The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?

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ABSTRACT

The US department of justice has long been trying to persuade jurisdictions around the world to adopt criminal law provisions for hard-core cartel activities; it seems South Africa has finally been persuaded.

This paper explores the implications of the new section 73A of the Competition Amendment Act 89 of 1998, which has introduced the imposition of criminal liability for directors of firms found guilty of hard core cartels.

It interrogates deterrence as the key justification offered by enforcers of competition law around the world in support of criminal cartel law enforcement and also raises serious questions about the possible unconstitutionality of this new section.

Will the imposition of such sanctions have negative consequences on the South African Competition Commission’s success in combatting cartels? How will the introduction of criminal liability impact on the Commission’s high prosecution rate, which is mainly attributable to its corporate leniency policy, its power to summons and interrogate and its ability to conclude consent orders. Will directors not be reluctant to divulge information to the Commission in fear of criminal prosecution? I proceed to answer these questions in the paper.

The paper proposes considerations on how we can ensure that emphasis is placed on strategies that provide a maximization of the value of criminal sanctions. And how the deterrence effect can be used without scaring away potential CLP applicants and future consent order signatories.
1. **INTRODUCTION**

The Competition Amendment Act\(^1\) ("Amendment Act") was first introduced as a Bill in June 2008, and it sought to introduce various amendments to the then existing Competition Act\(^2\). The proposed amendments were in relation to the following:

1. Concurrent jurisdiction between the competition authorities and other sector specific regulators;
2. Market enquiries;
3. Personal (criminal) liability for cartel conduct;
4. Complex monopolies;
5. Amendment of the Competition Commission’s ("Commission") Corporate Leniency Policy ("CLP").

In its 2008 format, a number of constitutional questions were raised against the Amendment Act. These questions related specifically to the imposition of criminal sanctions in cartels. Some of these constitutional questions were around:

i) The reverse onus on directors or managers who are to be tried for hard core cartels;
ii) The prevention of a company from assisting such director or manager by paying for his legal defence; and
iii) The prohibition of a company from paying a fine imposed on a director for a hard core cartel.

A decision therefore had to be made whether to sign the Bill so that it becomes an Act of Parliament, or, owing to doubts about its constitutionality, to refer the Bill to the Constitutional Court in terms of section 79 (4) (b) of the Constitution\(^3\) for a decision on its constitutionality.

The Honourable President Jacob Zuma signed the Bill on the 28\(^{th}\) of August 2009, without addressing the constitutional concerns that were raised.

However, even though the Bill was assented to and duly signed by the President, the Amendment Act has not been proclaimed, in other words, the President has not formally announced the date on which the various sections of the amended Act will come into force. The only portion of the amended Act that has come into effect is section 6, by proclamation published in the Government Gazette on Friday, 8 February 2013. The proclamation brought into force the provisions relating to market inquiries, which came into force on 1 April 2013.

2. **THE NEW SECTION 73 A**

Section 73A has been inserted into the principal Act after section 73, and it reads as follows;

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1. Act No 1 of 2009
2. Act No 89 of 1998

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“Causing or permitting a firm to engage in prohibited practice”

73A (1) A person commits an offence if, while being a director of a firm or while having 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 purposes 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 acknowledgment 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.
3. **WHY THE NEED FOR CRIMINAL SANCTIONS?**

In 2007, the then President Thabo Mbeki made reference to the need to strengthening the Competition Act in his state of the nation address. This resulted in the tabling of the Competition Amendment Bill that provided for the criminalisation of cartel conduct. This was however met with the unusual result that the agency endowed with these powers was opposing the legislation. The main criticism being that the Bill would significantly weaken the incentive for firms to use the CLP and to enter into consent orders - the two most important mechanisms in the apprehension of cartels.⁴

