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"THE CRIMINALISATION OF CARTELS IN SOUTH AFRICA, UNITED STATES OF AMERICA AND AUSTRALIA AND THE EFFECTS OF THE CORPORATE LENIENCY POLICY."

Supervisor: Justice Dennis Davis

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters degree in Law (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of courses.

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ABSTRACT

With the recent changes to the Competition Act[1], specifically with the inclusion of Section 73A[2] which came into effect on the 1 May 2017 the amendment now makes provision for cartelists to face criminal charges for infringing Section 4[3] of the Act.

Section 4[4] disallows firms from engaging cartel conduct and the objective of the recent amendment is to promote consumer welfare as well as to break the barriers to entry. Furthermore, allow for an open market and to promote the inclusion of all whom live in South Africa. To prohibit those involved in 'fixing of purchase' and or 'selling prices, dividing markets and/or involved collusive tendering amongst firms'.

Despite the criminal sanctions created to deter cartels, firms or directors still are involved in collusive conduct. Cartel activity could not only be damaging to a firms' or directors' reputation, but also results in significant financial losses.

With the recent implementation of S73A[5] there is a more stern approach followed by our legislature by now holding directors of firms criminally liable for collusive conduct. What this paper seeks to address is the question as to whether the new developments made by the legislature allows for proper implementation in South Africa. Moreover, if the National Prosecuting Authority as the authoritative body has the competency to fully deal with the complexity of cartels.

[1] South African Competition Amendment Act 1 of 2009 'the Amendment Act'.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

The South African model will be carefully examined against the backdrop of the United States and Australian advanced antitrust laws. Equally, as important also looking at what makes the United States and Australia more effective in their cartel detection and prevention.

Particular attention will be given to the leniency policy which plays a pivotal role in prohibiting cartel conduct. And how criminal and civil sanctions should be considered in conjunction with leniency in an attempt to deter and eliminate cartel conduct.

CHAPTER 1

1. Introduction

The objective of competition in an open market is to bring in customer welfare and to provide products to all consumers. Thus, the objective of antitrust laws is to conserve and protect the consumer environment. Judge Dennis Davis in his article[6] echoed this view in the publication by Richard Whish and David Bailey[7] which states that:

> 'As a general proposition competition law of rules are intended to protect the process of competition in order to maximise consumer welfare'.

> 'A central concern of competition policy is that a firm or firms with market power are able, in various ways, to harm consumer welfare, for example by reducing output, raising prices, degrading the quality of products on the market, suppressing innovation and depriving consumers of choice.'

Judge Davis reflects on the Competition Act,[8] and pays special attention to the Preamble which highlights the importance of Competition law in South Africa:

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[6] http://www.compcom.co.za/wp-content/uploads/2016/07/Special-Edition-Competition-News.pdf, Date of use 17 February 2019.
[7] R Whish, D Bailey, Competition Law, 8 ed (2015) 1.
[8] Competition Act No 98 of 1998 ('the Act').

> 'The people of South Africa recognise:
>
> That apartheid and other discriminatory law and practices of the past resulted in excessive concentrations of ownership and control within the national economy. This is inadequate restraints against anticompetitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.'

According to Judge Davis, Section 2[9] promotes the purpose of the Act. This is 'to promote a greater spread of ownership and particularly to increase the ownership stakes of historically disadvantaged persons.'[10]

Justice Davis refers to the previous dispensation as being very rigid and describing the South African economy as highly monopolised, concentrated and companies who topped the Johannesburg Securities Exchange (JSE) were primarily occupied by a small percentage of conglomerates which dominated the economy during the apartheid era[11]. Davis further pointed out that 'companies controlled by the Anglo-American Corporation accounted for forty three percent of the JSE's capitalisation in 1994'[12].

Moreover, in relation to the subject currently under review, collusion in legislation is deemed to be an agreement, whether done tacitly or expressly. Therefore, competitors are in a horizontal relationship to suppress competition by organizing their prices and the quantities of goods[13].

Competitors intentionally coordinate between themselves to increase prices and receive increased profits at the detriment of consumers. Therefore, due to the fact that intention is present, collusion for example is considered to be 'per se' illegal.

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[9] Ibid.
[10] 'Ten years of enforcement by the South African competition authorities 1999 – 2009' Available at http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf?cv=1, Date of use 09/07/2019.
[11] Ibid.
[12] Ibid.
[13] R D Blair, D Daniel Sokol, The Oxford Handbook of International Antitrust Economics, Volume 2, Oxford University Press (2015) 415.

Section 1 of the Sherman Act[14] in United States legislation endorses this principle in stipulating the following:

'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several States, or with foreign nations, is declared to be illegal'[15].

Despite these legal limitations on explicit coordination between firms, still, firms persist in formation of cartels to limit output and set fixed prices. Cartels are prevalent across a number of industries and companies engage in a variety of behaviours in their attempt to increase profit margins. Companies may set prices, rig bids, allocate markets or consumers. They make provision for side payments to each other. They even go as far as to develop ways to hide their true intention or activities. Thus, cartels require sophisticated techniques to achieve the required output and despite cartels ranging across a number of industries, cartels are more stable than one can expect[16].

Research shows that cartels last typically around five to eight years on average. It is also proven that cheating very rarely destroys cartels. Evidence shows that cartels generally are formed in times where prices drop considerably and are likely to be due to market integration or an increase in competitive concentration. The most useful method of cartel breakup is effective antitrust policies[17].

According to Henry Thompson[18] macroeconomics looks at the economy holistically and says that the most important variables include 'national output, unemployment, the interest rate, inflation, the balance of payments and the

[14] The Sherman Act 1890 ('The Sherman Act').
[15] Ibid.
[16] R Whish op cit (n6) 415.
[17] Ibid.
[18] H Thompson, International Economics Global Markets and Competition, 2nd ed (2006) 426.

current exchange rate'[19]. He further says that macroeconomics looks at policies implemented by government which has a considerable influence on these variables as it tries to 'manage production, employment rates and how income is distributed'[20].

After considering the statistics and examining the harmful effects of cartels to the South African economy, it is clear that a system must be developed that recognizes criminalisation of cartels. At the same time, incorporate the Corporate Leniency Policy which played a significant role in cartel prevention prior to the recent implementation of criminal sanctions.

Cartel activity is unlawful and close consideration must be had in regard to the United States and Australia model. This is to try and differentiate between these various countries with particularly strong economies.

This will allow for whistle blowers to come forward and maintain the significant number in reported cases, but at the same time where there is intent prevalent to harm the SA economy, these firms must face criminal or severe civil sanctions if criminally, cases cannot be proven 'beyond all reasonable doubt'.

This paper attempts to examine the challenges faced under the South African competition regime. And to evaluate the successful practices followed in the United States and Australia against the backdrop of the challenges faced in the SA dispensation. This is to try and address these concerns currently faced in South Africa and to allow for critical examination and allowance for effective methods to improve cartel detection and prevention in South Africa.

CHAPTER 2: SOUTH AFRICAN COMPETITION REGIME

[19] Ibid.
[20] Ibid.

2.1 Introduction

This chapter will evaluate the competition regime in South Africa. It will also highlight the shortfalls and challenges experienced since the recent implementation of competition laws.

Notwithstanding the recent developments, consideration too will be had in relation to the success of the Corporate Leniency Policy in an attempt to deter cartel activity.

The Competition Act[21] was developed by the legislature in South Africa to effectively 'promote equality for people in South Africa to freely participate and have access to a market that promotes consumer wealth in a fair and competitive manner'[22]. The legislature also 'regulated trade and economic development with maintaining public interest in establishing competent bodies to give effect to legislation'[23] when asserting the following:

> 'The people of South Africa recognize: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans'[24].

David Lewis[25] says that 'there is a concentration of ownership of private wealth in the hands of a minority group of large companies' (D Lewis, Thieves at the Dinner Table, 2012, p.5). This rings true especially if one looks at the significant difference between the rich and poor in South Africa. He says further that these 'highly diversified conglomerates are controlled by a select group of white families due to the segregation of the pre-1994 government structure'[26].

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[21] Supra n8.
[22] Ibid.
[23] Ibid.
[24] Supra n8.
[25] D Lewis, Thieves at the Dinner Table (2012) 5.
[26] Ibid.

He specifically pays tribute to the devastation of the pre-1994 government which encouraged 'poverty, inequality, unfairness in the struggle for democracy in our country'[27]. The 'concentration of wealth was prevalent across many industries which includes mining, manufacturing, financial and industrial sectors of which were lucrative, powerful organisations'[28]. These sectors are what holds wealth and promotes economies.

Further, David Lewis[29] reflects on markets and looks at ways in which South Africa can improve and strengthen the economy. He says that South Africa can improve by 'allocating resources and promote economic dynamism and opportunity'[30]. Competition law can 'institute core rules which effectively regulate the relationship between the public and market power'[31]. It can 'share the key rules which we often take for granted'[32]. These rules which have 'significant influences on the rights of people in South Africa'[33]. The 'nature of property' rights in particular and the 'connection between these rights and excessive market and state power'[34].

Cartels have a negative effect when it is prevalent in an economy. Klaaren, Roberts and Valodia[35] are of the opinion that cartelists make it increasingly difficult for markets to compete, more so 'penetration of markets' as cartelists drop prices when there is somebody new entering the market as a potential competitor. In doing so, investment becomes almost impossible as newcomers now are deterred from entering the market freely. This then further impacts job creation and proves to negatively impact the objective the competition Act[36] is trying to achieve. This also impacts 'trade integration and free movement of goods (customer and market allocation) when cartelists create barriers to entry

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[27] Ibid.
[28] Ibid at 6.
[29] Ibid at 15.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] J Klaaren, S Roberts, I Valodia, Competition Law and Economic Regulation, Wits University Press (2017) 72.
[36] Supra n8.

and therefore do not promote growth but instead stifles market growth to the economy'[37].

This paper examines the effects of hard-core cartels in South Africa. Cartels, which are 'deemed to be an association of independent firms coming together to coordinate prices or output to increase collective profits'[38].

Economists are of the opinion that 'cartels as a special type of ''oligopoly''' in which 'prices are raised, total production is lowered sales information is shared amongst individuals who in turn monitor price agreements'[39]. And in doing so, they 'destroy or hide evidence'[40]. There is always a 'profit incentive for firms to cheat within this self-enforced business arrangement and often creates high barriers to entry' to the 'detriment of others who want to freely and competitively enter a market' [41].

Criminalisation of cartels in South African law is examined with the recent implementation of the Section 73A of the Competition Amendment Act[42] which examines whether the new amendment meets the aim of the Competition Act as previously stated and if the implementation under the amendment Act has been successfully incorporated into South African law. More importantly if the Act has made a significant contribution to restrict the conduct of cartel conduct.

The amendment now awards power to the National Prosecuting Authority, an organisation that is highly respected for its competent individuals to combat crime in South Africa.

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[37] Ibid.
[38] J E Kwoka Jr, L J White, The Antitrust Revolution, Economics, Competition and Policy, New York, Oxford University Press (2009) 305.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Supra n1.

The legislature in prosecuting cartels shifts away from the tried and tested Corporate Leniency Policy previously relied on solely in South Africa by the competition authorities to combat the 'crime' of cartels. By introducing criminal sanctions, this now is a means to finally put an end to competitive conduct by firms.[43] Contrasts will be drawn between the new amendments laws against the backdrop of the Act[44] previously promulgated to primarily focus on the Corporate Leniency Policy ('CLP'). The CLP which was effective tool to address the concerns of anti-competitive conduct. And this will be critically viewed by examining the considerable changes in the law.

It is submitted that the amendment Act was a great initiative by the authorities in South Africa however in execution presented its challenges. The question as stated above is whether South Africa has the required resources and competency to deal with the complexity of cartels when presenting criminal evidence? Does legislation support the new amendment by allowing the authorities to Act independently to support the objective of economic growth in our developing economy?

The objective for introducing criminal penalties for cartel conduct is an attempt by government to provide a more effective mechanism to further deter individuals from subjecting themselves to cartel activity. There are civil penalties for less serious or first-time offenders[45]. But does the government meet their bottom line after carefully examining the new amendments to the Act?

Criminal sanctions bring a more serious element to sanctioning and furthermore could potentially damage a defendant's image and reputation with the associated stigma and negative publicity. This far outweighs that of civil proceedings. And for many executives, this is too much of a risk[46].

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[43] Supra n8.
[44] Ibid.
[45] http://classic.austlii.edu.au/au/journals/JlALawTA/2010/3.pdf, Date of use: 3 January 2019.
[46] Ibid.

This paper will first examine the legislative framework on limiting cartels in SA, and then compares the criminality aspect with the corporate leniency policy under the 1998 Act[47] and critically examine its success. Thereafter, the new amendment Act under Section 73A[48] with implementation of criminalisation of cartel conduct will be assessed. Also, the role of the National Prosecuting Authority (known as 'the NPA') will be assessed and its shortfalls.

Consideration will be given to the NPA as an organisation their importance together with that of the South African Police Service in fighting the crime of cartels.

This will be examined in distinction with the role of the Competition Commission and the success of the CLP and how the CLP can be incorporated into the amendment Act and add value to our economy.

South Africa needs to go back to the drawing board and consider effective alternatives in the quest for combating criminal prosecution of cartels. It is my submission that cartel conduct could be combated if the legislature considers both the CLP as well as the criminalisation element to overcome its current challenges.

This is the stance adopted in both the United States and Australia. And in both instances, this approached has helped these economies combat the crime of cartels.

The threat of criminal sanctions especially incarceration being implemented is a more stern approach and criminalisation is a stronger sanction to be imposed to hold cartelists liable. The concept of criminalisation is a significant one and

[47] Ibid 41.
[48] Supra n1.

victims who face cartelists in their respective trades could subject themselves to losses. It is therefore important that cartelists face criminal sanctions to ensure that justice prevails. Criminalisation of cartels identifies this phenomenon and further looks at redressing the inequality of the past thus bringing South Africa in line with advanced international practices. This is method to keep up to date with what works in more experienced countries.

Cartel activity is unlawful in a number of jurisdictions around the world, including the US and Australia. Sanctions vary from cartelists facing both criminal and civil penalties imposed on individuals either having to pay fines or face imprisonment. A number of advanced economies, the likes of United States and Australia provide for criminal fines and terms for contravention of their cartels, while at the same time making provision for civil remedies as an alternative to prohibit cartel activity.

The effects of the formation of cartels will be examined and the effects on the market and further examining local and international laws to test the effective formation of laws in the hope to detect how to better combat the crime of cartels. This will be done, particularly by focusing on South Africa in comparison with the United States and Australian legislative framework. However before addressing the US and Australia, consideration will first be given to the SA dispensation.

2.2 South African Legislative Enforcement

This section will now examine the Competition Act[49] ('The Act') and particular attention will be given to the effects of the cartel prohibition and the effects of the new amendments. Section 4 of the Act[50] will be scrutinised and each provision under this section will be scrutinised to establish the objective and aim of the amendment as well as how the Act prohibits cartel activity. This

[49] Supra n8.
[50] Ibid.

allows for reflection on the legislative framework and the effects thereof relating to the criminalisation of cartels and how laws have been developed to prohibit collusion.

