A CARTEL IN SOUTH AFRICA IS A CARTEL IN A NEIGHBOURING COUNTRY: WHY HAS THE SUCCESSFUL CARTEL LENIENCY POLICY IN SOUTH AFRICA NOT RESULTED INTO AUTOMATIC CARTEL CONFESSIONS IN ECONOMICALLY INTERDEPENDENT NEIGHBOURING COUNTRIES?

by

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Abstract

A number of countries have cartel leniency policies and/or similar interventions with the Public Prosecutor where cartels are criminalised. While cartel leniency policy has worked very well in South Africa, it has not worked this well in neighbouring countries such as Botswana, Namibia, Swaziland, Zambia and Zimbabwe. There have been cartels with a regional dimension unearthed in South Africa in sectors such as fertiliser, petroleum, cement, etc. Despite countries in the Southern Africa Customs Union (SACU) and Southern Africa Development Community (SADC) being economically interdependent, the businesses which have utilised the cartel leniency in South Africa have not done so in other countries. The paper seeks to examine why the same businesses have not sought leniency and examine why the policy has been very effective in South Africa and not so in neighbouring countries.

KEY WORDS: Competition law, cartel, corporate leniency, enforcement, fines, penalties

1. Introduction

South Africa began to implement its modern competition law in 1998 after a series of reforms following the 1994 political transformation. Its successful enforcement against cartels is yet to be replicated in other economically interconnected countries in Southern Africa Customs Union (SACU) and the Southern Africa Development Community (SADC). Of the BLNS countries (i.e., Botswana, Lesotho, Namibia and Swaziland), only Lesotho does not have a competition law or enforcement system. SADC on the other hand has 14 Member States, which are: Angola, Botswana, DR Congo, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. All the SACU countries are members of SADC as well. For purposes of this paper, all countries that are members of SADC and/or SACU are neighbouring countries to South Africa.

Sectors such as mining, petroleum and agricultural products have been a subject of anticompetitive investigations in South Africa, notably in relation to cartel activity. Despite the high number of cartels that have been unearthed in South Africa[2], there does not seem to be equivalent success in the neighbouring countries. This paper deals with this very issue by reviewing selected cartels that have been unearthed in South Africa, with possible links to other SACU/SADC Member States. It also links into a survey on selected SACU/SADC

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[2] The CCSA initiated **31** investigations in the year through March 2010, involving companies such as Tiger Brands Limited, South Africa's biggest food producer, and Shoprite Holdings Limited, Africa's biggest grocer. That is up from **23** in the previous year and triple the number in the year before. Sections 46 to 49A of the Competition Act of South Africa empowered the Commission to conduct unannounced search and seizure visits and to carry out 'dawn raids' at a firm's business premises to obtain and inspect documents, as well as interview staff if the Commission suspects an infringement of competition law.

Member States in relation to their cartel enforcement and sectors that have been a subject of cartel investigation in South Africa. The paper ends with an attempt to highlight lessons that other competition authorities in SACU/SADC can learn from the success story of the Competition Commission of South Africa (CCSA) in cartel enforcement.

2. Why South Africa's Neighbours must be worried about cartels unearthed in South Africa

South Africa is a key source of direct and indirect investment in sectors such as mining, retail, and to an extent in manaufacturing sectors. SACU's BLNS countries' (Botswana, Lesotho, Namibia, Swaziland) import bill from South Africa has been dominated by petroleum and related products (including bitumen), cement, motor vehicles, iron ore and concentrates. By 2012, Botswana was the 4th largest destination for South African exports at 5.1% of the exports (which incidentally accounted for 91.4% of total intra-SACU imports[3]). As for SADC, the main intra SADC trade export items include petroleum, agricultural products, electricity and some clothing and textile products[4].

Competition policy and law in SACU/SADC countries is increasingly putting emphasis on job creation, poverty reduction, and citizen or SME empowerment. ICN (2002) has recognised that these alternative objectives of competition policy go mostly hand in hand with the traditional ones[5]. The fact is that even the very alternative objectives will not be achieved where there are cartels. This is partly the reason why cartel enforcement has become an important part of competiton policy in many countries. Cartel activity has the propensity to stage manage competition and provide a facade of competition when in actual fact there is collusion and a reduction in consumer surplus.

Where cartels thrive, adverse effects include the following:

- Business opportunities will remain controlled by cartels;
- Penetrating markets with cartels becomes difficult as cartelists will lower prices when they detect prospective entry, making inward investment costly and cause exit of struggling firms. This in turn concentrates job creation in a sector amongst the cartel members;
- Cartels affect the objectives of regional trade integration and free movement of goods as cartel members may create barriers to entry. This is an indirect effect of cartel conduct on regional trade as it hinders the emergence and growth of competing firms located in various parts of the region. A direct effect of cartel conduct on regional trade occurs when a cartel hinders the flow of goods and services across regions through the very act of division of markets and allocation of customers; and
- Cartels do not grow markets, they stagnate market growth.

3. Cartel Enforcement in South Africa

It has been noted that some cartels in South Africa involve markets historically characterised by legal cartels. These legal cartels were outlawed in the 1990s, but long-standing market relationships appear to have prolonged coordinated conduct in many of these markets[6]. An

[3] See SACU Trade statistics, *Merchandise Trade Statistics,* www.stats.sacu.int/staticreports.php
[4] See http://www.sadc.int/about-sadc/overview/sadc-facts-figures/#ImportExport
[5] ICN, *Advocacy and Competition Policy*, (2002)
6 Roberts, S. (2004)

example is given by Boshoff (2014) of the *Bitumen cartel,* that this market is a prime example of one originally characterised by a legal cartel exempted from competition policy until 2000. Subsequently, information exchange continued among market participants, allegedly for the purpose of continuing to calculate a reference price requested by government and industry[7].

In 1999, the then Minister of Trade and Industry, Mr Alec Erwin, emphasised the pivotal role that the competition authorities were to play in transforming "an economy inherited in 1994 that was rigid, protected, locked up in inefficient institutions, highly monopolised and concentrated"[8].

