competition and Consumer Protection Commission Competition and Consumer Protection Tribunal
Zimbabwe	Section 4- section 22 of the Competition Act of 1996	Industry and Trade Competition Commission

The table above is a representation of the NCAs in COMESA, EAC, SACU SADC for Member States that have competition laws in their statute books.

¹⁰⁶⁶ For example, the Zimbabwe Competition Act of 1996 establishes the Industry and Trade Commission, which serves as both the investigative body and adjudicators in competition law matters. Its decisions can be appealed to the Administrative body established in terms of the Competition Act.

¹⁰⁶⁷ For example, the Botswana Competition Act 17 of 2009 establishes the Competition Authority, whose functions include playing an advisory role to government, enforcing measures to increase market transparency, investigating practices prohibited by the Competition Act, and evaluating mergers. It also establishes the Competition Commission, whose role is to adjudicate the investigations referred to it by the Competition Authority. In addition, the decisions or determinations of the Commission can be appealed to the High Court.

The Tanzania Competition and Consumer Protection Act 24 of 2010 establishes the Competition and Consumer Protection Commission as the investigative arm and the Competition Commission and Consumer Protection Tribunal as the adjudicating body, whose decisions can be appealed to the High Court.

4.6. Regional Institutional Mechanisms

Within the framework of the RECs, there are specially created regional competition authorities (RCAs) who are tasked with enforcing regional competition law and facilitating enforcement collaborations. In COMESA, the enforcement of regional competition law is governed by the COMESA Competition Regulations of 2004 and the COMESA Competition Rules of 2004. In the EAC, the EAC Competition Act of 2006 and the EAC Competition Regulations of 2010 govern the enforcement of regional competition law. In SADC, the Declaration on Regional Co-operation in Competition and Consumer Policies of 2009 governs the enforcement of regional competition law.

4.6.1. The Common Market for Eastern and Southern Africa (COMESA)

The COMESA Competition Regulations of 2004 established two institutions to be involved in the enforcement of the Common Market's competition law; the COMESA Competition Commission¹⁰⁶⁸ and the COMESA Board of Commissioners.¹⁰⁶⁹ The decisions of both institutions are legally binding on firms, governments of Member States and their courts.¹⁰⁷⁰

4.6.1.1. The COMESA Competition Commission

The COMESA Competition Commission is headed by a Director.¹⁰⁷¹ The Competition Commission's primary function is to apply the Competition Regulations to practices that affect trade between Member States.¹⁰⁷² To accomplish this, the Commission is required to monitor, investigate and make determinations regarding anti-competitive practices, such as, cartels within the Common Market. In addition, the Commission has to review regional competition policy; provide technical assistance to NCAs with a view to harmonising competition law in the Common Market; cooperate with NCAs of Member States; and conduct research on competition policy and law among Member States.¹⁰⁷³

The Competition Commission is empowered to investigate, and where appropriate, penalise firms for participating in prohibited conduct.¹⁰⁷⁴ The investigations can be initiated by means of an application lodged by any person, who has reason to believe that an activity by a firm within the COMESA Member State will interfere with competition in the Common Market.¹⁰⁷⁵ Consumer organisations are conferred similar legal standing

¹⁰⁶⁸ Article 6 of COMESA Competition Regulations of 2004.

¹⁰⁶⁹ Article 12 of COMESA Competition Regulations of 2004.

¹⁰⁷⁰ Rule 5(1)-(2) of COMESA Competition Rules of 2004.

¹⁰⁷¹ Article 9-11 of COMESA Competition Regulations of 2004; Rule 13(1), Rule 14 of COMESA Competition Rules of 2004; Article 7(1)(b) and Article 9(3) of COMESA Treaty of 1993.

¹⁰⁷² Article 7 (1) of COMESA Competition Regulations of 2004; Rule 13(1) of COMESA Competition Rules of 2004.

¹⁰⁷³ Article 7 (2)(a)- (j) of COMESA Competition Regulations of 2004.

¹⁰⁷⁴ Article 8(1) COMESA Competition Regulations of 2004.

¹⁰⁷⁵ Article 21(1) of COMESA Competition Regulations of 2004; Rule 17 of COMESA Competition Rules of 2004.

to request the initiation of investigations.¹⁰⁷⁶ These requests must be lodged in the prescribed format.¹⁰⁷⁷ Thereafter, the Commission should determine whether to initiate an investigation, or decline the request.¹⁰⁷⁸ If the Commission does conduct an investigation, it must do so within a specified timeline.¹⁰⁷⁹ The Commission can also initiate its own investigations *ex suo motu*.¹⁰⁸⁰

While conducting these investigations, the RCA is empowered to subpoena persons to give evidence before it, direct the discovery of documents, as well as any other action that may be necessary for the Commission's investigations.¹⁰⁸¹ Third parties affected by the Commission's investigations are allowed to intervene in the proceedings.¹⁰⁸² Depending on the outcome of its investigations, the Commission may conclude that a prohibited conduct has been committed.¹⁰⁸³ In such circumstances, the Commission can order the termination of the offending conduct, or order the payment of compensation to persons, who have suffered loss, because of the conduct, or require that a fine be paid.¹⁰⁸⁴ Failure to comply with an order by the Commission will result in the payment of a fine.¹⁰⁸⁵

In order to give effect to the general competition law provisions contained in Article 55 of the COMESA Treaty,¹⁰⁸⁶ and the Regulations, in particular, the COMESA Competition Commission is empowered to promulgate its own rules of procedure.¹⁰⁸⁷ In addition, the Commission may take such action, as may be necessary, to enforce the Regulations.¹⁰⁸⁸ A premium is placed on the confidentiality of information gained during the Commission's investigations.¹⁰⁸⁹ As with INCAs, empowered to conduct market inquiries,¹⁰⁹⁰ the Commission, similarly, makes provision for market inquiries in the Common Market.¹⁰⁹¹

¹⁰⁷⁶ Article 21(2) of COMESA Competition Regulations of 2004.

¹⁰⁷⁷ Article 21(3) of COMESA Competition Regulations of 2004.

¹⁰⁷⁸ Article 21(4)- (5) of COMESA Competition Regulations of 2004.

¹⁰⁷⁹ Article 21(6)- (9) of COMESA Competition Regulations of 2004; Rule 17(4)- (5) of COMESA Competition Rules of 2004.

¹⁰⁸⁰ Rule 18 of COMESA Competition Rules of 2004.

¹⁰⁸¹ Article 8(2)(a)- (c) of COMESA Competition Regulations of 2004; Rule 19-21, Rule 44 (1)- (6), Rule 74 of COMESA Competition Rules of 2004.

¹⁰⁸² Rule 22, Rule 49 of COMESA Competition Rules of 2004.

¹⁰⁸³ Rule 23- 24 of COMESA Competition Rules of 2004.

¹⁰⁸⁴ Article 8(3)-(4) of COMESA Competition Regulations of 2004; Rule 33(1), Rule 46, Rule 80 of COMESA Competition Rules of 2004.

¹⁰⁸⁵ Article 8(5) of COMESA Competition Regulations of 2004; Rule 45(1) of COMESA Competition Rules of 2004.

¹⁰⁸⁶ See 3.5 in Chapter 3.

¹⁰⁸⁷ Article 8(7) of COMESA Competition Regulations of 2004.

¹⁰⁸⁸ Article 8(8) of COMESA Competition Regulations of 2004.

¹⁰⁸⁹ Rule 30, Rule 50 , Rule 73 of COMESA Competition Rules of 2004.

¹⁰⁹⁰ See 4.2.1.1 in Chapter 4

¹⁰⁹¹ Rule 42 (1)- (3) of COMESA Competition Rules of 2004.

4.6.1.2. The Board of Commissioners

The Board of Commissioners is the “supreme policy body” in matters concerning the enforcement of regional competition law.¹⁰⁹² The Board is comprised of suitably qualified Commissioners, who shall serve for a specified term.¹⁰⁹³ The Board is empowered to decide on cases referred to it by the Competition Commission; to consider appeals from, or review any decision of the Commission, made in terms of the Regulations; and exercise any other powers that may be incidental to the operation of the Regulations.¹⁰⁹⁴

4.6.2. The East African Community

The EAC Competition Act of 2006 established the East African Community Competition Authority.¹⁰⁹⁵ The Competition Authority is comprised of Commissioners, appointed from Member States.¹⁰⁹⁶ From these Commissioners, one is appointed to serve as Chairperson for a specific term.¹⁰⁹⁷

The Authority is empowered to promulgate rules pertaining to its procedures.¹⁰⁹⁸ It has all the powers necessary to implement and enforce Community competition law.¹⁰⁹⁹ Like most CAs, it is endowed with wide powers to carry out its functions. It has the power to conduct investigations; conduct searches and seizures; summon witnesses; conduct hearings; render legally binding decisions; issue appropriate orders and remedies; refer matters to the East African Court of Justice (EACJ) for adjudication; advocate competition law compliance; carry out research and publish reports thereof; and cooperate with regional and international organisations, as well as foreign CAs.¹¹⁰⁰

The Competition Authority has exclusive jurisdiction when it comes to practices prohibited by the Competition Act.¹¹⁰¹ Its decisions are binding on NCAs and other subordinate courts.¹¹⁰² The RCA has precedence over NCAs. If both the Competition Authority and an NCA are deciding on the same case, the latter shall suspend its proceedings pending the decision of the Competition Authority.¹¹⁰³

¹⁰⁹² Article 12(1) of COMESA Competition Regulations of 2004; Rule 25 – Rule 26 , Rule 28- Rule 29 of COMESA Competition Rules of 2004.

¹⁰⁹³ Article 13- Article 14 of COMESA Competition Regulations of 2004.

¹⁰⁹⁴ Article 15 of COMESA Competition Regulations of 2004, Rule 47 of COMESA Competition Rules of 2004.

¹⁰⁹⁵ Section 37(1) of EAC Competition Act of 2006.

¹⁰⁹⁶ Section 38(1)-(3) EAC Competition Act of 2006.

¹⁰⁹⁷ Section 38(4)- (6), section 39, and section 41 of EAC Competition Act of 2006.

¹⁰⁹⁸ Section 40 of EAC Competition Act of 2006.

¹⁰⁹⁹ Section 42 of EAC Competition Act of 2006.

¹¹⁰⁰ Section 42(1)(a)-(l) of EAC Competition Act of 2006.

¹¹⁰¹ Section 44(1) of EAC Competition Act of 2006.

¹¹⁰² Section 44(2) of EAC Competition Act of 2006.

¹¹⁰³ Section 44(3) of EAC Competition Act of 2006.

NCAs and courts shall refer all matters falling within the scope of the EAC Competition Act to the EAC Competition Authority.¹¹⁰⁴ Decisions emanating from the Competition Authority are enforceable in Member States.¹¹⁰⁵ Where there is no consensus between the Competition Authority, NCAs and courts, the matter must be referred to the EACJ.¹¹⁰⁶ Similarly, disputes concerning the Authority's jurisdictional powers are to be heard by the EACJ.¹¹⁰⁷ The East African Community Competition Regulations of 2010 address the practical implementation of Community competition law, as contained in the Competition Act of 2006.

Failure to appear before the Competition Authority, or failure to submit documents when required to do so by the Authority, is an offence for which one may be required to pay a fine, or face imprisonment, or both.¹¹⁰⁸ There is also a possibility that domestic courts may adjudicate on these criminal offences.¹¹⁰⁹ The Authority is empowered to reduce penalties, or grant amnesty to individuals, who cooperate with the Authority's enforcement of Community competition law.¹¹¹⁰

4.6.3. The Southern African Development Community

In terms of the SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009 (the Declaration of 2009), the emphasis among SADC Members seems to be the promotion of "effective co-operation" regarding competition law and consumer policies.¹¹¹¹

4.6.3.1. The Secretariat

The SADC Secretariat is tasked with facilitating regional collaboration in competition policy and consumer protection.¹¹¹² As the principal executive organ of SADC,¹¹¹³ the Secretariat is required to: assist Member States in setting up their NCAs and consumer protection agencies; conduct advocacy campaigns regarding competition and consumer policies; provide Members with technical assistance in the implementation of competition and consumer policies; and collaborate with international partners, such as the EU and UNCTAD.¹¹¹⁴

¹¹⁰⁴ Section 44(4) of EAC Competition Act of 2006.

¹¹⁰⁵ Section 44(5) of EAC Competition Act of 2006.

¹¹⁰⁶ Section 44(6) of EAC Competition Act of 2006.

¹¹⁰⁷ Section 46 of EAC Competition Act of 2006.

¹¹⁰⁸ Section 42(2) of EAC Competition Act of 2006.

¹¹⁰⁹ Section 48 of EAC Competition Act of 2006.

¹¹¹⁰ Section 42(3) of EAC Competition Act of 2006.

¹¹¹¹ Article 1(a) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

¹¹¹² Article 1(c)- (d) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

¹¹¹³ Article 14 of Treaty of the Southern African Development Community of 1992.

¹¹¹⁴ Article 3 (1)(a)- (f) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

4.6.3.2. The Competition and Consumer Policy and Law Committee

In terms of the Declaration of 2009, the Secretariat is required to establish a standing Competition and Consumer Policy and Law Committee (CCOPOLC) to implement the system of competition among Members.¹¹¹⁵ The primary focus of the CCOPOLC is to foster collaboration among Members. This collaboration is in the form of information sharing among NCAs of Member States with the aim of adopting common rules and a common competition culture; facilitating technical assistance among Members; collaborating on measures of dealing with regional and international effects of anti-competitive conduct; and collaborating with regional and international competition law institutions.¹¹¹⁶

4.7. Concluding Remarks

The institutional framework in the enforcement of competition law is equally important as the substantive rules themselves. In light of the thrust of this thesis, these institutions form the enabling machinery in which co-operation within RECs occurs. An effective competition law framework requires that there be equally capable institutions to enforce the law. The institutions for the enforcement of competition law must be independent and must be endowed with the necessary powers to carry out their functions. As the chapter has revealed, some of these institutions are specifically created in terms of the competition law, and some are already in the existing law enforcement structures. Regardless of the structure, they must be tailored in such a manner that they can sufficiently execute their mandate, which is, to enforce the law in relation to cartels. On paper, RCAs seem capable to carry out their functions, but in practice, they are challenged in facilitating enforcement collaborations because of factors discussed earlier, such as, resource austerity, lack of home-grown expertise in the interpretation and application of competition law, and a judicial system that does not have much experience in applying competition law.

¹¹¹⁵ Article 2(a) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

¹¹¹⁶ Article 2(b)(i)- (viii) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

CHAPTER FIVE

PUBLIC ENFORCEMENT AND CARTELS

"Deterrence is a central theme in the theory and practice of law enforcement and the enforcement of competition law is no exception. Laws are enacted with the aim to influence people's behaviour, so that socially undesirable conduct is not undertaken. A law enforcement system that 'taxes' agents for undertaking unlawful behaviour, but is not able to prevent them would be a waste of resources from an economic point of view. Indeed, the enforcement of law is costly. It requires resources to monitor agents' behaviour, to detect infringements, to prove violations, and to inflict punishment... If these costly activities do not modify the rate at which agents undertake harmful actions then society does not benefit from them. Therefore, enforcement, without any deterrence entails social costs and no economic benefits."¹¹¹⁷

5.1. Overview

The enforcement of the substantive rules through established institutions is equally important as the rules themselves. The institutional framework discussed in Chapter 4, both the domestic and regional competition authorities, must employ specific tools in their investigations. The substantive competition law principles are only meaningful when accompanied by an effective enforcement framework. Such a framework must be, sufficiently, deterrent; the penalties for engaging in the prohibited practice, such as, cartel conduct, must outweigh the benefits thereof; the penalties must achieve a balance between the violation and the consequent harm; and there must be proportionality between the penalty and the prohibited conduct itself.¹¹¹⁸ In addition, an effective enforcement framework must not only impose severe sanctions, but it must also have a sufficiently high probability that prohibited practices will be prosecuted.¹¹¹⁹

The enforcement of competition law can be divided into two complementary categories: 'public enforcement' and 'private enforcement'.¹¹²⁰ Public enforcement refers to the mechanisms that are implemented by competition authorities, where the principal aim is to correct the market and, or, vindicate the public interest, by imposing administrative penalties on violators.¹¹²¹ In addition, in some jurisdictions, such as South Africa and the United States, criminal sanctions are a possibility.¹¹²² Private enforcement, on the other hand, refers to the enforcement measures available to private

¹¹¹⁷ Buccrossi, P. *et al. Deterrence in Competition Law*. Governance and the Efficiency of Economic Systems Discussion Paper (2009) 2.

¹¹¹⁸ *Promoting compliance with Competition Law*. Organisation for Economic Co-operation and Development (2011) 1- 15; Werden, G.J. "Sanctioning cartel activity: Let the punishment fit the crime" (2009) 5. *European Competition Journal* 30-31; Wils, W.J.P. "Optimal antitrust fines: Theory and practice" (2006) 29. *World Competition Journal* 8; Stucke, M.E. "Am I a price fixer? A behavioural economics analysis of cartels". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 263-288; Connor, J.M. "Recidivism revealed: Private international cartels 1991-2009" (2010). *American Antitrust Institute* 3; *Defining hard core cartel conduct, effective institutions and effective penalties: Building blocks for effective anti-cartel regimes*. International Competition Network (2005) 52; Motta, M. "On cartel deterrence and fines in the European Union" (2008) 29 *European Competition Law Review* 209-210; Barnett, T.O. *Seven steps to better cartel enforcement*. 11th Annual Competition Law & Policy Workshop, European Union Institute, 02 June 2006. Available online at http://www.justice.gov/atr/speech/seven-steps-better-cartel-enforcement#N_19 [Accessed 10 January 2015].

¹¹¹⁹ Nielsen, V.B., Parker, C. & Hammond, S.D. "Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation" (2011) 56. *Antitrust Bulletin* 377- 426.

¹¹²⁰ *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd Comair Ltd* [2006] ZACT 88 para 32; Case C-453/99 *Courage Limited v. Crehan* para 26-27.

¹¹²¹ The role of competition authorities was examined in Chapter 4.

¹¹²² See 5.7 in this Chapter.

individuals. This can be done in a number of ways: through claims for civil damages for losses sustained because of prohibited practices;¹¹²³ interim orders;¹¹²⁴ and declaratory orders.¹¹²⁵

The present chapter is concerned with the first type of enforcement, that is, “public enforcement”. Under public enforcement, competition authorities utilise several tools in order to deal with cartels. These tools include leniency policies, settlement procedures, administrative fines, and, in some jurisdictions, the criminalisation of cartel practices. In this chapter, the researcher investigates how these are utilised by domestic competition authorities, as well as how these tools are being utilised, or could be utilised, in the enforcement collaborations within regional economic communities (RECs).

5.2. Leniency Policies

Leniency policies, also referred to as “amnesty programmes” or “immunity procedures”, are a prominent mechanism, specifically used in the investigation and prosecution of cartels by CAs across the world, especially in the global North. A successful leniency policy is predicated on several elements; sufficiently severe penalties as an incentive to seek immunity; legal predictability and transparency of immunity procedures; and that the leniency policy itself creates a considerable risk of detection.¹¹²⁶ The International Competition Network recognises specific “Good Practices” that enhance the effectiveness of leniency programmes. These good practices include: the immunity should be made available, in circumstances where the CA is unaware of a cartel, as well as where it

¹¹²³ Section 65 of South Africa Competition Act of 1998; section 53N (3) of India Competition Act of 2002; Article 47 of Brazil Law 12.529 of 2011 and Article 944 of Brazil Civil Code; section 75 of Botswana Competition Act of 2009; section 52 of Malawi Competition and Fair Trading Act of 1998; section 54 of Namibia Competition Act of 2003; section 59 of Tanzania Fair Competition Act of 2003; Article 38 of Mexico Federal Economic Competition Law of 2014; Article 49 of Peru Competition Law 1034; section 86 of Singapore Competition Act of 2004; Article 57 of Turkey Act on the Protection of Competition of 1994; Article 50 of China Anti-Monopoly Law of 2007; Article 30 -34 of Taiwan Fair Trade Act of 2011; Articles 25-26 of Japan Anti-Monopoly Act of 1947; Article 25 of Egypt Law on the Protection of Competition and the Prohibition of the Monopolistic Practices of 2005; section 50 of Israel Restrictive Trade Practices Law of 1988.

¹¹²⁴ Section 33 of India Competition Act of 2002; Article 84 of Brazil Law 12.529 of 2011; section 49C and section 58(1)(a) of South Africa Competition Act of 1998; *JG Grant v Schoemansville Oewer Klub* Case No: IR202Dec15; *Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd* Case No: 018507; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* Case No: 017616; *Chitando v Webber Wentzel and Others* [2013] ZACT 93; *Gogga Tracking Solutions (Pty) Ltd v Vodacom Service Provider (Pty) Ltd* Case No: 09/IR/Mar10; *Directory Solutions CC v Telkom SA Ltd & Trudon (Pty) Ltd* Case No: 77/IR/Nov09; *Replication Technology Group (Pty) Ltd v Gallo Africa Limited* Case No: 92/IR/Sep07; *The Bulb Man(SA) (Pty) Ltd v Hadeco (Pty) Ltd* Case No: 81/IR/Apr06; *Nqobion Arts Business Enterprise CC v The Business Place Joburg & BeEntrepreneurings* Case No: 80/IR/Aug05; *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd, Waco International Ltd, CBC Fasteners (Pty) Ltd & Avlock International (Pty) Ltd* Case No: 95/IR/May05; *Nyobo Moses Malefo, Fullhouse Investments 119 (Pty) Ltd v Street Pole Ads (SA) (Pty) Ltd & Others* Case No 35/IR/May05; *Nuco Chrome (Pty) Ltd and Xstrata Rand York Minerals (Pty) Ltd* [2004] ZACT 51; *Dumpit Waste Removal (Pty) Ltd v The City of Johannesburg & Another* Case No:21/IR/Apr02; *National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd and Others* [2005] ZACAC 102; *Nkosinathi Ronald Msomi & Others v British American Tobacco Case No:49/IR/Jul02*; *York Timbers Ltd and SA Forestry Company Ltd* [2001] ZACT 19; *South African Fruit Terminals (Pty) Ltd v Portnet, Capespan (Pty) Ltd & Others* Case No: 52/IR/Sep01; *Natal Wholesale Chemists v Astra Pharmaceuticals* Case No: 98/IR/Dec00; *Nationwide Airlines and Others v South African Airways (Pty) Ltd and Others* [2001] ZACT 1; *Mainstreet 2 t/a New United Norvatis & Another v Norvatis (SA) (Pty) Ltd* Case No: 25/IR/C/Aug00; *Papercor v Finwood Papers* Case No: 51/IR/Apr00; ; *Bezuidenhout v Patensie Citrus Beherend Beperk* Case No: 66/IR/May00; *DW Intergrators CC and SAS Institute (Pty) Ltd* [2000] ZACT 16; *Cancun Trading No 24 CC and Others and Seven-Eleven Corp SA (Pty) Ltd* [2000] ZACT 10; *South African Raisins (Pty) Ltd and Another and SAD Holdings Ltd and Another* [2000] ZACT 4.

¹¹²⁵ Section 58(1)(a)(v)-(vi), section 65(1) of the Competition Act of 1998; *Competition Commission and South African Airways (Pty) Ltd* [2005] ZACT 50 para 12, the Competition Commission is also competent to seek declaratory orders

¹¹²⁶ Moodaliyar, K. “Are cartels skating on thin ice? An insight into the South African corporate leniency policy” (2008) 125 *South African Law Journal* 168-170; Riley, A. “Developing criminal cartel law: Dealing with the growing pains” (2007) 4 *Competition Law Review* 1-6; Leslie, C. “Trust, distrust and antitrust” (2004) 82 *Texas Law Review* 653; Organisation for Economic Co-operation and Development. *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002) 8-12.

is aware, but with insufficient evidence to prosecute the cartel participants; an applicant for immunity should be required to make a full and frank disclosure; on-going co-operation should be demanded from all immunity applicants, until the conclusion of the investigation; the provision of leniency should be extended to second and subsequent leniency applicants; confidentiality, regarding the identity of the self-reporting firm, and the information provided by it, must be ensured; and absolute transparency and certainty, regarding the requirements, procedures and practices of the leniency programme,¹¹²⁷ must be maintained.

5.2.1. The rationale for leniency policies

The secretive nature of cartels makes their detection and prosecution by CAs difficult.¹¹²⁸ As a result, it has been realised that awarding immunity to confessing participants provides a powerful tool in the fight against cartels. These immunity procedures incentivise self-reporting, with the CAs awarding total, or partial, immunity from prosecution to those cartel participants, who confess their collusion.¹¹²⁹ Leniency procedures have several important advantages. They improve the gathering of evidence that would not be available otherwise, but for the confessing cartel participant. They destabilise cartels and facilitate the prosecution of other cartel participants. They motivate firms to co-operate and divulge information on other cartels,¹¹³⁰ and, subsequently, provide the so-called “roll-over” effect, meaning, investigations into one cartel often lead to the discovery of another.¹¹³¹

In South Africa, the rationale for the Competition Commission’s leniency policy was explained by Zondo J, in *Agri Wire (Pty) Limited & Another v Commissioner of the Competition Commission & Others* in the following manner:

“...[I]t is very difficult to detect or prove conduct that is prohibited by section 4 (1)(b)(i), (ii) and (iii) of the Act. Obviously, this is partly because normally parties to agreements and decisions such as are referred to in section 4(1)(b) would be very determined to keep their agreements or decisions secret among themselves...it was as a result of this difficulty that the Commission decided to adopt a policy which would encourage firms or business enterprises involved in such decisions or agreements to break ranks and report such prohibited conduct so that the Commission could conduct its investigations and, in appropriate cases, refer complaints about such conduct to the Competition Tribunal. The policy that the Commission adopted in this regard is called the Corporate Leniency Policy (‘CLP’).”¹¹³²

¹¹²⁷ *Drafting and implementing an effective leniency programme*. International Competition Network Anti Cartel Manual (2006) 12.

¹¹²⁸ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 32.

¹¹²⁹ Zingales, N. “European and American leniency programmes: Two models towards convergence?” *The Competition Law Review* (2008) 6, 8. “...a cartel can be described as an organisation of businesses that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong psychological assumptions exist among cartel members about their reciprocal behaviour. Consequently the leniency programme tries to challenge the strength of these assumptions by pushing for a change in cartel members sentiments: its aim is the destabilisation of the organisation of the organisation, and ultimately its detection through confession.”

Immunity programmes are best explained by the so-called Prisoner’s Dilemma, a game of social strategy formalised by mathematician, Albert W Tucker. By creating distrust among cartel members, each rational cartel member chooses to serve its own interests by confessing and getting rewarded, while the rest of the members are penalised.

¹¹³⁰ Werden, G.J. *et al. Deterrence and the detection of cartels: Using all the tools and sanctions*. 26th Annual National Institute on White Collar Crime conference, Miami (2012) 15.

¹¹³¹ Riley, A. “Cartel whistleblowing: Toward an American model”. *Maastricht Journal* (2002) 82-132.

¹¹³² [2011] ZAGPPHC 117 para 4, it must be noted that this matter was decided by the High Court, Recall that in Chapter 4 of the current study, it was indicated that the High Court does not have jurisdiction to decide on conduct that falls within the

According to South Africa's Competition Commission, its immunity procedure, the Corporate Leniency Policy, which was adopted in 2008,¹¹³³ is an important tool that is aimed at encouraging cartel members to blow the whistle on cartel practices.¹¹³⁴ Without the CLP and the incentive it provides, the effective prosecution of cartels would be severely hamstrung.¹¹³⁵ Therefore, the CLP is meant to ease the process through which cartel participants are encouraged to disclose information in return for immunity from prosecution.¹¹³⁶

Amnesty policies are not created equal. For instance, South Africa has a single immunity procedure, the Corporate Leniency Policy,¹¹³⁷ which only applies to firms, as defined by the Competition Act of 1998.¹¹³⁸ On the other hand, the United States has separate immunity rules that apply solely to firms,¹¹³⁹ as well as those that apply only to individuals.¹¹⁴⁰ There is a reason for this. In the United States, the dual immunity that distinguishes individual immunity from corporate immunity is because of the country's antitrust enforcement framework. From the time of its enactment, the Sherman Act has always criminalised cartels.¹¹⁴¹ This means that engaging in cartels results in personal consequences under criminal law. In light of this, it makes sense for there to be individual immunity procedures that are independent of corporate leniency procedures. In South Africa, the criminalisation of cartels was not the original intent of the legislature when enacting the Competition Act Of 1998 and therefore, immunity procedures have always been directed at firms, not individuals. The title of South Africa's leniency policy

Competition Act. Recall also that, in terms of section 65(2) of the Competition Act, if a matter before a civil court involves conduct governed by the Competition Act, a civil court must not decide the issue on its merits, and if the issue is one in which the Competition Tribunal, or the Competition Appeal Court, has made a ruling, then a civil court must apply the ruling of the Competition Tribunal, or the Competition Appeal Court. Alternatively, the court must refer the issue to the Tribunal for consideration on the merits. In *Agri Wire*, the High Court was faced with a review application concerning the granting of conditional immunity by the Competition Commission. The High Court ruled that, in light of the Competition Act's provisions on shared exclusive jurisdiction between the Competition Tribunal and the Competition Appeal Court (section 62(1), read with the Competition Act's provisions on the functions of the Competition Tribunal (section 27), it did not have jurisdiction on the matter, and that the tribunal has exclusive jurisdiction (which it shares with the Competition Appeal Court) to entertain the review application, para 44-47. However, the High Court was of the view that its ruling on the point of jurisdiction was 'not beyond question' and, for that reason, it went on to deal with the merits of the case, in case its ruling on jurisdiction was wrong, para 47.

See also *Competition Commission of South Africa v Arcelormittal South Africa Ltd & Others* 2013 (5) SA 538 (SCA) para 4.

¹¹³³ South Africa's Corporate Leniency Policy was first introduced in 2004, in terms of the Government Notice 195 of 2004, *Government Gazette* No. 25963 of 6 February 2004. The 2004 CLP has since been replaced by the current CLP of 2008, introduced in terms of Government Notice 628 of 2008, *Government Gazette* No. 31064 of 23 May 2008.

Both CLPs were adopted in terms of section 79 of the Competition Act of 1998, which empowers the Commission to adopt guidelines indicating the Commission's approach pertaining to matters within its jurisdiction as laid out in the Act.

¹¹³⁴ Para 13 of Competition Commission Corporate Leniency Policy of 2008.

¹¹³⁵ Para 13 of Competition Commission Corporate Leniency Policy of 2008

¹¹³⁶ Para 2.5 of Competition Commission Corporate Leniency Policy of 2008.

¹¹³⁷ The CLP was influenced by jurisdiction by the EU, Australia, Canada, the United Kingdom, and the United States. Para 16.1-16.7 of Competition Commission Corporate Leniency Policy of 2008.

¹¹³⁸ Para 5.7 of the Competition Commission Corporate Leniency Policy of 2008 is also to the effect that a firm includes a person, a partnership or a trust, in the same way as defined in section 1(xi) of the Competition Act. A "person" refers to both a natural and a juristic person. Additionally, the CLP applies to a natural person to the extent that such a person is involved in economic activity, for example, as a sole trader or a partner in a business partnership.

¹¹³⁹ 'Corporate Leniency Policy' United States Department of Justice (1993). Available online at www.justice.gov/atr/public/guidelines/0091.htm [Accessed 06 January 2015].

¹¹⁴⁰ 'Leniency Policy for Individuals' United States Department of Justice (1994). Available online at www.justice.gov/atr/public/guidelines/0092.htm [Accessed 06 January 2015].

¹¹⁴¹ See 3.5 in Chapter 3.

confirms this; it is referred to as 'corporate leniency policy'. However, the Competition Amendment of 2009 inserted section 73A, which now criminalises cartel conduct.¹¹⁴²

5.2.2. Leniency policies in the global-South: A case study of South Africa

In the global South, leniency policies are yet to be firmly embedded in the public enforcement frameworks. It is not that leniency mechanisms are not contained in domestic competition laws, as they are; it is just that, for the most part, they are not implemented. In addition, the immunity granted in these procedures tends to vary. In South Africa, a successful leniency application means that a firm is absolved from paying an administrative fine. In Brazil, leniency will result in a reduced fine.¹¹⁴³ Similarly, India's immunity procedures also provide for a reduced fine, not absolution.¹¹⁴⁴ Besides, Brazil also distinguishes between 'corporate' amnesty and 'individual' amnesty.¹¹⁴⁵

Although the Corporate Leniency Policy applies to firms only, the Competition Commission does encourage "whistle-blowing", that is, the reporting of cartel activity by individual employees of firms, or persons not authorised to act on behalf of the firm.¹¹⁴⁶ However, such reporting is not regarded as an application for immunity,¹¹⁴⁷ and as such, these 'whistle blowers' currently do not receive any incentives.

5.2.2.1. *The Corporate Leniency Policy of 2008 in Agri Wire & Another v Competition Commission & Others*

When a firm has been granted immunity in another jurisdiction, it does not automatically guarantee its immunity in South Africa. Such a firm must submit an application that satisfies the requirements of South Africa's CLP.¹¹⁴⁸ As per the Corporate Leniency Policy of 2008, immunity granted pursuant to leniency applications, does not mean that the applicant is any less of a cartel member, nor does it make the applicant any less guilty of violating the relevant competition law. It simply means that the applicant was first, among other firms, to seek immunity.¹¹⁴⁹ Where immunity is granted, it means that a firm will neither be referred to the Competition Tribunal for adjudication for its participation in the cartel, nor will the Competition Commission propose that an administrative fine be imposed.¹¹⁵⁰

¹¹⁴² See 5.7.3.4 in this Chapter.

¹¹⁴³ Article 86 of Law 12.529 of 2011.

¹¹⁴⁴ The Lesser Penalty Regulations of 2009 which must be read together with section 46, section 64 and section 27(b) of India Competition Act of 2002.

¹¹⁴⁵ Article 86 (2) of Law 12.529 of 2011.

¹¹⁴⁶ Para 5.8 of Competition Commission Corporate Leniency Policy of 2008.

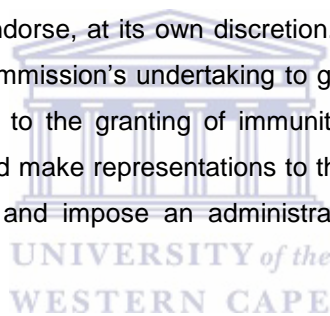
¹¹⁴⁷ Para 5.8 of Competition Commission Corporate Leniency Policy of 2008.

¹¹⁴⁸ Para 5.3 of Competition Commission Corporate Policy of 2008.

¹¹⁴⁹ Para 3.9 of Competition Commission Corporate Leniency Policy of 2008.

¹¹⁵⁰ Paras 3.3 and 4.2 of Competition Commission Corporate Leniency Policy of 2008.

These seemingly simple terms used to explain immunity, belie complications that have had to be dealt with by South Africa's NCAs and courts. The nature and the extent of the immunity granted under the CLP were examined by the High Court and the Supreme Court in *Agri Wire Limited & Another v Commissioner of the Competition Commission & Others*.¹¹⁵¹ In this case, the applicants essentially challenged the validity of the Corporate Leniency Policy.¹¹⁵² The High Court ruled that the term "immunity", which is granted by the Competition Commission, is made up of two elements. The Commission promises, or makes an undertaking, that it will not subject an immunity recipient concerned to adjudication before the Competition Tribunal, for its involvement in a cartel practice, as prohibited by section 4(1) (b) of the Competition Act. Additionally, the Commission will not pursue the imposition of administrative fines by the Tribunal, upon a successful immunity applicant for its role in the cartel practice.¹¹⁵³ The Court, as per Zondo J, continued to hold that the agreement between the Commission and an immunity applicant, in which the applicant commits to co-operate with the Commission, in exchange for immunity, becomes an agreement for the purposes of a consent order, as envisaged by section 49D of the Competition Act, which the Tribunal is empowered to accept, or decline to endorse, at its own discretion.¹¹⁵⁴ Alternatively stated, the Tribunal is not bound by the Commission's undertaking to grant immunity. According to the High Court, parties opposed to the granting of immunity to another firm may participate in referral proceedings and make representations to the Tribunal, seeking that the Tribunal exercise its discretion and impose an administrative fine on a party that has been granted immunity.¹¹⁵⁵



In terms of footnote 4 of the Competition Corporate Policy of 2008, the term "adjudication" must be taken to mean a referral by the Commission to the Tribunal of a Chapter 2 violation, with a view to getting a prescribed fine imposed on the respondent firm, against whom a referral has been made. The term "prosecution", as used in this context, also has a similar meaning.

¹¹⁵¹ *Agri Wire Limited & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117; *Agri Wire Limited & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA).

In this case, the Commission, in terms of the CLP of 2008, had granted conditional immunity to a cartel participant, in exchange for information regarding cartel practices among competitors in the manufacture and distribution of wire and wire-related products in South Africa and elsewhere. Thereafter, the Commission initiated a complaint and launched investigations. Based on the evidence gathered in its findings, the Commission was satisfied that the firms under investigation had engaged in price fixing, market and customer allocation, and collusive tendering. Accordingly, the Commission referred the matter to the Tribunal for adjudication. In light of this referral, the firms, who were cited as respondents, as they had engaged in the prohibited practice, lodged an application, seeking for the review and setting aside of the granting of conditional immunity by the Commission, a declaration that the evidence obtained by the Commission, as part of a leniency application, was unlawful and consequently inadmissible. The applicants contended that the Commission had no authority to grant conditional immunity to a participant in a practice prohibited by section 4(1)(b). They also argued that the Commission's decision to seek relief against the other cartel participants, and not the immunity applicant, amounted to "selective prosecution". Additionally, that since the Commission had no authority to grant conditional immunity, the referral to the Tribunal was also unlawful because it was the result of an unlawful conduct on the part of the Commission.

¹¹⁵² *Agri Wire Limited & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 30-31.

¹¹⁵³ [2011] ZAGPPHC 117 para 49, 55.

¹¹⁵⁴ [2011] ZAGPPHC 117 para 67.

See the discussion of consent orders in 5.4 in this Chapter.

¹¹⁵⁵ [2011] ZAGPPHC 117 para 72.

On the question of whether the Competition Commission has the authority to make an undertaking that it will not seek any relief against a party, who has been granted immunity, the High Court ruled that this was indeed envisaged in the Act, and therefore, it was an undertaking that the Commission was authorised to make.¹¹⁵⁶ The Court also ruled that the decision by a Commission to seek relief against the other cartel members, to the exclusion of the immunised firm, does not amount to “selective prosecution”.¹¹⁵⁷ The logic behind this ruling was that a prohibited practice, undertaken by a number of participants, does not cease to be a prohibited practice, simply because the Commissioner has initiated a complaint, regarding the practice, against only some, and not all its participants.¹¹⁵⁸ Accordingly, the High Court dismissed the application.

Several points must be made regarding the High Court’s judgment. First, the High Court’s reasoning results in a narrow understanding of the term “immunity”, since the Tribunal will not adjudicate on the question of whether the Act has been contravened by the conduct of the immunised firm.¹¹⁵⁹ Secondly, the court’s reasoning reduces immunity to nothing more than the Competition Commission undertaking, or promising, not to impose an administrative penalty on a party that has received immunity.¹¹⁶⁰ Thirdly, the idea that aggrieved parties can seek the imposition of an administrative fine on firms, who have been granted immunity, is problematic, as it may discourage firms from making applications for immunity, and consequently, have a severe negative impact on the efforts of the Competition Commission.

On appeal in the Supreme Court of Appeal, the appellants continued to contend that the granting of conditional immunity was unlawful and, since the Competition Commission was a creature of statute, it could only exercise those powers that were conferred on it by the enabling legislation, the Competition Act. The appellants further argued that the Competition Act does not authorise the Commission to engage in selective prosecution and when the Commission makes a referral to the Tribunal, it must do so in respect of all the applicants, and seek relief against all the participants in the prohibited conduct.¹¹⁶¹ The appellants were of the opinion that the most the Competition Commission could do, to ameliorate the position of an immunity applicant, was to request that the Competition

¹¹⁵⁶ [2011] ZAGPPHC 117 para 64

¹¹⁵⁷ [2011] ZAGPPHC 117 para 69, the applicants argued that the Commission had engaged in selective prosecution of joint wrongdoers. They argued that since section 49B(1) is to the effect that “the Commissioner may initiate a complaint against an alleged prohibited practice”, and by implication, if there was a number of firms participating in a prohibited practice, the Commissioner would no longer be initiating a complaint against a prohibited practice, as contemplated in section 49B(1), if s/he initiated the complaint only against some, as opposed to all those, who had participated in the prohibited practice.

¹¹⁵⁸ [2011] ZAGPPHC 117 para 70.

¹¹⁵⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁶⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁶¹ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 4-5

Tribunal take into account the applicant's co-operation with the Commission, in assessing the amount of an administrative penalty.¹¹⁶²

The Supreme Court of Appeal was unwilling to accept these arguments. It was of the view that throughout the Corporate Leniency Policy's provisions, the Competition Commission is consistently identified as the party vested with the authority to grant immunity.¹¹⁶³ In addition, when a confessing cartel participant approaches the Commission, only the Commission is empowered to grant conditional immunity.¹¹⁶⁴ The Commission also reserves the right to revoke the grant of conditional immunity, based on the lack of co-operation, and thereafter pursue prosecution of the unco-operative applicant, before the Tribunal.¹¹⁶⁵

The Supreme Court moved away from a narrow interpretation of immunity, as espoused by the High Court that immunity is a promise, or an undertaking by the Commission, not to seek relief against a party in referral proceedings, before the Tribunal.¹¹⁶⁶ The Supreme Court further criticised the High Court's approach that immunity is dependent on the Tribunal, because such an interpretation would go against the whole purpose of the CLP.¹¹⁶⁷ This, according to the Supreme Court, was an erroneous decision. Additionally, the view that the Tribunal could essentially override the Commission in the granting of immunity, would have a dampening effect on the CLP, and thereby reduce its effectiveness.¹¹⁶⁸ Contrary to the arguments by the appellants that the Commission had no authority to adopt the Corporate Leniency Policy, the Supreme Court highlighted that the Competition Act, actually, confers this authority on the Commission.¹¹⁶⁹ As to the

¹¹⁶² *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 4-5.

¹¹⁶³ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 7.

¹¹⁶⁴ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 7.

¹¹⁶⁵ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 7.

¹¹⁶⁶ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 8, the Supreme Court highlighted that the High Court's reasoning was based on a footnote in the Corporate Leniency Policy.

¹¹⁶⁷ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 9,21, according to the Supreme Court, such a construction would have an absurd result. For example, in a situation where conditional immunity was granted and the recipient co-operated fully in the investigation and the Tribunal proceedings, consequently, qualifying for total immunity; however, on the High Court's reasoning, is then compelled to pay an administrative fine. This does not qualify as immunity at all, as envisaged by the Corporate Leniency Policy.

¹¹⁶⁸ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 9, the Supreme Court expressed its misgivings in this way, "[i]t would be small comfort to the recipient to know that it had received total immunity if it had nonetheless been ordered to pay ten per cent of its annual turnover during the years of the cartel's existence as administrative penalty. We venture to suggest that the Corporate Leniency Policy would be far less effective, if not entirely useless, if it contained a disclaimer to the effect that the Commission would not seek an order against the party seeking leniency, but that the Tribunal would be free to impose such administrative penalty as the Act permitted against them. Hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the co-operation that the Commission seeks from them."

¹¹⁶⁹ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 22, "[t]he purpose of the Act, as set out in section 2... is to promote competition in South Africa. To that end the Commission is empowered to promote market transparency and to investigate and evaluate alleged contraventions of Chapter 2 of the Act under which cartels fall. Breaking up cartels serves to promote market transparency, as cartel behaviour is the antithesis of transparency in the market place. Investigating contraventions of the Act must entitle the Commission to put in place measures that will enable it to perform this function. That is the whole purpose of the CLP. Accordingly...the Commission

contention that a complaint referral involving a cartel, must involve all the participants, in order for it not to amount to selective prosecution, the Supreme Court emphasised that there is nothing in the Act to support such an understanding.¹¹⁷⁰

The Supreme Court's decision must be commended, especially on the point that the Competition Commission is the authority vested with the power to grant immunity to applicant firms, and this power is founded in the Commission's authority to promote competition through market transparency. However, the Competition Commission's ousting of the Tribunal's discretion, in order to provide greater protection to leniency, presents several problems.¹¹⁷¹ First, section 50(3) of the Competition Act, which makes provision for complaint referrals of complaints not initiated by the Commission, cannot be used as justification for the ousting of the Tribunal's discretion, in all cases.¹¹⁷² In fact, Sutherland and Kemp argue that the opposite is true.¹¹⁷³ Secondly, both the High Court and the Supreme Court judgements confirmed that a firm, granted immunity is not immunised from civil and criminal liability, in relation to the cartel.¹¹⁷⁴ It would also appear that an immunised firm is not protected, when faced by claims that a merger is anti-competitive.¹¹⁷⁵ In terms of the Competition Act, a party can petition a civil court to award compensation for loss or damage arising out of a prohibited practice.¹¹⁷⁶ In fact, immunity recipients, whose leniency applications led to the successful prosecution of other cartel participants, have faced, and are currently facing, claims for civil damages.¹¹⁷⁷



was empowered under the Act to adopt and implement the CLP by giving conditional immunity to parties who make disclosure and provide evidence that enables it to pursue cartels and bring them to an end.”

¹¹⁷⁰ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* 2013 (5) SA 484 (SCA) para 24, “[i]f at the conclusion of the investigation, the Commissioner decides to refer the complaint to the Tribunal, the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint submitted by the complainant. One of the central particulars in respect of cartel conduct is the identity of the members of the cartel. If the complaint is that A and B and C have engaged in cartel behaviour the Commissioner may decide to only refer A and B. In that way the Commissioner exercises the express statutory power to exclude certain particulars, namely C, from the referral. Equally, when the Commissioner decides to add D as a participant to the cartel, that is in accordance with the express provisions of the statute.”

¹¹⁷¹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁷² Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁷³ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁷⁴ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3; *Competition Commission v DPI Plastics & Others* [2012] ZACT 47 para 12.

¹¹⁷⁵ Para 5.9, 6.4 of Competition Commission Corporate Leniency Policy of 2008; Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 5.9.1.3.

¹¹⁷⁶ In terms of section 62(5), the Competition Tribunal and the Competition Appeal Court do not have jurisdiction to assess or award damages connected to loss incurred because of a prohibited practice. Only the civil courts have this competence. In terms of section 65, when a claim for damages is lodged before a civil court, it must be accompanied by a “certificate” indicating that the conduct constituting the basis for the claim is one that has been found to be a prohibited practice by the Competition Tribunal or the Competition Appeal Court. This certificate is regarded as conclusive proof of its contents, and is binding upon a civil court. However, a court will not award compensation where the claimant has already been awarded damages, in terms of a consent order.

¹¹⁷⁷ *Premier Foods v Manoim NO* 2016 (1) SA 445 (SCA); *Premier Foods (Pty) Ltd v Manoim NO & Others* [2013] ZAGPPHC 236; *Children's Resource Centre & Others v Pioneer Foods & Others* [2012] ZASCA 182; *Mukaddam & Others v Pioneer Foods Pty Ltd & Others* [2012] ZASCA 183.

Regarding the civil liability of immunised firms, the effects of both the High Court and the Supreme Court judgements is that immunised firms are not protected from civil liability, regardless of the fact that the Commission has not sought relief, or adjudication, against the immunised firm.¹¹⁷⁸ This is problematic for the party seeking compensation against an immunised firm, since the firm would not have been referred to the Tribunal for adjudication, like the other cartel participants.¹¹⁷⁹ This is specifically important because section 65 of the Act requires that claims for civil damages must be accompanied by a certificate confirming that the cause of action is one that has been found to be a prohibited practice. In the absence of an adverse ruling against an immunised firm, a party seeking civil damages must get the immunised firm, or its conduct, before the Tribunal,¹¹⁸⁰ and thereafter petition the Tribunal to declare the conduct to be prohibited by the Competition Act.¹¹⁸¹ In these circumstances, a declaration is crucial to a claim for damages, because without it, the right to claim damages cannot come into existence.¹¹⁸² In addition, a declaration by the Tribunal renders *res judicata* the issue of the wrongful conduct of the firm under consideration.¹¹⁸³

Another problem posed by the issue of civil liability is that firms may become reluctant to utilise the incentive offered by the CLP. Perhaps a solution lies in consent agreements for immunised firms. However, the Supreme Court did not decide on the issue of whether the Commission should conclude consent orders, or agreements, with firms that had received total immunity.¹¹⁸⁴ Without such a consent order, a firm that has received immunity will still be exposed to prosecution through a referral of a complaint (by a party other than the Commission).¹¹⁸⁵ To solve this problem, perhaps the decision of the Supreme Court should be accepted, subject to the qualification that the Competition Commission should conclude consent orders or agreements with immunised parties.¹¹⁸⁶ Additionally, it may be prudent for an immunised firm to include terms in its consent order, for example, provisions dealing with liability to the complainant.¹¹⁸⁷ The advantage

¹¹⁷⁸ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3; *Agri Wire Limited & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 51.

¹¹⁷⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 5.9.1.3, 12.3.7; *Premier Foods v Manoim NO 2016 (1) SA 445 (SCA)*.

¹¹⁸⁰ Recall that in terms of section 50(5) of the Competition Act, if the Commission has not referred a complaint to the Tribunal, or issued a notice of non-referral within the prescribed time period (where the complaint is initiated by a complainant), the Commission will be regarded as having issued a non-referral.

¹¹⁸¹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 5.9.1.3, 12.3.7.

In terms of section 58(1)(a)(v), the Competition Tribunal may issue an order declaring the conduct of a firm to be a prohibited practice in terms of the Act for the purposes of claiming damages in terms of section 65 of the Act.

¹¹⁸² In *Premier Foods v Manoim NO 2016 (1) SA 445 (SCA)* para 14..

¹¹⁸³ In *Premier Foods v Manoim NO 2016 (1) SA 445 (SCA)* para 14..

¹¹⁸⁴ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁸⁵ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁸⁶ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁸⁷ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

of a consent order for an immunised firm is that, once the order is granted and damages awarded to the complainant, such a complainant will not be able to claim further damages from the respondent firms.¹¹⁸⁸ However, the Competition Act, presently, does not preclude claims for damages lodged against immunised firms, who are not party to a consent order, or by persons who were not complainants.¹¹⁸⁹

5.2.2.2. *The circumstances under which leniency may be granted*

The Corporate Leniency Policy of 2008 only applies to cartels.¹¹⁹⁰ This means that if a firm confesses its involvement in a cartel, but it has also engaged in other non-cartel violations, for instance vertical restraints or abuse of dominance, the immunity granted will only apply to the cartel conduct and nothing else.¹¹⁹¹ The natural effect of this is that a self-reporting firm may still be held to account for the non-cartel violations, even though it will receive immunity for its cartel participation.¹¹⁹² This is a difficult position for any immunised firm because it finds itself in the unenviable position of having to co-operate with the Competition Commission's investigation into the cartel practice(s), while at the same time facing prosecution against the non-cartel conduct and having to defend itself against the prosecution.¹¹⁹³ The Competition Tribunal and the Competition Appeal Court have refused to accept arguments by the immunised firm, seeking for the dismissal of a referral based on prejudice.¹¹⁹⁴ Both the Tribunal and the Appeal Court are of the view that issues of prejudice are to be determined during the course of the trial.¹¹⁹⁵

Additionally, the leniency policy does not grant "blanket immunity". If a firm has participated in more than one cartel, then it must satisfy the requirements for each cartel activity, in order to be granted immunity for all the practices, unless the practices are regarded as constituting a single infringement.¹¹⁹⁶ The requirement that each cartel violation must be individually categorised, may prove difficult, at times, especially, when faced with complex cartels, where it would be difficult to determine where a single cartel practice begins, or ends.¹¹⁹⁷

¹¹⁸⁸ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁸⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.3.

¹¹⁹⁰ Para 2.1-2.6, 5.1 of Competition Commission Corporate Leniency Policy of 2008.

¹¹⁹¹ *Clover Industries Ltd & Other v Competition Commission* [2008] ZACT 46 para 32-34, 41.

¹¹⁹² Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 11.3.3.

¹¹⁹³ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2000) 5.9.1.2.

¹¹⁹⁴ *Clover Industries Ltd & Other v Competition Commission* [2008] ZACT 46 para 41, 43; *Clover Industries Ltd & Another v competition Commission & Others* [2008] ZACAC 3 para 19-34.

¹¹⁹⁵ *Clover Industries Ltd & Other v Competition Commission* [2008] ZACT 46 para 41, 43; *Clover Industries Ltd & Another v competition Commission & Others* [2008] ZACAC 3 para 19-34.

¹¹⁹⁶ Para 5.4 of Competition Commission Corporate Leniency Policy of 2008.

¹¹⁹⁷ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 5.9.1.2.

The CLP only applies to cartel conduct that the Competition Commission has no knowledge of at the time an application for immunity is submitted,¹¹⁹⁸ or where the Commission has knowledge of the application, but lacks sufficient information to launch investigations;¹¹⁹⁹ or has launched investigations, but lacks sufficient evidence to support adjudication before the Competition Tribunal.¹²⁰⁰ The last two instances must be applied carefully, only to those applicants, whose confessions, as well as the information they avail, contribute to the successful prosecution of other cartel members. If not, such an applicant would simply be a “free rider”, who receives rewards for bringing nothing to the confession table. The CLP also makes provision for “marker applications”, which are made by prospective leniency applicants, as a mechanism of reserve an “applicant’s place in the queue” of immunity applications.¹²⁰¹ However, the CLP will not apply, where the conduct for which immunity is being sought does not fall under the purview of the Competition Act to begin with; or another firm has already successfully lodged an immunity application regarding the same conduct; or where the applicant fails to fulfil the conditions set out in the CLP.¹²⁰²

The Corporate Leniency Policy of 2008 applies on a “first-to-the-door” or “first-come-first-served” basis, meaning that immunity will only be awarded to the firm that approaches the Competition Commission first to confess their participation in cartel conduct.¹²⁰³ However, cartel participants, who have been outrun in the race to the doorsteps of the Commission, may still receive lenient treatment, if they cooperate with the Commission’s investigations. Although they will not receive immunity, they will be rewarded and treated favourably in a number of ways: through reduced administrative fines; and settlement agreements (consent orders).¹²⁰⁴

In South Africa, “originators”, “instigators”, or “ring leaders” of cartels are not prevented from applying for immunity, unlike in the United States, where a cartel leader is not eligible for immunity.¹²⁰⁵ There is an advantage in allowing a cartel leader to apply for immunity. Such an applicant can disclose substantial information leading to a speedy conclusion of investigations. The perverse result is that it unfairly benefits a firm that led others to partake in cartel conduct, to later turn around and report them under the

¹¹⁹⁸ Para 5.5.1 of Competition Commission Corporate Leniency Policy of 2008.

¹¹⁹⁹ Para 5.5.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰⁰ Para 5.5.3 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰¹ Para 12 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰² Para 7.1 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰³ Para 5.6 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰⁴ Para 5.6, 7.2 of Competition Commission Corporate Leniency Policy of 2008; *Competition Commission and Tiger Consumer Brands (Pty) Ltd* [2007] ZACT 93; *Competition Commission and FoodCorp (Pty) Ltd* [2009] ZACT 14.

¹²⁰⁵ Under the Corporate Leniency Policy of 2004, a firm that was the cartel instigator or coerced other firms to partake in the cartel conduct was barred from making a CLP application. This condition was done away with when the Corporate Leniency Policy of 2008 came into force.

leniency policy.¹²⁰⁶ However, the position in South Africa is clear; a cartel ringleader is eligible for immunity, as any other cartel participant, provided the CLP's conditions are fulfilled. In any event, the Competition Commission has the discretion to offer other cartel participants favourable treatment, should they also cooperate with the Commission's investigations.

The CLP outlines specific requirements and conditions, with which an immunity applicant must comply. The foundation of these requirements and conditions is the assurance of the applicant's consistent co-operation throughout the whole process. The applicant must disclose, honestly and truthfully, all information, evidence and documents in its possession that pertains to *any* cartel conduct (emphasis added). The applicant must be the first to provide the Commission with information and evidence, sufficient to enable the Commission to institute proceedings regarding the cartel conduct. The applicant must cooperate, fully, expeditiously, and continuously, throughout the process until the matter is finalised and the subsequent proceedings in the Competition Tribunal, or Competition Appeal Court, are completed. The applicant must abstain from engaging in the cartel practice, forthwith, and refrain from informing other cartel members, or third parties, of the immunity application. In addition, the applicant must abstain from any act that compromises any information or evidence pertaining to the cartel conduct and finally, not falsify any facts pertinent to the cartel conduct.¹²⁰⁷ Brazil also requires similar conditions,¹²⁰⁸ which are also present in India's Lesser Penalty Regulations.¹²⁰⁹

5.2.2.3. *The procedure for obtaining immunity*

Applications for immunity must be made in the prescribed format and procedure.¹²¹⁰ However, the Competition Commission may opt for some flexibility, where necessary, to

¹²⁰⁶ Lavoie, C. "South Africa's corporate leniency policy". In Moodaliyar, K. & Roberts, S. *The Development of Competition Law and Economics in South Africa* (2012) 144-145.

¹²⁰⁷ Para 10.1 (a) – (g) of Competition Commission Corporate Leniency Policy of 2008.

¹²⁰⁸ Article 86 (1) (I)- (IV) of Brazil Law 12.529 of 2011.

¹²⁰⁹ Regulation (3)(1)(a) (e) of India Lesser Penalty Regulations of 2009.

¹²¹⁰ Para 11, para 15 of Competition Commission Corporate Leniency Policy of 2008.

In terms of para 11, an applicant seeking immunity must make first contact with the Commission, by lodging an application in writing to the Commission's Enforcement and Exemptions Division. The application must contain sufficient information to enable the Commission to identify the cartel practice and its participants, to enable the Commission to determine whether or not, an application for immunity has been made about the specific cartel practice. At this stage, it is unnecessary for the applicant to reveal its identity. Where another firm has already lodged an application for immunity concerning the same conduct, the Commission will communicate this to the applicant, accordingly. If there has been no immunity application regarding that conduct, the Commission must also communicate this to the applicant. Thereafter, the applicant must, within a reasonable period, make arrangements for a first meeting with the Commission.

In the First Meeting, the applicant is expected to avail all evidence, information and documents in its possession related to the cartel practice, for which immunity is being sought. At the First Meeting, the applicant must reveal its full identity and answer all questions put to it by the Commission. The First Meeting is directed as establishing the applicant qualifies for immunity. At this meeting, while the Commission may peruse the documents availed by the applicant it may not make copies of these. If the Commission decides that the applicant meets the conditions and requirements of the CLP, a Second Meeting will be arranged. If the Commission decides that the applicant does not qualify for immunity, then the applicant will be advised in writing of this. During the Second Meeting, the Commission grants conditional immunity to the applicant pending the finalisation of the Commission's investigations and final determination by the Tribunal or the Appeal Court. At

achieve the desired outcome.¹²¹¹ For instance, although the CLP requires meetings between the Commission and an immunity applicant, the Commission may use other forms of communication with the applicant, without having to convene a meeting.¹²¹² Upon submitting an application for immunity, the Commission will grant “conditional immunity” as a precursor to either total immunity or no immunity at all.¹²¹³ This is meant to foster a “good atmosphere and trust” between the applicant firm and the Commission.¹²¹⁴ The Commission may withdraw, or revoke this provisional immunity at any point during the process, if the applicant withholds its co-operation, or fails to satisfy the conditions of the CLP.¹²¹⁵

Through conditional immunity, the Competition Commission conditionally or provisionally undertakes not to seek relief against the immunity applicant in the referral to the Tribunal.¹²¹⁶ However, this conditional immunity is dependent upon the applicant co-operating with, and assisting, the Commission in the referral to the Tribunal.¹²¹⁷ Alternatively stated, the Commission is willing, and considers it appropriate, to forgo relief against one cartel member, in exchange for uncovering and proceeding against the rest of the cartel and its participants.¹²¹⁸ In the event that the firm granted conditional immunity fails to offer its full co-operation or assistance to the Commission, the Commission can amend its relief to include the now recalcitrant applicant.¹²¹⁹ Invariably, an applicant for leniency, or an applicant who has been granted conditional immunity, is cited as a party in the referral to the Tribunal, and the granting of final immunity at the end of referral proceedings in the Tribunal, is the final decision made by the Commission

this stage, the applicant will be required to avail any other relevant information, evidence and documents that it may still have in its possession. The Commission is not prevented from making copies of all documents provided. The conditional immunity will be reduced into writing, the “conditional immunity agreement”, which will be granted subject to the conditions and requirements of the CLP. The Commission is required to maintain, as confidential, all information, evidence and documents given to it by the applicant. The use of documents, or information, obtained by the applicant at the Tribunal, in terms of the Act, does not amount to breach of confidentiality. After the Commission grants the applicant conditional immunity, it will embark on its investigations into the cartel conduct. This will involve the analysis and verification of the information given by the applicant. During this process, the Commission may use all its investigatory methods and tools provided for in the Act, for instance, conducting interviews, issuing subpoenas, conduct searches or summons. Thereafter, the Commission will convene the Final Meeting with the applicant, during which it will inform the applicant that it has sufficient information to institute proceedings. If the Commission is not satisfied that it has sufficient information to institute proceedings, it can either revoke the conditional immunity, alternatively, it can solicit further documents or information to bolster its case.

