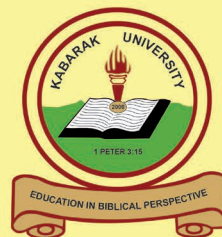


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# Cartel Conduct as a Moral Wrong: A Consequentialist Appraisal of the Kenyan Competition Regime on Cartels

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## Abstract

Cartel conduct in Kenya is regulated by the Competition Act. This paper seeks to investigate such cartel conduct as both a moral and legal wrong, based on the consequentialist theory of jurisprudential reasoning. The paper first examines the jurisprudential underpinning of a moral wrong and then proceeds to examine the norms that prohibit cartel behaviour. Upon a careful analysis of the nature and conduct of cartels, the paper concludes that cartels act in a manner that is both morally and legally wrong. The paper then suggests that the sanctions that the Competition Act of Kenya imposes on cartels are justified on both moral and legal basis.

**Key words:** Market, Competition, Agreement, Collusion, Cartel, Undertakings

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## 1. Introduction

Thomas Aquinas' moral philosophy is based on the idea that some acts are wrong when juxtaposed to the content of local community norms while others are wrong in and of themselves.<sup>1</sup> According to him, two distinct typologies underline the natural duties on which positive laws are based. The first typology is that some laws restate the natural obligations that people have to keep off such wrongful acts as murder and robbery. The second typology is that other laws are not expressly stated like in the first typology but are instead specified by natural law. They shape the society in a manner that is not practically determined. Such laws stipulate details of social life in a manner that practical reason does not. This paper argues that cartel behaviour is expressly prohibited by competition laws on purely economic grounds. This express prohibition of cartel behaviour in undertakings falls under the first category of Thomas Aquinas' typology of laws. The paper then proceeds to argue that cartel behaviour is immoral in the sense that the conduct is deceptive, fraudulent, oppressive, and in bad faith. This conduct is not covered by positive law but rather falls under the second category of Aquinas' typology of laws. The paper concludes that the civil and criminal sanctions stated by the Competition Act are justified under the two typologies.

## 2. The Jurisprudential Underpinning of a Moral Wrong

Aquinas' characterisation of a moral wrong is not novel. For example, it follows the Aristotelian thinking that an act is either good or bad depending on whether it contributes to or deters us from our proper human end (i.e. the *telos*) or the final goal at which all human beings aim.<sup>2</sup> This *telos* is happiness, derived from well-being, perfection, or completion.<sup>3</sup> Aristotle argued that happiness does not come automatically. Rather, it is derived from a range of moral and intellectual virtues that enable people seeking it to comprehend and seek it in a consistent and reliable manner. Aquinas further developed this conception of natural law by arguing that whereas some acts are wrong in and of themselves, other acts can be held to be wrong when compared to community norms or how the community

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<sup>1</sup> Colleen McCluskey, *Thomas Aquinas on Moral Wrongdoing*, (Cambridge: Cambridge University Press, 2017).

<sup>2</sup> Ackrill, J. 1980. "Aristotle on Eudemonia." In *Essays on Aristotle's Ethics*, ed. Amelie Oksenberg Rorty. Berkeley: University of California Press, 1980. Pp. 15-34.

<sup>3</sup> *Supra*, note 1.

expects its people to behave.<sup>4</sup> The society can shape its people to behave in a certain way that conforms to its norms.

This concept was further developed by other jurists like Mark Murphy and John Finnis. Murphy bases his argument on the idea of common good. Common good is derived from the concept of what is good for all the members of a community.<sup>5</sup> He envisages a state of affairs whereby all members of a community flourish in their lives. To him, the moral importance of the common good is represented by a scenario where intrinsic goods belong to a specific class of the citizenry. A good is said to be common if all members of the community are flourishing. It is, therefore, not a common good if only a particular class of citizens are flourishing while the other citizens are anguishing. This idea of the common good is what Murphy refers to as the *common good principle*.<sup>6</sup> It is an aggregative concept whereby everyone has an obligation to do what is good for all members of the community.

Even so, Murphy concedes that the common good principle cannot be completely achieved. He further presents the common good principle as an open-ended ideology in the sense that there are multiple ways of ensuring that the common good of all members of the community prevails. He, therefore, introduces the concept of determination. This concept of determination has its roots in Aquinas. It holds that law gains its normative force as a partial determination of the common good principle. Put differently, each member of the community must have a determination in promoting the common good principle. Both community and legal norms have a key role in ensuring that community members are determined to achieving the common good principle.

John Finnis on his part advances this concept of the role of legal norms in shaping natural duties.<sup>7</sup> Finnis focuses on the question of the status of law as the salient coordinator of actions aimed at achieving the common good. To him, the open-ended nature of the common good as discussed by Murphy sparks a coordination problem. This is because every person in the community is determined to pursue the common good principle, yet there are multiple varieties of determinations that can be pursued in this regard. As such, when different members of the community

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<sup>4</sup> Ibid.

<sup>5</sup> Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) ch 3.

<sup>6</sup> Ibid.

<sup>7</sup> John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press, 2011) 46–73.

pursue different varieties of determination, each of these attempts is frustrated.<sup>8</sup> He proposes that members of the community should identify one possible solution to this coordination issue. He argues that the law acts as a salient response to the coordination problem in the community as different members pursue different varieties of determination. This way, each member of the community must accept the law as the salient response to the coordination problem for the common good. The law is, in this respect, authoritative. Although Finnis' argument has been criticised as one that overlooks the fact that community coordination problems are solved by social conventions rather than by legal authorities,<sup>9</sup> it sparks a positive debate whose conclusion can only be that salient social conventions play a critical role in shaping societal common good duties, notwithstanding their legal-extra-legal dichotomies. They set the boundary of social behaviour to mark a territory within which each individual can flourish under the *common good* doctrine.<sup>10</sup>

The natural law debate initiated by Aquinas, Murphy, Finnis and other jurists can be applied in discussing cartel behaviour. For instance, we can apply the reasoning of these jurists in answering such questions as: is cartel behaviour wrong in itself or does the market make it wrong based on the fact that the market has its own rules within which it operates? Is it inherently wrong for a group of undertakings to behave in a manner that harms other undertakings in the same market? Does the market have rules that characterise cartels as a wrongful conduct? The presence of normative ideals in the competitive market can be equated to the concept of a common good because they are aimed at ensuring a healthy competitive environment. This creates an obligation on all players in the market to respect these salient coordinators (i.e. normative ideals) as they solve the problem that common good presents. Undertakings that fail to respect the salient coordinators (i.e. competition norms) that the society has put in place to solve the common good problem fail in their obligations to promote the common good doctrine. The section that follows will discuss how a consequentialist ethical approach can be used to appraise the Kenyan competition law based on the idea of the common good and moral wrong advanced in this section.

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<sup>8</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed., 2011) ch. 9.

<sup>9</sup> E.g. Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 786–8.

<sup>10</sup> Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2014) ch 2.