Section 4[51] restricts horizontal practice amongst firms and addresses the way in which 'firms may compete with one another, specifically whilst in a horizontal relationship'[52].

Moreover, Section 4(1)[53] explicitly prohibits certain 'agreements'[54] between firms and was emphasised in the case *National Association of Pharmaceutical Wholesalers and Others.*[55] This is further reiterated in the judgment under *Netstar (Pty) Ltd and Others v Competition Commission South Africa*[56] where the court draws a distinction between an 'agreement and a concerted practice'[57]. The Act confirms that 'agreements' include 'explicit formal, written as well as verbal agreements'[58]. This can be entered into by means of 'emails, SMS's telephonic conversations, even with "gentleman's agreements" or by means of a wink and nod'[59] which means to believe that firms have agreed to conduct themselves in a certain manner[60]. The key here is 'consensus'[61]. One

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Supra n8: 'agreement', when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable.
[55] *Pharmaceutical Wholesalers and Glaxo Welcome (2) (68/IR/JUN00) [2003] ZACT 37 (18 June 2003*). It was decided that: 'Certainly the Act gives a very wide meaning to 'agreement' a meaning that would extend some way beyond a legally enforceable contract'.
[56] *Netstar (Pty) Ltd and others v Competition Commission South Africa and Another (99/CAC/MAY10, 98/CAC/MAY10, 97/CAC/MAY10) [2011] ZACAC 1; 2011 (3) SA 171 (CAC) (15 February 2011)* para 25 – 26.
[57] Supra n8: 'concerted practice' means 'co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement'.
[58] Ibid.
[59] Ibid.
[60] Verbal vs. written contracts, available at https://www.snymans.com/advice/verbal-vs-written-contract, Date of use 28/02/2019.
[61] P Sutherland, K Kemp, Competition law of South Africa, LexisNexis (2013) 5-14 to 5-15.

has to ask the question as to whether ‘consensus or an agreement been reached between firms to collude with one another’[62].

In the *Netstar*[63] *judgment* the court defines ‘concerted practice as conduct which does not amount to an agreement'[64]. An example is illustrated in Sutherland, with Kemp saying ‘where a market leader advises a price increase on a product in a public announcement and other firms follow suit’[65]. The key emphasis here is the ‘conduct of the firms’[66].

Section 4(1)(a)[67] examines at the ‘rule of reason test’ whereas Section 4(1)(b)[68] on the other hand draws a contrast by examining the ‘per se’ prohibition of cartels. Section 4(1)(b)[69] under the ‘per se’ provision prohibits ‘direct and indirect price fixing when firms agree to sell their products at the same price or use a particular method to price their goods at the same price’[70]. If a firm falls within these categories, these firms will not have a defence and therefore fall under the ‘per se’ prohibition[71]. Under these instances the commission will not have the onus of proving that there was an agreement between parties to collude. Instead the ‘firms will then have the onus shifted

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[62] Ibid.
[63] Supra n52 par 23.
[64] Ibid.
[65] Ibid.
[66] Ibid at par 25.
[67] Supra n8: Section 4(1)(a) ‘Restrictive horizontal practices prohibited:
(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 –
(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other precompetitive gain resulting from it outweighs that effect; or
[68] Ibid: Section 4(1)(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; or
(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or
(iii) collusive tendering’.
[69] Ibid.
[70] Ibid.
[71] Ibid.

on them' to prove that their agreement does not constitute cartel conduct. Instead that it was an 'ordinary business transaction'[72].

Section 4[73] also 'prohibits market division' in instances where firms strike a deal between themselves not to compete in certain markets and 'prohibit collusive tendering'[74]. Therefore, firms must be careful when 'sharing information amongst one another'[75]. This supports the conduct of cartel activity.

Section 4(1)(a)[76] 'prohibits conduct by competitors that weaken competition in a market with the effect of anti-competitive conduct'[77]. In instances where parties can truly explain or provide an 'explanation on the basis of technological or for pro-competitive gains, this conduct will be accepted under the Act'[78].

The Commission or the party wishing to proceed with prosecution must prove the conduct had unfavourable effects on competition (Lewis, 2012, p.14). This will ensure that there is sufficient evidence in place to support the notion of anti-competitive conduct.

Under Section 4(2)[79] and 4(3)[80] provision is made for instances where firms which hold considerable "interest in one another or have a director or

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[72] Whish op cit (n7) at 208.
[73] Supra n8.
[74] Ibid.
[75] Ibid.
[76] Supra n8.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid at 8: (2) 'An agreement to engage in a restrictive horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if –
(a) any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
(b) any combination of those firms engages in that restrictive horizontal practice.
(3) A presumption contemplated in subsection (2) may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to

shareholder in common'[81]. Also, if these 'individuals engage in restrictive horizontal practice and therefore an agreement will be rebuttably presumed to exist between firms'[82]. Under these circumstances the commission will not have to prove the collusion existed between firms through agreement (Lewis, 2012, p.208).

The onus will shift to firms in providing otherwise, i.e. 'that their agreement did not achieve in price-fixing, market allocation or bid-rigging but instead was a normal commercial response to conditions prevailing in that market' (Lewis, 2012, p.208).

Section 4(4)[83] makes provision for directors and Section 4(5)[84] 'makes provision for conduct not applying to agreements between wholly owned subsidiary of that subsidiary, or any combination of them; or (b) the constituent of firms within a single economic entity'[85].

From the aforementioned, it is clear that Section 4[86] is a platform to completely eliminate collusive conduct between firms. Also, to create an opportunity for firms to justify their behaviour when involved in potentially collusive conduct.

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conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market'.

[81] Ibid.

[82] Lewis op cit (n25) at 208.

[83] Supra n8: (4) 'For purposes of subsections (2) and (3), "director" means –
(a) a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973); or
(b) a member of a close corporation, as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984); or
(c) a trustee of a trust; or
(d) a person holding an equivalent position in a firm'.

[84] Supra n8: (5) 'The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by, –
(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or (b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)'.

[85] Supra n8.

[86] Ibid.

This will allow authorities to properly establish with proof if cartel conduct is present amongst directors / firms.

The onus will shift to the individual who makes the alleged accusation that cartel conduct exists but more so now make provision for a thorough investigation, given the fact that the stakes are high. A director's reputation could be tarnished. And this could ultimately have a crippling effect on any business should any information in this regard be brought to the fore. With the fast-changing world, a firm's reputation is one of its greatest assets and any bad press or incarceration being faced by its directors could have significantly harsh consequences to the brand.

We can establish that South African legislation prohibits cartel activity in the form of in 'price-fixing, market allocation or bid-rigging between firms' and companies who find themselves guilty of this conduct will be answering to the legislature in this regard.

Emphasis was placed on the criminalisation phenomenon, however the principle further addressed in the Act,[87] the CLP will now be examined.

2.3 Corporate Leniency Policy ('CLP')

The corporate leniency policy will be examined, as this provision was passed as a means to further prohibit cartel enforcement and therefore the effects shall now be inspected.

David Lewis[88] in his book describes the CLP as essentially being a plea-bargaining arrangement between parties. This is in an attempt to allow

[87] Supra n8.
[88] Lewis op cit (n25).

cartelists an opportunity to either be totally or partially immune from prosecution provided that these parties bring their cooperation[89].

These agreements involve an information exchange of which the authorities currently do not have access to and further for parties to subject themselves to giving evidence at trial against fellow cartelists[90].

Chapter 2 of the Competition Act[91] says that if cartelists bring their co-operation they will be given 'immunity' when facing prosecution before the Competition Tribunal (Sutherland, 2013, p.138).

According to the CLP:

> 'Cartels are particularly a damaging form of anti-competitive agreement often resulting in price increases that are harmful to consumers of goods or services concerned. Not only does such activity affect consumer welfare, but it also hinders development and innovation in the industries within which this activity occurs'[92].

Recent developments in law now incorporate criminal prosecution for cartel activity. This is according to Section 73A[93] in the Competition Amendment Act which was published in 2017. Prior to the recent change the corporate leniency policy (hereinafter referred to as the 'CLP') was there as a tool to help the authorities prosecute cartels under Section 4(1)(b)[94] which were 'per se prohibited'[95].

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[89] Lewis op cit (n25) 210.
[90] Ibid.
[91] Supra n8.
[92] Supra n1: Chapter 2.3 of CLP.
[93] Ibid.
[94] Ibid.
[95] K Moodaliyar, S Roberts, The development of competition law and economics in South Africa (2012) 137.

The first principle with the CLP was the 'first to the door policy'. What this meant was the cartelist 'first to the door to blow the whistle' on the crime and provide the necessary evidence would be given immunity (Sutherland, 2013, p. 138).

By firm this includes anybody who is a 'person, partnership or who falls under a trust.'[96] The CLP does not give second or third applicants partial immunity or reduction of fines (Sutherland, 2013, p. 138).

The CLP is an effective model and the case law examples referred to below are of the many cases that were uncovered by authorities. One of which is when the penny dropped on Nick Dennis CEO of the giant food group, Tiger Brands.[97] Tiger Brands had to answer to the Competition Tribunal in the famous 'bread cartel'.[98] The commission received a complaint of 'price fixing and market allocation by Premier Goods (Blue Ribbon), Tiger Brands (Albany), Foodcorp (Sunbake) and Pioneer Foods (Blue Ribbon) who own Sasko and Duens bakeries'.[99]

Shortly after Premier Foods were investigated, they came forward and applied for leniency under the CLP. They complied by giving their co-operation and were given 'conditional immunity',[100] hereby contravening Section 4(1)(b)(i)[101] and (ii)[102]. Thereafter Tiger Brands settled with the Competition Commission who enforced an 'administrative penalty of R98 784 869.90' as they too 'agreed to assist the commission on prosecuting the additional cartelists'[103]. 'Foodcorp paid an administrative penalty of R45 406 359.82, which was 6,7 per cent of Foodcorp's turnover for its financial year' (Sutherland, 2013, p. 40). This is one

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[96] Ibid.
[97] Lewis op cit (n25) 204.
[98] *Premier Foods (Pty) Ltd v Manoim NO and others [2016] 1 All SA 40 (SCA*).
[99] https://www.comptrib.co.za/sapphire/main.php?url=/cases/complaint/retrieve_case/1120, Date of use 27 November 2017.
[100] http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-settles-milling-case-with-Foodcorp-.pdf, Date of use 27 November 2017.
[101] Supra n8.
[102] Ibid.
[103] Ibid.

of the highest penalties ever imposed by the competition authorities (Sutherland, 2013, p. 40).

In 2003, after the competition commission investigated and fined Sasol in the Sasol Chemical Industries case[104]. The case was initiated by the fertiliser industry cartel when Sasol gave 'full disclosure on their involvement in a cartel'[105]. Sasol agreed to pay an 'administrative fine of R188 million'[106] which at first was lower, however Sasol's refusal to cooperate and with new information coming to the fore, their conduct was confirmed to be a 'per se' contravention of the Competition Act[107].

Due to the nature of cartels it is almost impossible to detect because they are secretive and well hidden, incentives had to be put in place to award those who expose firms involved in the collusive activity (Kwoka Jr, 2009, pg. 80).

It is clear that the CLS was a great concept brought by the authorities and more so, after the judgement in Pioneer Foods, this sent a very stern message to the public on the seriousness of cartels and that this type of conduct will not be tolerated by the authorities in SA.

The concern with the CLP is that the only way cartels reach the competition authorities are when somebody exposes the other by approaching the Competition Commission and by 'blowing the whistle on crime' but how successful is this in eliminating the crime of cartels in its entirety? This will be examined in the chapter that follows.

2.3.2 Effects of the Corporate Leniency Policy

[104] *Sasol Chemical Industries Limited v Competition Commission (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015).*
[105] Ibid.
[106] Ibid.
[107] Supra n8.

Since its ‘inception, there were fifty-four cases brought to the commission during the period 2004 to 2009 which is significantly high considering its implications’ (Kwoka Jr, 2009, pg. 80). Thereafter the support the commission received in the exposure of the bread and milk cartels, brought a significant rise in numbers with cartel activity being brought to the fore (Kwoka Jr, 2009, pg. 80). In 2008 the commission saw an astounding nineteen CLP applications brought, which was double that of the previous year in 2008 (Kwoka Jr, 2009, pg. 80). There was under two hundred settlements up until 2015 which increased in the latter years since the inception of the CLP (Kwoka Jr, 2009, pg. 80).

Below is an illustration of the work done by the competition authorities in an attempt to combat cartel activity using the corporate leniency policy.

South African National Roads Agency Limited (SANRAL) was one of the SA’s most affected projects and includes the ‘Gauteng Freeway Improvement Project (GFIP)’. This project was for the ‘adding of more lanes, construction of retaining walls, bridges and structures and various intersections on the southern sections of freeways around Johannesburg’[108]. ‘Concor in a joint venture with Stefanutti agreed with WBHO around 2006 in regarding the GFIP which included three packages, namely, Package A, B and E’[109]. ‘In terms of the agreement Concor, Stefanutti and WBHO agreed to allocate packages among themselves exclusively’[110]. They also colluded amongst each other to ‘exchange cover prices to give effect to the allocation arrangements and the tender for Package A was awarded to Group Five, Package B was awarded to WBHO, and Package E was awarded to Group Five’[111].

[108] Highways and byways, Available on: http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf, page 19, Date of use 04/10/2018.
[109] Ibid.
[110] Ibid.
[111] Ibid.

Towards the end of 2007 a study conducted by the Competition Commission of concrete products showed that there was cartel collusion in this industry. This was a long-running cartel, established in early 1970 and only ended due to the Competition Commissions Corporate Leniency Policy (CLP) which led to 'Rocla Pty Ltd (part of Murray and Roberts) exposing the cartel and revealing important detail about the collusive activity'[112].

In '2008, the Competition Commission investigated four cement companies, Pretoria Portland Cement Company Limited (PPC), Lafarge Industries South Africa, AfriSam Consortium (Pty) Ltd, Natal Cement Cimpor (Pty) Ltd and in the process PPC applied for immunity' (Kwoka Jr, 2009, pg. 74). This was 'while Lafarge and AfriSam paid penalties of 6 percent and 3 percent of their annual turnover in cement sales' (Kwoka Jr, 2009, pg. 74).

The 'Commission initiated an investigation into the cement industry in June 2008, after investigating the construction and infrastructure sectors' (Kwoka Jr, 2009, pg. 74). 'Pretoria Portland Cement Company Limited (PPC), the largest cement producer in South Africa, applied for leniency around August 2009' (Kwoka Jr, 2009, pg. 74). They agreed to help the authorities regarding the cement cartel. The 'PPC also agreed to stop sharing detailed sales information through the industry. The cartel involved price fixing and market allocation through the distribution of market shares and territories by the main cement producers PPC, Lafarge, AfriSam and NPC–Cimpor' (Kwoka Jr, 2009, pg. 74).

The Commission settled with 'AfriSam in November 2011 and Lafarge in March 2012' respectively. The firms also confirmed that a cartel existed and exposed information regarding the technique used. The two firms paid 'settlement fines of around R125 million and R149 million'[113].

