Competition Law and Economic Regulation in Southern Africa


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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 the Southern African Customs Union (SACU) and the Southern African Development Community (SADC). Of the BLNS (Botswana, Lesotho, Namibia, Swaziland) countries within the SACU community, only Lesotho does not have a competition law or enforcement system. The SADC operates on a larger scale and has 14 member states: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. All the SACU countries are members of the SADC as well. For the purposes of this chapter, all countries that are members of the SADC and/or SACU are neighbouring countries to South Africa.

Sectors such as mining, petroleum and agricultural products have been a subject of anticompetitive interest in South Africa, notably in relation to cartel activity. Despite the high number of cartels that have been unearthed in South Africa, there does not seem to be equivalent success in the neighbouring countries. This chapter deals with this issue by reviewing selected cartels that have been unearthed in South Africa, with possible links to other SACU/SADC member states. It also references a survey on selected SACU/SADC member states in relation to their cartel enforcement and sectors that have been a subject of cartel investigation in South Africa. The chapter ends with an attempt to highlight lessons that other competition authorities in the SACU/SADC can learn from the success story of the Competition Commission of South Africa (CCSA) in cartel enforcement.

Why 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, manufacturing. SACU’s BLNS countries’ 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 fourth-largest destination for South African exports, at 5.1% of the exports, which accounted for 91.4% of total intra-SACU imports (see SACU, 2012). As for the SADC, the main intra-SADC trade export items include petroleum, agricultural products, electricity and clothing and textile products (SADC, n.d.).

Competition policy and law in SACU/SADC countries is increasingly emphasising job creation, poverty reduction and citizen or small and medium enterprise (SME) empowerment. The International Competition Network has recognised that these alternative objectives of competition policy go mostly hand in hand with the traditional ones (ICN, 2002). The fact is that even the very alternative objectives will not be achieved where there are cartels. This is partly why cartel enforcement has become an important part of competition 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, there are a number of adverse effects. 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 causing the exit of struggling firms. This in turn concentrates job creation in a sector among the cartel members. Cartels affect the objectives of regional trade integration and free movement of goods (e.g., customer and market allocation), as cartel members may create barriers to entry and frustrate the entry and growth of competitors. Cartels do not grow markets; they stagnate market growth.

Cartel enforcement in South Africa

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 (Roberts, 2004). An example given by Boshoff (2015) is the bitumen cartel. This market is 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 (Boshoff, 2015).

In 1999, the then minister of trade and industry, 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’ (CCSA and CTSA, 2009, p. 1).

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 and secure admissible evidence and prosecute successfully. The capacity of the Competition Tribunal of South Africa to handle referrals has also been demonstrated. However, despite record
fines and assured vigorous enforcement, there is little indication that cartels are in decline in South Africa (see Planting, 2013). This has led to recent proposed amendments to criminalise certain hard-core cartels, including price fixing and market allocation. Kelly (2010) notes that the introduction of criminal sanctions is based partly on recognition of how important competitive markets are in capitalist economies for maximising consumer welfare, and partly on the apparent inability of administrative fines to serve as an effective deterrent to cartelisation.

In a landmark report, the World Bank (2016, p. viii) noted that products that have been found to be affected by cartels in Africa include fertilisers, food (including wheat, maize and bread), pharmaceuticals, construction materials (including cement) and construction services.1 Table 3.1 highlights some key cartels with possible overspill into SACU/SADC countries.

### Cartel enforcement in neighbouring countries

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 sufficient understanding of competition law by enforcers as much as by adjudicators/courts. Of 14 SACU/SADC countries, 9 have functional competition laws and institutional arrangements to deal with the enforcement thereof. A sample of six of the nine countries 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 high that a cartel in South Africa is most likely also taking place or has taken place in other SACU/SADC countries. In a worst-case 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 not been successful in gathering the required evidence, or the case has been dismissed on appeal in the same cartels that were successfully investigated and prosecuted in South Africa.

