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THE CRIMINALISATION OF CARTEL CONDUCT IN SOUTH AFRICA AND THE UNITED KINGDOM

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I herby declare that I have read and understood the regulations governing the submission of the Masters of Laws dissertation papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation paper conforms to those regulations.

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I) INTRODUCTION

Cartels cause great harm to economies throughout the world. Particularly in developing countries where money is scarce, excessive cartel activities can have severe implications. However in the developed world too, the effects of cartels like deadweight losses, the redistribution of wealth from customers to cartel operators and an apathetic approach to innovation can massively damage economies. Preventing cartels from forming or detecting and punishing existing cartels should therefore be an important task in every country.

This paper shows how South Africa and the United Kingdom deal with this task by introducing criminal sanctions into their competition law for individuals engaging in cartel conduct.

As the criminal law is the ultima ratio of a constitutional state, its introduction into competition law needs some justification. In the context of competition law, criminal law is not designed to punish the offender retrospectively but to deter people from cartel conduct according to the utilitarian approach. Although seemingly high administrative fines of up to ten per cent of the firm's annual turnover are available, the level is too low to effectively deter cartels by only imposing these fines on companies. An adequate fine level is unenforceable in practice and may have unwanted effects on the company, on the public and customers. In contrast the introduction of criminal sanctions for individuals affects mainly the responsible decision-makers. Because not only their money but also their liberty is at stake, the threat of imprisonment in particular seems to be an effective deterrent.

South Africa tries to cope with cartels through its existing Competition Act 89 of 1998[1] ("Competition Act") which will be amended and also toughened by the Competition Amendment Act 1 of 2009 [2] ("Amendment Act") when it comes into force. The Competition Act prohibits hard core cartels per se in section 4(1)(b). Hard

[1] Competition Act No. 89 of 1998. Available at http://www.compcom.co.za/assets/Files/pocket-book-2005-R.pdf (accessed 7 February2013).

[2] Competition Amendment Act, No. 1 of 2009. Government Gazette. No.32533. 28 August 2009.

core cartels cause many types of damage and it is argued that hard core cartel conduct particularly affects the poor in developing countries like South Africa.

The Competition Act provides only for an administrative fine for firms in section 59 (2) Competition Act in order to act against cartels, but the Amendment Act introduces a criminal offence with section 73A. The offence is committed if a director or person with management authority within the firm causes the firm to engage in a prohibited practice in terms of section 4(1)(b) Competition Act or knowingly acquiesces in the firm engaging in a prohibited practice in terms of section 4(1)(b) Competition Act. The legal consequences reach from a fine of up to R500 000 to up to ten years imprisonment or both. These criminal sanctions go far beyond the previous civil administrative penalty.

However the Amendment Act raises several concerns regarding efficient enforcement, leniency policy and constitutional issues which will be discussed.

Section 73A Competition Act involves the National Prosecuting Authority ("NPA") in the enforcement but its resources and expertise might not be sufficient and no framework is provided for coordination with the Competition Commission.

Further on it is argued that the introduction of criminal sanctions might facilitate the efficiency of corporate leniency policy in general. Problematic here is that after section 73A (4) Competition Act, the ultimate decision to prosecute is taken by the NPA, even if the Competition Commission finds that the offender is deserving of leniency. This creates uncertainties which might be detrimental for the South African corporate leniency policy.

Finally several constitutional issues regarding the fair trial rights of the cartel offender are briefly addressed. It is argued that it seems likely that the utilization of evidence by the NPA, provided by the leniency applicant to the Competition Commission, is possible without violating section 35(3)(j) South African Constitution of 1996 ("Constitution")[3]. Further on section 73A (5) Competition Act seems to infringe the right to be presumed innocent and the right to remain silent of an accused in terms of section 73A Competition Act. Also section 73A (6)(b) Competition Act seems not to infringe the right to choose a legal practitioner.

[3] Constitution of the Republic of South Africa, No. 108 of 1996, as amended.

However the construction of the section is unclear and an infringement cannot be entirely excluded. Nevertheless it seems likely that the constitutional issues might be subject to future litigation.

The UK had already, in 2003, introduced criminal sanctions for individuals engaging in cartel conduct in section 188 (1), the so-called cartel offence, with its Enterprise Act 2002[4]. The rationale behind this step was that criminal sanctions for individuals ought to have a greater deterrence effect on companies participating in cartels than the existent administrative fines. According to Section 188 (1) an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement or to cause to be made or implemented a specific set of arrangements relating at least two undertakings like price-fixing, limitation of supply, market sharing or bid-rigging.

A key element of the cartel offence is the requirement that the offender has to dishonestly agree with one or more others to engage dishonestly in cartel conduct. The dishonesty element has drawn much criticism for reducing the deterrence effect of the cartel offence and not being able to pursue the aims for which it was initially implemented. It is proposed to remove the dishonesty element and define the cartel offence in a way which excludes agreements made openly. The proposed new cartel offence is supposed to increase the threat of effective prosecution, thus ultimately facilitating effective deterrence. However in the absence of another strong mental element to substitute the requirement of dishonest activity, the proposed cartel offence might erode the distinction between criminal and non-criminal conduct.

Individuals committing the cartel offence are liable up to five years' imprisonment and to an unlimited fine or both. In addition the Enterprise Act 2002 introduces the possibility of disqualifying directors. Director disqualifications appear to be a strong deterrent but are not an effective alternative to imprisonment and not necessarily superior to individual fines. However director disqualifications are a useful complement to the existing mix of penalties by adding additional deterrence value while simultaneously achieving it at a lower social cost.

[4] Enterprise Act 2002. Available at http://www.legislation.gov.uk/ukpga/2002/40/contents (accessed 7 February 2013).

In the UK much attention has also been paid to prosecution authorities and their investigation power as well as to leniency policy to establish effective prosecution. The way of proceeding of the Office of Fair Trading ("OFT") and the Serious Fraud Office ("SFO") is well co-ordinated and both are equipped with broadly the same strong investigative powers.

Unlike the NPA the SFO has sufficient resources and expertise. Moreover the OFT is also allowed to bring a criminal case to court. Finally the arranged coordination and their case management optimally utilize the existent resources.

The leniency policy for individuals for engaging in cartel conduct is well integrated in the corporate leniency policy with the possibility of blanket criminal immunity or the issuing of no action letters through the OFT for individual immunity. Also full civil immunity for companies participating in cartels is possible. Furthermore a marker system encourages early applications for leniency by lowering the evidentiary threshold. The possibility of asking the OFT for confidential guidance makes the outcome of the application process predictable. Finally the regular and extensive immunity granted by the OFT to applicants means that they do not hesitate to share their information.

II) HORIZANTAL COLLUSION

1) What is a Cartel?

A cartel refers to an association of competing firms which have agreements on a horizontal level to engage in certain conduct like price fixing, division or allocation of markets and collusive tendering.[5]

A horizontal agreement is an agreement between two or more firms operating at the same level of the market.[6] Often firms decide to cooperate with one another, while the degree of cooperation might vary in different industries.[7] These agreements might be advantageous for the consumers as well as the competitive structure of the

[5] S L Monnye & S L Afrika 'Prison Beckons directors involved in cartels' (2008) 16 Juta Business Law 13 at 14.

[6] M M Dabbah EC and UK Competition Law: Commentary, Cases and Materials (2004) 233.

[7] Ibid.

market: e.g. if the costs and risks to launch a new innovative product can be shared between the parties or if savings can be passed on to the customers.[8]

Nevertheless, such a horizontal cooperation might have the converse effect. The purpose of the cooperation might be purely to maximise the profit of the participants at the expense of the customers.[9] An association of manufacturers or suppliers might aim to maintain their actual position in the market and achieve price stability on a high level or an increase in prices and restrict competition.[10]

Such horizontal collusion is considered harmful to the economy as well as to consumers and is generally known in competition law as a cartel.[11] The most threatening anticompetitive practices like price fixing, market sharing and collusive tendering are often referred to as "hard core" restrictions of competition.[12] If cartel conduct in this form exists, one speaks of a "hard core" cartel, which is defined by the OECD as an "anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce".[13]

2) Damage caused by hard core cartels

The Organization for Economic Co-operation and Development ("OECD") assesses that "hard core cartels are the most egregious violation of competition law."[14] The conduct "injures consumers in many countries by raising prices and restricting

[8] Ibid.

[9] Ibid.

[10] Dabbah op cit note 6 at 233; SL Afrika & SD Bachmann 'Cartel regulation in three emerging BRICS economies: Cartel and competition policies in South Africa, Brazil, and India - A comparative overview' (2011) 45 The International Lawyer 975 at 978.

[11] Dabbah op cit note 6 at 233.

[12] Kelly op cit note 12 at 322.

[13] OECD 'Recommendation of the Council concerning Effective Action against Hard Core Cartels' (1998) at 3. Available at http://www.oecd.org/competition/cartelsandanti-competitiveagreements/2350130.pdf (accessed 7 February 2013).

[14] Ibid at 2.

supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others."[15]

A cartel is a form of monopoly, which is formed with the goal of limiting competition to increase profits.[16] A monopoly, meaning the domination of a market by a single entity, is free to price at a profit maximizing point[17] and through (secret) collusion cartels try to achieve the same level of market power.[18]

The adverse economic effects cartels cause are similar to the harm monopolies cause: they create deadweight losses, redistribute wealth from the customers to the cartel operators and reduce innovation.[19] In a competitive market rivals are not free to set the prices as they wish because of the interplay of supply and demand.[20] In a distorted market dominated by a cartel the price is set by its members.[21] Consumers in such a market are left as price-takers while the ruling cartel is a price maker.[22] The reducing of output and/ or the raising of the price has two effects: consumers pay more for the quantity they purchase and consumption is lost by buyers who were forced out of the market because of the high price of the cartelised product.[23]

For the former effect, also called overcharge,[24] one can argue if this is a negative effect. On the one hand the distributional effect, meaning shifting money from consumer to the cartel operators, is considered to be neutral because the wealth remains within the economy.[25] On the other hand it is pointed out that the rating of

[15] OECD (1998) op cit note 13 at 3; Afrika & Bachmann op cit note 10 at 978.

[16] J M Connor, A A Foer & S Udwin 'Criminalizing cartels: an American perspective' (2010) 1 New Journal of European Criminal Law 199 at 201.

[17] Kelly op cit note 12 at 322; Connor, Foer & Udwin op cit note 16 at 201-202.

[18] Kelly op cit note 12 at 322.

[19] Kelly op cit note 12 at 322; Connor, Foer & Udwin op cit note 16 at 201.

[20] Connor, Foer & Udwin op cit note 16 at 201.

[21] Ibid.

[22] Connor, Foer & Udwin op cit note 16 at 201; Kelly op cit note 12 at 322.

[23] Connor, Foer & Udwin op cit note 16 at 201; OECD 'Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws' (2002) at 6. Available at http://www.oecd.org/competition/cartelsandanti-competitiveagreements/2081831.pdf (accessed 7 February 2013).

[24] Connor, Foer & Udwin op cit note 16 at 202.

[25] J Clarke 'The increasing criminalization of economic law – a competition law perspective' (2012) 19 Journal of Financial Crime 76 at 78; OECD (2002) op cit note 23 at 6.

the redistributive effect as good or bad depends on the assumptions and welfare criteria that are used to determine them.[26] The preferable view seems to be that a consumer in a free market has the right to the consumer surplus.[27] Therefore the market distortion a cartel causes which leads to consumers unwittingly paying a much higher price compared to the competitive price is considered to be an unfair taking of the consumer.[28] In the context of the international consensus that one purpose of competition law is also to protect customers, this shifting of money to the cartel operators is considered to be cartel harm.[29]

The latter effect, the deadweight loss, is the output that buyers would have been willing to purchase at a competitively established price that they can no longer afford to buy, or money they spend on inferior substitutes.[30] That causes a loss for society as a whole. One reason for that loss is that if society's available resources were to be utilized more efficiently, more products could be produced.[31] In omitting doing that the society loses the benefit of additional production like the demand for labour.[32]

In addition to the mentioned effects, cartels are detrimental to innovation like new products or the adoption of cost- reducing technologies.[33] Cartels shelter their members from the competition of the free market and consumers cannot exert downward pressure on prices. [34] Therefore a cartel member does not need to be as cost-efficient or innovative as it otherwise would be if it was not a member, and still stay in business.[35]

The consequences of cartel conduct are particularly fatal for the poorest in the world. In developing countries, for instance South Africa, cartel conduct like price fixing on consumer goods and food staples affects a great number of people, especially the

[26] R H Lande ' Wealth transfers as the original and primary concern of antitrust: the efficiency interpretation challenged'(1982) 34 Hastings Law Journal 65 at 76.

[27] Lande op cit note 26 at 76; Clarke op cit note 25 at 78.

[28]Clarke op cit note 25 at 78.

[29] OECD (2002) op cit note 23 at 6.

[30] Connor, Foer & Udwin op cit note 16 at 202.

[31] Ibid.

[32] Kelly op cit note 12 at 322; Connor, Foer & Udwin op cit note 16 at 202.

[33] Connor, Foer & Udwin op cit note 16 at 202.

[34] Kelly op cit note 12 at 322; OECD (2002) op cit note 23 at 6.

[35] Connor, Foer & Udwin op cit note 16 at 202.

impoverished at the lower end of society, because they have to spend a higher proportion of their limited funds for these products. [36] Normally this is not the case in a free and fair market because this implies usually lower prices than in an unfree cartel-dominated market. Of course people in affluent societies, for example the UK or the USA, are also affected by cartel conduct; however the effects are usually not threatening to their existence.

III) CRIMINAL SANCTIONS IN COMPETITION LAW

1) Introduction of criminal sanctions to enforce competition law

As mentioned, cartel conduct causes significant dangers to society because it causes higher prices, less choice and an apathetic approach to innovation.[37] However the question is if the introduction of a criminal sanction is really necessary, especially because criminal law is "society's strongest form of official punishment and censure"[38], or if other measures for instance civil liability might be not sufficient.

a) Justification for criminal sanctions to enforce competition law

Given that the criminal law is the strongest form of official punishment its introduction into the competition law of a country needs adequate justification.[39]

aa) Retributive theory: cartel conduct is morally wrong

According to the retributive theory of criminal law a person "should suffer because of, and in proportion to, the moral wrongdoing felt by society toward the behaviour".[40] The theory pinpoints the moral wrong of an offence and justifies punishment because a person is responsible for his actions and must therefore receive

[36] Kelly op cit note 12 at 323; Afrika & Bachmann op cit note 10 at 976; Jordaan & Munyai op cit note 36 at 197.

[37] Kelly op cit note 12 at 322.

[38] Clarke op cit note 25 at 83.

[39] Ibid.

[40] A Gray 'Criminal sanctions for cartel behaviour' (2008) 8 Queensland University of Technology Law and Justice Journal 364 at 371.

what he or she deserves when the person has made a choice which society considers as wrong.[41]

One can argue that cartel conduct is morally reprehensible and that it is a deliberate activity which causes economic harm to consumers and therefore the criminalisation of this conduct is appropriate.[42]As mentioned above, cartels cause significant economic harm to consumers and a cartel which charges unjust prices or that uses unjust means to maintain its position is considered to be immoral.[43] Especially where the poverty level is high and for instance price-fixing of stable household products hits a lot of people particularly hard, the moral necessity to criminalize hard core cartel conduct is arguably a strong one.[44] Therefore the criminalisation of cartel conduct and punishment might be justified, particularly in the context of poor developing countries.[45]

On the other hand one can argue competition law is regulatory by nature and its goal is to ensure consumer welfare, meaning that society gets the best product possible to the most appropriate price.[46] By regulating the competition through the means of competition law a state shows its willingness to intervene in economic and social activities to facilitate the achievement of this goal which is considered to be valuable to society.[47] A violation of such a regulatory law, which protects economic interests, might not carry as strong a moral condemnation as do more traditional crimes like murder.[48] Even under acknowledgement of the "moral culpability" of cartel conduct, its criminalisation might not be inevitably supported because of the existing criminal and civil divide in many jurisdictions where much conduct which most people

[41] P Whelan 'A principled argument for personal criminal sanctions as punishment under EC cartel law' (2007) 4 The Competition Law Review 7 at 8; P H Rosochowicz 'The appropriateness of criminal sanctions in the enforcement of competition law' (2004) 25 European Competition Law Review 752 at 752.