[112] Ibid.
[113] Ibid.

This phenomenon continued and according to competition commissioner, Tembinkosi Bonakele when interviewed by ENCA on the 23 November 2017.[114] According to Bonakele, the competition commission currently has about 'one hundred ongoing investigations on cartels'[115]. In addition to about 'sixty prosecutions currently underway, including the likes of Transnet as mentioned by Tembinkosi due to its extravagant port prices of which SA has the highest in the world in comparison to other countries'[116]. 'Vodacom is also currently under investigation in its involvement with the Treasury providing them with cell phone contracts, which the commission feels makes Vodacom too dominant in the industry'[117].

At the Competition Commission and Competition Tribunal's eleventh Annual Conference on Competition Law, Economics and Policy held on the 30 August to 1 September 2017 in Johannesburg. Tembinkosi in his welcoming speech said there has been a significant 'rise in cartel investigations and prosecutions over the past few years'[118]. He says the 'commission heard 177 cases, of which 84 were prosecuted before the tribunal and the remaining 93 were still under investigation'[119].

What this meant is that as the number of cases grew with what was presented to the Competition Commission, the more the investigative unit gained thorough experience to combat collusion and price fixing in SA. This is prevalent in the number of cases which were prosecuted in the statistics above.

Tembinkosi mentioned in his speech that the commission is now busy investigating 'banks who are involved in collusion of the US dollar-rand

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[114] https://www.enca.com/media/video/taking-stock-in-conversation-with-tembinkosi-bonakele-part-2, Date of use 24 November 2017.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] http://www.compcom.co.za/11th-annual-competition-conference-2/, Date of use 23 November 2017.

currency pair as well as Stuttaford Van Lines'[120]. They face '649 counts of collusive tendering of office furniture removal tenders'[121]. This is the 'highest number of charges for collusion ever faced by a single firm in the history of the commission's jurisprudence'[122].

The CLP was a huge success when it comes to knuckling down hard on cartel conduct in SA. This is seen across the board and includes, to mention a few big industries which has significant impact in SA economy. The 'airline industry, followed by the milk industry'[123] followed by the "bread industry in the popular bread cartel case and milling industry[124]. This further led to competition authorities conducting further investigations into the entire 'food chain in industries such as the poultry and supermarket industry', steel and petroleum industry [125] given the success of the investigative functionality.

In 2008, the 'Competition Tribunal (" the Tribunal") established the settlement agreement between the Competition Commission ("the Commission"), Botswana Ash (Pty) Ltd (Botash), Chemserve Technical Products (Pty) Ltd, the American Natural Soda Ash Corporation (ANSAC) and CHC Global (Pty) Ltd (CHC) on 4 November 2008'[126]. This ended one of the 'longest cases the competition commission had faced'[127].

When settling ANSAC, they 'admitted that their membership agreement eliminated price competition between its members in export sales to South

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[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] See Competition Commission press release on the 7 December 2006 whereby the Competition Commission prosecutes milk cartel. In 2005, Clover applied for immunity for price fixing in relation to the removal of surplus milk. In 2006 the commission announced the referral of a cartel case against milk producers and while the CLP helped, through Clovers application, in exposing the cartel, this case was dismissed by the Supreme Court of Appeal because of the commission going beyond the proper exercise of its power in its investigation.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.

Africa which breached the Act'[128]. 'ANSAC also agreed to pay an administrative penalty of R9, 696,846.96, equalling eight percent of its annual turnover in South Africa'[129]. ANSAC was an organisation whose members were 'United States firms competing in the production of soda ash'[130].

Soda ash's trade name is for sodium carbonate (Na2CO3) which is a 'white, anhydrous, powdered or granular material' and this is significant as it is an important raw material. This is used for the 'manufacturing of glass, detergents, chemicals and other industrial products'[131]. The association was incorporated in accordance with the provisions of the 'United States Export Trade Act 1918, commonly known as the Webb-Pomerene Act'[132]. The 'objective of this law was to limit United States associations engaged in export trade from the application of the Sherman Act'[133]. Equivalent to SA Competition Act[134]. The 'ANSAC membership agreement ended when they agreed to settlement.'[135]. This was to 'stop anticompetitive conduct in export in SA'[136].

The settlement agreement led to a hearing before the Tribunal of which it was alleged that 'ANSAC contravened the price fixing provisions'[137] of the Competition Act[138]. ANSAC argued that their dealings were 'genuine and a good faith corporate joint venture'[139]. The Tribunal was due to hear closing arguments on the 4 November 2008 but instead the Commission received confirmation of settlement later that day[140].

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[128] Ibid at 3.
[129] Ibid.
[130] Justice delayed but not denied, Available at: http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf, Page 4, Date of use: 04/10/2018.
[131] Ibid.
[132] Ibid.
[133] Supra n14.
[134] Supra n8.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Supra n8.
[139] Ibid.
[140] Ibid.

In 2009 within the mining sector, four firms were involved in cartel activity. This included the likes of 'Aveng Africa's Duraset, RSC Ekusasa Mining, Dywidag-Systems International and Videx Wire Products'. 'RSC who is a subsidiary of Murray and Roberts Steel'[141] was first to the door and applied for leniency in 2008[142]. 'Aveng (Duraset) agreed to a penalty which amounted to five per cent of Duraset's total annual turnover and the remaining firms admitted to collusive conduct'[143].

With the 2010 Football World Cup in SA, the Competition Commission investigated a cartel in the steel industry[144]. This involved Cape Town Iron and Steel Works, Murray and Roberts, Highveld Steel and Vanadium, South African Iron and Steel Institute which was used to conduct the cartel activity. One of the companies approached the Commission for leniency[145]. A few major construction firms came together and organised to submit competitive bids to secure seats and due to the collusive conduct, firms were fined a 'combined penalty of R1.46 billion in July 2013 by the Tribunal. One of the biggest fines ever put forward by the Commission in a single process'[146].

About six months after the 2010 World Cup, the City of Cape Town started a project for the erection of the Green Point stadium. WBHO reached an agreement with Group Five in December 2006 in that WBHO provided a 'cover price to Group Five a joint venture with Murray & Roberts to win the tender' for the stadium. The tender was given to the Murray & Roberts / WBHO joint venture[147].

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[141] Ibid.
[142] Aveng Settles with Commission, Available at https://www.aveng.co.za/news-media/sens/aveng-settles-competition-commission-2, Page 1, Date of use: 12/7/2019.
[143] Ibid.
[144] Justice delayed but not denied, Available at: http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf, Page 4, Date of use: 04/10/2018.
[145] Ibid.
[146] Ibid.
[147] Ibid.

In ‘2010 to 2011 there was a complaint against six major oil companies in South Africa including Total, BP, Shell, Chevron, Engen and Sasol’ (Kwoka, 2009, pg. 75). ‘Engen agreed to pay R28.8 million rand and Shell further paid a penalty of R26.2 million rand after the matter was referred to the Competition authorities’ (Kwoka, 2009, pg. 75).

In 2013 further, the construction industry was investigated and the ‘Commission settled with 15 out of 18 construction companies that were involved in a construction project cartel’ (Kwoka, 2009, pg. 74). The ‘penalty imposed for the 15 firms totalled an amount of R1.4 billion’ (Kwoka, 2009, pg. 74).

Given the exorbitant claims imposed by the competition authorities it is clear that the CLP was a brilliant campaign executed by the commission to prevent collusion amongst firms.

Some of these firms entered into consent agreements prior to being fined millions. By firms blowing the whistle on the crime of cartels clearly word got around and fear crept into the various markets especially with the ‘first to the door’ campaign. This created an opportunity for firms to come clean, tell on one another in an attempt to start on a clean slate in exchange.

Sutherland says that the ‘CLP creates awareness and sends a strong message to perpetrators to deter cartel conduct’ (Sutherland, 2013, pg. 150). ‘Arguably, the partial leniency policy may weaken the effectiveness of the ‘‘first to the door principle’’ however it gives a sense of added consideration and flexibility by the commission in rewarding whistle blowers in successful detection of cartel activity’ (Sutherland, 2013, pg. 140).

2.3.2 Challenges facing the CLP process

From the aforementioned, it is evident that the CLP was a huge success. From the Tiger Brands case in the bread cartel, the administrative fine being imposed on Sasol for R188 million. The effects of the cement cartel being exposed where La Farge and AfriSam being paying R125 and R149 million in fines. Ansac who was 'fined R9 696 846, 96 which equates to eight percent of its annual turnover'[148]. The 2010 Football World Cup whereby firms were liable for penalty of just over one billion rand after the investigation into the six major oil companies. Despite these success stories, the CLP faces major challenges. This will be examined in the current chapter.

South Africa will be one of many countries who has opted for the criminalisation model. Amongst SA are the US, UK as well as Australia too have incorporated criminal sanctions for cartel activity.

However, in achieving an effective model one needs to consider other jurisdictions, especially more economically advanced countries in a further attempt to try and further eradicate this illegal conduct.

'International transitioning experience will be pivotal in the execution of criminality and will require a number of fundamental issues and areas of concern to be addressed to make criminal sanctions effective' (Sutherland, 2013, pg. 152) especially in South Africa. And to 'equally maintain the effectiveness of the CLP process for successful civil enforcement, which considering its track record to date has been quite impressive' (Sutherland, 2013, pg. 152).

One of the problems faced with the implementation of criminal charges against firms that there is a higher burden of proof for criminal sanctions, which affords

[148] Demise of the soda ash cartel, Available at http://www.compcom.co.za/wp-content/uploads/2014/09/4230%20Competition%20Commission%20Booklet%20FA%20WEB3.pdf page 4, Date of use: 14/7/2019.

more protection to the rights of the defence in criminal cases as the principle beyond all reasonable doubt must be established (Sutherland, 2013, pg. 152).

What this would then effectively mean is that civil investigations concluded prior could not be utilised during criminal proceedings, unless evidence was obtained on the basis of a criminal standard in advance, then this, in turn, would not breach the constitutional provisions in legislation (Sutherland, 2013, pg. 152).

Since the National Prosecuting Authority (‘the NPA’) has the ‘power to prosecute cartel activity it is unclear as to whether the commission will develop its policies to cater for criminal standards’ (Sutherland, 2013, pg. 152) in SA. ‘Criminal investigations will have to be conducted independently from the commission’s civil investigations and a “modus operandi” will need to be reached between the NPA, commission and SAPS to collectively decide on how criminal investigations will be conducted and effectively discuss the interface and challenges herein and to prevent any constitutionality breaches’ (Sutherland, 2013, pg. 152).

According to (Moodaliyar and Roberts, 2012, pg. 137) since the ‘Tribunal’s consent orders will be regarded as prima facie proof in criminal prosecutions. It is likely that the internal commission procedures will need to be reinforced in relation to effective criminal prosecution’. What this means is that there will have to be various roles, specific roles within the various organisations i.e. competition ‘commission and the NPA in creating policies and procedures and training’ (Moodaliyar and Roberts, 2012, pg. 137).

The CLP was a huge success in combating cartel activity in South Africa. However, given the lack of urgency and consideration for the new criminalisation policy and lack of execution calls for serious concern.

It is clear that the enforcement and consistency of identifying cartels is priority considering the detrimental effect cartel activity has on an already weakened economy in South Africa. It imperative that we return to the drawing board and that consideration given to the success of the corporate leniency policy and look at a means to incorporate both the CLP and the criminalisation models when prosecuting cartels.

Despite the success of the CLP, with the recent developments in the Competition laws[149] this poses a great threat to the success of the CLP. This is simply because the amendment Act does not make provision for CLP to be used in conjunction with imposing criminal sanctions against perpetrators.

2.4 Deterrence mechanism

After having considered the CLP and the challenges the authorities face, consideration will be had for the recent implementation of criminalisation of cartels under the amendment Act[150] and what this principle aims to achieve. Specifically, how legislation deter criminal activity.

Before examination into the criminalisation element, one must first consider the importance of the objective of combating crime. The theory of deterrence is to punish the public and in doing so, to 'deter society as a whole from committing crime'[151] in the future. The objective of the criminalisation principle is to highlight this exact notion that is to prevent perpetrators from prohibited conduct. And that a message will be sent out to the community that the transgression of law will not be tolerated and instil fear into individuals who find themselves transgressing the law. The end goal is to have individuals eventually 'abstain from prohibited conduct'[152].

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[149] Supra n1.
[150] Ibid.
[151] Prof L Jordaan, Prof C Van Der Bijl, Dr Mollema, Mr RD Ramosa, Criminal Law, Only study guide for CRW2601, Department of Criminal and Procedural Law, University of South Africa, Pretoria (2010 to 2012) 6.
[152] Ibid.

Perhaps it is an attempt by the government to take a more serious stance towards this prohibited conduct as perhaps despite the CLP's success, cartel conduct still persists in South Africa.

It is my submission that the reason for the implementation of Section 73A[153] in the Competition Amendment Act is to serve this exact purpose. To deter perpetrators from participating in cartel conduct as the government or authorities see fit.

The success of the deterrence theory is not entirely based on the 'severity of the sentence however, it is on how strong the possibility is that the offender will actually be caught, convicted and actually serve out his or her sentence'[154].

If the police are unable to 'trace perpetrators and do their jobs, then this would mean that the system they use is ineffective'[155]. This is often the result of South African Police Service being 'understaffed, in some instances lack competency due to sufficient training and support or a lack of professional experience the deterrence theory will not operate as effectively as it should'[156].

In relation to the recent development with the implementation of the amendment Act incorporating criminal sanctions for cartel activity, the nagging question still remains how effective the deterrence factor has been since its implementation?

Has any of the cartel activities been prosecuted criminally and has this had an adverse effect on the community as a whole. In the hope to deter them from acting in this unscrupulous manner and essentially negatively impacting the

[153] Supra n1.
[154] Ibid.
[155] Ibid.
[156] Ibid.

South African economy? These are all questions one hopes to address in the remaining chapters that follow by specifically further examining the criminalisation aspect and where it needs to be improved.

2.5 Criminalisation of Cartels

The focus will now be shifted to the criminalisation element in an attempt to answer the questions posed above relating to first the implementation of criminalisation and whether or not it was a success.

The recent change with the insertion of Section 73A of the Competition Amendment Act[157] now introduces criminal sanctions for individuals who are involved in cartel conduct through possible 'prison sentences'[158], effective on the 1 May 2016. This is a considerable diversion away from the previous Act[159] whereby parties faced civil remedies through the CLP, as stated in the previous chapter.

Where a director or a person in a position of management authority engaged in cartel conduct or in instances where cartel activity caused a firm to engage in illegal cartel conduct according to Section 73A(1)[160] he/she could face up to 'ten years imprisonment alternatively be liable to pay a fine of R500 000.00'[161].

Section 73A(2)[162] provides that if a 'director knowingly acquiesced in the firm engaging in prohibited practices', he/she would be 'deemed to have committed an offence'[163]. What this means according to the dictionary definition is that

[157] Supra n1.
[158] Lewis op cit 25 at 224.
[159] Supra n8.
[160] Supra n1.
[161] L Kelly, et al, Principles of Competition Law in South Africa, 2017 at page 244.
[162] Supra n1.
[163] Ibid.

the ‘director or person with the necessary authority if he or she engaged in practice having accepted something reluctantly without protest’[164].

