



**UNIVERSITY OF KWAZULU-NATAL
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A CRITICAL ANALYSIS OF THE LIABILITY IMPOSED ON SOUTH AFRICAN COMPANIES FOR THE CARTEL OFFENCE OF TENDER COLLUSION AND THE OFFENDING COMPANY'S RIGHTS TO HOLD ITS DIRECTORS PERSONALLY ACCOUNTABLE.

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DATE OF SUBMISSION: 28 NOVEMBER 2014

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ABSTRACT

Corporate crime is an area of criminal law that has swiftly gained momentum in South Africa, more specifically the cartel offence of tender collusion, particularly among the larger corporations within the construction industry.

It is often debated as to whether it is more desirable to punish the company or the individual responsible for engaging in prohibited practices as a company's thinking and acting is done by its directors and employees. In recent years it has become widely accepted that it is insufficient to only punish the corporate body that is guilty of committing a corporate crime and not the individuals within the corporate bodies who actually commit the crime. Hence, the introduction of a provision dealing with criminal liability within the Competition Amendment Act 1 of 2009 appears to be an ideal mechanism to safeguard companies and manage cartel activities. Whether such prosecutions are suitable under the umbrella of criminal law, competition law or company law remains a contentious point and one that this dissertation seeks to evaluate. It would appear that the statutes governing this area of law, in their current form, present practical concerns which would need to be remedied in order to provide an effective solution to the problem of cartel conduct.

This dissertation seeks to critically analyse the liability imposed on South African companies for the cartel offence of tender collusion and the offending company's rights to hold its directors personally, criminally and civilly accountable with reference to specific statutory provisions. It will evaluate circumstances under which an interested party may recover damages or recoup losses suffered by the company, in the form of substantial fines paid, from executives/directors or former executives/directors, in situations where a company is fined or could potentially be fined for its involvement in tender collusion. It will enlighten directors who wish to engage in cartel conduct, of the consequences of their actions and alert offending companies of the action that could be taken against such directors in terms of the law.

KEYWORDS:

Cartel offence, Cartel conduct, Tender collusion, Corporate crime, Personal liability

ACRONYMS

	ACRONYM	DEFINITION
1.	CAC	Competition Appeal Court
2.	CLP	Corporate Leniency Policy
3.	NPA	National Prosecuting Authority
4.	POCA	Prevention of Organised Crime Act

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1. INTRODUCTION

The South African economy has experienced substantial corporate activity and development in recent years; however a consequence of this expansion has been the rapid increase of corporate criminality. It is said that ‘while the 1990s was a decade of booming markets and booming profits, it was also a decade of rampant corporate criminality’.¹ ‘There is an emerging consensus among corporate criminologists, which is that corporate crime and violence inflicts far more damage on society than all street crime combined.’² It is said that while the South African government spends billions of Rands year after year in bringing criminals to justice but of those billions little, if any, is spent on bringing white collared corporate criminals to justice.³

Corporate crime is an area of criminal law that has swiftly gained momentum in South Africa but more specifically, the cartel offence of tender collusion, particularly among the larger corporations within the construction industry. South African competition authorities have seen major increases in cartel cases over the past years. It is argued that ‘cartel activities are tantamount to theft’⁴, which is a criminal offence. Therefore the individuals responsible should be held personally accountable and used as an example of the government’s and business sectors’ intolerance towards anti-competitive behaviour in a free market.⁵ Instead, these large corporations face a host of fines for anti-competitive behaviour while the individuals actually engaging in the cartel conduct, are absolved from liability and face no ramifications for their anti-competitive behaviour.

In order for the law to effectively confront cartel conduct, the individuals responsible need to be held accountable and personally liable for their cartel conduct.⁶ It can be debated that in most instances it is the directors of large corporations in South Africa who make the

¹ Singh, S ‘Corporate Crime and the Criminal Liability of Corporate Entities’ available at www.unafei.or.jp/english/pdf/RS_No76/No76_10PA_Singh.pdf, accessed on 28 February 2014.

² Ibid.

³ Ibid.

⁴ Makhubele, D ‘Fighting over breadcrumbs - cartels and the Competition Act 89 of 1998: feature’ (2014) 539 *De Rebus* 20-22.

⁵ Shahim, C (2013) ‘Colluding Constructions: Lucky break?’ available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 28 February 2014.

⁶ Ibid.

executive decisions to participate in such anti-competitive behaviour.⁷ These decisions are often unbeknown to shareholders and in most cases fuelled by the prospect of a higher performance return based on the company's success. It is often debated as to whether it is more advantageous to punish the company or the individuals responsible for engaging in prohibited practices. This is due to the fact that a company is an artificial legal person that acts through the medium of its directors and employees who act on its behalf.

In recent years it has become widely accepted that it is insufficient to solely punish the corporate body guilty of committing a corporate crime.⁸ Punishment should be extended to the individuals within the corporate body in question, who authorise or commit the crime, often in return for some kind of benefit. It is evident that there is a growing need among the victims of such crimes and the corporate bodies involved for the law to hold the individuals responsible criminally liable, given the important roles they play within the company and the nature of their office.

It is unjust to exclusively punish companies as a result of the cartel behaviour of their directors and it is difficult for them to recover compensation or reimbursement for the suffered loss by means of the legal system.⁹ In most instances, the individuals who have committed such crimes leave the exposed or guilty company, simply take up employment with competitors and continue relatively unscathed by the effects of their conduct. However, it is submitted that the introduction of the prospect of imprisonment would act as a deterrent to collusion by ensuring that such individuals are held accountable for their criminal actions.

1.1 Background

The history of apartheid and other discriminatory laws and practices in South Africa has resulted in inadequate restraints against anti-competitive trade practices, unjust restrictions on full and free participation in the economy, and excessive concentrations of ownership and control within the national economy. In order for an economy to flourish, the development of credible competition law, and the establishment of effective structures capable of administering that law, are necessary for a functioning and efficient economy. An efficient,

⁷ Ibid.

⁸ Ngobese, C 'NUMSA: dismiss all Directors and CEOs' available at <http://www.numsa.org.za/article/numsa-dismiss-all-directors-and-ceos-2013-06-25/>, accessed on 28 February 2014.

⁹ Makhubele (note 4 above) 20.

competitive economic environment should be focused on development and thereby capable of balancing the rights and interests of corporations, directors, employees, owners and consumers in order to benefit all South Africans.

Cartels are detrimental to economies all over the world, predominantly in developing countries where money and resources are scarce, and laws regulating cartel conduct are under-developed or lack sufficient enforcement mechanisms to have any real deterrent value.¹⁰ The excessive existence of cartel activity firmly rooted within such countries can have severe implications on the economy as a whole.

The Competition Act 89 of 1998 (the 'Competition Act') was introduced to fundamentally address concerns relating to the establishment of effective competition law policies and inequalities in the South African economy. The legislature has made specific reference to such policy goals in sections 2(c) and section 2 (f) of the Competition Act, as follows:

'The purpose of the Competition Act is to promote and maintain competition in the Republic in order-

- a) to promote the efficiency, adaptability and development of the economy;
- b) to provide consumers with competitive prices and product choices;
- c) to promote employment and advance the social and economic welfare of South Africans;
- d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'¹¹

Cartel behaviour is regulated by the provisions of section 4 of the Competition Act which sets out rules for business in relation to competitors, suppliers and customers. 'Certain activities, which would have a major negative effect on competition, are not allowed'¹² in terms of the

¹⁰ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

¹¹ 89 of 1998.

¹² Competition Commission 'The Competition Act - An Introduction (Book1) Brochure' (2001) available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Nov-01-The-Competition-Act-An-Introduction-Book1.pdf>, accessed on 3 October 2014.

Competition Act. These activities include the cartel offence of tender collusion, specifically prohibited by section 4(1)(b) of the Competition Act, which classifies such conduct as a restrictive horizontal practice.¹³ Section 4 of the Competition Act defines cartel activities as –

‘An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

- a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
- b) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.’¹⁴

It is important to note that the Competition Act only makes provision for the imposition of administrative fines on firms that engage in cartel activity in terms of section 59(2) in an effort to act against cartels. Criminal sanctions are used as a last resort in a Constitutional State, and as such its introduction into competition law requires some justification.¹⁵ Competition law, unlike criminal law, is designed to deter potential offenders from cartel conduct and not to punish offenders retrospectively.¹⁶ Although administrative fines seem relatively high, they have not proven to be effective in deterring cartel conduct. Furthermore, administrative fines may have unwarranted effects on the company, its employees, customers and the public at large.¹⁷ Conversely, the introduction of criminal sanctions for individuals would directly affect the decision-makers responsible for a firm engaging in cartel conduct because their personal finances and liberty would be at stake. In this light, the threat of imprisonment, as opposed to an administrative fine, appears to be an effective deterrent. However the fact that the introduction of criminal sanctions against directors may also have some unwarranted effects cannot be ignored.

¹³ 89 of 1998.

¹⁴ Section 4(1) of the Competition Act 89 of 1998 - ‘horizontal relationship’ means a relationship between competitors according to section 1 of the Competition Act.

¹⁵ Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹⁶ Ibid.

¹⁷ Ibid.

The recent increase in corporate crime is evident particularly in the construction industry as 15 of South Africa's largest construction corporations currently face a host of civil fines.¹⁸ This serves to highlight the extent of the entrenchment of cartel arrangements in South African industries. Recent cases that have gone before the Competition Commission have sparked a widespread debate about the extent to which directors may be held liable 'for the actions of the companies that employ them, following a guilty finding'¹⁹ by the Competition Commission. It has been suggested that the 'buck' or liability 'should not stop with the corporations'²⁰ but that punishment should be extended to the individuals actually involved in cartel activities, i.e. the directors.²¹ Thus there is a definite shift in focus to criminal investigations linked to contraventions of the Competition Act. As public custodians of the South African economy, competition authorities are expected to uphold stringent standards of fair trade in a free market.²² However, there is concern that the agreements reached by the Competition Commission in respect of the quantum of the fines imposed on guilty companies makes the fight against collusive tendering futile as it allows those directly responsible to escape liability unless good corporate governance exercised.

The Competition Act provided the Competition Commission with the power to examine and deal with the actions of companies involving prohibited conduct, it did not however allow the Competition Commission to scrutinize or react to the individual conduct of the directors of such companies who had actually committed the prohibited conduct in question, as a result, individuals actually responsible were able to escape liability.²³ However, one should bear in mind the simple fact that companies act through their directors, who have fiduciary duties to act in the best interests of the company and yet these duties have not deterred directors from

¹⁸ Ngobese, C 'NUMSA: dismiss all Directors' and CEOs' available at <http://www.numsa.org.za/article/numsa-dismiss-all-directors-and-ceos-2013-06-25/>, accessed on 28 February 2014.

¹⁹ Ibid.

²⁰ Shahim, C (2013) 'Colluding Constructions: Lucky break?' available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 28 February 2014.

²¹ Ibid.

²² Ibid.

²³ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

engaging in prohibited conduct, such as being part of a cartel and participating in tender collusion.²⁴

The time has come for directors to be held accountable for their actions as a consequence of involving their companies in cartel conduct. Cognizance should be given to the fact that ‘but for’ the cartel conduct of the director in question, their companies would never have had to sustain the large civil fines that they are being condemned with as a result thereof. It is therefore submitted that a criminal liability provision in the Competition Act would offer an ideal mechanism to protect companies and manage cartel activities. Whether such prosecutions are suitable under the umbrella of criminal law, competition law or company law remains a contentious point and one that this dissertation seeks to evaluate. It would appear that the statutes governing this area of law, in their current form, present practical concerns which would need to be remedied in order to provide an effective solution to the problem of cartel conduct.

‘Unlike the entrenched principles of Company Law that do not attach personal criminal liability to the conduct of directors, acting within their capacities as directors’²⁵ for specific public interest crimes such as the cartel offence of tender collusion, competition law at the very least should pierce the corporate veil and punish directors involved.²⁶ Directors who participate in tender collusion should face criminal penalties for doing so.²⁷ Therefore a provision imposing criminal liability onto such directors may prove to be an indispensable tool in securing justice.

Currently, ‘South African competition law does not make provision for personal liability.’²⁸ However competition authorities in a number of countries have steered towards the introduction of criminal sanctions against the individuals involved in cartel activities, in an effort to advance the fight against cartel conduct. It is, however, feared that subjecting individuals to personal criminal liability in South Africa will entangle competition authorities

²⁴ Ibid.

²⁵ Monnye, SL & Afrika, S ‘Prison beckons directors involved in cartels’ (2008) 16(1) *Juta’s Business Law* 13.

²⁶ Monnye (note 25 above) 14.

²⁷ Monnye (note 25 above) 14.

²⁸ Shahim, C (2013) ‘Colluding Constructions: Lucky break?’ available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 28 February 2014.

in pointless litigation thereby requiring ‘them to work much harder to detect and prosecute cartels in future.’²⁹

Notwithstanding constitutional and policy concerns relating to the effective imposition of criminal and civil sanctions on individuals, despite strident objections from practitioners, businesses and other stakeholders, parliament introduced a provision in the Competition Amendment Act 1 of 2009 (‘the Competition Amendment Act’) that creates a ‘cartel offence’ by criminalising cartel activity. This provision followed the implementation of a similar provision in other countries such as the United States, the United Kingdom and Australia.³⁰ The Competition Amendment Act was promulgated in 2009³¹ but is currently only partially enforced. Thus certain amendments have not yet become effective and of particular significance is the insertion of section 73A. Section 12 of the Competition Amendment Act inserts section 73A into the original Competition Act.

From the outset, it is important to note that this dissertation will only place focus on directors’ criminal liability and not that of persons of those involved in the management of the company. Section 73A ‘introduces criminal sanctions for infringements of section 4(1)(b) of the Competition Act by directors, or persons occupying management positions, within a firm.’³² Therefore under section 73A, cartel conduct will become a criminal offence in South Africa. It is apparent that once the Competition Amendment Act comes into full force, it will undoubtedly constitute the most significant overhaul in South African competition law to date.³³

The relevant section provides for the imposition of personal criminal liability on company directors or persons engaged by firms in positions having management authority, in an effort to manage cartel activities. Section 73A therefore criminalises cartel conduct and establishes, as has been termed in other countries, a ‘cartel offence’.³⁴ The offence is committed if a director within the firm causes that firm to engage in a prohibited practice or knowingly

²⁹ Ibid.

³⁰ Ibid.

³¹ Kelly, L ‘Introduction of a ‘Cartel Offence’ into South African Law’ (2010) 21(2) *Stellenbosch Law Review* = *Stellenbosch Regstrydskrif* 321-333.

³² Shahim, C (2013) ‘Colluding Constructions: Lucky break?’ available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 28 February 2014.

³³ Ibid.

³⁴ Ibid.

acquiesces in the firm engaging in a prohibited practice in terms of section 4(1)(b) of the Competition Act.³⁵ Section 12 of the Competition Amendment Act deals with ‘Causing or permitting *firm* to engage in *prohibited practice*’ provides that:

‘(1) A person commits an offence if, while being a director of a *firm* or while engaged or purporting to be engaged by a *firm* in a position having management authority within the *firm*, such person—

(a) caused the *firm* to engage in a *prohibited practice* in terms of section 4(1)(b); or

(b) knowingly acquiesced in the *firm* engaging in a *prohibited practice* in terms of section 4(1)(b).

(2) For the purpose of subsection (1)(b), ‘knowingly acquiesced’ means having acquiesced while having actual knowledge of the relevant conduct by the firm.

(3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if—

(a) the relevant *firm* has acknowledged, in a consent order contemplated in section 49D, that it engaged in a *prohibited practice* in terms of section 4(1)(b); or

(b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant *firm* engaged in a *prohibited practice* in terms of section 4(1)(b).

(4) The Competition Commission—

(a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances; and

(b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is *deserving of leniency* in the circumstances.

(5) In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the *firm* has engaged in a *prohibited practice* in terms of section 4(1)(b), is *prima facie* proof of the fact that the *firm* engaged in that conduct.

(6) A *firm* may not directly or indirectly—

(a) pay any fine that may be imposed on a person convicted of an offence in terms of this section; or

(b) indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in terms of this section, unless the prosecution is abandoned or the person is acquitted.’³⁶

³⁵ Section 73A of the Competition Amendment Act 1 of 2009.

It is inevitable that the enforcement of criminal sanctions in a previously civil arena is bound to raise concerns amongst directors anxious that their conduct may fall under section 73A. The section has raised a number of serious questions and has given rise to widespread debates concerning its efficient enforcement, the Corporate Leniency Policy (the ‘CLP’), coordination issues and constitutional issues regarding an accused director’s constitutional rights to a fair trial in general.³⁷ There also exists the very real possibility that the threat of criminal prosecution will negatively impact upon the CLP that is so central to the detection of sophisticated tender colluding cartels³⁸.

Section 73A involves the National Prosecuting Authority (‘NPA’) in the enforcement of its provisions; however the NPA’s resources and expertise may be insufficient to deal with competition law violations. Furthermore, no framework is provided for the NPA’s coordination with the Competition Commission. Also problematic in this regard is the fact that the final decision to prosecute an individual is taken by the NPA, ‘even if the Competition Commission finds that the offender is deserving of leniency.’³⁹ This creates uncertainty as to the extent of coordination required between the NPA and the Competition Commission which might be detrimental to the South African CLP.

Cartel conduct is commonly ‘considered to be the most egregious form of anti-competitive behaviour’⁴⁰ and thus there exists a need for an effective enforcement policy. This policy must be capable of both reducing the incentive for parties to collude by imposing serious penalties for those involved, whilst also creating attractive incentives for those involved to disclose their involvement in cartel conduct to competition authorities.⁴¹ The Competition Commission’s ‘applied weapon of choice in combating the deleterious effect of cartel conduct in South Africa’ is the CLP.⁴² The CLP operates to protect or grant immunity from prosecution by competition authorities to companies which are the first to disclose cartel

³⁶ Ibid.