### 3. A Consequentialist Ethical Theory

Consequentialism is best explained using two ethical principles: First, the question about whether an act is right or wrong depends only on the results of the act. Second, an act that is right produces more good consequences and results.<sup>11</sup> Therefore, when a person is faced with a moral dilemma, consequentialism proposes that such a person should choose the act that maximises the best consequences and results. Additionally, it proposes that people should live a life that maximises good consequences. Consequentialism exists in several forms which provide differing propositions on what constitutes a good thing that should be maximised.<sup>12</sup> Two of these variations are hedonism and utilitarianism. Utilitarianism focuses on human well-being or welfare. It requires that people should maximise human welfare to derive good consequences. It is derived from the word utility, hence, utilitarianism. Hedonism, on the other hand, focuses on human pleasure and it calls on people to maximise on human pleasure to derive good results.<sup>13</sup>

Consequentialism can also either be egoistic and particularistic or universal.<sup>14</sup> For egoistic and particularistic consequentialism, a person only considers whether the consequences of an act will be good or bad to them and members of their group. The person does not need to consider the goodness of the consequences of the act to people outside this group. The morality of the act, therefore, depends on the goodness of its consequences for members within this limited group. Universal consequentialism considers the goodness of the consequences of the act to all people. The morality of the act will, therefore, depend on how it affects all people.

### 4. Utilitarianism as a Form of Consequentialism

JJC Smart opined that the only reason a person may prefer doing act A and not act B is that act A will bring more happiness to humanity than act B.<sup>15</sup> For the utilitarian, an act has value either as right or wrong based on the good or bad state

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<sup>11</sup> Melissa A. Wheeler and Simon M. Laham, 'What We Talk About When We Talk About Morality: Deontological, Consequentialist, and Emotive Language Use in Justifications Across Foundation-Specific Moral Violations' (2016), 42 *Personality and Social Psychology Bulletin*, Issue 9.

<sup>12</sup> Ibid.

<sup>13</sup> Lukáš Švaňa, "On two modern hybrid forms of consequentialism", (2016), 6 *Ethics & Bioethics (in Central Europe)*, Issue 3-4.

<sup>14</sup> Ibid.

<sup>15</sup> Smart, J.J., 'An Outline of a System of Utilitarian Ethics' in Smart & Williams, *Utilitarianism: For and Against*. Cambridge, 1973: 30.

of affairs it brings to human beings.<sup>16</sup> Utilitarianism is derived from the principle of utility which holds that a morally right act is one that produces the best overall consequences as far as the welfare of the affected parties is concerned.<sup>17</sup> Jeremy Bentham opined that the right act will produce the greatest happiness of the greatest number and will, by so doing, maximise the total welfare of the affected persons.<sup>18</sup> Does cartel conduct produce the greatest happiness for the greatest number of consumers of the products they distribute in the market? Are cartels aimed at maximising the happiness and welfare of the people they serve? How does cartel conduct affect the welfare of the people the cartels serve? A utilitarian, and, therefore, consequentialist analysis of cartel behaviour will help answer some or all of these questions. A utilitarian variation of consequentialism is preferred because of its focus on the consequence of an act, in this case, cartel conduct.

Utilitarianism can either be in the form of “Act” or “Rule.” Act utilitarianism proposes that an act is morally right if it produces the best overall consequences for the welfare of the community.<sup>19</sup> A person faced with a dilemma on which act to choose should consider which of the given acts will produce the best consequences in the welfare of the affected persons. Looking at cartel behaviour, undertakings have a range of market practices to choose from: fixing prices, having a healthy competitive market by only selling at prices that will lead to good profits and consumer satisfaction, dividing markets among them so that they constrain other undertakings from accessing the market satisfactorily, and predatory pricing, among other practices.<sup>20</sup> To be morally upright, undertakings should choose a practice that will produce the best consequences for the consumer while at the same time producing profit for the undertakings. Undertakings that choose the practice that torments consumers and other undertakings in the market cannot be said to be morally upright.

Rule utilitarianism proposes that a morally upright act must be in line with moral rules and norms that are justifiable in utility.<sup>21</sup> In this form of utilitarianism, the question is not what act will produce the best consequences, but, rather,

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<sup>16</sup> Hart, H. L. A. ‘Natural Rights: Bentham and John Stuart Mill’ in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, by H. L. A. Hart. Oxford: Clarendon Press, 1982.

<sup>17</sup> Scheffler, Samuel, ed. *Consequentialism and Its Critics*. Oxford: Oxford University Press, 1988.

<sup>18</sup> Bentham, Jeremy (J. H. Burns and H. L. A. Hart, eds.). *An Introduction to the Principles of Morals and Legislation* [1789]. Oxford: Oxford University Press, 1996.

<sup>19</sup> Mill, John Stuart (Roger Crisp, ed.), *Utilitarianism* [1861]. Oxford: Oxford University Press, 1998.

<sup>20</sup> *Supra*, note 11.

<sup>21</sup> Darwall, Stephen. *Consequentialism*. Oxford: Blackwell Publishing, 2003.

which norms or rules will produce the best consequences when utilised. For such a rule to be morally upright, it must be able to derive the greatest consequences in the welfare of the people affected by the rule or norm.<sup>22</sup> Does competition law derive utility or welfare for all undertakings in the market that are likely to be affected by cartel behaviour? Do such competition norms and rules adequately protect the consumer? This paper will analyse the Kenyan competition regime on competition law regarding cartels and the norms that have been put in place to guard against dangerous cartel behaviour. The paper will utilise a consequentialist ethical approach and, specifically, utilitarianism to analyse the law in this regard.

## 5. Social and Economic Norms that Prohibit Cartel Behaviour

The law does not necessarily produce salient social conventions. As such, positive laws do not settle the content of common good duties. Therefore, a positive legal norm does not automatically become a salient social convention. It is not in question that competition laws prohibit certain cartel conduct. However, such prohibition does not automatically make cartel conduct morally wrong. In fact, moral wrongfulness of cartel behaviour has been used as a justification for legal prohibition.<sup>23</sup> Accordingly, cartel behaviour is morally wrong regardless of its legal status. Based on the concept of moral wrongs by Aquinas and that of common good by Murphy, cartels are morally wrong because they infringe on the salient social norms that determine common good duties. The common good duty of an undertaking is to sell products and services to the consumer in an ethical manner, while obeying competition rules, product standards regulations, and any other law that governs the market.

The market is usually a self-regulating enterprise, giving rise to what economists have referred to as a free market. A free market is expected to have free competition among undertakings. A market that enjoys free competition also enjoys an important social coordination mechanism. This social coordination mechanism serves the common good of the people because the allocation of goods and services in the economy is efficient and streamlined.<sup>24</sup> A freely competitive environment is not lawless. It has a set of norms that govern the conduct of undertakings in such key issues as contracts. A competitive market also sets competition limits so that

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<sup>22</sup> *Supra*, note 13.

<sup>23</sup> Crowe, J. and Jedličková, B., 'What's Wrong with Cartels?' *Federal Law Review*, 44(3), 401-418.