Section 73A(3)[165] on the other hand speaks to the fact that the only way the ‘director or person with management authority may be prosecuted is in instances where the Tribunal or Competition Appeal Court has made the ruling that the said person breached Section 4(1)(b)’[166]. In cases particularly where a firm has admitted this in a consent order (settlements order with the Competition Commission) (Kelly, 2017, pg.22).

Section 73A(4)[167] is an attempt to ‘retain the effectiveness of the CLP as it precludes the Commission from requesting the NPA to prosecute individuals who have been declared deserving of leniency’[168]. It is said that in such instances, it may (not a must) ‘make representations to the NPA to secure leniency for individuals from criminal prosecution, under Section 50’[169].

‘It was first held that the criminal court, for adjudication must treat the firm’s admission in a consent order or upon the finding of the Competition Tribunal

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[164] https://en.oxforddictionaries.com/definition/acquiesce, Date of use: 2 December 2017.
[165] Supra n1.
[166] Ibid.
[167] Ibid.
[168] Supra n1, Section 1(c): ‘deserving of leniency’ when used with respect to a firm contemplated in Section 50, or a person contemplated in Section 73A, means that the firm or person has provided information to the Competition Commission or otherwise co-operated with the Commission’s investigation of an alleged prohibited practice in terms of Section 4(1)(b) to the satisfaction of the Commission’.
[169] Ibid, Section 50:
‘(a) by the substitution for subsections (1) and (2) of the following subsections:
(1) At any time after [initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.]—
(a) receiving or initiating a complaint, the Competition Commission may certify, in the prescribed manner and form, and with or without conditions, that any particular respondent, or any particular person contemplated in section 73A, is deserving of leniency in the circumstances, and
(b) initiating a complaint, the Commission may refer the complaint to the Competition Tribunal in respect of any respondent, to the extent that the respondent has not been certified as being *deserving of leniency* in terms of paragraph *(a)’*.

or Competition Appeal Court has conclusive evidence that the firm is involved in cartels' (Lewis, 2012, pg. 226). 'However, during parliamentary hearings this position was challenged and law now holds for findings of the Tribunal regarding the subsistence of a cartel be treated in subsequent criminal proceedings as prima facie and not conclusive evidence' (Lewis, 2012, pg. 226). 'What this means is that the Act now makes provision for reverse onus or onus to rebut the Tribunals outcome on the accused in the criminal proceedings' (Lewis, 2012, pg. 226).

How will this impact the criminalisation of cartels? Consideration will be now had to the challenges facing the criminalisation model to effectively consider whether this model adds value to SA or leaves SA in an even worse position it was prior to the CLP being implemented?

2.5.1 Challenges facing criminalisation

'One of the problems identified with the recent implementation of criminalisation under S73A[170] is the disincentive that criminalisation has given to a successful corporate leniency policy' (Lewis, 2012, pg. 226). Prior its 'inception in 2004 due to the effectiveness of this policy the numbers of cases brought to the fore, increased considerably as a result' (Lewis, 2012, pg. 226). The 'Competition Commission was able to use settlements in the CLP as a means of inducing firms to avoid litigation' (Lewis, 2012, pg. 226). And to also come forward to 'promote immunity and urge whistle blowers to come forward' (Lewis, 2012, pg. 226).

The criminalisation of cartels will weaken the incentivised CLP considerably in the granting of consent orders by the Tribunal. The Competition Tribunal will not be authorised to impose criminal sanctions on persons who commit offenses of this nature, however under Section 73A(4)[171] it is held that for

[170] Supra n1.
[171] Ibid.

adjudication the firm's admission in a consent order or the finding of the Tribunal or Appeal Court must be considered as 'conclusive evidence' that in fact the firm had participated in cartel conduct (Lewis, 2012, pg. 226).

This means that the finding the Tribunal made on the balance of probabilities would constitute 'conclusive evidence' in a criminal proceeding, where the requirement would be deemed 'beyond a reasonable doubt'. However, during the parliamentary hearings the provision softened and thus held that the findings of the Tribunal relating to cartel conduct in any subsequent criminal proceedings, this would be treated as 'prima facie evidence and not conclusive evidence in the existence of cartel conduct'[172].

What this means is that the onus of rebutting the Tribunals findings rests with the accused during criminal proceedings.

According to (Lewis, 2012, pg. 226), 'under normal circumstances, the onus is usually on the state and not on the accused itself to rebut the evidence brought forward and this has serious constitutional repercussions as this breaches the accused's right to a fair trial' under Section 35(3).[173] Further breaches the 'accused presumption of innocence, to remain silent, and not to testify during the proceedings'[174] under Section 35(3)(h) [175].

When a case is 'referred to the competition commission, it is an inquisitorial and informal in nature and the applicable standard is on the balance of probabilities' (Lewis, 2012, pg. 226). However, when a matter is referred to the National Prosecuting Authority (NPA) during criminal proceedings, the 'onus for rebutting the tribunals findings now rest with the accused in criminal

[172] Ibid.
[173] The Constitution of the Republic of South Africa No 108 of 1996 ('the Constitution)'.
[174] Lewis op cit (n25) 226.
[175] Supra n173.

proceedings, which breaches the Constitution'[176] under the provision held under Section 35[177] according to Lewis.

Section 73A(5)[178] under the Amendment Act is problematic as it creates a 'reverse onus'[179] by the 'accused in a case, which in this instance is the means of an acknowledgment in a consent order by the firm / finding by the Competition Tribunal or Competition Appeal Court'[180]. This will confirm that a firm who has 'engaged in cartel activity is prima facie proof that a firm part took in cartel conduct'[181]. 'Reverse onus is where the director caused / knowingly acquiesced' which breaches Section 4(1)(b) of the Competition Act[182] will have to 'prove the contrary'[183]. This infringes on the 'directors constitutional right to fair trial, the right to remain silent and presumption of innocence'[184]. This is pronounced in our Constitution.[185]

Further, under Section 4(1)(a)[186] regarding the 'per se' provision, there is also a 'rebuttable presumption on the accused (reverse onus) to prove pro-competitive gains'[187] .

In criminal proceedings the 'onus of proof is normally on the state and not on the accused as in this instance with the reverse onus provision to prove a case beyond reasonable doubt'[188]. In the case of S v Coetzee[189] the constitutionality

[176] Ibid.
[177] Ibid.
[178] Supra n1.
[179] P Sutherland op cit (n55) 246.
[180] Ibid at 245.
[181] Ibid.
[182] Ibid.
[183] P Sutherland op cit (n55) 246.
[184] P Sutherland op cit (n55) 246.
[185] Supra n204.
[186] Supra n8.
[187] Blair op cit (n13) 227.
[188] Ibid.
[189] *S v Coetzee and Others (CCT50/95) [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527 (6 March 1997)*.

of Section 245[190] and Section 332(5)[191] of the Criminal Procedure Act was 'challenged and the court held that both Section 245[192] and Section 332(5)[193] was unconstitutional and therefore invalid by the court'[194].

The Constitutional Court further held in S v Zuma[195] that 'reserve onus is declared unconstitutional as it violates the accused right to be presumed innocent and the right to remain silent'[196]. The court explained that:

> 'the requirement that the state must prove guilt beyond reasonable doubt has been called a golden thread running through the criminal law, and a prime instrument for reducing the risk of convictions based on factual error. The very first judgment of this Court affirmed the significance of the principle of not convicting a person if a reasonable doubt as to his or her guild existed. In S v Zuma, Kenridge J pointed out that'[197]:
>
> 'In… South Africa the presumption of innocence is derived from the centuries-old principle of English law, … that is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt.'[198]
>
> 'The judge continued further by adopting the following principles:

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[190] Criminal Procedure Act No 51 of 1977, Section 245:
'Evidence on charge of which false representation is element:
If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false'.

[191] Ibid, Section 332:
'Prosecution of corporations and members of associations
(5)30* When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore'.

[192] Ibid.

[193] Ibid.

[194] Supra (n168).

[195] *S v Zuma and Others 1995 (2) SA 642 (CC).*

[196] P Sutherland op cit (n55) 246.

[197] Ibid.

[198] Ibid.

> I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of reasonable doubt'[199].

It is obvious that under the circumstances directors or management will be less likely to conclude consent orders on behalf of their firms. This is in instances where an admission made by a firm that they had part took in cartel activity could be used as a proof on a 'prima facie basis for securing a later criminal case against those very directors that might come forward and make admissions on behalf of their firms"[200].

Further, the vast majority of cases were reported in the form of admissions contained in consent orders by the Tribunal. This, in turn, saved the Tribunal 'considerable incurring of costs and time and costs of litigation' [201].

2.6 Authoritative Body: National Prosecuting Authority ("NPA")

Criminalisation of cartels introduces the National Prosecuting Authority (NPA) who now holds exclusive jurisdiction for prosecution of cartel conduct under the new amendment Act[202]. In relation to the 'civil enforcement this, however, will remain the responsibility of the Competition Tribunal'[203].

This raises the issue currently in contention, namely the competition tribunal versus the power of the NPA, who have completely separate and distinctive powers. The question one must ask is whether the commission has the power to institute criminal proceedings during their investigation for cartel participation. And if not, is this an avenue to be explored?

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[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Supra n1.
[203] P Sutherland op cit (n55) 151.

What role does the NPA play when looking at Section 179(2) of our Constitution[204] which stipulates that the NPA have the power to institute criminal proceedings relating to criminal cases. Does the NPA has exclusive jurisdiction in relation to civil as well as criminal matters when prosecuting cartels?

Section 179 of the Constitution[205] read with Sections 2 and 4 of the National Prosecuting Authority Act[206] provides for a single authoritative unit, namely in this instance NPA. What this means is that the NPA will have exclusive jurisdiction to deal with the criminalisation of cartels.

The competency of the NPA is under serious scrutiny especially since the high volumes of crime and poverty in South Africa leaves very little confidence for the NPA to successfully prosecute crime. In an online study conducted in Wits report[207], it releases shocking and concerning statistics about the success of prosecution by the NPA:

> 'In April, Africa Check researched and wrote about the NPA's conviction rates: "Conviction rates do not reflect the number of successful prosecutions in relation to the number of crimes reported to police each year, let alone the large number of crimes that go unreported… 23 086 rapes were reported in Gauteng in 2012. Of that number, 55.6 percent were referred to the NPA to be prosecuted. But 35.6 percent of those were referred back to police for further investigation and 38.4 percent of the cases prosecuted were thrown out of court due to incomplete investigations'[208].

According to the Constitution[209] the 'NPA is an independent body that consists of the National Director of Public Prosecutions known as the (NDPP)'[210]. They

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[204] Ibid at 173.
[205] Ibid.
[206] The National Prosecuting Authority Act, 1998 No. 32 of 1998 (hereinafter referred to as 'the NPA Act').
[207] Prison overcrowding not just due to effective NPA, Available at https://witsjusticeproject.wordpress.com/tag/npa-effectiveness/, Date of use 22 November 2017.
[208] Ibid.
[209] Ibid at 173.
[210] Ibid.

have the ‘power to institute criminal proceedings on behalf of the state’[211]. This is to ‘carry out any necessary functions to instituting criminal proceedings’[212].

Based on the statistics mentioned prior, one must ask, do they have the capacity to handle the complexity of cases under cartel activity? Especially considering current competition law has never fallen within the realm of criminal law in the past.

The implementation of criminalisation ‘leaves two separate proceedings at the discretion of two independent prosecutors, one from the Competition Commission and the other from the NPA’[213]. Unless the ‘granting to immunity to the firm which is subject to the discretion of the Commission and to the individual’[214] which is ‘subject to the discretion of the NPA and is coordinated’[215]. The danger is that there is no guarantee that these ‘two individuals will follow the same approach’[216].

It is highly debatable whether a board of directors or the executive committee of a firm will apply for corporate immunity if the individuals expose themselves criminally. And this poses a number of issues about whether evidence attained by one body, i.e. the competition commission to be used by another, in this instance the NPA. Will witnesses who face the competition commission who have not received immunity relating to criminal sanctions be allowed to refuse to testify at criminal proceedings on the basis self- incrimination. As it stands, the refusal would not be competent because cartels are only ‘administrative contraventions in respect of a firm and not to an individual’[217].

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[211] Ibid.
[212] Ibid.
[213] Lewis op cit (n25) at 228.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid.

David Lewis[218] poses a few suggestions to the concerns and poses a solution to the constitutional dilemma relating to the combination of criminal and civil sanctions. He recommends that the two theories run parallel. This means separate trials, one before competition body where a firm would be tried for cartel conduct and the other before the criminal justice system where individuals would be tried for their involvement in cartel activity. Lewis indicates that the challenge with following this approach apart from the burden on evidence, as indicated above is that you might end up in a situation where you have two bodies during adjudication arriving at two opposing views relating to the existence of a cartel. This of course poses a huge problem in arriving at the decision whether or not there was cartel conduct to begin with.[219]

Officials fear that the criminalisation aspect will lead to a 'decline in leniency applications and consent agreements'[220].

Another avenue to possibly explore relating to the constitutional challenge would be to hand over the entire matter to the criminal justice system. This is which is how the 'system was governed under civil route'[221] however as indicated above, the challenge is that one would not have great success rate based on the crime statistics presented above.

Further, the current statistics show that the NPA has a commitment to addressing issues of crimes in the community. Will cases of cartels receive the same priority over shocking murder, fraud, sexual offenses and other commercial crimes? The NPA has a '69 per cent target on their conviction rate for sexual offense cases which was exceeded by 3.7 per cent (72.7 per cent) and showed that there was an improvement from 2016 to 2017 by at least 1.1 per cent from the previous year'[222]. There was a '74.5 per cent (1 899

[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Annual Report, National Director of Public Prosecutions in terms of the NPA Act 32 of 1998, 2017/2018, Available at

convictions) achieved in reported cases to the NPA and murder prosecutions rate was at 77.7 per cent for the 2018 period, notwithstanding the fact that the previous year 2017 was 3.7 per cent less than the 74 per cent target'[223].

> 'Murder prosecutions received a 77.7% conviction rate, which is 3.7% more than the target of 74%. Also, in relation to the number of persons convicted of corruption involving an amount of more than R5m increased by 27.6% from 29 from the previous year to 37 persons in the 2017/18 period. Further, 213 government officials were convicted for offences related to corruption, exceeding the target of 210 by 1.4% according to the most recent statistics on the NPA's website'[224].

The following is a more detailed overview of the number of persons convicted of '5 million corruption':[225]

Table: Persons convicted of R5million corruption[226]

Financial Year:	R5m Corruption
2012/13	42
2013/14	34
2014/15	23
2015/16	24
2016/17	29

https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf, Date of use 27 March 2019.

[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.

