

THE USE OF PRESUMPTIONS IN DETERMINING LIABILITY  
FOR PASSIVE PARTICIPATION IN PRICE-FIXING CARTELS: A  
COMPARATIVE STUDY



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# The use of presumptions in determining liability for passive participation in price-fixing cartels: a comparative study

## I INTRODUCTION

Competition law regulates economic competition within free markets. It has a primary focus on combatting of cartels, which represent the most flagrant violations of competitive principles.<sup>1</sup> Cartels take the form of horizontal agreements among firms operating at the same market level.<sup>2</sup> While competition authorities worldwide share a common resolve to denounce cartels, they adopt varying approaches to their prosecution and punishment. The inherent secrecy of cartels makes it a daunting task to strike the right balance in terms of legislative and government intervention. Consequently, courts in different jurisdictions have allowed evidentiary presumptions aimed at aiding authorities to establish the essential elements of transgressions, particularly in cases of price-fixing.<sup>3</sup>

### *(a) Problem Statement*

Price-fixing is a severe infringement of free competition. The practice is particularly concerning as cartels can attain market power and, in turn, manipulate trade to their advantage. However, due to the clandestine and undocumented nature of cartels, price-fixing can be particularly challenging to prove. This complexity has prompted various jurisdictions to develop presumptions that simplify the task of competition authorities. This thesis explores the web of presumptions that operate in two chosen jurisdictions – the European Union and the United States. The research focus will then extend to the South African context to ultimately consider the appropriate role of these presumptions in safeguarding competition integrity and to assess whether they strike an appropriate balance between efficiency and fairness.

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<sup>1</sup> Philip Sutherland & Katharine Kemp *Competition Law of South Africa* at 1–1.

<sup>2</sup> Einer Elhauge *United States Antitrust Law and Economics* 4<sup>th</sup> ed (2022) at 53.

<sup>3</sup> Richard Whish & David Bailey *Competition Law* 10<sup>th</sup> ed (2021) at 536.

*(b) Significance of the Problem*

The appropriate balance between evidentiary presumptions and the burden of proof is of paramount significance in the context of price-fixing offences. Finding this balance is vital in preventing detrimental effects on competition and market dynamics. A process that is unduly tolerant may allow offenders to evade punishment, while an overly rigorous process can have a deterrent effect on competition and impede market dynamics. This is especially true during periods of worldwide economic vulnerability, for example the Covid-19 pandemic.

The EU has been developing its jurisprudence on the use of presumptions for many years and the US is not far behind. In South Africa, on the other hand, the issue has not been fully ventilated and courts have only recently begun to explore the various options, relying heavily on the EU for guidance. Comprehensive consideration of these issues from a South African perspective has not yet been undertaken.

*(c) Research Question*

Given the clandestine nature of cartels, this thesis therefore considers the following research question: How should competition authorities navigate evidentiary presumptions in borderline cases of price-fixing to ensure an effective and fair process that respects the rights of all parties involved?

This thesis will investigate the research question with an emphasis on South Africa's unique context and will also consider variations in the approaches of foreign legal systems.

This research considers, as a sub-question, whether the EU is the most suitable jurisdiction for South Africa to draw guidance from in addressing price-fixing. It will do so with reference to the US legal system as a potential alternative to the use of presumptions in response to cartel secrecy. The tentative answer suggests that the US model might offer a more balanced approach to addressing price-fixing cases more effectively, that aligns with South Africa's specific needs and circumstances. As the research will emphasize, however, each legal system must be considered and understood as a whole before categorical rules are drawn and transplanted from one to the other, as transplants may introduce unforeseen consequences.

*(d) Structure of the thesis*

This thesis is structured to provide a comprehensive analysis of the issues discussed above. Part II sets out relevant foundational concepts and provides a contextual discussion of

competition law penalties in the jurisdictions of focus. Parts III and IV delve into the European and U.S. positions respectively, analysing the process of proving and defending price-fixing cases, including the development of presumptions. Part V explores the South African position and the interplay of systems discussed earlier. Finally, Part VI synthesizes the findings to determine the extent to which foreign systems provide guidance for addressing the legal questions raised in the South African context. Part VII will summarise the discussion, conclude and highlight key findings.

## II BACKGROUND TO THE DISCUSSION

### *(a) The concept of price-fixing*

Price-fixing is a type of horizontal practice involving competitors within the same market who set prices for goods and services at an artificial, non-free market level.<sup>4</sup> They do this to increase, lower or maintain prices, depending on the objectives and strategies of the firms involved.

Price-fixing agreements operate within what we refer to as cartels. Cartels emerge when competitors choose to co-operate or collude with one another rather than to compete.<sup>5</sup> This grants each individual firm the power to enhance their influence on the market beyond what would be achieved independently. Cartel members merely pose as competitors while collectively exerting market control and disrupting the workings of a free market economy.<sup>6</sup> This behaviour is driven by the potential for increased profits that would not be attainable in a typical, free market scenario.

While the above is generally applicable, the concept of price-fixing is specialised and thus approached differently in each jurisdiction. Consequently, subsequent chapters will provide definitions of price-fixing relevant to the particular jurisdiction under discussion.

### *(b) The concept of public distancing*

The concept of ‘public distancing’ is crucial in a competition law context and directly related to the presumptions at play in two of the three jurisdictions investigated in this thesis. It intervenes in cartel cases where an undertaking seeks to disconnect itself from a cartel, and is used to break the evidential thread or rebut the presumption.<sup>7</sup> In other words, what the public distancing defence in effect does is to break the causal chain between the existence of an anti-competitive meeting and the concrete behaviour on the market by the attendees.<sup>8</sup> Before turning

<sup>4</sup> Luke Kelly et al *Principles of Competition Law in South Africa : Commercial Law* (2017) at 28; ‘Justice Manual Title 7: Antitrust’ available at: <https://www.justice.gov/jm/title-7-antitrust>.

<sup>5</sup> Isabel Goodman et al *Principles of Competition Law in South Africa* (2017) at 4.2 available at: <http://ezproxy.uct.ac.za/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1700046&site=ehost-live>.

<sup>6</sup> Ibid.

<sup>7</sup> Marc Abenhaim ‘Public Distancing and Liability in Cartel Cases: Does Distance Lend Enchantment?’ (2016) *World Competition* 413–29 at 413.

<sup>8</sup> *Commission of the European Communities v Anic Partecipazioni SpA C-49/92 P* European Court Reports 1999 I-04125 at 118–21.

to the development and transformation of the public distancing defence in Parts III and V, it is important to understand at the outset what public distancing originally entailed. In this regard, Scordamaglia explains that a presumption of infringement arises as soon as active or passive cartel participation is proven, and a firm needs to adduce evidence to show its participation was without anti-competitive intent in order to publicly distance itself.<sup>9</sup> Bailey proposes six key requirements that illustrate the characteristics traditionally associated with a ‘public distancing’.<sup>10</sup>

First, the act of public distancing should take place promptly and without undue delay. Secondly, the firm that wishes to exit should denounce the cartel's objectives and agreements. This denouncement should, in the third place, be unequivocal – which in turn means that internal reservations or passive behaviour will not suffice. In the fourth place, confidentiality in terms of the firm’s strategy and pricing intentions is required. If disclosed, these intentions must be promptly abandoned. The fifth requirement relates to independent commercial behaviour and would require a firm to demonstrate that its subsequent commercial policies and behaviour in the market are determined independently from what was discussed at cartel meetings. Finally, no further participation is tolerated. The firm must refrain from attending any further meetings related to anticompetitive activities.<sup>11</sup>

Scordamaglia proposes a final requirement from case law, in addition to those identified by Bailey, namely a duty of result: proving that the other cartel members understood the conduct as terminating the firm’s involvement.<sup>12</sup>

It appears that public distancing is a single concept that can be employed to address one of two distinct situations: First, it can be invoked when a firm seeks to avoid becoming involved in a cartel from the outset. In this situation, the firm must then clearly and unequivocally express its rejection of the cartel's objectives and agreements in order to publicly distance itself.<sup>13</sup>

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<sup>9</sup> Andreas Scordamaglia ‘Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees’ (2010) 7 *The Competition Law Review* at 25.

<sup>10</sup> David Bailey “‘Publicly Distancing’ Oneself from a Cartel’ (2008) *World Competition* 177–203 at 179.

<sup>11</sup> *Ibid* at 179.

<sup>12</sup> Scordamaglia, *supra* n 9 at 27–8; *Archer Daniels Midland Co v Commission of the European Communities C-510/06 P* European Court Reports 2009 I-05843.

<sup>13</sup> Bailey, “‘Publicly Distancing’ Oneself from a Cartel’, *supra* n 10 at 187; Scordamaglia, *supra* n 9 at 27.

Secondly, it comes into play when a firm that initially participated now wishes to terminate its involvement in an ongoing cartel.<sup>14</sup> To publicly distance itself from the cartel, the firm must unequivocally renounce the entire plan devised to distort competition and commit to no longer participating, either explicitly or implicitly, in the cartel's restrictive practices.<sup>15</sup>

It is worth noting that "whistle-blowing" is not a strict requirement for public distancing, although it is an effective means of doing so. While public distancing does not necessarily demand public announcements in, for example, a newspaper or website, it does require overt and incontrovertible proof that the firm was not part of the cartel.<sup>16</sup> The term "*public distancing*" is then perhaps somewhat of a misnomer.<sup>17</sup> The clear and unequivocal denouncement must be made to the competitors forming part of the cartel, and not to the general public. It would otherwise undermine the significance of the concept as a means of avoiding liability and might even imply an infringement in cases where the elements of price-fixing are not met.<sup>18</sup>

*(c) Value of the comparison*

Section 1(3) of the South African Competition Act 89 of 1998 ("Competition Act") allows for foreign and international law to be considered when interpreting or applying its provisions. In the realm of competition law, foreign law can offer valuable guidance, and competition authorities may consult foreign authorities more frequently than in other areas of law.<sup>19</sup> Both the Competition Tribunal ("Tribunal") and Competition Appeal Court ("CAC") have relied extensively on authority from, in particular, the US and EU.<sup>20</sup>

Sutherland and Kemp explain that like its US and EU counterparts, the current Competition Act is the product of political and economic events. It has its roots in the radical transformation process that followed the dismantling of Apartheid and the establishment of a

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<sup>14</sup> Scordamaglia, *supra* n 9 at 27.

<sup>15</sup> Bailey, "'Publicly Distancing' Oneself from a Cartel', *supra* n 10 at 187.

<sup>16</sup> *Ibid* at 188.

<sup>17</sup> *Ibid* at 189.

<sup>18</sup> *Ibid* at 188.

<sup>19</sup> Sutherland & Kemp, *supra* n 1 at p2-3.

<sup>20</sup> *Ibid* at p2-4.

constitutional democracy.<sup>21</sup> It must always be analysed and understood against this backdrop and, for that reason, the EU and US approaches to price-fixing are appropriate comparators.

However, any comparative analysis is accompanied by the caveat succinctly expressed by Schultz JA in *Standard Bank Investment Corporation Ltd v Competition Commission*,<sup>22</sup> :

*“Reference to foreign law is sometimes helpful, particularly when one’s own system is silent or uncertain on a point, or may be thought to be deficient, or simply for purposes of comparison and enlargement of view. But the ransacking of the legal libraries of the world may, where it is not appropriate, lead to [...] even more confusion, without any commensurate benefit. There is also sometimes a positive danger in resorting to foreign law – that it should be only half understood, because the person going to it does not sufficiently understand the foreign system.”*<sup>23</sup>

This aptly summarises the value of a comparison with foreign law but also serves as a warning against direct importation of foreign concepts and practices into our own law. The appropriate balance is a question that must be kept in mind throughout. The justifications and caveats surrounding each jurisdiction as a comparator will be discussed in more detail in each of the respective chapters.

*(d) The nature of penalties imposed for price-fixing in each jurisdiction*

The nature of the proceedings and the possible penalties that could be imposed where an infringement is found will naturally play a role in the investigative process. Where penalties are more severe, authorities should require a higher standard of proof to discharge the onus and more thorough investigation should be required. This, in turn, has an effect on the role and appropriateness of presumptions and the gap they will be allowed to bridge. The nature of penalties in each jurisdiction will be discussed below to show how approaches differ.

*(i) EU*

Council Regulation (EC) No 1/2003 of 16 December 2002 (“Regulation 1/2003”) gives effect to the EU rules that prohibit anti-competitive agreements such as price-fixing cartels.<sup>24</sup> Regulation 1/2003 gives the European Commission (“The Commission”) the principal power to impose fines on undertakings that infringe these provisions, which is known as public

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<sup>21</sup> Ibid at 3–46.

<sup>22</sup> *Standard Bank Investment Corporation Ltd v Competition Commission* 2000 2 SA 797 (SCA).

<sup>23</sup> Ibid at p30.

<sup>24</sup> A full discussion of the legislative framework will be provided in Part III below.

enforcement of EU competition law.<sup>25</sup> In addition, national courts of EU Member States can enforce rights and obligations placed on individuals, which is referred to as private enforcement of EU competition law.<sup>26</sup> Private enforcement allows for civil damages claims parallel with administrative fines, but public enforcement will be the focus for the purposes of this thesis.

The principal sanction available to the Commission is that of imposing fines.<sup>27</sup> Article 23(2) of Regulation 1/2003 allows for substantial fines to be imposed on undertakings that infringe Article 101 of the TFEU. Courts have confirmed that the Commission has a wide discretion in determining the level of fines to be paid by perpetrators, but fines are capped at 10% of a firm's worldwide turnover in the previous year.<sup>28</sup> In deciding the level of fine to be imposed, the Commission must consider the duration of the infringement as well as any aggravating or mitigating circumstances.<sup>29</sup> More guidance is provided in the "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003."<sup>30</sup>

These fines are administrative in nature as Article 23(5) of Regulation 1/2003 clearly states that fines imposed for anti-competitive activities "*shall not be of a criminal law nature.*"<sup>31</sup> The Commission cannot act as a criminal court, imposing fines on individuals or sentencing them to prison terms.<sup>32</sup> This is an important departure from the US position which will be discussed below. However, despite this, EU Courts have imported some basic procedural aspects of criminal law into EU competition law, inter alia, the presumption of innocence, and the application of the presumption of innocence in investigations is by now uncontroversial.<sup>33</sup>

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<sup>25</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union 2013, at 2.

<sup>26</sup> Ibid.

<sup>27</sup> Slaughter & May 'The EU competition rules on cartels' at 8.

<sup>28</sup> *Dansk Rørindustri A/S v Commission of the European Communities T-21/99*; Slaughter & May, supra n 27 at 8.

<sup>29</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty at Art 23.

<sup>30</sup> Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA Relevance) 2006,.

<sup>31</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty.

<sup>32</sup> Whish & Bailey, supra n 3 at 288.

<sup>33</sup> Maria João Melícias "'Did They Do It?' The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations' (2012) *World Competition* 471–509 at 479.

In addition to the risk of fines that may be imposed at EU level, companies involved in cartel activity run the risk of various other penalties under the legislation of their respective countries. National Competition Authorities of some EU Member States may take enforcement action against individuals, which may include criminal sanctions, but this will depend on their respective national legislation.<sup>34</sup>

Arguments have been made for EU enforcement to take on more stringent measures than administrative fines, but criticism of the current approach is beyond the scope of this thesis.<sup>35</sup>

(ii) US

In the context of US antitrust enforcement, the two key agencies are the Federal Trade Commission's Bureau of Competition and the Department of Justice's Antitrust Division.<sup>36</sup> The Bureau of Competition handles civil cases related to suppression of competition, while only the Department of Justice can prosecute criminal violations, and indeed most of the cases it brings are criminal in nature.<sup>37</sup>

The Department of Justice has a dedicated Antitrust Division (“The Division”). The mission of this Division is to promote and maintain competition in the American economy. Its primary functions include general criminal and civil enforcement of the Federal antitrust laws and prosecution of all litigation that may arise from such civil and criminal investigations.<sup>38</sup> The Division, in practice, follows a policy that generally favours proceeding with criminal investigation and prosecution in cases involving patently anticompetitive behaviour, such as explicit horizontal, *per se* unlawful agreements like price-fixing and bid rigging.<sup>39</sup> However, there are more complicated circumstances under which they might opt for a civil process instead.<sup>40</sup> These cases may include unsettled or uncertain case law, truly novel issues of law or fact, confusion reasonably caused by past prosecutorial decisions or clear evidence that the

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<sup>34</sup> Slaughter & May, *supra* n 27 at 9; Sean Janse van Rensburg *Administrative Penalties in South African Competition Law* (University of Pretoria, 2020) at 57.

<sup>35</sup> For more on this, see for example Janse van Rensburg, *supra* n 34. and the sources cited therein.

<sup>36</sup> Deon Prins & Pieter Koornhof ‘Assessing the nature of competition law enforcement in South Africa’ (2014) 18 *Law, Democracy and Development* 136–63 at 158.

<sup>37</sup> Elhauge, *supra* n 2 at 14.

<sup>38</sup> ‘Justice Manual Title 7: Antitrust’, *supra* n 4 at I–2.

<sup>39</sup> Elhauge, *supra* n 2 at 14–5; Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* 6<sup>th</sup> ed (2020) at 593.