³⁷ Kelly (note 31 above) 322.

³⁸ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

³⁹ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

behaviour. The competition authorities use the information acquired from such companies to effectively expose and eliminate the cartel arrangement in question.⁴³ However such immunity does not extend to various parallel offences engaged in by individuals employed by such companies.⁴⁴

Some may argue that ‘the introduction of criminal liability to individual cartel members in Section 73A (3) and (4) of the Competition Amendment Act should be welcomed with both hands as it common cause that most cartel activities are done deliberately by the individuals who know its effects on consumers, economic development and the market.’⁴⁵ Others argue that a finding that a firm has engaged in a prohibited practice leads to an unfair presumption or reverse burden of proof against the director or manager in subsequent criminal proceedings against him under section 73A(5). It may further be contended that the presumption relates only to the conduct of the firm and not to that of an individual director. The constitutional concerns that have been raised by various observers regarding section 73A are ‘born out of genuine and legitimate fears that directors’ fundamental rights may be trampled upon.’⁴⁶ More particularly, the rights possibly infringed by the section 73A provision would be the director’s right ‘to be presumed innocent, to remain silent, and not to testify during the proceedings’ and the broader right to a fair trial in general.⁴⁷ While others may be of the view that criminal sanctions are not justified in the context of corporate cartels and that large fines ought to be enough to compensate victims of tender collusion and pacify authorities’ determined on deterring future tender collusion.⁴⁸ However, the law needs to find a balance between holding the individual responsible and the company involved criminally, or civilly liable, while ensuring that the relevant parties achieve redress.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Makhubele (note 4 above) 21.

⁴⁶ Jordaan, L & Munyai, PS ‘The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998’ (2011) 23(2) *SA Mercantile Law Journal = SA Tydskrif vir Handelsreg* 197 – 213.

⁴⁷ Section 35(3) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

⁴⁸ Ibid.

1.2 Problem Statement

In light of the recent debates regarding the impact of cartels on the South African economy, the prevention of their formation, detection of their existence and punishment thereof remains an important task for competition authorities in South Africa. This dissertation examines whether individuals involved in cartel conduct can or should be held accountable and personally liable. In analysing the extent of the imposition of personal liability in competition law, it will show how South Africa has dealt with the task of introducing criminal sanctions in competition law for individuals, specifically directors, engaging in cartel conduct. It will provide an enquiry into the effectiveness of the cartel offence created under section 73A of the Competition Amendment Act which is yet to be enforced in South Africa.

The challenge arises where a corporate body is fined for anti-competitive behaviour for engaging in cartel activities such as tender collusion, i.e.: a corporate crime. The legal question that may then arise is whether it is more advantageous to punish the company or the individual responsible for engaging in anti-competitive conduct given the fact that a company's actions are executed by its directors and employees on its behalf. In the event that it is more advantageous to punish the individual, can or should the individuals involved be held personally liable. Further, if this is so, is it then possible for the offending companies to take action against executives/directors or former executives/directors to recover damages or recoup the delictual loss suffered by the company financially. It should be noted that the problem becomes increasingly difficult where none of these executives/directors or former executives/directors (as they have since resigned to escape liability) have been found guilty of a crime in any court of law or any disciplinary process and are therefore absolved from liability. The legal conundrum would then be to determine which branch of law would be better suited to deal with such a situation given the complexity of the matter.

1.3 Research Objectives

The purpose of this dissertation is to critically analyse the liability imposed on South African companies for the cartel offence of tender collusion and the offending company's rights to hold its directors personally criminally and civilly accountable in accordance with specific statutory provisions. It will evaluate the circumstances under which a company that has been

fined or faces being fined for tender collusion will be able to recover damages or recoup the loss suffered by the company in the form of substantial fines paid from directors or former directors. It will also evaluate the legal action that may be taken by NPA and the Competition Commission to prosecute such individuals.

Furthermore, the purpose of this dissertation is to enlighten directors engaging in cartel conduct of their responsibilities towards the company; the consequences of their actions as well as alert offending companies of the action that could be taken against such directors in terms of the law. This dissertation therefore aims to provide a benchmark on the liability of directors for cartel offences such as tender collusion.

1.4 Research Methodology

The research methodology adopted is the ‘black letter’ or desk top research methodology which is a traditionalist approach that concentrates on the ‘letter of the law’. This study is therefore a literature study. This means that existing resources on the subject will be used, through which an opinion will be formed. The scope of the research falls within South African law. The research methodology involves a study of the law by providing a descriptive analysis of a large number of legal rules to be found in primary sources such as statutes and case law. This type of methodology also requires searching for and examining information using existing academic secondary sources, such as journal and newspaper articles, the online resources and investigative reports which will then be followed by cross referencing and collation of the information collected.

1.4.1 Chapter Breakdown

Chapter one of the dissertation is aimed at introducing the reader to the core concepts of what corporate crime is and how the cartel offence of tender collusion fits into that definition. This discussion will also provide the statutory provisions in legislation pertaining to these concepts and how they have been interpreted in their present form.

Chapter two focuses on defining key concepts, it analyses the statutory laws regarding restrictive horizontal practices and how the concept of tender collusion is derived from that those practices. It will further discuss the causes and consequences of tender collusion. The

chapter also tracks the historical context of competition law and the development of Parliaments' approach to dealing with and regulating tender collusion. It will evaluate whether criminal law sanctions are necessary in competition law to and provide arguments in favour of the introduction of criminal liability as a legal mechanism aimed at deterring cartel conduct whilst considering the potential impact such sanctions may have.

Chapter three of this dissertation will focus on the relationship between competition law and criminal law, the Competition Amendment Act and its purpose in terms of the codification of the CLP and the development of section 73A. In analysing the extent of the imposition of personal criminal liability in competition law and criminal law, it will consider the effects that such punitive provisions will have on the successful implementation of the CLP advanced by the Competition Commission. In doing so, section 73A in its present form will be specifically analysed by highlighting certain weaknesses inherent in its approach to criminalisation that may negatively impact on enforcement, as well as noting certain aspects of the section that may present difficulties for the authorities in securing convictions.

Chapter four of this dissertation looks at the imposition of liability for cartel conduct. It considers liability on the part of the company and its director's under company law, competition law and criminal law. It assesses the sanctions that may be imposed, the possible defences that may be raised. It will also look at recent developments in South African competition law regarding tender collusion.

The last chapter of this dissertation will provide a conclusion as to whether the introduction of criminal sanctions for cartel offences such as tender collusion is necessary, and whether criminal sanctions against individuals are appropriate in the context of competition law.

1.5 Anticipated Limitations

One of the aims of this dissertation is to focus on the imposition of criminal liability on directors for the cartel offence of tender collusion which is a corporate crime.

Section 1 of the Competition Act does not define what a 'prohibited practice' is however chapter 2 of the Competition Act deals with 'prohibited practices'. Chapter 2 merely describes anti-competitive conduct as a 'prohibited practice'. Generally, prohibited practices

are those types of conduct which the Competition Act prohibits because they have, or may have anti-competitive effects on the economy or are the product of improper uses of market power. This part of the Competition Act does not attempt to address anti-competitive market structures directly, although market structure may be relevant in determining whether conduct is to be condemned. Chapter 2 prohibits three types of conduct, namely vertical restrictive practices, horizontal restrictive practices and abuses of dominance.

Cartel activity is a restrictive horizontal practice which is prohibited by section 4(1)(b) and in terms of sub-section (iii) includes collusive tendering. Thus this dissertation will be based on the assumption that the cartel offence of tender collusion is a restrictive horizontal practice and is therefore classified as a prohibited practice.

Although section 73A provides for the imposition of personal criminal liability on company directors or persons employed by firms occupying positions of management authority for causing or permitting firms to engage in practices that are prohibited under section 4(1)(b) of the Competition Act, this dissertation will focus on the imposition of personal criminal liability on company directors to the exclusion of persons employed by firms occupying positions of management authority.

2. THE HISTORICAL CONTEXT OF TENDER COLLUSION

2.1 Overview

In order to understand the context in which tender collusion operates as a cartel offence, as well as a punishable corporate crime within the Competition Act, an understanding of what constitutes tender collusion is imperative. This chapter traces the historical context in which tender collusion operates in South Africa and its prevalence in our economy. In addition, the chapter analyses the development of parliament's approach in dealing with and regulating anti-competitive conduct in relation to the amendments of the Competition Act.

2.2 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.'⁴⁹ In this instance, a horizontal agreement is simply an agreement between two or more competitors operating at the same level of the market.⁵⁰ In terms of these agreements, firms are obliged to cooperate with one another in order to ensure the success of the cartel. The degree of cooperation required between these firms may vary according to the type of industry.⁵¹

Essentially, a cartel exists when companies or businesses agree to work together rather than competing against one another in the market.⁵² This agreement is designed to increase profits of cartel participants while maintaining the impression of competition in the market place. Cartels control the markets and restrict choices. Such cartels have the ability to put honest, well-run and productive companies out of business while stifling innovation and protecting its own incompetent members.⁵³

⁴⁹ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

⁵⁰ Section 1 of Competition Act 89 of 1998.

⁵¹ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

⁵² *Ibid.*

⁵³ *Ibid.*

These agreements may be advantageous to the economy where firms decide to launch a new innovative product, share profits and losses or pass on savings to the public.⁵⁴ But where the purpose of cooperation is to maximise profit for participants at the expense of consumers, such an agreement may be highly detrimental to the economy and have far reaching effects.⁵⁵ Such horizontal collusion is generally known in competition law as ‘cartel conduct’.⁵⁶

2.3 *What is Tender Collusion?*

The practice of tender collusion is present in the South African economy. This view is supported by the increase in the number of cartel cases that the Competition Commission has recently had to tackle, particularly within the construction industry.⁵⁷ The term ‘cartel’ refers to an association by agreement among competing firms to engage in prohibited practices such as collusive tendering.⁵⁸ Section 4(1)(b) of the Competition Act prohibits cartel activity. The section lists anti-competitive practices which are often termed as ‘hard-core’⁵⁹ restrictions of competition and defines the term ‘cartel offence’ to include the restrictive horizontal practice of collusive tendering.

Collusive tendering is commonly referred to as ‘bid rigging’ and refers to agreements that are entered into by ‘competitors not to compete on the bids they submit after being invited to tender.’⁶⁰ To this end, firms will be regarded as competitors if they are involved in carrying on a similar business. Collusive tendering falls within the class of anti-competitive conduct referred to as ‘cartel activity’, together with market allocation and price fixing.⁶¹

Section 4(1)(b)(iii) of the Competition Act prohibits all forms of collusive tendering.⁶² There are various forms of collusive tendering that one should be aware of, for example, bid rotation

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Khumalo, J, Nqojela, P, Njisane, Y ‘Cover pricing in the construction industry: understanding the practice within a competition context’ available at <http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conference/Session-1A/Cover-pricing-in-the-construction-industry-Final.pdf>, accessed on 25 June 2014.

⁵⁸ Monnye (note 25 above) 15.

⁵⁹ Kelly (note 31 above) 325.

⁶⁰ GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT – OECD available at <http://www.oecd.org/competition/cartels/42851044.pdf>, accessed on 25 June 2014.

⁶¹ Ibid.

⁶² Ibid.

occurs when a number of firms decide to submit high bids so that a prearranged bidder will succeed in procuring the bid.⁶³ Bid suppression, on the other hand, occurs where firms agree to refrain from bidding, whereas complementary bidding occurs ‘where firms agree on their bids in advance by deciding that one of them will submit the lowest bid or will submit the only bid containing acceptable terms.’⁶⁴ Collusive tendering is often accompanied by an agreement, between colluding competitors, to allocate portions of a tender to the losing bidder should the tenders not be awarded as had been envisaged by the firms involved.⁶⁵

2.3.1 *The causes of tender collusion*

Tendering procedures are designed to create competition in sectors of the economy where this might otherwise be absent.⁶⁶ An important characteristic of this system is the independent preparation and submission of tenders by potential suppliers.⁶⁷ Collusive tendering undermines this system. Tender collusion is a process whereby competitors conspire together in an effort to effectively raise the prices of goods or services in demand through the solicitation of competing tenders.⁶⁸ The common objective of any type of collusive tendering scheme is to raise the amount of the winning tender and ultimately the amount that the winning bidder will gain.⁶⁹ This scheme requires that there be an agreement between competitors in advance as to who will submit the winning bid for a particular tender contract.⁷⁰ Generally, firms engage in cartel activities, such as tender collusion, to maximise the joint profits of cartel members by operating as a collective unit as if they were a monopoly.⁷¹

⁶³ Ibid.

⁶⁴ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

⁶⁵ Ibid.

⁶⁶ Khumalo, J, Nqojela, P, Njisane, Y ‘Cover pricing in the construction industry: understanding the practice within a competition context’ available at <http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conference/Session-1A/Cover-pricing-in-the-construction-industry-Final.pdf>, accessed on 25 June 2014.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT – OECD available at <http://www.oecd.org/competition/cartels/42851044.pdf>, accessed on 25 June 2014.

⁷⁰ Ibid.

⁷¹ Makhubele (note 4 above) 22.

2.3.2 *The consequences of tender collusion*

Collusive tendering reduces competition among firms that are competing for business in a free market.⁷² This limits innovation and deprives consumers of lower prices or better goods or services.⁷³ It should be noted that when competitors agree to forgo competition for collusion, consumers are disadvantaged, as they lose benefits that should have been afforded to them.

For an economy to thrive, the market requires an efficient competitive process in which competitors set prices or bid for tenders independently of one another.⁷⁴ South Africa's economy, whilst subject to governmental control is driven by a free market system and competition within that free market. Consumers should therefore be entitled to a choice of competitive prices and products. The cartel offence of tender collusion diminishes this right in that it: destroys the basis of a competitive economy; stifles fiscal development; and hinders innovation. This often leads to increased prices or reduced quality, and is harmful to the overall welfare of consumers. Competition thereby assists in securing the fair treatment of consumers by ensuring that they receive value for money. Therefore, the early detection and enforcement of preventive measures curtail cartel activity. This assists to stabilise the economy and prevent consumers from falling victim to artificially high prices and reduced quality.⁷⁵

Cartel conduct by a firm is punishable by an administrative penalty that may not exceed 10 percent of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.⁷⁶ The very nature of cartel activity undermines economic development and fair competition in the economy.⁷⁷

⁷² Monnye (note 25 above) 16.

⁷³ Monnye (note 25 above) 16.

⁷⁴ Monnye (note 25 above) 17.

⁷⁵ GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT – OECD available at <http://www.oecd.org/competition/cartels/42851044.pdf>, accessed on 25 June 2014.

⁷⁶ Section 59(2) of the Competition Act 89 of 1998.

⁷⁷ Monnye (note 25 above) 17.

2.4 The development of Parliaments' approach to regulating and dealing with Tender Collusion

In order to fundamentally understand the legislative framework in which the new provisions relating to cartel behaviour operate to hold those responsible for cartel conduct accountable, it is of paramount importance to briefly set out the purpose and objectives of the Competition Act in as far as they are applicable.

2.4.1 The purpose of the Competition Act 89 of 1998 in the new constitutional era

The primary goal of the Competition Act is the promotion and maintenance of competition. As such, the Competition Tribunal interprets the law to achieve this goal. One of the most common and egregious contraventions of the substantive provisions of the Competition Act are clearly the prohibited practices referred to in Chapter 2 of the Competition Act.

The Competition Act was promulgated to promote and maintain competition in the South African economy in the aftermath of apartheid.⁷⁸ Various markets in the South African economy have historically been characterised by monopolies, high levels of economic concentration and restrictive economic policies.⁷⁹ A number of powerful monopolies operated in the past which effectively controlled the majority of the South African economy. The apartheid regime created economic isolation, during which many of these monopolies were the beneficiaries of state concessions.⁸⁰ Thus for a new constitutional dispensation to arise, free trade had to be embraced together with the adoption of a new competition policy⁸¹ which would be capable of fostering economic development through fair competition between commercial rivals, whilst seeking to redress the economic inequalities of the past.

Previously, cartels formed by major stakeholders and industry leaders were a common feature of the South African economy.⁸² Accordingly, the administrative penalty provisions of the

⁷⁸ Jordaan (note 46 above) 198.

⁷⁹ Jordaan (note 46 above) 198.

⁸⁰ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

⁸¹ Jordaan (note 46 above) 198.

⁸² Ibid.

Competition Act were designed to suit a corporate type of offender.⁸³ The administrative penalty provisions of 10 percent of annual turnover were considered to be an effective method aimed at not only punishing but also deterring firms from engaging in prohibited practices.⁸⁴ Inherently contained in these penal provisions was the tacit acknowledgement that the Competition Act was principally concerned with the monetary penalisation of firms for derogation from its provisions, rather than seeking to act directly against those individual directors of that firm who were allegedly responsible for anti-competitive behaviour.⁸⁵ The Competition Act was thus a quasi-civil piece of legislation.⁸⁶ It was intended to achieve broad socio-economic objectives, rather than individualised criminal prosecution of company directors for being involved in corporate criminal conduct and more specifically, prohibited practices.

It could further be evidenced that at the time of the drafting of the Competition Act⁸⁷, the formulation of mechanisms to deter and eradicate anti-competitive practices, so as to allow for open, efficient and competitive markets to be developed, was a far greater policy objective than the criminal prosecution of the individuals within the corporate bodies who actually committed the crimes. Thus the penal or deterrence measures envisaged by the drafters of the Competition Act⁸⁸ for contraventions of its substantive provisions, applied exclusively to firms or the corporate entity i.e. the juristic persons, and not to natural persons associated with those firms such as directors, who ultimately controlled the activities of the firm.

It is possible that the drafters of the Competition Act might have considered the legal implications of the distinction that exists between a company and its members. The notion is that a company is a separate legal entity, and as such its individual members may only be held liable for acts performed by the company in exceptional circumstances.⁸⁹

⁸³ Ibid.