[42] Clarke op cit note 25 at 83.

[43] Clarke op cit note 25 at 83; Connor, Foer & Udwin op cit note 16 at 208.

[44] Kelly op cit note 12 at 323.

[45] Ibid.

[46] Rosochowicz op cit note 41at 753; Kelly op cit note 12 at 324.

[47] Rosochowicz op cit note 41 at 752; Kelly op cit note 12 at 324.

[48] Rosochowicz op cit note 41 at 753.

consider to be immoral is not criminalized (e.g. Prostitution in Germany, Consuming Cannabis in the Netherlands) and vice versa.[49]

Moreover criminal law is apparently extended to regulatory law as a convenient method to control and primarily deter anti-social behaviour.[50] Consequently the retributive theory seems to be inappropriate in the context of regulatory laws like competition law. [51]

bb) Utilitarian theory: deterrence effect

Rooted in the utilitarian theory which points out that suffering is a pain which should be avoided and that therefore punishment could not be justified unless a specific social benefit or utility can be derived from its imposition,[52] the aspect of deterrence is the main function in criminalising cartel conduct.[53] Basically the deterrence aspect of the utilitarian approach considers punishment only as justified if it prevents or reduces future crime, thus the preventive consequence of a sentence is crucial.[54] Within the theory it is differentiated between specific and general deterrence. The former aims to deter, through punishment, the individual himself from re-offending, while the latter aims to deter the public from committing the offence by showing the consequence, in other words the legal punishment, of being caught.[55]

It is argued that if the legislator introduces criminal sanctions instead of mere civil penalties for cartels, the deterrence of potential offenders from engaging in cartel conduct will be more effective compared to the deterrence by civil penalties, which results in a benefit for society as a whole by reducing the rate of the offence.[56] Thus

[49] Clarke op cit note 25 at 83.

[50] Clarke op cit note 25 at 83; Kelly op cit note 12 at 324.

[51] Kelly op cit note 12 at 324; Rosochowicz op cit note 41 at 753.

[52] Whelan (2007) op cit note 41 at 10.

[53] Kelly op cit note 12 at 324; Rosochowicz op cit note 41 at 753; Clarke op cit note 25 at 85.

[54] Whelan (2007) op cit note 41 at 10-11.

[55] Clarke op cit note 25 at 85; Rosochowicz op cit note 41 at 753.

[56] Clarke op cit note 25 at 85; Rosochowicz op cit note 41 at 753.

criminalisation is justified.[57] Therefore the general deterrence approach prevails and provides the main justification in the context of cartel criminalization.[58]

b) Need for criminal sanctions to enforce competition law

Already under many current national laws it is possible to impose very high administrative penalties on firms who are participants in cartels, like the R250 680 000 settlement reached between Sasol Chemical Industries and the Competition Commission in South Africa[59] because of Sasol's violations of section 4(1)(b) Competition Act, or the £121.5 million penalty imposed by the Office of Fair Trading on British Airways for an infringement of the Chapter I prohibition and Article 101 TFEU[60] which was later reduced £58.5 million[61]. The question is, in order to achieve sufficient deterrence, why cartel conduct should be criminalized particularly by extending beyond fines to the threat of imprisonment for individuals.[62]

aa) Fines on the company

According to an economic approach of the deterrence theory, the offenders are rational economic actors who act to maximize their welfare and therefore act pursuant to a cost-benefit calculation, which involves the risk of being caught and punished on the one side and the benefit gained from the violation on the other side.[63] Hence a financial penalty alone which is imposed on the company can only provide effective deterrence if the penalty in question exceeds the gain from the penalized conduct.[64] It is worth mentioning that in order to deter the company from

[57] Clarke op cit note 25 at 85; Rosochowicz op cit note 41 at 753.

[58] Clarke op cit note 25 at 85.

[59] Competition Commission vs Sasol Chemical Industries Limited. Case No. 31/CR/May05. Consent Order; Kelly op cit note 12 at 323.

[60] Treaty of the Functioning of the European Union, 09 May 2008, Official Journal of the European Union, C 115/47. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF (accessed 7 February 2013).

[61] OFT press release 33/12 of 19 April 2012.

[62] Clarke op cit note 25 at 83.

[63] Whelan (2007) op cit note 41 at 11; Rosochowicz op cit note 41 at 753.

[64] Clarke op cit note 25 at 85; Rosochowicz op cit note 41 at 753.

participating in cartel conduct, it makes little difference if the fine imposed on the company itself is civil or criminal in nature.[65] Of course a company cannot be imprisoned and except from the stronger stigma a criminal conviction may bring with it and if the purpose is not to close down the company, nothing is gained that cannot be handled through civil liability as well.[66]

On one hand experiences from other jurisdictions indicate that if fines are only imposed on companies, these fines have to be impossibly high in order to effectively deter cartel conduct.[67] There is no mutual consent about an absolute level below which fines will generally not deter companies from cartel conduct but according to estimations the fines must be around 150 per cent of the annual turnover to ensure sufficient deterrence.[68]

For instance, in South Africa the maximum financial penalty is according to section 59(2) Competition Act ten per cent of the annual turnover and seems to fall rather short in terms of the estimate above.[69] The same applies to the UK where the maximum financial penalty is ten per of the undertaking's worldwide turnover in the business year preceding the decision, see section 36(8) Competition Act 1998[70].[71]

Even if these penalty regimes were to be adapted to a higher or the proposed level, such penalty regimes might be unreasonable.[72]

Even for bigger firms, such high fines are usually not payable because they lack sufficient funds and assets.[73] In the worst case scenario the company is forced into bankruptcy with severe consequences for all stakeholders: employees may lose their

[65] Connor, Foer & Udwin op cit note 16 at 213; H L Packer The limits of the criminal sanction (1969) 361.

[66] Connor, Foer & Udwin op cit note 16 at 213; Packer op cit note 65 at 361.

[67] W P J Wils 'Is criminalisation of EU competition law the answer?' in R Zäch, A Heinemann & A Kellerhals (eds) The development of competition law: global perspectives (2010) 250 at 274; Clarke op cit note 25 at 86.

[68] Wils (2010) op cit note 67 at 277.

[69] Kelly op cit note 12 at 323.

[70] Competition Act 1998. Available at http://www.legislation.gov.uk/ukpga/1998/41/contents (accessed 7 February 2013).

[71] R Whish & D Bailey 'Competition Law' 7th ed. (2012) 410.

[72] Wils (2010) op cit note 67 at 277; Clarke op cit note 25 at 86.

[73] Wils (2010) op cit note 67 at 278; Kelly op cit note 12 at 323; Clarke op cit note 25 at 85.

job, customers suffer because the product may not be otherwise available, creditors may lose their debt claims, suppliers lose a customer, tax authorities lose tax revenue and a competitor leaves the market which is harmful to competition, particularly if the market is already highly concentrated.[74] If companies are able to pay, it is likely that they try to make up for this "loss" by raising prices or reducing labour costs and as an ultimate consequence the consumer may end up suffering.[75]

On the other hand it is argued that effective deterrence is achieved because the threat of the fine and the associated stigma encourages the company to monitor its employees and make them respect the law.[76] The company is closer to its staff and therefore might have more or stronger influence on the behaviour of its staff than for instance the authorities.[77] However this reasoning collapses in cases in which the company is not able to impose serious sanctions on their staff, for instance if the manager who was responsible for the violation has already left the company when the violation is detected.[78]

As a result it seems not sufficient to rely exclusively on fines on companies in order to provide efficient deterrence against cartel conduct. [79]

bb) Fines on individuals and imprisonment

One alternative is to inflict punishment also on company executives, mainly because it is very likely that the decision whether or not to engage in cartel conduct originates from them.[80] According to the economic approach it is individuals who consider the costs and the benefits of cartelising and decide if it is worth the risk.[81]

[74] Wils (2010) op cit note 67 at 278; Kelly op cit note 12 at 323; Connor, Foer & Udwin op cit note 16 at 213.

[75] Wils (2010) op cit note 67 at 278-279; Kelly op cit note 12 at 323.

[76] K J Cseres, M P Schinkel & F O W Vogelaar 'Law and economics of criminal antitrust enforcement: an introduction' in K J Cseres, M P Schinkel & F O W Vogelaar (eds) Criminalization of Competition Law Enforcement: Economic And Legal Implications For The EU Member States (2006) 1 at 8; Wils (2010) note 67 at 279.

[77] Wils (2010) op cit note 67 at 279.

[78] Ibid.

[79] Clarke op cit note 25 at 86; Wils (2010) op cit note 67 at 286.

[80] Rosochowicz op cit note 41 at 754.

[81] Clarke op cit note 25 at 86; Rosochowicz op cit note 41 at 753.

To impose fines on the responsible decision-makers or actors within the firm may threaten them and constitute a strong deterrence not to participate in any kind of cartel conduct because the costs are too high compared to the benefits. [82] However the individual may be "judgement-proof", meaning unable to pay the required fine, which limits its deterrence effect.[83] However this could be avoided by imposing alternative prison sanctions in the case of criminal fines.[84]

The key problem of fines in this context is that it is very easy for a company to indemnify directly or indirectly their penalized staff ex post which deprives the fine of its deterrence effect.[85]

This issue is recognised by some jurisdictions which try to solve it by adjusting their relevant law. For instance South Africa is going to try to counteract this problem by implementing section 73A (6) Competition Act which will not allow a firm to pay any fine for a convicted person[86] or indemnify, reimburse, compensate or otherwise defray the defence expenses of this person unless the prosecution is abandoned or the person is acquitted.[87] Ratio legis is that the firm should not be able to relieve the individual from the consequence of his contravention.[88] Thus the deterrence effect would be upheld.[89]

Nevertheless an ex ante compensation for instance by increasing the wages in compensation for bearing the risks without recourse seems still possible.[90] Admittedly it is hard to make the person carry out the agreement because it is likely to be unlawful and therefore unenforceable by law, but even these difficulties do not

[82] W.P.J. Wils 'Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?' (2001) Legal Service of the European Commission at 23. Available at http://www.eui.eu/RSCAS/Research/Competition/2001/Wils.pdf (accessed 7 February 2013).

[83] Clarke op cit note 25 at 86; Wils (2001) op cit note 82 at 23.

[84] Clarke op cit note 25 at 86; Wils (2001) op cit note 82 at 23.

[85] Wils (2010) op cit note 67 at 286; Clarke op cit note 25 at 86.

[86] Section 73A (6)(a) Amendment Act.

[87] Section 73A (6)(b) Amendment Act

[88] Kelly op cit note 12 at 332.

[89] Ibid.

[90] C D Stone 'The place of enterprise liability in the control of corporate conduct´ (1980) 90 The Yale Law Journal 1 at 52; Wils (2010) op cit note 67 at 286.

show that there is no cost for a determined firm to purchase such unlawful cartel conduct from its staff.[91]

The threat of imprisonment can close this gap.[92] US experience shows that imprisonment is a very effective deterrent because the conventional cost-benefit consideration of a businessman breaks down if the consequence of a contravention is the loss of his freedom accompanied by the social and professional stigma of a prison sentence and a usually higher media attention in comparison to imposed pecuniary fines. [93] It is hard to put a price tag on one's freedom as well as on one's social and professional reputation.[94] Also the public punishment of violators carries a strong moral message to the law-abiding which might reinforce their moral commitment to the rules.[95]

For this reasons imprisonment constitutes an effective deterrent to prevent individuals from engaging in cartel conduct.[96] Moreover imprisonment has the crucial advantages that it is impossible for a company to assume liability ex post and an ex ante compensation for the risk of a prison term is hard to arrange because liberty and reputation is at stake.[97] Even if the company manages to achieve an arrangement the expenses will be much higher for the firm.[98]

Therefore the introduction of criminal sanctions simultaneously with fines for individuals will force them to take both into account. Besides the peril of losing money, also their freedom and reputation are at risk. Provided that the regime to detect cartels and to prosecute the involved individuals is potent enough, there is a high likelihood that their cost-benefit analysis will tell them not to participate in cartel conduct.[99] In relation to a situation where only a fine on the company is

[91] Stone op cit note 90 at 53.

[92] Wils (2010) op cit note 67 at 286.

[93] Wils (2010) op cit note 67 at 282 and 285; Clarke op cit note 25 at 86; Rosochowicz op cit note 41 at 755; Kelly op cit note 12 at 324.

[94] Clarke op cit note 25 at 86.

[95] Wils (2010) op cit note 67 at 282 and 284.

[96] Ibid at 286.

[97] Wils (2010) op cit note 67 at 286; Stone op cit note 90 at 53.

[98] Stone op cit note 90 at 53.

[99] Kelly op cit note 12 at 324.

available, introducing criminal sanctions for cartel conduct is likely to raise the cost factor in the calculation and therefore raise deterrence. [100]

Nevertheless there are also some side effects which should be considered. There is a risk that lawful or economically desirable conduct can be deterred because of the fear of punishment, but this could be countered by imposing prison sanctions only in cases of clear-cut violations.[101] Furthermore there are administrative costs caused by detection, prosecution and punishment of violations for the public sector (e.g. competition authorities and courts) and for the concerned undertakings and individuals (e.g. lawyer costs, management time).[102]

IV) SOUTH AFRICA

1) Current situation in South Africa

In South Africa, section 4 of the Competition Act prohibits cartel activities.[103] The Competition Act lacks a clear and abstract definition of the term cartel, instead it provides examples of corporate activities that could qualify as a cartel activity, see section 4(1) Competition Act.[104]

Section 4 Competition Act concerns three types of cooperation between firms: agreements, concerted practices and decisions by associations of firms.[105] The existence of one of these forms of cooperation is a prerequisite that section 4 Competition Act can be applied.[106]

Section 4 (1)(a) Competition Act prohibits a horizontal relationship that "has the effect of substantially preventing or lessening competition in a market unless a party to the agreement... can prove that any technological, efficiency or other

[100] Kelly op cit note 12 at 324; Jordaan & Munyai op cit note 36 at 205.

[101] W P J Wils 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) at 18. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=939399 (accessed 7 February 2013); Wils (2010) op cit note 67 at 285.

[102] Wils (2007) op cit note 101 at 18.

[103] Afrika & Bachmann op cit note 10 at 978.

[104] Ibid.

[105] P Sutherland & K Kemp Competition Law of South Africa (2011) at 5-9.

[106] Ibid at 5-9.

procompetitive gain resulting from it outweighs that effect." Therefore Section 4 (1)(a) Competition Act is only applicable if it is established on the facts of the case that the relationship in question has a negative influence on competition in the market, a so-called rule of reason prohibition.[107]

In contrast section 4 (1)(b) Competition Act establishes a so-called per se prohibition: the enumerated specific restrictive horizontal practices, namely price fixing[108], market sharing[109] and collusive tendering[110] are per se prohibited, meaning if they are present there is no relieving justification that one can raise. [111]

These anticompetitive practices described in section 4 (1)(b) Competition Act are also referred to as "hard core" restrictions of competition.[112]

In the current situation the only available action against cartel activities in South Africa is the administrative penalty after section 59(2) of the Competition Act.[113] Pursuant to section 59 (1) Competition Act the Competition Tribunal may impose an administrative penalty, inter alia for the participation in a cartel, on the firm. Section 59 (2) Competition Act provides that such a penalty may not exceed ten per cent of the firm's annual turnover. It is disputable whether or not this administrative penalty is criminal in nature and therefore a criminal penalty.

In Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission of South Africa it was argued that such an administrative penalty which may be imposed by the Competition Tribunal according to section 59 Competition already constitutes a form of criminal punishment, because it inter alia would be punitive and deterrent in nature and therefore the nature of the penalty might be a criminal rather than a civil one. [114]

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[107] Ibid at 5-33.

[108] Section 4 (1)(b)(i) Competition Act.

[109] Section 4 (1)(b)(ii) Competition Act.

[110] Section 4 (1)(b)(iii) Competition Act.

[111] P Sutherland & K Kemp Competition Law of South Africa (2011) at 5-33, 34.

[112] Kelly op cit note 12 at 322.

[113] Afrika & Bachmann op cit note 10 at 990; Kelly op cit note 12 at 322.

[114] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission of South Africa and Another [2005] 1 CPLR 50 (CAC) at 67.