Table 3.2 summarises the survey results. It shows the cartel legal provisions as well as enforcement activities of the six countries in sectors where cartels have been unearthed in South Africa. These sectors include bread, flour, construction, cement, fertiliser, wheat and petroleum.

Except for South Africa, only Botswana and Zambia have busted cartels using dawn raids (none has been through cartel leniency). While no fines have been recorded due to appeal challenges on procedural errors, Botswana unearthed five cartels in five years: supply of food rations to government; car panel beating (Car World & Other); supply of sugar beans to government; and supply of infant formula to government. Three attempted bid-rigging cases were thwarted: supply of communication equipment to the Botswana Police Service; stationery to the Botswana government’s Central Transport Organisation; and supply of security
### Table 3.1 Cartels uncovered in South Africa, 2003–2010

<table>
<thead>
<tr>
<th>Name of cartel</th>
<th>Brief facts</th>
<th>End result</th>
<th>Enforcement in SACU/SADC country</th>
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<tbody>
<tr>
<td>Fertiliser cartel</td>
<td>In 2003, 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.</td>
<td>Sasol eventually settled for R250 million (Bonakele, 2009; see also Seria, 2010).</td>
<td>Only Zambia investigated a case in the fertiliser sector (although the case is yet to be determined on appeal).</td>
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<tr>
<td>Cement cartel</td>
<td>The CCSA initiated investigations on 2 June 2008 against four main cement producers: Pretoria Portland Cement Company Limited (PPC), Lafarge Industries South Africa, AfriSam Consortium (Pty) Ltd and Natal Portland Cement Cimpor (Pty) Ltd (CTSA, n.d.).</td>
<td>The CCSA raided the premises of the four cement producers on 24 June 2009. Subsequently, PPC applied for leniency. Lafarge and AfriSam settled with the CCSA and agreed to pay penalties of 6 and 3%, respectively, of their yearly turnover for cement sales in the SACU region in 2010.</td>
<td>Of the SACU/SADC countries, Namibia, Tanzania and Zimbabwe submitted to have investigated similar cartels but did not uncover any cartel. No leniency applications were made to authorities in Botswana, Namibia and Swaziland by the respondent companies that had subsidiaries in these other countries.</td>
</tr>
<tr>
<td>Mining-supply cartel</td>
<td>The CCSA uncovered a mining-supply cartel in 2009 (Cremer, 2009). The four companies involved were Aveng Africa's Duraset, RSC Ekusasa Mining, Dywidag-Systems International and Videx Wire Products.</td>
<td>ARSC, a subsidiary of Murray &amp; 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.</td>
<td>None of the SACU/SADC countries investigated similar cartels. Botswana, Namibia, Zambia and Zimbabwe have mining and related industries, which import mining-related components from or through South African agents.</td>
</tr>
<tr>
<td>Construction cartel</td>
<td>In 2009, a probe by the CCSA showed that top construction companies had fixed state and other contracts worth billions of rands (Sapa, 2013).</td>
<td>In July 2013, the CCSA settled with 15 out of 18 construction firms that participated in the Construction Settlement Project (CSP) (see Gedye, 2013). The total combined administrative penalty imposed by the Tribunal for the 15 firms amounted to R1.4 billion (see CCSA, 2014, p. 11).</td>
<td>None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries.</td>
</tr>
</tbody>
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<tr>
<td><strong>Steel cartel</strong></td>
<td>The CCSA unearthed the cartel after a raid of Cape Town Iron and Steel Works/Murray &amp; Roberts, Highveld Steel &amp; Vanadium and the South African Iron and Steel Institute offices, which were used as cartel secretariat. The cartel was at the peak of the construction works for the 2010 Football World Cup (Le Roux, 2008).</td>
<td>Following the raid, the CCSA received an application for leniency from one of the companies under its Corporate Leniency Policy (CLP).</td>
<td>None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries.</td>
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<tr>
<td><strong>Bread/flour/wheat milling cartel</strong></td>
<td>In March 2010, the CCSA, subsequent to its investigation into collusion in the wheat milling market, referred its findings to the Tribunal against Pioneer Foods Ltd, Foodcorp Ltd trading as Ruto Mills, Godrich Milling Ltd, Premier Foods Ltd and Tiger Brands Ltd (CCSA, 2010). The flour cartel fixed the price of flour and allocated customers from 1999 to 2007 (see Mncube, 2014).</td>
<td>Penalties were meted out against the cartel members.</td>
<td>Zambia and Zimbabwe investigated cartels in bread but did not uncover any cartel. Zimbabwe investigated a cartel in flour and Zambia in wheat, without success. Most SADC countries import wheat from South Africa.</td>
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<tr>
<td><strong>Bitumen cartel</strong></td>
<td>In 2010/2011 the CCSA initiated a price-fixing complaint in respect of bitumen against the six oil companies operating in South Africa: Total, BP, Shell, Chevron, Engen and Sasol.</td>
<td>Engen agreed to pay R28.8 million and Shell agreed to pay R26.2 million.</td>
<td>None of the SACU/SADC countries are reported to have investigated similar or related cartels in their countries. Botswana, Lesotho, Mauritius, Swaziland and Zimbabwe are net importers of bitumen and bituminous products from South Africa.</td>
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</table>

