

UNIVERSITY OF CAPE TOWN

FACULTY OF LAW

**THE ROLE OF CORPORATE LENIENCY POLICY IN THE LAW
ENFORCEMENT AGAINST CARTELS IN THE UNITED STATES, EUROPEAN
UNION AND SOUTH AFRICA: LESSONS FOR THE UNITED REPUBLIC OF
TANZANIA**

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Research dissertation presented for approval of Senate in the fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme courses.

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Signed by candidate

.....

Zainab Chanzi

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May the almighty bless you all abundantly.

LIST OF ABBREVIATIONS

CAT	Cashew nut Association of Tanzania
CLP	Corporate Leniency Policy
DoJ	Department of Justice
EWURA	Energy and Water Utilities Regulated Authority
FCC	Fair Competition Commission
FKSA	Fresenius Kabi South Africa (Pty) Ltd
FPMC	Food Price Monitoring Committee
FTP	Fair Trade Practices Act
GDP	Gross Domestic Product
HLR	Hoffman La Roche Ltd
ICN	International Competition Network
NPC	National Price Commission
OECD	Organisation for Economic Co-operation and Development
PPRA	Public Procurement Regulatory Authority
SUMATRA	Surface and Maritime Transport Regulatory Authority
TCAA	Tanzania Civil Aviation Regulatory Authority
TCPA	Tanzania Consumers Protection Association
TCRA	Tanzania Communications Regulatory Authority
TPCC	Tanzania Portland Cement Company
US	United States
WB	World Bank

ABSTRACT

Cartel practices such as price fixing, market division and bid rigging are very secretive in nature. Moreover, fighting against cartel is one of the tasks which have been given priority by competition authorities all over the world. However, competition authorities are facing significant difficulties in detecting and successfully prosecuting members of cartel due to the said secretive nature which surrounds the members of the cartel. On the other hand, the introduction of Corporate Leniency Policy has proved to be one of the effective mechanisms which can assist competition authority in the fight against cartels. The purpose of this paper is therefore to show how Corporate Leniency Policy has assisted United States, European Union and South Africa to unearth cartels and prosecute members of cartel practices. It also explores cartel practices in Tanzania and their effects to the economy and consumers. It further demonstrates that it is worth to introduce Corporate Leniency Policy in Tanzania so as to enable the Fair Competition Commission to fight against cartels.

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CHAPTER ONE

1.0 INTRODUCTION

Cartels are commonly regarded as one of the most serious restrictions of competition and therefore prohibited in many countries which have introduced competition policy and law.¹ It is unquestionably that cartels cause significant negative effects on overall social welfare by increasing prices and reducing choices for the consumer. It is also argued that cartels hinder innovations which are important in technological advancement.² Therefore detecting, investigating and prosecution of cartels are among main tasks of the competition authorities in the enforcement of their competition laws. Moreover, due the harm caused by cartels it is widely accepted that competition authorities should investigate aggressively into cartels and penalise its members severely.

However, the competition authorities are facing significant difficulties in enforcing their competition policy with respect to cartels because of the ‘wall of silence’, which typically surrounds the members of the illegal collusion, makes the detection and successful prosecution of members of cartels to be a very difficult task.³

On the other hand, Corporate Leniency Policy (CLP) also known as Amnesty Policy has become the most popular and effective mechanism used by some of Competition Authorities in the enforcement of competition law against cartels. The introduction of leniency programs has completely transformed the way competition authorities around the world detect, investigate and deter cartels.⁴ An effective CLP attracts cartels members to confess their conduct to competition authorities even before an investigation is opened. In other cases, it induces members of the cartel in a cartel which is under investigation to abandon their obligation of being silent, by defecting and race to the competition authority to provide evidence against the other cartel members.

¹ Einer Elhauge and Damien Geradin ‘*Global Competition Law and Economics*’ (2007) at 65.

² Marke Furse ‘*Competition Law of the EC and UK*’ (2004) at page 1.

³ Danilo Sama ‘Competition Law, Cartel Enforcement and Leniency Program’ A paper available at http://papers.ssrn.com/sol3/paper.cfm?abstract_id=1360470 [Accessed on 10/02/2010].

⁴ Scott D Hammond, ‘Cornerstones of an effective leniency program’ speech presented before the ICN Workshop on Leniency Programs Sydney, Australia on November 22-23, 2004 available at <http://www.justice.gov/atr/public/speech/206611.pdf> [Accessed on 23/02/2010].

The trend of using the Corporate Leniency Policy as a means of enforcing competition law against cartels was firstly introduced in the United States in 1978 however this program did not work to their expectations.⁵ Consequently, in 1993 the said Corporate Leniency Policy was revised. The revised CLP was more transparent and it also raised the incentive for companies to report cartel to the Department of Justice (DOJ). The revised CLP was so efficient and successful as a result it encouraged European Commission to adopt it in 1996 and thereafter many countries have introduced the CLP as one of the tools in the fight against cartel with the hope that it would assist their competition authorities in the fight.

2.0 STATEMENT OF THE PROBLEM

The importance of having effective competition law cannot be overemphasized. Hence competition policy and laws have been adopted not only in developed countries but also in developing countries. However, the effective implementation of any law will mainly depend on the enforcement mechanisms provided under the law.

Tanzania practiced socialism after the pronouncement of the Arusha Declaration in 1967. The economy was characterised by public ownership, price control and very limited private activities. Following new global perspective in economic management in the mid 1980's which emphasised reliance on the free market, the government of Tanzania deliberately pursued policies and legislation directing towards reducing government involvement in production and commercial services.⁶ This resulted in the liberalisation, privatisation and deregulation of the economy. It allowed many players in the market. In order to have a competitive market structure then the parliament enacted the Fair Competition Act⁷ to foster and regulate the open market.

Cartels conducts are prohibited by the Fair Competition Act under section 9. However, currently there is no single case on cartels which has been determined by the Fair Competition Commission of Tanzania. The Tanzanian competition authority like many other competition authorities is facing significant difficulties in enforcing competition law with respect to cartels due to the secrecy nature of cartel practices which makes the detection and the task of proving the existence of collusive practice become a very difficult task.

⁵ Scott (note 4).

⁶ Economic and Social Research Foundation (ESRF) 'Competition Law and Policy: A tool for development in Tanzania' available at <http://www.cuts-international.org/Tanzania-report.pdf> [Accessed on 20/02/2010].

⁷ Act 8 of 2003.

The problem of obtaining evidence can be supported by the investigation done by the Fair Competition Commission on fuel crises in Tanzania. The Fair Competition Commission concluded in its finding that

“...such evidence would not be readily available because all (oil) dealers know that it is illegal to engage in such activities”⁸

The above situation clearly reveals that though the law is in place, the Tanzanian competition authority is unable to effectively protect the economy and consumers from cartels practices due to the lack of mechanism which can assist the Fair Competition Commission to obtain evidence to prove the existence of cartel agreements.

While other countries have introduced Corporate Leniency Policy, there is no such programme in Tanzania. Therefore the Fair Competition Authority might not have the capacity to fight against cartels. Consequently, it will fail to meet objectives provided under the Fair Competition Act of increasing efficiency in the production, distribution and supply of goods and services,⁹ promote innovation,¹⁰ maximise the efficient allocation of resources¹¹ and protecting consumers.¹²

The paper seeks to explain the importance of introducing corporate leniency policy in Tanzania to the economy and social welfare of Tanzania. In many instances citizens of Tanzania have been complaining of cartels conduct practiced by traders such as Oil crisis, cement crisis just to mention a few.

It also seeks to analyse corporate leniency policy practiced by three countries namely United State of America, European Community and South Africa and thereafter to draw lessons to Tanzania.

3.0 OBJECTIVES OF THE STUDY

- i. To discuss the nature and impact of cartels.
- ii. To discuss the impact of Cooperate Leniency Policy in the fight against cartels.

⁸EWURA report on ‘Economic Regulation in the Petroleum down stream sub-sector in Tanzania’ available at <http://www.ewura.go.tz/pdf/Notices/Detailed%20Analysis.pdf> [Accessed on 20/02/2010].

⁹ Section 3 (a).

¹⁰ Ibid (b).

¹¹ Ibid (c).

¹² Ibid (d).

- iii. To explore the Cooperate Leniency Policy in the United States of America, European Community and South Africa.
- iv. To show how the absence of Leniency Policy has made the Fair Competition Commission unable to fight against cartel in Tanzania.
- v. To identify some of the essential lessons that Tanzania can learn from the role which the corporate leniency policy has played in the fight against cartel in United States of America, European Community and South Africa.

4.0 METHODOLOGY

This study is informed by both primary and secondary sources. Primary sources such as Legislation and Directives that regulate CLP were consulted. Secondary sources consist of books, journals, article, speeches, reports of various International Organisations and academic material from the internet. The study also proceeds using a comparative methodology.

United States of America and European Union were selected as sample of the study due to the fact that they have different approaches of implementing CLPs. Furthermore South Africa was selected because it is a developing country though economically is more advanced than Tanzania.

5.0 OVERVIEWS OF THE CHAPTERS

The structure of this paper is as follows; chapter one is the springboard of this paper. It introduces the subject, identifies the problem and outlines the methodology. It briefly gives picture of the rest of the chapters.

Chapter two starts with description of conduct which are regarded as cartels. It is followed by a discussion on the impacts of cartels particularly on economic and social impact to the society. The chapter further discusses the fight against cartels the main concern is on various sanctions which are generally imposed to convicts of cartels and the use of *per se* rule. The role of the Corporate Leniency Policy is also discussed.

Chapter three discusses the role of corporate leniency policy in the fight against cartels in three jurisdictions namely United States, European Community and South Africa.

The main focus is on the nature of their Corporate Leniency Policies, factors for their success and weaknesses if any.

Chapter four starts with an overview of competition policy and law in Tanzania. It describes conducts which are regarded as cartels in Tanzania. It proceeds by discussing sanctions which are imposed to convicts of cartels conduct. The chapter further discusses in detail economic and social impacts of establishing and implementing the Corporate Leniency Policy in Tanzania.

Chapter five concludes the study and provides some recommendations.

CHAPTER TWO

2.0 THE NATURE, IMPACT AND FIGHT AGAINST CARTEL

2.1 Introduction

Horizontal agreements between independent firms to fix prices, divide markets, restrict output and collusive tendering are the most obvious target for any system of competition law. They are prohibited in many countries which have introduced competition laws and are subject to both administrative and criminal sanctions. The problem of these kinds of anticompetitive practices started many years ago as this can be supported by the statement of Adam Smith of 1776 in his famously book the *Wealth of Nations*. He stated that '[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices'.¹³ The number of prosecuted cases of cartels in the world today suggests that cartels appear to be alive and are being practiced around the world. This chapter discusses types of cartels and their economic and social impacts to the societies so as to establish that the fight against cartel practice is important in any country. It also discusses the fight against cartels.

2.2 The Nature of Cartels

A cartel is an association of two or more legally independent firms that explicitly agree to coordinate their prices or out put for the purpose of increasing their collective profits and restrict or eliminate competition among them.¹⁴ Moreover, if the goal of members to control the cartelised market is achieved, members of cartel agreement will enjoy collective profits equal to that enjoyed by a monopoly firm in the same industry. However, members of a cartel must knowingly and intentionally conspire to raise or lower the price of the product that they sale or buy above or below the price that natural market forces would set in a competitive market.

Normally cartel arrangements are informal since participants of cartels are aware that their arrangements are illegal. Therefore members go to great lengths to hide evidence of their illegal activity for example the European Commission's decision in *Gas Insulated*

¹³ John M. Connor 'Global price fixing: Our Customers are the Enemy' Kluwer Academic (2001) Massachusetts US at 21.

¹⁴ Christopher Harding and Julian 'Regulating cartels in Europe: A study of legal control of corporate Delinquency' Oxford University Press (2003) at 15.

*Switchgear*¹⁵ reveals that participants in that cartels used codes to conceal their companies names and encryption software to protect the secrecy of emails and telephone conversations; made use of free email providers and the anonymous mail boxes made available for them; their passwords were regularly changed, systematically destroyed emails and made use of mobile telephones provided by a member of the cartels that contained encryption options.¹⁶

The above scenario portrays how cartels are so secrecy to the extent competition authority if it does not have effective mechanism which can induce members to defect from the cartel and give the competition authority evidence or valuable information concerning that cartel, detection, investigation and prosecution will be very difficult. Consequently many cartels members will escape the force of law and continue to cause significant harm to the society. Therefore for any competition authority to be able to combat cartels it must have in place effective enforcement mechanism which can render cartel unprofitable. Among of effective mechanisms which have proved to have positive impact is the Corporate Leniency Programme. This kind of policy assists the competition authorities to penetrate the cloak of secrecy that surrounds cartels.

2.3 Types of Cartels

2.3.1 Price fixing

The aim and result of price fixing agreement is the distortion of a competitive market. The power to fix prices whether reasonably exercised or not, involves power to control the market and fix unreasonable prices. When cartel price is fixed, it may remain unchanged due to the absence of competition among members of the cartel. Price fixing is the typical example of cooperative behaviour. The aim of members of cartel who enter into an agreement on price fixing is to increase the pool of profits without being efficiency at the detriment of consumers. The agreement on the price might benefit some sellers outside the collusive group, but to be effective it must raise a pool of profits to those in the cartel agreement.¹⁷

¹⁵ Commission's Decision of 24 January 2007, available at www.ec.europa.eu/comm/competition/index_en.html. [Accessed on 23/4/2010].

¹⁶ Ibid at para 170-176.

¹⁷ Connor (note 13) at 21.

Price fixing can happen in any concentrated market and also can be done in various ways and that fully effective competition must be able to comprehend not only the most obvious forms of price fixing but also a whole range of all other agreements whose object is to limit price competition.¹⁸ For example firms may agree to restrict discounts to their suppliers or notify each other the price they charge to customers. In *Vimpoltu case*¹⁹ an agreement to observe maximum discount and to offer the same credit terms were declared as price fixing by the European Commission. It was held that Vimpoltu decision was mainly of benefit to importers and dealers and did not allow farmers share of the benefit.²⁰

Generally price fixing is not only restricted among sellers but also buyers. In the case of *Mandeville Island Farms v America Crystal sugar*,²¹ the Supreme Court held that

it is clear that the agreement is the sort of combination condemned by the [Sherman]Act, even though the price fixing was by purchasers, and the persons specifically injured under treble damages claim are sellers, not customers or consumers. And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market it does not follow that it is out side the scope of Sherman Act.

The main purpose competition law in prohibiting price fixing is to ensure that there is efficiency allocation of resources and promotion consumer welfare. Therefore, it does not confine its protection to consumers, purchasers, competitors or to sellers nor does it immunise the outlawed acts because they are done by any of these. The competition law is comprehensive in its terms and coverage, protecting all whom are made victims of the forbidden practices by whomever they may be perpetrated. Likewise, in the *Italian Raw Tobacco*²² where tobacco processors were accused of colluding on prices the European Commission was of the view that an agreement on purchasing eliminates the autonomy of strategic decision making and competitive conduct, preventing the firms concerned from competing on merits and enhancing their position against less efficient firms.²³

In many developing countries which were previously characterised by controlled economy it is also possible to have this kind of collusion among buyers of crops. Since the

¹⁸ Richard Whish 'Competition Law' 6ed Oxford University press at p. 506.

¹⁹ OJ [1983]L 200/44 available at <http://eur-lex.lisriery.do.uri=CELEX:31983DO361:EN:HTML> [Accessed on 23/4/2010].

²⁰ Ibid para 49.

²¹ 334 US 219.

²² OJ [2006] L 353/45.

²³ Ibid at Para 285.

introduction of liberalised economy the governments are no longer buyers of farmer's crops then businessmen are players in the market. The effect of collusion among buyers is for them to obtain supra competitive profit at the detriment of poor farmers. Given that many people in developing countries and least developed countries subsist on less than one dollar per day. Their effort of cultivation crops therefore might not assist them in the fight against poverty. Therefore the fight against cartel is very important for their economic growth and society welfare.