⁸⁴ Kelly (note 31 above) 326.

⁸⁵ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

⁸⁶ Jordaan (note 46 above) 198.

⁸⁷ 89 of 1998.

⁸⁸ Ibid.

⁸⁹ Jordaan (note 46 above) 198.

It is against this backdrop that section 12 of the Competition Amendment Act inserts section 73A into the original Competition Act. The section provides for the imposition of personal criminal liability on company directors or persons employed by firms occupying positions of management authority for causing or permitting firms to engage in practices that are prohibited under section 4(1)(b) of the Competition Act. As mentioned above, it is important to note that this dissertation will focus solely on the criminal liability of company directors to the exclusion of other persons engaged by firms in positions of management authority.

2.5 The Introduction of Criminal Law Sanctions in Competition Law

The introduction and enforcement of criminal law sanctions in the context of competition law, an erstwhile civil arena, is undoubtedly controversial. Those against this introduction would argue that there is no justification for criminal law sanctions to be imposed on corporate cartels as large fines serve to deter future cartel activities, while those in favour argue otherwise. However the reality remains that there ‘exists a very real possibility that the threat of criminal prosecution will negatively impact upon the CLP that is so central to the detection of sophisticated cartels’.⁹⁰ Considering its constitutional implications, the challenges faced in criminalising competition law and more specifically cartel conduct, were inevitable from the outset of the Competition Amendment Act.

Whilst the Competition Amendment Act may seem like a bold step towards deterring anti-competitive practices that are prevalent in the South African economy, it remains a necessary tool in ensuring that companies found to have been involved in prohibited practices are not only heavily fined, but that their directors are also held accountable for their participation in such conduct. However, this has consequently led to an array of discussions amongst concerned directors who fear that their conduct may fall under section 73A, thus having a potentially alarming effect on corporate conduct that is actually benign.⁹¹ The law therefore needs to strike a balance between punishing cartel behaviour and protecting innocent directors who are exercising their reasonable commercial judgment, from unnecessary litigation and harassment. The arguments as to whether such sanctions are necessary in a competition law arena will be addressed below.

⁹⁰ Jordaan (note 46 above) 198.

⁹¹ Jordaan (note 46 above) 199.

2.5.1 *Are criminal sanctions necessary in Competition Law?*

Hypothetical perfect market systems are undermined by monopolies, thus without the existence of competitive restraints, monopolies would be free to price at a profit maximising point and consumers would be forced to tolerate this.⁹²

‘The central purpose of competition law is the protection and promotion of a competitive market economy. In competitive markets, firms prosper (and indeed survive) by surpassing their rivals in identifying and serving consumer needs, with the result that resources are put to their best use leading to the provision of an appropriate amount of goods or services (allocative efficiency) at the lowest cost (productive efficiency).’⁹³

In this regard, a cartel may be equated to a monopoly as it attempts to achieve the same degree of market power as a monopoly would through practical cooperation and participation between members. In respect of cartels, ‘through cooperation firms reduce uncertainty in the market, one of the key drivers of rivalry’⁹⁴ which undermines the entire notion of competition in the economy. Cartels have the same adverse economic effects as monopolies, i.e. higher prices, limited choices and little innovation.⁹⁵ Courts have historically been known to morally consider the position of those who are most vulnerable in the economy and those who are adversely affected or impacted by the consequences of the apprehension of a firm, namely its employees and shareholders. This arguably strengthens the moral imperative for deterrence and punishment.⁹⁶

Companies guilty of participating in cartel conduct are fined up to 10 percent of their annual turnover in terms of the present Competition Act. The legislature has created provisions which have the potential for substantial fines to be levied on offending companies. The question can then be raised as to why parliament has seen it fit to criminalise cartel conduct in competition law?⁹⁷

⁹² Jordaan (note 46 above) 199.

⁹³ Kelly (note 31 above) 328.

⁹⁴ Kelly (note 31 above) 328.

⁹⁵ Kelly (note 31 above) 328.

⁹⁶ Kelly (note 31 above) 329.

⁹⁷ Kelly (note 31 above) 329.

A possible answer to the above question could be that it becomes problematic to place an over reliance on fines to enforce regulatory offences involving companies. Section 59(4) of the Competition Act provides that monies collected as a result of levying of fines are paid to the National Treasury and forms part of the national budget. The fines levied go towards reducing the overall tax burden on the country.⁹⁸ In some instances the fines levied merely form part of the company's expenses or cost of trading and are likely to be recovered by the company through trade in the form of increased prices for goods or services.⁹⁹

Moreover, in instances where the profitability of the cartel proves to be highly beneficial to those involved that a simple cost-benefit analysis, which assesses likelihood of detection and punishment, potential legal fees and a possible fine of up to 10 percent annual turnover, may be insufficient to deter those in control of such a cartel.¹⁰⁰ In such instances, the benefits may outweigh the punishment.

Even though competition authorities have been given the discretion in law to vary the amount of the fine imposed on an offending company, situations may arise where a cartel member (in this instance member refers to the company as a whole) is fined and as a result, has to downscale or shut down altogether. There are several negative consequences in such a situation as employees of the offending company may be retrenched, shareholders may lose their investments or the company may choose to exit the market, thereby affecting the economy and potential tax revenues may be lost.

Competition laws are regulatory in nature and are therefore manifestations of state policy which 'indicate the willingness of the state to intervene in economic and social activities'.¹⁰¹ Directors are considered to be those individuals who have the potential to involve firms under their control in cartel activities. Directors involved in prohibited practices often carry out a cost-benefit analysis to work out whether the benefits of involving their firms in cartel activity outweigh the potential legal costs that they may incur if they are found to have contravened the law. It is likely that these directors would be hesitant to disclose the benefits

⁹⁸ Kelly (note 31 above) 329.

⁹⁹ Kelly (note 31 above) 329.

¹⁰⁰ Kelly (note 31 above) 330.

¹⁰¹ Rosochowicz 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law' 2004 *ECLR* 752 in Kelly, L 'Introduction of a 'Cartel Offence' into South African Law' (2010) 21(2) *Stellenbosch Law Review = Stellenbosch Regstydskrif* 321-333.

thereof when, after performing a cost-benefit analysis, the benefits outweigh the costs. Such costs may involve that director facing criminal prosecution and/or a substantial personal fine, along with the public scrutiny that often accompanies high-profile corporate scandals.¹⁰²

On the other hand, if competition authorities effectively enforce the legislation, the inclusion of criminal sanctions in a competition law arena will considerably raise the variable of cost in an overall cost-benefit analysis.¹⁰³ It therefore follows that in order for new sanctions to have real deterrence value, there would need to be successful prosecutions of individuals controlling cartels under the Competition Act. However, the challenge faced by parliament is to implement a thorough and nuanced framework for criminal sanctions within competition law which compliments and integrates with the existing mechanisms to combat cartels without infringing on the rights guaranteed by the Constitution.¹⁰⁴ Unfortunately, for corporations and their directors, the Competition Amendment Act and in particular its insertion of section 73A into the principal Act, falls short in this aspect, given the various concerns it gives rise to, as documented above.

It may also be appropriate to consider whether the imposition of criminal sanctions against directors is a justifiable way to hold directors personally accountable. In order to assess this, one would have to explore whether or not there exists a less restrictive means of achieving the same objective. A possible option might be the disqualification of a director from holding a managerial position or company directorship for a certain period of time.¹⁰⁵ The remedy for director disqualification is available under the Companies Act 71 of 2008 ('the Companies Act'). Section 162 of the Companies Act provides that certain types of conduct of directors may render a director to be declared delinquent. In terms of the Act, a director who has been declared delinquent is disqualified from holding the position of director.¹⁰⁶

Although the remedy of disqualification of delinquent directors may be regarded as a less intrusive and, to some extent a progressive means, its weakness in South African competition law is that it might be insufficient and ineffective in itself to adequately deal with the

¹⁰² Kelly (note 31 above) 328.

¹⁰³ Kelly (note 31 above) 328.

¹⁰⁴ Kelly (note 31 above) 328.

¹⁰⁵ Jordaan (note 46 above) 198.

¹⁰⁶ Section 69(8) (a) of the Companies Act 71 of 2008.

prevalent scourge of cartels, especially in key sectors of the economy.¹⁰⁷ The vast majority of South Africans, against whom cartel conduct strikes at the very core of their livelihood, are very poor. Wealthy nations such as Britain, which boasts a significant number of high net-worth individuals and families compared to South Africa, have opted to use the remedy of director disqualification in tandem with criminal sanctions. Given the social and economic implications of cartels in South Africa, it is submitted that the introduction of criminal sanctions is highly suitable.¹⁰⁸

2.5.2 Arguments in favour of the introduction of Criminal Law sanctions in Competition Law

The decisions taken by directors to act in breach of competition laws are often based on a cost-benefit analysis.¹⁰⁹ In some instances the scandalous monetary incentives directors receive play an important role in swaying their decision of whether or not their firms should abide by competition laws. Directors may engage in cartel conduct whilst striving to maximise profit objectives, given the attractive incentives that are offered to them, including ‘personal monetary gain, status, expensive business trips, lush company cars and dinners as well as discretionary powers over decision making for which the company incurs the unnecessary costs’.¹¹⁰ In these instances, corporate penalties, such as administrative fines, do not constitute an appropriate sanction capable of deterring potential offenders. The reason for this is that it is the individuals within the corporation who make the decision to engage in cartel conduct and hence actually commit the corporate crime.¹¹¹

In order to prevent a situation where company liability acts as a shield behind which directors can hide and collude to their personal advantage or own benefit, the corporate veil needs to be lifted. Direct intervention from the authorities against the individuals responsible is needed, in the form of individual fines, disqualification orders or jail sentences, as these sanctions provide a more effective tool towards deterring anti-competitive practices prevalent in the

¹⁰⁷ Jordaan (note 46 above) 198.

¹⁰⁸ Jordaan (note 46 above) 199.

¹⁰⁹ Kelly (note 31 above) 328.

¹¹⁰ Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹¹¹ *Ibid.*

South African economy.¹¹² By targeting the actual decision maker (whether that be the director or any other individual) within the firm and not the firm as a whole, competition authorities will avoid ineffective corporate governance mechanisms of compliance and indirect punishment.¹¹³ This process would help draw out the individual offenders out of the economy by identifying and naming them.¹¹⁴ Such actions would serve as precautionary measures to avoid future violations of competition law by warning potential employers of such offenders, whilst also creating an effective means of punishment to deter such anti-competitive conduct.

This process is commonly known as the common law remedy of 'piercing the corporate veil'.¹¹⁵ The remedy allows an aggrieved party to obtain an order declaring that the rights, liabilities or activities of a company ought to be treated as those of the relevant shareholder or director in his personal capacity.¹¹⁶ It is usually applied in circumstances where there has been some impropriety linked to an abuse of the company's legal personality. According to Davis the court will pierce the corporate veil where a company is used as a device to cover up or disguise fraudulent or illegal conduct; where a director and / or shareholder treats the company's assets as his or her own; or when a statute empowers the court to ignore corporate legal personality.¹¹⁷ The Western Cape High Court in the decision of *Ex parte Gore NNO*¹¹⁸ dealt with the interpretation of section 20(9) of the Companies Act which specifically permits piercing of the corporate veil in certain circumstances. The court held that the remedy is available 'whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced'.¹¹⁹ It was further decided that the remedy could be used in a variety of circumstances as a remedy of first instance, and not as a last resort in circumstances where justice will not otherwise be done.¹²⁰

However the Competition Amendment Act, with particular reference to section 73A, creates a very real possibility that the threat of criminal prosecution will negatively impact and weaken

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Davis, D. ...et al. *Companies and other Business Structures* Cape Town: Oxford University Press Southern Africa, (2009) 21.

¹¹⁶ Ibid at page 22.

¹¹⁷ Ibid at page 22.

¹¹⁸ [2013] 2 All SA 437 (WCC).

¹¹⁹ Ibid.

¹²⁰ Ibid.

the effectiveness of the CLP and a firm's incentive to enter into consent orders, which are two important mechanisms central to the detection of sophisticated cartels.¹²¹

Various scholars have argued that for the efficient enforcement of cartel law, the use of criminal sanctions is necessary. These arguments are motivated by the fact that cartel operations involve price-fixing, market allocation and/or bid rigging, all of which have harmful effects on consumers and the competitive processes that are necessary for economic growth. It is said that cartel conduct may be likened to a 'sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer'.¹²²

Moreover, if competition authorities could create a clear and targeted form of intervention which separates the directors responsible from owners and employees with no involvement in the anti-competitive acts, individual sanctions could be proficiently paired with the CLP and other compliance programmes. Criminal prosecution of individuals personally responsible would bring violations of competition law to the public conscience as a serious form of white collar crime. Furthermore, raising awareness of the fact that anti-competitive behaviour negatively affects the economy and society at large is likely to reduce violations generally.

The consequences of cartel conduct have been well documented in chapter 2. It is submitted further that with regard to the far reaching effects of cartel conduct, cartel activity results in a sufficient degree of harm to the economy to be considered for criminalisation. While there has been unanimity by competition authorities and anti-trust scholars surrounding the damaging consequences of cartel conduct, there has historically been a significant divergence in the remedies actually imposed in competition law until the introduction of section 73A.¹²³

The primary justification given for the criminalisation of cartel conduct is that 'fear of criminal sanctions and jail in particular will deter potential offenders'.¹²⁴ The deterrence

¹²¹ Kelly (note 31 above) 329.

¹²² Whelan P 'A principled argument for personal criminal sanctions as punishment under EC cartel law' *Competition Law Review* 28 in Letsike, T 'The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?' (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹²³ Ibid.

¹²⁴ Beaton Wells C and Parker C 'Justifying criminal sanctions for cartel conduct: a hard case' *Journal of Antitrust Enforcement* 204 in Letsike, T 'The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?' (2013) available at

theory supports the reasoning that ‘punishment can only be justified if it leads to the prevention or reduction of future crimes.’¹²⁵ In some cases cartel members apply a ‘cost-benefit’¹²⁶ analysis in order to calculate the guarantee of increased financial profitability from anti-competitive conduct against the possibility of being detected and prosecuted by competition authorities, taking into account the nature and extent of the sanction that will be imposed if their operation is uncovered.¹²⁷ In this way, cartel members are able to determine whether the benefits of collusion outweigh the risks of exposure, in deciding whether or not to engage in cartel activity. This highlights the need for parliament to create a clear and comprehensive framework capable of deterring cartel behaviour by ensuring that ‘sanctions are swift, sure and substantial’.¹²⁸

2.5.3 Arguments against the introduction of Criminal Law sanctions in Competition Law

The imposition of civil and criminal sanctions on individuals for cartel conduct, in addition to the administrative penalties levied against their companies, provides greater deterrence from such conduct. It can be said that this addition will further discourage and dissuade directors from engaging in cartel activity in the first place, thereby reducing the instances of cartels in the South African economy generally. However the possible negative effect that such sanctions will have on directors’ willingness to serve on boards cannot be ignored. It is important to note that although such sanctions are welcomed it does not guarantee results. In large countries such as the United States, where criminal sanctions have been in place for a number of years, cartels still exist, thus whether such criminal sanctions would have a deterring effect in South Africa is yet to be determined.

<http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Paralle-1-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹²⁵ Whelan P ‘A principled argument for personal criminal sanctions as punishment under EC cartel law’ *Competition Law Review* 28 in Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Paralle-1-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

‘There is not much empirical evidence that criminalisation actually reduces the instances of cartels. The criminalisation of cartel conduct will likely act as a greater punishment for offenders, but may not necessarily reduce the instances of cartels.’¹²⁹

2.5.4 *What will be the impact of criminal sanctions?*

It is impossible to ignore the glaring concerns that arise from the introduction of criminal sanctions in competition law, as it may adversely affect the Competition Commission’s success with regards to concluding consent orders and persuading leniency applicants to sign the CLP.¹³⁰ It seems blatantly obvious that directors will be reluctant to ‘conclude consent orders on behalf of their firms’,¹³¹ in light of the extent of their involvement in cartel conduct. This is due to that an admission by a firm that it participated in cartel conduct may be used as the *prima facie* basis for securing a criminal conviction against that director in subsequent proceedings.¹³² In view of the fact that it is often the directors of a firm who exercise the most influence in the decision of the firm to apply for corporate leniency, their incentive to do so may be considerably reduced by the risk of criminal sanctions, including imprisonment.¹³³ Regard must be had to whether it is necessary to uphold the corporate law principle of separate legal personality in deciding whether or not it is just to impose such sanctions. The fifteen construction firms that recently reached settlements with competition authorities for collusive tendering may be called firms or companies, but one should be conscious of the truth that firms or companies consist of natural persons in charge of its decision making processes. It logically follows that a firm or company cannot actually collude; only its directors can on its behalf.¹³⁴ This point should be taken into consideration when deciding whether such sanctions are appropriate given the legal nature of companies. This aspect will be addressed further in chapter 4.

¹²⁹ Criminalisation to deter cartel conduct (2014) available at <http://www.polity.org.za/article/criminalisation-to-deter-cartel-conduct-2014-03-07>, accessed on 21 October 2014.

¹³⁰ Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Pillay, O ‘Limiting collateral damage’ (2009) *Without Prejudice* 45.