**Source:** Compiled by the author

**Notes:**
1. 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 the fact that there was collusion between the three suppliers. The Competition Appeal Court (CAC) of South Africa held that the complainant did not intend to complain about the cartel conduct and that the CCSA should have initiated a separate investigation for this conduct. See CAC case no. 93/CAC/Mar10; CT case no. 31/CR/May05.
2. 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, Stocks & Stocks civil engineering, Murray & Roberts, Group Five, Concor and Aveng.
3. De Beers, Gold Fields, Harmony, Anglo Platinum, Lonmin and Sasol Mining were among the mining houses that bought roof bolts from the companies.
4. 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.
5. 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.
Table 3.2 Cartel legal provisions and enforcement activities of selected countries in southern Africa

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<thead>
<tr>
<th>Questions</th>
<th>Botswana</th>
<th>Namibia</th>
<th>Swaziland</th>
<th>Tanzania</th>
<th>Zambia</th>
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<tbody>
<tr>
<td>Does your competition agency (agency) deal with cartels?</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
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<td>Are cartels in your jurisdiction 'per se' offences?</td>
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<td>Are cartels in your jurisdiction a 'rule of reason'?</td>
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<td>Air passenger</td>
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<td>Does your agency have a leniency programme?</td>
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<td>Does your agency have whistleblower protection in cartels?</td>
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<td>Have you successfully ‘busted’ any cartel using the leniency programme?</td>
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<td>Have you ‘busted’ a cartel using ‘dawn raids’?</td>
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<td>Have any appeals against your agency’s cartel busting been upheld by a higher organ/court?</td>
<td>n/a</td>
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<td>Do you consider your agency as reasonably capacitated to investigate a cartel?</td>
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<tr>
<td>Indicate which cartels are 'per se', if any.</td>
<td>Price fixing, bid rigging, market/customer/geographical allocation, sales/production quotas, concerted practice, concerted refusal to join an arrangement crucial to competition</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>All cartels are per se offences</td>
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</tr>
<tr>
<td>Indicate which cartels are 'rule of reason', if any.</td>
<td>Joint ventures</td>
<td>All cartels</td>
<td>All cartels</td>
<td>All cartels, including price fixing between competitors, a collective boycott by competitors or collusive bidding or tendering.</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>What is the minimum (if any) and maximum penalty (if any) in your jurisdiction?</td>
<td>Max. 10% up to three years during the currency of the cartel</td>
<td>Max. 10% of global turnover</td>
<td>Fine not exceeding £250 000 (R250 000) or imprisonment to a term not exceeding five years or both.</td>
<td>5–10% of last audited accounts based on global turnover</td>
<td>Max. of 10% based on latest turnover</td>
<td>Max. imprisonment</td>
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Source: Compiled by the author
services to the Companies and Intellectual Property Agency. Attempted bid rigging is not provided for in the Competition Act.