There is no doubt that the CCSA has demonstrated a tough stance towards cartels, not only by word of mouth, but by clear actions that have removed any doubt of the CCSA's capacity to investigate, get the evidence and prosecute successfully and the capacity of the Competition Tribunal of South Africa (CTSA) to handle referrals. However, despite record fines and assured vigorous enforcement, there is little indication that cartels are in decline in South Africa[9]. This has led to recent proposed amendments to criminalise certain hardcore cartels, including price-fixing and market allocation. Kelly (2010) notes that the introduction of criminal sanctions is based, in part, on recognition of how important competitive markets are in capitalist economies for the maximisation of consumer welfare and, in part, on the apparent inability of administrative fines to serve as an effective deterrent to cartelisation[10].

Below is a highlight of some key cartels with possible overspill into SACU/SADC countries:

3.1. Fertiliser Cartel

In November 2003, Nutri-Flo, a small fertiliser blender and distributor (a customer of Sasol), lodged a complaint with the CCSA alleging that three large fertiliser suppliers in South Africa, Sasol, Kynoch and Omnia, were engaged in abuse of market power involving various fertiliser products. However, in the cause of articulating this conduct, the complainant alluded to fact that there was collusion between the three fertiliser suppliers. The Competition Appeal Court of South Africa[11] held that the complainant did not intend to complain about the cartel conduct and that CC should have initiated a separate investigation for this conduct.

To deal with the cartel allegations, the CCSA raided the premises of the suspected cartel members, following which Sasol filed a marker application for leniency for fixing prices of various fertiliser products. Sasol eventually settled for R250 million[12].

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries. Zambia investigated a fertiliser cartel, which case at the time of writing this report was yet to be determined on appeal.

3.2. Bread/Flour/Wheat Milling Cartel

7 Boshoff, Willem H. , *Determining illegal cartel overcharges for markets with a legal cartel history: bitumen prices in South Africa*, Department of Economics, Stellenbosch University, South Africa. E-mail: wimpie2@sun.ac.za
8 Unleashing Rivalry - *Ten years of enforcement by the South African competition authorities (1999 – 2009)* page 1
9 See also Heather Irvine (2014)
10 Kelly, L., (2010)
11 CAC Case No. 93/CAC/Mar10; CT Case No. 31/CR/May05
12 Competition Commission News, Edition 32, June 2009, www.compcom.co.za/wp-content/uploads/2014/09/June-09-Newsletter-32.pdf . See also Nasreen Seria, September 29, 2010, http://www.bloomberg.com/news/articles/2010-09-28/south-africa-targets-sasol-arcelor-in-bid-to-break-apartheid-era-cartels

In March 2010, the CCSA, subsequent to its investigation into collusion in the wheat milling market referred its findings to the CTSA against Pioneer Foods Limited, Foodcorp Limited trading as Ruto Mills, Godrich Milling Limited, Premier Foods Ltd and Tiger Brands Ltd[13]. The case was initiated following revelations by Premier Foods during the bread cartel investigation that the cartel, which involved largely the same companies, also covered their milling operations. The flour cartel fixed the price of flour and allocated customers from 1999 to 2007[14].

Zambia and Zimbabwe investigated cartels in bread but did not uncover any cartel. Zimbabwe investigated a cartel in flour and Zambia in wheat but are yet to register success. None of the other SACU/SADC countries are reported to have investigated similar or related cartels in their countries. Generally, across the SACU/SADC countries, import regulations and restrictions prevent importation of flour, thus South African cartels in flour may not extend to these countries. However, within these closed flour markets, cartels may thrive as well as abuse of dominance that would require an investigation. Wheat cartels in South Africa are most likely to spill-over into the importing BNLS countries.

3.3. Steel Cartel

The CCSA uncovered a steel cartel in 2008, which it believed involved all producers in the industry[15]. The cartel was unearthed after a raid of Cape Town Iron and Steel Works, a subsidiary of construction group Murray & Roberts, and Highveld Steel & Vanadium in Witbank, which is owned by Russian steel maker Evraz. The offices of industry body, the South African Iron and Steel Institute (SAISI) were also searched. SAISI was reportedly used as a platform to collude in long steel products and scrap metal. The product lines included reinforcing bar, wire rod, roofing bolts and fencing products. The cartel was at the peak of the construction works for the 2010 Football World Cup. Following the raid, the CCSA received an application for leniency from one of the companies under its Corporate Leniency Policy (CLP).

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries.

3.4. Mining-supply cartel

CCSA uncovered a mining-supply cartel in 2009***[16]***. The four companies involved were Aveng Africa's Duraset; RSC Ekusasa Mining; Dywidag-Systems International (DSI); and Videx Wire Products. All the companies supplied mining roof bolts, which are used to prevent cave-ins in underground mines. RSC, a subsidiary of Murray & Roberts Steel, was the first to admit it had colluded with its competitors, and submitted a leniency application on 26 September, 2008. The members had agreements to allocate customers and products and also to collude on tenders. De Beers, Gold Fields, Harmony, Anglo Platinum, Lonmin and Sasol Mining were among the mining houses that bought roof bolts from the companies.

[13] CCSA Media Release, 15/03/2010
[14] See *Journal of Industry, Competition and Trade,* December 2014, Volume 14, Issue 4, pp 487-509, 17 Dec 2013
[15] http://www.resourceinvestor.com/2008/07/17/cartel-exposed-south-africas-steel-industry, downloaded 1 March 2015.
[16] Martin Creamer, 30th September 2009)Mining Weekly

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries. Botswana, Namibia, Zambia and Zimbabwe have mining and related industries, which import mining related components from or through South African agents.

3.5. Cement Cartel

The CCSA initiated investigations on 2 June 2008 against four main cement producers Pretoria Portland Cement Company Limited (PPC), Lafarge Industries South Africa (Lafarge), AfriSam Consortium (Pty) Ltd (AfriSam) and Natal Portland Cement Cimpor (Pty) Ltd (NPC-Cimpor). The CCSA raided the premises of the four cement producers on 24 June 2009. Subsequently, PPC applied for leniency and confirmed the existence of a cartel among the four cement producers. AfriSam also admitted that it entered into agreements and arrangements with PPC, Lafarge and NPC to divide markets and indirectly fix the price of cement[17].

Of the SACU/SADC countries, Namibia, Tanzania and Zimbabwe submitted to have investigated similar or related cartels in their countries. However, they did not uncover any cartel – and there was no leniency applications received after the South African investigations. No confessions were made to the competition authorities in Botswana, Namibia and Swaziland by the respondent companies, who had subsidiaries in these other countries.