Price fixing agreements are considered *per se* illegal in many jurisdiction. This means that accused firm will be found guilty without any inquiry into potential anticompetitive effects, or pro competitive benefits of the agreement. In deed, the prohibition of price fixing is one area of competition law that even those who generally have doubt about importance of competition policy typically regard its enforcement positively.²⁴ In the absence of effective enforcement of competition laws which means absence of significant prospect of being detected and punished for breaking the law then all competitors would be attracted to participate in cartels hence maximise supra competitive profits among themselves.

2.3.2 Collusive tendering or bid rigging

Collusive tendering is a kind of cartel conduct whereby competing firms agree among themselves to collaborate over their response to a tender.²⁵ Collusive tendering may take a variety of forms. Probably the most common is 'bid rotation' by which bidders organise their bids to determine which firm will win a contract.²⁶ The 'losers' agree to refrain from bidding or to rise their bids in the hope that they will win when their turn comes up.²⁷ Other common forms of bid rigging include 'complementary bidding' in which some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Bid suppression is the kind of bid rigging whereby one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning

²⁴ www.wcas.northwestern.edu/csio/papers/2003/CISO-WP-0040.pdf [accessed on 1/03/2010].

²⁵ Whish (note 18) at 519.

²⁶ United states v Dynalectric Co 859 F. 2d 1559 (11th Cir 1988).

²⁷ Ibid.

competitor's bid will be accepted. The low bidder often secures support for the plan by giving co conspirators side payments or subcontracts.²⁸

In the case of *Elevators and Escalators*²⁹ the European Commission fined four companies a fine of Euro 992 million for operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands. These companies rigged bids for procurement contracts. The Commission held that the effect of this cartel will continued for twenty to fifty years as maintenance is often done by the company which installed the equipment for the first time, by cartelising the installation the companies distorted the markets for years to come.³⁰

All forms of collusive tendering aim at monopolising markets among members of cartel which in most cases ends up in creating barriers to entry to the market as it is hard for new firms to enter into that market. Consequently, the very important goal of competition policy of efficiency allocation of resources is impossible to be achieved. Generally where there is collusive tendering there is no value for money for the procured goods or services since the money paid is artificially raised by the winner of the tender.

2.3.3 Market sharing

Competition may also be restricted between independent firms other than price fixing. This other form of cartel is done by firms to divide particular markets between themselves. This can be done through the allocation of consumers or geographical markets. The effect of this kind of cartel is more effective than in price fixing. Since the cost of monitoring adherence to the cartel arrangement is not there anymore given the fact that the presence of competitor goods in another market is a sign of cheating.³¹ On the side of consumers there is no longer choice of products and services. In view of the fact that cartel firm is sure of gaining profit then quality of products might be low as there is no competition.

Markets sharing not only can affect consumer of one nation it can also draw back the effort of regional economic integration especially on the issue of creating common markets. Due to the fact that cartels members may decide to allocate market according to countries.

²⁸ United States v All Star indus. 962 F. 2d 465 (5th Cir. 1992)

²⁹ T-145/07.

³⁰ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38823 [Accessed on 23/04/2010].

³¹ Whish (note 18) at 513.

The European Commission have been so serious in condemning this kind of cartel since the effect is faced not only on the competition but also it violates the prime aim of the European Community Treaty of having single market.³² This can be echoed from *Seamless Steel tubes case*³³ whereby the court held that:

... the agreement [division of market] which is subject of this decision and whose purpose is the observance of domestic markets constitutes, in principle, a *very serious infringement of community law*, since it jeopardises the proper functioning of the single market. Aware that their actions were unlawful, the producers agreed to introduce a secret, institutionalised system designed to restrict competition in an important industrial sector.³⁴ (Emphasis added)

Similarly, the East African Community which Tanzania is a member, among other objectives of its establishment is to have in place a common market. For that objective to be achieved then each member country need to have in place effective mechanisms which can assist its competition authority to detect and prosecute cartel members who divide markets among themselves and hence lessening competition within the region.

2.4 Why should we be concerned with cartel practices?

The above discussion on types of cartels practices have no pro competitive object or effect at all but are rather purely intended to maximise the profits of the parties to the agreement of cartel at the expense of consumers. A successful cartel has a power to control the market and detect price, quality of service and goods as well as create barrier to entry. A seller's cartel will attempt to raise the price paid by its customers, and a cartel of buyers will aim at lowering the price it pays to its suppliers.³⁵ Cartels always bring negative effects to the economy and society at large. The following negative impacts of cartels demonstrate why cartels are considered to be the most anti competitive activity.

2.4.1 Economic effects

Bid rigging has negative impacts to governments and societies at large. Public procurement in many countries generally accounts for a large share of public expenditure in a domestic economy. Public procurement is a key economic activity of the government. The

³² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:140:0001:009:en:PDF> at para 98. [Accessed on 12/02/2010].

³³ Commission Decision of 8th December 1999 C (1999) 4154 2003/382/EC.

³⁴ *Ibid* para 161.

³⁵ Connor (note 13) at 36.

performance of public procurement markets has significant implications for the effectiveness of the governance in both developing and developed countries.³⁶ Moreover, procurement often involves goods and services with substantial economic and social significance, including transportation infrastructure, hospitals and health services and education supplies.³⁷ The main goal of the any government is to procure goods and services at the lowest possible price so as to save resources which can be used to support other development activities.

As already discussed on how bid rigging operates then the price which is artificially raised by participants of cartel is forcing public sector to pay above market prices. These practices have a direct and immediate impact on public expenditure and therefore tax payer resources. A good example can be found in the pharmaceutical cartel which was investigated by the Competition Commission of South Africa. It was revealed that members of the cartel agreed to cooperate rather than competing when tendering for State tenders.³⁸ They did so in the contract named RT 299 for supply of pharmaceutical products, irrigation solutions and administration sets to state hospitals and military health services. The effect of this cartel was that the State paid 10% to 15% more for IV fluids, which its estimate ranges from R20 million p.a to R60 million p.a.³⁹ Moreover, this cartel operated from 1999 to 2007.

This cartel illustrates to what extent the government can loose money to members of cartel. For a long period of time the South Africa government was forced by cartel members to spend more money than it was suppose to be if at all there would be competitive tendering among bidders. It is the Leniency Program which to a large extent unearthed this practice as one of the cartel participants⁴⁰ approached the Commission for leniency.

The supra competitive profit gained by the cartels members could be used by the government to implement other government plans such as building houses for the poor and granting social security for the needy. It is important to note that resource saving that can be generated by only a marginal reduction in bid rigging on government contracts is greater than the average

³⁶ OECD Global Forum on Competition ‘ Collusion in public procurement’ 2009 at p 2 available at www.oecd.org/dataoecd/9/61/44179852.pdf [Accessed on 12/03/ 2010].

³⁷ Ibid.

³⁸ *Competition Commission v Adcock Ingram Critical care(Pty) Ltd and Tiger Brands Limited* Case no 20/CR/Apr08 Competition Tribunal available at www.comptrib.co.za/comptrib/comtribdocs/882/20CRApril08.pdf [Accessed on 12/03/ 2010]

³⁹ Report on proceedings of the Third Anti corruption summit, Chapter seven ‘price fixing and its impact to the Communities at page 88. Available at <http://www.nacf.org.za/anti-corruption/third-summit/UnitedNationReports-summit/-chapter7.pdf> [Accessed on 1/03/ 2010].

⁴⁰ Fresenius Kabi South Africa (Pty).

annual operating budget of competition agency in most countries.⁴¹ Ensuring public procurement markets function effectively requires not only effective competition policy and law but also making sure competition authorities are having enough resources and effective policy to combat these collusive practices.

2.4.2 *Loss of consumer welfare*

When the cartel is successful the situation is automatically the same as found under monopoly. Cartels hinder the desirable impact of a competitive market as it is not possible for consumer of the cartelised market to obtain lower prices, good quality of goods and product choices since there is no competition among competitors. Besides, cartel practices such as price fixing tend to raise the price of products which consequently the seller is the one who maximise the profit at the detriment of poor consumer. The cartel practice may push up the price of basic foods and medical items to the detriment of consumers.

One can argue that the effect of cartel in developing countries can have more negative implication since most of such countries are characterised by high level of unemployment, low wages and the sharp decline in purchasing power.⁴² For instance the bread cartel which was operated in South Africa, poor people who mainly depend on bread as their staple food experienced a difficulty situation because the prices of breads were significantly raised.⁴³ One can ask himself that how many loaves of bread that cartel practice has taken away from mouth of school children who are dependant from school feeding scheme for a daily meal or street children? How many families had to go hungry for days because there was no enough money to afford the basic stuffs as a result of cartel practice? Cartels usually forces customers to give up consumption of the cartelised product and use their income on an inferior substitute if any and in case there is no substitute then poor people who does not have money to but cartelised product fail to consume the product.⁴⁴ For those who are well-off they can afford to buy at the cartel price since they are no choices.

⁴¹ Kovacic Ibid 80.

⁴² Report on proceedings of the Third Anti corruption summit, Chapter seven 'price fixing and its impact to the Communities at page 90. Available at <http://www.nacf.org.za/anti-corruption/third-summit/UnitedNationReports-summit/-chapter7.pdf> [Accessed on 1/03/ 2010].

⁴³ Ibid.

⁴⁴ Connor (note 13) at 38.

2.4.3 Hindrance of innovation

Members of cartel usually are sure of supra competitive profit. Consequently, there is no need for them to incur cost of investing on innovation since there is no competition pressure of attracting more customers by offering better advanced products or services. In a competitive market producers will constantly innovate and develop new products as part of continual struggle to increase customers as well as maintaining their market share. Therefore, if there is vigorous competition among competitors the desirable of effect of stimulation of technology research and development is guaranteed.⁴⁵ However, by cooperating rather than competing firms avoid competition pressures that could force them to invest in order to innovate so as to come up with new products or more efficient production methods.

It has been argued that the profits earned by large, monopolistic enterprises were the allies of innovation,⁴⁶ in that situation the dominant incumbent is likely to engage itself in innovation because it wants to maintain its dominance position in that market. However, the situation is different in cartels as members of cartel though cartel develop a kind of monopoly to that market, there is no incentives for them to use their supra profit for innovation. Given that even if they do not innovate they have nothing to loose. A competitive market is critical driver of performance and innovation. It benefits everyone by enabling consumer to choose from a range of excellent products at an affordable price.

The above impact caused by cartel practices to the economies and social welfare of the people make stronger the need of competition authorities to place the issue of fighting cartels as one of their priority function. It is clear that if at all there is no effective mechanism in place firms will be attracted to cooperate rather than competing taking into consideration gains obtains from participating in cartels.

2.5 The fight against cartels

Due to the harm caused by cartel practices the importance of fighting against those practices can not be overemphasized. Various measures are being used to discourage their formulation and breaking the existing one. The following section discusses those measures which have been employed by various countries.

⁴⁵ EC notice of 2002 at para 2

⁴⁶ John Vickers 'Concepts of Competition' Oxford Economic Papers, New Series, Vol. 47, no 1 at 6. Available at <http://www.jstor.org/stable/2663661>. [Accessed on 19/03/2010]

2.5.1 The use of *per se* rule

Cartel practices are regarded as most egregious form of anti competitive behaviour. It is almost universally accepted that cartels is illegal *per se* in a sense that any cartel activity has no justification at all. The importance of application of *per se* doctrine in cartel cases was well elaborated in the case of *United States v. Trenton Potteries Company*⁴⁷ as the court ruled that

The aim and result of price fixing agreement, if effective, is elimination of one form of competition...The reasonable price fixing today may through economic or business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement...Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without necessity of minute inquiry whether a particular price is reasonable or unreasonable⁴⁸

The ruling in that case outweighs one of the recurrent defences asserted by cartel participants, that they were doing negligible harm because they fixed only reasonable prices.⁴⁹ It can be noted that in deciding cartels cases courts are not concerned with the issue of market power of cartel members.⁵⁰ This approach shows how enforcement institutions want to deter cartels by not considering the issue of market power in cartel cases and indeed it has immensely simplified cartel litigations. The importance of this stand was clearly elaborated in the case of *United States v Northern Pacific Ry.*⁵¹ in the following way

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of 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. This principle of *per se* unreasonableness not only makes the type of restraints which are prohibited in the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable- an inquiry so often fruitless when undertaken.⁵²

⁴⁷ 273 US 392, 47 S.Ct.377,71 L.Ed 700(1927).

⁴⁸ Ibid at 397, 47 S.Ct.377,71 L.Ed at 705.

⁴⁹ Lawrence Anthony Sullivan '*Antitrust*' West publishing, Minnesota USA 1977 at p 183.

⁵⁰ *United States v. Sacony-Vacuum Oil Company* 310 US 224, 60 S. Ct. 845, 84 L. Ed.

⁵¹ 365 US 1,5, 78 S.Ct 514,518, 2L.Ed.2d 545, (1958).

⁵² Ibid 549-50.

Nevertheless, the use of *per se* doctrine frees the judicial system of any need for continuous supervision of arrangements within its ban.⁵³ The use of *per se* doctrine in cartel cases has more advantage to the whole process of deterring the formulation and continuation of cartels. Besides, the use of rule of reason would give a room to a lawyer to advise his client that it is possible to find evidence to justify reasonableness of the action. In contrast the *per se* rule makes it clear that the lawyer will advise his client that cartel practice is prohibited and there is no justification for that practice hence this opinion is likely to deter the organisation of cartel.⁵⁴

2.5.2 Sanctions

The principle purpose of sanctions in cartel is deterrent. Thus, in order for the objective of creating competitive market to be achieved then the laws must impose stringent sanctions to the infringers so as to send general deterrent effect to the potential infringers. It must be noted that the general harm caused by cartel can not be compensated by fines or jail terms. In addition, one of the prerequisite of an effective leniency program is the threat of severe sanctions to members of cartel. The efficient of sanctions normally depends on its nature and the level of its impact. As there is no international agreement on the enforcement of competition law then sanctions for cartel violators differs from one country to another. All in all there are two types of sanctions which many countries have opted for in punishing cartel members namely administrative fine and criminal sanctions.

However, firms can only be deterred from involving themselves in cartel practices if the expected benefits of their practice are smaller than the expected costs.⁵⁵ Therefore, sanctions and the conviction are important factors for effective enforcement against cartels as they are main determinant aspect which can create deterrent effect.

2.5.2.1 Administrative sanctions

Countries which have not criminalise cartels usually their competition laws provides for civil penalties. Whereby individual or firms involved in cartels practices faces pecuniary fines. However, for fines penalties to have a deterrent effect they must be sufficiently higher to

⁵³ Sullivan (note 49) at 193.

⁵⁴ P. Areeda, 'Antitrust Analysis, Problems, Text and cases 2nd ed. 1974 cited in Sullivan at p 194.

⁵⁵ Hammond, 'Detecting and deterring cartels activity through an effective Leniency program' Speech presented before the International Workshop on Cartels, on 21.11.2000 at page 3.

eliminate the gains from the cartel and in addition impose a significant punishment on the individual undertaking.⁵⁶

The decision either to join or form a cartel is primarily a financial one. Gains obtained by participants in the cartel are so high. Therefore, fines must be substantial. Otherwise companies will gain from collusion even if they are caught.⁵⁷ In realising this, courts when setting fines in cartel cases usually take into consideration the gravity and duration of the infringement.⁵⁸ In numerous cases the competition authorities have increased the level of fine imposed when the firm is a recidivist.⁵⁹

The imposition of large fines to a large extent are taken as an incentive for firms to defect from the cartel agreements and provide information to the to competition authority with exchange of leniency treatment. Therefore firms have to weigh its action whether to cooperate with the authority or wait to pay a fine which can even affect its financial stability. In that case then all gains from the cartel arrangement will be used to pay the fine imposed. This is being done in order to deter firms to engage into that worst form of anti competitive behaviour.

2.5.2.2 Criminal sanctions

Few countries have opted for criminal sanctions of imprisonment of natural persons.⁶⁰ Firms involved in cartel are ordered to pay high fines while individuals are subjected to imprisonment. Criminal sanctions are considered to create tension among cartel members hence they induce individual to come forward and offer cooperation to the competition authority because if they lose the chance to get immunity from the competition authority the likelihood of facing jail sentence is high.⁶¹

⁵⁶ Whish (note 18) at 273.

⁵⁷ Swedish Competition Authority 'Fighting Cartels : Why and how?' at 18 available at <http://www.konurrensverket.se/upload/Filer/ENG/Publications/3rdnordic010412.pdf> [Accessed on 12/04/ 2010].