Except for South Africa, Zambia is the only country that has processed a fine. This was a case\(^2\) in which 15 car panel-beating garages conspired to collectively charge a fixed amount for issuance of quotations to insurance companies. The tip-off to the case came after an advocacy workshop the competition authority had conducted for insurance companies. Top Gear Zambia, the ringleader, was fined 2\% of its turnover while the others were fined 1\%. A landmark case on a cartel in the fertiliser industry involving Omnia Zambia and Nyiombo Investments,\(^3\) where they were fined 5\% of their turnover, has been in the appeal process and is yet to be concluded by the Supreme Court of Zambia.

Except for Namibia and Zimbabwe, all the countries indicated that they are sufficiently capacitated to deal with cartel enforcement. Namibia and Zimbabwe have had their competition law implementation systems peer-reviewed under the auspices of the Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD). Recommendations to foster enforcement machinery are under implementation, which for Zimbabwe include an overhaul of the whole competition law as well as finalisation of a national competition policy.

Lessons from South Africa for other SACU/SADC countries

South Africa’s aggressive investigation and enforcement against cartel conduct is unparalleled in any of the SACU/SADC countries. The World Bank (2016) has noted that cartels are the most harmful anticompetitive practice, but anti-cartel enforcement remains relatively weak in Africa. The Bank noted that between 2013 and 2014, 42 horizontal agreement cases were completed by 9 authorities; of those, 50\% were investigated by the CCSA (World Bank, 2016, pp. viii, 15–16). While the experiences of South Africa may be unique and not necessarily applicable to or replicable in other countries, competition authorities in SACU/SADC countries can derive some lessons for a successful cartel enforcement regime by reviewing certain fundamentals that lie behind the enforcement machinery and success of the CCSA. These are discussed below.

Corporate leniency and use of settlement agreements

It has been widely 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 and Mncube, 2012). After contested proceedings, the Tribunal 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 Tribunal for adjudication or that were currently under investigation by the CCSA in which it was a respondent.  

From the first leniency application, the initial fine of R196 million showed the respondents that the CCSA was serious. Following this, Pioneer Foods settled all the other cases that were under investigation. UNCTAD (2010) has 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 for cartelists to self-report to the competition law enforcer. The UNCTAD report highlights the following as necessary conditions for an effective leniency programme:

- Anti-cartel enforcement must be 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;
- Penalties imposed on cartelists who do not apply for leniency must be significant and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;
- The leniency programme must be sufficiently transparent and predictable to enable potential applicants to predict how they would be treated; and
- To attract international cartelists, the leniency programme must protect 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 was intended to be a policy designed to encourage disclosure by offering immunity from penalisation for cartel conduct in terms of the Competition Act. It was intended, as leniency programmes generally are, to undermine cartel stability by creating a ‘prisoner’s dilemma’ – where none is sure whether the other will 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 afforded to the whistleblower from prosecution and the administrative fine that may be imposed by the Tribunal. Lopes, Seth and Gauntlett (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. To this end, an effective enforcement policy must be able to remove or greatly diminish the incentive for parties to collude by imposing penalties that have real and serious implications for those firms involved, while concomitantly creating an adequate incentive for firms and individuals to disclose their involvement in cartel conduct to the competition authorities. Typically, the trade-off made by competition authorities in this regard is to offer some form of immunity to those firms or individuals that disclose and cooperate in the exposure of cartel conduct (Lopes, Seth and Gauntlett, 2013).
Dawn raids ignite leniency applications
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 not only need a leniency programme, but must demonstrate that:

- They have the power to raid;
- 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’;
- When they raid, they can collect information that is relevant, that is, they have the capacity to obtain credible records (physical or electronic) which will address the issues raised in the charge sheet or search warrant;
- When they raid, they will not get 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 ‘frozen’ in its tracks; and
- When a leniency application is actually made, the staff dealing with it know exactly what they are supposed to do to ensure that leniency processing details are followed to the letter.