3.6. Construction Cartel.

In 2009, a probe by CCSA showed top construction companies fixed state and other contracts worth billions of rands[18]. At least 11 affidavits were made by executives from Stefanutti Stocks, one of the country's biggest construction firms, to the Hawks and the National Prosecuting Authority. The statements were also handed to the CCSA for its probe into construction industry tender-rigging, thought to involve contracts worth at least R30 billion. Suspected bid-riggers were: Wilson Bayly Holmes Ovcon (WBHO), Stocks & Stocks civil engineering, Murray & Roberts, Group Five, Concor, and Aveng[19]. In July 2013, the CCSA settled with 15 out of 18 construction firms that participated in the Construction Settlement Program (CSP). These included the top six largest construction firms in South Africa. The total combined administrative penalty imposed by the CTSA for the 15 firms amounted to R1,4 billion[20].

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries.

3.7. Power Cables Cartel

Following successful investigations in 2010, the CCSA referred its findings to the CTSA of cartel conduct in the supply of power cables against Alvern Cables, South Ocean Electric Wire Company, Tulisa Cables and Aberdare Cables to the CTSA for adjudication. The respondent

[17] CTSA website http://www.comptrib.co.za/cases/consent-order/retrieve_case/1355
[18] http://www.moneyweb.co.za/moneyweb-south-africa/competition-commission-probes-r30bn-construction-c
[19] See also Lloyd Gedye, Mail and Guardian, 8 February 2013, http://mg.co.za/article/2013-02-08-00-construction-collusion-may-be-industrys-fatal-flaw
[20] See CCSA Annual Report 2013/14, page 11

companies were all suppliers of power cables in South Africa and following a search and seizure operation in 2010, the CCSA found that these companies directly or indirectly fixed the selling prices of power cables to wholesalers, distributors and original equipment manufacturers.[21]

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries.

3.8. Bitumen Cartel

In 2010/2011 the CCSA initiated a price-fixing complaint in respect of bitumen against the six oil companies operating in South Africa. The six were Total, BP, Shell, Chevron, Engen and Sasol, whom the CCSA alleged had engaged in price fixing. Bitumen and bituminous products are used in road construction and rehabilitation. All the oil companies are members of the South African Bitumen and Tar Association (SABITA). The CCSA submitted that SABITA was a platform to share price sensitive information among horizontal competitors, and to jointly determine a wholesale list price (and a price index) for bitumen.

None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries. Countries such as Botswana, Lesotho, Swaziland and Zimbabwe are net importers of bitumen and bituminous products from South Africa.

4. Cartel Enforcement in neighbouring countries: SACU/SADC Region

Evidently, cartel enforcement in neighbouring countries has not been as successful as that in South Africa. Reasons for this are many, ranging from capacity to lack of understanding of competition law by enforcers as much as by adjudicators/courts. Out of a total of 14 SACU/SADC countries, 9 have functional competition laws and institutional arrangements to deal with the enforcement thereof. A sample of 6 countries out of 9 was considered reasonable for purposes of the survey that was carried out to review their cartel enforcement activities.

Considering the cartels unearthed in South Africa and the trends in trade and investment between SACU/SADC and South Africa, the chances are self-evidently higher that a cartel in South Africa is most likely taking place or has taken place in other SACU/SADC countries. In a worst but likely scenario, companies may discontinue cartels in South Africa but continue in other SACU/SADC countries where enforcement is weak or non-existent. It is clear from the survey that SACU/SADC countries with functional competition authorities have not investigated, or have investigated but have not been successful in gathering required evidence, or the case has been dismissed on appeal in the same cartels that were successfully investigated and prosecuted in South Africa.

The table below summaries the survey results from the countries that were engaged to assist in addressing the issues relevant for this paper:

[21] Oxenham, J(2015)

QUESTIONS	BOTSWANA		NAMIBIA		SWAZILAND		TANZANIA		ZAMBIA		ZIMBABWE	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
1. Does your Competition Agency ("Agency") deal with cartels?												
2. Are cartels in your jurisdiction 'per se' offences?												
3. Are cartels in your jurisdiction a 'rule of reason'?												
4. Has your agency investigated any cartel in the following sectors:												
Bread												
Flour												
Construction												
Cement												
Fertiliser												
Stock Feed												
Plastic Pipes												
Retail Supply												
Edible Oil												
Wheat												
Steel												
Petroleum												
Air Passenger												
5. Does your Agency have a Leniency Program?												
6. Does your Agency have Whistle-blower protection in cartels?												

7. Have you successfully 'busted' any cartel using the Leniency Program?												
8. Have you 'busted' a cartel using 'dawn raids'?												
9. Have any appeals against your Agency's cartel busting been upheld by a higher organ/court?				N/A		N/A				N/A		N/A
10. Do you consider your Agency as reasonably capacitated to investigate a cartel?												
11. Indicate which cartels are 'per se', if any	Price fixing, bid-rigging, market / customer / geographical allocation, sales / production quotas, concerted practice, concerted refusal to join an arrangement crucial to competition		None		None		None		All cartels are *per se* offences		All cartels are *per se* offences	
12. Indicate which cartels are 'rule of reason' if any	Joint-ventures		All cartels		All cartels		All cartels, including, price fixing between competitors; a collective boycott by		N/A		N/A	

				competitors; or collusive bidding or tendering.		
13. What is the minimum (if any) and maximum penalty (if any) in your jurisdiction?	Max. 10% upto 3 years during the currency of the cartel	Max. 10% of global turnover	Fine not exceeding E250,000 (SAR 250,000) or to imprisonment to a term not exceeding 5 years or to both.	5-10% of last audited accounts based on global turnover	Max. of 10% based on latest turnover	Max. imprisonment

5. Lessons from South Africa for other SACU/SADC Countries

The aggressive investigation and enforcement against cartel conduct by South Africa is clearly unparalleled in any of the SACU/SADC countries. While the experiences of South Africa may be unique and not necessarily applicable to nor replicable in other countries, the reasons and/or lessons for a successful cartel enforcement regime can be found by reviewing certain fundamentals that lie behind the enforcement machinery and success of the CCSA. These are discussed below.

