

TOPIC:

**THE RIGHT OF CONSUMERS IN TERMS OF SECTION 65 OF
THE COMPETITION ACT NO. 89 of 1998 TO COMMENCE
CLAIMS FOR FINANCIAL LOSSES SUFFERED AS A RESULT
OF CARTEL INFRINGEMENT**

DISSERTATION SUBMITTED BY

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Declaration:

I declare that this mini dissertation is my own work and that all data or sources of information from other authors have been acknowledged. I also declare that this mini dissertation has never been submitted before to any research institution or any higher learning institution for any examination or a degree.

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Abstract

The right to claim for civil damages in terms of section 65 of the Competition Act No. 89 of 1998 of South Africa (“CA of 1998”) is likely to contribute significantly to the objectives of the competition law in the country by serving as a deterring measure for companies to engage in anti-competitive behavior. Companies infringing the Competition Act will know that upon a finding of an infringement, they will have to pay back to consumers whatever profits they would have made illegally plus the litigation costs. These payments will be made in addition to the administrative penalties levied by the Competition Commission of South Africa, the Competition Tribunal of South Africa or the Competition Appeal Court of South Africa (“collectively referred to as the competition authorities”) and the possibility of directors’ criminal liability for causing companies to engage in cartel behavior. Therefore, the achievement of the objectives of the CA of 1998 as amended also depends on the effectiveness of civil damages claim provisions of section 65.

However, the effectiveness of civil damages claims in terms of section 65 is compromised when consumers are incapable of exercising the right conferred to them in terms of this section. The recent increase on the findings by the competition authorities for an infringement of the prohibited practices in terms of chapter 2 of the CA of 1998, the period in which the respondents had engaged in those prohibited practices, the financial losses or damages suffered by consumers who in most cases are end users of the products or services and most importantly consumers inactiveness in exercising their rights to claim for such damages in terms of section 65 of the CA of 1998 have influenced the researcher to investigate the relevant section and the impediments to pursuing civil damages claims in terms thereof.

The investigation both from the comparative law and individual consumer response shows amongst others the following as challenges that consumers will normally face to pursue their right in terms of section 65: the cost of litigation, lack of knowledge of consumer rights, lack of consumer activism, financial assistance, dragging of matters

before the courts to frustrate consumers, complex procedures to claim damages before civil courts etc.

There appears to be general consensus throughout the data collected by the researcher that private enforcement will discourage companies to engage in any form of anti-competitive behavior thereby serving as a deterrent mechanism for infringement in addition to the administrative penalties and directors' criminal liability.

Acronyms and Abbreviations

ANC	: African National Congress
BTI	: Board of Trade and Industries
BOARD	: Competition Board
CA of 1998	: Competition Act No. 89 of 1998
CA98	: UK Competition Act 1998 (c.41)
CACSA	: Competition Appeal Court of South Africa
CAT	: UK Competition Appeal Tribunal
CCSA	: Competition Commission of South Africa
COSATU	: Congress of South African Trade Unions
CTSA	: Competition Tribunal of South Africa
CLA	: Clayton Act
CLAF	: Contingency Legal Aid Funds
CLP	: Corporate Leniency Policy
DTI	: Department of Trade and Industry
EC	: European Community
ECJ	: European Court of Justice
ECN	: European Competition Network
EU	: European Union
EUC	: Commission of the European Communities
EUCA	: European Union Commission Antitrust
EUD	: European Union Directive
FAL	: Federal Antitrust laws (SAA, CLA and FTCA)
FRCP	: Federal Rules of Civil Procedure
FTC	: Federal Trade Commission
FTCA	: Federal Trade Commission Act
FTCBC	: Federal Trade Commission Bureau of Competition
MINISTER	: Minister of Trade and Industry
MPCA	: Maintenance and Promotion of Competition Act
NCA	: National Competition Authorities
NCF	: National Consumer Forum
NEDLAC	: National Economic Development and Labour Council
NMC	: National Marketing Council

OECD	: Organisation for Economic Co-operation and Development
OFT	: Office of Fair Trading
RDP	: Reconstruction and Development Programme
TFEU	: Treaty on the Functioning of the European Union
RSA	: Republic of South Africa
SAA	: Sherman Antitrust Act
SALC	: South African Law Commission
SARB	: South African Reserve Bank
UK	: United Kingdom
USA	: United States of America
USC	: United States Congress
U.S. DoJ	: United States Department of Justice

Definitions

Agreement: when used in relation to a prohibited practice, includes a contract, arrangement or understanding whether or not legally enforceable

Cartels: are agreements between companies not to compete with each other, they can be in writing or verbal. They involve conducts relating to fixing of purchase/selling prices or trading conditions, dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or collusive tendering.

Civil court: means a High Court or Magistrate Court as referred to in sections 166(c) and (d) of the Constitution

Competition Authorities: refers collectively to the Competition Commission, Competition Tribunal and Competition Appeal Court of South Africa

Concerted practice: means co-operative or coordinated conduct between firms, achieved through direct or indirect contact that replaces their independent action, but which does not amount to an agreement

Dominance: possession of at least 45% market share; at least 35% but less than 45% unless the firm can show it does not have market power; or has less than 35% with market power.

Horizontal relationship: means a relationship between competitors

Minister: refers to the Minister of Trade and Industry

Prohibited practices: means a practice prohibited in terms of Chapter 2 of the Competition Act No. 89 of 1998

Respondent: means a firm against whom a complaint of a prohibited practice has been initiated in terms of the Competition Act No. 89 of 1998

Restrictive horizontal practice: means any practice listed in section 4 of the Competition Act No. 89 of 1998

Restrictive vertical practice: means any practice listed in section 5 of the Competition Act No. 89 of 1998

Undertaking: covers any natural or legal persons engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, partnerships, firms, business, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (e.g. trade associations), non-

profit making organizations and (in some circumstances) public entities that offer goods or services on a given market.

Vertical relationship: means the relationship between a firm and its suppliers, customers or both

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CHAPTER 1

INTRODUCTION

1. Competition policy and law

Competition policy is defined as a regulatory tool which seeks to address market failures by maintaining or creating the foundations for effective functioning markets¹. In essence, competition policy aims to emulate free market conditions by creating regulatory institutions and procedures or laws that will ensure equal opportunities for all business, stimulate economic efficiency and more importantly protect consumers². It includes both economic policies adopted by government aimed at enhancing competition in the local and international markets (such as trade policy, deregulation and privatization) and competition or anti-trust law.³

Competition law on the other hand, contains provisions or rules which aim to ensure and sustain a market where vigorous but fair competition will result in the most efficient allocation of economic resources and the production of goods and services at the lowest prices⁴. In essence, competition law is designed to create a level playing field where both big and small business can compete fairly and effectively.⁵ It may thus be concluded that the end beneficiary of competition policy and law should inevitably be the consumer.

¹ Neuhoﬀ M, et al. A Practical Guide to the South African Competition Act (2006) 11 (hereafter referred to as Neuhoﬀ)

² Ibid

³ Ibid

⁴ Neuhoﬀ 12

⁵ Ibid

2 The legislative history of South African Competition Law

2.1 The Regulation of Monopolistic Conditions Act

In South Africa particular competitive situations were addressed in specific laws beginning as early as 1907.⁶ Under legislation that was effective from 1923 to 1944, the Board of Trade and Industries could offer advice about competition policy problems.⁷ It was a report by that Board which led to South Africa's first general competition law; the Regulation of Monopolistic Conditions Act of 1955 ("RMC Act of 1955").⁸

The RMC Act of 1955 was aimed at controlling, preventing or eliminating monopolistic activities detrimental to the public interest.⁹ The 1955 competition law was cautious and permissive.¹⁰ It defined and controlled a number of "monopolistic conditions," that is, potentially anti-competitive practices.¹¹ None of these practices was prohibited *per se*.¹² Instead, the law provided for an administrative process to examine particular cases and recommend action.¹³

The Board of Trade and Industry was charged with investigating conduct, recommending remedies, and negotiating and supervising compliance.¹⁴ Its decisions could be appealed to a special court.¹⁵ However, the Board had no independent powers, either of investigation or relief.¹⁶ Rather, the Minister of Trade and Industry decided what was to be investigated and what relief, if any, would be applied.¹⁷

⁶ OECD: South Africa – Peer Review of Competition Law and Policy (2003) p.4 available at <http://www.comptrib.co.za/assets/Uploads/Reports/South-Africa-Peer-Review.PDF>

⁷ Ibid

⁸ Act 24 of 1955.

⁹ Walsh & Paxton, Competition Policy: European and International trends and practices (1975) 11

¹⁰ OECD: South Africa – Peer Review of Competition Law and Policy (2003) p. 4

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

Over 20 years, the Minister ordered only 18 investigations.¹⁸ Nearly all of these findings resulted in negotiated settlements.^{19, 20} The Board's principal function seemed to be overseeing compliance with the handful of directives and orders that had been negotiated.²¹ There were a few actions against violators of those orders, but no significant penalties were imposed.²²

A Commission of Inquiry, appointed in 1975, criticized the enforcement system of the RMC Act of 1955.²³ It was of opinion that making investigations depend on the Minister's direction subjected enforcement to too much political influence.²⁴ It was also found that oligopoly had intensified dramatically in spite of the Act.²⁵ In addition to the merger and acquisition wave, reasons for high concentration levels included protectionist barriers, the small size of the local market, the distance between geographical centres, and historical factors associated with the industrialization process.²⁶ The Tariffs Board was found to be ineffective, as it had the power only to intervene after a merger or acquisition was complete.²⁷ As a result, the Commission of Inquiry called for a new competition body with more resources, stronger penalties against violations orders, and extension of the law to cover mergers.²⁸ The RMC Act of 1955 and its amendments²⁹ were subsequently repealed by the Maintenance and Promotion of Competition Act.³⁰

¹⁸ Ibid

¹⁹ Ibid The Minister took action only once.¹⁹ No decision or action was ever brought to the special court

²⁰ Ibid p.5

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Proposed Guidelines for Competition policy (27 November 1997) 9

²⁶ Ibid

²⁷ Proposed Guidelines for Competition policy (27 November 1997) 9

²⁸ OECD: South Africa – Peer Review of Competition Law and Policy (2003) 13. The Commission of Inquiry recommended a new institutional structure that would have followed the UK's "tripartite" system of a supervising ministry, a separate "enforcement" body, and a more independent decision-making tribunal.