Transition period of learning and growth
The South Africa Competition Act was promulgated in 1998, following which it underwent some teething problems. Its effective implementation was systematically assisted by increased investment in staff training and exposure at both the CCSA and the Tribunal. Learning from established competition authorities such as the Federal Trade Commission of the US and those under the Organisation for Economic Cooperation and Development assisted the South African competition authority to move out of the transition phase with a clear focus and a clear enforcement priority scheme.

The cliché ‘enforcement is the best advocacy’ has proved true for the South African competition authorities. While some authorities in the southern African region have claimed that they are not ready for enforcement because they are concentrating on advocacy, a late entry into enforcement leads to lack of experience in dealing with cases such as cartels. Additionally, procedural mistakes are better committed early on, in the establishment years. Table 3.3 shows fines meted out by the Tribunal only three years after the establishment of the CCSA in 1999.

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

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 dealing with their first cases. This is because initial training in cartel investigations is often 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 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 the merits of a case are to be entertained by the adjudicating bodies or the courts.

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 within the relevant processes. Declarations of interest must be a part of the process. However, administrative bodies such as competition authorities should not see themselves as ordinary civil litigants. Unlike ordinary litigants, competition authorities should not care about winning at all costs but rather about obtaining the best possible outcome for the economy. In this regard, they should remain independent, impartial and open-minded throughout their processes.

Overall, a systematic risk-monitoring and review framework must be in place. CCSA key risk-management areas and mitigations are indicated in table 3.4.

An early case that made the CCSA reflect on its procedures was the PPC 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, Reclaim. However, the CCSA did not relent in its pursuit of cartels but ensured that a similar mistake was not made in other cases.7

### Table 3.3 Fines meted out by the Tribunal

<table>
<thead>
<tr>
<th>Reporting year ending 31 March</th>
<th>Respondent</th>
<th>Penalty</th>
<th>Contravention</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002/2003</td>
<td>Federal Mogul</td>
<td>R3 million</td>
<td>Section 5(2)</td>
</tr>
<tr>
<td></td>
<td>Hibiscus Coast Municipality</td>
<td>No penalty</td>
<td>Section 5(1)</td>
</tr>
<tr>
<td></td>
<td>Patensie Sitrus Beherend Beperk</td>
<td>No penalty</td>
<td>Section 8(d)(i)</td>
</tr>
<tr>
<td>2003/2004</td>
<td>The Association of Pretoria Attorneys</td>
<td>R223 000</td>
<td>Section 4(1)(b)(i)</td>
</tr>
</tbody>
</table>

*Source: CCSA and CTSA (2009, p. 42)*
Table 3.4 CCSA risk management and mitigation

<table>
<thead>
<tr>
<th>Risk Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disaster recovery</td>
<td>The loss of data, unauthorised access and use of information and corruption of the network. An IT security audit took place in the 2013/2014 financial year. The findings from this audit were addressed during the course of the 2013/2014 financial year.</td>
</tr>
<tr>
<td>Adverse decisions from courts on powers and procedures</td>
<td>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.</td>
</tr>
<tr>
<td>Reputational harm</td>
<td>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.</td>
</tr>
<tr>
<td>Independence undermined</td>
<td>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.</td>
</tr>
<tr>
<td>Unmanageable caseload</td>
<td>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, given the current premises.</td>
</tr>
</tbody>
</table>

Source: CCSA (2014, p. 80)