Some scholars have argued that for efficient cartel law enforcement, the use of criminal sanctions is necessary. Peter Whelan argues that cartel formation involves price-fixing, output restriction, market allocation, and/or bid-rigging, acts which are extremely harmful and damaging and may have a number of destructive effects for customers, consumers, the competitive process and the economy. It may be likened to a sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer.⁵

It is argued that cartel activity reduces the competition on a given market and has the potential to reduce or eliminate the gains that such competition secures. There are other consequences of cartels which are not always given the attention they deserve, these are:

1. A transfer of wealth from the consumer to the producer, effectively reducing the consumer surplus. This transfer manifests itself in increased prices and a reduction in output;
2. Scarce economic resources are under utilised;
3. Higher prices may be charged by non-violating cartel members due to the higher cartel prices;
4. Non price effects (such as quality, choice and innovation) may arise due to a reduction in competition.⁶

As a result, it is submitted that cartel activity involves sufficient harm to be considered for criminalisation.

While there has been unanimity in the community of anti-trust scholars and enforcers surrounding the damaging consequences of cartel conduct, there is significant divergence in the remedies actually imposed in the various national competition law regimes.⁷

A key if not the primary justification given for cartel criminalization is that “fear of criminal sanctions and jail in particular will deter potential offenders.”⁸ This reflects the assumptions of classical deterrence theory that people know the law and make considered, rational and self-interested decisions to comply or not to comply with it. It is assumed that potential

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⁴ Lewis D *Thieves at the dinner table* page 226
⁵ Whelan P *A principled argument for personal criminal sanctions as punishment under EC cartel law* *Competition Law Review* 28
⁶ *Ibid* at 29
⁷ *Supra* n 4 at page 225
⁸ Beaton Wells C and Parker C *Justifying criminal sanctions for cartel conduct: a hard case* *Journal of Antitrust Enforcement* 204

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cartelists calculate the guarantee of increased financial profitability from cartel behaviour against the likelihood of being detected and prosecuted by an enforcement agency and the nature and size of the sanction that will be applied. The law is therefore supposed to be able to deter cartel behaviour by ensuring that sanctions are swift, sure and substantial, and that optimal sanctions are levied.\(^9\)

Deterrence theory finds its roots in the classic utilitarian argument that suffering is a pain that should be avoided and that, as a result, punishment itself a form of suffering, cannot be justified unless a specific social benefit or utility can be derived from its imposition. At its most basic, this theory holds that punishment can only be justified if it leads to the prevention or reduction of future crimes.\(^10\)

The United States has long been the standard bearer for imposition of criminal sanctions on those found to be implicated directly in cartel conduct. US enforcers argue that fines and civil damages imposed on companies do not compensate for the economic damage wrought by cartels and the rents derived by the firms that participate in them. They argue that the imposition of fines and damages on firms is insufficiently deterrent, that only the threat of imprisonment will act as a sufficient deterrent.\(^11\)

4. **WHAT WILL THE IMPACT OF CRIMINAL SANCTIONS BE?**

One cannot shy away from the glaring concern that the introduction of criminal sanctions may have an adverse effect on the Commission's impressive numbers when it comes to concluding consent orders and roping in leniency applicants to sign the CLP. It seems fairly obvious that directors and executives will be less willing to conclude consent orders on behalf of their firms, if an admission by a firm that it participated in a cartel (which is an essential feature of a consent order) may be used as the basis, even a mere *prima facie* basis for securing a later criminal conviction against the very same directors.\(^12\)

By encouraging cartel members to disclose information on any cartel activity, the CLP has facilitated the dismantling of cartels in other closely related sectors of the economy. For example, the Commission’s investigation into the milling sector was triggered as a result of information received in CLP applications relating to the bread cartel.\(^13\)

The construction and infrastructure sector is a good example where much effort was deployed by the Commission to eradicate cartels, largely based on information received through CLP applications.\(^14\)

Its Cartels Division of the Commission records that the number of CLP applicants, particularly in the Industrial products, and as we have recently seen with the Construction

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\(^9\) Ibid
\(^10\) Supra n 3 at page 11
\(^11\) Supra n 5 at page 224
\(^12\) Ibid at page 227
\(^13\) Lavoie C *South Africa’s Corporate Leniency Policy: A five year review* 13
\(^14\) Ibid at page 14

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fast track project, has risen dramatically.\textsuperscript{15} The graphs below illustrate how the Commission’s CLP applications have looked over the past four financial years.