²⁹ The Regulation of Monopolies Conditions Amendment Acts 14 of 1958, 48 of 1975, 23 of 1976 and 75 of 1978

³⁰ Section 21 of the Maintenance and Promotion of Competition Act No. 96 of 1979

2.2 The Maintenance and Promotion of Competition Act

The Maintenance and Promotion of Competition Act of 1979³¹ established the Competition Board (the “Board”) as an autonomous statutory body with an investigative and advisory competence relating to matters regulated by the Act.³² The Board had a responsibility in terms of the Maintenance and Promotion of Competition Act to conduct investigations on its own initiative through a designated member of the board or an investigating officer in its services of competition matters it consider necessary to investigate and adjudicate on those matters³³. However, the Competition Board report finding on its investigations still had to go through the Minister of Trade and Industry and resulted in a lot of political interference which eventually led to the ineffectiveness of the Maintenance and Promotion of Competition Act.

At the level of enforcement logistics, there were thus technical flaws in the Maintenance and Promotion of Competition Act *inter alia* a duplication of effort between the Competition Board and the Minister of Trade and Trade; the risk of political interference in the Competition Board’s activities³⁴; a dispersal of jurisdiction to other regulatory

³¹ Act 96 of 1979.

³² Proposed Guidelines for Competition policy (27 November 1997) 21. The Board consisted of representatives or appointees from the Department of Trade and Industry, Registrar of Financial Institutions, Governor of the South African Reserve Bank (“SARB”), Chairman of the National Marketing Council (“NMC”), nominee by the Minister of Finance, nominee by the Minister of Agricultural Economics and of Water Affairs and other members appointed on the grounds of expertise in the field of consumer affairs, economics, industry, commerce, law or the conduct of public affairs. The chairman of the Board is a full time member, and the minister shall determine whether the other members appointed by the minister shall be full-time or part-time members. In discharging its functions, the Board is assisted by career civil servants who are collectively termed the Directorate: Investigations of the Board.

³³ Section 10 of the Maintenance and Promotion of Competition Act No. 96 of 1979

³⁴ With respect to potential interference by politicians in competition law, problems arose from the potential power exercised by the Minister of Trade and Industry. He or she could direct the Board not to conduct a formal investigation which it wished to initiate or to terminate investigations that had been commenced. Any recommendation by the Board to the effect that a particular restrictive practice or anti-

authorities; insufficient guidelines relating to state-owned enterprises; and ineffective remedies and penalties.³⁵

In most other respects, the Maintenance and Promotion of Competition Act of 1979 resembled the previous Act.³⁶ The statute contained no explicit prohibitions, its substantive standard was ultimately the undefined “public interest”, a special court was to hear appeals (but never actually did), and actual decisions and orders were up to the Minister.³⁷ The Board did use its power to initiate investigations, and it produced some 75 formal reports.³⁸ Few of these reports dealt with what was probably the most important single source of anti-competitive restraints, namely the role of the state.³⁹ The most important substantive action under the 1979 Act was a regulation, issued by the Minister after a Competition Board investigation begun in 1984 that declared some practices to be *per se* unlawful: resale price maintenance, horizontal collusion about price, terms, or market share, and bid rigging.⁴⁰ Violations of these prohibitions were to be treated as crimes; however, there were no prosecutions (except for one negotiated guilty plea).⁴¹

competitive acquisition should be prohibited could be vetoed by the Minister. These arrangements politicised decision-making, enabled interest groups to lobby the minister, and could potentially even lead to attempts by other ministers to forestall investigations by the Board.

³⁵ Proposed Guidelines for Competition policy (27 November 1997) 10

³⁶ OECD: South Africa – Peer Review of Competition Law and Policy (2003) 13

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

2.3 The Competition Act of 1998

With the African National Congress (ANC) taking office, reviewing competition policy was high on the agenda of the first broadly democratic government, which was elected in 1994.⁴² The ANC presented its economic policy line in its Reconstruction and Development Programme (RDP) of 1994.⁴³ A white paper presented in the same year outlined the ANC's new, somewhat modified concept of competition policy.⁴⁴ The emphasis here was already less on correcting mistakes or injustices committed in the past, but rather on creating a credible competition policy framework.⁴⁵ Two elements of the new policy line could be distinguished as ones linked to the former 'corrective' approach of the ANC to competition policy, namely the marked promotion of small and medium sized firms with the tools of competition policy, and influencing of 'the behaviour of lead participants of highly concentrated markets in a socially desirable manner'⁴⁶

In 1995 the Department of Trade and Industry ("DTI") embarked on a three year project of consultation with experts and stakeholders to develop a new competition policy framework.⁴⁷ The result was released in November 1997, as DTI's Proposed Guidelines for Competition Policy, to stimulate public debate about how competition policy could contribute to restructuring the economy.⁴⁸ The 1997 Guidelines found the competition law of 1979 to be deficient, lacking adequate powers and proper political context.⁴⁹ DTI proposed a new competition law that would include familiar elements of

⁴² Ibid

⁴³ Adam Torok, Competition policy reform in South Africa, Towards the mainstream CP model for 'transition' economies in the Third World? (2005-05-28) 23

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ OECD: South Africa – Peer Review of Competition Law and Policy (2003) 16

⁴⁸ Ibid

⁴⁹ Ibid The then-current law did not deal with vertical or conglomerate combinations or ownership concentration, and it lacked both pre-merger notification and meaningful post-merger power of control. Its prohibitions against anti-competitive conduct were weak.

competition policy, such as a stronger law and more independent and powerful administrative authority.⁵⁰

Debate over the proposed competition policy framework was structured through National Economic Development and Labour Council (NEDLAC), which was set up in 1994 as the vehicle for consensus-building among government, business, labour and community NGOs.⁵¹ After parliamentary consultation process, the new Competition Act⁵² (herein referred to as the CA of 1998) was passed into law repealing the Maintenance and Promotion of Competition Act. The new CA of 1998 was adopted by Parliament still in the same year, and became effective as of September 1, 1999.⁵³

Enforcement of the Act was assigned to the newly established Competition Commission and further recourse could be had to the Competition Tribunal and thereafter to the Competition Appeal Court. Unlike its predecessor, it is clear from the key objectives of the CA of 1998 that the Act intends to achieve amongst others the goal of lowering prices and greater product choice for the benefit of consumers. The objectives of the CA of 1998 are to promote and maintain competition in the Republic in order⁵⁴

- (i) to promote the efficiency, adaptability and development of the economy,
- (ii) to provide consumers with competitive prices and product choices,
- (iii) to promote employment and advance the social and economic welfare of South Africans,
- (iv) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic,

⁵⁰ Ibid

⁵¹ Ibid Thus, it became necessary to change the old competition law system by repealing the Maintenance and Promotion of Competition Act of 1979. NEDLAC's trade and industry chamber considered the DTI competition policy proposals in early 1998. NEDLAC gave its assessment of the DTI proposals on competition policy reform in 1998. This was followed by hearings in and deliberations by the Parliament's Committee on Trade and Industry.

⁵² Act No. 89 of 1998

⁵³ Adam Torok, Competition policy reform in South Africa, Towards the mainstream CP model for 'transition' economies in the Third World? (2005-05-28) 24

⁵⁴ Section 2 of Act No. 89 of 1998

- (v) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy: and
- (vi) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The CA of 1998 *inter alia* regulates certain prohibited practices, namely restrictive horizontal practices and restrictive vertical practices and also contains provisions in respect of abuse of dominance and price discrimination and regulates mergers and acquisitions.⁵⁵

3. The Competition Act and “cartel activity”

A major concern within the context of South African competition law is “cartel activity”, especially with regard to “price fixing”. Section 4 of the CA of 1998 provides that an agreement between, or concerted practice by, firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if

- (a) it has the effect of substantially preventing , or lessening , competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological , efficiency or other pro-competitive gain resulting from it outweighs that effect⁵⁶; or
- (b) that it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading conditions;
 - (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
 - (iii) collusive tendering.⁵⁷

An elaborate discussion of the concept of cartel activity is beyond the scope of this dissertation. The essential point to be made however is that cartel activity in the realm

⁵⁵ See Sections 4 to 9 of Act No. 89 of 1998

⁵⁶ S4(1)(a).

⁵⁷ Section 4(1)(b)(i) to (iii)

of price fixing frequently occurs in the South African competition law context and that such cartel activity impacts negatively on the economic lives of consumers.

Some of the recent cases involving cartels, which affected consumers directly, are the following:

- The bread baking industry cartel involving major players such as Pioneer Foods, trading as Sasko and Duens Bakeries; Foodcorp trading as Sunbake Bakeries; Premier Foods trading as Blue Ribbon Bakeries; and Tiger Brands trading as Albany Bakeries.⁵⁸
- Milk cartel involving dairy processors such as Clover Industries Ltd, Clover SA (Pty) Ltd, Parmalat (Pty) Ltd, Ladismith Cheese (Pty) Ltd, Woodlands Dairy (Pty) Ltd, Lancewood (Pty) Ltd, Nestle SA (Pty) Ltd and Milkwood Dairy (Pty) Ltd.⁵⁹
- White Maize milling cartel involving Pioneer Foods, Foodcorp, Godrich Milling, Progress Milling, Pride Milling, Westra Milling, Brenner Mills, Blinkwater Mills, TWK Milling, NTK Milling, Carolina Mills, Kalel Foods, Bothaville Milling, Paramount Mills, Keystone Milling, Premier Foods and Tiger Brands.⁶⁰
- Wheat milling cartel which involved firms that were also part of the white milling cartel. The firms involved in the wheat milling cartel are Pioneer Foods, Foodcorp, Godrich Milling, Premier Foods and Tiger Brands.⁶¹ and
 - Lastly, the Pharmaceuticals cartel operating in the supply of medical products to both private hospitals and public hospitals by Adcock Ingram

⁵⁸ Competition Commission press statement 05 May 2008

⁵⁹ Competition Commission press statement of 07 February 2008

⁶⁰ Competition Commission press statement of 31 March 2010

⁶¹ Competition Commission press statement of 15 March 2010

Critical Care, Fresenius Kabi South Africa (Pty) Ltd, Dismed and Thusanong.⁶²

4. Punitive powers of Competition Tribunal

4.1 Powers in terms of section 58

The Competition Tribunal has relatively wide punitive powers that it can use to address transgressions of the CA of 1998. In terms of section 58 of the Act, it may

- (a) make an appropriate order in relation to a prohibited practice, including
 - (i) interdicting any prohibited practice;
 - (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
 - (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of section 59;
 - (iv) ordering divestiture, subject to section 60;
 - (v) declaring conduct of a firm to be a prohibited practice in terms of the CA , for purposes of section 65 of the Act;
 - (vi) declaring the whole or any part of an agreement to be void;
 - (vii) ordering access to an essential facility on terms reasonably required;
- (b) confirm a consent agreement in terms of section 49D as an order of the Tribunal; or
- (c) subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of the Competition Commission or Competition Tribunal Rules or a time limit as set out in the Act⁶³.