2017/18	37[227]

Further, the following figures reflect how current progress in relation to conviction rates across the number of courts in South Africa brought by the NPA:

Table: 'Achievement against Strategic Objectives and programme performance indicators':[228]

Strategic Indicator	Annual Target	2016/ 2017	2017/ 2018	Deviation from planned target to Actual Achievement for 2017/18	Progress over previous year
Conviction rate in high courts	87%	91,0%	91,7%	4,7%	0,7%
	897	968	890		
Conviction rate in regional courts	74%	79,8%	81,0%	7,0%	1,2%
	25 528	25 209	24 976		
Conviction rate in district courts	88%	95,6%	96,1	8,1%	0,6%
	248 301	295013	291 609		
Conviction rate in priority crime cases	85%	n/a	66,0%	-19,0%	n/a
	0		4		
Conviction rate in organised crime	90%	90,2%	93,8%	3,8%	3,6%'[229]
	269	386	346		

[227] Ibid.
[228] Ibid.
[229] Ibid.

From the aforementioned, it is clear that there is a significant rise in figures relating to crime statistics in South Africa. The conviction rate should be at one hundred percent for a crime to be prevented and perpetrators to be put to task for their wrong doings.

Also, with the crime statistics on the rise and the amount of intricate and long trials currently in place,[230] this often leads to several postponements on cases. One can imagine the high volume of cases which are yet to be finalised.

The NPA will need to either recruit a specialised team of experts on a panel to specifically deal with cartel offences or possibly merge with the Competition Commission to tackle all accounts of cartel activity. Also, this task team should collectively identify which cases could be flagged for leniency under the CLP. And which firms could potentially be liable for administrative fines or civil suits. And which companies could be potentially prosecuted for the crime of cartels and face incarceration.

With the recent implementation of the specialised task teams in South Africa to fight corruption, it is my submission that the NPA join forces with a Special Investigations Unit, SARS, the Public Protector and the Independent Police Investigative Directorate to tackle the growing concern of cartels in South Africa.[231]

2.7 Conclusion

South Africa is a unique country, especially with its historical, social, political and economic footprint. South Africa needs to remain true to its constitutional values by ensuring that the objective of the antitrust laws are met but also to

[230] Ibid.
[231] Ibid.

allow for the inclusion of an open market for all to run their businesses free from any form of corruption.

This is entrenched in the laws of South Africa, more so specifically addressed in the highest law of the land, our Constitution[232] which speaks to transparency and fairness. Our competition laws make provision for an open market to bring consumer welfare and provide products to all customers.

Any conduct that goes against this objective needs to be prohibited and parties who find themselves guilty of this conduct, should be held accountable for their corrupt cartel activity.

The United States model will now be examined in comparison to the South African model, thereafter the Australian model too will be examined as a further point of reference.

CHAPTER 3 UNITED STATES COMPETITION REGIME

3.1 Introduction

The next chapter now looks at the United States model and specifically what methods the United States of America (hereinunder referred to as the 'US') have adopted to govern cartel activity. The US is a strong country from an economic perspective and with progressive legislation, the objective of examining their policies are to highlight areas where South Africa could improve.

In the US, authorities have a responsibility of cartel enforcement and in doing so have incorporated US antitrust laws which have stood as the protector of

[232] Ibid at 416.

competition in their free and open market. There is a wide range of case resolution methods available in anti-cartel enforcement in the US. In exploring the various methods used to protect consumers and businesses from anticompetitive conduct since their inception.

It is important to note that the proceeding Chapters are not intended to serve as a comprehensive guide, but rather as a general overview of factors considered improving the challenges with the recent implementation of criminalisation of SA law under Section 73A of the Competition Amendment Act[233].

To 'protect US consumers and businesses from anti-competitive conduct, the federal antitrust laws have played an increasingly significant role in identifying cartels / anti-competitive conduct, from price-fixing cartels to competition-reducing mergers and monopolization increasingly is subject to investigation and, in some cases, remedial action implemented through independent and structured bodies'[234].

Enforcement of these laws are dealt with by four groups of authoritative bodies, namely The Department of Justice (the 'Department') which is the law enforcement body of the executive branch, the Federal Trade Commission (the 'Commission' or 'FTC') which is an independent regulatory body and also act as an administrative body created by Congress. Then you have the individual attorney general of the fifty states and lastly the private (non-governmental) civil litigants (Broder, 2016, pg.184). Despite the fact that bodies overlap in certain instances of enforcement, each has its own specific jurisdiction and areas of specialisation (Broder, 2016, pg.184).

Further, antitrust authorities in the USA have developed 'leniency programs for cartelists that denounce their collusive agreements'. These programs help

[233] Supra n1.
[234] Douglas Broder, US Antitrust Law and Enforcement, A Practice Introduction, Third Edition, Oxford University Press, 2016 at 184.

'prosecute participants in an attempt to deter collusion'[235]. There is a comparison made around the 'impact of reduced fines and positive rewards and argue that rewarding individuals, including firm employees, can deter collusion in a more effective manner'[236].

A determination is made into the possible adverse effects of whistle-blowing programs on firm's behaviour, and particularly on turnover. Incentives are used as a means to innovate and cooperation amongst firms. This will be examined against the backdrop of criminal sanctions in the US.

The leniency programme in the US makes provision for full immunity by cartelist and awards them immunity from prosecution only if they meet certain prerequisites alternatively, they will face criminal sanctions[237].

The proceeding chapters will examine the effectiveness of criminal sanctions as a deterrent to cartelists who breach antitrust law. Further, reference will be made to the US laws to explore the various avenues SA could implement to rescue the current challenges relating to the criminalisation of cartels.

In instances where criminal offences has occurred in the US, the relevant authorities to whom reference is made based on their skills and expertise will then 'investigate and prioritise prosecution of individuals responsible for going against competitive conduct in correspondence with the civil procedure against the company'. Companies in question 'need to anticipate how they would respond to an investigation where individuals are also prosecuted'[238].

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[235] The Impact of Leniency and Whistle-blowing Programs on Cartels, Available on https://www.semanticscholar.org/paper/The-Impact-of-Leniency-and-Whistle-blowing-Programs-Aubert/2dd9af0a041ddc9c6b342ebca9a39a62c5038d72, Date of use 17/7/2019.
[236] Ibid.
[237] Broder op cit (n230) at 184.
[238] The criminal cartel offence around the world, Available at http://www.nortonrosefulbright.com/knowledge/publications/140758/the-criminal-cartel-offence-around-the-world, Date of use 3 Jan 2019.

Internal procedures of organisations should also ‘anticipate the risk that individuals place themselves in’[239]. These allow individuals the opportunity to avail themselves to whistle blowing ‘opportunities to ensure immunity from prosecution under leniency programmes without having prior knowledge of the company’[240].

Further, companies need to ‘review their antitrust compliance policies and training programmes to ensure that they include individual sanctions that may apply in all jurisdictions’[241]. Especially where ‘businesses operate and to make sure that employees and the directors of companies are fully aware of their responsibilities and the sanctions that can apply to them personally as a means to deter individuals from cartel activity’[242]. This is highlighted under the advice and training in proceeding chapters that follow.

The objective of incorporating antitrust laws was to promote an open market which lays the ‘foundation for a vibrant and free economy’[243]. Aggressive ‘competition in a transparent and open market gives consumers which include both private individuals and business the perks of lower prices’[244]. Also, higher quality and services and essentially a ‘wider opportunity to choose products and services and thus greater innovation’[245].

In the chapters below US antitrust laws and will be reviewed and how the laws in the US promote competition by enforcing extremely strict sanctions on cartel activity. Further, the ‘per se’ principle in contrast with the rule of reason will be

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[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Antitrust Rothschild’s NWO Monopoly of Banks ~ Just As We Did With AT&T, Available at https://politicalvelcraft.org/2011/04/27/antitrust-rothschilds-nwo-monopoly-of-banks-just-as-we-did-with-att/, Date of use 17/7/2019.
[244] The Antitrust Laws, Available at https://www.scribd.com/doc/242037645/The-Antitrust-Laws, Date of use 16 July 2018.
[245] Ibid.

considered. This is followed by the role of the FTC (Federal Trade Commission) and the significance of this group elected by the US president.

Then the criminal enforcement policy, fines and sentencing will be explored with the objective of elaborating on the importance of deterrence followed by civil remedies and damages.

Thereafter before concluding the US chapter, the corporate leniency policy ('CLP') will be inspected and the procedure followed together with the significance of antitrust advice and training and how important this is for individuals to report the antitrust violation.

3.2.1 United States Antitrust Legislative Enforcement

Competition laws need to be enforced and laws must 'promote vigorous competition and consumer protection from anticompetitive business practice'[246]. The US has adopted its antitrust laws by the promulgation of the Sherman Act[247] in 1890 as a 'comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade'[248].

In 1914 'additional antitrust laws were implemented by Congress and the Federal Trade Commission Act[249], which created the FTC'[250]. And the Clayton Act[251] which forms the three-core federal antitrust laws, and which are still effective in the US today'[252].

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[246] Ibid.
[247] Supra (n14).
[248] The Antitrust laws, Available at https://ev.turnitin.com/app/carta/en_us/?s=1&lang=en_us&u=1062729198&student_user=1&o=1150191136, Date of use 17/7/2019.
[249] Federal Trade Commission Act of 1914.
[250] Supra (n239).
[251] Clayton Act, chapter 323, § 3, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 14 (1994 & Supp. V 1999)), known as ('The Clayton Act').
[252] Supra (n244).

The antitrust laws 'prohibit unlawful business practice and leave courts to decide which ones are illegal by assessing these matters on a case by case basis'.[253] Courts have applied the 'antitrust laws to uphold changing markets and keep up to date with recent developments in the law. At the same time, despite developments in legislation over the past one hundred years, the antitrust laws have had the same basic objective'[254]:

'to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down and keep quality up'[255].

The Sherman Act[256] prohibits 'every contract, combination, or conspiracy in restraint of trade'[257], and any 'monopolization, attempted monopolization, or conspiracy or combination to monopolize'[258]. The 'Supreme Court in the US does not hear every restraint of trade'[259]. Only those agreements which are considered 'harmful to competition'[260]. This includes 'arrangements among competing individuals or businesses to fix prices, divide markets, or rigged bids'[261]. These acts constitute 'per se' violations of the Sherman Act[262] in other words, no defence or justification is allowed under the circumstances[263].

The consequences for contravening US laws can be harsh. Although most 'enforcement Acts are civil, the Sherman Act[264] also has criminal law implications'[265].

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[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Supra (n14).
[257] Ibid.
[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Supra (n14).
[263] Supra (n244).
[264] Supra (n14).
[265] Supra (n244).

These individuals and businesses that contravene the rules prescribed by the Sherman Act may be 'prosecuted by the Department of Justice'[266]. Criminal prosecutions are typically restricted to 'intentional and clear violations in instances where competitors fix prices or where parties have rigged bids'[267]. The Sherman Act imposes criminal sanctions of 'up to $100 million for a firm and $1 million for individuals'[268]. Plus, up to 'ten years' imprisonment'[269]. Under US laws the 'maximum fine can be increased to double the amount the perpetrator gained from the illegal acts or twice the money lost by those who are victim to the crime if either of those amounts is over $100 million'[270].

In addition to these federal statutes, most states in the USA have antitrust laws that are imposed by 'state attorney general office or private plaintiffs in relation to antitrust policies and promote healthy competition between firms'[271].

From the aforementioned, it is clear that in the US cartel violations are imposed by state attorneys or general office or private plaintiffs who will then either face civil or criminal sanctions based on the laws and policies implemented in the Acts above. This then promotes healthy and productive means of prohibiting cartel activity.

The principle of 'per se' illegality and rule of reason will now be examined to draw contrasts between these two principles in US law followed by the Federal Trade Commission and their role within competition antitrust laws.

3.2.2 'Per Se' Illegality:

[266] Ibid.
[267] Ibid.
[268] Ibid
[269] Supra n14.
[270] Ibid.
[271] Supra n244.

As noted in the aforementioned, the ‘per se’ illegality is when an ‘agreement is per se illegal, this means that the provision is illegal irrespective of the reason for the illegal act’[272]. The plaintiff can prove that the defendant has entered into a ‘per se’ agreement and according to the Sherman Act, horizontal price-fixing is in violation under Section 1[273].

In a series of decisions made by the courts in the US it is held that ‘per se’ treatment is not applicable to vertical restrictions[274]. Therefore in the United States ‘per se’ illegal treatment is only reserved for hardcore cartel conduct which includes ‘horizontal price fixing’,[275] ‘bid rigging’[276] and ‘market allocation agreements’[277] as per the provisions stipulated in Section 1 in the Sherman Act[278]. Only the ‘DOJ have the power to bring criminal antitrust cases and the government can charge for any violation of the Sherman Act as a criminal violation’[279].

3.2.3 Rule of reason

Rule of reason, on the other hand, looks at the question whether there ‘is one that promotes competition or one that suppresses competition’.[280] And also ‘focuses on the impact this has on the market’[281].

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[272] See State of Oil v Khan, 522 U.S. 3, 10 (1997).
[273] Supra (n14).
[274] Ibid.
[275] United States v Socony-Vacuum Oil Co., 310 US 150, 223 (1940); United States v Trenton Potteries Co., 73 US 392, 397-98 (1927).
[276] United States v Heffernan, 43 F.3d 1144 (7th Cir. 1994) (Posner, J) (bid rigging is a subset of price-fixing offences).
[277] Pler v BRG of Georgia, Inc, 498 US 46, 49-50 (1990) (per curiam); United States v Topco Associates, 405 US 596, 608 (1972).
[278] Supra (n14).
[279] Roger Van Der Bergh with Peter Camesasca and Andrea Giannaccari, Comparative Competition Law and Economics, Edward Elgar Publishing, 2017, page 227 – 228.
[280] Professional Engineering, 435 S, at 691.
[281] Broder op cit 230 at 230 – 231.

Courts see the rule of reason as an analysis in terms of 'shifting the burden of proof'[282]. The plaintiff has the 'burden of proof relating to the likelihood of the substantial anti-competitive effects on the market'[283]. If the plaintiff is able to 'prove same, the defendant will have to produce evidence of pro-competitive conduct'[284]. Followed by which the courts will 'determine whether the restraints of anti-competitive harm substantially outweigh the competitive benefits for which the restraint is reasonably necessary'[285].

3.3 Division of Power:

3.3.1 Federal Trade Commission (FTC)

This is a quasi-judicial, independent regulatory agency led by five commissioners and each of these commissioners are appointed by the USA president (Broder, 2016, pg.200). The FTC has three divisions, namely Competition, Consumer Protection and Economics (Broder, 2016, pg.200).

Each commissioner is nominated by the President, confirmed by Senate, and serves a seven-year term. The terms are staggered and no more than 'three commissioners can be from the same political party (Broder, 2016, pg.184). The president then designates one of the commissioners as the Chairman of which investigations are conducted by staff within the FTC's Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics. The commissioner's roles are to administer law under the Federal Trade Commission Act[286] (Broder, 2016, pg.184).

The independent regulatory agency led by five commissioners who are individually appointed by the president of the United States is a great means

[282] ABA (2012) 62.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Supra n245.

to ensure that parties who are within this capacity have the competency to deal with the complexity of cartels (Broder, 2016, pg.184). These commissioners are highly competent as they have strong antitrust understanding and knowledge of antitrust laws and are highly trained (Broder, 2016, pg.184). The commissions appointed by 'President D Trump and their credentials as a point of reference to indicate the level of competence'[287].