In its decision in the matter of Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission of South Africa the Competition Appeal Court deals among other things with this issue.[115] Firstly the Competition Appeal Court stated that the Competition Act clearly distinguishes between provisions which are followed by administrative penalties and those by criminal sanctions, for instance sections 69, 70, 71 and 72 Competition Act.[116] Secondly the imposition of an administrative penalty is in the discretion ("may impose")[117] of the Tribunal and is not a compelling legal consequence as it would be in a criminal matter.[118] Furthermore an alternative sentence of imprisonment for failing to pay, which could be imposed by the Tribunal, is absent.[119] Comparably to civil matters, where the aforementioned is the case too, the remedy for the Tribunal or the affected party may be to proceed with an application for civil contempt to court or seek a conviction or judgment according to sections 73,74 read together with section 75 Competition Act.[120] This procedure is totally different to the one applicable in criminal matters where the terms of imprisonment come into force in the event that the accused party fails to pay.[121] Before there are no actions according to section 73, 74 read together with section 75 Competition Act taken, the non-compliant party does not "carry the keys of their own imprisonment in their own pockets".[122] In addition the Competition Appeal Court doubts that the Tribunal can ever imprison an individual for whatever reason because its enabling statute is the Competition Act which does not appear to grant such powers to the Tribunal which would again indicate the civil nature of the proceeding.[123]The Competition Appeal court mentioned besides this that an imposed administrative penalty in terms of section 59 Competition Act does not form part of the criminal record of the affected party as a previous conviction, contrary to a fine

[115] Ibid at 67-68.

[116] Ibid at 67.

[117] Section 59 (1) Competition Act.

[118] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission of South Africa and Another [2005] 1 CPLR 50 (CAC) at 67.

[119] Ibid.

[120] Ibid at 67-68.

[121] Ibid at 67-68.

[122] Ibid at 68.

[123] Ibid.

in a criminal court.[124] Finally the Competition Appeal Court takes into consideration the purpose and context of the section 59 Competition Act proceedings, whose purpose is not to punish criminals by imprisonment etc. and whose context is corrective and non-criminal in nature.[125]

Therefore in light of these arguments the Competition Appeal clearly provides reasons that the existing administrative penalty is civil rather than criminal in nature.[126]

2) Introduction of the Competition Amendment Act 1 of 2009 [127]

The Competition Amendment Act 1 of 2009 was assented to on 26 August 2009 while the date of entry into force has still not been proclaimed. As mentioned above the only measure the Competition Tribunal can apply against cartels in terms of the Competition Act is the imposition of an administrative penalty on the firm.[128] This measure applies exclusively to the firm and not to natural persons linked to firms such as directors. [129] Legal measures against directors or officers are only provided for in cases of hindering the administration of the Competition Act or failing to comply with lawful orders of the authorities responsible for administering and enforcing the Competition Act.[130] Besides, the jurisdiction to impose them lies not on the Competition Tribunal but on ordinary courts, see section 75 Competition Act.[131]

The Amendment Act goes a step further and provides in its section 12, which inserts section 73A into the Competition Act, for the criminal liability of company directors

[124] Ibid.

[125] Ibid.

[126] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission of South Africa and Another [2005] 1 CPLR 50 (CAC) at 67- 68; P. Sutherland & K. Kemp. Competition Law of South Africa (2011) at 11.4.6.5; P S Munyai 'Making administrative penalties work: The need for the accrual of interest of administrative penalties under the Competition Act 1998' (2008). 16 Juta Business Law 23 at 26.

[127] Competition Amendment Act, No. 1 of 2009. Government Gazette. No.32533. 28 August 2009.

[128] Monnye & Afrika op cit note 5 at 13; Jordaan & Munyai op cit note 36 at 199.

[129] Monnye & Afrika op cit note 5 at 13; Jordaan & Munyai op cit note 36 at 199.

[130] Monnye & Afrika op cit note 5 at 13.

[131] Ibid.

or persons engaged by firms in a position having management authority.[132] A consequence will be that individual members of a company can be held liable for acts being performed by the company.[133] The offence is committed if such a natural person causes[134] the firm to become engaged in a prohibited practice in terms of section 4(1)(b) Competition Act, meaning his conduct must be at least causal in the sense of condition- sine-qua-non for the firm engaging in the prohibited practise.[135] Also the offence is committed if such a natural person knowingly acquiesces[136]- which is defined in section 73A (2) Competition Act - in the firm's engaging in such a prohibited practice.[137] This means it has to be proven that the defendant had omitted, against his duty to act positively because of his fiduciary duty towards the shareholders of the firm, to prevent the conduct from happening or continuing once it came to his knowledge.[138]

The scope of section 73A Competition Act does not extend beyond hard core cartel conduct as specified in section 4(1)(b) Competition Act.[139] The possible sanctions will include a fine not exceeding R500 000 or imprisonment not exceeding ten years or both and are inserted by Section 13 of the Amendment Act which changes section 74 Competition Act by insertion of a link to the (then) new section 73A.[140]

To open up the possibility of imposing criminal sanctions on individuals might be a major step forward to effectively deter them from participating in cartel conduct. Section 73A Competition Act will force decision-makers in South Africa to take the consequence of paying a pecuniary fine of up to R500 000, the risk of up to 10 years imprisonment or both into account. In their cost-benefit analysis they have also to include the fact that due to section 73A (6) Competition Act their company cannot indemnify them legally ex post. Because not only money but also their liberty and

[132] Section 73A Competition Amendment Act 1 of 2009; Jordaan & Munyai op cit note 36 at 200.

[133] Section 73A Competition Amendment Act 1 of 2009; Jordaan & Munyai op cit note 36 at 200.

[134] Section 73A (1)(a) Amendment Act.

[135] Jordaan & Munyai op cit note 36 at 206; Kelly op cit not 12 at 330.

[136] Section 73A (1)(b) Amendment Act.

[137] Jordaan & Munyai op cit note 36 at 206; Kelly op cit note 12 at 321; Afrika & Bachmann op cit note 10 at 991.

[138] Jordaan & Munyai op cit note 36 at 206; Kelly op cit not 12 at 321; Afrika & Bachmann op cit note 10 at 991.

[139] Kelly op cit note 12 at 321.

[140] Section 13 Competition Amendment Act 1 of 2009; Kelly op cit note 12 at 321.

their reputation are at stake, and presupposing that the framework to detect cartels and prosecute the individuals is sufficiently potent, the result of their analysis is likely to be not to engage in cartel conduct.[141] Compared to a situation in which only the administrative penalty according to section 59(2) Competition Act is available, the introduced sanctions for cartel conduct are likely to raise the cost factor in the calculation and therefore raise deterrence.[142]

3) Concerns raised by section 73A Competition Act

The Competition Amendment Act, especially the introduction of section 73A, has raised several concerns of which some will be addressed here.

a) Effective prosecution

Issues might arise because through section 73A Competition Act a different authority, namely the National Prosecuting Authority ("NPA") will be involved in the enforcement of section 73A Competition Act.[143]

Section 73A (3) Competition Act regulates when a director or person having management authority may be prosecuted. Accordingly a person in the sense of section 73A Competition Act may only be prosecuted if either the relevant firm has acknowledged in a consent order[144] that it engaged in a prohibited practice in terms of section 4(1)(b) Competition Act, or the Competition Tribunal or the Competition Appeal court has made a finding[145] that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b) Competition Act.[146] Thus only after the Competition Commission has made its own determination that a prohibited practice has occurred, will the legal authority to prosecute a director or a person having management authority under section 73A Competition Act exist.[147] Therefore, the Competition Commission's authority to investigate and prosecute substantive issues

[141] Kelly op cit note 12 at 324.

[142] Kelly op cit note 12 at 324; Jordaan & Munyai op cit note 36 at 205.

[143] Jordaan & Munyai op cit note 36 at 201.

[144] Section 73A (3)(a) Competition Act.

[145] Section 73A (3)(b) Competition Act.

[146] Kelly op cit note 12 at 328.

[147] Kelly op cit note 12 at 328; Jordaan & Munyai op cit note 36 at 202.

under competition law stays the same after section 73A Competition Act but the NPA has been given exclusive jurisdiction to conduct a criminal prosecution under this section, which is underpinned by sections 179(1) and (2) South African Constitution of 1996 ("Constitution") and sections 2 and 20(1) National Prosecuting Authority Act 32 of 1998.[148]

This division raises several concerns.

The NPA resources regarding Specialised Commercial Crimes Units which are likely to be concerned with prosecuting offenders under section 73A Competition Act are limited.[149] Furthermore the range of duties of these units is already quite extensive and covers a wide area of commercial crimes.[150] In addition, there is no framework provided which helps to coordinate the NPA's and the Competition Commission's work for instance in terms of already uncovered evidence.[151] This is why there are reasonable doubts whether the resources and the expertise in practice are sufficient to allow an effective prosecution of offences under section 73A Competition Act.[152]

The situation might be improved by giving the Competition Commission a greater power to investigate and prosecute offenders but this would, as argued elsewhere, require an amendment of the relevant provisions in the Constitution, the Competition Act and the National Prosecuting Authority Act 32 of 1998.[153] Another improving measure which might also be easier to realise would be to provide a detailed structure for how to coordinate the work between the NPA and the Competition Commission.[154] Due to the fact that the Competition Commission has already established several coordination guidelines and memoranda of understanding with other institutions, it seems likely that such an agreement is achievable.[155]

[148] Jordaan & Munyai op cit note 36 at 201; Kelly op cit note 12 at 328.

[149] Kelly op cit note 12 at 328.

[150] Ibid.

[151] Ibid.

[152] Ibid.

[153] Jordaan & Munyai op cit note 36 at 201; Kelly op cit note 12 at 329.

[154] Kelly op cit note 12 at 329.

[155] Jordaan & Munyai op cit note 36 at 203.

b) Influence on leniency policy

Another concern is the influence of section 73A Competition Act on corporate leniency.[156]

Cartels usually operate under high secrecy and therefore it is quite difficult to detect and prove cartel activity.[157] In order to facilitate the detection of cartels the Competition Commission issued a Corporate Leniency Policy in February 2004 [158] ("CLP") according to its powers granted in section 79 Competition Act, which was revised in 2008[159].[160]

The CLP serves as incentive to make companies disclose their involvement in an uncovered cartel or to leave an already investigated cartel, approach the Competition Commission, and provide evidence of the cartel activity in return for immunity.[161] If they meet the requirements, especially being the "first through the door" according to section 5.6 CLP, the Competition Commission may grant immunity from prosecution and hence a fine.[162]

In general the introduction of criminal sanctions for cartel behaviour of individuals can make leniency policy more effective if the leniency policies for companies and individuals are well integrated.[163] The integration should be in such a way that if the company applies for leniency and hence for immunity, their cooperating staff can also obtain immunity, but if an individual applied for leniency earlier, immunity is not available for the company anymore and vice versa (if the individual was not a part of the application of the company).[164] It is important that the individual will

[156] Kelly op cit note 12 at 329.

[157] K Moodaliyar 'Are cartels skating on thin ice? An insight into the South African corporate leniency policy' (2008) 125 South African Law Journal 157 at 157; Wils (2007) op cit note 101 at 18.

[158] Government Gazette No. 25963 of 6 February 2004.

[159] Government Gazette. No. 31064 of 23 May 2008.

[160] Moodaliyar op cit note 157 at 158; Kelly op cit note 12 at 329.

[161] Moodaliyar op cit note 157 at 158; Kelly op cit note 12 at 329.

[162] Kelly op cit note 12 at 329.

[163] Wils (2007) op cit note 101 at 37.

[164] Ibid at 37- 38.

receive "full immunity" meaning that the individual is not subject to criminal penalties.[165]

In the situation mentioned above, leniency policy will be more efficient because companies which care about their staff might be more inclined to apply for leniency due to the fact that there is a higher overall penalty discount available.[166] Also because more parties can apply for leniency, there are not only races to be the first to cooperate with authorities between companies which are members of cartels, but also between companies and individual as well as between individuals themselves.[167] The individuals' fear of fines and imprisonment gives them a strong incentive to apply for immunity and break faith with the cartel or their firm as a matter of self-preservation.[168] In addition criminal penalties do not only incite an individual to blow the whistle based on fear but also based on revenge on e.g. the former employee for being fired.[169]

In contrast, the introduction of criminal penalties for individuals might decrease the effectiveness of leniency policy if leniency is not available for individuals.[170] If companies care about their staff they will be reluctant to apply for leniency because they would expose their staff to punishment. Even if they apply for leniency the application might be not useful because their staff might refuse to cooperate for fear of criminal prosecution.[171] Therefore it seems essential to provide for leniency for individuals.[172]

Section 50(1) Competition Act which will be amended by section 8 Amendment Act sets down that the Competition Commission may certify that a respondent or a person contemplated in section 73A is "deserving of leniency". Concerning leniency for violators of section 73A competition Act, section 73A (4)(a) Competition Act prevents the Competition Commission for seeking or requesting the prosecution of such violators if they deserve leniency in the circumstances. Section 73A (4)(b)

[165] Moodaliyar op cit note 157 at 162.

[166] Wils (2007) op cit note 101 at 38.

[167] Ibid.

[168] Connor, Foer & Udwin op cit note 16 at 214.

[169] Wils (2010) op cit note 67 at 281.

[170] Wils (2007) op cit note 101at 39.

[171] Ibid.

[172] Ibid.

states that the Competition Commission may make submission to the NPA in support of leniency for such violators if they certify that the violator is deserving leniency.

Therefore the Competition Commission makes the substantive decision if the violator is deserving leniency, but the ultimate authority if there will be a criminal prosecution or if the leniency recommended by the Competition Commission for prosecution for the violator is indeed granted is held by the NPA.[173]

It is argued that section 73A Competition Act makes it clear that it is primarily up to the Competition Commission if criminal prosecution is suitable and it would be within the Competition Commission's discretion if they seek or request prosecution of the NPA.[174] Also it is argued that it would be unlikely that the NPA would act against a recommendation of leniency in favour of the violator issued by the Competition Commission.[175]

Regardless if this is the case or not, the NPA is an "independent body charged with instituting criminal prosecution on behalf of the State, free of interference and influence".[176] Although the Competition Commission may submit its recommendations regarding leniency or may not seek or request criminal prosecution, the NPA can at least theoretically proceed and prosecute the violator because the NPA possesses the authority to do that.[177] This is problematic because the foundation of the CLP is its predictability and the trust of the violator that if he fulfils all the requirements of the CLP he will be granted eventually full immunity.[178] Section 73(4) Competition Act adds a variable which undermines this predictability for the violator because leniency for the violation of section 73A Competition Act is not guaranteed even if the Competition Commission considers that the violator deserves it.[179] Therefore it is very likely that the violator will hesitate to apply for leniency and share incriminating information with the Competition Commission if, although it is determined that he or she deserves leniency, he or she still could face a

[173] Kelly op cit note 12 at 330; Jordaan & Munyai op cit note 36 at 202.

[174] Jordaan & Munyai op cit note 36 at 202.

[175] Ibid.

[176] Jordaan & Munyai op cit note 36 at 202; Section 32(1)(b) of the National Prosecuting Authority Act 32 of 1998.

[177] Kelly op cit note 12 at 330.

[178] Ibid.

[179] Kelly op cit note 12 at 330; Moodaliyar op cit note 157 at 169.

prison term or a high penalty.[180] This "leniency-opportunity to avert criminal prosecution", as a mere possibility, might diminish the effectiveness of leniency policy which could otherwise be achieved by introducing criminal sanctions for cartel conduct. A remedy might be to issue binding guidelines between the NPA and the Competition Commission on how to handle this problematic situation.[181] These guidelines might help to create trust on the side of the applicants and hence might preserve or even improve the effectiveness of the CLP. [182]

c) Constitutional Issues

The introduction of section 73A into the Competition Act also raises several concerns about its compatibility with the South African Constitution of which some aspects will be briefly addressed.

aa) Self-incrimination of leniency applicants

It is not clear and should be considered briefly how the situation would be, if the NPA charges a manager or a person having management authority with the section 73A offence notwithstanding that the person had previously incriminated himself by coming forward and telling the Competition Commission that the firm engaged in a prohibited practice, or even that he or she caused the firm to engage in unlawful cartel conduct in order to apply for leniency.[183]

The question arises if the evidence given to the Competition Commission could be used in subsequent criminal proceedings.

According section 35(3)(j) Constitution no accused person can be compelled to give self-incriminating evidence. This is one of the fair trial rights after section 35(3) Constitution and these rights of arrested, detained and accused persons only exist from the moment of inception of the criminal process, namely form the moment of arrest.[184] In the moment the person comes forward (voluntarily) to the Competition

[180] Kelly op cit note 12 at 330.