5.1. Corporate Leniency and use of settlement agreements

It has widely been held that the CLP has been the single-most decisive factor in facilitating a successful cartel enforcement regime in South Africa. The CLP was introduced in 2004 but the first application was received in 2007. In December 2006, the CCSA initiated investigations against Premier, Tiger Brands, Foodcorp and Pioneer Foods, all of whom allegedly had been involved in the bread cartel. (Bonakele, T., and Mncube, 2012)
After contested proceedings, CTSA ruled that Pioneer Foods had engaged in fixing the price of bread products in the Western Cape province and nationally, imposing on Pioneer Foods a fine of R196 million. Following this Pioneer Foods approached the CCSA with the intention of settling all the other cases that had been referred to the CTSA for adjudication or that were currently under investigation by the CCSA in which it was a respondent[22].

From the first leniency application, we can learn that the initial fine of R196 million showed the respondents that the CCSA was not bluffing. Following this, Pioneer Foods settled for all the other cases that were under investigation. UNCTAD (2010) has equally observed that CLPs are effective only if cartelists not seeking leniency perceive significant punishment to be sufficiently likely. These programmes involve a commitment to a pattern of penalties designed to increase incentives of cartelists to self-report to the competition law enforcer[23]. The UNCTAD report highlighted that necessary conditions for an effective leniency programme include:

(a) Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do *not* apply for leniency;
(b) Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;
(c) The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;
(d) To attract international cartelists, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

The CLP in South Africa was revised in 2008 and it was intended to be a policy designed to encourage disclosure by way of offering immunity from penalisation for cartel conduct in terms of the Competition Act. It was intended, as leniency programmes in general are, to undermine cartel stability by creating a 'prisoner's dilemma', i.e., where none of them are sure whether

[22] See Case number 15/CR/Mar10, Competition Commission vs. Pioneer Foods (Pty) Ltd, 30/11/2010, available at http://www.comptrib.co.za/cases/consent-order/
[23] *The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries,* Geneva, 26 August 2010, TD/RBP/CONF.7/4

the other would reveal the cartel and thus benefit from reduced fines. It does so by modifying the incentives of cartel members and amending the interactions of the system in which they participate. Its success has been largely due to the immunity which it affords to the whistle blower from prosecution and the administrative fine that may be imposed by the CTSA. Lopes, et.al., (2013) posit that at the core of any successful cartel enforcement programme is the effective management of incentives.

Cartels are notoriously difficult to expose due to the fact that they are by their very nature secretive and, to varying degrees, incentivised by secured levels of profit and a "safe haven" mentality which allows for the firms involved to achieve some form of collective benefit. To this end, an effective enforcement policy must be able to remove or greatly diminish the incentive for parties to collude by imposing penalties which have real and serious implications for those firms involved, whilst concomitantly, creating an adequate incentive for firms and individuals to disclose their involvement in cartel conduct to the competition authorities. Typically, notes Lopes, the trade-off made by competition authorities in this regard is to offer some form of immunity to those firms or individuals who disclose and cooperate with the competition authorities in the exposure of cartel conduct[24].

5.2. Dawn raids ignite Leniency applications[25]

Dawn raids that pre-emptively assist to obtain relevant evidence go hand in hand with any CLP. In South Africa, a good number of leniency applications were received from firms after they were dawn-raided, and credible circumstantial or other evidence collected by the CCSA, notably in the construction sector. Competition authorities thus need not only have a leniency program, but must demonstrate:

- that they have the power to raid;
- that they actually carry out raids, in a legally enshrined manner (i.e., according to the rules of procedure and/or the respective legislation). Where a raid has not been carried out according to the legislation and/or rules of procedure, the respondent parties will ensure that the case does not see the light of day on the merits or substance of the case. Cases will thus be lost on 'technical grounds' - but technical grounds are and should be considered to be part of 'the law';
- that when they raid, they can collect information that is relevant, i.e., have the capacity to obtain credible records (physical or electronic) which will address the issues raised in the charge sheet or search warrant;
- that when they raid, they will not grow cold feet as various influential forces launch media or other covert attacks on the institution, its staff and processes, resulting in a case being abandoned and/or mysteriously 'freeze' in the tracks; and
- that when a leniency application is actually made, the staff dealing with such know exactly what they are supposed to do to ensure that leniency processing details are followed to the letter.

5.3. Transition period of learning and growth

[24] Lopes, N., Seth, J., and Gauntlett, E., (2013)

[25] Utilising powers of search and seizure and market inquiries, the Commission has demonstrated a far more proactive and robust enforcement of the cartel provisions in the Act. Accordingly, given the more proactive approach adopted by the Commission, companies operating in South Africa need to ensure that internal compliance programmes are regularly updated

The South Africa Competition Act was promulgated in 1998 and did undergo a transition phase when few at the CCSA and CTSA understood competition law and policy to the magnitude they began to understand these when referrals and appeals began to unfold. Learning from established competition authorities such as Federal Trade Commission (FTC) of the United States and those under the OECD greatly assisted to get out of the transition phase with a clear focus and enforcement priority scheme. Testing the system and the law were effected, and well-motivated investigation teams contributed to creating confident winning atmosphere and a growth curve that was not slanting, rather going upwards.

The cliché *enforcement is the best advocacy* came true for the South African competition authorities. While some authorities in the region have claimed that they were not ready for enforcement for many years because they concentrated on advocacy, a late run into enforcement leads to lack of experience in dealing with such cases as cartels and procedural mistakes are better committed early on in the establishment years. The table below shows fines which were meted out by CTSA only 3 years after the establishment of the CCSA in 1999[26]:

Reporting year ending 31 March	**Respondent**	**Penalty**	**Contravention**
2002/2003	Federal Mogul	R3 million	Section 5(2)
	Hibiscus Coast Municipality	No penalty	Section 5(1)
	Patensie Sitrus Beherend Beperk	No penalty	Section 8(d)(i)
2003/04	The Association of Pretoria Attorneys	R223 000	Section 4(1)(b)(i)

Early enforcement warning shots are important to raise public attention to what the competition authority can actually do, as opposed to what it says it can do. Thus, by the time the CLP was being introduced in 2004, the CCSA had already demonstrated the capability it had with the cases involving Federal Mogul and the Association of Pretoria Attorneys.