<sup>40</sup> Roxann E Henry ‘Per Se Antitrust Presumptions in Criminal Cases Comment’ (2021) 2021 *Columbia Business Law Review* 114–71 at 143.

subjects of the investigation were not aware of, or did not appreciate, the consequences of their actions.<sup>41</sup>

In general, the nature of the suspected conduct guides the decision. If the conduct aligns with the kind of behaviour that the Division typically prosecutes criminally, and criminal intent relating to anticompetitive effect is likely to be proven, the investigation will start as criminal.<sup>42</sup>

The Division follows certain characteristics that are typically present in criminal violations, namely agreement among competitors that is inherently likely to raise price and restrict output. The agreement is generally covert or fraudulent and conspirators are generally aware of the probable anti-competitive consequences their conduct may have.<sup>43</sup>

However, if one of the complicating factors mentioned above is present, a civil process may be initiated instead. The ultimate decision takes into account the specific circumstances of each case to determine the appropriate legal approach.

In the case of a criminal conviction, the US legislation prescribes fines of up to \$100 000 000 for corporations or a fine of \$1 000 000 for individuals, or a possible prison sentence.<sup>44</sup> A corporate leniency policy is, however, in place to mitigate punishment or prosecution for offenders who willingly come forward with their transgressions before the Division became aware thereof.<sup>45</sup>

(iii) *South Africa*

Section 59 of the Competition Act regulates administrative penalties. An administrative penalty is a punitive measure that the Tribunal can impose on an undertaking for participating in an anti-competitive practice prohibited by the Competition Act.<sup>46</sup> Section 59(1)(a) provides that the Competition Tribunal may impose certain administrative penalties if it finds that a party has participated in a prohibited practice such as price-fixing.

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<sup>41</sup> 'Justice Manual Title 7: Antitrust', supra n 4 at III-12; Prins & Koornhof, supra n 36 at 158. See further Donald Baker 'To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement' (1981) 12 *Journal of Reprints for Antitrust Law and Economics* 411-26 at 414-8.

<sup>42</sup> Hovenkamp, supra n 39 at 593.

<sup>43</sup> Ibid at 594.

<sup>44</sup> Article 1 of the Sherman Act will be discussed in full in Part IV.

<sup>45</sup> Hovenkamp, supra n 39 at 594.

<sup>46</sup> Michael Wilter 'Penalties for Anti-Competitive Conduct: Sharpening the sting of South Africa's competition authorities' at 2.

These administrative penalties are determined and enforced in two ways. The first method is unilateral determination by the Competition Tribunal under Section 59. The second method involves formulating the penalty through a consent agreement between the violating firm and the Competition Commission. This agreement is then approved and enforced by the Competition Tribunal under Section 58.

The nature of the administrative penalties remains a question to be answered. In the decision of *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd* (“*Federal Mogul*”),<sup>47</sup> the Tribunal explained that the Competition Act is clear in its confinement of administrative penalties to the realm of civil law.<sup>48</sup>

Later decisions have left the position less clear-cut,<sup>49</sup> with obiter remarks indicating that “*the so-called ‘administrative penalties’ bear a close resemblance to criminal penalties.*”<sup>50</sup> However, in line with the *Federal Mogul*-case, section 68 of the Competition Act reminds us that the standard of proof required in proceedings under this Act is the civil one, on a balance of probabilities. A separate chapter in the Competition Act deals with criminal offences, which are treated differently.<sup>51</sup>

In essence, the position in South Africa regarding the nature of administrative penalties under the Competition Act is not as certain as in the EU and US, as discussed above. It is generally accepted though that the proceedings of the South African Competition authorities are *sui generis* in nature, with aspects related to both civil proceedings and criminal proceedings, although seemingly weighted towards civil.<sup>52</sup>

The standard of proof mentioned in the Competition Act and most case law points to this being true and authors likewise agree that the penalties prescribed by the Competition Act, while of a hybrid nature, bear a stronger resemblance to civil penalties.<sup>53</sup>

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<sup>47</sup> *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd 08/CR/Mar01.*

<sup>48</sup> *Ibid* at p87.

<sup>49</sup> See for example *Woodlands Dairy (Pty) Ltd & v Competition Commission 2010 (6) SA 108 (SCA).*

<sup>50</sup> *Ibid* at p10.

<sup>51</sup> See Chapter 7, ss69-77. It is relevant to note that price-fixing is not listed as a criminal offence in this chapter and thus we can proceed on the assumption that penalties for price-fixing will never be of a purely criminal nature.

<sup>52</sup> Prins & Koornhof, *supra* n 36 at 143. See for example *Federal Mogul*, which stated in paragraph 70 that “*the courts recognize that administrative bodies will be enforcing the law through hybrids that are neither wholly criminal nor civil.*”

<sup>53</sup> Sutherland & Kemp, *supra* n 1; Prins & Koornhof, *supra* n 36; Janse van Rensburg, *supra* n 34; Wilter, *supra* n 46; M Neuhoff et al (eds) *A Practical Guide to the South African Competition Act 2<sup>nd</sup> ed* (2017).

Relevant provisions of the Competition Amendment Act 1 of 2009 came into operation on 1 May 2016.<sup>54</sup> Section 73A criminalises the conduct of a director or someone with similar management authority in a firm, if such conduct causes the firm to engage in a practice prohibited by section 4(1)(b) of the Competition Act.<sup>55</sup> If found guilty, such a person can be fined up to R500 000 and/or be sentenced to imprisonment for up to 10 years.<sup>56</sup> Thus, scope has been introduced into the South African regime to allow for criminal penalties for competition law infringements, but these provisions have not been used to date. It will be interesting to see how authorities decide to apply these provisions in future and whether guidance in doing so will be sought from the US system, which will be discussed in Part IV below.

*(e) Parameters of the research*

The case of *Cross Fire Management (Pty) Ltd v The Competition Commission of South Africa* (“*Cross Fire*”) was the first instance in which the Competition Appeal Court (“CAC”) clearly distinguished between the requirements for exiting a price-fixing cartel and those for exiting a collusive tendering cartel. The CAC emphasised that the requirements for exiting a price-fixing cartel, namely public distancing, is more onerous than the requirements in the case of a collusive tendering cartel. South African cases dealing with the public distancing approach of European case law will be discussed below.

This thesis specifically focuses on the issue of presumptions in determining liability for participation in price-fixing cartels. Since *Cross Fire*, these tests evidently cannot be treated as one and the same. Although some of the discussion could apply to both types of cartels, there may be subtle differences that remain beyond the scope of the current research. The focus here will be on price-fixing.

This research will also not focus extensively on the nature of administrative penalties for competition law offences. A brief overview was provided simply as context for the different treatment of price-fixing in each jurisdiction, which will be considered next.

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<sup>54</sup> Sutherland & Kemp, *supra* n 1 at 12–11.

<sup>55</sup> The Competition Amendment Act 1 of 2009 at s73A.

<sup>56</sup> *Ibid* at s74.

### III EUROPEAN COMPETITION LAW APPROACH

To understand the roots of the South African position on liability for participating in a price-fixing cartel, this thesis will examine the European approach. This chapter will begin with an overview of the European competition regime, demonstrating where price fixing fits into the legislative scheme and explaining the relationship between EU competition law and domestic European laws.

Next, the discussion will turn to case law related to price-fixing cartels, examining the presumptions at play and how courts approach the issue of exiting such cartels. The chapter will further explore the development of European case law concerning public distancing from cartels, including relevant evidentiary presumptions.

Finally the discussion will address criticisms of both the evidentiary presumptions and the public distancing approach, and evaluate their impact. The analysis will show how courts have progressively taken a stricter stance on the requirements for undertakings to rebut the presumptions and distance themselves publicly from price-fixing cartels.

#### *(a) Special nature of EU competition law*

Currently the EU consists of 28 Member States, which are all sovereign nations. The Commission may not be a 'sovereign state', but it does promulgate legislation that has to be transposed into the domestic laws of the EU Member States. Therefore, EU competition law exists in a system designed to eliminate barriers between the different EU Member States.<sup>57</sup> The concept of a union is strengthened by the free movement of goods, services and people among the different Member States and the competition regime seeks to encourage this, resulting in better prices, quality and range of choices.<sup>58</sup>

EU competition law plays an important role internationally in the development and interpretation of other national competition law systems.<sup>59</sup> It is lauded for helping internationalise competition law as a whole, as important lessons can be learnt from the example of creating a single market economy in the EU.<sup>60</sup> Within the EU itself, competition law plays an important role in facilitating and defending the EU single market imperative - the

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<sup>57</sup> Maher M Dabbah *International and Comparative Competition Law* (2010) at 164.

<sup>58</sup> Whish & Bailey, *supra* n 3 at 51.

<sup>59</sup> Dabbah, *supra* n 57 at 161.

<sup>60</sup> Dabbah, *supra* n 57; Oliver Black *Conceptual Foundations of Antitrust* (2005); Whish & Bailey, *supra* n 3.

idea that barriers to trade within the EU must be dismantled in the context of market integration.<sup>61</sup>

The goal is not only to eliminate formal barriers between states, but also to ensure that those barriers are not replaced by restraints formed through the conduct of private firms acting together, such as agreements or concerted practices amongst competitors.<sup>62</sup> For this reason, strict safeguards need to be in place to ensure that the vast freedoms granted by the legislative regime is not abused and curtailed by market players.

EU Competition law is regarded as progressive as it is mainly focused on the competitive process. It places emphasis on annihilating practices that can prevent smaller firms from entering the market in a way that is not based on fair competition.<sup>63</sup>

The use of the common currency, the euro, is another important and unique characteristic of EU competition law. As the competitive process depends on adequate information with which consumers make rational choices, the transparency created by price information fundamentally transforms the position of EU consumers and their ability to easily compare prices and make decisions.<sup>64</sup> The legislative regime will be considered next in more detail.

#### *(b) Legislation*

The European Union was established by what is currently known as The Treaty on the European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”). These treaties establish the respective competencies of the European Union and its Member States.

EU law is the supra-national law, which has priority over the national law of each Member State. A number of Member States have recently chosen to model their domestic competition laws on the relevant Articles of the TFEU and Regulations, which reduces the risk of conflict.<sup>65</sup>

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<sup>61</sup> Whish & Bailey, supra n 3 at 51.

<sup>62</sup> Dabbah, supra n 57 at 164.

<sup>63</sup> The debate on the exact nature of EU Competition law is nuanced and complex. A full analysis falls outside of the scope of this thesis but for more, see for example Whish & Bailey, supra n 3 at 49–51.

<sup>64</sup> Ibid at 52.

<sup>65</sup> Dabbah, supra n 57 at 176.

The TFEU contains European competition law in Chapter 1 of Title VII, which deals with common rules on competition, taxation and approximation of laws.<sup>66</sup> Articles 101-109 deal with competition law, but most relevant for present purposes is Article 101, which deals with collusion between firms. This provides the legislative basis against which the conduct under scrutiny must be tested. Article 101(1)(a) of the TFEU provides that agreements, decisions and concerted practices that directly or indirectly fix purchase or selling prices or related trading conditions will be prohibited as incompatible with the internal market.<sup>67</sup> Article 101(1)(a) reads:

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

*(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*

A key principle of Article 101(1) is that competing undertakings must determine their prices and conduct independently.<sup>68</sup> This provision is wide enough to apply extraterritorially to cartels that were entered into outside of the EU, but have an effect within the EU. It captures more than just blatant price fixing, but also agreements that distort price competition.<sup>69</sup> Furthermore, the application of Article 101(1) is not limited to formal contracts, as this is rarely the case in price-fixing cartels. It also applies to co-operation between firms or undertakings through informal agreements, decisions taken by industry associations and concerted practices, each of which terms has been given a broad interpretation.<sup>70</sup> These safeguards make sense especially in the context of the free flow of business throughout the EU, preventing private firms from restraining trade through such illicit agreements or practices as those mentioned above.

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<sup>66</sup> Consolidated Version of the Treaty on the Functioning of the European Union 26 October 2012, 2012/C 326; Whish & Bailey, supra n 3 at 50.

<sup>67</sup> The 2002 version contains the same provisions in Articles 81 and 82, resulting in secondary material referring to these articles. For current purposes, references to Article 81 and 82 will be replaced with reference to Article 101.

<sup>68</sup> Richard Whish & David Bailey *Competition Law* 8<sup>th</sup> ed (2015) at 558.

<sup>69</sup> Ibid; Dabbah, supra n 57 at 194.

<sup>70</sup> Whish & Bailey, supra n 3 at 104.

Article 101(3) of the TFEU then provides a defence for any anti-competitive conduct found under Article 101(1). The defence is available regardless of whether the conduct restricts competition by effect or object,<sup>71</sup> as confirmed by the General Court in *Matra Hachette v Commission* T-17/93 EU:T:1994:89.<sup>72</sup> This applies as long as the requirements of Article 101(3) are satisfied.

The provision reads:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

*(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*

*(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

It is clear from this Article that no agreement is *per se* illegal in EU competition law. Even price-fixing agreements that somehow contribute to the free movement of goods and services or towards economic growth can be excused under this section, regardless of their effect on competition. The relevance of this defence, in practice, is its potential to act as a counterbalance to any strict provisions or presumptions relating to price-fixing. Thus, although it may be difficult to succeed with an Article 101(3) defence in practice, scope technically exists to defend any restrictive agreement or concerted practice.<sup>73</sup>

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<sup>71</sup> These two terms are to be understood in the alternative: one can first consider the exact purpose of the agreement (object), or where this does not reveal the effect on competition sufficiently, the consequences (effect) can be considered. The consideration of effect is part of the functional approach. For more on this, see Scordamaglia, *supra* n 9 at 28.

<sup>72</sup> *Matra Hachette SA v Commission of the European Communities Case T-17/93* European Court Reports; Whish & Bailey, *supra* n 3 at 158.

<sup>73</sup> Whish & Bailey, *supra* n 3 at 158.

A narrow view of Article 101(3) suggests that it would permit only agreements that would bring about improved economic efficiency and that this Article is to be seen as a balancing act. A broader view includes policies other than those purely aimed at economic efficiency to fall within the ambit of the Article 101(3) defence, including industrial policy, environmental protection, employment or public interest.<sup>74</sup> Despite cases pointing towards allowing broader policy objectives into the scope of Article 101(3),<sup>75</sup> Whish and Bailey persist that clear legal standards dictate that the narrow interpretation be given preference.<sup>76</sup> This is considered to be most consistent with the wording of Article 101(3) and the scheme of the Article as a whole and is further supported by the Commission’s Guidelines on the application of Article 81(3) of the Treaty (“*Article 101(3) Guidelines*”).<sup>77</sup> The pro-competitive effects of the restrictive agreement may be taken into account if it outweighs the anti-competitive effects, but Guideline 11 makes it clear that this weighing exercise must take place exclusively within the framework laid down by Article 101(3). Therefore, it is most likely that only economic benefits of a restrictive agreement may serve as a defence to Article 101(1), under Article 101(3), thus reinforcing the narrow view.

(i) *Regulation No 1/2003*

Regulation 1/2003 lays down the powers of the EU Commission and individual Member States to enforce Articles 101 and 102.<sup>78</sup>

Article 2 of Regulation 1/2003 provides that ‘*the burden of proving an infringement of Article 101 shall rest on the party or the authority alleging the infringement.*’ and that the burden of proving compliance with the requirements of Article 101(3) is on the person or entity claiming such a benefit: Therefore, it is clear that the EU Competition authority needs to prove the elements of

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<sup>74</sup> Ibid at 163–4; *Case IV/34456 - Stichting Baksteen* Official Journal L 131; *Case IVF1/36718CECED* Official Journal L 187; *Metro SB-Großmärkte GmbH & Co KG v Commission 26/76* European Court Reports 1977-01875; *Metropole télévision SA v Commission T-528/93* European Court Reports 1996 II-00649.

<sup>75</sup> Whish & Bailey, supra n 3 at 163–4; *Case IV/34456 - Stichting Baksteen* Official Journal L 131; *Case IVF1/36718CECED* Official Journal L 187; *Metro SB-Großmärkte GmbH & Co KG v Commission 26/76* European Court Reports 1977-01875; *Metropole télévision SA v Commission T-528/93* European Court Reports 1996 II-00649.

<sup>76</sup> Whish & Bailey, supra n 3 at 165.

<sup>77</sup> European Commission ‘Guidelines on the application of Article 81(3) of the Treaty’ available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)).

<sup>78</sup> European Council Regulation No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty; Whish & Bailey, supra n 3 at 53.

Article 101(1) to succeed with a case of price-fixing against an entity. This seems to strike a fair balance between elements to be proven in price-fixing cases.

However, since Regulation 1/2003 entered into force, successful applications of Article 101(3) have been rare, which contributes to the sense held among professionals in the field that it is practically impossible to succeed with a defence based on the criteria of Article 101(3).<sup>79</sup>

(ii) *Proof and presumptions*

This section will begin by considering the onus and burden of proof in price-fixing allegations and then discuss the presumptions that developed through case law to assist in discharging that onus.

Article 2 of Regulation 1/2003 (discussed above) sets the burden of proof for competition matters. It essentially provides a basis for the presumption of innocence in community competition law.