Consideration will now be had with regards to criminal enforcement in antitrust US laws.

3.4 Criminal Enforcement

In the US, the DOJ has exclusive jurisdiction to deal with the criminal enforcement of federal anti-trust laws.[288] The Sherman Act[289] states that all 'contraventions of the antitrust laws are criminal violations and DOJ will only investigate and prosecute violations of illegal activity'[290]. Examples are 'hard-core cartel activity such as price-fixing, bid-rigging, market allocation

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[287] Joseph Simons Sworn in as Chairman of the FTC, Available at https://www.ftc.gov/news-events/press-releases/2018/05/joseph-simons-sworn-chairman-ftc, Date of use 25 June 2019:
'Joseph J. Simons was sworn in as Chairman of the Federal Trade Commission in May 2018 and obtained his A.B. in Economics and History from Cornell University as well as his J.D., cum laude, from Georgetown University Law Centre. Noah Joshua Phillips was appointed in April 2018 whom has strong legal background and has received his A.B. from Dartmouth College and his J.D. from Stanford Law School. Rohit Chopra was sworn in as a Federal Trade Commissioner in May 2018. He holds a BA from Harvard University and an MBA from the Wharton School at the University of Pennsylvania. Rebecca Kelly Slaughter was sworn in as a Federal Trade Commissioner on May 2018. She has a wealth of experience and received her B.A. in Anthropology magna cum laude from Yale University. She received her J.D. from Yale Law School, where she served as an editor on the Yale Law Journal. Christine S. Wilson was sworn in on September 2018 as a Commissioner of the Federal Trade Commission. She too has a wealth of experience and graduated cum laude from Georgetown University Law Centre as well as from Phi Beta Kappa from the University of Florida'.

[288] https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences/, Date of use 06 November 2018.

[289] Supra n14.

[290] Ibid.

agreements'[291]. The government's restraint is attributable to the ruling in United States v US Gypsum case[292] which states that the government must prove criminal intent to obtain a criminal antitrust conviction.[293] It was held that:

> 'A defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn there from, and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Since the trial judge's instruction on the verification issue had this prohibited effect, it was improper. Pp. 438 U. S. 434-446.
>
> (a) The Sherman Act is not to be construed as mandating a regime of strict liability crimes; rather, the criminal offenses defined therein are to be construed as including intent as an element. Pp. 438 U. S. 436-443.
>
> (b) Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent. Pp. 438 U. S. 443-446.'[294]

'Antitrust lawyers manage their own juries and prosecute their own criminal sanctions, as opposed to referring cases to the US Attorney's offices for further consideration and prosecution'. Only in certain instances, on occasion, the 'Antitrust Division will get assistance from the local US attorney'. This division also uses 'Federal Bureau of Investigation ("FBI") to conduct investigations and the FBI helps the DOJ in conducting their investigations using special techniques such as 'dawn raids, interviews, court-authorised electronic surveillance, and cooperating witnesses'[295].

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[291] See http://www.justice.gov/atr/public/international/273461, Date of use 07 November 2018.
[292] United States v. United States Gypsum Co., 438 U.S. 422 (1978).
[293] 438 U.S. 422.
[294] https://supreme.justia.com/cases/federal/us/438/422/, Date of use 07 November 2018.
[295] Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, Available at, https://www.justice.gov/atr/speech/recent-developments-trends-and-milestones-antitrust-divisions-criminal-enforcement, Date of use 07 November 2018.

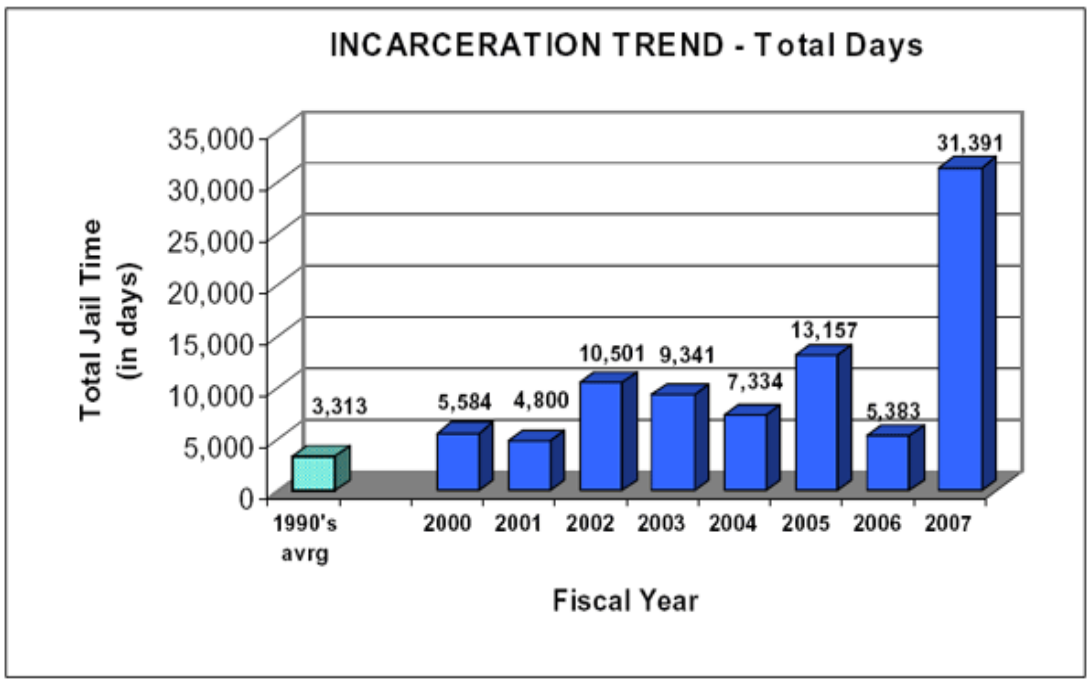
Defending criminal antitrust cases is a complex and highly specialised area and given the stakes parties accused of or suspected to be involved in antitrust conduct. The US DOJ emphasized that the ‘most effective way to deter and punish cartel activity is to hold wrongdoers accountable by seeking jail sentences’[296] This is due to the threat to US businesses and customers and in turn the DOJ significantly raised the ‘maximum jail term for Sherman Act[297] offenses from three to ten years to further deter antitrust conduct’[298].

Another reason for the amplified jail sentence is that the DOJ has ‘reinforced its negotiating position and is now in a position to insist on stiffer jail sentences’[299]. This is done in ‘plea agreements with foreign nationals.’[300] As a result of more ‘aggressively employing investigative tools, examples include use of border watches, INTERPOL Red Notices, the real possibility of extradition, and the assistance and coordination offered by foreign authorities’[301].

Also, the ‘Division is frequently exposing and prosecuting collateral federal offenses in connection with investigations of anti-competitive conduct’[302], which often call for ‘penalties greater than antitrust offenses’[303]. All these factors have added to a trend toward tougher penalties for US and foreign nationals convicted of violating the US antitrust laws. Below is a summary of the Antitrust Division's 2007 fiscal year results prosecuting individual defendants, who were sentenced to ‘over 31,000 jail days in the 2007 fiscal year’[304] which is more than twice the number of jail days imposed in any

[296] Ibid.
[297] Supra n14.
[298] Supra n291.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Ibid.

previous year. The 2007 increase was consistent with the trend toward rising jail sentences, as indicated:[305]



The DOJ uses all 'available investigative tools which include covert taping, informants, search warrants, and foreign assistance requests as a means to vigorously investigate cartel conduct'[306]. The DOJ was granted new 'investigatory power when it added antitrust offenses to the list of crimes that can be investigated using court-authorized wiretaps'[307]. Investigations are helped with 'audio or video recordings of cartel discussions either with or without the permission of one of the participants to the discussion'[308]. When a conversation is 'recorded by Division agents with the consent of one of the participants ("consensual monitoring"), court permission is not required, alternatively, where no party gives prior consent to recordings, the Department can seek a court order authorising same'[309].

[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] https://www.justice.gov/atr/speech/recent-developments-trends-and-milestones-antitrust-divisions-criminal-enforcement, Date of use 07 November 2018.

The fining and sentencing aspect will now be considered in light of the criminal enforcement highlighted in the aforementioned paragraphs.

3.4.1 Criminal fines and sentencing

The Sherman Act[310] 'enforces criminal penalties on companies and with the implementation of legislation'[311] in the US which increased the maximum Sherman Act[312] corporate fine to 'one million dollars per antitrust offence'[313]. The statutory maximum can be exceeded, which says that in instances where a person financially benefits from the offence. Alternatively, others experience financial loss, defendants can be 'fined up to twice the gross gain or twice the gross loss'[314].

However, in relation to individuals the maximum penalty is a fine of 'up to one million dollars well as a maximum of ten years' incarceration'[315]. This is clearly stipulated in the Sherman Act[316]. If fines exceed the statutory 'maximum legislation further holds that a fine can be paid double that of the gain received from the crime or double the gross loss the victim suffered'[317].

The DOJ has 'prosecuted corporations and individuals engaged in price fixing, bid rigging, market and customer allocation successfully over the past few years'[318]. Since 'January 2009, 365 criminal cases have been filed and more than 4.9 billion dollars in criminal fines have been got hold of'[319]. In the period 2010 to 2014, the average jail sentence in district division cases was 25 months, which was an increase from 20 months in the period 2000 to 2009'[320]. 'Charges were brought in a variety of significant industries which

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[310] Supra n14.
[311] Antitrust Criminal Penalty Enhancement and Reform Act of 2004.
[312] Supra (n14).
[313] Broder op cit (n230) at 184.
[314] Ibid at 191.
[315] Ibid.
[316] Supra n14.
[317] Ibid.
[318] https://www.justice.gov/archives/doj/accomplishments-under-leadership-attorney-general-eric-holder, Date of use 08 November 2018.
[319] Ibid.
[320] Ibid.

includes financial services, auto parts, and liquid crystal display (LCD), air transportation, real estate, coastal shipping and environmental services.[321]

Due to the 'DOJ Antitrust Division's investigation into price fixing and bid rigging in the auto parts industry, 32 corporations and 48 executives have been charged to date which results now in more than $2.4 billion in criminal fines'[322]. This includes the 'second and third major criminal fines ever and huge cases involving prison sentences against the guilty executives'[323][324].

The successful conviction of 'Taiwan-based AU Optronics, its Houston-based accompanying firm as well their former top executives for their participation in a price-fixing plot involving LCD panels'[325]. And for the first time ever, a jury made the decision that 'conspirators' gain from their illegal conduct was at least $500 million, increasing the potential for each organisation to a statutory maximum of $100 million in the USA'[326]. 'AU Optronics received judgment to pay a $500 million fine, matching the largest fine ever imposed against a company for violating the U.S. antitrust laws to date'[327]. On 10 July 2014, the 'Ninth Circuit confirmed these convictions together with the $500 million fine'.[328]

The DOJ currently has an ongoing 'investigation into the municipal bond facing almost $750 million in compensation'[329]. 'Penalties to federal and state agencies was obtained through settlements with UBS, Wachovia Bank, JP Morgan Chase, GE Funding Capital and Bank of America'[330]. To date a significant number of executives in the financial services industry has been

[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] Ibid.
[325] Supra n314.
[326] Ibid.
[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] Ibid.

criminally convicted as well as former executes involved for their collusion in 'investment contracts'[331].

Another big area of the DOJ is their focus to deal with collusion in the US real estate market, which currently has charges against one hundred individuals in counting of which specifically the government is trying to put an end to collusion activity during 'real estate auctions'[332].

Also, the 'LIBOR ("London InterBank Offered Rate") or known as the "Euribor investigation", the US government brought charges against the bank and received a criminal conviction against Rabobank[333]. They have agreed to pay '$325 million in criminal penalties and a conviction against Lloyds Banking Group plc', which agreed to pay '$86 million in criminal penalties'[334].

Below is a further illustration of successful top-end fines incorporated by the DOJ under US laws. Before 1994, the largest corporate fine ever paid by a company was $6 million. However, subsequent to the fine being paid, the amount has now risen to '$10 to $300 million and more'[335].

Examples include fines against 'British Airways and Korean Air as well as the $500 million fine imposed against F. Hoffmann-La Roche for its participation in the vitamins cartel'[336].

'Antitrust Division Fines of $100 Million or More		
F. Hoffmann-La Roche, Ltd. (1999)	Vitamins	$500 Million

[331] Ibid.
[332] Ibid.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid.

Korean Air Lines Co., Ltd. (2007)	Air Transportation	$300 Million
British Airways (2007)	Air Transportation	$300 Million
Samsung Electronics Company, Ltd.; Samsung Semiconductor, Inc. (2006)	DRAM	$300 Million
BASF AG (1999)	Vitamins	$225 Million
Hynix Semiconductor, Inc. (2005)	DRAM	$185 Million
Infineon Technologies AG (2004)	DRAM	$160 Million
SGL Carbon AG (1999)	Graphite Electrodes	$135 Million
Mitsubishi Corp. (2001)	Graphite Electrodes	$134 Million
UCAR International, Inc. (1998)	Graphite Electrodes	$110 Million
Archer Daniels Midland Co. (1996)	Lysine & Citric Acid	$100 Million'[337]

On March 7, 2016, the 'U.S. Supreme Court denied Apple's petition for certiorari'[338] and made final the lower court decisions in the case. The 'Supreme Court's action prompted that 'Apple pay $400 million to e-book purchasers'[339]. With the $166 million previously paid by publishers involved in

[337] Ibid.
[338] https://www.justice.gov/archives/opa/blog/e-book-retailers-distribute-400-million-victims-apple-led-conspiracy, Date of use 08/10/2018.
[339] Ibid.

collusion to settle claims against them, 'Apple's payment brings to $566 million the amount repaid to e-book purchasers overcharged as a result of Apple's and the publisher's joint illegal conspiracy'[340].

'Judge Cote also looked at ways to make sure that the court's goal of 'ensur[ing] that the government need never again expend its resources to bring Apple into court for violations of the country's antitrust laws'[341]. There was an 'external compliance monitor appointed externally to help Apple improve its antitrust compliance and training concerns'[342] .

After having considered criminal enforcement of cartels and sentencing, civil claims which are a route by the DOJ to further address anti-trust cartel violations which now will be addressed below.

3.5 Civil claims

The DOJ has the power not only to proceed with regards to criminal enforcement in the plight against antitrust violations, however, also has the power to proceed against cartelists using civil remedies.[343]

The civil route is followed in antitrust cases which are less serious, less clearly illegal in comparison to the criminal violation cases and those cases which are harder to prove. Further the activity than the hard-core conduct against that which brings about criminal sanctions.[344]

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[340] https://www.justice.gov/archives/opa/blog/e-book-retailers-distribute-400-million-victims-apple-led-conspiracy, Date of use 08/10/2018.
[341] Ibid.
[342] Ibid.
[343] Broder op cit (n230) at 196.
[344] Ibid.