¹²¹¹ Para 11.1 of Competition Commission Corporate Leniency Policy of 2008.

¹²¹² Para 11.1 of Competition Commission Corporate Leniency Policy of 2008.

¹²¹³ Para 9.1.1, para 11.1.3 of Competition Commission Corporate Leniency Policy of 2008.

¹²¹⁴ Para 9.1.1.1 of Competition Commission Corporate Leniency Policy of 2008.

¹²¹⁵ Para 9.1.1.3, para 13.1- 13.5 of Competition Commission Corporate Leniency Policy of 2008.

¹²¹⁶ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 14.

¹²¹⁷ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 14; *Claver Industries Ltd & Others v Competition Commission* [2008] ZACT 46 para 42.

¹²¹⁸ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 14.

¹²¹⁹ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 15.

not to seek relief against the applicant.¹²²⁰ According to the Commission, conditional immunity is an interim decision. If at the end of the Tribunal's proceeding, it is clear that the information given by an immunity applicant is incomplete, or is untrue, the Commission will decide not to grant final immunity.¹²²¹

The Commission will grant total immunity if the applicant fully co-operates with the Commission during its investigations, as well as consistently fulfilling the leniency policy's conditions and requirements.¹²²² Total immunity is only granted after the completion of the Commission's investigations, a referral of the matter to the Tribunal and a final decision has been handed down by the Tribunal, or the Appeal Court.¹²²³ Once total immunity is granted, the Commission cannot revoke it.¹²²⁴

If the applicant fails to fulfil the CLP's conditions and requirements, it will not be granted immunity.¹²²⁵ In these circumstances, the Commission has the discretion to conclude a settlement agreement with the firm, and if the matter has been referred to the Tribunal, to recommend that a reduced administrative penalty be imposed.¹²²⁶ Should the Commission not exercise this discretion, there is nothing preventing the applicant from approaching the Commission to ask for favourable treatment.¹²²⁷

Because of the inherent risks that immunity applications have, it is important for a firm to first ensure that the conduct for which a confession is being contemplated is one for which immunity can be granted. To that end, a firm may approach the Commission on a "hypothetical basis" in order to ascertain the position of the conduct in question.¹²²⁸ A firm may choose to remain anonymous in this stage. Such anonymity is strongly advised, because any admissions, or disclosures made during this process do not fall within the ambit of the CLP, they are not protected, and may open a firm up to investigations by the

¹²²⁰ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 15, para 16.

In its submissions, in the answering affidavit, the Commission also argued that information and evidence gathered from immunity applicants are in accordance with a lawful measure adopted by the Commission. Therefore, no basis existed for the arguments by *Agri Wire* that such evidence was obtained unlawfully. However, even if the position were that the evidence had been obtained unlawfully, this would not automatically render the evidence inadmissible. Instead, the admissibility of the evidence would have to be decided upon by the Tribunal, taking into account all the relevant factors, the nature of the proceedings, the nature of the evidence and the interest of justice.

¹²²¹ *Agri Wire (Pty) Ltd & Another v Commissioner of the Competition Commission & Others* [2011] ZAGPPHC 117 para 17.

¹²²² Para 9.1.1, 9.1.2, 11.1.4, 11.1.5 of Competition Commission Leniency Policy of 2008.

¹²²³ Para 9.1.1.2 of Competition Commission Leniency Policy of 2008.

¹²²⁴ Para 9.1.1, 9.1.2, 11.1.4, 11.1.5 of Competition Commission Leniency Policy of 2008.

¹²²⁵ Para 9.1.3.1 of Competition Commission Corporate Leniency Policy of 2008.

¹²²⁶ Para 9.1.3.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²²⁷ Para 9.1.3.3 of Competition Commission Corporate Leniency Policy of 2008.

¹²²⁸ Para 8.1 of Competition Commission Corporate Leniency Policy of 2008.

Commission, and subsequent referrals to the Tribunal for adjudication.¹²²⁹ These clarifications are not binding on the Commission, the Tribunal, or the Appeal Court.¹²³⁰ Notwithstanding, the Commission is still expected to uphold utmost confidentiality, when considering immunity applications.¹²³¹

5.3. The Impact of Leniency Policies

Leniency policies have yielded considerable success.¹²³² They have resulted in the detection of more cartels than any investigatory tool. Claims have been made that they often result in firms rushing to the doors of the competition authorities, often before investigations had begun; and where investigations have been launched; firms would readily cooperate, in exchange for lenient treatment for their involvement in cartel conduct.¹²³³ Faced with the reality that one of their own had confessed, cartel participants are usually willing to co-operate with the investigations competition authorities. This translates into expeditious resolution and saving of resources, which would have been spent by competition authorities in protracted investigations and litigation. However, there are exceptions, as some firms may continue to deny that they were part of the cartel, even after various confessions had implicated them.¹²³⁴

In South Africa, the first years after the adoption of the Competition Commission's CLP did not translate into significant results, but as the awareness of the Commission's investigations in some of the high-profile cases intensified,¹²³⁵ cartel participants started approaching the Commission, seeking immunity. In 2008, the Commission received 19 immunity applications, and in the first half of 2009, 20 immunity applications were submitted, a significant increase from the previous year.¹²³⁶ Leniency

¹²²⁹ Para 8.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²³⁰ Para 6.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²³¹ Para 8.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²³² *Competition Commission v South African Airways (Pty) Ltd* 20/CR/Mar05; *South African Local Government Association v Competition Commission* [2013] ZACT 92 para 8-12.

¹²³³ Hammond, S.D. *The evolution of criminal antitrust enforcement over the last two decades*. American Bar Association Centre Criminal Justice Section and American Bar Association Centre For Continuing Legal Education 25 February 2010; Hammond, S.D. *Recent developments relating to the Antitrust Division's Corporate Leniency Program*. American Bar Association Criminal Justice Section 5 March 2009; Hammond, S.D. *Cracking cartels with leniency programs*. Organisation for Economic Co-operation Development Competition Committee (2005); Hammond, S.D. *Cornerstones of an effective leniency program*. International Competition Network on Leniency Programs (2004); Hammond, S.D. *Fighting cartels - why and how? Lessons common detecting and deterring cartel activity*. 3rd Nordic Competition Policy Conference 12 September 2000; Hammond, S.D. *When calculating the costs and benefits of applying for corporate amnesty, how do you put a price tag on an individual's freedom?* American Bar Association Criminal Justice Section (2001); Hammond, S.D. *Detecting cartel activity through an effective leniency programme*. International Workshop on Cartels (2000); Spratling, G.R. *Making companies an offer they shouldn't refuse*. The Bar Association of the District of Columbia (1999); *Reviews of Regulatory Reform: Korea*. Organisation for Economic Co-operation and Development (2007).

¹²³⁴ For example, *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 6, 171-172.

¹²³⁵ For instance, *Competition Commission v Pioneer Foods Pty Ltd* [2010] ZACT 9; *Competition Commission v Tiger Brands Ltd T/A Albany and Another* [2009] ZACT 34; *Competition Commission and Lancewood Cheese (Pty) Ltd* 103/CR/Dec06; *Competition Commission and Deutsch Lufthansa GA* [2006] ZACT 58; *Competition Commission and South African Airways* [2006] ZACT 57; 'Competition Commission prosecutes milk cartels' *Competition Commission Media Releases* 07 September 2006. Available online at <http://www.compcom.co.za/2006-media-releases/> [Accessed 11 May 2015].

¹²³⁶ Lavoie, C. "South Africa's Corporate Leniency Policy". In Moodaliyar, K. & Roberts, S. *The Development of Competition Law and Economics in South Africa* (2012) 147-149; "Competition Newsletter". *Competition Commission* June 2008 1-4. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/June-08-Newsletter-28.pdf> [Accessed 10 June 2015].

applications also have “ripple effects”, in that the information submitted by applicants, as part of immunity applications, may sometimes reveal cartel activities in other sectors of the economy. For example, the Commission’s investigations into the milling industry were prompted by information revealed in immunity applications.¹²³⁷ Leniency applications among firms in various industries, such as the steel industry,¹²³⁸ and the pharmaceutical drugs industry¹²³⁹ have resulted in the undoing of cartels. In 2011, in light of the massive collusive practices in the construction sector, the Competition Commission launched an immunity process for construction sectors, in terms of which the Commission invited construction firms to apply for a “fast-track leniency procedure” with complete and truthful disclosure of information regarding collusion.¹²⁴⁰ This fast track settlement process revealed 300 instances of bid rigging and motivated a considerable number of firms to settle with the Commission.¹²⁴¹ The process also revealed how firms determined, maintained and monitored collusive practices, which not only included bid rigging, but also the division of markets and setting of price margins.¹²⁴² The fast track process also resulted in 150 marker applications being received by

2015); “Competition Newsletter”. *Competition Commission* September 2008 1-6. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Sept-08-Newsletter-29.pdf> [Accessed 10 June 2015].

¹²³⁷ *Paramount Mills (Pty) Ltd v Competition Commission, Competition Commission v Pioneer Foods (Pty) Ltd and Others* [2011] ZACT 71; “Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission”. *Competition Commission Press Release* 12 November 2007. Available online at <http://www.compcom.co.za/2007-media-releases/> [Accessed 05 May 2015]; “Wheat milling cartel referred for prosecution”. *Competition Commission Press Release* 15 March 2010. Available online at <http://www.compcom.co.za/2010-media-releases/> [Accessed 05 May 2015].

¹²³⁸ *Competition Commission v Power Metals Recyclers (Pty) Ltd* [2010] ZACT 46; *Competition Commission v Aveng (Africa) Ltd t/a Duraset* [2010] ZACT 56; *Competition Commission v New Reclamation Group (Pty) Ltd* [2008] ZACT 27; *Cape Gate Pty Ltd v Competition Commission in Re Competition Commission v Arcelomittal Pty Ltd* Case No: 018259; “Competition Commission refers findings of wire investigation to the Tribunal”. *Competition Commission Press Release* 14 September 2009. Available online at <http://www.compcom.co.za/2009-media-releases/> [Accessed 05 May 2015]; “Competition Commission refers finding of mesh wire cartel to Tribunal”. *Competition Commission Press Release* 3 December 2009. Available online at <http://www.compcom.co.za/2009-media-releases/> [Accessed 05 May 2015]; “Competition Commission investigates the steel industry”. *Competition Commission Press Release* 23 June 2008. Available online at <http://www.compcom.co.za/2008-media-releases/> [Accessed 05 May 2015]; “Competition Commission uncovers mining roof bolts cartel”. *Competition Commission Press Release* 30 September 2009. Available online at <http://www.compcom.co.za/2009-media-releases/> [Accessed 05 May 2015].

¹²³⁹ *Competition Commission v Adcock Ingram Critical CARE (Pty) Ltd & Another* [2008] ZACT 42; *Competition Commission and Thusanong Healthcare (Pty) Ltd* 20/CR/Apr08; *Competition Commission and Dismed Criticare (Pty) Ltd* 20/CR/Apr08; “Competition Commission settles with Dismed and Thusanong”. *Competition Commission Press Release* 06 February 2009. Available online at <http://www.compcom.co.za/2009-media-releases/> [Accessed 05 May 2015]; “Adcock Ingram Critical Care admits involvement in cartel and agrees to penalty representing 8% of turnover”. *Competition Commission Press Release* 08 May 2008. Available online at <http://www.compcom.co.za/2008-media-releases/> [Accessed 05 May 2015]; “Pharmaceutical product cartel referred for prosecution”. *Competition Commission Press Release* 11 February 2008. Available online at <http://www.compcom.co.za/2008-media-releases/> [Accessed 05 May 2015].

¹²⁴⁰ “Invitation to firms in the construction industry to engage in settlement of contraventions of the Competition Act” *Competition Commission Press Release*. Available online at <http://www.comptrib.co.za/assets/Uploads/Collusive-Tendering/Annexure-A.pdf> [Accessed 10 December 2014]; “Competition Commission invites construction firms to settle”. *Competition Commission Media Release* 11 February 2011. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> [Accessed 10 December 2014].

¹²⁴¹ “Construction firms settle collusive tendering cases with R1.5 billion in penalties” *Competition Commission Media Release* 24 June 2013. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> [Accessed 10 December 2014].

¹²⁴² “Construction firms settle collusive tendering cases with R1.5 billion in penalties”. *Competition Commission Media Release* 24 June 2013. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> [Accessed 10 December 2014].

the Commission.¹²⁴³ In the United States, the amnesty programme has proved to be the 'most effective generator' in cartel enforcement.¹²⁴⁴

Notwithstanding the successes attributed to leniency programmes, some have suggested that leniency policies do not necessarily translate into a race to the doorsteps of competition authorities. This is because there is not much information available in the public domain regarding the dynamics and timing of these races.¹²⁴⁵ For instance, because of confidentiality, the information given during immunity applications cannot be made public, unless the applicant consents to such disclosure.¹²⁴⁶ The effectiveness of leniency programmes can also be impacted by claims for civil damages in jurisdictions where this is available.¹²⁴⁷ Since leniency applications are essentially confessions, firms open themselves up to civil damages claims because the immunity does not extend to these civil claims. This means that would-be confessors may be discouraged by the possibility that they will be opening themselves up to private lawsuits. Solutions have been suggested; competition authorities must not disclose the identity of leniency applicants to cartel victims; or alternatively, lesser damages must be awarded to successful plaintiffs claiming damages from confessed cartel participants.¹²⁴⁸ As can be recalled, immunised firms ought to consider the possibility of concluding settlement agreements with the Commission, to obviate the possibility of future civil claims for damages. In the EU, in a bid to safeguard the usefulness of leniency procedures, evidence and information gained and contained in leniency statements, cannot be disclosed for purposes of claiming civil damages.¹²⁴⁹

5.4. Settlement Procedures

Settlement procedures, also referred to as "plea agreements", 'negotiated settlements', or "consent orders", are mechanisms through which CAs and firms agree to "settle" alleged competition law violations, without entering into lengthy investigations and litigation.¹²⁵⁰ These procedures are aimed at achieving efficiencies. These efficiencies accrue to both the CAs, as well as the firms. For the CAs, they achieve procedural efficiencies by eliminating full-scale investigations and legal proceedings; the

¹²⁴³ "Competition Commission invites construction firms to settle". *Competition Commission Media Release* 11 February 2011. Available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> [Accessed 10 December 2014]

¹²⁴⁴ Spratling, G.R. "Detection and deterrence: Rewarding informants for reporting violations" (2001) 69. *George Washington Law Review* 799.

¹²⁴⁵ Leslie, C.R. "Editorial- Antitrust leniency programmes" (2011) *Competition Law Review* 174-179.

¹²⁴⁶ Para 6.2 of Competition Commission Corporate Leniency Policy of 2008.

¹²⁴⁷ Leslie, C.R. "Editorial- Antitrust leniency programmes" (2011) *Competition Law Review* 174-179.

¹²⁴⁸ Cauffman C "The Interaction of Leniency Programmes and Actions for Damages" (2011) *Competition Law Review* 184.

¹²⁴⁹ Article 6(6), Article 7(1)-(3) of the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union of 26 November 2014.

Prior to the Directive, Union Courts had ruled that, subject to the national laws of member countries, access to leniency documents could be granted to litigants seeking to pursue civil damages in *Pfleiderer AG v Bundeskartellamt* C-360/09; and *CDC v Commission* Case T-437/08.

¹²⁵⁰ *Netcare Hospital Group (Pty) Ltd & Another v Manojm N.O. & Others* [2008] ZACAC 1 para 25; *Policy Roundtable: Plea bargaining settlement of cartel cases*. Organisation for Economic Co-operation and Development (2006) 9.

saving of resources (both human and financial); and streamlining their enforcement activities.¹²⁵¹ For the firms, they too are saved resources involved in the litigation process, the benefit of reduced administrative fines and minimal bad publicity that may result from prolonged litigation.¹²⁵² Successful settlement procedures must be governed by rules that are clear, transparent, predictable and certain.¹²⁵³

5.4.1. Settlement procedures in the global South: A case study section 49D of the Competition Act 89 of 1998

The Competition Act addresses the competencies of the Competition Commission and the Competition Tribunal when it comes to negotiation of settlement agreements and the making of consent orders.¹²⁵⁴ Unlike the Competition Commission's CLP which only applies to cartels, settlement procedures apply to all prohibited practices, as laid out in Chapter 2 of the Competition Act, namely all horizontal and vertical restraints, as well as abuse of dominance.¹²⁵⁵ Settlement procedures can also apply in certain circumstances under merger evaluation, for example, when a respondent firm fails to notify a merger transaction as required by the Act.¹²⁵⁶

The Competition Commission can, "during, on, or after completion" of an investigation, negotiate and enter into a settlement agreement with the firm under investigation (the respondent). Thereafter, an application must be made to the Competition Tribunal to confirm the settlement as a consent order.¹²⁵⁷ An application for a consent order can culminate in one of three ways: the approval of the settlement agreement as a consent order on the terms as negotiated and agreed upon by the Commission and the respondent firm,¹²⁵⁸ the Tribunal

¹²⁵¹ Policy Roundtables: Experience with direct settlements in cartel cases. Organisation for Economic Co-operation and Development (2008) 7-10, 17-108; Laina F & Laurinen E 'The EU cartel settlement procedure: Current status and challenges' (2013) *Journal of Competition Law and Practice* 7-8.

¹²⁵² *Policy Roundtables: Experience with direct settlements in cartel cases'* Organisation for Economic Co-operation and Development (2008) 7-10, 17-108; Laina, F. & Laurinen, E. "The EU cartel settlement procedure: Current status and challenges" (2013) *Journal of Competition Law and Practice* 7-8.

¹²⁵³ *Policy Roundtable: Plea bargaining settlement of cartel cases.* Organisation for Economic Co-operation and Development (2006) 9-13, 21-44.

¹²⁵⁴ Section 49D (1)-(4); and section 58(1)(b).

In terms of section 21 (1)(f), one of the functions of the Competition Commission is to negotiate consent orders. Currently, section 21(1)(f) provides that the granting of consent orders is provided for in terms of section 63. However, because of the Competition Second Amendment Act 29 of 2000, the provisions dealing with the granting of consent orders are in section 49D, not section 63 as section 21(1)(f) currently states..

¹²⁵⁵ *Competition Commission v Marley Pipes Systems (Pty) Ltd, Competition Commission v DPI Plastics (Pty) Ltd and Others* [2010] ZACT 24; *Competition Commission v Bridgestone South Africa (Pty) Ltd* [2012] ZACT 34; *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13; *Competition Commission v Royal Bafokeng Holdings (Pty) Ltd and Others* [2011] ZACT 29; *Competition Commission vs Pangbourne Properties Limited & Others* [2013] ZACT 15; *Competition Commission vs Old Mutual Life Assurance Company (SA) Ltd and Momentum Group Ltd* [2013] ZACT 49; *Competition Commission v Cargill RA (Pty) Ltd* [2013] ZACT 61.

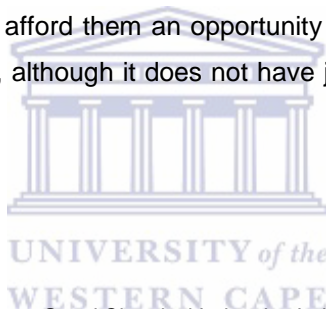
¹²⁵⁶ In *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 16, the respondent firms conceded to having engaged in price fixing, as laid out in section 4(1)(b)(i), and failing to comply with the Commission's request, regarding the implementation a small merger, as provided for in section 13A(3).

¹²⁵⁷ Section 49D(1).

¹²⁵⁸ Section 49D(2)(a).

requesting that the parties make alterations before it gives its approval (the Tribunal does not have the power to amend the proposed order),¹²⁵⁹ or the Tribunal refuses to approve the proposed order.¹²⁶⁰ The Tribunal, ‘without hearing any evidence’, may confirm a settlement agreement as a consent order.¹²⁶¹ However, because the Tribunal cannot simply “rubber stamp” a settlement agreement,¹²⁶² it must satisfy itself that the settlement agreement is a rational one and its terms adequately protect the public interest.¹²⁶³ If not, the Tribunal can exercise its discretion and refuse to grant the consent order.¹²⁶⁴ The Tribunal must at all times be cognisant of its pivotal status ‘in the competition hierarchy’, by ensuring that the objectives of the Competition Act and the public interest are not subverted.¹²⁶⁵ This means that the Commission cannot enter into “sweetheart deals” with respondent firms, thereby denigrating the public interest.¹²⁶⁶

However, the Competition Appeal Court has emphasised that while the Tribunal is endowed with exercising its discretion, it must give due deference to the views of the Commission.¹²⁶⁷ In the event that the Tribunal decides not to approve the consent order, for various reasons, particularly those not canvassed during the consent hearing, the rules of natural justice require that it informs the parties and afford them an opportunity to address the issues.¹²⁶⁸ Regarding the Competition Appeal Court, although it does not have jurisdiction to consider appeals about



¹²⁵⁹ Section 49D(2)(b); *Competition Commission v Sasol Chemical Industries Ltd* [2011] ZACT 9.

¹²⁶⁰ Section 49D(2)(c).

¹²⁶¹ Section 49D(1).

¹²⁶² According to the Competition Appeal Court in *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 26, 28-29, 35 the stipulation that the Tribunal, “without hearing any evidence”, may confirm the agreement, means that the Tribunal “will not embark on its own independent inquiry, that is to say, it will not hear the evidence the witness to determine the suitability or otherwise of the agreement”. This is different from the criminal law context where “a presiding officer would be entitled to call evidence before approving of a bargain between the State and accused.”

¹²⁶³ *Competition Commission v Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd* Case No: 27/CR/Mar07 para 11-19, 32; *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 29

¹²⁶⁴ *Competition Commission v Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd* Case No: 27/CR/Mar07 para 32-33; *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 26

¹²⁶⁵ *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 29.

¹²⁶⁶ *Competition Commission v South African Airways (Pty), Comair Ltd & Nationwide Airlines (Pty) Ltd* Case No. 83/CR/Oct04 para 70, the Competition Tribunal stated that “[t]he more the order contains terms that settle the issues finally, thereby depriving other parties of further remedies, the more careful we have to be about granting it, to ensure that the Commission does not enter into sweetheart deals with the respondents, that mock the public interest.”; *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 29, according to the Appeal Court, “the Tribunal plays a most important role in the Competition hierarchy. In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement. An agreement which imposes an inordinately low penalty for a serious contravention will obviously bring the objects of the Competition Act into disrepute and will be against public policy...”

¹²⁶⁷ *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 28, 35.

¹²⁶⁸ *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 29.

consent orders made by the Tribunal, it can hear appeals regarding the *refusal* of a consent order.¹²⁶⁹

5.4.2. Settlement agreements and *GlaxoSmithKline* case series

The timing of making a consent order by the Tribunal is important, depending whether it has been initiated by the Commission *ex mero motu* or upon receipt of a complaint from a complainant.¹²⁷⁰ The issues of the timing of a consent order and the jurisdiction of the Tribunal in granting the same were the subject of much contestation in the *GlaxoSmithKline* case series, a matter involving the South African subsidiary of the British multinational pharmaceutical manufacturer GlaxoSmithKline (GSK). The *GlaxoSmithKline* case series dealt with alleged abuse of dominance, in the form of excessive pricing of antiretroviral medication for Human Immunodeficiency Virus (HIV) infected individuals.¹²⁷¹ The case had been initiated by two separate complainants: in September 2002 by Treatment Action Campaign (TAC), a South African non-governmental organisation involved in healthcare activism,¹²⁷² and in January 2003 by the Aids Healthcare Foundation and Others (the AHF complainants).¹²⁷³ Because both complaints concerned the same conduct by GSK, the AHF complainants agreed that their complaint be joined to the one that had already been initiated by the TAC. In October 2003, the Competition Commission informed the complainants that it had taken the decision to refer the matter to the Competition Tribunal for adjudication; however, in December 2003, before the matter could appear before the Tribunal, the Commission indicated to the complainants that it had entered into a final settlement of the matter with GSK.¹²⁷⁴ Amid claims that it had not been privy to the settlement agreement, AHF sought to refer the matter itself to the Tribunal, as the Commission's conduct amounted to a non-referral.¹²⁷⁵ GSK, however, lodged an application before the Tribunal seeking the approval of the settlement agreement it had concluded with the Competition Commission.¹²⁷⁶ The basis of this application was that the Commission had concluded an agreement, the "December 2003 agreement", with GSK, in terms of which the Commission would not refer the matter to the Tribunal for adjudication; and in exchange, GSK would licence its generic drugs to ensure access to essential antiretroviral medication for HIV

¹²⁶⁹ *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1; *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 para 8, 12, 18-36; *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 11- 23; Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2000) 11.6.4.2.

¹²⁷⁰ See 4.4.1 in Chapter 4.

¹²⁷¹ *Mpho Mkhathnini 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.

¹²⁷² http://www.tac.org.za/about_us [Accessed 10 May 2015].

¹²⁷³ <http://www.aidshealth.org/#/archives/countries/za> [Accessed 10 May 2015].

¹²⁷⁴ *Mpho Mkhathnini and Others and Glaxosmithkline SA (Pty) Ltd / Glaxo Group Ltd* [2004] ZACT 48 para 3.

¹²⁷⁵ See 4.4.1 in Chapter 4.

¹²⁷⁶ *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 para 1,2.

infected individuals.¹²⁷⁷ As an activist organisation, concerned with promoting access to essential medicines, TAC was agreeable to this proposal.¹²⁷⁸ The AHF applicants, viewing this move by GSK as a “tactical ploy” to scupper their complaint, opposed it (although they would later withdraw their complaint referral and opposition of the consent order, for reasons not disclosed to the Competition Tribunal).¹²⁷⁹

Both the Competition Tribunal and the Competition Appeal Court had to decide whether the settlement agreement negotiated between the Competition Commission and GSK, could be made a consent order by the Tribunal, as the application for the consent order was lodged outside the one year period (or the extension thereof), stipulated by the Competition Act, in cases of complaints lodged by complainants. Regarding the initiation of complaints, the Commissioner can *suo motu* initiate a complaint against a prohibited practice, as well as a private person (the complainant), upon a complaint to the Commission, in the prescribed format.¹²⁸⁰ In *suo motu* initiations, the Commission can make a referral to the Tribunal at any time after initiating a complaint.¹²⁸¹ However, if a complaint is initiated by a complainant, the Commissioner has one year, within which to refer the complaint to the Tribunal, if it determines that a prohibited practice has taken place.¹²⁸² Alternatively, the Commission must issue a non-referral notice to the complainant in the prescribed format.¹²⁸³ This one-year period may be extended by mutual agreement between the Commission and the complainant, or upon application to the Tribunal by the Commission.¹²⁸⁴

When the *GlaxoSmithKline* matter appeared before it, the Tribunal opted to first settle the question of its jurisdiction, in terms of the relief sought and the fact that the application for the consent order was filed after the one-year period, stipulated in section 50 of the Competition Act. Additionally, it was GSK (not the Competition Commission) seeking the granting of a consent order.¹²⁸⁵ Although GSK conceded that the Tribunal no longer possessed the requisite jurisdiction, it argued that the Tribunal, nonetheless, retained the authority to agree on the terms of the appropriate order.¹²⁸⁶ GSK also contended that an application for the making of a consent order could be lodged at any time.¹²⁸⁷ The Tribunal considered GSK’s submission to be “a straw man argument” on the basis that the Competition Act was unambiguous: once the

¹²⁷⁷ Para 8.

¹²⁷⁸ Para 8.

¹²⁷⁹ Para 12.

¹²⁸⁰ Section 49B(1), section 49B(2)(b) of the Competition Act. See also 4.4.1.1.- 4.4.1.3. of Chapter 4.

¹²⁸¹ Section 50(1) of the Competition Act. See also 4.4.1.1.- 4.4.1.3. of Chapter 4.

¹²⁸² Section 50(2)(a) of the Competition Act. See also 4.4.1.1.- 4.4.1.3. of Chapter 4.

¹²⁸³ Section 50(2)(b) of the Competition Act. See also 4.4.1.1.- 4.4.1.3. of Chapter 4.

¹²⁸⁴ Section 50(4) (a)- (b) of the Competition Act. See also 4.4.1.1.- 4.4.1.3. of Chapter 4.

¹²⁸⁵ Para 18.

¹²⁸⁶ Para 19.

¹²⁸⁷ Para 20- 22.

one-year period expires, or any such extension, similarly, expires, the Commission's *dominus litis* status expires. Alternatively stated, the Commission loses its title to sue.¹²⁸⁸ Situations may arise where the Commission and the firm under investigation are unable to reach consensus on the terms of a settlement agreement, during the investigation period, before referral to the Tribunal, but eventually reach agreement after referral and during the adjudication process. It is precisely for such situations that section 49D(1) envisages the granting of consent orders *after* the completion of the Commission's investigations.¹²⁸⁹ Most importantly, where referrals are made within the one-year period (or the extension thereof), and a consent order application is not granted, the Commission retains its title to sue.¹²⁹⁰ It would be an undesirable situation, when a consent order application is made in time, while no referral to the Tribunal has been made. Should the Tribunal not grant the consent order before the one-year period expires (or the extension thereof), and there has been no referral, then the Commission loses its title to sue.¹²⁹¹ This means that "the power to prosecute and the power to settle are co-extensive; once the former is lost so is the latter". Therefore, it could not have been the intention of the legislature to separate the power to settle from the power to prosecute.¹²⁹² To infer that these two competencies of the Commission were not co-extensive would be absurd.¹²⁹³ Accordingly,

¹²⁸⁸ Para 24, 25.

According to the Tribunal, "the Act... contemplates two distinct periods in the gestation of a complaint before the Commission. First, an investigation period in which the Commission decides whether to refer the complaint or not, or with the consent of the respondent to enter into a consent agreement contemplated in section 49D; second, a litigation period if the Commission decides to refer the matter to the Tribunal, which is the period '*after the completion of the investigation*', which runs from the date of the filing of the referral until the conclusion of the proceedings. As long as the Commission files its complaint referral, which is the pleading that initiates the litigation period, within the prescribed period, it retains the title to prosecute the matter, and does not lose this title, irrespective of the time it takes to conclude the matter."

¹²⁸⁹ Para 26.

There have been cases where the Tribunal has made consent order after complaints had been referred to it. For example, *Competition Commission v BMW South Africa (Pty) Ltd t/a BMW Motorrad* [2010] ZACT 21; *Competition Commission v Zedek Trading 799 CC* [2010] ZACT 42.

¹²⁹⁰ Para 28.

¹²⁹¹ Para 28, 29.

The Tribunal reasoned that it is, "clear that the Commission must retain its title to prosecute at the time a consent order application has been launched, to avoid it facing prosecutorial impotence, if the Tribunal does not sanction its bargain with the respondent. It can retain this title to prosecute either (a) by having the consent application considered during the one year period or an extended period or (b) after this period, provided it has referred the complaint to the Tribunal during this period thus preserving that right. The legislature intended that once a matter had been non-referred by the Commission it washed its hands of the matter and had no further right or interest in the complaint including the right to settle it by way of a consent order. At this stage having non-referred, whether expressly or by way of inference, the Commission effectively vacates the battlefield with the respondent in favour of the complainant. It follows logically that this schema contemplates a period during which the Commission is unrestricted by the complainant in dealing with the complaint and thereafter, if not otherwise disposed of by the Commission by way of referral or a consent order, the complainant, with its full rights restored, may prosecute the matter unrestricted by the Commission."

¹²⁹² Para 30-31.

¹²⁹³ Para 32-33, on the absurdities, the Tribunal was of the view that "in the first place there is the fact that the Commission is left in a position of a contracting party not a prosecuting party in approaching settlement negotiations with the respondent, which cannot be in the public interest. ... the legislature never contemplated placing the Commission in this sort of situation as a settler of last resort – once it lost its title to prosecute the fate of the litigation is left to the private complainant and the respondent to resolve. Nor as a matter of public policy is it desirable that a body charged with policing legislation be left with a residual power to settle when its primary power to prosecute is lost. The applicant's interpretation would also be extremely unfair to the private complainant. The latter is entitled to proceed with a complaint referral on the assumption that the field is now open to it and that the Commission had not entertained the possibility of entering into a consent agreement with the respondent, otherwise it would have done so before non-referring the complaint. It might spend vast resources on prosecuting its complaint only to find that it is robbed at the post by a subsequent deal between the Commission and the

the Tribunal reached the conclusion that, even though the “December 2003 agreement” was arrived at during the period in which the Commission still held its title to sue, the application for approval of the same was, unfortunately, made after the expiration of the specified period, when the Commission was no longer *dominus litis*. Because the Commission no longer had this title, the Tribunal could also not make a consent order, based on the “December 2003 agreement”.¹²⁹⁴ However, in circumstances where the Tribunal had adjudicated on a matter and handed down its final decision, it may not make a consent order. The Commission and the respondent firm may also not conclude a settlement agreement.¹²⁹⁵

The Tribunal was quick to emphasise that this matter was of immense public interest, in particular, the healthcare issues involved in the treatment of HIV infected individuals.¹²⁹⁶ In addition, the Tribunal emphasized that its refusal to grant the order was based on technicalities. Had the application been made in time, the Tribunal would not have been opposed to making the consent order. Therefore, as creatures of statute, the Competition Tribunal, as well as the Competition Commission, could only exercise the powers delineated to them in the Competition Act.¹²⁹⁷

Subsequent to the Competition Tribunal’s decision, GSK lodged an appeal and a review before the Competition Appeal Court.¹²⁹⁸ Both the appeal and review raised a question of law, essentially revolving around the Tribunal’s jurisdictional powers regarding consent orders.¹²⁹⁹ According to the Competition Appeal Court, the Competition Commission, as the enforcer of first choice, has a public duty, which it cannot abrogate, that goes beyond the interests of complainants’ private interests to encompass the interests of the public, especially consumer interests.¹³⁰⁰ The Appeal Court concurred with the Tribunal that consent orders could not be granted, when submitted out of time. However, the Appeal Court was of the view that, when the Commission refers the complaint to the Tribunal, such a referral takes away its ability to make

respondent. On our interpretation this would not arise because the settlement would have had to occur during the time that the Commission retained its prerogative to prosecute.”

¹²⁹⁴ Para 34.

¹²⁹⁵ Page 12-23; see also *Competition Commission v Pioneer Foods (Pty) LTD* [2010] ZACAC 2 para 9-10, per the Appeal Court, “...a [consent] order cannot be sought or granted after the tribunal has adjudicated on a complaint referred to it and made an order. Once that has occurred the tribunal has discharged its statutory function and its jurisdiction regarding the complaint exhausted. In technical legal parlance, it is *functus officio*. The situation is no different from what arises once a court has rendered its judgment. This is reinforced by the fact that any decision, judgment or order of the Tribunal is enforceable as if it were an order of the High Court [64(1) of the Competition Act]. It follows that it is not open to the Commission and a party against which the Tribunal has made a determination that they have contravened provisions in Chapter 2 of the Act to enter into an agreement subsequent to the determination altering its content or effect and then place the Tribunal...In the absence of any statutory provision authorizing such proceeding it is impermissible as it amounts to a request that the Tribunal alter its earlier decision, something that it has only limited power to do. Under the structures established by the Act it is only the Appeal court has that power to later a determination by the Tribunal and then only in the exercise of its powers in terms of the Act...after a due consideration of an appeal against that determination.”

¹²⁹⁶ Para 35.

¹²⁹⁷ Para 35; section 19(1)(c) and section 26(1)(d) of the Competition Act.

¹²⁹⁸ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACA 6 page 1-2.

¹²⁹⁹ Page 2.

¹³⁰⁰ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACA 6 page 12.

an application for a consent order, resulting in the Commission's prosecutorial impotence.¹³⁰¹ This is in direct contrast with the Tribunal's decision that the Commission will retain title to sue, even after a timeous referral.¹³⁰² On this point, the possibility of prosecutorial impotence does not arise where the Commission seeks a consent order after it has referred the complaint to the Tribunal.¹³⁰³ On some points, the Appeal Court seems to have misconstrued the Tribunal's decision. For example, on the issue of the one-year period and the possibility of its extension, the Appeal Court seems to have understood the Tribunal to mean that a settlement agreement could be entered into even after the time for the Commission to refer the complaint to the Tribunal has expired. Regrettably, this is incorrect because the Tribunal was clear that the Commission must refer the matter while it retains title to sue, and during that period, if the possibility presented itself, conclude a settlement agreement.¹³⁰⁴ The Tribunal's reasoning is preferred to that of the Appeal Court.¹³⁰⁵ Regarding the undertaking by the Commission not to refer the matter to the Tribunal, it was not only a fettering of its discretion, but was also *ultra vires*.¹³⁰⁶ Sutherland & Kemp emphasise that this statement is of no effect on the Tribunal's proceedings because, in any event, the proposed order would have to be considered by the Tribunal. Besides, a proposed settlement agreement (which can be incorporated in the consent order), is not enforceable until approved by the Tribunal.¹³⁰⁷ This implies that, if the Tribunal makes the consent order, the Commission's promise not refer the complaint becomes immaterial; as such a referral would be prevented by the Competition Act, or the common law principle of *estoppel*.¹³⁰⁸ Ultimately, the Appeal Court decided that the 'December 2003 agreement' was simply a settlement agreement and did not satisfy the requirements in section 49D of the Competition Act. Accordingly, while disagreeing with the Tribunal's reasoning, the Appeal Court affirmed the Tribunal's correctness in declining to make the consent order.¹³⁰⁹

5.4.3. The procedure for settlement procedures

The initiation of a consent order hearing must comply with certain procedural requirements.¹³¹⁰ If the Competition Commission and the respondent firm agree on the terms of an appropriate order, the Commission must attach to the referral, a draft order setting out the section of the Act

¹³⁰¹ Page 11-14

¹³⁰² Para 28.

¹³⁰³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.4.2.

¹³⁰⁴ Page 12-23; Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.4.2.

¹³⁰⁵ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2000) 11.6.4.2.

¹³⁰⁶ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 11, 17.

¹³⁰⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.4.4; *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACA 6 page 11.

¹³⁰⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 11.6.4.4.

¹³⁰⁹ Page 181.

¹³¹⁰ Rule 24 (1) of the Competition Tribunal Rules of Procedure, Notice of Motion must be in Form CT 6.

It must also be noted that, in terms of Rule 24, where the Commission and the respondent firm have negotiated a settlement, and a consent order must be sought from the Tribunal, they need not comply with the procedural forms that are filed under referrals of complaints.

that has been contravened and the terms agreed between the Commission and the respondent. In addition, the amount of damages agreed between the respondent and the complainant, where applicable, must also be attached and the referral must be signed by the Commission and the respondent indicating their consent to the draft order.¹³¹¹ A party seeking a consent order must notify each complainant, in writing, of the proposed consent order.¹³¹² In addition, each complainant must be given an opportunity to indicate to the Commission whether it is willing to accept damages, as part of the consent order, and what amount these damages will be.¹³¹³ A refusal by a complainant to consent to the inclusion of an award for damages in the draft order does not prevent the Tribunal from considering the application.¹³¹⁴ However, this refusal will have an impact on the complainant's rights.¹³¹⁵

Normally, the Competition Commission files an application to the Competition Tribunal for the making of a consent order.¹³¹⁶ Although in *GlaxoSmithKline*, the respondent firm filed the application (and the Commission was not even party to the proceedings), the Competition Appeal Court held that it would be preferable if both parties, seeking the confirmation of the order, jointly applied for the consent order.¹³¹⁷ If such a joint application is not practical, then the Commission should file an affidavit indicating its support of the respondent firm's application.¹³¹⁸ In all other situations, the Commission must be represented at the hearing, in order to assist the Tribunal in its task.¹³¹⁹ For its part, the Competition Tribunal is also bound by certain procedural rules that govern consent hearings.¹³²⁰

5.4.4. The contents of a consent agreement according to *Competition Commission v South African Airways (Pty) Ltd/ Comair Ltd*

From the outset, it must be emphasised that a settlement agreement negotiated between the Competition Commission and the respondent firm is not the same thing as a consent order made by the Competition Tribunal.¹³²¹ In its referral, the Commission must: attach a draft order

¹³¹¹ Rule 18 of the Competition Commission Rules of Procedure.

¹³¹² Rule 24 (3) of the Competition Tribunal Rules of Procedure.

¹³¹³ Rule 24 (3) of the Tribunal Rules, Form CT 3; *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 53

In terms of Rule 18(3) of the Competition Commission Rules, the Commission must not include an order of damages in the draft order, unless it is supported by a completed Form CT 3.

¹³¹⁴ Rule 18 (4) of the Competition Commission Rules of Procedure.

¹³¹⁵ See 4.4.1.1.- 4.4.1.3. in Chapter 4.

¹³¹⁶ Section 49D(1) of the Competition Act; *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 para 18

¹³¹⁷ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 14.

¹³¹⁸ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 17.

¹³¹⁹ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 17.

¹³²⁰ For instance, in terms of Rule 25(1) of the Tribunal Rules, upon receipt of a Complaint Referral or Notice of Motion, the registrar must convene a hearing of the Tribunal at the earliest possible date.

¹³²¹ Sutherland, P. & Kemp, K. *Competition Law in South African* (2014) 11.6.4.4.

highlighting the specific provision/s of the Competition Act that has/have been contravened; specify the terms agreed with the respondent firm, as well as details of the award for damages, if applicable; and sign the referral, along with the respondent firm, signifying their consent to the order.¹³²² A consent order made by the Tribunal may include a provision for payment of civil damages by the respondent firm to the complainant, where a complainant has agreed to this.¹³²³ A complainant, aggrieved by a consent order, may obtain a declaratory order indicating that the conduct attached to the consent order is a prohibited practice, or apply independently for civil damages in a civil court (provided the consent order does not include an award for damages).¹³²⁴

The requirement of including the specific provision contravened was the subject of contention in *Competition Commission v South African Airways (Pty) Ltd/ Comair Ltd*, a case concerning alleged abuse of dominance and vertical restraints.¹³²⁵ The Competition Commission and the respondent firm South African Airways (SAA), had negotiated a settlement agreement, after the Commission had initiated an investigation, pursuant to a section 49B(2) complaint that had been initiated by Comair Ltd., the complainant. Faced with this application to make the consent order, one of the contested issues before the Tribunal was, whether the validity of a consent order was dependent on whether it contained an 'admission of guilt' by a firm. Both the Commission and the SAA argued that such an admission was not a requirement.¹³²⁶ However, the Comair Ltd (as one of interveners in the proceedings) argued that a valid consent order should not only include the identification of the specific prohibited practice, and the specific statutory provisions, but should, as a matter of necessity, also include an admission of guilt, or a plea of guilty, by the respondent firm.¹³²⁷

The Competition Tribunal, while conceding that section 49D of the Competition Act is not forthcoming on the contents of consent orders, and on whether admissions of liability are necessary, it also emphasised that this should not be taken as authority that consent orders

According to the Appeal Court in *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. & Others* [2006] ZACAC 6 page 12, "the nature of the agreement which the Commission can conclude is limited to an agreement on the terms of an appropriate order. That agreement is not to be confused with a settlement agreement which may itself be incorporated into the proposed order. The actual terms of the proposed order are not enforceable nor, indeed, is any settlement agreement, which is referred to or incorporated in the proposed order, legally enforceable until it is dealt with and confirmed by the Tribunal in terms of section 49D."

¹³²² Rule 23- Rule 25 of the Competition Tribunal Rules of Procedure

¹³²³ Section 49D(3).

¹³²⁴ Section 49D(4)(a)-(b).

¹³²⁵ *Competition Commission v South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88.

¹³²⁶ *Competition Commission v South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88, para 12.

¹³²⁷ *Competition Commission v South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88, para 18 the complainant, Comair Ltd, argued that a consent order must, by necessary implication, include an admission of guilt because 'it does not suffice to have the Commission allege a contravention and the respondent deny liability, and then for them, in the face seemingly irreconcilable positions to agree a remedy in terms of the consent order. Expressed differently, dissent over conduct and its legal implications cannot lead to consent on the outcome.'

need not satisfy specific requirements.¹³²⁸ In addition, the fact that section 49D does not regulate the contents of consent orders, does not imply that the legislature had been remiss in its duty, instead, it is an indication that it did not intend to be prescriptive on the issue.¹³²⁹ The Tribunal, therefore, embarked on an examination of the juristic consequences of consent orders. Firstly, the fact that the Rules for the Conduct of Proceedings in the Competition Commission require specification of the statutory provision that has been contravened,¹³³⁰ and the draft order to set out 'the terms as agreed between the Commission and the respondent',¹³³¹ does not necessarily lead to an inference that an admission of guilt is required.¹³³² According to Comair Limited, since section 49D(1) requires the proposed consent order to be 'an appropriate order', the appropriateness thereof can only be determined in light of an admission of guilt by the respondent firm regarding a specific practice.¹³³³ On this point, the Tribunal indicated that an 'appropriate order' simply means "no more than suitable", implying, "suitable in the sense that it is an agreement that suits the contending interests of the Commission, as the proxy of the public interest, and the respondent, and in that sense, can be said to be *appropriate as between themselves*" (emphasis added).¹³³⁴ However, the Tribunal emphasised that, if the consent order includes an order as to damages, the respondent firm is required to make an admission as to guilt.¹³³⁵ Therefore, when the order is made to include an award of damages, the complainant's consent is required, and by so doing, the complainant waives its right to a further civil claim in respect of that conduct.¹³³⁶

According to the Competition Tribunal, the juristic consequences of a consent order must be determined by its contents, and not that it is designated as a consent order.¹³³⁷ A consent order, which contains an admission of liability, is equivalent to a finding that a prohibited practice has occurred.¹³³⁸ Consequently, claims for damages before a civil court (where they

¹³²⁸ Para 13-17, 37, 52

¹³²⁹ Para 52.

¹³³⁰ Rule 18(2)(b)(i)(aa).

¹³³¹ Rule 18 (2)(b)(i)(bb).

¹³³² *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 40.

¹³³³ Para 24.

¹³³⁴ Para 44- 47.

¹³³⁵ *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 55, according to the Tribunal, "[i]t follows that if a consent order contains an award for damages and that this award of damages immunises the respondent from civil claims from the complainant, that the content of the consent order must be sufficiently precise to enable a later determination as to what conduct of the respondent is the subject of this immunity. From this we can conclude that where the consent order is said to have the effect of giving civil immunity, the content of the order should not just include the statement of the award of damages, but would also have to contain a description of the conduct that gave rise to it, as well as the section of the Act contravened. ... although this content requirement is not expressly provided for in the Act, it is by implication. One cannot have immunity without being clear what conduct has been immunised, otherwise this could lead to interminable disputes later. Thus, in this circumstance it is permissible to read back into section 49D, a requirement that where there is an award of civil damages, an admission of liability that founds that award, will be necessary. If this were not the case this could lead to dispute in the future with a complainant contending that it retains the right to bring the action and a respondent contending that the matter is *res judicata*."

¹³³⁶ *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 53.

¹³³⁷ Para 52.

¹³³⁸ Para 57.

have not been included as part of the consent order) would become more viable as stipulated in the Competition Act,¹³³⁹ and the respondent would be immunised from administrative proceedings before the CAs regarding the same conduct to which an admission was made.¹³⁴⁰ In light of the criminalisation of cartel conduct, a consent order containing an admission of guilt, therefore, may be a basis for prosecution under criminal law, becoming a 'conviction', which will be perceived as 'previous convictions', when considering recidivism, and determining the appropriate administrative fine, should the respondent engage in a prohibited practice again.¹³⁴¹

A consent order containing an admission of guilt and the implicit finding that a prohibited practice had been committed, could be the basis upon which a complainant could lodge an application with the Tribunal, seeking a declaration that the respondent firm's *admitted* conduct amounts to a prohibited practice, or that the whole, or part of an agreement is void.¹³⁴² Subsequently, a complainant could institute civil damages against the respondent, if these have not already been awarded to the complainant, as part of the consent order.¹³⁴³ Other than the issues of civil damages, once the respondent firm admits its liability, the proceedings are completed, and the specific conduct, which was the subject of the consent order, may not be a basis upon which a referral may be made to the Tribunal for adjudication.¹³⁴⁴

Alternatively, a consent order *sans mea culpa* means that, by approving the order, the Competition Tribunal is not making a positive finding of a prohibited practice. The effects of such a consent order will be the opposite of one, in which an admission is made.¹³⁴⁵ Civil liability will not be automatic, and the consent order will not have recidivism implications.¹³⁴⁶ Therefore, if consent orders, *sans* admissions of guilt, have no consequences, the question remains, "What purpose do they serve?" The Tribunal has indicated that consent orders are final settlements *between the Competition Commission and the respondent firm* (emphasis added) and no one else. A complainant, faced with an "admission-free" consent order, is not prevented from either seeking a referral, or a declaratory order that the conduct in question is a prohibited practice, or an order declaring that the agreement (in whole or in part) is void.¹³⁴⁷ When the Tribunal makes a consent order, the proceedings have been *terminated* (between the Commission and the respondent firm), but they have not been *completed*, with regards to the merits of the case, since these would not have been decided upon, as the consent order

¹³³⁹ Section 65.

¹³⁴⁰ Section 67(2).

¹³⁴¹ *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 57, 60.

¹³⁴² Section 65(1).

¹³⁴³ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.6.4.6.

¹³⁴⁴ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.6.4.6.

¹³⁴⁵ Para 58.

¹³⁴⁶ Para 58, 60.

¹³⁴⁷ Section 51 and section 58(1).

does not contain an admission of guilt and, therefore, issues of double jeopardy do not apply.¹³⁴⁸ Sutherland & Kemp offer similar sentiments.¹³⁴⁹ They emphasise, however, that the Commission may not again refer a complaint against the respondent, regarding the same conduct that was formerly the subject of the consent order made by the Tribunal.¹³⁵⁰

Some of the arguments made by Comair Limited, and other cases, mirror those that view settlement procedures as being equivalent to plea-bargaining in criminal law proceedings.¹³⁵¹ This desire to equate settlement proceedings with admissions of guilt and plea-bargaining in criminal proceedings is tempting.¹³⁵² It stems from the typical structure and content of consent orders. A perusal of consent orders reveals what appears to be standard practice for firms, actually, to admit to contravening a specific provision of the Act, as the general structure of consent orders seem to confirm this.¹³⁵³ The similarity also stems from the fact that both settlement procedures and plea-bargaining are aimed at eliminating prolonged litigation, achieving procedural efficiencies, by reaching consensus on certain points in the legal proceedings.¹³⁵⁴ However, this is where the similarity between the two ends. As stated in the previous section, a consent order needs not contain an admission of guilt, whereas a plea bargain in criminal proceedings, *must* contain an admission, which will result in a verdict of guilty, that is, of the lesser bargained plea. Perhaps the perfect analogy of plea-bargaining and settlement proceedings is more apparent in the United States, where violations of the Sherman Act are criminal offences right from the beginning.¹³⁵⁵ In South Africa, the position is clear. It is not a requirement for the respondent firm to make an admission of guilt,¹³⁵⁶ particularly in light of how consent orders fit into the legal machinery involved in enforcing the Competition Act, as well as the purpose that they seek to achieve, namely, 'a constructive alternative to

¹³⁴⁸ Para 59.

¹³⁴⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.6.4.6.

¹³⁵⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 11.6.4.6.

¹³⁵¹ *Netcare Hospital Group (Pty) Ltd & Community Hospital Group (Pty) Ltd v Manoin N.O. & Others* [2008] ZACAC 1 para 25-27; *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* [2010] ZACT 13.

¹³⁵² Vilakazi, T. *Cartel settlements, leniency and penalties in African jurisdictions*. Centre for Competition Regulation and Economic Development Quarterly Review May 2015. Available online at <http://www.competition.org.za/review/2015/5/25/cartel-settlements-leniency-and-penalties-in-african-jurisdictions> [Accessed 07 June 2015].

¹³⁵³ For example, *Competition Commission vs Wallenius Wilhelmsen Logistics AS* Case No. CO084Jul15, para 4; *Competition Commission vs SA Metal Group (Pty) Ltd* Case No. CR047Aug10/SA067Jul15 para 6; *Competition Commission vs Execu Move CC* Case No. CO027May15 para 3; *Competition Commission vs Haw & Inglis Civil Engineering (Pty) Ltd* Case No. CO028JUN15 para 5; *Competition Commission vs Pele Kaofela CC* Case No. CO142Nov14 para 4; *Competition Commission and Amstele Systems (Pty) Case No. CO190Jan14/018465* para 4; *Competition Commission vs A & B Movers CC* Case No. CO002Apr15/021170 para 3; *Competition Commission v Norvo Construction (Pty) Ltd* [2013] ZACT 64 para 6; and *Competition Commission v Ruml Construction Cape (Pty) Ltd* [2013] ZACT 71 para 6.

¹³⁵⁴ Joubert, J.J. *Criminal Procedure Handbook* [11th ed.] (2014) 248-250.

¹³⁵⁵ O'Brien, A. *Cartel settlements in the U.S. and EU: Similarities, differences & remaining questions*. Antitrust Division, United States Department of Justice 13th Annual EU Competition Law and Policy Workshop 06 June 2008 1-13. Available online at <http://www.justice.gov/atr/file/519681/download> [Accessed 13 June 2015].

¹³⁵⁶ *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 para 35; *Competition Commission v South African Airways (Pty), Comair Ltd & Nationwide Airlines (Pty) Ltd* Case No. 83/CR/Oct04 para 60, 65, 67, according to the Tribunal, "no admission by the respondent is required... even a pronouncement of innocence, if it should so choose, would not interfere with our ability to confirm the order."

litigation'.¹³⁵⁷ Therefore, there are public policy considerations motivating the nature of consent orders. Nonetheless, firms concluding consent agreements with the Commission must take care how they phrase the terms thereof.¹³⁵⁸ It is submitted that, even though the Commission and Tribunal do not require an admission, these institutions are under no legal obligation to dissuade a firm from making an admission of guilt.

In Brazil, although “admissions of guilt” are not required, firms must nonetheless acknowledge participation in cartel conduct.¹³⁵⁹ As for India, it presently does not make provision for settlement procedures.¹³⁶⁰

5.5. The Impact of Settlement Procedures

In South Africa, settlement procedures have proved to be useful mechanisms. Subsequent to the uncovering of bid rigging in the construction sector, numerous consent orders were made by the Competition Tribunal.¹³⁶¹ The idea is to establish a “virtuous cycle”, in which the successful indictments of cartels, pursuant to settlement agreements, would have a deterrent effect, which, in turn, will motivate firms to co-operate with CAs.¹³⁶² However, settlement procedures do have pitfalls, for example, if they involve numerous firms, they may prove to be cumbersome. In such circumstances, a CA must conduct parallel proceedings on the same cartel conduct, which ultimately takes away from the procedural efficiencies that settlement procedures are directed at achieving.¹³⁶³

¹³⁵⁷ *Competition Commission and South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88 para 45.

¹³⁵⁸ An example of a carefully worded “admission” in a settlement agreement is the one reached between the Competition Commission and American Natural Soda Ash Corporation (ANSAC) and approved by the Tribunal in *Competition Commission & Others v American Natural Soda Ash Corporation & Another* (49/CR/Apr00) [2008] ZACT 92 para 5, where ANSAC consented that “solely for purposes of this settlement agreement to settle the instant proceedings, ANSAC admits that the Membership Agreement eliminates price competition between its members in export sales to South Africa in contravention of section 4(1)(b)(i) of the Act’.

¹³⁵⁹ Article 85(1)- (15) of Law 12.529 of 2011; Martinez AP & de Jauro MT ‘Brazil: Immunity, Sanctions & Settlements’ Global Competition Review available online at <http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/6/brazil/> (accessed 12 August 2015).

¹³⁶⁰ Sorabjee, F. & Kumar, A. “India”. In Parr, N. & Sander, R. [eds.]. *Cartels: Enforcement, Appeals and Damages Actions* 3 ed 150 -157.

¹³⁶¹ *Competition Commission v Esorfranki Ltd* [2013] ZACT 68; *Competition Commission v Aveng (Africa) Ltd* [2013] ZACT 76; *Competition Commission v Murray & Roberts Ltd* [2013] ZACT 75; *Competition Commission v Tubular Technical Construction (Pty) Ltd* [2013] ZACT 7; *Competition Commission v Hochtief Construction AG* [2013] ZACT 70; *Competition Commission v Haw & Inglis Civil Engineering (Pty) Ltd* [2013] ZACT 66; *Competition Commission v Basil Read Holdings (Pty) Ltd* [2013] ZACT 69; *Competition Commission v Raubex (Pty) Ltd* [2013] ZACT 65; *Competition Commission v Guirich Bros Construction (Pty) Ltd* [2013] ZACT 77; *Competition Commission v G Liviero & Son Building (Pty) Ltd* [2013] ZACT 67; *Competition Commission v Norvo Construction (Pty) Ltd* [2013] ZACT 64; *Competition Commission v Rumdel Construction Cape (Pty) Ltd* [2013] ZACT 71; *Competition Commission v WBHO Construction (Pty) Ltd* [2013] ZACT 74; *Competition Commission v Vlaming (Pty) Ltd* [2013] ZACT 73; *Competition Commission v Stefanutti Stocks Holdings Ltd* [2013] ZACT 63; *Competition Commission v Norvo Construction (Pty) Ltd* [2013] ZACT 64; *Competition Commission v Basil Read Holdings (Pty) Ltd* [2013] ZACT 69; *Competition Commission v Cobro Concrete (Pty) Ltd* [2010] ZACT 25; *Competition Commission v Concrete Units (Pty) Ltd and Others* [2010] ZACT 26; *Competition Commission v Cape Concrete (Pty) Ltd* Case No. 23/CR/Feb09; and *Competition Commission v Lafarge Industries South Africa (Pty) Ltd* 23/CR/Mar12; *Competition Commission v Basil Read Holdings (Pty) Ltd* [2013] ZACT 69; *Competition Commission v Murray & Roberts Ltd* [2013] ZACT 75; and *Competition Commission v WBHO Construction (Pty) Ltd* [2013] ZACT 74.

¹³⁶² Laina, F. & Laurinen, E. “The EU cartel settlement procedure: Current status and challenges” (2013) *Journal of Competition Law and Practice* 1-2; Mehta, K. & Centella, M.L.T. “Settlement procedure in EU cartel cases” (2008) *Competition Law International* 11-16.

¹³⁶³ Laina, F. & Laurinen, E. “The EU cartel settlement procedure: Current status and challenges” (2013) *Journal of Competition Law and Practice* 8-9.