¹³⁴ *Ibid.*

The CLP has an impressive track record and it has proven to be a formidable tool in detecting cartels as well as an effective mechanism in facilitating the dismantling of cartels by encouraging cartel members to disclose information on any cartel activity. A good example of this is evident in the construction and infrastructure sector, where much effort was employed by the Competition Commission to eradicate cartels, largely based on information received through CLP applications.¹³⁵ The introduction of criminal liability will add a new dimension to competition law enforcement, namely the jurisdiction of the NPA and criminal courts in the enforcement of criminal sanctions against individuals. This will definitely require a *modus operandi* to be developed with all relevant authorities for the effective implementation of both cartel enforcement under the Amendment Act and the criminal prosecution of individuals.¹³⁶

Criminal liability provisions will place a substantial burden on South Africa's already encumbered criminal justice system, seeing as the enforcement of such provisions will remain under the jurisdiction of the NPA and the criminal courts. One should be cognizant of the fact that an unwanted consequence of the introduction of criminal penalties is that such sanctions are 'likely to undermine three of the key pillars of competition law enforcement in South Africa'.¹³⁷ Firstly, the Competition Commission presently places a heavy reliance on the procedures set out in section 49A of the Competition Act, which gives the Competition Commission the power to summon any person believed to have information relating to cartel activity to an interrogation. In terms of which that person is obliged to answer questions put to him or her at an enquiry held by the Competition Commission under this section, unless their answer is self-incriminating. It is clear that if criminal liability were to be introduced, almost every question a person answered could potentially be self-incriminating and directors would, in most cases, exercise their right not to answer. This practice would significantly limit the extent of information provided to the Competition Commission in such enquiries. Secondly, it should be noted that to date the Competition Commission has been able to settle almost all complaints relating to collusion through the conclusion of consent orders in terms of section 49D of the Competition Act.¹³⁸ This section makes it possible for the Competition Commission to process cases expeditiously, accordingly punish offending firms and publicise

¹³⁵ Letsike, T 'The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?' (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Paralle-1-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

its enforcement effort. This process was designed to make action simpler, more efficient and flexible in order to reduce the cost, length and delays associated with running a full hearing before the Competition Tribunal.¹³⁹ However, directors who fear the imposition of personal criminal sanctions are highly unlikely to agree to enter into consent orders on behalf of their firms if this could later facilitate prosecution against them. Lastly, attention should be given to the fact that the Competition Commission has been able to uncover a number of cartels, such as the cartels in the bread and milk industries, after receiving applications for leniency from cartel members in terms of the CLP. Regard must be given to the fact that directors are less likely to come forward if their own liberties are at stake.¹⁴⁰

It is against this background that one should consider the relationship between competition law and criminal law in order to ascertain whether such sanctions are necessary considering the impact they will have on the economy generally and directors and their firms in particular.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

3. THE RELATIONSHIP BETWEEN COMPETITION LAW AND CRIMINAL LAW

3.1 Overview

The Competition Act is an economic statute and as such it is administered and enforced by an administrative agency, the Competition Commission.¹⁴¹ The Competition Commission has an entirely different role from that of the National Prosecuting Authority (the ‘NPA’), whose function it is to prosecute general offences or crimes in terms of its own prosecutorial policy and enabling legislation such as the Criminal Procedure Act. Section 12 of the Competition Amendment Act introduces one of the most contentiously debated amendments to the existing competition law regime in South Africa. The Competition Amendment Act introduces an extremely controversial provision, namely section 73A, into the original Competition Act which makes provision for the imposition of individual personal criminal liability for cartel offences. This provision has raised various concerns that might blur the constitutional rights of such individuals concerned as well as the relationship between the NPA and the Competition Commission which will be discussed and dealt with later in this chapter.

3.2 The Competition Amendment Act

The purpose of the Competition Amendment Act was to amend the original Competition Act:

‘so as to provide certainty with regard to the concurrent jurisdiction between the Competition Commission and other regulatory authorities; to introduce provisions to address other practices that tend to prevent or distort competition in the market for any particular goods or services; to provide more guidance in relation to conducting market enquiries as a tool to identify, and make recommendations with respect to, conditions that tend to prevent, distort or restrict competition in the market for any particular goods or services; to introduce provisions to hold personally accountable those individuals who cause firms to engage in cartel conduct; and to authorise the Competition Commission to excuse a respondent to a complaint if the respondent has assisted the competition authorities in the detection and investigation of cartel conduct; and to provide for matters connected therewith.’¹⁴²

¹⁴¹ Jordaan (note 46 above) 198.

¹⁴² Preamble of the Competition Amendment Act 1 of 2009.

The Competition Amendment Act has raised serious questions and has given rise to debates concerning an accused director's rights. It has blurred the lines between the separate legal personalities of the company and its directors by introducing criminal sanctions to promote compliance with the substantive provisions of the Competition Act. It has created further confusion regarding the legal relationship between prosecutions under the Competition Act and those under the Criminal Procedure Act, 51 of 1977.¹⁴³

3.2.1 *The Corporate Leniency Policy*

When the Competition Act was drafted, the Corporate Leniency Policy ('the CLP'), which is a policy which grants immunity to a firm from prosecution in exchange for the voluntary submission of evidence (as opposed to being summoned to provide evidence) of cartel conduct, was not contemplated. Cartel conduct is criminal in nature and the parallel enforcement methods envisaged in terms of the Competition Act and the Competition Amendment Act have had the effect of 'muddying' the proverbial 'competition waters' in terms of jurisdiction and policy.¹⁴⁴ The question as to whether individuals who voluntarily submit information to the Competition Commission in terms of the CLP are exposed to criminal prosecution or whether individuals who are subpoenaed by the Competition Commission to provide evidence, on the strength of the evidence provided by a whistleblower in terms of the CLP, are immune from criminal prosecution on the basis of section 49A(3) of the Competition Act will be addressed below. It is evident that the effect of this provision has potentially harsh and seemingly unjust consequences.

The Competition Commission issued the original CLP in 2005 to discourage and prevent cartel conduct and encourage its disclosure. It set out the procedure adopted and the requirements that to be fulfilled for the granting of immunity.¹⁴⁵ The CLP encouraged firms engaged in cartel activity to come forward and provide information or expose evidence relating to the existence of cartel activity in order to assist Competition Authorities to uncover anti-competitive cartel conduct. In exchange, the Competition Commission would grant the

¹⁴³ Jordaan (note 46 above) 198.

¹⁴⁴ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcor.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁴⁵ Pillay (note 133 above) 45.

first whistle-blower leniency and therefore immunity from prosecution provided the policy requirements were met.¹⁴⁶ Immunity meant that if a firm were successful in its application for leniency, that firm would escape prosecution, adjudication and administrative penalties. However the 2005 CLP did not have the impact the Competition Commission had expected it to have and raised some policy concerns. Provisions of the policy were therefore amended by way of the Competition Amendment Act which introduced section 8 and section 73A.

The revised CLP alleviated these concerns as it sought to refine the CLP's existing framework.¹⁴⁷ Section 8 of the Competition Amendment Act codifies the CLP and the existing practice of granting corporate leniency to whistle blowers and other persons who provide the Competition Commission with information regarding cartel activity.¹⁴⁸ The section provides that:

‘At any time after receiving or initiating a complaint, the Competition Commission may certify, in the prescribed manner and form, and with or without conditions that any particular respondent, or any particular person contemplated in section 73A, is deserving of leniency in the circumstances.’¹⁴⁹

The ambit of the revised CLP is wider than its forerunner and offers greater certainty in respect of a number of issues, for example it does not draw a distinction between firms that instigated or coerced cartel activity and other members of the cartel.¹⁵⁰

It is important to note that this revised CLP does not afford individuals immunity from criminal prosecution. Consequently personal liability and criminal sanctions may have the effect of deterring potential whistle-blowers from coming forward.¹⁵¹ The probabilities of such sanctions reducing the incentives for directors to apply for corporate leniency on behalf of their firms are high, given the potential personal risk they may face for their own involvement in cartel conduct. This conflict seems to defeat the purpose of the CLP in such

¹⁴⁶ Mendelsohn, L; Chetty, D ‘Whistle-blowers and corporate leniency’ (2008) 8(8) *Without Prejudice* 12-13.

¹⁴⁷ Mendelsohn (note 146 above) 12.

¹⁴⁸ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcor.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁴⁹ Section 8 of the Competition Amendment Act 1 of 2009.

¹⁵⁰ Pillay (note 133 above) 45.

¹⁵¹ Mendelsohn (note 146 above) 12.

instances where a real threat of criminal prosecution arises from voluntary statements made to the competition authorities. It seems that individuals faced with this conflict would have to choose whether or not to protect themselves from self-incrimination or face potentially criminal exposure when voluntarily making statements to the Competition Commission regarding their involvement in cartel activities.

The new aspect of the codification of the CLP relates to section 73A which provides that the Competition Commission may make submissions to the NPA in support of leniency for any person prosecuted in respect thereof but may never fetter the discretion of the NPA.¹⁵² The Competition Commission has the discretion to request the NPA to institute criminal proceedings against a director.¹⁵³ Though the Commission may choose not to request the prosecution of any director who has cooperated with the Competition Commission in terms of the CLP, there is nothing that prevents a third party from doing so.¹⁵⁴ The Competition Commission cannot compel the NPA to grant an individual leniency thus a whistle-blowing individual may very well be exposed to criminal liability as a result of their disclosure made to the Competition Commission.¹⁵⁵

The presumably neat solution was to therefore incorporate the CLP into the Competition Act and extend the ambit of its protection to those whistle-blowing individuals who were involved in cartel conduct. However as the Competition Commission cannot compel the NPA to grant an individual leniency, this solution does not appear to sufficiently address the concern for whistle-blowers exposing themselves to criminal liability.¹⁵⁶ It is therefore apparent that directors of the applicant firm are exposed to personal criminal liability as the CLP does not protect them from such liability resulting from their involvement in cartel activity.

At first glance, it appears that the intention of the drafters of the Competition Amendment Act was to attend to the public's call for harsher penalties and a greater deterrent than the levying

¹⁵² Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁵³ Ibid.

¹⁵⁴ Pillay (note 133 above) 45.

¹⁵⁵ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁵⁶ Ibid.

of administrative penalties against firms engaged in cartel conduct, in an effort to target those individuals actually involved.¹⁵⁷ Section 73A therefore ensures that the individuals responsible for cartel conduct face criminal liability and are accordingly found guilty of an offence where they have caused, or knowingly acquiesced to, the firm having engaged in a prohibited practice.

The CLP has proven to be an effective tool in not only the campaign to rid the economy of cartel activity but in providing firms with an incentive to step forward, expose cartel conduct and seek leniency.¹⁵⁸

3.3 The Provisions of Section 73A

The NPA derives its mandate from section 179 of the Constitution which expressly empowers the prosecuting authority to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.¹⁵⁹ In order for the NPA to secure a conviction against an individual who commits an offence under section 73A, the NPA must prove the following elements: firstly that the person was a ‘director of a firm’¹⁶⁰ or was ‘engaged or purporting to be engaged by a firm in a position having management authority within the firm’¹⁶¹; and secondly that such person caused the ‘firm to engage in a prohibited practice or knowingly acquiesced in the firm being involved in such a prohibited practice.’¹⁶²

It is important to bear in mind that the offence created under section 73A imposes personal criminal liability to a specified category of persons involved in cartel conduct and is restricted to this specific class of persons. In order for one to be found guilty of this offence, one must either be a director or a person engaged by a firm in a position having management authority. The latter is not defined in the Competition Amendment Act¹⁶³ but it can be assumed that

¹⁵⁷ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁵⁸ Ibid.

¹⁵⁹ Section 179 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution)

¹⁶⁰ Section 73A(1)(a) of the Competition Amendment Act 1 of 2009.

¹⁶¹ Section 73A(1)(a) of the Competition Amendment Act 1 of 2009.

¹⁶² Section 73A(1)(b) of the Competition Amendment Act 1 of 2009.

¹⁶³ 1 of 2009.

such a position closely resembles that of a director.¹⁶⁴ However this dissertation will solely focus on the position of the director and not the position of persons engaged by a firm in a position having management authority.

According to the case of *S v Daniëls*¹⁶⁵ the word ‘caused’ indicates that the conduct of that person must have been the causal link in the firm engaging in a prohibited practice or anti-competitive activity. The NPA bears the onus of proving that the conduct of the director is also the legal cause of the firm engaging in that prohibited practice. This requires an inquiry into whether there was a sufficiently close connection between the conduct of the accused director and the prohibited practice that the firm was engaged in.

The words ‘knowingly acquiesced in the firm engaging in a prohibited practice’ specifies that the NPA has to prove that the director/s knew about the firm engaging in a prohibited practice but nevertheless allowed the prohibited practice to take place and failed to take the necessary steps to prevent it from happening (or intervene or put a stop to it) once he or she first became aware of it.¹⁶⁶ The criminal liability imposed on such a director is based on an omission, a failure of that director’s duty to act in such a situation. It can then be said that where there is an omission there is a breach of the directors’ fiduciary duties to act positively and in the best interests of the firm and its shareholders.¹⁶⁷ In order for a director to be convicted of an offence under section 73A, he or she must have ‘actual knowledge of the relevant conduct of the firm’.¹⁶⁸

Section 73A does not therefore create strict liability as there is no burden on the accused director to prove due diligence.¹⁶⁹ The consequences of committing an offence under this section will result in an accused director, upon conviction, being sentenced to a fine not exceeding R500 000, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.¹⁷⁰

¹⁶⁴ Jordaan (note 46 above) 198.

¹⁶⁵ 1983 (3) SA 275 (A) at 324 and 330.

¹⁶⁶ Jordaan (note 46 above) 198.

¹⁶⁷ Jordaan (note 46 above) 198.

¹⁶⁸ Section 73A(2) of the Competition Amendment Act 1 of 2009.

¹⁶⁹ See *S v Coetzee* 1997 (1) SACR 379 (CC).

¹⁷⁰ Section 13 of the Competition Amendment Act 1 of 2009 and section 74 of the Competition Act 89 of 1998.

3.3.1 *Coordination issues arising from the introduction of Section 73A*

3.3.1.1 *The possible overlap between the functions of the NPA and the functions of the Competition Commission*

In order to proceed with prosecution against a director under section 73A, subsection (3) requires ‘either that the firm must have acknowledged an infringement of section 4(1)(b) of the Act in a consent order, or that the Competition Tribunal or the Competition Appeal Court’¹⁷¹ (‘the CAC’) must have made finding relating to the infringement of section 4(1)(b).¹⁷² Therefore an administrative case under the Competition Act must be established before criminal prosecution under section 73A can successfully follow.¹⁷³ The NPA has been given exclusive criminal jurisdiction over the enforcement of section 73A.¹⁷⁴ Concern arises as the NPA is a separate authority from the Competition Commission which has no expertise in the handling of competition law infringements and yet the NPA has exclusive jurisdiction over cartel enforcement. This raises concerns of expertise, coordination of cartel cases and the critical issue of state resources.

As a consequence, the introduction of criminal law sanctions into competition law and the involvement of the NPA in a competition law arena have led to a possible overlap in the functions of the NPA and the Competition Commission. The Competition Commission’s prerogative is to ‘investigate and prosecute substantive issues’¹⁷⁵ of competition law; however the authority to conduct a criminal prosecution of a director under section 73A of the Competition Act vests in the NPA.¹⁷⁶ The Competition Commission is therefore an investigative body as its mandate is to investigate issues of anti-competitive behaviour, refer prohibited practice complaints to the Competition Tribunal and negotiate settlements based on admissions of prohibited practices.¹⁷⁷ The Competition Tribunal is the ‘adjudicative body of first instance; it makes determinations of complaint referrals’¹⁷⁸ from the Competition

¹⁷¹ Kelly (note 31 above) 322.

¹⁷² Kelly (note 31 above) 322.

¹⁷³ Kelly (note 31 above) 327.

¹⁷⁴ Kelly (note 31 above) 327.

¹⁷⁵ Kelly (note 31 above) 328.

¹⁷⁶ Kelly (note 31 above) 328.

¹⁷⁷ Kelly (note 31 above) 328.

¹⁷⁸ Kelly (note 31 above) 328.

Commission and also ‘hears appeals and applications for review’¹⁷⁹ of certain Competition Commission decisions.¹⁸⁰

The NPA has exclusive jurisdiction over the enforcement of section 73A in terms of the Constitution and the National Prosecuting Authority Act 32 of 1998 (‘the NPA Act’) which provides for a single national prosecuting authority.¹⁸¹ Therefore, unless the relevant provisions in the Constitution, the Competition Act and the NPA Act are amended, the Competition Commission does not have legal authority to assume responsibility for the prosecution of a director who has ‘caused the firm to engage (or knowingly acquiesced in the firm engaging) in a prohibited practice.’¹⁸²

It is important to note that although the NPA has exclusive jurisdiction and authority to conduct criminal prosecutions in terms of section 73A, it is only after the Competition Commission have made a substantive determination that a contravention of the Competition Act has occurred, that the NPA acquires the legal authority to prosecute a director.¹⁸³ According to section 73A, it is primarily the duty of the Competition Commission to determine whether or not the criminal prosecution of a director is appropriate in the circumstances.¹⁸⁴

Thus both the Competition Commission and the NPA play crucial roles in the criminal prosecutions instituted in terms of section 73A. The efficient enforcement and administration of this provision will require a certain degree of cooperation between the Competition Commission and the NPA, however there is little guidance given as to the level of practical cooperation that should exist between these two agencies.¹⁸⁵

It is highly unsatisfactory that the South African parliament did not make use of a framework which either included more detail regarding the degree to which the NPA and the Competition Commission are to cooperate with one another and coordinate case management

¹⁷⁹ Kelly (note 31 above) 322.

¹⁸⁰ Kelly (note 31 above) 322.

¹⁸¹ Section 179(1) and (2) of the Constitution of the Republic of South Africa, 1996 (1996 Constitution) and sections 2 and 20(1) of the NPA Act.

¹⁸² Jordaan (note 46 above) 198.

¹⁸³ Jordaan (note 46 above) 198.

¹⁸⁴ Section 73A(4) of the Competition Amendment Act 1 of 2009.