[181] Ibid.

[182] Ibid.

[183] Jordaan & Munyai op cit note 36 at 210.

[184] Jordaan & Munyai op cit note 36 at 210 ; M H Cheadle, D M Davis & N R L Haysom South African Constitutional Law: The Bill of Rights (2011) par a 29.2.

Commission in order to apply for leniency there is no criminal process and therefore the person is not eligible for the right against self-incrimination. However there are examples in the South African Law that incriminating evidence provided by a person in a proceeding of administrative nature may not be used against him in subsequent criminal proceedings because that would amount to prejudicing the accused's right to a fair trial.[185] In Ferreira v. Levin[186] the Constitutional Court held that a person before a liquidation inquiry may be compelled to produce direct self-incriminating evidence but the evidence may not be used in a subsequent criminal trial.[187]

Therefore if the interrogation procedure outside of the criminal process compels persons to appear and to answer incriminating questions, section 35 (3)(j) Constitution may be applicable.[188]

To enjoy the protection of section 35 (3)(j) Competition Act the examinee must be charged in a subsequent criminal proceeding and the prosecution must seek to use the evidence which was gained in the previous interrogation outside of the criminal process in the subsequent trial. [189] If the evidence was gained under violation of the privilege against self-incrimination such evidence may be excluded in terms of section 35(5) Constitution in the subsequent trial. [190] Accordingly the right to a fair trial is protected by the use of immunity in respect of evidence arising out of the previous interrogation which was outside of the criminal process.[191]

However in the case mentioned above the individual would have to approach the Competition Commission and provide evidence on his own account in order to qualify for leniency and ultimate for immunity. It does not seem to be an interrogation like e.g. a summoning according to section 49A Competition Act. Section 49A (1) Competition Act, although allowing the Commissioner to summon

[185] Jordaan & Munyai op cit note 36 at 211.

[186] Ferreira v Levine and Vryenhoek v Powell [1996] (1) BCLR 1 (CC).

[187] C. Theophilopoulos, C. 2005.' The influence of American and English law on the interpretation of the South African right to silence and the privilege against self-incrimination' (2005). 19 Temple International & Comparative Law Journal 387 at 409; Ferreira v Levine and Vryenhoek v Powell [1996] (1) BCLR 1 (CC) para 196.

[188] Cheadle, Davis & Haysom op cit note 184 para 29.5.10.

[189] Ibid para 29.5.10.

[190] Ibid para 29.5.10.

[191] Ibid para 29.5.10.

any person and to be inter alia interrogated, protects the interrogated person in sections 49A (2) and (3) Competition Act. He or she is not obliged to give self-incriminating answers and any self-incriminating answers given are made inadmissible in criminal proceedings except in the case of perjury or sections 72, 73(2)(d) Competition Act offence if the answer is relevant to prove the offence charged.[192]

In contrast, in the application process for leniency the Competition Commission would not compel him to appear and to answer self-incriminating questions truthfully. It would be up to the individual to take the chance and try to convince the Competition Commission that he is deserving of leniency. This might indicate that the use of evidence in subsequent trials by the NPA is easily conceivable without violating the fair trial rights of the applicant.[193]

It is beyond the scope of this paper to discuss every possible constellation which might infringe the privilege against self-incrimination according to section 35(3)(j) Constitution in this context but it is a constitutional issue which could be subject to future litigation.

As mentioned above, the use of such information in subsequent criminal proceedings might also discourage individuals from applying for leniency or lead to them to be extremely guarded towards the Competition Commission which would both be counterproductive to the sense of a corporate leniency programme.[194] Binding guidelines between the NPA and the Competition Commission, on how and if such evidence may be used in subsequent criminal trials, could help to allay the concerns.

bb) Section 73A (5) Competition Act

Another concern is if section 73A (5) Competition Act conflicts with the accused rights to be presumed innocent as guaranteed in section 35(3)(h) of the Constitution .

[192] Sections 49A (2) and (3) Competition Act.

[193] Kelly op cit note 12 at 329: Suggesting that "evidence could be used later by the National Prosecuting Authority to prosecute them.".

[194] Kelly op cit note 12 at 329.

This right requires that the state bears the burden of proving the guilt of the accused person and the proof must be beyond reasonable doubt.[195]

Section 73A (5) Competition Act creates a presumption in court proceedings against a person in terms of section 73A Competition Act that a firm engaged in a prohibited practice infringes section 4 (1)(b) Competition Act, if the Competition Commission found it so or the firm acknowledged it in a consent order. This might be unconstitutional if it created a reverse burden of proof for the accused person in a way that the person had to discharge this assumption to avoid guilt.[196]

However, this is not the intention of section 73A (5) Competition Act.[197] Instead an evidentiary burden is created which obviates the NPA having to re-establish the fact that there was an infringement of section 4(1)(b) Competition Act by the firm.[198] This assumption is underpinned by the wording of section 73A (5) which speak of "is prima facie evidence".[199] The effect of the presumption is that the individual cannot raise the defence that there was no infringement of section 73A Competition Act by the firm when being charged for an offence in terms of Section 73A (1) Competition Act by the State. [200]However, this presumption does not in itself allow for the accused to be convicted in the absence of other evidence capable of raising a reasonable doubt, in other words it does not result in presumption of guilt on the part of the accused.[201] The State has still to prove all the other elements of the section 73A (1) Competition Act offence like causation or knowing acquiescence.[202]

Also this presumption that there was engagement in a prohibited practice on the side of the firm does not violate the right of the accused to remain silent under section 35 (3)(h) Constitution.[203] As mentioned above all the other elements of the offence still have to be proven by the State beyond reasonable doubt in order to find the accused guilty. It is not that the accused needs to come forward and provide evidence in order

[195] Jordaan & Munyai op cit note 36 at 207; State v Zuma 1995 1 SACR 568 (CC).

[196] Kelly op cit note 12 at 331.

[197] Kelly op cit note 12 at 331; Jordaan & Munyai op cit note 36 at 209.

[198] Kelly op cit note 12 at 331.

[199] Jordaan & Munyai op cit note 36 at 207.

[200] Kelly op cit note 12 at 331.

[201] Jordaan & Munyai op cit note 36 at 207-210.

[202] Kelly op cit note 12 at 331; Jordaan & Munyai op cit note 36 at 209.

[203] Jordaan & Munyai op cit note 36 at 210.

to prove his innocence.[204] If the state fails to establish the necessary evidence there is no risk of the accused being found guilty if he or she chooses to remain silent.[205]

Therefore section 73A (5) Competition Act seems not to infringe the constitution.[206]

cc) Section 73A (6) (b) Competition Act

As mentioned above, the purpose of section 73A (6) Competition Act is to prevent the company from shielding the director or the person having management authority from the consequences of the violation of section 73A(1) Competition Act, in order to maintain the deterrence effect of the threat of the penalty. Although this objective is thoroughly reasonable the implementation through section 73A (6)(b) Competition Act raises the question if this is consistent with the fair trial rights of the accused.[207] After section 35 (3)(f) Constitution the accused has the right to choose and be represented by a legal practitioner. In a case where a company is the only source of revenue e.g. if the company is privately held and the owner of the company is the accused director as well as the sole shareholder, the accused director would not be allowed to take money from the company to fund his own defence meaning inter alia choosing a particular lawyer.[208] However the Constitutional Court held in Fraser v Absa Bank Ltd that section 35 (3)(f) Constitution does not mean that the accused is entitled to the legal service of any counsel he or she chooses, regardless of the financial situation of the accused and that financial considerations necessarily play a role. [209] He is entitled to a legal practitioner assigned at the State's expense in terms of section 35(3)(g) where substantial injustice would otherwise result.[210] Therefore if the accused is not able to choose the particular lawyer he wants because he cannot afford it, it seems not to necessarily violate his right to a fair trial.

Moreover the section is unclear and several interpretations are possible.[211] It might be possible to construe the second half sentence of section 73A (6)(b) "unless the

[204] Ibid.

[205] Ibid.

[206] Kelly op cit note 12 at 331.

[207] Ibid at 333.

[208] Kelly op cit note 12 at 333.

[209] Fraser v Absa Bank [2007] (3) BCLR 219 (CC) para 68.

[210] Ibid.

[211] Kelly op cit note 12 at 333.

prosecution is abandoned or the person is acquitted" in a way that the accused may first obtain funds to meet his legal costs and has to pay them back if he or she is sentenced, or in a way that the accused has to meet his or her own legal costs but can be compensated by the firm if he or she is acquitted. [212] Nevertheless the latter construction seems to be more reasonable concerning the ratio of this section and concerning its enforceability.[213]

The question whether section 73A(6)(b) Competition Act is in any case consistent with the South African Constitution goes beyond the scope of this paper and it is likely that its constitutionality might be questioned in future litigation.[214]

V) UNITED KINGDOM

1) Introduction of the cartel offence

Prior to 1998, engaging in cartel conduct was not in itself a crime in the United Kingdom.[215] First the Competition Act 1998[216] introduced in its section 2, the so-called Chapter I prohibition[217], a wide prohibition on anti-competitive arrangements.[218] According to section 36 Competition Act 1998 a penalty may be imposed if there is an agreement which infringes the Chapter I prohibition. However, those provisions apply only to undertakings, see section 36 (1) Competition Act 1998.[219]

The possible fines are imposed through an administrative process and are therefore civil in nature.[220] If the infringement of the Chapter I prohibition ended after 1 May 2004 the maximum fine which can be imposed on the undertaking may not exceed

[212] Ibid.

[213] Ibid.

[214] Ibid.

[215] A Nikpay & D Rawlings 'Cartel conduct under UK law' (2012). 8 Competition Law International 75 at 75.

[216] Competition Act 1998. Available at http://www.legislation.gov.uk/ukpga/1998/41/contents (accessed 7 February 2013).

[217] Section 2(8) Competition Act 1998.

[218] Nikpay & Rawlings op cit note 215 at 75.

[219] Ibid.

[220] Ibid.

ten per cent of the worldwide turnover in its last business year preceding the OFT's decision.[221]

Although the Competition Act 1998 allowed for the imposition of high fines on the undertakings, about five years later on 20 June 2003 the Enterprise Act 2002[222] ("EA 2002") came into force which goes even one step further than the Competition Act 1998.[223] The EA 2002 establishes the so-called cartel offence in its part 6 which provides criminal sanctions for individuals who participate in hard core cartel conduct. [224]

The rationale for the introduction of the cartel offence was approached in a White Paper[225] on this topic. In it the UK Government focused on deterrence as being the main reason for the introduction of criminal sanctions against individuals for participating in cartels.[226] Indeed it expressed the view that fines on companies might effectively deter companies from participating in cartel conduct.[227] However it was suggested that the level of fines at that time was too low to achieve the desired deterrence effect and that the fines would have to be six to ten times the maximum fine existing at that time to deter efficiently against cartel conduct.[228] Such high fines were considered to be disproportionate because it is very likely that most companies could not pay those fines and would be forced into bankruptcy which might cause the

[221] Whish & Bailey op cit note 71 at 410; Section 36(8) Competition Act 1998 read in conjunction with section 38 Competition Act 1998 and OFT's guidance as to the appropriate amount of a penalty (September 2012) OFT 423 para 2.21.

[222] Enterprise Act 2002. Available at http://www.legislation.gov.uk/ukpga/2002/40/contents (accessed 7 February 2013).

[223] Nikpay & Rawlings op cit note 215 at 76.

[224] Nikpay & Rawlings op cit note 215 at 76; Kelly op cit note 12 at 324.

[225] United Kingdom White Paper: Productivity and Enterprise: A World Class Competition Regime (Cm 5233 of July 2001). Available at http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf (accessed 7 February 2013).

[226] A MacCulloch 'The cartel offence and the criminalisation of United Kingdom competition law' (2003) 5 Journal of Business Law 616 at 616.

[227] United Kingdom White Paper op cit note 225 para 7.13.

[228] Ibid para 7.14.

previously mentioned ramifications for employees, shareholders, creditors, customers and markets.[229]

An introduction of a criminal fine against individuals alone was assessed as being unlikely to provide adequate protection against cartel conduct because in practice it would be easy for a company to compensate or indemnify their staff ex ante or ex post.[230] As mentioned above, this would deprive the fine of its deterrence effect.[231]

Finally criminal sanctions against individuals directly involved in cartels were recommended.[232] As mentioned before it makes sense to take actions against those individuals, for instance executives, because the decision whether or not an undertaking will engage in cartel conduct originates mainly from them.[233] The executives or decision-makers would have to balance in their personal cost-benefit calculation the threat of a criminal conviction and the loss of their freedom due to imprisonment against the benefits of cartelising.[234] Normally a conventional cost-benefit calculation breaks down because the worth of one's freedom and reputation is hard to determine.[235] Consequently individuals would think much more carefully beforehand and be more reluctant to participate in any kind of cartel conduct or would be more willing to inform the authorities if they are directed to engage in cartel conduct by their manager.[236] Also this would make sure that the right people are punished namely the usually small number of employees who founded the cartel and operate it outside the institutional framework of the firm.[237] Thus the UK Government was of the opinion that criminal sanctions beyond fines against individuals directly involved in cartels would be a more appropriate solution to achieve effective deterrence.[238]

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[229] United Kingdom White Paper op cit note 225 para 7.14; see Chapter III 1) b) aa).

[230] United Kingdom White Paper op cit note 225 para 7.17.

[231] See Chapter III 1) b) bb).

[232]United Kingdom White Paper op cit note 225 para 7.16.

[233] See Chapter III 1) b) bb).

[234] United Kingdom White Paper op cit note 225 para 7.16; see Chapter III 1) b) bb).

[235] See Chapter III 1) b) bb).

[236] United Kingdom White Paper op cit note 225 para 7.16.

[237] United Kingdom White Paper op cit note 225 para 7.27; A Stephan 'How dishonesty killed the cartel offence' (2011) 6 Criminal Law Review 446 at 447.

[238] MacCulloch op cit note 226 at 617; United Kingdom White Paper op cit note 225 para 7.16.

2) Main elements of the cartel offence

The cartel offence is established in section 188 EA 2002.[239] According to section 188 (1) EA 2002, which contains the main elements of the cartel offence, "an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements … relating to at least two undertakings (A and B)".[240] It is noteworthy that section 188(1) EA 2002 uses the wording "individual" in lieu of the wording "person", which is commonly used in criminal offences.[241] This usage is deliberate.[242] The reason is that the term "individual" only includes natural persons whereas the broader term "person" encompasses both natural persons and corporate bodies.[243] Therefore the legislature wants to make clear that the cartel offence in section 188 EA 2002 is only applicable to natural persons and that corporate bodies are explicitly excluded from criminal liability.[244]

a) Arrangement and Agreement

The arrangements which can lead to an offence being committed must be ones which operate as the parties to the agreement intend and are enumerated in section 188 (2) EA 2002, namely direct and indirect price-fixing,[245] limitation of supply[246] or

[239] Whish & Bailey op cit note 71 at 425; Nikpay & Rawlings op cit note 215 at 76.

[240] Whish & Bailey op cit note 71 at 426.

[241] Nikpay & Rawlings op cit note 215 at 76.

[242] Ibid.

[243] Ibid.

[244] Nikpay & Rawlings op cit note 215 at 76; Whish & Bailey op cit note 71at 425; MacCulloch op cit note 226 at 620.

[245] Section 188 (2)(a) Enterprise Act 2002.

[246] Section 188 (2)(b) Enterprise Act 2002.

production[247], market sharing[248] and bid-rigging[249].[250] These stated arrangements reflect the commonly accepted definition of hard core cartel conduct.[251]

The cartel offence is only applicable to horizontal agreements between the parties and does not cover vertical agreements, see sections 188 (4) and 189 EA 2002.[252]Additionally section 188 (3) EA 2002 specifies that an agreement between the parties concerning arrangements relating to price fixing and the limitation of supply or production must be reciprocal.[253] This is not explicitly laid down for market sharing and bid-rigging because these are actions which are by their nature reciprocal.[254]

With entry into force section 188 (2) EA 2002 explicitly made price-fixing a criminal offence. However the House of Lords had in Norris v Government of the United States of America[255] (Norris case) to decide if inter alia price fixing per se could amount in to a common law conspiracy to defraud.[256] In the case the US Government was seeking the extradition of Mr Norris under the Extradition Act 2003[257].[258] Amongst other things Mr Norris was accused of having conspired with others to operate a price-fixing agreement in relation to different carbon products in the US

[247] Section 188 (2)(c) Enterprise Act 2002.

