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TOPIC: REDRESS FOR VICTIMS OF CARTEL ACTIVITY

by

Leanda Els

Student number: 10048384

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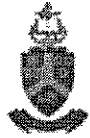
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Supervisor: Prof Corlia van Heerden

Department of Mercantile Law

Faculty of Law



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Acknowledgment

Philippians 4:13

"I can do all things through Christ who strengthens me. In Jesus, everything is possible."

To my Lord and Saviour, thank you for blessing me with your mercy, grace and love, without which this would not have been possible.

I would like to express my sincere gratitude to my supervisor, Prof. Corlia van Heerden, for her expertise and patience and for making time *whenever* I needed her guidance.



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Student number: **10048384**

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SUMMARY

It is well known amongst competition law experts that public enforcement of competition law, i.e. administrative penalties for competition law infringements, alone is not enough. Consequently, private damages claims play a crucial role in promoting and maintaining competition in a market. This suggests a need for interaction between public and private enforcement of competition law.

Cartel activities, in terms of section 4(1)(b) of South Africa's Competition Act, are considered by competition law experts to be the most egregious of anti-competitive activities. When taking this into account, it is clear to see the need for a method which cartel victims can use to claim compensation for the harm they had to endure because of the competition law infringements.

Section 65 of South Africa's Competition Act sets out the requirements, which must be met before a private damages action can be pursued in a civil court, as well as the procedure in this regard. Class actions play a very important role as its advantages provide indigent victims in a cartelised market the opportunity to institute their private damages claims. South Africa's Competition Act is silent on the matter of *locus standi* regarding a damages claim. There is no legal certainty regarding the issue of which type of claim, either delictual or statutory, the injured party has in terms of section 65. Nevertheless the *Children's Resource Centre*-case provides a few useful insights regarding the nature of the cause of action. In order to address some problem areas regarding private damages claims the European Commission published a *Green Paper*, *White Paper* and *Draft Directive*. Because South Africa's competition law is largely based on the European Union's competition law principles, guidance will be obtained from the European Commission's initiatives regarding the issue of *locus standi* as well as other problem areas.

Leniency programmes are very effective in the uncovering of cartel activities which is why it plays a crucial role in the process of claiming for damages. It is important to note that the 'immunity' offered by South Africa's Corporate Leniency Policy does not cover civil liability towards victims and that civil damages claims in turn affect the Corporate Leniency Policy in such a way that the effectiveness of the policy gets jeopardised. Guidance on how to solve these problems will be obtained from the European Union's *Draft Directive* which addresses the issue by regulating access to documents and protecting a leniency applicant.

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CHAPTER 1: INTRODUCTION

1. Competition Policy and Law

'Competition in a market' refers to a market where the legal control is reduced and the consumer welfare improved because the resources are efficiently apportioned.¹ Without the presence of 'competition' in a market, i.e. a monopolistic market, consumers are unable to apply any pressure on firms during a business transaction. As a result consumers are forced to either pay an outrageous price for the goods or services they wish to buy or simply abstain from purchasing altogether.² Free markets, such as the one in South Africa, sometimes fail to provide lower prices and wider choices to consumers due to the anti-competitive behaviour of firms in the market. Fortunately competition policy and competition law can address these failures and provide solutions. Competition policy forms the basis of competition law as well as economic policies which enable the government to intervene in these business transactions in order to stimulate the economy and protect consumers.³ The main purpose of competition law is to promote consumer welfare.⁴ In order to achieve this goal competition law contains provisions which aim to ensure equal business opportunities and sustain a market with fair competition.⁵

It would be appropriate to look at the development of competition law in South Africa. Since 1979 competition was regulated by the Maintenance and Promotion of Competition Act⁶ and competition matters were investigated and adjudicated by the Competition Board.⁷ In 1994, the new South African government published the *White Paper on Reconstruction and Development*⁸ in order to review the South African competition law regime.⁹ In September 1998 the Competition Act (hereinafter 'Act')¹⁰ was passed by Parliament. The Preamble of the Act addresses the abovementioned principles of competition policy and competition law and states that there is a need for an efficient, competitive economic environment, which balances the interest of workers, owners and consumers.¹¹

¹ P Sutherland & K Kemp *Competition Law of South Africa* (November 2014) (Service Issue 18) at 1-14.

² Jones & Sufrin *EC Competition Law* 3ed (2008) 11-13.

³ M Neuhoff *et al A Practical Guide to the South African Competition Act* (2006) 11-12.

⁴ *Ibid* at 12.

⁵ M Neuhoff *supra* n3. See L Kelly 'The introduction of a 'cartel offence' into South African Law' (2010) 21 *Stellenbosch Law Review* 321, 322.

⁶ 96 of 1979.

⁷ M Neuhoff *supra* n3 at 12.

⁸ GN 1954 GG 16085 of 23 November 1994.

⁹ See 'The Evolution of Competition Policy in South Africa'.

¹⁰ Act 89 of 1998.

¹¹ Preamble of the Competition Act.

2. Brief overview of the Competition Act

Besides a few exceptions, the Act applies to all economic activities within, or those that have an effect within, the Republic of South Africa.¹² Its purpose is to provide consumers with competitive prices and product choices by way of promoting and maintaining competition in South Africa.¹³ In order to achieve these goals the Act regulates restrictive horizontal¹⁴ and vertical¹⁵ practices, abuse of dominance¹⁶, price discrimination by a dominant firm¹⁷ and mergers.¹⁸ The focus of this documentation is the restrictive horizontal practices which refer to the interaction between firms in a horizontal relationship, namely a relationship between competitors. Competitors are defined in the Act as firms who either produce or sell products or offer services to consumers within the same market.¹⁹ The main reason why the practices of competitors are under such strict regulation is because of their immense effect on the majority of South African consumers.²⁰ It is to be noted that section 4 makes provision for 'per se prohibitions' as well as 'rule of reason prohibitions', which will be discussed in more detail later on in this chapter of the dissertation.

Three important entities, which have jurisdiction throughout the Republic, have been established by the Act to deal with competition law matters. The first tier of the South African competition authorities is the Competition Commission (hereinafter 'Commission'),²¹ which is responsible for the investigation, control and evaluation of restrictive practices, abuse of dominance, price discrimination by a dominant firm and mergers. The second tier consists of the Competition Tribunal (hereinafter 'the Tribunal') which was established in terms of section 26 of the Act. Besides adjudication of competition law matters, its functions also include the consideration of an appeal or reviewing of any decision made by the Commission. The Act also enables the Tribunal to make any necessary ruling or order.²² In the final instance, the Competition Appeal Court (hereinafter 'the CAC')²³ may consider an appeal or review any decision made by the Tribunal and can give any

¹² See section 3(1) of the Act. From this point on all references, with regards to sections, refer to those of the Competition Act 89 of 1998, unless indicated otherwise.

¹³ Section 2(b).

¹⁴ Section 4.

¹⁵ Section 5.

¹⁶ Section 8.

¹⁷ Section 9.

¹⁸ Section 12.

¹⁹ Section 1(1)(xiii). See M Neuhoff *supra* n3 page 74.

²⁰ M Neuhoff *supra* n3 page 62.

²¹ This body was established in terms of section 19 and its functions are set out in section 21.

²² For the functions of the Tribunal, see section 27.

²³ This court was established in terms of section 36.

judgment or make any order that the circumstances require.²⁴ Any judgement or order made by the Commission, Tribunal or the CAC will have the status of an order of the High Court.²⁵ The abovementioned entities were established in order to fulfil the purpose of the Act and all three of them play a very important role in the enforcement of competition law as per the Competition Act.

3. Background to this dissertation

Infringements of the Act can cause significant harm to victims of anti-competitive activities. Enforcement of competition rules therefore plays a significant part in promoting and maintaining healthy competition between firms, from which not only the victims but the whole economy can benefit.

Public enforcement of competition law is the type of enforcement which is exercised by the competition authorities, namely the Commission, the Tribunal and the CAC. These authorities enforce competition law and punish infringements thereof in accordance with the provisions of the Act.²⁶ If the Tribunal finds a particular firm guilty of contravening the Act, it can impose an administrative penalty of up to 10% of the firm's annual turnover in South Africa²⁷, which is paid into the National Revenue Fund.²⁸ Despite these severe administrative fines the victims of anti-competitive conduct are however not compensated for the harm they had to endure.²⁹ Therefore, there is a need for mechanisms which can assist victims in claiming compensation for their damages. It is in this context that the ability of victims to institute private damages claims becomes relevant.

Private enforcement is the enforcement of competition law by way of damages actions before national courts. In other words, it is when the parties that were injured by the competition law infringement claim, via national courts, compensation for the damages that they had to endure.³⁰

²⁴ For the functions of the CAC, see section 37.

²⁵ Section 64(1).

²⁶ K Moodaliyar, J Freardon and S Theuerkauf 'The relationship between public and private enforcement of competition law – a comparative analysis of South African, European Union and Swiss law' (2010) 127 *SALJ* 151.

²⁷ Section 59(2).

²⁸ Section 59(4). See *Southern Pipeline Contractors and another v Competition Commission* 105/CAC/Dec10 pars 1-2, 51 where the Competition Appeal Court stated that a firm's *affected* turnover, not its *total* turnover, must be used in the calculation of the administrative penalty. The Tribunal in *Competition Commission v Aveng (Africa) Ltd and others* 84/CR/Dec09 par 133 sets out a prescribed method for the calculation of administrative penalties, which consists of six steps that the Tribunal must follow. In *Competition Commission v DPI Plastics (Pty) Ltd and others* 15/CR/Feb09 pars 43-44 the Tribunal applied the six step approach.

²⁹ K Moodaliyar *supra* n26 at 141.

³⁰ K Moodaliyar *supra* n26 at 151.

Whish correctly points out that the competition authorities have limited resources; thus access to the national courts is necessary in order to help relieve the competition authorities' burden regarding enforcement.³¹

Public enforcement alone will not effectively achieve the main purpose of the Act³², thus it is important that South Africa makes more of an effort in following the avenue of private enforcement. At present, there is little South African case law regarding civil actions for damages caused by competition law infringements. As a result, the purpose of this dissertation is to provide an overview of the challenges which South African victims of anti-competitive conduct have to deal with. This dissertation will not consider all the competition law infringements; its aim is to focus on cartel activities in terms of section 4(1)(b) of the Act as these activities are considered to be the most egregious of anti-competitive activities.³³ Compensation for victims of cartel conduct is a matter that should not be taken lightly; therefore this dissertation aims to point out the substantial difficulties that cartel victims are faced with when they try to obtain a damages award. The compensation methods in the European Union ('hereinafter EU') will be analysed for guidance on how to improve the position of cartel victims in South Africa and for purposes of suggestions for reform.

4. Unpacking section 4(1)(b) of the Act

A cartel is an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their competitive behaviour, through engaging in restrictive horizontal practices.³⁴ Section 4 of the Act regulates restrictive horizontal practices and consists of a 'rule of reason provision' as well as 'a *per se* provision'. Section 4(1)(a) is the rule of reason provision and will be discussed below. The *per se* prohibited practices set out in section 4(1)(b) include the fixing of prices, dividing of markets as well as the act of collusive tendering. Firms' conduct will be regarded as price fixing when they directly or indirectly fix a purchase or selling price or any other trading condition.³⁵ Firms can be found guilty of market division when they allocate customers, suppliers, territories or specific types of goods or services.³⁶ Collusive tendering, which is also known

³¹ R Whish *Competition Law* 6 ed (2009) 290-291.

³² Section 2(b) states that the Act's purpose is to provide consumers with competitive prices and product choices by way of promoting and maintaining competition in South Africa.

³³ P Sutherland *supra* n1 at 5-45 to 5-46.

³⁴ Corporate Leniency Policy GN 628 GG 31064 of 23 May 2008 (hereinafter 'CLP'), par 5.1.

³⁵ Section 4(1)(b)(i).

³⁶ Section 4(1)(b)(ii).

as 'bid-rigging', occurs when competing firms agree not to compete on their bids for a tender.³⁷ This type of cartel is regarded as a form of market division and presents some of the characteristics of price fixing.³⁸ Because cartels very rarely have pro-competitive consequences and are usually extremely harmful, the legislature decided to make section 4(1)(b) of the Act a *per se* prohibition.³⁹ This means that the mere existence of price fixing, market division and collusive tendering is seen as automatic contraventions of the Act. In other words, once it is established that the conduct mentioned in section 4(1)(b) has occurred, the contravention cannot be justified with evidence from a further investigation and a firm can be fined for its *first* contravention of the provision.⁴⁰

Section 4 also provides for 'rule of reason prohibitions' which refers to practices that have the effect of substantially preventing or lessening competition in a market. In this regard, the 'rule of reason test' is applied to determine whether the practice is prohibited or not. A firm's conduct will not be regarded as prohibited if it can prove that it resulted in a technological, efficiency or other pro-competitive gain which outweighs the abovementioned effect.⁴¹ As the dissertation focuses only on cartels as described in section 4(1)(b) and its effect on competition, further discussions regarding 'rule of reason prohibitions' will be disregarded for purposes of this dissertation.