<sup>24</sup> *Ibid*, p. 5.



a certain level of competition or lack of it is regarded as being outside the norm. A competitive market, therefore, has certain norms that regulate the behaviour of undertakings in the market so that certain forms of behaviour are regarded as uncondusive for the market environment.<sup>25</sup> These norms coagulate to become principles of competition law that can be used to guard against certain form of unethical conduct in the market such as cartel behaviour.

The free market has previously been referred to as the generator of social norms.<sup>26</sup> Such reference is derived from what has now come to be known as the classical liberation tradition.<sup>27</sup> This doctrine asserts that forces in a free market have capacity to create norms that regulate the economy through free competition. Whereas a free market without laws has a high propensity to create cartels, free competition creates norms that enhance the economic welfare of the society. This thinking is based on ordoliberalism which holds that a market that is run through free competition has capacity to enhance the welfare of the society on which it is based.<sup>28</sup> Cartels do not promote free competition. Instead, they curtail this free competition so that only a selected group of undertakings thrives in the market at the expense of other undertakings.<sup>29</sup>

Ordoliberals advance the arguments that free competition promotes the economic welfare of the society. They also opine that free competition promotes economic freedom. This economic freedom, by extension, promotes political freedom.<sup>30</sup> A market that is free should also have free competition so that the political economy of the country is enhanced. Cartels curtail all these freedoms, hence, they are immoral. The presence of cartels as powerful private economic groups curtails free competition in the market.<sup>31</sup> Ordoliberals, and Eucken is one of them, argue that competition law is derived from salient economic conventions. This paper earlier discussed that legal norms arise from salient social conventions. Likewise, competition law is anchored on salient economic conventions.<sup>32</sup> These

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<sup>25</sup> Friedrich A Hayek, *Law, Legislation and Liberty* (Routledge, 1982) Vol 1, Ch. 4–5.

<sup>26</sup> F A Hayek, 'The Use of Knowledge in Society' (1945) 35 *American Economic Review* 519, 526.

<sup>27</sup> *Ibid.*

<sup>28</sup> Walter Eucken, *The Foundations of Economics* (T W Hutchison trans, William Hodge, 1950).

<sup>29</sup> See, for example, the arguments of Walter Eucken, 'What Kind of Economic and Social System?' in Alan Peacock and Hans Willgerodt (eds.), *Germany's Social Market Economy: Origins and Evolution* (Palgrave Macmillan, 1989) 27.

<sup>30</sup> Eucken, *The Foundations of Economics*, p. 263–73.

<sup>31</sup> David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 *American Journal of Comparative Law* 25, 36.

<sup>32</sup> Franz Böhm, 'Rule of Law in a Market Economy' in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Macmillan, 1989) 48–52.

conventions propose that an economic system that embodies free competition as a salient feature protects market freedom, boosts welfare, and provides stability in the market.<sup>33</sup> The legislator should, therefore, enact laws that obey these salient economic norms. That is, protecting market freedom, boosting welfare, and providing stability in the market. In Kenya, the Anti-Corruption and Economic Crimes Act and the Competition Act are the two main pieces of legislation that can be used to regulate cartel conduct. Such laws are expected to prohibit conduct that curtails free competition.

Since this paper has concluded that salient economic norms are derived from salient social norms, it can also be said that competition law should reflect these salient social norms. There is no single undertaking or a group of undertakings that should be allowed to exert arbitrary monopolistic power on other undertakings in the market. There should be a complete competitive environment in the market. Social norms value equality and freedom. Business should be carried out in a manner that produces the greatest happiness of all members of the community, as seen in arguments about consequentialism and utilitarianism in the previous sections of this paper. Business in the market should also be carried out in a manner that fulfils the common good duties of all persons. Cartel behaviour does not abide by these social conventions that govern market conduct. This is the reason this paper concludes that they are morally wrong on the basis of their disregard to the salient social and economic conventions that govern market conduct.

A behaviour that curtails the freedom of competition also curtails innovation and product quality improvement. Competition freedom ensures that undertakings “up their game” in improving the quality of products released to consumers. Competition enhances creativity and innovation because an undertaking that sticks to the very quality of products they have been selling all along will soon lose customers to other innovative competitors.<sup>34</sup> A behaviour that demotivates undertakings from improving products quality therefore works against social welfare. It is an immoral behaviour. The social norms and values that competition law seeks to protect are the ideals of justice in the market, economic fairness, economic and distributive justice, prohibition of private economic power, and economic prosperity, sustainability, and stability, among others.

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<sup>33</sup> See, for example, the sentiments of Jan Tumlir, ‘Franz Böhm and Economic-Constitutional Analysis’ in Alan Peacock and Hans Willgerodt (eds.), *German Neo-Liberals and the Social Market Economy* (Macmillan, 1989) 135–6.

<sup>34</sup> Barbora Jedličková, ‘One Among Many or One Above All? The Role of Consumers and Their Welfare in Competition Law and Policy’ (2012) 33 *European Competition Law Review* 568, 573–5.

## 6. Cartel Conduct as an Economic Crime

Historically, cartel conduct connoted a form of a truce between rivals in pursuit of a common good.<sup>35</sup> Hence, rivals would cooperate in defensive mode to respond to economic disruption and crisis with a view to restoring stability in the economy. This practice was not considered harmful. Recently, however, cartel conduct has been used pejoratively to refer to a sinister or harmful activity in which firms suspend competition in the market to advance their selfish interests at the expense of others.<sup>36</sup> The Organisation for Economic Co-operation and Development [OECD], for example, lists some of these practices as bid rigging, output restriction, market sharing and price fixing.<sup>37</sup> The understanding is that using these sinister approaches to limit or eliminate competition in the market would interfere with the quality of goods released in the market. Economists have argued that competition in the market improves product quality, offers a greater variety of products, delivers better services and ensures that prices are competitively apportioned.<sup>38</sup> Lack of competition as a result of establishment of cartels would therefore affect the market and in effect harm the consumer.<sup>39</sup>

Cartel conduct distorts the market by derailing competition and, therefore, injuring the welfare of the consumer. Regulating them through competition law is, therefore, justified. Some cartels are considered “hard-core” because they impede business responsiveness and innovation reduce consumer choice, and create artificial price hikes.<sup>40</sup> If the cartel conduct is such that the colluding firms hike prices, there will be lower output and consumers will be unable to afford the products. This is because cartels tend to collude around essential goods that do not have substitutes in the market. The standard of living of the people will therefore be affected.<sup>41</sup>

A recent report by the World bank has suggested that through severely fighting cartels, the prices of food products could be reduced by 10%, over half a million

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<sup>35</sup> Harding, H., & Joshua, J. (2003). *Regulating cartels in Europe*. New York: Oxford University Press. Page 13-14.

<sup>36</sup> Spar, D. (1994) *The cooperative edge: The Internal politics of international cartels*. Ithaca: Cornell University Press. Page 2.