4.2 Administrative penalties in terms of section 59

⁶² Competition Commission press statements of 11 February and 09 May 2008

⁶³ S59(1)(c)(i) and (ii).Further powers relating to postponement of a hearing is provided for in section 59(2) and (3).

The Competition Tribunal is further empowered by section 59 to impose administrative penalties in respect of prohibited practices and certain other conduct. As such it can impose an administrative penalty for a prohibited practice in terms of section 4(1)(b) ⁶⁴. Insofar as a prohibited practice in terms of section 4(1)(a) is concerned, it may impose an administrative penalty only if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice⁶⁵.

The administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year⁶⁶. Depending on the firm that is being fined, it is clear that the administrative fines that may be imposed may in certain instances be quite sizeable, especially when large entities such as Sasol, Arcelor Mittal or Pioneer Foods is involved.

It is further to be noted that a fine payable in terms of section 59 has to be paid into the National Revenue Fund referred to in section 213 of the Constitution⁶⁷.

5. Institution of civil claims in terms of section 65

Section 65 of the CA of 1998 provides for the institution of civil claims in certain instances. Section 65(6) specifically provides that a person who has suffered loss or damage as a result of a prohibited practice-

⁶⁴ S59(1)(a).

⁶⁵ S59(1)(b).

⁶⁶ S59(2). When determining an appropriate penalty, the Competition Tribunal must consider the following factors:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behavior of the respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
- (g) whether the respondent has previously been found to be in contravention of the Act.

⁶⁷ S59(4).

- (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 the CA;
 - (ii) stating the date of the Tribunal or Competition Court finding, and
 - (iii) setting out the section in the CA in terms of which the Tribunal or the Competition Appeal court made its finding.

A certificate referred to in section 65(6)(b) is conclusive proof of its contents and is binding on a civil court⁶⁸. For purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act⁶⁹, interest on a debt in relation to a claim for damages in terms of the CA commences on the date of issue of the section 65(7)- certificate⁷⁰.

It is further provided that a person's right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person ; or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded⁷¹.

6. Scope of dissertation

When firms engage in anti-competitive behaviour such as price fixing and collusion, consumers are overcharged for goods and services. Clearly, by agreeing as

⁶⁸ S65(7).

⁶⁹ Act 55 of 1975.

⁷⁰ S65(10).

⁷¹ S65(9).It is to be noted that in accordance with section 65(8) an appeal or application for review against an order made by the Competition Tribunal in terms of section 58 of the CA suspends any right to commence an action in a civil court with respect to the same matter.

competitors on how much they should charge for their products or services, consumers' are deprived of the choice of shopping around for the same products or services at competitive prices and consequently the objective of promoting competition in various industrial sectors is defeated. Similarly, by agreeing on prices, discounts etc, consumers are not only being deprived of their right to competitive prices and product choices but they are also left with no option but to pay for the overcharged goods and/or services at prices fixed by firms who were supposed to be competing independently rather than concertedly operating to the detriment of consumers.

The bread and milk cartels provide good examples.⁷² In both cases, the firms concerned admitted their guilt and huge fines were imposed.⁷³ However, consumers who walked into the supermarket the day after the Tribunal's order did not pay less for bread nor financially benefitted from lower bread prices. Indeed, as many pointed out, it seemed that prices continued to rise.⁷⁴

There is no doubt that fixing the purchase or selling prices on basic foods such as bread, flour, meal, milk, medicine etc impacts significantly on consumers in the form of high prices. This raises serious concerns in the South African context where a large population is dominated by economically disadvantaged communities', the majority of whom rely on government grants to have these basic foods as their daily meal. The end result is that poor consumers continue to pay more and become poorer as a result of the overcharged goods or products they are paying for, whereas business continue to increase their revenue at the expense of poor consumers.

Whilst consumers may derive a sense of satisfaction from seeing huge penalties being paid by companies such as Sasol, Foodcorp and Tiger Brands, the fines are paid into the National Revenue Fund with the result that consumers who actually bore the brunt

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

of paying higher prices, do not benefit from the high fines imposed by the competition authorities as these fines simply go into the fiscal government coffers.⁷⁵

The purpose of this dissertation is thus to investigate whether the CA provides a remedy for consumers who have been the victims of cartel activity. And to make suggestions in order to improve the opportunity for consumers to institute civil damages claims as a result of cartel activity. Such investigation will also encompass the conduct of an empirical study as set out hereinafter.

6.1. Empirical studies

Despite the existence of consumer's rights to claim for damages in terms of section 65 of the CA of 1998, consumers including consumer representative organizations/groups have to date shown little interest if no interest at all in exercising this right by claiming for damages suffered as a result of an infringement of the prohibited practices.

Thus, the researcher intends to investigate the perception of consumers including their representative organizations and labour federations regarding the use of section 65 of the CA of 1998 to recover the damages or loss suffered as a result of cartel infringement. The following questions were asked to consumers in a questionnaire format:

- As a consumer, are you aware of your right to claim for damages in terms of the CA of 1998? (This question relates to the redress mechanisms available in terms of section 65 of the CA of 1998 to recover losses suffered as a result of anti-competitive prohibited practices infringement).

⁷⁵ Jason van Dijk and Marianne Wagener 'Is the Competition Act really benefiting consumers? Deney's Reitz Attorneys News May 1, 2009 and June 17, 2010

- If they were aware of these mechanisms, what would they do if there was a finding of contravention of the CA of 1998, which finding impacted directly on them as consumers?
- What are the obstacles or challenges on their part to exercise the right conferred to them in terms of this section?
- What form of assistance or support do consumers or their representatives (consumer groups) need to lodge follow up claims with civil courts?

6.2 Research Methodology

The South African Competition Act is fairly new and has been in existence for little more than a decade. Despite this the competition authorities have successfully prosecuted and settled with the infringers of the CA of 1998, a number of cases, the majority of which affected consumers directly or indirectly through passing-on. Amongst these cases includes the bread cartel, milk cartel and the wheat milling cartel which has since been referred to the CTSA for prosecution.

On this basis, the researcher opts to use the quantitative research method by collecting, analyzing and interpreting the responses received from consumers and their representative organization. The response from both consumers and their representatives were sourced through the developed questionnaire. Apart from individual consumers responses received, only one representative labour federation responded. This organization represents the majority of employees through the affiliated labour unions in the RSA.

The intention was also to get views from other consumer organizations such as Blacksash and the National Consumer Forum, which are dedicated specifically to the promotion and protection of consumer rights in South Africa. Unfortunately, there was no response from these two organizations offices. However, direct responses from

consumers and a labour federation movement which represents a number of unions which are affiliated to it in the RSA suffice for this investigation.

In addition to the views of consumers, the researcher will also use comparative study by collecting data from the competition authorities' counterparts, analyse and interpret it to determine how they have dealt with the research in question. In this instance, the researcher intends to limit the comparative study to the EUCA and the FTCBC as they have previously developed guides relating class actions/collective claims.

6.2.1 Population Study

Population is a group of people or any collection of samples in the research study. The population under investigation is individual consumers including employees of the CCSA and the consumer umbrella bodies in South Africa such as the labour federations (Cosatu), Blacksash and the National Consumer Forum ("NCF") which represents the interests of consumers in the country.

6.2.2. Sampling

Sampling involves selecting certain individuals to measure from a larger population. For this purpose, the researcher will use questionnaire to be addressed to consumers, employees' of the competition authorities, members of consumer groups such as the Congress of South African Trade Union and the National Consumer Forum in investigating the research question.

6.2.3. Data Collection

The data collection method is a tool used to gather information on the research study. The researcher will make use of the qualitative data collection method which can be collected with relative speed and ease. The researcher developed the questionnaire and forwarded the same to consumers, competition authorities employees, consumers'

representative organizations such as the Congress of South African Trade Unions (Cosatu), National Consumer Forum (NCF) and Black Sash. Although, there was no response from the two consumer representative groups i.e. the National Consumer Forum and Black Sash, the response from consumers themselves is a true reflection of the challenges they have in so far as section 65 of the Competition Act of South Africa is concerned.

In addition, research information or the data relating to the question under investigation will be sourced from the competition authorities of South Africa counterparts in particular the European Union Communities and the United States Federal Trade Commission Bureau of Competition.

CHAPTER 2

REMEDIES PROVIDED BY THE COMPETITION ACT AND PROBLEMS RELATED THERETO

1. Introduction

Apart from making the findings listed in section 58 of the CA and imposing the administrative penalties in accordance with section 59, conduct that constitutes prohibited practices in terms of the CA may also be addressed in other ways provided for by the Act. As such consent orders may be entered into or , where applicable, a firm may apply for corporate leniency or exemption.

2. Consent orders in terms of section 49D

If, during or after the completion of the investigation of a complaint, the Competition Commission and the respondents agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b)⁷⁶.

After hearing a motion for a consent order, the Competition Tribunal must⁷⁷

- (a) make the order as agreed to and proposed by the Competition Commission and the respondent;
- (b) indicate any changes that must be made in the draft order before it will make the order; or
- (c) refuse to make the order.

With the consent of a complainant, a consent order may include an award of damages to the complainant⁷⁸. However such a consent order does not preclude a complainant

⁷⁶ S49D(1).

⁷⁷ S49D(2).

⁷⁸ S49D(3).

from applying for a declaration in terms of section 58(1)(a)(v) or (vi) interdicting a prohibited practice or declaring conduct to be a prohibited practice⁷⁹. It also does not preclude a complainant from applying for an award of civil damages in terms of section 65 unless the consent order includes an award of damages to the complainant⁸⁰.