5. Scope of the dissertation

Section 65 of the Act regulates the position of civil damages actions. Section 65(6) states that a person who has suffered loss or damage as a result of a prohibited practice -

- (a) may not commence an action in a civil court for the assessment of the amount or the awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or
- (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form -
 - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;
 - (ii) stating the date of the Tribunal or Competition Appeal Court finding; and

³⁷ Section 4(1)(b)(iii). See 'How to prevent, detect and report collusive tendering', page 2.

³⁸ P Sutherland *supra* n1 at 5-76.

³⁹ P Sutherland *supra* n1 at 5-45 to 5-46.

⁴⁰ M Neuhoff *supra* n3 pages 62-63, 73-74.

⁴¹ Section 4(1)(a).

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

Although section 65 provides for a right to claim damages, it does not specify who exactly qualifies as a victim of anti-competitive conduct. It sets out the procedure and requirements to institute private damages actions but provides no clarity on the kind of claim a victim has. Section 65 also fails to provide for a class action to be instituted to claim damages. There is also no provision made for the effect which civil damages actions will have on the Corporate Leniency Policy (hereinafter 'CLP'). These issues will be addressed as follows:

In Chapter 2 of this paper an overview will be provided of how competition law, in the context of damages claims, developed in the European Union in order to extract guidance on how to improve South Africa's compensation system. Firstly, two European cases, *Courage Ltd v Bernard Crehan*⁴² (hereinafter 'Crehan') and *Manfredi and Others*⁴³ (hereinafter 'Manfredi'), which awarded victims of anti-competitive conduct a right to claim compensation, will be dealt with. Thereafter, an extensive discussion will be provided on how the European Commission's *Green Paper*⁴⁴, *White Paper*⁴⁵ and *Draft Directive*⁴⁶ can ensure that the exercise of this right will have more positive outcomes, which includes collective redress mechanisms etc. The issue of who exactly qualifies to be a victim, i.e. who has *locus standi*, will also receive pertinent attention. Despite South Africa's Competition Act being silent on the matter it permits anyone who interprets or applies the Act to consider appropriate foreign and international law.⁴⁷ Consequently it is submitted that regard may be had to look at the EU law for guidance in this regard as its *Draft Directive* allows any victim, including indirect purchasers, to claim for damages. In addition an explanation will be provided of the 'passing-on defence' whilst also mentioning the requirements which an indirect purchaser has to comply with in order for him or her to claim for damages. Subsequent thereto the definition and development of a class action in South Africa will be discussed and it will be considered whether individuals, who suffered damages due to competition law infringements (which is a non-constitutional claim) are allowed to pursue a class action. In this regard, the factors which a court may take into account when considering whether to certify a class action or not, will also be touched upon. With the

⁴² Case C-453/99 [2001] ECR I-6297.

⁴³ Joined Cases C-295 to 298/04 [2006] ECR I-6619.

⁴⁴ *Damages Actions for Breach of the EC Antitrust Rules* COM(2005) 672 final.

⁴⁵ *White Paper on Damages for Breach of the EC Antitrust Rules* COM(2008) 165 final.

⁴⁶ *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* COM(2013) 404 final.

⁴⁷ Section 1(3) of the Act.

assistance of recent case law the manner in which these factors should be applied by the courts will be examined. Lastly, the barriers which a victim are faced with when claiming for damages in its individual capacity as well as the many advantages of class actions will be discussed.

Chapter 3 of this dissertation will deal with the manners in which a victim can practically give effect to his or her right to claim damages, i.e. the procedural aspects of this particular right. It will comprise of a brief discussion of the need for interaction between public and private enforcement of competition law. Thereafter the options will be considered which a claimant has when instituting an action for damages, namely a 'follow-on' action or a 'stand-alone' action. Because only the 'follow-on' action applies in South Africa, it will then be appropriate to discuss the requirements which must be met when a victim pursues a damages claim in a civil court. Consequently the purpose of the certificate in terms of section 65 of the Competition Act (hereinafter 'section 65-certificate') will be highlighted as well as the effect which it will have on immunised firms. The term immunised firm refers to a firm that received immunity in terms of the Corporate Leniency Policy for confessing its involvement in a prohibited practice.⁴⁸ This will be followed by a detailed discussion on which type of claim, either delictual or statutory, the injured party has in terms of section 65. With reference to the Corporate Leniency Policy, case law and professional opinions the importance of leniency programmes as well as the requirements which a leniency applicant has to comply with in order to receive immunity will be pointed out. The remainder of this chapter will comprise of an elaboration on the way in which civil damages claims will affect the effectiveness of the CLP and how the *Draft Directive* addresses this issue by regulating access to documents and protecting a leniency applicant.

Chapter 4 of the dissertation provides concluding remarks on the concepts and issues which were addressed throughout chapter 1 to 3. It focuses on the complex areas, which causes the most problems and therefore needs urgent attention. After having discovered that South Africa is in desperate need of legal certainty regarding private damages claims, the chapter provides recommendations on how to effectively address these problem areas. The chapter contains recommendations that the legislature should provide amendments to the current Competition Act. Further, there are suggestions stating that the competition authorities, together with the Department of Trade and Industry, should issue guidelines which will possibly improve the use of civil damages actions.

⁴⁸ *Premier Foods (Pty) Ltd v Norman Manoim NO* (unreported) 38235/2012 02/08/2013 at par 36.

CHAPTER 2: COMPENSATION MECHANISMS

6. Developments in the European Union

6.1 Introduction

Section 1 of the Treaty on the Functioning of the European Union⁴⁹ (hereinafter 'TFEU') provides rules that specifically apply to undertakings. Article 101(1) of the TFEU prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...". Article 101(1) goes on to state specific prohibited practices, set out in subsections (a)-(e). These prohibited practices are similar to those set out in section 4⁵⁰ of our Competition Act, which makes it obvious for the reader to see where the South African legislatures found the basis for our Competition Law. Consequently, regard will be had to how the European Union's competition law has developed in the context of damages claims, and guidance will be extracted on how to improve the South African compensation system in this context.

Since 2001, the European Union (hereinafter 'EU') has made remarkable progress in the field of private enforcement of anti-competitive conduct which all started with the *Crehan* case⁵¹. The crux of this case dealt with an exclusive purchase obligation ('beer tie') between Courage, a brewery, and Mr Crehan, a pub owner.⁵² In other words, Mr Crehan was obliged to buy beer exclusively from Courage and no other brewery. Courage brought an action for unpaid deliveries of beer against Mr Crehan.⁵³ In reaction to the claim, Mr Crehan counterclaimed for damages and stated that the beer tie was contrary to "Article 85 of the EC Treaty (now Article 81 EC)".⁵⁴ Currently, these articles are better known as 'article 101 of the TFEU'.⁵⁵ The civil division of the Court of Appeal (England and Wales) found that English law does not allow a party to an illegal agreement to claim damages from

⁴⁹ 'Consolidated version of the Treaty on the Functioning of the European Union' (2012) *Official Journal of the European Union* C 326/47 (hereinafter 'TFEU').

⁵⁰ See pages 4-5 of this dissertation.

⁵¹ *Crehan supra* n42.

⁵² *Ibid* at pars 3-5.

⁵³ *Ibid* at par 6.

⁵⁴ *Ibid* at pars 1,6. On 1 May 1999, when the Treaty of Amsterdam entered into force within the EU, article 85 was renumbered to article 81. "Article 85 of the EC Treaty (now Article 81 EC)" was a new method of citation introduced to avoid confusion between an article's version before 1 May 1999 and as it stood after that date. The specific format of the wording indicates that the article has not been amended by the Treaty of Amsterdam. 'EC' indicates the 'EC Treaty'. See Hartley 'The Foundations of European Union Law 7e – Table of Equivalence'. See 'Note on the citation of articles of the Treaties in the publications of the Court of Justice and the Court of First Instance'.

⁵⁵ In 2009 article 81 was renumbered to article 101 by the TFEU when the Treaty of Lisbon came into force within the EU. See 'Tables of equivalences annexed to the Treaty of Lisbon'. See Hartley *supra* n54.

the other party.⁵⁶ Consequently, the Court of Appeal decided to stay proceedings and refer the case to the European Court of Justice (hereinafter 'ECJ') for a preliminary ruling.⁵⁷ The ECJ held that any individual can rely on a breach of Article 85 before a national court.⁵⁸ The fact that the particular individual is a party to a contract that restricts or distorts competition within the meaning of Article 85 is irrelevant and will not take away his or her right to claim for damages.⁵⁹ It held further that the full effectiveness and practical effect of the prohibition in Article 85 would be put at risk if this was not the case, which refers to the scenario where the particular individual did not have the right to claim for damages.⁶⁰ As a result, Article 85 precludes the English law provision mentioned above.⁶¹

Five years later, the ECJ had to deal with a similar issue in the *Manfredi* case.⁶² It is important to first have a look at the situation which preceded this case. On 28 July 2000 the Italian competition authority, Autorità garante per la concorrenza e del mercato, (hereinafter 'AGCM') made its final decision⁶³ and declared a particular agreement between different insurance companies unlawful. This type of agreement is better known as a 'price fixing agreement' which the insurance companies used to charge users large increases in premiums which were not justified by market conditions.⁶⁴ The fact that the conduct in question had been declared unlawful by the competition authorities, paved the path for a damages claim in a civil court.⁶⁵ In 2004 Mr Manfredi and others brought damages actions in the *court a quo*, namely the Giudice di Pace di Bitonto, against the said insurance companies for the harm they suffered, i.e. for repayment of the increases in the cost of premiums.⁶⁶ The *court a quo* decided to stay the proceedings and refer some of the issues to the ECJ for a preliminary hearing.⁶⁷ In 2006 in the *Manfredi*-case the ECJ emphasized two aspects which it also stated in the *Crehan*-case. Firstly, any individual can rely on a breach of Article 85 and subsequently rely on the invalidity of an agreement or practice prohibited under that article.⁶⁸ Secondly, if an individual did not have this particular right the full effectiveness and practical effect of the Article 85-

⁵⁶ Crehan *supra* n42 at par 11.

⁵⁷ Crehan *supra* n42 at par 16.

⁵⁸ Crehan *supra* n42 at par 24.

⁵⁹ *Ibid.*

⁶⁰ Crehan *supra* n42 at par 26.

⁶¹ Crehan *supra* n42 at par 36.

⁶² *Manfredi supra* n43 at par 22.

⁶³ No 8546 (I377) of 28 July 2000 (Bolletino 30/2000 of 14 August 2000).

⁶⁴ *Manfredi supra* n43 at par 11.

⁶⁵ The position is the same in South Africa, where a victim can only seek damages after the conduct in question has been declared unlawful, and not beforehand. For a discussion on 'follow-on damages litigation' see pages 25-26 of this dissertation.

⁶⁶ *Manfredi supra* n43 at pars 2, 7, 13, 14.

⁶⁷ *Manfredi supra* n43 at pars 20-21. These questions entailed the interpretation of article 81 EC.

⁶⁸ *Manfredi supra* n43 at par 59.

prohibition would be put at risk.⁶⁹ Furthermore, the ECJ stated that victims should be able to claim damages when there is a causal relationship between the harm and the prohibited practice.⁷⁰

By making similar decisions in both *Crehan*⁷¹ and *Manfredi*⁷² the ECJ confirmed that a victim of anti-competitive conduct indeed has a right, in terms of EU law, to claim compensation. The ECJ in *Crehan*⁷³ held that the existence of this right will perform a deterrence function in the sense that it will discourage anti-competitive conduct.⁷⁴ The ECJ stated in both these cases that, if the Community rules are silent on this matter, the domestic legal system of each Member State must provide detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law.⁷⁵ These particular rules must comply with two principles namely 'equivalence' and 'effectiveness'. These concepts can be explained as follows: firstly, the rules must not be less favourable than those governing similar domestic actions ('equivalence'). To comply with the second principle ('effectiveness'), the rules may not cause the exercise of rights conferred by Community law to be practically impossible or excessively difficult.⁷⁶

With the help of the *Comparative report*⁷⁷, the EU Commission (hereinafter 'EC') found that the Member States' rules, which governed damages actions before national courts, did not have the positive results that they hoped it would.⁷⁸ Instead the outcome was a shockingly low amount of cases where the victims of EC antitrust infringements received reparation of the harm they suffered.⁷⁹ This was largely due to legal uncertainty caused by considerable deviations in the rules of different Member States.⁸⁰ The most noteworthy problem factors were the inaccessibility of evidence, due to it being held by the infringing party,⁸¹ and the unfavourable risk/reward balance for

⁶⁹ *Manfredi supra* n43 at pars 60, 90.

⁷⁰ *Manfredi supra* n43 at par 61.