This requirement of proof before a guilty finding is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).<sup>80</sup> This provision is relevant in EU competition law in view of the degree and nature of the sanctions that can be imposed, as was explained in section II.<sup>81</sup> Furthermore, Article 48(1) of the Charter of Fundamental Rights of the European Union (“The Charter”) deals with the presumption of innocence and rights to defence.<sup>82</sup>

This, in turn, is closely linked with the legal principle under which doubt must benefit the one who is prosecuted, or “*in dubio pro reo*”.<sup>83</sup> This principle shows the importance of the burden of proof on the Commission provided for in Regulation 1/2003. The European Commission is tasked with the application of the European Treaties, and Directorate G is

<sup>79</sup> Whish & Bailey, *supra* n 3 at 175; David Bailey ‘Reinvigorating the Role of Article 101(3) under Regulation 1/2003’ (2016) 81 *Antitrust Law Journal* 111–44 at 112; Niamh Dunne ‘Characterizing Hard Core Cartels Under Article 101 TFEU’ (2020) 65 *The Antitrust Bulletin* 376–400.

<sup>80</sup> European Convention on Human Rights Rome, 4.XI.1950. Article 6(2) of the ECHR contains this right: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

<sup>81</sup> Koen Lenaerts ‘Some Thoughts on Evidence and Procedure in European Community Competition Law Developments in European Union Law Dedicated to CFI President Bo Vesterdorf’ (2006) 30 *Fordham International Law Journal* 1463–95 at 1471.

<sup>82</sup> Charter of Fundamental Rights of the European Union 2000/C 364/01. Article 48 reads: “(1) Everyone who has been charged shall be presumed innocent until proved guilty according to law. (2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”

<sup>83</sup> Lenaerts, *supra* n 81 at 1471.

exclusively responsible for fact-finding and taking action in cartel cases.<sup>84</sup> Aggrieved parties can appeal against Commission findings to the General Court or to national courts of Member States. If the Commission fails to prove its case before the General Court, the judgment must be in the favour of the undertaking under investigation. Parties have challenged Commission decisions that relied on insufficient or equivocal evidence in national courts, which have the power to subsequently overturn them.<sup>85</sup>

Article 101(1) and these two principles lay down the requirements for the Commission to succeed with a case of price-fixing against a member of a cartel. Read together, these provisions clearly state that it is for the Commission to prove an agreement, decision or concerted practice to fix prices or set market conditions, with the effect of preventing, restricting or distorting competition. The Commission must bring “*precise and consistent evidence*” to support a firm conviction that the agreement in question was concluded.<sup>86</sup> Lenaerts points out that it is for the Commission to collect conclusive evidence to show the existence of an infringement of Article 101(1).<sup>87</sup> Naturally, the Commission will also need to prove a party’s involvement in such an agreement or practice before it can be held liable.

Some commentators<sup>88</sup> point out that Article 101 distinguishes cartel agreements from concerted practices, as these distinct types of cartels differ in their complexity, intensity and evidentiary trail.<sup>89</sup>

In its application of the above provisions, the European courts developed a number of standards over the years.<sup>90</sup> The position used to be clearly set out that the Commission must prove three constituent elements to demonstrate the existence of an agreement or concerted practice: ‘(i) *agreement or concerted practice between the undertakings (i.e., contacts); (ii) conduct*

<sup>84</sup> Whish & Bailey, *supra* n 3 at 56.

<sup>85</sup> *Commission of the European Communities v Anic Partecipazioni SpA* C-49/92 P European Court Reports 1999 I-04125.

<sup>86</sup> *Toshiba Corporation v European Commission* C-373/14 P 2016 Court Reports – Court of Justice.

<sup>87</sup> Lenaerts, *supra* n 81 at 1420.

<sup>88</sup> Martynas Jablonskis ‘Strategic leniency: insights from game theory and empirical evidence’ (2020) *Vilnius University Open Series* 68–85 at 70.

<sup>89</sup> Jablonskis (above) states that there are legal differences in proving these infringements but does not offer further guidance. It is not clear what the differences are for proving an agreement versus proving a concerted practice. It is assumed that proof of a concerted practice is less onerous but then the case of Polypropylene Cartel 1991 mentions that the term ‘complex infringement’ has become the norm, and no longer requires precise qualification of the infringement as an agreement or concerted practice.

<sup>90</sup> See part *iii* below on the development of these standards through case law.

on the market; and (iii) a relationship of cause and effect between the two.’<sup>91</sup> This, however, became less certain because of presumptions at play in some recent case law, which will be discussed below.

Despite these requirements laid out above, the European courts have always been reluctant to clearly define the required legal standard of proof for cartel cases.<sup>92</sup> This has caused courts to increasingly turn to presumptions to fill the evidentiary gaps often present in cartel cases, given their clandestine nature. In *Total Marketing Services SA v Commission*, the court found that mere attendance at meetings with an anti-competitive spirit or object creates a presumption of illegality of the participation in the undertaking.<sup>93</sup> The onus will then be on the undertaking concerned to rebut this by proving that it has publicly distanced itself. Presumptions like the above contribute to effective anti-cartel enforcement in the EU, along with proof in the form of objective and consistent indicia, as opposed to direct evidence, being allowed to prove an infringement.<sup>94</sup>

Bailey notes that presumptions can have different strengths and that different jurisdictions treat presumptions based on their own legal structure.<sup>95</sup> He describes the *per se* rule in US law as an example of a conclusive presumption, which is in reality more of a rule, as opposed to an evidentiary presumption often used in EU law that allows an inference to be drawn from facts.<sup>96</sup>

Cyril Ritter from the European Commission’s Directorate-General for Competition, defines the term “presumption” as:

“[U]sing a known fact to infer another fact; the inference that a fact exists based on the existence of other known facts.”<sup>97</sup>

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<sup>91</sup> *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba C-74/14* Court Reports – Court of Justice at 42.

<sup>92</sup> Melícias, supra n 33 at 471. The degree of certainty required in each Member State will depend on whether it follows a civil law or common law system and is a complex discussion in itself which falls outside of the current scope.

<sup>93</sup> *Total Marketing Services SA v European Commission* at 21; Whish & Bailey, supra n 3 at 543.

<sup>94</sup> Whish & Bailey, supra n 3 at 543.

<sup>95</sup> Swedish Competition Authority ‘Pros and Cons of Presumptions’ (2020) at 3 available at: <https://www.konkurrensverket.se/en/competition/knowledge-and-research/the-pros-and-cons/pros-and-cons-of-presumptions-2020/#anchor1>.

<sup>96</sup> *Ibid* at 3.

<sup>97</sup> Cyril Ritter ‘Presumptions in EU competition law’ (2018) 6 *Journal of Antitrust Enforcement* 189–212 at 189.

Bailey points out how a presumption phrased as a *prima facie* rule will likely be admissible, as it indicates the possibility of rebutting such a presumption.<sup>98</sup> Where rules have categorically been drawn from cases and continue to be applied in practice, this requirement is crucial.<sup>99</sup> Furthermore, since presumptions are better not set in stone as human thinking remains flexible, it is preferable for presumptions to be judicial or administrative in nature, as opposed to legislative.<sup>100</sup>

Bailey aptly summarised the question that this research also grapples with:

*“For some, presumptions are inappropriate shortcuts, which run a high risk of leading to wrong answers. For others, presumptions are an invaluable way to make competition law administrable and workable in practice.”*<sup>101</sup>

The ability to rebut a presumption is what keeps it fair, and treatment thereof by European courts has been a focal element of the discussion about presumptions.<sup>102</sup> One way for an undertaking to rebut the presumption of illegal involvement in a price-fixing cartel is to show that it had publicly distanced itself from the cartel conduct. Treatment of the public distancing defence by courts will be discussed below.

*(c) Development through case law*

The first step in the direction of the public distancing approach, was the case of *Tréfileurope Sales SARL v Commission of the European Communities*.<sup>103</sup> In 1995, the court stated that the fact that an undertaking did not abide by the outcome of meetings that had a manifestly anti-competitive purpose did not release it from full accountability for its participation in the cartel, unless that undertaking has publicly distanced itself from what was agreed or discussed.<sup>104</sup> This

<sup>98</sup> Swedish Competition Authority, supra n 95 at 4.

<sup>99</sup> See for example *Archer Daniels Midland Co v Commission of the European Communities C-510/06 P* European Court Reports 2009 I-05843; *Westfalen Gassen Nederland BV v Commission of the European Communities T-303/02* European Court Reports 2006 II-04567.

<sup>100</sup> David Bailey ‘To presume, or not to presume: that is the question’ (at the Stockholm, Sweden, Konkurrensverket Seminar “Pros and Cons of Presumptions”, 6 November 2020) available at: [https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2020\\_1---david-bailey.pdf](https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2020_1---david-bailey.pdf); Swedish Competition Authority, supra n 95 at 5.

<sup>101</sup> Swedish Competition Authority, supra n 95 at 2.

<sup>102</sup> See for example Ritter, supra n 97; Bailey, ‘To Presume, or Not to Presume: That Is the Question’, supra n 100; Swedish Competition Authority, supra n 95. See subsection (c) below on the treatment by European courts.

<sup>103</sup> *Tréfileurope Sales SARL v Commission of the European Communities T-141/89* European Court Reports 1995 II-00791.

<sup>104</sup> *Ibid* at 85.

principle has since been repeated various times in the European context, with the case of *Comap SA v European Commission* (“*Comap*”) being a prime example.<sup>105</sup> This principle is premised on the fact that the undertaking has led other participants to believe that it subscribed to what was being discussed and that it would act accordingly.<sup>106</sup> This is not unreasonable as cartels operate and succeed only on the basis of consensus and cooperation.

In 2003, the court in *Adriatica di Navigazione SpA v Commission of the European Communities* (“*Adriatica*”)<sup>107</sup> expanded on the test, by stating that once participation in the anti-competitive meetings has been established, the undertaking in question must put forward evidence that its participation was in a spirit different from its competitors.<sup>108</sup> In the absence of such evidence, the fact that an undertaking did not abide by the discussed outcome is not sufficient to relieve it from liability for participation in the cartel.<sup>109</sup> This phrasing indicates that the burden of proof is still on the Commission to show that the undertaking partook in the impugned meetings, but that the onus is on the undertaking to put forward evidence that its participation had no ill intent. The Court here suggested that the applicant could, for example, have written to its competitors after the meeting, indicating its non-participation.<sup>110</sup>

The first official test was laid down in 2004 in the decision of *Aalborg*. The Court stated that:

*“[I]t is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.”*<sup>111</sup>

It explained that this is because where a party tacitly approved of an unlawful agreement, and did not publicly distance itself or report it to the authorities, it effectively encouraged the continuation of the infringement.<sup>112</sup> Once again, this does require the Commission to prove participation by the undertaking and, only once this is done, does the burden shift to the firm

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<sup>105</sup> *Comap SA v European Commission* C-290/11 P European Court Reports 2012 -00000.

<sup>106</sup> Whish & Bailey, supra n 68 at 554–5.

<sup>107</sup> *Adriatica di Navigazione SpA v Commission of the European Communities* T-61/99 European Court Reports 2003 II-05349.

<sup>108</sup> *Ibid* at 91.

<sup>109</sup> *Ibid* at 91, 118.

<sup>110</sup> *Ibid* at 138. This statement read in context was apparently not intended to set a precedent or expand upon the requirements for extrication, although it was subsequently interpreted in that way in the cases that followed.

<sup>111</sup> *Aalborg Portland A/S and Others v Commission of the European Communities* C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P European Court Reports 2004 I-00123 at 81.

<sup>112</sup> *Ibid* at 46.

to prove that it has publicly distanced itself. It is this test that South African authorities, amongst others, have relied on for many years.<sup>113</sup>

In the EU, though, the tone became more restrictive in the 2006 case of *Westfalen Gassen Nederland BV v Commission of the European Communities* (“*Westfalen*”).<sup>114</sup> The Court repeats the *Aalborg*-test but adds that the notion of public distancing as a way to exclude liability must be interpreted narrowly.<sup>115</sup> As authority for this, it relied on the suggestion made by the Court in *Adriatica*, stating that the undertaking should have distanced itself by writing to its competitors after the meeting.<sup>116</sup> The appellant’s attempt to show that the spirit in which they participated was different from that of their competitors was rejected by the Court on the basis of a lack of evidence.

The narrowing of the scope of the defence of public distancing, which was based on an obiter remark by a previous court, indicated the first steps taken towards a shift in approach, the defence becoming increasingly difficult to comply with. This makes sense as an attempt by courts to curtail abuse by market players given the context of the vast freedoms of the integrated EU market, as discussed in section (a).

The court in *Westfalen* did not give further reasons why the parameters of public distancing must be interpreted narrowly, nor did it provide any alternatives to the instance of writing to competitors. It seemed to have simply accepted this as a requirement to avoid liability.

The case of *Archer Daniels Midland Co v Commission of the European Communities* (“*Archer Daniels*”)<sup>117</sup> followed suit in 2009. Applying the *Aalborg*-test, the court found that the mere fact that the appellant had stood up and left the meeting early could not be regarded as an act of sufficient public distancing.<sup>118</sup> The court said that it was for that party to bring evidence that the other members of the cartel had understood his actions as a way of ending his

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<sup>113</sup> Reliance on this test by South African authorities will be fully discussed in Part V below.

<sup>114</sup> *Westfalen Gassen Nederland BV v Commission of the European Communities* T-303/02 European Court Reports 2006 II-04567 at 103.

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

<sup>116</sup> *Ibid.*

<sup>117</sup> *Archer Daniels Midland Co v Commission of the European Communities* C-510/06 P European Court Reports 2009 I-05843.

<sup>118</sup> *Ibid* at 120.

participation.<sup>119</sup> This placed a heavy burden on the appellant undertaking to discharge, having to show its own repudiating conduct and the understanding in the minds of the other participants. The court did not elaborate on how this understanding stands to be proven.

In 2012, the *Comap*-case appeared to be the first to lay down set indicators. It required the act of public distancing to be expressed firmly and unambiguously,<sup>120</sup> and that an undertaking must either distance itself publicly or denounce the activities by reporting it to a competition authority.<sup>121</sup> We can still see that these were distinct possibilities and not steps in an overall requirement.<sup>122</sup> These requirements did provide some much-needed clarity but, in applying them, the court took a categorical statement from a previous decision, *Westfalen*, and turned it into a requirement that needed to be satisfied. In *Comap*, the applicant's President wrote a letter to the President of the relevant federation, FNAS, to attempt to distance themselves. The court, in quoting from *Westfalen*, stated that the notion of public distancing must be interpreted narrowly and therefore a mere letter would not suffice to exclude liability.<sup>123</sup> The court in *Comap* explains that the communication intended to constitute the public distancing from the anti-competitive conduct must be expressed "*firmly and unambiguously*", referencing the decision in *Archer Daniels*.<sup>124</sup>

Further arguments that have been unsuccessfully presented to escape liability for price fixing under Article 101(1) include: not being an active participant in the market in which the cartel operates, not respecting the proposed price increase, having attended the meetings simply for the otherwise legitimate industry matters discussed or the participant's future involvement in the cartel being viewed as "doubtful".<sup>125</sup>

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<sup>119</sup> *Ibid* at 119.

<sup>120</sup> *Comap SA v European Commission C-290/11 P* European Court Reports 2012 -00000 at 76.

<sup>121</sup> *Ibid* at 75.

<sup>122</sup> Whish & Bailey, *supra* n 68 at 555.

<sup>123</sup> *Westfalen Gassen Nederland BV v Commission of the European Communities T-303/02* European Court Reports 2006 II-04567 at 103; *Comap SA v European Commission C-290/11 P* European Court Reports 2012 -00000 at 75.

<sup>124</sup> *Comap SA v European Commission C-290/11 P* European Court Reports 2012 -00000 at 76; *Archer Daniels Midland Co v Commission of the European Communities C-510/06 P* European Court Reports 2009 I-05843 at 120.

<sup>125</sup> Whish & Bailey, *supra* n 68 at 560; *Toshiba Corporation v European Commission C-373/14 P* 2016 Court Reports – Court of Justice at 64.

This case law above shows that cartels are dealt with as a “quasi-automatic system of liability” upon mere cartel participation.<sup>126</sup> The degree of participation will only be considered later in the judicial process at the time of sanctioning.

It appears that, at this point, public distancing entails taking a firm and unambiguous stand against the cartel behaviour, making it known that one no longer wishes to take part or reporting the cartel to the authorities. The term ‘public’ was never intended to refer to the general public at large, but instead the other members of the cartel, as was discussed in the initial introduction of the concept of public distancing in Part II, with Bailey suggesting that the term “*public distancing*” is somewhat of a misnomer.<sup>127</sup>

Before criticism of this approach can be investigated, the role of the *Anic*- and T-Mobile presumptions will be clarified.

(i) *The Anic presumption and T-Mobile presumption*

In 1999, the *Anic*-presumption was developed in a case involving the big four incumbents in the petrochemical industry. There was no evidence that *Anic*, a relatively small firm, had implemented the collusive policy or partook in discussions to the extent that the other firms had.<sup>128</sup> The court in *Commission of the European Communities v Anic Partecipazioni SpA* (“*Anic*”)<sup>129</sup> formulated the crucial presumption, which has since become known as the *Anic*-presumption. The presumption is set out as follows:

*“The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; (2) and it remains active in that market. Such an undertaking is liable for Article 101 infringement unless the presumption is rebutted.”*<sup>130</sup>

In terms of this presumption, once an undertaking’s attendance at the cartel meetings is established, the conduct on the market and relationship of cause and effect will be presumed. The court in *Anic* also stated that a concerted practice falls under Article 101(1) of the TFEU

<sup>126</sup> Scordamaglia, supra n 9 at 35.