Thus, where the complainant is a consumer or consumer group, it would be possible for such a consumer or consumer group to come to an agreement with the firm/s guilty of cartel activity to pay a certain amount of damages to the consumer or consumer group. Such an arrangement would be beneficial in the sense that it would not involve protracted and expensive litigation. However, consumers are very seldom the complainants in cartel matters and this remedy thus has limited application.

3. The Corporate Leniency Policy

Another issue that may complicate civil litigation by consumer-victims of cartel activity is the Corporate Leniency Policy (CLP)⁸¹ which was introduced by the Competition Commission on 6 February 2004. In terms of this non-binding policy, which applies only to cartel activity, the exposure of cartel behavior is encouraged and rewarded.⁸² The purpose of the CLP is to improve the detection and prevention of cartel activities⁸³.

In essence this policy enables the Competition Commission, in its discretion, to grant a cartel member who is first to approach the Commission (thus a whistleblower) immunity or indemnity for its participation in the cartel activity⁸⁴. Only a firm that is first to the door to confess and provide information to the Competition Commission in respect of particular cartel activity qualifies for complete immunity should the Commission exercise

⁷⁹ S49D(4)(a).

⁸⁰ S49D(4)(b).

⁸¹ Neuhoff et al 367.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

its discretion favourably⁸⁵. Those members of a cartel who are not first to confess but subsequently co-operate fully with the Commission, although not qualifying for immunity, could qualify for a reduction in any administrative penalty imposed⁸⁶.

The CLP provides for conditional immunity as a precursor to total immunity or no immunity. Once the Competition Commission finalises its preliminary investigations and is of the opinion that it has sufficient evidence to institute proceedings in respect of the reported cartel conduct, it will give the co-operating applicant total immunity⁸⁷. Total immunity is granted to a successful applicant who has met all the conditions and requirements, has not previously been found guilty of cartel activity and has not been the instigator or leader of the cartel in question⁸⁸. The Commission however will not grant immunity to an applicant who fails to meet the necessary requirements and conditions or who are dishonest⁸⁹.

The requirements for obtaining immunity under the CLP are the following⁹⁰:

- (a) The applicant must provide the Competition Commission with complete and truthful disclosure of all evidence, information and documents relating to the cartel activity in its possession or under its control;
- (b) The applicant must offer full and expeditious co-operation to the Competition Commission until the Commission's investigations are completed and the subsequent proceedings in the Competition Tribunal are completed;
- (c) The applicant must immediately cease the cartel activity or act as directed by the Competition Commission;
- (d) The applicant must not have been the instigator of, or have co-erced other firms to be part of the cartel activity; and

⁸⁵ Neuhoff et al 368.

⁸⁶ Ibid.

⁸⁷ Neuhoff et al 369. The Competition Commission reserves the right to revoke the conditional immunity if the applicant does not co-operate.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Neuhoff et al 370.

- (e) The applicant must not alert former cartel members that it has applied for leniency.

Immunity will be revoked where there is lack of co-operation by the applicant or misrepresentation of facts, dishonesty and failure by the applicant to meet the conditions for conditional or total immunity or where a person commits an offence by knowingly providing false information to the Competition Commission⁹¹. It is to be noted that the granting of immunity under the CLP will not shield an applicant from criminal prosecution⁹². The CLP does also not provide for the protection of an individual employee who wants to report a prohibited practice⁹³

It is also a concern that some of these penalties came as a result of a negotiated process between the competition authorities and the CA of 1998 infringers in a form of the Corporate Leniency Programme (CLP) or consent orders. The problem with these models of settlement is that the alleged contraveners of the CA of 1998 may argue that they did not contravene the Act but find it necessary to negotiate settlement to avoid possible legal costs which may be far more expensive if they chose the litigation route. This becomes a huge challenge for consumers to take on the infringers in terms of claims for financial losses as there was no finding or a judgment that the firms involved have indeed contravened the CA of 1998.

4. Problematic issues regarding institution of a civil claim

4.1 Introduction

The chairperson of the National Consumer Forum (NCF), Thami Bolani, remarked at the Tiger Brands bread price fixing hearing before the Competition Tribunal that the process

⁹¹ Ibid.

⁹² Ibid.

⁹³ Neuhoff et al 369. However, the restricted information provisions provide for treating an individual's identity as restricted information at the request of the individual concerned. However the individual wish to become a complainant should, the request for confidentiality would have to be waived in writing.

of lodging complaints and having them addressed needs to be streamlined and easy to access. He pointed out that the reason why most consumers and small businesses do not use the existing channels is that they lack the financial resources. However, companies use revenue from consumers to employ specialized people to protect their interests but consumers have no such resources to protect themselves, or to finance their efforts to seek redress after being unfairly treated.⁹⁴ It appears that most consumers are ignorant about the existence and contents of section 65 of the CA, and thus unaware of the possibility to institute proceedings to recover their “cartel losses”.

However, even in those instances where consumers are aware of these rights or are assisted by consumer protection groups, the procedural and evidential impediments to instituting civil claims may in most cases prove to be insurmountably onerous. Some of the challenges facing a consumer who wishes to institute civil action to recover losses resulting from cartel activity are:

4.2 Locus standi

As indicated, very often the consumers who suffer most as a result of cartel activity are vulnerable consumers who are forced to pay higher prices for basic food such as bread. Clearly such a consumer on his or her own will not have the necessary funds to pursue a civil claim for losses occasioned by cartel activity. In most cases these individual losses on their own would not be of such an economic extent as to justify expensive, time-consuming litigation even if the consumer was in a financial position to pursue civil action. The test for standing in South Africa is whether a party has a direct and substantial interest, which should not be a mere financial interest, in the matter before the court.⁹⁵ Although in the high court, the Uniform rules of court provide for joinder of plaintiffs, it does not provide for a general class action procedure⁹⁶. The same is the

⁹⁴ National Consumer Forum Consumer fair November-December 2008 pg.4

⁹⁵ *Pete et al Civil Procedure* (2007) 13; *Henri Viljoen v Awerbuch Brothers* 1953 (2) SA 151 (O); *Khumalo v Wilkins* 1972 (4) SA 470 (N).

⁹⁶ See High Court Rule 10 and 12.

position in the Magistrates Court where joinder is governed by sections 41 and 42 of the Magistrates Court Act⁹⁷ read with Magistrates Court Rule 28.

From the point of view of the indigent consumer civil litigation to recover economic loss as a result of cartel activity will however not be an option unless the possibility exists to proceed by way of a class action. In essence a class action is a collective remedy brought by a class representative on behalf of a specific class of litigants⁹⁸.

However, within the South African procedural context, instituting a class action is problematic. As long ago as with the judgment in *Wood & Others versus Ondangwa Tribal Authority & Another*⁹⁹ already certain principles were accepted in our courts regarding plaintiffs acting in a group. In this matter the Appellate Division allowed church leaders to claim an interdict in the interest of a large, vaguely defined group of persons who feared that they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations.¹⁰⁰ The court allowed the church leaders to act on behalf of a group of persons in a representative capacity.¹⁰¹

Also in the matter of *Rail Commuters Actions Group and Others versus Transnet Limited t/a Metrorail and Others (NO1) 2003 (5) SA 518 (C)*¹⁰², a voluntary association brought an action on behalf of applicants against Transnet Limited t/a Metrorail to ensure safe rail commuters service in which violent attacks on passengers are prevented.¹⁰³ The voluntary association was formed in order to ensure that action could be taken to prevent further loss of life and injury to rail commuter population.¹⁰⁴

⁹⁷ Act 32 of 1944.

⁹⁸ See Hurter "Some thoughts on current developments relating to class actions in South African Law as viewed against leading foreign jurisdictions" 2006 *CILSA* 485; Hurter "The class action in South Africa *quo vadis?*" 2008 *De Jure* 293; Gericke "Can class actions be instituted for breach of contract?" 2009 *THRHR* 304.

⁹⁹ 1975(2) SA 294 (A).

¹⁰⁰ *The International Comparative Legal Guide to Class and Group Actions* (2010) 138. www.iclg.co.uk

¹⁰¹ *Ibid*

¹⁰² 1975(2) SA 294 (A).

¹⁰³ *Ibid*

¹⁰⁴ *Ibid*

From these aforementioned cases it becomes evident that the issue of class actions or associational representation before the courts existed in South African law long before the democratic regime. However, the class action remedy and procedure was never formalized nor legislated to give proper guidance to consumers or representative organizations wishing to pursue class actions before the South African courts.

In its first report the Nel Commission deplored the fact that class actions were not available to the thousands of participation bond investors, holders of debentures and other creditors who had lost hundreds of millions of rands in companies such as the Masterbond Group, Supreme Bond, Owen Wiggins, Fancourt and Marina Martinique.¹⁰⁵ It indicated that the people who suffered most were often elderly, not wealthy and individually did not have the means or the courage to litigate.¹⁰⁶ In this regard the Commission stated: “Had a class action been available to them there is little doubt that actions with more than a fair chance of success would have been instituted by them against all the directors and auditors of all the Masterbond companies, the directors and auditors of Fancourt, the directors and auditors of Marina Martinique, the directors and auditors of Owen Wiggins, the directors and auditors of the Supreme Group of Companies and all the intermediaries who advised their clients to invest in entities such as Masterbond, Fancourt, Marina Martinique and the Supreme Group”.¹⁰⁷

Pursuant to a request in 1992 by the then Minister of Justice, the South African Law Commission undertook an investigation into the possible introduction of class actions into South African Law.¹⁰⁸ During 1998 an attempt was also made to provide for a procedure for the institution of public interest and class actions by the South Africa Law

¹⁰⁵ Justice H.C. Nel, Commission of Inquiry into the Affairs of the Masterbond Group and investor protection in South Africa: Corporate Law and Securities Regulation in South Africa (April 2001) p 19

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ South African Law Reform Commission (Project 88) *The recognition of class actions and public interest actions* (August 1998). See also South African Law Commission *The Recognition of a class action in South African Law* (Working Paper 57, 1995).