[248] Section 188 (2)(d) and (e) Enterprise Act 2002.

[249] Section 188 (2)(f) Enterprise Act 2002; Bid- rigging is further defined in section 188 (5) Enterprise Act 2002.

[250] Kelly op cit note 12 at 324; Whish & Bailey op cit note 71 at 426.

[251] Nikpay & Rawlings op cit note 215 at 76; MacCulloch op cit note 226 at 619; OECD (1998) op cit note 13 at 3.

[252] Whish & Bailey op cit note 71 at 427; Kelly op cit note 12 at 324; MacCulloch op cit note 226 at 619.

[253] Whish & Bailey op cit note 71 at 426.

[254] Ibid.

[255] Norris v Government of the United States of America [2008] UKHL 16.

[256] P Whelan 'Resisting the long arm of criminal antitrust laws: Norris v The United States' (2009) 72 The Modern Law Review 272 at 272.

[257] Extradition Act 2003. Available at http://www.legislation.gov.uk/ukpga/2003/41/contents (accessed 7 February 2013).

[258] Whish & Bailey op cit note 71 at 436.

and other countries which was contrary to section 1 of the Sherman Act 1890[259] and happened prior to the EA 2002 came into force.[260] To achieve an extradition the US Government had to demonstrate "double criminality".[261] This means they had to show that the alleged price-fixing was illegal under US law and also that if the price fixing would have occurred in the UK it would be criminal under the UK's domestic law and would there be punishable with imprisonment or another form of detention for a term of at least 12 months.[262]

In the precedent decision the Administrative Court held that price fixing per se was capable of amounting to a conspiracy to defraud.[263] According to the Administrative Court price fixing may well consist of "an agreement between two or more persons dishonestly to prejudice or to risk prejudicing another's right, knowing that they have no right to do so."[264].[265] On appeal the House of Lords decided that the price fixing conduct of Mr Norris which happened before the EA 2002 came into force was not a criminal offence under common law or under statute law and therefore not punishable under UK law.[266] The court stated that the requirement of double criminality under the Extradition Act 2003 was not satisfied and Mr Norris could not be extradited on this ground.[267] However the House of Lords held that price-fixing could be conspiracy to defraud under common law if there "were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a

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[259] Sherman Antitrust Act of 1890. United States of America. 15 U.S.C. §§ 1–7. Available at https://docs.google.com/viewer?a=v&q=cache:dRWl4AiHmjoJ:www.justice.gov/atr/public/divisionmanual/chapter2.pdf+&hl=de&pid=bl&srcid=ADGEEShWT8kMdughIcGx27SympTi1eqQv5iz8UpK3Bmw_Ons0CnRfojpNUa63NVfJnrFRWOD7YRhe5_3ja_d-_9Qgf8DnruT8_MZ2oevjqVN51XkGHeIeCDo1kf9SeMDWBLN92t9SOAs&sig=AHIEtbRfH5FAgoPyY8et4dJr-h088EhfJA (accessed 7 February 2013).

[260] Whelan (2009) op cit note 256 at 273; R. Whish & D. Bailey 'Competition Law' 7th ed. (2012) at 436.

[261] Whish & Bailey op cit note 71 at 436.

[262] Whish & Bailey op cit note 71 at 436-437. See section 137 Extradition Act 2003.

[263] Whelan (2009) op cit note 256 at 273; Whish & Bailey op cit note 71 at 437.

[264] Norris v Government of the United States of America [2007] EWHC 71 (Admin) para 56.

[265] Whelan (2009) op cit note 256 at 273.

[266] Norris v Government of the United States of America [2008] UKHL 16 para 6; Whelan (2009) op cit note 256 at 274; Whish & Bailey op cit note 71 at 437.

[267] Norris v Government of the United States of America [2008] UKHL 16 para 6; Whelan (2009) op cit note 256 at 274; Whish & Bailey op cit note 71 at 437.

breach of contract…"[268].[269] Therefore price-fixing which happened before the cartel offence came into force could be prosecuted under UK common law if such aggravating features were present.[270]

b) The dishonesty element

The key element of the cartel offence is the requirement of dishonesty which is also a common element in acquisitive offences in UK criminal law.[271] Pursuant to section 188 (1) EA 2002 "the individual is guilty of an offence if he dishonestly agrees with one or more other persons" to engage in the section 188 (2) EA 2002 stated arrangements. Dishonesty is a matter of fact, not law, and if dishonesty on the part of the concerned individual was present has to be determined by a jury in consideration of the particular circumstances of the case.[272] In the absence of a definition by statute regarding dishonesty, the Court of Appeal established a two part-test in R v Ghosh[273] in order to help a jury to decide whether the behaviour is dishonest or not.[274] Pursuant to the test, first the jury has to decide if, objectively viewed, what was done by the defendant was dishonest according to the ordinary standards of reasonable and honest people.[275] The second part of the test asks whether the defendant subjectively would have realised that his action was dishonest by those standards.[276] Only if the jury answers both questions in the affirmative beyond reasonable doubt can the defendant be found guilty of an infringement of the cartel offence.[277]

[268] Norris v Government of the United States of America [2008] UKHL 16 para 17.

[269] Whelan (2009) op cit note 256 at 275; Whish & Bailey op cit note 71 at 437.

[270] Whelan (2009) op cit note 256 at 283.

[271] Whish & Bailey op cit note 71 at 426; Nikpay & Rawlings op cit note 215 at 77.

[272] MacCulloch op cit note 226 at 621.

[273] R v Deb Baran Ghosh [1982] 2 All ER 689 (CA) at 696.

[274] Whish & Bailey op cit note 71 at 426; MacCulloch op cit note 226 at 621; Nikpay & Rawlings op cit note 215 at 77; A. Stephan 'The UK cartel offence: lame duck or black mamba?' (2008) ESRC Centre for Competition Policy (CCP) Working Paper No. 08-19. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310683 (accessed 7 February 2013).

[275] R v Deb Baran Ghosh [1982] 2 All ER 689 (CA) at 696; Whish & Bailey op cit note 71 at 426; Kelly op cit note 12 at 325.

[276] Regina v Deb Baran Ghosh [1982] 2 All ER 689 (CA) at 696; Whish & Bailey op cit note 71 at 426; Kelly op cit note 12 at 325.

[277] Whish & Bailey op cit note 71 at 426.

aa) Removing the dishonesty element

In 2011 the UK Government proposed in a consultation document on the competition regime inter alia the removal of the dishonesty element from the cartel offence.[278] This proposal is based on the grounds that the dishonesty element might put "the UK at odds with developing international best practice on how to define a hard core cartel offence"[279] and, more significantly, might be reducing the deterrence effect of the offence. [280] It is argued that the reason for the allegedly decreased deterrence effect is the low number of prosecuted and completed criminal cases and that more successful criminal cases would increase the deterrence effect.[281] Since the introduction of the cartel offence only two cases, the Marine Hose[282] case and British Airways[283] case reached the trial stage.[284] The latter collapsed and only the Marine Hose case resulted in a conviction owing to the support of the United States Department of Justice.[285] It is suggested that the reason for the tenuous number of cases is that the dishonesty element narrows the scope of the cartel offence and makes the remaining cases disproportionately difficult to prove and thus reducing its deterrence effect.[286]

Initially the inclusion of dishonesty should pursue several aims. Pro-competitive agreements that have strong offsetting or countervailing benefits which outweigh their harmful effects should be excluded in contrary to anti-competitive and harmful

[278] Whish & Bailey op cit note 71 at 434.

[279] United Kingdom. Department for Business, Innovation and Skills (BIS) 'A Competition Regime for Growth: A Consultation on Options for Reform' (March 2011) at 61. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf (accessed 7 February 2013).

[280] Ibid para 6.4 -6.6.

[281] Ibid para 6.5.

[282] R v Whittle, Allison and Brammar [2008] EWCA Crim 2560.

[283] R v George, Crawley, Burns and Burnett [2010] EWCA Crim 1148.

[284] United Kingdom. BIS 2011 op cit note 279 para 6.5; M O'Kane 'International cartel criminalisation and leniency: recent lessons from the UK and global comparisons' (2012) 8 Competition Law International 55 at 55; Whish & Bailey op cit note 71 at 434.

[285] United Kingdom BIS 2011 op cit note 279 para 6.5; O'Kane op cit note 284 at 55; Whish & Bailey op cit note 71 at 434.

[286] Nikpay & Rawlings op cit note 215 at 78-79; United Kingdom BIS 2011 op cit note 279 para 6.6.

agreements.[287] Also, as a common element in UK criminal law, dishonesty should provide the jury with a familiar element and mark the seriousness of the offence to facilitate the likelihood of custodial sentences and thus allow for the maximum deterrence effect of the offence.[288] Juries should also be discouraged from having to consider complex economic analysis about the benefit of collusive behaviour, which would be the case if one had instead included an alternative element which would link the offence to an infringement of the Chapter I prohibition.[289] As it was believed that the average jury member would find it difficult to understand and evaluate such economic evidence, he or she should rather focus on the conduct and intention of the parties which would at the same time largely exclude most beneficial agreements from falling under the ambit of the offence.[290]

Within the consultation it was argued that the dishonesty element is an imperfect means to achieve these objectives.[291] Especially the last point gained greater significance in the light of the British Airways case.[292] The pre-trial ruling in this case suggests that such economic evidence relating to the effects of a cartel was not necessarily excluded and even admissible on the issue of dishonesty itself.[293] After-the-event economic analysis might be used to support the credibility of a claim of a member of an alleged cartel that the cartel had no, or was believed to have no, detrimental effect on customers.[294] Besides, referring to the exclusion of pro-competitive agreement, though the dishonesty element narrows the scope of the offence, it does it in a way which creates uncertainty, especially for businesses and their executives, by leaving them in the dark about the clear limits of the ambit of the offence.[295] In addition, pursuant to a survey that only 63 per cent of the people in Britain consider price-fixing as dishonest, it seems that the support for a cartel

[287] United Kingdom. BIS 2011 op cit note 279 para 6.8; Nikpay & Rawlings op cit note 215 at 79.

[288] United Kingdom BIS 2011 op cit note 279 para 6.10; Nikpay & Rawlings op cit note 215 at 79; O'Kane op cit note 284 at 64.

[289] United Kingdom BIS 2011 op cit note 279 para 6.9; Nikpay & Rawlings op cit note 215 at 79; O'Kane op cit note 284 at 64.

[290] United Kingdom BIS 2011 op cit note 279 para 6.9; Nikpay & Rawlings op cit note 215 at 79.

[291] United Kingdom BIS 2011 op cit note 279 para 6.11-6.17.

[292] Nikpay & Rawlings op cit note 215 at 79.

[293] Nikpay & Rawlings op cit note 215 at 79; United Kingdom BIS 2011 op cit note 279 para 6.13.

[294] Nikpay & Rawlings op cit note 215 at 79; United Kingdom BIS 2011 op cit note 279 para 6.13.

[295] United Kingdom BIS 2011 op cit note 279 para 6.12.

offence defined around dishonesty is only moderate and that juries might be more reluctant to convict a defendant based on dishonesty than originally assumed.[296]

Hence the UK Government looked for possible alternatives to this element and eventually favoured the option to remove dishonesty from the offence and to define it in a way which excludes agreements made openly.[297] The intention behind the exclusion of such agreements from criminal liability is that it is in the nature of a cartel that its existence is only known to its members and kept secret from customers.[298] Such a definition around "agreements made openly" would introduce a factual, objective element which is likely to exclude economic evidence as far as possible and is therefore easier to apply for a jury than the Gosh test.[299] Also dishonesty in not inevitably necessary to exclude beneficial or benign agreements from the scope of the offence, because on the one hand there are only a few examples of agreements that fall under the definition of hard core cartels but are nevertheless lawful under competition law rules, and on the other hand if such a situation is given it is not unreasonable to expect disclosure of the potentially offending elements to those who might be affected by them in order to escape criminal liability.[300] In a response to the consultation paper the UK Government decided to adopt this opinion which led to the Enterprise and Regulatory Reform Bill[301] ("Bill").[302]

[296] Ibid para 6.14.

[297] United Kingdom BIS 2011 op cit note 279 at 61; Nikpay & Rawlings op cit note 215 at 79.

[298] B McGrath & J Love 'A further twist in the 'Dishonesty' tale: UK Government proposes new defences to the criminal cartel offence' (2012) Available at http://www.edwardswildman.com/newsstand/detail.aspx?news=3234 (accessed 7 February 2013); Connor, Foer & Udwin op cit note 16 at 203.

[299] Nikpay & Rawlings op cit note 215 at 79; United Kingdom. Department for Business, Innovation and Skills (BIS) 'Growth, competition and the competition regime: Government response to consultation' (March 2012) para 7.23. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31413/12-512-growth-and-competition-regime-government-response.pdf (accessed 7 February 2013).

[300] Nikpay & Rawlings op cit 215 at 79; United Kingdom BIS 2012 op cit note 299 para 7.28.

[301] Enterprise and Regulatory Reform Bill (Bill 7 2012-13 as introduced). Available at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0007/13007.pdf (accessed 7 February 2013)

[302] United Kingdom BIS 2012 op cit note 299 para 7.26.

bb) The proposed cartel offence and its deterrence effect

At the time of writing the Bill has not completed all its parliamentary stages in both Houses and has not received Royal Assent. Regarding the cartel offence, the currently amended version of the Bill[303] proposes in its Part 4 Chapter 4 inter alia to remove the requirement of dishonesty and to add the new sections 188A, 188B and 190A.[304]

Section 188A of the Bill is intended to implement the requirement to exclude agreements which are made openly. Accordingly an offence is not committed if the relevant information concerning an arrangement at issue: (a) had been notified to the customer before he or she agreed to buy affected goods; (b) had been notified to a person before or at the time he or she requests bids or (c) are published beforehand in a way specified by the Secretary of State for Business, Innovation and Skills.[305]

Section 188B of the Bill wants to introduce three new defences to the cartel offence.[306] The defences are applicable if the charged individual can show that he or she did not intend that the nature of the arrangement concerned would be concealed from customers at all times before entering into the agreement in question or from the Competition and Markets Authority ("CMA")[307] at the time of the making of the agreement.[308] Furthermore a defence is applicable if the individual who is charged with the cartel offence can show before making the agreement that he or she "took reasonable steps to ensure that the nature of the arrangements would be disclosed to

[303] Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

[304] R Bell & P Henty 'Amendments to the UK cartel offence are finalised and tabled to the House of Lords' (2012) Available at http://www.lexology.com/library/detail.aspx?g=49c3c3ab-dfde-4420-ac4d-c276eb3b54d6 (accessed 7 February 2013).

[305] Bell & Henty op cit note 304; Proposed section 188A (1)(a)-(c) in section 41(5) Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

[306] McGrath & Love A further twist op cit note 298.

[307] Body that will be established to replace the Office of Fair Trading and the Competition Commission, see Part 3 Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

[308] McGrath & Love A further twist op cit note 298; Proposed section 188B (1) and (2) in section 41(6) Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

professional legal advisers for the purposes of obtaining advice" before the making or the implementation of the arrangements.[309]

Additionally the Bill introduces in section 190A (1) a statutory requirement for the CMA to give guidance on the "principles to be applied in determining, in any case, whether proceedings for an offence … should be instituted".[310]

The most significant proposed change is the removal of the dishonesty element from section 188(1) EA 2002.[311] As mentioned above, the requirement for the individual to act dishonestly was seen as weakening the deterrence effect of the cartel offence and the question is if the elimination of the element can enhance deterrence.

For section 188 EA 2002 to work as an effective deterrent, it is not enough just to enact legislation which created the criminal offence: in fact the effective operation of the legislation must be ensured.[312] According to the economic approach an individual will do a cost-benefit calculation in order to determine if the benefits gained through an infringement is worth the risk, more precisely, the risk of being caught and punished.[313] Therefore the idea of deterrence is to create a credible threat of detection and punishment which weights sufficiently in the cost-benefit calculation of the person, here the concerned individual who wants to participate in cartel conduct.[314] As the cost of a violation for an offender is an equation of the penalty, the likelihood of detection and the enforcement costs, effective deterrence can be achieved through different combinations of the level of penalty and the level of detection and punishment.[315] According to section 190(1)(a) EA 2002, a person guilty of an

[309] McGrath & Love A further twist op cit note 298; Proposed section 188B (3) in section 41(6) Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

[310] Section 41(7) Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012; McGrath & Love A further twist op cit note 298.