Also, the Commission’s Legal Services Division reports that in the financial year 2011/2012, it negotiated and entered into 28 settlement/consent agreements, to a total value of R548 494 066.\textsuperscript{16}

Total number of CLP applications received per year (excluding construction and infrastructure)

\begin{figure}
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\includegraphics[width=\textwidth]{chart.png}
\caption{Chart showing CLP applications received per year.}
\end{figure}

\textsuperscript{15} Competition Commission Annual Report 2011/2012 at page 21
\textsuperscript{16} Ibid page 41

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As shown above, the CLP’s track record has been impressive and it has proven to be a formidable tool in detecting cartels and in enforcement.

The introduction of criminal liability will add a new dimension to competition law enforcement, namely the jurisdiction of the National Prosecution Authority (“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 criminal prosecution of individuals.17

5. UNCONSTITUTIONAL ASPECTS

One of the reasons why this Bill took so long before it was signed in as law is that a number of constitutional questions were raised around its validity. The imposition of personal liability in itself is not considered to be problematic, however the content of subsection 5 is what caused great unease previously, and it seems despite that uneasiness, the subsection has been included, unchanged. It reads thus:

(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

17 Supra n 13

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in terms of section 4 (1) (b), is prima facie proof of the fact that the firm engaged in that conduct.”

The then President Kgalema Motlanthe relied on the advice of his legal counsel who informed him that this provision introduces a reverse onus on an accused, inconsistent with the provisions of section 35 of the Constitution. The Constitution guarantees that:

“35(1) Everyone who is arrested for allegedly committing an offence has the right –

(a) To remain silent
(b) To be informed promptly –
   (i) Of the right to remain silent; and
   (ii) Of the consequences of not remaining silent;
(c) Not to be compelled to make any confession or admission that could be used in evidence against that person…”

Advocate Semenya stated that “it would be perilous for an accused person to remain silent in the face of prima facie proof introduced by section 73A (5).” In other words, the Amendment Act now provides that the onus for rebutting the Competition Tribunal’s (“Tribunal”) conclusion rests with the accused in the criminal proceedings. The above subsection may raise the following constitutional concerns:

1. Infringement of the right to a fair trial

The presumption of innocence enshrined in section 35 (3) of the Constitution, as discussed above, requires that the State bear the full burden of proof in relation to each element of the criminal offence. It is only once the State has established each element of the crime, beyond a reasonable doubt, that the burden of proof shifts to the accused to create reasonable doubt.

The fair trial right is expressly set out as a residual right which includes, but is not limited to, the enumerated fair trial rights in section 35 of the Constitution. The Appellate Division in S v Rudman & Another held that “the exhaustive extent of the common law right to a fair trial was a determination whether there had been an irregularity or illegality, in other words, a departure from the formalities, rule and principles of procedure according to which our law required a criminal trial to be initiated or conducted.”

2. The right to be presumed innocent

The state is expected to bear the full burden of proving the case and not to compel assistance from the accused. This is the governing principle behind silence and self-incrimination rights of the accused. The presumption of innocence requires the final burden

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19 Ibid
20 1992 (1) SA 343 (A)
21 Woolman S et al Constitutional Law of South Africa 51-100
of persuasion to be on the prosecution, activity premised on the guilt of the accused threatens the presumption of innocence.\textsuperscript{22}

By failing to observe the above mentioned rights, one runs the risk that they are now creating a reverse onus and this is generally considered to be constitutionally unsound. A reverse onus refers to the shift in the burden of proof in criminal matters. Both rights to silence and the right to be presumed innocent are trampled upon in that a fact is presumed to have been proven unless the accused can disprove that fact.\textsuperscript{23}