¹⁸⁵ Kelly (note 31 above) 332.

or alternatively a framework which afforded the Competition Commission greater investigative and prosecutorial powers in terms of section 73A. Uncertainty arises where the Competition Commission or Competition Tribunal reveals evidence which is capable of establishing the requisite causation or knowing acquiescence of a director. Given the severity of the crime and the possibility of criminal prosecution if found guilty, directors have become reluctant to cooperate with the Competition Commission and guarded in administrative hearings before the Competition Tribunal for fear that they may incriminate themselves and provide evidence that the NPA could later use to prosecute them.¹⁸⁶

The second coordination issue relates to the CLP. The purpose of the policy is to afford the Competition Commission the ‘authority to grant immunity from prosecution to companies’¹⁸⁷ who are the first to disclose their participation in a cartel and assist the Competition Authorities in the prosecution of the cartel members. The intention behind the formulation of this policy was to create a mechanism to serve as a means to aid detection and investigation of cartels. However the final discretion to grant leniency in terms of criminal charges vests in the NPA under section 73A and not the Competition Commission.

In terms of section 73A(4)(a), the Competition Commission may not seek nor request the prosecution of a person for an offence if the Competition Commission has certified that the person is deserving of leniency. However in terms of section 73A(4)(b), the Competition Commission may make submissions to the NPA in support of leniency for any person prosecuted for an offence, if the Competition Commission has certified that, that person is deserving of leniency in the circumstances. It is evident, upon reading both subsections, that the authority to grant leniency from criminal prosecution does not lie with the Competition Commission but ultimately with the NPA.

The Competition Commission is a single body tasked with the mandate of implementing the CLP but is ultimately subject to the NPA in respect of the decision to prosecute in terms of section 73A. Thus directors would be inclined to carefully consider any thoughts of approaching the Competition Commission for leniency as there is no guarantee that personal liberty would not be at risk. It seems as though the drafters of section 73A have inadvertently

¹⁸⁶ Kelly (note 31 above) 332.

¹⁸⁷ Kelly (note 31 above) 332.

discounted the incentive that drives the CLP.¹⁸⁸ In this regard, it would seem necessary for the Competition Commission and the NPA to provide guidance on their coordination in order to preserve the efficacy of the CLP.¹⁸⁹

3.3.2 *Constitutional issues arising from the introduction of Section 73A*

The Competition Amendment Act introduces personal criminal liability for specified classes of individuals involved in cartel conduct, but it does not contemplate the effect that this has on section 49A(3) of the Competition Act. Section 49A of the Competition Act deals with summons and provides that:

‘(3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.’¹⁹⁰

On the basis of the abovementioned provision, any person who is summonsed to provide evidence to the Competition Commission and discloses self-incriminating information or makes self-incriminating statements regarding his or her conduct during the course of an investigation, is afforded protection from criminal prosecution or enforcement arising from the statement in question, as it is entirely inadmissible in any criminal proceedings as a consequence of the above provision.¹⁹¹ This section gives effect to the fundamental constitutional right not to be compelled to give self-incriminating evidence but does not compromise the ability of the Competition Commission to gather evidence against a firm engaged in cartel conduct in terms of the Competition Act.

¹⁸⁸ Kelly (note 31 above) 332.

¹⁸⁹ Kelly (note 31 above) 333.

¹⁹⁰ Section 49A(3) of the Competition Act 89 of 1998.

¹⁹¹ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

It seems that the only inescapable conclusion is that these two sections are at odds with one another as section 49A(3) advances the constitutional right of an individual against self-incrimination¹⁹² whilst section 73A does not. This consequently gives rise to grave constitutional concerns. It is clear that the Competition Act cannot be amended in a ‘piecemeal’ fashion.¹⁹³ In light of the underlying goals of the Competition Act and the very specific manner in which it is drafted (namely on a quasi-civil basis where the onus of proof is on a balance of probabilities), the incorporation of the section 73A amendment is at odds with the rest of the Competition Act.

It is argued that in order to introduce into the Competition Act such a fundamentally divergent purpose, namely that of prosecuting individuals, requires a comprehensive overhaul of the Competition Act in order to ensure adherence to fundamental constitutional rights.¹⁹⁴

It is also important to note that section 73A creates a presumption in the formulation of this offence which has an effect on the burden of proof. Section 73A provides that in any court proceedings against a person being prosecuted for an offence, an acknowledgment in a consent order by the firm, or a finding by the Competition Tribunal or the CAC that the firm has engaged in a prohibited practice, will automatically constitute prima facie proof of the fact that the firm did engage in that conduct.

From this, it is clear that the provision creates a presumption requiring proof of a ‘basic fact’.¹⁹⁵ The basic fact that needs to be proven by the State is that an acknowledgment in a consent order by the firm, or a finding by the Competition Tribunal or the CAC that the firm has engaged in a prohibited practice, constitutes prima facie proof of the fact that the firm engaged in that conduct. Once this basic fact has been proven, the presumption is triggered in the criminal proceedings against the director of the firm.¹⁹⁶

¹⁹² Section 35 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution).

¹⁹³ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁹⁴ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

¹⁹⁵ Jordaan (note 46 above) 198.

¹⁹⁶ Jordaan (note 46 above) 198.

The above issues raise questions as to whether the offence created under section 73A has the potential to infringe an accused director's constitutional rights, namely those rights guaranteed to an accused person in terms of section 35(3) of the Constitution and in particular those rights mentioned in section 35(3)(h).¹⁹⁷ Section 35 of the Constitution pertains to the rights of 'arrested, detained and accused persons' and subsection (3)(h) provides that:

- '3) Every accused person has a right to a fair trial, which includes the right:
h) to be presumed innocent, to remain silent, and not to testify during the proceedings'

One of the reasons why the Competition Amendment Bill took so long before it was signed into law was that a number of constitutional questions were raised regarding its validity. These aspects will be dealt with separately in the paragraphs that follow.

3.3.2.1 An Accused Director's Right to be Presumed Innocent

As a rule, the State is expected to bear the full burden of proving the elements of an offence and is prohibited from compelling the assistance of an accused person.¹⁹⁸ This forms the general principle that underlies the self-incrimination rights of the accused in terms of which the presumption of innocence requires the final burden of persuasion to be on the State. A failure by parliament to observe the constitutional rights of an accused guaranteed in terms of section 35(3)(h) creates a reverse onus which is generally considered to be constitutionally unsound.¹⁹⁹ This is because if a reverse burden of proof is created, as indicated inter alia by the words 'shall be presumed unless the contrary is proved', a person may be convicted even if a reasonable doubt exists as to his or her guilt. This means that if the accused cannot disprove a presumed fact, he or she may be convicted of the crime despite the existence of a reasonable doubt as to his or her guilt. In criminal proceedings, a reverse onus refers to the shift in the burden of proof. Thus both the right to silence and the right to be presumed innocent under section 35(3)(h), have the potential to be infringed upon where a fact is presumed to have been proven unless the accused can disprove that fact.²⁰⁰

¹⁹⁷ Jordaan (note 46 above) 198.

¹⁹⁸ Letsike, T 'The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?' (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

According to Letsike²⁰¹, a two-stage test may be applied in order to determine whether a reverse onus is constitutional:

‘First, does the provision violate the presumption of innocence and the requirement that the accused's guilt be proved beyond reasonable doubt? This is so if the provision creates the risk of conviction of the accused despite the existence of a reasonable doubt about his guilt.

Secondly, is it a justifiable limitation in terms of section 36(1) of the Constitution? The principal considerations are the purpose of the reverse onus provision and the risk it creates of the conviction of an accused despite the existence of a reasonable doubt.’²⁰²

In terms of Section 73A, the content of subsection (5) has previously caused great unease and it seems despite that unease, the subsection has been included, unchanged in the Competition Amendment Act. The subsection establishes a potentially problematic presumption that will be discussed below. Section 73A(5) of the Competition Amendment Act provides that:

‘In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b), is *prima facie* proof of the fact that the *firm* engaged in that conduct.’²⁰³

This above section establishes a presumption that a firm has engaged in cartel conduct if it has acknowledged this in a consent order or has been found to have done so by the Competition Tribunal or Competition Appeal Court.²⁰⁴ This presumption thereby creates a reverse onus. A possible reason as to why parliament chose to include this presumption is to alleviate the burden on the NPA of having to re-establish an infringement of section 4(1)(b) of the Competition Act²⁰⁵ when prosecuting an individual under section 73A. It therefore limits the possible defences that could be raised by the individual director facing

²⁰¹ Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

²⁰² Ibid.

²⁰³ Section 73A(5) of the Competition Amendment Act 1 of 2009.

²⁰⁴ Kelly (note 31 above) 332.

²⁰⁵ Kelly (note 31 above) 332.

prosecution.²⁰⁶ However, section 73A has the effect of requiring the competition authorities to establish cartel participation on the part of the firm before the NPA has to establish the involvement of those in control of the firm. In order to assist the NPA, section 73A(5) creates a presumption that the firm did engage in this conduct. It therefore follows that the individual facing prosecution cannot argue that section 4(1)(b) has not been infringed. In light of this, it could therefore be argued that section 73A(5) does not create a reverse onus but operates so as to eliminate potential defences. It is important to note that section 73A(5) does not require the accused to discharge this presumption in order to avoid guilt as the onus is still on the NPA to prove causation, or knowing acquiescence, beyond a reasonable doubt. It is therefore unlikely that a constitutional challenge to this section would succeed.

In *S v Zuma*,²⁰⁷ the Court held that a presumption of innocence required the State to bear the burden of proving the guilt of the accused person beyond a reasonable doubt. Therefore the guarantee would be infringed if there was a possibility that a person may be convicted despite the existence of reasonable doubt. The question as to whether such a possibility exists relates to the question of whether such a presumption creates a reverse burden of proof or an evidentiary burden.

In *Scagell v AG Western Cape*,²⁰⁸ the Court held that where only an evidential burden was created by the parliament, as indicated by the words '*prima facie evidence*', the presumption of innocence is not infringed because the accused only needed to give evidence which creates a reasonable doubt as to the presumed fact. Thus the evidential device that is created is not in itself suggestive of any criminal behaviour. In such instances there is no burden on an accused person to disprove any element of an offence on a balance of probabilities.²⁰⁹

If one were to only focus on the language contained in section 73A(5) of the Competition Act, it would appear clear that a mere evidential burden is created by the words that an acknowledgement in a consent order or a finding by the Competition Tribunal is '*prima facie*

²⁰⁶ Kelly (note 31 above) 332.

²⁰⁷ 1995 1 SACR 568 (CC).

²⁰⁸ 1996 (11) BCLR 1543 (CC), O'Regan J stated in par [11]: 'As a general rule in our law, the formulation, "shall be *prima facie* evidence" does not impose the burden of proof on the accused, but merely gives rise to an evidential burden.'

²⁰⁹ Jordaan (note 46 above) 198.

proof of the fact that the *firm* engaged in that conduct'.²¹⁰ However unlike the mandatory presumption found in other legislative provisions, the presumption created in section 73A does not in itself allow for a conviction in the absence of other evidence capable of raising a reasonable doubt.²¹¹ The State must still prove all the other elements of the offence, specifically that the accused had 'caused' the firm to engage in a prohibited practice, or had 'knowingly acquiesced in the firm engaging in a prohibited practice'.²¹²

Upon assessing the instruments created by the Competition Act, it can be seen that the Competition Commission has been given an oversight role over competition in South Africa; it is therefore unlikely that the NPA would prosecute a person unless it is requested to do so by the Competition Commission. However, as indicated earlier, the authority to conduct prosecutions in terms of section 73A ultimately resides in the NPA and it is therefore still possible in theory, although highly unlikely in practice, that such a prosecution could proceed where the Competition Commission regards it as unnecessary or inappropriate.

In applying the two stage test, mentioned above, to section 73A(5), it can be concluded firstly, that section 73A(5) creates such a risk because an accused 'may be convicted despite the absence of any evidence that the firm had engaged in a prohibited practice'²¹³ and secondly, that 'the apparent purpose of the reverse onus provision in this case is to ensure that the finding of prohibited conduct occurs in the Competition Tribunal rather than in the criminal courts.'²¹⁴

It may, however be argued that the reverse onus provision does not serve a legitimate purpose for the simple reason that, in terms of section 35(3) of the Constitution, an accused person has the right to a fair trial 'before an ordinary court', which the CAC and the Competition Tribunal are not. The reality is that there remains a possibility of conviction despite the existence of a reasonable doubt due to the fact that the accused may not have been party to the proceedings in the CAC or the Competition Tribunal which found that the firm had engaged in the prohibited practice. It may therefore be argued, on the basis of the application of the

²¹⁰ Section 73A(5) of the Competition Amendment Act 1 of 2009.

²¹¹ Ibid.

²¹² Section 73A(5) of the Competition Amendment Act 1 of 2009.

²¹³ Bouwman, N 'An Appraisal of the Modification of the Director's Duty of Care and Skill' (2009) 21(4) *SAMLJ*, 509 – 534.

²¹⁴ Bouwman (note 213 above) 511.

above test, that section 73A(5) is therefore not a justifiable limitation of the presumption of innocence.²¹⁵

It can also be concluded that the offence created in terms of section 73A does not in itself amount to an infringement of the right to be presumed innocent. Nevertheless, the evidential burden created in the section might amount to a prima facie infringement of the accused director's right to remain silent as opposed to his or her right to be presumed innocent.

3.3.2.2 An Accused Director's Right to Remain Silent

Section 35(3)(h) of the Constitution also guarantees the right of an individual to remain silent, in addition to being presumed innocent. This section may therefore be extended to apply to directors in the context of company law and competition law. The director's right to remain silent becomes relevant because of the presumption created by section 73A. It can be argued that such a presumption discharges the State's onus of proving one of the elements of the offence in Section 73A, namely the existence of a prohibited practice.

Under section 73A, proof of the basic fact, as mentioned previously, creates an evidential burden that does not automatically result in a presumption of guilt against the accused.²¹⁶ Thus it follows that the State will still have to prove the other elements of the offence, namely unlawfulness and fault, beyond reasonable doubt, before the accused director can be found guilty of the offence. Therefore, if the State is unable to prove the remaining elements of the offence, the accused will not be found guilty if he or she chooses to exercise his or her right to remain silent.

3.3.2.3 An Accused Director's Broader Right to a Fair Trial

It is important to remember that the section 35(3) rights of an arrested, detained or accused person only exist from the moment that criminal proceedings commence. The presumption of innocence that is enshrined in this section requires the State to bear the full burden of proof in relation to each element of the offence in question. It is only after the State has established each element of the criminal offence beyond a reasonable doubt that the burden of proof

²¹⁵ Bouwman (note 213 above) 511.

²¹⁶ Jordaan (note 46 above) 198.

shifts to the accused person to create a reasonable doubt.²¹⁷ This affects the position of a director of a firm who, despite having previously come forward and admitting the fact that the firm had engaged in unlawful cartel activities to the Competition Commission, is charged with the section 73A offence. However the cases of *Ferreira v Levin and Vryenhoek v Powell*²¹⁸ and *Bernstein NO v Bester NO*²¹⁹ held 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.’²²⁰ It would therefore seem apparent that a constitutional challenge to section 73A on the basis of a prima facie violation of the director’s right to fair trial is unlikely.²²¹

The right to a fair trial is a residual right which includes, but is not limited to, those rights mentioned in section 35. The initial purpose of the offence created in section 73A was to deter directors of firms from causing their firms to engage in cartel activity and from condoning such activity through their passivity while having actual knowledge of such activity. The preamble of the Competition Act clearly states that its purpose is, inter alia, ‘to hold personally accountable those individuals who *cause* firms to engage in cartel conduct’.²²² But also and more importantly, ‘to authorise the Competition Commission to excuse a respondent to a complaint if the respondent has assisted the competition authorities in the detection and investigation of cartel conduct’.²²³

It seems apparent that the intention of the drafters of this provision intended for the provision to be applied in this manner and that directors’ should not be prosecuted unless the Competition Commission made such a request to the NPA. However cognizance must also be paid to the fact that section 36 of the Constitution may allow the possible infringement of directors’ constitutional rights in circumstances where it is reasonable and justifiable to do so.

²¹⁷ Letsike, T ‘The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?’ (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2B/THE-NEW-SECTION-73A.pdf>, accessed on 24 March 2014.

²¹⁸ (1) BCLR 1 (CC) in par 185.

²¹⁹ 1996 (4) BCLR 449 (CC) in par 4.

²²⁰ Ibid para 4.

²²¹ Jordaan (note 46 above) 198.

²²² 89 of 1998.

²²³ Ibid.

The presumption created in section 73A serves the legitimate purpose of enabling the NPA to institute criminal proceedings against delinquent directors to deter these directors from encouraging or allowing such cartel activity by their firms. The section also serves to address the social need for the effective prosecution of this particular type of conduct.

It is therefore recognised that the constitutional concerns raised by various observers regarding section 73A of the 2009 Competition Act, as introduced by the Competition Amendment Act 1 of 2009, are born out of genuine and legitimate fears that directors' fundamental rights may be trampled upon. In particular, the rights invoked in the section 73A discourse have been the director's right 'to be presumed innocent, to remain silent, and not to testify during the proceedings' and the broader right to a fair trial in general. It has been argued that section 73A does not amount to an infringement of any of these particular constitutional rights, or the broader right to a fair trial of an accused person. However even if section 73A is viewed as a *prima facie* infringement of the right to a fair trial, it is submitted that such infringement would be justifiable given the leading role directors play in their company's affairs and the pressing social need to eradicate cartel and other anti-competitive practices in society.

3.3.3 Evidentiary threshold issues arising from the introduction of Section 73A

The evidentiary thresholds that parliament has placed in section 73A are potentially problematic. The heading of section 73A reads: 'Causing or permitting [a] firm to engage in prohibited practice'²²⁴. The heading contains two of the necessary thresholds that the NPA would need to prove in order to successfully prosecute persons under this section. The first threshold is that of causation. Section 73A(1)(a) requires that it be shown that a person 'caused' the firm to engage in a prohibited practice contrary to section 4(1)(b). It would appear that conventional criminal law relating to causation would be applicable in this regard. It would seem that the NPA has to show that the individual in question caused that participation beyond reasonable doubt. An issue of consideration for the courts would be to decide what evidence counted as causation. The question arises as to whether proof of a mere attendance at a cartel meeting would suffice or whether the courts would require evidence of an actual cartel agreement with the individual's signature?