<sup>127</sup> Bailey, “‘Publicly Distancing’ Oneself from a Cartel’, supra n 10 at 189.

<sup>128</sup> Martynas Jablonskis ‘Concerted Practices: Concept and Evolution’ (2022) 8 *International Comparative Jurisprudence* 13–25 at 20.

<sup>129</sup> *Commission of the European Communities v Anic Partecipazioni SpA C-49/92 P* [1999] European Court Reports 1999 I-04125 (Sixth Chamber).

<sup>130</sup> *Ibid* at 121; *Jablonskis*, supra n 128 at 20.

even in the absence of anti-competitive effects on the market.<sup>131</sup> This presumption bridged the gap necessary to satisfy the third requirement of proving a concerted practice, namely the relationship between the anticompetitive meeting and the attendees' behaviour in the market.<sup>132</sup>

The court clarified that the *Anic*-presumption could be rebutted, and this is where public distancing becomes relevant. The key function of public distancing is to rebut the presumption that an undertaking in a collusive contract necessarily uses the information and acts accordingly.<sup>133</sup> The act of public distancing breaks the chain between the agreement and the behaviour in the market by restoring the decisional autonomy of the attendee that chooses to distance itself. Where the cartel seeks to remove the independent decision-making of the firms involved, public distancing does the opposite.<sup>134</sup>

Following *Anic*, the case of *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ("*T-Mobile*")<sup>135</sup> restated the *Anic*-presumption and expanded upon it by stating the following, which became known as the *T-Mobile* presumption:

*"The causality between illegal exchange of information and market conduct must be presumed, given: (1) an undertaking actively or passively participating in an illegal exchange of information; and that (2) it remains active in that market. Such an undertaking is liable for Article 101 infringement, even if the exchange of information took place on a single occasion (meeting), unless the presumption is rebutted."*<sup>136</sup> (own emphasis)

This case dealt with the mobile telecommunications market in the Netherlands, which was controlled by an oligopoly of 5 undertakings. These undertakings held a single meeting during which standard dealer remuneration was discussed. The court was faced with the decision whether the single meeting between rivals could constitute price fixing in the form of a concerted practice and found that all of the essential elements were present. Jablonskis explains that the *T-Mobile* case provides the strictest legal stance on exchange of information between undertakings to date, as the presumption operates more as a substantive and *sui generis*

<sup>131</sup> *Commission of the European Communities v Anic Partecipazioni SpA* C-49/92 P European Court Reports 1999 I-04125 at 122.

<sup>132</sup> Abenhäim, supra n 7 at 417.

<sup>133</sup> *Ibid* at 418.

<sup>134</sup> *Ibid*.

<sup>135</sup> *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* C-8/08 Court Reports – Court of Justice.

<sup>136</sup> *Ibid* at 71; Jablonskis, supra n 128 at 21.

prohibition on exchange of information as opposed to an aid in proving an agreement or concerted practice, as it was initially intended.<sup>137</sup>

Both the *Anic*- and *T-Mobile* presumptions are now used in practice as *sui generis* substantive norms upon which cartel enforcement largely depends.<sup>138</sup>

In 2016, the CJEU provided a reminder of the presumption of innocence in the case of *"Eturas" UAB v. Lietuvos Respublikos konkurencijos taryba* (“Eturas”).<sup>139</sup> In this case, travel agencies in Lithuania received an email from the platform administrator, Eturas, stating that discount offers were to be capped at 3% to normalise competition and preserve commission.<sup>140</sup> The Competition Council found that the agencies had engaged in an anti-competitive practice insofar as they did not express an objection and had infringed competition rules.<sup>141</sup> The Court of Justice of the European Union (“Court of Justice”) referred to the presumption of a causal connection between a concertation and the market conduct of the active participants, as set out in *Anic* and *T-Mobile*. However, it also invoked the presumption of innocence, stating that this is a general principle of EU law, enshrined in the ECHR. This precluded the court from inferring from the mere dispatch of the email that the agencies would have been aware of the content of the message to cap discounts.<sup>142</sup> Furthermore, the court stated that undertakings must have a realistic chance to rebut the presumption that they had been aware of the content of the email and departs from the *T-Mobile* judgment by finding that because of the presumption of innocence, it cannot be inferred that all platform participants were aware of the contents of the single email sent.<sup>143</sup>

Despite this, the court did invoke the notion of passive participation in collusion as a sufficient ground for legal liability. The behavioural nature of passive participation is called into question, as a concerted practice was initially seen as the causal link between collusion and subsequent conduct by an undertaking.<sup>144</sup> In *Anic* and *T-Mobile*, the court presumed that the undertakings involved must have relied on strategic information shared at the anti-

<sup>137</sup> Jablonskis, *supra* n 128 at 22.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba* C-74/14 Court Reports – Court of Justice.

<sup>140</sup> *Ibid* at 6–12.

<sup>141</sup> *Ibid* at 13–5.

<sup>142</sup> *Ibid* at 39.

<sup>143</sup> *Ibid* at 41; Jablonskis, *supra* n 128 at 23.

<sup>144</sup> Jablonskis, *supra* n 128 at 23.

competitive meetings held, which directly influenced their own behaviour in the market – a presumption of direct causality. In contrast, the court in *Eturas* imputes liability even in the absence of a causal link between collusion and the subsequent market conduct, entering the territory of indirect causality.<sup>145</sup> While the *Anic*- and *T-Mobile* presumptions allow for violations of Article 101(1) to be proven without harmful effect, they still require explicit mention of causality between collusion and the subsequent conduct. *Eturas* does not require the same explicit causal link.

In the wake of these decisions, it seems that once an undertaking's attendance at one cartel meeting is proven, the presumptions discussed fill in the gaps and allow for the requirements of conduct in the market and causality to be conclusively presumed in the process of proving price-fixing.

*(d) Criticism on the European approach*

The European approach, as described above, relies on a number of evidentiary presumptions, on the one hand, and a rebuttal to balance out these presumptions on the other, namely public distancing.

The evidentiary presumptions at play have been subject to comment and criticism. These presumptions prove certain aspects necessary for the Commission to succeed with a case against undertakings involved in price-fixing cartels but various authors have described how the *Anic*- and *T-Mobile* presumptions have become nearly impossible to rebut in practice.<sup>146</sup> Criticism of the presumptions themselves will first be considered.

In principle, the use of presumptions can be an effective approach to enforcing competition policy when a particular behaviour does typically constitute a violation.<sup>147</sup> Effective use of such presumptions can help reduce the risk of type 2 errors, namely false acquittals, and alleviate the burden on authorities of proving incidental evidence of the existence of an infringement. On the other hand, these presumptions will increase the burden placed on the alleged infringer to put forward evidence to rebut the presumed guilt.<sup>148</sup> In a

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<sup>145</sup> Ibid.

<sup>146</sup> Abenhaïm, supra n 7 at 414; Jablonskis, supra n 128 at 22; Bailey, 'To Presume, or Not to Presume: That Is the Question', supra n 100; Scordamaglia, supra n 9.

<sup>147</sup> Cani Fernández 'Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment' (2019) 10 *Journal of European Competition Law & Practice* 448–56 at 449.

<sup>148</sup> Ibid; Swedish Competition Authority, supra n 95.

system organised under the rule of law, a presumption will, by its very nature, be rebuttable, but where the procedural guarantees fall away, infringements of fundamental rights become possible.<sup>149</sup> For that reason, for the system to remain fair, the public distancing defence needs to remain a practical reality.

Concerns arise where the increased reliance on presumptions in EU competition law has facilitated a shift of the burden of proof away from the competition authorities.<sup>150</sup> De la Torre advances the argument that since the ultimate goal of competition law is to shield against consumer harm, it is consumer harm that must be proven.<sup>151</sup>

Considering the rules of the burden of proof laid down in Regulation 1/2003, the Commission is responsible for establishing the existence of an infringement of Article 101(1)(a) of the TFEU. In doing this, the use of presumptions is admissible. Nonetheless, the effectiveness of a rebuttable presumption will rely on the proportionality of the conditions necessary for its rebuttal.<sup>152</sup>

The *Anic*- and *T-Mobile* presumptions allow the Commission to establish all three constituent elements of price-fixing by merely demonstrating a company's attendance at a meeting. As soon as an undertaking becomes aware of information, that awareness will be permanent and there is very little (apart from public distancing within the narrow parameters set out by the courts) an undertaking can do to prove that it had no anti-competitive intentions. This interpretation renders a significant portion of Article 101(1) redundant as the requirements listed therein no longer need to be individually proven. The presumptions thus appear to assume more than they should.

Jablonskis explains that the subjective elements of intent and awareness are necessary for proving a violation of Article 101(1).<sup>153</sup> *Anic* did not adhere to the collusion, but this was not sufficient to prove that it did not have the necessary intention to collude. The *Anic*-

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<sup>149</sup> Ritter, *supra* n 97 at 204.

<sup>150</sup> Fernández, *supra* n 147 at 449.

<sup>151</sup> Fernando De la Torre 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) *World Competition* 505–78 at 507.

<sup>152</sup> Fernández, *supra* n 147 at 450; Cani Fernández Vicién 'The use of presumptions in the application of Article 102 TFEU' (at the Stockholm, Sweden, Konkurrensverket Seminar "Pros and Cons of Presumptions", 6 November 2020) available at: [https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2020\\_5---cani-fernandez.pdf](https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2020_5---cani-fernandez.pdf).

<sup>153</sup> Jablonskis, *supra* n 128 at 21.

presumption goes beyond establishing causality after the first two requirements are met, as it assumes all the elements necessary for the Commission to prove price-fixing.<sup>154</sup>

In addition, the *Eturas*-decision allows a court to impute liability even in the absence of a causal link between collusion and the subsequent market conduct. In this case, the participants did not even attend a meeting, but were the mere recipients of an administrative email that was proven to be anti-competitive in nature.<sup>155</sup> There is no clear guideline from the Court of Justice on the level of proof needed to satisfy the requirements for the presumption to enter into operation.<sup>156</sup> A domestic court in Strasbourg has taken the opportunity to set some limits on the use of presumptions in criminal proceedings, by stating:

“Article 6 [of the ECHR] ... requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”<sup>157</sup>

De la Torre points out that whichever presumption may be at play, courts should never start an enquiry with the preconceived idea that the accused has committed the competition offence with which it has been charged; the burden of proof is and always will be on the prosecution.<sup>158</sup> He makes it clear that the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence, as evidentiary presumptions must be confined within reasonable limits.<sup>159</sup>

Allowing these presumptions to become *sui generis* legal rules as opposed to rebuttable evidentiary presumptions stands in conflict with the presumption of innocence in terms of the legislative provisions discussed above.<sup>160</sup> Furthermore, Article 2 of Regulation 1/2003 requires the party alleging the infringement, which would be the Commission in these cases, to establish all the constituent elements of collusion.<sup>161</sup> Fernández concludes that when conditions imposed

<sup>154</sup> Ibid; Abenhaïm, supra n 7 at 419.

<sup>155</sup> Abenhaïm, supra n 7 at 421.

<sup>156</sup> Fernández, supra n 147 at 454.

<sup>157</sup> *Salabiaku v France (Application no 10519/83)* at 28; Ritter, supra n 97 at 201.

<sup>158</sup> De la Torre, supra n 151 at 513. European law seems to integrate criminal law into competition proceedings, and concepts traditionally associated with criminal matters are used in this context, although penalties are civil in nature. Refer to Part II(c) for a full discussion.

<sup>159</sup> De la Torre, supra n 151; *Salabiaku v France (Application no 10519/83)* at 28.

<sup>160</sup> European Convention on Human Rights Rome, 4.XI.1950; Charter of Fundamental Rights of the European Union 2000/C 364/01.

<sup>161</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty; Consolidated Version of the Treaty on the Functioning of the European Union 26 October 2012, 2012/C 326.

to rebut a presumption are disproportionate, it amounts to non-respect for the presumption of innocence and will cause a high number of type 1 errors, namely false convictions.<sup>162</sup> Bailey advances the argument that presumptions are only appropriate where one is able to draw reliable and consistent inferences from certain facts.<sup>163</sup> If this is not the case, courts will be faced with a multitude of type 1 errors.

Some commentators even go as far as to say that an undertaking cannot be deemed to have adhered to a price-fixing agreement just because it is a member of an association that participated in such an agreement or meeting.<sup>164</sup> This is, in essence, a rejection of the way in which the European courts have been finding involvement from the mere presence of an undertaking at an impugned meeting, triggering the requirement of public distancing. This approach makes it seem impossible to rely on public distancing once strategic or pricing information is shared among competitors.<sup>165</sup>

As mentioned before, the importance of the public distancing defence as a practical reality lies in its role in rebutting the *Anic*- and *T-Mobile* presumptions. Considering the above, the more stringent the requirements of the public distancing defence become, the more problematic the *Anic*- and *T-Mobile* presumptions are in light of the presumption of innocence.<sup>166</sup> Put differently, under the requirements for use of a presumption, the scope, stringency and practical application of the public distancing defence must remain reasonable if the current set of presumptions are to be in line with the ECHR. Development and usage of the public distancing defence will be critiqued next.

One can observe the progression from *Adriatica* in 2003 suggesting a mere letter as an example of public distancing, *Westfalen* in 2006 requiring a letter to be written and *Comap* in 2012 rejecting the letter that was written on the basis that it was addressed only to the President of FNAS and not copied to the other participants by the applicant.<sup>167</sup> In practice, it has become

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<sup>162</sup> Fernández, supra n 147 at 456. See also *Salabiaku v France (Application no 10519/83)*.

<sup>163</sup> Swedish Competition Authority, supra n 95.

<sup>164</sup> De la Torre, supra n 151; Lenaerts, supra n 81; Federico Ghezzi & Mariateresa Maggiolino 'Bridging EU Concerted Practices with U.S. Concerted Actions' (2014) 10 *Journal of Competition Law and Economics* 647–90.

<sup>165</sup> Ghezzi & Maggiolino, supra n 164 at 668; Scordamaglia, supra n 9 at 28.

<sup>166</sup> Abenhaim, supra n 7 at 419.

<sup>167</sup> *Comap SA v European Commission C-290/11 P* European Court Reports 2012 -00000 at 78. Para 77 explains the contents of the letter: "The letter merely expresses concern in relation to the discussions on prices that might have taken place between the participants and contains a reminder of the applicant's internal policy in respect of

very difficult for undertakings to actually succeed in meeting the requirements for proving public distancing as the goalposts continuously shift. In *Archer Daniels*, the applicant physically stood up and left an early cartel meeting but failed to prove that this constituted public distancing.<sup>168</sup> It is unclear how much more the Commission and courts require an undertaking to do in order to succeed with this defence. Even “*storming out*” was not sufficient, in the *Total Marketing Services* case.<sup>169</sup> Anti-cartel enforcement, which is so strict that it prevents undertakings from attending legitimate industry meetings, will no doubt have a chilling effect on competition.

Since its inception in *Tréfileurope*, the public distancing defence has been mentioned in 46 cases, actually invoked in 10 of them but accepted only in one judgment.<sup>170</sup> This tally is a strong indicator that the public distancing defence is a mere theoretical concept being used by EU courts, instead of a practical reality.<sup>171</sup> As public distancing is the only way for an undertaking to entirely escape liability once their attendance at anti-competitive meetings has been established, the public distancing defence plays a crucial role in cartel law.<sup>172</sup>

Applicants themselves complained that the notion of public distancing applied by courts is too restrictive. In the *Comap* case, the applicants complained that the approach was excessively rigid and breached the *in dubio pro reo*-principle.<sup>173</sup> These applicants further argued that the presumption of innocence is a higher-ranking norm than the *Anic*-presumption, and the test must be adapted accordingly.<sup>174</sup> It is unfortunate that the General Court did not rule on the merits of this argument. Furthermore, applicants complain that the assumption of taking

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competition law and, in that context, requests the President of FNAS to take steps to avoid such an anti-competitive practice”

<sup>168</sup> *Archer Daniels Midland Co v Commission of the European Communities C-510/06 P* European Court Reports 2009 I-05843 at 39.

<sup>169</sup> *Total Marketing Services SA v European Commission* at 36. However, it must be noted that this act by Total Marketing was later contradicted by attendance at a later meeting. See paras 39-46 of the judgment.

<sup>170</sup> Abenhaïm, supra n 7 at 414.

<sup>171</sup> *Ibid*; Bailey, “Publicly Distancing” Oneself from a Cartel’, supra n 10 at 179.

<sup>172</sup> Abenhaïm, supra n 7 at 414.

<sup>173</sup> From the papers filed to appeal the decision of *Comap SA v European Commission C-290/11 P* European Court Reports 2012 -00000. This principle was discussed above and translates to the effect that doubts must sway the case in favour of the undertaking to which the decision is addressed.