<sup>37</sup> Organisation for Economic Co-operation and Development. (1998). Recommendation of the council concerning effective action against hard core cartels (C(98)35/FINAL) available at <<http://www.oecd.org/dataoecd/39/4/2350130.pdf>> Page 2 and 3.

<sup>38</sup> Williams, P. (1989). Why regulate for competition? In M. James (Ed.), *Regulating for competition? Trade practices policy in a changing economy* (pp. 11–28). Sydney, Australia: Centre for Independent Studies.

<sup>39</sup> Yeung, K. (2004). *Securing Compliance: A Principled Approach*. Oxford: Hart Publishing.

<sup>40</sup> Caron Beaton-Wells and Ariel Ezrachi (eds), “Criminalising Cartels: Critical Studies of an International Regulatory Movement” (Hart Publishing 2011).

<sup>41</sup> UNCTAD ‘The impact of cartels on the poor’ (24 July 2013), available at <[http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf)> accessed on 20th December 2016.

people in people in Kenya, South Africa and Zambia would be lifted from poverty and consumers in those countries would be saved US\$700 million a year.<sup>42</sup> Although it is difficult to estimate the economic damage that cartels cause globally per year, it is possible to estimate such damage for noticeable cartels. For instance, in the period 1997-2000, the international cartels that were detected and prosecuted in the United States caused economic damage of approximately US\$10 billion.<sup>43</sup>

Various jurisdictions have criminalised cartel conduct on the basis that it is both economically and morally reprehensible. The UK Enterprise Act at section 188 creates a cartel offence, and commentators have opined that this was meant to o ‘send out a strong message to the perpetrators, their colleagues in business, the general public and the courts.’<sup>44</sup> The aim is therefore to deter future cartel conduct.

In Kenya, economic crimes are regulated by the Anti-Corruption and Economic Crimes Act.<sup>45</sup> Section 2 of the Act defines the term economic crime as ‘an offence under section 45 or an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue.’ Part V of the Act is labelled “Offences.” The part creates several offences that are characteristic of cartel conduct. For example, section 44 creates the offence of “bid rigging” whose features are: refraining from submitting a tender, proposal, quotation or bid, withdrawing or changing a tender, proposal, quotation or bid; or submitting a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions. Section 47A creates the offence of “attempts, conspiracies, etc.” whose main characteristic is ‘doing or omitting to do something designed to its fulfilment but does not fulfil the intention to such an extent as to commit the offence.’ As will be discussed in the section that follows, these are the main characteristics of cartel conduct as provided for under the Competition Act.

Cartel conduct can therefore be prosecuted as a crime under the Anti-Corruption and Economic Crimes Act of 2003. There is, however, need to

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<sup>42</sup> World Bank Breaking Down Barriers: Unlocking Africa’s Potential Through Vigorous Competition Policy (June 2016), available at <<http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-Africa-Competition-Report-FINAL.Pdf>> accessed on 20th December 2016, at iii.

<sup>43</sup> See JM Griffin, speech at Criminal Practice and Procedure Committee, American Bar Association Section of Antitrust Law, 49th Annual Spring Meeting, Washington, DC (28 March 2001), available at <<https://www.justice.gov/atr/speech/criminal-cartel-enforcement-statusreports>> accessed on 11th May 2020.

<sup>44</sup> A Jones and R Williams ‘The UK Response to the Global Effort against Cartels: is Criminalization really the Solution?’ (2014) 2(1) J Antitrust Enforcement 100–125 at 102. See also Patricia Hewitt, Secretary of State for Trade and Industry. Hansard HC Deb, vol 383, col 48, 10 April 2002.

<sup>45</sup> No 3 of 2003.

characterise cartel conduct in a more detailed manner to understand what practices amount to such conduct.

## 7. The Nature and Conduct of Cartels

According to the Australian Competition and Consumer Commission (ACCC),<sup>46</sup> a cartel exists when businesses decide to work together instead of competing with each other. They do so to maximise profits of the cartel members at the expense of businesses that are not part of the cartel. Cartel conduct, according to the ACCC, includes such behaviour as price fixing, sharing markets, rigging bids, and controlling product output. In a cartel, undertakings come together to protect their interests. In most cases, cartels comprise the largest undertakings in the market. Such cartels will then start controlling the market by fixing prices. Other undertakings that are not members of the cartel will either have to follow the prices set by the cartels or set their own and lose customers. Competition on the basis of price is therefore avoided since the cartel sets the price for all. When cartels set prices, they are also referred to as price rings.

Cartels also restrict the output of products released to the market. They will do so, for instance, when demand is low and a need to increase demand arises. They will, in this regard, instruct their members to release minimised product quantities so that consumers start thinking that there is product scarcity. The cartels will then hike prices for those commodities. Most significantly, cartels set rules to be followed in the market. These are not the legal rules that jurists have discussed about. They are predatory rules whose effect is to suit cartel interests. An example of cartel-like behaviour and its effect on consumer welfare can be seen in the Siemens-led electronic equipment cartel of 2007. In 2007, the European Commission fined 11 European power equipment firms led by Siemens a record 397 million euros (\$546.4 million). The Commission was satisfied that, between 1988 and 2004, the firms had ‘carved up’ the European power market through a quota system and through geographical lines. The 11 firms were Siemens, VA tech, Schneider, Toshiba, Areva, Fuji Electric, Mitsubishi Electric Corporation, Hitachi Japan, AE Power Systems, Alstrom, and ABB. The firms had operated for 16 years under code names to avoid being discovered.<sup>47</sup>

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<sup>46</sup> Australian Competition and Consumer Commission, ‘Cartels,’ available at <<https://www.accc.gov.au/business/anti-competitive-behaviour/cartels>> accessed on 21st July 2018.

<sup>47</sup> European Commission, ‘Competition: Commission Fines Members of Gas Insulated Switchgear Cartel over 750 Million Euros,’ available at <[http://europa.eu/rapid/press-release\\_IP-07-80\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-07-80_en.htm?locale=en)> accessed on 21st July 2018.

The European Commission held that the firms had acted in violation of article 81 of the European Commission Treaty that prohibits restrictive business practices. The companies had rigged bids for procurement contracts, exchanged commercially confidential and important communication, shared markets, allocated projects to each other, and fixed prices. Notably, the Commission noted that the cartel members met regularly to prepare sham bids for members who were not supposed to win bids. The idea was to ensure that a member of the cartel won the bid the proceeds of which would be shared between the members. They used encrypted email messages and anonymous email addresses.