²²⁴ 1 of 2009.

In terms of section 73A(1)(b), the NPA is also able to prosecute an individual occupying a position of management authority on the basis that he or she ‘knowingly acquiesced’ in cartel conduct. Section 73A(1)(b) may prove to be difficult to enforce. It is unclear precisely what the prosecution would need to show to establish acquiescence. The section speaks of ‘actual knowledge’, this would seem to rule out the possibility of drawing inferences regarding what a director ought to have known about the company under his or her watch. It would certainly rule out any appeal to constructive knowledge. This phrasing of the section also opens up avenues to dispute acquiescence. Firstly, disputing actual knowledge may be fairly straightforward if the prosecution is without any actual evidence and secondly, it would seem that there is the possibility that a director might dispute allegations of acquiescence. For example, it might be possible to craft a defence of conscientious objection along the lines that a single director out of a group of directors could not have acquiesced in that he or she had consistently objected to involvement in cartel activities, thereby escaping liability. It will be challenging for the courts to develop standards around these rather vague thresholds. It will be even more of a challenge for the NPA to establish ‘knowing acquiescence’ beyond reasonable doubt.²²⁵

Insofar as section 73A is concerned, the numerous constitutional concerns to which it gives rise have been documented above. One can only surmise that the reason why this provision has taken so long to come into force and effect is due in large part to such constitutional concerns. In light of the critique proffered above, the question then arises as to whether the imposition of criminal liability as contemplated in section 73A is in fact a necessary policy goal in the context of cartel enforcement, and in light of the Competition Act itself.

²²⁵ Kelly (note 31 above) 322.

4. LIABILITY FOR CARTEL CONDUCT

4.1 Overview

Cartel activity is rampant in the South African economy and a source of growing concern.²²⁶ It remains vital that the law provides adequate sanctions to deter and punish those found guilty of such conduct. This chapter focuses on how the law applies to a company as a whole and directors individually. It will look at the civil and criminal sanctions or liabilities imposed on companies for their involvement in the cartel offence of tender collusion, the possible defences that they may raise, any rights of recourse that they may have against the individuals responsible and recent case law regarding this matter. It will also provide an analysis of the responsibilities and duties placed on directors to prevent cartel conduct, their liabilities in this regard both civilly and criminally in comparison to the international trends, and the possible defences that they may raise with regard to this offence.

4.2 Liability for Cartel Conduct

Before competition authorities or aggrieved persons can institute legal proceedings for cartel conduct, it is important to identify who such proceedings are being instituted against. This is important as ‘significant penalties apply where companies and individuals have been found to have engaged in cartel conduct.’²²⁷

The Competition Act prohibits restrictive horizontal practices and ‘does not allow practices which substantially prevent or lessen competition in a market, unless these practices can be justified on the basis of technology, efficiency or other pro-competitive gains.’²²⁸ The onus of proving this burden rests upon the companies engaged in restrictive practices.²²⁹ This would constitute a defence against a charge of anti-competitive conduct where companies are able to prove that their relationship is beneficial to the economy in a favourable sense, and that there

²²⁶ Singh, S ‘Corporate Crime and the Criminal Liability of Corporate Entities’ available at www.unafei.or.jp/english/pdf/RS_No76/No76_10PA_Singh.pdf, accessed on 28 February 2014.

²²⁷ Competition Commission ‘The Competition Act - An Introduction (Book1) Brochure’ (2001) available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Nov-01-The-Competition-Act-An-Introduction-Book1.pdf>, accessed on 3 October 2014.

²²⁸ Ibid.

²²⁹ Ibid.

are significant advantages which outweigh the anti-competitive effects of the horizontal practice in question.²³⁰

However, the restrictive horizontal practice of cartel conduct is specifically prohibited by section 4(1)(b). The section states that there are three restrictive horizontal practices, namely collusive tendering, market sharing and price fixing. Conduct falling within these categories is prohibited outright and constitutes practices for which no justification is permitted.²³¹ This means that no defence is allowed for these ‘unfair arrangements’.²³² In summary, a cartel, as explained above, is:

‘ a group of two or more companies who are competitors or potential competitors, who enter into price fixing, bid rigging, collusive tendering or market sharing arrangements. Although the arrangement often has the effect of lessening competition in the industry or results in one or more of the colluding parties excluding other parties from the market, a significant lessening or prevention of competition does not have to be proven in a cartel case, as cartel conduct is prohibited outright.’²³³

Section 4(1)(b) of the Competition Act applies to agreements between ‘firms’. In terms of section 1 of the Competition Act, a ‘firm’ includes ‘a person, partnership or a trust’. Thus, the Competition Act currently applies to companies, individuals, partnerships and trusts. However, individuals are not yet held personally accountable for engaging in cartel conduct, as only firms may be found liable in terms of section 59 of the Competition Act. But once section 12 of the Competition Amendment Act comes into operation and inserts section 73A, it will be a criminal offence for a director or manager of a corporation to cause the firm to engage in cartel conduct or to knowingly acquiesce thereto. Nevertheless, individuals and companies that cooperate with the Competition Authorities may face mitigated fines or penalties. These points will be discussed below.

²³⁰ Ibid.

²³¹ Oxenham, J; Webber, M ‘Cartel Regulation: South Africa’ available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

²³² Ibid.

²³³ Ibid.

4.2.1 Companies

Where a corporation is found guilty of cartel conduct, it may face an array of penalties. These penalties usually fall within the ambit of competition law and are imposed under the Competition Act but other areas of the law may apply depending on the level of seriousness of the conduct in question and its effects on the economy.

4.2.1.1 Competition law

The Competition Act currently does not provide for criminal sanctions in respect of cartel conduct. A contravention of section 4(1)(b) of the Competition Act amounts to cartel conduct. A company who contravenes this section is ‘punishable through the imposition of an administrative penalty’²³⁴ by the Competition Tribunal. A ‘firm found to have engaged in cartel conduct may be liable to pay an administrative penalty of up to 10 percent of the firm’s annual turnover in South Africa (including its exports from South Africa) during the firm’s preceding financial year.’²³⁵ This penalty may be imposed for non-compliance with provisions of the Act in terms of section 59 of the Competition Act.²³⁶ Thus offending companies found guilty of participation in cartels and contravention of the Competition Act may be stripped of productive assets, operating divisions or subsidiaries in order to settle the fine. Section 59 of the Competition Act deals with the imposition of administrative penalties and provides that:

- ‘(1) The Competition Tribunal may impose an administrative penalty only—
- (a) for a *prohibited practice* in terms of section 4 (1) (b), 5 (2) or 8 (a), (b) or (d);
 - (b) for a *prohibited practice* in terms of section 4 (1) (a), 5 (1), 8 (c) or 9 (1), if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Competition Tribunal to be a *prohibited practice*;
 - (c) for contravention of, or failure to comply with, an interim or final order of the Competition Tribunal or the CAC; or
 - (d) if the parties to a merger have—
 - (i) failed to give notice of the merger as required by Chapter 3;

²³⁴ Section 59(2) of the Competition Act 89 of 1998.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

- (ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
 - (iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or
 - (iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by *this Act*.
- (2) An administrative penalty imposed in terms of subsection (1) may not exceed 10 per cent of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year.
- (3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors:
- (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of the *respondent*;
 - (d) the market circumstances in which the contravention took place;
 - (e) the level of profit derived from the contravention;
 - (f) the degree to which the *respondent* has cooperated with the Competition Commission and the Competition Tribunal; and
 - (g) whether the *respondent* has previously been found in contravention of *this Act*.
- (4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the *Constitution*.²³⁷

In addition hereto, companies or individuals who have suffered loss or damage as a result of cartel conduct, or other anti-competitive conduct prohibited under the Competition Act, may institute civil proceedings against cartel members in order to recover the loss or damages suffered.²³⁸ There is an increasing trend in the number and quantum of fines levied per year.²³⁹ It is important to note that the Competition Tribunal has a low-tolerance approach to cartel activity and has expressed the view that ‘absent any mitigating circumstance, hard-core cartellists deserve the maximum penalty provided for in the Act’.²⁴⁰

²³⁷ Ibid.

²³⁸ Oxenham, J; Webber, M ‘Cartel Regulation: South Africa’ available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

²³⁹ Ibid.

²⁴⁰ Ibid.

The CAC has held that an administrative penalty must be considered after a prohibited practice, in terms of section 4 of the Competition Act, has been determined. Thereafter, the Competition Tribunal must consider all of the relevant factors contained in section 59(3) of the Competition Act to reach a decision as to the quantum of the potential fine. It is only after reaching a decision as to an appropriate penalty in respect of the first two steps that the Competition Tribunal will then ensure the quantum is within the limits set out in section 59(2).

The Competition Commission and Competition Tribunal have emphasised the fact that full and early cooperation or disclosure will be rewarded when determining the extent of the penalty that has to be paid in a settlement agreement. They are more likely to impose higher penalties on firms that do not cooperate. Other factors that affect the extent of the fine include, inter alia, any previous anti-competitive conduct of the particular firm, any previous penalties for cartel conduct, the period over which the cartel has been operating and the effects it had on the economy.²⁴¹

It is important to note that first time offenders may be held liable for cartel behaviour that is in contravention of the Competition Act.²⁴² First time offenders may thus be held liable for a fine not exceeding 10 percent of the firm's annual turnover in terms of section 59 of the Competition Act. Other violations of competition law usually attract a warning for the first contravention, often accompanied by a mandatory requirement to cease the offensive behaviour in contravention with the Competition Act which is often done by way of modifying business practices.²⁴³ Further, if the company's participation in any anti-competitive behaviour ceased more than three years before a competition investigation is commenced, then prescription will apply.²⁴⁴

However, members of cartels should be encouraged to realise the benefits of reporting transgressions to the Competition Commission under the CLP in order to mitigate penalties and fines. In terms of the CLP, applicants who voluntarily make disclosures and agree to cooperate with the Competition Commission in its investigation 'may be granted immunity

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

from prosecution, provided the requirements for leniency have been met.²⁴⁵ This provides firms participating in cartel behaviour with an incentive to provide useful information to the Competition Commission which assists in the investigation of cartel activities. However, corporate leniency may only be applied for, in respect of cartel conduct, by the cartel member that is ‘first to the door’ of the Competition Commission.²⁴⁶

The quantum of any fine imposed upon a firm for anti-competitive conduct by competition authorities may substantially be affected by the action plans that the company has established to prevent and detect such behaviour.²⁴⁷ The precautionary steps undertaken by the company in order to reduce the possibility of the firm engaging in anti-competitive conduct will be taken into consideration as mitigating factors in the event that such behaviour is detected.²⁴⁸

It is often said that ‘ignorance of the law is no excuse for non-compliance’²⁴⁹ with the law and this applies to competition law as a recent case shows. In the judgment of *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v The Competition Commission and Others*,²⁵⁰ the CAC provided guidance as to the approach taken by competition authorities towards cartel members that rely on ‘passive participation to deny liability’²⁵¹ the case confirmed the view that ‘passive participation in a cartel is sufficient to constitute being a party to a cartel.’²⁵² In terms of this case, the Competition Commission alleged that the firms had contravened the provisions of section 4(1)(b) of the Competition Act which deal with price-fixing and market allocation. Vulcania argued that it could not be held legally responsible for cartel conduct as it maintained a passive role during meetings and further, that they had no intention of complying with the decisions reached at these meetings. Vulcanias’ argument was rejected by the Competition Tribunal as it contravened the Competition Act. On appeal, the CAC found ‘that passive participation in unlawful conduct without distancing oneself from its content could be seen as an indication of tacit approval of the conduct.’²⁵³

²⁴⁵ PricewaterhouseCoopers ‘Anti - competitive practices: Corporate Governance Network - position paper 2’ available at http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/CGN_Position_Paper_2_Anti-competitive_practices.pdf, accessed on 3 October 2014.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ [2013] 2 CPLR 455 (CAC).

²⁵¹ Ibid 216.

²⁵² Ibid 216.

²⁵³ Ibid. 216.

This common law principle is now applied in a competition law context.²⁵⁴ Thus, if the firm concerned is proven to have engaged in any one of the prohibited practices, a contravention of section 4(1)(b) may be sufficiently established even if the effects thereof are not established.²⁵⁵

The CAC stated that ‘it [was] abundantly clear from the wording of Section 4(1)(b) that in order to establish a contravention, the Competition Commission [had to] produce proof which [showed] an agreement to engage in the prohibited anti-competitive behaviour.’²⁵⁶ According to the Act, the term ‘agreement’, when used in relation to any prohibited practice, includes ‘a contract, arrangement or understanding, whether or not legally enforceable.’²⁵⁷ From this, it can therefore be deduced that section 4(1)(b) is not primarily concerned with the effects of prohibited agreements between firms in a horizontal relationship or the extent of a firm's engagement in the process of reaching that agreement, but it is concerned with the mere existence of such an agreement.²⁵⁸

In the above stated case the CAC found that the Competition Commission had established the existence of an agreement between Vulcania and the cartel members to engage in anti-competitive behaviour. The CAC, agreeing with the Competition Tribunal, concluded that Vulcania had contravened section 4(1)(b) of the Competition Act. The CAC reasoning was based on the fact that Vulcania did not distance itself from the cartel and its participation in the overall agreement was sufficient to establish its liability. The approach taken by the CAC in this case falls in line with the European competition law position that ‘passive participation without some indication that the firm in question distances itself from the arrangement is capable of rendering the firm liable for a prohibited practice.’²⁵⁹ The courts have therefore maintained the view that firms cannot rely on ‘internal reservations to dispute the conduct which they display outwardly where a prohibited agreement exists.’²⁶⁰ Despite the uncertainty surrounding ‘passive participation’, it is submitted that the CAC reached a suitable conclusion in holding that Vulcania was liable for cartel conduct.

²⁵⁴ Lekoma, Z ‘Cartel members liable for passive participation: competition law’ (2014) 14 (3) *Without Prejudice* 100-101.

²⁵⁵ Lekoma (note 254 above) 101.

²⁵⁶ Lekoma (note 254 above) 101.

²⁵⁷ Section 1 of the Competition Act 89 of 1998.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

When a firm agrees to become a member of a cartel, it is automatically presumed that the firm tacitly agrees to comply with any decision taken by the cartel to engage in anti-competitive behaviour, unless the firm overtly opposes any of the cartels' decisions. Cartel members may be regarded to have effectively compromised the detection of a cartel and encouraged its continuation in instances where the firm fails to publicly distance themselves from the anti-competitive initiative or report it to the competition authorities. These cartel members should therefore be held fully responsible for their participation in such anti-competitive conduct. The aforementioned judgment has set a valuable precedent in deterring both passive and active involvement in prohibited agreements.²⁶¹

4.2.2 *Directors*

In terms of the Competition Amendment Act, directors may in certain circumstances be held criminally and/or civilly liable. Once section 73A becomes effective, it will create a criminal offence and bring about consequences for directors and managers of corporations who cause or knowingly acquiesce the firm to engage in cartel conduct. The consequences imposed by this section include personal criminal liability. These sanctions are intended to apply in addition to the current sanctions based on reckless trading and reputational damage. Directors therefore have the burdensome responsibility of ensuring their firms compliance with competition law in order to protect not only their firms but themselves from unnecessary litigation.

'Some breaches of competition law, such as the rigging of tenders, allocation of markets and the manipulation of prices are so obviously anti-competitive that any ethical business person would know that they are wrong.'²⁶² A director, given the nature of his or her position, is fundamentally required to have a thorough knowledge, awareness and understanding of the laws governing competition and actions that result in contraventions of the Competition Act in order to prevent his or her firm from engaging in unlawful behaviour.²⁶³ A director's

²⁶¹ Ibid.

²⁶² PricewaterhouseCoopers 'Anti-competitive practices: Corporate Governance Network - position paper 2' available at http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/CGN_Position_Paper_2_Anti-competitive_practices.pdf, accessed on 3 October 2014.

²⁶³ Ibid.

‘ignorance of the law is no excuse for non-compliance’²⁶⁴ and thus does not constitute a defence.

The imposition of liability on directors is a contentious point. It remains unclear as to whether these individuals should be prosecuted under the auspices of competition law, criminal law or company law for their roles in cartel conduct. As a result, the liability they face may vary depending on the type of action taken against them. The following section will therefore analyse the legislation in its current form.

4.2.2.1 Directors liability in terms of Competition law

Both criminal and administrative sanctions may be pursued in respect of the same conduct in cartel proceedings. However this requires a finding by the Competition Tribunal of cartel conduct in order to pursue either a criminal or civil claim. It is not possible to pursue civil damages if such a finding has not been made. The Competition Amendment Act specifically caters for a situation in terms of which an administrative sanction may be imposed on a corporation while criminal sanctions may, subsequently, be brought against the respondent firm’s directors. Action may only be taken against directors for a criminal offence once there has been a finding by the Competition Tribunal or the CAC that the respondent firm has engaged in cartel conduct, or the respondent firm has entered into a consent order with the Commission. Furthermore, a person or firm may only pursue a claim for civil damages once there has been a finding that the respondent firm has engaged in a prohibited practice (the cartel conduct).²⁶⁵

Under the Competition Amendment Act, directors of firms who cause or knowingly acquiesce in collusive tendering, market division or the fixing of prices and trading conditions under section 4(1)(b), who are subsequently found guilty of contravening section 73A of the Competition Amendment Act will in future, once Section 73A becomes effective, be held liable to a maximum of 10 years’ imprisonment or a maximum fine of R500,000, or both a fine and imprisonment. Section 73A requires ‘either that the firm must have acknowledged an infringement of section 4(1)(b) of the Act in a consent order, or that the Competition Tribunal

²⁶⁴ Ibid.