Unsound it may be but it is not without some convenient and constitutionally acceptable application, provided that the reversed burden does not create undue hardship or unfairness.\textsuperscript{24}

In this regard there are some important distinctions to be drawn between evidential presumptions and those presumptions which in fact reverse the onus of proof. The Constitutional Court has held that only where a reverse onus means that there is a risk that an innocent party could be found guilty, is the reverse onus unconstitutional. Where, however, there is not a true reverse onus, but an evidentiary burden shift, this may be constitutionally tolerable.\textsuperscript{25}

A reverse onus is not automatically unconstitutional. There is a two-stage test:

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. 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.

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. The apparent purpose of the reverse onus provision in this case is to ensure that the finding of prohibited conduct occurs in the Tribunal rather than in the criminal courts.

This is not, however, a legitimate purpose because an accused is entitled, in terms of section 35(3) of the Constitution, to a trial "before an ordinary court", which the Tribunal and the Competition Appeal Court ("CAC") are not. The risk of conviction despite the existence of a reasonable doubt is real, because the accused may not have been party to the proceedings in the Tribunal or the CAC which determined that the firm had engaged in the prohibited practice.

Section 73A(5) is accordingly not a justifiable limitation of the presumption of innocence.

\textsuperscript{22} Ibid at 51-144
\textsuperscript{23} Smith A and Stubs, M "The competition and constitutional conundrum: cartels, criminalisation and complex monopolies" Competition Law SG at page 6
\textsuperscript{24} S v Zuma 1995 (2) SA 642 (CC) at para 38
\textsuperscript{25} Supra n 23 at page 7

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3. **The right to adequate time and facilities to prepare a defence**

The Constitution already points out that every accused person has the right to choose, and be represented by a legal practitioner, and to be informed of this right promptly.  

6. **DUAL PROCEEDINGS**

A dual administration proceeding is where one authority prosecutes the firm for cartel activities under a civil law standard, and another prosecutes the individual under a criminal standard for criminal activity.

Section 179 of the Constitution states that:

(1) “There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of –

(a) A National Director of Public Prosecutions…

(b) …

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceeding.”

Furthermore, the National Prosecuting Authority Amendment Act\(^\text{27}\) requires that:

21(1) “The National Director shall, in accordance with section 179 (a) and (b) and any other relevant section of the Constitution –

(a) …

(b) Issue policy directives,

Which must be observed in the prosecution process and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act and any other law.”

Subsection 4 requires a dual role of prosecution between the Commission and the NPA by requiring the NPA to be the body that is responsible for the criminal prosecution, and the Commission being responsible for making submissions to the NPA in support of leniency of a person certified as deserving of leniency.

David Lewis criticises the above by submitting that it may be appropriate that jail time fits the offence of price-fixing. However, it introduces immense complexity at both the investigative and prosecutorial stages. Jail time can only be imposed by the courts following a successful prosecution by the NPA.

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\(^{26}\) See section 35 (3) f) of the Constitution  
\(^{27}\) Act no 61 of 2000

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He adds that we’re all familiar with the inability of the NPA to successfully prosecute complex white collar crimes. Even the threat of personal liability would reduce the likelihood of companies admitting to price-fixing, thus requiring the commission to prosecute conspiracies without the assistance of inside informants who are usually complicit in the impugned conduct, but who could not be extended immunity from prosecution without the agreement of the prosecutors and ultimately the courts.28

This is already expressing a view that the anticipated dual role between the Commission and the NPA may be doomed for failure before it even starts.

In his address at the Bowman Gilfillan Africa competition law seminar29, Mr Norman Manoim said that the United States Department of Justice (“DoJ”) has been trying to persuade other jurisdictions to adopt criminal law provisions for hard core cartel activities.