Commission's Draft Bill¹⁰⁹, entitled "Public Interest and Class Actions Act" .¹¹⁰ However, this draft bill has not been promulgated into law yet.¹¹¹

Like the Supreme Court Act and Uniform Rules of court, the Competition Act also does not provide for institution of class actions by consumers who have suffered economic loss due to cartel activity. Actually, as indicated above, no legislation currently exists that provides for a general class action or that sets out the procedural and other requirements for bringing a class action.

It is to be noted that section 38 of the South African Constitution¹¹² provides for the introduction of a class action when a right protected by the Bill of Rights has been infringed or is threatened.¹¹³ As such the section provides:¹¹⁴

"Anyone listed in this section has the right to approach a competent court, *alleging that a right in the Bill of Rights* (own emphasis) has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) *anyone acting as a member of, or in the interest of, a group or class of persons;*(my emphasis)
- d) anyone acting in the public interest;
- e) an association acting in the interest of its members".

¹⁰⁹ The International Comparative Legal Guide to: Class and Group Actions 2010 p 106

¹¹⁰ The International Comparative Legal Guide to: Class and Group Actions 2010 p 137. www.iclg.co.uk

¹¹¹ Ibid

¹¹² The Constitution of the Republic of South Africa , 1996.

¹¹³ Justice H.C. Nel, Commission of Inquiry into the Affairs of the Masterbond Group and investor protection in South Africa: Corporate Law and Securities Regulation in South Africa (April 2001) p 19

¹¹⁴ Ibid p 19-20

However, it is submitted by Kok, that it appears that the *locus standi* afforded to a class of litigants by virtue of this section is limited to losses suffered as a result of violations of the basic human rights contained in the Bill of Rights.

Despite the lack of legislation providing for general class actions on a substantive and a procedural level, the South African high courts have in a number of instances come to the aid of vulnerable consumer groups by laying down rules of practice applicable to class actions. However, the exact scope of this practical class action remedy and whether South African law as a result thereof can be said to have recognized a general class action remedy, is still uncertain.

Because South Africa does not have a promulgated legislation to cater for class/group actions, no procedure to opt-in or opt-out of a class or group action exists.¹¹⁵ Fortunately, the Supreme Court of Appeal has exercised its discretion as one of its inherent powers, to allow for potential plaintiffs to opt-in or opt-out in the matter of *Permanent Secretary, Department of Welfare, Eastern Cape and Another versus Ngxuza and Others*.¹¹⁶ The plaintiffs in this matter wanted the court to order that they were entitled to a class action and public interest proceedings and brought the application to proceed under Section 38 of the Constitution.¹¹⁷ The court subsequently granted an order requiring the provincial government to provide details of members of the class kept on computer or physical file, and a publication order, requiring the plaintiffs to disseminate information about the proposed class action through the print and radio media in the province and, with the assistance of the provincial government, by notices at pension payout points.¹¹⁸ The object of the publication order was to allow

¹¹⁵ Ibid

¹¹⁶ 2001 (4) SA 1184 (SCA).

¹¹⁷ Ibid

¹¹⁸ Ibid

members of the class, if they so wished, an opportunity to exclude themselves from the proposed proceeding, thus to opt-out of the proceedings.¹¹⁹

Some progress has also recently been made with the promulgation of the Consumer Protection Act¹²⁰ which provides that a class of persons will have *locus standi* where their rights in terms of the aforesaid act have been infringed, impaired or threatened or where conduct prohibited by the Consumer Protection Act has occurred or is occurring. The Consumer Protection Act does however not lay down the procedure for such class actions. Section 48 of the Consumer Protection Act provides that goods may not be supplied to a consumer at a price that is unreasonable, unfair or unjust and it is submitted that this provision read together with the relevant provisions of the CA might possibly enable consumer groups to claim *locus standi* in a class action as envisaged in section 4 of the Consumer Protection Act. Whether a court will uphold this assertion of *locus standi* however remains to be seen.

Thus, it is undeniably clear that the absence of specific legislation catering for class actions and the procedure to be followed when instituting a class action may cause difficulty for consumer- victims of cartel activity in their quest to employ civil procedure to recover economic losses. Should the legislator intervene by promulgating legislation to facilitate general class actions or should the courts refine the procedure to such an extent that it is comprehensive enough to cover civil claims by classes of consumers for economic loss resulting from cartel activity, it will constitute a step forward but the procedural dilemma of proceeding by means of a class action itself will be challenging to indigent consumers. The reason for this is because even if a comprehensive class action procedure is to the avail of consumers, the procedure itself is complex and will still yield various requirements and challenges that will need to be met before the class action can progress.

¹¹⁹ Ibid

¹²⁰ Act 68 of 2008.

4.2.1 Quantification of damages

In order to claim damages a consumer will have to prove the extent of the losses suffered by him or her. This is ordinarily done by means of presenting expert evidence on the quantification of the losses suffered. The cost of consulting such experts and securing their services may prove to be a further impediment against instituting civil action. The quantification of damages may also further be complicated by the fact that in many instances the consumer victims of cartel losses might comprise millions of persons who suffer relatively small losses which may prove difficult to quantify. If one for example considers quantifying the losses suffered by consumers as a result of the bread fixing cartel, the magnitude of the class and the inherent difficulty in quantifying the losses suffered becomes apparent.

4.2.2 Jurisdictional and cost issues

There are also jurisdictional challenges in so far as the claim for damages is concerned as it is necessary to determine which court has the power to hear a civil claim for damages in a competition law matter. Considering that a plaintiff can sue in the civil courts for damages only after the South African competition authorities made their final decision (in terms of the Act), it is presumed that the South African civil courts would thereafter have automatic jurisdiction.¹²¹

A Magistrates Court has jurisdiction in the area where the defendant resides, carries on its business, is employed or where the cause of action took place.¹²² If the amount claimed for is under R100 000 then the District Magistrates Court has jurisdiction. If the claim is for an amount of R100 000 but not in excess of R300 00, the Regional Magistrate Courts will have jurisdiction. The High Court has unlimited monetary jurisdiction which is governed by section 19 of the Supreme Court Act 59 of 1959 which

¹²¹ See Kasturi Moodaliyar, James F. Reardon and Sarah Theuerkauf 'The relationship between public and private enforcement in Competition Law – A comparative analysis of South African, the European Union and Swiss Law 7

¹²² Section 28(1)(a) of the Magistrates Court Act 32 of 1944

provides: “A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance”¹²³ .

It is likely that litigation in order to pursue losses suffered by consumers as a result of cartel activity, especially if instituted by way of class action, would most appropriately be dealt with by the high courts rather than the magistrates courts due to their complexity and the amounts involved. However, high court litigation is notoriously more costly than magistrates court litigation and it is thus debatable whether proceeding in the high court would be economically viable for consumers unless they receive funding in respect of such litigation.

It is therefore submitted that even if consumers unite to institute a class action against cartel perpetrators, the cost and protractedness of such litigation might make it unattractive to litigate. The lack of consumer funds thus translates directly into a dire need for funding of this type of litigation failing which the recovery by consumers of losses as a result of cartel activity will remain unattainable

4.2.3 Case law

4.2.3.1 The Nationwide Airlines / Comair Case

In RSA, there has been only a few attempts to sue for civil damages flowing from a contravention of the CA of 1998. One such claim was instituted by Nationwide Airlines and BA/Comair against the South African Airways (“SAA”).

¹²³ Kasturi Moodaliyar, James F. Reardon and Sarah Theuerkauf ‘The relationship between public and private enforcement in Competition Law – A comparative analysis of South African, the European Union and Swiss Law 7

The facts of the case were as follows:¹²⁴ Nationwide Airlines lodged a complaint with the CCSA against SAA in 2001. After a thorough investigation the CCSA established that SAA had abused its dominant position in the market for domestic airline travel by engaging in 'override incentive scheme' and the 'Explorer scheme'. The abuse of dominant position by SAA related to loyalty rebates, in which SAA offered a discount or a rebate payment to a purchaser in return for remaining loyal to a particular supplier. In this case rebates in a form of increased commission payments were made to travel agents in return for increasing SAA sales relative to the previous year sales. These schemes induced travel agents to divert passengers from Nationwide and BA/Comair to SAA, thus resulting in a contravention of section 8(d)(i) inducing a supplier (travel agents) not to deal with SAA competitors.

As a result of its finding, the Competition Commission referred the case to the Competition Tribunal for adjudication. The Tribunal concurring with the Commission's findings ruled as follows:¹²⁵

- That the two incentive schemes SAA used to compensate travel agents for their services gave travel agencies a compelling commercial incentive to sell SAA tickets in preference to those of its competitors; and
- That the SAA's Explorer scheme, a system of rewarding travel agents staff with SAA tickets on the basis of the number of SAA tickets they sold, reinforced the exclusionary effects of the incentive schemes.

In its conclusion, the Tribunal decided that the practical effect of the incentive schemes was to induce suppliers not to deal with SAA's competitors, in contravention of the CA. An administrative penalty of R45 million was subsequently imposed on SAA.

¹²⁴ Bowman Gilfillan articles and updates: Nationwide Settles Damages Claim for SAA's abuse of dominance- by Tamara Dini

¹²⁵ Ibid

Although this case involved a juristic person namely Nationwide Airlines as a plaintiff claiming for damages suffered, it had the potential to serve as a precedent for civil damages flowing from contravention of the CA of 1998. Unfortunately, the defendant in this matter, SAA, settled the claim for damages with Nationwide Airlines out of court, thus foreclosing on the opportunity to set a precedent for other consumers who wish to pursue civil claims as a result of contraventions of the CA.

4.2.3.1 Children's Resources Centre, Black Sash, Cosatu & NCF / Pioneer Foods, Tiger Brands and Premier Foods Case

More recently, after the Competition Tribunal found Pioneer Foods guilty of cartel activity relating to the fixing of the price of bread the Western Cape High Court was approached by the four organizations - the Children's Resources Centre, Black Sash, Cosatu (Western Cape) and the National Consumer Forum – for a provisional class certification order in its lawsuit against Pioneer Foods, Tiger Brands and Premier Foods.¹²⁶ These organizations instituted the lawsuit on behalf of consumers who suffered losses as a result of the aforesaid cartel activity. It was reported that the lawyers for the three companies argued that the pre-trial application was unnecessary and that the organizations failed to obtain a certificate from regulators to file civil damages for the breach of competition law as required by South African law.¹²⁷ Unfortunately, the High Court dismissed the application to certify the action as a class action¹²⁸ and the matter could not proceed.¹²⁹

¹²⁶ Iol "Activists won't let bread makers off". November 29, 2010. www.iol.co.za

¹²⁷ Ibid

¹²⁸ "Class action" means 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 similar in respect of all members of the class, and certified as a class action in terms of section 6 Public Interest and Class Actions Draft Bill.