[311] Section 41(1) and (2) Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012; B McGrath & J Love 'Bill setting out new competition law regime scrutinised by UK parliament' (2012) Available at http://www.edwardswildman.com/newsstand/detail.aspx?news=2939 (accessed 7 February 2013).

[312] Wils (2010) op cit note 67 at 288.

[313] Rosochowicz op cit note 41 at 753.

[314] Wils (2010) op cit note 67 at 288; W P J Wils 'Optimal antitrust fines: theory and practice' (2006) at 12. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=883102 (accessed 7 February 2013).

[315] Rosochowicz op cit note 41 at 753; Wils (2006) op cit note 314 at 12.

offence under section 188 EA 2002 is liable up to five years of imprisonment and/or an unlimited fine.[316] Although this threat of imprisonment in combination with a fine is likely to serve as a strong deterrent for various reason mentioned above, the UK seems to fall short in pursuing and convicting an adequate number of cartel offenders, as there have only been two criminal cases brought to prosecution by the OFT since the introduction of the cartel offence. [317] The reason for this may originate from difficulties in prosecuting the offence caused by the narrow scope of the offence and the obstacles to prove the remaining cases, both based on the strict requirement that the offender has to act dishonestly.[318]

One could also argue that the small number of convictions might be based on the fact that the OFT prosecuted only a small number of civil cases and has not sought to commence prosecution even in plainly warranted cases and is not based on the dishonesty requirement.[319] For instance despite the OFT having found out in its civil investigations that bid-rigging had taken place on 199 tenders concerning building projects and that in six cases the successful bidder made compensation payments to the unsuccessful bidder, no criminal prosecution was initiated. [320]

Regardless of the exact reason for the small amount of criminal cases, this circumstance might give the impression to potential offenders that the risk of being punished is relatively low which in turn might undermine the credibility of the threat of being detected and punished and thereby damage the deterrence effect.[321]

Besides, apart from the reasons for the small amount of cases, one could suggest that due to the small amount of cases brought to the courts there is actually a lack of evidence that cases failed because of the dishonesty requirement and that it is therefore inherently problematic.[322]

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[316] Kelly op cit note 12 at 325.

[317] O'Kane op cit note 284 at 55.

[318] Nikpay & Rawlings op cit note 215 at 78-79; United Kingdom BIS 2011 op cit note 279 para 6.6.

[319] O'Kane op cit note 284 at 61.

[320] O'Kane op cit note 284 at 61; Bid rigging in the construction industry in England (Case CE/4327-04) 21September 2009.

[321] Wils (2010) op cit note 67 at 288.

[322] O'Kane op cit note 284 at 61; Nikpay & Rawlings op cit note 215 at 79; McGrath & Love Bill setting out op cit note 311.

However the fundamental issue is that as long as the offence includes dishonesty its scope will be inevitably narrower than the range of hard core cartel agreements that damage the economy.[323] Through the removal of the dishonesty requirement the ambit of the offence widens and adjusts the cartel offence to avoid that in practice only overt dishonest acts are covered which might also be prosecuted as fraud.[324] Without the need to prove dishonesty, it is easier to punish individuals participating in a cartel which increases the threat of effective prosecution and conviction, therefore will facilitate efficient deterrence.[325] It is for this reason that no other jurisdiction which has criminalised cartel conduct implemented dishonesty as an element of the offence.[326]

Nevertheless the removal of dishonesty might have severe impacts. Initially the implementation of dishonesty was to ensure that only the most serious forms of anti-competitive conduct were criminalised. As part of the mens rea, it should reflect the perceived need for a high threshold of individual culpability before a punitive criminal conviction up to five years and/or an unlimited fine could be imposed.[327] At this stage dishonesty is proposed to be removed without substitution, meaning what remains is the need to prove the mental elements of intention to enter into an agreement and intention as to the operation of the arrangements in question.[328] As a consequence of the proposed change of section 188(1) EA 2002, any individual agreeing for undertakings to engage in arrangements according to section 188(2) EA 2002 is exposed to strict liability, irrespective of if he or she is aware that the agreement is illegal or of its impact on competition.[329] The proposed section 188A which wants to exclude agreements made openly and the proposed three new defences of section 188B of the Bill may produce some relief.[330] Also the proposed new duty of the CMA under section 190A of the Bill, whose apparent intention is to

[323] Nikpay & Rawlings op cit note 215 at 79.

[324] Nikpay & Rawlings op cit note 215 at 79; O'Kane op cit note 284 at 62; McGrath & Love A further twist op cit note 298.

[325] Wils (2010) op cit note 67 at 288; Wils (2006) op cit note 314 at 12; Nikpay & Rawlings op cit note 215 at 79.

[326] O'Kane op cit note 284 at 79; McGrath & Love Bill setting out op cit note 311.

[327] McGrath & Love A further twist op cit note 298.

[328] United Kingdom BIS 2012 op cit note 299 para 7.9; O'Kane op cit note 284 at 62.

[329] McGrath & Love A further twist op cit note 298; O'Kane op cit note 284 at 62.

[330] McGrath & Love A further twist op cit note 298.

enable the CMA to clarify that legitimate behaviour will not be prosecuted, might help to clear up uncertainties about the legality of the agreements in question, assuming that the CMA will actually deliver such clarification.[331]

Notwithstanding the basic concern stays, namely that the removal of the dishonesty element vastly widens the range of conduct that may now be vulnerable to criminal sanctions and that without its replacement by an appropriate alternative test capable of distinguishing legitimate from illegitimate conduct, the distinction between criminal and non-criminal conduct might erode.[332] On one side comparable criminal offences like insider dealing and corruption do not require prosecutors to prove that the offender acted dishonestly.[333] Here, too, the harm caused by the offender is rather harm on the fair operation of markets and the fair conduct of transactions than solely or even primarily to a particular victim who has suffered loss and they carry a similar or higher maximum sentence.[334] These similar offences may provide a precedent for a cartel offence without the dishonesty element.[335]

On the other hand one could substitute dishonesty with an element of knowledge, suspicion or belief that the agreement entered into is illegal to achieve a clearer distinction between criminal and non-criminal conduct.[336] These elements are common in various jurisdictions as well as in the UK.[337] To take action despite the knowledge or suspicion, which requires less than absolute certainty, that the conduct is illegal is an indicator for serious criminality.[338] If an individual engages in an arrangement although he knows or suspects that it is illegal justifies also the possibility of a five year sentence upon conviction.[339] In addition it would provide a gauge for prosecutors to determine how serious the cartel is and if criminal prosecution in necessary or civil mechanisms might be sufficient instead.[340]

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[331] Ibid.

[332] O'Kane op cit note 284 at 62; McGrath & Love A further twist op cit note 298.

[333] Nikpay & Rawlings op cit note 215 at 79.

[334] Nikpay & Rawlings op cit note 215 at 79; United Kingdom BIS 2012 op cit note 299 para 7.5.

[335] Nikpay & Rawlings op cit note 215 at 79.

[336] O'Kane op cit note 284 at 62.

[337] O'Kane op cit note 284 at 62; see for instance section 328 Proceeds of Crime Act 2002.

[338] O'Kane op cit note at 62.

[339] Ibid at 62-63.

[340] Ibid at 63.

In summary it can be stated that the removal of the dishonesty element from section 188(1) EA 2002 will widen the definition of the cartel offence and therefore widen its scope. When the element ceases to exist, the offence might then also be easier to prove. Consequently the prosecution and punishment of offenders might be facilitated. An increased number of successful prosecutions might create a more credible threat of punishment and hence promote effective deterrence of potential offenders from participating in cartel conduct. The downside of removing the requirement to act dishonestly is that it might be achieved at the cost of a clear distinction between criminal and non-criminal behaviour which creates uncertainty on the part of businesses and their executives.[341] The proposed sections 188A, 188B and the prosecution guidance pursuant to the proposed section 190A might help to create some clarity but there is still the concern that without an adequate replacement of dishonesty through a strong mens rea element, the boundaries between criminal and non-criminal behaviour might be too indistinct.

3) Legal consequence of the infringement of UK competition law

As already mentioned above, the maximum penalty for a person guilty of an offence under section 188 EA 2002 is according to section 190 (1) EA 2002 a term of imprisonment up to five years and/or an unlimited fine. In addition the Enterprise Act 2002 introduced under its section 204, which inserted new sections 9A-9E in the Company Directors Disqualification Act 1986 (CDDA 1986)[342], the possibility to impose a Competition Disqualification Order (CDO) to disqualify directors for up to 15 years[343] where their companies are guilty of a competition law infringement.[344] During the time of disqualification the concerned individual is not allowed to be a director of a company, to act as a receiver of a company´s property, to promote, form or manage a company or to act as an insolvency practitioner.[345] Also such a CDO may be placed on a public register maintained by the secretary of State for Business,

[341] Ibid at 62.

[342] Company Directors Disqualification Act 1986, Available at http://www.legislation.gov.uk/ukpga/1986/46/contents (accessed 7 February 2013).

[343] Section 9A (9) Company Directors Disqualification Act 1986.

[344] Whish & Bailey op cit note 71 at 435; A Stephan 'Disqualification orders for directors involved in Cartels' (2011) at 3 ESRC Centre for Competition Policy (CCP) Working Paper No. 11-8. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879784 (accessed 7 February 2013).

[345] Sections 1(1) Company Directors Disqualification Act 1986; Whish & Bailey op cit note 71 at 435.

Innovation and Skills[346].[347]A contravention of the CDO is a criminal offence which can be punished by up to two years of imprisonment and/or a fine. [348] In addition the offender could be held liable for all the relevant debts of the company[349].[350]

a) Nature of the CDO and its requirements

The disqualification of individuals is possible for any infringement of Article 101 Treaty of the Functioning of the European Union ("TFEU")[351] and for its domestic equivalent in UK law, the Chapter I prohibition and can also be sought for abuse of dominance under Article 102 TFEU or Chapter II prohibition[352], see section 9A(4) CDDA 1986.[353] Therefore the disqualification of individuals is not limited to circumstances in which the cartel offence has been committed.[354] Although the CDOs are essentially a civil penalty, it is for the High Court or, in Scotland, for the Court of Session to make such an order and not for the competition authority like the OFT or a specified regulator (or when the proposed abolition of the OFT takes place, its successor, the CMA[355]).[356] In contrast the competition authority can impose corporate fines without any independent adjudication before appeals, see section 36 Competition Act 1998.[357] In the context of CDOs their power is restricted to: (a) making an application to the court, which will decide if a CDO should be granted[358]

[346] Section 18 Company Directors Disqualification Act 1986.

[347] Whish & Bailey op cit note 71 at 435.

[348] Section 13(a) Company Directors Disqualification Act 1986.

[349] Section 15(1)(a) Company Directors Disqualification Act 1986.

[350] Whish & Bailey op cit note 71 at 435.

[351] Treaty of the Functioning of the European Union, 09 May 2008, Official Journal of the European Union, C 115/47. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF (accessed 7 February 2013).

[352] See section 18(4) Competition Act 1998.

[353] Whish & Bailey op cit note 71 at 435; Stephan Disqualification orders op cit note 344 at 3.

[354] Whish & Bailey op cit note 71 at 435.

[355] See Part 3 Enterprise and Regulatory Reform Bill as brought from the Commons on 18 October 2012.

[356] Whish & Bailey op cit note 71 at 435; Stephan Disqualification orders op cit note 344 at 3.

[357]Stephan Disqualification orders op cit note 344 at 3.

[358] Section 9A (10) Company Directors Disqualification Act 1986.

and (b) deciding whether to accept a disqualification undertaking in lieu of a CDO[359] which has the same effect as a CDO approved by court, see section 9B CDDA 1986.[360]

The court must make a CDO against a person if he or she is a director of a company which commits an infringement of UK and/or EU[361] competition law and if the "court considers that his conduct as a director makes him or her unfit to be concerned in the management of a company"[362].[363] In deciding whether or not the conduct of a director makes him or her unfit the court has to take into account if the conduct concerned contributed to the infringement of competition law or, where this is not the case, whether the director had reasonable grounds to suspect that the company's conduct constituted a breach and he or she took no steps to prevent it. [364] Alternatively if the director did not know that the conduct constituted a breach, the court has to take into consideration if he ought to have known it.[365]According to the OFT the term "director" also includes a de facto director meaning a person who assumes to act as a director without having been appointed validly or at all.[366]

[359] Section 9B (2) Company Directors Disqualification Act 1986.

[360] See section 9B (3) Company Directors Disqualification Act 1986; Stephan Disqualification orders op cit note 344 at 3.

[361] Section 9A (2) Company Directors Disqualification Act 1986.

[362] Section 9A (3) Company Directors Disqualification Act 1986.

[363] Whish & Bailey op cit note 71 at 435.

[364] Section 9A(5)(a) and (6)(a)(b) Company Directors Disqualification Act 1986; Whish & Bailey op cit note 71 at 435; Stephan Disqualification orders op cit note 344 at 3.

[365]Section 9A(5)(a) and (6)(c) Company Directors Disqualification Act 1986; Whish & Bailey op cit note 71at 435; Stephan Disqualification orders op cit note 344 at 3.

[366] Office of Fair Trading 'Disqualification Orders in Competition Cases: an OFT Guidance Document' OFT 510 (June 2010) para 2.3. Available at https://docs.google.com/viewer?a=v&q=cache:JxR0nD4p4_sJ:www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf+&hl=de&pid=bl&srcid=ADGEESi4dhVSSNiEhyL8T5A0TjP2D46vRXmUaWvz_8pGoRvuPLti2R--IHEkF0wZoCiaZdGHJRrCgYaMFHgRMX7NLr2f1yV5nm5G7WHgf2XMhx3-xbNdEPxP_erKmYacPKcTo9tG8XxG&sig=AHIEtbTt5RluhELMcsN-E8-ZPTiJDWJqAg (accessed 7 February 2013); Hydrodam (Corby) Ltd, Re [1994] B.C.C. 161 at 162.

b) The effectiveness of CDOs compared to imprisonment and fines on the individual

The introduction of the possibility of disbarring a company director from office through the EA 2002 is like the possibility of imposing a prison sentence and/ or an unlimited fine on the individual, designed to encourage compliance with competition law.[367] As already mentioned, the reason for the implementation of criminal sanctions on the individual was governed by the insight that fines on companies alone, even very substantial ones, may not have a sufficiently deterrent effect, besides other contingent unwanted ramifications like the allocation of the fine on customers which might increase prices or force companies into bankruptcy and thereby lose a competitor in the market.[368] By contrast the threat of prison terms in combination with fines on the individuals from whom the decision to engage in cartel conduct usually emanate, have proved to be an effective measure in deterring potential competition law offenders.[369] Having the possibility to disqualify a director for an infringement of competition law as well raises the question if the threat or the infliction of CDOs can efficiently deter directors from engaging in anticompetitive conduct, and if CDOs even be an equally effective alternative to imprisonment and fines on the individual?[370]

aa) Deterrent effect of CDOs

Like a prison term the disqualification of a director is also directed towards a natural person but as a restriction on his or her career not as punitive or as sobering as a prison sanction which takes his liberty.[371] Nevertheless a CDO may have the potential to have a strongly dissuasive influence on directors whether to pursue a collusive arrangement with their competitor for several reasons.[372] Similar to

[367] Whish & Bailey op cit note 71 at 424.

[368] Whish & Bailey op cit note 71 at 424; see Chapter III 1) b) bb).

[369] Wils (2010) op cit note 67 at 282; see Chapter III 1) b) bb).

[370] Wils (2010) op cit note 67 at 286.

[371] Stephan Disqualification orders op cit note 344 at 3; D H Ginsburg & J D Wright 'Antitrust Sanctions' (2010) at 20 George Mason University Law and Economics Research Paper Series No. 10-60. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705701 (accessed 07. February 2013).