⁵⁸ Whish (note 18) at 272.

⁵⁹ Nitrine butadiene rubber, Commission decision of 23 January 2008.

⁶⁰ US, UK, Australia, South Africa.

⁶¹ Scott D. Hammond 'Cornerstones of an effective Leniency program' speech presented at the 7th Latin American Competition Forum, Santiago Chile 9th to 10th September 2009.

2.6 CORPORATE LENIENCY PROGRAM

The previous parts demonstrate various ways which has been introduced so as to fight against cartel such as the use of per se rule and imposition of punitive sanctions to cartel members.

However, the court will not be able to use per rule or impose punitive sanction if the competition authority is not able to detect, investigate and prosecute successfully members of cartels. Therefore, although there are various means which have been adopted by competition authority to assist them to gather evidence to prove the existence of cartel their assistance are too minimal due to the nature of cartel practices as discussed previously.

2.6.1 The corporate leniency policy: perception on anti cartel enforcement

The most important contribution of recent years to the global fight against cartel formation and sustainability derives from the adoption of leniency policies by a number of national jurisdictions. Consequently, legislation prohibiting collusive agreements among competitors provide for powers to the competition authority to introduce corporate leniency so as to intensify the cartel enforcement and hence to remove the harmful and negative effects on consumer and social welfare originated by these prohibited practices.

The lenient treatment, otherwise known as corporate amnesty or immunity policy, is in fact instituted to encourage firms or employees involved into cartel practices to defect and disclose the illegal practices in question to the competition authorities. Moreover, the disclosure affords a reward for firms which cooperate with competition authority in the investigation, total immunity or partial reduction of the fines and penalties which would otherwise be imposed if the cartel was really detected by the authority without its assistance.⁶²

Logically, leniency programs are based on particular conditions which must be achieved and respected in order to qualify for such treatment: in brief depending on the design of the leniency treatment complete immunity is granted to the first cartel member firm which furnishes and submits in detail information of the cartel practices to the competition authority.

⁶² Sama (note 3) at 10.

Leniency program is regarded an important instrument to the competition authority because it assists and sustains the fight against cartel in each of four stages of the fight against cartel which are

- a) Prosecution, making conviction and penalisation more frequent and strict
- b) Detection, making discovery more probable
- c) Desistance, making cartel less stable seeding mistrust and suspicion among cartel partners
- d) Deterrence, making cartel less profitable.⁶³

Historically the task of detecting cartel activities was among the hardest tasks vested to the competition authorities. Now through the introduction of leniency programs many of the prosecuted cartels are unearthed through the use of information gathered from applicants of leniency programs. The importance of CLP can be proved by the fact that for instance US which is well known for its well advanced systems of investigation it failed to effectively fight against cartel without the assistance from CLP.

Moreover, the survival of cartel mainly depends on the existence of trust among its members therefore benefits which provided under leniency program creates mistrust among them. Leniency program creates prisoners dilemma to members of cartels either not to report in the hope that the other partner also will cover the cartel or report and receive benefits provided under the CLP. Therefore, CLP assists the competition authority since it plants a seed of distrust and tension to members of cartel as a result members are attracted to defect and give information which leads to detection and then successful prosecution of cartels cases. Its is the interest of consumers and the whole society that cartels practices are being detected and punished which outweigh the need of punishing members of cartel who enable the competition authorities to detect and prosecute cartels.⁶⁴

2.6.2 Relationship between sanctions and corporate leniency policy

For a leniency Policy to be successful there are three requirements which must be fulfilled. These requirements are basis that must be in place before a jurisdiction can successfully

⁶³ Sama (note3) at 11.

⁶⁴ Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 para 3 available at <http://eur-lex.europa.eu/lexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF> [Accessed on 12/02/2010]

implement a leniency policy. First the competition law must provide for the risk of severe sanctions for those who take part in cartel activities. Secondly, participants of cartels must perceive a high risk of detection by the competition authority if they do not self report and cooperate with it.⁶⁵ Thirdly, there must be transparency and certainty in the enforcement of leniency policy, so that firms can expect and have high degree of certainty on how they would be treated if they seek leniency and what consequences will be if they do not.

Although there are different arguments on the type of sanctions which can force members of cartel to defect and race to the Authority for leniency, evidence shows that leniency policy can be proved to be fruitful in any jurisdiction regardless of whether cartel activity is treated as criminal, civil or administrative offence. However the key point to be noted is that if the country decides to depend on financial penalties alone to the violators then the fines imposed must be so high. By imposing high fines then firms will weigh either to engage themselves in cartel or not and also whether to race for leniency to the competition authority or not. Contrary to that then the fine imposed by the Competition authority will be viewed simply as a tax or a cost of doing business.⁶⁶

2.7 Conclusion

In this chapter the discussion has mainly focused on the nature of the cartels which reveals that cartels are being operated in the very secretive ways. It portrays the necessity of having a mechanism in place which will assist the Competition Authority to obtain evidence from members of the cartel. The chapter has highlighted the types of cartels and their impacts to the economy and society at large. The impacts posed by the cartel are so severe then there is a need of taking every measure to combat these collusive practices. The chapter also looked at various measures which have been taken to fight against cartels and the relationship between sanctions and Corporate Leniency Policy. The chapter has also raised some issues as to why and how Corporate Leniency Policy is regarded as the best tool which every Competition Authority must? These questions are being considered in the next chapter.

⁶⁵ Scott D (note 61).

⁶⁶ Ibid at 5.

CHAPTER THREE

THE ROLE OF CORPORATE LENIENCY PROGRAM IN THE FIGHT AGAINST CARTEL IN THE UNITED STATES, EUROPEAN UNION AND SOUTH AFRICA

3.1 Introduction

The corporate leniency policy is regarded as the most important tool which any competition authority should think to adopt if at all it wants to curb cartel practices in its jurisdiction. This part is going to highlight important principles of Corporate Leniency Policy and how United States, European Union and South Africa CLP models have reflect those principles.

Thereafter it analyses the role played by cartel in the fight against cartel in the United States, European Union and South Africa.

3.2 UNITED STATES

US leniency policy is considered to be the most successful tool of fighting against cartel in the world. It is this success which has inspired several countries to adopt corporate leniency policy in their jurisdictions.

Cartels practices were prohibited in US since 1890 when the Sherman Act was enacted by the Congress to address antitrust issues in the US. Section 1 of the Sherman Act forbids cartels by providing that '[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade...is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony'.⁶⁷ However, it was in 1978⁶⁸ when the US Department of Justice established the corporate leniency policy as an additional tool of fighting against cartels practices.

⁶⁷ 26 Stat.209, 15 U.S.C.A 1.

⁶⁸ John H Shenefield 'The Disclosure of Antitrust Violations and Prosecutorial Discretion' address before the 17th Annual Corporate Council institute on 4th October 1978 cited in Gary R Spratling and D.Jarrett 'The Transformation of international cartel enforcement during the first ten years of the united states' 1003 corporate Amnesty/ immunity policy' at 2 available at <http://www.accc.gov.au/content/item.phtml?item.Id?=566510&nodeId=6ae65db34138257c64b61193b00f923a&fn=Sess> [Accessed on 12/03/2010].

3.2.1 *The 1978 US Corporate Leniency Program*

The importance of leniency program in US can be traced back in 1978 when the original version of leniency program was first introduced in US. This was after 88 years of enforcement of the Sherman Act. The program allowed any cartel member to come forward and report cartel activity before the Department of Justice started its investigation on that particular cartel. This information made the eligible leniency applicant to receive a complete pass from criminal prosecution. However this program was uncertain since immunity was not automatically granted to the applicant. The Department of Justice retained a great deal of prosecutorial discretion in the decision making process. Among factors which the Department was considering when granting immunity was weather it could have reasonably become aware of the cartel activity in the near future if the corporation had not report the cartel.⁶⁹ Consequently, potential applicants were not attracted to apply for leniency because the DoJ might refuse to grant the immunity the action which could have exposed them to prosecution. A company which has engaged itself in cartel has to weigh the consequences of either to report that conduct and seek leniency or take a cover and avoid prosecution. For reporting to be incentive to the company or individual, corporate leniency policy has to be certain and transparent. On the other hand 1978 US leniency policy did not have the said essential principles therefore the program failed to bring about the desirable impact in the fight against cartel.

The 1978 US CLP was able to assist the Division to a less extent in the fight against domestic cartel. In the first ten years of the policy application, only four companies qualified for immunity.⁷⁰ In addition, within fourteen and a half years which the policy operated, only 17 corporations applied for immunity.⁷¹ It also failed to assist the Antitrust Division to prosecute even a single international cartel.⁷²

⁶⁹ Gary R Spratling and D.Jarrett 'The Transformation of international cartel enforcement during the first ten years of the united states' 1003 corporate Amnesty/ immunity policy' at 2 available at <http://www.accc.gov.au/content/item.phtml?item.Id?=566510&nodeId=6ae65db34138257c64b61193b00f923a&fn=Sess> [Accessed on 12/04/ 2010].

⁷⁰ Ibid.

⁷¹ Ibid at 29.

⁷² Ibid.

3.2.2 The current leniency program

The weaknesses which were proved in the 1978 leniency program necessitated its review. The review sought to expand the scope of the leniency program as well to be transparent and certain to the applicant.

3.2.2.1 Winner takes all

The current version of the US leniency program automatically grants to the first firm to come to the DoJ full immunity if there is no pre existing investigation, whereas the second firm is heavily penalised. The CLP also created an alternative amnesty whereby a firm can receive immunity even if cooperation begins after an investigation is under way.⁷³ This approach seems to have the advantage to set maximum incentives to be the first one who provides evidence as it induces maximum tension with the cartel. The second firms is a great loss as the DoJ clearly puts it that ‘ if you are second, even if only by a matter of a few hours, which has happened on a number of occasions, the second firm and all its culpable executives will be subject to full prosecution’.⁷⁴ In other words leniency program apply to one firm in a single cartel. This kind of leniency program creates the favourable condition of cheating among cartel members as it demonstrates that the ‘winner takes all’. Therefore, it maximises the impact of cartel of destabilising the cartel.⁷⁵ It spells out the effect of two options available to the members of cartel which are either to seek leniency or cover the cartel arrangement and hope to avoid prosecution.⁷⁶ Moreover, a successful applicant is guaranteed that there is no criminal conviction, non prosecution for all officers, directors and employees.⁷⁷ On the other end the risk of covering cartel activity are also obvious to the cartel members as they expose themselves to heavy financial sanctions as well as imprisonment which can be up to ten years. This makes the program to be transparent to members of cartel.

⁷³ See DoJ Corporate Leniency Policy, Part B.

⁷⁴ Scott D Hammond ‘When calculating the costs and benefits of applying for corporate amnesty, how do you put price tag on an individual’s freedom?’ Speech presented at the 15th Annual National Institute of white collar crime in San Francisco, California 8th March 2001 at 5. Available at www.justice.gov/atr/public/speech/7647.pdf [Accessed on 9/02/2010].

⁷⁵ Joseph E Harrington ‘Optimal Corporate Leniency Program’ *The Journal of Industrial Economic* Vol.LVI no 2 June 2008 215-246 at 232.

⁷⁶ Scott D (note 61) at 1.

⁷⁷ See Do J Corporate Leniency Policy, Part C.

Although this is one of the features which distinguishes the corporate leniency Policy terms between US and EU in real sense in US other participants can also receive benefit of cooperating with the Division. However that is outside the scope of the US leniency program as it is covered under plea bargaining agreement between antitrust division and cartel members who missed the opportunity of obtained immunity under leniency program. The agreement will only reduce the fine according to the guideline fines. This can be illustrated in the vitamin cartel case, whereby the first company which obtained full immunity from criminal charges and fines was Rhone-Poulenc SA. After learning that the their co-conspirator's approached the Division, Hoffman La Roche Ltd (HLR) and German-based company BASF Aktiengesellschaft (BASF) agreed to plead guilty and cooperate with the government's investigation.⁷⁸ This action was taken into consideration when calculating their fines hence their fines were reduced as HLR was fined to pay US\$500million while HRL's guideline fine ranged from \$1.3 billion to 2.6 billion and BASF's was fined US\$ 225million while it's guideline fine ranged from US \$409 million to US \$818 million.⁷⁹ However, plea bargaining agreement does not eliminate the jail sentence to executives of firms involved in cartel practices since there is 'no jail deal' in the agreement.⁸⁰

3.2.2.2 Conditions to be fulfilled

The applicant of the leniency program has a number of conditions to fulfil. The company is required to take prompt and effective action to terminate its participation in the cartel.⁸¹ It also requires to continuously and completely cooperating with the Antitrust Division in gathering important information for the prosecution of the cartel.⁸² The program further requires the applicant to report their involvement in the cartel with candour and completeness and must provide full, continuing and complete cooperation with US Department of justice throughout the investigation.⁸³ This obligation is very important in order to achieve the objective of leniency program as it enables the authority to gather strong evidence in order to

⁷⁸ Plea Agreement 2,8, Unites States v. BASF Aktiengesellschaft (ND. Tex.1999) (No.99-200-R); Plea Agreement 2,8, United States v F. Hoffman-La Roche Ltd (N.D. Tex 1999) (No.99-CR-184-R) cited in Gary R.Spartling 'Detection and Deterrence: Rewarding informants for Reporting Violations' 69 *George Washington Law Review* 798- 823 at 801. 200-2001

⁷⁹Gary R Spratling, Address before the Fordham Corporate Law Institute speech exhibits include Fine Calculation Summary Sheets prepared by the US Department of Justice, Antitrust Division 15th October 1999 available at <http://www.usdoj.gov/atr/public/speeches/3952.htm> at Tab22.[Accessed on 20/4/2010]

⁸⁰ Previous the Antitrust division had used the no jail deal to encourage members of international cartels to cooperate with the division however this benefit is no longer available to any defendant.

⁸¹ US CLP at 1.

⁸² Ibid.

⁸³ Ibid.

successfully prosecute cartel cases. Moreover, this has been done purposely to avoid weakening the race for applying immunity under leniency policy.⁸⁴

However on the side of the Division, it also has the duty of fulfilling its promise given to Leniency applicants of affording completely amnesty. This obligation was emphasised in the case of *United States of America v Stolt Nielsen S.A et all*⁸⁵ as it was held that

...with respect to immunity agreements, due process requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against other which simultaneously implicates themselves⁸⁶

The court further held that ‘as matter of fundamental fairness, the Division may not seek to revoke [Corporate Leniency] Agreement on the basis of facts known to it at the time it entered into the Agreement’.⁸⁷ The court also held that the Division failed to produce credible evidence to prove that Stolt participation in the conspiracy continued past March 2002. Conditions stipulated in CLP require full cooperation and prompt termination of the applicant involvement in the cartel are valuable because they maintain the integrity of the policy. However this judgement elaborates the importance of competition authority to be cautious on receiving information given by co-conspirators who were implicated by the Leniency applicant which can force them to revoke the leniency granted. As in this case the two witnesses who testified against the Stolt had strong motive to seek leniency from the Division hence they retaliated against a competitor who had implicated them in the cartel.⁸⁸ Therefore, for the leniency policy to be attractive the competition authority must keep its promises and must take into consideration all necessary factors before revoking immunity granted to the applicant as this can encourage potential applicants. This will also make the leniency policy certain the component which is essential for its applicability.

⁸⁴ It is US perspective that jail sentence is the most deterrent sanction which forces individuals to apply for sanctions thus why they are willingly to reduce fines and not waving jail sentences to participants who failed to get immunity from leniency program *See* Scott D Hammod, ‘*Charting new Waters in International cartel prosecutions*’ speech presented at the National Institute on white collar crime in San Francisco California 2 March 2006 at 16 available at <http://www.usdoj.gov/atr/public/speeches/214861> [Accessed on 16/04/2010].

⁸⁵ In the United States district court for the Eastern District of Pennsylvania *United State of America v Stolt Nielsen S.A et al* criminal action no. 06-cr-466 available at http://www.jenner.com/files/tbl_s69NewsDocumenOrder/FileUpload500/3612/Stolt-Nielsen%20v.%20United%20States.pdf [Accessed on 16/04/ 2010]

⁸⁶ *Ibid* at 10.