⁷¹ *Crehan supra* n42 at par 29.

⁷² *Manfredi supra* n43 at par 62.

⁷³ *Crehan supra* n42 at par 27.

⁷⁴ For a discussion on the function of damages claims see pages 23-24 of this dissertation.

⁷⁵ *Crehan supra* n42 at par 29. *Manfredi supra* n43 at pars 62; 64.

⁷⁶ *Ibid.*

⁷⁷ Study on the conditions of claims for damages in case of infringement of EC competition rules (August 2004). This study was undertaken by the law firm Ashurst.

⁷⁸ *Commission Staff Working Document*, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, *Impact Assessment SEC(2008) 405* (hereinafter '*IAR accompanying the White Paper*'), page 5, par 1.1.

⁷⁹ *White Paper supra* n45 page 2, section 1.1. *IAR accompanying the White Paper supra* n78 pages 13-14, section 2.2.

⁸⁰ *White Paper supra* n45 page 2, section 1.1. *IAR accompanying the White Paper supra* n78 page 16, section 2.3.

⁸¹ *Ibid.* *Green Paper supra* n44 par 2.1 on page 6.

claimants as they found that the uncertainties and costs of a damages claim outweigh the benefits.⁸² Consequently, the EC decided to overcome these legal and procedural hurdles by publishing various documents which would provide guidance to ensure that the task of awarding victims a right to damages would have more positive outcomes.

The EC started this game-changing process on 19 December 2005 when they issued a document called *Damages Actions for Breach of the EC Antitrust Rules*⁸³ (hereinafter '*Green Paper*') which, together with its *Commission Staff Working Paper*⁸⁴, points out the main obstacles to effective antitrust damages actions and considered various options on how to improve the situation.⁸⁵ The main issues which the *Green Paper* identified was, amongst others, access to evidence; the fault requirement; damages; the 'passing-on defence' and indirect purchasers' standing. Regarding access to evidence, the EC found that, for damages claims to be effective, the claimant needs access to the relevant evidence which is usually not easily available as it is held by the party who committed the anti-competitive conduct.⁸⁶ Concerning the requirement of fault, a standard of fault required for damages claim should be set as fault is presumed in some Member States but not in others.⁸⁷ Regarding the issue of damages, the EC noted that the legal definition of a damages award as well as economic models to calculate the quantification of damages should be considered.⁸⁸ The EC highlighted that it has to be considered whether the infringer should be allowed to raise the 'passing-on defence' and as a result one has to look at the effect which this will have on the standing of an indirect purchaser.⁸⁹

6.2 White Paper

On 2 April 2008 the *Green Paper* was followed by another EC initiative, namely the *White Paper on Damages Actions for Breach of the EC Antitrust Rules*⁹⁰ (hereinafter '*White Paper*'). Whilst the *Green Paper* identified obstacles which are in the way of successful damages claims, the *White Paper* introduced detailed proposals and a combination of measures on how to address these obstacles.⁹¹

⁸² *White Paper supra* n45 page 2, section 1.1. *IAR accompanying the White Paper supra* n78 page 15 section 2.2; page 16, section 2.3.

⁸³ *Green Paper supra* n44.

⁸⁴ Commission Staff Working Paper, Annex to the *Green Paper*, Damages actions for breach of the EC antitrust rules SEC(2005) 1732.

⁸⁵ *Green Paper supra* n44 par 1.3 on page 5.

⁸⁶ *Green Paper supra* n44 par 2.1 on page 6.

⁸⁷ *Green Paper supra* n44 par 2.2 on page 7.

⁸⁸ *Green Paper supra* n44 par 2.3 on pages 7-8.

⁸⁹ *Green Paper supra* n44 par 2.4 on page 8. For a discussion on the 'passing-on defence' and the standing of indirect purchasers, see pages 14-16 of this dissertation.

⁹⁰ *White Paper supra* n45.

⁹¹ *White Paper supra* n45 page 2, section 1.1.

The *White Paper* is to be read in conjunction with the documents that accompany it,⁹² namely the *Commission Staff Working Paper on EC antitrust damages actions*⁹³; the *Impact Assessment Report* (hereinafter '*IAR accompanying the White Paper*')⁹⁴ and an *Executive Summary of the Impact Assessment*⁹⁵. The primary objective of the *White Paper* is to improve the legal conditions of all the victims to enable them to exercise their right and in turn be fully compensated for the damages they suffered due to EC antitrust law infringements.⁹⁶ The *White Paper* proposes measures regarding access to evidence and the effect that private enforcement will have on leniency programmes, which will be discussed in Chapter 3 of the dissertation.⁹⁷ The *White Paper*⁹⁸ uses the *Manfredi*-judgement as a starting point and emphasizes the fact that *any individual* who suffered harm due to a competition law infringement can claim compensation. This obviously also includes 'indirect purchasers', as explained below.⁹⁹ The EC found that it is usually individual consumers and small businesses that suffered low-value damage which are the most vulnerable. Subsequently, the *White Paper* suggests a combination of two collective redress mechanisms, namely representative actions and 'opt-in' collective actions to aid this particular group of victims.¹⁰⁰ The reason for this is because the entities involved are better equipped to institute a private damages action and a better chance of winning such an action.¹⁰¹ This is because they are more competent than the guy on the street, as they are specialists in their field; they have stronger financial resources than a small business owner and they are independent, as they don't need to conduct business with the infringer in order to keep their business going.¹⁰²

The *White Paper* also addresses the position regarding the requirement of fault in a damages claim and makes it easier for a victim to have a claim, by providing a rebuttable presumption namely that if a victim has shown a mere breach of either Article 81 or 82 of the TFEU, an infringer will be

⁹² *White Paper supra* n45 page 3.

⁹³ *Commission Staff Working Paper, accompanying the White Paper on Damages actions for breach of the EC antitrust rules* SEC(2008) 404 (hereinafter '*SWP*'). This document contains the underlying reasons for the recommendations in the *White Paper*.

⁹⁴ *IAR accompanying the White Paper supra* n78. This document analyses the potential benefits and costs of various policy options.

⁹⁵ *Commission Staff Working Document, Executive Summary of the Impact Assessment, White Paper on Damages actions for breach of the EC antitrust rules* SEC(2008) 406.

⁹⁶ *White Paper supra* n45 pages 2-3, section 1.2.

⁹⁷ For a discussion on *access to documents* see page 34 of this dissertation.

⁹⁸ *White Paper supra* n45 page 4, section 2.1.

⁹⁹ See "Legal standing '*locus standi*'" on page 14 of this dissertation.

¹⁰⁰ *White Paper supra* n45 page 4, section 2.1. For a more detailed discussion on class actions see 'Class actions in the context of cartel conduct' on page 17 of this dissertation.

¹⁰¹ F W Bulst 'Of Arms and Armour' (2/2008) *Bucerius Law Journal* page 89 at F (I).

¹⁰² *ibid.* *SWP supra* n93 par 50.

presumed liable.¹⁰³ This presumption can be rebutted if the infringer can show that the infringement was the result of an excusable error.¹⁰⁴ An objective test applies in this regard which means that the error would only be deemed 'excusable' if a reasonable person, applying a high standard of care, could not have been aware that his or her conduct was illegal in terms of competition law.¹⁰⁵

6.3 Draft Directive

Five years later, the EC published a *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*¹⁰⁶ (hereinafter '*Draft Directive*'). The *Draft Directive* is to be read in conjunction with its *Impact Assessment Report* (hereinafter '*IAR accompanying the Draft Directive*').¹⁰⁷ Regarding the status of the abovementioned EC initiatives, green papers, white papers and directives are all secondary sources of EU law and are called 'unilateral acts'.¹⁰⁸ Consequently, the *Green Paper* and the *White Paper* are not listed in article 288 of the TFEU and fall into the category of 'atypical acts'. They are intended to launch public consultations on certain issues and are thus not legally binding.¹⁰⁹ The *Draft Directive* is indeed listed in article 288 of the TFEU. Consequently, as to the result, it is binding on the countries to whom it is addressed, but in so far as the form and means in which the result is achieved, national authorities have their own discretion. However, the *Draft Directive* will only be binding on the EU countries after it underwent the mandatory process of being transpositioned into national law.¹¹⁰

One of the objectives of the *Draft Directive* is to improve the conditions under which victims of EU competition law infringements can obtain compensation.¹¹¹ The basic principle is that direct purchasers are *per se* allowed to institute private damages actions.¹¹² In addition to that, the *Draft Directive* proposes measures¹¹³ regarding a rebuttable presumption that cartels cause harm as well

¹⁰³ *White Paper supra* n45 pages 6-7, section 2.4. *SWP supra* n93 pars 175-176.

¹⁰⁴ *White Paper supra* n45 pages 6-7, section 2.4. *SWP supra* n93 pars 175-176.

¹⁰⁵ *White Paper supra* n45 page 7, section 2.4. *SWP supra* n93 par 177.

¹⁰⁶ *Draft Directive supra* n46.

¹⁰⁷ *Commission Staff Working Document, Impact Assessment Report, Damages actions for breach of the EU antitrust rules SWD(2013) 203 final.*

¹⁰⁸ See 'Unilateral acts'.

¹⁰⁹ See 'Atypical acts'.

¹¹⁰ Directives are binding in terms of article 288 of the TFEU. See 'European Union Directives'.

¹¹¹ *Draft Directive supra* n46 par 4.1 page 12.

¹¹² *Draft Directive supra* n46 at page 17, par 4.4. The *Draft Directive* states that a victim who suffered harm can indeed claim compensation, regardless of whether he or she is a direct or an indirect purchaser.

¹¹³ A Scallan, M Mbikiwa and L Bignaut 'Compensating for harm arising from anti-competitive conduct' *Seventh Annual Competition Law, Economics and Policy Conference* (5 & 6 September 2013) at 18.

as a rebuttable presumption that indirect purchasers suffered loss and a measure regarding the disclosure of evidence. With regards to a cartel¹¹⁴ the *Draft Directive* states that it can be presumed that the infringement has caused harm by affecting the price of the goods or services, which are the object of a cartel activity, in a negative way.¹¹⁵ The rationale behind this provision is to assist injured parties by placing the onus of proof on the infringing undertaking, who already has all the necessary evidence to rebut the presumption, due to an 'information asymmetry'.¹¹⁶

7. Legal standing '*locus standi*'

Taking into account the above mentioned EU case law and three EC initiatives one can come to the conclusion that an individual, i.e. natural and legal person,¹¹⁷ can indeed claim compensation for damages caused by an infringement of competition law. The next issue regards who exactly qualifies to be a victim, i.e. who has *locus standi*.

In South Africa section 65 of the Competition Act¹¹⁸ gives a plaintiff a right to claim damages, but it does not specify who exactly has *locus standi*. In other words, our Act is silent on who qualifies as a victim of anti-competitive conduct.¹¹⁹ It is however submitted that one may look at the EU law for guidance in this regard, by virtue of section 1(3) of the Act, which sanctions the use of foreign law.

In the EU the *Draft Directive* states that *anyone*, and not only a specific group of victims, can claim full compensation for the harm they had to endure because of an infringement of EU or national competition law.¹²⁰ 'Individual', for purposes of the EU competition law, has a wider meaning which also includes indirect purchasers.¹²¹ Consequently one can come to the conclusion that an 'indirect purchaser' is definitely included in the terms 'any individual' and 'anyone'. In other words, an indirect purchaser qualifies as an antitrust victim and may therefore claim for damages.¹²² An 'indirect purchaser', also known as a 'final purchaser', is defined as a natural or legal person who did

¹¹⁴ The secret nature of a cartel infringement makes it more difficult, compared to other infringements, for the injured party to obtain evidence to prove the harm. Therefore this presumption is only applicable to the cartel infringement and none of the other prohibitions.

¹¹⁵ 'Negative' refers to artificially high prices as well as limiting a buyer's choice. See D Harrison and R Cuff 'Private damages actions in competition law' *The In-House Lawyer* (September 2007) 52.

¹¹⁶ *Draft Directive supra* n46 article 16 & par 4.5 page 18 & par 35 page 28. For a discussion on 'information asymmetry' see page 34 of this dissertation.

¹¹⁷ *Draft Directive supra* n46 par 4.1 page 13.

¹¹⁸ *Supra* n10.

¹¹⁹ K Moodaliyar *supra* n26 at 147.

¹²⁰ *Draft Directive supra* n46 article 2(1).

¹²¹ *Draft Directive supra* n46 at page 17, par 4.4.