<sup>174</sup> From the papers filed to appeal the decision of *Ibid*.

into account anti-competitive information operates too automatically, as it then assumes that concrete market behaviour will always follow.<sup>175</sup>

Considering all of the above, where the public distancing defence does not function as a practical reality, the *Anic*- and *T-Mobile* presumptions practically amount to presumptions of liability based on attendance at an anticompetitive meeting, even where participation of the undertaking in question cannot be proven.<sup>176</sup>

*(e) Conclusion on the European Competition regime*

The discussion above has illustrated that, while the scope of presumptions has broadened over time, application of the public distancing defence has got narrower. These two opposing forces are working in the same direction, towards an extreme legal position. After *Comap*, it seems that what is required to succeed with public distancing is proof that a written communication was sent to all in attendance and that this written communication *firmly and unambiguously* distanced the firm attempting to rely on the public distancing defence.

As mentioned in section (a), EU competition law is largely focused on defending the single market imperative and dismantling any internal barriers to trade within the EU. There is an emphasis on ensuring that the vast freedoms granted by the legislative regime are not abused and curtailed by market players, and this provides the foundation for the strict safeguards in place.

However, considering these unique aspects of EU competition law, drawing from this jurisdiction must be approached with caution. With the goalposts shifting every few years, it is difficult to predict what the requirements for public distancing would be by now. It seems that an undertaking wishing to publicly distance itself from anti-competitive activities will only know upon judgment of its case if it had done enough to distance itself, as the requirement seems to move continuously one step out of reach.

It cannot be shown that the European approach is accepted worldwide. In the United States, no court has ever relied on any general principle or any presumption to the effect that a firm simply taking part in an exchange of strategic information is guilty of price fixing.<sup>177</sup> In

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<sup>175</sup> *Commission of the European Communities v Anic Partecipazioni SpA* C-49/92 P European Court Reports 1999 I-04125.

<sup>176</sup> Abenhaïm, *supra* n 7 at 418.

<sup>177</sup> Ghezzi & Maggiolino, *supra* n 164 at 649.

the United States, a leap on the basis of these preconditions, which is accepted in European law as the *Anic*- and *T-Mobile* presumptions, simply does not exist. Ghezzi points out that the main difference between the EU and US approaches to exiting of cartels lies in the ease or difficulty with which the two jurisdictions establish presumptions that either favour complainants, or requires them to bring more evidence to prove their case.<sup>178</sup> The US system does not rely so heavily on presumptions to prove their case as this is not consistent with their law. For this reason, the US position will be considered next as a possible alternative for South African competition lawyers to draw from.

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<sup>178</sup> Ibid at 650.

#### IV US POSITION

The US approach to determining liability for price-fixing cartels will be considered to provide an alternative to the EU approach described above. The US system is primarily concerned with efficiency.<sup>179</sup> Large corporations are historically not found to be problematic as long as their operation is efficient, and cartels are deemed inefficient as it allows competitors to fix trading conditions, which cannot be for consumer benefit and therefore are not efficient.<sup>180</sup> When viewed within the broader scope of the capitalist policies of the US, the efficiency focus seems apt.

This chapter will start with an overview of the US antitrust legislative regime to illustrate how serious the fight against price-fixing cartels in the US has always been. Case law will then be studied to provide context to the broadly formulated Sherman Act of 1890 (“Sherman Act”). It will be shown how US case law developed based on the courts’ understanding of the prohibition of price-fixing in section 1. The evidentiary burden of the prosecution will be explained in a comparison between the rule of reason and *per se* approaches. Criticism of the current position will be discussed and evaluated.

##### *(a) US legislation on price-fixing*

Antitrust law in the US has a wide web of competition laws, the most important being the Sherman Act, followed by the Clayton Act of 1914 and the Federal Trade Commission Act of 1914.<sup>181</sup> The Sherman Act puts the Department of Justice in charge of instituting proceedings in equity to prevent actions that restrain trade and violate the law. In the United States, price-fixing is defined by the Department of Justice Antitrust Division as

*“an agreement by two or more competing producers of a specific commodity, or competing providers of a particular service, in a defined geographic area, to raise, set or maintain prices for their goods or services.”*<sup>182</sup>

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<sup>179</sup> Lina Khan ‘Amazon’s Antitrust Paradox’ 126 *The Yale Law Journal* 712–805 at 719. The Chicago School approach is the predominant approach followed in the US.

<sup>180</sup> Sutherland & Kemp, *supra* n 1 at 2–11.

<sup>181</sup> *Act of July 2, 1890* (‘*Sherman Act*’); *Clayton Antitrust Act of 1914* (‘*Clayton Act*’); *Federal Trade Commission Act of 1914* (‘*Federal Trade Commission Act*’).

<sup>182</sup> ‘Justice Manual Title 7: Antitrust’, *supra* n 4.

Thus, what needs to be proven is the existence of an agreement, that the producers in question are competitors and the effect on prices. As outlined in section II, US law provides for both civil and criminal avenues of antitrust enforcement. Cases involving egregious horizontal, *per se* unlawful agreements, including price-fixing, however, will usually be prosecuted by criminal investigation, according to the policy of the Antitrust Division.<sup>183</sup> Price-fixing cases have seen severe punishment by Government, sometimes even attracting prison sentences for individuals.<sup>184</sup> Thus, only criminal prosecution will be relevant for the scope of this paper.

The Sherman Act was the first federal antitrust legislation to be adopted and contains the main pillars of US competition law - section 1 and section 2.<sup>185</sup> Section 2 deals with unilateral conduct and monopolisation and is not relevant for our purposes.

Section 1, however, is one phrase treated as two statutes in its application to civil and criminal matters. The Sherman Act criminalizes felonies and has severe penalties for these, and allows for a civil route as well, depending on the offence.

Section 1 outlaws behaviour that restrains trade or amounts to anti-competitive behaviour:

*“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 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, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”<sup>186 187</sup>*

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<sup>183</sup> Ibid at 7- 1.100.

<sup>184</sup> ‘Antitrust Division | Criminal Enforcement Of Antitrust Laws: The U.S. Model | United States Department of Justice’, available at: <https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model> [last accessed 22 October 2023].

<sup>185</sup> Dabbah, *supra* n 57 at 238.

<sup>186</sup> *Sherman Act 1890*.

<sup>187</sup> These amounts are updated according to the latest amendments and are not the original wording of the Sherman Act.

The prohibition's absolute nature was acknowledged long ago, leading to its confinement to only unreasonable restraints on trade, despite this not being in the wording of the Act.<sup>188</sup> This confinement is supported by a long line of cases, the most significant being *Board of Trade of City of Chicago v US*, which lays down a test for the legality of an agreement: whether the restraints imposed on trade merely regulate competition, or whether they suppress or destroy competition.<sup>189</sup> On this basis, two different approaches to the application of section 1 offences have materialised:

Some offences are covered by a rule of reason approach, while others are prohibited without a case-by-case enquiry into their net effect – the *per se* prohibition.<sup>190</sup> Rule of reason cases cover practices in a grey area, where restraints merely regulate competition and do not patently and manifestly harm competition by object or effect. Courts applying the rule of reason will examine some factors before deciding whether the circumstances warrant a prohibition of the practice due to it imposing an unreasonable restraint on competition.<sup>191</sup> The rule of reason approach will still allow for a balancing of circumstances before a court. The scope accorded to the rule of reason depends on the degree of permissible judicial discretion in interpreting and applying the Sherman Act at the time, as it is broadly worded.<sup>192</sup>

*Per se* offences are actions so manifestly uncompetitive that there is no need for a court to investigate the behaviour in question to determine the anti-competitive effect thereof; it should be deemed illegal.<sup>193</sup> Once it becomes known that certain factual patterns are regarded as harmful and known to restrain trade, then once the practice is proven, the illegality thereof follows.<sup>194</sup> The key difference between *per se* rules and the rule of reason lies in how a *per se* rule's application or formulation eliminates the necessity for future litigation concerning that specific practice and its reprehensibility.<sup>195</sup> Price-fixing is an example of such a fact pattern, for which US antitrust law does not consider pro-competitive gains as a defence, as it

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<sup>188</sup> See Elhauge, supra n 2 at 54. and the cases discussed therein.

<sup>189</sup> *Chicago Board of Trade v United States*, 246 US 231 (1918) at 238; Hovenkamp, supra n 39 at 253.

<sup>190</sup> Elhauge, supra n 2 at 55.

<sup>191</sup> Dabbah, supra n 57 at 240.

<sup>192</sup> AD Neale & DG Goyder *The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law* 3d ed (1980) at 24.

<sup>193</sup> Larry W Blalock 'Gypsum Intent and Felonious Conspiracies under Section 1 of the Sherman Act: U.S. v. Gillen Case Comments' (1979) 82 *West Virginia Law Review* 371–82 at 374; Dabbah, supra n 57 at 241.

<sup>194</sup> Neale & Goyder, supra n 192 at 30.

<sup>195</sup> Blalock, supra n 193 at 374.

necessarily suppresses or destroys competition. Questions of harm are not to be decided by degree or intent, but are answered by general presumption, namely that price-fixing is *per se* illegal.<sup>196</sup>

The implication of such a presumption is of evidentiary nature – once the prosecution has proven on the facts that price fixing has occurred, the defence can only be on the point of proving price fixing itself, and not on issues such as public harm or noble industry intention.<sup>197</sup> It is through this lens that the price-fixing test in the US needs to be considered in this section.

As mentioned above, what needs to be proven is the existence of an agreement, that the producers in question are competitors and the effect on prices. In contrast to rule of reason cases, evidence on industry effect is not permissible in cases of price-fixing.

Acting as a counterbalance to this strict rule, Neale notes that the term ‘price-fixing’ must not be defined too broadly.<sup>198</sup> The abstract nature of the term may allow it to cover too many fact patterns, and this may place too significant a restriction on undertakings to ensure that the law remains fair. This is a logical approach when considering the US concept of conscious parallelism, which entails the practice of independent price setting in an oligopolistic market by competing firms without an agreement between firms.<sup>199</sup> By including this concept in the US antitrust regime, provision is made for action against conduct in the continuum of actions falling outside of price-fixing, but which is still possibly harmful. This conduct may still be considered under the rule of reason and found to be illegal where the facts justify such a finding.<sup>200</sup> The concept of conscious parallelism falls short of meeting the requirements for an agreement under the US system, and is therefore beyond the scope of this thesis.

This stands in contrast to EU regime, which strictly precludes any direct or indirect contact between competitors, as explained in Part III.

Other legislation relevant to the field includes the Antitrust Procedures and Penalties Act of 1974 (“APPA”).<sup>201</sup> The APPA sets forth the procedures for civil and criminal enforcement of antitrust laws in the United States. In 1974, the APPA changed the status of criminal

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<sup>196</sup> Neale & Goyder, *supra* n 192 at 30.

<sup>197</sup> *Ibid* at 31.

<sup>198</sup> *Ibid*.

<sup>199</sup> Boniwell Ann & Goolabjith Kriska-Leila ‘The contentious concept of conscious parallelism: competition law’ (2013) 13 *Without Prejudice* 64–7 at 64.

<sup>200</sup> *Ibid* at 66.

<sup>201</sup> *Antitrust Procedures and Penalties Act of 1974* (‘*Tunney Act*’).

violations of antitrust laws from misdemeanours to felonies.<sup>202</sup> It also raised limits for fines and extended possible sentences for perpetrators. The maximum criminal fine for firms is now \$100 million and \$1 million for individuals. Individuals can also face imprisonment of up to 10 years, or both.<sup>203</sup> The APPA's stricter penalties aim to deter anti-competitive behaviour and promote fair markets while necessitating a thorough inquiry into price fixing to avoid stifling competition in the world's largest capitalist economy.

Despite the enactment of subsequent legislation, the broad wording of the Sherman Act still creates some confusion.<sup>204</sup> Courts have been instrumental in the development and understanding of antitrust legislation. For this reason, case law on the interpretation of section 1 of the Sherman Act will be considered next.

*(b) US case law on price fixing*

Based on the legislation, one can fairly state that in American anti-trust law, agreements between independent firms to fix a common price for their products will constitute a *per se* violation of section 1 of the Sherman Act. Case law through the years has developed the implications of this statement.

*United States v Addyston Pipe & Steel Company* was an early case dealing with the sale, manufacture and transport of iron pipe in a way that the Supreme Court described as restraining trade between states. The Supreme Court found that a 'naked' restraint on trade is unlawful, and that reasonableness of such a restraint is not a defence.<sup>205</sup> Thus, already in 1899 the Supreme Court laid down the principle that certain restraints cannot be defended by their effect on the market, laying the foundation for what would later become known as a *per se* prohibition.

The leading case on price-fixing in the US and the *per se* prohibition is that of *United States v Trenton Potteries Company*.<sup>206</sup> This case dealt with an agreement by undertakings

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<sup>202</sup> B Dan Wood & James E Anderson 'The Politics of U.S. Antitrust Regulation' (1993) 37 *American Journal of Political Science* 1–39 at 3.

<sup>203</sup> *Tunney Act* at s3.

<sup>204</sup> John J Flynn 'Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos' (1980) 49 *Antitrust Law Journal* 1593–634; Matthew G Sipe 'The Sherman Act and Avoiding Void-for-Vagueness' (2017) 45 *Florida State University Law Review* 709–62.

<sup>205</sup> *Addyston Pipe & Steel Co v United States*, 175 US 211 (1899) at 271.

<sup>206</sup> *United States v Trenton Potteries Co*, 273 US 392 (1927); Hovenkamp, *supra* n 39 at 256.

controlling over 80% of the market for sanitary pottery to maintain uniform prices. The defence was raised that the prices fixed were reasonable and caused no injury to the public. However, this defence was rejected in a classic statement by Justice Stone, indicating that although only those restraints on interstate commerce that are unreasonable are prohibited by the Sherman Act,

“[I]t does not follow that agreements to fix or maintain prices are reasonable restraints, and therefore permitted by the statute, simply because those prices are reasonable.”<sup>207</sup>

Since the *Chicago Board of Trade*-case, the understanding is that the Sherman Act prohibits only unreasonable restraints on trade, for the sake of efficiency. Justice Stone in *Trenton Potteries* explained that the very aim and result of all cases of price-fixing is to eliminate some form of competition and the power to invoke such control over the market must not be abused. A ‘reasonable’ fixed price today may be an unreasonable fixed price tomorrow as economic and business environments change while the established price remains constant.<sup>208</sup> Prices should always remain free and flexible in response to changing market conditions and, for that reason, the US law regards price fixing as a *per se* restraint on trade.

Undertakings attempting to defend themselves in later cases came up with more nuanced and complex arguments to distinguish themselves from the facts of the *Trenton Potteries*-case. This provided the Supreme Court with opportunities to set out the parameters of prohibited price-fixing practices. In the case of *United States v. Socony-Vacuum Oil Co., Inc.*, for example, the Supreme Court, during the Great Depression, disposed of any distinction between aggressive and defensive price-fixing, settling the law that no amount of financial distress justifies agreements to suppress prices in competition or tamper with the free workings of the price mechanism.<sup>209</sup> In this case, the court condemned a plan among gasoline companies to buy up excess gasoline to create a floor for market prices, finding that both the purpose and the effect was to destroy competition. There can now be no defence resting on the nature of the prices fixed by industry players, since the agreements themselves will be *per se* illegal once it

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<sup>207</sup> *United States v Trenton Potteries Co*, 273 US 392 (1927) at 396.

<sup>208</sup> *Ibid* at 396–7.

<sup>209</sup> *United States v Socony-Vacuum Oil Co, Inc*, 310 US 150 (1940) at 218–9; Neale & Goyder, *supra* n 192 at 41.

has been proven that both the *purpose and effect* of an agreement is to fix prices.<sup>210</sup> Undertakings hoping to escape liability will then need to defend themselves on the facts relating to proof of the price-fixing agreement itself, after a finding of purpose and effect on prices was made.

Difficult questions in case law arise from the challenges of proving the existence of price-fixing agreements themselves, as American authorities must establish all elements of such agreements to impose sanctions.<sup>211</sup> The Supreme Court was faced with such a difficulty in the case of *Maple Flooring Manufacturers Association v United States*, which concerned an association of 22 manufacturers of hardwood flooring.<sup>212</sup> In this case, summaries of all sales, prices and stocks were circulated between association members and meetings were held to exchange views on the industry's problems. Evidence was led that no discussion of prices took place at the meetings and prices of members were not found to be uniform or higher than those of other market participants. The Supreme Court ruled that the evidence pointing to price-fixing was not persuasive. This indicates that, in US law, any inference of collusion needs to be solidly established on the facts and will not be presumed.<sup>213</sup> The court held that '*competition does not become less free merely because conduct of commercial operations becomes more intelligent through free distribution of knowledge*' regarding commercial transactions.<sup>214</sup> Here we can observe an approach that contrasts with the European approach and the *Anic*-presumption, which presumes that undertakings rely on information shared and, in doing so, reduce competition in the market. To reiterate, what needs to be proven in the US system is the existence of an agreement, that the producers in question are competitors and the effect on prices. Only thereafter will the *per se* prohibition be triggered. Mere information exchanges will be dealt with under the rule of reason.<sup>215</sup>

We observe that, in criminal cases, an additional requirement for the state to succeed with price-fixing allegations was introduced: that of *mens rea* or the intention to commit a crime. The case of *United States v United States Gypsum Company* ("Gypsum") dealt with criminal

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<sup>210</sup> *United States v Socony-Vacuum Oil Co, Inc*, 310 US 150 (1940) at 261.