Further, in 2006, the European Commission fined a group of five companies a total of 519 million euros for participating in a cartel to share customers and fix prices for certain types of synthetic rubber (Butadiene Rubber - BR and Emulsion Styrene Butadiene Rubber – ESBR). By so doing, they violated article 81 of the European Commission Treaty which prohibits restrictive trade practices. The five companies were Trade-Stomil, Unipetrol, Dow, Shell, Bayer and Eni. They were charged with operating the cartel for close to six years between 1996 and 2002 where they used to agree on prices for the synthetic rubber, exchange information regarding the market and certain customers, and also the quantity of the product to be released in the market. In reaching the amount of fine, the Commission considered the period the cartel had been in operation, the size of firms involved, and the size of the EEA market for the product.<sup>48</sup>

Cartels disrupt healthy economic activities by fixing prices, striking agreements on product quality and quantity, allocating each other markets, and rigging bids so that at any time a member of the group has to win the bid, in contravention of procurement laws of the country and region. The diversity, competition, innovation and creativity of firms is interfered with in the process, because members of the cartel literally own the market. In another decision of 2006, the European Commission fined a group of 30 companies a total of €314.76 million for participating in a copper fittings cartel in violation of article 81 of the European Commission Treaty regarding restrictive trade practices. The companies had, for close to 16 years between 1988 and 2004, participated in fixing prices for copper fittings, exchanged commercially confidential information, allocated each other customers and markets, rigged bids, agreed on mechanisms to increase

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<sup>48</sup> European Commission, 'Competition: Commission Fines Producers and Traders of Synthetic Rubber € 519 Million for Price Fixing Cartel,' available at <[http://europa.eu/rapid/press-release\\_IP-06-1647\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-1647_en.htm?locale=en)> accessed on 22nd July 2018.

prices, and allowed discounts and rebates in a manner that injured the market for other undertakings.<sup>49</sup>

From the decisions of the European Commission in the above cases, it is clear that cartels have a particular conduct when carrying out their unhealthy practices. First, it is evident that they fix prices for particular products. Since the undertakings in the cartel are the largest in the market and are capable of controlling the market due to their large sizes and ability to cover large markets, other undertakings falling outside the cartel are forced to follow suit lest they lose customers. This behaviour is predatory and has capacity to cause economic harm not only to the smaller undertakings but also to the country's economy at large. Second, cartels allocate each other markets and customers. Cartel meetings, as noted by the European Commission in the cases it has investigated, are meant to discuss how to allocate certain markets and customers to certain undertakings who will operate in furtherance of the cartel's interests. The Commission has in most cases noted that such meetings are highly confidential, communication is done using anonymous email addresses, and the messages are highly encrypted. In addition, cartels rig bids in contravention of procurement laws. The cartel members meet to draft sham bids for certain undertakings that will place their bids for formality, knowing too well that only one undertaking will win the bid. They ensure that the bids are won alternately, so that the undertaking that wins today's bid will not win the next one, another undertaking will win it. They do so in a highly confidential manner that is choreographed to blind the government that the bids are open and transparent.

Based on this conduct, cartels are immoral and, therefore, wrong. Accordingly, the ACCC has referred to them as 'immoral and illegal' because they not only cheat consumers and other businesses, but also restrict healthy economic growth.<sup>50</sup> The European Commission has, on the other hand, referred to cartels as illegal under EU Competition Law because they restrict competition and reduce innovativeness and diversity of products.<sup>51</sup> They reduce innovation by protecting their members who no longer have to compete in the market since they have an assured and ready market. Such members do not have to invest in new research

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<sup>49</sup> European Commission, 'Competition: Commission Fines Copper Fittings Producers €314.76 million for Price Fixing Cartel' available at <[http://europa.eu/rapid/press-release\\_IP-06-1222\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-1222_en.htm?locale=en)> accessed on 22nd July 2018.

<sup>50</sup> Australian Competition and Consumer Commission, 'Cartels,' note 25.

<sup>51</sup> European Commission, 'Cartels,' accessed at <[http://ec.europa.eu/competition/cartels/overview/index\\_en.html](http://ec.europa.eu/competition/cartels/overview/index_en.html)> on 22nd July 2018.

and development. As a result, the consumer gets low quality products and services from these undertakings.

Cartels also reduce investment by blocking new entrants. New entrants are likely to bring new investments in the form of jobs, economic growth, and new business opportunities that may not be available in the market. Cartels do not allow new entrants and they do this by setting predatory prices that the new entrants find disingenuous and unprofitable. The consumer is therefore left with no choice other than buying from the cartel members. The market remains underinvested and underutilised.

Additionally, cartels lock up resources by interfering with normal supply and demand forces in the market. They hoard products in their stores and create an artificial scarcity of these products so that an artificial demand arises. They will then hike the prices of the product in the pretence that it is a scarce product. This is an unhealthy business practice, the reason the Australian Competition and Consumer Commission outlaws cartels under Australian competition law. They also control markets and restrict products and by so doing destroy other businesses that operate in an honest manner because they can no longer survive the unhealthy business practices carried out by cartels. The result is decreased innovation and product quality. Consumer confidence in these undertakings goes down, including businesses that operate honestly because the consumer can no longer trust any undertaking.

Cartels operating in the public sector lead to the increase of taxes and other rates, yet the services they offer are reduced because there is no competition. This also happens when they rig bids in public infrastructural projects. As a result, costs of the projects are inflated, the capacity of the public sector to invest in these infrastructural projects is reduced, and, generally, public infrastructural investment and development is slowed down. The ultimate cost goes to the consumer and the citizen at large. This is, definitely, not what the likes of Thomas Aquinas, Murphy, Jeremy Bentham, and other natural law theorists intended. Using a consequentialist perspective, this behaviour does not produce the greatest happiness to the greatest number of members of the community. It is an immoral behaviour.

Competition authorities across the globe are mandated by legislation to launch investigations of undertakings if certain cartel conduct is evident. For example, section 45 of the Australian Competition and Consumer Act<sup>52</sup> allows

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<sup>52</sup> Australian Competition and Consumer Act 2010 (Cth), available at <[http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol\\_act/caca2010265/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/caca2010265/)> accessed on 22nd July 2018.



the Commission to launch investigations if certain cartel conduct satisfies certain criteria. For instance, the conduct was covert. Secondly, the conduct caused or would have caused serious economic harm. Thirdly, the conduct had caused or would have caused a significant impact on the market within which the cartel operates. Fourthly, the Commission will launch investigations if the conduct of the cartel caused or would have caused detriment to members of the public or consumers who rely on the undertakings who form the cartel for products. As discussed earlier in this paper, cartel conduct harms the public generally, and consumers specifically. Competition authorities therefore have powers under legislation to investigate such conduct.

## **8. Regulation of Cartel Conduct under the Competition Act of Kenya**

Part III of the Competition Act<sup>53</sup> prohibits restrictive trade practices, agreements, and decisions. The part does not expressly mention cartels. However, the conduct described in this part is reminiscent of cartel behaviour. Section 21 (1) outlaws any agreements, concerted practices, and decisions between undertakings that are aimed at lessening, distorting, or preventing competition in any market in the country. However, some restrictive practices are exempted from prohibition under section 25 of the Act. The Competition Authority is permitted by section 26 of the Act to make certain considerations in determining whether an undertaking's application for exemption from prohibition will be accepted or declined. One consideration is whether the practice, agreement, or decision is meant to maintain or promote exports.<sup>54</sup> The other consideration is whether the practice or conduct is meant to improve production or distribution of goods and services.<sup>55</sup> The Authority will allow the exemption from cartel behaviour if the cartel conduct is contributing to the production and distribution of goods and services.