With regards to the dual proceedings provisions he stated that "I do not think that in dual administration proceedings it is a good idea to introduce criminal sanctions."

Mr Manoim states that the only jurisdiction where he had seen criminal sanctions working, was in the US and only because the department who prosecuted the firm was also prosecuting the individual. "Where you start dividing the function, and when you have divided standards and you have two proceedings it is bound to end up in tears. And it is tears for those who have to prosecute the cartel and possibly joy for the cartel and those involved in it," he said.

He suggests that certainly for developing countries, the adoption of criminal sanctions against cartel activities is not a good idea, as developing countries are not ready for this.

in the United Kingdom, dual proceedings seem to be working well for the Office of Fair Trading (“OFT”) and the Serious Fraud Office (“SFO”). The OFT is the United Kingdom’s consumer and competition authority. Their mission is to make markets work well for consumers. They are a non-ministerial government department established by statute in 1973. They carry out many different functions, including, carrying out consultations on various topics; guidelines for policy makers, carrying out of Regulatory Impact Assessments and an investigation of cartels.30

When the OFT first receives information about alleged cartel activity it may not immediately be clear whether the case will involve a criminal prosecution of individuals, or whether it will merely lead to an administrative procedure against the undertakings concerned under the relevant Competition Act.

When it becomes clear that there is a possibility of both criminal and administrative proceedings, and where the Serious Fraud Office (“SFO”) is conducting the criminal case,

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28 D Lewis Commission’s critics wrong in criticising cartel fines Available at http://www.iol.co.za/business/opinion/commission-s-critics-wrong-in-criticising-cartel-fines-1.1540414 (Last viewed on 12 August 2013)
29 African Competition Law Seminar held at Bowman Gilfillan on 14 March 2013

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the SFO and OFT will consult, and the OFT will not institute an administrative proceeding without prior consultation with the SFO.  

Where the OFT and the SFO are working together, the two investigating teams will maintain an on-going dialogue in order to ensure that the administrative procedure does not prejudice the on-going criminal procedure and vice versa.

But because the OFT has the power to simultaneously conduct the administrative and criminal proceedings, if it is conducting both, then it will have two separate investigating teams for each investigation.  

If a comparison was to be drawn between the SFO, the OFT and the competition and criminal law enforcement institutions in South Africa, it is clear that the SFO is similar to the NPA and the OFT is similar to the Commission. Placed in context, some of the pros and cons of such a dual system would be as follows:

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<tr>
<th>UNITED KINGDOM</th>
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<tr>
<td><strong>PROS</strong></td>
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<tr>
<td>- Memorandum of understanding between the OFT and the DFO to encourage cooperation and create a skills bridge between the two institutions</td>
<td>- National criminal prosecution authority responsible for investigating and prosecuting criminal infringements have extensive experience in criminal cases</td>
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<td><strong>CONS</strong></td>
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<tr>
<td>- OFT principal enforcer of criminal sanctions. But no pre-existing expertise. Need to bridge skills gap to ensure effective prosecution</td>
<td>- National criminal prosecution authority may not have necessary experience in competition law and/or capacity to investigate/prosecute</td>
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<tr>
<td>- Scope for complications in dual and criminal cases – usually criminal case brought first – leads to impact on timing and use of resources</td>
<td>- Competition Tribunal does not have to follow Commission’s recommendations on reductions in fines</td>
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<td>- Time lag between introduction of criminalisation and effective prosecution of individuals</td>
<td>- Immunity from criminal sanctions cannot be provided by the Commission or the Tribunal – could deter leniency applications</td>
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31 R Whish and D Bailey *Competition Law* page 431

32 *Ibid*

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7. COUNTRIES THAT HAVE INTRODUCED CRIMINAL SANCTIONS

UNITED STATES OF AMERICA

Criminal sanctions have been part of the US antitrust system since it came into existence. Engagement in cartel agreements has consistently been punished as a criminal offence. Anti-trust authorities like the DoJ and the Federal Trade Commission ("FTC") are equipped with broad investigative powers. Moreover judges are willing to impose prison sentences on individuals.33