Collaboration with other agencies
When the CCSA investigated the construction cartel case, other local enforcement agencies were involved as well, due to the multiplicity of legal issues that were at play. In this case, the Hawks and the National Prosecuting Authority and its Specialised Commercial Crimes Unit were involved. In Botswana, the Competition Authority has collaborated successfully with the Directorate on Corruption and Economic Crime as well as the Public Procurement and Asset Disposal Board in dawn raids. Zambia launched joint dawn raids 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 Afrika (2011), the benefits of bilateral agreements regarding international cartels are clear. They afford the exchange of information and assist counterpart agencies that may not have sufficient capacity to deal with complex cartels (Bachmann and Afrika, 2011).
Part One: Cartel law enforcement

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 counterpart agency formally to have access to such information. The SADC’s Heads of State Declaration on Regional Cooperation in Competition and Consumer Policies and Laws states that:

- 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.

Competence and knowledge management

Competition authorities must invest in sustainable training of their staff in their own substantive competition legislation, rules of evidence collection and handling, 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 the knowledge and do not continue to seek further training. Practical application and demonstration of knowledge in a case is important, develops confidence and achieves the requisite enforcement objectives of the competition legislation. The 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 the 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 one, 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. The CCSA is working on KM systems being integrated with the existing information technology infrastructure, the organisational culture and procedures and the human resources policy. The CCSA (2014) 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.

The KM is assisted greatly by workplace skills plans and annual training reports, which other competition authorities, such as that in Botswana, have also been producing since 2012.
Use of temporary and external staff

The engagement and requisite training of temporary and/or external staff (investigators, inspectors, analysts, etc.) may assist greatly in cases where existing staff are overwhelmed with work, or where the need to remain focused on investigation, analysis and prosecution is beyond the capacity and scope of existing staff numbers, skills levels and funding. It may also be necessary to devise effective ways to dispose of cases while achieving the key enforcement objectives. During 2013/2014, the CCSA completed settlements under the Construction Settlement Project (CSP), a special dispensation for uncovering bid rigging and settling the cases. The process uncovered more than 300 private- and public-sector rigged projects, including major infrastructure developments 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 (see CCSA, 2014). In addition to this case, the CCSA had about 30 other cartel investigations going on.

Where funds permit, it may be necessary to employ specialised legal and economic consultants to assist with such a workload. Internal counsel may be knowledgeable about a case but other administrative work within the authority may divide their time. In cases where internal staff fall prey to high emotionalism, which may affect their ability to see the details and could result in derailing the case, the use of external counsel may provide the necessary accountability, leaving internal counsel to devote time to reviewing external counsel submissions and providing policy guidance.

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, 2015). Political awareness and commitment to a cause matter a lot, especially in developing countries.

There is clear political will and support in South Africa to see the CCSA being as successful as it can be. The minister for economic development in South Africa, 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 has highlighted the fact that the exclusive nature of apartheid led to dominance by a limited number of companies in many industries (CCSA, 2014).

The relatively small, closed economy and the privatisation of major state manufacturing companies in the 1980s added to securing an environment replete with monopoly power. In this environment, collusion and rent seeking continued as an entrenched culture in even some of the most important and productive companies (CCSA, 2014). Patel indicated that competition policy must be used to combat cartels and abuse of market dominance, and that this must become a greater focus of the authorities in the period ahead.
Such well-informed political support has, however, not been given on a silver platter – it has been earned over the years by the CCSA. 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 development vision and expected deliverables in terms of jobs, poverty, narrowing socioeconomic 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 it investigates high-profile cases;\(^\text{10}\)
- Reasonable funding of the operations of the competition authority in relation to government’s expectations of its deliverables;
- A clear political message to special interest groups of government’s commitment to the rule of law in commerce and trade, which competition policy is envisaged to bring about; and
- National consensus on the understanding of the egregious nature of cartels.