¹²² *Ibid.*

not purchase the goods or services, which were affected by an infringement, directly from the infringer. Nevertheless, they still suffered harm in the form of an illegal overcharge¹²³ that was passed on to them along the distribution chain when they purchased those goods from the direct purchaser.¹²⁴ Consequently, the indirect purchaser may rely on the occurrence of 'passing-on' to enable him or her to claim for damages caused by the infringement.¹²⁵ Article 15 of the *Draft Directive* makes it possible for the rights of indirect purchasers to be recognised. The article states that courts should not only focus on the direct purchasers, but also look at damages actions that are related to the same infringement but brought by claimants from different levels in the supply chain.¹²⁶

In South African case law a good example of indirect purchasers with *locus standi*¹²⁷ would be the group of consumers in the *Trustees for the time being of the Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others*¹²⁸ (hereinafter '*Children's Resource Centre*'). The reason for this is because the bread producers, Premier, Tiger and Pioneer sold bread to informal traders, such as the distributors in the case of *Mukaddam and others v Pioneer Food (Pty) Ltd and others*¹²⁹ (hereinafter '*Mukaddam*') but never directly conducted business with the consumers.¹³⁰

The position of indirect purchasers is being extensively addressed in articles 12 and 13 of the *Draft Directive*. However it should be noted that according to the EC, the absence of a type of shield to prevent the defendant from having to compensate the illegal overcharge more than once, will result in an unjust enrichment of the claimant as well as in multiple compensation which the defendant has to pay.¹³¹ Consequently, article 12 allows an infringing undertaking to raise the 'passing-on defence' against a claimant, i.e the person for whom the overcharge was passed on to, on the condition that it proves the existence and extent of the pass-on of the overcharge.¹³² A 'passing-on defence' is the

¹²³ *Draft Directive supra* n46 at article 4. An 'overcharge' is any positive difference between the price the purchaser actually paid and the price he or she would have paid had the competition law infringement not been committed.

¹²⁴ *White Paper supra* n45 page 4, section 2.1. *IAR accompanying the Draft Directive supra* n107, page 83. *Bulst supra* n101 page 84 at D (i).

¹²⁵ *Bulst supra* n101 page 83 at C (i).

¹²⁶ *Draft Directive supra* n46 article 15.

¹²⁷ For the reasons why these indirect purchasers received legal standing, see pages 19-20 of this chapter of this dissertation.

¹²⁸ 2013(2) SA 213 (SCA) (hereinafter '*Children's Resource Centre*') at par 4. For a discussion of this case see pages 19-20 of this chapter of this dissertation.

¹²⁹ 2013 (2) SA 254 SCA) (hereinafter '*Mukaddam SCA*') at par 3.

¹³⁰ A Scallan *supra* n113 at 17. See 'Class actions in the context of cartel conduct' on page 17 of this chapter of this dissertation.

¹³¹ *White Paper supra* n45 section 2.6 on pages 7-8. *SWP supra* n93 pars 209-210.

¹³² *Draft Directive supra* n46 page 27, par 29.

defence that the claimant has again passed on the whole or part of the overcharge to his or her own purchasers and therefore cannot claim for harm he or she did not suffer.¹³³ Nevertheless, this defence cannot be raised against someone, at the next level of the supply chain, for whom it is legally impossible to claim compensation because it would unjustifiably free the infringing undertaking from its liability.¹³⁴ Rules of causality, foreseeability and remoteness can make it legally impossible for indirect purchasers to claim compensation.¹³⁵ To summarise, the 'passing-on defence' cannot be raised against an indirect purchaser. This defence has bilateral advantages; it reduces the damages award which a defendant has to pay a direct purchaser whilst also ensuring that an indirect purchaser has *locus standi*.¹³⁶ It also solves the problem of unjust enrichment and multiple compensation.¹³⁷

Article 13 gives an indirect purchaser the right to claim damages if he or she has proven two things, namely that the overcharge was indeed passed onto him as well as the scope thereof. In other words, the indirect purchaser is allowed to claim for damages if he or she can prove that:

- a) the defendant has committed a competition law infringement;
- b) the abovementioned infringement caused an overcharge for the direct purchaser of the defendant; and
- c) he or she purchased the goods or services that were affected by the infringement.¹³⁸

As mentioned above, the *White Paper* and *Draft Directive* awards the right to claim to *any individual* who suffered harm due to a competition law infringement. In theory this might seem very promising but in practice these victims are faced with the cruel reality of not being able to give effect to these rights due to certain barriers.¹³⁹ This is typically known as the length and delay of the procedure which in turn determines the total costs involved; the uncertainty as to the outcome and the size of the damages award.¹⁴⁰ Another barrier is the fact that victims are sometimes not even aware of the infringement or of the extent of the losses they suffered.¹⁴¹ It is submitted that due to these hurdles, 'class actions' are definitely the way to go when one wants to claim for harm suffered. It is

¹³³ *Ibid* at article 12(1).

¹³⁴ *Ibid* at article 12(2) ; page 27 par 30.

¹³⁵ *Ibid* at page 17 par 4.4 ; page 27 par 30.

¹³⁶ K Mahlase page 28.

¹³⁷ *White Paper supra* n45 section 2.6 on pages 7-8. *SWP supra* n93 pars 209-210.

¹³⁸ *Draft Directive supra* n46 article 13(1)-(2).

¹³⁹ *SWP supra* n93 par 39.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*.

clear to see why the *White Paper* suggests collective redress mechanisms to aid victims in the process of claiming for damages.¹⁴²

8. Class actions in the context of cartel conduct

8.1 Definition and certification of class actions

The Competition Act does not define a class action. The fact that there is also no provision made for requirements or procedural aspects, indicates that the Act is silent when it comes to providing cartel victims with a right to institute a class action. Thus one has to revert to other legislation which may provide the basis for such a class action. Section 38(c) of South Africa's Constitution¹⁴³ provides for a class action to be instituted by anyone acting as a member of, or in the interest of, a class of persons. Generally there is a condition attached to this provision, which requires the threatened or infringed rights to be those contained in the Bill of Rights.¹⁴⁴ A competent court can then grant appropriate relief.¹⁴⁵

The South African Law Reform Commission (hereinafter 'SALRC') put together its recommendations regarding class actions in the form of a draft bill which accompanied its report.¹⁴⁶ In section 1 of the the *Draft Bill on Public interest and Class actions* (hereinafter '*Draft Bill*') the SALRC recommends that a class action should be defined as follows:

"an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar¹ in respect of all members of the class, certified as a class action in terms of section 6 of this Act".¹⁴⁷

When the wording of the abovementioned definition is read together with section 6(1) of the *Draft Bill* it is clear that the SALRC suggests that certification by a court should be an important requirement for a class action to proceed as such. Section 6(2) of the *Draft Bill* sets out factors which a court may take into account when considering whether to certify a class action or not.¹⁴⁸

¹⁴² See page 12 of this dissertation.

¹⁴³ Constitution of the Republic of South Africa 1996 (hereinafter 'Constitution'). For a detailed discussion on section 38(c) see J S van Wyk.

¹⁴⁴ Section 38 of the Constitution.

¹⁴⁵ See *Children's Resource Centre supra* n128 par 21, where the court decided not to deal with the effect of the condition because the situation did not require it. A Scallan *supra* n113 at 11.

¹⁴⁶ See 'Report on the recognition of class actions and public interest actions in South African law'.

¹⁴⁷ *Ibid* at page 89.

¹⁴⁸ *Ibid* at page 92. These factors are substantially similar to the elements which the SCA referred to in *Children's Resource Centre supra* n128. See page 13 footnote 72 of this document.

The latest annual report of the SALRC shows that the report was submitted to the Department of Justice and Constitutional Development in September 1998 and is still under consideration.¹⁴⁹ Thus despite the submission of the *Draft Bill* South Africa still does not have specific legislation dealing with the requirements and procedure pertaining to class actions and therefore the South African courts have produced class action jurisprudence in order to assist class action litigation.¹⁵⁰ Fortunately the courts, especially the Constitutional Court in *Mukaddam v Pioneer Food (Pty) Ltd and others*¹⁵¹, applied the SALRC's recommendations which in turn ensured legal certainty by setting a precedent regarding the certification process of a class action.

During a time prior to the revolutionary *Mukaddam*-judgements, Mr Mukaddam and other distributors purchased bread from major bread producers, Premier, Tiger and Pioneer and distributed it to informal traders, who sold it to consumers.¹⁵² These bread producers were found guilty of price fixing and other restrictive horizontal practices.¹⁵³ Their prohibited conduct allegedly caused financial losses to many distributors in the Western Cape.¹⁵⁴ In November 2012 Mr Mukaddam, WEM Distributors cc and Mr Ebrahim applied to the Western Cape High Court for certification authorising them to institute a class action to recover their losses.¹⁵⁵ Due to various reasons¹⁵⁶ the court decided in favour of the respondents, Premier, Tiger and Pioneer and dismissed the application.

The distributors, Mr Mukaddam; WEM Distributors cc and Mr Ebrahim, appealed against the judgement of the *court a quo* which led to the *Mukaddam* appeal case¹⁵⁷ where they sought to certify an 'opt-in' class action.¹⁵⁸ In this type of class action the class is limited to those claimants who came forward and identified themselves as claimants, i.e they expressly decide to join their individual claims into one single action.¹⁵⁹ During the same time as *Mukaddam's* case, an application by a class of consumers was dismissed by the Western Cape High Court and the applicants also appealed to the Supreme Court of Appeal (hereinafter 'SCA') in the *Children's Resource Centre*

¹⁴⁹ See 'Thirty eighth annual report'.

¹⁵⁰ See 'Recent developments in South African class action litigation'.

¹⁵¹ 2013 (5) SA 89 (CC) (hereinafter 'Mukaddam CC').

¹⁵² *Mukaddam SCA supra* n129 at par 1.

¹⁵³ *Children's Resource Centre supra* n128 pars 2-3.

¹⁵⁴ *Mukaddam SCA supra* n129 at par 3.

¹⁵⁵ *Ibid.*

¹⁵⁶ For a summary of the High Court's reasons, see *Mukaddam CC supra* n151 at pars 9-11.

¹⁵⁷ *Mukaddam SCA supra* n129.

¹⁵⁸ *Ibid* at par 11.

¹⁵⁹ *White Paper supra* n45 page 4, section 2.1. *SWP supra* n93 pars 57-58.

case.¹⁶⁰ They however sought to certify an 'opt-out' class action where all the identified members were to be bound by the outcome of the class action, unless they chose to opt out of it, i.e provide notice that they wish to be excluded from the class.¹⁶¹ With this type of class action it is important that the class members are effectively notified once the class is certified because the *res judicata*¹⁶² principle will hinder any future individual claims in this regard.¹⁶³

Despite the condition that a class action can only be instituted if the threatened rights are those contained in the Bill of Rights¹⁶⁴ it should be noted that section 34 of the Constitution of South Africa gives individuals the right of access to courts. The SCA in *Children's Resource Centre* emphasized the fact that the people who sought damages did not have the financial means to pursue their claims separately and their claims were also too small for them to claim individually thus their only hope of getting redress was to join their claims and become part of a class action.¹⁶⁵ The SCA used their inherent power to protect and regulate their own process and developed the common law whilst taking into account the interest of justice.¹⁶⁶ Consequently, individuals who suffered damages due to competition law infringements, which is a non-constitutional claim, are allowed to pursue a class action in terms of section 38(c) because not allowing this would be unconstitutional.¹⁶⁷ This was also confirmed by the Constitutional Court in *Mukaddam v Pioneer Food (Pty) Ltd and others*.¹⁶⁸

After deciding that the abovementioned individuals have class standing, the SCA in *Children's Resource Centre*¹⁶⁹ set out the following requirements which a court should consider when making a certification decision:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;

¹⁶⁰ *Mukaddam CC supra* n151 at par 13.

¹⁶¹ *Children's Resource Centre supra* n128 pars 10,18. A Scallan *supra* n113 at 11.

¹⁶² *Res judicata* is a defence which means that the proceedings have come to an end by a judicial decision. See 'Article RES Judicata'.

¹⁶³ *Mukaddam CC supra* n151 par 62. See 'Report on the recognition of class actions and public interest actions in South African law', pages 54-55 par 5.10.3.

¹⁶⁴ See section 38(c) of the Constitution.

¹⁶⁵ *Children's Resource Centre supra* n128 par 19.

¹⁶⁶ *Ibid* at par 15. The SCA acted in terms of section 173 of the Constitution.

¹⁶⁷ *Ibid* at par 21.

¹⁶⁸ *Mukaddam CC supra* n151 at pars 62, 65.

¹⁶⁹ *Children's Resource Centre supra* n128 pars 26-28. These elements were first set out by the SALRC in its *Draft Bill*, see footnote 148 on page 18 of this dissertation.