The Antitrust Division has sole authority for federal criminal antitrust enforcement in the United States. We have separated criminal antitrust enforcement from civil enforcement, and have created a specialized criminal enforcement team. We also have focused our criminal enforcement only on hard core violations -- price fixing, bid rigging and market allocation. This helps us conserve prosecutorial resources by reducing the number of potential cases and the complexity of proof, and establishes clear, predictable boundaries for companies, which can more easily determine whether their own conduct will form the basis of a criminal case.34

AUSTRALIA

Australia introduced cartel offences with criminal sanctions in 2009. The shift was from a regime that involved civil fines to one that involved convictions and jail sentences of up to 10 years.35 The Australian introduction of criminal sanctions was justified on two grounds; first, it was claimed that having a criminal regime is the most effective way to deter cartel conduct and induce compliance with the law. Second, it was said that serious cartel conduct is inherently criminal, and is sufficiently harmful and wrongful, and as a result should be treated like other crimes such as fraud and theft. These were arguments that were made by the Australian Competition and Consumer Commission (ACCC).36

8. COUNTRIES THAT HAVE NOT ADOPTED CRIMINAL SANCTIONS

For a number of reasons the present European system relies on administrative law based corporate fines being imposed on the undertakings.37 Similar to South Africa, the EU Fining Guidelines and European Council Regulations 1/2003 limit the effective fine to a maximum of 10 per cent of group turnover worldwide.

Moreover these sanctions affect the corporation and not the private individuals, who may be both higher and lower management, and the ones to decide on the undertaking’s business activities.

33 Cseres KJ et al Criminalization of Competition Law Enforcement: Economic and Legal
34 Masoudi G "Cartel enforcement in the United States and beyond Available at http://www.justice.gov/atr/public/speeches/221868.htm (Last viewed on 16 August 2013)
35 These criminal provisions were introduced by the Trade Practices Amendment Act 2009
36 Supra n 8 at page 199
37 Supra n 33

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strategy, including possible anti-competitive acts. Neither the European Commission nor most of the member states have at present possibilities to impose sanctions on the individual directors, managers or employees of the undertakings that are responsible for the anticompetitive acts.  

9. **ARGUMENTS IN FAVOUR OF CRIMINAL SANCTIONS**

A decision to act in breach of antitrust rules will often be based on a cost benefit analysis. Managerial incentives are often difficult to reconcile with corporate profit maximisation objectives. Managers may strive for objectives other than firm profits, 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. Corporate penalties may therefore not constitute the appropriate sanction, because it is the individuals within the corporation who take the decisions and hence actually commit the corporate crimes.

To prevent company liability acting as a shield behind which managers can hide and collude to their personal advantage, direct intervention from the authorities against the individuals responsible, in the form of individual fines, disqualification orders or even jail sentences may provide a more effective deterrence.

By targeting the actual decision maker, competition authorities could bypass ineffective corporate governance mechanisms of compliance and indirect punishment within the firm in cases where otherwise only corporate antitrust fines would be levied.

The identification, branding or even formal disqualification of these managers would weed the offenders out of the management pool.

By making a clear and targeted intervention, thus separating management responsible from owners and employees with no involvement in the anti-competitive acts, individual sanctions could be efficiently paired with corporate leniency and compliance programmes. The business community would be further encouraged to have good compliance mechanisms in place so as to document the internal responsibility and place the blame in the event of a discovery.

Criminal prosecution of individuals will bring antitrust violations to the public eye as a serious form of white collar crime. Raising awareness of the fact that anti-competitive behaviour generates social welfare losses is likely to reduce violations generally.