5.4. Managing Risk of mistakes and Emotionalism

It is important not to dwell on mistakes made and also to ensure that those mistakes are not institutionalised. Team leaders and their members may make tactical and operational errors when they are dealing with the first cases. This is because often initial training in cartel investigations may be undertaken by foreign experts using their laws and rules of procedure, which the novice investigating officers in a developing competition authority may take as applicable in their jurisdictions as well. This is a *natural mistake* but a lesson for new and developing competition authorities is to ensure that they follow the investigating process as indicated in their laws and/or rules of procedure. The rules of procedure must equally be alive to constitutional provisions and precedents set in court decisions. Each country has certain rules of procedure that must be adhered to if at all the merits of a case will be entertained by the adjudicating bodies or the courts.

[26] Unleashing Rivalry - *Ten years of enforcement by the South African competition authorities (1999 – 2009)* page 42

Emotionalism in case selection, investigation, prosecution and adjudication can be fatal to a case, no matter how well trained and exposed the officers may be. This needs to be checked and managed well within the relevant processes. Declarations of interests must be a part of the whole process. It is however, worth noting that administrative bodies such as competition authorities should not see themselves as any other ordinary civil litigants. In other words unlike ordinary litigants, competition authorities should not care about winning at all costs but in obtaining the best possible outcome for the economy. In this regard they remain independent and impartial and open minded throughout their processes and not necessarily focus on 'winning at all costs'.

Overall, a systematic risk monitoring and review framework must be in place. CCSA key risk management areas and mitigations are indicated in the table below:

CCSA Risk Management

Disaster recovery:
The loss of data, unauthorised access and use of information and corruption of the network. An IT Security Audit took place in the 2013/14 financial year. The findings from this audit were addressed during the course of the 2013/2014 financial year.

Adverse decisions from courts on powers and procedures:
Court decisions on appeal, which were handed down during the period under review, have impacted negatively on the Commission's ability to initiate and investigate complaints submitted to it by third parties. The Commission's response to this has been to improve its internal procedures.

Reputational harm:
The reputation of the organisation might be damaged if the
Commission executes its legislative mandate, powers and duties inappropriately. This risk is being managed by taking due consideration of public interest concerns, stakeholder perceptions and policy expectations.

Independence undermined:
The Commission may be subject to external influences in executing its legislative duties. The Commission manages this risk by ensuring transparency in decision-making and justifying its decisions on merit within the parameters of the Competition Act. It also engages in continuous advocacy with its stakeholders.

Unmanageable caseload:
The current caseload has placed the Commission's structure and resources under severe pressure and has a negative impact on the quality of service delivered. The Commission manages this situation by focusing its resources on priority cases and sectors, as well as the effective screening of cases. The issue of space constraints has been escalated to the Minister of Economic Development in order to address the organisation's inability to hire much-needed staff with the current premises.

SOURCE: CCSA Annual Report 2013/14, page 80

An early case that made the CCSA reflect on their procedures was in the case of Pretoria Portland Cement case, where a search and seizure summons was quashed by the High Court primarily because the CCSA alerted the media before the summons was executed. In another case, the CCSA's haste to publicise a cartel prosecution led to the unwarranted disclosure of confidential information relating to the defendant, Reclam. However, the CCSA did not relent in their pursuit of cartels but ensured that a similar mistake was not made in other cases[27].

5.5. Collaboration with other agencies

When the CCSA investigated construction cartel case other local enforcement agencies were involved as well due to a multiplicity of legal issues that were at play. In this case, the Hawks

[27] See commentary by Paul P J Coetser, Head of Competition Department, Werksmans Attorneys, then Chairman, Competition Law Committee of the Law Society of South Africa in Unleashing Rivalry - *Ten years of enforcement by the South African competition authorities (1999 – 2009)* page 34

and the National Prosecutions Authority and its Specialised Commercial Crimes Unit ("SCCU") were involved. In Botswana, the Competition Authority has collaborated successfully with the Directorate on Corruption and Economic Crime (DCEC) as well as the Public Procurement and Asset Disposal Board (PPADB) in dawn raids. Zambia launched joint dawn raid with the Anti-Corruption Commission in the fertiliser cartel investigations. It is also possible to have bilateral cooperation where there are cross-border effects. According to Bachmann and Africa (2011), the benefits of bilateral agreements in regard to international cartels are clear as they afford exchange of information as well as assist counter-part agencies which may not have sufficient capacity to deal with complex cartels (Bachmann and Afrika, 2011). There was coordinated investigations in the United States, Europe, Canada, Brazil, China, Japan, South Korea, South Africa, Mexico, Singapore, and Australia in the automotive cartel. Total global fines in 2014 in this sector were reckoned to be in the region of US $4.1 billion.

It is worth noting that while competition authorities may not readily share confidential information secured through a leniency application, this could be overcome by obtaining waivers from leniency applicants or those cartel participants who are willing to settle. A competition authority will have to engage a counter-part agency formally to have access to such information. Under SADC, there is a *Heads of State Declaration on Regional Cooperation in Competition and Consumer Policies* and Laws, as captured below:

- *Cooperation shall be enhanced by establishing a transparent framework that contains appropriate safeguards to protect the confidential information of the parties and appropriate national judicial review;*
- *Member States shall have regard to comity' principles, including positive comity, as an instrument of regional and bilateral cooperation within the region, including informal positive comity referrals among competition enforcement authorities;*
- *Member States shall review those provisions in their laws that stand in the way of these cooperative efforts and explore areas where they are prepared to enter into binding agreements*

SOURCE: SADC *Heads of State Declaration on Regional Cooperation in Competition and Consumer Policies and Laws*, paragraph 1 (e) -(h)

5.6. Competence and Knowledge Management

Competition Authorities must invest in a sustainable training of their staff in their own substantive competition legislation, rules of evidence collection and handling, and rules of procedure for summoning witnesses, interviewing techniques and referral. While such training is indispensable, there should be a knowledge application monitoring system in the organisation, to ensure that those who are trained in a specific area actually apply knowledge and not continue to seek for further training. Practical application and demonstration of such knowledge in case process is important and is actually a panacea to develop confidence and achieve the requisite enforcement objectives of the competition legislation. CCSA has invested in an elaborate Knowledge Management (KM) system through a range of strategies and practices that allow it to identify, create, represent, distribute, and facilitate the adoption of peer learning and experience of insights and expertise.