- the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- the proposed representative is suitable to be permitted to conduct the action and represent the class;
- given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

The SCA in *Mukaddam* applied the abovementioned requirements and stated that the non-compliance with two of them was the reason for the dismissal of the appeal.¹⁷⁰ Firstly, if a novel cause of action is sought it is required that the claim must be legally tenable.¹⁷¹ In this context, the claim must be founded either upon section 22 of the Constitution¹⁷², read together with the Competition Act, or under the common law.¹⁷³ With regards to the basis of section 22, the court mentioned three hurdles that stood in the way of the particular claim.¹⁷⁴ With regards to a claim for damages based on anti-competitive conduct¹⁷⁵ as well as the reliance upon delictual claims¹⁷⁶, the court held that such claims were also not tenable in law. Secondly, it is required that a class action must be the most appropriate method for the claims to be pursued.¹⁷⁷ The court held that the use of class actions is justified by the fact that claimants will be denied access to court if they are not allowed to institute a class action.¹⁷⁸ The mere institution of an 'opt-in' action proves that claimants are indeed capable of positively advancing their claims in their own names.¹⁷⁹ Therefore, the court

¹⁷⁰ *Mukaddam SCA supra* n129 at par 15.

¹⁷¹ *Ibid* at par 4.

¹⁷² This section states : "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

¹⁷³ *Mukaddam SCA supra* n129 at par 6.

¹⁷⁴ *Ibid* at par 8. The hurdles with regards to the rights in terms of section 22 were as follows:

Firstly, the rights are limited to citizens only and there was no evidence that the members of the class were indeed citizens. Secondly, the right is accorded to individuals and some of the proposed claimants were juristic persons. Thirdly, the section did not guarantee success once a trade, profession or occupation has been entered.

¹⁷⁵ *Ibid* at par 9. This claim was not legally tenable because the appellants asserted a right to receive the profits which the producers made as a result of their anti-competitive behaviour.

¹⁷⁶ *Ibid* at par 10. There was no evidence that suggested that public policy required the recognition of a claim to maximise profits or reap the rewards of price fixing. The fact alone that price fixing is prohibited is sufficient to dispose of any such suggestion.

¹⁷⁷ *Ibid* at par 4.

¹⁷⁸ *Ibid* at par 11.

¹⁷⁹ *Ibid* at par 12.

further held that an 'opt-in' class action can only succeed in exceptional circumstances, which were absent in this case.¹⁸⁰

Mr Mukaddam however refused to give up on his quest for certification and appealed again in the case of *Mukaddam v Pioneer Food (Pty) Ltd and others*.¹⁸¹ In this matter the Constitutional Court indicated that the requirements, as laid down by *Children's Resource Centre*, must be considered in a flexible manner and the absence of one or another must not result in an automatic refusal of certification.¹⁸² The Constitutional Court referred to section 173 of the Constitution and emphasized the fact that the guiding principle is to determine whether the interests of justice allow for certification or not.¹⁸³ The court stated that the interpretation of section 38 of the Constitution was not placed in dispute in this particular case.¹⁸⁴ Therefore, it decided to leave open the question whether the institution of a class action to enforce a right in the Bill of Rights against a private litigant, requires prior certification.¹⁸⁵ A further error made by the SCA was corrected by the Constitutional Court when it held that it is unnecessary to establish exceptional circumstances for certification in the context of an 'opt-in' class action.¹⁸⁶ Based on the abovementioned reasons, the appeal succeeded.¹⁸⁷

The ground-breaking *Mukaddam*-case made it possible and easier for injured parties to institute a class action for damages caused by cartel activities. Consequently, the true victims of anti-competitive conduct can be compensated for their losses. In addition to the cases of *Children's Resource Centre* and *Mukaddam* there are two other matters regarding class action developments that is worth mentioning as they were in part facilitated by the SCA's judgement in *Children's Resource Centre*.¹⁸⁸ Firstly, the 'silicosis class action' is a matter regarding miners who contracted silicosis while working in South African gold mines.¹⁸⁹ Secondly, in July 2013 the North Gauteng High

¹⁸⁰ *Ibid* at par 14.

¹⁸¹ *Mukaddam CC supra* n151.

¹⁸² *Ibid* at pars 35, 37.

¹⁸³ *Ibid* at pars 34, 36, 38. In terms of section 173 courts are obliged to take into account the interests of justice when they regulate their own process and develop the common law.

¹⁸⁴ *Ibid* at par 41.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid* at par 55. A Scallan *supra* n113 at 11-13.

¹⁸⁷ *Mukaddam CC supra* n151 at par 56.

¹⁸⁸ See 'Companies should pay close attention to class actions'.

¹⁸⁹ On 21 December 2012 attorney Richard Spoor sought class certification for 17 000 ex-gold miners. On 12 October 2015 the South Gauteng High Court started to hear the class certification motion. See 'Gold miner silicosis litigation (re So. Africa)'.

Court certified the class action of the injured and arrested persons, who were represented at the Marikana Commission of Inquiry.¹⁹⁰

8.2 *The rationale behind class actions*

Due to barriers like the cost of litigation, the size of the claim and others mentioned above¹⁹¹, it would be advantageous for indigent victims of cartels, such as the victims of the bread cartel, to not pursue a damages claim in their own name, but instead follow the route of class actions when seeking damages for anti-competitive conduct.

As mentioned earlier, the EU's *White Paper* provides for collective redress in the form of representative actions as well as 'opt-in' collective actions.¹⁹² Representative actions are brought by qualified entities such as consumer associations, on behalf of identified or identifiable victims. The entities are either officially designated in advance¹⁹³ or certified¹⁹⁴ on an *ad hoc* basis for a particular antitrust infringement.¹⁹⁵ These entities, just as in the case of 'opt-in' collective actions, must notify the victims on behalf of whom they intend to institute a claim, in order for the victims to still have the option of bringing an individual action or not.¹⁹⁶ In the *White Paper* the EC rightfully pointed out that individual consumers and small businesses¹⁹⁷ are the most vulnerable victims of anti-trust infringements.¹⁹⁸ Due to the fact that they are typically the ones who suffer scattered low-value damages they usually abstain from claiming because of too high litigation costs.¹⁹⁹ It is in this context that the advantages of class actions become apparent. By way of collective redress claimants can share the litigation costs and join their claims so that the total value of the aggregated claims will offer them the opportunity to have one strong claim against the defendants.²⁰⁰ Procedural efficiency is another advantage of class actions because it is better for the judicial system to rather handle one big claim than a multitude of scattered low value individual claims.²⁰¹

¹⁹⁰ See *Mzoxolo Magidiwana and Injured and arrested persons v The President of the Republic of SA* (unreported) 37904/13 pars 27 & 57. *Mzoxolo Magidiwana and Others v The President of the Republic of SA and others* [2013] ZACC 27 pars 1, 6.

¹⁹¹ See page 16-17 of this dissertation.

¹⁹² For a description of an 'opt-in class action' see pages 18-19 of this dissertation.

¹⁹³ Entities that are designated in advance can bring claims on behalf of either identified or identifiable victims.

¹⁹⁴ Ad hoc certified entities can only bring claims on behalf of identified victims.

¹⁹⁵ *White Paper supra* n45 page 4, section 2.1. *SWP supra* n93 pars 52-54.

¹⁹⁶ *Bulst supra* n101 page 90 at F (I).

¹⁹⁷ See *Children's Resource Centre supra* n128 par 6. A typical South African example is the bread consumers throughout the whole of South Africa, who are individuals with limited means, who would have been adversely affected by the rise in the bread price. See *Children's Resource Centre supra* n128 par 6.

¹⁹⁸ *White Paper supra* n45 page 4, section 2.1.

¹⁹⁹ See page 12 of this dissertation.

²⁰⁰ *SWP supra* n93 pars 39, 41.

²⁰¹ *White Paper supra* n45 page 4, section 2.1. *Bulst supra* n101 page 89 at F (I).

CHAPTER 3: ENFORCEMENT PROCEDURE REGARDING CIVIL ACTIONS

9. The purpose of a damages award

The fact that both the *White Paper* and the *Draft Directive* place such a high value on ‘full compensation’²⁰² and on helping indirect purchasers²⁰³ makes it clear that the EC regards the main aim of a damages award to “repair the harm suffered because of the infringement”.²⁰⁴ Nevertheless, damages claims perform both a remedial as well as deterrence function.²⁰⁵ In other words by compensating victims for the harm they have suffered it also dissuades firms from taking part in prohibited practices. This shows why private enforcement of anti-competitive conduct is extremely important and in turn explains why the EC introduced the *White Paper* “to create an effective system of private enforcement . . .”.²⁰⁶

Under South African law, the reason for awarding damages is to compensate a cartel victim for the harm he or she suffered or to place him or her in the position that he or she would have been in had the cartel not been committed.²⁰⁷ In the *Children’s Resource Centre* case the appellants sought a remedy where the monies be paid into a trust fund which will generally benefit bread consumers.²⁰⁸ One of the propositions was that these monies would be used for feedings schemes which would provide food in general, not just bread.²⁰⁹ The food would be given to people in need, not necessarily those who suffered because of the prohibited practice.²¹⁰ This however caused the court to hold the remedy to be insufficient. Consequently, the court held that the remedy was impermissible specifically because the members of the class were “not compensated either directly or indirectly for the loss they [had] suffered.”²¹¹ This case is a perfect example of the fact that a damages award plays the same compensatory role in South Africa, as it does in the EU. Consequently, it is clear that our country is in need of policy documents similar to that of the *White Paper* and *Draft Directive* to promote private enforcement and in turn combat anti-competitive conduct more effectively.

²⁰² See pages 12; 14 of this dissertation.

²⁰³ See “Legal standing ‘locus standi’” on page 14 of this dissertation.

²⁰⁴ *Official Journal of the European Union* (2013/C 167/07) 19 par 2. Bulst *supra* n101 page 85 at D (III).

²⁰⁵ *White Paper supra* n45 page 3, section 1.2. *SWP supra* n93 pages 97-98, par 320.

²⁰⁶ *White Paper supra* n45 page 3, section 1.2.

²⁰⁷ JC van der Walt and JR Midgley *Principles of Delict* 3 ed (2005) 216.

²⁰⁸ *Children’s Resource Centre supra* n128 par 80.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid* at par 87.

10. Interaction between public and private enforcement

10.1 Introduction

The aim of the *White Paper* is “to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardize, public enforcement”.²¹² One of the main objectives of the *Draft Directive*²¹³ is “to ensure the effective enforcement of the EU competition rules by optimising the interaction between the public and private enforcement of competition law”. The *Draft Directive* also sets out rules for the coordination between public and private enforcement, in particular rules regarding access to documents held by competition authorities.²¹⁴ Both these EC initiatives place a high value on both private and public enforcement which makes it clear to see the need for interaction between the two. Moodaliyar also notes the importance of the relationship between these two types of enforcement. She states that the competition authorities have an important role to play when it comes to private enforcement, namely to provide access to information but at the same time to protect leniency applicants.²¹⁵

Similarly in South Africa, the public and private enforcement of damages claims are linked in such a way that, without public enforcement mechanisms, there will be no successful private enforcement. The South African competition authorities do not have the jurisdiction to award damages to an injured party. The only exception to this rule can be found in section 49D of the Act. This section gives the Tribunal the authority to confirm an agreement, between the Commission and the respondent, as a consent order²¹⁶ which already includes an award of damages to the complainant. The Act²¹⁷ defines a ‘complainant’ as a person who has submitted a complaint, against an alleged prohibited practice²¹⁸, to the Commission.²¹⁹ The wording of this section makes it clear that an ‘intervenor’²²⁰ in terms of section 53 of the Act is not included in the definition. Consequently, an

²¹² *White Paper supra* n45 page 3, section 1.2.

²¹³ *Draft Directive supra* n46 page 2-3, par 1.2 & page 19, par 6.2.

²¹⁴ *Draft Directive supra* n46 article 1 par 2 page 30 & par (5) page 22. For a discussion on ‘access to documents’ see page 34 of this dissertation.

²¹⁵ K Moodaliyar *supra* n26 at 149; 153. For a discussion on these concepts, see pages 34-35 of this dissertation.

²¹⁶ This can only take place if the claimant consents to it. See subsections 49D(1), (3) of the Act.

²¹⁷ Section 1(1)(iv).

²¹⁸ Section 1(1)(xxiv) defines this as a practice prohibited in terms of Chapter 2 of the Act, which includes a ‘cartel’.

²¹⁹ Section 49B(2)(b) of the Act.

²²⁰ According to Rules 3(4)(t); 46 of the Competition Tribunal Rules an intervenor is any person who, in terms of the Act or the Competition Tribunal Rules, is allowed to participate in Tribunal proceedings.