5.6. Administrative Penalties

In the global South, administrative penalties, also referred to as administrative fines, are a common feature in competition laws.¹³⁶⁴ Whether the matter is concluded after a full-blown investigation, or during a settlement procedure, or amnesty applications (in those jurisdictions, where successful leniency applicants are still required to pay a reduced penalty), competition authorities may impose administrative penalties. Regarding cartels, these penalties act as a deterrent in several ways: they threaten the existence of cartels; they discourage firms from engaging in cartel conduct; they penalise firms that have participated in cartel conduct; and they disgorge cartel participants of their illegally earned profits.¹³⁶⁵ In South Africa, the phrase ‘administrative penalties’ has a particular significance because the Competition Tribunal, as the adjudicative body, tasked with imposing these penalties, is of an administrative nature.¹³⁶⁶

The value of administrative penalties cannot be denied; however, in some cases, these penalties may prove to be, particularly, large,¹³⁶⁷ which may result in unintended consequences. It may lead to increased prices, as firms try to recoup the administrative fines imposed on them; some may be forced into liquidation; some may be forced to exit the market; job losses may result; and ultimately, a reduction in tax revenues, as the tax base shrinks.¹³⁶⁸ As a solution, an alternative to administrative penalties, which benefits consumers, could be implemented, with the penalties being in the form of enforced price reductions, as opposed to paying the fines into the National Treasury.¹³⁶⁹ Alternatively, the calculation of these penalties must include the accrual of interest.¹³⁷⁰ The Competition Tribunal, through its general power to issue “appropriate orders” has made use of the so-called “discount remedy”, in terms of which, in addition to paying an administrative penalty, a firm is also required to implement a discount on the products affected by the cartel practices.¹³⁷¹

¹³⁶⁴ For example, section 43(2)- (4) of Botswana Competition Act of 2009; Article 58-59 of Bulgaria Law on the Protection of Competition of 1998; section 49 of Gambia Competition Act of 2007; section 53 of Namibia Competition Act of 2003; section 60(1) Tanzania Fair Competition Act of 2003.

¹³⁶⁵ Wils, W.P.J. “Optimal antitrust fines: Theory and practice” (2006) 29. *World Competition Journal* 183–208; Aproskie, J. & Goga, A. “Administrative penalties: Impact and alternatives” (2014) 4. *Journal of Economic and Financial Sciences* 133-139; Elhauge, E. “Disgorgement as an antitrust remedy” (2009) 76. *Antitrust Law Journal* 79-95; Darji, R., Grimbeek, S. & Muzata, G. *The impact of antitrust fines on firm valuation in South Africa: The case of Pioneer Foods, Tiger Brands and Sasol Chemical Industries*. Working Paper Competition & Regulation European Summer School & Conference (2011) 1-22;

¹³⁶⁶ Section 33 of the Constitution of the Republic of South Africa, 1996; the Promotion of Administrative Justice Act of 2000; Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2000) 11.4.6.3. See also 4.4.1.1. and 4.4.1.5. of Chapter 4.

¹³⁶⁷ “Construction firms settle collusive tendering cases with R1.5 billion in penalties”. *Competition Commission Media Releases* available online at <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> [Accessed 10 November 2014].

¹³⁶⁸ Aproskie, J. & Goga, A. “Administrative penalties: Impact and alternatives” (2014) 4. *Journal of Economic and Financial Sciences* 133-139; Graddy, K. & Ashenfelter, O. “Anatomy of the rise and fall of price-fixing conspiracy: Auctions at Sotheby’s and Christies” (2005) 1 *Journal of Competition Law and Economics* 12-13.

¹³⁶⁹ Aproskie, J. & Goga, A. “Administrative penalties: Impact and alternatives” (2014) 4. *Journal of Economic and Financial Sciences* 139-144.

¹³⁷⁰ Munyai, P.S. “Making administrative penalties work” (2008) 16. *Juta Business Law* 23-28.

¹³⁷¹ *Competition Commission v Pioneer Foods (Pty) Ltd* Case No: 10/CR/Mar10 & 15/CR/Mar10 para 14; Bonakele, T. & Mncube, L. “Designing appropriate remedies for competition law enforcement: The Pioneer Foods settlement agreement” (2012) 8. *Journal of Competition Law and Economics* 425-447; Mncube, L. “Settling for a discount: A review of the Pioneer Foods price reduction remedy” (2014) 53. *Agricultural Economics Association of South Africa* 25-45.

5.6.1. The use of administrative penalties in the global South: A case study of section 59 of the Competition Act of 1998

In South Africa, section 59 of the Competition Act, empowers the Competition Tribunal to impose administrative penalties. The Tribunal may impose administrative penalties, even in circumstances where the Competition Commission has not requested them as a remedy.¹³⁷² Additionally, a complainant may seek the imposition of an administrative penalty.¹³⁷³ The Tribunal has the discretion, in limited circumstances, to decline a petition to impose an administrative penalty.¹³⁷⁴ In *Competition Commission v DPI Plastics (Pty) Ltd*, the Tribunal, in connection with allegations of price fixing cartel, held that, although an administrative penalty for engaging in cartel conduct is normally imposed, it is not mandatory.¹³⁷⁵

The Competition Act distinguishes between “first-time violations” and “repeat violations”. Specific “first time violations” will immediately attract administrative fines, namely, cartel practices as well as specific vertical restraints and abuse of dominance.¹³⁷⁶ These are: all cartel practices (price fixing, market divisions, collusive tendering); specific vertical restraints (namely minimum resale price maintenance) and abuse of dominance, namely excessive pricing by dominant firms to the detriment of consumers, refusal by a dominant firm to give a competitor access to an essential facility (when economically feasible to do so), as well as exclusionary practices by a dominant firm, unless the firm can show technological, efficiency or other pro-competitive benefits, which outweigh the anti-competitive effects thereof.¹³⁷⁷

However, with regards to all other practices, administrative fines may only be imposed if the practice is “substantially a repeat by the same firm of conduct” previously found to be a prohibited practice by the Competition Tribunal, the so-called “repeat violations”.¹³⁷⁸ These are: horizontal restraints are judged in terms of the rule of reason under section 4(1)(a); vertical

¹³⁷² *Harmony Gold Mining Company Ltd & Another v Mittal Steel South Africa Ltd & Another* Case No: 13/CR/Feb04 para 34.

¹³⁷³ *Harmony Gold Mining Company Ltd & Another v Mittal Steel South Africa Ltd & Another* Case No: 13/CR/Feb04 para 34.

¹³⁷⁴ For example, in *Competition Commission v Patensie Sitrus Beherend Bpk* Case No: 37/CR/Jun01 para 112, the Tribunal was willing to issue an order declaring that the conduct of the respondent, namely, the abuse of dominance, in the form of inducing a supplier to not deal with a competitor, was a prohibited practice. In addition, some of the provisions of the respondent firm's Articles of Association were practices prohibited by the Competition Act and, therefore, void. Regarding the Commission's prayer for an administrative penalty equivalent to 10% of the respondent firm's annual turnover, the Tribunal declined on the basis that “a fine is not appropriate in these particular circumstances. While we have characterised the anti-competitive transgression as ‘naked’...the respondent may well have believed that its long-standing practices would pass muster with the Competition Act. While these factors certainly do not protect the practice complained of from scrutiny of the Competition Act, it does affect a decision regarding a punitive remedy, such as a fine. Certainly, if the respondent persisted with this approach or if it attempted to reintroduce a similar anti-competitive restriction in another guise, then it would make itself vulnerable to a fine. Others, in the agricultural sector or elsewhere, who utilise similar anti-competitive mechanisms and who, in the wake of this decision persist with the practice, may well render themselves liable to a fine. However, we consider it inappropriate to impose a fine on the respondent in this matter.”

¹³⁷⁵ [2012] ZACT 47 para 100- 106, the Tribunal decided not to impose an administrative penalty on one of the cartel members on the basis that it did not implement the cartel's price fixing commitments and that its pricing was more aggressive than the other firms; in *Competition Commission v South African Airways (Pty) Ltd* [2005] ZACT 50 para 270, a case involving abuse of dominance, the Tribunal similarly held that although administrative penalties are a competent remedy, they are not mandatory.

¹³⁷⁶ Section 59(1)(a).

¹³⁷⁷ Section 59(1)(a).

¹³⁷⁸ Section 59(1)(b)

restraints are judged in terms of the rule of reason under section 5(1); abuse of dominance, in the form of exclusionary practices, whose anti-competitive effects outweigh any technological, efficiency or other pro-competitive gain, is judged in terms of the rule of reason under section 8(c); price discrimination by a dominant firm is judged in terms of the rule of reason under section 9(1). An administrative penalty may also be imposed for the contravention of, or a failure to comply with, an interim or final order of the Competition Tribunal or the Competition Appeal Court.¹³⁷⁹ Parties to a merger, who fail to disclose the transaction to the Competition Commission, as required by the Competition Act, or who proceed to implement the merger, contrary to a decision of the Competition Commission or the Competition Tribunal, prohibiting the transaction, may find themselves facing an administrative penalty.¹³⁸⁰ Similarly, those who proceed to implement the merger contrary to a condition imposed by the Competition Commission or the Competition Tribunal, or who proceed to implement the merger without the approval of the Competition Commission or the Competition Tribunal, may also find themselves facing an administrative penalty.

The administrative penalty, which must be paid into the National Revenue Fund,¹³⁸¹ may not exceed 10 per cent of the firm's domestic annual turnover in South Africa, as well as its exports from South Africa in the firm's preceding financial year.¹³⁸² However, it has been the Competition Tribunal's practice to calculate this penalty on the basis of "affected turnover", that is, the portion of the firm's turnover derived from the product market, in which it was found to have acted anti-competitively.¹³⁸³ The reliance on the affected turnover is based on the understanding that the restrictive practice may not be connected to a firm's annual turnover, because the relationship between the contravention and the total business, to which that turnover may be attributed, could be too remote.¹³⁸⁴ This is particularly the case where firms often conduct business in multiple product markets; therefore, it would be appropriate to correlate the penalty to the firm's attempts to extend its market power through anti-competitive

¹³⁷⁹ Section 59(1)(c)

¹³⁸⁰ Section 59(1)(d)(i)-(iv).

¹³⁸¹ Section 59(4).

¹³⁸² Section 59(2).

In India, upon a finding that a prohibited practice has been committed, section 27(b) of the Competition Act 2002 empowers the Competition Commission to impose a penalty of not more than 10 per cent of the average of each firm's turnover over the last three preceding financial years. If the prohibited practice is a cartel, the Commission may impose, upon each cartel participant, a penalty up to three times of its profit for each year that the cartel existed, or 10 per cent of its turnover for each year that the cartel existed, whichever is higher.

See also *M/s Bio-Med Private Limited vs Union of India & Others* Case No. 26 of 2013; *In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna v National Insurance Co. Ltd. and Others, Suo Motu* Case No. 02 of 2014.

In Brazil, Article 37- Article 38 of Law 12529 of 2011, the administrative fine must not exceed 20 per cent of a firm's gross sales in the preceding financial year in the market of the cartelised products, or services. In addition, this fine must not be less than the profits gained by cartel participants. Individuals, directly or indirectly, involved in the prohibited practice (upon proof of negligence or intention) also face the possibility of paying an administrative penalty.

¹³⁸³ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 140.

¹³⁸⁴ Para 141.

arrangements in a particular product market.¹³⁸⁵ The Tribunal has been quick to emphasise that, depending on the circumstances, it has the discretion to impose a penalty, based on a respondent's annual turnover, as opposed to utilising the affected turnover.¹³⁸⁶

However, the Tribunal's discretionary powers in imposing the fine are not unfettered. It is guided by seven factors, as outlined in section 59(3) of the Competition Act,¹³⁸⁷ namely:

- (a) the nature, duration, gravity and extent of the violation;¹³⁸⁸
- (b) the harm caused by the prohibited practice;¹³⁸⁹
- (c) the offending firm's behaviour;¹³⁹⁰

¹³⁸⁵ Para 141.

¹³⁸⁶ Para 142, the Tribunal emphasised that, while it has followed the route of utilising the affected turnover; "this does not mean that the statute does not permit imposing a penalty on the firm's annual turnover. The language of the statute is clear - it includes the firm's total annual turnover in the Republic, including its exports and, in appropriate cases, one can expect that the Tribunal would impose such a penalty. An exercise of the Tribunal's discretion, nevertheless, must always be rational and justifiable. There is no *numerus clausus* of circumstances in which the Tribunal can be expected to exercise its discretion in favour of a fine, calculated on a firm's annual turnover, but one can anticipate that there should be some evidence to show that a firm's monopolisation efforts through anti-competitive conduct in one product market conferred, or tended to confer, onto it some leverage in another product market, which it would otherwise not have had. For example, if there was evidence to show that the closure of bakeries, while output limiting in the bread industry, also conferred some advantage to Pioneer in the milling or packaging industry (assuming it had an interest there) it would be permissible to calculate the penalty on the basis of the total turnover."

¹³⁸⁷ Section 59 (3)(a)-(g) of the Competition of 1998; *Competition Commission v South African Airways* [2006] ZACT 88 para 86; *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others* [2003] ZACT 43 para 173-174, 190- 211.

See also Article 45(I)-(VII) of Brazil's Law 12529 of 2011 contains similar provisions.

¹³⁸⁸ On these factors, the Competition Tribunal will consider the geographical reach of the contravention, the market share relevant to the contravention, the frequency of the contravention, and whether the contravention affects a critical sector of the economy.

See *Competition Commission v Aveng Africa Ltd* 84/CR/Dec09 para 147; *Competition Commission v Telkom SA Ltd* 11/CR/Feb04 para 184.

Competition Commission v South African Airways (Pty Ltd) [2005] ZACT 50 para 282, 284, an abuse of dominance practice of 20 months was considered to be brief; *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others* [2003] ZACT 43, a vertical restraint enduring less than a year was deemed to be short; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 62, an eight year unilateral contravention by a dominant firm was understandably held to be long.

The Tribunal has consistently held that cartel practices are the egregious of all contraventions- *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 158; *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others* [2003] ZACT 43 para 173; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 63,67.

Competition Commission v Telkom SA Ltd 11/CR/Feb04 para 184, the Tribunal went as far as saying that abuse of dominance was not as serious as cartel conduct.

Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.5 argue that the Tribunal should eschew the labels "cartels" and "abuse of dominance", but should rather examine the nature of the contravention, as it has done in other cases, for example in *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 64, 67, where it held that abuse of dominance, by dividing the market so that it could maintain its excessive pricing, was really no different from cartel conduct. In fact, such abuse of dominance is "conceptually identical to that of colluding with a competitor in the reduction of output in order to raise prices."

¹³⁸⁹ The harm is that which is visited upon the competition process, not solely the competitors. See *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others* [2003] ZACT 43 para 191; *Competition Commission v Telkom SA Ltd* 11/CR/Feb04 para 184, where the abuse of dominance was regarding increased costs in the telecommunications sector, a critical sector in the South African economy, which had knock-on effects on the costs of doing business in the country; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 64, the Tribunal considered it to be an aggravating factor, as the abuse of dominance impacted the downstream market, affected upcoming small to medium enterprises and resulted in the inefficient use of resources.

¹³⁹⁰ This factor should not be confused with the factor of whether the firm co-operated with the Competition Commission and the Competition Tribunal. Instead, it is concerned with whether the firm had knowledge of the wrongfulness of its conduct and its participation in the contravention; the firm's blatant disregard of the implications of its conduct; in contraventions involving multiple firms the Tribunal considers whether the firm was the ring leader or instigator; the extent to which a firm's

- (d) the market structure in which the prohibited practices took place;¹³⁹¹
- (e) the profits gained from the prohibited practices;¹³⁹²
- (f) the extent to which the offending firm co-operated with the Competition and the Tribunal;¹³⁹³
- and,
- (g) whether the respondent firm has been previously found in violation of the Competition Act.¹³⁹⁴

Over time, the Competition Tribunal's approach towards administrative penalties has been a somewhat metamorphic process. There seemed to have been inconsistent application of section 59(2) provisions that the penalty that should not exceed "10 per cent" of the firm's annual turnover in the "preceding financial year". In some cases, the Tribunal was willing to accept the year recommended by the Competition Commission, and not disputed by the respondent firm.¹³⁹⁵ The Competition Appeal Court made efforts to bring logic and consistency to the meaning and interpretation of the phrase "preceding financial year", by acknowledging it as the financial year preceding the year in which the administrative penalty was imposed.¹³⁹⁶ The Tribunal, however, has indicated that, while it acknowledges the "preceding financial year" to imply the last completed year before the imposition of the administrative penalty, it, nonetheless, could vary its meaning, as the circumstances of a case may require.¹³⁹⁷

management was involved in the transgression. See *Competition Commission v Aveng Africa Ltd* 84/CR/Dec09 para 171-179, 189-191; *Competition Commission v DPI Plastics (Pty) Ltd* 15/CR/Feb09 para 48, 52; *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 162; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 84-88.

¹³⁹¹ *Competition Commission v Telkom SA Ltd* 11/CR/Feb04 para 187-188, the Competition Tribunal considered the circumstances of the market, especially the fact that Telkom was a parastatal, with a history of monopolisation, pressure from its shareholders to increase profits and market power, were taken into account.

¹³⁹² Although direct evidence can be available to determine the profits realised, as in the bread cartel case - *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9, there is often no direct evidence of the levels of profit realised as a result of a prohibited practice, the Tribunal has been known to utilise the turnover realised from the product or service for which the contravention took place - *Competition Commission v DPI Plastics (Pty) Ltd* 15/CR/Feb09 para 187-192.

¹³⁹³ While a firm is free to challenge, through litigation, the allegations made against it by the Competition Commission and is not penalised for this, the Competition Tribunal will not take kindly to blatant falsehoods. Lying under oath will be considered aggravating factors, while a firm that co-operates with the Commission and the Tribunal will be seen as mitigating factors. See *Competition Commission v DPI Plastics (Pty) Ltd* 15/CR/Feb09 para 50, 196; *Competition Commission v Aveng Africa Ltd* 84/CR/Dec09 para 181, 193; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 93-94; *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 162.

¹³⁹⁴ While recidivism by the respondent firm will be an aggravating factor, the Tribunal has indicated that the absence of a record of a previous conviction, where the firm has consistently committed multiple contraventions without being prosecuted, will not be a mitigating factor. See *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 170.

¹³⁹⁵ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.4.

Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others [2003] ZACT 43 para 169, the Tribunal accepted this to be the 'year preceding the contravention'; *Competition Commission v South African Airways (Pty) Ltd* [2005] ZACT 50 para 271, the Tribunal accepted it to be the year just prior to the period in which the Commission had proved the contravention to have taken place; *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* Case No: 13/CR/Feb04 para 52, it was accepted that the year in question was the year preceding the filing of the complaint; *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 135, 174.3, it was the year preceding the referral of the complaint to the Tribunal.

¹³⁹⁶ *Southern Pipeline Contractors v Competition Commission* 105/CAC/Dec10 para 61, citing Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.4.

¹³⁹⁷ *Competition Commission v Aveng Africa Ltd* 84/CR/Dec09 para 129.

Sutherland & Kemp concede that often it is acceptable for a court to deviate from the literal meaning of a statutory provision; especially, where such literal meaning could result in absurdities, so obvious that it could not have been the intention of the legislature; or, the literal meaning could result in a situation, contrary to what the legislature would have intended.¹³⁹⁸ However, they also highlight that, in order to depart from the literal meaning of a statutory provision, the absurdity must be glaring and the legislature's intention clear and not a simply a matter of probability or supposition.¹³⁹⁹

In its early years, the Competition Tribunal adopted a "broad-brush" approach towards its section 59 discretion regarding administrative penalties.¹⁴⁰⁰ For instance, the Tribunal initially declined to impose administrative fines, where the respondent firms had most likely been unaware that it was engaging in conduct prohibited by the Competition Act.¹⁴⁰¹ Subsequently, in the *Federal Mogul* case series, a case involving vertical restrictive practices, in the form of minimum resale price maintenance, the Tribunal made a clear and conscious step to use the seven factors in section 59(3) of the Competition Act, explicitly.¹⁴⁰² In *Competition Commission v South African Airways*, a case dealing with abuse of dominance (in the form of an override scheme between SAA and its travel agents, and a compensation scheme for its travel agents), the Tribunal applied the section 59(3) factors, weighed them against each other, to add up to 10 per cent, the maximum cap allowed by section 59(2) of the Competition Act.¹⁴⁰³ As to the method of setting the level of the penalty, the Tribunal weighted the section 59(3) factors in relation to one another, so that they added up to 10 per cent, the maximum allowed under section 59(2) of the Competition Act.¹⁴⁰⁴ This weighting process not only considered aggravating circumstances, but also considered the mitigating circumstances that favoured the respondent firm.¹⁴⁰⁵ According to the Tribunal, this weighting process, used in the calculation of the fine, is aimed at rationalising the calculation of the administrative penalty and to ensure that the penalty be argued and determined, with as much attention to evidence and rational argument, as the merits of the case itself.¹⁴⁰⁶ In addition, the Tribunal also emphasises that its process of weighting is not prescriptive, but merely a guideline for the future.¹⁴⁰⁷ In *Harmony*

¹³⁹⁸ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.4.

¹³⁹⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.4.

¹⁴⁰⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.2.

¹⁴⁰¹ *Competition Commission v Patensie Sitrus Beherend Bpk* Case No: 37/CR/Jun01 para 112; *Competition Commission v DPI Plastics (Pty) Ltd* 15/CR/Feb09.

¹⁴⁰² *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Lt d& Others* [2003] ZACT 43; *Federal- Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission* Case No: 33/CAC/Sep03

¹⁴⁰³ *Competition Commission v South African Airways (Pty) Ltd* [2005] ZACT 50, para 280-328.

¹⁴⁰⁴ Para 341.

¹⁴⁰⁵ Para 342, according to the Tribunal, "the weightings are not just a matter of adding up strikes against a respondent, where we find mitigation, we would credit the respondent with a score... Thus we score co-operation with the authorities at 1.5 per cent. A firm that failed to co-operate could find its fine increased by this percentage. Conversely a firm that co-operated could find that its fine is discounted by this amount or part thereof."

¹⁴⁰⁶ Para 343.

¹⁴⁰⁷ Para 343.

Gold Mining Company Ltd & Another v Mittal Steel South Africa & Another, the Tribunal followed its approach in *South African Airways* in the weighing and calculating approach.¹⁴⁰⁸ This method of calculation through adding, or subtracting fractions of a firm's turnover (depending on whether it was an aggravating or mitigating factor), does not adequately distinguish between the levels of gravity of the prohibited practices.¹⁴⁰⁹ Instead commencing by allocating points, based on the aggravating or mitigating factors, the Tribunal ought to use the 10 per cent of the turnover as a cap, after the initial calculation of the administrative fine.¹⁴¹⁰

In the *Pioneer Foods*, the Competition Tribunal, while deviating from its calculation approach in *South Africa Airways* and *Harmony Gold Mining*, stressed the egregious impact of the bread cartel before it, as well as cartels in general,¹⁴¹¹ and that, in the absence of mitigating circumstances, cartels deserve the maximum penalty stipulated in section 59 of the Competition Act.¹⁴¹² In *Competition Commission v Southern Pipelines Contractors & Another*, a price fixing and market allocation cartel, which began in 1994, the Tribunal imposed 10 per cent

The nature, duration and extent of contravention was weighted at 3 per cent; the loss or damage, as a consequence of the contravention, at 1 per cent; the behaviour of the respondent in the market, at 1 per cent; the market circumstances at the time of the contravention, at 1 per cent; the level of profit derived from the contravention, at 0.5 per cent; the respondent's degree of co-operation with the regulators, at 1.5 per cent; and the recidivism factor, at 2 per cent. These figures indicate the percentage weight that the Tribunal allocated to each of the actors. When added together, they amount to the stipulated maximum of 10 per cent of a firm's annual turnover. Thereafter, SAA's conduct was scored against these weightings, whether it was an aggravating or mitigating factor. In scoring the factors, SAA's conduct was weighed against the weighting above allocated to each specific factor. For the nature, duration and extent of contravention, SAA scored 0.75 per cent; for loss and damage, as a consequence of the contravention, SAA scored 0.25 per cent; for its behaviour, SAA scored 0.5 per cent; for the market circumstances at the time of the contravention, SAA scored 0.75 per cent; for level of profit derived, there was no evidence and SAA scored 0 per cent; for its co-operation with the Competition Commission and the Competition Tribunal, there was no finding in aggravation or mitigation and SAA scored 0 per cent; and for previous contravention, there was no evidence to this effect and SAA scored 0 per cent. Therefore, in total, SAA scored 2.25 per cent, which was calculated on the base figure of R2 billion (annual turnover) that ultimately amounted to R45 million as an administrative fine.

¹⁴⁰⁸ Case No: 13/CR/Feb04 para 60-96 imposed an administrative penalty of R691.8 million (5.5 per cent of the respondent nearly R12 billion turnover), the record highest penalty at the time.

See Creamer, T. 'Tribunal fines ArcelorMittal R691.8 m, orders it to change uncompetitive behaviour' 06 September 2007 *Engineering News*. Available online at <http://www.engineeringnews.co.za/article/tribunal-fines-arcelormittal-r6918m-orders-it-to-change-uncompetitive-behaviour-2007-09-06> [Accessed 10 August 2015].

¹⁴⁰⁹ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.2.

¹⁴¹⁰ Sutherland, P. & Kemp, K. *Competition Law in South Africa* (2014) 12.4.2.

¹⁴¹¹ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 144-151, 173-175.

¹⁴¹² Para 151, 153-172, the Competition Tribunal took into account the serious nature and duration of the respective cartel practices; the damage suffered by consumers in the form of higher prices, less choice and inferior services. It also considered that the cartel affected the poorest members of society, whose staple food is bread and the damage to competition that would ensue, because of the permanent nature of the bakeries' market allocation agreement. The significant levels of profit and the dire market conditions, at the time of the contravention, for example, wheat prices had escalated significantly, and the difficulties that plant bakeries had to sustain price increases, were scrutinised, as well. In addition, the respondent firm had not co-operated with either the Commission, or the Tribunal, instead, it chose to litigate the matter to the last. While the Tribunal was cognisant of the fact that the respondent should not be penalised for exercising to litigate, it emphasises that the conduct of the respondent left much to be desired. For instance, its defence was based on manifest falsehoods, which involved the concoction of elaborate falsehoods; it did not co-operate with the Tribunal regarding witnesses scheduled to testify, lying under oath by some in its management, and its entire management was involved in this lack of co-operation. According to the Tribunal, the respondent's conduct, throughout the proceedings, was downright disdainful. In addition, while the respondent had not engaged in previous contraventions, cartel practices cannot rely on the absence of recidivism, as a basis for mitigating the penalty. Besides, even though the respondent had not been previously prosecuted before the Tribunal, it had in fact contravened the Act on several occasions over a considerable period. Ultimately, considering all these factors, the respondent did not deserve leniency, whatsoever. Based on its application of the seven factors under section 59(3), the Tribunal ultimately imposed two separate fines: the first amounting to 10 per cent of its affected turnover, for a seven-year long cartel; and the second amounting to 9.5 per cent of its affected turnover, for a cartel with a shorter duration. These translated into R150 million and R46 million, respectively.

of a cartel participant's annual turnover as the administrative penalty.¹⁴¹³ On appeal, the Competition Appeal Court set aside the Tribunal's determination, and instead developed its own approach, regarding the calculation of the administrative penalty.¹⁴¹⁴ According to the Competition Appeal Court, the 10 per cent cap, set out in section 59(2), becomes operative *only* after the Competition Tribunal has taken into account the seven factors, set out in section 59(3), and determined the penalty.¹⁴¹⁵ Therefore, the process of determining the administrative fine requires that the Tribunal formulate the appropriate fine, after careful application of section 59(3), and only after such a determination, assess whether the cap had been exceeded.¹⁴¹⁶ However, although the Tribunal considered some of the factors outlined in section 59(3), it failed to follow the framework, meaningfully, as laid out in section 59(3). Instead, it confined its reasoning to certain considerations related to the nature and duration of the offence, as well as general comments about the harm caused to the public purse and the South African taxpayer.¹⁴¹⁷ According to the Competition Appeal Court, the appropriate approach is to use the affected turnover as the baseline, to achieve proportionality between the nature of the contravention and the benefit derived from it, as well as balancing the interests of the consumer and the legitimate interests of the respondent firm.¹⁴¹⁸ Thereafter, the affected turnover, as the baseline, should be used as the basis for the initial calculation of the appropriate penalty, and the duration of the contravention should be considered.¹⁴¹⁹ Further, the Tribunal should consider the section 59(3) factors, in order to determine the percentage of the affected turnover, as representation of the appropriate fine.¹⁴²⁰ Once the Tribunal has arrived at the initial fine, it must consider the 10 per cent cap in section 59(2). If the initial fine is more than 10 per cent of the respondent firm's annual turnover, it must be reduced to 10 per cent of the firm's annual turnover.¹⁴²¹ Therefore, the affected turnover is used as the baseline in the initial calculation, the final determination utilises the 10 per cent cap of the respondent firm's annual turnover.

¹⁴¹³ Case No: 23/CR/Feb09.

¹⁴¹⁴ *Southern Pipeline Contractors & Another v Competition Commission* [2011] ZACAC 6.

¹⁴¹⁵ Para 10, 48.

¹⁴¹⁶ Para 19.

¹⁴¹⁷ Para 47.

¹⁴¹⁸ Para 51, according to the Appeal Court, "[t]he concept of 'turnover' is not defined in the Act and is only referred to in section 59(2) as being the annual turnover... However, section 59(3) refers on more than one occasion to 'the contravention'; in particular, in dealing with the nature, duration, gravity and extent 'of the contravention', the loss or damage suffered as a result, of 'the contravention' the market circumstances in which 'the contravention' took place and the level of profit derived from 'the contravention'. Thus, there is a legislative link between the damage caused and profits which accrue from the cartel activity. The inquiry, in terms of section 59(3), appears to envisage that consideration be given to the benefits which accrue from the contravention; that is to the amount of the affected turnover. By using the base line of the affected turnover, the implications of the doctrine of proportionality that is between the nature of the offence and benefit derived there from, the interests of the consumer community and the legitimate interests of the offender can be taken more carefully into account and appropriately calibrated."

¹⁴¹⁹ Para 55.

¹⁴²⁰ Para 55, 60, 82.

¹⁴²¹ Para 55, 60, 82.

The Competition Tribunal considered the criticism of the Competition Appeal Court in *Southern Pipeline Contractors* case and in *Competition Commission v Aveng (Africa) Ltd*, a price fixing and market allocation cartel, the Tribunal developed a six-step method to be utilised in the calculation of the administrative penalty, and recommended that guidelines be adopted to standardise the calculation of administrative penalties.¹⁴²² The steps outlined were:

- step one, determine the affected turnover in the relevant year of assessment;
- step two, calculate the “base amount” (the proportion of the relevant turnover relied upon);
- step three, if the contravention’s duration exceeds one year, multiply the amount obtained in step two by the duration of the contravention;
- step four, round off the figure under step three, if it exceeds the 10 per cent cap under section 59(2);
- step five, consider the factors that might mitigate, or aggravate, the amount reached in step four, by way of a discount, or premium, expressed as a percentage of that amount, which is either subtracted from, or added to it; finally,
- step six, round off the amount if it exceeds the 10 per cent cap under section 59(2), and if it does, adjust it downwards so that it does not exceed the cap.¹⁴²³

Step one involves the determination of the affected turnover of the firm in the relevant year of assessment, which is based on sales of the products or services that can be said to have been affected by the contravention.¹⁴²⁴ For calculating the affected turnover, the relevant year is the last, complete financial year, during which the firm participated in the prohibited practice.¹⁴²⁵ The Tribunal indicated that, in circumstances where the contraventions spanned several years, it is tempting to take into account the affected turnover for each year of the violation.¹⁴²⁶ However, calculating the affected turnover for each specific year loses sight of the determination of the overall purpose, which is to find a proxy of the harm done, not an exact calculation of profits or damages.¹⁴²⁷ Additionally, the calculation for each year, in a multiyear cartel, would be lengthy and involve futile sub-enquiries into each year’s intricacies making the

¹⁴²² Case No: 84/CR/DEC09

¹⁴²³ Para 133.

¹⁴²⁴ Para 134, the Tribunal pointed out that EU regulators, similarly, start off by establishing the affected turnover. Also the determination of the affected turnover must not be conflated with the identification of the relevant market, that the former does not involve the rigour and precision involved in the latter.

On the nature of affected turnover see also *Southern Pipeline Contractors v Competition Commission* [2011] ZACAC 6 para 51, 53, 60; *Competition Commission v Federal Mogul Aftermarket Southern Africa* [2003] 2 CPLR 464 (CT) para 171; *Competition Commission v South African Airways (Pty) Ltd* [2005] ZACT 50 para 272-274; *Harmony Gold Mining company Ltd v Mittal Steel South Africa* Case No: 13/CR/Feb04 para 53.

¹⁴²⁵ Para 135.

¹⁴²⁶ Para 136.

¹⁴²⁷ Para 137-138.

process more complicated, unnecessarily.¹⁴²⁸ Besides, the effects of a prohibited practice do not necessarily end when proceedings by regulators are initiated, or even when they are concluded, the assessment of the affected turnover can never perfectly replicate the harm caused, or the illicit profits made from the prohibited practice.¹⁴²⁹ Therefore, finding the base year serves as a proxy for calculating the penalty, and by utilising the final complete year of the cartel, a measure of certainty is created.¹⁴³⁰

After determining the affected turnover, the Tribunal moves on to step two, a process, which involves the calculation of the “basic amount” that would be the “building block” for the penalty calculation. This step involves, as in step one, the exercise of discretion.¹⁴³¹ The basic amount is arrived at by multiplying the affected turnover of the relevant year, by a percentage ranging between 1 – 30 per cent.¹⁴³² The percentage used in the multiplication is determined by the nature of the contravention under consideration, therefore, the more egregious the conduct, the more likely it is that the Tribunal will tend towards the 30 per cent maximum.¹⁴³³ Other than the nature of the contravention, the Tribunal will also consider the combined market share of undertakings involved in the contravention, the geographic reach of the contravention, as well as whether or not the contravention has been implemented.¹⁴³⁴ In step two, the Tribunal considers the contravention as a whole (it is only in step five that the individual firms will be considered).¹⁴³⁵ In step two, the Tribunal considers certain section 59(3) factors, namely: (a) the nature, gravity and extent of the contravention; (b) loss or damage suffered as a result of the contravention; and (d) the market circumstances in which the contravention took place.¹⁴³⁶ According to the Tribunal, these factors are not an exhaustive list.¹⁴³⁷

Step three considers the duration of the contravention. In this step, the basic amount is multiplied by the number of years that the contravention persisted.¹⁴³⁸ This is aimed at ensuring that proportionality is achieved – the longer a contravention persists, the more harm it causes, and the more heavily its fines should be.¹⁴³⁹ Conversely, the shorter the duration of the

¹⁴²⁸ Para 138.

¹⁴²⁹ Para 139.

¹⁴³⁰ Para 139.

¹⁴³¹ Para 140.

¹⁴³² Para 140.

¹⁴³³ Para 140, the Tribunal’s approach follows the EU approach by the Commission’s “Guidelines on the method of setting fines imposed pursuant to Article 23(2)() of Regulation No. 1/ 2003”.

¹⁴³⁴ Para 140.

¹⁴³⁵ Para 141.

¹⁴³⁶ Para 143- 147.

¹⁴³⁷ Para 143.

¹⁴³⁸ Para 148.

¹⁴³⁹ Para 148.

contravention, the lesser the penalty should be.¹⁴⁴⁰ Under step four, the Tribunal considers whether the amount under step three exceeds the 10 per cent cap, stipulated by section 59(2).¹⁴⁴¹ If it does, the Tribunal rounds the amount off to fall within the statutory cap.¹⁴⁴² Under step five, the Tribunal considers the mitigating and aggravating factors pertaining to the specific respondent, namely: (c) the behaviour of the respondent; (e) the level of profit derived from the contravention; (f) the degree to which the respondent co-operated with the Commission and the Tribunal; and (g) the issue of recidivism on the part of the respondent.¹⁴⁴³ These factors will either increase or decrease the basic amount.¹⁴⁴⁴ Finally, under step six, the Tribunal must again ensure that the penalty does not exceed the 10 per cent cap under section 59(2) of the Act.¹⁴⁴⁵

The Tribunal's approach in *Averg* is commendable as they emphasise that, for the most part, it resolves the problems of the determination of administrative penalties; however, it still presents some problems.¹⁴⁴⁶ For instance, under step four, the Tribunal resorts to the 10 per cent cap, under section 59(2), contrary to the Appeal Court's reasoning in *Southern Pipeline Contractors*, that the cap is not a starting point, when calculating a penalty, but rather, a final check, to prevent the penalty from being so severe that it destroys the respondent's business.¹⁴⁴⁷ In addition, the Tribunal's approach is not founded on solid sound logic because treating the 10 per cent cap as the benchmark or starting point, is premature and renders step four meaningless or inconsequential, especially in cases where the contravention spans over several years.¹⁴⁴⁸ By comparing two firms that had participated in the same contravention, but for different periods (one firm for a longer and one for a shorter period), the Tribunal's premature application of the 10 per cent cap under step four, ultimately results in both firms receiving the same penalty, even though they engaged in the contravention for different periods of time.¹⁴⁴⁹ The Tribunal's reasoning and explanation in *Averg* regarding the application of the 10 per cent cap under step four, is not entirely convincing, because without doing so, the aggravating factors may result in a fine that is more than the 10 per cent cap.¹⁴⁵⁰ By implication, it appears that the Tribunal's reasoning is that only the egregious contraventions must attract a penalty of up to 10 per cent.¹⁴⁵¹ It could not have been the intention of the legislature for the

¹⁴⁴⁰ Para 148.

¹⁴⁴¹ Para 149-152.

¹⁴⁴² Para 149-152.

¹⁴⁴³ Para 153.

¹⁴⁴⁴ Para 153.

¹⁴⁴⁵ Para 154.

¹⁴⁴⁶ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁴⁷ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁴⁸ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁴⁹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁵⁰ Para 150.

¹⁴⁵¹ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

cap to be applied twice just to distinguish between respondent firms.¹⁴⁵² If, according to the Tribunal, the penalty was too high, a possible solution would be re-evaluate the discounts made, during the calculation process, and not to prematurely resort to the section 59(2) cap.¹⁴⁵³

5.6.1.1. *The Guidelines for the Determination of Administrative Penalties for Prohibited Practices of 2015*

Finally, in 2015, the Competition Commission adopted the Guidelines for the Determination of Administrative Penalties for Prohibited Practices that provided the steps to follow when calculating administrative penalties.¹⁴⁵⁴ These Guidelines are not entirely new, as they are a reflection of case law.¹⁴⁵⁵ The methodology of calculation in the Guidelines involves the following steps:

- determining of the affected turnover;
- calculating the base amount;
- determining the duration of the contravention;
- ensuring that the penalty does not exceed the statutory limit;
- taking into account aggravating and mitigating factors, should they be present; and,
- rounding off the penalty arrived at, if it exceeds the statutory limit.¹⁴⁵⁶

The Guidelines allow for a discount of at least 10 per cent, but not exceeding 50 per cent off the administrative fine based on the firm's co-operation with the Commission's investigations.¹⁴⁵⁷ In exceptional circumstances, a firm's ability to pay the penalty may be taken into account. This may result in favourable payment terms, or a discount.¹⁴⁵⁸ The Guidelines treat cartels as the most egregious conduct, deserving maximum

¹⁴⁵² Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁵³ Sutherland, P. & Kemp, K. *Competition Law of South Africa* (2014) 12.4.2.

¹⁴⁵⁴ Available online at <http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Administrative-Penalties-MAY-2015.pdf> [Accessed 10 August 2015].

¹⁴⁵⁵ *Competition Commission v Aveng (Africa) Ltd, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, BRC Mesh Reinforcing (Pty) Ltd* Case No: 84/CR/DEC09; *Southern Pipeline Contractors v Competition Commission* [2011] ZACAC 6; *Reinforcing Mesh Solutions (Pty) Ltd & Vulcania Reinforcing (Pty) Ltd v Competition Commission* Case No: 119 & 120/CAC/May2013; *Competition Commission v. DPI Plastics (Pty) Ltd, Petzetakis Africa (Pty), Marley Pipe Systems (Pty) Ltd, Swan Plastics (Pty) Ltd, Amitech South Africa (Pty) Ltd, Flo-Tek Pipes & Irrigation (Pty) Ltd, MacNeil Agencies (Pty) Ltd, Andrag (Pty) Ltd, Gazelle Plastics (Pty) Ltd & Gazelle Engineering (Pty) Ltd* Case No.: 15/CR/Feb09; *Competition Commission v Telkom* Case No: 11/CR/Feb04; *Competition Commission v Sasol Chemical Industries* Case No: 48/CR/Aug2010.

¹⁴⁵⁶ Para 5 of the Guidelines for the Determination of Administrative Penalties for Prohibited Practices of 2015.

¹⁴⁵⁷ Para 6 of the Guidelines for the Determination of Administrative Penalties for Prohibited Practices of 2015.

¹⁴⁵⁸ Para 7 of the Guidelines for the Determination of Administrative Penalties for Prohibited Practices of 2015.

penalties.¹⁴⁵⁹ However, with collusive tendering, the nature of the bid rigging will influence the calculation of the penalty.¹⁴⁶⁰

5.6.1.2. Are administrative penalties a criminal sanction? A case study of *Competition Commission v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*

The Competition Tribunal's powers to impose administrative fines came under careful scrutiny in *Competition Commission v Federal-Mogul Aftermarket Southern Africa (Pty) Ltd & Others*.¹⁴⁶¹ The respondent firm argued that, when an administrative penalty is imposed, in terms of section 59(1) of the Competition Act, the Tribunal is essentially imposing a criminal penalty; therefore, the civil standard of proof on a balance of probabilities, mandated by section 68 of the Competition Act, does not apply.¹⁴⁶² Consequently, the Tribunal does not have the jurisdiction to impose these penalties.¹⁴⁶³ The Tribunal, therefore, had to decide whether the procedure for imposing administrative penalties was of a criminal nature, and if so, whether it should be subjected to the rights of accused persons, enshrined in section 35(3) of the Constitution.¹⁴⁶⁴ The Tribunal concluded that these proceedings were not criminal in nature.¹⁴⁶⁵ Although they resembled both criminal and civil proceedings, they were, nonetheless, in a class of their own, and did fit into either civil or criminal proceedings.¹⁴⁶⁶ The Supreme Court of Appeal indicated that administrative penalties closely resemble criminal penalties as they have a punitive element to them, and also added that there was need to uphold the constitutional values and rights contained in the Constitution.¹⁴⁶⁷ However, this should



¹⁴⁵⁹ Para 5.12- para 5.13 of the Guidelines for the Determination of Administrative Penalties for Prohibited Practices of 2015.

¹⁴⁶⁰ Para 5.17 of the Guidelines; *Videx Wire Products (Pty) Ltd v Competition Commission* Case No: 124 CAC/OCT12

¹⁴⁶¹ [2003] ZACT 3 para 21-34, 80-81.

¹⁴⁶² Section 68 stipulates that in any proceedings under the Competition Act, other than interim relief proceedings or criminal proceedings, the standard is on a balance of probabilities

¹⁴⁶³ In terms of section 68, in any proceedings under the Act, the civil standard of proof on a balance of probabilities applies. However, the civil standard does not apply to 49C proceedings for interim relief and the criminal offences laid out in Chapter 7 of the Competition Act.

¹⁴⁶⁴ Para 7-9 17, 77.

¹⁴⁶⁵ Para 70- 73, 100-103, 104-123.

¹⁴⁶⁶ *Competition Commission v Pioneer Foods (Pty) Ltd* Case No 91/CAC/Feb10 para 11, citing *Sappi v Competition Commission* [2003] 2 CPLR272 (CAC) para 47 "[i]n civil proceedings before the High Court ... it would generally speaking be open to the parties to frame their dispute on such terms as they saw fit. However, it does not seem to us that it is correct to treat proceedings arising from a complaint being referred to the Tribunal by the Commission as standing in the same footing as a conventional civil suit. First the proceedings are directed at adjudicating conduct that is prohibited by the Act, in other words, on conduct that the legislature has seen fit to outlaw in the public interest. Second the Commission is representing the public interest and acts as 'claimant cum prosecutor'. The public interest is that all South Africans have in open and unfettered competition in our economy. The Commission is assigned this task because of the difficulty facing ordinary citizens in pursuing anti-competitive conduct through normal court channels. Third, the determination by the Tribunal results, at least when an administrative penalty is imposed, in an order that resembles a fine imposed in criminal proceedings...the proceedings before the Tribunal are a hybrid between criminal and civil proceedings...they are 'adjudicative procedures of a hybrid kind, not criminal but not civil in the ordinary sense either: proceedings in which one or more parties may suffer serious consequences if an adverse decision is made.'"

¹⁴⁶⁷ *Woodlands Dairy (Pty)Ltd & Another v Competition Commission* [2011] 3 All SA 192 para 10-11, "[t]he Act...must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in section 2 of the Constitution. Importantly, in the context of this case is that the Constitution is based on the rule of law, affirms the democratic values of dignity, freedom and guarantees the right to privacy, a fair trial and just administrative action...this

not be taken out of context to suggest that criminal procedural elements, must therefore apply to the administrative proceedings of the Tribunal.¹⁴⁶⁸ The nature of the 'punishment' envisaged by the Competition Act does not warrant the application of the rights of accused persons, as enshrined in the Constitution.¹⁴⁶⁹ According to the Competition Appeal Court, an administrative penalty must be proportional to the severity of the degree of blameworthiness of the offending party, the nature of the prohibited practices, and its impact on the South African economy, in general, and consumers, in particular.¹⁴⁷⁰

Although the CAs have rightly concluded that its proceedings are not of a criminal nature, some commentators continue to hold a strong view that the procedural rights of the accused person, guaranteed by the Constitution (at least to the extent to which they apply to juristic persons), should apply to firms, against whom complaints have been referred to the Tribunal.¹⁴⁷¹ In addition, the Supreme Court of Appeal, at times, refers to firms that participate in practices prohibited by the Competition Act, as 'accused persons'.¹⁴⁷² Fortunately, the Constitutional Court has indicated that such criminal law terms are not found in the Competition Act, and should not be used.¹⁴⁷³

5.7. Cartel Conduct as a Criminal Offence

The imposition of criminal sanctions on those who partake in cartel practices, is a reflection of society's displeasure and condemnation. Cartels are perceived as the most egregious anti-competitive practices,¹⁴⁷⁴ as well as morally reprehensible, and deserve to be treated as criminal violations.¹⁴⁷⁵ Some individuals opine that cartels must be regarded as 'property crime', similar to

means that [the Commission's] procedural powers must be interpreted in a manner that least impinges on these values and rights."

¹⁴⁶⁸ *Competition Commission v Pioneer Foods (Pty) Ltd* para 8 "[t]he Tribunal has the power to impose administrative penalties ...[although] administrative penalties imposed by the tribunal bear a close resemblance to criminal penalties, [t]his should not be taken as detracting from [earlier] decisions. That proceedings before the Tribunal are not criminal proceedings for the purposes of the Constitution, but is merely a reflection of the fact that in their amount, their intended deterrent purpose and undoubted punitive effect and the fact that they are paid into the Consolidated Revenue Fund they bear a resemblance to fines, as reflected in the language of section 59(4)."

See also Jordaan, L. & Munyai, P. "The constitutional implications of the new section 73A of the Competition Act of 1998" (2011) 23. *South African Mercantile Law Journal* 204.

¹⁴⁶⁹ *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd* [2003] ZACT 43 para 154-156.

¹⁴⁷⁰ *South Pipeline Contractors & Another v Competition Commission* [2011] ZACAC 6 para 9.

¹⁴⁷¹ Munyai, P.S. "The interface between competition and constitutional law: Integrating constitutional norms into South African competition law proceedings" (2013) 25. *South African Mercantile Law Journal* 323-341.

¹⁴⁷² *Woodlands Dairy (Pty) Ltd & Milkwood Dairy (Pty) Ltd v Competition Commission* [2010] ZASCA 104 para 1, 11.

¹⁴⁷³ *Competition Commission v Senwes Ltd* 2012 (7) BCLR 667 (C) para 65, where the Constitutional Court, as per Fronman J (Cameron J concurring), indicated that "the Supreme Court erred in its approach ...by failing to have regard to the relevant provisions of the Act. The Act does not use the language of 'charge' and 'conviction' at all. Even if they were used merely for the sake of brevity, the metaphor or analogy that they carry is inapposite to the Tribunal's power in conducting a hearing."

¹⁴⁷⁴ See 1.5 in Chapter 1.

¹⁴⁷⁵ Clarke, J. "The increasing criminalization of economic law- a competition law perspective" (2011) 19. *Journal of Financial Crime* 83; Akers, R.L. "Rational choice, deterrence, and social learning theory in criminology: The path not taken" (1990)

burglary, albeit with far greater economic damage, therefore, necessitating criminal sanctions.¹⁴⁷⁶ Some have even equated cartels to organised crime.¹⁴⁷⁷

The criminalisation of cartels and the consequent criminal sanctions, especially imprisonment, complement administrative penalties by adding a further deterrent effect.¹⁴⁷⁸ Unlike administrative fines that are paid by firms, a custodial sentence is actually served by the culpable individual, be it directors or persons in positions of management.¹⁴⁷⁹ Even where fines are imposed as a criminal sentence, these must be paid by the individual, not the firm. For countries that provide individual immunity, the criminalisation of cartels motivates individuals to report their cartel involvement, and, even if there is no immunity, the possibility of a mitigated imprisonment term or fine, in exchange for co-operation with competition authorities, is sufficient motivation.¹⁴⁸⁰ Therefore, the threat of imprisonment serves as the 'stick to complement the carrot of individual immunity'.¹⁴⁸¹ Additionally, the personal consequences of a criminal conviction for participating in a cartel can be considerable. A criminal conviction may mark the end of a director's career aspirations and result in a tarnished reputation.¹⁴⁸² This criminal conviction may prove to be the scarlet letter that a director will bear for the rest of his/her life. The criminalisation of cartel conduct, or the "cartel offence", as it is referred to in the United Kingdom,¹⁴⁸³ is also based on the perception that administrative penalties are not a sufficient deterrent.¹⁴⁸⁴ Estimates conducted in the EU suggest that, in order for administrative fines to

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81. *Journal of Criminal Law and Criminology* 657; Ginsburg, D.B. & Wright, J.D. "Antitrust Sanctions" (2010) 6. *Competition Policy International* 13; Buccirosi, P. et al. *Deterrence in Competition Law*. Discussion Paper No. 285 Governance and the Efficiency of Economic Systems (2009) 2.
- ¹⁴⁷⁶ Werden, G.J., Hammond, S.D. & Barnett, B.A. "Deterrence and detection of cartels: Using all the tools and sanctions" (2011) 56. *Antitrust Bulletin* 216; Werden, G.J. "Sanctioning cartel activity: Let the punishment fit the crime" (2009) 5. *European Competition Journal* 23.
- ¹⁴⁷⁷ Cronin, Z.A. "The competitor's dilemma: Tailoring antitrust sanctions to white collar priorities in the fight against cartels" (2013) 36. *Fordham International Law Journal* 1683-1732.
- ¹⁴⁷⁸ *Policy Roundtables: Cartel sanctions against individuals*. Organisation for Economic Co-operation and Development (2005) 7-9, 16-25.
- ¹⁴⁷⁹ Werden, G.J., Hammond, S.D. & Barnett, B.A. "Deterrence and detection of cartels: Using all the tools and sanctions" (2011) 56. *The Antitrust Bulletin* 213; Beaton-Wells, C. & Fisse, B. "U.S. policy in pursuing individual accountability for cartel conduct: A preliminary critique" 2011 (56). *Antitrust Bulletin* 277- 309.
- ¹⁴⁸⁰ Werden, G.J., Hammond, S.D. & Barnett, B.A. "Deterrence and detection of cartels: Using all the tools and sanctions" (2011) 56. *The Antitrust Bulletin* 215; *Policy Roundtables: Cartel sanctions against individuals*. Organisation for Economic Co-operation and Development (2005) 7-9, 16-25.
- ¹⁴⁸¹ Williams, R. "Cartels in the criminal law landscape". In Beaton-Wells, C. & Ezrachi, A. [eds]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 292; Low, D.M. & Halladay, C.S. "Redesigning a criminal cartel regime: The Canadian conversion". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 99-103; Beaton-Wells, C. "Cartel criminalisation and the Australian Competition and Consumer Commission: Opportunities and challenges". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 185.
- ¹⁴⁸² Rosenboom, N.S.R. "Career development after cartel prosecution: Cartel vs non-cartel managers" (2012) 8. *Journal of Competition Law and Economics* 145-165; Bryan, A. & O'Kane, M. "Does prison work for cartelists? A view from behind bars" 2011 (56) *Antitrust Bulletin* 483- 500.
- ¹⁴⁸³ Section 188 of United Kingdom Enterprise Act of 2002.
- ¹⁴⁸⁴ Fisse, B. "Cartel offences and non-monetary punishment: The punitive injunction as a sanction against corporations". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 313-338; Massey, P. & Cooke, J.D. "Competition offences in Ireland: The regime and its results". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 111-113; Whelan, P. "A principled argument for personal criminal sanctions as punishment under EC cartel law" (2007) 4. *Competition Law Review* 7-40; Gray, A. "Criminal sanctions for cartel behaviour" (2008) 8. *Queensland University of Technology Law and Justice Journal* 364-379; Ginsburg, D.B. & Wright, J.D. "Antitrust Sanctions" (2010) 6. *Competition Policy International* 5-6; Pickford, M. "The introduction of a new economic crime" (2002) 1. *Competition Law Journal* 35;

be adequately deterrent, they must be equivalent to 150 per cent of the annual turnover of the affected cartelised products in the very least.¹⁴⁸⁵ Imposing fines of such magnitude will have immense negative consequences.¹⁴⁸⁶ In these circumstances, imposing personal liability, in the way of criminal sanctions on individuals, participating in cartel conduct, becomes important.

The criminalisation of competition law violations is nothing new, and the current surge of criminalising cartel activity, is actually a revival of an old principle.¹⁴⁸⁷ In the United States, violations of section 1 of the Sherman Act of 1890 have always been criminal offences. In South Africa, there have been earlier attempts to criminalise certain competition law violations in earlier legislation.¹⁴⁸⁸ However, during Parliamentary debates leading up to the enactment of the Competition Act of 1998, it was clear that competition law violations would not be subject to criminal sanctions, save for conduct that interfered with the administration of the Act.¹⁴⁸⁹ Therefore, the express intention of the legislature, at that time, was that competition law violations should not be criminalised. It would seem that the pendulum is swinging back to criminalisation.

5.7.1. The resistance towards the criminalisation of cartel conduct

Despite the general trend to criminalise cartels, debates about the rationale of criminalising cartels remain, as well as how this will fit into individual legal systems.¹⁴⁹⁰ Some jurisdictions have resisted imposing personal criminal liability on cartel conduct, even though criminal sanctions are imposed on individuals, who defraud the public purse in procurement processes.¹⁴⁹¹ Some have argued that personal liberty must take precedence, when considering punishing cartel behaviour, and that competition law is a regulatory tool, not a

Harding, C. "Business cartels as a criminal activity: Reconciling North American and European models of regulation" (2002) 9. *Maastricht Journal of European and Comparative Law* 393; Harding, C. & Joshua, J. "Breaking up the hard core: Prospects of the new cartel offence" (2002). *Criminal Law Review* 933; Joshua, J. "A Sherman Act bridgehead in Europe of a ghost ship in the Mid-Atlantic?" (2002) 23. *European Competition Law Review* 231; Macdonald & Thompson. "Dishonest agreements" (2003) 2. *Competition Law Journal* 94; Beard, D. "The cartel criminal offence" (2003) 2. *Competition Law Journal* 156; Barnett, B.A. & Hammond, S.D. "Deterrence and detection of cartels: Using all the tools and sanctions" 2011 (56). *Antitrust Bulletin* 207- 234; Combe, E. & Monneir, C. "Fines against hard core cartels in Europe: The myth of over-enforcement" 2011 (56). *Antitrust Bulletin* 235- 275.

¹⁴⁸⁵ Wils, W.P.J. *Optimal Enforcement of EC Antitrust Law: A Study in Law and Economics* (2002) 208; Whelan, P. "A principled argument for personal criminal sanctions as punishment under EC cartel law" (2007) 4. *Competition Law Review* 25-27; Calvani, T. & Calvani, T.H. "Cartel Sanctions and Deterrence" (2011) 56. *Antitrust Bulletin* 2 191, 192.

¹⁴⁸⁶ See 5.6 in this Chapter.

¹⁴⁸⁷ Jones, F.D. "Historical development of the law of business competition, Part 1" (1926) 35. *Yale Law Journal* 905-938; Harding, C. "A pathology of business cartels: Original sin or the child of regulations" (2010) 1. *New Journal of European Criminal Law* 42-58.

¹⁴⁸⁸ Undue Restraint of Trade Act of 1958; Maintenance and Promotion of Competition Act of 1979; Government Notice 801, *Government Gazette* 10211 of 02 May 1986.

¹⁴⁸⁹ Explanatory Memorandum: Competition Bill 1998 63. See also 4.4.1.6 in Chapter 4.

¹⁴⁹⁰ Wilks, S. "Cartel criminalisation as juridification: Political and regulatory dangers" In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 341-357.

¹⁴⁹¹ Baker, D.I. "Punishment for cartel participants in the US: A special model?". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 36-38; Wagner-von Papp, F. "What if all bid riggers went to prison and nobody noticed? Criminal antitrust law enforcement in Germany". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 165; Parker, C. "Criminal cartel sanctions and compliance: The gap between rhetoric and reality". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 239-262.

punishment mechanism.¹⁴⁹² However, with foreign accused persons, the process of extradition may prove to be especially cumbersome, if the jurisdiction from which extradition is sought does not criminalise cartel conduct.¹⁴⁹³ Even in cases of dual criminality, that is, where the antitrust conduct is a criminal offence in both the surrendering and requesting jurisdictions, the extradition can be legally challenged, endlessly. An example of this is the *Marine Hose* cartel case, the first case in which a European citizen (a certain Mr Piscioti) was extradited from Europe to the United States, to face criminal proceedings for his participation in the cartel.¹⁴⁹⁴ In spite of the successful extradition and the subsequent prison sentence, Mr Piscioti continued to challenge his extradition, for example, he lodged a claim for damages from the German government on the basis that his extradition was in violation of fundamental EU legal principles that prohibit discrimination between a country's own nationals and citizens from other EU Member States.¹⁴⁹⁵ Currently, the matter is before the Court of Justice of the European Union,

¹⁴⁹² Calvani, T. & Calvani, T.H. "Cartel sanctions and deterrence" (2011) 56. *Antitrust Bulletin* 186, 194.

¹⁴⁹³ Connor, J.M. "Problems with prison in international cartel cases" (2011) 56 *Antitrust Bulletin* 311- 344.

¹⁴⁹⁴ Order of the Higher Regional Court of Frankfurt dated 22 January 2014, A Ausl A 104/13

The extradition order was authorised based on "dual criminality", as required by the bilateral extradition treaty between Germany and the United States. In January 2014, Higher Regional Court of Frankfurt approved Mr Piscioti's (an Italian citizen) extradition to the United States for his participation in the bid rigging cartel. His appeal before the German Constitutional Court was dismissed.

In the Order of the German Constitutional Court, dated 17 February 2014, 2BvQ 4/14, Mr Piscioti appealed, on the basis that he was being discriminated against, because of his nationality. The Constitutional Court held that, as an Italian national, he could not benefit from protection against extradition available to German citizens, under the German Constitution, and that EU law does not require Germany to extend such protection to the citizens of other EU Member States. Therefore, his appeal was rejected.

Further appeals before the European Court of Human Rights, the European Commission, and Italian courts of Varese and Catani, were all dismissed. See *Decision of the European Court of Human Rights*, 17 April 2014 and the European Commission, Case T-403/14 *Pisciotti v. Commission*.

Subsequently, Piscioti was extradited to the United States, in April 2014, where he pleaded guilty and accordingly handed an imprisonment sentence and a fine.

United States v Romano Pisciotti case information available online at <https://www.justice.gov/atr/case/us-v-romano-pisciotti> [Accessed 10 September 2016].

"CJEU to rule on extradition of EU citizens in criminal antitrust proceedings" 24 April 2016 available online at <https://www.mwe.com/en/thought-leadership/publications/2016/04/cjeu-rule-on-extradition-of-eu-citizens> [Accessed 10 July 2016].

Mr Piscioti received a sentence of 24 months imprisonment and a fine of US\$50 000. From the incarceration sentence, he was credited with nine months (the period he had spent in Germany custody). In April 2015, he was released after having served his sentence.