Arising from the above, political will and commitment can be used as a channel to bring to the fore the destructive nature of 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 the competition authorities but all those involved in business at policy, leadership, entrepreneurial, advisory or operational levels should understand this. 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 a system is inherently divided and/or at any level considers cartels not to be a serious form of anticompetitive activity, 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.

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 programme and to link it to consumers. The steel and construction cases were linked to the World Cup, which event was on the lips of every South African. Busting cartels for the sake of it should not be an end in itself, but must be seen to have some form of impact in society. A caution here is that competition authorities should not lose sight of their role as watchdogs of all sectors in the economy while pursuing cases which could earn them more publicity.
Demonstrate benefit of cartel enforcement to government and consumers

The news that a number of South African construction firms were guilty of tender rigging and price fixing to the tune of R30 billion was surely welcomed by the Treasury. In 2012, companies paid administrative fines of about R934 million for violations of the Competition Act. Most of these fines (R482 million) were paid by companies that engaged in price fixing, market allocation and collusive tendering in a cartel. Tembinkosi Bonakele (CCSA, 2014) indicated in his statement in the annual report that the CCSA had undertaken a study of the impact of uncovering the 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 between approximately R4.5 billion and R5.8 billion for the period 2010 to 2013. In addition, there was a noticeable change and dynamism in the market, with firms entering territories they had previously not traded in (CCSA, 2014). Carrying out such impact studies is an important advocacy tool that enhances a competition authority’s value to society.

In the Pioneer Foods white maize meal and milled wheat products cartel cases, the benefits arising from the fine included the following (see Bonakele and Mncube, 2012):

- Pioneer Foods had to pay a fine of R500 million to the National Revenue Fund; and
- The CCSA, National Treasury and the Economic Development Department separately agreed that the 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.

Fines and penalties must be punitive

One school of thought posits that fines and penalties in legislation must be punitive enough to merit the effort of uncovering a cartel. Another is of the view that even if the fines and penalties are low, the point is to name and shame – the bad publicity and reputational damage (if any) that a company suffers may provide some form of deterrence and discipline market behaviour. However, the effectiveness of this will depend on the levels of competition culture in a particular economy and on the society’s norms.

In South Africa, penalties are up to 10% of the previous year’s gross turnover. Tanzania has the highest fine and can fine from a minimum of 5% up to 10% of global turnover of the companies involved. Namibia has a maximum of 10% based on global turnover. Botswana has a maximum fine of 10% (domestic market turnover) for each year during the currency of a cartel, up to a maximum of three years. Zambia has a maximum fine of 10% based on domestic turnover, while Zimbabwe has the lowest fine at US$5,000. Apart from South Africa, Mauritius and Zambia, none of the SACU/SADC countries have successfully meted out any cartel-related fines (see World Bank, 2016).
A fine balance is needed between cartel enforcement in terms of high fines and discounting penalties to those who cooperate during investigations. Senona (2013), a legal counsel at the CCSA, acknowledges the need to discount a penalty when determining the appropriate penalty against a cooperating firm. Bonakele and Mncube (2012) hail penalty discounting as a remedial tool to take centre stage as a competition law remedy.

Attract 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 development is arguably unprecedented in any part of Africa. In 2007, a renowned cartoonist captured the nation’s anti-cartel sentiments (figure 3.1).

Figure 3.1 Zapiro, Mail & Guardian, 15 November 2007

Develop legal clarity and precedents through Tribunal and court decisions
Through the initial years of trial and error, the South African competition authorities and the judiciary provided legal clarity and precedents, with internationally quotable Tribunal and court decisions. Oxenham (2015) notes 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 was the Supreme Court of Appeal’s confirmation 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 Tribunal12 – in which case it will be taken to have waived privilege. Another court held that the Tribunal may make a declaration that it has found the conduct of
an applicant for immunity to be a prohibited practice, even if the applicant is not cited as a respondent, provided that natural justice is followed and there is a proper factual basis.13

Such jurisprudence is necessary to develop the law and to streamline legal processes accordingly. It also helps to give clearer meaning to the law and provides for greater consistency and certainty in future case direction for both the CCSA and the respondents.