'intervenor' cannot be the recipient of a damages award if it is included in a consent order because section 49D only refers to the 'complainant'.²²¹

In the situation where a consent order does *not* include a damages award, section 49D(4) of the Act states that a complainant may approach a civil court for an award of damages. Despite the section's repeated use of the word 'complainant' it does not prohibit an 'intervenor' from approaching a civil court and applying for a damages award. Sutherland points out that when one looks at section 53(1)(a)(iv)²²² of the Act and Rule 24(3) of the Competition Tribunal Rules, which refers to "each complainant", it seems that the legislature intended for two situations to arise in this regard.²²³ Firstly, if the respondent does *not* admit liability in the consent order, an 'intervenor' can refer a complaint regarding the respondent's conduct and seek his or her own remedies, including civil damages.²²⁴ Secondly, in the situation where the consent order indeed includes the respondent's admission of liability an 'intervenor' can use a section 65-certificate, which will be discussed below, to apply for a damages award.²²⁵ To summarise, because the South African competition authorities do not have the jurisdiction to award damages, victims of infringements of competition law can only receive compensation if they themselves institute an action in a civil court.²²⁶

It is worth pausing at this point briefly to consider the options which a claimant has in the EU, when considering instituting an action for damages. These options vary according to the national rules of each member state. In the United Kingdom, for example, a claimant can either institute a 'follow-on' action in terms of sections 47A and 47B of its Competition Act 1998, or a 'stand-alone' action.²²⁷ One can institute the latter if the damage is so severe that it is making it impossible to undergo a lengthy investigation and a possible appeal and he or she has to take immediate action.²²⁸ The downside to this is that the claimant himself has to prove the infringement, causation and the quantum of the damages without the help of a competition authority's decision.²²⁹ When this disadvantage is taken into account it is clear to see why only the 'follow-on' action applies in South Africa.

²²¹ P Sutherland *supra* n1 at 12-8 to 12-9.

²²² The section states that a person with a material interest in a particular Tribunal matter, which is not adequately represented by another participant, may apply to intervene in the proceedings.

²²³ For the effect of these situations in the context of the Corporate Leniency Policy, see page 21 of this dissertation.

²²⁴ P Sutherland *supra* n1 at 12-9.

²²⁵ *Ibid.*

²²⁶ P Sutherland *supra* n1 at 12-7.

²²⁷ D Harrison *supra* n115 page 52.

²²⁸ *Ibid* page 54.

²²⁹ *Ibid* page 53.

Returning to South Africa, it is important to consider the wording of section 65 of the Act very carefully as it sets out the procedure in this regard. Subsection 65(2) of the Act states that the Tribunal and the CAC are the only bodies with the authority to decide if the conduct in question is prohibited in terms of the Act. A civil court must merely apply the determination of the Tribunal or the CAC without considering the issue on its merits, i.e. asking questions regarding the legality of the conduct.²³⁰ To summarise, section 65 of the Act provides for a 'follow on' claim founded on a finding of prohibited anti-competitive conduct by the Tribunal thus the term *follow-on damages litigation*.²³¹ A 'follow-on' action is not limited to individual victims but can also be used by a group of persons by way of instituting a class action.²³²

Section 65 of the Act sets out the requirements which must be met before a damages action can be pursued in a civil court. Firstly, *a person* must have suffered loss or damage because of a prohibited practice.²³³ Secondly, he or she must not already have been awarded damages in a consent order confirmed in terms of section 49D(1) of the Act.²³⁴ Thirdly, after the competition authorities have decided that the particular conduct does indeed contravene the Act, a claimant must file with the civil court a notice from the Tribunal or CAC. This notice certifies that the conduct in question has been found to be a prohibited practice. This certificate is binding on the civil court and also serves as conclusive proof before the aforementioned civil court.²³⁵ Lastly, there must be no appeal or application for review²³⁶ with respect to the same matter.²³⁷ The use of the words 'a person' indicates that *anyone* who suffered loss due to the prohibited practice can use this certificate to claim damages, it is not for the exclusive use of the complainant in the Tribunal proceeding.²³⁸ The North Gauteng High Court in the case of *Premier Foods (Pty) Ltd v Norman Manoim NO*²³⁹ held that the Tribunal has the power to issue a section 65-certificate in respect of the conduct of a leniency applicant, who received immunity in terms of the Corporate Leniency Policy²⁴⁰, despite the fact that he or she was not cited as a respondent in the Tribunal proceedings. The rationale behind this is

²³⁰ Section 65(2).

²³¹ *Children's Resource Centre supra* n128 par 66.

²³² See page 36-37 of this dissertation.

²³³ Section 65(6).

²³⁴ Section 65(6)(a).

²³⁵ Subsections 65(6)(b) and (7) of the Act.

²³⁶ This refers to a review made against a Tribunal order, in terms of section 58 of the Act.

²³⁷ Section 65(8).

²³⁸ P Sutherland *supra* n1 at 12-7 to 12-8.

²³⁹ *Premier Foods (Pty) Ltd v Norman Manoim supra* n48 pars 43; 45-47.

²⁴⁰ For a discussion on the Corporate Leniency Policy see page 31 of this dissertation.

because the 'immunity' that the CLP offers an applicant does not cover civil liability towards victims.²⁴¹

10.2 "Cause of action" in the context of section 65

It would be appropriate to once again look at the requirements of the certification process in respect of a class action.²⁴² In the *Children's Resource Centre* case Wallis JA noted that evidence is needed to comply with these requirements.²⁴³ The evidence has to show a *prima facie* cause of action, because the existence of a cause of action in turn forms the basis for the existence of a class and identifies the common issues of the class members. It is clear that a *cause of action* is the key component in this equation.²⁴⁴ Consequently, after a class action has been certified and a civil action for damages instituted²⁴⁵ the court has to interpret section 65 and decide which type of claim the injured party has. In other words, the court has to decide whether section 65 can be interpreted to allow for a claim to be founded upon either a delictual or a statutory basis.²⁴⁶ The first interpretation involves a delictual claim where the victim has to comply with common law requirements before being able to claim damages. The second interpretation, as highlighted by Premier, one of the respondents in *Children's Resource Centre*, involves section 65 creating a statutory claim. Premier argued that the victim has to provide the 'section 65-certificate' and prove that he or she suffered damages due to the particular prohibited practice.²⁴⁷ Unfortunately there is no South African case law which can provide legal certainty in this regard. Nevertheless, it is submitted that the *Children's Resource Centre*-case²⁴⁸ can still be used as guidance regarding this matter despite the fact that the court did not expressly deal with the *section 65-interpretation issue*.²⁴⁹ Contend

Regarding the first interpretation, the appellants' heads of argument did not make it clear on which cause of action they based their claim. It did indeed state that they pursued a delictual claim, with an alternative claim based upon a breach of the constitutional right to sufficient food.²⁵⁰ Despite

²⁴¹ P Sutherland *supra* n1 at 12-8.

²⁴² The requirements as set out by the case of *Children's Resource Centre supra* n128.

²⁴³ *Children's Resource Centre supra* n128 par 42.

²⁴⁴ *Ibid.*

²⁴⁵ In terms of section 65(6)-(8) of the Act.

²⁴⁶ A Scallan *supra* n113 at 5.

²⁴⁷ A Scallan *supra* n113 at 7-9.

²⁴⁸ *Children's Resource Centre supra* n128.

²⁴⁹ The situation did not require it because it was simply an application for the certification of a class action. See A Scallan *supra* n113 at 9.

²⁵⁰ *Children's Resource Centre supra* n128 par 43.

this, Wallis JA stated that they had “nailed their colours to the mast of a delictual action flowing from a breach of statutory duty”.²⁵¹

The essential requirements which a claimant must prove for a delictual action to succeed include harm, wrongfulness, fault and causation.²⁵² As mentioned earlier, the primary function of a damages award is to compensate a victim for the harm he or she suffered.²⁵³ Consequently, the first element that requires proof is the fact that the plaintiff must have suffered harm. In other words, the existence of a damages award is dependent upon the fact that the victim actually suffered harm.²⁵⁴ The second delictual requirement relates to the wrongfulness of the defendant’s conduct.²⁵⁵ This entails the situation where the defendant has a legal duty which originated either from a statute or from the common law.²⁵⁶ The defendant’s conduct will be wrongful if it breached the legal duty which it had towards the plaintiff.²⁵⁷ During this enquiry, the court has to apply the ‘reasonableness’-criteria together with the *boni mores*-standard.²⁵⁸ To establish wrongfulness the defendant’s conduct has to be *contra boni mores*, i.e. unreasonable and unacceptable according to society’s legal convictions.²⁵⁹ Thirdly, the requirement of fault entails the question of whether the defendant acted with intent or negligence. *Intent* refers to the defendant acting in a “*reprehensible state of mind*”, whilst *negligence* refers to “*insufficient care*”.²⁶⁰ The last requirement which has to be satisfied is known as ‘causation’, which refers to “a causal nexus between the defendant’s conduct and the detrimental consequences sustained by the plaintiff.”²⁶¹ To summarise, in order to establish the defendant’s delictual liability the plaintiff must prove that the loss he or she suffered was caused by wrongful conduct and that there was fault on the part of the defendant.

Regarding an application of the delictual requirements to the facts of the *Children’s Resource Centre* case, Wallis JA stated that the appellants must first prove that the respondents had a legal duty to *not* cause the appellants harm. In addition to this they have to prove that by breaching this duty the respondents’ conduct was wrongful, according to the legal convictions of the community.²⁶² This is a very complex enquiry when one looks at the context of pure economic loss, i.e. loss arising from

²⁵¹ *Children’s Resource Centre supra* n128 par 63.

²⁵² JC van der Walt *supra* n207 page 2.

²⁵³ See pages 23-24 of this dissertation.

²⁵⁴ JC van der Walt *supra* n207 page 43.

²⁵⁵ *Ibid* page 68.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*.

²⁵⁸ JC van der Walt *supra* n207 page 69.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* page 155.

²⁶¹ *Ibid* pages 196-197.

²⁶² *Children’s Resource Centre supra* n128 pars 64, 71.

conduct in the absence of patrimonial harm.²⁶³ Wallis JA took into account the SCA decisions in both the *Steenkamp*-case²⁶⁴ and the *Olitzki*-case²⁶⁵ and highlighted that statutory interpretation is needed to determine if a legal duty, such as the one invoked by the plaintiff, indeed exists. It has to be determined whether the statute was *intended* to confer a civil remedy *and* whether the duty is intended to indeed protect the specific harm suffered by the plaintiff.

The appellants stated that the mere fact that section 65(6) gives victims the right to claim damages automatically creates a legal duty not to cause financial loss.²⁶⁶ They therefore argued that the bread producers deliberately breached this duty by participating in the prohibited practice, which in turn caused financial loss for the appellants.²⁶⁷ The respondents emphasized that the purpose of the Act is to promote and maintain competition²⁶⁸; it is not enacted for the benefit generally of the consumers. Subsequently, the Act does not create the legal duty stated by the appellants.²⁶⁹ The respondents then further contended that there was neither evidence of loss suffered by the consumers nor any causal link between the prohibited practices and the increase in prices. Consequently, they alleged there was no *prima facie* case in relation to the elements of a delictual action.²⁷⁰

The Constitutional Court in *Mukaddam v Pioneer Food (Pty) Ltd and others*²⁷¹ supports the second interpretation of section 65. It held that the wording of section 65(6)(a) shows that victims may, after the conduct in question has been certified as a prohibited practice, approach a civil court to claim damages.²⁷²

Regarding the second interpretation, Premier, one of the respondents, argued that because section 65 of the Act provides for a 'follow-on' claim²⁷³ it resulted in any common law delictual claim being

²⁶³ *Ibid.* A Scallan *supra* n113 at 8.

²⁶⁴ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at pars 19-21.

²⁶⁵ *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at pars 12-14.

²⁶⁶ *Children's Resource Centre supra* n128 par 64.

²⁶⁷ *Ibid.*

²⁶⁸ See section 2 of the Act.

²⁶⁹ *Children's Resource Centre supra* n128 par 65.

²⁷⁰ *Ibid.*

²⁷¹ *Mukaddam CC supra* n151 par 54.

²⁷² This will only take place on the condition that the injured party has not already been awarded damages by way of a consent order.

²⁷³ For a discussion on 'follow-on damages litigation' see pages 25-26 of this dissertation.

excluded from the equation.²⁷⁴ Premier further argued that because there was no claim for damages there could be no valid delictual claim.²⁷⁵

The SCA considered both the abovementioned interpretations and held that it is impossible for a legal duty and an exclusive statutory claim to co-exist.²⁷⁶ In other words, if it is found that section 65 creates a statutory claim then there will be no legal duty but if a statutory claim is absent then a delictual claim will indeed exist.²⁷⁷ Wallis JA disagreed with Premier and stated that he was not convinced that section 65 creates that type of exclusive 'follow-on' claim.²⁷⁸ It is important to note that section 65 considers the mere *possibility* of a claim for damages when a victim suffered loss and neither expressly states that the victim has an action nor does it set out the requirements for such an action. When taking this into account it can be concluded that Wallis JA disagrees with Premier's view and is of the opinion that section 65 does not create a statutory claim, which in turn secures the existence of a legal duty.²⁷⁹ On the contrary, Wallis JA pointed out some textual factors which can be found when section 65(6)(a) is read together with section 49D(4).²⁸⁰ Section 65(6)(a) speaks of commencing an action "for the assessment of the amount or awarding of damages" while section 49D(4) refers to a complainant "applying for an award of civil damages". Both these sections refer to the mere action of assessing the quantum of the claim and nothing more. Subsequently, one can come to the conclusion that section 65 does indeed create a statutory claim.²⁸¹ After it has been established that the victim indeed has a right the next issue that needs to be considered is the effect that it will have on a leniency programme. The situation can arise where the effectiveness of a leniency programme gets jeopardised by the mere exercise of a right to damages. A firm can decide against applying for leniency because of the risk of civil claims, thus effectively foreclosing the Commission's opportunity to detect a cartel.