¹²⁹ Iol "Activists won't let bread makers off". November 29, 2010. www.iol.co.za

Be that as it may, the civil society groups went ahead with their legal fight to hold the firms involved accountable for price fixing conduct by lodging the application for leave to appeal. Unfortunately, the Western Cape High Court dismissed their application for leave to appeal an earlier decision to deny a class certification order against Premier Foods, Tiger Consumer Brands and Pioneer Foods.¹³⁰ Black Sash spokesperson, Nkosikhulule Nyembezi commented thereafter that they would be taking the matter further to the Supreme Court of Appeal.¹³¹ He stated that they believe this issue doesn't just lie in defining the class and having a conclusive list of who has been affected.¹³² They think it's sufficient to describe the class and say all the people who have been negatively affected by the price of bread being artificially increased, needs to be compensated.¹³³

¹³⁰ Sabc News, Civil groups vow to continue fight against bread companies. August 29, 2011. www.sabc.co.za/news

¹³¹ Ibid

¹³² Ibid

¹³³ Ibid

Chapter 3

COMPARATIVE PERSPECTIVES

1. Introduction

In stark contrast with the lack of co-operation by competition authorities to assist consumers in pursuing civil claims as a result of cartel contraventions, the United States Federal Trade Commission, the European Union Commission and the Canadian competition authorities have published a number of notice guidelines on consumer claim for damages as a result of competition law infringements.

2 The European Community (EC) Antitrust Law

2.1 Introduction

The European Union competition law is set forth in Articles 81 and 82 of the Treaty Establishing a European Community ('EC Treaty').¹³⁴ Articles 81 and 82 of the EC Treaty are the equivalent of chapter 2, part A and B of the South African Competition Act of 1998 which deals with restrictive practices and abuse of a dominant position.

Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices pertaining to horizontal co-operations which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition. As an exception to 81(1), Article 81(3) provides that the prohibition contained in Article 81(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not

¹³⁴ Tiana Leia Russell, Exporting Class Actions to the European Union. 164

indispensable to the attainment of these objectives, and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.¹³⁵

A co-operation is of a horizontal nature if an agreement is entered into between actual or potential competitor. Horizontal co-operation agreements can lead to substantial economic benefits in particular if they combine complementary activities, skills or assets. It can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.¹³⁶

No provision in the EC Treaty allows for an action before an E.U. Court by a private party against another private party for a violation of E.U. law, nor does any provision in the EC Treaty set out the conditions under which private parties may sue each other before national courts for violations of E.U. law.¹³⁷ However, in the early years of the European Economic Community, the European Court of Justice (“ECJ”) held that rights conferred by community law can be relied upon in proceedings before national courts.¹³⁸

In *Courage v. Crehan*, the ECJ held that as a matter of community law, the possibility of claiming compensation must be open to any individual who suffers harm as the result of an infringement of community competition laws.¹³⁹ The court emphasized the importance of private enforcement in ensuring the full effectiveness of the competition rules, stating that “actions for damages before the national courts can make a significant

¹³⁵ Communication from the Commission Notice Guidelines on the application of Article 81(3) of the Treaty (2004/C101/08) p1-2.

¹³⁶ EU Draft Communication from the Commission guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements 5.

¹³⁷ Tiana Leia Russell, Exporting Class Actions to the European Union .164

¹³⁸ Ibid

¹³⁹ Tiana Leia Russell, Exporting Class Actions to the European Union 165

contribution to the maintenance of effective competition in the community.¹⁴⁰ The decision in *Courage* was significant in recognizing the importance of private enforcement of Community law.¹⁴¹

The E.U. took another step to encourage private enforcement by passing European Union Directive 98/27/EC¹⁴² which governs injunctions for the protection of consumers' interests.¹⁴³ The directive required all EU member states to implement laws for collective litigation by the year 2000.¹⁴⁴ Under the directive, aggrieved consumers may seek civil relief from wrongdoings that fall within the ambit of the law, but may only do so in an action commenced by a "qualified entity"¹⁴⁵ as defined in Article 3 of the directive.¹⁴⁶ The directive consists of the minimal methodology whereby a class action procedure can be put into effect in all E.U. member countries as part of the overall E.U. Program of consumer protection and antitrust enforcement.¹⁴⁷ Though this collective redress mechanism exists in the E.U., the inability of private individuals to seek reimbursement through the collective litigation hinders the incentive for consumers to engage in collective actions and hinders the potential for a strong deterrent effect.¹⁴⁸ Nonetheless, the directive comprises one more effort by the E.U. to encourage private litigation.¹⁴⁹

¹⁴⁰ Ibid

¹⁴¹ Tiana Leia Russell, Exporting Class Actions to the European Union 165 -166

¹⁴² Council Directive 98/27, 1998 O.J. (L 166) (EC)

¹⁴³ Tiana Leia Russell, Exporting Class Actions to the European Union 166

¹⁴⁴ Ibid

¹⁴⁵ Article 3 defines "Qualified Entity" as follows: For the purposes of this Directive, a "qualified entity" means anybody or organization which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or (b) organizations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law.

¹⁴⁶ Tiana Leia Russell, Exporting Class Actions to the European Union 166

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Ibid

On May 1, 2004, the European Community Regulation 1/2003 was implemented, a significant development within the E.U.'s private litigation landscape.¹⁵⁰ The two key objectives of Regulation 1/2003 were to decentralize the enforcement of EC Competition Law and to strengthen the possibility for individuals to seek and obtain effective relief before national courts.¹⁵¹ Despite the above developments and the ECJ's acknowledgements that "the right to damages is necessary to guarantee the useful effect of the EC competition rules,"¹⁵² numerous barriers to private litigation still exist.¹⁵³ These include, among other things, the cost and risk of litigation, unfavorable discovery rules, uncertainty as to whether plaintiffs can rely on Commission documents and Commission decisions in national proceedings, uncertainty over how national rules on damages and injunctions apply, uncertainty as to who can sue (Competitors, Direct Purchasers, Indirect Purchasers), and the possibility of dual enforcement (National Courts have an obligation to ensure that their decisions do not conflict with any decisions given at the Community level, so national courts may in certain circumstances have to stay proceedings).¹⁵⁴ Additionally, and most importantly, there are still relatively few E.U. Member States that provide any collective action mechanisms.¹⁵⁵

However, the practice of allowing collective actions is developing in E.U. Member States, particularly in the areas of consumer protection, product liability, discrimination, environmental pollution and litigation arising from certain capital market transactions.¹⁵⁶ Several European jurisdictions have either implemented legislation that makes it easier for claimants to bring group or class actions, or are currently considering implementing legislation, especially in the consumer protection context.¹⁵⁷ For this reason, several

¹⁵⁰ Ibid

¹⁵¹ Tiana Leia Russell, Exporting Class Actions to the European Union 167

¹⁵² Commission Impact Assessment, *supra* note 3, 5

¹⁵³ Tiana Leia Russell, Exporting Class Actions to the European Union 167

¹⁵⁴ Ibid

¹⁵⁵ Ibid 167-168

¹⁵⁶ Ibid 168

¹⁵⁷ Ibid

member states now have class action procedures that more closely resemble those available in the United States.¹⁵⁸

In 2002, the Swedish Parliament passed the Group Proceedings Act to make private group actions available in all areas of civil law.¹⁵⁹ The Dutch Parliament passed its own legislation, the Collective Settlement of Mass Damages Act in 2004 being the first European country to adopt the “opt-out” provision of the United States style class actions.¹⁶⁰ In England, representative actions and joinder of claims have long been available, but the recent Enterprise Act 2002 introduced an amendment to the Competition Act expressly granting the right of damages to include group consumer claims before the CAT.¹⁶¹ Following in the footsteps of the above countries, more and more European countries are considering adopting new group litigation laws.¹⁶² France, Ireland, Italy and Finland are all considering legislations facilitating group litigations.¹⁶³ Unfortunately some E.U. Member States still lack the procedural devices to bring collective actions, and even in Member States with the requisite procedural devices, the lack of funding often poses an impediment to effective collective actions.¹⁶⁴ Due to the inconsistent and piecemeal attempts by Member States to introduce collective actions, the E.U. is considering implementing a more uniform approach to collective actions, particularly within the realm of competition law, suggesting that the E.U. is heading towards a “single set of consumer rights and obligations” with an effective and efficient enforcement system.¹⁶⁵

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid (also See Ashurst LLP, The Availability of “Class Actions” in Europe, at 15 (Dec. 2007); Lin supra note 3, at 146

¹⁶¹ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 168-169

¹⁶² Ibid pg. 169

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Ibid pg. 169-170

In March 2007, the European Commission launched two studies on collective redress.¹⁶⁶ The first of these studies evaluates the redress that currently exists in E.U. Member States, assesses whether consumers suffer detriment in those Member States where collective redress mechanisms are not available, and examines the existence of negative effects for the single market and distortions of competition.¹⁶⁷ The second study analyzes in detail the problems faced by consumers in obtaining redress for mass claims, as well as the economic consequences of such problems for consumers, enterprises and the market.¹⁶⁸

Collective redress for victims of EC antitrust infringements poses special issues because of the specific nature of antitrust law and the wider scope of victims.¹⁶⁹ The E.U. has published both a Green Paper and a White Paper on Damages Actions for Breach of the EC Antitrust Rules which both extensively discuss the possible introduction of collective action devices within E.U. competition law.¹⁷⁰ The European Commission adopted a Green Paper and a Commission Staff Working Document on Damages actions for breach of the EC antitrust rules in December 2005, accompanied by a Comparative Study undertaken by the law firm Ashurst.¹⁷¹

On 2 April 2008, the EU Commission adopted and published a White Paper on Damages Actions for Breach of the EC Antitrust rules (herein referred to as the White Paper of 2008)¹⁷². The primary objective of this White Paper of 2008 is to improve the legal conditions for victims to exercise their rights under the Treaty to reparation of all

¹⁶⁶ Ibid pg. 170

¹⁶⁷ Ibid (also See European Commission DG SANCO Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union Final Report, available at http://ec.europa.eu/consumer/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf.