¹⁴⁹⁴ De Stefano, D. & Ritz, C. "German court refers question on extradition discrimination to the Court of Justice in the case of the first business executive extradited to the U.S. on cartel charges". In *Hogan & Lovells* 28 July 2016. Available online at <http://www.hlregulation.com/2016/07/28/german-court-refers-questions-on-extradition-discrimination-to-the-court-of-justice-in-the-case-of-the-first-business-executive-extradited-to-the-u-s-on-cartel-charges/> [Accessed 10 August 2016]; De Stefano, G. & Ritz, C. "The Regional Court of Berlin refers the extradition of an Italian citizen from Germany to the United States for cartel charges to the European Court to rule on whether Member State extradition can violate the principle of non-discrimination under EU law". Available online https://www.hoganlovells.com/-/media/hogan-lovells/pdf/article_80290.ashx?la=en [Accessed 28 July 2016].

¹⁴⁹⁵ De Stefano, D. & Ritz, C. "German court refers question on extradition discrimination to the Court of Justice in the case of the first business executive extradited to the U.S. on cartel charges". In *Hogan & Lovells* 28 July 2016. Available online at <http://www.hlregulation.com/2016/07/28/german-court-refers-questions-on-extradition-discrimination-to-the-court-of-justice-in-the-case-of-the-first-business-executive-extradited-to-the-u-s-on-cartel-charges/> [Accessed 10 August 2016]; De Stefano, G. & Ritz, C. "The Regional Court of Berlin refers the extradition of an Italian citizen from Germany to the United States for cartel charges to the European Court to rule on whether Member State extradition can violate the principle of non-discrimination under EU law". Available online https://www.hoganlovells.com/-/media/hogan-lovells/pdf/article_80290.ashx?la=en [Accessed 28 July 2016].

which has to decide the question of whether the extradition of EU Member State citizens may in certain circumstances, violate fundamental EU law principles of non-discrimination.¹⁴⁹⁶

Notwithstanding these challenges facing the extradition of cartel participants, the threat of extradition still holds a deterrent effect. For instance, statistics indicate that extraditions continue to rise in antitrust cases, that there is always the possibility of co-operation among jurisdictions and their antitrust regulators, and when finally extradited, antitrust violators will not get any special treatment, simply because they engaged in 'white-collar' crimes.¹⁴⁹⁷ The United States' Department of Justice has been particularly active in ensuring that foreign accused persons involved in violations of the Sherman Act, are extradited to face prison sentences in the United States.¹⁴⁹⁸

Regarding sentences imposed for antitrust violations, available evidence suggests that custodial sentences are not easily imposed, and where they are imposed, the sentences are either suspended (wholly or partially), or they are commuted to other forms of punishments, for example, community service.¹⁴⁹⁹ In Korea, between 2000 and 2007, there were six cases in which imprisonment sentences were imposed on company executives for engaging in cartel conduct; none of the sentences were not served, as they were all suspended.¹⁵⁰⁰ Even the general-public is not convinced that the criminalisation of cartels is the appropriate approach to take. An Australian survey on the suitability of imprisonment sentences for market allocation cartels, found that less than 15 per cent of the respondents selected incarceration as a sanction, while in the United Kingdom only 11 per cent of the respondents chose imprisonment as the appropriate sanction for individuals involved in price fixing cartels.¹⁵⁰¹

Public opinion plays a significant role in how restrictive business practices, particularly cartels, are viewed.¹⁵⁰² The media, in all its forms, can play a significant role in creating public awareness as to the criminality of cartels. This can go a long way in gaining grass roots support, as well as legitimising and augmenting CAs' commitment in this area.¹⁵⁰³ This means

¹⁴⁹⁶ Case C-191/16, Request for a preliminary ruling from the Landgericht Berlin lodged on 5 April 2016, *Romano Piscioti v Bundesrepublik Deutschland*

¹⁴⁹⁷ Thomas, C. & De Stefano, G. "Extradition and antitrust: Cautionary tales for global cartel compliance" 30 September 2016

¹⁴⁹⁸ Tween, D. & Rafkin, B. "DOJ's first ever extradition on an antitrust charge increases risk to companies doing business in the United States". Available online <http://www.lexology.com/library/detail.aspx?g=6fe43cc5-c71a-496e-95ff-0321ecbe017d> [Accessed 10 August 2014].

¹⁴⁹⁹ Calvani, T. & Calvani, T.H. "Cartel sanctions and deterrence" (2011) 56. *Antitrust Bulletin* 186.

¹⁵⁰⁰ *Reviews of regulatory reform: Korea 2007 progress in implementing regulatory reform*. Organisation for Economic Co-operation and Development (2007) 84-85.

¹⁵⁰¹ Beaton-Wells, C. "Criminal sanctions for cartels- the jury is still out". In Ezrachi, A. [ed]. *Research Handbook on International Competition Law* (2012) 271.

¹⁵⁰² Mehta, P. & Nanda, N. "The role of civil society in promoting competition culture at the regional level". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 254- 276.

¹⁵⁰³ Stephan, A. "The battle for hearts and minds: The role of the media in treating cartels as criminal". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 382-385.

that the 'newsworthiness' of cartels must not be downplayed. The media must refrain from reinforcing perceptions that cartels are unique, distinct from "ordinary" crime"; perpetuating the view that cartels are the preserve of the elite; focusing on "side issues", while relegating the real issues (cartels and their impact) to "footnote status".¹⁵⁰⁴ The under-reporting of the criminality of cartels seems to buttress the view that cartels are not regarded as "front page" news items. In Germany, although bid rigging has been singled out as a criminal offence and sentences have been routinely imposed, such cases rarely feature in the national news.¹⁵⁰⁵

There are also difficulties in visiting criminal liability on cartel participants, specifically for those jurisdictions where the "cartel offence" is an amendment of the competition law statute and/or where the criminal proceedings are based on the findings of CAs. One of these difficulties is the difference between criminal offences and competition law violations. In South Africa, for criminal liability to ensue, the State (represented by the prosecution) bears the onus of proving beyond a reasonable doubt that an accused person, possessing the requisite *criminal capacity*, committed an *unlawful (actus reus), voluntary act*, accompanied by the necessary *fault (mens rea)*.¹⁵⁰⁶ Besides, criminal law is also capable of punishing "incomplete" or "inchoate" criminal offences.¹⁵⁰⁷ In comparison, competition law violations (other than the criminalisation of conduct offences that obstructs the enforcement of the Competition Act) are proved on a civil standard (proof on a balance, or preponderance of probabilities).¹⁵⁰⁸ This is especially problematic when the criminal prosecution of cartel conduct is expressly based on the findings of competition regulators, where the burden of proving a competition law violation is much lighter.¹⁵⁰⁹ Additionally, competition law is not concerned with "inchoate violations", for example, "attempted cartels".¹⁵¹⁰ Competition laws are principally aimed at prohibiting conduct that interferes with the competition process.¹⁵¹¹ For this very reason, the *leitmotif* of competition law

¹⁵⁰⁴ Stephan, A. "The battle for hearts and minds: The role of the media in treating cartels as criminal". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 386-393.

For instance, in *Norris v Government of United States of America* [2008] UKHL 16, 12 March 2008, the accused person (Mr. Norris, a British citizen and former CEO of Morgan Crucible), had been indicted by a United States jury for allegedly participating in a price fixing cartel, in violation of section 1 of the Sherman Act. However, Norris' extradition would eventually fail because at the time it was committed, the United Kingdom had not yet criminalised cartel conduct. In reporting the case, British media seemed more concerned about the extradition of a 'vulnerable' British citizen to the United States, while no mention was made of the fact that what Mr. Norris had done, essentially amounted to theft. See for example, Peel M 'US bid to extradite sick man attacked' *Financial Times*, 01 December 2009. Available online at <http://www.ft.com/cms/s/0/cb44a596-ddff-11de-b8e2-00144feabdc0.html#axzz3mNrcAbqX> [Accessed 10 November 2014]; Hope, C. "Ian Norris talks of his nightmare at last" *The Telegraph*, 17 March 2008. Available online at <http://www.telegraph.co.uk/finance/markets/2786354/Ian-Norris-talks-of-his-nightmare-at-last.html> [Accessed 10 November 2014].

¹⁵⁰⁵ Wagner-von Papp, F. "What if all bid riggers went to prison and nobody noticed? Criminal antitrust law enforcement in Germany". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 157- 182.

¹⁵⁰⁶ Burchell, J. *Principles of Criminal Law* [4th ed.] (2014) 47-59.

¹⁵⁰⁷ Burchell, J. *Principles of Criminal Law* [4th ed.] (2014) 515-556.

¹⁵⁰⁸ Section 68 of the Competition Act.

¹⁵⁰⁹ Section 68 of the Competition Act.

¹⁵¹⁰ See 3.4- 3.10 in Chapter 3.

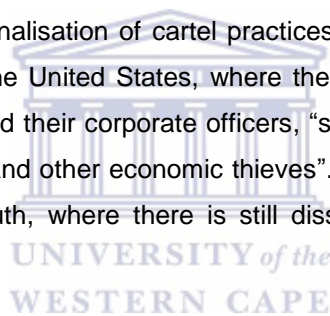
¹⁵¹¹ See 2.7.1 in Chapter 2.

violations is the word 'effect',¹⁵¹² which, in South Africa, need not be anti-competitive or detrimental.¹⁵¹³ Even with cartels, they are regarded as *per se* illegal by their mere existence because they are understood to have a negative effect.¹⁵¹⁴ Further, criminal law is capable of punishing conduct that does not have a negative effect or impact.¹⁵¹⁵

In South Africa, the relationship between the criminalisation of cartels and other investigatory tools available to the Competition Commission has been the subject of much debate. Some have suggested that the criminalisation of cartels will enhance the effectiveness of the Competition Commission's CLP.¹⁵¹⁶ Others have made the point that the cartel offence will negatively affect the use of the CLP by firms seeking to confess their involvement in cartel practices.¹⁵¹⁷ It is submitted that a proper reading of the relevant statutory provision (section 73A of the Competition Act) reveals that the Commission's CLP is not in any danger of being eroded, at least not in the manner that some have argued it would be. This point is discussed in more detail later in this chapter.¹⁵¹⁸

5.7.2. The criminalisation of cartels in the global South

In the global South, the criminalisation of cartel practices has yet to be firmly established.¹⁵¹⁹ This is in sharp contrast to the United States, where there seems to be unanimity that cartel participants, both the firms and their corporate officers, "should be treated in the same way as embezzlers, stock swindlers and other economic thieves".¹⁵²⁰ Such conviction has yet to reach the shores of the global South, where there is still dissent among members of the public,



¹⁵¹² Section 3(1) of the Competition Act of 1998 sets the tone by stipulating that the Act "applies to all economic activity within, or having an *effect* within the Republic"; section 4(1)(a) prohibits agreements which have "the *effect* of substantially preventing, or lessening, competition in a market"; section 5(1) prohibits vertical restrictive practice which have "the *effect* of substantially preventing or lessening competition"; section 8(c) prohibits exclusionary practices "if the anti-competitive *effect* of that act outweighs its technological, efficiency or other pro-competitive gain"; section 8(d) prohibits specific exclusionary practices "unless the firm can show technological, efficiency gains which outweigh the anti-competitive *effects*" thereof; section 9(1)(a) prohibits price discrimination if "it likely to have the *effect* of substantially preventing or lessening competition".

¹⁵¹³ See 7.6.1 in Chapter 7.

¹⁵¹⁴ See 1.5 in Chapter 1; and 3.3.1 and 3.4 in Chapter 3.

¹⁵¹⁵ Van der Merwe, N.J. & Olivier, P.J.J. *Die Onregmatige Daad in die Suid-Afrikaanse Reg* [6th ed.]. (1989) 51; Neethling, J. *et al. Law of Delict* [6th ed.]. (2010) 34-35, 211-250 give this example, "if X races down Johannesburg's main street at 120 km/h in peak hour traffic, and nothing happens, his act will not be considered wrongful... X contravenes the statutory speed limit and his conduct is, as far as criminal law is concerned, indeed *prima facie* wrongful".

¹⁵¹⁶ Merdian, M. *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* [unpublished LLM thesis, University of Cape Town] (2013) 5-7; Dwyer, S. *The Effect of Leniency Policies and Criminal Sanctions in the Fight Against Cartels: An Overview of Developing Countries* [unpublished LLM thesis, University of Cape Town] (2013) 5-72.

¹⁵¹⁷ Kelly, L. "The introduction of a 'cartel offence' into South African law" (2010) 21 *Stellenbosch Law Review* 321-322.

¹⁵¹⁸ See 5.7.3.4 in this Chapter.

¹⁵¹⁹ For example, Articles 47-49 of Indonesia Competition Law of 1999; section 47 of Israel Restrictive Trade Practices Law, 5748-1988 ; sections 89-98 of Japan Antimonopoly Act of 2009; section 178 (1) Russia Criminal Code; Article 66-67 of South Korea Monopoly Regulation and Fair Trade Act of 2011; Article 35 of Taiwan Fair Trade Act of 2011; and section 51 of Thailand Trade Competition Act of 1999.

¹⁵²⁰ Baker, D.I. "Punishment for cartel participants in the US: A special model?". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 27; Barnett, T.O. "Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement" United States Department of Justice, Antitrust Division 29 February 2008 1-16; Eckert, D. "Sherman Act sentencing: An empirical study, 1971-1979" (1980) 71. *Journal of Criminal Law & Criminology* 244.

lawmakers and the judiciary, about the aptness of the criminalisation of cartel conduct. The levels of clarity and unity in the United States can probably be attributed to the fact that the Sherman Act has been in force for about 125 years. While the criminalisation of cartel conduct was expressly stated in the Sherman Act, since enactment, it would take some 70 years before criminal sanctions would be visited on individuals.¹⁵²¹ During this time, federal judges seemed unwilling to impose incarceration sentences on individuals involved in cartel conduct,¹⁵²² even though the law made provision for custodial sentences for antitrust violations.¹⁵²³ In comparison, competition laws in the global South are relatively new.

Some members of COMESA, EAC, SACU and SADC, only enacted their competition laws in the 1990s, while others enacted their laws within the last decade, and some are yet to enact their domestic competition laws.¹⁵²⁴ Their domestic competition regulators are also relatively new; therefore, they are still developing. However, not all is lost, because even the best competition law frameworks can take a considerable time to establish an effective system of deterrence, based on jail sentences for individual cartel participants.¹⁵²⁵ The ability of CAs to impose criminal liability for antitrust violations must not be seen as the pinnacle of development, as far as the enforcement of competition law is concerned. It is submitted that criminal sanctions certainly add a powerful deterrent in the fight against cartel practices, in particular, and competition law violations, in general, because they visit personal consequences on those individuals, who are actually responsible for carrying out the contraventions.¹⁵²⁶

5.7.3. The statutory provisions: A case study of section 73A of the Competition Act of 1998

In 2008, South Africa's legislature introduced the criminalisation of cartels.¹⁵²⁷ Section 12 of the Competition Amendment Act of 2009 inserted section 73A, the principal provision that criminalises cartel practices. The Amendment was seen as a progressive step in holding

¹⁵²¹ Baker, D.I. "The use of criminal law remedies to deter and punish cartels and bid rigging" (2001) 9. *George Washington Law Review* 693-714; Herling, J. *The Great Price Conspiracy: The Story of Antitrust Violations in the Electrical Industry* (1962); Lean, D.F., Ogur, J.D. & Rogers, R.P. *Competition and collusion in electrical equipment markets: An economic assessment*. Bureau of Economics Staff Report to the Federal Commission July 1982; *Ohio Valley Electric Corporation et al v General Electric Corporation et al* 244 F.Supp. 914 (1965); Neal, C.P. & Goldberg, P. "The electrical equipment antitrust cases: Novel judicial administration" (1964) 70. *American Bar Association Journal* 621-628.

¹⁵²² Baker, D.I. & Reeves, B.A. "The paper label sentences: Critiques" (1977) 86 *Yale Law Journal* 623.

The trend favoured by federal judges was to impose "public service" sentences. It seems that the prevailing sentiment at that time was that cartel participants were outstanding members of the communities in which they lived as they gave financial support to noble causes such as churches and charities. Thus, they were not a danger to society.

¹⁵²³ *Guidelines for Sentencing: Recommendation in Felony Cases under the Sherman Act*. United States Department of Justice, Antitrust Division 24 February 1977; *Sentencing Guidelines and Policy Statements*. United States Department of Justice Sentencing Commission (1987).

¹⁵²⁴ See 3.5, 3.7-3.10 in Chapter 3 and 4.5 in Chapter 4.

¹⁵²⁵ Baker, D.I. "Punishment for cartel participants in the US: A special model?" In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 28.

¹⁵²⁶ Baker, D.I. "The use of criminal remedies to deter and punish cartels and bid rigging" 69 *George Washington Law Review* (2001) 705, where one senior executive states that "as long as you are only talking about money, the company can at the end of the day take care of me...but once you begin talking about taking away my liberty, there is nothing the company can do for me."

¹⁵²⁷ Competition Amendment Bill, B 31D-2008.

directors to account and adding to the deterrent, mechanisms regarding cartel practices.¹⁵²⁸ Others, however, were more cautious. While commending the step, they highlighted the potential problems of the Amendment. They asserted that it would have “a chilling effect” on benign commercial conduct. They cited the lack of clarity as to how the National Prosecuting Authority (NPA) would prosecute a section 73A offence, wondered whether the Competition Commission would be involved in the process, in what capacity, and to what extent, as well as the constitutional implications that would be triggered by section 73A.¹⁵²⁹ Some raised the issue about the possible duplication of roles by the NPA and the Competition Commission.¹⁵³⁰ Others were opposed to the criminalisation of cartel practices. One of these was the former Chairperson of the Competition Tribunal.¹⁵³¹ On 01 May 2016, certain provisions of section 73A came into force, specifically sub-section (1), (2), (3) and (4), while sub-section (5) and (6) are yet to come into force.¹⁵³²

Section 73A, titled “Causing or permitting a *firm* to engage in *prohibited practice*”, is the principal provision, which criminalises cartel conduct. It reads:

1. “A person commits an offence if, while being a director of a *firm* or while engaged or purporting to be engaged by a *firm* in a position having management authority within the *firm*, such person-
 - a) caused the *firm* to engage in a *prohibited practice* in terms of section 4(1)(b); or
 - b) knowingly acquiesced in the *firm* engaging in a *prohibited practice* in terms of section 4(1)(b).
2. For 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* in a *prohibited practice* in terms of section 4(1)(b.)
4. The Competition Commission –
 - a) may not seek or request 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

¹⁵²⁸ Monnye, S.L. & Afrika, S.L. “Prison beckon directors involved in cartels” (2008) 16. *Juta Business Law* 13-19; Makhubele, D. “Fighting over bread crumbs: Cartels and the Competition Act 89 of 1998”. *De Rebus*, March 2014 21-22.

¹⁵²⁹ Kelly, L. “The introduction of a ‘cartel offence’ into South African law” (2010) 21. *Stellenbosch Law Review* 321-333; Van der Meulen, S. “Criminalisation of cartel conduct”. *Polity Focus* 07 March 2014. Available online at <http://www.polity.org.za/article/criminalisation-to-deter-cartel-conduct-2014-03-07> [Accessed 10 November 2014]; Lopes, N. & Lurie, J. “Concern over criminalisation of competition findings”. *Business Day* 09 March 2009. Available online at https://www.ensafrica.com/newsletter/briefs/09_03_09%2001%2001r0903LAW_AL_9b.pdf [Accessed 10 November 2014].

¹⁵³⁰ Jordaan, L. & Munyai, P. “The constitutional implications of the new section 73A of the Competition Act 89 of 1998” (2011) 23. *South African Mercantile Law Journal* 201-203.

¹⁵³¹ Carte, D. “Don’t jail offenders - Competition boss” Moneyweb 05 December 2007. Available online at <http://www.moneyweb.co.za/archive/dont-jail-offenders-competition-boss/> [Accessed 10 December 2014].

¹⁵³² Proclamation No. 25 of 2016, Government Gazette No 39952, 22 April 2016. Available online at http://www.gov.za/sites/www.gov.za/files/39952_proc25.pdf [Accessed 11 June 2016].

- b) may make submission 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* in the circumstances
5. In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the *firm* or a finding by the Competition Tribunal or the Competition Appeal Court that the *firm* has engaged in a *prohibited 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 acquitted.”

As to the competent sentence to be imposed, where a person is found guilty of committing the cartel offence, section 13 of the Competition Amendment Act of 2009 amends section 74. It now provides that:

- a) “in the case of a contravention of section 73(1), or section 73A, a fine not exceeding R500 000-00 or 10 years, or to both to a fine and such imprisonment;”

5.7.3.1. The threshold for the “cartel offence”

The criminal offence created by section 73A is directed at the “controlling mind” of a firm, that is, persons serving as directors of firms, or persons in management positions. For conduct to fall within the purview of section 73A, there must be a causal link between a director (or a person in a management position) and the cartel conduct as prohibited by section 4(1)(b); or the director (or person in a management position) must have ‘knowingly acquiesced’ to the firm’s participation in the cartel activity.

5.7.3.2. The bases for prosecution and the section 73A criminal offence

If the threshold is met, prosecution can only be done under two circumstances: where there have been admissions of liability made in consent orders; or where the Competition Tribunal, or the Competition Appeal Court, has found that cartel conduct has occurred.

5.7.3.2.1. The Competition Tribunal’s consent orders and the section 73A criminal offence

In terms of section 49D, the Competition Commission can negotiate a settlement with a respondent firm, during, on or after completing an investigation of a complaint.¹⁵³³ Thereafter, the Competition Tribunal, without hearing any evidence, may confirm the agreement as a consent order.¹⁵³⁴ The effect of section 73A(3)(a) is that consent orders will now be the basis for prosecution. Criticism that a section

¹⁵³³ See 5.4- 5.5 in this Chapter.

¹⁵³⁴ See 5.4- 5.5 in this Chapter.

73A offence will undermine the Commission's settlement procedures is justified. However, it is submitted that such an effect will depend on the contents of the consent order.¹⁵³⁵ Recall that the Competition Tribunal and the Competition Appeal Court have held that the legal consequences of consent orders is dependent on the contents thereof, and not the fact that it is designated as a consent order.¹⁵³⁶ This means that it is only a consent order that contains an admission that will form the basis for criminal prosecution, in terms of section 73A. However, in light of the fact that virtually all consent orders contain admissions, it is submitted that this is little comfort to directors and persons in management.¹⁵³⁷ Therefore all consent orders that contain admissions of liability, expose directors, or persons in management positions, to criminal prosecution and a possible fine of up to R500 000, and/or a prison sentence of up to 10 years.

Since section 73(A)(1)-(4) came into force on 01 May 2016, a distinction must be drawn between consent orders containing admissions of liability, made *before* this provision came into force, and those made *after* it came into force. In line with the common law presumption against the retrospective application of legislation, admissions of liability, contained in consent orders made *before* section 73A (1)-(4) came into force, will not be a basis for prosecution.¹⁵³⁸ However, with consent orders (containing admissions of liability) concluded *after* section 73A(1)-(4) came into force, the possibility of a director, or person in a management position facing criminal prosecution for participating in a cartel, is very real.

5.7.3.2.2. *The findings of the Competition Tribunal or the Competition Appeal Court's findings as the basis for the section 73A criminal offence*

Regarding the findings of the Tribunal and Appeal Court forming the basis of a section 73A prosecution, the problem of a civil standard being the basis of criminal prosecution, still applies.

¹⁵³⁵ See 5.4.4 in this Chapter.

¹⁵³⁶ See 5.4.4 in this Chapter.

¹⁵³⁷ See 5.4.4 in this Chapter.

¹⁵³⁸ Botha, C. *Statutory Interpretation: An Introduction for Students* [5th ed.] (2013) 55-62; *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman of the National Transport Commission & Others, Transnet Ltd (autonet Division) v Chairman of the National Transport Commission & Others* [1999] ZASCA 40; *Transnet Ltd v Ngcezula* [1994] ZASCA 192; *Principal Immigration Officer v Purshotam* 1928 AD 435; *Curtis v Johannesburg Municipality* 1906 TS 308; *Veldman v Director of Public Prosecutions, Witswatersrand Local Division* [2005] ZACC 22. However, there are exceptions to this common law principle. First, where the relevant statute only deals with procedural aspects, provided the procedures do not negatively impact on substantive rights, *Minister of Public Works v Hafajee* [1996] ZASCA 17; *Euromarine International of Mauren v The Ship Berg* [1986] ZASCA 4. Secondly, where the retrospective application of the statute brings with it benefits for the individual concerned, *R v Sillas* 1959 (4) SA 305.

5.7.3.3. *The National Prosecuting Authority's jurisdiction and the section 73A offence*

In terms of section 73A, the authority to conduct the criminal prosecution of the section 73A offence vests solely with the NPA,¹⁵³⁹ while the Competition Commission remains the investigator and prosecutor of competition law violations, as far as the administrative enforcement of the Act is concerned. Therefore, it makes sense for the NPA to assume its status as the *dominus litis* in prosecuting the cartel offence, or else, the alternative of vesting the power to prosecute the section 73A offence in the Commission will have been contrary to section 179 of the Constitution. However, there must be co-ordination between the NPA and the Competition Commission to ensure that the criminal sanctions complement other enforcement tools, such as the Commission's settlement procedure. David Lewis argues that, while jail time may be appropriate, for example, on the participants of price fixing and bid rigging cartels, it creates considerable complexities in the investigation and prosecutorial stages, undertaken by distinct bodies, namely the Competition Commission and the NPA.¹⁵⁴⁰

The Competition Commission, however, indicated its misgivings about section 73A. While the Commission concurs with public sentiment that competition regulators should be better equipped to deal with cartel conduct, in order to hold cartel participants accountable, they have called for caution regarding section 73A. The point has been made that the strength of the regulators does not only come through amendments, such as section 73A, but also through creative use and vigorous application of the Competition Act.¹⁵⁴¹ In addition, there is the possible adverse effect that section 73A will have on the Competition Commission's successful record of accomplishment in its Leniency Policy.¹⁵⁴² David Lewis, former Chairperson of the Competition Tribunal, argues that the Commission and the Tribunal's successful records of accomplishment in its cartel-busting campaign is due to the independence they enjoy in investigating, prosecuting and adjudicating contraventions of the Competition Act, without fear or favour.¹⁵⁴³

According to Lewis, while the Commission aligns its investigatory and administrative prosecutorial priorities with the government's economic policy, it has not allowed its work

¹⁵³⁹ Section 179(1)-(2) of the Constitution of the Republic of South Africa, 1996; section 2 and section 20 of the National Prosecuting Authority Act of 1998 .

¹⁵⁴⁰ Lewis, D. *Commission's critics wrong in criticising cartel fines*, 02 July 2013. IOL Business News. Available online at <http://www.iol.co.za/business/opinion/commissions-critics-wrong-in-criticising-cartel-fines-1540414> [Accessed 10 October 2015].

¹⁵⁴¹ Creamer, T. *Executives now face jail time if they knowingly participate in cartels*. Available online at <http://www.engineeringnews.co.za/print-version/executives-now-face-jail-time-if-they-knowingly-participate-in-cartels-2008-10-23> [Accessed 10 October 2015].

¹⁵⁴² Creamer, T. *Executives now face jail time if they knowingly participate in cartels*. Available online at <http://www.engineeringnews.co.za/print-version/executives-now-face-jail-time-if-they-knowingly-participate-in-cartels-2008-10-23> [Accessed 10 October 2015].

¹⁵⁴³ Lewis, D. *Commission's critics wrong in criticising cartel fines*, 02 July 2013. IOL Business News. Available online at <http://www.iol.co.za/business/opinion/commissions-critics-wrong-in-criticising-cartel-fines-1540414> [Accessed 10 October 2015].

to be dictated to by personal, or political, agenda,¹⁵⁴⁴ which is why it has been successful. The same cannot be said of the NPA, whose independence has been questioned in the appointment of its officials,¹⁵⁴⁵ and the way it has handled cases involving high profile politicians and government officials.¹⁵⁴⁶

5.7.3.4. The Competition Commission's Leniency Policy and the section 73A offence

It seems that, although the NPA is the *dominus litis* under section 73A, the Competition Commission is not entirely shut out, as section 73A(4)(a) stipulates that the Commission may not seek, or request, the prosecution of a person for the section 73A offence, whom the Commission has certified as "deserving of leniency". Because of the permissive language used, the implication is that the Commission may request that the NPA institute the criminal prosecution of an individual. For such a person, who has been certified as being worthy of leniency, section 73A(4)(b) permits the Commission to make representations to the NPA that the person be treated leniently. It could be, however, that the use of the permissive word "may" has resulted in much consternation among those in the business sector. It would have been better if peremptory language, such as "shall not" or "will not" were used in order to allay any fears. However, the current provision is couched in permissive language. It is submitted that the legislature's intent was to leave room for the Commission to exercise its discretion under section 73A.

Because section 73A(4) refers to leniency awarded to an individual, it is tempting to assume that the Competition Commission's CLP¹⁵⁴⁷ applies to the criminal offence of engaging in cartel conduct. This is why there has been criticism that section 73A will affect the Commission's CLP. It is submitted that the Commission's current CLP does not

¹⁵⁴⁴ Lewis, D. *Commission's critics wrong in criticising cartel fines*, 02 July 2013. IOL Business News. Available online at <http://www.iol.co.za/business/opinion/commissions-critics-wrong-in-criticising-cartel-fines-1540414> [Accessed 10 October 2015].

¹⁵⁴⁵ For example, Advocate Nomgcobo Jiba, the former Deputy National Director of Public Prosecutions, whose appointment to the post in 2010 was viewed as largely a political appointment. The public sentiment was that she would not be able to fulfil her duties impartially. In September 2016, she was struck off the roll of advocates. See *General Council of the Bar of South Africa v Nomgcobo Jiba & Others* 23576/ 2015, in which the High Court had scathing remarks about the manner in which she had conducted herself, when she served as Deputy National Director of Public Prosecutions. The Court found that Jiba, together with the National Prosecuting Authority's special director, had acted in bad faith, when they defended a withdrawal of criminal charges against a politically connected accused person.

See also Van Wyk, P. *Shock ruling rocks NPA: It's now "untenable" for Jiba and Mwrebi to hold their positions after judgment*, 16 September 2016. The Mail & Guardian. Available online at <http://mg.co.za/article/2016-09-16-00-shock-ruling-rocks-npa-its-now-untenable-for-jiba-and-mrwebi-to-hold-their-positions-after-judgment> [Accessed 11 December 2016].

The present Director of National Public Prosecutions, Advocate Shaun Abrahams has also faced allegations that he is unfit to hold the office, due to his lack of impartiality and political control by the Office of the President. See Madia, T. *Application launched to get Shaun Abrahams suspended*, News24 09 November 2016. Available online at <http://www.news24.com/SouthAfrica/News/application-launched-to-get-shaun-abrahams-suspended-20161109> [Accessed 11 December 2016].

¹⁵⁴⁶ Examples of these cases include *Thint (Pty) Ltd v National Director of Public Prosecutions & Others, Zuma & Another v National Director of Public Prosecutions & Others* 2009 (1) (CC); *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA); *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC); *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 27 (CC); Selabe, B.C. *The independence of the national prosecuting authority of South Africa: Fact of fiction?* University of the Western Cape unpublished LLM thesis (2015) 44-89.

¹⁵⁴⁷ See 5.2- 5.3 in this Chapter.

apply because, as its name suggests, it is “corporate” leniency policy, it is not “individual” leniency policy.¹⁵⁴⁸ Therefore, it applies to firms, as defined in the Competition Act of 1998 and the Commission’s CLP.¹⁵⁴⁹ As previously mentioned, even though the Commission encourages “whistle blowers”, currently, such individuals are not eligible for immunity.¹⁵⁵⁰

The leniency envisaged in section 73A(4) is different to what currently exists. Although the Commission must certify a person as deserving of leniency, there is no framework or rules by which to do this. It is submitted that further clarification is required; either through the amendment of the Commission’s current CLP, to include the certification of individuals, as envisioned by section 73A(4), or alternatively adopting an entirely new leniency mechanism that is specifically directed at individuals facing criminal prosecution, in terms of section 73A. On this point, lessons, conceivably, could be learnt from the United Kingdom’s prosecution of the “cartel offence”, where immunity from criminal prosecution is granted to individuals for their co-operation, in the form of what is referred to as, ‘no- action letters’.¹⁵⁵¹ Consequently, it is also submitted that the concerns alluded to, regarding the connection between the CLP and criminal prosecution, under section 73A, are because of misunderstanding, or misinterpreting, the provisions in section 73A. Consequently, this criticism falls away.

5.7.3.5. *The presumptions and the section 73A offence*

In terms of section 73A(5), a consent order containing an admission of liability, or a finding by the Competition Tribunal, or the Competition Appeal Court that a cartel practice has occurred, are “*prima facie* proof of the fact that the firm has engaged in that conduct’. In law, presumptions serve as ‘aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry’.¹⁵⁵² The creation of the presumption in section 73A(5) raises several constitutional issues. It has the potential to violate the accused director’s right of presumption of innocence; their right against self-incrimination; their right to remain silent; and their right to a fair trial, as

¹⁵⁴⁸ See 5.2.2- 5.3 in this Chapter.

¹⁵⁴⁹ Section 1(1)(i)(a)(xi) of the Competition Act of 1998; para 2.5, 2.6, 3.1, 3.3, 3.4, 3.5, 3.7, and 5.6- 5.7 of Competition Commission Corporate Leniency Policy of 2008.

¹⁵⁵⁰ See 5.2.2- 5.3 in this Chapter.

¹⁵⁵¹ Section 190(4) of United Kingdom Enterprise Act of 2002.

This immunity is different from the immunity granted in proceedings concerning the administrative enforcement of United Kingdom Competition Act of 1998.

¹⁵⁵² Schwikkard, P.J. “Rebuttable presumptions of law”. In Schwikkard, P.J. [ed.]. *Principles of Evidence* [3rd ed.] (2009) 498-502; Thayer, J.B. *A Preliminary Treatise of Evidence at Common Law* (1898) 314; Elliot, D.W. *Elliot and Phipson Manual of the Law of Evidence* [12th ed.] (1987) 77.

guaranteed by section 35 of the Constitution.¹⁵⁵³ Thus, the Constitution entrenches an accused person's right to be presumed innocent.

In *S v Zuma & Others*, a case dealing with the constitutionality of presumptions against accused persons, the Constitutional Court held that such presumptions have the effect of reversing the burden of proof and placing it on an accused person, thereby seriously compromising their fundamental rights.¹⁵⁵⁴ The constitutionality of a presumption, such as the one contained in section 73A(5), may depend on the language in which it is couched. The use of peremptory language, such as 'shall be presumed unless the contrary is proved', has the effect that an accused person can still be convicted of an offence, regardless of the fact that there is reasonable doubt. The use of "is *prima facie* evidence' creates an evidentiary burden, which does not violate the accused person's right to be presumed innocent.¹⁵⁵⁵ However, if this analysis is taken to its logical conclusion, it means that, regardless of whether the presumption reverses the burden of proof, or creates an evidentiary burden, the result is the same in both cases. If the accused person elects to exercise his/her right to remain silent, s/he will be found guilty of an offence, because of that presumption.¹⁵⁵⁶ In *Scagel v AG Western Cape*, the Constitutional Court, emphasised that the phrase 'shall be prima facie evidence' does not impose the burden of proof on the accused person, it only results in an evidentiary burden.¹⁵⁵⁷ Regarding the status of section 73A, an acceptable alternative is that the presumption contained therein, results in nothing more than an evidentiary burden. Therefore, a conviction based on the presumption alone is not possible, as the NPA must still prove a causal nexus between the person's conduct and the prohibited practice by the firm, or that the accused person "knowingly acquiesced" to the firm's participation in the prohibited practice.¹⁵⁵⁸ As noted at the beginning, section 73A(5) has yet to enter into operation.¹⁵⁵⁹

¹⁵⁵³ Schwikkard, P.J. "A constitutional perspective on statutory presumptions". In Schwikkard, P.J. [ed.]. *Principles of Evidence* [3rd ed.] (2009) 513- 521; Kelly, L. "The introduction of a 'cartel offence' into South African law" (2010) 21. *Stellenbosch Law Review* 331; Jordaan, L. & Munyai, P. "The constitutional implications of the new section 73A of the Competition Act 89 of 1998" (2011) 23. *South African Mercantile Law Journal* 206-213.

¹⁵⁵⁴ 1995 (2) SA 642 (CC).

For EU perspectives on the implication of the cartel offence on the European Convention on Human Rights, see Whelan, P. "Criminal cartel enforcement in the EU: Avoiding a human rights trade off". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 217- 235.

¹⁵⁵⁵ Jordaan, L. & Munyai, P. "The constitutional implications of the new section 73A of the Competition Act 89 of 1998" (2011) 23. *South African Mercantile Law Journal* 207-209, citing Ashworth, A. "Four threats to presumption of innocence" (2006) 123. *South African Law Journal* 89.

¹⁵⁵⁶ Jordaan, L. & Munyai, P. "The constitutional implications of the new section 73A of the Competition Act 89 of 1998" (2011) 23. *South African Mercantile Law Journal* 207-209, citing Schwikkard, P.J. *The Presumption of Innocence* (1999) 116-117.

¹⁵⁵⁷ 1996 (2) SACR 579 (CC). Nonetheless, the Court found that the statutory provisions in question, section 6(1) and section 6(3) of the Gambling Act of 1965, which created a presumption, violated a person's right to a fair trial and their right to be presumed innocent.

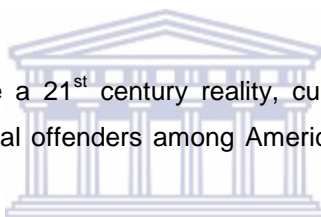
¹⁵⁵⁸ Section 73A(1)(a)-(b); Jordaan, L. & Munyai, P. "The constitutional implications of the new section 73A of the Competition Act 89 of 1998" (2011) 23. *South African Mercantile Law Journal* 207-210.

¹⁵⁵⁹ See 5.7.3 in this Chapter.

5.8. The Impact of criminalising Cartel Conduct

With the criminalisation of cartels gradually gaining momentum across the world, the United States has been at the forefront.¹⁵⁶⁰ Recall that section 1 of the Sherman Act has always criminalised cartels.¹⁵⁶¹ Therefore, in the United States there is no talk of “administrative penalties” when ruminating public enforcement mechanisms and cartels. A former executive of one of the companies involved in the graphite electrodes PIC, served a 17-month prison sentence, in addition to paying a criminal fine, for fixing the price and allocating the volume of electrodes sold in the United States, as well as in other jurisdictions around the world.¹⁵⁶² Two executives involved in the lysine PIC, received 36 months and 33 months of imprisonment,¹⁵⁶³ respectively. In 2002, Alfred Taubman was sentenced to 10 months’ imprisonment for his role as chairman of Sotheby’s, due to its involvement in the arts auctions price fixing cartel, with rival auction house, Christie’s.¹⁵⁶⁴ The Antitrust Division’s statistics for incarceration sentences of antitrust violations reveal that, in the 1990s, the Antitrust Division obtained 3 313 days, in 2005 it was 13 157 days, in 2007 it was 31 391 days, in 2008 it was 14 331 days, and in 2009 it was 25 396 days.¹⁵⁶⁵ In addition, the average length of jail time increased from eight months in the 1990s to an average of 31 months in 2007.¹⁵⁶⁶ In 2012, the Antitrust Division realised criminal fines of US\$1.14 billion.¹⁵⁶⁷

Even though cartels continue to be a 21st century reality, current trends indicate that the use of custodial sentences has curbed serial offenders among American firms.¹⁵⁶⁸ It is not the same firms



¹⁵⁶⁰ Kobayashi, B.H. “Antitrust, agency, and amnesty: An economic analysis of the criminal enforcement of antitrust laws against corporations” (2001) 69 *George Washington Law Review* 715- 728; Klawiter, D.C. “After the deluge: The powerful of substantial criminal fines, imprisonment, and other penalties in the age of international cartel enforcement” (2001) 69. *George Washington Law Review* 745- 765; Connor, J.M., Foer, A.A. & Udwin, S. “Criminalising cartels: An American perspective” (2010) 1. *New Journal of European Criminal Law* 199- 217; Hammond, S.D. *Fighting Cartels - Why and How? Lessons Common to Detecting and Deterring Cartel Activity*. 3rd Nordic Competition Policy Conference, 09 September 2000.

¹⁵⁶¹ See 3.3- 3.5 in Chapter 3.

Upon conviction, for violating section 1 of the Sherman Act, a person shall be punished by a fine of not more than US\$100 million for firms, and US\$1 million for natural persons or an imprisonment sentence not exceeding 10 years or both.

¹⁵⁶² United States Department of Justice Press Release of 29 September 1999.

See 6.6 in Chapter 6.

¹⁵⁶³ United States Department of Justice Press Release of 17 September 1998; and Press Release of 22 September 2000.

See also Eichenweld, K. *The Informant: A True Story* (2000), a book which details the workings of the PIC.

See also 6.6 in Chapter 6.

¹⁵⁶⁴ United States Department of Justice Press Release of 18 August 2000, and Press Release of 05 October 2000 .

¹⁵⁶⁵ Hammond, S.D. *Recent developments, trends, milestones in the Antitrust Division’s criminal enforcement program*. United States Department of Justice, ABA Section of Antitrust Law, 26 March 2008 1- 21; Barnett, T.O. *Antitrust update: Supreme Court decisions, global developments, and recent enforcement*. United States Department of Justice, Antitrust Division 29 February 2008 17-18.

¹⁵⁶⁶ Hammond, S.D. *Recent developments, trends, milestones in the Antitrust Division’s criminal enforcement program*. United States Department of Justice, ABA Section of Antitrust Law, 26 March 2008 1- 21; Barnett, T.O. *Antitrust update: Supreme Court decisions, global developments, and recent enforcement*. United States Department of Justice, Antitrust Division 29 February 2008 17-18

¹⁵⁶⁷ *Antitrust Division 2013 criminal enforcement update*. United States Department of Justice available online at <http://www.justice.gov/atr/public-documents/division-update-spring-2013/criminal-program> [Accessed 15 March 2015].

¹⁵⁶⁸ Whish, R. *Competition Law* [5th ed.] (2005) 454, it seems that “[a]s a deterrent, there is no question that in the US, for example, being in prison rather than with the family on Thanksgiving Day is going to have a deterrent effect than the imposition of a corporate fine might be.”

engaging in cartel practices, re-offending again. Instead, it is those firms have not been previously found guilty of antitrust violations.¹⁵⁶⁹ Current statistics indicate that foreign companies make up the bulk of defendants, from whom 80 per cent of corporate fines have been collected.¹⁵⁷⁰ Initially, the Antitrust Division adopted a 'no jail' sentence approach towards foreign defendants; however, currently, they receive the same treatment as American defendants and, therefore, can expect custodial sentences and have in fact been sentenced to imprisonment.¹⁵⁷¹

In South Africa, the effect of section 73A is still to be witnessed, as there is yet to be a prosecution of an individual. Certainly, the introduction of the cartel offence is commendable; however, much still remains to be done. For instance, the section 73A brings with it institutional implications; the NPA must act in a transparent manner when prosecuting section 73A offences; it must have the capabilities to prosecute competition law matters; it must synergise its work with that of the Competition Commission; and the judiciary must be capable to adjudicate on section 73A offences.¹⁵⁷² Possible jurisdictional conflicts can be expected between the NPA and the Competition Commission, allocating the NPA's resources to section 73A violations.¹⁵⁷³ In addition, the meaning of 'leniency' under section 73A has to be clarified, as well as how this will be determined in practice by the Competition Commission. An unfortunate position is that section 73A(6), which provides that a person found guilty may be fined up to ZAR500 000, or imprisoned for up to 10 years (or both), is still yet to enter into force. It has been suggested that, if an accused person is charged under section 73A (before section 73A(6)) and found guilty of the offence, the competence sentence that will be imposed on them is a fine of up to ZAR2 000, or six months imprisonment (or both), which are prescribed for those classes of conduct that hinder, or obstruct the implementation of the Act.¹⁵⁷⁴

¹⁵⁶⁹ Baker, D.I. "Punishment for cartel participants in the US: A special model?" In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 34; Harding, C. "The anti-cartel enforcement industry: Criminological perspectives on cartel criminalization". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 359-379.

¹⁵⁷⁰ *Sherman Act violations yielding a corporate fine of US\$10 million or more*. United States Department of Justice (2010). Available online at <http://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more> [Accessed on 15 March 2015].

¹⁵⁷¹ Hammond, S.D. *Recent developments, trends, milestones in the Antitrust Division's criminal enforcement program*. United States Department of Justice, ABA Section of Antitrust Law, 26 March 2008 1- 21.

¹⁵⁷² Kovacic, W.E. "Criminal enforcement norms in competition policy: Insights from the U.S. experience". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 45-73.

¹⁵⁷³ Similar challenges have faced the Australian Competition and Consumer Commission since the introduction of the cartel offence, in terms of Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth). See Beaton-Wells, C. "Cartel criminalisation and the Australian Competition and Consumer Commission: Opportunities and challenges". In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 188-199.

¹⁵⁷⁴ Section 74 (1)(b).

See Henderson, R. *Amendments to the Competition Act "not been thought through"*, 17 May 2016. Available online at <http://www.timeslive.co.za/local/2016/05/17/Amendments-to-the-Competition-Act-not-been-thought-through> [Accessed 11 December 2016].

5.9. Perspectives from COMESA, EAC, SACU and SADC Members

5.9.1. Leniency and settlement arrangements

There is no uniformity among individual members regarding the use of leniency procedures and settlement mechanisms. Only a minority of the domestic laws make provision for these mechanisms,¹⁵⁷⁵ while the majority do not. Within the RECs, the COMESA Competition Regulations of 2004 and the COMESA Competition Rules of 2004, currently, do not authorise the Competition Commission, or the Board of Commissioners, to offer immunity to firms, or conclude settlement agreements with firms. The SADC Declaration on Regional Corporation on Competition and Consumer Policies of 2009 does not make provision for leniency procedures, settlement agreements, and payment of administrative fines or criminalising cartels. The EAC Competition Act of 2006, currently, does not authorise the Competition Authority to negotiate settlements with cartel participants. However, the Act does make provision for “amnesty” or reduced penalties for persons, who cooperate with the RCA in its investigations.¹⁵⁷⁶ Unfortunately, this is all there is to the EAC’s amnesty provisions. There are no further details, or rules on this kind of amnesty.

5.9.2. Administrative penalties

Concerning administrative penalties, individual members make provision for the payment of administrative penalties in one form, or another.¹⁵⁷⁷ The COMESA Competition Regulations of 2004 authorise the COMESA Competition Commission to impose a fine, subsequent to a finding that a prohibited practice has occurred.¹⁵⁷⁸ The Board of Commissioners is authorised to impose fines on firms that participate in prohibited practices, such as cartels. These fines may not exceed 10 per cent of a firm’s annual turnover in the Common Market, in the preceding financial year.¹⁵⁷⁹ In determining the fine, the Board must take into account the duration and gravity of the cartel.¹⁵⁸⁰ The decision to impose a fine is not of a criminal nature.¹⁵⁸¹ In the EAC, ordering the payment of fines is encompassed in the broad powers of the Competition Authority to ‘impose sanctions and remedies’.¹⁵⁸²

¹⁵⁷⁵ Section 40 of Namibia Competition Act of 2003; section 57 and section 79 of Zambia Competition and Consumer Protection Act of 2010; section 38 of Kenya Competition Act of 2010.

¹⁵⁷⁶ Section 42(3) of the EAC Competition Act of 2006.

¹⁵⁷⁷ For example section 43(2)-(7) of Botswana Competition Act of 2009; section 38(d) of Namibia Competition Act of 2003; section 86 of Zambia Competition and Consumer Protection Act of 2010; section 36(d) of Kenya Competition Act of 2010; section 56 of Mauritius Competition Act; Article 8, 29-30, 32 of Mozambique Competition Law of 2013; and Article 45 of Seychelles Fair Competition Act of 2009.

¹⁵⁷⁸ Article 21 (10)(b) of COMESA Competition Regulations of 2004.

¹⁵⁷⁹ Rule 45(2) of COMESA Competition Rules of 2004.

¹⁵⁸⁰ Rule 45(3) of COMESA Competition Rules of 2004.

¹⁵⁸¹ Rule 45(5) of COMESA Competition Rules of 2004.

¹⁵⁸² Section 42(1)(e) of EAC Competition Act of 2006.

5.9.3. The criminalisation of cartel practices

The COMESA Competition Regulations of 2004 and the Competition Rules of 2004 do not presently criminalise cartel conduct. Although the Competition Regulations provide that engaging in prohibited practices, such as, price fixing, market allocation, and collusive bidding, qualify as “offences”,¹⁵⁸³ this term does not seem to be used in the criminal law sense. This inference is based on a reading of the powers and functions of the COMESA Competition Commission and the COMESA Board of Commissioners.¹⁵⁸⁴ Their roles are of an administrative nature. In the EAC, the position is similar to that in COMESEA; the EAC Competition Act does not currently criminalise cartel practices.

5.10. Concluding Remarks

Regarding cartels, it is important that the various enforcement mechanisms be implemented in a manner that ensures optimal results. The investigatory tools are certainly valuable in ensuring this. Leniency policies, settlement procedures and administrative fines play an important role in this process. Leniency policies incentivise confessions by cartel participants, thereby speeding up the investigations of the NCAs. Unfortunately, the global South has not been actively using leniency policies in the fight with cartels. In addition, amnesty procedures concerning cartels are not currently utilised by COMESA, EAC, SACU and SADC. This is also unfortunate. Settlement procedures are also useful in the fight against cartels. However, as with leniency policies, they currently do not feature in COMESA, EAC, SACU and SADC. Although the criminalisation of cartel conduct is new in the developing world, it does hold potential to serve as a deterrent, where administrative fines seem not to achieve the required result. It is clear, however, that the developing world still has much to learn about the criminalisation of cartel conduct.

¹⁵⁸³ Article 19(1) of COMESA Competition Regulations of 2004.

¹⁵⁸⁴ See 3.7 in Chapter 3.

PART C:
THE INTERNATIONAL
NATURE OF CARTEL CONDUCT



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CHAPTER SIX

PRIVATE INTERNATIONAL CARTELS

"...[T]here has been a major transformation in the attitude of competition authorities toward international cartels. In the past, even the most hostile antitrust authorities presumed that international cartels were largely beyond prosecution, either for diplomatic or jurisdictional reasons or simply for lack of evidence. Today ... countries are willing to prosecute international cartels."¹⁵⁸⁵

6.1. Overview

In this chapter, the researcher focusses on a one particular species of cartels, private international cartels (PICs), as well as their impact in the global South. The focus on PICs is motivated by a number of reasons. First, by their nature, the impact of PICs always transcends territorial borders. Secondly, the complications presented by PICs, when they are being investigated and prosecuted, bring jurisdictional challenges. Thirdly, there seems to be minimal prosecution of PICs in the global South. Finally, the fact that PICs operate across territorial boundaries makes a case for South-South regional co-operation, in dealing with such types of cartels.

6.2. Private International Cartels defined

PICs, as their name indicates, occur among firms that operate across territorial borders. Sometimes, however, a subsidiary of a foreign company may be a member of a PIC, based in a single country with other cartel participants.¹⁵⁸⁶ This qualifies as a PIC. Statistics reveal that PIC members are headquartered in more than one country, which gives them the characteristic of "international". However, "international" is more of a membership concept than it is a geographic concept, although the geographic element does distinguish PICs from domestic cartels.¹⁵⁸⁷

PICs exhibit the usual hallmarks of cartels, namely price fixing, market allocation, and collusive tendering.¹⁵⁸⁸ While this chapter is devoted to PICs, the substantive rules that apply to domestic cartels also apply to PICs.¹⁵⁸⁹ However, some distinct features separate PICs from domestic cartels. PICs prefer to utilise a geographic market allocation as their *modus operandi* to carry out their cartel activities.¹⁵⁹⁰ But, recall that market allocation also result in price fixing, because once a firm is assured of a certain market or a segment thereof, it has the liberty to determine what price it will

¹⁵⁸⁵ Levenstein, M.C. & Suslow, V.Y. *Breaking up is hard to do: Determinants of cartel duration*. Ross School of Business Working Paper 1150 (2010) 3.

¹⁵⁸⁶ Levenstein, M.C. & Suslow, V.Y. "International cartels" (2008) 2. *Issues in Competition Law and Policy* 1107.

¹⁵⁸⁷ Connor, J.M. "Price effects of international cartels in markets for primary products". In Evenett, S.J. & Jenny, F. [eds.], *Trade, Competition, and the Pricing of Commodities* (2012) 62; Meyerman, G., Moltenbrey, M.J. & Whalley, J. "Agreements". In Khemani, R.S. & Barsony, A. [eds.]. *A Framework for the Design and Implementation of Competition Law and Policy* (1999) 21.

¹⁵⁸⁸ See 3.7- 3.9 in Chapter 3.

¹⁵⁸⁹ See 3.5 - 3.6 in Chapter 3.

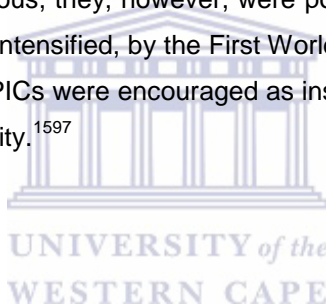
¹⁵⁹⁰ Levenstein, M.C. & Suslow, V.Y. *Breaking up is hard to do: Determinants of cartel duration*. Ross School of Business Working Paper 1150 (2010) 4.

charge.¹⁵⁹¹ PICs are confronted by unique challenges, such as linguistic and cultural differences, exchange rate fluctuations, as well as trade preferences.¹⁵⁹² This means that PICs are faced with more obstacles in the maintaining of their cartels, compared with domestic cartels. Additionally, PICs present interesting challenges during their investigation and prosecution. The problems of obtaining evidence and testimony from abroad, as well as, the lack of government co-operation, cited as contributory to the problem of PICs, do not apply to domestic cartels.¹⁵⁹³

6.3. The Evolution of the Legal Treatment of Private International Cartels

There are records of a “Renaissance cartel” that existed in the 15th century, whose features bear a striking resemblance to 21st century PICs.¹⁵⁹⁴ An analysis of the prevalence and progression of PICs is not a simple one. Their evolution cannot be viewed simply as something of ‘a rise and fall’. Instead, the various stages and the manner in which PICs have morphed over the years, is more of a ‘rise, boom, collapse, revitalisation, gradual decline, and then criminalisation’.¹⁵⁹⁵

Initially, PICs were actively encouraged by governments. In the 1920s, the attitude towards PICs was that, even though they were deleterious, they, however, were politically expedient for smoothing over the economic difficulties created, or intensified, by the First World War and in mitigating unwholesome market conditions.¹⁵⁹⁶ At that time, PICs were encouraged as instruments of economic warfare, in the defence of domestic economic security.¹⁵⁹⁷



¹⁵⁹¹ See 3.9 in Chapter 3.

¹⁵⁹² Levenstein, M.C. & Suslow, V.Y. *Breaking up is hard to do: Determinants of cartel duration*. Ross School of Business Working Paper 1150 (2010) 4.

¹⁵⁹³ Connor, J.M. & Helmers, C.G. “Statistics on modern private international cartels, 1990-2005” (2007). *The American Antitrust Institute 4; Recommendation concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014) 1-14.

¹⁵⁹⁴ Mirow, K.F. & Maurer, H. “A conspiracy against the public”. In Mirow, K.F. & Maurer, H. [eds.]. *Webs of Power: International Cartels and the World Economy* (1982) 11, although the members of the cartel were sovereigns, and, therefore, different from PICs, there are several features of the cartel that are also characteristic of PICs. This aluminium cartel, between Pope Paul II and Naples’ King Ferdinand, was signed in 1470. Each had aluminium mines in the Papal State and on the Island of Ischia, respectively. The agreement included classical cartel features, namely, price fixing, profit sharing, market allocation, setting sale quotas, employing the same sales agents and adopting similar conditions of sale. In addition, punishment in the form of fines was used for any violation of the cartel agreement. Information sharing also played a crucial part and each party had the right to inspect the other party’s premises to combat cheating. The cartel also had an additional feature, the so-called ‘combat clause’, which would be used against cartel non-members, in terms of which, *inter alia*, the Pope used his religious authority to issue an edict annually, prohibiting all of Christendom from purchasing aluminium from competing infidel Turkish mines.

¹⁵⁹⁵ Fear, J. *Cartels and competition: Neither markets nor hierarchies*. Harvard Business School Working Paper No. 07-011 (2006) 18.

¹⁵⁹⁶ Nussbaum, H. “International cartels and multinational enterprises”. In Teichova, A., Levy-Leboyer, M. & Nussbaum, H. [eds.]. *Multinational Enterprises in Historical Perspective* (1986) 131-132.

¹⁵⁹⁷ Harding, C. “The anti-cartel enforcement industry: Criminological perspectives on cartel criminalization”. In Beaton-Wells, C. & Ezrachi, A. [eds.]. *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 361-362; Fear, J. “Cartels and competition: Neither markets nor hierarchies”. *Harvard Business School Working Paper No. 07-011* (2006) 15.

6.4. The golden age of Private International Cartels

The early 1920s saw the beginning of the “golden age of cartels”.¹⁵⁹⁸ Even the 1929 collapse of the New York Stock Exchange and the subsequent Great Depression in 1930, did not wholly supplant PICs, as industrialists and politicians, ‘the new converts to the philosophy of economic reactionism’, soon created new PICs and resurrected those that had fallen into disuse during the Depression.¹⁵⁹⁹ Between 1929 and 1937, PICs constituted 40 per cent of world trade in manufactured goods.¹⁶⁰⁰

For the most part, PICs largely remained the preserve of the global North and its (multinational corporations) MNCs.¹⁶⁰¹ European firms were regarded as cartel “instigators” or “originators”, while United States companies were regarded as “joiners”.¹⁶⁰² After the Second World War, the winds of change began to blow. The world had reached a level of consensus that PICs were illegal and deleterious, although prosecutions remained minimal.¹⁶⁰³ At the same time, in other countries, such as the United States, they were still being resorted to, as an industrial policy tool.¹⁶⁰⁴

6.5. Contemporary private international cartels: a post-liberalisation reality

Although much has been said about PICs being a “19th century relic”, the high profits that PICs bring continue to lure and whet the appetites of firms to collude and conduct cartel activities across territorial borders.¹⁶⁰⁵ Far from being deterred by punishment that may be meted out, should the cartel be discovered, the “giddy financial results” that are achieved through overcharges are too difficult to resist.¹⁶⁰⁶ Sanguine arguments that the costs of negotiating and maintaining PICs far outweigh benefits that may accrue are not supported by evidence on the ground. In fact, PIC statistics provide ample evidence to the contrary, revealing that overcharges gained from PIC activities are quite substantial.¹⁶⁰⁷

¹⁵⁹⁸ Mirow, K.F. & Maurer, H. “A conspiracy against the public”. In Mirow, K.F. & Maurer, H. [eds.]. *Webs of Power: International cartels and the World Economy* (1982) 24.

¹⁵⁹⁹ Mirow, K.F. & Maurer, H. “A conspiracy against the public”. In Mirow, K.F. & Maurer, H. [eds.]. *Webs of Power: International cartels and the World Economy* (1982) 25.

¹⁶⁰⁰ Nussbaum, H. “International cartels and multinational enterprises”. In Teichova, A., Levy-Leboyer, M. & Nussbaum, H. [eds.]. *Multinational Enterprises in Historical Perspective* (1986) 134.

¹⁶⁰¹ Fear, J. *Cartel and Competition: Neither Markets Nor Hierarchies*. Harvard Business School Working Paper No. 07-011 (2006) 18.

¹⁶⁰² Suslow, V.Y. *Cartel contract duration: Empirical evidence from international cartels*. University of Michigan (2010) 544.

¹⁶⁰³ Levenstein, M.C. & Suslow, V.Y. “International Cartels” (2008) 2. *Issues in Competition Law and Policy* 165.

¹⁶⁰⁴ Fear, J. *Cartels and competition: Neither markets nor hierarchies*. Harvard Business School Working Paper No. 07-011 (2006) 16.

¹⁶⁰⁵ Levenstein, M.C. & Suslow, V.Y. *Breaking up is hard to do: Determinants of cartel duration*. Ross School of Business Working Paper No. 1150 (2010) 3.