⁸⁷ *Ibid* at 20.

⁸⁸ *Ibid* at 25.

3.2.2.3 Evidence needed

The significance of granting leniency even to the applicant who does not have decisive evidence is to give DoJ opportunity to obtain information which can also lead to decisive evidence. The participant who played a peripheral role can assist DoJ in the fight against cartel by submitting information which it possesses. Example of this kind of information can be illustrated in the graphite electrodes cartel investigation as in the words of Scott;

‘...the amnesty applicant played only peripheral role in the conspiracy and thus was not able to provide us with ‘decisive evidence’. In this respect, the company’s limited role made it more attractive as an amnesty applicant than the other members of the cartel that were far more culpable. While the amnesty applicant did not attend the key conspiratorial meetings, it provided the division with information that allowed us to obtain warrants to search the offices of several of the cartel members. The execution of the warrants together with the other cartel members’ knowledge of an insider’s cooperation, quickly led to the guilty pleas of other co-conspirators.’⁸⁹

Although the US leniency program does not require the applicant to have decisive evidence that does mean that the information given should be of no significant value. For information to assist the Division must have serious effect in the whole process of investigation of that particular cartel. As it has been said by the Scott that in the graphite electrodes cartel the information was not decisive but it had significant value in that investigation.

3.2.2.4 Ring leader

Despite that the leniency program is automatic it is not entitled to each participant to the cartel. The applicant of leniency program must be the one who did not coerce another participant to participate in the cartel activity.⁹⁰ This requirement caused interpretive ambiguity hence the DoJ had to clarify that if the firm is the singular organiser or the singular ring leader of the cartel activity then it is not eligible for immunity.⁹¹ The purpose of this condition is to deter formulation of cartel activity which is *ex ante* deterrence. It focuses on

⁸⁹ Scott Hammond ‘When Calculating the costs and benefits of applying for corporate amnesty, how do you put a tag on an individual’s freedom’ speech presented in the 5th Annual National Institute on white collar crime in San Francisco California 8th March 2001 at 3 available at <http://www.justice.gov/atr/public/speeches/7647.pdf> [Accessed on 12/02/2010]

⁹⁰ DoJ Corporate Leniency Policy B7.

⁹¹ Gary Spratling ‘Answers to recurring questions: Answers to recurring questions’ <http://www.justice.gov/atr/public/speeches/1626.pdf> [accessed on 12/04/2010].

preventing cartel formulation with the threat of sufficiently heavy and prompt expected sanctions against ringleader. Thus the firm which initiate the formulation of cartel take a known risk of paying heavy financial fines as well its directors will face criminal sanctions. Therefore, this condition avoid the initiator to receive double benefits which means illegal profit gained from cartel and the benefit of leniency program. It has been argued that ex ante deterrence is by far the most important objective since it may be achieved to a very large number of potential infringements and at a much lower social and individual cost.⁹² Potential cartel that is not deterred will be formed and it can also go undetected or detected after causing great harm to the society.⁹³

3.2.2.5 *Amnesty plus*

Experience gathered over many years has taught competition authorities in the US and EU that companies which have been colluding in one aspect product or geographic market are more likely to have engaged in, or at least to know about cartel activities in other adjacent markets.⁹⁴ Thus, the DoJ in order to enhance its fight against cartel it has also introduced as *Amnesty plus*. ‘*Amnesty plus*’ is a form of leniency policy whereby a firm which does not qualify for immunity at the first cartel which is being investigated uses the occasion of that first investigation to report a second, distinct cartel. This firm will be given immunity to the second cartel and a further benefit of fine reduction for the first cartel.⁹⁵ During the negotiation on a plea bargain agreement the DoJ usually uses this opportunity to set an omnibus question to firms if they are aware or they are involved in cartel in other markets. The firms which reveal its participation in another unrelated cartel is guaranteed to receive amnesty for its participation in the second offence and none of its officers, directors and employees who cooperate will be prosecuted criminally in connection with that offence.⁹⁶ Conversely, the counter part of amnesty plus is penalty plus which means that ‘if amnesty

⁹² Giancarlo Spagnolo ‘*Leniency and whistleblowers in antitrust*’ Discussion paper no. 5794 2006 at 9 available at <http://www.cerpr.org> [Accessed on 25/05/2010]

⁹³ Ibid.

⁹⁴ Catherine Roux and Thomas von Ungern-Sternberg, ‘*Leniency Programs in a Multimarket Setting: Amnesty Plus and Penalty Plus*’ available at <http://www.hec.unil.ch/deep/textes/07.03.pdf> at 2. [Accessed on 25/05/2010]

⁹⁵ Wouter P JWils ‘*Leniency in Antitrust Enforcement: Theory and Practice*’ at 42 available at http://papers.ssrn.com/so13/cf_dev/AbsByAuth.cfm?per_id=456087 [Accessed on 20/04/2010]

⁹⁶ Scott D Hammod, ‘*An update of the Antitrust Division’s Criminal Enforcement*’ 16th November 2005 available at <http://www.usdoj.gov/atr/public/speeches/213247.htm> [Accessed on 20/04/2010]

plus is the carrot, then penalty plus is the stick'.⁹⁷ If companies fail to take advantage of amnesty plus are then exposed to high fine and jail sentence for its executive.

3.3 The Role of CLP in the Fight against Cartel in US

The aim of establishing CLP is to equip competition authority with a tool which can assist competition authority to fight cartel in all four stages which are firstly, prosecution, whereby the authority is able to prove the case and hence culprits of cartels are convicted and penalised more frequent. Secondly, is able to detect by making discovery more probable. Thirdly, desistance, making cartels less stable as it seeds mistrust and suspicion among cartel partners. Lastly, deterrence, by making the involvement in cartels less profitable as participation will cost the participating firms. In this part the paper seeks to show to what extent the CLP has assisted the DoJ to succeed to in the fight against cartel.

The revision made in the 1993 CLP brought about significant impact in the fight against CLP in the US. The application rate has jumped to roughly two per month.⁹⁸ Immunities granted to the applicants have generated a number of cases including international cartels cases. For example in graphite electrodes investigation, the cooperation of a leniency applicant led to the execution of search warrants, the cracking of international cartel and shortly thereafter a plea agreement with other corporate conspirator.⁹⁹ Furthermore, investigation on this cartel prompted investigation in other jurisdiction since the effects of this cartel were felt in many countries including developing countries. Therefore, there is no doubt that the CLP in the US played a major role in unearthing this cartel. It facilitated prosecution and conviction of members of cartel not only in US but also in other jurisdiction such EC and developing countries such as Brazil and Korea.¹⁰⁰

The type of the US corporate leniency policy which grants immunity only to the first applicant has achieved to create race to the DoJ since if the firm is late for few seconds it exposes itself to the adverse financial consequences and jail term to its executives. The US

⁹⁷ Roux (note 95) at 4.

⁹⁸ Scott Hammod, 'An update of the Antitrust Division's Criminal Enforcement' 16th November 2005 available at <http://www.usdoj.gov/atr/public/speeches/213247.htm> [Accessed on 12/04/2010].

⁹⁹ Gary R Spratling 'The Corporate Leniency Policy Answers to recurring questions' Speech presented at the ABA Antitrust section in 1998 Spring Meeting. Available at <http://www.justice.gov/atr/public/speeches/1626.pdf> [accessed on 12/04/2010].

¹⁰⁰ Margaret Levenstein and Valerie Suslow 'Contemporary international cartels and developing countries: Economic effects and implications for competition policy' 71 *Antitrust Law Journal* 2003-2004 801 at 889.

CLP has accomplished the goal of its establishment since it has been able to make cartels less stable by creating tension among members of cartel.

The CLP has made the organisation less profitable in the US due to the fact that the company which fail to secure immunity from full prosecution has to suffer from heavy fine and jail term. Even if the company come forward and cooperate with the DOJ still is liable to pay fine though their cooperation save them from paying the full fine but the amount of fine is still large. The Vitamin case can illustrate this notion as F. Hoffmann-La Roche and BASF decided to cooperate with the DOJ and their fines were reduce to be \$500 million and \$225 respectively.¹⁰¹ These fines set a record of highest fine ever imposed against member of cartel or criminal prosecution of any kind.¹⁰² Even in electrodes cartel the involved firms were penalised to pay a fine amount \$135 against SGL Carbon AG and \$110 against UCAR international. Furthermore, executive from those firms had to serve their jail sentences. This can prove that CLP can have deterrent effect both ex ante and post ante effect as before organising cartel members have to weigh the profit which they can acquire, loss of financial and their liberty when their action is detected.

Moreover, CLP has assisted the institution of civil cases for damages. The evidence gathered from investigation leads to the successful prosecution of members of cartel. Consequently, victims of cartel are able to sue members of cartel for treble damages.¹⁰³ This also minimises the profit which can be accumulated from participating in cartel practices. Besides, their reputation is lowered from the eyes of the public. Thus to a large extent it has achieved the deterrence effect to members of cartel since there is no trust among themselves.

¹⁰¹ In the 1999 financial year the DOJ was able to secure over \$1.1 billion because of the fines imposed to the two firms. See US Department of Justice 'Status reports on criminal fines, international cartel enforcement and corporate leniency program 2001' available at <http://www.justice.gov/atr/public/speech/8063.pdf> [Accessed on 10th May 2010]

¹⁰² Ibid.

¹⁰³ For instance in Lysine cartel defendants agreed to pay US customers more than \$45 million in damages and vitamins cartel defendants agreed to pay US customers more that \$ billion in damages. See US Department of Justice 'Status reports on criminal fines, international cartel enforcement and corporate leniency program 2001' available at <http://www.justice.gov/atr/public/speech/8063.pdf> [Accessed on 10th May 2010]

3.3.1 Factors for its success

The winner takes all has to large extent created mistrust among members of cartel. Trust which is the cornerstone of cartel success has been destroyed since the decision of one member to remain in the cartel largely depends on another member's decision. Individual interest forces members to think for their own fate rather than the importance of keeping their obligation imposed by their participation in the cartel. According to Scott Hammond, former director of criminal enforcement of the DoJ antitrust division stated that more than 50% of the leniency applications are taking place before an investigation is opened.¹⁰⁴

The type of sanctions imposed after conviction in US also contributes much on CLP success because members of cartels are aware if they do not utilise the offer granted to one of them they put themselves at risk of losing their liberty and paying higher fines. Therefore, to them the best option is to choose a 'carrot rather than a stick' in other words to apply for CLP and reveal information concerning cartel in exchange of immunity granted by the DoJ.

The prospects of treble damages lawsuits to some extent were said to be a barrier to the utilisation of leniency program as applicant has to weigh the benefits on immunity from criminal prosecution against likelihood of those lawsuits. Seeing this problem in 2004 the Congress passed the Criminal Penalty Enhancement Reform Act 2004¹⁰⁵ to rectify that situation. This new legislation limits the total private liability of firms that have entered into leniency agreements with the antitrust Division to actual damages "attributable to the commerce done by the applicant in the goods or services affected by the violation" plus attorneys' fees, cost, and interest.¹⁰⁶ That means firm which met the requirements and obtained amnesty are no longer liable for treble but single damages and are no longer jointly and severally liable for damages suffered by their co-conspirators' customers. Conversely, the legislation increases the potential liability for cartel participants who do not obtain leniency, because in addition to their previous liability they may also be jointly and severally liable for twice the actual damages suffered by customers of the leniency applicant.¹⁰⁷ The Act also increased potential criminal penalties such as imprisonment of a period not exceeding ten years and fines for price fixing and analogous infringements. fn

¹⁰⁴ 15 USC.

¹⁰⁵ Ibid 11.

¹⁰⁶ Ibid 12.

¹⁰⁷ Ibid .

All these factors force members of cartel to use the CLP so as to avoid consequences of heavy sanctions in terms of financial and jail terms. The utilisation of CLP assists DoJ to detect and successfully prosecute cartel members hence it deter the formulation or continuation of cartels not only domestic cartel in US but also international cartels.

3.4 EUROPEAN UNION

Cartel practices are prohibited under Article 81 of EC Treaty. European Commission has the duty to curb the cartel practices in the Union. The European Commission was among the first jurisdiction to follow the example of the DoJ by introducing a Leniency program in 1996¹⁰⁸ to assist the Commission in the enforcement against cartel.¹⁰⁹ Similarly, as to what happened to the first US leniency Policy, the first EU Leniency Notice was not very effective to attract applications from cartel members, as it did not guarantee complete immunity, even if a firm was the first to report a violation. The Notice was uncertain since the EC was having discretion hence the applicant was not sure if it will receive favourable treatment it sought or any favourable treatment at all.¹¹⁰ It was after the EC's entire investigation was concluded and then the fate of the applicant will be made by the Commission.¹¹¹

Therefore in 2002¹¹² the EU revised the 1996 Notice which also was revised in 2006.¹¹³ The 2002 Leniency Notice¹¹⁴ had been a successful tool in destabilising cartels and encouraging undertakings to report their violations to the competition authority. However, the purpose of revision was to enhance the use of leniency program to be a most effective tool in the fight against cartel activity with in the European Community by providing more guidance to applicants and increasing transparency.¹¹⁵

¹⁰⁸ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 96/C807/04, 1996 O.J(C207) available at http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html [Accessed on 23/03/2010]

¹⁰⁹ Spagnolo (note 92) at 12.

¹¹⁰ Commission Notice Leniency 1996 E (2).

¹¹¹ Ibid.

¹¹² It reduced Commission discretion in its implementation and increased the size of fine reductions to leniency applicants. It also started to offer almost automatic immunity from fines to the first member of a cartel that report the cartel with significant information before the investigation is opened or where it has little information concerning the reported cartel.

¹¹³ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17.

¹¹⁴ Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] O.J C45/3. S

¹¹⁵ Sari Suurinakki and Maria Luisa Tierno Centella 'Commission adopts revised Leniency Notice to reward companies that report hard core cartels' *1 Competition Policy Newsletter* spring 2007 at 7. Available at http://www.ec.europa.eu/competition/publications/cpn/2007_1_7.pdf [accessed on 12/04/ 2010].

3.4.1 Quality of evidence

The Commission grants immunity from any fine which would have otherwise be imposed to an undertaking disclosing its participation in a cartel if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to carry a targeted inspection in connection with the cartel¹¹⁶ and if at the time of application the Commission did not have sufficient evidence to adopt a decision to carry out an inspection and had not yet carried out such an inspection.¹¹⁷ However, for an undertaking to receive total immunity from fine then it has to provide to the Commission information and evidence which would not jeopardise the inspections.¹¹⁸ In this regard the Commission will conduct an assessment of the threshold whereby it assesses the type and quality of the information submitted by the applicant.

If no undertaking has been granted immunity on point 8(a), the Commission will grant immunity from any fine to an undertaking that is the first to submit information and evidence which will enable the Commission to find an infringement of Article 81 in connection of the alleged cartel.¹¹⁹ However the Commission must not have sufficient evidence to find that infringement.¹²⁰

The reason on emphasising of the quality evidence needed by the Commission is to be clear to the applicant that applicant is supposed to give detailed evidence which will assist the Commission to realise the objective of detecting and successfully prosecuting members of the cartel. Although the Leniency program clarifies by listing information which the Commission needs, requirements are different from the required information which the US corporate leniency policy needs. This makes the possibility of a member of cartel who played a peripheral role to be unable to get total immunity. However, in order to avoid undesirable effect to the Leniency policy the EU leniency policy has introduced a marker system. Under the marker system the applicant is given considerable time to collect necessary evidence

¹¹⁶ Ibid 8(a).

¹¹⁷ Ibid 10.

¹¹⁸ See 9 (a) It has to give a detail description of the alleged cartel arrangement, including for instance the aims, activities and functioning; the product or services concerned the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, contents of and participants in alleged cartel contacts and all relevant explanations in connection with pieces of evidence provided in support of the application.

¹¹⁹ Point 20 at para 8(b).

¹²⁰ Point 11.

which will enable it to reach the threshold while holding its position but this might not help a cartel member who played a peripheral role.

3.4.2 Other conditions to be fulfilled

Together with the mentioned requirements the applicant is supposed to fulfil a number of additional conditions to qualify for immunity which are; the undertaking must cooperate genuinely, fully, on a continuous basis and expeditiously from the time of submission of its application throughout the Commission's administrative procedure.¹²¹ The undertaking also is required to end its involvement in the alleged cartel immediately following its application except for what would, in the Commission's view be reasonably necessary to preserve the integrity of the inspections.