[372] Stephan Disqualification orders op cit note 344 at 3-4.

imprisonment a CDO imposes a direct and substantial cost upon the individual.[373] It may damage the reputation and adversely affect career and earning potential of a director, thus will raise the cost side of his or her personal cost-benefit calculation.[374]

In addition the cartel offence does not have to be committed to impose a CDO. This means that there is no need to prove the (still existing) dishonesty element to impose a CDO.[375] Even when it comes to the proposed removal of the dishonesty element there need not be a criminal trial.[376] Therefore the application of CDOs is potentially very wide which increases the threat for directors involved in anticompetitive behaviour to be disqualified.[377] In combination with survey results indicating that the threat of disqualification is seen by businesses and lawyers as a serious one[378] and that companies ranked CDOs as the second best factor to motivate directors to comply with competition law,[379] CDOs appear to be a potent deterrent.[380]

bb) CDOs: an alternative to imprisonment and fines on the individual ?

As mentioned, the criminal law is "society's strongest form of official punishment and censure" but its application in the context of competition law can be justified because, according to the general deterrence approach rooted in utilitarian theory, the deterrence of potential offenders will be more effective compared to other measures, for example civil penalties.[381] Therefore the question arises if CDOs as an essentially

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[373] Ginsburg & Wright op cit note 371 at 20.

[374] Stephan Disqualification orders op cit note 344 at 3-4; Whelan (2007) op cit note 41 at 37.

[375] Stephan Disqualification orders op cit note 344 at 7.

[376] Ibid.

[377] Ibid.

[378] Office of Fair Trading 'The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte' OFT 962 (November 2007) para 5.117. Available at https://docs.google.com/viewer?a=v&q=cache:dJ0cVdZcXT8J:www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf+&hl=de&pid=bl&srcid=ADGEESin8ihimNbiNcj8-UOvfTAFrU_vqs1DbIRjB5E6UpV4KSnGltA21l5mkN80rUUfQkmQmVvvE4PYkO6nCCb5sQO1V1zVIl1qeTIusdCij9-ylfMZD5U0Z_kJeKKuUGHqg7oxa1x5&sig=AHIEtbSKNGXSsoERsazCHHiUtXBoiPMTVw (accessed 7 February 2013).

[379] Ibid at Footnote 3.

[380] Stephan Disqualification orders op cit note 344 at 7.

[381] Clarke op cit note 25 at 83 and 85; Rosochowicz op cit note 41 at 753.

civil penalty[382], and for the concerned person less affecting and therefore milder instrument than criminal sanctions, especially like imprisonment, could be an equally effective alternative.[383]

However there are various reasons that this might not be the case. A CDO can only be imposed on a director, not on the middle management.[384] The possible consequence might be that a vicariously responsible director would be solely targeted whereas the directly involved middle management members would be spared a CDO and thus not be threatened.[385] Also its deterrence effect depends how close the director is to retirement.[386] If he or she is close to it, a disqualification order might be an occasion to move into retirement and it might be easy for a company to fully financially compensate its former director, which is a comparable concern to the situation where just a fine is imposed on the individual.[387] This might especially be a problem because there is likely to be a time lag between the detection of the cartel and the imposition of a CDO.[388] For example in insolvency cases a CDO pursuant to section 6 CDDA 1986 is typically made two to seven years after the initial business failure and so the likelihood might be higher that the director is closer to retirement.[389] Nevertheless if the director is not ready for retirement due to his or her age or personal life planning, CDOs are preferable to fines because this may hurt the director in a way which a company cannot fully compensate.[390] Additionally, although CDOs also have a stigmatic effect and send a moral message this effect is less pronounced compared to imprisonment but more compared to fines.[391] Therefore

[382] Stephan Disqualification orders op cit note 344 at 12.

[383] Wils (2010) op cit note 67 at 287.

[384] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37; Stephan Disqualification orders op cit note 344 at 9.

[385] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37.

[386] Wils (2010) op cit note 67at 287; Whelan (2007) op cit note 41 at 37; Stephan Disqualification orders op cit note 344 at 9.

[387] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41at 37; Stephan Disqualification orders op cit note 344 at 9; see Chapter III 1) b) aa).

[388] Stephan Disqualification orders op cit note 344 at 9.

[389] Ibid.

[390] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37.

[391] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37.

CDOs do not seem to be an equivalently effective alternative to imprisonment and are not necessarily superior to individual fines in every aspect.[392]

cc) Disqualifying directors: a useful complement

Adding the option of disqualifying a director has the advantage that besides bringing additional direct costs on the perpetrator which enhances total deterrence, such a measure might also achieve its deterrence value at a lower social cost.[393] It is argued that it is likely that the stigma and the reputational effect of a prison sentence do not continue to increase when a certain threshold is met.[394] Consequently a director might be as deterred by a long prison sentence as by a shorter prison sentence supplemented by a disqualification order which adds some deterrence value.[395] As a shorter prison term entails fewer expenses than a long one and the disqualification of a director is effectively costless for society the social cost would be less.[396]

Also the debarment of directors might enhance the likelihood that their reputation might be damaged as well as the scope of that damage which in total might amount to heavier sanctions of the job market.[397] These indirect consequences would facilitate deterrence.[398]Certainly one has to keep in mind that the deterrent effect of disqualification orders will be heterogeneous across individuals like the deterrence effect of a prison sentence.[399] It would weight more heavily upon individuals who are more restricted in their job choice, for instance who have skills especially tailored to managing a publicly traded company.[400] But at least in these cases, the additional reputational effects of debarment might reduce the required level of fines and prison time to achieve any given level of deterrence and less prison time could reduce social costs.[401] Regarding the level of fines, a high level has the disadvantage that wealth-

[392] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37.

[393] Ginsburg & Wright op cit note 371 at 20.

[394] Ginsburg & Wright op cit note 371 at 37.

[395] Ibid at 20.

[396] Ibid.

[397] Ibid.

[398] Ibid.

[399] Ibid footnote 64.

[400] Ibid.

[401] Ibid at 20.

constrained individuals might be unable to pay them which would limit the fines' deterrence effect from a certain point and hence make them inefficient.[402] By reducing fines to a payable but still fully deterrent level and adding deterrence value through debarment would increase the total deterrence amount and therefore also improve efficiency.[403]

Thus director disqualifications are in general a useful complement to the mix of potential penalties.[404]

4) Prosecution and Leniency

To deter potential offenders from participating in cartel conduct one has to establish a credible threat of being caught and punished. To constitute a credible threat for them it is crucial that there exists a well resourced body to investigate and prosecute potential competition law offences.[405] It must be equipped with adequate powers of investigation and supported by tools helping it to detect cartels.[406] An especially effective tool to facilitate detection of secretly operating cartels is a well designed leniency policy.[407] In the context of criminalising cartels in the UK, much attention has been paid by policymakers regarding these issues.

a) Authorities

In the UK prosecution may be brought to the courts by the OFT or the Serious Fraud Office ("SFO").[408] The OFT, as the body tasked with the enforcement of competition

[402] Ibid.

[403] Ibid.

[404] Wils (2010) op cit note 67 at 287; Whelan (2007) op cit note 41 at 37.

[405] E J Morgan 'Criminal cartel sanctions under the UK Enterprise Act: an assessment' (2010) 17 International Journal of the Economics of Business 67 at 70; Wils (2010) op cit note 67 at 289.

[406] Morgan op cit note 405 at 70; Wils (2010) op cit note 67 at 289.

[407] Morgan op cit note 405 at 72; Wils (2007) op cit note 101 at 22.

[408] R. Whish & D. Bailey 'Competition Law' 7th ed. (2012) at 430.

law in the UK, will exercise its powers under the EA 2002 but works in close co-operation with the SFO.[409]

aa) Prosecution authorities and investigation powers

According to section 190(2) EA 2002 the SFO is the actual intended prosecutor for the cartel offence where serious or complex fraud is involved (except in Scotland where prosecution falls to the Lord Advocate).[410] If this not the case, the OFT can decide to prosecute a case itself as it did in Marine Hose and British Airways, the only two criminal cartel cases prosecuted so far.[411] In case that it is not clear but suspected that serious or complex fraud issues are involved the OFT agreed to a Memorandum of Understanding[412] with the SFO which records the basis on which both bodies will cooperate.[413] Principally the initial enquiries in possible cartel conduct are executed by the OFT but it refers the matter to the SFO if it considers the case to amount to a serious or complex fraud case.[414] However the investigation powers granted in the EA 2002 are only available to OFT officers but where the SFO decides to accept a case it may determine to carry out additional enquiries using its

[409] Office of Fair Trading 'Power for investigating criminal cartels' OFT 515 (January 2004) para 3.18. Available at https://docs.google.com/viewer?a=v&q=cache:CffOjRrgYt8J:www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft515.pdf+&hl=de&pid=bl&srcid=ADGEESiG1rXKASH05dbqF8J8H-eB_706eNWYyJgVgccA7ATzo8YU0RCEmByoZyw2DREjG7TuQVU12g3o5bw0kQUMCQ4K0lpG0TlZJwkR4Gi7nO_cHq5AdCc9AgGULLNSDcyzP5N0auNY&sig=AHIEtbQkLXp4BH9WimK2L9JKRuTRkgQj1A (accessed 7 February 2013); Kelly op cit note 12 at 325.

[410] Whish & Bailey op cit note 71 at 430; OFT 515 op cit note 409 para 3.18.

[411] Whish & Bailey op cit note 71 at 430.

[412] Office of Fair Trading 'Memorandum of Understanding between the Office of Fair Trading and the Director of the Serious Fraud Office' OFT 547 (October 2003) para 1.Available at https://docs.google.com/viewer?a=v&q=cache:StLfzyHp4KwJ:www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft547.pdf+&hl=de&pid=bl&srcid=ADGEESgrd-0bAhgJaY06G3JYPJq_e6zBWrqLAZcOtYK4dxykgWhbMEiKPcTa7H7BTiEZrWBBUBS4q5mQbJMG3WMGyQNXnquQMC46HvWeAKirKHh5h3yRUc20BY1zOGdzQzrrUfK9MPxP&sig=AHIEtbSH_hkh5RZaMMTFkh4muUDfeG5MSg (accessed 7 February 2013).

[413] Whish & Bailey op cit note 71 at 430; OFT 515 op cit note 409 para 3.18.

[414] Whish & Bailey op cit note 71 at 430; OFT 547 op cit note 412 para 3.

powers under section 2 of the Criminal Justice Act 1987[415].[416] The powers available to each agency are broadly the same and authorize them to conduct compulsory interviews, to require persons under investigation to provide information, to require such persons to produce documents for the purpose of investigation and to obtain a warrant under certain circumstances.[417] According to section 192 (1) EA 2002 these OFT's powers under section 193 and 194 EA 2002 are triggered when there are, objectively, "reasonable grounds for suspecting that an offence under section 188 has been committed".[418] In addition section 199 EA 2002 grants the OFT the authority to carry out intrusive surveillance and property interference measures to gain evidence on individuals suspected of committing cartel offences.[419] These powers under sections 193, 194 and 199 EA 2002 go beyond the investigatory powers allowed in administrative investigations under Chapter 41 of the UK Competition Act 1998.[420] In the cause the SFO accepts a referral the members of the criminal case team will comprise of staff of the OFT and the SFO under the direction of an SFO case controller.[421] In practice, however, the SFO prioritises serious commercial frauds, bribery and corruption cases over cartels.[422]

If it is not immediately clear if the case will lead to criminal prosecution or to a mere administrative procedure, the OFT will follow the procedures required by the Police and Criminal Evidence Act 1984[423] and its associated Codes of Practice which will mean inter alia giving the person the standard criminal caution and advising them that they are free to seek the presence of a legal adviser.[424] If a statement in respect

[415] Criminal Justice Act 1987. Available at http://www.legislation.gov.uk/ukpga/1987/38/contents (accessed 7 February 2013).

[416] Whish & Bailey op cit note 71 at 430; OFT 515 op cit note 409 para 3.18; OFT 547 op cit note 412 para 4.

[417] Section 2 Criminal Justice Act 1987; Sections 193 and 194 Enterprise Act 2002;
Whish & Bailey op cit note 71 at 430; OFT 515 op cit note 409 para 3.18; Nikpay & Rawlings op cit note 215 at 78.

[418] Kelly op cit note 12 at 326.

[419] Kelly op cit note 12 at 327; Morgan op cit note 405 at 72.

[420] Kelly op ci note 12 at 327; Morgan op cit note 405 at 72.

[421] Whish & Bailey op cit note 71 at 431. OFT 547 op cit note 412 para 6.

[422] Nikpay & Rawlings op cit note 215 at 78.

[423] Police and Criminal Evidence Act 1984.
Available at http://www.legislation.gov.uk/ukpga/1984/60/contents (accessed 7 February 2013).

[424] Whish & Bailey op cit note 71 at 431; OFT 515 op cit note 409 para 4.1 – 4.2.

of administrative proceedings under the compulsory powers of the Competition Act 1998 has been obtained without abiding by criminal law standards, it usually cannot be used in criminal proceedings.[425] The same applies to statements obtained by the OFT using its compulsory powers of investigation under the EA 2002.[426] Such statements obtained by using theses powers under the Competition Act 1998 and the EA 2002 are excluded in order to protect individuals against self-incrimination.[427]

Finally where both proceedings are possible and the SFO conducts the criminal case, the OFT will consult the SFO before instituting an administrative procedure in order not to compromise any criminal prosecution.[428] Where the OFT conducts both proceedings it will establish separate case teams for each investigation.[429]

bb) Effectiveness of this regime

The UK seems to provide a system which ensures effective prosecution. In contrast to other jurisdictions like South Africa where two bodies, namely the Competition Commission and the NPA, are also concerned with pursuing anticompetitive and criminal cartel behaviour, the UK system appears to be more sophisticated and superior. First the SFO has a well established infrastructure with a substantial prosecuting team and the necessary support facilities.[430] Also the SFO has specialist skills in prosecuting complex and serious fraud cases which entail that more

[425] Section 30A Competition Act 1998. Whish & Bailey op cit note 71 at 431; Kelly op cit note 12 at 329; OFT 515 op cit note 409 para 4.8.

[426] Section 197 Enterprise Act 2002; Whish & Bailey op cit note 71 at 427; OFT 515 op cit note 409 para 6.3.

[427] Whish & Bailey op cit note 71 at 427; OFT 515 op cit note 409 para 6.3 - 6.4.

[428] Whish & Bailey op cit note 71 at 431; OFT 515 op cit note 409 para 4.6.

[429] Whish & Bailey op cit note 71 at 431.

[430] A Hammond & R Penrose 'Proposed criminalisation of cartels in the UK' (2001). Office of Fair Trading. OFT 365 para 3.19. Available at https://docs.google.com/viewer?a=v&q=cache:Z7U6kq1iOAsJ:www.oft.gov.uk/shared_oft/reports/comp_policy/oft365.pdf+&hl=de&pid=bl&srcid=ADGEESiXr_g8ktnzmuxWmZi7MyCwHYTMQVw0AozQ4nX9Flx-ohPw4lDY4Jlc9LDuJ2ldAOjD7TcSAUlFm3HrRfYbL5UWTwBYMIH08MonWizLMytbSr5NWQh2c4K-VWRk-26zZbtkYdks&sig=AHIEtbRA8W3QXfT7zmqfpf0GBfPgEiV_sg (accessed 7 February 2013).

expertise in the economic crime environment and its prosecution is present compared to for example the NPA.[431]

Most importantly the OFT and the SFO have concurrent jurisdiction to prosecute which makes the system very efficient from resource point of view.[432] The OFT can bring a criminal cartel case to court too, if it does not amount to serious or complex fraud. As the actual body tasked with the enforcement of competition law the OFT has extensive expertise and knowledge in handling cases relating to it. Furthermore the OFT is not restricted like the Competition Commission in South Africa to just determine if there has been any prohibited conduct. Therefore cases can be brought directly to court by the OFT without going first to another prosecuting authority which saves resources regarding competition law enforcement and is therefore more efficient.[433]

Moreover in the context of the UK approach it is likely that a criminal investigation or prosecution precedes an administrative procedure against the undertaking to avoid that the latter compromising a potential criminal prosecution.[434] As the evidence in criminal investigations is gained according to strict criminal law standards it can be used afterward to bolster an administrative case which would not be possible in reverse.[435] Especially if the OFT conducts both the criminal and the administrative case the resources allocated to the OFT are thus optimally utilised.[436] The close coordination and case management of the OFT and the SFO where the SFO pursues the criminal investigation in order to not prejudice the criminal case also utilises the available enforcement resources optimally.[437]

In addition, in comparison with other jurisdictions like South Africa, the UK grants similarly strong powers to the competition authority OFT, by the EA 2002, as to the SFO by section 2 of the Criminal Justice Act 1987.[438] In combination with the high

[431] Hammond & Penrose op cit note 430 para 3.15; Morgan op cit note 405 at 70.