¹⁶⁸ Ibid (also See the European Commission Report on Consumer Redress in the European Union: Consumer Experiences, Perceptions and Choices (Aug. 2009), available at http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf

¹⁶⁹ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 170

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Dr. W. Beckert et al, Quantifying antitrust damages (2009) p 1

damage suffered as a result of a breach of the EC Antitrust rules. Full compensation is, therefore, the first and foremost guiding principle.¹⁷³

Of importance is the introduction of guidelines relating to the European Union damages actions. The EU White Paper of 2008, and its accompanying Commission Staff Working Paper, emphasise the following main principle behind damages claims under Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of TFEU), as established in EU case law, by stating:¹⁷⁴

“Any citizen or business who suffered harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage.¹⁷⁵ This right of victims to compensation is guaranteed by community law, as the European Court of Justice recalled in 2001 and 2006.”¹⁷⁶

Victims of these infringements are entitled to compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.¹⁷⁷ A major policy concern that the White Paper of 2008 seeks to address is that, ‘to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered.’¹⁷⁸

¹⁷³ Ibid

¹⁷⁴ Dr. W. Beckert et al, *Quantifying antitrust damages* (2009) p 1

¹⁷⁵ Ibid

¹⁷⁶ Ibid (Also see European Commission (2008a), p. 2. The Court of Justice judgments referred to are Case-453/99, *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297, and Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619.

¹⁷⁷ Dr. W. Beckert et al, *Quantifying antitrust damages* (2009) p. 2

¹⁷⁸ Ibid. The Commission’s consultation process and subsequent debates on the White Paper of 2008 have identified a range of obstacles to the enforcement of the victims’ rights to damages. These obstacles are often derived from legal and procedural rules in member states, which in turn give rise to legal uncertainty. They relate to matters such as access to evidence, the definition of damages, the availability of the passing-on defence, the standing of indirect purchasers and end-consumers, collective redress mechanisms and the costs of damages actions.

The Commission's Impact Assessment accompanying the White Paper of 2008 found the level of the uncompensated damages in the field of competition law to be "particularly big", in part due to "a number of particular characteristics of actions for damages for competition infringements.... [Including] the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants."¹⁷⁹ Since antitrust infringements usually involve damages which are spread widely among a large number of victims, the victims of these infringements are often reluctant to file suit due to the costs of litigation in relation to their potential pay-outs, procedural difficulties within the E.U and the complicated analysis often required in antitrust cases.¹⁸⁰ The Comparative Impact Assessment concluded that it is very difficult to exercise the right to antitrust damages and that very few victims are compensated.¹⁸¹

Given the immense and diffuse nature of damages arising from many competition claims, the possible introduction of collective actions in the E.U offers one of the best chances of increasing private enforcement.¹⁸² The White Paper of 2008 goes a long way towards realizing consumer rights as it focuses on four different collective redress mechanisms namely: Joinder, Representative Actions, Opt-in collective actions and Opt-out collective actions.¹⁸³

In analyzing the four collective action policy options, the White Paper of 2008 balances its stated goals (with emphasis on compensation) against the following costs: litigation

¹⁷⁹ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 172 (also See the Commission Impact Assessment, supra note 3, at 13.

¹⁸⁰ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 172

¹⁸¹ Ibid

¹⁸² Ibid. Russel cautions that if Europe seriously hopes to promote private enforcement, particularly in competition law, there is little doubt that they will need to institute some mechanism for bringing collective actions. According to her the E.U should consider carefully how proposed mechanisms for collective actions will interact with the existing E.U legal and procedural framework.¹⁸² In this regard the White Paper of 2008 considers various policy options to determine the most appropriate form of collective actions.

¹⁸³ Ibid

costs, administrative burdens, error costs and costs of harmonization.¹⁸⁴ Of the four policy options, the White Paper of 2008 ultimately recommends two collective redress mechanisms namely, representative actions brought by qualified entities and Opt-in collective actions.¹⁸⁵

The distinction is further made between private damages claims and private enforcement of the competition claims.¹⁸⁶ “Private damages claims may be brought after public or regulatory action has been taken by a court or relevant competition authorities, so called “follow-on” claims.¹⁸⁷ Such claims enable compensation of those who have suffered loss due to the unlawful behavior in question and may have a deterrent effect additional to that of the public sanctions (including fines).¹⁸⁸

In addition to follow on claims/actions, private damages may also be brought where the claimant does not rely on a pre-existing infringement decision/judgment and still needs to prove the infringement, the so called ‘stand alone’ or ‘original actions’.¹⁸⁹

On the other hand, private enforcement of the competition law occurs where urgent action needs to be taken to prevent anti-competitive behavior by enabling urgent orders to be imposed by courts without the involvement of regulatory authorities. Private enforcement in this context refers to bringing private actions claim compensation for harm caused by infringements of Article 101 or 102.¹⁹⁰ These can either be ‘follow-on actions’- subsequent to a finding of infringement by a court or competition authority – or ‘stand-alone’ or ‘original actions’- where the claimant does not rely on a pre-existing

¹⁸⁴ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 176

¹⁸⁵ Ibid

¹⁸⁶ Daniel, B., and Monckton C., 2006. Damages in competition law litigation in the United Kingdom, p1-2.

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Dr. W. Beckert et al, 2009. Quantifying antitrust damages, pp.i.

¹⁹⁰ Ibid p 1

infringement decision/judgement and still needs to prove the infringement.¹⁹¹ Thus, it is possible to have the private enforcement of competition law without or additional to damages claims¹⁹².

The EUC distinguishes between “individual redress” and “collective redress” for purchasers who have suffered harm caused by an antitrust infringement to claim damages before national courts. This principle also applies to indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

With respect to “collective redress” the EUC suggested a combination of two complementary mechanisms of collective redress to address effectively issues of antitrust affecting individual consumers and small businesses especially those who have suffered scattered and relatively low-value damage and are deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. The two complementary mechanisms for collective redress are representative actions and opt-in collective actions. These two collective redress mechanisms are discussed separately and fully below:

2.2 Representative actions

Representative Actions are actions initiated by an *ex ante* authorized representative body on behalf of a specific group of victims.¹⁹³ They refer to those actions brought by qualified entities such as consumer associations, state bodies or trade associations on behalf of unidentified or, in rather restricted cases, identifiable victims.¹⁹⁴ These entities

¹⁹¹ Ibid

¹⁹² Daniel, B., and Monckton C., 2006. Damages in competition law litigation in the United Kingdom, pp.1-2

¹⁹³ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 176

¹⁹⁴ EC Commission white paper on damages actions for breach of the EC antitrust rules, 2008 (165 final)

are either officially designated in advance or certified on an *ad-hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members”.¹⁹⁵ Associations may claim damages on behalf of their members either because they generally represent their interests or because the association is established with the particular aim to represent the claims of its members in specific cases, as was done on the Skandia Case in Sweden.¹⁹⁶ While representative actions for damages may be an appropriate way to encourage greater private enforcement of competition cases, procedures for representative bodies to bring this type of action on behalf of the victims they represent are, for the most part either not currently available under national law or not fully suitable.¹⁹⁷

Russel points out those representative actions have their own pros and cons. its advantages include increased access to information, more evenly matched opponents, greater detection of competition law infringements, less rational apathy, and easier financing through fees.¹⁹⁸ Representative actions by associations also offer more possibilities to curb principal-agent problems than do other forms of class actions.¹⁹⁹ On the other hand, one of main obstacles to representative actions is funding.²⁰⁰ One potential solution is the creation of a “partially publicly financed fund. . . in which revenues (for example, proceeds from disgorgement procedures) are used to cross-finance damages claims.”²⁰¹ Such a fund may also be made accessible for representative actions.²⁰² While public subsidies may be considered . . . this moves

¹⁹⁵ EC Commission white paper on damages actions for breach of the EC antitrust rules, 2008 (165 final)

¹⁹⁶ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 176 (also See Welfare Impact Report, supra note 4, at 271 n.441 (“The Skandia case concerned the illegal transfer of money between the parent company Scandia AB and other subsidiaries to the detriment of 1.2 million private insurance policy holders of the subsidiary Scandia Liv. To make the procedure manageable the association Foereningen Grupptalan mot Skandia was founded. In the first six months already 15 000 victims became members and paid a small membership fee. The fees were used to partially finance the class action, in combination with a risk contract with the lawyers”))

¹⁹⁷ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 176-177

¹⁹⁸ Ibid pg. 177

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Ibid

²⁰² Ibid

private enforcement closer to the domain of public enforcement and makes associations dependent on their financiers.²⁰³ Another option is the creation of professional litigation companies.²⁰⁴ However, representative actions alone do not adequately address the shortcomings of private enforcement in the EC competition law.²⁰⁵ Therefore, a more aggressive form of collective action litigation is required if the E.U. hopes to possess an active private enforcement landscape in the field of competition law.²⁰⁶

2.2 Opt-in Collective Actions

Opt-in collective actions refer to collective actions in which victims of antitrust infringement expressly decide to combine their individual claims for harm they suffered into one single action.²⁰⁷ After considering representative actions, the Commission considers opt-in and opt-out collective actions.²⁰⁸ The White Paper of 2008 ultimately asserts a preference for opt-in collective actions.²⁰⁹ The white Paper of 2008 justifies its choice of opt-in collective actions over opt-out collective action by pointing out that opt-out actions have in other jurisdictions been perceived to lead to excesses.²¹⁰ In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem).²¹¹

Opt-in mechanisms come closest to the traditional E.U. legal principle that the outcome of a case is binding only *inter partes*.²¹² Opt-outs have an impact on the rights of individual parties unless they become active and declare not to be willingly bound by the

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Ibid

²⁰⁶ Ibid

²⁰⁷ EC Commission white paper on damages actions for breach of the EC antitrust rules, 2008 (165 final)

²⁰⁸ Tiana Leia Russell, Exporting Class Actions to the European Union pg. 177

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ Ibid

²¹² Tiana Leia Russell, Exporting Class Actions to the European Union pg. 178

judgment or the settlement.²¹³ It carries the risk that individuals who were not aware of the proceedings may be bound by the resulting verdict.²¹⁴ The possibility that “members of the group who were never [made] aware of the proceeding may be bound by the outcome . . . creates conflicts with constitutional rights.”²¹⁵ As a result, “introducing opt-out collective actions would require substantially larger changes than other forms of group litigation in many legal systems.”²¹⁶