3.4.3 Duty to maintain confidentiality

The Notice also prohibits the applicant from revealing the facts or any content of the application before the Commission has filed the statement of objection. The aim of prohibition is to avoid the application to jeopardise investigation process. This can be exemplified by the *Raw Tobacco Cartel* as the leniency applicant let its main competitor to know that it has applied for leniency consequently most of members of the cartel were aware of the Commission investigations hence even when the Commission conducted inspection they anticipated it. The leakage of the information had negative impact on the investigation process and the Commission revoked the conditional leniency granted to the applicant. Since the aim of establishing CLP is to assist the Commission to gather enough evidence which can assist it in prosecuting successful members of cartel if there is no obligation of maintaining confidentiality to the applicant then the whole process of enforcement against cartel will not be achieved.

3.4.5 Ring leader

The EU leniency program does not allow the undertaking which coerced other undertaking to participate or remain in the cartel to get immunity from fine. However that undertaking is

¹²¹ Point 12(a).

eligible to qualify for a reduction of fines if it fulfils the relevant requirements and meets all the above conditions.¹²²

3.4.6 Subsequent applicants

Undertakings disclosing their participation in a cartel that do not meet the conditions for immunity may still under the EU leniency policy be eligible for fine reduction that would otherwise have been imposed if they provide evidence which represents significant added value compared to the evidence already possessed by the Commission.¹²³ The first undertaking to provide such significant added value will receive a reduction of 30% to 50% of the fine which would otherwise be imposed. The second undertaking will get a reduction of 20% to 30% and subsequent undertakings get a reduction of up to 20%.¹²⁴ This system to a great extent can reduce the tension among cartel members hence weakening the race to the Commission for leniency. Moreover, members of cartel may decide to distribute evidence among themselves so as each of them to benefit from fine reduction since there is no big difference of fine reduction between the subsequent applicants.¹²⁵ This weakness together with the absence of criminal sanctions to individual makes the race to be the first to the Commission weakened. This position is different from US corporate leniency policy which speeds up the race to the DOJ because it gives opportunity of getting immunity only to the first applicant. The effectiveness of US position can be illustrated by the number of international cartel members who run to seek Leniency in US first.

3.4.7 Leniency while investigation is under way

The EU leniency policy like the US allows applications for leniency even after the Commission's investigation on the cartel is underway. This is important because it provides necessary incentives for firms to come forward with their information which may assist the Commission to obtain credible evidence against cartel. For example in the *Lifts and Escalators case* the Commission's investigation through surprise inspections at the premises

¹²² Point 13.

¹²³ Point 24.

¹²⁴ Point 26.

¹²⁵ Rossella Incardona 'The fight against Hard core cartels and the new EU Leniency Notice' *The European Legal Forum* 1 2007 39 at 41. Available at <http://www.simons-law.com/library/pdf/e/686.pdf> [Accessed on 27/05/ 2010].

of lift and escalators manufactures in Europe in 2004 triggered many applications for immunity or reductions in fines under the policy.¹²⁶

3.5 The role of EC Corporate leniency policy in the fight against cartel in EU

The role of CLP in EU can be traced back in the 1996 when the first leniency notice was introduced. The application of the EU leniency policy resulted in a significant increase in the discovery of cartels, thus strengthened the public enforcement against cartel in the EU.¹²⁷

The 2006 leniency notice has been very successful in persuading companies to provide evidence of cartels to the Commission. On average, the Commission has received two applications for immunity per month since the introduction of 2006.¹²⁸ This success has been contributed much by the increase of fine imposed to the infringers of Article 81. The adoption of Fining Guidelines in 2006 increases the deterrent effect of the fine sanction. The adoption has produced the desirable impact for example the Car Glass cartel which set the largest fine to be imposed against all members of a single cartel which totalled Euro 1,383 billion whereby a company known as Saint Goban was fined to pay Euro 896 million.¹²⁹ These fines were successful imposed partly due to information given to the EC from Asahi Company which was one of glass cartel members.¹³⁰ This Company was able to receive a fine reduction of 50% as the EC had already started an investigation concerning that cartel after being tipped off from anonymous source.¹³¹

Generally, the corporate leniency policy has had a considerable impact on the fines paid by cartels members. The level of fines imposed to violators increased from mid 1990's. This rise could result from a higher rate of detection and more cartels being successfully

¹²⁶ Eleanor Morgan 'Controlling cartel: implications of the EU policy reforms' 27 *European Management Journal* (2009) 1 at 4.

¹²⁷ Rosella (note 125) at 41.

¹²⁸ See <http://www.globalcompetitionreview.com/reviews/20/sections/71/chapters/786/international-len>

¹²⁹ The fines collected from cartel infringers goes to the EU budget. See at 3 Neelie Kroes Press release on Car Glass Cartel available at

<http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/604&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed on 29th May 2010].

¹³⁰ Press release 12th November 2008 on 'Antitrust: Commission fines car glass producers over Euro 1.3 billion for market sharing' available at

<http://europa.eu/rapid/pressReleaseAction.do?reference=IP/08/1685&guiLanguage=de> [Accessed on 29th May 2010].

¹³¹ Ibid.

prosecute after obtaining valuable evidence from members of cartel in exchange of immunity or fine reduction. As a matter of fact after 1996, in 12 years 75 cartels were detected, which corresponds to 6.25 detections per year on average, while before 1996, in 28 years solely 35 detected cartels which corresponds to 1.4 detections per year on average.¹³² These figures prove that corporate leniency policy plays an important role in the detection and prosecution of cartels in European Union. The fines imposed to the convicted companies send a significant warning to companies that through the use of CLP cartels can be rendered profitless as conviction is possible due to the hard evidence used by the EC to prove case against cartel members.

3.6 SOUTH AFRICA

The South Africa Competition Act was enacted in 1998. Cartels are dealt with under section 4 of the Act which deals with horizontal restrictive practices. Section 4(b) prohibits the fixing a purchase or selling price or any other trading condition,¹³³ dividing markets by allocation of customers, suppliers, territories, or specific types of goods or services¹³⁴ and collusive tendering.¹³⁵

The Competition Commission is empowered to conduct investigations relating to cartels and refer such matter to the Competition Tribunal for adjudication.¹³⁶ Cartel members found guilty of contravening the Act are subject to an administrative penalty up to 10 per cent of firm's annual turnover in South Africa in the preceding financial year.¹³⁷ The Act was amended in 2009¹³⁸ to provide for criminal sanctions for executive directors of companies which will be convicted for contravening the cartel provisions of the Act.¹³⁹

3.6.1 The pre CLP period

¹³² Emmanuel Combe and Constance Monnier 'Fines against hard core cartels in Europe: The Myth of over enforcement' 2009 at 4 available at <http://ssrn.com/abstract=1431644> [Accessed on 1/06/ 2010].

¹³³ See s.4 (b)i.

¹³⁴ Ibid (ii).

¹³⁵ Ibid (iii).

¹³⁶ Section 21(1) (c) and (g) of Competition Act.

¹³⁷ Section 59 (2).

¹³⁸ Competition Amendment Act, 1 of 2009.

¹³⁹ Ibid section 12.

South Africa economy is highly concentrated hence attracts collusions among firms.¹⁴⁰ However, the number of complaints on cartel practices which were laid before the Commission before introduction of CLP was small.¹⁴¹ Various factors are behind those situations which are that the first five years the Commission focused more on evaluation of merger and acquisition as well as a publicising the Act and its implication to the public.¹⁴² The Commission also was having difficult of detecting and investigating cartels due to the nature of the cartel practises hence they were investigated to a limited extent such as healthcare sector, in the automobile industry and markets for supply of broken glass for recycling.¹⁴³

Thereafter the Commission like other competition authorities decided to put the fight against cartel as one of its priority.¹⁴⁴ This decision was followed by the introduction of Corporate Leniency policy in 2004.¹⁴⁵ The Corporate Leniency Policy was adopted by the commission as a tool which will assist the Commission in detecting and prosecuting cartels practices successful. In January 2007 the Commission decided to review its cooperate leniency policy. The purpose of review was to make it an effective tool in the fight against cartel in South Africa.¹⁴⁶ It sought to create certainty regarding the criteria that will qualify an applicant and remove the criteria which were disincentive to firms from applying for leniency.

As previously mentioned that certainty and transparency are key principles of any successful model of leniency policy thus in order to attain that the Competition Act of South Africa was amended to specifically recognise corporate leniency policy. This action consequently gives a statutory back up the policy which in turn build confidence to the public

¹⁴⁰ Trudi Hartzembergh 'Competition Policy in South Africa: Towards Development?' at 6.A paper available at http://www.commerce.uct.ac.za/Research_Units/DPRU/Conference2008/Conference2008_Papers/Com [Accessed on 20/05/ 2010].

¹⁴¹ Chantal Lavoie 'South Africa's Corporate Leniency Policy: A five year review' at 2 available at <http://www.compcom.co.za/assets/uploads/events/10-year-review/parallel-3b/clp-paper-conference-Chantal-Lavoie.docx> [Accessed on 20/05/ 2010].

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Competition Commission Annual Report for the period 2002 to 2004 available at <http://www.compcom.co.za/assests/Filcs/annual-report-2002-2003.pdf> [Accessed on 14/4/2010].

¹⁴⁵ Corporate Leniency Policy GN 25963 6th February 2004.

¹⁴⁶ Thulani Kunene 'Review of Corporate Leniency Policy' 28 *Competition News* at 3 available at <http://www.compom.co.za/assests/uploads/AttachedFiles/Mydocuments/June-08-Newsletter-28.pdf> [Accessed on 16/4/2010].

since it removed the uncertainty surrounded its legal status which made firms to be reluctant to apply for leniency.¹⁴⁷

Similarly to the US review this review also removed certain clauses which were interpreted by firms to give the Commission too much discretion in granting immunity. Too much discretion on the authority act as disincentive for the firms to defect the cartel and apply the leniency because they are uncertain of the outcome furthermore it is difficult to weigh the benefit of reporting the cartel and remaining in the cartel practice.

The South Africa leniency policy introduced the marker system as the EC.¹⁴⁸ This system increases race to the Commission for application of immunity. In South Africa the race is more because the winner takes all.

3.6.2 The Corporate Leniency Policy

3.6.2.1 First to the door

The CLP provides for immunity to only one member of the cartel practice similar to the US CLP.¹⁴⁹ This condition creates race to the Commission for leniency hence it act as incentive for member of cartel practice to defect and adduce evidence of the cartel. However, the Commission does value cooperation given by unsuccessful applicants or other members of cartel nonetheless negotiations to settle through settlement agreement which may result in a fine reduction is being pursued outside the CLP.¹⁵⁰ The amount of fine and a reduction of fine is determined by the Competition Tribunal according to its power given by the Act. The option for negotiation with unsuccessful members assists the Commission to a large extent as this can be demonstrated by the bread cartel whereby the company which was involved in that cartel decided to give the Commission early cooperation by giving information on the bread cartel. The kind of cooperation which can be valuable to the commission must be given in time and full disclosure of the conduct for it to be rewarded fine reduction.

The Commission value the cooperation given by other members of the cartel however that notion does not destroy its aim of creating distrust among members of the cartels as the benefit granted by the leniency applicant is higher compare with the fine reduction. Besides,

¹⁴⁷ Ibid.

¹⁴⁸ section 12.1 of CLP.

¹⁴⁹ Section 5.6 of CLP.

¹⁵⁰ Section 9.1.3.2 of CLP.

the 2009 amendment which introduced criminal sanctions for cartel cases will make the race to the Commission more effective as immunity is granted to the first firm only.

3.6.2.2 Application while investigation is underway

The CLP allows application for immunity even in a situation the Commission has already initiated investigation on that particular cartel.¹⁵¹ However, that application will have a chance to succeed if after Commission's assessment it is concluded that the evidence held by the Commission is not sufficient for the purpose of proving the existence of collusion in that particular economic activity. The use of hypothetical case to ascertain the possibility of a successful application, affords applicants opportunity of knowing if the firms qualifies for immunity. Moreover, granting leniency when the investigation of the cartel is underway forces members of the cartel to quickly run to the door of the Commission for leniency before the Commission has obtained any other evidence. Nevertheless, it allows the Commission to obtain credible evidence which can be used to prosecute other members.

3.6.3 The role of corporate leniency policy in the fight against cartel in South Africa

The introduction of CLP in South Africa marked the new beginning of commitment of the Commission in the fight against cartels. Although the Commission is active in conducting investigation in industries which seems to have signs of collusion to a large extent CLP contributes much to its success in prosecution and settlement agreements between the Commission and cartel members. For one to get a good picture of the role of the CLP in the fight against cartel two things are being analysed the number of applications submitted to the competition authority, convictions and sanctions imposed to the cartel members so as to create deterrent effect to the potential cartel and existing ones.

The financial year between 2008 and 2009 the Competition Commission was able to handle a total of 13 leniency and marker application which is a new record and may partly be

¹⁵¹ Section 5.5.3 of CLP.

attributed by the review of the Corporate Leniency policy.¹⁵² These applications were made by companies from various sectors such as construction, liquid fuels and food.¹⁵³

The administrative penalties levied for cartel practices in the financial year 2008 to 2009 in total were R331, 423,704. Adcock Ingram Critical Care (Pty) Ltd, a subsidiary of Tiger Brands Limited which involved itself in bid rigging and division of markets in pharmaceutical tenders invited by the Department of Health. It was ordered and agreed to pay 8 per cent of its turnover which amounted to R53.3 million. It is the company which set a record of paying a highest fine for cartel practice.¹⁵⁴

The following cartels exemplifies clearly the role played by CLP in facilitating the prosecution of members of cartel in South Africa

3.6.3.1 The bread and milling cartel

The existence of anti competitive behaviour in the food value chain was suspected for a long time in South Africa. High increases of food price and possible profiteering was the major concern raised. This problem forced the government to appoint the Food Price Monitoring Committee (FPMC) to probe on the price hike in 2002 and 2003. The FPMC concluded in report that 'No profiteering on basic foodstuffs has occurred'.¹⁵⁵

The investigation done by the Commission and the support from leniency policy proved otherwise. The evidence obtained exemplifies that there has been wide spread of anti competitive practices in the pricing of some foodstuffs products certainly in wheat and maize value chain.¹⁵⁶ It has been established that major firms dominating the milling wheat and maize and the production of bread and maize have been colluding to set prices from 1994 up to 2007.

While the Commission's investigation on the bread and milling was underway, the Premier Foods Limited filed an application for immunity and offered to cooperate fully with the Commission. The information furnished by the applicant showed that from 1995 to 2006

¹⁵² South Africa Competition Commission Annual Report for the period of 2008 to 2009 at 25. Available at <http://www.compcom.co.za/assests/Files/annual-report-2008-2009.pdf> [Accessed 16/4/2010].

¹⁵³ Ibid.

¹⁵⁴ Ibid at 33.

¹⁵⁵ Mapato Rakhudu and Avish Kalicharan 'Bread and Milling cartel' 28 *Competition News* at 4 available at <http://www.compom.co.za/assests/uploads/AttachedFiles/Mydocuments/June-08-Newsletter-28.pdf> [Accessed on 16/4/2010].

¹⁵⁶ Ibid.

Premier, Tiger, Pioneer and Foodcorp agreed to fix the selling price of bread to their customers and also to close down some of bakeries in certain areas in favour of competitors.

It is the Leniency program which revealed the secrecy of the cartel. This proves that cooperate leniency policy is an important tool in the fight against the cartel. The FPMC failed to establish the cartel and profiteering of the cartel to the members of the cartel because it was difficult to obtain evidence without assistance from the members of the cartel. It is true that cartel benefited members of that cartel therefore there were profiteering on basic foodstuff.