<sup>211</sup> *Morissette v United States*, 342 US 246 (1952) at 274.

<sup>212</sup> *Maple Flooring Manufacturers' Assn v United States*, 268 US 563 (1925).

<sup>213</sup> Neale & Goyder, *supra* n 192 at 47.

<sup>214</sup> *Maple Flooring Manufacturers' Assn v United States*, 268 US 563 (1925) at 583.

<sup>215</sup> Hovenkamp, *supra* n 39 at 218.

proceedings under section 1.<sup>216</sup> It dealt with several competing gypsum board manufacturers and their officials being indicted for violations of section 1 of the Sherman Act for allegedly engaging in a price-fixing conspiracy when exchanging information about resale prices. The Supreme Court found that an effect on prices, without more, cannot support a criminal conviction under the Sherman Act, as the defendant's state of mind is an element of the enquiry that must be established through evidence, and not presumed.<sup>217</sup> The court made clear that there cannot be a legal presumption of wrongful intention from proof of an effect on prices, stating that "*the criminal offenses defined by the Sherman Act should be construed as including intent as an element.*"<sup>218</sup> In support, the Supreme Court relied on a decision it made in the case of *Morissette v United States*, stating that "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."<sup>219</sup> The court in *Gypsum* pointed out its unwillingness to construe the Sherman Act as mandating a form of strict liability for criminal offences in antitrust law.<sup>220</sup> Criminal liability and intent can, however, be found where defendants acted with knowledge of the anticipated consequences of their calculated conduct, and where anti-competitive effects have occurred.<sup>221</sup>

Lower courts interpreted this statement from the *Gypsum*-case by saying that the defendant must have knowingly entered into the anti-competitive conduct, knowing the nature thereof, or that the conduct was intended to produce anticompetitive effects, although this would be more difficult to prove.<sup>222</sup> This makes sense as an investigation into the intent of the undertaking would raise questions the *per se* rule is intending to avoid.<sup>223</sup>

Despite this, only one year later, an Appeal Court decision went against what was decided in *Gypsum*. In *United States v Gillen* ("Gillen"), the court held that "[I]n price-fixing conspiracies, where the conduct is illegal *per se*, no inquiry has to be made on the issue of intent beyond

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<sup>216</sup> *United States v United States Gypsum Co*, 438 US 422 (1978).

<sup>217</sup> *Ibid* at 435.

<sup>218</sup> *Ibid* at 443.

<sup>219</sup> *Morissette v United States*, 342 US 246 (1952) at 274.

<sup>220</sup> *United States v United States Gypsum Co*, 438 US 422 (1978) at 435–6. This would, however, be enough to show a civil violation.

<sup>221</sup> *Ibid* at 444, 446.

<sup>222</sup> *US v Giordano*, 261 F3d 1134 (2001); *US v Brown*, 936 F2d 1042, 925 F2d 1182 (1991); Dabbah, *supra* n 57 at 242; Hovenkamp, *supra* n 39 at 593.

<sup>223</sup> *United States v Koppers Co, Inc*, 652 F2d 290 (1981).

*proof that one joined or formed the conspiracy.*<sup>224</sup> For this, the court relied on a statement made in *Socony Vacuum* that any firm which tampers with price structures is engaged in an unlawful activity.<sup>225</sup> The court in *Gillen*, however, ignores a statement made later in the same paragraph by *Socony Vacuum* relating to the requirement of proving the “*purpose and effect*” of price-fixing.<sup>226</sup> Requiring proof that the purpose was to fix prices cannot be said to be disconnected from intention. The court in *Gillen* thus equated participation with intention, similar to the EU approach. However, this approach does not overrule the approach laid down in *Gypsum*, as the Supreme Court decision carries more authority.<sup>227</sup>

Neale and Goyder provide some examples of cases in which defendants successfully defended allegations of price-fixing made in information exchange cases.<sup>228</sup> An illustrative example is in *Tag Manufacturers’ Institute v Federal Trade Commission* where pricing information exchanged by competitors had been made publicly available, thus evidence of collusion in price determination was weak.<sup>229</sup>

This indicates how the US position has not strayed into the same territory as the EU, in which it has become practically impossible to succeed with a defence. The statements in *Gypsum* have been subject to some commentary and criticism, which will be considered next.

### (c) Commentary

The Sherman Act’s prohibition of price-fixing has been mainly criticised for its *per se* approach and the uncertainty regarding the additional requirement of *mens rea* read into the provision for criminal matters.

#### (i) *Per se* illegality

Some commentators argue that *per se* illegality of price-fixing in the US violates certain constitutional principles. Henry, for example, states that the presumption it creates takes away

<sup>224</sup> *United States v Gillen*, 599 F2d 541 (1979) at 545.

<sup>225</sup> *United States v Socony-Vacuum Oil Co, Inc*, 310 US 150 (1940) at 261.

<sup>226</sup> *United States v Gillen*, 599 F2d 541 (1979) at 545; *United States v Socony-Vacuum Oil Co, Inc*, 310 US 150 (1940) at 261.

<sup>227</sup> Much academic debate around the *Gypsum*-case took place in the 1980’s, indicating the controversial shift this case caused. However, subsequent case law seems to consider the debate as settled, as the position has not changed from what was decided in *Gypsum* and current academics no longer dwell on this. For more on this, see Hovenkamp, supra n 39 at 593. And the cases discussed therein.

<sup>228</sup> Neale & Goyder, supra n 192 at 48.

<sup>229</sup> *Tag MFRS Institute v Federal Trade Commission*, 174 F2d 452; Neale & Goyder, supra n 192 at 48.

from judicial fact-finding and violates due process.<sup>230</sup> She warns that the Department of Justice could leverage the uncertainty surrounding *per se* illegality to deprive the accused of an opportunity to bring evidence at trial to defend the notion of conclusive illegality. Sipe also comments that the questions on inclusion of *mens rea* as a requirement to prove price-fixing adds to the vagueness of which the Sherman Act is frequently accused.<sup>231</sup> The *mens rea* requirement does, however, answer the constitutional questions raised by Henry since fact-finding is necessary to prove the defendant's state of mind in the alleged price-fixing conduct.

Another avenue of criticism against the *per se* rule came from its application by the courts in the 1960's and 70's. At this time, application of the *per se* rule reached its pinnacle, placing greater emphasis on the 'conclusively presumed' language.<sup>232</sup> For example, the case of *United States v Container Corp of America*<sup>233</sup> in 1969 arguably went too far. This case dealt with defendants providing details to one another about prices charged or quoted to individual customers for corrugated containers. This information sharing aimed to stabilise prices in the market, albeit at a downward level. In deciding that these actions were sufficient to establish the conspiracy ingredient of section 1 of the Sherman Act, the court held that when competitors have knowledge of each other's prices, they typically tend to align their own prices accordingly. It furthermore explained that "*inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.*"<sup>234</sup> This thought process relied on an inference and not on fact-finding regarding purpose and effect, as *Socony Vacuum* laid out. It is understandable that scrutiny of the approach takes place at this point, especially when viewed through the constitutional lens. Reliance on inferences or presumptions of anti-competitive conduct seems reminiscent of the approach taken in the EU, discussed in Part III.

This all changed in 1979, with the watershed decision of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*<sup>235</sup> This decision appeared to revert the position to its former focus on competitive purpose and effect, as observed in *Trenton Potteries* and *Maple*

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<sup>230</sup> Henry, supra n 40 at 116.

<sup>231</sup> Sipe, supra n 204 at 744.

<sup>232</sup> Henry, supra n 40 at 127.

<sup>233</sup> *United States v Container Corp*, 393 US 333 (1969).

<sup>234</sup> *Ibid* at 337.

<sup>235</sup> *Broadcast Music, Inc v CBS, Inc*, 441 US 1 (1979).

*Flooring Manufacturers*. This case dealt with a complaint against the issuing of blanket licenses to copyrighted musical compositions at fees negotiated by Broadcast Music Inc and their members and affiliates, alleging illegal price-fixing under antitrust laws.

In finding that it did not constitute *per se* unlawful price-fixing, the Supreme Court stated that “[I]t is necessary to characterize the challenged conduct as falling within or without that category of behaviour to which we apply the label “per se price-fixing”.”<sup>236</sup> Essentially, the complainant is required to prove all of the elements of price-fixing before the *per se* prohibition enters into force. The court found that a *per se* analysis demands fact-finding even in price-fixing cases, in the form of an assessment of the competitive purposes and effects of the competitors and the agreement amongst them. This approach dismisses the idea of excluding the purpose and effect enquiry when assessing reasonableness, as was suggested in *Gillen*, and once again confirming the *Gypsum*-position.<sup>237</sup> Considering the long-held consensus that price-fixing is the most egregious form of competitive market distortion, presuming illegality once price-fixing is conclusively proven does not seem to be too radical an approach. This is also in line with sentiments of the old cases *Addyston Pipe & Steel* and *Trenton Potteries* that price-fixing is *per se* illegal and that there is no such thing as reasonable price-fixing. This also appears to be in line with the position previously established in *Socony Vacuum* to support a relatively clear position after the *Gypsum*-case.

Henry further notes that the *Gypsum*-case states that information sharing is not *per se* illegal, while price-fixing is.<sup>238</sup> Information sharing would thus be evaluated under the rule of reason approach. This distinction between actions leaves scope to find price-fixing only where defendants knowingly entered into price-fixing agreements and anticipated the consequences.<sup>239</sup> This differs greatly from the EU position where information sharing is the crucial conduct, which gives rise to a presumption of effect on prices. In the US, once price-fixing is conclusively proven on the facts, presuming unreasonableness is not unwarranted in view of the consensus that price-fixing is illegal.

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<sup>236</sup> *Ibid* at 9.

<sup>237</sup> Henry, *supra* n 40 at 130.

<sup>238</sup> *Ibid* at 126; *United States v United States Gypsum Co*, 438 US 422 (1978) at 441.

<sup>239</sup> It must be noted that authors recently comment on the distinction between the *per se* and rule of reason approaches as narrowing or becoming merely superficial, due to increasing proof required to access the *per se* prohibition. This debate is beyond the scope of the current research. For more on this, see Hovenkamp, *supra* n 39 at 255; Elhauge, *supra* n 2 at 56.

Neale is in favour of the *per se* approach, stating that there is clear consensus in the United States in favour thereof.<sup>240</sup> He states that such a rule would rarely cause economic harm on balance and economic harm is, in any event, not a concept courts are best positioned to assess.<sup>241</sup> Confining evidence to the facts of price-fixing and excluding economic considerations *per se* significantly simplifies the prosecution process.<sup>242</sup> Considering arguments from other authors mentioned above, there no longer seems to be consensus today, but the benefits of the *per se* approach highlighted by Neale still hold. Even critics of the antitrust administration have to concede that price fixing is a flagrant offence and that prohibition of such offences would rarely cause economic harm.<sup>243</sup> For this reason, the *per se* approach aids in creating clear legal rules in the antitrust regime.<sup>244</sup> The Sherman Act has been criticised for its vagueness, but the *per se* prohibition on price-fixing is useful in providing some answers.<sup>245</sup>

(ii) *The mens rea requirement*

Apart from questions on the *per se* prohibition itself, the main thrust of the criticism of the US position on price fixing relates to the *mens rea* requirement and the vagueness that surrounds it. When considering the Sherman Act's legislative history, it is relevant to note that the addition of a *mens rea* requirement to the original bill by the Finance Committee was heavily criticized for allegedly making it impossible to secure a conviction. The *mens rea* requirement was later specifically removed.<sup>246</sup> The court in *Gypsum* did not seem to be aware of these developments, as it did not discuss this nor any aspect of the Sherman Act's legislative history. The Supreme Court has failed to consider whether the *mens rea* requirement should now be higher under the new Act, having elevated price-fixing to the status of a felony.<sup>247</sup>

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<sup>240</sup> Neale & Goyder, supra n 192 at 447.

<sup>241</sup> Ibid at 446.

<sup>242</sup> Ibid at 447.

<sup>243</sup> Ibid at 445.

<sup>244</sup> Ibid at 447.

<sup>245</sup> See for example Donald Baker 'To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement' (1981) 12 *Journal of Reprints for Antitrust Law and Economics* 411–26 at 417; Blalock, supra n 193 at 378; Henry, supra n 40 at 158.

<sup>246</sup> Sipe, supra n 204 at 749.

<sup>247</sup> Ibid at 750.

Blalock criticises the *Gypsum* decision for rejecting the requirement that a specific intent to restrain trade must be shown. He states that a conclusive presumption of intent is rational as those involved in a conspiracy that necessarily and directly restrains trade must be considered to have intended such necessary and direct consequences of their acts.<sup>248</sup>

Blalock arguably loses sight of the distinction between intended actions and their natural consequences. One must namely keep in mind that this approach enters the territory of strict liability, which the Supreme Court in *Gypsum* expressly decided against imposing. *Gypsum* does not state that intent does not need to be proven. It states that knowledge of the nature and effect of the conduct must be present, followed by a choice to proceed, which will then amount to intentional price-fixing. This avoids a hard presumption of intent based merely on the effect on prices. It also requires concrete evidence of the specific consequences and harm, which would be nearly impossible to bring. *Gypsum* requires that an intention to fix prices must be proven, but not specifically the intention to restrain trade or bring about harm. Harm would be a necessary consequence of price-fixing, and not an objective in itself.

It is rational to conclude that any substantial harm to competition is contrary to public interest, and any agreement that demonstrably imposes significant restrictions on competition is inherently associated with illegal intent in line with the principle that he who wills the means, wills the end.<sup>249</sup> This accords with the approach stated by the court in *Gypsum* that the defendant must have knowingly entered into the anti-competitive conduct, knowing the nature thereof, but that it is not necessary to show the specific intention or desire to cause actual anti-competitive effects.<sup>250</sup>

It is true that the original bill specifically excluded the *mens rea* requirement, but the offence of price-fixing has since changed from a misdemeanour to a felony, and therefore more misdemeanour convictions would not have had as chilling an effect on natural competition as it may now. Therefore, in the current climate, the higher threshold for the prosecution to prove is appropriate considering the severity of the sanctions available to the court. Case law has successfully set out the scope of section 1 of the Sherman Act in its current understanding and going forward, the Supreme Court must adhere to the precedent it has set.

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<sup>248</sup> Blalock, *supra* n 193 at 377.

<sup>249</sup> Neale & Goyder, *supra* n 192 at 448.

<sup>250</sup> *United States v United States Gypsum Co*, 438 US 422 (1978) at 446.

(d) *Conclusion*

When comparing the US system with the EU system, as described in Part III, the contrast lies in what the prosecution must prove. Where the EU system requires the Commission to prove the existence of an agreement or concerted practice in order for the *Anic-* and *T-Mobile* presumptions to come into play and for the elements of conduct on the market and relationship between cause and effect to be presumed, the US system requires proof of all three elements of price-fixing, whereafter the presumption in terms of the *per se* rule merely presumes illegality of such an agreement. This illegality will only be presumed once it is proven that the object or effect of such conduct is to harm competition or restrain trade.

The key difference lies in whether the system considers knowledge of certain price or industry information as necessarily influencing decisions of firms and causing harm, or whether such restraint on trade and harmful intents need to be proven for sanctions to be imposed. The US approach does not assume any fact patterns, which may not exist; it relies on facts provided in court and relies on the presumption merely to find that the practice of price-fixing is, *per se*, a punishable offence. This is in the interests of justice as it saves time and resources, which can rather be spent curbing other offenders.

The case law on Article 1 of the Sherman Act has developed to a position where the existence of an agreement between competitors with an effect on prices needs to be proven in a case of price-fixing. If criminal prosecution is undertaken, the prosecution needs to prove, in addition to the element of *mens rea*, that there was an intent to fix prices. Only then will the presumption of *per se illegality* be triggered.

To reiterate, the US antitrust system utilises presumptions only to aid in finding that no enquiry into competitive harm of the impugned agreement needs to be conducted, as price-fixing is harmful and illegal *per se*. The presumption in terms of the *per se* rule does not presume any of the elements of price-fixing, but merely presumes illegality of such an agreement.

Having considered the US approach, the discussion will now turn to the position in South Africa to facilitate a comparative analysis.

## V APPROACH IN SOUTH AFRICA

A study of the above jurisdictions helps to illustrate how large markets treat evidentiary presumptions and burdens of proof in deciding cases of price-fixing. The South African competition law regime will be considered next to investigate how the requirements of proving price-fixing overlap with and draw from the aforementioned legal regimes. It will be shown how both systems have played a role in the development of South African competition law, which nonetheless has a number of its own unique features, particularly context and public interest.

This section will first investigate the unique context and features of South African competition law. Thereafter, the key legislative provisions on price-fixing will be set out and case law will be discussed to show how the public distancing approach has been slowly incorporated and expanded in our law. Finally, observations will be made regarding the appropriateness of incorporating features of each system discussed above into South African competition law by comparing contexts and approaches.