Cartel conduct promotes economic or technical progress and stability in an industry.<sup>56</sup> Accordingly, a cartel whose conduct brings stability in the economy and contributes to technological growth is likely to be exempted from prohibition. This exemption follows the consequentialist approach to the analysis of human conduct whereby this paper argued that a conduct that produces the greatest happiness to the

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<sup>53</sup> No. 12 of 2010.

<sup>54</sup> Section 26 (3) (a).

<sup>55</sup> Section 26 (3) (b).

<sup>56</sup> Section 26 (3) (c).

largest number of members of the society is moral and acceptable. Therefore, even though cartel conduct is generally despicable, it is allowable when it contributes to this happiness, at least in accordance with Kenyan competition law.

The Authority has received several applications for exemption under section 25(3) of the Act. For instance, in September 2017, the Authority published in the Kenya Gazette a notice of the application of Majid Al Futtaim Hypermarkets Limited (trading as Carrefour) (the lessee) and Two Rivers Lifestyle Centre Limited (the lessor). The two parties had a seven-year lease agreement in which under clause 7.4 the parties agreed that the lessor would 'not lease any part of the Centre to any hypermarket, supermarket, butcheries, green grocers or fruit or vegetable stores or permit the expansion of the leased premises without the written consent of the lessee.'<sup>57</sup> The clause was in contravention of section 21(1), (3) (e) and 3 (i) of the Act unless an exemption was granted under section 25 (1). Hence, the parties applied for an exemption. Through the Gazette notice, the Authority invited members of the public to make submissions to the Authority regarding any information they may have regarding the two undertakings within 30 days.

Agreements, decisions and concerted practices discussed in the Competition Act affect undertakings trading in both horizontal and vertical relationships. Horizontal relationships involve agreements between undertakings or competition at the same level of production, distribution or supply cycle. Vertical relationships refer to agreements between undertakings at different levels of production, distribution or supply cycle. Undertakings are prohibited from engaging in certain forms of agreement, decision or concerted practice. For example, such undertakings violate the provisions of the Competition Act if they directly or indirectly fix prices.<sup>58</sup> The market is supposed to be free for all undertakings and, therefore, no undertaking or group of undertakings is allowed to fix prices. Agreements, decision or concerted practice that divide markets by allocating customers, suppliers, areas or specific types of goods or services are also prohibited.<sup>59</sup> Market division is aimed at ensuring that only members of a particular group of undertakings reach certain customers and that those that fall outside the group do not reach those customers. Each member of the cartel operates to enhance the interests of the cartel.

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<sup>57</sup> Gazette Notice No. 8760, Page 5153, September 2017 available at <[http://kenyalaw.org/kenya\\_gazette/gazette/volume/MTU3OQ--/Vol.CXIX-No.133](http://kenyalaw.org/kenya_gazette/gazette/volume/MTU3OQ--/Vol.CXIX-No.133)> accessed on 24th July 2018.

<sup>58</sup> Section 21 (3) (a).

<sup>59</sup> Section 21 (3) (b).

Collusive tendering is another prohibited cartel conduct under the Act.<sup>60</sup> Collusive tendering occurs where members of the cartel decide which member is supposed to win the tender and then they proceed to prepare sham bids for the other members. Every member of the cartel will place bids but will not be intending to win them because only one member has prepared a successful bid. In the next tender, a different member of the cartel will be aiming at winning the tender as the rest submit sham bids. Such conduct is deceitful and immoral. A conduct that limits or controls production, market outlets or access, technical development or investment is also prohibited under the Act.<sup>61</sup> By controlling production and also markets, such undertakings seek to ensure that they gain maximum profits at the expense of other undertakings that are not part of the cartel, hence, limit free competition.

Undertakings are also prohibited from applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage compared to the rest of undertakings. Such conduct is classified as cartel conduct.<sup>62</sup> One other prohibited conduct is one that amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use.<sup>63</sup> This paper discussed earlier that conduct which leads to unfairness, discrimination and lack of reasonableness and transparency is immoral, and, therefore, illegal. Likewise, business conduct that otherwise prevents, distorts or restricts competition is also prohibited.<sup>64</sup>

Section 36 of the Act stipulates the penalties that the Authority can impose on undertakings accused of cartel conduct under the Act. Firstly, the Authority is required to declare such conduct as an infringement on free competition.<sup>65</sup> Secondly, the Authority should proceed to restrain the undertakings from engaging in the conduct that has been found to be an infringement.<sup>66</sup> The Authority then proceeds to direct the undertakings to remedy the infringement or the effects of the infringement on the market, other undertakings, or consumers of the products or services they are engaged in.<sup>67</sup> The authority has powers under the Act to impose a financial penalty of up to ten percent of the immediately preceding year's gross

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<sup>60</sup> Section 21 (3) (c).

<sup>61</sup> Section 21 (3) (d).

<sup>62</sup> Section 21 (3) (f).

<sup>63</sup> Section 21 (3) (h).

<sup>64</sup> Section 21 (3) (i).

<sup>65</sup> Section 36 (a).

<sup>66</sup> Section 36 (b).

<sup>67</sup> Section 36(c).

annual turnover in Kenya of the undertaking or undertakings in question.<sup>68</sup> It can also grant any other appropriate relief that it deems fit. Any undertaking that is aggrieved by the decision of the Authority can appeal to the Competition Tribunal within thirty days of the decision. Further appeals can be made to the High Court within thirty days of the service of a notice of appeal.<sup>69</sup> The decision of the High Court shall be final.

Cartel regulation is also provided for in the Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices.<sup>70</sup> Guideline 3 of the guidelines is dedicated to the assessment or review standard used in assessing anticompetitive agreements. Guideline 24 provides that when the Authority makes a decision to investigate certain cartel conduct, it seeks to ascertain that there is an agreement in fact, there is a plurality of fact, and that the agreement has the object or effect of preventing, restricting/lessening or distorting competition on the market.<sup>71</sup> Guideline 34 gives the Authority the mandate to also investigate cartel conduct of professional associations and trade associations using the same criteria that is used in investigating businesses. The reasoning behind taking such measures is that professional and trade associations also have a profound effect on the economy as is the case with businesses. The Authority will consider three factors when determining whether the conduct of professional and trade associations is cartel-like, in addition to the criteria under section 21(1) of the Act. The additional factors are: the presence of sufficient evidence that the agreement operates as an absolute ban on competitive bidding, whether agreement interferes with free market price structures, or whether agreement limits production or markets by creating a market that is unresponsive to consumer needs.<sup>72</sup>

Guideline 38 discusses cartel conduct under the heading “Hard-core Restrictions/Cartels: Price Fixing, Collusive Tendering and Market Division.” Contracts, agreements, decisions, or concerted practices are cartel-like if they are meant to fix prices, limit output, allocate customers, territories, products or suppliers, limit innovation and proliferation of new technology, or to rig bids or tenders.<sup>73</sup> This paper will discuss these practices at length in the section that follows.