By 2014, the KM system at the CCSA had evolved from primarily a document management system to a far more integrated system, where users actively utilise its workflow capabilities and process automation, to further enhance the quality of their cases. All cases lodged with the CCSA now go through an automated process and supporting documents can be shared with users[28]. The CCSA is working on KM systems being integrated with the existing IT infrastructure, the organisational culture, procedures and human resources (HR) policy. The CCSA has recognised that culture and user behaviours are the key drivers and inhibitors of internal information sharing, and are strategising on ways to stimulate people to use and contribute to KM systems[29].

The KM is assisted greatly by the Annual Training Report and the Annual Workplace Skills Plan, which other competition authorities such as that in Botswana have also been producing since 2012.

5.7. Use of temporary staff, analysts, consultants, external counsel, etc.

Existing staff may be overwhelmed with the work before them, and the need to remain focused on investigation, analysis and prosecution may be beyond the capacity and often scope of existing staff numbers, skills and funding. It may also be required to devise effective ways of disposing off cases while achieving the key enforcement objectives. During 2013/14, the CCSA completed settlements under the Construction Settlement Project (CSP), a special dispensation for uncovering bid-rigging and settling them, which process yielded the uncovering of more than 300 private and public sector rigged projects, which included major infrastructure development in South Africa, such as the 2010 FIFA Soccer World Cup stadia, dams, business/residential buildings, the Gauteng Freeway Improvement Project and other national roads[30]. In addition to this case, the CCSA had about 30 other cartel investigations going on.

Engagement and requisite training of temporary staff and external investigators/inspectors/analysts may assist greatly. Where funds permit, specialised legal and economic consultants to assist with such workload would be a necessity. Internal counsel may be knowledgeable about the case but they may be prone to other administrative work within the authority which divides their time. They may also fall prey, consciously or unconsciously, to high emotionalism in cases that may affect their ability to see the details that may end up derailing the case. Use of external counsel may also provide necessary accountability where internal counsel devote time to reviewing external counsel submissions and also providing policy guidance.

5.8. Political Will and Support

In various countries and at various times, competition policy has had a number of other legitimate objectives ranging from industrial policy and economic development goals to economic freedom. But even when it only seeks to enhance economic welfare, it has been posited that effective competition policy is inherently deeply political, since it entails the use of political power to constrain or even redistribute economic power (Büthe, 2014). Political awareness and commitment to a cause does matter a lot, especially in developing countries.

[28] It is worth noting that the Swaziland Competition Commission has equally adopted a similar system
[29] CCSA Annual Report, 2013/14, page 75
[30] see Bonakele, T., Commissioner, CCSA Annual Report, 2013/14, page 11

There is self-evident political will and support in South Africa to see the CCSA as successful as it can be. The Minister for Economic Development in South Africa, Hon. Ebrahim Patel, has noted that competition policy is particularly important for South Africa because of the relatively high levels of market concentration across the economy. He highlighted the fact that the exclusive nature of apartheid led to dominance by a limited number of companies in many industries. The relatively small, closed economy and the privatisation of major state manufacturing companies in the 1980s added to the conducive environment for monopoly power. In this environment, collusion and rent-seeking continued as an entrenched culture in even some of the most important and productive companies[31]. Hon.Patel has indicated that competition policy must be used to combat cartels and abuse of market dominance; this must become a greater focus of the authorities in the period ahead.

Such well-informed political support has however been earned over the years by the CCSA – and not given on a silver platter. It is the duty of the competition authority to demonstrate its relevance to the political establishment by ensuring that its outcomes feed into the national developmental vision and expected deliverables in terms of jobs, poverty, narrowing economic-social gaps, fighting corruption/cartels, and supporting SME growth and sustenance.

Political will and support should be expressed in the following overt features:

- Publicly promulgated clear and consistent political support for the very existence of a competition authority;
- Publicly declared autonomy in the operations and processes of the competition authority as they investigate high profile cases[32];
- Reasonable funding of the operations of the competition authority in relation to Government's expectations of its deliverables;
- Clear political message to special interest groups of Government's commitment to the rule of law in commerce and trade that competition policy is envisaged to bring about; and
- Keeping rent-seeking behaviours to a bare minimum, if any, and within the confines of the explicit or implicit competition policy objectives.

5.9. National consensus on the Understanding the evil behind cartels

Arising from the above, political will and commitment can be used as a channel to bring to the fore the evil behind cartel conduct. Public understanding of the nature of cartels and the damage they bring about not only to competition, but to society at large is important. Not only should the competition authorities understand this, but all those involved in business at policy, leadership, entrepreneurial, advisory or operational levels must so understand. This extends to those involved in authorising cartel investigations, those who undertake the investigations, those who analyse the findings, those who adjudicate and those who deal with appeals. Where

[31] *Foreword* in the CCSA Annual Report 2013/14, page 9

[32] ICN (2002) have noted that it is generally considered that autonomy is essential to the effectiveness of advocacy work. However, a distinction should be made between formal and factual independence. In some countries a high degree of formal independence goes together with a certain isolation of the competition authority from the Executive Branch of Government which definitely does not favour the advocacy activities of the agency. In other jurisdictions competition agencies with a low degree of autonomy, forming a Directorate of a Ministry subject to Ministerial oversight, claim that their decisions are generally respected in an environment of transparency and accountability. That is to say, formal independence need not coincide with factual independence and it is factual independence that really matters.

a system is inherently divided and/or at any level consider cartels not to be as serious but only deserving of a slap on the wrist, business will be quick to recognise this and will not undertake to stop their cartel activity. CLP will equally not yield much in terms of confessions as has been the case in other SACU/SADC countries, except for South Africa.

5.10. The Right Case for the Right Moment

Finding the right case for the right moment is very important to bring credence to cartel enforcement. The bread cartel case for instance brought instant recognition of the work of the CCSA to ordinary South Africans. While the case neither guaranteed nor brought about lower bread prices following the busting of the cartel, it provided a good platform to launch the CCSA's cartel enforcement program and link it to consumers. The steel and construction cases were linked to the World Cup, which event was well on the lips of every South African. Busting cartels for the sake of it may not be an end in itself, but it must be seen to have some impact in society in some form. A caution here is that competition authorities should not lose sight of their role as watch dogs of all sectors in the economy while pursuing cases which could earn them more publicity.