11. The Corporate Leniency Policy in the context of private damages claims

11.1 Introduction

In the case of *Pfleiderer AG v Bundeskartellamt*²⁸² (hereinafter 'Pfleiderer') the ECJ stressed the fact that leniency programmes are very effective mechanisms which are used for public enforcement of

²⁷⁴ *Children's Resource Centre supra* n128 par 66.

²⁷⁵ *Ibid.*

²⁷⁶ *Children's Resource Centre supra* n128 par 67.

²⁷⁷ *Ibid.*

²⁷⁸ *Children's Resource Centre supra* n128 par 68.

²⁷⁹ *Children's Resource Centre supra* n128 par 69. A Scallan *supra* n113 at 9.

²⁸⁰ For a discussion on these sections see pages 24-25 of this dissertation.

²⁸¹ *Children's Resource Centre supra* n128 par 72.

²⁸² Case C-360/09, [2011] ECR I-5161, par 25.

the EU competition rules. Bulst²⁸³ correctly points out that leniency programmes are very effective in the uncovering of cartel activities which is why it plays a crucial role in the process of claiming for damages.

In 2004 the Commission issued South Africa's first leniency programme named the Corporate Leniency Policy (hereinafter 'CLP 2004').²⁸⁴ The CLP 2004 was published in line with leniency policies in the EU and other jurisdictions as a guideline on how to effectively address cartel activities.²⁸⁵ The CLP 2004 lacked clarity and certainty and was therefore revised in 2008.²⁸⁶ This gave rise to South Africa's most recent Corporate Leniency Policy (hereinafter 'CLP').²⁸⁷ The CLP does not substantially differ from the CLP 2004; the flaws that caused uncertainty were merely removed and some extra features added.²⁸⁸ The CLP *inter alia* provides legal certainty regarding the granting of immunity;²⁸⁹ allows instigators or leaders of a cartel to also apply for immunity;²⁹⁰ introduces the 'marker application'²⁹¹ and accepts oral statements.²⁹²

Sutherland compares the methods set out in the CLP to the strategies used in 'whistleblower programmes'.²⁹³ The CLP applies to alleged participation in the restrictive horizontal practice 'cartel behaviour', as set out in section 4(1)(b) of the Act.²⁹⁴ An advantage of the CLP's limited application is that even if a firm received immunity for its cartel conduct, it can still be prosecuted for its related anti-competitive conduct in terms of section 5 and 8.²⁹⁵ The main objective of the CLP is to uncover cartels which are of such a secretive nature that it is almost impossible for the Commission to detect.²⁹⁶ The confidential nature²⁹⁷ of the CLP encourages cartel members to come forward and

²⁸³ Bulst *supra* n101 page 88 at D (IV); page 91 at F (III).

²⁸⁴ Corporate Leniency Policy GN 195 GG 25963 of 6 February 2004 (hereinafter 'CLP 2004'). Although there is no mention of the Corporate Leniency Policy in the Act, it is published in terms of section 79 of the Act which provides for the publishing of guidelines.

²⁸⁵ CLP 2004 *supra* n284 at pars 1.1; 2.5; 14.1.

²⁸⁶ K Moodaliyar *supra* n26 at 143.

²⁸⁷ CLP *supra* n34.

²⁸⁸ L Mendelsohn and another 'Whistle-blowers and corporate leniency: competition law' 2008 (8) *Without Prejudice*, page 12.

²⁸⁹ *Ibid.*

²⁹⁰ CLP *supra* n34 par 3.9.

²⁹¹ CLP *supra* n34 par 12.

²⁹² CLP *supra* n34 par 15.

²⁹³ P Sutherland *supra* n1 at 5-101.

²⁹⁴ For a discussion on this section as well as the different types of cartel behaviour, see pages 4-5 of this dissertation. P Sutherland *supra* n1 at 5-102.

²⁹⁵ When this is read together with par 10.1(a) of the CLP it is clear to see the downside to this, namely that it can dissuade firms from applying for leniency altogether.

²⁹⁶ CLP *supra* n34 par 3.8. See also P Sutherland *supra* n1 at 5-102 to 5-103.

²⁹⁷ CLP *supra* n34 pars 6.2, 8.2. The fact that the applicant's information will be protected and disclosed only if it has given the necessary consent, is advantageous to any cartel member.

disclose information which in turn enables the Commission to effectively and more quickly investigate cartels.²⁹⁸ Consequently, the CLP contributes to the successful discouragement and prevention of cartels either by prosecuting cartel members or by reaching settlement agreements.²⁹⁹

The CLP states that a cartel member will receive 'immunity' on the condition that it fulfils specific requirements.³⁰⁰ An applicant cannot be guaranteed that it will receive full immunity by simply applying for leniency. It will initially be granted conditional immunity and one of two situations will then follow. Either the Commission will revoke the conditional immunity, the effect of which is that the applicant can then be prosecuted for its anti-competitive conduct,³⁰¹ or the applicant will be granted total immunity.³⁰² The latter will take place if the applicant has met a detailed list of conditions and requirements as set out by paragraph 10 of the CLP, of which only the relevant ones will be discussed here.³⁰³ Firstly it is important to note that to qualify for immunity under the CLP a cartel member must be the 'first to the door' which means that it must be the first to confess to its participation in the cartel activity.³⁰⁴ It can confess by admitting that its conduct resulted in a contravention of the Act and by signing a conditional immunity agreement.³⁰⁵ The main purpose of the 'first to the door' principle is to create a competition between cartel members where they race amongst each other to be the first to apply for immunity out of fear that another member might beat them to the Commission's door.³⁰⁶ Secondly, the applicant must provide complete and truthful disclosure of all information relating to any cartel activity in order to make it possible for the Commission to institute proceedings.³⁰⁷ Thirdly, the applicant is also obliged to immediately stop the cartel activity.³⁰⁸

11.2 Issues

'Immunity' means that the Commission will neither subject the applicant to adjudication before the Tribunal neither will it propose to have any fines imposed to the applicant, with regards to its

²⁹⁸ CLP *supra* n34 par 3.8. See K Moodaliyar 'Are cartels skating on thin ice? An insight into the South African Corporate Leniency Policy' (2008) 125 *SALJ* 157, 158.

²⁹⁹ CLP *supra* n34 par 3.6. See C Lavoie 'South Africa's Corporate Leniency Policy: A Five-Year Review' Speech at the Third Annual Competition Conference (3 & 4 September 2009) at 14-15.

³⁰⁰ CLP *supra* n34 par 3.1.

³⁰¹ Revocation will take place if the applicant fails to meet the necessary conditions and requirements; does not fully cooperate with the Commission or provides false information.

³⁰² Revocation cannot take place once total immunity is granted. CLP *supra* n34, pars 9.1.1.3, 13.3, 14.1.1.

³⁰³ CLP *supra* n34 pars 9.1.1.1-9.1.2.1. K Moodaliyar *supra* n298 pages 157, 159.

³⁰⁴ CLP *supra* n34 pars 5.6, 10.1(b).

³⁰⁵ C Lavoie *supra* n299 at 6.

³⁰⁶ K Moodaliyar *supra* n298 pages 157, 160, 170.

³⁰⁷ CLP *supra* n34 par 10.1(a).

³⁰⁸ CLP *supra* n34 par 10.1(d).

participation in the alleged cartel mentioned in the CLP application.³⁰⁹ It should be noted that this does not apply to the civil liability that the applicant has with regards to injured parties.³¹⁰ When one looks at the CLP in the context of private damages claims one realises the complexity of the situation when these claims are allowed against CLP applicants.

As mentioned earlier,³¹¹ a person who suffered harm due to cartel conduct can refer a complaint to the Tribunal and seek civil damages or use a section 65-certificate, which the Tribunal issued in respect of conduct of a successful leniency applicant, to approach a civil court and apply for a damages award.³¹²

The effectiveness of the CLP gets jeopardised when an applicant, by applying for leniency, exposes itself to the risk of civil claims by various victims. Firms might be so afraid of disclosing their business' name and information in the public domain that they become completely dissuaded from approaching the Commission and filing a leniency application, thus effectively foreclosing the Commission's opportunity to detect a cartel.³¹³ Subsequently, two complex issues arise in this regard, namely access to information and the liability of a successful leniency applicant.

11.3 *The position in South Africa*

The CLP states that evidence given to the Commission by a leniency applicant, prior to immunity being granted or obtained at the Tribunal, will be protected and treated as confidential.³¹⁴ Sutherland notes that once the Commission discloses or relies upon a document in its pleadings or during court proceedings, its litigation privilege will be waived and its confidentiality can only be protected by section 44 and 45 of the Act.³¹⁵

11.4 *The position in the EU*

With regards to the matter of the accessibility of information, the *Draft Directive* addresses the 'information asymmetry' issue by stating that national courts may, subject to certain conditions³¹⁶, order the disclosure of evidence. The courts can either order a defendant or third party, who has evidence which a claimant needs to prove his or her case, or a claimant with evidence which the

³⁰⁹ CLP *supra* n34 pars 3.3, 4.2.

³¹⁰ CLP *supra* n34 pars 5.9, 6.4.

³¹¹ See pages 24-27 of this dissertation.

³¹² P Sutherland *supra* n1 at 5-106 to 5-107.

³¹³ Bulst *supra* n101 page 88 at D (IV).

³¹⁴ CLP *supra* n34 pars 8.2, 11.1.3.3.

³¹⁵ P Sutherland *supra* n1 at 5-113.

³¹⁶ These conditions are set out in articles 5-8 of the *Draft Directive*.

defendant may need to prepare his or her defence.³¹⁷ Consequently, the disclosure of leniency documents is a very complex matter. In the case of *Pfleiderer*³¹⁸ the ECJ held that, in the absence of EU law, national courts have to decide on a case-by-case basis whether to allow or refuse the disclosure of leniency documents. When making this decision it is important to protect the effectiveness of public enforcement of EU competition law without compromising the injured party's right to obtain full compensation for the harm he or she suffered.³¹⁹ Fortunately, the *Draft Directive* provides legal certainty regarding the protection of a leniency applicant's confidential information by prohibiting national courts from ordering the disclosure of corporate leniency statements³²⁰ and settlement submissions held by a competition authority.³²¹ The rationale behind this provision is to ensure that the leniency applicant does not find itself in a less favourable position than its co-infringers, which makes leniency programmes attractive enough to assist in effective public and private enforcement.³²²

The *Draft Directive* addresses the issue regarding a successful leniency applicant's civil liability. It suggests that in order for the leniency programme to be attractive to new applicants the civil liability of the leniency applicant should be limited.³²³ Generally where anti-competitive undertakings took place by way of joint behaviour, each undertaking is held jointly and severally liable for the damage caused by the cartel.³²⁴ Consequently, the injured party can claim full compensation from any of the cartel members, which in turn has to recover a contribution from the other members for their relative responsibility for the harm caused.³²⁵ The situation where a cartel member has been granted immunity differs in the sense that its liability will be limited to only its direct or indirect purchasers.³²⁶ Nonetheless, a cartel member will not be exempted from joint liability if the injured party can show that it is unable to obtain full compensation from the other cartel members.³²⁷

³¹⁷ *Draft Directive supra* n46 article 5 par 1.

³¹⁸ *Pfleiderer supra* n282 pars 30-32. *Draft Directive supra* n46 at page 3.

³¹⁹ *Ibid.*

³²⁰ This is all the documents which the leniency applicant voluntarily submitted when he or she applied for leniency. *SWP supra* n93 par 118.

³²¹ *Draft Directive supra* n46 article 6.

³²² *Draft Directive supra* n46 page 14 par 4.2. *White Paper supra* n45 page 10, section 2.9.

³²³ *Draft Directive supra* n46 par 4.3.3 on page 16.

³²⁴ *Ibid* article 11 & par 4.3.3 on page 16.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

CHAPTER 4 : CONCLUSION

12. Concluding remarks

12.1 *Private damages claims*

It is true that the imposition of severe administrative penalties plays an important role in preventing cartel conduct. Nevertheless, public enforcement alone is not enough and it is crucial for the South African legislature to indicate its commitment to the development of private damages actions.³²⁸ I agree with Harrison³²⁹ who emphasizes that private damages actions are “an essential complement to public enforcement”. Private enforcement ensures compensation and acts as a cartel deterrent, which not only benefits consumers but the economy as a whole. This suggests that interaction between public and private enforcement of competition law is absolutely vital. It is clear to see from this dissertation that private enforcement has many advantages, not just for individual customers but for competition law as a whole, as it acts as a deterrent as well. It is important that infringers of competition law should know that they will be prosecuted by the competition authorities, which is a costly and time consuming process, and on top of that they will have to endure another litigation process in the civil courts, which involves legal costs as well as the payment of civil damages.