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<sup>68</sup> Section 36 (d).

<sup>69</sup> Section 40.

<sup>70</sup> The Competition Authority of Kenya, ‘Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices’ available at <<https://www.cak.go.ke/images/docs/Restrictive-Trade-Practices-Guidelines.pdf>> accessed on 23rd July 2018.

<sup>71</sup> *Ibid*, guideline 24.

<sup>72</sup> Regulation 38.

<sup>73</sup> Regulation 39.

## **8.1 Price Fixing**

The authority will consider cartel-like conduct to constitute price fixing if it satisfies certain criteria. Firstly, price fixing is evident. Secondly, an element of price fixing is present. Such an element could be fixing a discount or setting a percentage price increase. Setting the permitted range of prices between competitors also constitutes price fixing. Price fixing is also evident when undertakings set the price of transport charges (such as fuel charges), credit interest rate terms, etc. In addition, agreements or arrangements to indirectly restrict price competition in some way such as recommended pricing also constitute price fixing under the regulations. Lastly, prices are fixed when undertakings agree to share price lists before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision. The Authority has powers to rule that such conduct constitutes price fixing and then take action against the involved undertakings.

## **8.2 Collusive Tendering (Bid Rigging)**

The regulations consider certain conduct of cartels to constitute bid rigging. Two examples are given as taking turns to win competitive tenders and bid suppression where undertakings agree that only one of them will submit a bid for the contract and bid rotation where the parties to the agreement take turns to win contracts. Undertakings may agree to submit cover bids/tenders that are intended not to be successful. Since only one undertaking will win the bid, the unsuccessful bidders/ tenderers may get kick-backs from the undertaking that has won the bid. Therefore, it is a win-win situation for all the undertakings forming the cartel.<sup>74</sup> Members of a cartel usually employ three tactics to avoid winning a bid that they intend to be won by one of their members. Firstly, they can abstain from bidding. This practice is also referred to as “bid suppression.” Secondly, they can submit a high bid that is not likely to be accepted by the bidding committee. This is also referred to as “cover bidding.” Thirdly, they can intentionally fill the bid forms wrongly so that they avoid being considered for the tender. This practice is not only illegal because the Act prohibits it, but also immoral because it is deceptive and dishonest.

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<sup>74</sup> Guideline 41.

### 8.3 Market Division

Market allocation may take two forms: undertakings may agree to stay out of each other's geographic territory or customer base, or to allocate customers between themselves. Undertakings could also agree to buy only from certain suppliers.<sup>75</sup> This conduct is also considered anticompetitive and, therefore, prohibited under the Act. Finally, where competitors agree to specialise in certain products, ranges of products or in particular technologies, the Authority will consider this to be market division and, therefore, cartel conduct.<sup>76</sup> It is not only illegal but also immoral to agree to allocate certain markets to specific undertakings. It restricts competition with other undertakings that are not members of the cartel. This paper notes here that the Authority carries investigations on its own motion and does not need any authorization by courts to conduct such investigation.<sup>77</sup>

## 9. Immunity Program

The Competition Authority has promulgated Leniency Program Guidelines under section 89A of the Competition Act.<sup>78</sup> Section 89 of the Act permits the Authority to allow some leniency to undertakings (s) that report to the Authority regarding concerted agreements meant to restrict or lessen competition in the market. The undertaking applying for leniency should be ready and willing to cooperate with the Authority in investigations into the conduct of the cartel. The Authority can then grant the undertaking complete or partial immunity from penalties as a result of the conduct. An undertaking in need of leniency must apply for the same to the Authority. The Authority will accept the leniency application in specific instances. The first instance is when the Authority has no knowledge of the existence of the cartel or statutory contravention. The second instance is when the Authority has knowledge of the contravention but lacks sufficient information to start an investigation. The third instance is when the Authority has commenced investigations but requires additional evidence to penalize the offenders. In this case, applications may be received, as long as new evidence can be introduced in the file.<sup>79</sup>

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<sup>75</sup> Guideline 43.

<sup>76</sup> Guideline 44.

<sup>77</sup> *Mea Limited v Competition Authority of Kenya and Another* [2016] eKLR.

<sup>78</sup> Competition Authority of Kenya, 'Leniency Program Guidelines,' available at <[https://www.cak.go.ke/images/docs/Leniency\\_Programme\\_Guidelines.pdf](https://www.cak.go.ke/images/docs/Leniency_Programme_Guidelines.pdf)> accessed on 23rd July 2018.

<sup>79</sup> *Ibid*, guideline 11.

The reasoning behind the promulgation of these guidelines would be that a member of a cartel has discovered that the substratum of the cartel is to undermine competition, transparency, market freedom, and other values of morality in the marketplace. Therefore, after discovering that what the cartel is engaged in does not produce the greatest happiness to the largest number of people, and that it might lead to punishment by authorities, if discovered, the undertaking decides to provide crucial information to the Authority and apply for immunity. This is the whole idea of utilitarianism and, by extension, consequentialism.

The Competition Authority of Kenya has investigated several cases in the nature of cartels. For example, in *Competition Authority of Kenya vs Consumer Link Communication Limited*,<sup>80</sup> the Authority dealt with a classic price fixing cartel involving 12 undertakings forming the Outdoor Advertisers Association as the cartel under whose name they operated. Some of the undertakings were the Consumer Communication Limited, Firm Bridge Limited, Live AD Limited, and A1 Outdoor Limited. The undertakings were accused of fixing minimum prices of billboard space. The billboards measured 12 meters by 12 meters each. The Authority discovered a circular signed by 12 members of the cartel in which they agreed to fix the minimum price of the billboards at Kshs 160,000 in major towns and Kshs 150,000 in other towns. The Authority found the undertakings to be in violation of section 22 (1) (b) of the Act and fined them as follows: Consumer Communication Limited (Kshs 1,200,000), Firm Bridge Limited (Kshs 604,352), Live AD Limited (Kshs 2,500,000), A1 Outdoor Limited (Kshs 114,000), Magnate Ventures Limited (Kshs 5,000,000), Adsite Limited (Kshs 2,390,000), Look Media (Kshs 136,000), and Spellman Walkers Limited (Kshs 45,180). The undertakings were fined in bits.

In 2016, the Authority fined Crown Beverages, a subsidiary of SABMiller, Kshs 2.4 million for setting a minimum price for its products. In the opinion of the Authority, this conduct constituted a restrictive trade practice under section 21 of the Act. The Kenyan subsidiary of the British multinational company had set a minimum price for distributors who supplied its products.<sup>81</sup> For this reason, therefore, Kenyan undertakings are also engaged in restrictive trade practices in the form of cartel conduct.