¹⁶⁰⁶ Connor, J.M. *The great global vitamins conspiracy 1989-1999*. Purdue University (2006) 8.

¹⁶⁰⁷ Connor, J.M. *Global cartels redux: The lysine antitrust litigation (1996)* (2008) 310. Available online at <http://www.law.berkeley.edu/faculty/rubinfeld/Profile/publications/GlobalCartels.pdf> [Accessed 10 June 2013].

However, the 1990s saw a sterner stance adopted towards PICs. In particular, the beginning of the 21st century saw the United States increasing its efforts regarding PICs.¹⁶⁰⁸

6.6. Private International Cartel statistics

There is no end to the type of products in which PICs have been discovered. PICs can exist in any industry, from specialised sectors to manufacturing. For example, fine art auctions, agriculture, transportation, food processing, chemicals, and construction.¹⁶⁰⁹ PICs have also been uncovered in the mining sector: diamonds,¹⁶¹⁰ uranium,¹⁶¹¹ gold,¹⁶¹² and silver.¹⁶¹³

PICs have also been known to exist in basic products, for example, the price fixing and market allocation vitamins PIC operated for more than a decade from 1989-1999.¹⁶¹⁴ If the cartel involves a sufficient number of participating firms, the cartel can dominate the market of the product in question. For example, with the vitamins PIC, its members accounted for 75 per cent of the vitamins global market.¹⁶¹⁵ Further, only 7 per cent of global vitamin production (Chinese companies) was not part of the PIC.¹⁶¹⁶

An example of the extent of significant reach of a PIC was the graphite electrode manufacturers.¹⁶¹⁷ Its participants fixed global prices of graphite electrodes, allocated output and markets according to geographic regions, designated price leaders for each region, agreed not to export to each member's home markets, prevented non-cartel members from accessing technology on graphite electrode manufacturing, and shared information on sales and customers in order to monitor compliance.¹⁶¹⁸

¹⁶⁰⁸ Levenstein, M.C. & Suslow, V.Y. *Breaking up is hard to do: Determinants of cartel duration*. Ross School of Business Working Paper No. 1150 (2010) 3.

¹⁶⁰⁹ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 806.

¹⁶¹⁰ Spar, L.D. "The power to persuade and the success of the international diamond cartel". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 39.

¹⁶¹¹ Spar, L.D. "Yellowcake: The rise and decline in the international uranium cartel". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 88.

¹⁶¹² Spar, L.D. "Howling wolves: Co-operation in the international gold markets". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 137.

¹⁶¹³ Spar, L.D. "Stockpiles, speculators and the international silver market". In Katzenstein, P.J. [ed.]. *The Cooperative Edge: The Internal Politics of International Cartels* (1994) 178.

¹⁶¹⁴ First, H. "Vitamins case: Cartel prosecutions and the coming of international competition law". (2011) 68. *Antitrust Law Journal* 717-718.

¹⁶¹⁵ *United States v Hoffman- La Roche Ltd.*, Crim. No. 99-CR-184-R (N.D. Tex. May 20, 1999) (plea agreement); *United States v. BASF Aktiengesellschaft*, Crim. No.3:99-CR-200-R (N.D. Tex. May 20, 1999) (plea agreement); *In re Vitamins Antitrust Litig.*, 2000-1 Trade Cas. (CCH) 72, 914 (D.D.C. 2000); "Vitamin international cartel", *Shearman & Sterling LLP*. Available online at <http://www.cartelidigest.com/cartel-detail-page.cfm?itemID=21> [Accessed 12 January 2014].

¹⁶¹⁶ Connor, J.M. *The great global vitamins conspiracy 1989-1999*. Purdue University (2006) 26.

¹⁶¹⁷ Graphite electrodes are carbon rods that are a crucial ingredient in steel manufacturing, using electronic arc furnaces (EAFs). While there are other traditional methods that can be utilised in making steel, the EAF process, (which has no substitute, as graphite electrodes are the only material that can create enough heat to melt steel), has proved popular across the globe.

¹⁶¹⁸ Case COMP/E-1/36.490- *Graphite Electrodes* para 30-34, 43-74,95-125, and 130- 157; *Ferromin Int'l Trade v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa 2001); Government's Sentencing Memorandum and Government's Motion for Guidelines Downward Departure *United States v Krass* No. 99-626 (filed 18 October 1990) available at <http://www.justice.gov/atr/cases/f3800/3810.htm> [Accessed 03 May 2013].

Another example was the cathode ray tubes PIC, in which its participants colluded on prices, market and customer allocations, and shared confidential commercial information.¹⁶¹⁹ The PIC was considered particularly egregious, as the cartelised cathode tubes constitute 50-70 per cent of the price of televisions and computer monitors.¹⁶²⁰ The overcharges that result from PICs can be significant. For example, the citric acid and lysine PICs, in which the participants allocated each other sales quotas, fixed prices and shared sensitive information,¹⁶²¹ resulted in price increases by more than 30 per cent in the United States.¹⁶²²

6.7. The Implementation of Private International Cartels

A PIC could almost be viewed as an entrepreneurial act. Once consensus has been reached to form a PIC, its terms and conditions must be negotiated¹⁶²³; much like a business undertaking, albeit illegal.¹⁶²⁴ The manner in which the top-level management of the individual cartel members meet to discuss issues, such as the cartel's budget, is much the same way that managers of a firm would meet to discuss the company's budget.¹⁶²⁵ These cartel meetings would essentially entail evaluations and comparisons of the set quotas, sales and allocations, as well as making adjustments.¹⁶²⁶ As with domestic cartels, PICs are characterised by their blatant disregard of competition law and enforcement authorities.¹⁶²⁷ Even though they are aware of the unlawfulness of their activities, they persist.¹⁶²⁸

PICs tend to be self-perpetuating. Once a PIC has been formed related to a particular product, it may extend to other products. The formation of a PIC in a single product can open ways for the formation of a cartel among its members. For instance, the vitamins PIC did not limit itself to a single product,

¹⁶¹⁹ Case COMP/39.437 – *TV and Computer Monitor Tubes* para 9-14.

¹⁶²⁰ "Commission Fines Producers of TV and Computer Monitor Tubes €1.47 billion for Two Decade-Long Cartels". *European Commission Press Release* 05 December 2012 IP/ 12/ 1317. Available online at http://europa.eu/rapid/press-release_IP-12-1317_en.htm [Accessed 05 May 2013].

¹⁶²¹ Case No. COMP/E-1/36/604 - *Citric Acid* para 35-36, 47, 80-84, citric acid is a widely used food and beverages additive mainly because of its acidic and preservative properties. It is a preferred ingredient in the production of household detergents because it is biodegradable and, therefore, less harmful to the environment (when compared to other detergent ingredients). It is also used in the manufacture of pharmaceutical products and cosmetics.

¹⁶²² *International anticartel enforcement and interagency co-operation*. United States Department of Justice available online at <http://www.justice.gov/atr/icpac/chapter4.pdf> [Accessed 14 May 2013]; *United States v. Archer Daniel Midland Co.*, Crim. No. 96-CR-00640 (N.D. Ill. October 15, 1996) (plea agreement); *United States v. Andreas*, 216 F.3D 645 (7th Cir. 2000); *United States v. Ajinomoto Co.*, Crim. No. 96-CR-00520 (N.D. Ill August 27, 1996) (plea agreement); *United States v. Kyowa Hako Kogyo Co. Ltd.*, Crim. No. 96-CR-00520 (N.D. Ill. August 27 1996 (plea agreement).

¹⁶²³ Fear, J. *Cartels and Competition: Neither markets nor hierarchies*. Harvard Business School Working Paper No. 07-011 (2006) 19.

¹⁶²⁴ Hovenkamp, H. "The firm as cartel manager" (2011) 64. *Vanderbilt Law Review* 813- 873.

¹⁶²⁵ Genesove, D. & Mullin, W.P. *Rules, communication and collusion: Narrative evidence from the Sugar Institute case*. National Bureau of Economic Research Working Paper (2001) 1-62.

¹⁶²⁶ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels*. OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 12.

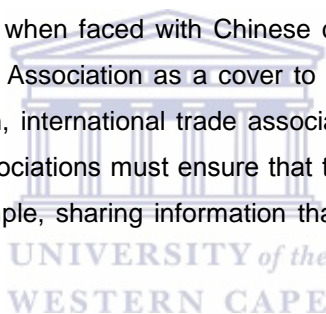
¹⁶²⁷ Hammond, S.D. *Caught in the act: Inside an international cartel*. OECD Competition Committee Working Party No.3 Public Prosecutors Programme 18 October (2005) 2. Available online at <http://www.justice.gov/atr/public/speeches/212266.pdf> [Accessed 11 May 2013].

¹⁶²⁸ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels*. OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 6-7.

but extended to the full range of vitamin supplements for both human and animal consumption.¹⁶²⁹ The vitamins PIC also led to the formation of the lysine and citric acid PICs.¹⁶³⁰ Therefore, once firms form a PIC, it becomes easier to engage in other cartel activities, as the participants would have developed something akin to a “rapport” with fellow cartel participants.¹⁶³¹

At times, international trade associations play a considerable role in the formation and survival of PICS. By their nature, trade associations¹⁶³² provide the prime opportunity for producers, or manufacturers from all over the world, to discuss cartel plans.¹⁶³³ The majority of PICs prosecuted and investigated by the United States’ Antitrust Division would not have endured in the manner that they did, had it not been for the involvement of international trade associations.¹⁶³⁴ Members of the lysine PIC formed a legitimate sub-committee of the European Feed Additive Association, whose purpose was to disseminate false, but seemingly legitimate information regarding its meetings. The association was used as a cover for the PIC’s price fixing meetings.¹⁶³⁵ Therefore, international trade associations provide both a “combination of cover and convenience” for PICs.¹⁶³⁶

Another example is how members of the lysine PIC formed the Amino Acids Trade Association.¹⁶³⁷ In the citric acid PIC, the participants, when faced with Chinese citric acid imports, sought to use the European Citric Acid Manufacturers Association as a cover to bring an anti-dumping action against Chinese imports.¹⁶³⁸ For this reason, international trade associations deserve special attention, and for their part, international trade associations must ensure that their meetings’ agendas do not cross over to what is prohibited, for example, sharing information that relate to prices, production quotas and market shares.¹⁶³⁹



¹⁶²⁹ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 12.

¹⁶³⁰ Connor, J.M. *The great global vitamins conspiracy 1989-1999.* Purdue University (2006) 7-8.

¹⁶³¹ Dick, A.R. “If cartels were legal, when would firms fix prices?” In Grossman, P.Z. & Efrogmson, C. [eds.]. *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (2004) 168; Benheim, B.D. & Whinston, M.D. “Multimarket contact and collusive Behaviour” (1990) 21. *RAND Journal of Economics* 1-26; “Commission fines five companies in citric acid cartel”. *EU Commission Press Releases* IP/ 01/1743 5 December 2001. Available online at http://europa.eu/rapid/press-release_IP-01-1743_en.htm?locale=en [Accessed 14 September 2013].

For instance, Archer Daniels Midland and Jungbunzlaeur, who were members of the citric acid PIC, were also part of the sodium gluconate PIC, while Hoffmann-La Roche was part of the vitamin and citric acid PICs.

¹⁶³² See 3.6.2 in Chapter 3.

¹⁶³³ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 4.

¹⁶³⁴ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 5.

¹⁶³⁵ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 9.

¹⁶³⁶ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 9.

¹⁶³⁷ Connor, J.M. *Archer Daniels Midland: Price fixer to the world.* Purdue University (2000) 17.

¹⁶³⁸ Case No. COMP/E-1/36/604- *Citric Acid* para 116.

¹⁶³⁹ *United States Department of Justice – An Inside look at a cartel at work: Common characteristics of international cartels.* OECD Centre for Co-operation with Non-Members Directorate for Financial, Fiscal and Enterprises Affairs (2002) 4.

6.8. How the Global South has dealt with Private International Cartels

With a few exceptions, CAs in the global South does not possess the capabilities to adequately deal with PICs. Their enforcement efforts are minuscule. For instance, between 1990 and 2007, the United States successfully indicted 67 PICs, while Brazil's CADE investigated only 10, and between 2000 and 2011, the Korea Fair Trade Commission (KFTC) prosecuted only eight.¹⁶⁴⁰

This lack of PIC enforcement in the global South is attributed to a number of factors, including, the lack of leniency applications by PIC participants in the global South; the lack of a physical presence of PIC participants (for example, in the way of subsidiaries), which makes the task of gathering evidence that much more difficult. Additionally, even where a subsidiary firm may be located in a developing country, the necessary evidence is usually not there, as it can only be found in another jurisdiction.¹⁶⁴¹ All of this makes it difficult for NCAs in the global South to employ their investigatory powers in prosecuting PICs located outside of their jurisdictions.

Where enforcement in the global South does occur, most of it is usually a 'follow-on' of decisions by NCAs in the global North, for example, in the United States and in the EU. With the vitamins PIC, Brazil's CADE found that the cartel had collusively fixed prices of vitamins and restricted output of the same in Brazil.¹⁶⁴² The PIC not only resulted in increased prices, but also prevented the entry of cheaper Chinese-manufactured vitamins into the Brazilian market.¹⁶⁴³ The KFTC's investigations estimated that as a net importer in vitamins, Korea had purchased US\$185 million worth of cartelised vitamins.¹⁶⁴⁴ In 2003, the KFTC imposed varying fines on members of the PIC.¹⁶⁴⁵ In the graphite electrodes PIC, the KFTC's investigations found that 90 per cent of its graphite electrodes were from members of the PIC and imposed appropriate fines on the PIC participants.¹⁶⁴⁶ The KFTC also fined several members of the cathode tubes PIC.¹⁶⁴⁷ In the international cargo price fixing PIC, which also operated in South Africa, the Competition Commission applied its domestic law, the Competition Act of 1998, not only to the national airline (South African Airways), but also to other international airlines

¹⁶⁴⁰ *Cross-border anticompetitive practices: The Challenges for developing countries and economies in transition*. United Nations Conference on Trade and Development (2012) para 8-11.

¹⁶⁴¹ *Cross-border anticompetitive practices: The Challenges for developing countries and economies in transition*. United Nations Conference on Trade and Development (2012) para 14-29.

¹⁶⁴² *Fighting Cartels: Brazil's Leniency Programme* [3rd ed.]. Brazil Secretariat of Economic Law (2009) 8.

¹⁶⁴³ *Fighting Cartels: Brazil's Leniency Programme* [3rd ed.]. Brazil Secretariat of Economic Law (2009) 8.

¹⁶⁴⁴ Connor, J.M. *The great global vitamins conspiracy 1989-1999*. Purdue University (2006) 127.

¹⁶⁴⁵ *The vitamins international cartel*. Shearman & Sterling LLP. Available online at <http://www.carteldigest.com/cartel-detail-page.cfm?itemID=21> [Accessed 10 November 2013].

¹⁶⁴⁶ Chang, D.S. "Suggestions for enhancing the effectiveness of co-operation on competition law and policy at the regional level from the experience of the Republic of Korea". In Brusick, P., Alvarez, A.M. & Cernat, L. eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 423- 424; "Graphite electrodes international cartel" Shearman & Sterling LLP. Available online at <http://www.carteldigest.com/cartel-detail-page.cfm?itemID=24> [Accessed 10 December 2013].

¹⁶⁴⁷ "Cathode ray tubes and colour display tubes international cartels" Shearman & Sterling LLP. Available online at <http://www.carteldigest.com/cartel-detail-page.cfm?itemID=37> [Accessed on 13 November 2013].

that participated in the PIC.¹⁶⁴⁸ Some of the airlines concluded settlement agreements with the Competition Commission and paid varying administrative penalties.¹⁶⁴⁹ In this PIC, all members of the cartel belonged to the International Air Transport Association (IATA).¹⁶⁵⁰

6.9. Private International Cartels and Regional Co-operation in the Global-South

Since no international competition law instrument exists to deal with PICs, means that its investigation is done based on domestic competition law legislation, in individual countries, and regional competition law in RECs. Currently, there is no record of PIC prosecution by RCAs in COMESA, EAC, SACU or SADC.

6.10. The Impact of Private International Cartels in the Global-South

Information regarding the impact of PICs can only be gleaned, predominantly, from documents released to the public by NCAs, as part of their investigations; or when firms have admitted to engaging in cartel practices; or in media reports discussing cartel activities; or in reports from CAs and published judgments from these authorities.¹⁶⁵¹ While the negative effects of PICs are similar for both the global North and the global-South, the latter are especially vulnerable.¹⁶⁵² Owing to their sometimes-inadequate competition laws and enforcement frameworks, they are fertile ground for PIC activities.¹⁶⁵³

From the available data, it is clear that PICs come at a huge cost, as they cause egregious economic harm.¹⁶⁵⁴ Whether price fixing or market allocation, they affect both consumers, who purchase the



¹⁶⁴⁸ These were: Lufthansa Cargo, British Airways, Air France Cargo, KLM Cargo, Alitalia Cargo, Cargolux International, Singapore Airlines, and Martinair Cargo.

¹⁶⁴⁹ *Competition Commission v Air France Cargo- KLM Cargo In Re Competition Commission v Lufthansa Cargo & Others* CT Case No: 42/CR/JUL10; *Competition Commission v British Airways PLC In Re Competition Commission v British Airways PLC* CT Case No: 42/CR/JUL10; *Competition Commission v South African Airways (Pty) Ltd In Re The Settlement of Various Matters* CT Case No:42/CR/JUL10.

¹⁶⁵⁰ *Competition Commission v Air France Cargo- KLM Cargo In Re Competition Commission v Lufthansa Cargo & Others* CT Case No: 42/CR/JUL10 para 2.3- 3.2; Kganare, W. & Mohamed, A. "South Africa refers international air cargo cartel case" 2010 (36). *Competition Commission Newsletter* 1-3.

The cartel, which was traced to the 1990s, came about as a result of fuel increases, which led to the IATA proposing to its members to levy a surcharge mechanism on its customers. IATA undertook to monitor the implementation of the levy through monitoring what the cartel members referred to as "trigger events", that is, weekly fuel price increases. Depending on the fuel price increases, each member would then impose a surcharge. The higher the fuel price increases, the higher the surcharge. IATA also set surcharges on certain routes, for example, cargo from South Africa destined for other African countries, and cargo destined outside of Africa. A member desiring to impose its own different surcharge would apply to IATA for permission, which would require permission from other members.

¹⁶⁵¹ Chowdury, J. *Private international cartels - An overview*. Consumer Unity & Trust Society Briefing Paper No.5 (2006); Connor, J.M. & Helmers, C.G. *Statistics on modern international cartels, 1990-2005*. The American Institute Working Paper No. 07-01 (2007) 7.

¹⁶⁵² See 1.6 in Chapter 1.

¹⁶⁵³ Connor, J.M. "Effectiveness of antitrust sanctions on modern international cartels" (2006) 6. *Journal of Industry, Competition and Trade* 200.

¹⁶⁵⁴ Mehta, P., Aggarwal, A. & Nayak, N. "Global welfare consequences of cartelisation in primary commodities: Cases of natural rubber and banana." In Evenett, S.J. & Jenny, F. [eds.]. *Trade, Competition, and the Pricing of Commodities* (2012) 81-95.

cartelised products, as well as local producers of similar products.¹⁶⁵⁵ PICs also impede international trade.¹⁶⁵⁶

A positive correlation exists between the harm suffered by consumers and the size of the market in which the cartel operates – a bigger market means more consumers will be affected by the cartelised products.¹⁶⁵⁷ Similarly, with the duration of a cartel – the longer it continues (usually when it remains undetected), the more consumers suffer in the way of price increases, or inferior quality products. The extent of the overcharge also affects the harm suffered by consumers – the higher the overcharge, the more the harm suffered by consumers.¹⁶⁵⁸ A study on the impact of PICs on countries in the global South found that cartelised imports to these countries were to the tune US\$51.1 billion.¹⁶⁵⁹ Another study of PICs that operated between 1990 and 2003, revealed that sales of cartelised products affected by price-fixing PICs were US\$530 billion, and on average, the cartel overcharges were between 25-30 per cent.¹⁶⁶⁰

Ceteris paribus, MNCs are more likely to collude successfully because of multi-market contact, as they operate across territorial borders, when compared with smaller companies without a global footprint.¹⁶⁶¹ Although consumers in the global South may benefit from lower prices through price wars, provided that local companies are able to compete with the PIC, this will only last for a short time.¹⁶⁶² It is estimated that from 1992 to 1995, the lysine PIC overcharges were in excess of US\$200 million, worldwide.¹⁶⁶³ During this time, lysine prices increased,¹⁶⁶⁴ and in the vitamins PIC it is estimated that buyers were overcharged by more than 25 per cent.¹⁶⁶⁵ A survey of six countries in the global South, namely, India, Kenya, Pakistan, South Africa, Tanzania, and Zambia, showed that they had suffered total losses of more than US\$164 million, because of the vitamins PIC.¹⁶⁶⁶

¹⁶⁵⁵ Organisation for Economic Co-operation and Development. *Issues for trade and competition in the global context* (2004) 15.

¹⁶⁵⁶ Mason, E.M. *The future of international cartels*. United States Council for Foreign Affairs available online at <http://www.foreignaffairs.com/articles/70357/edward-s-mason/the-future-of-international-cartels> [Accessed 03 May 2013]

¹⁶⁵⁷ Connor, J.M. "Effectiveness of antitrust sanctions on modern international cartels" (2006) 6. *Journal of Industry, Competition and Trade* 195-223.

¹⁶⁵⁸ Connor JM Effectiveness of antitrust sanctions on modern international cartels (2006) 6 *Journal of Industry, Competition and Trade* 195-223.

¹⁶⁵⁹ See 1.6 of Chapter 1; Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) *Antitrust Law Journal* 814-816.

¹⁶⁶⁰ Zimmerman, J.E. & Connor, J.M. *Determinants of cartels duration: A cross-sectional study of modern private international cartels* (2005) 3.

¹⁶⁶¹ Bernheim, B.D. & Whinston, M.D. "Multimarket contact and collusive behaviour" (1990) 21 *RAND Journal of Economics* 1-26.

¹⁶⁶² Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) *Antitrust Law Journal* 820.

¹⁶⁶³ Baker, J.B. "The case for antitrust enforcement" (2003) 17 *Journal of Economic Perspectives* 28.

¹⁶⁶⁴ Bolotova, Y., Connor, J.M. & Miller, D.J. *The impact of collusion on price behaviour: Empirical results from two recent cases*. American Agricultural Economics Association Annual General Meeting (2005) 10.

¹⁶⁶⁵ Baker, J.B. "The Case for Antitrust Enforcement" (2003) 17. *Journal of Economic Perspectives* 29.

¹⁶⁶⁶ *Pulling up our socks*. Consumer Unity & Trust Society (2003) 3. South Africa suffered the most losses with US\$99.9 million, followed by Pakistan- US\$36.82 million, India-US\$25.71 million, Kenya- US\$1.79 million and Tanzania and Zambia falling below the million mark with US\$160 000 and US\$60 000 respectively.

Concerning the graphite electrodes PIC, a comparison of graphite electrode prices before and during the cartel reveals that there was a price increase during the PIC's existence, and, that for most parts of the world, the cartel's existence resulted in overcharges ranging between 45-90 per cent.¹⁶⁶⁷ The popularity of graphite electrodes and the EAF process¹⁶⁶⁸ is supported by global statistics. For example, in 2000, 52 per cent of Africa's steel production utilised the EAF process, while in North America, 67 per cent of steel production made use of the EAF method.¹⁶⁶⁹ At that time, the graphite electrodes market was dominated by members of the PIC.¹⁶⁷⁰

PICs also result in the inefficient use of resources, as the cartelists are 'sheltered' from rigorous competition.¹⁶⁷¹ The elimination or restriction of competition, therefore, takes away the impetus to be innovative, as cartel members are assured of their profits. PICs can also result in the destruction or even the take-over of domestic firms.¹⁶⁷² A PIC can achieve this by withholding manufacturing technology of necessary production processes, or through price undercutting in order to drive competitors from the market.¹⁶⁷³ Therefore, limiting access to essential technology is used as a barrier to entry.¹⁶⁷⁴ Moreover, in cases where the cartelised products are inputs, developing country businesses are constrained and have no option but to purchase the inputs at inflated prices.¹⁶⁷⁵ Thereafter, these inflated prices are transferred to the consumer.

In the aftermath of a PIC break-up, the barriers created during its existence may still have lingering effects on developing country manufacturers, who may be forced to enter into agreements to overcome these barriers. These agreements are then used as a way for the members of the erstwhile PICs to continue colluding under the guise of collaboration arrangements (also referred to as joint ventures in other jurisdictions), and even if developing country companies are able to penetrate the global market, this comes at a price, the elimination of competition.¹⁶⁷⁶ In a number of PICs, following their discovery and breakup, the trend of the use of joint ventures emerged as a way to consolidate

¹⁶⁶⁷ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 838, 842.

¹⁶⁶⁸ See 6.4 .3 in this Chapter.

¹⁶⁶⁹ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 832.

¹⁶⁷⁰ Government's Sentencing Memorandum and Government's Motion for Guidelines Downward Departure *United States v Krass* No. 99-626 (filed 18 October 1990). Available online at <http://www.justice.gov/atr/cases/f3800/3810.htm> [Accessed 03 May 2013].

¹⁶⁷¹ *Issues for trade and competition in the global context*. Organisation for Economic Co-operation Development (2004) 15.

¹⁶⁷² Mirow, K.F. & Maurer, H. "The cartel threat". In Mirow, K.F. & Maurer, H. *Webs of Power: International Cartels and the World Economy* (1982) 199.

¹⁶⁷³ Mirow, K.F. & Maurer, H. "The cartel threat". In Mirow, K.F. & Maurer, H. *Webs of Power: International Cartels and the World Economy* (1982) 199.

¹⁶⁷⁴ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 821-822.

¹⁶⁷⁵ Chowdury, J. *Private international cartels- An overview*. Consumer Unity & Trust Society Briefing Paper No.5 (2006) 3.

¹⁶⁷⁶ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 824.

and restructure the industry to compensate for the losses that occurred, due to the disbanding of the PICs, and to maintain, or even increase their position without resorting to the prohibited PICs.¹⁶⁷⁷

However, not all joint ventures are to be frowned upon, because honourable joint ventures can indeed affect welfare enhancing gains, for example, technology transfers, developing local market expertise, as well as providing a means of access to capital.¹⁶⁷⁸ However, joint ventures in industries that have experienced cartelisation previously, must not simply be ignored. Instead, a more reasoned approach by NCAs towards joint ventures would be to analyse them, in order to evaluate whether they have pro-competitive gains.

6.11. Concluding Remarks

In this chapter, the prevalence and impact of PICs on the economies and consumers in the global South have been revealed. From the discussion, it is clear that the impact of PICs in the developing world is not conceptually different from that of the developed world. It is also clear that, because countries in the South lack adequate enforcement measures, they become the target of PICs. Without adequate enforcement measures, the economic losses in developing countries cannot be remedied. Although there have been several instances of developing countries prosecuting PICs, these efforts are minuscule, when compared to developed country competition regimes. PICs cause significant economic harm, when compared to domestic cartels, because the impact of the former is felt in more than one jurisdiction. Unfortunately, presently, there are no precedents from the RCAs of COMESA, EAC and SADC regarding enforcement actions pertaining to PICs. Other than the institutional incapacities of the global South concerning enforcement actions against PICs, there are reasons to explain the lack of enforcement. First, at the time when these PICs were investigated and prosecuted in the global North, countries in the global South were in the process of enacting their competition laws. Secondly, the NCAs had not yet been established. However, PICs provide an opportunity for regional co-operation, which might prove to be useful in taking enforcement actions against PICs.

¹⁶⁷⁷ Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 824; "Commission fines cartel of seamless steel tube producers for market sharing". *European Commission* Press Release IP/99/957 8 December 1999. Available online at http://europa.eu/rapid/press-release_IP-99-957_en.htm [Accessed 10 August 2013].

¹⁶⁷⁸ See 1.5 in Chapter 1, 3.3 - 3.5 in Chapter 3 of this current study; Levenstein, M.C. & Suslow, V.Y. "Contemporary international cartels and developing countries: Economic effects and implications for competition policy" (2004) 71. *Antitrust Law Journal* 826.

CHAPTER SEVEN

EXPORT CARTELS

“Merchants and manufacturers are not contented with the monopoly of the home market, but desire likewise the most extensive foreign sale for their goods. Their country has no jurisdiction in foreign nations, and therefore can seldom procure them a monopoly there. They are generally obliged, therefore, to content themselves with petitioning for certain encouragements to exportation.”¹⁶⁷⁹

7.1. Overview

The researcher investigates another aspect of international cartel conduct, namely, export cartels, in this chapter, by examining the nature, prevalence, and legal treatment of export cartels in competition law. In this chapter, decided case law on export cartels by CAs and courts are considered, both at the domestic and regional levels in the global North, as well as the global South. Thereafter, specific export cartels and their impact in the global South are explored. The aim of the chapter is to consider possible avenues of co-operation in South-South RTAs, concerning export cartels.

7.2. The Nature of Export Cartels and their legal treatment

In 1683, in the *East India Company v Sandys* case, the King's Bench ruled that monopolies for the sole purpose of export trade were acceptable and good.¹⁶⁸⁰ Domestic monopolies were not. Granted, this case dealt with monopolies, not export cartels. However, the treatment accorded to monopolies for export trade in this case, is similar to that rendered to export cartels. Also when firms collude and form a cartel, where such cartel constitutes a significant share of the cartel, the cartel essentially behaves like a monopolist. Essentially, the dominant rationale is that monopolies, or cartels, are acceptable for purposes of export trade, however, domestic monopolies and cartels are not.

As their name suggests, export cartels involve collusion among firms concerning their export activities.¹⁶⁸¹ The collusion is concluded, in order to transfer income from foreign consumers to the cartel's participants, in a bid to achieve a favourable balance of trade.¹⁶⁸² Export cartels operate in a way that has firms competing within the domestic market, but co-operating with each other in the export markets.¹⁶⁸³ Export cartels present an interesting scenario. In country A, an export cartel is encouraged and defended, while in country B that same cartel is regarded as illegal, because of its impact in country B. Ultimately, what is used by a hosting country as a policy instrument to earn foreign currency, is condemned as illegal in the target country. South Africa's Competition Tribunal has described export cartels as “a cynical policy which allows firms to do in someone else's backyard

¹⁶⁷⁹ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book IV, Chapter IV, para 1.

¹⁶⁸⁰ (1685) 10. St. Tr 371.

¹⁶⁸¹ Sweeney, B. *The Internationalisation of Competition Policy* (2010) 56.

¹⁶⁸² *Glossary of industrial organisation economics and competition law*. Organisation for Economic Co-operation and Development (1993) 43.

¹⁶⁸³ Eaton, P. “CANPOTEX: Potash's biggest marketer marks 40 years in business” (2013) 1. *Saskatchewan Mining Journal* 7.

what they could not do at home.”¹⁶⁸⁴ It appears that, while nations are opposed to domestic and international cartels, such opposition does not extend to export cartels.¹⁶⁸⁵

In its 1998 Report, the Working Group on the Interaction between Trade and Competition Policy (WGTCP) categorised export cartels as anti-competitive practices, having a differential impact on the national markets of countries.¹⁶⁸⁶ In addition, it was understood that export cartels have a clear distortionary effect on international trade, as well as a harmful impact on development.¹⁶⁸⁷ Because of this, the WGTCP identified export cartels as an area of competition law for which global rules are necessary.¹⁶⁸⁸ Additionally, the impact of export cartels may even be worse, as most countries, within whose borders export cartels originate, explicitly condone them, or do not require their registration, or simply ignore them because their negative impact is not felt within the domestic borders.¹⁶⁸⁹ Even if the competition regulators in countries of origin were to attempt to regulate export cartels, they would have to justify applying domestic laws on practices that do not affect the domestic market.

Precise statistics on the number of export cartels in existence are not available.¹⁶⁹⁰ This is because of how they are treated in the competition laws of jurisdictions across the world. Some jurisdictions make provision for specific and explicit exemption of export cartels and require their notification with a government agency. An example of this is in the United States. In terms of the 1918 Webb-Pomerene Act, registered export associations are granted qualified immunity from section 1 of the Sherman Act, which otherwise prohibits “every contact, combination or conspiracy in restraint of trade or commerce among the several States, or with foreign nation”. Because the Webb-Pomerene Act also makes provision for registration of export associations, it is relatively easier to gather information on the statistics of export cartels.¹⁶⁹¹ Initially, the Webb-Pomerene Act only applied to associations, exclusively in export trade, and excluded the export of services. Unfortunately, it exposed registered associations to challenges by the government, or even private litigants. The Export Trading Companies Act of 1982 was adopted to deal with these problems. The Export Trading Companies Act makes provision for firms, both export trading companies and non-export trading companies, to apply

¹⁶⁸⁴ *Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* Case No. 49/CR/Apr00 and 87/CR/Sep00, page 26

¹⁶⁸⁵ See 1.5- 1.7 in Chapter 1; Chapter 3; Chapter 6.

Fox, E., Fingleton, J. & Mitchell, S. “The past and future of international antitrust gaps, overlaps and the institutional challenge. In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 179.

¹⁶⁸⁶ Report of the Working Group on the Interaction Between Trade and Competition Policy (1998) to the General Council, 8 December 1998 WT/WGTCP/2 para 83.

¹⁶⁸⁷ Minutes of the Working Group on the Interaction Between Trade and Competition Policy Meeting of 2-3 October 2000 WT/WGTCP/M/12 para 10 and 25; WT/WGTCP/W/156 Communication from Japan, 19 December 2000.

¹⁶⁸⁸ *Report of the Working Group on the Interaction between Trade and Competition Policy*. World Trade Organisation (1998) para 89.

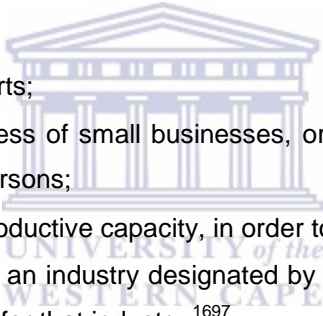
¹⁶⁸⁹ *Report of the Working Group on the Interaction Between Trade and Competition Policy*. World Trade Organisation (1998) para 89.

¹⁶⁹⁰ Sokol, D. “What do we really know about export cartels and what is the appropriate solution” (2008) 4 *Journal of Competition Law and Economics* 967-982.

¹⁶⁹¹ *Webb-Pomerene Act Filings*. Available online at <https://www.ftc.gov/policy/reports/webb-pomerene-act-filings> [Accessed 11 August 2016].

for a Certificate of Review (CoR) for specific export-related activities, including services, even if exports constitute only a small portion of their business.¹⁶⁹² The CoR will only be granted, if the practice, for which the CoR is sought, does not lessen competition in the United States, substantially. In addition, it should not restrain the export trade of another United States exporter, affect prices in the United States, unreasonably, or result in the resale of the exported goods and services in the United States.¹⁶⁹³ The CoR immunises firms from prosecution.¹⁶⁹⁴ The United States Office of Export Trading Company Affairs also offers scope for joint bidding, market sharing and co-ordinated pricing, to avoid rivalry among United States firms in their export activities,¹⁶⁹⁵ which would fall foul of the Sherman Act, if they were not in export markets.

In some jurisdictions, such as South Africa and Namibia, their competition laws explicitly exempt prohibited practices, such as cartels, in order to promote exports. In South Africa, section 10 of the Competition Act is the general provision that governs exemption applications. Restrictive practices, or agreements, as prohibited by Chapter 2 of the Competition Act, namely restrictive horizontal practices, restrictive vertical practices and abuse of dominance, can be exempted by the Competition Commission for the purposes of attaining specific objectives.¹⁶⁹⁶ These specific objectives are as follows:

- 
- to maintain, or promote exports;
 - to promote the competitiveness of small businesses, or businesses controlled, or owned by historically disadvantaged persons;
 - to address changes in the productive capacity, in order to prevent decline in an industry; or
 - to bring economic stability in an industry designated by the Minister of Trade, in consultation with the Minister responsible for that industry.¹⁶⁹⁷

Therefore, it is possible for competitors, wanting to penetrate export markets, to seek exemption based on promoting or maintaining South African exports. Such an exemption can be, either conditional or unconditional, and must be for a specified term.¹⁶⁹⁸ Exemptions do not remain in force indefinitely. The Competition Commission has granted several exemptions to South African firms, seeking to penetrate the export markets. For examples: the citrus fruit export exemption was granted to the Western Cape Citrus Producers Forum (WCCPF), as well as citrus fruit producers, to

¹⁶⁹² *The Export Trade Certificate of Review Program Guidelines: The competitive edges for U.S. exporters.* Available online at http://www.trade.gov/mas/ian/etca/tg_ian_002140.asp [Accessed 11 August 2016].

¹⁶⁹³ *The Export Trade Certificate of Review Program Guidelines: The competitive edges for U.S. exporters.* Available online at http://www.trade.gov/mas/ian/etca/tg_ian_002140.asp [Accessed 11 August 2016].

¹⁶⁹⁴ *The Export Trade Certificate of Review Program Guidelines: The competitive edges for U.S. exporters.* Available online at http://www.trade.gov/mas/ian/etca/tg_ian_002140.asp [Accessed 11 August 2016].

¹⁶⁹⁵ *The Export Trade Certificate of Review Program Guidelines: The competitive edges for U.S. exporters.* Available online at http://www.trade.gov/mas/ian/etca/tg_ian_002140.asp [Accessed 11 August 2016].

¹⁶⁹⁶ Section 10(3)(b).

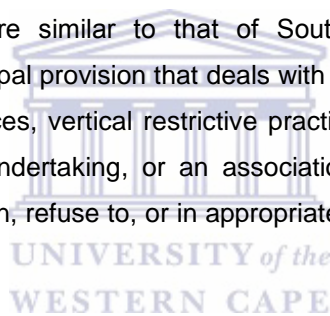
¹⁶⁹⁷ Section 10(3)(b)(i)-(iv)

¹⁶⁹⁸ Section 10(2)(a).

collectively export their produce to the United States.¹⁶⁹⁹ The lobster export exemption¹⁷⁰⁰ and the squid export exemption were granted to the South African Squid Exporters Association, anticipating that these exemptions would promote exports and small businesses, as well as firms, controlled by historically disadvantaged persons.¹⁷⁰¹

The Commission may revoke these exemptions under certain circumstances, such as, the exemption was granted based on false or incorrect information; a condition of the exemption is not fulfilled; or the reason for granting the exemption no longer exists.¹⁷⁰² Before the Commission grants, or revokes, an exemption, notice must be given in the Government Gazette and parties with an interest must be given time to make representations, as to whether the exemption should be granted or revoked.¹⁷⁰³ Before granting or revoking an exemption, the Commission may conduct an investigation into the agreement, or practices concerned.¹⁷⁰⁴ Although, there is no requirement for the registration of exemptions, specifically those granted for the purpose of export activities, the Commission is required to publish in the Government Gazette all the exemptions granted, refused, or revoked.¹⁷⁰⁵ The Commission's exemption decisions are appealable to the Competition Tribunal.¹⁷⁰⁶

Namibia's exemption provisions are similar to that of South Africa. Section 27 of Namibia's Competition Act of 2003 is the principal provision that deals with the exemption of prohibited practices namely, restrictive horizontal practices, vertical restrictive practices and abuse of dominance. Upon receiving an application from an undertaking, or an association of undertakings, the Competition Commission can grant the exemption, refuse to, or in appropriate circumstances, issue a certificate of



¹⁶⁹⁹ Competition Commission Notice, in terms of section 10(7) of the Competition Act 89 of 1998 (as amended): Western Cape Citrus Fruit Producers granted unconditional exemption. Government Gazette No. 34562 Notice 597 of 2011.

The exemption covered all activities by members of the WCCFP, which were considered by the Commission to be a violation of the section 4(1)(b)(ii) prohibition on market allocation cartels. The Commission based its decision on the basis that the exemption would not have an impact on competition in the domestic market for citrus fruit.

¹⁷⁰⁰ The firms sought exemption from the Competition Act's prohibitions on price fixing and market allocation. After conducting its own inquiry, the Commission granted the exemption, on the basis that it would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allowing the South African exporters leverage, when negotiating with foreign buyers, which would allow them to obtain the best possible price, contribute to the tax revenue base, and ultimately the growth of the South African economy. The exemption was granted for a period of 5 years (the parties had sought a 10-year period exemption). Available online at http://www.compcom.co.za/wp-content/uploads/2014/10/Gazette-Notice-Lobster-Revised_221014.pdf [Accessed 11 December 2016].

¹⁷⁰¹ The Association made the application on the basis that they were sharing commercially sensitive information, for example, information on pricing and quantity information relating to international competitors and international market conditions. The Commission, while finding that this amounted to price fixing and market allocation, granted the exemption for a period of 5 years (although the parties sought a 10-year period exemption). The Commission also indicated, as with the lobster exemption, that the exemption would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allow the South African exporters leverage when negotiating with foreign buyers, would allow them to obtain the best possible price, contribute to the tax revenue base and ultimately the growth of the South African economy. Available online at http://www.compcom.co.za/wp-content/uploads/2014/10/Squid-Exemption-GG-Notice-Final_29102014.pdf [Accessed 17 December 2016].

¹⁷⁰² Section 10(5)(a)-(c).

¹⁷⁰³ Section 10(6)(a)-(b).

¹⁷⁰⁴ Section 10(6)(c).

¹⁷⁰⁵ Section 10(7).

¹⁷⁰⁶ Section 10(8).

clearance, indicating that the practice under consideration is not prohibited by the Competition Act.¹⁷⁰⁷ An exemption will be granted if it is aimed at contributing towards specified objectives, one of which is the maintenance or promotion of exports.¹⁷⁰⁸ Therefore, competing undertakings, or an association of undertakings, seeking to penetrate the export market may apply for an exemption based on the objective of maintaining exports. The Commission may choose to attach conditions to the exemption.¹⁷⁰⁹ When considering exemption applications, the Commission must be satisfied that, there are 'exceptional and compelling' circumstances, which necessitate the granting of the exemption.¹⁷¹⁰ Similar to South Africa's exemptions provisions, Namibia's exemption provisions allow for the revoking of exemptions, in circumstances, where it was granted, based on incorrect or misleading information, where there has been a material change in the circumstances, since the exemption was granted, or a condition, imposed by the Commission, has not been observed.¹⁷¹¹

Israel's Restrictive Trade Practices Law of 1998 provides that, in order to achieve 'the public good', its CAs will consider the contribution of a restrictive practice, to certain objectives. They will also assess whether the expected public benefit, substantially, exceeds the damage that could be caused to the public, or a part thereof, or anyone who is not party to the restrictive arrangement, for which an exemption, or approval, is being sought.¹⁷¹² When considering the public good, Israel's competition regulators take into account several factors, one of which is, whether the restrictive arrangement for which exemption is being sought contributes to improve the country's balance of payments, by reducing the price of imports, or increasing exports.¹⁷¹³ The duration of the approval, or exemption, cannot exceed a period of three years.¹⁷¹⁴ The approval may be granted subject to conditions.¹⁷¹⁵ Approvals may also be revoked; if there have been substantive changes in the circumstances that were in effect, when the approval was granted.¹⁷¹⁶ Applications for exemptions must be published in government media.¹⁷¹⁷

¹⁷⁰⁷ Section 28(1)(a)-(c).

¹⁷⁰⁸ Section 28(3)(a)-(e).

¹⁷⁰⁹ Section 28(4).

¹⁷¹⁰ Section 28(2).

¹⁷¹¹ Section 29(1)(a)-(c).

¹⁷¹² Section 7- 10.

¹⁷¹³ Section 10(1)-(7).

¹⁷¹⁴ Section 11.

¹⁷¹⁵ Section 12(a)-(b).

¹⁷¹⁶ Section 12(a)-(b).

¹⁷¹⁷ Section 7(b).

In other jurisdictions, export cartels are implicitly excluded, because competition law only applies to activities that affect competition in the domestic market. By implication, export cartels are excluded because their impact is not felt within the domestic market in which they originate. The EU follows the implicit exclusion approach. An export agreement amongst producers in the Common Market, exclusively to increase export to non-EU markets, falls outside of the scope of Article 101 (1) of the TFEU, as it only prohibits cartels 'which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market'. In other jurisdictions, such as Botswana, the Competition Act provides that competition law only apply to conduct undertaken, or whose effect is felt within its borders. The Competition Act explicitly provides that the law does not apply to practices, conduct, or agreements that relate to the export of goods from Botswana, or the supply of services outside of Botswana.¹⁷¹⁸

7.3. A Taxonomy of Export Cartels

There are several categories of export cartels: "pure private" export cartels, with firms in one country colluding for the sole purpose of penetrating foreign markets, which does not affect the domestic market;¹⁷¹⁹ and "mixed" export cartels, entered into by firms in a single country for the purposes of export activities, but may inadvertently affect the domestic market as well.¹⁷²⁰ However, this distinction between the two categories should not be taken too far. For example, where the members of a 'pure' export cartel constitute a sizeable part of the domestic production in the exporting country, the exchange of information on prices, costs and sale policies and decisions that they take to implement the export cartel will inevitably affect domestic supplies and prices.¹⁷²¹ The United States exempts 'pure' export cartels from competition law scrutiny, since the harm is felt by foreign consumers, and not by domestic consumers. However, if the export cartel is 'mixed', the exemption falls away.¹⁷²² For instance, the aim of the Export Trading Companies Act of 1982 was to increase United States' exports of products and services, provided this did not restrict competition within the United States.¹⁷²³

¹⁷¹⁸ Section 3(2)(f) of the Competition Act of 2009.

¹⁷¹⁹ Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S.J. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 99; Case 17/84 - *Bulk Oil v Sun International* [1986] E.C.R. 589 para 44.

¹⁷²⁰ Atwood, .J.R. "Conflicts of jurisdiction in the antitrust field: The example of export cartels" (1988) 50. *Law and Contemporary Problems* 154; Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S.J. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 99.

¹⁷²¹ Immenga, U. "Export cartels and voluntary export restraints between trade and competition policy" (1995) 4. *Pacific Rim Law and Policy Journal* 125-126; Victor, A.P., "Export cartels: An idea whose time has passed" (1991) 60. *Antitrust Law Journal* 571.

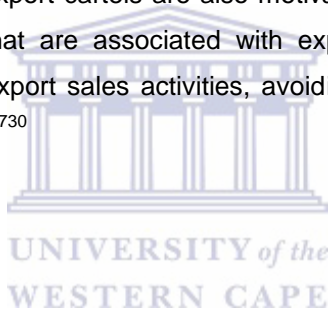
¹⁷²² Congressman Charles C. Carlin of Virginia, speaking in defence of the Webb-Pomerene Act of 1918, cautioned against the unintended negative impact that export cartels may have on the domestic market and consumers: "I am frank to say that personally I have no sympathy with what a foreigner pays for our products. I would like to see the American manufacturers get the largest price possible, but if by indirection we are going to set up a system which is going to fix a higher price eventually at home, through a combination suggested in the bill, I think you can very well see that such a system is a very dangerous." *Hearings before the House Committee on the Judiciary H.R. 16707, 64th Cong., 1st Session., 7 (1916)*. *United States v Concentrated Phosphate Export Association* 89 S.Ct 361 U.S. 199, 21 L.Ed. 2d 206 also offers similar sentiments in that "while Congress was willing to create an exemption from the antitrust laws to serve this narrow purpose, the exemption was carefully hedged in to avoid substantial injury to domestic interest".

¹⁷²³ The statute was enacted after it became clear that the ambit of the preceding Webb-Pomerene Act was unclear, particularly in light of court decisions that declared export cartel activities in violation of the Sherman Act. It was enacted as a guide for US courts that had somehow lost sight of the national interest at stake, regarding the promotion of exports. Such a case was *United States v Minnesota Mining & Mfg* (1950), 92 F. Supp. 947, where the Court rejected Minnesota Mining's

7.4. Export Cartel Proponents

Strategic trade policy is one of the reasons advanced by supporters of export cartels. It is based on the premise that export cartel exemptions allow participating firms to penetrate foreign markets.¹⁷²⁴ Export cartels allow members to set higher prices than they would have, were they to compete against each other in the export market.¹⁷²⁵ Therefore, the principal impetus for exempting export cartels is that it facilitates “the penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable trade balance”.¹⁷²⁶ Export cartels certainly have the ability to amass great amounts of money for their members. For example, in 1998, firms registered under the United States’ Export Trading Companies Act recorded over US\$30 billion dollars on export trade for that year.¹⁷²⁷

In the United States, the Congress’s intention in the enactment of the first export cartel exemption statute, the Webb-Pomerene Act of 1918, was partly informed by the desire of American companies to increase their export sales.¹⁷²⁸ At that time, the view was that the United States’ exporters were being affected by prevalent cartels in global markets and that the legalisation of export cartels was a tool to “level the playing field”.¹⁷²⁹ Export cartels are also motivated by perceived efficiency gains, in that export cartels reduce costs that are associated with export trade through collaborations in matters, such as centralisation of export sales activities, avoiding duplication of services, which, in turn, generates economies of scale.¹⁷³⁰



argument that their endeavours were for purposes of profit maximisation through export cartels, and held that restrictions on United States exports were in violation of the Sherman Act.

¹⁷²⁴ Ehrlich, W. & Sharma, P. *The case of export cartels*. Policy Staff Paper Canada Department of Foreign Affairs and International Trade (1994) 3; *Glossary of industrial organisation economics and competition law*. Organisation and Economic Co-operation and Development (1993) 44; Levenstein, M.C. & Suslow, V.Y., “The changing international status of export cartels” (2005). *American University International Law Review* 792; Article 10 (7) of Israel Restrictive Trade Practices Law, 5748-1988.

¹⁷²⁵ Schultz, C. “Export cartels and domestic markets” (2002) 2. *Journal of Industry Competition and Trade* 235.

¹⁷²⁶ Khemani, R.S. & Shapiro, D.M. *Glossary of Industrial Organisation Economics and Competition Law*. OECD (1993) 44.

¹⁷²⁷ Magnus, J.R. “Joint Export Trade Provisions in Antitrust Laws: A supporter’s Perspective” (2005) 39. *Journal of World Trade* 181.

¹⁷²⁸ Unkovic, D. “Joint Venture and the Export Trading Company Act” (1985) 5. *Journal of Law and Commerce* 377-378.

During the debates leading up to the enactment of the Webb-Pomerene Act, Senator Pomerene opined, rather crudely, that “we have not reached that high plane of business morals which will permit us to extend the same privileges to the people of the earth outside of the United States that we extend to those within the United States”, *Hearings before the House Committee on the Judiciary H.R. 16707, 55 Cong.Rec. 2787 (1917)*. In the same vein, Congressman Webb added: “I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States for doing so.” *Hearings before the House Committee on the Judiciary H.R. 16707, 55 Cong.Rec. 3580 (1917)*.

¹⁷²⁹ Unkovic, D. “Joint Venture and the Export Trading Company Act” (1985) 5. *Journal of Law and Commerce* 377-378.

¹⁷³⁰ Desmarais, F. *Export cartels in the Americas and the OAS: Is the harmonisation of national competition law the solution?* University of Manitoba (2009) 8; Bhattacharjea, A. “Export cartels: A developing country perspective” (2004) 38. *Journal of World Trade* 348; Magnus JR ‘Joint export trade provisions in antitrust laws: A supporter’s perspective’ (2005) 39 *Journal of World Trade* 181; Dick, A. “Are export cartels efficiency enhancing or monopoly promoting?: Evidence from the Webb-Pomerene Experience” (1992) 15. *Research in Law & Economics* 94; Sokol, D.S. “What do we really know about export cartels and what is the appropriate solution?” (2008) 4. *Journal of Competition Law and Economics* 974.

7.5. Export Cartel Opponents

The exemption of export cartels from the application of competition law has not gained absolute support,¹⁷³¹ because, while they are treated with indifference in their countries of origin, they may nonetheless have anti-competitive spill over effects in the domestic market, due to tacit collusion among cartel members.¹⁷³² The very nature of export cartels is that they share information on prices and output, which makes it impossible for exporters to dissociate their export cartel activities from those of the domestic market.¹⁷³³ A study of export cartels operating under the Webb-Pomerene Act revealed that some of the firms engaged in illegal collusive practices in the domestic market, by using their export cartel exemptions.¹⁷³⁴ In *Kali- Salz/MdK/Treuhand*, the European Commission recognised the spillover effects of export cartels.¹⁷³⁵

Exemptions for export cartels have been viewed as “myopic” because, even though they increase a country’s balance of payments, they perpetuate a “downward spiral or beggar-thy-neighbour dynamic through measures that, in the long run, reduce national and global welfare”.¹⁷³⁶ According to Adam Smith, this mercantilist principle taught nations that ‘their interest lies in beggaring all their neighbours’, that is, a country attempts to rectify its economic woes by adopting policies that may create, or exacerbate the economic problems of its neighbours.¹⁷³⁷ Export associations are also inimical to countries’ international trade obligations that seek to promote free trade and enhance market integration.¹⁷³⁸ In addition, the exemption of export cartels amounts to a differential treatment of cartel activities that, at any other time, would have been illegal in the exporting country.¹⁷³⁹ They allow export cartel members to gain monopoly rents from foreign consumers and impose severe costs on importing countries, particularly developing countries.¹⁷⁴⁰

7.6. International Trade in Natural Soda - The Case of American Natural Soda Ash Corporation

Natural soda ash (sodium carbonate) is an essential raw substance, the uses of which include the production of glass, chemicals, soaps and detergents, fuel gas desulphurisation, water treatment,

¹⁷³¹ Victor, A.P. “Export cartels: An idea whose time has passed.” (1991) 60. *Antitrust Law Journal* 571; Waller, S.W. “The failure of the export trading company program” (1992) 17. *North Carolina Journal of International Law and Commerce Regulation* 279; *Obstacles to trade and competition*. Organisation for Economic Co-operation and Development (1993) 11.

¹⁷³² Schultz, C. “Export cartels and domestic markets” (2002) 2. *Journal of Industry Competition and Trade* 233; Martyniszyn, M. “Is it legal to target your neighbour? Analysis in light of recent case law” (2012) 15. *Journal of International Economic Law* 182-222.

¹⁷³³ Schultz, C. “Export cartels and domestic markets” (2002) 2. *Journal of Industry Competition and Trade* 235, 237.

¹⁷³⁴ Dick, A. “When are Cartels Stable Contracts?” (1996) 34. *Journal of Economics & Law* 273.

¹⁷³⁵ Case IV/M.308 - *Kali-Salz/MdK/Treuhand* para 60.

¹⁷³⁶ Trebilcock, M., Winter, R.A., Collins, P. & Lacobucci, E.M. *The Law and Economics of Canadian Competition Policy* (2002) 2.

¹⁷³⁷ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book IV, Chapter II, Part II, 2.

¹⁷³⁸ Victor, A.P. “Export cartels: An idea whose time has passe” (1992) 60. *Antitrust Law Journal* 581; *Working Group on the Interaction between Trade and Competition Policy Report*. World Trade Organisation (2003) para 15.

¹⁷³⁹ Fox, E.M. “Competition law and the Millennium Round” (1999) 2. *Journal of International Economic Law* 674.

¹⁷⁴⁰ Becker, F. “The case of export cartel exemptions: Between competition and protectionism” (2007) 3. *Journal of Competition Law and Economics* 115.

paper and pulp.¹⁷⁴¹ The American Natural Soda Ash Corporation (ANSAC) is a Webb-Pomerene registered export association, consisting of six United States natural soda ash producers.¹⁷⁴²

7.6.1. American Natural Soda Ash Corporation in South Africa

The matter was initiated in early 1999 on the basis that ANSAC had engaged in price fixing and market allocation in violation of section 4(1)(b) of the Competition Act of 1998.¹⁷⁴³

7.6.1.1. American Natural Soda Ash Corporation before the Competition Tribunal

Before the Competition Tribunal, the crux of the argument raised by ANSAC was the interpretation of section 3 (1) of the Competition Act, which addresses the Act's extra-territorial application. Section 3(1) provides that the Competition Act "applies to all economic activity *within* or having an *effect within*" South Africa (emphasis added).¹⁷⁴⁴

First, ANSAC argued that the relevant "economic activity" was the conclusion of the agreement between ANSAC members, which was done in the United States.¹⁷⁴⁵ If ANSAC's conduct were justiciable in South Africa, the Competition Commission would have to adduce evidence to prove that ANSAC's activity had an 'effect within' South Africa. This, ANSAC contended, would necessitate that the meaning of the word 'effect' be determined by taking into account the purpose of the Act (the textual approach), which is to deal with practices that negatively impact competition.¹⁷⁴⁶ In order for a section 4 (1) (b) violation to be sustained, it had to be shown that the conduct in question had anti-competitive effects, and therefore, ANSAC would be entitled to adduce evidence to show the conduct generated efficiency benefits that outweighed the anti-competitive effects thereof, an argument akin to the "rule of reason". ANSAC also sought to argue for a "policy-based" interpretation of the word "effect", which would proceed on the basis that the lawmaker had not intended to reach benign foreign conduct.¹⁷⁴⁷

¹⁷⁴¹ Information available online at <http://www.ansac.com/products/about-soda-ash/> [Accessed 21 December 2012].

¹⁷⁴² Information available online at <http://www.ftc.gov/os/statutes/webbpomerene/index.shtm> [Accessed 18 March 2013].

The members of the association are American Soda LLP, MFC Wyoming Corporation, General Chemical (Soda Ash) Partners, IMC Chemicals INC., OCI Chemical Corporation, and Solvay Soda Ash Joint Venture. Available online at <http://www.ansac.com/applications/> [Accessed 18 March 2013].

¹⁷⁴³ See 3.5 , 3.8 - 3.9 in Chapter 3.

¹⁷⁴⁴ According to section 1(2) of the Competition Act of 1998, the interpretation of the Act, in general, must be done in a manner that is in line with the Constitution, upholds the Act's objectives and is consistent with South Africa's international obligations. Furthermore, section 1(3) of the Act allows for the possibility of considering foreign and international law. On this point, section 232 and section 233 of the Constitution of the Republic, 1996, respectively, provide that "customary international law, is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament", and that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any other alternative interpretation that is inconsistent with international law."

¹⁷⁴⁵ *Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* Case No. 49/CR/Apr00 and 87/CR/Sep00 page 5-6.

¹⁷⁴⁶ Page 6, 9-11.

¹⁷⁴⁷ Page 6, 12, 13- 27.

According to the Competition Tribunal, a reading of section 3(1) of the Competition Act reveals that there are two alternative ways, in which the Act finds application. The Act applies where the economic activity has been undertaken “within” South Africa, or where the economic activity has an “effect within” South Africa, regardless of where the economic activity takes place.¹⁷⁴⁸ In this case, both requirements were satisfied, as the alleged export cartel practices took place in South Africa, and the effects thereof were felt within South Africa.

Concerning ANSAC’s argument for the “textual approach”, an ordinary interpretation of ‘effect’, as used in section 3(1), is not limited to adverse effects.¹⁷⁴⁹ Additionally, there is no ambiguity as to how the word ‘effect’ is employed in section 3(1) of the Act.¹⁷⁵⁰ Jurisdiction, in terms of section 3(1), can be based on any effect within South Africa, regardless of whether that effect is pro-competitive or anti-competitive. Furthermore, any agreement that amounts to price fixing, or allocation of markets is *per se* illegal, notwithstanding that it is part of a joint venture, the nature of the entity setting the prices, and the nature of its activities.¹⁷⁵¹ Section 4(1)(b) does not require proof of anti-competitive consequences or effects.¹⁷⁵² Therefore, ANSAC’s argument did “not justify re-engineering the interpretation of the Act to admit through a side door a defence of justification which the legislature has pertinently banned from entering through the front door”.¹⁷⁵³

Regarding the extra-territorial application of national laws to conduct outside of its borders, international law recognises that a state can regulate conduct occurring outside its borders, which has effects within its territory.¹⁷⁵⁴ Economic factors and the objective of competition law make a powerful case for its extra-territorial application. According to Fox, “competition law is national, markets are global, and there is the rub”.¹⁷⁵⁵ According to the Competition Tribunal, the country, in whose territory the effects of an export cartel are felt, must prosecute it, even if the country of origin has exempted it.¹⁷⁵⁶ In defending

¹⁷⁴⁸ See para 5.2 of the Competition Commission Corporate Leniency Policy of 2008.