### *(a) Unique features of South African competition law and background*

South African competition law is predicated on the essential assumption that the market, when left to its own devices, will not operate at optimal capacity as large corporations will create monopolies and misappropriate profits where regulation does not step in to curb excessive power.<sup>251</sup> The Competition Act was designed to regulate traditionally accepted competition goals such as competitive prices and improved quality, but unlike most other countries also includes wider public interest goals. These goals go beyond the scope of the competition laws of other jurisdictions.<sup>252</sup> The Competition Act aims to contribute to redressing and curbing the power of large businesses that existed after Apartheid. This stands in contrast with the EU position, which is mainly focused on the competitive process itself, and the US approach, which focuses on efficiency above all.<sup>253</sup>

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<sup>251</sup> Kelly et al, supra n 4 at 21.

<sup>252</sup> Neuhoff et al, supra n 53 at 13.

<sup>253</sup> See parts III and IV above on the position in these jurisdictions.

The Competition Act enjoins lawyers and courts to develop a jurisprudence which reflects the law of the jurisdictions from which it was drawn, but ensures content is given to the particular demands of the country as provided for in the Competition Act.<sup>254</sup>

The preamble of the Competition Act acknowledges the impact of South Africa's discriminatory past, which led to an unfair distribution of ownership and control, inadequate control over anti-competitive trade practices and unjust limitations on the economic participation of all South Africans. The Act recognizes the importance of making the economy more accessible to a broader spectrum of citizens. The emphasis is on creating an efficient and competitive economic environment that considers the interests of workers, owners, and consumers, with a focus on overall development, ultimately benefiting all South Africans.<sup>255</sup> Although consumer welfare is of central importance, South African competition law goes further in pursuing a public interest avenue to redress the inequalities of the past.

Section 2 removes any doubt relating to social welfare goals instilled in South African competition law by listing 7 multifarious goals. These include the promotion of employment and advancement of social and economic welfare of South Africans, enhancement of the opportunities for small and medium-sized enterprises to participate fairly in the economy and promotion of a greater spread of ownership and increase of the ownership stakes of historically disadvantaged persons.<sup>256</sup> Internationally, broader approaches to competition law had lost popularity, especially in the US.<sup>257</sup> However, it is clear that the drafters of the South African Competition Act wanted to make a distinct break from the worldwide trend. Case law seems to propose that South Africa's developing country status and distinctive political history should not limit competition to solely consumer welfare or related economic interests.<sup>258</sup> Section 2 and the preamble advocate for a more comprehensive approach to competition and competition law, providing SA competition law with some unique features, which must be kept in mind when relying on foreign law to fill gaps.

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<sup>254</sup> MSM Brasseley (ed) *Competition Law* 1st ed (2002) at v.

<sup>255</sup> Sutherland & Kemp, *supra* n 1 at 1–52.

<sup>256</sup> S2(e)-(f). This resembles the Harvard school of thought in modern competition law. For more on this, see *Ibid* at 1–25.

<sup>257</sup> *Ibid* at 1–53.

<sup>258</sup> *Mondi Limited v Kohler Cores and Tubes [2003] 1 CPLR 25 (CAC)* at 48; *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited [2009] ZACAC 1*; Sutherland & Kemp, *supra* n 1 at 1–57.

This approach is not without criticism, the concerns relating mainly to the overcomplication of competition law and the difficulty for authorities to make use of precedents from other jurisdictions.<sup>259</sup> However, the position still holds and Sutherland and Kemp state that the conflicts over and effectiveness of these policy goals should not be exaggerated.<sup>260</sup> Courts and academics must keep these unique aspects of South African competition law in mind when deciding to import principles from foreign jurisdictions such as the EU and US. The legislative provisions dealing with price-fixing specifically will be explored next.

*(b) Legislation dealing with price-fixing in South Africa*

In South Africa, competition has been regulated since 1979 through the Maintenance and Promotion of Competition Act 96 of 1979. After a new political dispensation came to be in 1994, the need arose for an updated Act. The current Competition Act came into existence in 1998, drawing heavily on the experience of developed countries such as Canada and Australia, as well as the EU.<sup>261</sup>

Section 4 of the Competition Act deals with interactions between competitors, which are called restrictive horizontal practices and widely known as cartels. The Competition Commission defines a cartel as

*“An agreement or concerted practice between two or more competitors to fix prices and/or trading conditions, divide markets and/or engage in collusive tendering. By artificially limiting competition that would normally prevail between them, companies avoid exactly the kind of pressures that lead them to innovate, both in terms of product development and production methods. This ultimately results in high prices and less choices for consumers.”<sup>262</sup>*

Section 4 covers three types of cooperative activities, namely agreements, concerted practices and decisions by associations of firms. Section 4(1)(a) of the Competition Act states that an agreement, concerted practice between competing firms or decision by an association of firms will be prohibited if it has anti-competitive effects, namely substantially preventing or

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<sup>259</sup> W Duncan Reekie ‘The Competition Act, 1998: An Economic Perspective’ (1999) 67 *The South African Journal of Economics* 115–25 at 284; Sutherland & Kemp, supra n 1 at 1–58; Neuhoff et al, supra n 53 at 14.

<sup>260</sup> Sutherland & Kemp, supra n 1 at 1–58.

<sup>261</sup> Neuhoff et al, supra n 53 at 12.

<sup>262</sup> Makgale Mohlala ‘Cartels’, available at: <https://www.compcom.co.za/cartels/>.

lessening competition in the market. This can only be justified if the undertakings concerned can show that the agreement or concerted practice creates certain technological, efficiency or procompetitive gains, which outweighs the anti-competitive effect. The wording of this section is similar to the rule of reason provisions of the Sherman Act, which allows consideration of the pro-competitive gains which may result from the agreement.

Section 4(1)(b), however, prohibits three horizontal practices outright, with no provision made for a defence based on technological or efficiency reasons. These are price-fixing,<sup>263</sup> market allocation<sup>264</sup> and collusive tendering.<sup>265</sup> Therefore, these three practices are prohibited *per se*, as this business conduct is deemed to be anti-competitive and harmful to consumers by its very nature. Price-fixing is defined in South Africa as a contract, agreement or understanding having the effect of fixing, controlling or maintaining prices, or other market conditions for goods or services sold or bought by any party in competition with another.<sup>266</sup>

Section 4(1)(b)(i) reads:

- (1) *'An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if -*
- (b) *it involves any of the following restrictive horizontal practices:*
- (i) *directly or indirectly fixing a purchase or selling price or any other trading condition;'*

There will be no enquiry into the technological, efficiency or other pro-competitive gains which the firm believes may have emanated from these prohibited practices.

This hard stance on *per se* prohibitions was confirmed by the Supreme Court of Appeal in *American Natural Soda Ash Corporation and Another v The Competition Commission of South Africa* ("ANSAC").<sup>267</sup> There is no right of recourse for a firm that has contravened this section.

The section 4(1)(b)(i) prohibition on price-fixing operates in a similar manner to that of the US regime discussed in Part IV. Courts or competition authorities will focus solely on

<sup>263</sup> The Competition Act 89 of 1998. S4(1)(b)(i).

<sup>264</sup> Ibid. S4(1)(b)(ii).

<sup>265</sup> Ibid. S4(1)(b)(iii).

<sup>266</sup> Neuhoff et al, supra n 53 at 63.

<sup>267</sup> *American Natural Soda Ash Corporation v Competition Commission 2005 6 SA 158 (SCA)*.

whether the price-fixing has taken place, and not whether it was indeed harmful to competition.<sup>268</sup> Once the necessary elements of price-fixing have been proven by the Commission, it will be *per se* unlawful.

The threshold for applying section 4(1) is that one of the three forms of co-operation must be proven, and that there is evidence that the parties are competitors.<sup>269</sup> For the *per se* prohibition to apply, all that is required to be proven is the parties' engagement in price-fixing. The case of *National Association of Pharmaceutical Wholesalers v Glaxo Welcome*<sup>270</sup> summarised the above in simple terms: what the competition authority must establish is an agreement between competitors to fix prices.<sup>271</sup> Once all three of these elements are shown to be present, the *per se* rule does the rest. This is reminiscent of the functioning of the *per se* rule in the US system, as laid out by the Supreme Court in the *Trenton Potteries*-case.<sup>272</sup>

Section 4(2) then introduces a legislative presumption that price-fixing will be presumed to exist between firms where any of those firms owns a significant stake in another or shares a director or substantial shareholder. Rebutting this presumption requires the firm in question to establish that the practice in question was a normal commercial response to prevailing market conditions.<sup>273</sup>

The Competition Act is silent on how participation in any of these prohibited practices must be determined in the event that the evidence does not offer a clear-cut solution. For this, interpretation by courts and the presumptions at play become instructive.

### (c) Case law

In order to escape liability once a price-fixing agreement has been proven and rebut the presumption of *per se* illegal conduct, an undertaking must show that it had publicly distanced itself from the price-fixing agreement. This approach and its contents stemmed from European

<sup>268</sup> Neuhoff et al, supra n 53 at 16.

<sup>269</sup> Sutherland & Kemp, supra n 1 at 5–11; Neuhoff et al, supra n 53 at 73.

<sup>270</sup> *National Association of Pharmaceutical Wholesalers v Glaxo Welcome (2)* (68/IR/JUN00).

<sup>271</sup> *Ibid* at 75.

<sup>272</sup> *United States v Trenton Potteries Co*, 273 US 392 (1927).

<sup>273</sup> The Competition Act 89 of 1998 at 4(3); Brassey, supra n 254 at 153. Legislative presumptions are not the focus of this thesis as there is no scope for courts to ignore these. It is worth mentioning, though, that Bailey warns against legislative presumptions as they do not allow the inherent flexibility of presumptions developed in case law. For more, see Bailey, 'To Presume, or Not to Presume: That Is the Question', supra n 100. Fortunately, a legislative requirement for rebuttal is included in s4(3), so this is not of any severe consequence at present.

law, approvingly quoted in various South African decisions. The question of public distancing becomes particularly relevant in cases where undertakings involved in price-fixing cartels participated in a passive manner, or where their participation is in dispute.

The Tribunal decision of *The Competition Commission v Aveng (Africa) Ltd* (“*Aveng*”)<sup>274</sup> was an early example that dealt with a respondent wishing to escape liability under section 4(1)(b) of the Competition Act for their passive participation in a wire mesh price-fixing cartel. In finding that its entirely passive role was not sufficient to escape liability, the Tribunal cited the European decision of *Aalborg* and the approach it took to evaluating participation in a cartel.<sup>275</sup> *Aalborg* is authority for the premise that passive participation without manifest opposition is sufficient to lead to liability. The Tribunal further incorporated the dictum from the *Aalborg*-case that a party which tacitly approved of an unlawful initiative without publicly distancing itself or reporting it to the authorities effectively encouraged the continuation of the infringement.<sup>276</sup> This provides a solid logical basis for the reliance on the public distancing approach in South African law. The differences between public distancing, as described at the outset (Part II) and as developed by EU courts (Part III), become important here. It was observed above how the notion of public distancing has been developed beyond its initial bounds by the EU courts.<sup>277</sup>

In *MacNeil Agencies (Pty) Ltd v Competition Commission* (“*MacNeil*”), the CAC set out what must be proven by the Commission to establish liability for price-fixing before the onus can shift to the respondent undertaking to defend itself by raising the public distancing defence.

The Commission had to prove, on a balance of probabilities, that there was sufficient consensus between attendees to constitute a contract, arrangement or understanding in order to prove an infringement under section 4(1)(b).<sup>278</sup> The nature of MacNeil’s involvement was indeed shown to be passive on the facts, but the CAC explained that this was not sufficient to escape liability.<sup>279</sup> The CAC found that the representatives of MacNeil portrayed themselves as passive participants at the meetings in question, and this was sufficient to prove their

<sup>274</sup> *The Competition Commission vs Aveng (Africa) Ltd, t/a Steeldale (84/CR/DEC09) [2012] ZACT 32.*

<sup>275</sup> *Ibid* at 16, 19.

<sup>276</sup> *Ibid* at 16.

<sup>277</sup> See the concept of public distancing as discussed in Part II(b) versus Part III(c) where “public” initially referred to other market participants but was developed into meaning something more akin to “the general public at large”.

<sup>278</sup> *The Competition Commission vs Aveng (Africa) Ltd, t/a Steeldale (84/CR/DEC09) [2012] ZACT 32* at 56.

<sup>279</sup> See for example paras 32-52.

participation in the cartel, as firm repudiation is required from those wishing to rely on non-participation.<sup>280</sup> This is in line with the general procedural principle that it is for the Commission to prove an infringement before the onus shifts to the respondent to defend itself against these allegations. *MacNeil* also provides useful guidance from European law on what the appropriate test is for exiting from a price-fixing cartel by referring to cases such as *Aalborg* and *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v European Commission*.<sup>281</sup> These cases explain that the notion of public distancing as a means to avoid liability must be interpreted narrowly and that silence cannot be regarded as a firm and unambiguous expression of disapproval.<sup>282</sup>

A further case demonstrating the reliance on European jurisprudence by South African courts is the decision of *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) (Ltd) v Competition Commission (“Vulcania”)*.<sup>283</sup> *Vulcania* was one of the appeals stemming from the Tribunal decision in *Aveng*. In this case, *Vulcania* attempted to dispute its role in the cartel, as it did not abide by the pricing decisions taken at the meetings or implement the formula provided. All it did was create the impression that it was abiding by the agreement due to its vulnerability, while selling at considerably lower prices, *Vulcania* claimed.<sup>284</sup> As explained in *MacNeil*, the Competition Act specifically requires it to be shown that *Vulcania* was part of an agreement or concerted practice before it could be held liable. The CAC agreed with the Tribunal in *Aveng* that it was appropriate to apply the European jurisprudence relevant to the determination of consensus in cases of passive participation in deciding this case, considering that our Competition Act specifically states in section 1(3) that regard may be had to foreign or international law when interpreting the Act.<sup>285</sup>

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<sup>280</sup> *The Competition Commission vs Aveng (Africa) Ltd, t/a Steeldale (84/CR/DEC09) [2012] ZACT 32* at 58, 64.

<sup>281</sup> *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v European Commission T-83/08* General Court Seventh Chamber ECLI:EU:T:2012:48 (2 February 2012).

<sup>282</sup> *Ibid* at 52.

<sup>283</sup> *Aalborg Portland A/S and Others v Commission of the European Communities C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P* European Court Reports 2004 I-00123 at 84; *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) (Ltd) v Competition Commission and Others (84/CR/DEC09) [2013] ZACAC 4*.

<sup>284</sup> *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) (Ltd) v Competition Commission and Others (84/CR/DEC09) [2013] ZACAC 4* at 11.

<sup>285</sup> *Ibid* at 19; *The Competition Commission vs Aveng (Africa) Ltd, t/a Steeldale (84/CR/DEC09) [2012] ZACT 32* at 16.

At this point, it can be accepted that South African courts rely on the public distancing approach set out in the EU's *Aalborg* ruling when considering whether an undertaking should be held liable for its passive role in a price-fixing cartel. The basic rationale of the European cases was that passive participation without public distancing is sufficient in price-fixing cases since it creates the belief in the minds of others that the passive participant has subscribed to the arrangement and intends to comply with it.<sup>286</sup> This was quoted with approval in the cases above.

Later cases, such as *Competition Commission v DPI Plastics (Pty) Ltd*, suggest a tendency towards an overly strict reliance on European law and the European approach.<sup>287</sup> This case presented some rather unfortunate and unique facts surrounding a firm called Andrag. The evidence against Andrag was limited to the attendance by one of its directors, Walter Andrag, at a single meeting in August 2006. Walter Andrag stated that he was unaware of the purpose of the meeting when invited and was taken aback by the proposals made.<sup>288</sup> He agreed to take the proposals back to his sales force but was otherwise passive and never responded to the proposals. The Tribunal acknowledged that, at this stage, it could be concluded that the parties did not consider Andrag as an adherent to the pricing agreement.<sup>289</sup> Thereafter, a party named Kerr Fox played "a game of duplicity" with DPI and Andrag when he indicated to DPI that Andrag was willing to adhere, while never having discussed anything of such a nature with Andrag.<sup>290</sup> For this reason, without any direct or indirect communication between Andrag and DPI, DPI was now under the impression that Andrag was on board with the pricing proposals.

The Tribunal accepted that Andrag was not party to the pricing agreement at this stage. However, as the law after *MacNeil* is focused on the objective beliefs of the meeting attendees, the Tribunal decided to find that Andrag was implicated in the cartel on the basis of the duplicity by Fox and the proposal Andrag said he would take back to his office. The Tribunal explained that he was under a legal duty to give an unambiguous response despite being innocently placed in a situation which was not of his own creation.<sup>291</sup> This, the Tribunal

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<sup>286</sup> *MacNeil Agencies (Pty) Ltd v Competition Commission (121/CACJul12) [2013] ZACAC 3* at 63.

<sup>287</sup> *Competition Commission v DPI Plastics (Pty) Ltd (15/CR/Feb09) [2012] ZACT 47* Saflii.

<sup>288</sup> *Ibid* at 57–8.

<sup>289</sup> *Ibid* at 63.

<sup>290</sup> *Ibid* at 66.