[432] Kelly op cit note 12 at 328.

[433] Ibid.

[434] Kelly op cit note 12 at 328; Whish & Bailey op cit note 71 at 431.

[435] Kelly op cit note 12 at 329.

[436] Ibid.

[437] Ibid.

[438] Morgan op cit note 405 at 72; Kelly op cit at 329.

expertise in the field of competition law this facilitates effective prosecution and helps to create a credible threat to deter persons from engaging in cartels.

b) Leniency policy

As cartels usually operate under high secrecy, corporate leniency and whistle blowing initiatives play a central role in detecting cartels and obtaining evidence needed to investigate cases successfully.[439] Leniency can be defined as the "granting of immunity from penalties or the reduction of penalties for competition law violations in exchange for cooperation with the competition law enforcement authorities".[440]

The OFT first introduced its leniency policy in conjunction with the Competition Act 1998 and since then has issued several sets of guidance on them.[441] The aim of these is to promote these policies and make them more transparent to companies or individuals considering whether to engage in "whistle-blowing" in exchange for leniency.[442]

aa) Immunity from prosecution for the individual

In the United Kingdom an individual engaging in cartel conduct can obtain criminal immunity meaning immunity granted from prosecution for the cartel offence in two ways, namely through a leniency application by the company where he or she was or currently is working, or by approaching the OFT directly and providing information about the cartel.[443]

If a company applies for leniency four different categories of corporate leniency are available: Type A immunity, Type B immunity, Type B leniency and Type C

[439] Morgan op cit note 405 at 72.

[440] Wils (2007) op cit note 101 at 4.

[441] Whish & Bailey op cit note 71 at 414; Moodaliyar op cit note 157 at 165.

[442] Whish & Bailey op cit note 71 at 414.

[443] S Holmes, P Girardet & A Butler 'Cartel regulation in the United Kingdom' (2010) The European Antitrust Review 237 at 241; Whish & Bailey op cit note 71 at 432.

leniency.[444] Which of these different types will be granted to the company depends on whether the company was the first to apply or not, and whether there was a pre-existing civil or criminal investigation into such activity.[445]

Each type brings with it different consequences concerning the reduction of a potential fine for the applicant company and the granting of criminal immunity for the company's current or former employees and directors. [446] In addition the granting of criminal immunity for the individual also depends on the level of co-operation between the individual and the OFT.[447]

Type A immunity has the most considerable effect on companies and individuals. Full civil immunity, meaning immunity from any financial penalty for infringing the Chapter I prohibition or Article 101 TFEU, is automatically granted to the company if it was the first applicant providing the OFT with all its available information regarding the cartel, and if there was no previous civil or criminal investigation into such cartel activity.[448] Furthermore the company has to maintain continuous and complete cooperation throughout the OFT's investigation and end its involvement in the cartel unless the OFT directs otherwise to get full civil immunity.[449] However no

[444] Office of Fair Trading 'Leniency and no-action: OFT's guidance note on the handling of applications' OFT 803 (December 2008) para 1.6. Available at https://docs.google.com/viewer?a=v&q=cache:Yk9UILDJRPMJ:www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf+&hl=de&pid=bl&srcid=ADGEEShKc93iI_Qj0uhJiWOhIxeXZ-Yae3s0DPdccXqHAaEHWMtO4Y0IUW7T2_VfVoflMS0MLJO7K8NxmvF6JArlEfnTekgv1NqBM393lLe4Esgy-LwczuwX3P9VTnsQhFet6h3Gb43N&sig=AHIEtbT5T2estkJ5-gZJaN3jzNaOtWXMew (accessed 7 February 2013); Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[445] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[446] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[447] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[448] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[449] OFT 803 op cit note 444 para 3.15; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

civil immunity is available if the company "coerced" another undertaking to participate in the cartel.[450]

Such Type A immunity is also very advantageous for staff members. If the current and former employees and directors of the company co-operate with the OFT, they will be automatically granted full criminal immunity for their individual cartel conduct, so called blanket criminal immunity.[451] Blanket criminal immunity for the individual as well as full civil immunity from the financial penalty is also possible under the Type B immunity, which is warranted when the company was the first to apply but there was, for example, a pre-existing investigation.[452] However, in the case of Type B immunity the disadvantage is that the OFT awards civil immunity to the company or blanket immunity to the individual on a discretionary basis rather than on an automatic basis.[453]

If the company only qualifies for Type B or Type C leniency, for example in cases where there was a pre-existing investigation of the cartel activity, and the OFT has already good evidence of the allegations or the company was not the first to apply, blanket criminal immunity to the former or current employees or directors is not warranted.[454]

Nevertheless the former or current staff members have still the possibility of obtaining individual immunity, meaning criminal immunity which is not linked to a grant of corporate immunity or blanket immunity, under Type A or Type B immunity.[455] Section 190 (4) EA 2002 provides for the issuing of so-called "no action letters" whereby individuals who supply the OFT with information about the cartels will be granted immunity from prosecution.[456] In these cases where no automatic or discretionary blanket immunity is available, the OFT will consider on

[450] OFT 803 op cit note 444 para 3.15; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[451] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241.

[452] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[453] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 416.

[454] Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 432.

[455] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 1.6.

[456] Whish & Bailey op cit note 71 at 432; Holmes, Girardet & Butler op cit note 443 at 241.

an individual-by-individual basis whether one or more individuals associated with the corporate Type B or Type C leniency applicant should be granted individual immunity.[457] Its granting depends on an assessment of the overall public interest and on the overall value added through the Type B or Type C leniency applicant to the investigation.[458]

The other option for individuals to obtain criminal immunity is to apply directly to the OFT for immunity independently of any approach by a company to the OFT.[459] Provided he or she subsequently co-operates with the OFT, there is no previous application of a company or another individual and no criminal or civil investigation is already pre-existing, immunity will be granted to the individual.[460] In other cases and presupposing the individual is the first to report about the cartel activity to the OFT, individual immunity may be still be granted by the OFT but on a discretionary basis.[461]

bb) Efficiency of the OFT's leniency policy

In general, besides expertise, adequate investigation powers and resources of the authorities, leniency policy plays an important role in detecting cartels. However its efficiency is crucial to achieve the desired effect.

As already mentioned, adding criminal sanctions for individuals participating in cartels in addition to corporate fines can make leniency policy more effective if the leniency policies for individuals and companies are well integrated, and full immunity for the individual concerned is available. [462] Conversely it might decrease in effectiveness if full immunity is unavailable.[463] In addition the leniency policy

[457] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 7.20; Whish & Bailey op cit note 71 at 432.

[458] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 7.20.

[459]Holmes, Girardet & Butler op cit note 443 at 242; OFT 803 op cit note 444 para 7.23; Whish & Bailey op cit note 71 at 432.

[460] Holmes, Girardet & Butler op cit note 443 at 242; OFT 803 op cit note 444 para 7.24; Whish & Bailey op cit note 71 at 432.

[461] OFT 803 op cit note 444 para 7.25; Whish & Bailey op cit note 71 at 432.

[462] See Chapter IV) 3) b).

[463] See Chapter IV) 3) b).

should be predictable and transparent in order to work well and achieve its purpose of detecting cartels and obtaining evidence.[464]

Against this backdrop, the UK leniency policy seems to be well thought through and effective.

In the UK full immunity from civil proceedings against companies and criminal prosecution against individuals is potentially available.[465] The corporate leniency policy and the no action policy are designed to work together.[466] A company that obtains Type A or Type B immunity may therefore also, through its application, cause its employees and directors to obtain blanket immunity if they co-operate fully with the OFT.[467] This penalty discount makes it more attractive to companies to apply for leniency at least to the extent that the company cares about its staff.[468] Secondly, to qualify for full civil immunity or a potential high reduction of a financial penalty, namely in cases of Type A or B immunity and Type B leniency, the company must be the first to apply to the OFT. If another company or individual has already approached the OFT then only Type C leniency and hence a maximum reduction of the financial penalty up to 50 per cent is granted.[469] Also blanket immunity is not available any more. Likewise the approach of individuals to the OFT on their own account might not lead to individual immunity if they are not the first. The potential loss of a possible high fine discount as well as possible loss of (automatic) blanket immunity or individual immunity asserts pressure on companies and individuals involved in cartel activity.[470] If the company is the first of those involved to report, then the company itself and its staff will benefit from immunity. However if it delays an application or refuses to apply for leniency at all, it risks employees or directors coming forward from fear of losing their chances of being granted criminal immunity.[471] This race for leniency between companies and their

[464] Morgan op cit note 405 at 72; Wils (2007) op cit note 101 at 37.

[465] Holmes, Girardet & Butler op cit note 443 at 237.

[466] Ibid at 241.

[467] Ibid.

[468] Wils (2010) op cit note 67 at 280.

[469] OFT 803 op cit note 444 para 1.6; Holmes, Girardet & Butler op cit note 443 at 241; Whish & Bailey op cit note 71 at 415.

[470] Wils (2010) op cit note 67 at 280.

[471] Ibid.

staff as well as between individuals may generate a higher amount of applications compared to the situation where no criminal sanctions and immunity therefrom are offered. [472] This facilitates the discovery of hidden cartels and the obtaining of evidence needed to prosecute them.[473]

This effect is supported through a "marker" system whereby a company which does not have all relevant information about the cartel at the time of its application can put down a marker, which effectively secures its rank as the first applicant, and provides sufficient evidence later.[474] It requires a relatively low evidentiary threshold which suffices that the provided information "gives the OFT a sufficient basis for taking forward a credible investigation". [475] This gives companies the possibility to apply very early, thus tightening the pressure on the parties to hurry with an application in order to be the first.[476]

In addition, if a company or an individual is uncertain whether to apply for leniency or not, the company or the individual may approach the OFT for confidential guidance.[477] Such guidance usually takes the form of a hypothetical discussion about a particular factual scenario on a no-name basis with the purpose of allowing the applicant to be reasonably sure about his or her respective position under the OFT's leniency policy before making an application.[478] Given that the OFT will also inform the enquirer about its views by which it will consider itself bound to what was said in the confidential guidance discussion, the outcome of a leniency application is highly predictable and reliable for an applicant.[479]

Also it is certain for an individual applicant that once a no action letter is granted by the competition authority OFT and not revoked, for instance due to non co-operation, the individual will be safe from prosecution regarding the cartel offence.[480] In

[472] Ibid.

[473] Ibid.

[474] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 3.11-3.15; Whish & Bailey op cit note 71 at 416.

[475] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 3.14.

[476] Holmes, Girardet & Butler op cit note 443 at 241.

[477] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 2.1.

[478] Holmes, Girardet & Butler op cit note 443 at 241; OFT 803 op cit note 444 para 2.1.

[479] OFT 803 op cit note 444 para 2.2.

[480] Ibid para 8.54.

comparison with for example South Africa where the Competition Commission makes the substantive decision if the violator is deserving leniency but the ultimate authority if there will be a criminal prosecution or if leniency is indeed granted is down to the criminal prosecution authority NPA, the OFT's no action letter decision is final.[481] Even if the cartel activity itself gives rise to criminal liability for another charge for example under the Fraud Act 2006[482], the SFO confirms that it will not prosecute the applicant.[483] However a separate and distinct offence from the cartel offence like corruption is still indictable.[484] Also if a case has been referred to the SFO before a leniency approach to the OFT, the latter will consult with the SFO if leniency should be granted, whereas in such cases the granting of immunity is usually not in the public interest any more.[485]

Such extensive safety from criminal prosecution is crucial for individual applicants. Otherwise it is very likely that they might hesitate to come forward on their own account or refuse to co-operate for instance in a Type B leniency case and not provide – potential – self-incriminating evidence for fear of criminal prosecution. Conversely the broad ability to obtain immunity from criminal prosecution builds trust on the part of the applicants and thus facilitates that they can share their information without reserve, which in turn helps to uncover cartels and gain evidence against them.[486]

Therefore in total the UK leniency policy appears to have become more effective since the introduction of criminal sanctions for engaging in cartel conduct.[487]

[481] See Chapter IV) 3) a) ; Section 190(4) Enterprise Act 2002; OFT 803 op cit note 444 para 8.54.

[482] Fraud Act 2006. United Kingdom. Available at http://www.legislation.gov.uk/ukpga/2006/35/contents (accessed 7 February 2013).

[483] OFT 803 op cit note 444 para 8.54.

[484] Ibid.

[485] OFT 803 op cit note 444 para 8.55-8.56.

[486] Kelly op cit at 330.

[487] Wils (2010) op cit note 67 at 280; Wils (2007) op cit note 101 at 37-38; M Bloom 'Despite its great success, the EC leniency program faces great challenges' (2006) at 16. Available at http://www.eui.eu/RSCAS/Research/Competition/2006%28pdf%29/200610-COMPed-Bloom.pdf (accessed 7 February 2013).

VI) CONCLUSION

The harm hard core cartels cause is significant and the poorest in society suffer the most. The key aspect in this context is deterrence of cartel conduct. To effectively deter a company from participating in a cartel a fine on a company has to be unrealistically high. Better alternatives are therefore criminal sanctions on individuals in order to achieve effective deterrence. The threat of criminal sanctions for the ones who usually take the decision to participate in a cartel is a much more effective deterrent than a civil fine on the company. The threat of imprisonment will force decision-makers to reconsider their cost-benefit analysis and will therefore likely facilitate effective deterrence.

However in South Africa the Amendment Act raises several concerns. It should be ensured that the NPA has sufficient resources to ensure an effective prosecution. Also a framework for the coordination between the Competition Commission and the NPA should be developed. Furthermore, the current version of section 73A Competition Act may cause willing persons to hesitate to apply for leniency, and therefore the generally positive effect of criminal sanctions on leniency policy may be subverted. Finally it should be ensured that section 73A Competition Act is absolutely consistent with the Constitution.

If these concerns can be remedied, the introduction of criminal sanctions in the Competition Act in addition to the administrative penalty will be a step forward towards a more effective way of fighting cartels in South Africa.

The implementation of criminal sanctions for individuals engaging in cartel conduct in the UK competition law seems to have turned out well. However it remains to be seen if the removal of the dishonesty element simplifies the application of the cartel offence and if it achieves increased deterrence through a higher number of successful prosecutions. A softening of the boundaries between criminal and non-criminal conduct seems not to be excluded. Without another strong mental element the proposed new cartel offence might entail an escalating strict criminal liability for any individual agreeing to engage in arrangements according to section 188 (2) EA 02, irrespective of whether he or she knows that the arrangement is illegal or of its impact on competition. The substitution of dishonesty with an element of knowledge,

suspicion or belief that the agreement entered into is illegal might ensure a clear distinction.

The available CDO's - although a strong deterrent - are not an equally effective alternative to imprisonment and not necessarily superior to individual fines. Imposing the CDO depends on the hierarchy position of the manager concerned, and depending on a director's life planning it might even not deter him or her at all. Furthermore its stigmatic effect is not as strong as the stigmatic effect of imprisonment. However in general, as the possibility of disqualifying a director might add additional deterrence value while simultaneously reducing social costs, it is a useful complement to the UK's mix of available penalties.

The prosecution regime the UK provides ensures effective prosecution. Its prosecution authorities are both equipped with broadly the same strong investigation powers. Additionally, the SFO has in contrast to the NPA the necessary resources and expertise. SFO and OFT have concurrent jurisdictions to prosecute which allows the OFT to also bring cases to court. This, the close co-ordination of the SFO and the OFT and the case management make the prosecution very effective.

Finally the UK managed to integrate the leniency policy for individuals participating in cartels well into their corporate leniency policy. Blanket immunity through a company leniency application is available. Also the OFT can issue no action letters to grant individual immunity. The requirement to be the first applicant creates races for leniency and therefore might generate a higher amount of applications. This race for leniency is supported through a marker system which encourages early applications. The possibility of asking for confidential guidance makes the outcome predictable for an applicant. Eventually a leniency decision of the OFT is final. The SFO has confirmed that it will not prosecute the applicant as long as the cartel activity does not give rise to a separate and distinct criminal charge.

The UK's combination of the criminal cartel offence with a system of administrative fines and director disqualifications for competition law infringements appears to be well balanced and efficient. Supported by well-resourced and powerful prosecution authorities and a well-integrated and sophisticated leniency policy, the UK provides the ideal basis to effectively fight cartels.

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