Section 2 of the Sherman Act (15 U.S.C. § 2)[345] does not allow for monopolization or attempts to collude amongst parties and violations are generally proceeded on criminal charges. However, in instances criminal prosecution is warranted under the circumstances, the courts will proceed on this basis. In circumstances where 'violence is used or threatened as a means of discouraging or eliminating competition, such as cases involving organized crime will generally be prosecuted criminally'[346] .

3.5.1 Civil remedies and Treble Damages

Criminal sanctions, facing jail time and significant amount in fines being paid in the US looks like the most effective method to deter cartels. However, in situations where government or its agencies have been victim to cartels, DOJ may obtain 'treble damages' under the Clayton Act (15 U.S.C. Section 15a)[347]. Also, under the Civil penalties up to treble damages under the False Claims Act (31 U.S.C. Section 3729)[348].

In addition, private parties can get treble damages if they are victim to cartels and may use successful prosecution as 'prima facie' evidence against a 'defendant in a follow-on suit for treble damages'[349]. Plaintiffs can also recover 'reasonable attorney's fees' for the inconvenience of having to face court time under US legislation, specifically under the 'Antitrust Criminal Penalty Enhancement and Reform Act'[350].

The treble damages under Section 4 and 4A of the Clayton Act[351] is an important section relating to antitrust laws in the US as successful plaintiffs[352].

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[345] Ibid at 173.
[346] https://www.justice.gov/atr/page/file/1091651/download, Date of use 07 November 2018
[347] Ibid at 174.
[348] Ibid.
[349] Ibid.
[350] Antitrust Criminal Penalty Enhancement and Reform Act of 2004.
[351] Ibid.
[352] Broder op cit (n230) 18.

Consideration will now be had relating to the CLP and its enforcement in cartel violation conduct.

Evidently that the US has significant means of combatting the crime of cartels. There are harsh sanctions imposed on individuals who find themselves guilty of collusive activity and not only are the criminal sanctions quite severe, the civil remedies can be substantial for the guilty party to pay.

Further, the injured party has right of resource by having their legal fees paid if they are subjected to lengthy trials as a result of somebody else's wrong doings.

3.6 Corporate Leniency Policy ('COP')

The COP gives reduced penalties to cartelists provided they give antitrust authorities information in cooperation of cases under investigation by prosecution and assist in revealing evidence[353].

The USA Department of Justice (DOJ) has a policy regarding leniency relating to corporations reporting their illegal antitrust activity to the authorities at an early stage if they meet certain 'legal requirements'. 'Leniency' according to the DOJ means 'not charging such a firm criminally for the activity being reported (known as the corporate amnesty or corporate immunity policy)'.[354]

Leniency is divided into two programs, namely CLP and individual leniency program and this is to encourage and reporting of antitrust violations. This is

[353] Blair op cit (n13) 424.
[354] https://www.justice.gov/atr/corporate-leniency-policy, Date of use 8 October 2018

not to implement criminal charges against corporate or individuals who openly come forward and report antitrust conduct[355].

This program is known as corporate amnesty or the corporate immunity program, which gives leniency to an organization that comes forward, confirming the following (Broder, 2016, pg. 193):

> ‘1) The DOJ has not yet received information about the illegal conduct as yet from another source;
>
> 2) The corporation promptly and effectively stopped its participation in the antirust activity and;
>
> 3) The corporation reports fully and open and continues to bring its cooperation;
>
> 4) The corporations confession is truly a “corporate act’’ and not an ‘‘isolated confession of individuals executives or officials’’;
>
> 5) The corporation makes restitution to injured parties “where possible’’;
>
> 6) The corporation was not the leader of the illegal activity and did not force others to take part in the antitrust activity.’[356]

The DOJ has a ‘marker system’ to keep record the applicants place in relation to leniency and to secure a position onto the DOJs system, they must report that some alleged cartel activity and give the state information regarding the ‘nature of the conduct to date’.[357]

‘Leniency may still be available even if the company does not come forward until after the DOJ started an investigation’[358] under the following circumstances, namely in instances whereby (Broder, 2016, pg. 193):

> ‘1) If the corporation is the first one to come forward;
>
> 2) If the DOJ does not already have any evidence against the corporation that is likely to lead to a “sustainable conviction”;

[355] Broder op cit (n230) 193.
[356] Ibid.
[357] Scott D. Hammond and Belinda D. Barnett, Frequently Asked Questions Regarding the Antitrust Division’s Leniency at 193.
[358] Ibid.

> 3) The corporation promptly and effectively stopped the illegal activity upon discovery;
>
> 4) The corporation reports fully and openly and continues to bring their cooperation;
>
> 5) The confession is truly a "corporate act" and not a "isolated confessions of individuals executives or officials"';
>
> 6) The corporation makes restitution to injured parties "where possible'' and;
>
> 7) The DOJ confirms that granting of leniency or immunity will not be unfair or to the detriment of others'[359].

In meeting requirement seven above most important consideration is when the firm approaches the officials and if the company forced another company to 'take part in the collusive activity'[360].

The DOJ sees leniency as an alternative whereby if the factors above are met, the firm will not face criminal sanctions. However, they will be granted 'immunity from the DOJ'[361].

3.6 Corporate Leniency Policy (CLP)

3.6.1 Leniency for Corporate Directors, Officers and Employees

If a company is entitled to leniency and meets the requirements, before the DOJ started their investigation, 'all directors, officers, and employees of the corporation who admit to their participation in illegal antitrust conduct' and are open and co-operate means that the individuals will not face a jail sentence or experience time in jail. If they openly admit what they did wrong and are open and honest, they 'will be granted immunity'[362].

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[359] Ibid.
[360] https://www.justice.gov/atr/file/810281/download, Date of use 10 November 2018.
[361] Broder op cit (n230) 193.
[362] Ibid at 226.

If a company does not meet the requirements for a leniency application before the authorities started investigating, more so 'the directors, officers, and employees' do speak up and confess, they will be considered only for immunity against criminal prosecution but could still face 'civil charges'[363].

3.6.2 Leniency procedure

If staff are under the impression that their company should be considered for leniency, these respective staff members can send a 'favourable recommendation to the Office of Operations' listing their reasons why their company should be granted leniency[364].

The Director of Operations will then look into the recommendation and decide on the final decision as to whether to grant a company leniency.

Since the implementation of the CLP in 1993 as an attempt to promote self-reporting by corporations, the DOJ's corporate leniency policy has been a remarkable success, often creating a 'race among conspirators to disclose their conduct to enforcers'[365]. This program has ultimately led to the DOJ successfully prosecuting a number of huge international conspiracies and in turn creating an opportunity for the government of the USA to recover billions and also sending many to prison in the process[366].

Over and above the CLP provision, the DOJ also provides training to individuals to help spread awareness of cartels. In the paragraph below, this concept will be examined in more detail followed by the concluding remarks.

[363] Ibid.
[364] Ibid.
[365] Scott op cit n354.
[366] Broder op cit (n230) 194.

3.7 Antitrust Advice and Training

The DOJ offers training and development to informal 'federal and state' agencies in the US which is a means to help and develop their skill and competency to easily identify instances of cartel conduct amongst firms.

This is crucial as the training allows for inspectors or investigative agencies to critically 'recognize evidence of antitrust violations and ensure that all the necessary is done herein'[367].

There are a few Divisions in the US that specifically are equipped to deal with cartels, namely 'Antitrust Division with its offices based in Washington, D.C., New York, Chicago, and San Francisco. These offices investigate and prosecute criminal violations of the antitrust laws and the public are encouraged to make contact with the offices relating to questions or significant information necessary'[368].

3.8 Conclusion

In a speech delivered by Bill Baer (US prosecutor), he addresses his concerns and says that parties repel laws must be put to task and dealt with by the law in dealing with antitrust violations. Parties put themselves at huge risk being exposed to strenuous criminal fines.

The US justice system has incorporated criminal sanctions amounting to '$1.4 billion in a single year and the average jail term for parties are currently at 25 months'[369], which have increased considerably. Currently double to what is

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[367] Ibid.
[368] https://www.justice.gov/atr/page/file/1091651/download, Date of use 11 November 2018
[369] See BILL BAER, Prosecuting Antitrust Crimes, Assistant Attorney General Antitrust Division U.S. Department of Justice Remarks as Prepared for the Georgetown University Law Centre Global Antitrust Enforcement Symposium,

was in 2004. Not only do parties now face criminal sanctions, but possibly face civil sanctions too[370].

Based on current stats in the USA, it is clear that there is a willingness and successful ability to prosecute criminal activity relating to cartels. This is due to trained prosecutors who work very closely with authorities in the US and other state and investigative agencies who are competent to deal with the complexity of cartels and work in a collaborative way to combat illegal cartel activity. Consistent efforts have been made to detect and prosecute cartels. This is based on the administrative bodies, laws and various divisions; it is clear that in the cartel enforcement is a top priority[371].

Regardless of the tireless efforts by government, there remains an attempt or desire to cheat the profit margins of companies and therefore firms will collude. However, despite these obvious challenges, the US continues to prosecute cartels.

Companies that apply for leniency must appreciate that it is more than just a phone call to advise and promise to bring their cooperation. This requires continuous and total disclosure. Further, companies will also be given the option for leniency and in doing so, employees too may earn leniency. Individuals must be truthful and honest and must be credible witnesses when producing evidence relating to their involvement[372].

The bottom line is clear, if a company subjects themselves to an antitrust violation it will face serious consequences in the USA. A company can try to

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Washington, DC September 10, 2014, available at http://www.justice.gov/atr/public/speeches/308499, Date of use 06 November 2018.

[370] See BILL BAER, Prosecuting Antitrust Crimes, Assistant Attorney General Antitrust Division U.S. Department of Justice Remarks as Prepared for the Georgetown University Law Centre Global Antitrust Enforcement Symposium, Washington, DC September 10, 2014, available at http://www.justice.gov/atr/public/speeches/308499, Date of use 06 November 2018.

[371] Ibid.

[372] Ibid.

mitigate the potential outcomes by blowing the whistle against these crimes and be honest by providing the authorities with information and give their co-operation. This will help the state ensure that the necessary is taken to prevent cartel conduct.

The Australian model will now be scrutinised in detail after having considered both the South African and United States model. This will allow for deeper consideration and reflection.

CHAPTER 4 AUSTRALIAN COMPETITION REGIME:

4.1 Introduction

The Australian competition law is underlined in the Competition and Consumer Act 2010 (Cth) (CCA)[373] and further is governed by the Australian Competition and Consumer Commission ('ACCC').

In 2017 there was important changes made to the law including amendments relating to cartel conduct. The ACCC has powers to investigate and to bring proceedings against parties who engaged in cartel conduct and their powers include the following instances[374]:

> '(a) compel any person or company to provide information about a suspected breach of the CCA, including by providing documents or oral evidence;
>
> (b) obtain search warrants for company offices and the premises of company officers; and;
>
> (c) facilitate surveillance of individuals, including phone taps, through collaboration with the Australian Federal Police'[375].

[373] Competition and Consumer Act 2010 Act No. 51 of 1974 as amended ('the Act').
[374] https://thelawreviews.co.uk/edition/the-cartels-and-leniency-review-edition-6/1159144/australia, Date of use 03 January 2019.
[375] Ibid.

In the Act, there are four types of cartel conduct that are prohibited under Section 45AD[376]. These provisions prohibit making or giving effect to a contract, arrangement or understanding between competitors, which has[377]:

> 'a) the purpose of, or is likely to have had the effect of, price fixing;
>
> b) the purpose of market sharing;
>
> c) the purpose of bid rigging; or
>
> d) the purpose of preventing, restricting or limiting production, capacity or supply'[378].

Cartel conduct constitutes both a civil and criminal offences under the laws and does as seen in the SA and US distinguish between the various levels of serious cartel conduct[379]. Under the Criminal Code Act 1995 (Cth)[380], additional requirements must be met to successfully prosecute criminally for cartel offence, including meeting fault elements, 'proving the offence beyond reasonable doubt" and also owing to the circumstances, obtain a 'unanimous jury verdict'[381].

This is significantly different to the SA model as there is not a jury system in place in our local judiciary system.

The ACCC investigates and argues the matter in court as a 'civil offence'. It is the Commonwealth Director of Public Prosecutions ('CDPP') who prosecutes criminal cartel offences, not the DOJ nor the NPA. However, this resembles the CLP whereby prior to the recent amendments in the SA legislation, the Competition Commission had strict jurisdiction to only deal with the complexity of cartels.

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376 Supra n373.
377 Supra n374.
378 Ibid.
379 Ibid.
380 Criminal Code Act 1995 Act No. 12 of 1995 as amended.
381 Ibid.

The ACCC and the CDPP have signed a memorandum of understanding (MoU), which says that the ACCC must 'refer cases of cartel conduct that could cause large-scale or serious economic harm to the CDPP for prosecution'[382].

This then allows a reporting system in instances where there will be substantial harm to the economy in Australia.

4.2 Corporate Leniency Programme ('CLP')

The 'ACCC first implemented a leniency programme in 2003'[383]. The current laws entitle the 'ACCC immunity and cooperation for cartel conduct'. The 'Leniency Policy' was enforced in September 2014 and underlines the ACCC's approach to cooperation by participants involved in cartel activity and the policy as it stands 'currently is further under review'[384].

The Leniency Policy offers two forms of leniency for participants who have engaged in cartel activity and who are willing to help the ACCC in its investigation, namely:

> 'a) Immunity: the first cartel participant to approach the ACCC may be granted conditional immunity from civil enforcement actions, and potentially from criminal action by the CDPP if it meets the necessary criteria.
>
> b) Cooperation: if a cartel participant fails to meet the criteria for conditional immunity, it may still receive leniency from the ACCC or the court if it cooperates in the ACCC's investigation'[385].

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[382] Ibid.
[383] Ibid.
[384] Australian Competition and Consumer Commission, 'Updated Immunity Policy to uncover cartel conduct' (Media Release, MR 225/14, 10 September 2014), www.accc.gov.au/media-release/updated-immunity- policy-to-uncover-cartel-conduct, Date of use 03 January 2019.
[385] Ibid.

A company that is or was previously a participant to a cartel, whether in primary or secondary form will be 'eligible for conditional civil immunity where it meets the following seven conditions', namely if[386]:

> "(a) it applies for immunity under this policy and satisfies the following criteria:
>
> (i) the corporation is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity;
>
> (ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the CCA;
>
> (iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy;
>
> (iv) the corporation has not coerced others to participate in the cartel;
>
> (v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel;
>
> (vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives);
>
> (vii) the corporation has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings, and
>
> (b) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel'[387].

A person who was a director or employee of a company that is or previously was a participant in cartel conduct can also apply for conditional immunity, provided the same criteria is met and passed[388].

The ACCC upon determining 'if a party meets the criteria for conditional immunity, they will interpret the Policy in favour of the applicant and in certain exceptional cases, the ACCC can grant immunity to a person that fails to meet

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[386] Ibid.

[387] https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_PRINT_FA3.pdf, Date of use 03 January 2019.

[388] Ibid.

the required standard and may not proceed to instituting civil sanctions against the applicant'[389].

Where an applicant meets the criteria for 'conditional immunity', it may suggest to the CDPP that the applicant be 'granted immunity from criminal prosecution'[390]. The CDPP will then apply the necessary discretion to see if the 'applicant meets the criteria under the Leniency Policy'[391].