²⁶⁵ Oxenham, J; Webber, M ‘Cartel Regulation: South Africa’ available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

or CAC have made a finding of infringement²⁶⁶ in terms of section 4(1)(b). The Competition Act states that if these requirements are satisfied, a director, or person having management authority, may be prosecuted.²⁶⁷

Furthermore, section 73A(6) (signed but not yet in force) provides that a firm is precluded from ‘(i) paying any administrative penalty imposed on an individual; and/or (ii) indemnifying, reimbursing, compensating or otherwise defraying the expenses of any individual incurred in defending such a prosecution unless the prosecution is subsequently abandoned or the person acquitted’.²⁶⁸ It is important to note that a similar provision exists under company law such as section 77(3)(b) and section 78(6) of the Companies Act.

In terms of section 73A(4) of the Competition Amendment Act, ‘the Competition Commission may not seek or request the prosecution of a person for an offence in terms of section 73A if the Competition Commission has certified that the person is deserving of leniency in the circumstances.’²⁶⁹ Whilst immunity granted in terms of the CLP extends to all forms of prosecution initiated and enforced by the competition authorities and the NPA in terms of the Competition Act, such immunity does not extend to various parallel criminal offences engaged in by individuals employed by the firms who have been found to have engaged in cartel behaviour.²⁷⁰ The CLP does not seem to contemplate the fact that an individual may expose himself or herself to criminal liability when voluntarily making a statement to the Competition Commission which implicates him or her in cartel conduct. Individuals will become increasingly aware of this (and at a minimum should be informed of their right not to self-incriminate), and unless they are provided with assurances that information disclosed to the Competition Commission may not be used in parallel criminal proceedings, such individuals will be reluctant to assist the Competition Commission in uncovering cartels.²⁷¹ ‘As a director of a company, one would be almost certain to think twice

²⁶⁶ Kelly (note 31 above) 322.

²⁶⁷ Shahim, C ‘Colluding constructions: Lucky break?’ (2013) available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 3 October 2014.

²⁶⁸ Section 73A(6) of the Competition Amendment Act 1 of 2009.

²⁶⁹ Ibid.

²⁷⁰ Lopes, N; Seth, J; Gauntlett, E ‘Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?’ available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

²⁷¹ Ibid.

before approaching the Competition Commission for leniency without guarantees that one's own liberty is not at risk.²⁷²

As the CLP did not extend its immunity to individuals, the Competition Amendment Act made provision for this by introducing a section which is not yet in full force, but relates to individual leniency for persons who provide information or otherwise cooperate with the Competition Commission's investigation into cartel conduct. In terms of section 50 of the Competition Amendment Act, the Competition Commission may, at any time after receiving or initiating a complaint, certify that any particular person contemplated in section 73A is deserving of leniency in the circumstances. Thus when immunity or leniency is granted to a corporate defendant, its current and former employees may be prosecuted for a cartel offence only in instances where the relevant firm has acknowledged, in a consent order, that it engaged in cartel conduct or in instances where the Competition Tribunal or the CAC has made a finding that the relevant firm engaged in cartel conduct. However if a firm is granted total immunity in terms of the CLP, its directors or managers, current and former, cannot be prosecuted for cartel conduct.²⁷³

The contemporary competition law regime fails to provide for directors to be held personally liable for the company's anti-competitive conduct. In other words, the individuals involved in cartel conduct will not face prosecution under the Competition Act. Such a restriction has not deterred those seeking justice from pursuing alternative avenues in an effort to take action against and hold those actually responsible for such conduct liable, as relief may be sought under other branches of law.²⁷⁴

4.2.2.2 Directors liability in terms of Company law

Company law comprises that area of law that governs a director's relationship with his or her firm. In terms of that relationship, a director owes certain responsibilities and duties to his or her company. It is important to understand the context of this relationship as a company

²⁷² Ibid.

²⁷³ Oxenham, J; Webber, M 'Cartel Regulation: South Africa' available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

²⁷⁴ Shahim, C 'Colluding constructions: Lucky break?' (2013) available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 3 October 2014.

wishing to recoup or recover losses incurred as a result of the director's unlawful conduct for competition law violations, should be able to do so within the ambit of company law.

It is important to note that since directors are not held personally liable for cartel conduct under the current competition law, they remain untouchable by competition authorities.²⁷⁵ It would, therefore, seem that company law remains a possible avenue of law that could provide companies with a remedy so that they could take actions against those individuals responsible for cartel conduct.

4.3 Directors' Responsibilities, Duties and Liabilities

4.3.1 The Common Law duties

Prior to the 2008 Companies Act, directors' rights and duties were derived primarily from the Companies Act 61 of 1973 ('the 1973 Act'), contracts entered into with the company, the memorandum of incorporation, articles of association and the common law. The common law imposes both a fiduciary duty and a duty of care and skill on directors.²⁷⁶

'A fiduciary is a person who is in a special position of trust'²⁷⁷ and confidence. 'A director is a fiduciary and therefore must act in good faith in his dealings with or on behalf of the company and he must exercise the powers and fulfil the duties of his'²⁷⁸ or her office honestly. Fiduciary duties are non-negotiable and cannot be waived in any manner or form.²⁷⁹ Fiduciary duties require a director to act with an unfettered/unbiased discretion to observe any limitation of powers; to use his powers for the purpose for which they were conferred and intended (i.e. 'proper purpose'); and to avoid a personal conflict of interest between their personal interests and those of the company.²⁸⁰

Directors also have the duty to act with a certain amount or degree of care and skill or they will be liable to the company for their negligence when performing their functions for the

²⁷⁵ Ibid.

²⁷⁶ Bouwman (note 213 above) 515.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

company. Therefore, even if the director lacks the intention to cause prejudice to the company, they will be held liable where they performed their functions in a negligent manner.²⁸¹

4.3.2 *The Companies Act 71 of 2008*

It must be noted that the Companies Act partially codifies the common law, and incorporates in its provisions some of the common law principles²⁸². However, this is only a partial codification and thus the Companies Act must always be considered in conjunction with the common law. The common law provides a fiduciary duty on directors. It is accepted that a director, in his capacity as a director, owes a fiduciary duty to his company. This means that directors, when acting as individuals and as a board, must act in good faith and for the benefit and in the best interests of the company as a whole. In this regard the company is the beneficiary of the duty.²⁸³

The Companies Act partially codifies both the fiduciary duties and the duty of care and skill.²⁸⁴ Section 76 of the Companies Act makes provision for the codification of the fiduciary duties of directors; as well as the standards of conduct required to be performed and exercised by directors; whilst section 77 explains the basis and the extent of liability imposed on directors for breach of these duties. In the common law, wrongs were decided on a case by case basis whereas under the Act there is a clear list of wrongs that can constitute liability.²⁸⁵ It is important to note that the Companies Act does not exclude the common law, but applies in addition to it. In the event of a conflict between a statutory provision and the common law provisions, the statute will apply.²⁸⁶

Section 66(1) of the Companies Act codifies the powers of the board and states that:

‘The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'²⁸⁷

Essentially, shareholders rights are restricted to appointing directors to run the company for them. In turn directors have an obligation to assure themselves that they do not expose the company to the risks of unlawful and anti-competitive conduct in terms of section 76 the Companies Act. Shareholders consequently run the risk of directors acting fraudulently and involving the company in cartel activity. However if shareholders do not like the manner in which their company is being run, they have the right to remove the defaulting director.

It is important to note that the Companies Act which, while providing for the personal civil liability of directors (in terms of section 77 and section 22(1) of the Companies Act) and criminal liability for fraud (in terms of section 214 of the Companies Act), remains silent on whether directors involved in cartel offences should face criminal prosecution.

'Section 77, as read with section 22 of the Act, penalises and holds directors personally liable for any loss incurred through knowingly carrying on the business of the company recklessly or with the intent to defraud creditors and other stakeholders.' Section 214 creates criminal liability for those directors trading a company in a manner which is calculated to defraud a creditor.'²⁸⁸

'Section 22(1) states that a company must not:

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'²⁸⁹

'Section 77 (3) states that any director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- (a) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);
- (b) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose'.²⁹⁰

²⁸⁷ 71 of 2008.

²⁸⁸ Levenstein, E 'The personal liability of directors: company law' (2011) 11 (5) *Without Prejudice* 21-23.

²⁸⁹ 71 of 2008.

²⁹⁰ 71 of 2008.

According to the Companies Act, the word 'knowing' is defined 'as a person either having actual knowledge, a person who has investigated the matter to an extent that would have provided the person with actual knowledge; or a person who has taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.'²⁹¹ It is imperative to note that the definition of 'knowing' in the Companies Act is similar to the definition of 'knowingly acquiesced' in section 73A of the Competition Amendment Act. Thus, only directors who are shown to have had a legitimate interest in the prosperity of the company and whose decisions have been made in the best interests of the company, whilst carrying on the business of the company, would have a valid defence against such claims.²⁹² Enquiries conducted as to the affairs of a company will always involve an evidential investigation into whether a director has carried out the business of the company in accordance with sound legal business practices and has fulfilled his or her fiduciary duties.²⁹³ The law provides directors with a defence to any action instituted in terms of section 77, in appropriate and objective circumstances, where a director can show that he or she has complied with what can be reasonably expected of a reasonable director placed in the same situation or faced with similar circumstances as that director.²⁹⁴

Section 76(3) of the Companies Act provides that 'a director acting in his capacity as a director, must exercise the powers and perform the functions of a director in good faith and for proper purpose; and act in the best interests of the company with the necessary degree of care, skill and diligence that is reasonably expected.'²⁹⁵ Further, the Companies Act provides that directors 'may only use their position, or any information which they become aware of whilst holding that position, to the advantage of the company. They are therefore prohibited from any personal gain or to knowingly causing harm to the company.'²⁹⁶ It therefore follows that a person who accepts their appointment as a director, agrees in principle, to act in accordance with certain standards listed in section 76 of the Companies Act which encourages directors, whilst acting in their capacity as directors, to be responsible and accountable for their actions.

²⁹¹ Levenstein (note 288 above) 22.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Section 76(3) of the Competition Act 71 of 2008.

²⁹⁶ Levenstein (note 288 above) 23.

It is also important to note that the Companies Act applies to all directors as it draws no distinction between executive, non-executive and independent non-executive directors. Section 76(2)(ii) specifically provides that ‘directors must not use the position of director, or any information obtained while acting in the capacity of a director, to knowingly cause harm to the company.’²⁹⁷ Thus the Companies Act does not contain provisions which is directly applicable that specifically provides for the imposition of personal criminal and civil liability on directors for corporate crimes such as tender collusion which is an anti-competitive practice.

It is often said that prevention is better than a cure. Directors should be encouraged to create a risk management framework which assesses the prevailing laws and regulations affecting the company. An assessment of the company’s compliance with competition laws is an important risk management strategy which is often overlooked.²⁹⁸ Directors should use this as a means to assess the internal regulations and procedures established by the company to mitigate the risks of anti-competitive behaviour. Furthermore, directors should develop internal policies, which include internal penalties, and compliance programmes, which prohibit anti-competitive behaviour within the company.

Following a director’s conviction under section 73A of the Competition Amendment Act, section 78 of the Companies Act (still to become effective) provides that a company will be prohibited from directly or indirectly paying any fine imposed on a ‘director of the company, or of a related company, who has been convicted of an offence in terms of any national legislation.’²⁹⁹

In future, fines personally incurred by directors as a result of anti-competitive behaviour, in contrast with fines levied against the company, ‘will result in increased personal risk of liability for the directors in their personal capacity, without the prospect of assistance from

²⁹⁷ Levenstein (note 288 above) 23.

²⁹⁸ PricewaterhouseCoopers ‘Anti - competitive practices: Corporate Governance Network - position paper 2’ available at http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/05E93ACB-10BE-4507-9601-307A66F34BD8/CGN_Position_Paper_2_Anti-competitive_practices.pdf, accessed on 3 October 2014.

²⁹⁹ Ibid.

the company.’³⁰⁰ Companies may only assist in paying directors’ legal costs if the prosecution is abandoned, or the director is acquitted.³⁰¹

Section 162 of the Companies Act states that a director may be declared ‘delinquent’ if such director grossly abuses the position of his office ‘intentionally; or, by gross negligence, inflicts harm upon the company or a subsidiary of the company contrary to section 76; or acts in a manner that amounts to gross negligence, willful misconduct or breach of trust in relation to the performance of the director’s functions within, and duties to, the company or as contemplated in section 77 of the Act.’³⁰²

4.3.3 *Criminal Law*

Criminal law is aimed at punishing unlawful conduct. Given the fact that a corporation is an artificial entity and not a natural person, liability can be imputed to the corporation for crimes committed by its employees or agents. Therefore criminal liability may be imposed on a corporate body vicariously. However this form of liability is much wider than that of natural persons. Section 332(1) of the Criminal Procedure Act 51 of 1977 (the ‘Criminal Procedure Act’) imputes the criminal fault of an individual to a corporation, even though that individual may have acted beyond the course and scope of their employment duties but with the ‘intent of furthering the corporations’ interests.’³⁰³ However many have debated the constitutionality of section 332(1) and argue, in the context of criminal conduct, that ‘while fault may exist on the part of the delinquent committing the crime, there need be no fault on the part of the company. A company can therefore be morally blameless according to the convictions of the community and nevertheless still be convicted.’³⁰⁴ Thus even though a company is a fictitious person, it still has legal personality and can be held to be ‘morally blameless’.³⁰⁵

The Competition Act does not currently provide for criminal penalties or sanctions in respect of cartel conduct, except in circumstances where persons engaged in cartel behaviour

³⁰⁰ Ibid.

³⁰¹ Oxenham, J; Webber, M ‘Cartel Regulation: South Africa’ available at <http://nortonsinc.com/wp-content/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

³⁰² Levenstein (note 288 above) 22.

³⁰³ Borg-Jorgensen, VL & Van der Linde, K ‘Corporate Criminal Liability in South Africa – time for a change?’ (2011) 20(3) TSAR 452- 465 (part 1) and (2011) 20(4) TSAR 684- 702 (part 2).

³⁰⁴ Van Eeden, H; Hopkins, K; Adendorff, C ‘Criminal liability of morally blameless corporations’ (2011) 512 *De Rebus* 26-29.

³⁰⁵ Ibid.

knowingly disclose false information to the Competition Commission or attempt to mislead the Competition Commission in the course of its investigation.³⁰⁶ However, the NPA may pursue action to hold directors or executives criminally liable for their involvement in cartel conduct.

It seems that little thought has been given by individuals to their potential criminal exposure when voluntarily making statements to the Competition Commission regarding their involvement in cartel activities in terms of the CLP, as these statements may be used in subsequent criminal proceedings against them by the NPA.³⁰⁷ However, this is an anticipated consequence of the CLP. These individuals are however often given amnesty by their companies if they cooperate with competition authorities. If they choose not to cooperate, they may face disciplinary proceedings or worse face the risk of losing their employment should such activity subsequently be discovered.³⁰⁸ Competition authorities do not consider individuals' criminal liability as section 73A of the Competition Amendment Act is not yet of force and effect. However, the involvement of individuals in certain types of cartel conduct may meet the elements for the common law crime of fraud or they may be guilty of the general offence of corruption, as expressed in various provisions of Parts 1 to 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('the Corruption Act').³⁰⁹

Criminal liability can apply to an offence involving the procurement and withdrawal of tenders in terms of the Corruption Act.³¹⁰ Offenders can face possible sanctions in terms of their company being registered on a tender defaulter list, a fine of up to R100 million or up to life imprisonment.³¹¹ Although competition law does not make provision for individuals to be held accountable for anti-competitive conduct, competition authorities may pursue those involved in a cartel under the auspices of the Corruption Act, which applies to corruption in both the private and public sectors. The Corruption Act creates the general offence of corruption and criminalizes corrupt activities. This route may be used to charge the directors

³⁰⁶ Oxenham, J; Webber, M 'Cartel Regulation: South Africa' available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

³⁰⁷ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ 12 of 2004.

³¹¹ Section 26 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

or executives who engaged in the construction cartels price-fixing, market allocation and tender collusion.³¹²

Although the private sector bears little responsibility for corruption, there is no doubt that tender collusion is rife not only in the public sector but in the private sector of the economy as well.³¹³ The effects of cartel activity in both sectors are far reaching and should be properly punished in order to deter future offenders.³¹⁴ The Corruption Act states that anyone who offers or accepts gratification in order to improperly influence the procurement of a contract will be guilty of an offence.³¹⁵ Individuals convicted of offences under section 12 and 13 of the Corruption Act may face fines as well as prison sentences.

Criminal liability is also provided for under the Prevention of Organised Crime Act³¹⁶ ('POCA'). In terms of POCA, a person who engages in cartel behavior may be found criminally liable under the common law offence of fraud, and an offence involving racketeering in terms of this can result in the guilty party being liable for a fine of up to R100 million or imprisonment for up to 30 years.³¹⁷ However it is important to note that both the Corruption Act and POCA currently provide for criminal sanctions for tender collusion in certain circumstances.

4.4 Recent Developments in South African Competition Law Regarding Tender Collusion

In the course of 2013, the Competition Commission dealt with allegations concerning collusive tendering between 15 construction firms in South Africa after effectively implementing its fast-track settlement process for the first time.³¹⁸ These firms were alleged of contravening section 4(1)(b) of the Competition Act.³¹⁹ As a result thereof, twenty-one firms responded to the Competition Commission's offer of early settlement and three hundred

³¹² Shahim, C 'Colluding constructions: Lucky break?' (2013) available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 3 October

³¹³ Lewis, D 'Collusion is corruption' (2013) available at <http://www.citypress.co.za/columnists/collusion-is-corruption/>, accessed on 1 March 2015.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ 121 of 1998.

³¹⁷ Ibid.

³¹⁸ Ngobese, C 'NUMSA: dismiss all Directors and CEOs' available at <http://www.numsa.org.za/article/numsa-dismiss-all-directors-and-ceos-2013-06-25/>, accessed on 28 February 2014.