<sup>291</sup> *Ibid* at 88.

reasoned, is justified as it is in line with European law on the matter and there is no reason in our law to adopt a less stringent approach.<sup>292</sup>

The Tribunal provided no further basis for its reliance on European jurisprudence following the *Aalborg* case, which - as will be argued below – has become increasingly restrictive in its application of the public distancing approach. South African case law up to this point had only incorporated the principles set out in *Aalborg*, but not any subsequent European decisions.

However, based on the increasingly strict application of the public distancing approach followed by European courts after the *Aalborg* ruling, the Tribunal decided to find Andrag liable for contravention of section 4(1)(b)(i) of the Competition Act on the basis of his failure to actively repudiate the price proposal at or after the impugned meeting.<sup>293</sup> Fortunately for Andrag, however, the Tribunal found it appropriate to impose no penalty on him despite its finding.

This was based on the duration of Andrag's involvement, Andrag's lack of prior involvement and its more aggressive pricing than required by the pricing proposal.<sup>294</sup>

Although this was a Tribunal decision, which has not been confirmed by the CAC or any higher court, it has also not been overturned. It therefore stands as a precedent for a formalistic application of the *Aalborg*-test in instances where the objective belief of the other members to the agreement was not brought about by the party under scrutiny, but instead by another party acting on behalf of other cartel members.

The overview above shows how South African courts have increasingly incorporated the EU precedent into our competition law regime. This, however, is a moving target, as it is shown above that the EU precedent regarding public distancing is still developing as the meaning of 'public distancing' expands. The next chapter will consider whether this reliance is appropriate.

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<sup>292</sup> *Ibid* at 92.

<sup>293</sup> *Ibid* at 99.

<sup>294</sup> *Ibid* at 100–3. This has been one of only two cases to date in which the Tribunal decided not to impose any penalty despite finding a contravention of s4(1)(b).

## VI AN EVALUATION OF THE RELIANCE BY SOUTH AFRICAN COURTS ON THE LAW OF FOREIGN JURISDICTIONS

As demonstrated in Part III, the European position in its current form is subject to some criticism. This section delves into the appropriateness of the South African Competition Commission and courts relying directly on the European approach and its key presumptions. We will identify and analyse potential tensions and obstacles. Subsequently, the discussion turns to an examination of the overlap and similarities between South African competition law and the US antitrust system. The goal is to assess the appropriateness of relying on the US system in the South African context.

### *(a) Transplanting the European approach into South African law - critiques and suggestions*

Direct transplantation of law from one system or context to another will necessarily have unforeseen consequences.<sup>295</sup> Law and precedent must always be investigated for inconsistencies with the foreign legal system in which it is being applied. Even strong proponents of the European approach admit that however good the solution found in EU law is believed to be, it will fall short of satisfying everybody.<sup>296</sup> It will not suffice in South African law as there is a legally mandated burden of proof for both civil and criminal cases, which is also enshrined in the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

When considering the unique features of South African competition law, it is apparent that European law is not a universally ideal model. The Competition Act's distinctive focus on broader public interest goals sets it apart from other jurisdictions. Consequently, directly transplanting foreign legal concepts and presumptions may not be suitable without careful consideration of the differing goals of each system.

The broader view of the Article 101(3) defence in EU law (discussed in Part III) would indicate some overlap in policy approach with the South African regime. The broader view allows for goals other than those purely aimed at economic efficiency to be included, for

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<sup>295</sup> Tudor-Nicolae Nacev ‘Public Distancing in Completion Law. Concept, Scope, Legal and Procedural Conditions Competition Law’ (2016) 2016 *Revista Romana de Drept al Afacerilor* 71–86 at 85.

<sup>296</sup> De la Torre, *supra* n 151 at 506.

example industrial policy, environmental protection, employment or public interest.<sup>297</sup> This is analogous to section 2 and the preamble in the South African Competition Act, which allow for redistribution of ownership, promotion of employment and advancement of the social and economic welfare of the previously disadvantaged groups. However, there is relative consensus among academics that the EU does not follow this broad approach.<sup>298</sup> Instead, the narrow approach being followed is focused purely on the competitive process.

Furthermore, one must not underestimate the impact of the unique context of EU competition law. This focus on the competitive process strives for more competitive prices and an increased range of choices to be available to consumers. In the EU, protecting the competition system is more important than the individual consumer's welfare as the legislation is not based on any public welfare goals, unlike the South African Competition Act. Because of the low barriers that the EU regime imposes on undertakings and individuals for doing business throughout the continent, strict safeguards are required to act as a counterbalance. Mechanisms such as the *Anic*- and *T-Mobile* presumptions are created in an attempt to ensure that barriers are not replaced by restraints formed through the conduct of private firms acting together to fix prices or market conditions. This can be considered appropriate in the particular context specifically because the broader legislative context is not as strict, thus necessitating the need for the competition regime to step in with safeguards.

To reiterate, it is appropriate in the EU because of the vast freedoms granted by the free market system, but when one considers these unique aspects of EU law in comparison with those in South Africa, as discussed in Part V(a), the contextual differences necessitate different legal treatment of alleged perpetrators. The above demonstrates that each legal system must be considered and understood as a whole before categorical rules are drawn and transplanted from one to the other as it may hold unforeseen consequences.

A further noteworthy aspect of the EU approach is its definition of a concerted practice: a form of coordination between undertakings, which knowingly substitutes practical cooperation between them for the risks of competition without an agreement ever being

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<sup>297</sup> Whish & Bailey, *supra* n 3 at 163–4; *Case IV/34456 - Stichting Baksteen* Official Journal L 131; *Case IVF1/36718CECED* Official Journal L 187; *Metro SB-Großmärkte GmbH & Co KG v Commission* 26/76 European Court Reports 1977-01875; *Metropole télévision SA v Commission T-528/93* European Court Reports 1996 II-00649.

<sup>298</sup> Whish & Bailey, *supra* n 3 at 163–4.

concluded.<sup>299</sup> Jablonskis explains how this broad concept is useful as it catches even the most sophisticated cartels in its net, where an agreement cannot be proven.<sup>300</sup> It assists in reducing anti-competitive behaviour but results in legal uncertainty and over-prosecution when defined vaguely. The European approach to price-fixing still distinguishes between an agreement and a concerted practice, with different requirements for proving each of these, but these requirements have unfortunately become muddled through the case law discussed in Part III.

Considering the above, and by encompassing a very strong presumption in EU law that firms exchanging strategic information will necessarily shape their *internal* pricing decisions accordingly, this notion catches cartels that emerge only from these strategic inter-firm contacts, regardless of firms' actual pricing conduct.<sup>301</sup> It lessens the burden for Competition authorities attempting to prove cartel participation and makes it more difficult for such firms to defend themselves. Since the EU does not impose criminal sanctions for price-fixing offences, the conflation of these concepts are of lesser consequence. With the South African Competition Act moving towards allowing scope for criminal penalties in certain instances, the concepts must remain clearly delineated if the system is to remain fair.

In contrast, South African law still requires proof of an agreement to cooperate. The CAC in *MacNeil* stated that the Commission must prove sufficient consensus on the proposals by the end of each meeting to constitute a contract, arrangement or understanding in order to prove a restrictive horizontal practice such as price-fixing.<sup>302</sup> The undertaking in question must be shown to have consented to the price-fixing agreement. What was brought into our law by the South African cases discussed was not the strict European approach pertaining to exchange of strategic information. The prohibitions applied in the EU are formulated very broadly as the Commission has the power of exemption guided by Article 101(3) of the TFEU as a counter-balance to the burden of casting the net so wide.<sup>303</sup> In South Africa, the *per se* prohibition in section 4(1)(b)(ii) does not provide for any such exemption.

In conclusion, South African courts must guard against direct importation of this mutated European approach as it has arguably been developed to capture conduct beyond reasonable

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<sup>299</sup> Jablonskis, *supra* n 128 at 15.

<sup>300</sup> *Ibid* at 13.

<sup>301</sup> Ghezzi & Maggiolino, *supra* n 164 at 467.

<sup>302</sup> *MacNeil Agencies (Pty) Ltd v Competition Commission (121/CACJul12) [2013] ZACAC 3* at 56.

<sup>303</sup> Brassey, *supra* n 254 at 140.

bounds where measures do not already exist to safeguard against this. Instead of focusing so intensely on the mere presence at a meeting, authors suggest that European institutions should condemn the invitation to collude, which is what some US courts have done.<sup>304</sup> This would restore balance by taking the full focus off the party receiving strategic information, often possibly by accident. Understanding each legal system as a whole before categorical rules are transplanted from one to another will ensure that evidentiary burdens and presumptions remain fair to both competition authorities and alleged perpetrators.

*(b) The resemblance of US antitrust law to SA competition law*

From the discussions so far, one can conclude that the South African position on price-fixing more closely resembles that of the US. In both jurisdictions, three elements of price-fixing need to be proven, after which it is considered to be *per se* illegal. Presumptions are only allowed to enter the courtroom at this point, once price-fixing is conclusively proven. This section will point out the similarities of these two systems in this regard and thereafter provide some points of caution where contextual differences do exist.

While the strictness of the *per se* rule prevents perpetrators from falling through the cracks, the parameters for finding participation in a price-fixing cartel need to be confined. If we define price-fixing narrowly according to Neale's suggestion, and include only cases with substantial evidence, applying a strict presumption of illegality becomes reasonable.<sup>305</sup> This approach targets those who have already been proven to violate Section 4(1)(b)(i) of the Competition Act and Article 1 of the Sherman Act, ensuring more precise punishment. In the US, courts are more restrained in demarcating the legislative prohibition as there is no system of exemption, similar to what is observed in Article 101(3) of the TFEU.<sup>306</sup>

In the same vein as the above discussion on EU law, Brassey warns against slavishly following even US law on price-fixing.<sup>307</sup> A major distinction to keep in mind relates to the common law of competition, which US courts have developed over time from the broadly formulated legislation discussed in Part IV. However, South African lawmakers have considered the common law and created a formal codification thereof in the form of the

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<sup>304</sup> Ghezzi & Maggiolino, *supra* n 164 at 668.

<sup>305</sup> Refer to Part IV(a); Neale & Goyder, *supra* n 192 at 30–1.

<sup>306</sup> Brassey, *supra* n 254 at 140.

<sup>307</sup> *Ibid* at 20.

Competition Act. Codification contributes greater certainty in the process of adjudication, better understanding of the law and an opportunity for firms to model behaviour accordingly to be certain that their conduct falls within the legal parameters.<sup>308</sup> The problem is the rigidity that comes along with it, and possibly a formalistic application of the black letter law by decision makers who may not have a proper appreciation of the context and scope of the law sought to be applied.<sup>309</sup>

The application of common law principles and legislative principles must be different. Common law can be applied more flexibly and can be adapted by judicial interpretation and the dictates of societal norms. Legislation, on the other hand, requires a formal amendment process, which is time consuming and cumbersome. It is also applied in all cases falling within the scope of the specific Act in question and courts must adhere to general rules of interpretation, whereas common law is applied by way of analogy where similar fact patterns are repeatedly presented. As a result, South African lawmakers need to exercise greater caution when formulating policies and laws, considering that the long-term consequences will have a more pronounced impact compared to the United States, where the common law position can be readily altered by decisions from the Supreme Court without legislative intervention.

The hierarchy of decisions is also influenced by the source of law that is applied. The Constitution is the supreme law of the land and any legislative provision that is in conflict with the Constitution will be declared invalid. Courts must side in favour of constitutional values and requirements where relevant. Common law, on the other hand, is dependent on decisions by higher courts.<sup>310</sup> Therefore, when considering the position in the US, once the Supreme Court makes a decision on the interpretation of the price-fixing provisions of the Sherman Act, the lower courts are bound by the line of precedent on the interpretation of the vague wording of the Sherman Act.

Therefore, a comprehensive understanding of US antitrust law necessitates consideration of its historical context.<sup>311</sup> It becomes evident that, when studying the US antitrust regime, one

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<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Although all decisions will be subject to the Constitution, courts focused on implementing legislation have more freedom to apply the provisions as they see fit in the circumstances whereas the common law requires judges to identify a similar fact pattern and provide a similar outcome, leaving less room for judicial creativity.

<sup>311</sup> Dabbah, *supra* n 57 at 229.

must take into account various contexts, such as social, political, and economic dimensions.<sup>312</sup> This realisation highlights the fact that competition law is intricately connected to the broader social and economic policies of the system within which it operates and does not exist in isolation.<sup>313</sup> These considerations are more akin to the objects of the South African Competition Act and show that the US may tend to be a more appropriate jurisdiction for South Africa to draw from in answering questions of price-fixing and presumptions.

In summary, the examination of price-fixing in both the South African and US contexts reveals striking similarities, particularly in respect of the requirement to prove three elements before deeming the conduct *per se* illegal. The introduction of presumptions at this stage aligns both systems closely. While the *per se* rule in the US ensures a stringent stance against violators, the careful delineation of parameters for finding participation in a price-fixing cartel, as suggested by Neale, reflects a shared approach between the two jurisdictions' treatment of price-fixing allegations. However, caution is advised in slavishly adopting the US model in this regard, as the unique common law development and codification in South Africa bring about distinctions. The Competition Act's codification offers clarity but raises concerns about rigidity and potential formalistic applications. In essence, the alignment in contextual considerations, key concept definitions, and evidentiary requirements positions the US system as a more fitting reference for South Africa than the EU in the regulation of price-fixing under competition law.

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<sup>312</sup> These contexts become clear when studying the history of US antitrust law and its origins, as well as the debates between the Harvard and Chicago schools of thought in competition enforcement, which is beyond the scope of this assignment. For more on this, see Dabbah, *supra* at 250-256.

<sup>313</sup> Dabbah, *supra* n 57 at 230.

## VI CONCLUSION

Given the clandestine nature of cartels, this thesis considered the question of how competition authorities should navigate evidentiary presumptions in borderline cases of price-fixing to ensure an effective and fair process that respects the rights of all parties involved.

The research centred around South Africa's unique context and considered global variations in the approaches of foreign legal systems.

As a sub-question, the EU was not found to be the most suitable jurisdiction for South Africa to draw guidance from in the use of presumptions in response to cartel secrecy, but instead focused on the US legal system as a potential alternative. This thesis ultimately concludes that the US price-fixing model can offer a more balanced approach that aligns with South Africa's specific needs and circumstances, aiming to address price-fixing cases more effectively. It is emphasized, however, that each legal system must be considered and understood as a whole before categorical rules are drawn and transplanted from one to the other as transplants may hold unforeseen consequences.

In the EU, the paramount focus lies on the competitive process. EU law has ventured into relying significantly on presumptions, allowing authorities to establish one of three requirements and invoking the *Anic*- and *T-Mobile* presumptions to infer the other two. When viewed in context, the implications of this approach are not as stringent, as the strict safeguards may be more fitting for the EU's free-market system, coupled with the administrative nature of penalties.

The US system is primarily concerned with efficiency. It mandates the establishment of three elements of price-fixing, following which the conduct is presumed to be *per se* illegal. Criminal sanctions for price-fixing are permissible in the US, contingent upon meeting the additional requirement of *mens rea*.

South Africa has progressively incorporated concepts and practices from the EU system into its legal framework, exemplified by the introduction of public distancing as a rebuttal to the presumption of involvement in a price-fixing agreement. Moreover, there is a parallel effort to narrow the scope of public distancing, mirroring developments in the EU. However, it is crucial to recognise that the South African Competition Act necessitates distinct treatment due to its broader objectives, which were discussed in Part V(a). Additionally, the Competition Act now provides for criminal sanctions in specific cases. Consequently, a more comprehensive investigation is warranted to meet the burden of proof, and presumptions should play a less

prominent role given that a finding of guilt may carry more severe consequences in the South African context.

The difficulty we are faced with, as Black aptly puts it, is the fact that legal distinctions are usually binary, but the facts to which they are applied are matters of degree.<sup>314</sup> For this reason, a *per se* versus rule of reason approach, as seen in the US, is sound as it provides for differing degrees of anti-competitive conduct to be dealt with using differing legal principles, as explained in Part IV.

While the EU system relies on presumptions to carry more of the evidentiary burden than that of the US, the repercussions of a guilty finding are less severe and the key focus of the regimes differ. For this reason, this thesis argued that the US is a more appropriate comparator jurisdiction, as presumptions are only allowed to enter the courtroom once all three elements of price-fixing are conclusively proven. The focus of the US regime is also more comparable with that of South Africa, although unique contextual factors such as consumer welfare also need to be kept in mind.

In view of these considerations, it is evident that the contexts, definitions of key concepts and evidentiary requirements of the US system align more closely with the South African framework than with the EU. The flexibility inherent in this approach suggests that the US serves as a more pertinent jurisdiction for South Africa to draw from in shaping its competition law approach without acting contrary to the premises of our legal regime.

In conclusion, the analysis of competition law in South Africa, the United States and the European Union reveals a closer alignment between the South African and US systems when it comes to proving the elements of price-fixing. The strictness of the *per se* rule in the US ensures accountability without loopholes, while careful definition and substantial evidence requirements provide a basis for the application of presumptions. Therefore, the presumptions utilised in the US may be more appropriate to incorporate into the South African price-fixing landscape subject to consideration of any contextual sensitivities, as discussed.

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<sup>314</sup> Black, *supra* n 60 at 184.

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