3.6.3.2 Pharmaceutical supplies to public hospital cartel

The Commission initiated investigation on the pharmaceutical companies after receiving complains on the alleged collusive tendering and the division of markets.¹⁵⁷ During the investigation the Fresenius Kabi South Africa (Pty) Ltd (FKSA) approached the Commission for leniency. It confirmed that it had knowledge and involved itself in the collusive tendering and market divisions with its competitors namely Dismed Criticare (Pty), Thusanong Health Care (Pty) Ltd, Adcock Ingram Critical Care (pty) Ltd as alleged by the Commission. The applicant gave the Competition Commission detailed information which implicated itself and its competitor. Thereafter, all other firms which participated on the collusion approached the Commission for settlement negotiation hence the case was referred to the Tribunal for consent order. In this case the corporate leniency policy proved to be an important tool which can expedite settlement of cartel cases.

The Corporate Leniency policy applicant in this cartel cause assisted the Competition Commission not only to obtain evidence to prove the bid rigging but also to save the cost of enforcement since the case did not go to the full trial. The resource saved can be used to detect and prosecute other complex cartel cases for the benefit of the economy and social welfare.

3.7 Amendment of Competition Act of 2009

¹⁵⁷ Competition Commission v Dismed Criticare (Pty) Ltd Case No: 20/CR/Apr08 available at <http://www.comtrib.co.za/comtrib/comtribdocs/1016/20CRFeb08dismed.pdf> [Accessed 16/4/2010].

The amendment of the 2009 Competition law¹⁵⁸ among other things introduces criminal sanction for practicing cartels. This means that causing or permitting firm to engage in cartel practices amount to criminal offence whereby managers and directors of firms which are held liable for practicing cartel practices may be imprisoned if convicted of such behaviour.¹⁵⁹ Prior to the introduction of the Competition Amendment Act, there were no criminal sanctions for engaging in cartel practices. Indeed the provisions on the liability were civil in nature whereby penalties that could be imposed for a contravention of the Act were classified as administrative penalties and could only be imposed on the firm involved in the violation rather than individual. This means that Directors and other employees of firms engaged in cartel practices were not liable for the firm's contravention of the Act.

The current amendment seeks to create significant risk and deterring executive directors and managers from causing or permitting their firms to engage in cartel practices since the result will not only cost financial position of the firm but also possible loss of their liberty. The Amendment Act provides that convicted manager and director of the firm involved in cartel practices can possibly face a fine of R500 000 or imprisonment for a term not exceeding 10 years.¹⁶⁰ Additionally, the Amendment Act prohibits firms from paying any fine, indemnify, reimburse, compensate or settle the expenses of a person incurred in defending before the court of law for prosecution of causing or permitting firm to engage in prohibited practice unless that person is acquitted or the prosecution is abandoned.¹⁶¹

3.7.1 Implication of the Amendment to the CLP

The introduction of criminal sanctions to cartel practices has implications to the operation of the CLP. Previous firms which where involved in cartel practices were able to apply for leniency from the South Africa Competition Commission therefore the amendment will force managers and directors of firms which were involved in cartel practices to apply for leniency so as to get immunity from criminal prosecution. Moreover, the Amendment has retained the power of the Competition Commission to grant leniency.¹⁶²

¹⁵⁸ Act no 1 of 2009.

¹⁵⁹ Section 12 of the Amendment Act 2009.

¹⁶⁰ Section 13 of the Amendment Act 2009.

¹⁶¹ Section 12 (6) of the Amendment Act 2009.

¹⁶² Section 1(c) of the Amendment Act.

The leniency which will be granted by the CLP will afford immunity to the applicant from prosecution of cartel offence therefore there is a great possibility that the confidence which CLP has built to the public might continue to exist. Moreover, the directors and managers will have to choose between 'carrot and stick' whether to keep the secret or run to the Competition Commission and reveal the cartel in order to rescue themselves from facing jail sentence. The race to the Competition Commission might increase since one cannot compare the effect of the financial penalties with the effect of loss of liberty. As previous discussed, it has been agreed that one of the reason of the success of US CLP is existence of criminal penalties for cartel practices. Therefore, the introduction of individual criminal sanction in South Africa might also bring more success as well deterring firms from involving themselves in cartel practices.

However, it has to be noted that there are possibilities of negative impacts which can be experienced from this introduction. For instance the wording of the Amendment Act can be interpreted to mean that it is not mandatory for the Competition Commission to submit to the National Prosecution Authority that the prosecuted person has been certified to deserve leniency since the word used is 'may' rather than 'shall'. This provision might create uncertainty of the benefits which one can obtain after getting leniency. Certainty is an important element for CLP to succeed since potential applicants of CLP must be assured with the outcome of their applications so that they can weigh the benefit of applying and cooperating with the Commission and the consequences of failure to apply for CLP. The importance of certainty can be exemplified by the failure of the 1978 US CLP to successfully assist the DoJ in the fight against cartel due to the lack of certainty hence no one dared to risk and approach DoJ for leniency because risking could amount jeopardising applicant's liberty.

3.8 Conclusion

The chapter has looked at models and role of Corporate Leniency Policy in the fight against cartel in three different jurisdictions. Although the design of the three jurisdictions varies each of them have two important principles of an effective CLP which are certainty and transparency. It has revealed that CLP plays a great role in the fight against cartel as it enables competition authorities to detect, successfully prosecute members of cartel hence their conviction and imposition of heavy penalise which in turn can deter cartel practices. The prosecution of cartel also assist affected consumer to recover damages from members of

cartel in US. Thus, the pertinent question is: is CLP worth of introduction in Tanzania? This question will be considered in the next chapter.

CHAPTER FOUR

IS CORPORATE LENIENCY POLICY WORTH INTRODUCTION IN TANZANIA?

4.1 Introduction

Should Corporate Leniency Program be introduced in Tanzania? What would be the implication of its introduction? In this chapter, I consider these questions by showing the development of competition law in Tanzania. The Chapter further illustrates cartel practices in Tanzania. The importance of competition is also discussed in order to establish the need of having an effective mechanism which can assist the Fair Competition Commission in the fight against cartel.

4.2 An over view of socio economic context in Tanzania

Tanzania's economy has passed through a number of socio economic stages, the most important milestone being the Arusha Declaration in 1967 which lead into nationalisation of all major means of production, exchange and distribution. The Declaration further based on the notion that prospect of a growing and viable public sector through public investment, as the principal engine of economic growth and development.¹⁶³ With the Arusha Declaration, the government control of major means of production and consumption, the manipulation of

¹⁶³ Tanzania Development Vision 2025 available at <http://www.tanzania.go.tz/vision.htm> [Accessed 16/4/2010].

prices was common.¹⁶⁴ The main reason advanced for controlling prices was to check on monopolies¹⁶⁵ and to keep retail prices as low as possible.¹⁶⁶ The government's price control system was introduced by the Regulation of Prices Act of 1973.¹⁶⁷ The Regulation of Prices Act established the National Price Commission (NPC)¹⁶⁸ which was vested with the duty of determining prices of goods¹⁶⁹ and services so as to conform to the principles of socialism and the political, economic and social aspirations of the people of Tanzania.¹⁷⁰ The NPC was the powerful body because its decision was not subject to any review by any court on any ground. Therefore, the sustenance of many industries heavily depended on the NPC decisions.¹⁷¹

In the mid-eighties, due to the new global perspective on economic management, which emphasised reliance on a market-run economy, the government of Tanzania embarked on deliberate policy and legislation reforms directed towards reducing government involvement in production and commercial services.¹⁷² The new policy focused on the trade liberalisation, privatisation and deregulation of the economy with the aim that they stimulate competition in different spheres of production and service in the domestic market. After the government withdrew from total control of the economy, the private sector has dominated the rehabilitation of the industrial sector.

However the issue of market structure and concentration, there is no comprehensive study which has recently been made. It is clear, however, that the number of monopolies has fallen with the abolition of confinement policy. Public monopoly has been reduced in many sectors such as transportation (air, marine and road transport), media, energy (petroleum and

¹⁶⁴ Frola Musonda 'Competition Regimes in the world: Tanzania' available at <http://competitionregimes.com/pdf/Book/Africa/56-Tanzania.pdf> at 288.[Accessed on 15/02/2010].

¹⁶⁵ Ibid.

¹⁶⁶ Alan Whitworth 'Price Control Techniques in Poor Countries: The Tanzania Case' 10 *6 World Development* (1982) 475 at 477.

¹⁶⁷ Act no. 19 of 1973.

¹⁶⁸ Ibid section 3. The NPC was not having the power set prices on services and goods which other institution had powers to do so such services as water, electricity and postal were beyond its scope.

¹⁶⁹ The NPC was essentially responsible for setting prices of manufactures goods, intermediate as well as finished goods locally produced as well as imported goods and a number of basic processed foodstuffs such as sugar, salt, milk, bread and cooking oils. See Alan Whitworth 'Price Control Techniques in Poor Countries: The Tanzania Case' 10 *6 World Development* (1982) 475 at 476.

¹⁷⁰ Act no. 19 of 1973 Section 6.

¹⁷¹ Whitworth (note 165) at 476.

¹⁷² These social and economic reform measures were taken in response to the economic crisis that had persisted in the country and the world as a whole since the early of 1980's. See Tanzania development vision 2025 available at <http://www.tanzania.go.tz/vision.htm>

gas)¹⁷³ communication (postal and telecommunication services)¹⁷⁴ finance (private banks and financial institutions) and agriculture sector especially in crop buying and selling of farming equipments. However, the market is characterised by monopoly and oligopolies structure.

4.3 The Development of Competition Law in Tanzania

4.3.1 Fair Trade Practices Act of 1994

Following the abolition of command and control type of economy and the introduction of privatization, trade liberalisation and deregulation, the Regulation of Prices Act was repealed and replaced by the Fair Trade Practices (FTP) in 1994.¹⁷⁵ The FTP Act was a crucial milestone as it set forth the rules to regulate monopolies¹⁷⁶ and prohibited unfair business practices¹⁷⁷ and rules which protected consumers.¹⁷⁸ Nevertheless, the Act gave too much power to the Minister of Trade with regard to competition matters.¹⁷⁹

The FTP Act also established the office of the Trade Practices Commissioner to deal among other duties with competition cases. The Commissioner was able to rule on merger among multinational accounting firms,¹⁸⁰ solve disputes in the beer brewing industry and false advertising claims.¹⁸¹ However, there was no single case on cartel which was determined by the Trade Practices Commissioner.

The FTP Act had many weaknesses as the provisions for restrictive businesses practices were so broad that they could catch pro- competitive conduct.¹⁸² The Trade Practices Commissioner was not independent as the Minister of Industry and Trade was given excessive discretion on overseeing certain competition cases. For instance the minister was given powers to fix prices,¹⁸³ which was the subject matter of the previous Regulation of Prices Act of 1973. This power of the minister was contrary to the main important principle

¹⁷³ Previous the Tanzania Petroleum Development Company was the only company which was allowed to import petroleum in Tanzania. Currently there are many petroleum companies which are allowed to import and distribute petroleum in Tanzania.

¹⁷⁴ Tanzania Telecommunication Company Limited (TTCL) now has competitors who operate through mobile service.

¹⁷⁵ Act no 4 of 1994.

¹⁷⁶ Part IV of the FTP Act.

¹⁷⁷ Part III of the FTP Act.

¹⁷⁸ Part VI of the FTP Act.

¹⁷⁹ For instance section 35 gave the Minister the power to approve or disapprove merger application. section 42 of the FTP Act.

¹⁸⁰ Coopers & Lybrand and Price Waterhouse

¹⁸¹ ESRF report at 35.

¹⁸² Part III of the FTP Act.

¹⁸³ Section section 42 of the FTP Act.

that competition authorities need to be independent so as to make its decision without fair or bias.¹⁸⁴

4.3.2 The Fair Competition Act

In line with international trends and coping with changing realities, Tanzania repealed the FTP Act and replaced it with the Fair Competition Act in 2003.¹⁸⁵ The Fair Competition Act attempts to correct many shortfalls which were found under the FTP Act. The Act created an independent Fair Competition Commission (FCC)¹⁸⁶ as well as the Fair Competition Tribunal¹⁸⁷ to hear appeals from Fair Competition Commission. The Tanzanian competition authority like other competition authorities in the world has a duty of eliminating cartels in Tanzania. This can be reflected from the objectives stipulated under the Act. One of the main objectives of the Act is focused on enhancing the welfare of the people by promoting effective competition in the markets.¹⁸⁸ Moreover, the Fair Competition Act gives the Competition Authority substantial powers of investigation and enforcement.¹⁸⁹

Along with Fair Competition Commission, competition matters are also being administered by sector regulatory authorities in various sectors. Those regulators are namely the Energy and Water utilities Regulated Authority (EWURA),¹⁹⁰ the Surface and Maritime Transport Regulatory Authority (SUMATRA), the Tanzania Civil Aviation Regulatory Authority (TCAA)¹⁹¹ and the Tanzania Communication Regulatory Authority (TCRA).¹⁹² However, the Act and the Fair Competition Commission have overriding powers over competition matters.¹⁹³

4.4 CARTEL PRACTICES IN TANZANIA

4.4.1 Practices regarded as cartel in Tanzania

¹⁸⁴ OECD Global Forum on competition 'Challenges/obstacles faced by competition authorities in achieving greater economic development through the promotion of competition' contribution from Tanzania available at <http://www.oecd.org/dataoecd/18/63/23733551.pdf> at 4. [Accessed on 15/02/2010].

¹⁸⁵ Act no 8 of 2003.

¹⁸⁶ Ibid section 62.

¹⁸⁷ Ibid section 83.

¹⁸⁸ Section 3 of Fair Competition Act.

¹⁸⁹ Sections 68 and 71 of the Fair Competition Act..

¹⁹⁰ Act no 11 of 2001.

¹⁹¹ Act no 10 of 2003.

¹⁹² Act no. 12 of 2003.

¹⁹³ Section 96 of the Fair Competition Act.

The Fair Competition Act like other competition acts in the world prohibits price fixing between competitors,¹⁹⁴ a collective boycott by competitors¹⁹⁵ and collusive bidding or tendering.¹⁹⁶ Those acts are *per se* prohibited regardless of their effect in competition process in Tanzania.

4.4.1.1 Price fixing

The Act generally prohibits any fixing, restring or control of prices, tariffs, surcharges or other charges for or terms or condition upon which, a party to an agreement supplies or acquires, or offers to supply or acquire, goods or services, in competition with any other party to the agreement.¹⁹⁷

4.4.1.2 Collective boycott by competitors

The Act prohibits any agreement between competitors which its effects are to prevent competitors to supply goods or services from particular persons or acquiring goods or services from particular persons.¹⁹⁸

It further prohibits any agreement between competitors which intend to restrict or control the terms and conditions on which, or the circumstances in which, a party to an agreement supplies goods or services to particular persons or acquires or services from particular persons.¹⁹⁹

4.4.1.3 Collusive tendering or bidding

The Act prohibits any agreement intended to fix or control price or terms or conditions of any bid or tender by any of the parties to an agreement at an auction or in any tender or other form of bidding.²⁰⁰ It also prohibit the an agreement which prevent a party to an agreement from making a bid or tender in any tender or any other form of bidding.²⁰¹

The prohibition of this kind of agreement has been done purposely due to their effects in a market which in turn affects economy and consumer welfare. The Competition

¹⁹⁴ Section 9(1) (a).

¹⁹⁵ Section 9(1) (b).

¹⁹⁶ Section 9(1) (c).

¹⁹⁷ Section 9(2) (b)

¹⁹⁸ Section 9 (2) (b) (i).

¹⁹⁹ Section 9 (2) (b) (ii).

²⁰⁰ Section 9 (2) (d) (i).

²⁰¹ Section 9 (2) (d) (ii).

Commission has been vested with the power of investigating all economic conduct which violates the prohibitions provided under the Fair Competition Act within the country or which have effect in Tanzania.

4.5 SANCTIONS FOR CARTEL OFFENCE

Tanzania like European Community provides for penalties of fines to firms which have been found engaging in cartel practices. The Commission has the power to impose a fine to a convicted firm of not less than five percent of its annual turnover and not exceeding ten percent of its annual turnover.²⁰² The commission is also empowered in addition to fines if it is satisfied that a monetary value can reasonably be placed on the damage including loss of income suffered by a person as a result of cartel practices, order for a fine of two times such monetary value to a person who suffered damage.²⁰³

The liability in cartel offences may also be extended to directors, managers and officers of the convicted firm. However, they are given the right to defend themselves by proving that the offence was committed without their knowledge or that they have exercised all due diligence to prevent the commission of the offence. Despite this liability the Act is silent on the penalty which will be imposed to them. Therefore, the penalty imposed to the firms covers the liabilities of its officers. For a fine to be deterrent the Act should have imposed fines to officers when their firms are found liable for participating in cartel practices. It should further prohibits firms to pay or indemnify fines imposed to its officers because officers are the ones who are making decisions for the company therefore for a penalty to have a deterrent effect it should be felt by decision makers.