³¹⁹ Ibid.

instances of bid rigging were uncovered.³²⁰ The settlements revealed that the construction cartel had been in operation for some time, and that collusion was widespread in the construction market. The firms Group 5, Construction ID and Power Construction will be investigated further and possibly prosecuted for any contraventions as they have not settled with the Competition Commission. The construction cartels and fast-track settlement process generated intense public interest in South Africa as many of the construction projects connected with the cartel were publically funded.³²¹

However the fines imposed by the Competition Commission on these 15 construction companies ‘have resulted in wide-spread public out-cry.’³²² These construction firms recently reached settlement agreements with the Competition Commission in relation to collusion and bid-rigging. Combined fines of R1.46 billion were imposed after an investigation was conducted into collusion over certain building contracts, including those contracts involving the construction of the stadiums for the 2010 Soccer World Cup. The Competition Commission ‘investigated 140 projects in both private and public sectors tendering between 2006 and 2011.’³²³ This investigation was reportedly the ‘biggest collective fine ever imposed on South African companies.’³²⁴ While this may appear to be a landmark investigation signalling the development of competition law enforcement mechanisms, the quantum of the administrative fines imposed on these companies have not impressed most observers who seek the further punishment and criminal prosecution against the directors directly involved as the fines imposed are ‘financially insignificant for these multi-billion rand corporations.’³²⁵ These public outcries highlight the need to establish a precedent that such anti-competitive conduct will not be tolerated or merely passed off as a ‘cost of trading’ and that ‘further punishment is a necessity.’³²⁶

³²⁰ Ibid.

³²¹ Oxenham, J; Webber, M ‘Cartel Regulation: South Africa’ available at <http://nortonsinc.com/wpcontent/uploads/2014/01/CR2014-South-Africa.pdf>, accessed on 3 October 2014.

³²² Shahim, C ‘Colluding constructions: Lucky break?’ (2013) available at <http://www.polity.org.za/article/colluding-constructions-lucky-break-2013-07-18>, accessed on 3 October 2014.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Ibid.

Despite the fact that cartel conduct is an undeniably damaging form of anti-competitive behaviour, it is questionable as to whether section 73A will be capable of practical implementation by the South African competition authorities.³²⁷

The CLP provides a system which allows firms that admit to the allegations of collusive tendering to conclude settlement agreements. Firms, being civil claimants, do not have the burden of proving this collusion. The burden in this respect rests upon the State. 'This removes some pressure of having to satisfy the already higher burden of proof required for criminal, as opposed to administrative, sanctions. If firms are unwilling to cooperate, then such proof will be more difficult to establish.'³²⁸

At present, competition law regulations lack provisions pertaining to the prosecution of individual directors for their involvement in cartel conduct. This effectively means that the individuals involved in cartel conduct will not be subject to prosecution under the Competition Act. Whether the NPA will succeed in prosecuting individuals involved in cartel conduct under the relevant provisions of the Corruption Act, is yet to be established.

³²⁷ Ibid.

³²⁸ Ibid.

5. CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The harm caused by collusive tendering cartels is significant and greater emphasis should be placed on the deterrence of cartel conduct.³²⁹ The imposition of a fine often defeats the purpose of the law in this context, to bring those in violation of the law to justice. It seems highly unsatisfactory to impose a fine on a juristic person given that it is an artificial entity. In some cases such fines are merely written off as a cost of trading by that juristic person. This illustrates the need for alternative preventative measures and enforcement mechanisms that have real deterrence value. Thus, the introduction of criminal sanctions against individuals may serve to be an effective alternative solution if implemented in the correct manner. The threat of criminal sanctions against individuals appears to be a greater deterrent than the imposition of a civil fine on the company as it targets those actually responsible. The threat of imprisonment would force these decision-makers to reassess their cost-benefit analysis thereby facilitating an effective deterrence mechanism.

The introduction of criminal sanctions for cartel offences such as tender collusion is, in principle, a welcome development in competition law that brings South Africa in line with a number of larger countries and places even more emphasis on deterrence.³³⁰ However the manner in which this is being done in South Africa is problematic. The Competition Amendment Act lacks sufficient detail, potentially detracts from the established practice of the CLP and contains vague evidentiary thresholds around which the courts will need to develop benchmarks.³³¹

As previously mentioned, the Competition Amendment Act was enacted by Parliament in 2009 but the provisions relating to the criminalisation of cartel conduct have not yet come into force through proclamation by the President. It is to date not known when these provisions will come into force. Thus this remains a pertinent topic which the NPA should consider in relation to the recent construction cartel matters. It is submitted that the delay in giving effect to these provisions is caused by the criticism and resistance to the introduction

³²⁹ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

³³⁰ Kelly (note 31 above) 333.

³³¹ *Ibid.*

of criminal sanctions by various stakeholders.³³² It is recognised that the constitutional concerns raised by various observers regarding section 73A are born out of genuine and legitimate fears that directors' fundamental constitutional rights may be impinged upon.³³³

There are various constitutional concerns relating to the criminalisation provisions of the Competition Amendment Act as they are currently framed, with regard to the burden of proof placed on any defendant with respect to subsequent criminal proceedings.³³⁴ It remains to be seen if the constitutionality of the new section 73A of the Act will be sent to the Constitutional Court for a review *a posteriori*.³³⁵ However, it is submitted that section 73A does not amount to an infringement of the right to be presumed innocent, the right to remain silent, the right not to testify during proceedings and the broader right to a fair trial of an accused person. It is further submitted that even if section 73A is viewed as a *prima facie* infringement of the aforesaid constitutional rights, that such infringement would be reasonable and justifiable in the circumstances, given the leading role directors play in their company's affairs and the pressing social need to eradicate cartel and other anti-competitive practices in our society.³³⁶

Besides these constitutional concerns relating to a person's rights to remain silent and to be presumed innocent, in terms of the rules of evidence, findings by the Competition Tribunal are arguably not admissible evidence in any subsequent court proceedings, owing to the different standards of evidence and proof required for competition proceedings before the tribunal.³³⁷ If this is correct, a significant practical difficulty is that it is likely to be difficult and time consuming for the NPA to prosecute and secure convictions against individuals for cartel conduct, as the NPA would likely have to lead all evidence of cartel conduct anew before a court in order to obtain a conviction. While the Competition Amendment Act does allow for the Competition Commission to make submissions to the NPA regarding persons

³³² Ibid.

³³³ Jordaan (note 46 above) 198.

³³⁴ Criminalisation to deter cartel conduct (2014) available at <http://www.polity.org.za/article/criminalisation-to-deter-cartel-conduct-2014-03-07>, accessed on 21 October 2014.

³³⁵ Letsike, T 'The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?' (2013) available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-1-2B/THE-NEW-SECTION-73A.pdf>, accessed on 21 October 2014.

³³⁶ Jordaan (note 46 above) 198.

³³⁷ Criminalisation to deter cartel conduct (2014) available at <http://www.polity.org.za/article/criminalisation-to-deter-cartel-conduct-2014-03-07>, accessed on 21 October 2014.

being prosecuted for an offence that is regarded as ‘deserving of leniency’, it is not clear how this will work in practice. These practical difficulties will place an enormous burden on the resources, skills and expertise not only of the NPA but of the courts as well. However, it is submitted that the recommendations made hereunder would be a helpful step towards a way forward.

Regardless of all the flaws present in section 73A, such a provision is needed in South Africa given the failure of current legislation to adequately hold those individuals responsible for tender collusion personally liable. The introduction of criminal sanctions can be justified by the apparent failure of administrative fines imposed on firms or the civil enforcement administration as a whole to provide sufficient deterrence of cartel behaviour.

As a concluding remark, it seems appropriate to assert that there are sound reasons for regarding horizontal restrictive practices in competition law as crimes. Unlike other anti-competitive conduct, considering secretive nature of a cartel and the incentive of cartel members to increase their profits at the expense of the general economy, cartels bear the resemblance of purely criminal conduct. The criminalization of cartel conduct in order to hold directors personally accountable reflects society’s need to attain justice by seeking to target the masterminds behind anti-competitive conduct in the South African economy. The reasons attached to criminalization are wide-ranging. Criminal sanctions for cartel conduct in South Africa have the potential to create a strong deterrent mechanism, given that the only sanction presently imposed is otherwise weak in the form of administrative fines. However, once these criminal sanctions come into effect, cognisance must be taken of the fact that detection, investigation and prosecution of such schemes become a more challenging task. Likewise, there are higher evidential burdens to overcome. It is therefore equally important to understand that an operational CLP is the cornerstone of effective cartel enforcement. Tight judicial control with regards to legal proceedings and effective case management subsequently, are considered essential to ensure that these objectives of the Competition Act are met.

5.2 Recommendations

Having regard to the contents of this dissertation as well as the concluding remarks, recommendations are set out below which assist in addressing some of the issues considered herein.

5.2.1 *Is there still a need for Section 73A given the constitutional and coordination issues?*

It is submitted that there is a need for section 73A, despite the various constitutional and coordination issues it poses as it provides an avenue for the Competition Commission to hold those actually responsible for cartel conduct accountable. Although other legislation and the common law criminalise certain types of cartel conduct, they do not serve as a substantial discouragement for individuals to engage in cartel conduct. Section 73A allows the NPA to prosecute individuals in terms of specific legislation.³³⁸

However section 73A raises several concerns that need to be addressed in order for it to become an effective piece of legislation. Firstly, the development of a framework governing the extent and degree of cooperation required between the Competition Commission and the NPA needs to be installed in order to address the issue of coordination. This should be done in addition to ensuring that the NPA has adequate resources to guarantee effective prosecutions.³³⁹ Furthermore, the current version of section 73A of the Competition Act may need to be altered to avoid the creation of hesitation amongst willing applicants for leniency given the possibility that subsequent criminal proceedings may be instituted against them. The provision, in this respect, has the effect of undermining the generally positive effect that criminal sanctions have on leniency policies.³⁴⁰ It should also be ensured that section 73A is capable of enduring constitutional review and that its provisions concerning the director's right to a fair trial are absolutely consistent with the Constitution.³⁴¹

³³⁸ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

³³⁹ Markus Merdian *The Criminalisation of Cartel Conduct in South Africa and the United Kingdom* (unpublished LLM thesis, University of Cape Town, 2013).

³⁴⁰ Ibid.

³⁴¹ Ibid.

If these concerns are remedied, then there would remain no reason as to why the introduction of criminal sanctions in the Competition Act, in addition to the imposition of an administrative penalty, should not be enforced. In this regard, the introduction of criminal sanctions in competition law constitutes a bold step forward towards a more effective way of exposing and dealing with cartels in South Africa.³⁴²

Moreover, it should be stressed that if section 73A is to become effective, it will be necessary for the entire Competition Act to be assessed and amended holistically in order to ensure that it does not infringe the fundamental constitutional rights of individuals, and to ensure that it reads as a singular cohesive piece of legislation.³⁴³ In doing so, careful consideration should be given to the fundamental policy objectives of the Competition Act. This should be done to account for the various amendments that the Competition Act has undergone over the years as there may have been a shift in the purpose of the Competition Act and if so, then such amendments would have given effect to amended policy objectives.³⁴⁴

5.2.2 Directors' liability for Cartel Conduct

While Section 73A contains legislation giving the NPA and the Competition Commission the power to hold accountable those individuals responsible for cartel conduct, it does not contain a provision relating to the possible civil action a company, corporation or wronged party could take against that individual to recoup or recover a portion of the loss the corporation suffered as a result of its involvement in cartel conduct via that individual. Although it is acknowledged that company law provides an avenue for the offending corporation to recover or recoup loss from directors under various provisions relating to that director's recklessness, misconduct, etc., it is recommended that a specific provision should be included within section 73A in the ambit of competition law regarding this, rather than resorting to company law. Since it is a competition law infringement, there should be legislation which obliges that guilty individual to compensate the firm to which they belong so as to provide a form of

³⁴² Ibid.

³⁴³ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

³⁴⁴ Ibid.

justice to the firm which may have been unaware of that individual's actions. Given the fact that a firm found to have engaged in prohibited conduct under competition law is liable to an administrative fine, the individual responsible for that firm's participation in cartel conduct should compensate the firm a percentage of the administrative fine which the firm had to pay as a result.

Therefore, should the competition authorities not wish to criminalize cartel conduct under section 73A, it is recommended that individuals, specifically the directors (and not just their firms), should be liable for the payment of administrative fines, based on the level or degree of their involvement in the cartel.³⁴⁵ Individuals who know that they could be personally civilly liable for fines worth millions of Rands, would be more hesitant to engage in or allow their firms to engage in cartel activities, or, if they are already engaged in such activities, they might reconsider their involvement.³⁴⁶ The fines imposed should be punitive enough to convey an effective echoing message to other cartels because the risk of a heavy fine should outweigh the cartel members' benefit from their involvement in the cartel.³⁴⁷ However until such legislation is passed, firms should still be encouraged to hold their directors accountable under the ambit of company law as discussed in chapter 4.

5.2.3 Coordination issues

The Competition Commission and the Competition Tribunal are currently unable to cooperate with the NPA in its efforts to prosecute individuals involved in cartel conduct in terms of the common law crime of fraud or in terms of POCA with regard to information provided to them pursuant to summoning or ordering an individual or firm to give evidence to them which is self-incriminating.³⁴⁸ Even if such evidence were made available to the NPA, it would be inadmissible in any criminal proceedings.

³⁴⁵ Moodaliyar, K 'Are cartels skating on thin ice? An insight into the South African Corporate Leniency Policy' (2008) 125 (1) *South African Law Journal* 157-177.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Lopes, N; Seth, J; Gauntlett, E 'Cartel enforcement, the CLP and criminal liability – are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?' available at www.compcom.co.za/.../Cartel-Enforcement-Paper-Final-2013-08-20.pdf, accessed on 24 March 2014.

Ironically, any evidence provided to the competition authorities on a voluntary basis does not appear to be afforded the protection of section 49A(3), and it thus appears that the Competition Commission could cooperate with the NPA to prosecute individuals who make self-incriminating statements in leniency applications via the CLP.³⁴⁹ However, whether the Competition Commission wants to cooperate with the NPA is another matter in itself as there are no guidelines governing the extent or limitation of their cooperation with one another.³⁵⁰

It is submitted that even if the Competition Commission were, hypothetically, obliged to cooperate with the NPA, it would be detrimental to the economy as it would give rise to highly inequitable results and would be likely to have a negative effect on the submission of leniency applications. This in turn would be detrimental to the policy objectives of the Competition Act.³⁵¹

The Competition Act currently provides two avenues of options open to the Competition Commission regarding this matter.³⁵² The first is for the Competition Commission to cooperate with the NPA in order to seek to ensure that such individuals are not prosecuted as their cooperation with the Competition Commission would result in the uncovering of a cartel, and in order to ensure that future individuals are not dissuaded from giving evidence to the Competition Commission in terms of the CLP.³⁵³ But this is not an ideal solution as the discretion of the NPA to prosecute an individual cannot be fettered by any third party, including the Competition Commission.³⁵⁴ The second avenue is for the Commission to subpoena or summon evidence from a whistle-blower pursuant to receiving and granting a leniency application. On this basis any self-incriminating statements made in the leniency application should be inadmissible in any criminal proceedings by virtue of the operation of section 49A(3). It is submitted that this avenue is far more plausible than exercising the right not to make self-incriminating statements.³⁵⁵

The Competition Amendment Act provides that any finding of cartel conduct by a company by the Competition Tribunal shall serve as *prima facie* proof in subsequent criminal

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

proceedings that the company engaged in a prohibited practice. The Competition Commission and the Competition Tribunal have publicly criticised the criminalisation provisions on the basis that they are likely to undermine the Competition Commission's ability to detect, and the NPA's ability to prosecute, cartels through the CLP.³⁵⁶ As a result, directors will be less likely to come forward and reveal the existence of cartels through the Competition Commission's CLP if they face the possibility of criminal sanctions, as they do not have guarantees of absolution from prosecution by the NPA.

In terms of the Competition Act, the firm is likely to receive leniency, and, most importantly, there is no risk that individuals' statements can later be used against them in criminal proceedings. In the absence of the extension of the above protection, individuals who have been involved in cartel conduct are less likely to make self-incriminating statements to the Commission in leniency applications. Thus a firm which is alleged to be involved in cartel conduct is less likely to step forward and make use of the CLP. This is clearly not in the public interest, nor does it advance the objectives of the Competition Act

The ultimate onus on the NPA of proving the elements of section 73A beyond reasonable doubt, is made even more difficult to discharge by these fundamental flaws. It would have been preferable for the Competition Commission to have been given a greater role in the enforcement of section 73A to economise on state resources, instead of placing the entire burden of doing so on the NPA. While it can be acknowledged that this would have required more considered and nuanced legislative amendments which would have taken a longer period of time to draft and implement, adopting this approach would undoubtedly have benefitted competition law enforcement in the long run. It is evident that the downside to criminalizing cartel behaviour is that other government departments, such as the Department of Justice, would have to play a significant role in prosecuting cartels. This may lead to time delays in liaison between the different authorities. It is therefore recommended that cartels should be prosecuted in a specialized competition-law or commercial-crimes court.

³⁵⁶ Ibid.

5.2.4 Alternative sanctions for construction cartels

Another highly debated possible deterrent is the barring or blacklisting of companies found guilty of cartel conduct from the submission of future tenders. This type of deterrence strategy has been applied in other fields of law for instance the blacklisting of entities that have committed acts of fraud or corruption against local authorities. A blacklist or register of entities or individuals who contravene competition law sanctions should be entered onto a database which is constantly updated and properly administered to ensure that such entities or individuals are barred from, for example, competing for a tender. However, the effects of barring companies are difficult to predict in a South African context. It would also be difficult to predict the reaction of companies found guilty of cartel activity who would subsequently be blacklisted from participating in tenders.

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