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<sup>80</sup> CAK/EC/05/80/A, date of commencement of investigations: February 4, 2018. Date of decision: October 15, 2015. Available at <<https://www.cak.go.ke/index.php/enforcement-compliance/2016-05-17-08-21-31>> accessed on 24th July 2018.

<sup>81</sup> Mugabi Mutege, 'SABMiller Kenya Subsidiary Fined over Price Fixing,' *Business Daily on July 12, 2016*. Available at <<https://www.businessdailyafrica.com/corporate/SABMiller-Kenya-subsidiary-fined-over-price-fixing/539550-3292158-f3p435/index.html>> accessed on 24th July 2018.

## 10. Cartel Conduct and Market Regulation

The previous discussion has confirmed that cartel conduct is economically harmful. Cartels decrease output, efficiency, and innovation by increasing product prices. This conduct makes the society worse off than it should be. Does the consideration that cartels make the society worse off than it would have been explain why cartels are morally wrong? The mere fact that cartel behaviour causes economic harm does not make it *prima facie* morally wrong.<sup>82</sup> Whereas it is correct to say that every person or group of persons, whether private or legal persons, have a moral obligation not to cause harm, the degree of harm that constitutes a moral wrong depends on a variety of factors.<sup>83</sup> One of the questions to ask is whether the person acting wrongfully has the entitlement to act as such, regardless of the harm the act causes to the society. For instance, a member of a cartel does not have the entitlement to cause economic harm on the society. Yet a person who has worked for a company for long is entitled to retire when they reach the retirement age, regardless of the harm the company will suffer.<sup>84</sup>

The ordoliberal concept of the Economic Constitution explains how economic transactions generate social norms that reflect competition values.<sup>85</sup> These competition values are part of a larger enterprise of social and economic norms that must be adhered to by all members of the society. Cartel conduct violates these social and economic norms that are derived from competition values. The idea of the immorality and wrongfulness of cartels is therefore derived from their violation of these norms. These social norms and competition values, therefore, lay the foundation for the establishment of competition laws and regulation to outlaw violation. Competition values promote the common good of all members of the society forming the market that competition law regulates. The economic consequences of cartel behaviour are to harm the common good of the people and not to promote it. Hence, a consequentialist perspective of analysing competition law would propose the punishment of cartel behaviour because it works against the common good of the people and, therefore, immoral.

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<sup>82</sup> Mark Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Edward Elgar, 2012) 28–49.

<sup>83</sup> Crowe, J. and Jedličková, B., note 13.

<sup>84</sup> See, for example, G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge University Press, 1995) 55–6; Friedrich A Hayek, *The Constitution of Liberty* (Routledge, 1960) 139.

<sup>85</sup> Crowe, J. and Jedličková, B., note 13.



Competition law, and the Kenyan Competition Act is an example, provides legal remedies for societies whose values and welfare has been harmed by such behaviour as cartel conduct. The three legal remedies available are criminal liability for corporations, criminal liability for individuals, and civil remedies. These remedies are justified on consequentialist reasoning. The idea is to deter potential individuals and corporations from engaging in cartel conduct because it is harmful to the common good of the society and the economy.<sup>86</sup> Mark Furse opines that the essence of any anti-cartel law would be to punish present corporations engaging in the conduct and to deter other corporations that might be contemplating entering cartel-like agreements.<sup>87</sup> In this regard, criminal sanctions are preferred to civil remedies because they have a greater deterrent effect.<sup>88</sup> Although criminal sanctions are preferred for their deterrent effect on cartels, an approach that classifies cartel behaviour as a moral wrong is also preferred.

Philosophy asserts that an individual will only be morally responsible, and therefore liable, for a wrong if a two-pronged criterion is satisfied. First, the individual must have intended, foresaw or should have foreseen the outcome. Secondly, the individual's actions in some way must have caused the outcome that has since been declared a wrong.<sup>89</sup> Likewise, an individual or a group of individuals that engage in cartel behaviour knowing too well that such behaviour causes economic and social harm is morally responsible for such harm. Is it, therefore, possible to attach moral responsibility to corporations, noting that it is corporations that exhibit the cartel-like conduct and not the natural persons representing them this paper notes that, even in decisions from competition authorities discussed here, penalties were levelled against the undertakings and not the directors.

Christopher Kutz has argued that individual members of a group that causes harm through its acts should be held responsible, and therefore pay, for their participation in causing the harm.<sup>90</sup> Crowe has also opined that although

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<sup>86</sup> See arguments by John M Connor, 'Effectiveness of Antitrust Sanctions on Modern International Cartels' (2006) 6 *Journal of Industrial Competition and Trade* 195; Alan Riley, 'Modernising Cartel Sanctions: Effective Sanctions for Price-Fixing in the European Union' (2011) 32 *European Competition Law Review* 551.

<sup>87</sup> Mark Furse, note 62.

<sup>88</sup> Brenda Marshall, 'Criminalisation of Cartel Conduct: Compelling Compliance with Anti-Collusion Laws' (2010) 3 *Journal of the Australasian Law Teachers Association* 11, 13.

<sup>89</sup> Jonathan Crowe, 'Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs' (2012) 75 *Modern Law Review* 159, 162.

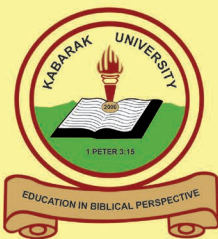
<sup>90</sup> Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2000) 138.

participants in a collective endeavour should not automatically be held individually liable for the harm of the collective endeavour, they should not completely escape liability and should therefore shoulder part of the burden of the harm. Shareholders, employees, and directors of a company have a stake in the business. For this reason, they benefit from the proceeds of the business. Likewise, they suffer loss when the business registers losses. Accordingly, they shoulder some burden of the civil remedies that are imposed on the undertaking in case it is found to have engaged in cartel conduct. However, it is not this easy when criminal and moral wrongs are involved. This paper therefore concludes that individuals in charge of the undertaking should also be held criminally and morally liable for participating in cartel-like conduct on behalf of the undertaking.

## **11. Conclusion**

This paper has advanced a discussion of the behaviour of cartels as a moral wrong, linking such behaviour to the economic and social harm that it causes. The paper has argued that cartels cause economic harm and are, therefore, economically and legally objectionable. However, such harm does not, by itself, constitute a moral wrong. Instead, the paper has argued that cartels violate certain salient social and economic norms that the society has put in place to govern the conduct of individuals or groups of individuals. Competition values are part of those social and economic norms. Such violation harms the common good of the greatest number of people in the society, as a consequentialist perspective would pose. The criminal and civil sanctions stipulated under competition law, especially the Kenyan Competition Act, are, therefore, justified. The Competition Act should also be amended to make the penalties stiffer to the effect that cartel conduct is classified as both a moral and legal wrong. The paper concludes that this law is a moral framework that should be used to regulate the conduct of undertakings by punishing those that cause harm to the social welfare of the people. A consequentialist approach to the analysis of these laws therefore justifies the penalties that are levelled against cartels because they are deceptive, which acts against the social welfare of the economic community.





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