Since there is no cartel case which has been determined by the Competition Commission the effectiveness of the sanctions are not yet tested. However, for a corporate leniency policy to work properly the stiffness of the penalty to a large extent contributes much to its successes. Besides, if cartel practices are subjected to fines only, the corporate leniency program can only function well then fines imposed are supposed to be too high to the extent they outweigh the gains accumulated from the participation as well as the presence of the probability of its imposition. Therefore one can conclude that on the issue of sanction, sanctions provided under Fair Competition Act in Tanzania are similar to those applied in the

²⁰² Section 60 (1).

²⁰³ Section 60 (2).

European Commission however the question remains that whether the Fair Competition Commission is able to successful prosecute cartel members so they can feel the sanction without the assistance of the Corporate Leniency Program.

4.6 CARTEL COMPLAINTS IN TANZANIA

Tanzania is at its early stage of implementing competition law and policy. Public awareness on issues concerning competition is not well advanced. However, the responsible authorities are vested with the duty of monitoring the market so as to ensure Tanzania establishes and maintains competitive markets in all sectors. The following are examples of alleged cartels and how were dealt with by relevant authorities.

4.6.1 Oil cartels

Until the year 2000, the Ministry of Energy and Minerals was the regulator for the entire petroleum sector. In 2000, the downstream petroleum industry was liberalised as part of Tanzania's structural reforms.²⁰⁴ One of the objectives of liberalisation was to increase competition among oil companies.²⁰⁵

The petroleum industry has been subject to complaints from the public on alleged collusive practices among its operators. In the period between 2003 and 2004 fuel prices increased considerably on average by 14.67 percent on diesel, 25.54 percent on petrol and 18.44 percent on kerosene.²⁰⁶ It was alleged that the country's seven large importers of petroleum products formed a cartel which threatened the entrance and existence of the small traders.²⁰⁷ The big importers were alleged to collude and charge high rate of warehousing charges to small operators²⁰⁸ this was been done purposely to create barrier to entry to new oil dealers as they would incur high cost of doing business. Even the ones who were able to enter the market should face difficulties in obtaining profits which would enable them to survive in the market and compete hence they had to exist the market leaving the big players enjoying the gains of their collusions. However, in concluding its finding the Fair

²⁰⁴ EWURA Report (note 8) at 2

²⁰⁵ The National Energy Policy of February 2003 'competition on fair and equitable conditions among independent actors shall form the basis for market efficiency'.

²⁰⁶ Musonda (note 163) at 290.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

Competition Commission stated that ‘evidence would not be readily available because all dealers know that it is illegal to engage in such activities’.²⁰⁹

Again in July 2007 petroleum pump prices rose from TSh 1,340 to 1,500 for a litre of petrol to the extent there were complaints that there was collusion among petroleum sellers in Tanzania.²¹⁰ This price increase claimed to give sellers supra profit due to their collusion. EWURA which is the regulatory authority vested with the duty of regulating energy and water utilities sector, conducted an inquiry following complaints from consumers of petroleum products. As a result of that inquiry, EWURA observed that the alleged collusion by oil companies to raise prices was possible though it failed to obtain proof of a coordinated effort on the part of oil marketing companies to set prices.²¹¹ EWURA has the legal duty to promote competition in all sectors which has the power to regulate. However, it is supposed to report its investigation and recommendation to the Fair Competition Commission in this case it did so and the reply from the Commission was that the similar to the one which the FCC advanced in the 2003 oil cartel allegation that evidence to prove collusion is hard to be obtained so as to prove the case.²¹²

The nature of the offence hindered the relevant authority from obtaining evidence to support the allegation which could make members of the cartel liable for their actions. Thus, perpetrators of the cartel were able to recoup the gains from their artificial increase of petroleum prices without being held liable for their actions.

Following that finding that there was possibility of collusion among oil companies then the EWURA Act was amended to give more powers to EWURA. Among powers given to EWURA is to set price of petroleum pump price as an option to avoid price fixing. In reality a regulator should not be a price setter since in a liberalised market competitors are supposed to compete in prices. By giving a regulator the power to set price then efficiency will not be achieved because inefficient operators will be able to enter the market and participate in the market at the detriment of consumers. There will be no vigorous competition among operators which is necessary in stimulating dynamic competition to the

²⁰⁹ EWURA Report (note 8) at 20.

²¹⁰ Ibid at 2.

²¹¹ EWURA Public notice on the inquiry on Allegations of Collusion and windfall gains by the oil marketing companies’ order 07-010 available at <http://www.ewura.go.tz/pdf/Notices/Board%20Order%20on%20Petroleum%20Final.pdf> [Accessed on 23/02/2010]

²¹² EWURA Report (note 8) at 20.

betterment of consumers. The objectives of introducing an open market cannot be realised in a situation where the regulator is setting prices. The purpose of enacting competition Act is to transform the failed market into a competitive market by deterring and punitively punishing those who violate the provision of law.

4.6.1.1 The effects of oil cartels

The rise of price of petroleum had a lot of effect to all Tanzanians due to the reason that the rise of the price of petroleum products influenced the rise of all other things. For instance the oil cartel of 2003 accelerated the increase of bus fair in the country.²¹³ The increase of bus fair raised suspicion that bus operators also colluded to increase bus fair.²¹⁴ Consumers were so affected by that conduct to the extent the Tanzania Consumers Protection Association (TCPA) lodged a complaint to the Fair competition Commission so it can evoke its powers and remedy the situation.²¹⁵

Additionally, food prices increased since transporters argued that the cost of transporting goods has increased due to the rise of petroleum products. Although the increase of food affected majority of Tanzanians poor people suffered more because it was hard for them to afford the increase of food taking into account majority of Tanzanians are living under 1US\$. It can be said the increase of petroleum price affected the economy of Tanzania to a large extent although there is no formal study which have been undertaken to measure the effect of oil cartel.

Furthermore, electricity distribution has not yet been covered in a large part of Tanzania especially in rural areas. Thus the increase of kerosene price affected majority of people in rural areas since it is a main source of energy and also they depend on agriculture as a source of income.

4.6.2 Cement cartel

Tanzania has three cement manufactures which are Tanzania Portland cement company (TPCC), Mbeya Cement Company and Tanga Cement Company. During the year 2007 there

²¹³ Musonda (note 163) at 291.

²¹⁴ Ibid.

²¹⁵ Ibid.

was a sharp increase of cement prices from Tsh 10,500 up to Tsh 22,000.²¹⁶ Many people complained against that increase as it affected their construction capacity. The prevalence of the problem necessitated the government intervention on this issue. It was established that the three cement company did not increase their price as claimed by the sellers and also they did not reduce the amount of cement production.²¹⁷

In responding to the question from one of the Member of Parliament on the issue of sharp increase of cement prices, the Minister of Industries, Trade and Markets stated that there are various reason which are associated with the increase of cement prices such as infrastructure and cost of production. However, the minister also insisted that since the government is no longer setting prices on goods and services unscrupulous suppliers of cement and other products used that leeway to collude on price setting to the detriment of consumers.²¹⁸

Although there was that complain the Fair Competition Commission did not conduct any investigation with regard to the relationship of increase of cement prices. It is clear that the Minister's statement shows there was a need to conduct such investigation in order to detect the collusive behaviour and then prosecute the suspects. The rise of the cement price had causal effect of the rise of all products which use cement as raw material. It also forced some of people to stop construction activities due to the rise of cost of building.

A free market economy must be regulated in order for a country to realise its positive impact to the economy of the country and increase the welfare of its people. Hence having a law which prohibits collusive behaviours does not guarantee the existence of a competitive market if the law is not enforced so as to be perceived as deterrent tool.

Moreover, the government instead of dealing with violators it allowed the importation of cement from foreign countries. This action to a large extent has effect in the economy of the country as it creates imbalance of trade and the use of foreign money to buy cement.

²¹⁶ Available at http://bunge.go.tz/bunge/parl_question.php?pageNum_quest=18&totalRows_quest=20&memberid=1155 [Accessed on 1/06/ 2010].

²¹⁷ Xinhua News Agency reported on 17th December 2007 that 'Tanzania blames dealers for cement price hikes' available at <http://highbeams.co./doc/IP2-13461925.html> [Accessed on 27/05/2010]

²¹⁸ Response of the question raised by Hon. Jenister Muhagama Member of Parliament, Peramiho constituency by the Deputy Minister of Industries, Trade and Markets Hoh. Ezekia Chibulunje, In Parliament session no 10 on 4th February 2008. Available at http://bunge.go.tz/bunge/parl_question.php?pageNum_quest=18&totalRows_quest=20&memberid=1155 [Accessed on 1/06/2010].

Besides even the companies which were allowed to import 100,000 tones up to March 2008 were able to import 4000 tonnes until the government threatened them to cancel their cement importing licences.

4.6.3 Crops Purchase Cartels

After liberalisation, the government through its various cash crops boards is no longer buyer of crops from farmers. The licensing of private buyers was started in 1992 and the government relinquished its control on pricing in 1992.²¹⁹ For framers, liberalisation has meant an early sale of the crops, prompt payment and high prices as a result of competition between traders.²²⁰

However, the benefits of free trade through competition among traders are yet to be realised by majority farmers in Tanzania. Farmers are complaining on collusive behaviours of traders as they decide the purchase price of farmers' food and cash crops. They normally decide who will buy what and what price.²²¹ Furthermore, through their collusive behaviour they adopt delay tactic on purchasing of farmers cash crops such as cotton, coffee, tobacco, tea and cashew nuts with the intention of frustrating farmers whom later can accept low prices for their crops.

Although there are some incidences where the Government had to intervene and abolish some traders purchasing licenses whom appeared having the intention of exploiting farmers in one way or another, majority of them go without being identified.²²² For instance cash nuts farmers had to boycott selling their produce due to the low price which was set by the traders and they lodged their complaint to the government. Besides, the Cashew nut Board also supported their claims by stating that the traders lowered the price without justification because the world trade price for cashew nut was high in India where the cashew nuts are exported from Tanzania.

Moreover, there is attractive condition for cashew nut traders to formulate cartel since they have established their association known as Cashew nut Association of Tanzania (CAT)

²¹⁹ P J Martin et al 'Cashew nut Production in Tanzania' 16 *Crop Protection* (1997) 16 at 8.

²²⁰ Ibid.

²²¹ Bernard Kihyo ' Tanzania Consumer advocacy society: Tanzania consumers are suffering from uncontrolled, unreported inflation and cartel' available at <http://tanzaniaconsumer.blogspot.com/2008/01/tanzania-consumers-are-suffering-from.html> [Accessed on 23/05/2010]

²²² Ibid.

which can also be used to exchange price information. Trade associations have been alleged to be used as a platform of collusive agreements among traders. Therefore, if there is no effective mechanism to detect and prosecute cartel members, consumers and economy of the country will continue to suffer from harm caused by cartels.

In addition, majority of Tanzanians are highly depending on agriculture as their means of generating incomes. Thus competition of traders in purchasing their produce could be the best way of raising their incomes by encouraging them to produce more crops. The impact of that competition would be also important to the economy of Tanzania as it would be able to increase its export trade in the world market which in turn eradicate poverty and create a strong economy for the benefit of the whole nations.

However, such cartels can only be deterred if there is an effective enforcement against cartel in Tanzania. Deterrence can only be achieved if there is detection and prosecution of traders who involve themselves in cartel practices at the detriment of farmers and economy of the country.

4.7 Is Tanzania safe from international cartel?

This part analyses the possibility of cartel in form of collusive tendering or bid rigging at international level which might have implications in Tanzania.

The performance of public procurement markets has major implications for the effectiveness of governance and well being of citizens in any country. Public procurement accounts for a substantial proportion of gross domestic product between 15 to 20 per cent on average in developed economies.²²³ Moreover, procurement often involves goods and services having particular economic, social and or developmental significance example transportation and other physical infrastructure which is vital to the competitiveness of business users and mobility of citizens; hospitals and other public health facilities; schools and universities; and defence and policing.

Due to profit obtained after acquiring government tenders procurement attracts firms to cooperate rather than competition in bidding. Tanzanian government like other governments is also procuring goods and services from private sector both internationally and

²²³ William Kovacic Competition Policy, Consumer Protection and Economic Disadvantage 25 *Washington University Journal of Law and Policy* (2007) 101.

domestically. Therefore, it is not exceptional for such collusive behaviours. Although, there is no case before the Fair Competition Commission or Public Procurement Regulatory Authority (PPRA) with regard to collusive tendering or bidding ringing that does not preclude the discussion of necessity of having an effective mechanism of fighting such behaviour in Tanzania.

The PPRA which is the authority vested with the power of regulating public procurement admits that most of non compliance observed by it are associated from the lack of capacity of people vested with the task of handling procurement activities in the procuring entities.²²⁴ This admission concludes that there is a risk that public procurement may be vulnerable to cartel behaviours without the knowledge of procuring entities.

A good example can be found in the decision of World Bank (WB) to debar seven companies among them are three Chinese construction companies which have won various tenders on roads constructions in Tanzania. Those companies are China State Construction Engineering Corporation, China Road and Bridge Corporation and the China Geo-Engineering Corporation²²⁵. The reason for the WB decision was that those companies engaged in collusive practices under a major WB financed roads project in Philippines.²²⁶

That decision of the WB shows a significant sign that even in Tanzania collusive behaviours can be possibly be practiced in procurement sector because many tenders are being eligible to both international and domestic firms. As it was revealed in International cartels cases that there is convincing evidence that firms which participate in cartel in one market might also participate in another cartel in other markets. Then if the Competition Authority does not have in place effective mechanism to detect and prosecute those behaviours Tanzanian procurement sector might be vulnerable not only to domestic but also international cartels. This has negative effect to the fragile economy of Tanzania as it might

²²⁴ Ramadhani S Mlinga 'CEO Note' 11 9 *Tanzania Procurement Journal* (2009) at 4.

²²⁵ According to Chief executive officer of the Tanzania National Roads Agency (TANROADS) This Company has been awarded various tenders by TANROADS including designing and building the 40km Manyoni to Isuna road in central Tanzania in a contract worth Tsh 30.2 billion (\$23 million), upgrading of the 120km Kyamyorwa to Buzirayombo road in the western zone of Tanzania on a contract worth Tsh 50 billion (\$38.4 million) and the construction of Unity Bridge connecting Tanzania and Mozambique a contract worth \$26.8 million reported in *The East African* 'Dar roads works at risks as WB bans 3 firms' 23rd January 2009 available at <http://theeastafrican.co.ke/news.-/2558/519036/-/view/printVersion/-/s12cjoz/-/index.html> [Accessed on 16/2/2010].

²²⁶ *The East African* 'Dar roads works at risks as WB bans 3 firms' 23rd January 2009 available at <http://theeastafrican.co.ke/news.-/2558/519036/-/view/printVersion/-/s12cjoz/-/index.html> [Accessed on 16/2/2010]

pay large amount of money for less value of the service or goods because the procurement process was not awarded through fair competition.

4.8 THE RATIONALE FOR THE ESTABLISHMENT AND IMPLEMENTATION OF CLP IN TANZANIA

The above discussion reveals how difficult is to detect cartels and gathering evidence which can support the prosecution of cartels. It also showed to what extent the economy and consumers are suffering from collusive behaviour of the business operators in Tanzania. This part proceeds in elucidating why the introduction of corporate leniency program is important both to the economy and consumer welfare.

4.8.1 Economic impact

Stigler defined competition in the product market as ‘rivalry that arises when two or more firms strive for something that not all can obtain’.²²⁷ Economic analyse provide the findings that vigorous competition in domestic market has close relation with economic growth and international competitiveness.²²⁸ Moreover, the existence of competition policy and law alone cannot guarantee economic growth. It is competition enforcement which can to a large extent creates competitive markets which impact economic growth of a country.