5.11. Demonstrate benefit of cartel enforcement to Government and consumers

The news that a number of SA construction firms were guilty of tender rigging and price fixing to the tune of R30 billion was surely welcome by the Treasury. In 2012, administrative fines of about R934m were paid by companies for violations of the Competition Act. Most of these fines (R482m) were paid by companies who engaged in price-fixing, market allocation and collusive tendering in a cartel. Bonakele (2014), indicated in his Statement in the Annual Report (2013/14) that the CCSA had undertaken a study of the impact of uncovering construction cartel. Using estimates of overcharges as a result of the cartel, the study found that consumer saving as a result of the cartel being uncovered ranged approximately between R4.5 billion to R5.8 billion for the period 2010 to 2013. In addition, there was noticeable change and dynamism in the market, with firms entering territories they previously did not trade in[33]. Carrying out such impact studies is an important advocacy tool that enhances a competition authority's value to society.

It is worth noting that the CCSA paid to the Government R1 037 565 in 2014 (up from P617 343 in 2013) in fines and penalties meted out against various businesses[34]. Competition authorities need to show such kinds of 'pay-outs' to Government.

In the Pioneer Foods white maize meal and milled wheat products cartel cases, the benefits arising from the fine included the following[35]:

- Pioneer Foods was to pay a fine of R500 million to the National Revenue Fund; and
- In addition, the CCSA, National Treasury and the Economic Development Department separately agreed that the Economic Development Department would submit a budgetary proposal and business case motivating for the creation of an Agro-processing Competitiveness Fund of R250 million drawn from the penalty to be administered by the Industrial Development Corporation (IDC).

[33] CCSA Annual Report 2013/14, page 12
[34] Ibid, page 97
[35] See Bonakele and Mncube (2012)

5.12. Fines and Penalties must be punitive

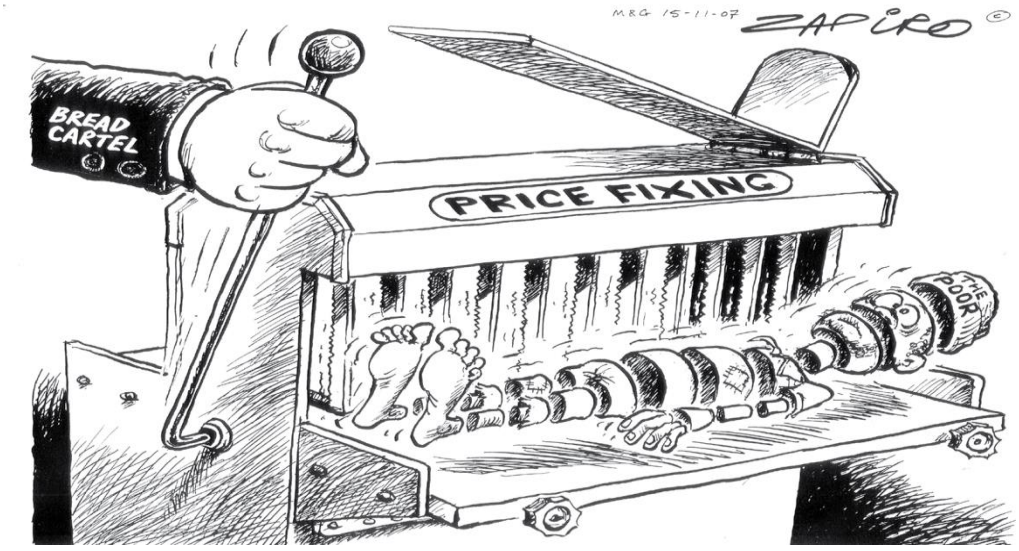
One school of thought posits that fines and penalties in a legislation must be punitive enough to merit the effort of uncovering a cartel. Another school of thought would be that even if the fines and penalties may be low, the point is to name and shame and the bad publicity/ reputational damage (if any…) that comes to a company may provide some form of deterrence and discipline market behaviour. However, the effectiveness of name and shame will depend on the levels of competition culture in a particular economy and society's norms. In South Africa, penalties are up to 10% of the previous year's gross turnover. Tanzania has the highest fine as they can fine from a minimum of 5% upto 10% of global turnover of the companies involved. Namibia has a maximum of 10% based on global turnover. Botswana follows with a maximum fine of 10% (domestic market turnover) for each year during the currency of a cartel, upto a maximum of 3 years. Zambia has a maximum fine of 10% based on domestic turnover, while Zimbabwe has the least maximum fine of US$ 5,000. None of the SACU/SADC countries have successfully meted out any cartel-related fines. Cartel cases are still under or about to be referred for adjudication in Botswana and at appeal stage in Zambia[36].

It has been recognised that there is a need to have a fine balance between cartel enforcement in terms of high fines as well as discounting penalties to those who cooperate during investigations. Senona, a Legal Counsel at the CCSA acknowledged the need to discount a penalty when determining the appropriate penalty against a cooperating firm[37]. Bonakele and Mncube (2012) hailed penalty discounting as a remedial tool to take center stage as a competition law remedy[38]. This does not take off the fact that operating effectively in all three stages – detection, prosecution, and penalisation – is crucial to disrupting existing cartels and deterring new ones from forming[39].