¹⁷⁴⁹ *Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* Case No. 49/CR/Apr00 and 87/CR/Sep00 page 9.

¹⁷⁵⁰ Page 30.

¹⁷⁵¹ See 3.3.1 in Chapter 3.

¹⁷⁵² See 3.3.1 in Chapter 3.

¹⁷⁵³ *Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* Case No. 49/CR/Apr00 and 87/CR/Sep00 page 30.

¹⁷⁵⁴ According to *United States v Aluminium Company of America* 148 F.2d 416 , 443-444 (1945), it is “settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders which the State reprehends, and those liabilities other states will ordinarily recognise.”

¹⁷⁵⁵ Fox, E.M. “National law, global markets, and Hartford: Eyes wide shut” (2000) 68. *Antitrust Law Journal* 73.

¹⁷⁵⁶ Page 29-30, according to the Tribunal, “there are sound reasons in competition law for adopting the ‘effects’ based jurisdiction as our legislature has done in section 3(1). Without such a doctrine one can easily have a situation where the offenders reside in country A and plot to affect the market of country B. If we require the restrictive practice has to have some element in country B before we can found jurisdiction there, we would fail, but the anti-competitive effect would still

the extra-territorial application of the Competition Act, the Tribunal referred to several United States Supreme Court decisions, regarding the extra-territorial application of competition law.¹⁷⁵⁷

The extra-territorial application of domestic competition law is quite common.¹⁷⁵⁸ COMESA, EAC, SACU and SADC Members with competition laws provide for the extra-territorial application of their laws. In Botswana, the Competition Act of 2009 applies to all economic activity within the country's territorial borders, or has an effect within its territorial borders.¹⁷⁵⁹ Namibia's Competition Act of 2003 applies to all economic activity within, or having an effect within its territorial borders.¹⁷⁶⁰ Tanzania's Competition Act applies to conduct outside of mainland Tanzania; by a citizen, or person ordinarily resident in Tanzania; by a body corporate, incorporated in Tanzania, or carrying on business within Tanzania; by any person, in relation to the supply, or acquisition of goods, or services by that person into, or within, Tanzania; or by any person, in relation to the acquisition of shares, or other assets outside Tanzania, resulting in the change of control of a business, part of a business, or an asset of a business in Tanzania.¹⁷⁶¹ Zambia's Competition applies to all economic activity within, or having an effect within Zambia's territorial borders.¹⁷⁶² Egypt's competition law applies to acts committed outside of Egypt, if these acts prevent, restrict or harm the freedom of competition in Egypt.¹⁷⁶³

Ethiopia's competition law applies to any commercial activity, transaction in goods or services conducted, or having effect within Ethiopia.¹⁷⁶⁴ Kenya's extra-territorial

be felt there leaving only country A to exercise jurisdiction. There is no reason why it should do so when it has no interest prosecuting conduct not affecting its markets. The 'effects test' seeks to avoid a juristic *lacuna* where restrictive practices cross borders. We accept the doctrine is open to abuse by states exercising jurisdiction when their connection to the conduct is only tangential. This does not mean throwing it out. It means limiting it sensibly to avoid the *de minimis* case. Not only is there no basis in international law to support ANSAC's reading, but also, there is no practical foundation for it either. In effect it leads to double inquiry. First, one will have to inquire into whether the Tribunal has jurisdiction. This entails a net balancing of pro-and anti- competitive effects. Then if a net harm is shown one proceeds with the substantive enquiry, which might in a rule of reason case involve extensive duplication of the evidence. In a *per se* contravention it would mean the leading of evidence in the jurisdiction, which is then inadmissible in the substantive enquiry."

See Wood, D.P. "International jurisdiction in national legal systems: The case of antitrust". *Northwestern Journal of International Law & Business* 10 (1989) 72;

¹⁷⁵⁷ *Timberlane Lumber Co v Bank of America National Trust and Savings Association* 549 F.2d 597 (1976); *Hartford Fire Insurance Company v California* 509 US 764 (1993); *Laker Airways Ltd v Sabena, Belgian World Airlines* 731 F.2d 909 (D.C Cir. 1984); *Metro Industries v Sammi Corporation* 82 F.3d 839 (9th Cir.1996); *United States v Nippon Paper Industries Co. Limited* 109 F.3d 1 (1st Cir. 1997); *United States v Concentrated Phosphate Export Association* 89 S.Ct 361 U.S. 199, 21 L.Ed. 2d 344.

¹⁷⁵⁸ Warner, M. "Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law". (1991) 11. *Northwestern Journal of International Law and Business* 374; Fox, E.M. "Can we solve the antitrust problem of globalisation by extraterritoriality and co-operation? Sufficiency and legitimacy" (2003). *The Antitrust Bulletin* 358; Wagner-von Papp, F. "Competition law and extraterritoriality". In Ezrachi, A. [ed.]. *Research Handbook on International Competition Law* (2012) 21-59.

¹⁷⁵⁹ Section 3 (1) of Botswana Competition Act of 2009.

¹⁷⁶⁰ Section 3 (1) of Namibia Competition Act of 2003.

¹⁷⁶¹ Section 7 (a)-(d) of Tanzania Fair Competition Act of 2007.

¹⁷⁶² Section 3 (1) of Zambia Competition and Consumer Protection Act of 2010.

¹⁷⁶³ Article 5 of Egypt Law on the Protection of Competition and the Prohibition of Monopolistic Practices of 2005.

¹⁷⁶⁴ Article 4 of Ethiopia Trade Competition and Consumer Protection Proclamation of 2015.

provisions are similar to those of Tanzania. Kenya's competition law applies to conduct carried on outside of Kenya; by a citizen, or a person ordinarily resident in Kenya; a body corporate, duly incorporated in Kenya, or carrying on business within Kenya; any person in relation to the supply or acquisition of goods, or services by that person in Kenya; or any person, in relation to the acquisition of shares or other assets outside Kenya, resulting in the change of control of a business, or part of it, or an assets of a business in Kenya.¹⁷⁶⁵ Mauritius' competition law applies to every economic activity within, or having an effect within Mauritius, or part of Mauritius.¹⁷⁶⁶ In the case of Malawi, the preamble of the Competition and Fair Trading Act speaks to the need to encourage robust domestic economic activity, but it does not explicitly state the activities to which it applies. Instead, it proceeds by mentioning those activities, which are excluded from its application. These exclusions include, labour and collective bargaining agreements, agreements that relate exclusively to the exercise of copyright, patent or trademark, and activities by professional associations, which relate exclusively to the development and enforcement of professional standards.¹⁷⁶⁷ By implication, an activity that does not fall within the exclusions is governed by the Competition Act. Mozambique's competition law applies to economic activities undertaken, or having an effect on national territory.¹⁷⁶⁸ Seychelles' competition law, similarly, applies to all economic activity within, or having an effect within its territorial borders.¹⁷⁶⁹

Their regional competition rules in the COMESA Competition Regulations of 2004 and the EAC Competition Act of 2006 also have extra-territorial application.¹⁷⁷⁰

7.6.1.2. *American Natural Soda Ash Corporation before the Competition Appeal Court*

Subsequently, ANSAC lodged an appeal before the Competition Appeal Court. Rejecting the purposive approach in establishing the meaning of the word "effect", the Competition Appeal Court opted to assign the word its ordinary meaning, as importing words such as "anti-competitive" into section 3(1) could not be justified by the language used in the Act.¹⁷⁷¹ Attaching "anti-competitive" to section 3(1), directly contradicts the purpose of the Competition Act, which, as a "regulatory net", is not only concerned with anti-competitive practices, but also practices, the impact of which, would still have to be determined.¹⁷⁷²

¹⁷⁶⁵ Section 6 of Kenya Competition Act of 2010.

¹⁷⁶⁶ Section 3 of Mauritius Competition Act of 2007.

¹⁷⁶⁷ Section 3 of Malawi Competition and Fair Trading Act of 1998.

¹⁷⁶⁸ Article 3 of Mozambique Competition Law of 2013.

¹⁷⁶⁹ Section 3 of Seychelles Competition Act of 2009.

¹⁷⁷⁰ Article 3(1) of COMESA Competition Regulations of 2004; section 4(1) of the EAC Competition Act of 2006.

¹⁷⁷¹ *American Soda Ash Corporation & Another v Competition Commission & Others* Case No: 12/CAC/ DEC01 para 13.

¹⁷⁷² Para 18, where Malan AJA, pointed out that section 3(1) 'does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences. ... The question is ... one relating to the ambit of the legislation: the Act in the matter under

The preferable approach would be to assign the word “effect” its ordinary grammatical meaning, as this did not violate any principles of international customary law.¹⁷⁷³

Therefore, the question was not whether the consequences of ANSAC’s conduct were anti-competitive, but whether the conduct had “direct and foreseeable” substantial consequences in the regulating country.¹⁷⁷⁴ In this particular case, the “effects” would have to fall within the ambit of the Competition Act’s regulatory framework, regardless of their pro-competitiveness, or otherwise. Besides, the Tribunal’s interpretation of section 3(1) did not violate any international comity principle. This principle, ‘more an aspiration than a fixed rule, more a matter of grace than a matter of obligation’,¹⁷⁷⁵ was not infringed, as there was no conflict between South African and United States competition law. As an export association, ANSAC does not operate in the United States. It operates outside of the United States, in terms of the Webb-Pomerene Act, which guarantees ANSAC limited exclusion from the provisions of the Sherman Act. In addition, the Webb-Pomerene Act does not provide an export cartel with immunity from prosecution under foreign competition laws.¹⁷⁷⁶

7.6.1.3. *American Natural Soda Ash Corporation before the Supreme Court of Appeal*

In essence, the Supreme Court of Appeal confirmed the reasoning of the Competition Appeal Court that section 3(1) does not consider the positive or negative effects on competition in the regulating country, but whether there are sufficient jurisdictional links between the practice and its consequences.¹⁷⁷⁷ Alternatively stated, section 3(1) covers ‘both the benign and the malign’.¹⁷⁷⁸ ANSAC’s arguments that words be read into section 3(1)(b) were not supported by conventional canons of statutory interpretation, as there was nothing in the statute to necessitate, or any implication pointing towards, such a “reading-in”.¹⁷⁷⁹ The correct approach would be that the wide and unqualified wording of

consideration, its regulatory “net”, concerns not only anti-competitive conduct but also conduct the import of which still has to be determined.’

¹⁷⁷³ Para 17.

¹⁷⁷⁴ Para 18.

According to *Ahlstrom Osakeyhtiö & Others v Commission of the European Communities* [1988] CMLR 901 ECJ para 16, the reason for such an approach is because ‘if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading these prohibitions.’

¹⁷⁷⁵ *United States v Nippon Paper Industries Co Limited* 109 F 3D 1 (1997).

¹⁷⁷⁶ United States Department of Justice and Federal Trade Commission ‘Antitrust enforcement Guidelines for international operations’ available online at <http://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations> (accessed on 11 December 2014).

¹⁷⁷⁷ *American Soda Ash Corporation & CHC Global (Pty) Ltd v Competition Commission of South Africa, Botswana Ash (Pty) Ltd, Chemsolve Technical Products (Pty) Ltd & Minister of Trade and Industry* [2005] 3 All SA 1 (SCA) para 6, 24-25.

¹⁷⁷⁸ Para 26.

¹⁷⁷⁹ Para 27-28, ANSAC’s line of argument would have “the anomalous consequence that, if it were adopted, the Tribunal and the Commission would have no jurisdiction to conduct any of their activities until they had established that the economic activity at issue had a negative or deleterious effect within the Republic. A long contestation about the statute’s applicability would ensue before the Act’s institutions could assume jurisdiction. That, manifestly, is to approach the structure and

section 3(1) allows all effects to be included, but that the Act only prohibits those that are detrimental.

On the admissibility of evidence about the nature and effect of the agreement, the Supreme Court held that section 4(1)(b) violations are inimical to competition, *per se* illegal, incapable of redemption, and the efficiency defence available under section 4(1)(a) cannot be raised.¹⁷⁸⁰ Additionally, when juxtaposed with section 4(1)(a), section 4(1)(b) adopts a *per se* illegal principle, for which the efficiency gains defence, which applies to section 4(1)(a), will not apply to section 4(1)(b).¹⁷⁸¹ The Supreme Court's concurrence with the Competition Tribunal and Competition Appeal Court decisions ends here.

The Supreme Court of Appeal departed, in a major way, from the decisions of the Competition Tribunal and the Competition Appeal Court on one important aspect: that evidence to determine the nature of the conduct should have been admitted. According to the Supreme Court, both the Competition Tribunal and the Competition Appeal Court seem to have conflated two separate issues: whether evidence could be tendered to show if section 4(1)(b) conduct had occurred; and whether evidence could be tendered to show efficiency gains for section 4(1)(b) violations.¹⁷⁸² The Supreme Court was of the view that both the Tribunal and Appeal Courts had erred, in that they prematurely inquired into whether efficiency gains could be raised for *per se* illegal violations, without first determining whether conduct, falling within the purview of section 4(1)(b), had actually occurred, a process referred to as "characterisation" in the United States.¹⁷⁸³ Only once conduct has been characterised as, for example, price fixing, can one exclude any evidence relating to pro-competitive gains. Alternatively stated, both the Tribunal and the Appeal Court put the proverbial cart before the horse.

It is submitted that the "characterisation" inquiry is well suited for the American context, where the Sherman Act is cast in broad language, and does not mention the specific prohibited practices. In the United States, business practices that are judged under the *per se* illegal have been determined by courts on a case-by-case basis. In contrast,

operation of the Act, and the functioning of its institutions, from the wrong end. The correct approach- which the wide and unqualified wording of section 3(1) requires- is that all effects are captured, but that the statute enjoins only those that are adverse... the 'effect' the Act contemplates must be such that it falls within the regulatory framework created by the statute, whether anti-competitive or not."

¹⁷⁸⁰ Para 37.

¹⁷⁸¹ Para 37.

¹⁷⁸² Para 39-40

¹⁷⁸³ Para 41- 55.

According to *Broadcast Music Inc., v Columbia Broadcasting System Inc.* 441 U.S. 1, 9 (1978) "when two partners set the price of their goods or services they are literally 'price-fixing, but they are not *per se* in violation of the Sherman Act. It is necessary to characterise the challenged conduct as falling within or without that category of behaviour to which we apply the label '*per se* price fixing'. That will often, but not always, be a simple matter".

section 4(1)(b) of the Competition Act of 1998 is quite specific: price fixing, market divisions, and collusive tendering are to be evaluated in terms of the *per se* illegal principle.¹⁷⁸⁴ According to the Supreme Court, the legislative prohibition in the Competition Act was not clear and, therefore, it would be premature to determine what evidence might, or might not, be admissible, in order to decide if the prohibited practice had occurred.¹⁷⁸⁵ Therefore, although the exclusion of evidence by both the Competition Tribunal and the Competition Appeal Court, purporting to justify conduct prohibited by section 4(1)(b) was correct, the same could not be said of the exclusion of evidence aimed at characterising the conduct under investigation.¹⁷⁸⁶

The Supreme Court's ruling should not be used to infer that the evidence, which ANSAC sought to introduce, was admissible; instead, the Supreme Court's decision was simply because the refusal by both the Competition Tribunal and the Competition Appeal Court to admit evidence for characterising ANSAC's activities was premature.¹⁷⁸⁷ Therefore, although, ANSAC's appeal was unsuccessful, regarding the extra-territorial application of the Act, it, nonetheless, achieved victory concerning the admissibility of evidence aimed at characterising ANSAC's agreement and activities in South Africa. In light of the Supreme Court's inclusion of the characterisation of section 4(1)(b) violations, Moodaliyar and Weeks concede that a framework may be needed to enable this characterisation, provided it does not encumber litigants, and does not erode the value of the *per se* illegal rule that applies to cartel practices.¹⁷⁸⁸

ANSAC finally negotiated a settlement agreement with the Competition Commission and undertook to terminate its group soda ash exports to South Africa, as well as amend its

¹⁷⁸⁴ *American Soda Ash Corporation & Another v Competition Commission & Others* Case No: 12/CAC/ DEC01 para 31, the Competition Appeal Court also highlighted the dangers of transmitting foreign law into South African law, by stating that although the "characterising" inquiry espoused in the *Broadcasting Music Inc.* case was indeed attractive, it was unnecessary to follow in the South African context, as it was excluded by the very terms of section 4(1)(b), which declared the specified conduct as *per se* illegal. According to the Competition Appeal Court, "it is not sufficient to compare the texts of legislation; one should look for the customs and practices of countries to determine how laws are applied and how the law enforcing authorities function in practice. There are, therefore, limits to comparative law... The differences between the approach of the United States case law and [the] interpretation of section 4(1)(b) are clear: there is no basis of importing a 'rule of reason' analysis in construing section 4(1)(b). The words of the legislature are clear and unambiguous".

¹⁷⁸⁵ Para 56.

¹⁷⁸⁶ Para 61-62.

¹⁷⁸⁷ Para 60, in fact the Supreme Court took pains to emphasise that "we do not suggest that the evidence ANSAC seeks to lead is necessarily admissible, we hold only that it is premature at this stage to make a finding as to what evidence is or is not admissible, so long as the characteristics of the prohibited conduct have not been established by construing the statute. It is for the Tribunal to consider, in the manner and in accordance with such procedure as it may decide, to what extent evidence may be admissible to establish whether the ANSAC agreement falls within the prohibition contained section 4(1)(b)."

¹⁷⁸⁸ Moodaliyar, K. & Weeks, K. "Characterising price fixing: A journey through the looking glass with ANSAC" (2008) 11. *South African Journal of Economic & Management Sciences* 337-352; Moodaliyar, K. "The impact of the ANSAC judgments on competition analysis" (2006) 18. *South African Mercantile Law Journal* 367-375.

membership agreement, to allow its individual members to negotiate exporting into South Africa, independently.¹⁷⁸⁹

7.6.2. American Natural Soda Ash Corporation in India

In September 1996, ANSAC attempted to ship soda ash into India. India's Alkali Manufacturers Association of India (AMAI) filed a complaint with the former Monopolies and Restrictive Trade Practices Commission (the MRTP Commission) and sought an interim order interdicting ANSAC from shipping its product into India (which order was granted).¹⁷⁹⁰ The complaint was that, in violation of the previous competition law, Monopolies and Restrictive Trade Practices Act of 1969 (the MRTP Act), ANSAC was engaging in restrictive trade practices, among them, cartel conduct. According to AMAI, ANSAC was 'dumping' its natural soda ash in India,¹⁷⁹¹ thereby restricting competition and leading to the closure of domestic companies.¹⁷⁹² ANSAC argued that the MRTP Commission had no jurisdiction, as the MRTP Act only applied to practices undertaken in India. According to ANSAC, the Act was not applicable, as there was no agreement among their members relating to supply or distribution in India,¹⁷⁹³ on the contrary, India's consumers stood to benefit from ANSAC's low prices.¹⁷⁹⁴

7.6.2.1. ANSAC before the Monopolies and Restrictive Trade Practices Commission

Relying on ANSAC's Membership Agreement, the MRTP Commission concluded that ANSAC was a cartel carrying out its trade practices in India, thereby conferring jurisdiction on the Commission, notwithstanding the fact that the ANSAC Membership Agreement was concluded outside of India.¹⁷⁹⁵ The Commission clarified a few issues. First, ANSAC members, in their individual capacities, and other individual American firms, were allowed to export their product to India, individually.¹⁷⁹⁶ Secondly, the

¹⁷⁸⁹ *Competition Commission & Others v American Natural Soda Ash Corporation & Another* [2008] ZACT 92 para 6. Venter, I. "ANSAC member in independent move to supply the South African market". *Engineering News* 15 April 2009. Available online at <http://www.engineeringnews.co.za/article/ansac-member-in-move-to-supply-sa-market-on-its-own-2009-04-15> [Accessed 13 April 2013].

¹⁷⁹⁰ *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp LJ 152 MRTPC.

¹⁷⁹¹ Under the rules of international trade, the practice of "dumping" occurs when a firm sells its export products at prices lower than what it would normally sell them in its home market. The WTO, as the organisation tasked with ensuring compliance with international trade rules, does not regulate "dumping". Instead, through the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade (the "Anti-Dumping Agreement"), the WTO prescribes how governments can react to the practice of dumping. Typically, this involves the imposition of anti-dumping duties, through additional import duties on the "dumped" product, so as to bring the price closer to its "normal price", or to offset injuries suffered by domestic producers. To ensure due process, and to adhere to the principles of fair international trade, the imposition of anti-dumping must be preceded by a thorough investigation, in line with WTO principles.

¹⁷⁹² *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp LJ 152 MRTPC para 3, 13-16.

¹⁷⁹³ Para 20.

¹⁷⁹⁴ Para 20.

¹⁷⁹⁵ Section 14 of the Monopolies and Restrictive Trade Practice Act of 1969; *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp LJ 152 MRTPC para 24.1, citing *Jugaldas Damodar Mody* 1983 (3) Comp LJ 221, where the Commission ruled that the Monopolies and Restrictive Trade Practice Act of 1969 applied to an agreement which, although was not concluded in India, was implemented in India.

¹⁷⁹⁶ *Alkali Manufacturers Association of India v American Natural Soda Ash Corporation (ANSAC) and Others* 1998 (3) Comp LJ 152 MRTPC para 28.

efficiencies claimed by ANSAC were, in reality, not necessary in order to export to India.¹⁷⁹⁷ Instead, they simply gave ANSAC more influence to export their natural soda ash, than they would have had, if they were acting individually.¹⁷⁹⁸

The Commission was not oblivious to the fact that consumers would benefit from lower prices. However, the Commission was more concerned about balancing consumer welfare against the public interest.¹⁷⁹⁹ Even though the low prices would serve the consumer interest, such benefit would only be short-term. On the other hand, the public interest was at stake: the interest of India's domestic soda ash producers; excess capacity of soda ash in India; and the impairment of the competition process by ANSAC's conduct. Based on this, the Commission ruled that, in this particular case, the public interest trumped consumer welfare.¹⁸⁰⁰

7.6.2.2. American National Soda Ash Corporation before the Supreme Court

In the appeal, ANSAC submitted that the MRTP Act and the MRTP Commission did not have extra-territorial jurisdiction in the matter. In its judgment, the Supreme Court ruled that, according to the wording used, the Act did not have extra-territorial application.¹⁸⁰¹ Additionally, it ruled that the Commission would have jurisdiction, if a person in India were party to the agreement.¹⁸⁰² Therefore, the Commission did not have jurisdiction to ban the entry of ANSAC's products into India, nor could it challenge foreign cartels, or the pricing of exports destined for India.¹⁸⁰³ The Commission could only take action if it were proved that there was an anti-competitive agreement, which involved an Indian firm. In addition, such action could only be taken if the products had actually been imported into India, which was not the case (since the Commission had issued an interim interdict, preventing the entry of American soda into India).¹⁸⁰⁴ The Supreme Court also considered the public interest and clarified that the public interest does not always mean the interest of the particular industry only (unless it could be shown that an India industry would be foreclosed resulting in the loss of employment).

Importing goods into India at lower prices was not *per se* illegal. The Supreme Court declared that "the era of protectionism is now coming to an end and India must gear up

¹⁷⁹⁷ Para 29.

¹⁷⁹⁸ Para 30-31.

¹⁷⁹⁹ Para 34.

¹⁸⁰⁰ Para 38-40.

¹⁸⁰¹ *Haridas Exports v All India Float Glass Manufacturers' Association & Others* (2002) 6 SCC 600 para 22.

¹⁸⁰² Para 23-25.

¹⁸⁰³ Para 23-24

¹⁸⁰⁴ Para 24.

to meet the challenge from abroad”.¹⁸⁰⁵ Although the Supreme Court did not express itself on whether ANSAC was a cartel, since the Commission had failed to make a case for granting an interdict against ANSAC,¹⁸⁰⁶ the Court did emphasise that, if a cartel carries out restrictive trade practices in India, or its actions have an effect in India, then the Commission would have jurisdiction.¹⁸⁰⁷

7.6.3. American Natural Soda Ash Corporation before the European Commission

Before the European Commission, ANSAC argued that its entry into the EU market was pro-competitive, that it would allow a new entrant into the market, thereby, ensuring genuine competition, and that “if the end is good, the means, (within limits) cannot be regarded as restrictive”.¹⁸⁰⁸ Alternatively, if its activities were found to be in violation of Article 101(1), then its activities must be exempted in terms of Article 101(3).¹⁸⁰⁹ In addition, EU consumers would benefit by the lower prices, the reliable and competitive supply of the product, and, even if ANSAC’s practices were regarded as restrictive and in violation of EU competition law, these restrictions were indispensable and did not eliminate competition in the soda ash market.¹⁸¹⁰

The Commission was not swayed by these arguments. First, ANSAC’s practices were among those envisaged by Article 101 (1), the likely effect of which would be the restriction of competition within the Common Market, in terms of prices and quantities (since ANSAC members would not be able to sell individually).¹⁸¹¹ Secondly, ANSAC’s presence would not contribute to improving production, or promoting technical progress. Thirdly, the presence of a single sales agency, such as ANSAC would open the way for collusions among suppliers.¹⁸¹² In essence, the agreements were dispensable. The singular advantage accruing to consumers was that there would be more of the product, and not the low prices.¹⁸¹³ Accordingly, the Commission declared that ANSAC’s practices violated EU competition law, refused the exemption application that ANSAC had made, and ordered ANSAC together with its members to refrain from implementing the practices under investigation in the Common Market. Therefore, the extra-territorial application of EU competition law to foreign conduct that affects trade within the EU is settled.¹⁸¹⁴

¹⁸⁰⁵ Para 24.

¹⁸⁰⁶ Para 24.

¹⁸⁰⁷ Para 25.

¹⁸⁰⁸ Case IV/33.016 – ANSAC para 10, para 14.

¹⁸⁰⁹ Para 15

¹⁸¹⁰ Para 16.

¹⁸¹¹ Para 19.

¹⁸¹² Para 26.

¹⁸¹³ Para 27-30.

¹⁸¹⁴ Breibat, E. “The Wood Pulp case: The application of European Community competition law to foreign based undertakings” (1989) 19. *Georgia Journal of International and Comparative Law* 149- 173.

7.7. International Trade in Potash - The Case of Canadian Potash Exporters

Potash is the main ingredient in agricultural fertilisers.¹⁸¹⁵ Global trade in potash is dominated by Canada, Russia and Belarus.¹⁸¹⁶ Canadian Potash Export (CANPOTEX) was formed in 1972. It comprises of three Canadian potash-mining companies.¹⁸¹⁷ Exempted, in terms of section 45 (5) of Canada's Competition Act,¹⁸¹⁸ the export cartel co-ordinates and manages the global sales of its members.¹⁸¹⁹ CANPOTEX has been likened to "an OPEC on steroids" because, although OPEC only has 12 members and controls 37 per cent of oil flows, CANPOTEX accounts for 52 per cent of global potash reserves.¹⁸²⁰ CANPOTEX is also structured in such a way that it neither operates in Canada nor exports its potash to the United States. This is a clear acknowledgment of the deleterious impact of export cartels. Initially, Belarusian Potash Company (BPC) was another potash export cartel between Russia and Belarus, which collaborated with CANPOTEX, and together these two export cartels accounted for 70 per cent of global potash trade.¹⁸²¹ However, BPC broke down in August 2013.¹⁸²² This effectively left CANPOTEX as the sole potash export cartel. Since its formation, CANPOTEX has sold more than 185 million tonnes to 135 buyers in 60 countries, of which, 106 tonnes was sold to its top five buyers, namely, China, Brazil, India, Indonesia and Malaysia,¹⁸²³ all developing countries.

7.8. What does the Potash Export Cartel mean for the Global-South?

A substantial number of countries depend either entirely, or at least partially, on imports to satisfy their domestic potash demands. The world's largest potash users, India, Indonesia, and Malaysia import all their potash consumption, since they do not have any domestic sources of the crop nutrient, while Brazil and China import close to 90 per cent and 60 per cent, respectively, of their domestic needs.¹⁸²⁴ When compared to other crop nutrients, potash demand is forecast to have a significant global

¹⁸¹⁵ According to 2010 data from the International Fertiliser Industry Association, East Asia is the world's biggest consumer of potash with 30.8 per cent, followed by Latin America (17.5 per cent), North America (16.8 per cent), West Europe (10.5 per cent) and Africa with a potash consumption of 1.4 per cent. Information available online at <http://www.fertilizer.org/ifa/HomePage/STATISTICS/Production-and-trade> [Accessed 01 May 2013].

¹⁸¹⁶ "Saskatchewan in the spotlight: Acquisition of Potash of Saskatchewan Inc.- the risks and opportunities". *Conference Board of Canada Report* (2010) 8.

¹⁸¹⁷ Information available online at <http://www.canpotex.com/what-we-do/products> [Accessed 01 May 2013].

¹⁸¹⁸ Competition Act (R.S.C., 1985, C.c-34).

¹⁸¹⁹ "Saskatchewan in the spotlight: Acquisition of Potash of Saskatchewan Inc.- the risks and opportunities". *Conference Board of Canada Report* (2010) 9.

¹⁸²⁰ Heaps, T.A. "Potash politics, Canadian O.P.E.C: the Organisation of Potash Export Countries". *Corporate Knights* 24 April 2009. Available online at <http://www.corporateknights.com/channels/mining/potash-politics-12405817/> [Accessed 11 March 2013]; See 7.3 of this Chapter.

¹⁸²¹ "Saskatchewan in the spotlight: Acquisition of Potash of Saskatchewan Inc.- the risks and opportunities". *Conference Board of Canada Report* (2010) 9.

¹⁸²² Devitta, P. & Shurmina, N. "Potash sector rocked as Russia's Uralkali quits cartel" 30 July 2013. *Reuters News*. Available online at <http://www.reuters.com/article/2013/07/30/us-russia-uralkali-idUSBRE96T0S220130730> [Accessed 05 September 2013].

¹⁸²³ Eaton, P. "CANPOTEX: Potash's biggest marketer marks 40 years in business" (2013) 1. *Saskatchewan Mining Journal* 7.

¹⁸²⁴ Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities*, Centre for Economic Policy Research (2012) 109.

increase of 3.7 per cent, annually, between 2012 and 2016.¹⁸²⁵ Several factors are likely to influence the rise in the demand for potash; the first being the growth of the global population, for which the global South, particularly Africa, will experience a substantial part thereof.¹⁸²⁶ Secondly, higher incomes in the global South have led to changing eating habits.¹⁸²⁷ Thirdly, the fact that arable land has stagnated, means that the available land has to produce maximum yields, through the use of plant and soil nutrients, such as potash.¹⁸²⁸

In 2010, one of CANPOTEX's members, Potash Corporation, faced a hostile takeover bid by Australia's BHP Billiton.¹⁸²⁹ Although, BHP Billiton, subsequently, withdrew its bid to acquire Potash Corporation, projections were made to estimate the cost to potash global trade within a competitive scenario, if BHP Billiton had been successful. The projections were startling. Under a competitive scenario, the price of potash would result in a price decrease from US\$574 in 2011 to US\$217 by 2015, which would increase to US\$488 by 2020.¹⁸³⁰ In stark contrast, the CANPOTEX strategy would see a steady increase in prices from US\$574 in 2011, to US\$734 in 2020.¹⁸³¹

The above figures certainly affect developing countries, such as, India and China. For instance, India's population has been soaring and coupled with limited land under cultivation, with no possibility of finding additional arable land, the demand for fertiliser, particularly potash, will increase, in order to maintain food security.¹⁸³² By the year 2025, India must increase its food-grain by at least 40 per cent, which will necessarily mean an increase in agricultural productivity and a significant use of fertiliser.¹⁸³³ What needs to be considered is that, if India's government continues to subsidise fertiliser purchases for its farmers (as it currently does), in reality, it will be financing the monopolistic

¹⁸²⁵ United Nations Food and Agriculture Organisation *Current World Fertiliser Trends and Outlook to 2016* (2012) 7, the Food and Agriculture Organisation statistics further show that, in the 2012-2016 period, the percentage of the potash world demand from Asian countries is expected to rise: India 32 per cent, China 25 per cent, Indonesia 5 per cent, Thailand 3 per cent, Vietnam 2 per cent, and Malaysia 1 per cent. In the Americas, 11 per cent is projected from Brazil. In Sub-Saharan Africa, a forecast of 4.2 per cent is projected for South Africa, Nigeria, Kenya, Ethiopia, and Malawi being the major fertiliser users. While 1.2 per cent is forecast from North Africa with Egypt and Morocco, as the major fertiliser users.

¹⁸²⁶ Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 109 -111; Population Bureau. *World Population Datasheet* (2013) 7. Available online at <http://www.prb.org/Publications/Datasheets/2013/2013-world-population-data-sheet/data-sheet.aspx> [Accessed 28 January 2013].

¹⁸²⁷ Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 109 - 111; Chaize, T. "Potash fertiliser, its price and production in the world". *Energy and Mining Newsletter* March 2010; McCorrison, S. "Commodity prices, government policies and competition". In Evenett, S. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 3 – 29.

¹⁸²⁸ Jenny, F. "Export cartels in primary products: the Potash case in perspective". In Evenett, S. & Jenny, F. [eds.]. *Trade, Competition and the Pricing of Commodities* (2012) 109 – 111.

¹⁸²⁹ "BHP's bid for PotashCorp: how it unfolded" *CBC News* 02 November 2010. Available online <http://www.cbc.ca/news/business/bhp-s-bid-for-potashcorp-how-it-unfolded-1.929246> [Accessed 12 May 2013].

¹⁸³⁰ Jenny, F. *Price instability and competition law: The case of the potash cartel case*. Organisation for Economic Co-operation and Development Global Forum on Trade and Competition (2012) 1 – 10.

¹⁸³¹ Jenny, F. *Price instability and competition law: The case of the potash cartel case*. Organisation for Economic Co-operation and Development Global Forum on Trade and Competition (2012) 1 – 10.

¹⁸³² Jenny, F. *Price instability and competition law: The case of the potash cartel case*. Organisation for Economic Co-operation and Development Global Forum on Trade and Competition (2012) 1 – 10.

¹⁸³³ Jenny, F. "Global potash trade and competition". *The Economic Times* 02 November 2010. Available online at http://articles.economictimes.indiatimes.com/2010-11-25/news/29382665_1_potash-saskatchewan-bhp-billiton [Accessed 01 May 2013].

rents that benefit export cartels such as CANPOTEX.¹⁸³⁴ In fact, in 2009, India's total fertiliser subsidies tripled to US\$ 2.5 billion, of which more than 80 per cent was channelled towards potash procurement.¹⁸³⁵ Projections also revealed that, if India continued to purchase its potash from CANPOTEX, India would be paying an annual overcharge of US\$ 750 million.¹⁸³⁶ China faces similar circumstances.¹⁸³⁷

7.9. Concluding Remarks

Export cartels are another area in which enforcement collaboration can be done in RECs. In theory, because the COMESA Competition Regulation of 2004 and the EAC Competition Act of 2006 apply to conduct that affects trade among Member States within the respective RECs, these regional competition laws can apply to export cartels originating within the RECs and affecting regional trade relations.¹⁸³⁸ A distinction must be drawn between "types" of export cartels. On the one hand, those export cartels, whose participant firms do not originate in COMESA, EAC, SACU or SADC, for example, ANSAC and CANPOTEX. On the other hand, those export cartels, which may involve firms originating in RTA Member States. With the former, there is certainly scope for enforcement collaborations, particularly if the impact of the export cartel is felt among several Members States. However, the same cannot be said of export cartels originating from one or more Member States. For example, in the event of an export cartel, exempted in terms of section 10 of the South Africa Competition Act of 1998, it is not likely that South Africa's Competition Commission will cooperate with the NCAs of other SADC Members in the investigation of such a cartel. Indeed the Competition Commission of South Africa has neither the motivation, nor the incentive to cooperate. The same can also be said for other Members of the RTAs, who exempt export cartels, which may export into the territories of other REC Members. Therefore, co-operation in this type of cartel is similarly unlikely. The only probable situation, in which collaboration in the enforcement of export cartels can be realised, will be if all Members in these RTAs agree on common rules regarding export cartels. Such rules will have to be clear about the fact that such export cartels are to operate outside of the territories of Member States. This is possible within the COMESA framework; especially in light of the fact that the COMESA Competition Regulations do not apply, to conduct that is expressly exempted by national legislation.¹⁸³⁹ This means that express exemption is allowed and lawful. In the event that

¹⁸³⁴ Jenny, F. "Global potash trade and competition". *The Economic Times* 02 November 2010. Available online at http://articles.economictimes.indiatimes.com/2010-11-25/news/29382665_1_potash-saskatchewan-bhp-billiton [Accessed 01 May 2013].

¹⁸³⁵ Heaps, T.A. "Potash politics, Canadian O.P.E.C: the Organisation of Potash Export Countries". *Corporate Knights* 24 April 2009 available online at <http://www.corporateknights.com/channels/mining/potash-politics-12405817/> [Accessed 11 March 2013]; Taylor, T.C. "Forget Oil, Worry About Phosphorus". *Daily Yonder* 13 September 2010. Available online at <http://www.dailyyonder.com/forget-oil-worry-about-phosphorus/2010/09/08/2929> [Accessed 01 May 2013].

¹⁸³⁶ Jenny, F. "Global potash trade and competition". *The Economic Times* 02 November 2010. Available online at http://articles.economictimes.indiatimes.com/2010-11-25/news/29382665_1_potash-saskatchewan-bhp-billiton [Accessed 01 May 2013].

¹⁸³⁷ Jenny, F. "Global potash trade and competition". *The Economic Times* 02 November 2010. Available online at http://articles.economictimes.indiatimes.com/2010-11-25/news/29382665_1_potash-saskatchewan-bhp-billiton [Accessed 01 May 2013].

¹⁸³⁸ See 4.5- 4.6 in Chapter 4.

¹⁸³⁹ Article 3(3) of COMESA Competition Regulations of 2004.

a cartel affects a Member State, they will be well within their rights to deal with it in terms of its domestic competition law.



PART D:
CARTELS IN SOUTH- SOUTH
REGIONAL ECONOMIC COMMUNITIES



CHAPTER EIGHT

CROSS-BORDER CARTEL ACTIVITY AND SOUTH- SOUTH REGIONAL CO-OPERATION

“Enforcement co-operation is a key means both of improving the effectiveness of individual agency investigations and producing consistent outcomes in similar circumstances ... co-operation has developed into an important tool for achieving these goals... it is an extremely useful tool for working together, at the practical level in helping agencies to resolve individual cases effectively and efficiently.”¹⁸⁴⁰

8.1. Overview

In consideration of the focus of this research, the South-South co-operation in the following Regional Economic Communities (RECs) – COMESA, EAC, SACU and SADC – is assessed in this chapter. Because Regional Trade Agreements (RTAs) are the legal foundations upon which co-operation regarding cross-border anti-cartel activities are based, the researcher starts this chapter with a discussion on of the link between international trade and competition law. Thereafter, the types of co-operation are discussed. In this chapter, the researcher also makes a case for regional co-operation, by using specific examples of cross-border cartels in the above RECs. The substantive rules on co-operation are presented, as contained in regional competition laws, as well as how these are presently being implemented. Finally, the researcher discusses the successes of, as well as the problems plaguing, South-South collaborations in the enforcement of regional cartel laws.

8.2. The Link between International Trade, Regional Trade Agreements and Competition Law

As can be recalled, competition policy encapsulates the plethora of government measures that are utilised to encourage competitive market structures and practices.¹⁸⁴¹ These measures include competition law itself and trade liberalisation. To ensure that trade is not distorted; an active competition law is a necessary ingredient.¹⁸⁴² Seen in this light, trade liberalisation and competition law have a mutually consistent, reinforcing and complementary relationship.¹⁸⁴³

Concerning cartels, the WTO has made it clear that they are harmful and that concerted efforts must be undertaken to eradicate them. Although the WTO does not have a legal instrument, specifically, addressing competition law, some of its multilateral agreements have competition law implications. For example, the General Agreement on Tariffs and Trade (GATT) 1994 contains one of the basic principles that govern international trade – the so-called ‘national treatment’ principle, a non-discriminatory rule, which requires that products from the territory of any Member, imported into the

¹⁸⁴⁰ *Informal co-operation among competition agencies in specific cases*. United Nations Conference on Trade and Development (2014) 13.

¹⁸⁴¹ See 1.2 in Chapter 1.

¹⁸⁴² Von der Groeben, H. *Competition in the Common Market*. European Economic Community Commission (1961) 4. Available online at <http://aei.pitt.edu> [Accessed 11 November 2013].

¹⁸⁴³ Mehta, P.S. & Smita, J. *Trade liberalisation and competition policy*. Consumer Unity Trust Society (2007) 1-3.

territory of another Member, should not be subjected to less favourable treatment than similar domestic products.¹⁸⁴⁴ The WTO's Dispute Settlement Body (DSB) has ruled on this issue in several cases.¹⁸⁴⁵

The Anti-Dumping Agreement also has competition law implications,¹⁸⁴⁶ as does the Agreement on Subsidies and Countervailing Measures.¹⁸⁴⁷ The Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) also addresses the interaction between trade law, intellectual property rights and competition law.¹⁸⁴⁸ The General Agreement on Trade in Services (GATS) recognises the negative impact that restrictive business practices have on competition,¹⁸⁴⁹ as does the GATS Reference Paper on Pro-competitive Regulatory Principles, which requires Members to maintain 'appropriate measures' to prevent "major suppliers" from engaging in "anti-competitive practices".¹⁸⁵⁰

Mexico-Telecomms was the first case in the WTO's jurisprudence to deal with competition law violations, expressly and specifically.¹⁸⁵¹ In this case, the Mexican government argued that, as a sovereign state, it had undertaken the cartel pricing complained of, but that this had been done as part of legitimate government policy, aimed at encouraging competition among its domestic telecommunications providers. This case has since generated a considerable amount of commentary.¹⁸⁵² In the *Kodak-Fuji* dispute, the United States argued that Japan's Fuji maintained

¹⁸⁴⁴ Article III of the General Agreement on Tariffs and Trade 1994.

¹⁸⁴⁵ Appellate Body Report *Korea – Taxes on Alcoholic Beverages* WT/DS75/AB/R, WT/DS84/AB/R adopted 17 February 1999; Panel Report *Japan - Measures Affecting Consumer Photographic and Film Paper* WT/DS44/R adopted 22 April 1998; Appellate Body Report *Japan-Tax on Alcoholic Measures II* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 01 November 1996; Appellate Body Report *Canada - Certain Measures Concerning Periodicals* WT/DS31/R adopted 30 July 1997.

¹⁸⁴⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

¹⁸⁴⁷ Article XVI of the General Agreement on Tariffs and Trade 1994.

¹⁸⁴⁸ Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights; Anderson, R.A. "Intellectual property rights, competition policy and international trade: Reflections of the work of the WTO Working Group on the Interaction between Trade and Competition Policy (1996-1999)" In Cottier, T. & Mavroidis, P.C. [eds.]. *Intellectual Property: Trade, Competition and Sustainable Development* (2006) 235; Ullrich, H. "Expansionist intellectual property protection and reductionist competition rules: A TRIPS perspective" (2004) 7. *Journal of International Economic Law* 401- 430; Kolstad, O. "Competition law and intellectual property rights - outline of an economics based approach". In Drexel, J. [ed.]. *Research Handbook on Intellectual Property and Competition Law* (2008) 3-26; Drexel, J. "Is there a 'more economic approach' to intellectual property and competition law?". In Drexel, J. [ed.]. *Research Handbook on Intellectual Property and Competition Law* (2008) 27- 53; Brunell, R.M. "Appropriability in antitrust: How much is enough?" *Antitrust Law Journal* 69 (2001) 4; Villarejo, C.M. & Kramler, T. "Intellectual property rights and competition rules, a complex indispensable coexistence". In Anderman, S. & Ezrachi, A. [eds.]. *Intellectual Property and Competition Law, New Frontiers* (2011) 61.

¹⁸⁴⁹ Article IX (1) of the General Agreement on Trade in Services.

¹⁸⁵⁰ Article 1(1) of the Reference Paper on Pro-competitive Regulatory Principles.

¹⁸⁵¹ Panel Report *Mexico – Measures Affecting Telecommunications Services* WT/DS204/R adopted on 01 June 2004.

¹⁸⁵² For example, Sidak, J.G. & Singer, H.J. "Ubberegulation without economics: The World Trade Organisation's decision in the U.S.- Mexico arbitration telecommunications services" (2004) 57. *Federal Communications Law Journal* 1-48; Neven, D.J. & Mavroidis, P.C. "El mess in Telmex: A comment on *Mexico-Measures Affecting Telecommunications Services*" (2006) 5. *World Trade Review* 271- 296; Arena, A. "The role of GAL standards in juris-generative interactions between global antitrust institutions in light of the *Mexico-Telecoms* case" *IPRA Working Paper –GAL Series No.3* (2013) 17; Davey, W.J. "Has the WTO dispute settlement system exceeded its authority?" (2001). *Journal of International Economic Law* 79-110; Marsden, P. "Trade and competition: WTO decides its first competition case, with disappointing results" (2004). *Competition Law Insight* 3- 9; Fox, E.M. "The WTO's first antitrust case- Mexican Telecom: A sleeping victory for trade and competition" (2006) *Journal for Economic and Economic Law* 271- 292; Bronckers, M. & Larouche, P. "Telecommunications services". In Macrory, P., Appleton, A. & Plummer, A. [eds.]. *The World Trade Organisation: Legal,*

anti-competitive relationships with its primary distributors, effectively excluding Kodak from penetrating the Japanese market.¹⁸⁵³

8.3. Regional Trade Agreements in the Global-South – The New Trade Geography

North-South RTAs, dominated by the EU and the United States, are quite common.¹⁸⁵⁴ However, South-South trade and economic integration is steadily growing, and has proved significant in today's global economy.¹⁸⁵⁵ But, South-South trade and integration is plagued by problems, such as the lack of diversification in the goods traded, trading in raw materials as opposed to trading in manufactured products, supply-side constraints, incompatible economic systems, poor economic and political governance, as well as the lack of grassroots support of integration initiatives.¹⁸⁵⁶ Nevertheless, with the failure of some of the trade negotiation rounds at the WTO, the Doha Round being a recent example, RTAs continue to grow in popularity.¹⁸⁵⁷

While their designation, as 'RECs', seems to suggest that they are formed by countries, based on geographical location, this is not always the case. For example, not all SADC Members are located in Southern Africa. Additionally, not all Members of COMESA are located in the Eastern or Southern parts of the continent. RTAs are simply reciprocal trade agreements between two or more customs territories. They could be either Free Trade Areas (FTAs) or Customs Unions (CUs), and have to be notified at the WTO, before they are implemented.¹⁸⁵⁸



Economic and Political Analysis (2005) 1013; and Singh, S. *The Telmex dispute at the WTO: Competition makes a backdoor entry*. Consumer Unity Trust Society Centre for Competition, Investment & Economic Regulation (2006) 1-6; Bronckers, M. "The WTO Reference Paper on Telecommunications: A model for WTO competition law?" In Bronckers, M. & Quick, P. [eds.]. *New Directions in International Economic Law* (2000) 371- 375.

¹⁸⁵³ Japan- Measures Affecting Consumer Photographic Film and Paper WT/ DS44/R Appellate Body Report Adopted on 22 April 1998

¹⁸⁵⁴ Torrent, R. & Molineuvo, M. "Keeping multilateralism and development in mind: Proposals for a new model of North- South agreements". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 79- 93; do Santos Tarrago, P. "Special and differential treatment under North- South trade agreements". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 95- 96.

¹⁸⁵⁵ Mashayekhi, M., Puri, L. & Ito, T. "Multilateralism and regionalism: The new interface". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 16-20; Kuwayuma, M. "Latin American South- South integration and co-operation: From a regional public goods perspective". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 105- 133; Ferreira, R.M. "Regional co-operation agreements and competition policy- the case of Andean Community". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 145; *Co-operation framework for South- South co-operation 2009-2011*. Executive Board of the United Nations Development Programme (2008) 3; Singh, S. & Dube, M. *BRICS and the world order: A beginner's guide*. Consumer and Unity Trust Society (2012) 3-8.

¹⁸⁵⁶ Houtsy, F. "Addressing market access and entry barriers through regional integration to maximising development gains". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 137-138; Pearson, M. "Addressing market and entry barriers through regional integration: COMESA experience". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 175-176; Chinongo, M. & Nakana, S. "The challenges of regional integration in Southern Africa" (2009) 3. *African Journal of Political Science and International Relations* 396- 408; Kalenga, P. *Regional integration in SADC: Retreating or forging ahead*. Trade Law Centre (2012) 1- 19.

¹⁸⁵⁷ Mashayekhi, M., Puri, L. & Ito, T. "Multilateralism and regionalism: The new interface". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 8; Iumba, N. "Comments on dynamism in the interface of the multilateral trading system and regional trade agreements". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 27- 32.

¹⁸⁵⁸ Article XXIV of the General Agreement on Tariffs and Trade 1994; and Onguglo, B. "Issues regarding notification to the WTO of a regional trade agreement". In Mashayekhi, M. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 33- 49.

In light of the multilateral trade rules, established by the WTO, specifically, the Most Favoured Nation Treatment (MFNT) principle; RTAs are an exception to the general rule. The MFNT is another of the WTO's basic principles underlying multilateral trade. According to the MFNT principle, any advantageous, or favourable, treatment granted by a WTO Member to any product originating from, or destined for, any territory, shall also be granted, immediately and unconditionally, to a like product originating from, or destined for, the territory of a WTO Member.¹⁸⁵⁹ The nature of RTAs is such that they confer favourable trade relations to their members, for example the total elimination of tariffs on goods originating from within the RTA. This favourable treatment is not conferred upon non-members. Therefore, the GATT 1994 requires that RTAs satisfy specific requirements to ensure that multilateral trade is not distorted.¹⁸⁶⁰

There is a new trend in the on-going RTA formations; commitments have moved beyond the traditional trade in goods. They now encompass numerous trade-related subjects, for example, competition law, intellectual property rights, investment, labour, and government procurement. An examination of the RTAs in the global South reveals that competition law provisions are now a constant feature.¹⁸⁶¹ These provisions include commitments to adopt, maintain and enforce competition law; co-operation and coordination among NCAs; common rules on prohibited practices; transparency in the enforcement of competition law; and the establishment of dispute settlement bodies.¹⁸⁶²

8.4. A bird's eye view of the Regional Economic Communities in the Global-South

In Africa, the African Union (AU) recognises several RECs. There is the North Africa's Arab Maghreb Union (AMU);¹⁸⁶³ the Central African Economic and Monetary Community (CEMAC);¹⁸⁶⁴ the Common Market for Eastern and Southern Africa (COMESA);¹⁸⁶⁵ the East African Community (EAC);¹⁸⁶⁶ the Economic Community of Central African States (ECCAS);¹⁸⁶⁷ the Economic Community of West

¹⁸⁵⁹ Article I of the General Agreement on Tariffs and Trade 1994.

¹⁸⁶⁰ Article XXIV of the General Agreement on Tariffs and Trade 1994.

¹⁸⁶¹ Cernat, L. "Eager to ink, but ready to act? RTA proliferation and international co-operation on competition policy". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains* (2005) 20-22; Alvarez, A.M., Clarke, J. & Silva, V. "Lessons from the negotiation and enforcement of competition provisions in South-South and North-South RTAs". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains* (2005) 123.

¹⁸⁶² Evenet, S.J. "What can we really learn from the competition provisions of RTAs?". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains* (2005) 39-43.

¹⁸⁶³ Algeria, Libya, Mauritania, Morocco, and Tunisia.

¹⁸⁶⁴ Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, and Gabon available online at <http://www.internationaldemocracywatch.org/index.php/central-african-economic-and-monetary-community> [Accessed 24 February 2014].

¹⁸⁶⁵ Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Kenya, Libya, Seychelles, Swaziland, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia, and Zimbabwe available online at <http://www.comesa.int/> [Accessed 24 February 2014].

¹⁸⁶⁶ Burundi, Kenya, Rwanda, Tanzania and Uganda available online at <http://www.eac.int/> [Accessed 24 February 2014].

¹⁸⁶⁷ Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, and Sao Tome and Principe. Available online at <http://www.uneca.org/oria/pages/eccas-economic-community-central-african-states-0> [Accessed 23 February 2014].

African States (ECOWAS);¹⁸⁶⁸ the West African Economic and Monetary Union (EUMOA);¹⁸⁶⁹ the Southern African Customs Union (SACU);¹⁸⁷⁰ and the Southern African Development Community (SADC).¹⁸⁷¹ In Asia-Pacific, there is the Association of South East Asian Nations (ASEAN),¹⁸⁷² the South Asian Association for Regional Co-operation (SAARC);¹⁸⁷³ the Economic Co-operation Organisation (ECO);¹⁸⁷⁴ and the Bangkok Agreement.¹⁸⁷⁵ In the Americas, it is the Common Market for the South (MERCOSUR);¹⁸⁷⁶ the Andean Community; the Caribbean Community and Common Market (CARICOM),¹⁸⁷⁷ and the Central American Common Market (CACM).¹⁸⁷⁸

The idea is that in RTAs, where there are relatively fewer members, consensus can be reached much easier, compared to the WTO's multilateral negotiations, in which all parties must reach consensus. With particular reference to South-South RECs, negotiations are relatively easier because Members are at similar levels of economic development. RECs also serve as "half way houses", "building blocks", "laboratories" for testing new issues, before they are dealt with at the multilateral level.¹⁸⁷⁹ Some issues that were originally raised in RECs, eventually made it to the WTO's agenda, and culminated in the adoption of agreements, for example, trade in services and intellectual property rights.¹⁸⁸⁰



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- ¹⁸⁶⁸ Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togolese. Available online at <http://www.ecowas.int/> [Accessed 23 February 2014].
- ¹⁸⁶⁹ Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo. Available online at <http://www.uemoa.int/Pages/Home.aspx> [Accessed 24 February 2014].
- ¹⁸⁷⁰ Botswana, Lesotho, Namibia, South Africa, and Swaziland. Available online at <http://www.sacu.int/> [Accessed 20 February 2014].
- ¹⁸⁷¹ Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Available online at <http://www.sadc.int/> [Accessed 18 February 2014].
- ¹⁸⁷² Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Available online at <http://www.aseansec.org/asean-member-states/> [Accessed 19 February 2014].
- ¹⁸⁷³ Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. Available online at <http://www.saarc-sec.org/> [Accessed 19 February 2014].
- ¹⁸⁷⁴ Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan, and Uzbekistan.
- ¹⁸⁷⁵ India, the Republic of Korea and China.
- ¹⁸⁷⁶ Argentina, Brazil, Paraguay, Uruguay, Venezuela, and Bolivia. Available online at http://www.mercosur.int/t_generic.jsp?contentid=3862&site=1&channel=secretaria&seccion=3 [Accessed 17 February 2014].
- ¹⁸⁷⁷ Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Nevis and the Grenadines, Suriname, Trinidad and Tobago. Available online at http://www.caricom.org/jsp/community/member_states.jsp?menu=community [Accessed 17 February 2014].
- ¹⁸⁷⁸ Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Available online at <http://www.itfglobal.org/itf-americas/CACM.cfm/languageID/1> [Accessed 17 February 2014].
- ¹⁸⁷⁹ Mashayekhi, M., Puri, L. & Taisuke, I. "Multilateralism and regionalism: The new interface". In Mashayekhi, M., Puri, L. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 6-7; Plank- Brumback, R.M. "Consideration on the interface between the WTO and the FTAA negotiations and between FTAA and the recent free trade agreements in the Western hemisphere". In Mashayekhi, M., Puri, L. & Ito, T. [eds.]. *Multilateralism and Regionalism: The New Interface* (2005) 97- 103; Gupta, S. "Changing faces of international trade: Multilateralism to regionalism" (2008) 3. *Journal of International Commercial Law and Technology* 263- 264.
- ¹⁸⁸⁰ *Regionalism: Friends or rivals? Understanding the WTO, cross cutting and new issues*. World Trade Organisation available online at https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm [Accessed 24 November 2013].

8.5. The problem of Multiple Membership - The 'Spaghetti Bowl' Phenomenon

As of April 2015, 612 RTA notifications have been filed at the WTO; of these, 406 are currently in force.¹⁸⁸¹ The “regionalism wave” has brought about the problem of multiple membership, the so-called “spaghetti bowl” phenomenon, in which a single country can belong to more than one REC, simultaneously.¹⁸⁸² The membership in COMESA, EAC, SACU, and SADC reveals how common this phenomenon is. For example, Swaziland is a member of COMESA, SACU and SADC; in the EAC, all members, with the exception of Tanzania, also belong to COMESA; for its part, Tanzania is also a member of SADC; and with SADC, more than half of its members belong to COMESA, as well.

These instances of multiple memberships have drawn contrasting responses. On the one hand, there are those who criticise multiple memberships. They argue that multiple membership, and the rise in RTAs, is an erosion of the multilateral trading system¹⁸⁸³ that it results in conflicting treaty obligations, as well as high transaction and administrative costs, in implementing these obligations.¹⁸⁸⁴ For example, if the COMESA Competition Commission has to decide on a case, it has to go through EAC, SACU and SADC configurations.

On the other hand, while recognising the problems that the “spaghetti bowl” phenomenon may bring, others highlight that this is an indication of the flexibility and diversity of RTAs in the global South, for example, those in Africa.¹⁸⁸⁵ In this context, “flexibility” does not mean disregard of treaty commitments, nor does it mean that treaties are devoid of binding obligations. Instead, it refers to the fact that, in these RTAs, compliance with treaty commitments takes into account the different levels of economic development of treaty signatories. An example of this is the principle of variable geometry, which allows different “speeds” of treaty compliance.¹⁸⁸⁶

¹⁸⁸¹ *Regional trade agreements information system*. Available online at https://www.wto.org/english/tratop_e/region_e/region_e.htm. [Accessed 11 May 2015].

¹⁸⁸² Bhagwati, J. “U.S. trade policy: The infatuation with free trade areas”. In Bhagwati, J. & Krueger, A.O. [eds.]. *The Dangerous Drift to Preferential Trade Agreements* (1995) 2-10; Cho, S. “Defragmenting world trade” (2006) 27. *Northwestern Journal of International Law and Business* 39; Chiumya, C.C. “Regional trade agreements: An African perspective of challenges for customs policies and future strategies” (2009) 2. *World Customs Journal* 88; Ndlovu, P.N. “The state of trade liberalisation in goods in SADC” (2012) 2. *Southern African Development Community Law Journal* 201-202.

¹⁸⁸³ Bhagwati, J. “Trading preferentially: Theory and policy” (1998) 108. *The Economic Journal* 1128- 1138; Panagariya, A. “Preferential trade liberalisation: The traditional theory and new developments” (2000) 38. *Journal of Economic Literature* 328; Gupta, S. “Changing faces of international trade: Multilateralism to regionalism” (2008) 3. *Journal of International Commercial Law and Technology* 263.

¹⁸⁸⁴ Panagariya, A. “Preferential trade liberalisation: The traditional theory and new developments” (2000) 38. *Journal of Economic Literature* 271-292; Choi, W.M. “Defragmenting fragmented rules of origin of RTAs: A building block to global trade free trade” (2010) 13. *Journal of International Economic Law* 115; Geda, A. & Kebret, H. “Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA” (2008) 17. *Journal of African Economics* 371-372; Jakobiet, C. *et al.* “Overlapping membership in COMESA, EAC, SACU and SADC: Trade policy options for the region and for EPA negotiations” (2005) 22. *Deutsche Gesellschaft fur Technische Zusammenarbeit*; Davey, W.J. & Separ, A. “The soft drinks case: The WTO and regional agreements” (2009) 5. *World Trade Review* 15; Krueger, A.O. “Problems with overlapping free trade areas”. In Takatoshi, O. & Krueger, A.O. [eds.]. in *Regionalism Versus Multilateral Trade Agreements* (1997) 18.

¹⁸⁸⁵ Gathii, J.A. *African Regional Trade Agreements as Legal Regimes* (2011) 65, 67, 73-75.

¹⁸⁸⁶ Article 4(1)(f), Article 4(4)(d) of the Common Market for Eastern and Southern Africa Treaty of 1993; Article 7(1)(e), (g), (h), Article 75 (2) of the Treaty Establishing the East African Community of 1999; Article 26 of the Southern African Customs Union Agreement of 2002; Article 3(1)(c), Article 4 of the Southern African Development Community Trade Protocol of 1996.