The growth of economy in Tanzania is too low. Private sector to a large extent can contribute to economic growth. However, as the previous section revealed that cartel practices are being practiced in Tanzania hence they distort efforts of creating competitive market in Tanzania. For instance collusive behaviour among crop traders affects not only affects welfare of farmers but also have undesirable effect to the economy. The low price set by those traders discourages the expansion of cultivation of cash crops which their exports to the world market bring foreign currency. At certain point cotton growers in western part of Tanzania threatened that they will cultivate cassava instead of cotton due to low price which were set by buyers. Besides, if the price is good farmers will even compete in improving the quality of their produce. Recently, the government has launched a program entitled ‘*Kilimo Kwanza*’ which means ‘Agriculture first’. The president of Tanzania in his speech during the

²²⁷ Wendy Carlin and Paul Seabright ‘ The importance of competition in developing countries for productivity and innovation: Background paper for World Development Report’ Available at http://www.idei.fr/doc/by/seabright/competition_and_productivity.pdf [Accessed on 22/05/2010]

²²⁸ Kazuhiko Takeshima ‘ competition and economic growth: Japan experience from over 60 years’ a paper presented at 5th East Asia conference of Competition and Policy 29th June 2009 at Ulaanbaatar available at http://www.jftc.go.jp/eacpf/06/6_05_03.pdf [Accessed on 27/05/2010]

inauguration of that program insisted on the importance of agriculture on the countries economic development.²²⁹ However, that good program goal can not be achieved if there is corporation rather than competition among crop traders. Competition enforcement may have positive effect in the economic growth as it will create competitive market. A competitive market usually separates out the good from the bad performers, induce the entry of low cost firms that may challenge the incumbents and facilitate exist of the firms with low efficiency.²³⁰

Effective competition enforcement removes barrier to entry in the market. Cartel practices contribute much not on the creation of barrier to entry in market for example in Telecommunication sector if incumbent operators fix their interconnection charges new entrants will not be able to enter the market. New entrants will not be able to recoup profit from their investment as they will pay high interconnection rate to the incumbent operators hence it will be impossible for them to compete with incumbents. Therefore, Tanzanian economy needs many efficient players in various markets which will boost economic growth in the country and promote consumer welfare.

The less fear of detection and punishment encourage firms to cartelise.²³¹ This gap has acts as an incentive to oil companies as it can be noted that the oil cartel has happened twice and organisers of the two cartels were not held accountable for their actions. Besides for them there was nothing to fear because the Competition Commission and sector regulators have no mechanism in place to assist them to acquire evidence which can used to successful prove their collusion.

For a market economy to yield the expected result from competition between firms there must not only be a framework of laws and regulation in place but also an effective enforcement of those laws which can remedy imperfect behaviours in the market. Although, Tanzania has in place a competition law since 2003 its role in the fight against cartel practice is not impressive. Moreover, the Fair Competition Commission which has been vested with the duty of administering the objectives of the Competition Act which are to increase of efficiency in the production, distribution and supply of goods and service, promote

²²⁹ 'Kilimo Kwanza for countrywide distribution' *Daily News* of 5th August 2009. Available at <http://www.dailynews.co.tz/home/?n=3277&cat=home> [Accessed on 27/05/ 2010].

²³⁰ Wendy (note 226).

²³¹ G.R. Bhatia 'Combating cartel in markets : issues and challenges' available at http://www.competition-commission-india.nic.in/speech_article_presentations/GRBhatiaArticle.pdf [Accessed on 6/03/ 2010].

innovation, maximise the efficient allocation of resources and protecting consumers²³² is facing difficulties in discharging that duty due to the absence of an effective enforcement mechanism which can assist it to gather evidence and prosecute suspects of collusion. Therefore, corporate leniency policy is the perfect policy which can assist the Fair competition Commission in the fight against cartel and hence the creation of competition which can contribute much on economic growth in Tanzania.

4.8.2 Build credibility and reputation of the Fair Competition Commission

The introduction of corporate leniency program will assist the Commission to achieve the objective of establishment which is to enhance competition in Tanzania and protecting consumers from anticompetitive behaviours. As the previous discussion have revealed that in Tanzania cartels practices are being practices however cartel members have not yet prosecuted by the Competition Commission. Moreover, the main reason being the absences of a mechanism which can assist the Competition Commission to obtain decisive evidence which can prove existence of collusive arrangement among competitors. This weakness automatically lowers the credibility and reputation of the Fair Competition Commission in the eyes of the public taking due to the harm caused by the cartel practices to consumers.

The introduction of CLP together with the existing investigative tools to a large extent will solve this problem. CLP if well designed can deter the formulation of cartels and it can also force members of existing cartels to defect from cartel and run to the Fair Competition Commission to give evidence in exchange of leniency treatment from the authority.

The evidence gathered can enable the Commission to successfully prosecute cartel members and thus deter the formulation of cartels. Consequently, this will build reputation of the Commission. Reputation is an extremely valuable asset to any Competition Authority. It is perceived that the reputation of an authority influence the legislative decision on budgets and the additions of agency's statutory authority.²³³ It also influences the decision of firm officials on whether to comply with the law or not.²³⁴ Moreover, there must be observable

²³² Section 3 of the Fair Competition Act.

²³³ William E Kovacic 'rating the competition agencies: what constitutes good performance? 903 *George Mason law Review* vol. 16 issue 4 903 at 905.

²³⁴ *Ibid.*

gains to consumers that derive from actions of the Competition Commission as this will create citizens confidence in public governance and thereby justify its establishment.²³⁵

Moreover, it should be noted that in this era of the fight against international cartels, credibility and reputation of a competition authority is an important aspect. Competition authorities are entering on voluntary multilateral cooperating agreements which assist them in the fight against international cartels because there is no international organisation which can solve international competition matters. Therefore competition authorities would possibly want to enter into cooperating agreements with reputable and active competition authorities because they would want to exchange experience and important information on cartels. Tanzanian Fair Competition Commission needs to be active in the fight against cartel so as to attract other competition authorities to cooperative with it. Therefore, CLP can assist the Commission in building its reputation to foreign competition authorities as it will be able to fight against cartels. Tanzania can learn this from Zambia a similar least developed country which its competition authority performance is quite impressive. The Zambia competition authority is currently working jointly with Egyptian and South African competition authorities in the Joint Food Project (JFP).²³⁶ The objective of JFP is to provide a platform for the three competition authorities to facilitate learning through sharing of work experiences and assisting each other in building capacity to develop better ways of rooting out anticompetitive behaviour in the food sector of their respective countries.²³⁷

4.8.3 Cost saving in the cartel enforcement

The introduction of corporate leniency program will enable the Fair Competition to save cost in the enforcement against cartels. Corporate leniency program assist the authority to obtain deceive information which enable it to prove the existence of collusive arrangement between competitors. In the event of detection, the commission will successful prosecute members of the cartel without using much of its limited resources.

²³⁵ Competition Advocacy: Challenges for developing Countries a paper available at <http://oecd.org/dataoecd/52/42/3203371> at 2 [Accessed on 24/04/2010].

²³⁶ Mulalo Shandukani 'Joint Food Project being undertaken by the Zambian Competition Commission, the Competition Commission of South Africa and the Egyptian Competition Authority' 33 *South Africa Competition News* 2009 at 7 available at

<http://www.compcom.co.za/assets/Uploads/AttachedFiles/Mydocuments/december-2009newsletter.pdf>

[Accessed on 16/04/2010].

²³⁷ Ibid.

As in the previous section the paper has shown that the Competition Commission together with EWURA had incurred cost of making an inquiry on the sharp increase of oil prices in Tanzania. The inquiry which cost much of their resources and yet it did not give hard evidence which could enable them to prove the case against members of oil cartel.

The evidence obtain from Corporate Leniency policy will enable it to resolve an investigation and thereafter prosecute the case and the imposition of sanction as stipulated in the Act. Moreover, the information given and the need of the applicant to continue cooperating with the commission in the investigation not only assist the Commission in the prosecution but also saves public time and resources and provides the commission with a fuller picture of what the contravention entails.²³⁸ A good example can be illustrated by the application done by the South Africa Primer Food company on the bread cartel whereby it revealed all information regarding to that cartel to the Commission in exchange of immunity from any sanction. The information obtained assisted the Commission in the investigation into the Western Cape cartel hence it took less than two months to conclude and investigation into the national bread cartel's took a few more months.²³⁹

It can be noted that resource issue is well known to be a critical aspect to most of competition authorities and Tanzania Fair Competition Commission is not exceptional to this problem.²⁴⁰ Given this scarcity, competition commission need to have a mechanism is not so costly but guarantee desirable impact in the process of fighting cartel in Tanzania. The above example of South Africa Competition Commission exemplifies how cost and time can be saved by corporate leniency policy. Furthermore, the time and resources saved due to the shortening of investigation process can further be used by the Fair Competition Commission to investigate other markets which have signs of cartel practices and support advocacy functions of the Competition Commission.

4.8.4 Deterring and detecting cartels

The fight of cartel is legally and practically a demanding task due to the reason that cartels are so secretive. Moreover, the Competition Authority has the burden of proving the existence of the arrangement between competitors rather than proving their effect in the

²³⁸ 10 years at 50.

²³⁹ Ibid at 52.

²⁴⁰ Competition Advocacy: Challenges for developing Countries a paper available at <http://oecd.org/dataoecd/52/42/3203371> at 2 [Accessed on 24/04/2010].

competition process. For the Competition Commission to successfully detect and prosecute participants of cartel it needs to have a mechanism which will enable it to obtain evidence from members of cartel. That evidence can not be obtained if at all the participants do not anticipate detection because to conceal evidence seems to be outweighing the giving out of information.

In addition, the absence of leniency programs attract firms to collude because they are aware that the gains of obtains in the cartel is more valuable and its detection is very difficult due to the secrecy built upon their unlawful arrangement.²⁴¹ On the other hand, Corporate Leniency Program increases the risk of detection of cartels as firms have to weigh up the possibility of fellow cartel members making use of this policy. If cartel members believe that one firms among them may use that opportunity provided under the leniency program , then it is in their interest to be ‘the first through the door’, since the reward in terms of immunity is great. According to the survey made by the South Africa Competition Commission the main factor which accelerates the increase of application of cartel is the distrust condition created by the CLP.²⁴² The intention of establishing CLP is to create prisoner’s dilemma among members of the carte in that it create uncertainty of the intention of other members of the cartel thus it is a clear to race to apply first. This means that cartel members are unable to fully trust fellow cartelists, as they are each aware that it is in their competitors’ interests to be the first to file for leniency.

On the previous section on cartel allegation, it has been shown that oil cartel seems to repeat regardless of its impact in the economy and consumer welfare. Operators of this cartel are confidently that neither Competition Commission nor EWURA can prove that the existence of alleged collusion as there is they have inadequate capacity to detect, discover and prosecute cartels. Therefore, the introduction of the corporate leniency policy in Tanzania will significantly create incentives to colluding firms cooperate with the Fair Competition Commission hence deter the formulation of cartels as well as punish violators.

4.9 Conclusion

This chapter has looked at the trend of the establishment of competition law in Tanzania. The current Fair Competition Act prohibits cartel practices in Tanzania regardless of their impact

²⁴¹ Harrington (note 75) at 16.

²⁴² 10 years at 46.

in Tanzania. It has been established that although there are cartels practices among competitors in some sectors among competitors such as oil companies, cement suppliers and crop traders, the Commission in some instances have often faced serious difficulties in detecting and obtaining sufficient evidence to prosecute cartel members. Therefore, cartel participants have taken that weakness to organise cartel practices at the detriment of consumers and also ruin the economic growth by artificially increasing price of goods and services. Furthermore, it has also shown that although there is no case on collusive tendering in Tanzania there is a sign that such kind of behaviour can be practiced in Tanzania. Therefore, I conclude that it is worth to introduce corporate leniency policy in Tanzania as one of mechanism which can assist the Fair Competition Commission to fight against cartel in Tanzania.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The paper has demonstrated the secrecy nature of cartel agreements and the harm which they cause to economy and consumer welfare. It is the harm which they cause attributed much for them to be regarded as per se prohibited competition violations. However, proving the existence of cartel is not an easy task to competition authorities due to the secrecy wall. It was the United States in 1978 which first formulated corporate leniency policy to assist DoJ to find evidence which can enable it to detect and successfully prosecute cartel violators. Due to uncertainty the aim of its establishment was not attained hence the revision of that policy in 1993. The 1993 corporate leniency policy has been the most successful tool of fighting not only domestic cartel but also large international cartel which operated for a number of years. This success made the European Union to follow the United States foot steps in formulating its corporate leniency program which also made the European Union to be able to fight cartel as it has been able to detect and prosecute cartels.

The paper has revealed that corporate leniency policy cannot only yield the intended result in developed countries but also in developing countries. South Africa which is a developing country through the use of corporate leniency policy has been able to unearth cartels and punish cartel members through the assistance of corporate leniency program. Thus it has built its reputation not only to South Africans but also to the whole world.

Tanzania is not free from cartel practices as it has been shown that there are cartel practices which have brought about an undesirable effect to economic growth and consumer welfare. The Fair Competition Commission is facing great difficulties in prosecuting cartel

members due to the absence of an effective mechanism which can enable it to get evidence from members of cartel. Therefore, traders are using that gap to obtain supra profit at the detriment of consumers and economy. Thus from the lessons drawn on how corporate leniency program assist competition authorities to curb cartel practices, I conclude that it worth for Tanzania to introduce corporate leniency policy as another mechanism to assist the Fair Competition Commission in the fight against cartel and creating competitive market in Tanzania.

5.2 Recommendations

The following recommendations should be taken into account when designing corporate leniency policy in Tanzania;

- 5.2.1 The introduction of corporate leniency program in Tanzania
- 5.2.2 The competition Commission should be proactive in the fight against cartel by identifying and conduct investigation on sectors which shows some signs of cartel practices among its competitors. This action will trigger self reporting from potential leniency applicants. This is action is important because cartel participants must also feel that even if they do not defect and report their engagement in the cartel practices there is possibility of their act to be detected by the Competition Commission. This mechanism to a large extent has great contribution on the success of the Corporate Leniency Policy in South Africa.
- 5.2.3 Adequate resources should be allocated to the Competition Commission so that it can have ability to retain qualified employees who can assist it in the fight against cartel. Besides, investigation in cartel cases needs specialist skills which differ from the skills required for investigating and prosecuting other infringement of competition law. Furthermore, resources should also be used to make advocacy on competition issues because it is important for the public to be aware of the functions of the Fair Competition Commission, their rights and their role in the facilitation of detection of cartel practices.
- 5.2.4 Since certainty and transparency are fundamental principles of a successful corporate leniency policy, the Fair competition Act should be amended to empower the

Commissioner of the Fair Competition Commission to make corporate leniency policy details in a subsidiary legislation. This subsidiary legislation should contain all details of the corporate leniency program. It is better for corporate leniency program to be in subsidiary legislation rather than in the Act itself because it will be easy to amend it without following parliamentary bureaucratic procedure which can consume a lot of time.

- 5.2.5 The corporate leniency policy should automatically provide for leniency to the first *eligible* applicant who has furnishes required information. This will encourage potential applicant to feel free to use the policy rather than making trial without assurance of the outcome.
- 5.2.6 It should also be clear under what circumstance the conditional leniency can be revoked by the Fair Competition Commission. This will enable the Commission to achieve the objective of the corporate leniency program as applicants will know that they have obligation to corporate and be honest to the commission.
- 5.2.7 Potential applicants should be allowed to make application for leniency through oral submission. This will be an incentive to applicants as it will make them to be in a safe side rather than being forced to make written submission as this might be used against them in civil litigation. At all time the application for leniency should be taken as safer decision so as to make the race to the Fair Competition Commission valuable.
- 5.2.8 The corporate leniency policy should not differentiate between ringleader or instigator and other members. Besides it is hard for members of the cartel to draw a line of their roles in the participation of the cartel therefore the exclusion can act as disincentive for potential applicant as they may hesitate to approach the Commission with the fear that they might be ineligible for leniency. Moreover, instigator might have valuable evidence needed to prove the existence of the collusive arrangements. However, members of cartel who coerce others to participate should not be eligible for leniency.
- 5.2.9 The corporate leniency program should go together with the introduction of amnesty plus.

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