12.2. *The need for intervention*

When one takes into account all the difficulties that cartel victims in South Africa are faced with when attempting to claim damages it is clear to see that we are in desperate need of guidance. Barriers like the cost of litigation, the size of the claim and others mentioned in Chapter 2, prevents these victims from being effectively compensated for the loss they suffered. Claimants, especially those with scattered low-value claims, need assistance and legal certainty regarding remedies for their suffering. Relevant case law developed the EU competition law in such a way that cartel victims are awarded the right to claim compensation for the damages they suffered. In order to guide possible claimants; enable them to give effect to this right and have more positive outcomes, the EC published three initiatives, namely the *Green Paper*, *White Paper* and *Draft Directive*. Because a directive requires transposition into national law³³⁰, one can look forward to the next step being legislation providing legal certainty regarding damages claims in the EU. As South Africa’s competition law is largely based on the EU’s competition law principles, it is appropriate to say that South Africa can use the EU competition law as guidance regarding damages actions. The task of creating documents similar to those of the *White Paper* and *Draft Directive* requires close

³²⁸ K Moodaliyar *supra* n26 at 141.

³²⁹ D Harrison *supra* n115 page 56.

³³⁰ Bulst *supra* n101 page 94 at i (II).

cooperation between the Department of Trade and Industry and the competition authorities. The competition authorities must publish guidelines which ordinary consumers can easily comprehend to be sure of the procedural steps that they have to follow to become claimants in terms of section 65. The Department of Trade and Industry should introduce documents which provide claimants with truly effective mechanisms which they can use to obtain compensation for the harm they suffered. Just like in the case of the *Draft Directive*, this can maybe later on be transpositioned into legislation.

12.3. 'Locus standi'

South Africa's Competition Act is silent on the matter of *locus standi* regarding a damages claim. Fortunately guidance can be obtained from the EU's *Draft Directive* which allows any victim, including indirect purchasers, to claim for damages. The *locus standi* of an indirect purchaser depends on whether the concept of 'passing-on' exists. In terms of the *Draft Directive* an indirect purchaser may rely on the occurrence of 'passing-on' to enable it to claim for damages caused by the infringement, despite the fact that it is further down in the distribution chain.³³¹ The *Draft Directive* also provides for a 'passing-on' defence to be raised by a defendant if it can prove that the claimant did not absorb the overcharge itself. As mentioned in Chapter 2, if both direct and indirect purchasers suffered harm because of the same infringer's conduct, the 'passing-on defence' makes it possible for both these purchasers to claim damages. Due to this immense advantage, it is important that South Africa takes the necessary steps in order to also recognise this defence.³³²

12.4 Class actions

It is all good and well that the *White Paper* and the *Draft Directive* make it possible for the claims of all victims to be recognised, but this is of little value if it cannot be given effect to because of the barriers which a victim are faced with when claiming for damages in its individual capacity. A typical South African example is the fact that huge corporate institutions are not even startled by a small claim by one individual, with a lack of resources and financial means.³³³ Fortunately, due to its many advantages, victims in a cartelised market as well as competition in general can benefit from collective redress. Firstly, because it places victims in a better position by providing them with the necessary means they need to actually stand a chance of receiving a damages award. Secondly, the risk of receiving aggregated claims of several victims can discourage huge corporate companies from becoming potential cartel members.

³³¹ Bulst *supra* n101 page 83 at C (I).

³³² A Scallan *supra* n113 at 18-19.

³³³ A Scallan *supra* n113 at 41.

As discussed in Chapter 2, the EC's *White Paper* introduces two mechanisms of collective redress, namely representative and 'opt-in' collective actions, to assist victims in claiming compensation for the damages they suffered. On South African soil, the SCA judgement of *Children's Resource Centre*³³⁴, followed by the constitutional judgement of *Mukaddam v Pioneer Food (Pty) Ltd and others*³³⁵, provided a breakthrough for people who suffered loss as a result of cartel activities. These cases dealt with both 'opt-out' (*Children's Resource Centre*) and 'opt-in' (*Mukaddam*) class actions. The courts addressed the matter regarding the factors which a court may take into account, when considering whether to certify a class action or not. It also examined the manner in which these factors should be applied by the courts, by stating that the guiding principle should be to determine what the interests of justice demands. The courts held that individuals, who suffered damages due to competition law infringements, which is a non-constitutional claim, are allowed to pursue a class action. The rationale behind this is that the banning of such a class action would result in the unconstitutional action of prohibiting one's access to court.

With regards to class actions, the courts developed the competition law by providing for a class action to be instituted by victims of cartel activities. Nevertheless, the fact that the Competition Act provides no definition or procedural elements regarding class actions, results in the legal position being very much uncertain. This, together with the abovementioned barriers can dissuade private litigants from claiming for damages. The only solution to this problem is if the South African legislatures produce amendments to the current Competition Act, which will guide and assist victims in the compensation claiming process.

12.5 Section 65 of the Competition Act

Section 65 of the Act sets out the requirements, which must be met before a damages action can be pursued in a civil court, as well as the procedure in this regard. There is no legal certainty regarding the issue of which type of claim, either delictual or statutory, the injured party has in terms of section 65. In the *Children's Resource Centre*-case the situation did not require of the SCA to interpret section 65 for the purpose of deciding what kind of claim a victim will have. Nevertheless the case provides a few useful insights regarding the nature of the cause of action. The court held that if it is found that section 65 creates a statutory claim there will be no legal duty but if a statutory claim is absent then a delictual claim will indeed exist. Section 65 does not expressly state that the victim will have an action for damages nor does it set out the requirements for such an

³³⁴ *Children's Resource Centre supra* n128.

³³⁵ *Mukaddam CC supra* n151.

action, which can suggest that the legislature did not intend for section 65 to be interpreted as to create a statutory claim. Consequently, this secures the existence of a legal duty as it is impossible for the two interpretations to co-exist. On the contrary, the court pointed out some textual factors which can suggest that the legislature intended for section 65 to create a statutory claim. Despite the conflicting opinions and lack of legal certainty the case can still be used as guidance in this regard.

As discussed in Chapter 3, the Tribunal and the CAC have the authority to find a firm guilty of committing a prohibited practice. Thereafter, they produce a notice which certifies that the conduct in question constitutes a prohibited practice in terms of the Act. The only way in which a private litigant can claim compensation is by approaching a civil court with the section 65-certificate. This provision can have far-reaching consequences in the context of settlement agreements and consent orders. In the CLP, the Commission encourages firms to settle the matter by way of a settlement agreement or a consent order because it leads to more cartels being uncovered and put to an end.³³⁶ The downside to this is that these processes skip a very important step, i.e. the one where the competition authority makes its judgement, which is the main requirement for claiming damages. To summarise, settlement agreements and consent orders causes, from a claimant's perspective, much more harm than good. This will however not be the case if the settlement agreement or consent order includes the firm's admission of guilt pertaining to the prohibited practice.

12.6 Corporate Leniency Policy

Because cartels are of such a deceptive and secretive nature the Commission decided to develop the CLP to effectively detect and prevent cartel behaviour.³³⁷ A leniency applicant provides information regarding the cartel to the Commission and in return receives immunity. The Commission then uses the information to uncover cartel activities. The 'immunity' offered does not cover civil liability towards victims, which means that the Tribunal can issue a section 65-certificate in respect of the conduct of an immunised firm despite the fact that it was not cited as a respondent in the Tribunal proceedings.³³⁸

As can be seen from Chapter 3 of the dissertation, civil damages claims affect the CLP in such a way that the effectiveness of the policy gets jeopardised. Certain issues can cause infringers to become completely dissuaded from approaching the Commission altogether. The first issue regards the

³³⁶ CLP *supra* n34, pars 5.6, 7.2, 9.1.3.2-9.1.3.3.

³³⁷ CLP *supra* n34 pars 2.4-2.5.

³³⁸ *Premier Foods (Pty) Ltd v Norman Manoim supra* n48 pars 43; 45-47.

evidence which a claimant may have access to when claiming for damages. The second issue regards limitations on a leniency applicant's civil liability. In the EU, the *Draft Directive* addresses these issues by introducing measures to protect the attractiveness of their leniency programme, as it plays an important role in the effective public enforcement of competition law.³³⁹ Firstly, national courts are prohibited from ordering the disclosure of corporate leniency statements and settlement submissions held by a competition authority, to ensure that the leniency applicant does not find itself in a less favourable position than its co-infringers. Secondly, a leniency applicant will be protected in the sense that it will only be liable to its direct or indirect purchasers. The applicant's liability will only be limited to the extent that the injured party is able to obtain full compensation from the other cartel members. The reason for this is to avoid jeopardising an injured party's right to be compensated for the harm it had to endure because of the infringement.

13. Recommendations

To summarise, coordination between public and private enforcement is very important, in both South Africa and abroad, as it ensures effective enforcement of the competition law rules. In order for this to be even possible in South Africa, we need policy interventions similar to Europe's *White Paper* and *Draft Directive*. Moodaliyar rightfully recommends that the Department of Trade and Industry, together with assistance from the competition authorities, should provide guidelines. These will help victims overcome the challenges that they are faced with due to the anti-competitive conduct and assist private litigants when they want to claim for damages.³⁴⁰ The South African legislatures must produce amendments to the current Competition Act to specify who exactly has *locus standi* and incorporate the 'passing-on' defence, in order for indirect purchasers to be able to claim. These amendments must also provide procedural elements regarding class actions. As mentioned earlier, the South African Competition Act does not provide a definition of a class action. It is submitted that it has been long enough since the Department of Justice and Constitutional Development submitted the SALRC report in 1998. There is a desperate need for a decision regarding the draft bill's recommendations for class actions. Now that the courts, in *Children's Resource Centre* and *Mukaddam*, have provided legal certainty by setting a precedent regarding the certification process of a class action, there are two new cases which will hopefully produce important class action jurisprudence, i.e. the Silicosis class action matter and the Marikana class action. There is no doubt that the whole of South Africa will be anticipating positive outcomes from

³³⁹ *Draft Directive supra* n46 page 16.

³⁴⁰ K Moodaliyar *supra* n26 at 149.

these matters. The next step is for the legislature to provide specific legislation dealing with the requirements and procedure pertaining to class actions.

Regarding the issue of the type of claim a victim will have in terms of section 65, South Africa is in desperate need of legislative intervention, as there is not even case law which can provide clarity in this regard. As section 65 already sets out the requirements and the procedure, it is appropriate to recommend that amendments to the section need to be made to clear up the confusion. The legal certainty which these amendments will provide will guide and assist victims in the compensation claiming process. Regarding the attractiveness of a leniency programme, I agree with Bulst's statement that the EC succeeded in effectively striking a balance. In an attempt to address the issues of 'access to evidence' and 'a leniency applicant's civil liability', it succeeds in giving a leniency applicant the necessary protection without unduly protecting it from the civil law consequences of its conduct.³⁴¹ As mentioned above, South Africa's CLP plays a vital role when it comes to the detection of cartels. As a result, it is very important to prevent anything that can make it less effective, thus its attractiveness needs to be protected. In South Africa we need a policy document, similar to the *Draft Directive*, which prohibits access to corporate leniency statements and settlement submissions and limits a leniency applicant's civil liability. In doing so, we can make sure that the leniency applicant will be protected, by not being in a less favourable position than its co-infringers, without jeopardising a victim's right to compensation.

Another issue which South Africans may see more of in the future entails funding, from state resources, for legal costs incurred by a victim's participation in an investigation of anti-competitive conduct. This matter was already addressed in *Mzoxolo Magidiwana and Others v The President of the Republic of SA and others*³⁴² where the Constitutional Court held that the applicants do not fall in either of the three categories of persons entitled to legal representation at state expense.³⁴³ It is submitted that the South African competition authorities must consider the fact that by assisting cartel victims, in the form of financial means, will enable them to claim compensation more effectively. This in turn might even have the same positive effect, on the uncovering of cartels, as

³⁴¹ Bulst *supra* n101 page 91 at F (III). *SWP supra* n93 par 287.

³⁴² [2013] ZACC 27.

³⁴³ *Ibid* pars 2-4, 6-7, 12. The three categories are found in three provisions in the Bill of Rights, in the Constitution. Firstly, section 28(1)(h) states that every child has the right to legal representation at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Secondly, section 35(2)(c) states that everyone who is detained has the right to legal representation at state expense, if substantial injustice would otherwise result. Lastly, section 35(3)(g) states that every accused has the right to a fair trial, which includes legal representation at state expense, if substantial injustice would otherwise result.

the CLP. This will prevent injured parties from playing the role of helpless victims and instead enable them to be more pro-active in the process of promoting and maintaining competition.³⁴⁴

³⁴⁴ See section 2 for the purpose of the Act.

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