In Africa, RTAs have been influenced by factors, which are not necessarily connected to economic integration, or even the elimination of trade barriers. In some cases, historical, cultural and linguistic interests motivated African RTAs, while for others; the motivation was the need to access waterways for transportation.¹⁸⁸⁷ SADC's predecessor, the Southern African Development Co-operation Conference (SADCC) was established in 1980. At that time, its objectives included the realisation of political liberation of Southern African countries and the need to reduce dependence on apartheid South Africa.¹⁸⁸⁸ In 1992, SADCC transformed into SADC and, subsequently, its membership grew. Through regional integration, members set their sights on attaining new objectives; economic growth and development, poverty alleviation, as well as improving the quality of life of citizens and the socially disadvantaged in SADC.¹⁸⁸⁹

Another distinguishing feature is that, unlike RTAs in the global-North, where a premium is placed on strict adherence to legal obligations contained in treaties, RTAs in the global-South, for example African RTAs, are characterised by their informal institutions, the tendency to use broad social, economic and objectives, as well as absence of "scrupulous and rigorous adherence" to treaty obligations.¹⁸⁹⁰ For instance, in its Preamble, the COMESA Competition Regulations of 2004 recognise the need to give effect to regional competition law, while at the same time using 'moderation and self-restraint in the interest of co-operation'. The African continent also has the added disadvantage that it is among the least competitive regions in the world, trailing behind South East Asia, Latin America, and the Caribbean. A 2013 study of 38 African countries conducted by the World Bank using indicators, such as, macro-economic environment, market efficiency, market size, business sophistication, and innovation, found that Africa was home to 14 of the least competitive countries in the world.¹⁸⁹¹

8.6. Global trends in Co-operation and Competition Law enforcement

Co-operation is defined as "the action or process of working together to the same end", or "assistance, especially by complying readily with requests".¹⁸⁹² Regarding the enforcement of competition law, this co-operation, which can be either formal, or informal, has proved quite

¹⁸⁸⁷ Gathii, J.A. *African Regional Trade Agreements as Legal Regimes* (2011) 68, 72.

¹⁸⁸⁸ Information available online at <http://www.sadc.int/about-sadc/overview/history-and-treaty/#SADCC> [Accessed 11 May 2015].

¹⁸⁸⁹ Article 5 of the Treaty Establishing the Southern African Development Community Treaty 1992.

¹⁸⁹⁰ Gathii, J.A. *African Regional Trade Agreements as Legal Regimes* (2011) 1-2; Maluwa, T. *The move from institutions? Examining the phenomenon in Africa*. American Society of International Law (2006) 294; Naldi, G.J. & Magliveras, K.D. 'The African Economic Community: Emancipation for African states or yet another glorious failure?' (1999) 24. *North Carolina Journal of International Law and Commercial Regulation* 601-631; Ravenhill, J. "The future of regionalism in Africa". In Onwuka, R.I. & Sasey, A. [eds.]. *The Future of Regionalism in Africa* (1985) 10-12; Wionczek, M.S. "Present status and prospects of economic integration movements in developing countries: Political atomisation and the economic backwardness of the Southern Hemisphere". In Wionczek, M.S. [ed.] *Economic Co-operation in Latin America, Africa and Asia* (1969) 8-10.

¹⁸⁹¹ *The African Competitiveness Report 2013*. World Bank (2013) 5, 38.

¹⁸⁹² *Oxford Advanced Learner's Dictionary* (2009); Jennings, H. *International co-operation in cartel investigations: The additional challenges faced by developing countries*. Organisation for Economic Development and Co-operation (2012) 3; *Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014).

popular.¹⁸⁹³ Without this co-operation, the enforcement actions of cross-border cartels are hampered. Conversely, the presence of co-operation increases the prosecution of cartel conduct.¹⁸⁹⁴

Consequently, OECD Members have committed themselves to effective international co-operation in the enforcement of competition law.¹⁸⁹⁵ In practical terms, this co-operation involves consultation and comity. For example, lending a sympathetic ear to the concern of another member, when the investigations of a member affects the other; notifying other members, whose interests may be affected, of competition investigations, or proceedings; coordinating competition investigations and proceedings; exchanging legally permissible information regarding competition investigations and proceedings; and providing voluntary investigative assistance among NCAs.¹⁸⁹⁶

Enforcement collaborations among individual NCAs can take place at various stages:

- the “pre-investigation stage”, where NCAs collaborate because they do not have sufficient proof of cartel practices, but there is reasonable belief in the existence of such cartel practices;
- the “investigation stage”, where information among NCAs is shared, subject to confidentiality rules; or
- the “post-investigation stage”, where NCAs are seeking to adopt common sanctions and remedies, to be imposed on the participants of cross-border cartels.¹⁸⁹⁷

Co-operation in the enforcement of competition law involves mutual assistance and reciprocity. However, although enforcement co-operation between NCAs in the global-North and in the global-South does exist, it is minimal when compared with the enforcement co-operation between NCAs in the global-North. The prevalence of enforcement co-operation among NCAs in the global-North is motivated by the real likelihood that their MNCs operate in each other’s jurisdictions.¹⁸⁹⁸ However, the minimal co-operation between the North and the South is motivated by perceived institutional weaknesses of NCAs in the South. An additional factor is the global-North’s “fear” of that they will be

¹⁸⁹³ *Policy Roundtables: Improving international co-operation in cartel investigations*. Organisation for Economic Co-operation and Development (2012) 1- 334.

¹⁸⁹⁴ American Bar Association *International Antitrust Co-operation Agreements* (2004) 1- 4.

¹⁸⁹⁵ *Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014) 4.

¹⁸⁹⁶ *Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014) 4- 7.

¹⁸⁹⁷ *Informal co-operation among competition agencies in specific cases*. United Nations Conference on Trade and Development (2014) 2.

¹⁸⁹⁸ Jennings, H. *International co-operation in cartel investigations: The additional challenges faced by developing countries*. Organisation for Economic Development and Co-operation (2012) 3; *Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014).

requested to cooperate and assist in the prosecution of their own MNCs.¹⁸⁹⁹ Where co-operation agreements do exist, the terms of these agreements are that NCAs from the North *may* cooperate, meaning that they also have the choice not to cooperate, should they so choose. Additionally, where this co-operation exists, it is usually by way of exchanging non-confidential information, and sharing information regarding the practical aspects of investigations.¹⁹⁰⁰ In the cement cartel,¹⁹⁰¹ South Africa's Competition Commission engaged in consultations with the NCAs of Brazil and Germany, as well as the European Commission.¹⁹⁰² This led to the Competition Commission's successful prosecution of firms in the cement cartel. In the 2010 collusive tendering investigations of the construction industry, the Competition Commission also consulted with the Dutch NCA.¹⁹⁰³

It appears that NCAs in the global-South are not actively seeking out collaboration opportunities, or assistance from their peers in the global-North. The vitamins-PIC¹⁹⁰⁴ affected several African countries;¹⁹⁰⁵ however, no record exists of them seeking collaboration, or even assistance from NCAs in the North that had successfully prosecuted the cartel, for instance, the United States.¹⁹⁰⁶ The United States had indicated that it would have been willing to assist, but emphasised that requests for co-operation in specific cases from the global-South were uncommon.¹⁹⁰⁷ Unfortunately, even if NCAs in the South were to make information and assistance requests, such information would have been non-confidential and would already have been in the public domain.¹⁹⁰⁸

8.6.1. Formal co-operation

Formal co-operation occurs within the parameters of legal instruments and institutional arrangements that are meant to facilitate the coordination of competition law enforcement. It can be through co-operation agreements between states;¹⁹⁰⁹ through co-operation between

¹⁸⁹⁹ Jennings, H. *International co-operation in cartel investigations: The additional challenges faced by developing countries*. Organisation for Economic Development and Co-operation (2012) 3-4; *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011) para 9, 32-33

¹⁹⁰⁰ *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 117- 121.

¹⁹⁰¹ See 8.7 of this Chapter.

¹⁹⁰² *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 246.

¹⁹⁰³ *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 246.

¹⁹⁰⁴ See 6.6-6.8, 6.10 in Chapter 6.

¹⁹⁰⁵ See 6.9 of in Chapter 6.

¹⁹⁰⁶ *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011) para 70.

¹⁹⁰⁷ *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011) para 70.

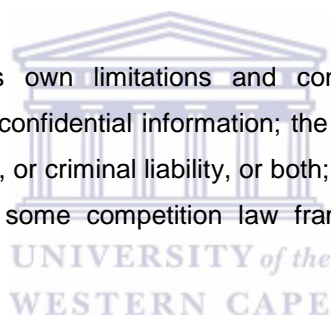
¹⁹⁰⁸ Chang, D.S. "Suggestions for the enhancing the effectiveness of co-operation on competition law and policy at the regional level from the experience of the Republic of Korea". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 425- 426.

¹⁹⁰⁹ For example, Agreement between the European Community and the Government of Japan, concerning co-operation on anti-competitive practices (2003); United States-Australia Co-operation Agreement (June 1982); United States-Brazil Co-operation Agreement (October 1999); United States-Canada Co-operation Agreement (August 1995); United States-Chile Agreement on Antitrust Co-operation (March 2011); United States-China Memorandum of Understanding on Antitrust and

NCA; through mutual legal assistance treaties; through co-operation in RECs;¹⁹¹⁰ through Memoranda of Understanding (MOU);¹⁹¹¹ and through domestic competition law provisions.¹⁹¹²

The developing world has attempted to make use of formal co-operation in the enforcement of competition law in their RTAs,¹⁹¹³ but this has not resulted in practical implementation on the ground. It seems that countries in the South have been eager to ink, but not ready to act.¹⁹¹⁴ The global South has also made use of MOUs, as a way of “formalising” their co-operation; for example, the MOU between the NCAs of South Africa and Namibia.¹⁹¹⁵ The MOU governs the sharing of information between the two NCAs, co-operation in substantive analyses of their respective competition laws, as well as collaborations in research and technical assistance.¹⁹¹⁶ It is submitted that co-operation between the two countries would be relatively easy because of the similarities, not only in their competition laws, but also in the structure of their legal systems. Another MOU exists between the COMESA Competition Commission and Malawi’s Competition and Fair Trade Commission.¹⁹¹⁷ MOUs are certainly valuable, in that they “formalise” co-operation between signatory agencies. However, they are not legally binding on the parties.

Formal co-operation has its own limitations and constraints. These limitations include restrictions on the sharing of confidential information; the difference in legal systems between those who impose civil liability, or criminal liability, or both; the different legal standards; and the perceived ineffectiveness of some competition law frameworks, particularly in the global-South.¹⁹¹⁸



Antimonopoly Co-operation (July 2011); United States-Germany Co-operation Agreement (June 1976); United States-Commission of the European Communities Co-operation Agreement (September 1999); United States-European Union Merger Working Group, Best Practices on Co-operation in Merger Investigations (October 2002); United States-Israel Co-operation Agreement (March 1999); United States-Japan Co-operation Agreement (October 1999); United States-Mexico Agreement (July 2000).

¹⁹¹⁰ See 3.5- 3.6 in Chapter 3, 4.3 in Chapter 4; Matsushita, M. “International co-operation in the enforcement of competition policy” (2002) *Washington University Global Studies Law Review* 466.

¹⁹¹¹ *Anti-cartel enforcement manual: International co-operation and information sharing*. International Competition Network (2013) 9-12.; European Union-Brazil Memorandum of Understanding on Co-operation (2009); European Union-China Memorandum of Understanding on Co-operation (2012); European Union-India Memorandum of Understanding on Co-operation (2013).

¹⁹¹² For example, section 82(4) of South Africa Competition Act of 1998.

¹⁹¹³ See Chapter 3; and Chapter 4.

¹⁹¹⁴ See Chapter 1; Cernat, L. “Eager to ink, but ready to act? RTA proliferation and international co-operation on competition policy”. In Brusnick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 3.

¹⁹¹⁵ “Competition Commission of South Africa signs landmark MOU with the Namibian Competition Commission”. *Competition Commission Media Release*. Available online at <http://www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-of-South-Africa-Signs-Landmark-MoU-with-the-Namibian-Competition.pdf> [Accessed 15 November 2015].

¹⁹¹⁶ *Policy Roundtables: Improving international co-operation in cartel investigations*. Organisation for Economic Co-operation and Development (2012) 245.

¹⁹¹⁷ *The COMESA Competition Commission signs Memorandum of Understanding with the Competition and Fair Trade Commission of Malawi*. COMESA Competition Commission Press Release. Available online at <http://www.comesacompetition.org/?p=1020> [Accessed 18 September 2015].

¹⁹¹⁸ *Informal co-operation among competition agencies in specific cases*. United Nations Conference on Trade and Development (2014) 2.

An example of an effective formal regional co-operation framework is the European Competition Network (ECN), created in 2004. It facilitates co-operation and coordination of enforcement activities, as well as information sharing among NCAs in the EU regarding cross-border restrictive business practices that affect the Common Market.¹⁹¹⁹ In order to deal with the substantive differences in their individual competition laws, and as part of cooperating, NCAs notify each other of new investigations, as well as those that are pending; where required, they co-ordinate and assist each other in their investigations; they exchange evidence; and share information on common issues affecting the Common Market. The benefit of the ECN is that it results in uniform and consistent application of Community Competition Law.¹⁹²⁰ This is in addition to the existing co-operation between the European Commission, individual NCAs, and domestic courts, as well as co-operation between the individual NCAs.¹⁹²¹

8.6.2. Informal co-operation

In contrast, informal co-operation refers to the cross-border collaboration concerning the enforcement of competition law, which occurs outside of established legal rules and institutions. This “soft law” approach can be through general co-operation arrangements or on a case-by-case basis. Although informal co-operation is a “best endeavour” approach, it provides for flexibility, in that cooperating NCAs are not bound by strict formal rules.¹⁹²²

When compared to formal co-operation, informal co-operation has seen a measure of success in the developing world. The NCAs of Namibia and South Africa, Zambia and Zimbabwe, have cooperated on a number of occasions regarding certain merger transactions.¹⁹²³ Zimbabwe has also collaborated with other countries, namely Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan and Swaziland.¹⁹²⁴

¹⁹¹⁹ European Commission Notice on co-operation within the Network of Competition Authorities (2004/ C 101/03).

¹⁹²⁰ European Commission Notice on co-operation within the Network of Competition Authorities (2004/ C 101/03) para 16- 30; European Commission ‘Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities’ (2005).

¹⁹²¹ European Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁹²² *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011) para 55.

¹⁹²³ Lipimile, G.K. & Gachuri, E. “Allocation of competencies between national and regional competition authorities: The case of COMESA” In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains*. United Nations Conference on Trade and Development (2005) 373-381; “Opening up to a giant” *Namibian Sun* 03 October 2013. Available online at <http://www.namibiansun.com/business/opening-giant.57952> [Accessed 10 November 2015].

¹⁹²⁴ *Informal co-operation among competition agencies in specific cases*. United Nations Conference on Trade and Development (2014) 8.

8.6.3. Convergence in cartel enforcement and international organisations

International organisations such as, ICN, OECD and UNCTAD have been instrumental in the “soft law’ approach.¹⁹²⁵ They have contributed immensely to the convergence of rules pertaining to cartels¹⁹²⁶; in achieving common standards about the enforcement of competition law, through the dissemination of good practices¹⁹²⁷; enforcement collaborations among NCAs¹⁹²⁸; and through the adoption of common competition policy objectives.¹⁹²⁹

On the African continent, the African Competition Forum (ACF), formed in 2011, is another organisation that utilises the “soft law’ or the “soft convergence” approach in the enforcement of competition law and the dissemination of common practices in the continent. The ACF is also involved in the capacity building of NCAs, conducting research with a focus on regional

¹⁹²⁵ See 1.7 in Chapter 1.

¹⁹²⁶ *Policy Roundtables: Enhanced enforcement co-operation*. Organisation for Economic Co-operation and Development (2014); *Policy Roundtables: Ex-officio cartel investigations and the use of screens to detect cartels*. Organisation for Economic Co-operation and Development (2013); *Policy Roundtables: Competition and procurement*. Organisation for Economic Co-operation and Development (2011); *Policy Roundtables: Crisis cartels*. Organisation for Economic Co-operation and Development (2011); *Guidelines for fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2010); *Hard core cartels*. Organisation for Economic Co-operation and Development (2000); *Report on hard core cartels*. Organisation for Economic Co-operation and Development (2000); *Recommendation of the Council concerning effective action against hard core cartels*. Organisation for Economic Co-operation and Development (1998); *Recommendation on fighting bid rigging in public procurement*. Organisation for Economic Co-operation and Development (2012); *Recommendation on competition assessment*. Organisation for Economic Co-operation and Development (2009); *Recommendation on competition policy and exempted or regulated sectors*. Organisation for Economic Co-operation and Development (1979); *Anti-cartel enforcement manual: Relationships between competition agencies and public procurement*. International Competition Network (2015); *Anti-cartel enforcement manual: Digital evidence gathering*. International Competition Network (2014); *Anti-cartel enforcement manual: International co-operation and information sharing*. International Competition Network (2013); *Anti-cartel enforcement manual: Cartel awareness, outreach and compliance*. International Competition Network (2012); *Anti-cartel enforcement manual: Cartel case resolution*. International Competition Network (2011); *Anti-cartel enforcement manual: Cartel case initiation*. International Competition Network (2010); *Anti-cartel enforcement manual: Searches, raids and inspections*. International Competition Network (2009); *Anti-cartel enforcement manual: Investigative strategy and interviewing*. International Competition Network (2008); *Anti-cartel enforcement manual: Interviewing techniques*. International Competition Network (2008); *Anti-cartel enforcement manual: Drafting and implementing an effective leniency policy*. International Competition Network (2004).

¹⁹²⁷ *Cartels: Best practice Roundtables on competition policy*. Organisation for Economic Co-operation and Development. Available online at <http://www.oecd.org/daf/competition/cartels-competition-roundtables.htm> [Accessed 10 June 2015]; *Glossary of industrial organisation economics and competition law*. Organisation for Economic Co-operation and Development (1993).

¹⁹²⁸ *Informal co-operation among competition agencies in specific cases*. United Nations Conference on Trade and Development (2014); *Recommendation concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014); Jennings, H. *International co-operation in cartel investigations: The additional challenges faced by developing countries*. Organisation for Economic Development and Co-operation (2012); *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011);

¹⁹²⁹ *Policy Roundtables: Collusion and corruption in public procurement*. Organisation for Economic Co-operation and Development (2010); *Reviews of regulatory reform: Korea 2007 progress in implementing regulatory reform*. Organisation for Economic Co-operation and Development (2007); *Policy Roundtables: Prosecuting cartels without direct evidence of agreement, contribution from Brazil*. Organisation for Economic Co-operation and Development (2006); *Policy Roundtables: Prosecuting cartels without direct evidence of agreement, contribution from Japan*. Organisation for Economic Co-operation and Development (2006); *Policy Roundtables: Prosecuting cartels without direct evidence of agreement, contribution from Korea*. Organisation for Economic Co-operation and Development (2006); *Policy Roundtables: Prosecuting cartels without direct evidence of agreement, contribution from Russia*. Organisation for Economic Co-operation and Development (2005); *The objectives of competition law and policy and the optimal design of a competition agency*. Organisation for Economic Co-operation and Development (2003); *The policy challenge of globalisation and regionalisation*. Organisation for Economic Co-operation and Development (1996); *What opportunities and challenges for governments*. Organisation for Economic Co-operation and Development Globalisation (1996).

enforcement of competition law, promoting a competition culture in the continent, and sharing experiences in competition law enforcement among African countries.¹⁹³⁰

8.7. The Case for South-South Co-operation in Cross-Border Cartel Cases

In light of the collaborations in merger transactions, there should be hope for collaboration in cross-border cartel cases, as well. There is reason for this optimism. Unlike mergers, where individual competition laws and NCAs may require varying thresholds for the notification and approval of these transactions, with cartels there is unanimity that they are illegal. Market allocation, price fixing and collusive bidding are prohibited by the COMESA Competition Regulations of 2004 and the EAC Competition Act of 2006.¹⁹³¹ However, although SACU and SADC do not have regional competition law rules on cartel practices, individual Members of SACU and SADC, with competition laws in their statute books, prohibit cartels.¹⁹³²

Of all the members in COMESA, EAC, SACU and SADC, South Africa is the most active competition law enforcer.¹⁹³³ Within those RECs, to which South Africa belongs, namely SACU and SADC, South Africa's cartel enforcement record of accomplishment is the most effective. The country also dominates the Southern African economy. Between 2011 and 2012, it was responsible for 60 per cent of the GDP in the region.¹⁹³⁴ In addition, a significant number of cartel participants are the so-called "regional multinational corporations" (RMNCs). They have operations throughout Southern Africa.¹⁹³⁵ For instance, between 2009 and 2012, nearly 50 per cent of cases decided by the Competition Tribunal and Competition Appeal Court involved RMNCs operating within Southern Africa.¹⁹³⁶

There are several cartel cases that have been investigated by the South Africa's Competition Commission and adjudicated upon by the Competition Tribunal and the Competition Appeal Court, which also operated in countries belonging to COMESA, SACU and SADC. For example, the fertiliser cartel before the CAs of South Africa¹⁹³⁷ was also investigated and its participants were fined by

¹⁹³⁰ Information available online at <http://africanantitrust.com/2014/11/13/acf-in-the-spotlight-african-competition-forum-promotes-policy-enhancements/> [Accessed 15 May 2015].

¹⁹³¹ See 3.7 in Chapter 3.

¹⁹³² See 3.5 and 3.7 in Chapter 3.

¹⁹³³ See 4.4 in Chapter 4.

¹⁹³⁴ Report of the SADC Executive Secretary, Activity Report of the SADC Secretariat 2011-2012. Available online at http://www.sadc.int/files/1613/7243/4333/SADC_ES_Report_2011-2012_web.pdf [Accessed 10 November 2014].

¹⁹³⁵ Nxumalo, M. *Fruit from the neighbour's tree: On indirect extra-territorial effects of South Africa's competition law rulings*. Competition Commission of South Africa (2012) 2-3.

¹⁹³⁶ Nxumalo, M. *Fruit from the neighbour's tree: On indirect extra-territorial effects of South Africa's competition law rulings*. Competition Commission of South Africa (2012) 3-4.

¹⁹³⁷ *Competition Commission v Sasol Chemical Industries (Pty) Ltd and Others* [2009] ZACT 25; *Sasol Chemical Industries Limited v Competition Commission and Others* [2006] ZACAC 8; *Yara South Africa (Pty) Ltd v Competition Commission and Others in re: Competition Commission v Sasol Chemical Industries Ltd and Others* 2012 (9) BCLR 923 (CC); *Omnia Fertilizers v Competition Commission* [2011] ZACAC 9.

Zambia's Competition and Consumer Protection Commission.¹⁹³⁸ The bread, flour and wheat milling cartels before South Africa CAs,¹⁹³⁹ for which Zambia's Competition and Consumer Protection Commission and Zimbabwe's NCA initiated investigations, however, no outcomes were registered.¹⁹⁴⁰ The mining-supply cartel¹⁹⁴¹ that not only supplied mining houses in South Africa, but also operated in Botswana, Namibia, Zambia, and Zimbabwe, is yet another.¹⁹⁴² The cement cartel¹⁹⁴³ that had operations in Botswana, Namibia, Swaziland, Tanzania, and Zimbabwe.¹⁹⁴⁴ Finally, the bitumen cartel¹⁹⁴⁵ that also exported substantial amounts of bitumen and bituminous products to Botswana, Lesotho, Swaziland, and Zimbabwe,¹⁹⁴⁶ was another case investigated by the South Africa's Competition Commission

The above cross-border cartels make a strong case for enforcement collaborations within the existing RECs. There are benefits that can be realised from such co-operation. These include that a common competition policy and law will further deepen regional integration among members; that common competition law rules will promote fair trade between members of the RECs and with external parties; and that common competition law rules will create legal certainty and predictability for firms operating within these RECs.¹⁹⁴⁷



¹⁹³⁸ "Zambia: Fertiliser company slammed with fine for US\$20 million cartel". *Competition Policy International* 10 June 2013. Available online at <https://www.competitionpolicyinternational.com/zambia-fertilizer-co-slammed-with-fine-for-20m-cartel/> [Accessed 13 January 2015]; Mupeseki, K. "Zambia: Omnia, Nyiombo fined over US\$20 million cartel". *Times of Zambia* 08 June 2013. Available online at <http://allafrica.com/stories/201306070434.html> [Accessed 13 January 2015]; "Competition and Consumer Protection Commission gears up to fight cartels in Zambia"; *Lusaka Voice* 01 August 2013. Available online at <http://lusakavoice.com/2013/08/01/ccpc-gears-up-to-fight-cartels-in-zambia/> [Accessed 13 January 2015]; "Zambia saves US\$36 million from fertiliser" 04 December 2014. *Zambia Daily Mail*. Available online at <https://www.daily-mail.co.zm/?p=13089> [Accessed 13 January 2015].

¹⁹³⁹ *Competition Commission v Tiger Consumer Brands (Pty) Ltd* Case No: 15/CR/Feb07; *Competition Commission v Pioneer Foods (Pty) Ltd* Case No: 15/CR/Feb07 50/CR/May08; *Competition Commission v Foodcorp (Pty) Ltd* Case No: 50/CR/May08; *Paramount Mills (Pty) Ltd v Competition Commission* Case No: 15/CR/Mar10.

¹⁹⁴⁰ Kaira, T. *A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?* Centre for Competition and Economic Development (2015) 4.

¹⁹⁴¹ *Competition Commission v Aveng (Africa) Ltd t/a Duraset* Case No: 65/CR/Sep09; *Competition Commission v RSC Ekusasa Mining (Pty) Ltd, Aveng (Africa) Ltd t/a Duraset, Dywidag-Systems International (Pty) Ltd, Videx Wire Product (Pty) Ltd* Case No: 65/CR/Sep09 (010546).

¹⁹⁴² Kaira, T. *A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?* Centre for Competition and Economic Development (2015) 5.

¹⁹⁴³ *Competition Commission v Afrisam (South Africa) Pty Ltd* Case No: 93/CR/Nov11; *Competition Commission v Lafarge Industries South Africa (Pty) Ltd* Case No: 23/CR/Mar12.

¹⁹⁴⁴ Kaira, T. *A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?* Centre for Competition and Economic Development (2015) 5.

¹⁹⁴⁵ *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; *Competition Commission v Masana Petroleum Solutions (Pty) Ltd* Case No: 06/CR/Mar10.

¹⁹⁴⁶ Kaira, T. *A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?* Centre for Competition and Economic Development (2015) 6.

¹⁹⁴⁷ Gal, M.S. "Regional competition law agreements: An important step for antitrust enforcement" (2010) 60. *University of Toronto Law Journal* 248-250.

The lack of common rules could dampen the enforcement of regional competition law. For example, the lack of common rules on “dawn raids” (searches and seizures without warrants issued by NCAs),¹⁹⁴⁸ has been cited as a significant impediment to cross-border cartel investigations among SADC Member States.¹⁹⁴⁹

The principal advantage of cooperating within established RECs is that it results in greater substantive and procedural convergence. In addition, such co-operation saves resources, not only in cases of cross-border cartels, but also in other business practices. For example, in the case of merger transactions, instead of notifications being submitted before the various NCAs and complying with the sometimes-different procedural requirements, a single notification before the RCA, such as the COMESA Competition Commission, will suffice.

8.8. Cartel Enforcement Co-operation in South-South Regional Trade Agreements

From the perspective of the global South, the effective enforcement of competition law is beneficial. It is this understanding that has spurred the rise in competition provisions for their RTAs.¹⁹⁵⁰ In particular, the effect of cross-border cartels among RTA members makes it the sensible choice for NCAs to collaborate in their enforcement actions towards cartels.

8.8.1. Co-operation in the Common Market for Eastern and Southern Africa

In terms of the COMESA Competition Regulations of 2004, Member States declare that price fixing, market allocation and collusive tendering are illegal.¹⁹⁵¹ COMESA’s Competition Commission is the body tasked with enforcing regional competition law.¹⁹⁵² It has been quite active in evaluating and approving merger transactions.¹⁹⁵³ However, it has yet to decide on cartel cases.¹⁹⁵⁴

¹⁹⁴⁸ See 4.4.1.4.2 and 4.4.1.4.4 in Chapter 4.

¹⁹⁴⁹ Mashego, P. “Borders getting in the way of dawn raids, say lawyers”. *Businessday News* 14 August 2015. Available online at <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=5146c3e4-ce8e-49d1-8368-6c5261af6f85&key=7an%2fns5aTazt5mvAXdWAtQ%3d%3d&issue=1106201508140000000001001> [Accessed 11 November 2015].

¹⁹⁵⁰ Horna, P.M. & Kayali, B.O. “National implementation of competition-related provisions in bilateral and regional trade agreements”. In *Implementing Competition-Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?* (2007) 23; Lipimile, D.K. “Competition policy as a stimulus for enterprise development”. In *Competition, Competitiveness and Development* (2004) 171-176.

¹⁹⁵¹ See 3.7 in Chapter 3.

¹⁹⁵² See 4.6 in Chapter 4.

¹⁹⁵³ *Decision of the Committee of Initial Determination regarding the proposed merger between Old Mutual Alternative Investments Holdings Proprietary Limited and African Fund Managers (Mauritius) and African Infrastructure Investment Fund 2 General Partner Proprietary Limited* Case No: CCC/MER/07/11/2015; *Decision of the Committee of Initial Determination regarding the proposed merger between Sanlam Emerging Markets Proprietary Limited and Masawara Investments Mauritius Limited* Case No: CCC/MER/07/09/2015; *Decision of the Committee of Initial Determination regarding the proposed merger between Traxys Africa Proprietary Limited and Metmar Limited* Case No: CCC/MER/06/08/2015; *Decision of the Sixteenth Meeting of the Committee of Initial Determination regarding the proposed acquisition by Ethos Private Equities Fund IV of Two Divisions of Nampak Products Limited namely Nampak Corrugated and Nampak Tissue Products Limited* Case No: CCC/MER/03/01.2015; *Decision of the Sixteenth Meeting of the Committee of Initial Determination regarding the proposed merger between Steinhoff International Holdings and Pepkor Holdings Proprietary Limited* Case No: CCC/MER/03/02/2015; *Decision of the Sixteenth Meeting of the Committee of Initial Determination regarding the proposed merger between Holtzbrinck Publishing Group and Springer Science and Business*

Co-operation among COMESA Member States is governed by both the COMESA Competition Regulations of 2004 and the COMESA Competition Rules of 2004. These are binding on Member States.¹⁹⁵⁵ Recall that the COMESA Competition Regulations of 2004 are aimed at promoting and encouraging competition by preventing anti-competitive practices.¹⁹⁵⁶ The Competition Regulations apply to conduct that affects trade between Member States and restricts competition in the Common Market.¹⁹⁵⁷

Members are enjoined to establish measures to ensure compliance with the Competition Regulations, by actively implementing the provisions of the Regulations, and abstaining from measures that conflict with the objectives of the Regulations.¹⁹⁵⁸ Additionally, the Commission is empowered to promote a competition culture among Member States; to carry out investigations to determine if a prohibited practice has occurred; to issue necessary orders; and to refer matters to the Board of Commissioners.¹⁹⁵⁹

Other than conducting investigations into alleged cartel practices, the COMESA Competition Commission is tasked with assisting Member States to harmonise their competition laws with the COMESA's Competition Regulations, to achieve uniformity in the interpretation and application of the Common Market's competition law.¹⁹⁶⁰ The Competition Commission is enjoined to cooperate with the NCAs of individual Member States; to cooperate with Member States in the enforcement of the Commission's decisions; to render assistance to Member States in the promotion and protection of consumer welfare; to aid the exchange of information and expertise between the Commission and the NCAs of Member States.¹⁹⁶¹

The Commission may also enter into collaborations with third parties, in the investigation of practices that, although occurring outside of the Common Market, have an impact within the Common Market.¹⁹⁶² The Commission may also collaborate with other agencies within the

Media GP Acquisition S.C.A Case No: CCC/MER/03/05/2015; Decision of the Sixteenth Meeting of the Committee of Initial Determination regarding the proposed acquisition of the entire issued share capital of Kenya Towers Limited, Malawi Towers Limited and Uganda Towers Limited by Eaton Towers Limited; Case No: CCC/MER/03/04/2015; Decision of the Sixteenth Meeting of the Committee of Initial Determination regarding the proposed merger between Coca-Cola Beverages Africa Limited and the Coca-Cola Sabco Proprietary Limited Case No: CCC/MER/03/03/2015.

Information on other mergers and acquisitions considered by the COMESA Competition Commission is available online at http://www.comesacompetition.org/?page_id=639 [Accessed 17 February 2014].

¹⁹⁵⁴ Evidence of the lack of case law on cartels is available online at http://www.comesacompetition.org/?page_id=335 [Accessed 29 November 2015].

¹⁹⁵⁵ Article 10(2) of the Treaty Establishing the Common Market for Eastern and Southern Africa, 1993.

¹⁹⁵⁶ See 2.8 of Chapter 2 and 3.7 in Chapter 3.

¹⁹⁵⁷ Article 3 of COMESA Competition Regulations of 2004.

¹⁹⁵⁸ Article 5(1) of COMESA Competition Regulations of 2004.

¹⁹⁵⁹ See 4.6.1 in Chapter 4.

¹⁹⁶⁰ Article 7 (2)(c) of COMESA Competition Regulations of 2004.

¹⁹⁶¹ Article 7(2)(d)- (g) of COMESA Competition Regulations of 2004.

¹⁹⁶² Article 7(2)(h) of COMESA Competition Regulations of 2004.

Common Market, when such co-operation has a bearing on the objectives of the Competition Regulations.¹⁹⁶³

In applications to commence investigations into alleged restrictive practices, the Competition Commission must communicate this, together with all relevant documentation, to the relevant NCA.¹⁹⁶⁴ Regarding the gathering of information by the Commission, in carrying out its investigations, the Competition Rules of 2004 envisage co-operation between the Commission and Governments, between the Commission and the NCAs of Member States and between the Commission and firms, or associations of firms.¹⁹⁶⁵

Requests for information by the Commission should indicate the legal basis on which the information is sought.¹⁹⁶⁶ If the request is directed at a firm, or an association of firms, a copy of the request should be made to the NCA, under whose jurisdiction the firm, or association of firms, falls.¹⁹⁶⁷ A failure by a firm, or an association of firms, to comply with an information request, may result in the payment of a fine.¹⁹⁶⁸

The COMESA Competition Rules also envisage co-operation between the Commission and NCAs, regarding market inquiries in the Common Market.¹⁹⁶⁹ With market inquiries or “sector inquiries”, as they are referred to in the Competition Rules, the relevant individual NCAs shall be required to conduct investigations within the relevant sectors in their territories.¹⁹⁷⁰ The NCAs shall rely on their investigatory powers as provided for in the domestic competition laws.¹⁹⁷¹ Where necessary, the Commission may assist the relevant NCA in these investigations.¹⁹⁷²

Firms or associations of firms that are under investigation must cooperate with the Commission’s investigations.¹⁹⁷³ If the firm does not cooperate with the Commission’s investigations, the Member State concerned shall assist the Commission in this regard.¹⁹⁷⁴ Where the need arises, an NCA may be called upon to assist the Commission in its

¹⁹⁶³ Article 7(2)(j) of COMESA Competition Regulations of 2004.

¹⁹⁶⁴ Rule 40 (1) of COMESA Competition Rules of 2004.

¹⁹⁶⁵ Rule 41 (1) of COMESA Competition Rules of 2004.

¹⁹⁶⁶ Rule 41 (3) of COMESA Competition Rules of 2004.

¹⁹⁶⁷ Rule 41 (2), (6) of COMESA Competition Rules of 2004.

¹⁹⁶⁸ Rule 41 (3) of COMESA Competition Rules of 2004.

¹⁹⁶⁹ See 4.6.1 in Chapter 4.

¹⁹⁷⁰ Rule 43(1) of COMESA Competition Rules of 2004.

¹⁹⁷¹ Rule 43(1) of the COMESA Competition Rules of 2004.

¹⁹⁷² Rule 43(2) of the COMESA Competition Rules of 2004.

¹⁹⁷³ Rule 44(3), (4) of the COMESA Competition Rules of 2004.

¹⁹⁷⁴ Rule 44(6) of the COMESA Competition Rules of 2004.

investigations.¹⁹⁷⁵ However, in practice, formal co-operation within the framework established by the Competition Regulations, regarding cross-border cartels has been minimal. It seems that members are opting for informal co-operation, for example, staff exchanges and workshops.¹⁹⁷⁶

8.8.2. Co-operation in the East African Community

The EAC Competition Act of 2006 requires co-operation, between the Competition Authority and the Member States, in the implementation of Community competition law.¹⁹⁷⁷ The Authority's investigations can be initiated by an interested party, or a Member State.¹⁹⁷⁸ The Authority can also initiate investigations. Where the Authority finds that a prohibited practice has occurred, it must take appropriate action to remedy the violation.¹⁹⁷⁹ Co-operation may be required from a Member State, for example, to comply with requests for information.¹⁹⁸⁰ A failure to comply with the request shall be referred to the supreme policy body of the EAC Council.¹⁹⁸¹ Appeals against the Authority's decisions lie with the East African Court of Justice (EACJ).¹⁹⁸² The Authority places a premium on confidentiality regarding the information gained during the course of its investigations.¹⁹⁸³ The EAC Competition Regulations of 2010 also make provision for the procedures of the Competition Authority's investigations, correspondence between the Authority and Member States, collaborations with NCAs, requests for information, and the conducting of market inquiries.¹⁹⁸⁴

The enforcement of the Act has faced major problems, due to some members not having domestic competition laws in place, and those with competition laws, not having incorporated the regional law into their domestic legislation.¹⁹⁸⁵ In addition, nearly a decade after the adoption of the EAC Competition Act, the Competition Authority has yet to become operational, due to lack of coordination among Members in this process, and the unavailability of financial resources to support the work of the RCA.¹⁹⁸⁶

¹⁹⁷⁵ Rule 44(5) of the COMESA Competition Rules of 2004.

¹⁹⁷⁶ Information available online at <http://www.comesacompetition.org/?p=1015> [Accessed 13 March 2014].

¹⁹⁷⁷ Section 43 of EAC Competition Act of 2006.

¹⁹⁷⁸ Section 21(1), section 24(1) of EAC Competition Act of 2006.

¹⁹⁷⁹ Section 22 of EAC Competition Act of 2006.

¹⁹⁸⁰ Section 23(1)-(2) of EAC Competition Act of 2006.

¹⁹⁸¹ Section 23(3) of EAC Competition Act of 2006.

¹⁹⁸² Section 24(2) of EAC Competition Act of 2006.

¹⁹⁸³ Section 25 of EAC Competition Act of 2006.

¹⁹⁸⁴ Article 21- 25, Article 35 of EAC Competition of 2010.

¹⁹⁸⁵ Bonge, G.M. *Towards EAC Competition Laws and Policy*. East African Business Council Briefing Paper (2010) 1-3; Manishatse, L.M. "EAC Competition Policy: Adopted but not implemented in Burundi". *Iwacu English News*. Available at <http://www.iwacu-burundi.org/blogs/english/eac-competition-policy-adopted-but-not-implemented-in-burundi/> [Accessed 10 May 2015].

¹⁹⁸⁶ Brigot-Laperrousaz, A. *East Africa and antitrust: Enforcement of the EAC Competition Act*. 14 January 2016. Available online at African Competition Trusts <http://africanantitrust.com/2016/01/14/the-big-picture-aat-east-africa-antitrust-enforcement/> [Accessed 16 January 2016].

8.8.3. Co-operation in the Southern African Development Community

Article 25 of the SADC Protocol on Trade stipulates that Member States shall implement measures within the Community for the purposes of promoting competition and prohibiting anti-competitive business practices.¹⁹⁸⁷ The Preamble of the SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009 recognises that competition and consumer protection laws are national, but the relevant markets extend past territorial borders. There has to be more efforts at regional co-operation, regarding cross-border anti-competitive practices; therefore, a need exists to “formalise” collaborations between NCAs and their competition laws, in order to cooperate, meaningfully, in cross-border anti-competitive practices, to the benefit of, not only the individual nations cooperating, but also the SADC region in its entirety. The Declaration enjoins members to take all necessary measures to adopt, strengthen and implement competition law and consumer protection rules.¹⁹⁸⁸ The Declaration also envisages positive comity principles as a means of bilateral and regional co-operation. In addition, hard core cartels, abuse of dominance and anti-competitive merger transactions have been cited as specific areas of co-operation.¹⁹⁸⁹ The process of co-operation, which shall be gradual, is geared towards harmonisation of regional competition law and consumer protection. The Competition and Consumer Policy and Law Committee (CCOPOLC) is tasked with the responsibility of implementing the process of co-operation.¹⁹⁹⁰

Even though the Declaration does not contain substantive rules on cartels, SADC Members, with domestic competition laws in their statute books, prohibit cartel practices.¹⁹⁹¹ While the members recognise the value of exchanging information with other NCAs, harmonisation of competition laws is yet to be achieved, because of the differences in confidentiality of information clauses, and legal restrictions on the admissibility of such confidential information.¹⁹⁹² Additionally, the lack of political cohesion and resources, have prevented meaningful implementation of regional competition law aspirations.¹⁹⁹³ For instance, despite the competition provisions in Article 25 of the SADC Protocol on Trade, the members have not gone any further, since the trade bloc does not have a specific legal instrument, wholly devoted to competition law. Other than the CCOPOLC, the trade bloc does not have a regional body, solely directed towards the enforcement of regional competition law. Because of the lack of common rules, for example, in the execution of investigations by NCAs, it appears that

¹⁹⁸⁷ See 3.7 in Chapter 3

¹⁹⁸⁸ Article 1 (a), (b) of SADC Declaration on Regional Corporation on Competition and Consumer Policies of 2009.

¹⁹⁸⁹ Article 1(f), (g) of SADC Declaration on Regional Corporation on Competition and Consumer Policies of 2009.

¹⁹⁹⁰ Article 2 of SADC Declaration on Regional Corporation on Competition and Consumer Policies of 2009; see Chapter 3.

¹⁹⁹¹ See 3.5, 3.7- 3.10 in Chapter 3.

¹⁹⁹² Sakata, N. *Are Southern African competition law regimes geared up for effective co-operation in competition law enforcement?* (2011) 11. Available online at <http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-co-operation-PaperFinal-27-Sept-11-.pdf> [Accessed 13 August 2015].

¹⁹⁹³ *Review of the experience gained so far in enforcement co-operation, including at the regional level.* United Nations Conference on Trade and Development Intergovernmental Group of experts on Competition Law and Policy (2011) para 40.

individual NCAs are not open to the possibility of other NCAs conducting investigations in their territories.¹⁹⁹⁴

8.9. The Problems besetting Regional Enforcement Co-operation regarding Cross-Border Cartels in the South

As the foregoing discussion has revealed, formal co-operation in South-South RECs has not been prominent. This lack of co-operation is not only concerning cartels, but with other anti-competitive practices, as well.¹⁹⁹⁵ This is because the competition law frameworks are relatively new in the South; they are still at the stage where they are developing their institutional capacities, such that cross-border co-operation is not a priority, in general.¹⁹⁹⁶ Nevertheless, it is submitted that, unlike other business practices, cartels do provide scope for co-operation.¹⁹⁹⁷

Generally, while countries in the global-South have competition laws in their statute books, enforcement of the same has been inadequate. Naturally, this affects their co-operation activities within RECs. With reference to competition law provisions in RTAs, it appears that countries are “eager to ink but not ready to act” to enforce their commitments.¹⁹⁹⁸ Therefore, the enactment of competition laws in individual countries and in South-South RTAs has not achieved the anticipated results. Several factors have contributed to this state of affairs.

8.9.1. Lack of political will and political interference

In general, both in the North and the South, political influences have a bearing on domestic enforcement efforts,¹⁹⁹⁹ and enforcement collaborations across territorial borders.²⁰⁰⁰ These influences either propel competition law and its enforcement, or hamper it.²⁰⁰¹ In the global South, the absence of political commitment has seen several attempts at drafting competition legislation dying before they could see the light of day, or even before the stakeholders and the

¹⁹⁹⁴ Mashego, P. “Borders getting in the way of dawn raids, say lawyers”. *Businessday News* 14 August 2015. Available online at <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=5146c3e4-ce8e-49d1-8368-6c5261af6f85&key=7an%2fns5aTazt5mvAXdWAtQ%3d%3d&issue=1106201508140000000001001> [Accessed 11 November 2015].

¹⁹⁹⁵ Chapeyama, S. *Developing a Regional Competition Regulatory Framework in the Southern African Development Community* (unpublished LLM thesis, University of the Western Cape, 2015) 42-48, 51.

¹⁹⁹⁶ Jennings, H. ‘International co-operation in cartel investigations: The additional challenges faced by developing countries’ Organisation for Economic Development and Co-operation (2012) 7-9.

¹⁹⁹⁷ See 1.5-1.11 in Chapter 1.

¹⁹⁹⁸ See 1.8 in Chapter 1.

¹⁹⁹⁹ Kovacic WE & David AH ‘Institutional design, agency life cycle, and the goals of competition law’ (2013) 81 *Fordham Law Review* 2163- 2174; Baker JB ‘Economics and politics: Perspectives on the goals and future of antitrust’ (2013) 81 *Fordham Law Review* 2175- 2196.

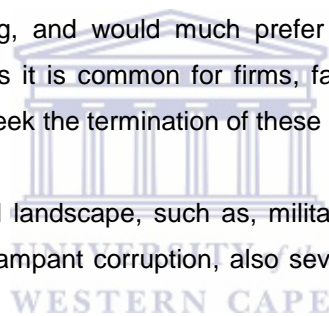
²⁰⁰⁰ ‘Policy Roundtables: Improving international co-operation in cartel investigations’ Organisation for Economic Development and Co-operation (2012) 20.

²⁰⁰¹ Gal, M. “Reality bites (or bits): The political economy and antitrust. In Hawk, B.E. [ed.]. *International Antitrust Law and Policy: Fordham Corporate Law* (2002) 605-616; Hovenkamp, H. “Antitrust after Chicago” (1985) 84. *Michigan Law Review* 213- 214; Pitofsky, R. “The political content of antitrust” (1979) 127. *University of Pennsylvania Law Review* 1051-1075.

public, in general, had the opportunity to engage with the proposals.²⁰⁰² For instance, Nigeria experienced a series of unco-ordinated and, sometimes-conflicting competition law Bills, characterised by turf wars and a lack of clarity, as to the government department by which the law would be enforced.²⁰⁰³ Ghana, too, saw three different competition law Bills from different government agencies. None of these Bills made it to the country's legislature, in spite of calls by the business community to develop a domestic competition law framework.²⁰⁰⁴ Not only does this amount to wasteful use of resources, but it is also counterproductive. Lack of political will and commitment has been cited as one of the reasons why the EAC's Competition Authority has not been formally instituted to begin its work.²⁰⁰⁵

There is also concern among REC Members about ceding their sovereignty to a supranational organisation, to regulate their economic policies and activities.²⁰⁰⁶ However, as with other regional integration efforts all over the world, membership to an REC will inevitably involve a transfer of some sovereign competencies of the Member States to a regional supranational organisation.²⁰⁰⁷ In some cases, NCAs are faced with political pressures from interest groups that oppose the application of competition law, as they may be benefiting from uncompetitive markets through rent seeking, and would much prefer to maintain the *status quo*.²⁰⁰⁸ For instance, in some jurisdictions it is common for firms, facing investigations by NCAs, to use their political connections to seek the termination of these investigations.²⁰⁰⁹

At times, the general political landscape, such as, military coups, fluctuations in the political regime and the consequent rampant corruption, also severely hamper the work of NCAs. For



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- ²⁰⁰² *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 3; Buthe, T. "The politics of market competition: Trade and antitrust in a global economy". In Martin, L. [ed.]. *Oxford Handbook of the Politics of International Trade* (2014) 1-19; Botta, M. "The co-operation between the competition authorities of the developing countries: Why does it not work? Case study on Argentina and Brazil" (2009) 5. *Competition Law Review* 153-178.
- ²⁰⁰³ *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 3-5.
- ²⁰⁰⁴ *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 3-4.
- ²⁰⁰⁵ Brigot-Laperrousaz, A. *East Africa and antitrust: Enforcement of the EAC Competition Act*. 14 January 2016 available online at African Competition Trusts <http://africanantitrust.com/2016/01/14/the-big-picture-aat-east-africa-antitrust-enforcement/> [Accessed 16 January 2016].
- ²⁰⁰⁶ Lipimile, G.K. & Gachuri, E. "Allocation of competences between national and regional competition authorities: The case of COMESA". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains, United Nations Conference on Trade and Development* (2005) 364.
- ²⁰⁰⁷ Lipimile, G.K. & Gachuri, E. "Allocation of competences between national and regional competition authorities: The case of COMESA". In Brusick, P., Alvarez, A.M. & Cernat, L. [eds.]. *Competition Provisions in Regional Trade Agreement: How to Assure Development Gains* (2005) 364.
- ²⁰⁰⁸ Gal, M.S. *The ecology of antitrust: Preconditions for competition law enforcement in developing countries*. United Nations Conference on Trade and Development (2004) 21- 50.
- ²⁰⁰⁹ Mashego, P. "Borders getting in the way of dawn raids, say lawyers". *Businessday News* 14 August 2015. Available online at <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=5146c3e4-ce8e-49d1-8368-6c5261af6f85&key=7an%2fns5aTazt5mvAXdWAtQ%3d%3d&issue=1106201508140000000001001> [Accessed 11 November 2015].

example, in Thailand, the Thai Trade Competition Office is yet to decide on a single case, notwithstanding the fact that numerous complaints have been submitted before it.²⁰¹⁰

8.9.2. Lack of competitive neutrality

Another hurdle facing the global South is the absence of competitive neutrality. This shows itself in the persistent favourable treatment of SOEs to the detriment of the full participation of privately owned companies in the market.²⁰¹¹ The lack of competitive neutrality regarding SOEs presents itself in a number of ways, for example, general preferential treatment; government subsidisation; tax exemptions; and exemption from complying with cumbersome regulatory measures that apply to privately owned companies.²⁰¹²

8.9.3. Institutional incapacities

The institutional incapacities of NCAs in the global-South are well documented.²⁰¹³ Institutional capacities have a direct impact on the development of a competition law culture. The less effective an NCA is, the less of a competition law culture in that particular jurisdiction. These incapacities impede the South's NCAs from fulfilling their mandate, concerning the enforcement of competition law.²⁰¹⁴ Consequently, the problems facing NCAs tend to also affect attempts at enforcement co-operation within RECs.

Institutional incapacities relate to, *inter alia*, the lack of independence of NCAs, insufficient investigatory powers, a judiciary that lacks competition law expertise, lack of synergies between NCAs and other law enforcement agencies, as well as inadequate financial and human resources.²⁰¹⁵ For instance, in Senegal, the NCAs decision on the existence of a cartel was overturned by the administrative tribunal (made up of members of the bench) because it was

²⁰¹⁰ Nikomborirak, D. "The political economy of the competition regimes in Thailand and South Korea: A comparison". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 110- 118.

²⁰¹¹ *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 3; Alvarez, A.M. *et al.* "Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation". In *Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?* (2007) 77-82.

²⁰¹² Capobianco, A. & Christiansen, H. *Competitive neutrality and state owned enterprises: Challenges and policy options.* Organisation for Economic Co-operation and Development Co-operation (2011) 5-7; *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 3-5.

²⁰¹³ See 1.8 in Chapter 1; and 4.2-4.3 in Chapter 4.

²⁰¹⁴ Jennings, H. *International co-operation in cartel investigations: The additional challenges faced by developing countries.* Organisation for Economic Development and Co-operation (2012) 6; Alvarez, A.M. *et al.* "Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation". In *Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?* (2007) 77-82.

²⁰¹⁵ See Chapter 4; *Policy Roundtable: Improving international co-operation in cartel investigations.* Organisation for Economic Development and Co-operation (2012) 46- 47; *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 4.

not a price fixing cartel.²⁰¹⁶ It appears as if the administrative tribunal assumed that cartels only occurred in the form of price fixing.

The availability of resources will improve an NCA's enforcement record of accomplishment. The opposite is true. The opposite is true, to be precise, where there are no resources, the NCA's enforcement record will be poor. For example, because they are well resourced, NCAs in the global North are 40 per cent more effective than NCAs in the global-South.²⁰¹⁷ Fortunately, some NCAs, realising their capacity shortcomings, provide for the appointment of consultants in their investigations and market analyses.²⁰¹⁸

Consequently, the unavailability of funding has been blamed for the ineffectiveness of the COMESA Competition Commission and the Board of Commissioners, and has also contributed to the failure to appoint staff to serve in these two institutions.²⁰¹⁹ The issue of resource austerity is more prominent in international cartels. In these circumstances, it becomes difficult to allocate resources towards the collection and gathering of evidence abroad.²⁰²⁰ In addition, global South NCAs may prove to be less-experienced, when compared to the more experienced antitrust lawyers from the North, representing MNCs. Therefore, in isolation, NCAs are not a credible threat to international cartels. However, the problem of resources by individual countries may be resolved by them pooling their resources together and undertaking joint enforcement within the framework of RECs.²⁰²¹

8.9.4. The absence of common procedural rules and investigatory tools in domestic competition laws

In spite of the institutional challenges faced by NCAs in the global South, some NCAs have been extremely successful in their enforcement actions. For instance, the Competition Commission of South Africa has uncovered a considerable number of cartels, through its Corporate Leniency Policy (CLP).²⁰²² The same cannot be said of other SADC members. The question is, therefore, "Why have firms readily confessed their cartel involvement before the Competition Commission in South Africa and not done the same to the NCAs of other SADC

²⁰¹⁶ *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 237- 240.

²⁰¹⁷ *World Development Report: Building institutions for markets*. World Bank (2002) 141.

²⁰¹⁸ For example, section 15 of Namibia Competition Act of 2003; section 20 of Botswana Competition Act of 2009.

²⁰¹⁹ Heimler, A. & Jenny, F. "Regional trade agreements". In Lewis, D. [ed.]. *Building New Competition Regimes* (2013) 193.

²⁰²⁰ Gal, M.S. "Regional competition law agreements: An important step for antitrust enforcement" (2010) 60. *University of Toronto Law Journal* 243.

²⁰²¹ Gal, M.S. "Regional competition law agreements: An important step for antitrust enforcement" (2010) 60. *University of Toronto Law Journal* 243-245.

²⁰²² See 5.2-5.3 in Chapter 5.

Members, where they have also engaged in cartel conduct?”²⁰²³ The answer lies in the fact that South Africa has a CLP in place which guarantees that applicants who fulfil all its conditions will receive total immunity.²⁰²⁴ Additionally, the CLP’s provisions guarantee the confidentiality of information submitted to it, pursuant to CLP applications.²⁰²⁵ This is very important because the success of immunity procedures depend on the confidentiality of immunity applications, and the adequate protection of confidential information.²⁰²⁶ Without such protection and guarantees, immunity procedures would not be successful.²⁰²⁷ This is further exacerbated by the fact that only a minority of Members make provision for leniency policies.²⁰²⁸

Therefore, the absence of a common and functioning leniency policy among SADC Members has been cited as a contributory factor to the weaknesses of enforcement collaborations with regard to cross-border cartel conduct.²⁰²⁹ In addition, there are problems regarding the confidentiality of information, and the fact that there are different legal definitions for what qualifies as “confidential” information, making it more difficult to co-ordinate enforcement activities.²⁰³⁰ Perhaps, to solve the problems regarding this issue, guidance could be sought from the Recommendations of the OECD. For instance, Members could use voluntary “confidentiality waivers” (South already has this in its CLP),²⁰³¹ where immunity applicants waive their right to confidentiality, and the information divulged, pursuant to a waiver, only used for the specific purpose, for which the waiver was made. Alternatively Members could use “information gateways”, that is, individual domestic competition laws or regional legal instruments could make provision for the exchange of information, thereby eliminating the need to seek consent at every turn.²⁰³² However, in order for “information gateways” to be effective, and to enhance the effectiveness of enforcement collaborations, clear rules and safeguards should be in place to ensure the confidentiality of such information, nevertheless, and to limit

²⁰²³ Kaira, T. *A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?* Centre for Competition and Economic Development (2015) 1-22.

²⁰²⁴ See 5.2.2 in Chapter 5.

²⁰²⁵ See Chapter 5; para 6.2 of Competition Commission Corporate Leniency Policy of 2008.

²⁰²⁶ *Anti-cartel enforcement manual: International co-operation and information sharing*. International Competition Network (2013) para 3.3.

²⁰²⁷ *National Grid Electricity Transmission PLC v ABB Ltd & Others* HC08C03243 para 7– Observations of the European Commission pursuant to Article 15(3) of Regulation 1 of 2003; Hammond, S.D. *Dispelling the myths surrounding information sharing*. Antitrust Division, United States Department of Justice (2004) ; Hansen, M., Croccon, L. & Kennedy, S. *Challenges to international cartel enforcement and multi-jurisdictional leniency applications - Disclosure of leniency applicant statements and materials*. American Bar Association International Cartel Workshop (2012) 1-22.

²⁰²⁸ See 5.9 in Chapter 5.

²⁰²⁹ *Review of the experience gained so far in enforcement co-operation, including at the regional level*. United Nations Conference on Trade and Development (2011) para 75; *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 42.

²⁰³⁰ *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 44.

²⁰³¹ See 5.2.2 in Chapter 5.

²⁰³² *Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings*. Organisation for Economic Co-operation and Development (2014) 6-10.

the use of the information for any other purposes, save those for which it was given.²⁰³³ The ICN also recommends a similar approach.²⁰³⁴

The SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009 recognises the need for a transparent system that provides adequate safeguards to protect the confidential information of the parties.²⁰³⁵ However, it currently does not clarify such safeguards, which means that these safeguards need to be established, in terms of each Member's competition law.

A common leniency policy will have to address the above differences. It will also have to consider whether the corporate leniency policy should be separated from the individual leniency policy. Additionally, a common leniency policy will have to take into account that some of the RTA Member States do not have competition laws in place presently, and of those with competition laws in force, only a few make provision for leniency procedures.²⁰³⁶

8.9.5. State intervention still present

Despite of the enactment of competition laws, there appears to be a general apathetic attitude towards creating and adopting a competition law culture. This is mainly because competition policy, as well as competition law are relatively new concepts, and some countries still operate under systems in which state intervention is a prominent feature, for example, state price control.²⁰³⁷ Besides, it seems that government policies have contributed to the creation of market structures that are fertile ground for cartels.²⁰³⁸ For instance, the majority of EAC Members' economies are currently moving away from state regulated markets. They are now adopting liberal markets, moving towards the privatisation of former SOEs and deregulating some sectors, all of which have impacted on the implementation of regional competition law.²⁰³⁹

8.9.6. Fledgling national and regional competition authorities

Both national and regional enforcement institutions are relatively young and are still in the process of establishing themselves. For example in SADC, Malawi, Namibia, South Africa,

²⁰³³ Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings. Organisation for Economic Co-operation and Development (2014) 6-10.

²⁰³⁴ Anti-cartel enforcement manual: International co-operation and information sharing. International Competition Network (2013) 4-8.

²⁰³⁵ Article 1(e) of SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009.

²⁰³⁶ See 5.9 in Chapter 5.

²⁰³⁷ Alvarez, A.M. et al. "Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation". In *Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?* (2007) 77-82.

²⁰³⁸ Roberts, S., Vilakazi, T. & Simbanegavi, W. *Understanding competition and regional integration as part of an inclusive growth agenda for Africa: Key issues, insights and a research agenda*. Competition Commission and Tribunal Annual Conference (2014) 15- 21.

²⁰³⁹ Sisenda, E. "The exemption regime under the East African Community's Competition Regulation". *African Competition Trust* 19 January 2016. Available online at <http://africanantitrust.com/category/eac/> [Accessed 17 January 2016].