5.13. Ignition of Public Attention - Media, Legal and Academic discourse

The level of public interest, particularly in the media, legal and academic fraternity has brought competition law, in particular, cartel enforcement, to the fore. Almost all leading legal firms in South Africa have a division solely devoted to competition law. Universities have students writing dissertations on competition law and enforcement. This 'euphoria' is arguably unprecedented in any part of Africa. The use of cartoons to illustrate the evil nature of cartels was well captured and self-marketed in the following cartoon of 2007:

[36] Excessive fines which take into account turnover not generated in the country where the contravention occurred may lack credibility and may be subject to legal challenges especially when the turnover generated in the fining country is insignificant when compared to the company's global turnover.
[37] Senona, L., (2013)
[38] Bonakele and Mncube, (2012)
[39] Joseph Harrington, "Behavioural Screening and the Detection of Cartels", *European Competition Law Annual 2006*: *Enforcement of Prohibition of Cartels*, Hart Publishing, Portland, Oregon [as quoted at page 43 of Unleashing Rivalry - *Ten years of enforcement by the South African competition authorities (1999 – 2009)*]



5.14. Development of legal clarity and precedents through tribunal and court decisions

Through initial years of trial and error, the South African competition authorities on one hand and the judiciary on the other hand have provided legal clarity and precedents, with internationally quotable CTSA and court decisions. Oxenham (2014) noted that within a space of 18 months, South Africa witnessed significant developments in the investigation and prosecution of cartel conduct. One of the key developments has been that the Supreme Court of Appeal confirmed that leniency applications submitted to the CCSA by a leniency applicant are subject to legal privilege unless the CCSA makes reference to the application in a complaint referral to the CTSA – in which case it will be taken to have waived privilege. Another notable court precedent is the North Gauteng High Court ruling that a leniency applicant is not protected from private damages claims – even where it is not cited by the Commission as a respondent in complaint proceedings brought before the Tribunal[40].

Such jurisprudence is necessary to perfect the law and streamline legal processes accordingly. It also assists to give clearer meaning to the law and provide for greater consistence and certainty to future case direction for both the CCSA and the respondents.

5.15.Efficient and capacitated Institutional Arrangement

There is an efficient institutional arrangement comprising the CCSA, the CTSA, and the Competition Court of Appeal. A number of countries such as those in Botswana, Swaziland, Tanzania and Zambia have had in recent years direct or indirect attacks against their institutional arrangements. The South Africa system provides a clear separation between the investigatory, adjudication and appeal functions. This system avoids a situation where case success is frustrated by conflicting roles played by any organ in the enforcement chain. The institutions such as CCSA, CTSA, CCA and Supreme Court of Appeal are well capacitated to deal with their mandate.

5.16. Strong Code of Ethics and Incorruptible staff, adjudicators and courts

[40] Oxenham, J., (2015)

An institution may have the best system, funds and political support - but as long as there are unethical and corruptible staff and adjudicators, the system will struggle to achieve desired enforcement goals and objectives, especially in cartels. Cartel profits are in hundreds of millions of US dollars and generally, it does not take much to corrupt a public official. Codes of conduct have been adopted by most competition authorities.

5.17. Enduring Long and costly investigation and litigation processes

Cartel investigations may take years from the initiation of the investigation to settlement. A competition authority must brace itself for protracted legal battles, *interlocutory* or *points in limine (*points of law) before the substantive or merits of the case are heard. The soda-ash cartel investigation in South Africa was opened in 1999 and took 9 years to reach settlement in 2008. The CCSA's investigations revealed a contravention of the Competition Act and the complaint was referred to the CTSA on 14 April 2000. ANSAC opposed the referral on the grounds that the agreement was not a contravention of the Act, but rather was integral to the operation of a legitimate and transparent corporate joint venture, which existed for the promotion of export sales, generated significant logistics efficiencies and impacted pro-competitively on the South African market. Between February 2000 and July 2008, the case was held up by extended litigation involving points *in limine* and appeals. In May 2005, the Supreme Court of Appeal decided that the matter be heard before the CTSA. CTSA hearings into the merits of the case began in mid-2008, and ANSAC closed its case within a month. In September 2008, ANSAC and its fellow respondent and South African agent, CHC Global, approached the CCSA to discuss a settlement.

5.18. Leadership

There is need for self-evident anti-cartel leadership that is seen not only to be knowledgeable but also well inclined to undertake sustained action against cartels. Such leadership will prioritise the resources accordingly and ensure that maximum impact is made out of the prioritisation. Leadership will also be expected to engage in impactful debates that create awareness of a competition authority's unflinching stance against cartels. This kind of leadership should show examples of visible enforcement achievements and not merely play public relations. Such leadership should equally ignite the right national debate and interest in the work of a competition authority. Leadership must project a visionary dedication to the rule of law, transparency and fairness in investigations and prosecutions.

No one perhaps has put the right words on leadership than Spicer (2009), who said the following about David Lewis, who at the time was leaving the CTSA, as follows:

Key to achieving, the kind of stability, certainty and predictability that business craves have been the highly professional competition authorities under the able leadership of David Lewis. What has particularly struck me about Lewis is the combination of toughness, independent-mindedness, but ultimately the fairness of his approach. Business can expect no favours, but it can generally be confident that the law will be fairly applied. There is much work still to be done, as anti-competitive practices still thrive in both the public and private sectors, but South Africa is lucky to have a strong and respected set of institutions in the competition policy arena

to help it address these particular challenges. David Lewis can pass the leadership baton confident in the competition authorities' ability to do the job.[41]

6. The Conclusion

Cartel leniency confessions and settlements in South Africa have not resulted in similar confessions in SACU/SADC countries where there are functional competition authorities. It is unlikely that such confessions will ever be received in the absence of the competition authorities actually demonstrating that they have the capacity and resolve to detect and punish cartel offences. As useful as it is, a CLP is merely a document and in and of itself will not invite confessions from cartel participants. Life has to be breathed into CLPs by competition authorities going out into the market place and getting smoking gun evidence, which in turn attract substantial penalties. To do this, competition authorities must not only invest in systems, but also in developing the persons involved in cartel investigations, analysis, prosecution and adjudication to understand investigation procedures, rules of evidence, collection and handling. Such persons must also be of high ethical persuasion and incorruptible.

Cartels unearthed in South Africa are worth pursuing by neighbouring competition authorities. While the companies involved in cartel conduct in South Africa may not be operating in all the SACU/SADC countries, it may not necessarily be a question of the same companies involved in the cartel that should be the yardstick, rather the same or related industries. Substantially, until the countries get the enforcement train in motion against cartel behaviour, and engage the adjudicating panels, the chances of CLPs working, and/or demonstrating value of cartel enforcement will make their laws lag behind and not be tested and improved with time.

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[41] Michael Spicer, *A personal reflection from Organised Business*, Business Leadership South Africa, in Unleashing Rivalry - *Ten years of enforcement by the South African competition authorities (1999 – 2009)* page 34

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