4.3 Conditional Immunity

The Trade Practices Amendment Act[392] was amended to bring in criminal sanctions for cartel conduct in Australia. If an application for immunity was brought forward on or after 24 July 2009 then the applicant will 'automatically be considered as an application for civil as well as criminal immunity'.

However, instances before this date will not be considered for criminal immunity as criminal sanctions were legislatively enforced at the time[393].

In instances where the 'ACCC is satisfied that the applicant has met the standard for conditional immunity, the applicant will be granted with conditional immunity relating to civil and criminal sanctions'[394].

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[389] Ibid.
[390] Ibid.
[391] Ibid.
[392] The Trade Practices Amendment Act of 2009.
[393] http://docreader.readspeaker.com/docreader/?jsmode=1&cid=btass&lang=en_au&url=https%3A%2F%2Fwww.accc.gov.au%2Fsystem%2Ffiles%2F885_ACCC%2520immunity%2520and%2520cooperation%2520policy%2520FAQ_FA3.pdf&v=, Date of use 03 January 2019.
[394] Ibid.

Correspondence to the applicant will include a full description of the cartel conduct and the 'terms and conditions upon which immunity will be granted in both criminal and civil cases'[395].

4.4 Final Immunity

Parties must satisfy the following criteria in order to be given final immunity, after conditional immunity has been granted, namely:

> '(a) maintain eligibility criteria for conditional immunity
>
> (b) provide full, frank and truthful disclosure, and cooperate fully and expeditiously on a continuing basis throughout the ACCC's investigation and
>
> (c) maintain confidentiality regarding its status as an immunity applicant and de tails of the investigation and any ensuing civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC'[396].

Conditional civil immunity will become final immunity if the applicant does not break the 'terms and conditions of their immunity'[397].

Section 9 (6D) of the DPP Act[398] in giving of criminal immunity is subject to conditions will remain in place 'unless revoked by the CDPP'[399]

4.5 Penalties

Penalties are application to individuals and companies facing civil and criminal liability under the CCA for their participation in cartel activity. The only aspect that separates the civil component from the criminal aspect is the 'additional

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[395] Ibid.
[396] Ibid.
[397] Ibid.
[398] Director of Public Prosecutions Act of 1983.
[399] Supra n388.

fault element of knowledge or belief'[400]. The CDPP that has the authority to bring forward 'criminal indictments under the Act and the ACCC will refer serious cartel cases to the CDPP'[401].

Individuals who are involved in cartel conduct are faced with 'pecuniary penalties of up to A$500,000 for breach of the cartel prohibitions contained in Part IV, Division 1 of the CCA'[402]. Individuals also found to have breached cartel laws, may face criminal penalties of up to 'A$220,000 per breach alternatively face up to 10 years' imprisonment'.

This is similar to the SA and US model. It is 'illegal for a company to indemnify its workers against legal costs and any financial penalties'[403] therefore parties would be held liable for legal costs.

The 'maximum fine or penalty for a business (per criminal cartel offence or civil contravention, whichever applies) will be the greater of the following amounts', namely in instances where:

> 'a) A$10 million;
>
> b) three times the commercial gain derived from the anticompetitive activity; or
>
> c) where the amount of gain cannot be fully determined, 10 per cent of the group turnover in Australia'[404].

[400] Ibid.
[401] Ibid.
[402] CCA, Section 79.
[403] CCA, Section 77A.
[404] Supra n388.

Other remedies include 'injunctions, damages, court orders disqualifying an individual from managing a company, non-punitive orders'[405] for example community series orders or probation orders or order somebody to make full disclosure of information relating to cartel conduct. The courts have the power to authorise these orders where the court thinks it is appropriate[406].

4.6 Criminal Sanction

Under Section 45AF[407] to have an offence that constitutes criminally, the courts first need to consider if an offence has any 'fault elements' and this is defined as 'knowledge or belief' in Australian law[408]. According to sub section 45AG(3)[409] an offence is 'punishable on conviction by means of a fine not exceeding the greater of (and ss 45AF(3)[410] has reference) namely":[411]:

> '(a) A$10,000,000;
>
> (b) if the court can determine the total value of the benefits that:
>
> (i) have been obtained by one or more persons; and
>
> (ii) are reasonably attributable to the commission 3 times that total value;
>
> (c) if the court cannot determine the total value of those benefits - 10% of the corporation's annual turnover during the 12 month period ending at the end of the month in which the corporation committed, or began committing, the offence'[412].

Further, under Section 45AH[413] makes it evident that if a company subjects itself to cartel conduct, they may be criminally liable 'even if the other parties involved are not criminally liable or have been acquitted of the offence. Unless

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[405] Ibid.
[406] Ibid.
[407] Competition and Consumer Amendment (Competition Policy Reform) Act 2017 (Act 114 of 2017).
[408] Supra n388.
[409] Supra n402.
[410] Supra n402.
[411] http://www.australiancompetitionlaw.org/law/cartels/index.html, Date of use 3 January 2019.
[412] Ibid.
[413] Supra n402.

all parties in question have 'agreed to have been acquitted and a finding of guilt would be varying with the acquittal'[414].

Individuals on the other hand under Section 79[415] states that penalties against individuals who have attempted to breach legislative or involved in breaking the law regarding cartels, could face a term of 'imprisonment of not more than 10 years or a fine not greater than 2,000 penalty units', which is the value of a penalty unit which is currently set at 'A$210 with the result that the maximum fine for an individual is A$420,000 per offence'[416].

The ACCC and the CDPP are bodies in Australia tasked to investigate serious forms of conduct of cartels and thereafter it must assess whether the conduct warrants a 'criminal case or not'[417]. Criminal cases are more challenging to prove in comparison to civil cases and further, cartel collusion must be proved beyond reasonable doubt in the Australian courts, as is in SA. The evidence must show that persons involved either knew that they were involved in collusive activity or believed that they were involved in collusive activity[418] to be prosecuted criminally, otherwise they would face potential civil sanctions.

Australia and the USA incorporate both the civil and criminal element as a form punishment for cartel conduct. Though Australia does not look into the severity of the crime, it looks at specifically at the intent element. Evidence must show that persons involved either 'knew' that they were involved in collusive activity or 'believed' that they were involved in collusive activity. There still is the opportunity for parties to be prosecuted criminally and under civil suit and parties would be liable for their own legal fees and a company cannot exempt its employees from this responsibility.

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[414] Supra n388.
[415] Supra n402.
[416] Supra n388.
[417] Ibid.
[418] http://theconversation.com/criminal-charges-against-banking-cartels-show-australia-is-getting-tough-on-competition-law-97855, Date of use 3 January 2019.

4.7 Conclusion

Cartel conduct constitutes both a civil and a criminal offence under the under Australian legislation and the Act does not distinguish between differing levels of cartel behaviour as stated.

However, under the Criminal Code Act 1995 there are more requirements to be met to successfully prosecute criminally for cartel conduct. This includes meeting fault elements, proving the offence beyond reasonable doubt and owing to the circumstances, obtain a unanimous jury verdict.

The ACCC will investigate and litigate cartel conduct as a civil offence and it is the Commonwealth Director of Public Prosecutions (CDPP) who prosecutes criminal cartel conduct and serves as an authoritative body herein. The ACCC and the CDPP have signed a memorandum of understanding (MoU), which says that the ACCC must refer cases of cartel conduct that could cause large-scale or serious economic harm to the authorities for prosecution. And this then places a further investigative power on this body to further look into the more serious cases.

Therefore, there are striking similarities between the United States competition regime and the Australian regime, in that there are specific authoritative bodies assigned specifically to deal with the complexity of cartels. Further, there is a strong influence on the Civil and Criminal sanctions which are followed to deter cartel conduct and for the economies not to suffer as severely under the threat of cartel conduct.

CHAPTER 5: FUTURE OF CARTELS IN SA

Cartels, based on the intricacies identified above, are extremely difficult to detect and taking this into cognisance subsequent the implementation of the

criminalisation principle the NPA have not yet prosecuted any crimes of this nature. Therefore, it leaves one concerned as to future success of the criminalisation model in SA.

Is the NPA competent to handle the complexities of competition law, furthermore are the prosecutors skilled and do they possess the required knowledge to successfully and efficiently investigation and prosecute the challenging nature of cartels in South Africa? Should the NPA look at appointing somebody who has received the required training by a competent body. A body such as the competition commission to ensure they are able to tackle the complexity of cartels.

The USA model is a clear indication that appointing a competent body to effectively deal with the complexities of cartel is paramount to combating the crime of cartels. Also, developing laws specifically for a certain authoritative group also assists in furtherance of combating the crime of cartels.

The other alternative to consider in the SA model to enforce the extremely disciplined nature of the Constitution.[419] Without compromising the authoritative nature and independence of the legislation. The independence of the NPA can be maintained by appointing somebody who remains independent and is given the mandate from the minute the matter is set down upon investigation of a cartel and see the case through to the it being prosecuted. This would uphold the legislative enforcements and further maintain the intention of the Competition Act[420] in identifying and prosecuting criminal conduct.

Under Section 73A(4)[421] there is a dual duty on the competition commission as well as the NPA to institute criminal proceedings against cartelists in SA. This allows the NPA as well as the Competition Commission to proceed in

[419] Ibid at 80.
[420] Supra n8.
[421] Ibid.

cases of where parties breach competition laws. However, the primary concern here is that the NPA under our current Constitution exercises exclusivity based on the premise of Section 179(a) and (b) of our Constitution[422].

The US model clearly and specifically defines individual roles and responsibilities for parties to execute their powers exclusively. The DOJ exercises exclusive jurisdiction in relation to criminal sanctions in the US and there too are specific groups appointed by the DOJ. For example, the Federal Trade Commission to further investigate and exercise their authority. And to ensure that they identify unfair methods of competition. This is an attempt to further investigate and combat cartel activity.

The 'Consumer Protection Commission (CCPC) and the National Prosecution Authority (NPA) have signed a Memorandum of Understanding (MOU) with the objective of ensuring that the CCPC's Leniency Programme set out in the Competition Act, is executed for the criminalisation of cartels'[423]. This gets closer to the USA model as now the Leniency Programme is a huge success.

The SA legislature should seriously consider this principle against the backdrop of the success story behind the US system. The US and Australia have not let go of the CLP and still effectively use this programme as a means to encourage firms to come forward and report cartels. More so in the trickier cartel cases where there is a heavy burden on the state to prove criminal liability.

Contrasts can be drawn between the SA and the Australian criminalisation policy. Australia had experienced the same challenges with the implementation of criminal sanctions. However, Australia proceeds with either

[422] Lewis op cit n25.
[423] https://www.ccpc.org.zm/index.php/all-docs/116-cartels-main2#, Date of use 17 October 2017.

civil or criminal charges, which allows for dual consideration and not just merely proceeding with criminal sanctions.

Criminal sanctions generally are harder to prove, as in SA, Australia and the USA. ‘Beyond all reasonable doubt’ would need to be proven and this places a significant burden on the state to prove. Especially where a state division is under resourced and understaffed. They run the risk of losing cases based on this heavy burden placed on a struggling department who might not be able to prove cases on this basis.

Cartels require time and effort in building a case, what helps here is where firms come forward and blow the whilst on crime in the hope to secure leniency. In firms providing pivotal information of their past participation on cartels, this will assist in developing and building a case for the state to produce evidence.

Another possible solution is adopting the US model under the Sherman Act[424] through anti-trust enforcement which falls under the Department of Justice which has prosecutors competent to deal with this provision. And the criminal / civil split is already in their regulations. What this does is, it identifies the criminal aspect and places a duty on the state to prove a criminal case and prosecute criminals. This could be done by the NPA provided they have sufficient competence and the necessary staff compliment to deal with cartels.

However, in the less serious cartel cases, as well as the cartel conduct that are harder to prove, our judiciary can proceed by means of civil sanctions against cartelists who find themselves participating in unlawful conduct and further subject themselves to paying extraneous fines.

Here too, under civil sanctions, the competition commission could use their internal resources and legal minds to effectively deal with and combat the

[424] Ibid at 6.

crime of cartels by further considering the civil route. Therefore, arguing cases for damages. This is especially helpful where like in the USA, firms have financially pocketed millions of Rands during their illegal conduct. Perhaps SA could adopt the ‘treble damages policy’ where victims to cartel violations can obtain an order for treble damages and recover extensive damage suffered due to cartel violation.

This would allow for prima facie evidence to be produced against a defendant and allow for plaintiffs to recover ‘reasonable attorneys fees’ and have cost orders produced in relation to same.

Having cases split between criminal and civil cases would allow for one or the same institution or competent body to specifically deal with the matter and see the case to its conclusion. This would allow for matters to be expedited effectively and in the interest of justice ensure that the court roll is not heavy piled up with caseloads. And prevent unnecessary delays in the administration of justice. Also identify a task team held accountable for unnecessary delays and ensure that this is avoided.

Authorities must be prepared to investigate and go after high profiled individuals and companies with the most powerful companies together with their executives for alleged cartel-like conduct. This is an enormously important step for deterrence as criminal charges are more attention-grabbing than civil suits[425].

Research shows that significant prison time or the possibility of prison time is a more effective deterrent tool than that of civil penalties[426].

CHAPTER 6: CONCLUSION

[425] Ibid at 244.
[426] Ibid.

The implementation of criminal sanctions in the recent implementation of Section 73A[427] in SA is a powerful deterrent against cartel conduct. This however comes with its own challenges, which require development and work by the legislature for it to be equally as effective as the CLP under the 1998 Act[428].

To be efficient it is submitted that criminal sanctions must be considered in conjunction with civil remedies. More so the provisions which fall under the Corporate Leniency Policy allowing firms to apply for immunity in certain exceptional circumstances.

Given the statistics it is clear that the CLP was a successful tool introduced to restrict cartel activity. The CLP should be kept under review to ensure it remains an effective tool for cartel enforcement in South Africa. This will require the commission to continuously engage with the National Prosecuting Authority. This is an authoritative body to achieve transparency, consistency and predictability in the public. While at the same time maintaining its effectiveness and flexibility, which will be a continuous long-term challenge[429]. Further, South Africa like the United States and Australia should consider implementing civil sanctions as an alternative to Criminal sanctions in a further attempt to deter cartel conduct.

Despite the shortcomings and lack of effective resources currently faced under the new laws in South Africa, with the correct resources and engagement amongst authorities, as well as regular reviews and training to keep abreast with international standards and practices, all these challenges could be addressed and overcome.

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[427] Supra n1.
[428] Supra n8.
[429] Ibid.

Cartel activity is unlawful and after looking at the United States and Australia, sanctions should range from criminal to financial penalties levied on businesses and individuals to criminal fines and imprisonment. This will allow for whistle blowers to come forward and maintain the significant number in reported cases, but at the same time where there is intent prevent to harm the SA economy, these firms must face criminal and severe civil sanctions. If criminality cannot be proven beyond all reasonable doubt.

This would then effectively contribute to a developing and strengthening our South African economy and allowing all people to access an open market for all people to freely participate and compete in.

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