Zambia, and Zimbabwe enacted their statutes in the 1990s.²⁰⁴⁰ Their NCAs also came into operations thereafter.²⁰⁴¹ Tanzania, Mauritius, Namibia, and Seychelles, Swaziland and Botswana enacted their competition laws in the early 2000s.²⁰⁴² Their NCAs came into operation thereafter.²⁰⁴³

8.9.7. Limited competition law advocacy

In some instances there is not enough awareness among the business community and the community at large of the existence of the competition legislation.²⁰⁴⁴ This problem is persistent.²⁰⁴⁵ Conducting awareness and advocacy programmes plays a huge part in competition law compliance.²⁰⁴⁶ In the EAC, lack of competition advocacy has been cited as a contributing factor as to why there is slow progress in the implementation of regional competition law.²⁰⁴⁷

In order to address such situations, The Gambia's Competition Commission devoted 2011-2014 to advocacy and training of its staff. Some of its advocacy work was directed at the general public, the business community, as well as government officials and civil society organisations.²⁰⁴⁸

8.9.8. Small market economies

Added to the above issues, small market economies and population sizes also hinder the work of NCAs, and by extension, the work of RCAs.²⁰⁴⁹ Small market economies have quite a long



²⁰⁴⁰ See 4.5 in Chapter 4.

²⁰⁴¹ See 4.5 in Chapter 4; Zambia's NCA was established in 1997; in Zimbabwe it was in 1998; in South Africa it was in 1999; in Malawi it was in 2005.

²⁰⁴² See 4.5 in Chapter 4.

²⁰⁴³ Tanzania's NCA became operational in 2007; those of Mauritius, Namibia and Seychelles in 2009; and for Swaziland and Botswana it was in 2010

²⁰⁴⁴ Alvarez, A.M. *et al.* "Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation". In *Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains?* (2007) 77-82; *Promoting competition reforms for development: How to proceed in West Africa?* Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 4.

²⁰⁴⁵ Manishaste, J. "EAC competition policy: Adopted but not implemented in Burundi". *Iwacu News* 10 September 2013. Available online <http://www.iwacu-burundi.org/blogs/english/eac-competition-policy-adopted-but-not-implemented-in-burundi/> [Accessed 10 May 2015].

²⁰⁴⁶ *Preamble, Article 3 of the SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009; Cartel awareness and outreach.* International Competition Network Cartel Workshop (2010) 1- 10; de Araujo, M.T. "Outreach activities: the Brazilian experience". International Competition Network Annual Conference (2010) 1-14; Hesseling, D. *Education and targeted outreach: Netherlands Competition Authority.* International Competition Network Annual Conference (2010) 1-8; *Cartel awareness: Competition Commission of Mauritius.* International Competition Network Annual Conference (2010) 1-3; *Outreach strategies used to promote awareness and use of leniency programs : Nowergian Competition Authority.* International Competition Network Annual Conference (2010) 1-11.

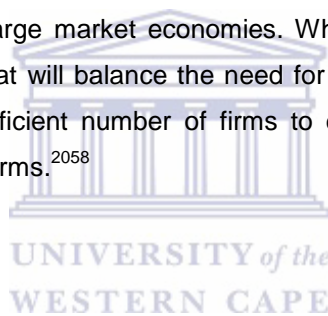
²⁰⁴⁷ Brigot-Laperrousaz, A. *East Africa and antitrust: Enforcement of the EAC Competition Act* 14 January 2016. Available online at African Competition Trusts <http://africanantitrust.com/2016/01/14/the-big-picture-aat-east-africa-antitrust-enforcement/> [Accessed 16 January 2016].

²⁰⁴⁸ Cessay, A. *Gambia: Competition Commission The African and Middle Eastern Antitrust Review* (2014). Available online at <http://globalcompetitionreview.com/reviews/59/african-middle-eastern-antitrust-review-2014/> [Accessed 10 March 2014].

²⁰⁴⁹ Alvarez, A.M. *et al.* "Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation". In *Related Provisions in Regional Trade Agreements: Is it*

history.²⁰⁵⁰ A small market economy is defined as “an independent sovereign economy that supports only a small number of competitors in most of its industries, when catering to demand.”²⁰⁵¹ Therefore, certain features are used to identify small markets, namely, a small number of competitors within a country’s industries; population size; population dispersion; and openness to trade.²⁰⁵² In addition, small market economies are influenced by geographical, technological, legal and political factors.²⁰⁵³ Because of concentrated markets and high barriers to entry, cartels tend to thrive.²⁰⁵⁴ Lesotho is an example of a small market economy. It has a population of 2.1 million.²⁰⁵⁵ Its economic performance is influenced by lack of diversification, recent and on-going political upheavals, high levels of poverty, all of which contribute the country’s failure to implement its commitments in RTAs.²⁰⁵⁶ Similarly, The Gambia’s population size of 1.7 million has been cited as a factor that hampers its Competition Commission’s investigations. Market players know each other very well and are reluctant, therefore, to come forward and assist the Commission in its investigations, where there are allegations of anti-competitive practices.²⁰⁵⁷

Consequently, when developing their competition law frameworks, small market economies must not simply copy from large market economies. What is required is a specially tailored competition policy and law that will balance the need for firms to achieve economies of scale with the need to allow a sufficient number of firms to enter the market in order to ensure competition or rivalry among firms.²⁰⁵⁸



Possible to Obtain Development Gains? (2007) 77-82; “Competition policy and small markets”. *Global Forum on Competition*, Organisation for Economic Co-operation and Development (2003) 5, 9.

²⁰⁵⁰ “Little countries: Small but perfectly formed”. *The Economist* 01 January 1998. Available online at <http://www.economist.com/node/109387> [Accessed 13 December 2014].

²⁰⁵¹ Gal, M.S. “Market conditions under the magnifying glass: The effects of market size and optimal competition policy” (2000) 50 *American Journal of Comparative Law* 303- 304.

²⁰⁵² Gal, M.S. “Size does matter: General policy prescriptions for optimal competition rules in small economies” (2001) 74 *Southern California Law Review* 1439.

²⁰⁵³ Gal, M.S. “Size does matter: General policy prescriptions for optimal competition rules in small economies” (2001) 74 *Southern California Law Review* 1439-1440; *Competition policy and small markets: Global Forum on Competition*, Organisation for Economic Co-operation and Development (2003) 8.

²⁰⁵⁴ Gal, M.S. “Size does matter: General policy prescriptions for optimal competition rules in small economies” (2001) 74 *Southern California Law Review* 1444-1449; *Competition policy and small markets: Global Forum on Competition*, Organisation for Economic Co-operation and Development (2003) 5; Diallo, M. *Senegal Competition Commission: The African and Middle Eastern Antitrust Review* (2014). [Accessed 10 March 2014]. Available online at <http://globalcompetitionreview.com/reviews/59/african-middle-eastern-antitrust-review-2014/>

²⁰⁵⁵ *Lesotho Statistics*. World Bank Statistics available online <http://data.worldbank.org/country/lesotho> [Accessed 10 November 2015].

²⁰⁵⁶ Nseera, A., Salami, A. & Bhatia, A. *Lesotho: African Economic Outlook*. [Accessed 10 September 2015]. Available online at <http://www.africaneconomicoutlook.org/en/country-notes/southern-africa/lesotho/>

²⁰⁵⁷ Ceesay, A. *Gambia Competition Commission: The African and Middle Eastern Antitrust Review* (2014). Available online at <http://globalcompetitionreview.com/reviews/59/african-middle-eastern-antitrust-review-2014/> [Accessed 10 March 2014].

²⁰⁵⁸ Gal, M.S. “Size does matter: General policy prescriptions for optimal competition rules in small economies” (2001) 74 *Southern California Law Review* 1442- 1443, 1450- 1462.

8.10. Concluding Remarks

Cross-border co-operation regarding cartels, or in any other area of competition law, is beneficial. It allows for economies of scale, avoids duplication in investigating proceedings by different NCAs, creates synergies, and ensures that cartel participants are dealt with and brought to book in more than one territorial jurisdiction through the RCA. This has considerable advantages for countries in the global South. It ensures that there are pooling resources, sharing of expertise in an area where most NCAs are still relatively new and allows individual NCAs to grow together. Co-operation also results in the achievement of common principles, if not the harmonisation of their competition laws, at least with reference to the substantive rules governing cartels, and the enforcement thereof. Currently, the co-operation has not been substantial, in terms of actually investigating cartel conduct. Instead, the co-operation has been in the form of training workshops, study tours, and staff exchanges. This is understandable, and indeed expected, because NCAs in the South are still in the process of learning how to deal with this area of law, and building up capacities in the way of home-grown knowledge, equipping their judicial systems and generally creating a competition law culture. Therefore, an endogenous competition law enforcement framework will be developed. Although regional competition law instruments, such as, the COMESA Competition Regulations, the COMESA Competition Rules, the EAC Competition Act, and the EAC Competition Regulations envisage formal co-operation, this has not materialised, regarding collaboration in cross-border cartels. As can be recalled, the COMESA Competition Commission has been quite active the area of cross-border mergers and acquisitions. The same cannot be said for cross-border cartels. It should not be this way, as, more than any other area of competition law, there is a much greater level of convergence on the substantive rules that govern cartels.²⁰⁵⁹ Possible solutions are discussed in Chapter 9 of this thesis.

²⁰⁵⁹ See Chapter 3.

PART E:
CONCLUSIONS AND RECOMMENDATIONS



CHAPTER NINE

FINAL CONCLUDING REMARKS AND THE WAY FORWARD

9.1. Summary of the study

Chapter 1 comprised an introduction to the study, which revealed that free markets, competition and an effective competition law are intertwined.²⁰⁶⁰ One cannot exist without the other.²⁰⁶¹ Cartels are an anathema to free markets, and the global-South is increasingly becoming aware of the scourge, not only on their consumers, but also on their prospects of economic development.²⁰⁶² In addition, there is a connection between international trade and competition law.²⁰⁶³ Consequently, South-South RTAs are increasingly incorporating provisions for cartel enforcement collaborations.²⁰⁶⁴ The aim of this thesis, therefore, was to examine the effectiveness of enforcement collaborations in South-South RECs, with specific reference to cross-border cartels.²⁰⁶⁵

Chapter 2 incorporated an inquiry into the connection between economic doctrine and competition law, as well as the goals of competition law.²⁰⁶⁶ The connection between economics and competition law must exist because proper competition law analyses require a basic understanding of economic doctrine.²⁰⁶⁷ Classical economists advocated free markets and generally frowned upon government intervention. However, with monopolisation and other market failures, the Classical theory espoused that markets were self-regulating and that government regulation was not required.²⁰⁶⁸ Economists of the Classical School firmly trusted that the “invisible hand” would result in the efficient allocation of resources.²⁰⁶⁹ Nonetheless, they admitted that at times government intervention was necessary.²⁰⁷⁰

Under the “new thinking” of the Neo-Classical theory, its economists are known for their model of “perfect competition”.²⁰⁷¹ In a perfectly competitive market, there was efficient allocation of resources.²⁰⁷² The limitations of the Neo-Classical School were the assumptions on which its model of

²⁰⁶⁰ See 1.1 of Chapter 1.

²⁰⁶¹ See 1.2 of Chapter 1.

²⁰⁶² See 1.4-1.7 of Chapter 1.

²⁰⁶³ See 1.7 of Chapter 1.

²⁰⁶⁴ See 1.8 of Chapter 1.

²⁰⁶⁵ See 1.10-1.13 of Chapter 1.

²⁰⁶⁶ See 2.1 of Chapter 2.

²⁰⁶⁷ See 2.1 of Chapter 2.

²⁰⁶⁸ See 2.2, 2.2.1 of Chapter 2.

²⁰⁶⁹ See 2.1, 2.2.1 of Chapter 2.

²⁰⁷⁰ See 2.2.2 of Chapter 2.

²⁰⁷¹ See 2.3, 2.3.1 of Chapter 2.

²⁰⁷² See 2.3.1 of Chapter 2.

'perfect competition' was based.²⁰⁷³ The criticism was that in the real world, markets were rarely perfect. Instead, they were characterised by monopoly elements that Neo-Classical economists failed to consider.²⁰⁷⁴

Under the Harvard School, Chamberlin introduced an alternative to "perfect competition", namely, "monopolistic competition".²⁰⁷⁵ In direct contrast to the "perfect competition" model's premise that there was product homogeneity, under monopolistic competition, Chamberlin relied on product differentiation.²⁰⁷⁶ The SCP paradigm was another point of focus for the Harvard School. Its adherents were preoccupied with the structure of markets.²⁰⁷⁷ To them, market failures were symptoms of an underlying problem, namely, the structure of the market.²⁰⁷⁸ Therefore, the solution was to correct the market structure.²⁰⁷⁹ Once the structure was corrected, the conduct and performance of the participants in the market would be corrected, consequently.²⁰⁸⁰

Because the Harvard School was viewed as an overzealous form of "antitrust structuralism",²⁰⁸¹ economists of the Chicago School were concerned about advancing the viewpoint that the primary goal of competition policy and law should be the achievement of economic efficiency.²⁰⁸² Like the Classical economists, the Chicagoans professed faith in the ability of the market to correct itself, without the need for government regulation, because for Chicagoans, "the best antitrust policy was one of doing as little as possible", except when confronted with naked restraints, such as cartels.²⁰⁸³ They were of the view that not all forms of co-operation among firms should be penalised, and because of this, they were especially critical of the courts' readiness to apply the *per se* illegal principle.²⁰⁸⁴ Charged with overestimating its abilities, the Chicago School was criticised for its insistence on the achievement of economic efficiency, as the principal goal of competition policy and law, to the exclusion of other equally important considerations.²⁰⁸⁵

²⁰⁷³ See 2.3.2 of Chapter 2.

²⁰⁷⁴ See 2.3.2 of Chapter 2.

²⁰⁷⁵ See 2.4 of Chapter 2.

²⁰⁷⁶ See 2.4 of Chapter 2.

²⁰⁷⁷ See 2.4 of Chapter 2.

²⁰⁷⁸ See 2.4 of Chapter 2.

²⁰⁷⁹ See 2.4 of Chapter 2.

²⁰⁸⁰ See 2.4 of Chapter 2.

²⁰⁸¹ See 2.4.1 of Chapter 2.

²⁰⁸² See 2.5 of Chapter 2.

²⁰⁸³ See 2.5 of Chapter 2.

²⁰⁸⁴ See 2.5 of Chapter 2.

²⁰⁸⁵ See 2.5.1 of Chapter 2.

Post-Chicago economics sought to refine the analyses of the Chicagoans.²⁰⁸⁶ Post Chicago, economists were open to the possibility of government intervention and conceded that certain market structures offered opportunities for anti-competitive collaborations.²⁰⁸⁷

Economic doctrine has influenced competition law and the application of the same by NCAs in the global-South.²⁰⁸⁸ Because of the importance of economics, South-South RECs should not ignore its role in the enforcement of competition law, regarding cartels. A failure to understand the basic principles in economics may spell disaster in enforcement collaborations. For example, the use of political power to interfere with investigations by NCAs is because of ignorance of the economic doctrine underlying competition law analyses, as well as the benefits thereof.

The objectives of competition law reveal how countries in the global-South can tailor their competition laws to fit into their context, if the basic principles of economics are not ignored.²⁰⁸⁹ For instance, South-South RTAs can incorporate the interests of SMEs, improving the participation of their citizens in their regional economies, as well as improving the competitiveness of their firms in global markets.²⁰⁹⁰ Although such a multifarious approach can be problematic, it shows, nonetheless, that the objectives of competition law are malleable.²⁰⁹¹ Therefore, the inclusion of non-economic objectives is especially important for the global-South and should be properly understood and applied.²⁰⁹²

Chapter 3 comprised a discussion on the unanimity of the legal treatment of cartels under domestic competition laws, as well as within regional competition law provisions.²⁰⁹³ The Chapter commenced with a discussion on the importance of identifying the relevant market in competition law analyses²⁰⁹⁴ and when specifically dealing with horizontal restraints.²⁰⁹⁵ As a species of restrictive horizontal practices, cartels are especially egregious; they result in monopolistic tendencies among cartel members.²⁰⁹⁶ Unlike efficiency enhancing collaboration arrangements (joint ventures), cartels do not have this attribute.²⁰⁹⁷ Because of their nature and effect, cartels are judged as *per se* illegal, by their mere existence.²⁰⁹⁸ In this chapter, the researcher analysed the statutory provisions prohibiting

²⁰⁸⁶ See 2.6 of Chapter 2.

²⁰⁸⁷ See 2.6 of Chapter 2.

²⁰⁸⁸ See 2.8 of Chapter 2.

²⁰⁸⁹ See 2.7 of Chapter 2.

²⁰⁹⁰ See 2.7.5 -2.8 of Chapter 2.

²⁰⁹¹ See 2.9 of Chapter 2.

²⁰⁹² See 2.10 of Chapter 2.

²⁰⁹³ See 3.1 of Chapter 3.

²⁰⁹⁴ See 3.2, 3.2.1- 3.2.2 of Chapter 3.

²⁰⁹⁵ See 3.2.3 of Chapter 3.

²⁰⁹⁶ See 3.4 of Chapter 3.

²⁰⁹⁷ See 3.4 of Chapter 3.

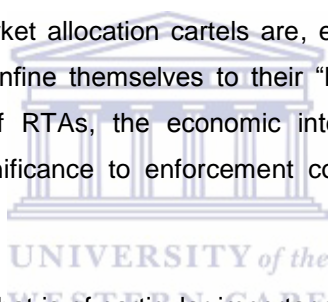
²⁰⁹⁸ See 3.3.1 of Chapter 3.

cartels, as contained in the COMESA Competition Regulations of 2004, the EAC Competition Act of 2006,²⁰⁹⁹ and in the domestic competition law provisions of Member States.²¹⁰⁰

Cartels can present as agreements among competing firms; as decisions by associations of firms; and as concerted practices.²¹⁰¹ Three types of cartel practices are generally prohibited: price fixing, market allocations, and collusive tendering.²¹⁰² Price fixing can be implemented directly or indirectly.²¹⁰³ However, regardless of the manner in which a price fixing cartel is implemented, the objective is the same; the elimination of price competition among firms.²¹⁰⁴ NCAs in the global-South have been very wary of price fixing cartels.²¹⁰⁵

Market allocation cartels present themselves in two ways; either as geographical territorial divisions, or as customer allocations.²¹⁰⁶ Market allocations are problematic because they also pave the way for price fixing. For example, once a firm has monopoly over a certain sector of the market, whether geographically, or in terms of certain categories of customers, or lines of commerce, that firm has the ability to determine prices.²¹⁰⁷

Within the framework of RTAs, market allocation cartels are, especially, serious.²¹⁰⁸ For example, cartel participants may agree to confine themselves to their “home markets”.²¹⁰⁹ This is in direct contradiction to the basic tenet of RTAs, the economic integration of Members’ territories.²¹¹⁰ Therefore, they are of special significance to enforcement collaborations within the South-South RECs.²¹¹¹



Collusive tendering is another area that is of particular importance to South-South RECs.²¹¹² Through collusive tendering, firms may agree that they will only submit tenders in their ‘home markets’, thereby effectively allocating markets among themselves.²¹¹³ Collusive tendering is a particular scourge in the global-South, not only because public procurement constitutes a significant portion of the GDP, but

²⁰⁹⁹ See 3.7 of Chapter 3.

²¹⁰⁰ See 3.5 of Chapter 3.

²¹⁰¹ See 3.5 of Chapter 3.

²¹⁰² See 3.8-3.10 of Chapter 3.

²¹⁰³ See 3.8 of Chapter 3.

²¹⁰⁴ See 3.8 of Chapter 3.

²¹⁰⁵ See 3.4 of Chapter 3.

²¹⁰⁶ See 3.9 of Chapter 3.

²¹⁰⁷ See 3.9 of Chapter 3.

²¹⁰⁸ See 3.9.1 of Chapter 3.

²¹⁰⁹ See 3.9.1 of Chapter 3.

²¹¹⁰ See 3.9.1 of Chapter 3.

²¹¹¹ See 3.9.1 of Chapter 3.

²¹¹² See 3.10 of Chapter 3.

²¹¹³ See 3.10 of Chapter 3.

also because the poorest of the poor bear the consequences of bid rigging, as they rely on the public goods and services that are procured by government.²¹¹⁴ Within the framework of RECs, governments too, may influence public procurement within by giving preferential treatment to domestic firms.²¹¹⁵

Chapter 4 included an assessment of the practical enforcement of cartel provisions through public institutions.²¹¹⁶ In domestic settings, this is done by specially created NCAs, established by the respective competition laws and referred to by various titles.²¹¹⁷ They are endowed with the necessary investigatory and other powers to fulfil their functions.²¹¹⁸ In some South-South RECs, specially created RCAs have been established to facilitate co-operation in the enforcement of regional competition law.²¹¹⁹ In COMESA, it is both the COMESA Competition Commission and the Board of Commissioners that are tasked with enforcing regional competition law.²¹²⁰ The Competition Commission, vested with the necessary powers, is authorised to enforce regional competition law and to render technical assistance to individual NCAs, for the harmonising of regional competition law in the Common Market.²¹²¹

In the EAC, the Competition Authority is vested with the necessary powers to implement and enforce Community competition law.²¹²² It has exclusive jurisdiction over practices, prohibited by the EAC Competition Act of 2006, and its decisions are binding on individuals, NCAs and domestic courts.²¹²³ In addition, its decisions are enforceable in Member States. A further appeal may be referred to the East African Court of Justice.²¹²⁴ Unfortunately, the EAC Competition Authority has yet to be constituted.²¹²⁵

In SADC, both the SADC Secretariat and the Competition and Consumer Policy and Law Committee (CCOPOLC) are involved with promoting effective co-operation in competition law matters and consumer protection among Members States.²¹²⁶ Unlike the COMESA Competition Commission, which is endowed with the investigatory and remedial powers, such as those of NCAs, it is not so with

²¹¹⁴ See 3.10 of Chapter 3.

²¹¹⁵ See 3.10 of Chapter 3.

²¹¹⁶ See 4.1 of Chapter 4.

²¹¹⁷ See 4.4.1, 4.4.1 of Chapter 4.

²¹¹⁸ See 4.5 of Chapter 4.

²¹¹⁹ See 4.6, 4.6.1 of Chapter 4.

²¹²⁰ See 4.6.1.1- 4.6.1.2 of Chapter 4.

²¹²¹ See 4.6.1.1 of Chapter 4.

²¹²² See 4.6.2 of Chapter 4.

²¹²³ See 4.6.2 of Chapter 4.

²¹²⁴ See 4.6.2 of Chapter 4.

²¹²⁵ See 4.6.2 of Chapter 4.

²¹²⁶ See 4.6.3.2 of Chapter 4.

the CCOPOLC.²¹²⁷ The principal focus of the CCOPOLC is to foster co-operation among SADC Members through, what the Declaration on Regional Co-operation in Competition and Consumer of 2009 refers to as, 'soft convergence'.²¹²⁸ Currently, the kind of co-operation envisaged by the Declaration is voluntary, in that neither the SADC Secretariat, nor the CCOPOLC, is empowered to impose sanctions on any member that does not cooperate.²¹²⁹

In SACU, although Article 40 and Article 41 of the SACU Agreement of 2002 underscore the need for effective competition law, as well as the achievement of common competition law among Members, there is currently no legal instrument, specifically, devoted to competition law and the co-operation in the enforcement thereof, among Members of the customs union. However, there have been instances of informal co-operation among individual SACU Members.

Chapter 5 contained the researcher's focus on the tools, used by NCAs and RCAs, for the public enforcement of competition law in the global South.²¹³⁰ Three mechanisms have been especially successful in dealing with cartels: leniency policies,²¹³¹ settlement procedures,²¹³² and the criminalisation of cartel practices.²¹³³ The Chapter also considered the use of administrative penalties utilised by the NCAs and RCAs.²¹³⁴

Leniency programmes are aimed at incentivising confessions by cartel participants, by granting them either full or limited immunity.²¹³⁵ Globally, especially in the North, leniency programmes have yielded considerable success in the fight against cartels, more than any other investigatory tool.²¹³⁶ South Africa does have a leniency policy,²¹³⁷ the CLP and has experienced the fruits of its leniency mechanism.²¹³⁸ However, the same cannot be said for most of the countries in the global-South.²¹³⁹ It appears that, in the developing world, leniency mechanisms are yet to be fully understood and imbedded into their public enforcement frameworks. Currently, COMESA, EAC, SACU, SADC do not have common rules on leniency procedures.²¹⁴⁰

²¹²⁷ See 4.6.3.2 of Chapter 4.

²¹²⁸ See 4.6.3.2 of Chapter 4.

²¹²⁹ See 4.6.3.1- 4.6.3.2 of Chapter 4.

²¹³⁰ See 5.1 of Chapter 5.

²¹³¹ See 5.2- 5.3 of Chapter 5.

²¹³² See 5.4- 5.5 of Chapter 5.

²¹³³ See 5.7 of Chapter 5.

²¹³⁴ See 5.6 of Chapter 5.

²¹³⁵ See 5.2, 5.2.1 of Chapter 5.

²¹³⁶ See 5.2.1 of Chapter 5.

²¹³⁷ See 5.4.1- 5.4.4 of Chapter 5.

²¹³⁸ See 5.5 of Chapter 5.

²¹³⁹ See 5.9 of Chapter 5.

²¹⁴⁰ See 5.9.1 of Chapter 5.

Leniency policies also need to be understood in light of other enforcement mechanisms, for example, civil law suits that may be brought by individuals harmed by cartel practices.²¹⁴¹ As leniency applicants, essentially, confess their participation in cartel practices; this exposes firms to claims for civil damages.²¹⁴² Such a position may dampen the willingness of applicants to make use of leniency procedures.²¹⁴³ Therefore, leniency policies must be properly calibrated with other enforcement mechanisms, to ensure that they retain the incentive of encouraging firms to confess their participation in cartel practices.²¹⁴⁴

Settlement procedures are also another investigatory tool.²¹⁴⁵ Negotiated settlements are aimed at achieving procedural efficiencies by reducing the time and resources, used in resolving investigations of prohibited practices, such as cartels.²¹⁴⁶ The legal requirements and consequences of settlement procedures tend to vary.²¹⁴⁷ In some jurisdictions, it is mandatory for a firm to make an admission of guilt, while in other jurisdictions; such a requirement did not exist.²¹⁴⁸ This Chapter also showed that, currently, COMESA, EAC, SACU, SADC do not have common rules on settlement procedures.²¹⁴⁹

In terms of the administrative enforcement of the law, once an NCA and the adjudicatory institutions arrive at a decision that a firm has engaged in cartel activity, such a firm must be 'punished', accordingly. This "punishment" is in the form of administrative penalties.²¹⁵⁰ There is unanimity in the use of administrative penalties, as well as how they ensure that cartel participants are made to bear the cost of the prohibited conduct.²¹⁵¹ Administrative penalties threaten the existence of cartels, they discourage potential cartel activities, they penalise cartel participants for engaging in the prohibited practice, and they disgorge cartel participants of their illegal profits.²¹⁵² The COMESA Competition Regulations of 2004 and the EAC Competition Act of 2006 make provision for administrative penalties on firms that engage in cartel practices.²¹⁵³ In SADC, the Declaration on Regional Co-operation in Competition and Consumer of 2009, currently, makes no provision for the imposition of administrative

²¹⁴¹ See 5.2- 5.3 of Chapter 5.

²¹⁴² See 5.2- 5.3 of Chapter 5.

²¹⁴³ See 5.2- 5.3 of Chapter 5.

²¹⁴⁴ See 5.2- 5.3 of Chapter 5.

²¹⁴⁵ See 5.4-5.5 of Chapter 5.

²¹⁴⁶ See 5.4-5.5 of Chapter 5.

²¹⁴⁷ See 5.4-5.5 of Chapter 5.

²¹⁴⁸ See 5.4-5.5 of Chapter 5.

²¹⁴⁹ See 5.9.1 of Chapter 5.

²¹⁵⁰ See 5.6 of Chapter 5.

²¹⁵¹ See 5.6 of Chapter 5.

²¹⁵² See 5.6 of Chapter 5.

²¹⁵³ See 5.9.2 of Chapter 5.

fines.²¹⁵⁴ The same applies to the SACU Agreement of 2002. However, members of all four RECs with domestic competition laws, make provision for administrative penalties.²¹⁵⁵

The criminalisation of cartels is a reflection of society's condemnation of this kind of conduct.²¹⁵⁶ The advantage of criminalising cartels is that it personally visits punishment for violating competition law on the "controlling mind", the individual(s) engaged in the cartel. However, disagreements exist as to the suitability of criminalising cartels.²¹⁵⁷ Some do not view cartels as conduct for which participants must be incarcerated, or ordered to pay fines, personally, as a criminal sentence.²¹⁵⁸ In some jurisdictions, even where the law makes provision for the criminalisation of cartels, courts impose criminal sentences that are not served.²¹⁵⁹ Instead, they are converted to other forms of punishment. The Chapter considered the criminalisation of cartel conduct in the global South as whole,²¹⁶⁰ and with reference to specific jurisdictions.²¹⁶¹ Within the framework of RECs, COMESA, EAC, SACU and SADC do not currently criminalise cartel conduct.²¹⁶²

In **Chapter 6**, the international nature of anti-competitive practices is addressed, by specifically looking at private international cartels (PICs).²¹⁶³ PICs are cartels that operate across territorial boundaries.²¹⁶⁴ Previously, they were actively encouraged as instruments of promoting domestic economic security, and constituted 40 per cent of world trade in manufactured goods.²¹⁶⁵ There is no end to the sectors in which PICs have been uncovered.²¹⁶⁶ Some of the PICs discussed in the chapter had significant adverse effects in the South.²¹⁶⁷ For example, domestic firms may be forced to exit the market, as they could not compete with the PICs.²¹⁶⁸ In this chapter, the researcher also revealed the role that trade associations have in the existence and survival of PICs.²¹⁶⁹ With the exception of a few countries, the global-South has largely been unable to deal with PICs, irrespective of their negative effects.²¹⁷⁰ Within the framework of RECs, the RCAs of COMESA, and EAC are yet to record

²¹⁵⁴ See 5.9.2 of Chapter 5.

²¹⁵⁵ See 5.9.2 of Chapter 5.

²¹⁵⁶ See 5.7 of Chapter 5.

²¹⁵⁷ See 5.7.1 of Chapter 5.

²¹⁵⁸ See 5.7.1 of Chapter 5.

²¹⁵⁹ See 5.7.1 of Chapter 5.

²¹⁶⁰ See 5.7.2 of Chapter 5.

²¹⁶¹ See 5.7.3 of Chapter 5.

²¹⁶² See 5.9.3 of Chapter 5.

²¹⁶³ See 6.1 of Chapter 6.

²¹⁶⁴ See 6.2 of Chapter 6.

²¹⁶⁵ See 6.3- 6.8 of Chapter 6.

²¹⁶⁶ See 6.3- 6.7 of Chapter 6.

²¹⁶⁷ See 6.3- 6.7, 6.10 of Chapter 6.

²¹⁶⁸ See 6.3- 6.7 of Chapter 6.

²¹⁶⁹ See 6.3- 6.7 of Chapter 6.

²¹⁷⁰ See 6.8- 6.9 of Chapter 6.

prosecutions of PICs.²¹⁷¹ In light of the institutional shortcomings of NCAs in the global-South, PICs provide a good case for enforcement collaborations within these RECs.²¹⁷² For instance, if a PIC operates in COMESA, the COMESA Competition Commission can, with the co-operation of individual NCAs, work together in the investigation and prosecution of the PIC. This will save resources, as the matter will be settled once, and the Commission's decision will be enforced in the individual jurisdictions.

In **Chapter 7**, another aspect of the international nature of cartel conduct is investigated, namely, export cartels.²¹⁷³ These are essentially cartels, exempted from the domestic competition law, supposing that they are solely directed towards export activities.²¹⁷⁴ Supporters of export cartels cite several reasons why export cartels should exist.²¹⁷⁵ Example are, strategic trade policy, perceived efficiencies that result from export cartels, and that export cartels enable SMEs to compete, effectively, against established MNCs.²¹⁷⁶ On the other hand, opponents of export cartels oppose them for a number of reasons.²¹⁷⁷ These are, export cartels may have spill-over effects in the market of origin, they promote a 'beggar-thy neighbour' effect on the importing countries, they are contrary to countries' international trade obligations, and they amount to the differential treatment of cartel conduct, which, although deemed illegal within the country of origin, are nonetheless, allowed in another jurisdiction.²¹⁷⁸

Unlike PICs that have been actively investigated and prosecuted by NCAs, export cartels have received a much more subdued treatment.²¹⁷⁹ The following reasons refer. First, because 'pure' export cartels have no impact in their country of origin, implying that the NCAs of their home country have neither reason, nor motivation to investigate and prosecute them.²¹⁸⁰ Secondly, the target countries that bear the adverse impact of the export cartels may have difficulties in, not only assuming jurisdiction over the cartel, but also gathering evidence of the export cartel, abroad.²¹⁸¹ Fortunately, it is now common for competition laws to make provision for extra-territorial application. Thirdly, political pressure may also be brought to bear on the NCA of the importing country, to dissuade them from conducting any investigations.²¹⁸² Export cartels are an area of possible collaboration within RECs. However, there may be problems in this co-operation, for example, if the export cartel originates from

²¹⁷¹ See 6.8- 6.9 of Chapter 6.

²¹⁷² See 6.8- 6.9 of Chapter 6.

²¹⁷³ See 7.1 of Chapter 7.

²¹⁷⁴ See 7.2- 7.3 of Chapter 7.

²¹⁷⁵ See 7.4 of Chapter 7.

²¹⁷⁶ See 7.4 of Chapter 7.

²¹⁷⁷ See 7.5 of Chapter 7.

²¹⁷⁸ See 7.5 of Chapter 7.

²¹⁷⁹ See 7.2 of Chapter 7.

²¹⁸⁰ See 7.2- 7.5 of Chapter 7.

²¹⁸¹ See 7.2- 7.5 of Chapter 7.

²¹⁸² See 7.2- 7.5 of Chapter 7.

a member of a REC; it is unlikely that the member will cooperate with the RCA to prosecute the export cartel (which it exempted, in terms of its domestic competition law). Maximum co-operation is only possible where the export cartel does not originate from Member States.

In **Chapter 8**, the researcher addressed issues of co-operation in the enforcement of competition law across territorial borders, specifically cross-border cartels.²¹⁸³ The research revealed that there is an intimate link between trade liberalisation and the enforcement of competition law.²¹⁸⁴ These two areas have a mutually reinforcing and complementary relationship.²¹⁸⁵ With the failure of trade negotiation Rounds at the WTO, there appeared to be renewed efforts to utilise RTAs to address those issues that countries failed to resolve at WTO level.²¹⁸⁶ It appears, therefore, that RTAs are being perceived as the new trade geography.²¹⁸⁷ A problem that confronts competition law's enforcement collaborations, in the framework of RECs, is multiple memberships, which is highlighted when perusing the membership in COMESA, EAC, SACU, and SADC.²¹⁸⁸ This factor has the potential of frustrating efforts of achieving common standards, as well as the implementation thereof, by members.²¹⁸⁹ However, this problem is manageable, when prosecuting cartel conduct, because all RECs with regional competition laws, namely, COMESA and EAC prohibit cartel conduct. Members of SADC and SACU, with competition laws in place, also prohibit cartel practices.

Chapter 8 examined the global trends in co-operation and competition law enforcement.²¹⁹⁰ By identifying several RMNCs that have engaged in cross-border cartel practices, Chapter 8 made a case for South-South co-operation.²¹⁹¹ In RECs, formal co-operation is encapsulated in the RTAs and legal instruments pertaining to the substantive rules governing cartels and the enforcement of those rules.²¹⁹² In COMESA and in EAC, despite of the existence of formal rules that govern co-operation, these rules have not been utilised much, especially in the monitoring of cross-border cartel activity.²¹⁹³ For example, COMESA has been very active in evaluating cross-border mergers and acquisitions; however, not very active in investigating cross-border cartel conduct.²¹⁹⁴ This is not unique to the COMESA Competition Commission and the Board of Commissioners. For instance, during the formative years of South Africa's Competition Commission, it was very active in considering mergers

²¹⁸³ See 8.1 of Chapter 8.

²¹⁸⁴ See 8.2 of Chapter 8.

²¹⁸⁵ See 8.2 of Chapter 8.

²¹⁸⁶ See 8.3 of Chapter 8.

²¹⁸⁷ See 8.3 of Chapter 8.

²¹⁸⁸ See 8.4-8.5 of Chapter 8.

²¹⁸⁹ See 8.3- 8.5 of Chapter 8.

²¹⁹⁰ See 8.6 of Chapter 8.

²¹⁹¹ See 8.7 of Chapter 8.

²¹⁹² See 8.8 of Chapter 8.

²¹⁹³ See 8.8 .1- 8.8.2 of Chapter 8.

²¹⁹⁴ See 8.8.1 of Chapter 8.

and acquisitions. It was only much later that it extended its investigatory efforts to cartel conduct. As can be recalled, the EAC Competition Authority is still to become operational.²¹⁹⁵

9.2. The Effectiveness of Enforcement Collaborations in Cross-Border Cartel cases in COMESA, EAC, SACU and SADC

The effectiveness of enforcement collaborations in COMESA, EAC, SACU, and SADC is plagued by quite a number of problems.²¹⁹⁶ Some of these problems will take quite a while and a lot of effort to resolve. Some can be easily solved. For example, the absence of political will and lack of competition advocacy can be cured by educating the public and those holding political office of the benefits of competition policy and competition law.

Institutional incapacities, on the other hand, cannot be cured by a “quick fix”. Instead, what is needed is a sustained effort, aimed at improving the capacities of these institutions, through staff exchanges, as well as availing funding, or financial resources, to enable NCAs to do their work effectively. This also requires capacitating the ordinary courts, by giving members of the bench training in competition law, in terms of its interpretation and application.

The absence of competitive neutrality is a major issue in the global-South, where certain sectors are not subjected to competition law principles.²¹⁹⁷ Such a state of affairs is contrary to free market and competition, because it results in the sheltering of companies that are not competitive. It also stifles competition and leads to firms exiting the market, as they cannot profitably remain in a market, where firms are receiving favourable treatment from the government. This does not imply that certain sectors of the economy should not be exempted from the provisions of competition law. They should be and must. An example of “deserving” exemptions is that of SMEs. However, this must not be done on an *ad hoc* basis; such exemptions require proper procedures and rules.

Another problem facing enforcement collaborations in the South is the issue of small market economies. This has affected co-operation between NCAs in the North and the South.²¹⁹⁸ Unfortunately, there is no short-term solution to this problem. Instead, what is required is a long-term solution that will fix the underlying problems. One solution could be to introduce sustainable diversification of the economies, to allow competition to take place, effectively, failing which, the problem will continue to exist. Another solution would be to tailor a competition law that is not a copy of competition laws of large economies. Such a competition law must focus on achieving economic efficiency.

²¹⁹⁵ See 8.8.2 of Chapter 8.

²¹⁹⁶ See 8.9 of Chapter 8.

²¹⁹⁷ See 8.9.2 of Chapter 8.

²¹⁹⁸ Heimler, A. & Jenny, F. “Regional trade agreements” In Lewis, D. [ed.]. *Building New Competition Regimes* (2013 186).

As far as enforcement collaborations are concerned, one thing is obvious, although formal co-operation is provided for in, for example, the COMESA Competition Regulations of 2004, there is no record of such collaborations regarding cartels.²¹⁹⁹ It appears that the COMESA Competition Commission, currently, is only dealing with merger transactions. This is particularly worrisome, in light of the existence of cartels that operate across members of COMESA, EAC, SACU and SADC.

Perhaps evaluating the work of RCAs, such as the COMESA Competition Commission, may be too soon. The Commission has been in operation since 2009, so a decade has hardly gone by. Therefore, it may be too soon to judge whether the Commission has proved its capabilities. In the EAC, since the Competition Authority has not been instituted, it is not possible to evaluate its effectiveness. Another issue is that, although the regional competition laws have granted the RCAs investigatory powers to deal with cartels, and made provision for co-operation between the RCAs and NCAs, the investigatory tools that are ordinarily available to some of the NCAs, such as leniency policies and settlement procedures, have not been included in the regional instruments.

For enforcement co-operation in South-South RTAs, through RCAs to be effective, the jurisdiction and involvement of domestic courts and NCAs must not be ousted. Excluding these domestic institutions will weaken the objectives of enforcement collaborations, in addition to being resisted by Member States. For example, as the centre, the COMESA Competition Commission must be closely connected and linked to the periphery, the individual NCAs, in order to be effective. This involves clarity on the provisions of the law being enforced and the jurisdictional powers of each of these participants. The COMESA Competition Regulations of 2004, the COMESA Competition Rules of 2004, the EAC Competition Act of 2006, and the EAC Competition Regulations of 2010 are clear on this.

9.3. Some Recommendations

In light of the issues examined in the entire thesis, several recommendations are suggested. These recommendations contend with augmenting the effectiveness of the RCAs.

9.3.1. Examining the possibility of a common leniency policy

Leniency policies play an important role in the fight against cartels. As can be recalled, leniency policies are a process through which firms could approach CAs to “confess” their involvement in cartel conduct, by providing sufficient information that will enable a CA to launch an investigation, and/or make a positive finding of a cartel infringement. In exchange, the firm will be granted total immunity from administrative penalties, or a reduction thereof. The value of a leniency policy lies in the fact that it enables NCAs, or even RCAs, to obtain “insider” evidence and information pertaining to cartel infringements that they would otherwise not have had access to, under normal circumstances.

²¹⁹⁹ See 8.8.2 of Chapter 8.

Although widely used by CAs in the global-North, it appears that CAs in the South have not realised the potential of leniency policies. For instance, in COMESA, not all members have a leniency policy. Certainly, the fact that not all COMESA Members have leniency policies in place is an impediment to the efforts of the COMESA Competition Commission. However, it also provides the opportunity for all countries to adopt a common leniency policy. Because of the absence of leniency policies in most individual countries, not many amendments to the domestic competition laws would be necessary to accommodate the new leniency policy. Instead, members will start on a *tabula rasa*, a blank table, which will allow them to negotiate on an equal footing, more or less.

It is submitted, therefore, that COMESA adopts a leniency policy “template”, on which all members may tailor their individual competition laws, as well as the competencies of their NCAs, in order to achieve substantive and procedural convergence of leniency procedures. A common leniency policy has immense advantages. It motivates firms to break rank and confess their cartel participation. The converse is also true. In the absence of a common leniency policy, a firm will only confess in a jurisdiction with a leniency policy and not in a jurisdiction without one, which implies that there will be enforcement asymmetries. Jurisdictions with leniency policies in place are likely to experience a better enforcement record of accomplishment concerning cartels, when compared to those, who do not have leniency policies in place. In Southern Africa, South Africa’s corporate leniency policy, administered by the Competition Commission, has been cited as one of the reasons why it has brought more cartels to book, successfully, than any other NCA in the region.²²⁰⁰

Another advantage is that once a firm applies for leniency before a RCA, for example, the COMESA Competition Commission, it means that the immunity will be enforced throughout the Common Market. On this point, there must be a framework to co-ordinate the activities of the RCA and the individual NCAs. For example, to ensure coordination and create synergies between the RCAs and NCAs, a firm applying for immunity before the Competition Commission may be required to indicate if it has also applied for leniency before a Member’s NCA. In order to facilitate the consideration of the leniency applications, to achieve uniformity, and ensure the efficient use of resources, an applicant may have to include a waiver of confidentiality, which will assist in multi-jurisdictional co-operation among the individual NCAs.²²⁰¹ Such waivers will permit NCAs and the RCA to exchange information, thereby leading to a speedy conclusion of cartel investigations.

²²⁰⁰ Kaira, T. “A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?” Centre for Competition and Economic Development (2015) 1- 21.

²²⁰¹ *Policy Roundtable: Improving international co-operation in cartel investigations*. Organisation for Economic Development and Co-operation (2012) 38-39.

There are certain salient features that this leniency policy template must have. Firstly, it must be clear on which institution will be responsible for granting the immunity. In COMESA, there must be a choice between the Competition Commission and the Board of Commissioners. In the EAC, when it becomes operational, it will be the EAC Competition Authority. In addition, clarification is needed on whether the policy will apply to firms only, or to both firms and individuals. The latter option is especially relevant in those jurisdictions where cartel conduct is also a criminal offence. There must also be clarity on the types of prohibited practices to which the policy will apply. In light of the thrust of this thesis, and the impact of cartels, it is submitted that the leniency policy must initially apply to cartels.

Additionally, there has to be clarity on whether cartel “leaders” or “originators” are eligible for immunity, or whether they are disqualified from seeking immunity, because they were instrumental in the cartel activity. Ultimately, clarity is needed on whether the immunity policy will follow a ‘winner-takes-all’ approach, implying that only the first successful leniency applicant will be granted total immunity and be absolved from the payment of an administrative fine. Regarding the alternative, provide clarity on whether the policy would allow subsequent applicants to be granted immunity, by way of reduced administrative penalties, if they furnished valuable information that enabled the RCAs or NCAs to conclude the matter. In the EU, in order for subsequent leniency applicants to be awarded immunity (by way of reduced administrative fines), they have to furnish, what is referred to as “significant added value”, information.²²⁰²

Between the two options: either granting total immunity only to the first successful applicant, or granting immunity, by way of reduced administrative penalties, to subsequent successful applicants, it is submitted that the preferable option is the second. The second option encourages subsequent applicants to seek immunity in exchange for leniency. It is assumed that subsequent applicants will provide valuable additional information, and rewarding them with reduced administrative fines, incentivises those firms, who have lost the race for immunity,²²⁰³ to come forward. Therefore, the fact that the first applicant has been granted immunity should not exclude other applicants, who could provide valuable information.

In addition, there must not be a limit as to how many applicants may seek immunity per cartel case. As long as a firm is able to furnish the RCA or NCA with valuable information that furthers the investigation and conclusion of a matter, it should be granted leniency by way of a reduced administrative penalty, commensurate with the information that they had provided and the timing of the immunity application. However, the first successful applicant will gain the most immunity, as opposed to, say the fifth applicant, since the cartel would have been revealed in the first application, provided the firm fulfils the requirements of the leniency policy.

²²⁰² “Commission Notice on immunity from fines and reduction of fines in cartel cases” *Official Journal C* 45, 19.02.2002 3-5.

²²⁰³ *Policy Roundtable: Leniency for subsequent applicants*. Organisation for Economic Development and Co-operation (2012) 5-8.

Several other basic issues must be dealt with in the leniency policy template. For instance, when an immunity application is made, it has to be clarified whether such an application will be made regarding cartel conduct which the RCA or the NCA does not have knowledge (or information) of, or alternatively, where the RCA or the NCA has insufficient knowledge (or information) to launch investigations. In addition, it has to be clarified whether total immunity is only awarded to the first applicant, to the exclusion of subsequent applicants. Selecting this option implies that subsequent applicants will not receive total immunity. Alternatively, the leniency policy template may allow for subsequent applicants, who, while not receiving total immunity, will receive reduced penalties. Additionally, the leniency policy can also make use of “marker applications”, where prospective leniency applicants can reserve their place in the queue of immunity applications.

A successful leniency policy template will depend on the applicants’ co-operation. This implies that applicants must disclose all information, fully and truthfully, to the RCA or NCA; continually cooperate with the RCA or NCA throughout the process, until the matter is finalised; terminate participation in any cartel practice, immediately; and abstain from falsifying information, or acting in a manner that compromises any information of, or evidence pertaining to the cartel activity. A crucial ingredient of an effective leniency policy is the protection of confidentiality of the information availed by immunity applicants. Indeed, this applies to all the investigative activities of the CAs. In addition, RCAs and NCAs must implement the common leniency policy in a transparent, fair, and predictable manner, as provided for in the policy’s rules.

However, for SACU and SADC this template cannot really apply, as SACU, currently, has no mechanism for the enforcement of regional competition law, other than the broad competition law provisions contained in Article 40 and Article 41 of the SAC Agreement of 2002. SADC, similarly, has no RCA tasked with enforcing regional competition law, as, presently, the Declaration on Regional Cooperation on Competition and Consumer Policies of 2009 is directed towards “effective co-operation”.

9.3.2. Examining the possibility of a common settlement procedure

Another tool, namely, settlement procedures, is utilised by CAs to dispose of cartel cases, speedily. As can be recalled, settlement procedures, referred to as ‘consent orders’ in South Africa, are utilised to bring about speedier conclusions to investigations, which are beneficial to CAs. They result in the efficient allocation of resources in enforcement procedures; increase enforcement activities and ensure expedient outcomes. Defendant firms benefit from negotiated settlements, as well. Settlement procedures allow firms to have greater influence over the outcome of a case, since the settlement is negotiated, as opposed to a trial, where the decision is handed down by an arbiter. Negotiated settlements also allow firms to allocate their resources, efficiently, by avoiding the need to engage in protracted litigation, saving firms from any perpetual bad publicity that may come about because of lengthy legal proceedings.

Settlement procedures can be used as a “case closure” mechanism, suggesting that they come after a full and complete investigation by the CA of the firm under investigation. Having seen the extent of the investigation, the firm decides to negotiate a settlement, instead of defend the legal proceedings. Alternatively, settlement procedures can be used at anytime during the NCA’s proceedings, but before conclusion thereof.

A common settlement procedure must clarify at what point it can be utilised, whether the first alternative, or the second. It is submitted that the second alternative is the most preferable because it will give the RCA, or the NCA, the most leeway to decide whether to enter into settlement agreements. Besides, settlement agreements could be concluded at any time before the completion of the investigation, as opposed to waiting until the investigations are finalised.

There must be certainty as to the legal nature, legal effect and legal consequences of a settlement agreement. In South Africa, as previously indicated, a firm that concludes a settlement agreement with the Competition Commission, need not enter an “admission of guilt” concerning the specific competition law violation, for example, engaging in cartel conduct. Firms are not legally bound to include such admissions in their settlement agreements. However, if they do, there will be no legal consequences, namely that the admission will be taken as a previous violation, should the firm engage in a prohibited practice again, or that in jurisdictions, where civil damages are available, the firm may face the prospect of a civil law suit. A preferable approach would probably be to stipulate that there must be an acknowledgment of engaging in the cartel practice, at least, because negotiating a settlement makes no sense, when there is no acknowledgement of competition law violation.

The argument made by Comair Ltd in *Competition Commission v South African Airways (Pty) Ltd/Comair Ltd* makes sense:

“it does not suffice to have the Commission allege a contravention and the respondent deny liability, and then for them, in the face seemingly irreconcilable positions to agree a remedy in terms of the consent order. Expressed differently, dissent over conduct and its legal implications cannot lead to consent on the outcome.”²²⁰⁴

It must be determined whether the conclusion of settlement agreements will result in the reduction of administrative penalties, or total immunity from paying any administrative penalties. It is submitted that with the proposed settlement procedure, the preferable approach is to reduce the administrative penalties, as opposed to absolving the applicant altogether. There are several reasons for this and concerns the need to calibrate the leniency policy and the settlement procedure. First, if firms are absolved from paying administrative fines, under the settlement procedure, this will reduce, or even eliminate the usefulness of the leniency policy.

²²⁰⁴ *Competition Commission v South African Airways (Pty) Ltd / Comair Ltd* [2006] ZACT 88, para 18. See 5.3.1 of Chapter 5 of this current study.

Secondly, when comparing the value of the two investigatory tools, a leniency policy is more “valuable” than a settlement procedure. With leniency policies, an immunity-seeking applicant is required to divulge information that will probably implicate other firms that have engaged in cartel activity. However, with negotiated settlements, the co-operation that is expected from a firm does not legally require the firm to “break rank”, while confessing its cartel involvement, or disclose its fellow cartel participants. In a settlement negotiation, it is required of the firm to avail information regarding its *own* participation in the cartel in question. Therefore, the co-operation envisaged under settlement procedures only concerns that firm and its involvement/participation in a cartel; although, an RCA, or NCA, will not be opposed to additional information implicating other cartel participants.

In order to preserve the effectiveness of leniency policies, CAs must seek stiffer penalties in settlement procedures. This will safeguard the leniency policy, incentivise self-reporting firms to use it, and in turn, it will be of greater use to CAs.

Several issues will influence the amount of an administrative penalty that can be extracted from a settling firm. If there is a possibility that a significantly large penalty would have been imposed, had the matter gone to trial, the penalty negotiated between the parties, however, must reflect this possibility. To ignore this will remove the incentive on the part of firms to negotiate settlements and reduce the deterrent effect thereof. For this to happen, the RCA or NCA must impose a penalty that is substantially higher than the one that would have been imposed in a trial. Conversely, if the fine to be imposed at the conclusion of a trial would have been relatively less, then this reality must be reflected in the administrative penalty negotiated by the parties. Therefore, the RCA or NCA must not enter into “sweetheart deals” with firms, by imposing lesser administrative fines, than would have been imposed, had the matter gone to trial.

For its part, the CA must show itself to be a fair, transparent negotiator in settlement agreements to encourage firms to enter, enthusiastically, into negotiations with the CA. In addition, the rules and procedures governing settlement agreements must be transparent, predictable and certain.

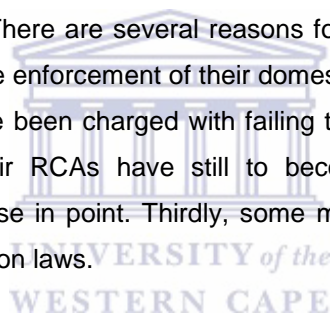
9.3.3. Examining the possibility of a “cartel offence”

Another option would be to criminalise cartel conduct in the RECs. As will be recalled, the rationale behind criminalising cartel practices is to increase the deterrent effect of enforcement mechanisms, to visit personal consequences on those corporate officers, or persons in management, who engage, or cause the firm to engage, in the prohibited conduct. Of all the competition law violations, namely, restrictive horizontal conduct, restrictive vertical conduct and prohibited unilateral conduct, only cartels have been criminalised. This is an indication of how seriously they should be viewed, or, ought to be viewed. Although, competition laws in the

South do make provision for criminal offences and sentences, these are especially created for conduct that interferes with the administration of the competition law and the work of NCAs and RCAs.

In theory, the criminalisation of cartel conduct is attractive because of the reasons cited above. It is certainly tempting to recommend that there be a criminal offence at the regional level. In order for such a regional cartel offence to exist, several issues have to be clarified. First, the elements of the criminal offence must be clearly laid out. The body that will be involved in prosecuting the offence must be clarified. Such a body can be a specially created institution, the NCA, or the normal prosecution system. The sentences that may be imposed for the cartel offence must also be clarified. Additionally, whether the cartel offence will follow on the administrative proceedings, or whether the cartel offence will be dealt with first, and thereafter the usual/normal administrative proceedings by the NCAs, have to be clarified.

However, the reality is that in the global-South, specifically in COMESA, EAC, SACU, and SADC, the NCAs and their RCAs are still a long way off from being regarded as capable of criminalising cartel conduct. There are several reasons for this. First, members are still facing difficulties in the administrative enforcement of their domestic and regional competition laws, for example, EAC Members have been charged with failing to implement Community competition law. Secondly, some of their RCAs have still to become operation, of which, the EAC Competition Authority is a case in point. Thirdly, some members in these RECS have still to enact their domestic competition laws.



9.4. A Final Word

In the final analysis, one thing is clear: with an ever increasingly globalised economy, the effects of anti-competitive conduct in one jurisdiction may affect another jurisdiction. RECs do make provision for formal enforcement collaborations concerning cross-border cartels; however, this has not been used. In addition, RCAs lack important investigatory tools, by which to enforce regional competition law, effectively, especially cross-border cartels. Therefore, informal co-operation has been utilised, and must continue, while formal co-operation must be employed, as well. These two forms of co-operation can complement each other; however, they must be used together, to ensure the effectiveness of enforcement collaborations in South-South RECs.

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Brazil

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Ltda e Drogeria Nossa Senhora Aparecida Ltda ME), Farmácia Atual (Léa de Fátima Ferreira & Cia Ltda ME), Farmácia Graciosa (Graciosa Drogeria e Perfumaria Ltda), Farmácia Sul Brasil (Farmácia Sul Brasil Ltda), Farmácias Moderna (Farmácia Tambosi Ltda ME), Farmácias Moderna (A S Tambosi & Cia Ltda), Farmácias São João (Brasfarma Comercial de Medicamentos Ltda).

2. Administrative Process No. 08012.003745/2010-83. *Defendants: Escritório Central de Arrecadação e Distribuição, União Brasileira de Compositores, Sociedade Brasileira de Administração e Proteção de Direitos Intelectuais, Associação Brasileira de Música e Artes, Associação de Músicos Arranjadores e Regentes, Sociedade Brasileira de Autores, Compositores e Escritores de Música e Sociedade Independente de Compositores e Autores Musicais.*
3. Administrative Process No. 08012.004039/2001-68. *Defendants: Panificadora e Confeitaria Eulálio – ME, Panificadora da Paz, Panificadora e Lanchonete Shallom, Panificadora Pão de Sal, Panificadora Pão de Ouro, Panificadora Lua da Serra Ltda, Pão d'Italia, Panificadora Serranê Delícias do Trigo, Panificadora Pão da Casa, Panificadora de Itália, Panificadora Martins, Pão Nosso, Panificadora e Merceria Belo Pão, Panificadora e Confeitaria Candanga Ltda – ME, Panificadora São Francisco, Panificadora Pão Francês, Panificadora Pão da Casa, Panificadora e Confeitaria São Conrado.*
4. Administrative Process No. 08012.011027/2006-02. *Defendants: Deutsche Lufthansa AG, Lufthansa Cargo AG, Swiss International Airlines, American Airlines, Inc, KLM – Companhia Real olandesa de Aviação, Societé Air France, ABSA Aerolíneas Brasileiras SA, Varig Logística SA – Varig Log, Alitalia Linee Aeree Italiane SPA and United Airlines Inc.*
5. Administrative Process No. 08012.012420/1999-61. *The Defendants Livraria e Editora Brasília Jurídica Ltda, Livraria do Advogado de Brasília Ltda, Livraria Universitária de Brasília Ltda, Valdinar da Costa Veras EPP, Livraria Edições Jurídicas Ltda, Livraria Acadêmica Ltda and Câmara do Livro do Distrito Federal.*
6. Administrative Process No. 08012.001794/2004-33. *Defendants: Oliveira e Lima Com Extintores Ltda, Chamatec Extintores de Incêndio Ltda, Eficaz Ltda, Extintur Ltda, Casa do Extintor Ltda, Copel Extintores Sist. Seg. Ltda, FN Equipamentos C/ Incêncio Ltda, Gama Extintores Com. e Serv. Ltda, Centraltec Com. de Extintores Ltda, Comando Extintores Ltda, AABA Extintores Ltda, Guanabara Extintores Ltda, Getel Equipamentos de Segurança Ltda, Triunfo Com. e Serviços Ltda, Ceilândia Extintores Ltda, Samambaia Extintores Ltda, Confiança Extintores de Incêndio Ltda-ME, Associação de Empresas de Equipamentos de Combate de Incêndio no Distrito Federal – AEECI-DF.*
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Case No: CCC/MER/07/11/2015
2. *Decision of the Committee of Initial Determination regarding the proposed merger between Sanlam Emerging Markets Proprietary Limited and Masawara Investments Mauritius Limited*
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14. Case C-19/00 *SIAC Construction*
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17. Case C-324/98 *Telaustria and Telefonadress*
18. Case C-380/98 *University of Cambridge*
19. Case C-275/98 *Unitron Scandinavia*
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21. Case C-199/92 *Huls v Commission*
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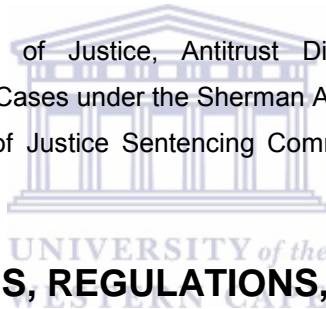
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APPENDICES

Appendix A. Editorial Certificate

21 April 2017

To whom it may concern

Dear Sir/Madam

RE: Editorial Certificate

This letter serves to prove that the thesis listed below was language edited for proper English, grammar, punctuation, spelling, as well as overall layout and style by myself, publisher/proprietor of Aquarian Publications, a native English speaking editor.

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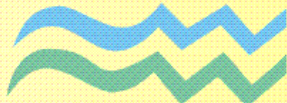
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