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38 Ibid
39 Supra n 33 at page 7
40 Ibid
41 Ibid
10. STEPS TO MITIGATE CONCERN

To avoid an intermingling of criminal and civil procedure, two separate trials can be run. One before the competition authorities in which the firm will be prosecuted, the other before the criminal courts in which the persons participating in the cartel would be tried.\(^42\)

RISK: Possibility that the two adjudicative bodies will reach different conclusions. In the South African context, it is not clear what direction will be taken once the criminal sanction provision is proclaimed.

The removal of responsibility for cartel prosecution and adjudication from the competition authorities and hand it over to the criminal justice system.\(^43\)

RISK: Ineffective prosecution of cartels and it is undesirable for the adjudication of competition matters to be placed in the hands of criminal authorities.

The strengthening of administrative penalties. Particularly that the restriction of the basis of the administrative penalty to a single year’s turnover be amended to permit an administrative penalty based on the number of years the anti-competitive conduct was practiced.\(^44\)

It is imperative to bear in mind that the underpinning of any deterrence prediction should be closely scrutinized and empirically tested. At the very least there should be some attempt to assess the existing state of knowledge and perceptions of anti-cartel law and enforcement amongst the relevant business community. To address any gaps in knowledge and perceptions exposed by such assessment, educational and awareness strategies should be devised to ensure, not only that business people know about the law and sanctions but that they are aware of the competition authority’s powers and commitment to enforce the law.

In particular, it would be important that potential offenders be aware of the authority’s leniency policy, the weapon of choice for cartel destabilization and detection for most competition enforcers around the world.\(^45\) It is submitted that due to the modest level of public awareness of the seriousness of antitrust violations, incurring a negative reputation with regard to compliance with competition rules does not seem to worry many companies in Europe.

Given the risks associated with administering a criminal cartel regime, there is a good case for suggesting that advocacy, education and dialogue should precede any change in the law to introduce criminal sanctions. Indeed Australia seems to have adopted this approach. The campaign for criminalization and the period immediately after the introduction of the criminal legislation saw a significant focus and investment by the ACCC in gearing up for criminal enforcement.\(^46\)

\(^{42}\) Supra n 4 at page 228
\(^{43}\) Ibid
\(^{44}\) Ibid at page 229
\(^{45}\) Supra n 34 at page 216
\(^{46}\) Ibid at 217
11. CONCLUSION

The South African competition authorities can adopt a similar approach to that of Australia by first adopting a knowledge and outreach program that will enable not only the business community at large to have a better understanding and perception of anti-cartel law enforcement. With a better understanding, better decisions can be made and there could be a curb in the number of cartels reported at the Commission.

Education and outreach however should not be aimed only at the public, in order to hone into the skills of the existing competition and criminal practitioners that are already prosecuting this conduct, constant training should be considered. Indeed a dual administration can work efficiently and effectively if there is a balance of criminal trained attorneys within the Commission and competition trained practitioners in the NPA.

Earlier in the paper, it was highlighted that one of the advantages of the United Kingdom’s dual administration between the SFO and the OFT is that a Memorandum of Understanding has been signed between the two entities. One that encourages cooperation and a skills bridge between the two institutions. The NPA and the Commission could adopt a similar approach and sign a Memorandum of Understanding in terms of which for a certain period of time, there is an exchange of staff between the two institutions, with the aim of understanding better how the other works. This would hopefully lead to a harmonization of processes.

With regards to the constitutional questions, it is unfortunate that the President did not refer the Bill to the Constitutional Court for a decision on its constitutionality. However, South Africa has a unique provision when it comes to the question of constitutionality of a Bill. The section 79 (4) (b) provides for either a priori or a posteriori constitutional review. This means that prior to a Bill becoming an Act; it can be referred to the Constitutional Court for a theoretical review. In addition, after an Act has been promulgated, it can also be referred to the Constitutional Court. 47

It remains to be seen therefore, if the constitutionality of the new section 73A of the Act will be sent to the Constitutional Court for a review a posteriori.

47 Supra n 23 at page 29
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