Efficient and capacitated institutional arrangement
South Africa has an efficient institutional arrangement comprising the CCSA, the Competition Tribunal and the CAC. A number of countries, such as Botswana, Swaziland, Tanzania and Zambia, have in recent years experienced direct or indirect attacks against their institutional arrangements. The South African system provides a clear separation between the investigatory, adjudication and appeal functions. This system avoids a situation where case success is frustrated by the conflict of roles played by any organ in the enforcement chain. However, this does not lessen the fact that operating effectively in all three stages – detection, prosecution and penalisation by the CCSA – is crucial to disrupting existing cartels and deterring new ones from forming (see Harrington, 2007, in CCSA and CTSA, 2009). Most importantly, it appears that the implementing institutions (the CCSA, the Tribunal, CAC and the Supreme Court of Appeal) are well capacitated to deal with their respective mandates.

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

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* (preliminary points of law) before the substantive merits of the case are heard. The soda ash cartel investigation in South Africa was opened in 1999 and took nine years to reach settlement in 2008. The CCSA’s investigations revealed a contravention of the Competition Act and the complaint was referred to the Tribunal on 14 April 2000. The American Natural Soda Ash Corporation (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 Tribunal. The Tribunal 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. This case took nine years to reach settlement. With the threat of staff turnover and loss of institutional memory, a competition authority will need to ensure that there is a system of continuity in such cases, in the context of both human resources (proper and easily traceable records) and financial resources, in order to effectively sustain them.

Leadership
There is a need for anti-cartel leadership that is seen to be not only knowledgeable but also well inclined to undertake sustained action against cartels. Such leadership should prioritise resources accordingly and ensure that maximum impact is gained from 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. For instance, Spicer (2009, in CCSA and CTSA, 2009, p. 34) remarked about David Lewis, former chairperson of the Tribunal: ‘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.’

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 marketplace and getting admissible evidence that can attract punitive penalties. To do this, competition authorities must invest not only in systems, but also in developing the staff involved in advocacy, cartel investigations, analysis, prosecution and adjudication to understand investigation procedures, rules of evidence, collection and handling.

It is also worth noting that a number of competition authorities in the SADC have been undertaking market studies/inquiries into specific sectors to understand the nature of such sectors and their competition dynamics. This has been
done by individual competition authorities at the national level as well as in the regional collaborative context under the SADC and the African Competition Forum in sectors that include transport, sugar, cement and poultry. Such investment is timely and will assist the authorities to better understand particular sectors and how the cross-regional corporate strategies and linkages can be monitored to ensure that cartels are detected timeously. It will also facilitate the necessary cooperation among competition authorities.

Notes
1 The World Bank (2016, p. 61) reports, for instance, that cement prices in Africa were 183% higher on average than the world price of cement at the end of 2014.
2 Case no. CCPC/RBP/009 of 2011.
3 Case no. CCPC/RBP/052 of 2012.
4 See case no. 15/CR/Mar10, Competition Commission vs. Pioneer Foods (Pty) Ltd, 30 November 2010.
6 Utilising powers of search and seizure and market inquiries, the CCSA 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 CCSA, companies operating in South Africa need to ensure that internal compliance programmes are regularly updated.
7 See commentary by Paul PJ Coetser, head of Competition Department, Werksmans Attorneys, then chairman, Competition Law Committee of the Law Society of South Africa, in CCSA and CTSA (2009, p. 34).
8 Paras. 1 (e)–(h).
9 The Swaziland Competition Commission has adopted a similar system.
10 The ICN (2002) has noted that autonomy is generally considered 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 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.
11 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.
12 Competition Commission v ArcelorMittal SA Ltd & Others (680/12) [2013] ZASCA 84, para. 50.
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