However, any collective redress mechanism will be significantly hamstrung if there is not an efficient means of financing it.²¹⁷ “The Ashurst Report (2004) reveal(s) that in all Member States legal costs have to be paid upfront and in all but two Member States the “loser pays”- rule applies.”²¹⁸ This system discourages a plaintiff from bringing any cause of action, especially competition law violations against powerful corporations who will likely have substantial litigation costs.²¹⁹ Thus, if Europe truly hopes to make class actions available, they will have to rethink their current system of financing.²²⁰

Fortunately, several alternative ways of funding group litigation are available, and, in some cases, have already been adopted in different jurisdictions within Europe.²²¹ Contingency fees are one way to overcome the obstacles of financing litigation when the liquidity of plaintiffs is constrained.²²² However, contingency fees are currently not permitted in the E.U. Member States.²²³ Another option is to introduce one-way fee shifting rules for private antitrust litigation such as that introduced by the U.S. Clayton

²¹³ Ibid

²¹⁴ Ibid at 179

²¹⁵ Ibid

²¹⁶ Ibid

²¹⁷ Ibid

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ Ibid

²²¹ Ibid

²²² Ibid

²²³ Ibid at 179-180

Act.²²⁴ The British have found a way around the ban on contingency fees in the form of professional litigation funders.²²⁵ Funders are companies or individuals – anyone but a licensed lawyer – who contract with plaintiffs to sponsor their lawsuit.²²⁶ In exchange, they take a percentage of the award if the plaintiffs prevail, or nothing if they lose.²²⁷ Another option available as a means to facilitate private litigation is the creation of Contingency Legal Aid Funds (“CLAF”) for damages actions, especially in cartel cases.²²⁸ CLAF’s are currently operated in Canada, Australia and Hong Kong.²²⁹ Another option is to use the pool of money from unclaimed rewards to finance litigation.

3 The Antitrust Laws of the United States

In the United States of America (“USA”), there are three major federal antitrust laws namely, the Sherman Antitrust Act (“SAA”), the Clayton Act (“CTA”) and the Federal Trade Commission Act (“FTCA”)²³⁰ collectively referred to as the Federal Antitrust laws (“FAL”).

In 1890, United States Congress passed the Sherman Antitrust Act in response to public discontent with monopolistic business practice.²³¹ Section 1 of the Sherman Antitrust Act declares illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.²³² Section 2 makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce....”²³³

²²⁴ Ibid at 180

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Anne K. Bingaman, U.S. Department of Justice, Washington D.C. 20530 Pamphlet on Antitrust Enforcement and the Consumer. http://www.pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm

²³¹ Tiana Leia Russell, Exporting Class Actions to the European Union pg 163

²³² Ibid

²³³ Ibid

The Clayton Antitrust Act was passed in 1914 and added even further substance to the USA antitrust law regime by establishing the right to prevent activity in its incipiency which may tend to restraint trade, and by authorizing private rights of action.²³⁴ Section 4 of the Clayton Antitrust Act states that:²³⁵

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”.²³⁶

Additionally, the Clayton Antitrust Act allowed private actions to follow on the decisions of public enforcement agencies, making final judgments or decrees in any civil or criminal suit brought by the United States under the antitrust laws “prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.”²³⁷

3.1 Class Action Litigation in the United States

Private litigation in the USA was encouraged by numerous factors, including a cultural background sympathetic to private enforcement, broad discovery rules, jury trials, contingency fees and the class action rules themselves.²³⁸ Early on, the United States

²³⁴ Ibid

²³⁵ Patricia Hanh Rosochowicz, Deterrence and the relationship between public and private enforcement of competition law²³⁵ Ibid

²³⁵ Ibid

²³⁵ Anne K. Bingaman, U.S. Department of Justice, Washington D.C. 20530 Pamphlet on Antitrust Enforcement and the Consumer. http://www.pueblo.gsa.gov/cic_text/misc/antitrust/antitrust.htm

²³⁵ Tiana Leia Russell, Exporting Class Actions to the European Union pg 163

²³⁵ Ibid

²³⁵ Ibid

²³⁵ Ibid

²³⁵ Patricia Hanh Rosochowicz, Deterrence and the relationship between public and private enforcement w pg.5

²³⁶ Ibid

²³⁷ Tiana Leia Russell, Exporting Class Actions to the European Union pg 163

²³⁸ Tiana Leia Russell, Exporting class actions to the European Union pg. 158

Congress (“USC”) recognized that the government alone would not have the resources to adequately handle the enforcement, so it enlisted the support of its public to serve as “private attorney general” by providing incentives to pursue private litigation in the public interest.²³⁹ This early acceptance of private enforcement gave rise to many of the procedural and legal aspects which have encouraged a private litigation culture in the United States.²⁴⁰

One of the most significant factors incentivizing private litigation in the United States is the procedural rules providing for class action lawsuits.²⁴¹ The U.S class action was originally an “invention of equity, allowing certain groups of individuals with common interests to enforce their rights in a single suit.”²⁴² When the Federal Rules of Civil Procedure (“FRCP”) were first adopted in 1938, the class action was extended to all actions federal courts.²⁴³ Originally, the FRCP provided for three kinds of class actions, depending on the nature of the rights asserted, and under all three categories, individuals had to choose to opt in to the litigation.²⁴⁴ Only those who opted in were allowed to participate in an eventual recovery.²⁴⁵

In 1966, Congress amended the FRCP and introduced Rule 23(b)(3) which was markedly different from its predecessors.²⁴⁶ The revised FRCP allowed the court to certify the plaintiff class of a Rule 23(b)(3) class action without the consent of the plaintiffs.²⁴⁷ A Rule 23(b)(3) class became available when a “court finds that questions of law or fact common to the members of the class predominate over any questions

²³⁹ Ibid

²⁴⁰ Ibid

²⁴¹ Tiana Leia Russel, Exporting class actions to the European Union pg. 159

²⁴² Ibid

²⁴³ Ibid

²⁴⁴ Ibid

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Ibid

affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.²⁴⁸

In the U.S provision is also made for “Treble” damages, which carry both a compensatory and a deterrent aim.²⁴⁹ Their deterrent aspect works at two different levels.²⁵⁰ On the one hand, it is an incentive for private enforcement since private plaintiffs are themselves motivated by a private interest and treble damages might convince them to act, in which case, they might heighten the probability of detection of serious anticompetitive behavior, and thus add to the cost of the offence as the offender would have more chances of being apprehended.²⁵¹ On the other hand, the prospect of paying high amounts of damages can itself be a strong deterrent.²⁵²

Moreover, the recent Antitrust Criminal Penalty Enhance and Reform Act 2004 enacted the “detrebling” provision in the case of a company that cooperates with private litigants against other members of a cartel and the Assistant Attorney General stated that:

“(...) The detrebling provision of the Act removes a major disincentive for submitting amnesty applications, encouraging the exposure of more cartels and making the Division’s Corporate Leniency Program even more effective.”²⁵³

The success of private enforcement in the USA does not depend on the sole trebling provision of the statutes but also on the availability of class actions and contingency fees.²⁵⁴ Indeed, as is explained later, the interest of victims to bring an action against an

²⁴⁸ Ibid

²⁴⁹ Patricia Hanh Rosochowicz, Deterrence and the relationship between public and private enforcement of competition law pg.5

²⁵⁰ Ibid

²⁵¹ Ibid

²⁵² Ibid

²⁵³ Patricia Hanh Rosochowicz, Deterrence and the relationship between public and private enforcement of competition law pg.7

²⁵⁴ Ibid

anti-competitive behavior is most of the time very diluted.²⁵⁵ Therefore, the possibility of bringing actions in groups and the reduction of the costs, by not having to pay lawyer's fees unless the claimant's wins are big incentives to go before the courts.²⁵⁶

There are also three main ways in which the Federal Antitrust Laws (FAL) are enforced: criminal and civil enforcement actions brought by Antitrust Division of the U.S.DoJ, civil enforcement actions brought by the FTC and lawsuits brought by private parties asserting damage claims.²⁵⁷ The latter, enforcement through lawsuits brought by private parties asserting damage claim is relevant for the purposes of this investigation.

The SAA has stood since 1890, it outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate trade. This includes agreements among competitors to fix prices, rig bids and allocate consumers. It also makes it crime to monopolize any part of interstate commerce. The SAA violations are punished as criminal felonies. The Department of Justice alone is empowered to bring criminal prosecutions under the Act. Individual violators can be fined up to \$350,000 and sentenced up to 3 years in federal prison for each offence; corporations can be fined up to \$10 million for each offence. Under some circumstances, the fines can go even higher.²⁵⁸

The CTA is a civil statute (it carries no criminal penalties) that was passed in 1914 and significantly amended in 1950. It prohibits mergers or acquisitions that are likely to lessen competition. Under the Act, the government challenges those mergers that a careful economic analysis shows are likely to increase prices to consumers. All persons considering a merger or acquisition above a certain size must notify both the Antitrust

²⁵⁵ Ibid

²⁵⁶ Ibid

²⁵⁷ Anne K. Bingaman, U.S. Department of Justice, Washington D.C. 20530 Pamphlet on Antitrust Enforcement and the Consumer. http://www.pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm

²⁵⁸ Ibid

Division of the United States Department of Justice and the Federal Trade Commission. The Act also prohibits certain other business practices that under certain circumstances may harm competition.²⁵⁹

A provision in the CTA also permits private parties injured by an antitrust violation to sue in federal court for three times their actual damages plus court costs and attorneys' fees. State attorneys general may bring civil suits under the CTA on behalf of injured consumers in their states, and groups of consumers often bring suits on their own. Such follow-on suits to criminal enforcement actions can be a very effective additional deterrent to criminal activity.²⁶⁰ This provision is relevant to the current research and thus the relevancy of the CTA to the investigation on consumer claim for damages from the RSA perspective.

The FTCA prohibits unfair methods of competition in interstate commerce, but carries no criminal penalties. It also created the FTC to police violations of the Act.²⁶¹

4. Conclusion

It is thus evident that pursuing a civil claim for damages as a result of cartel activity under either EU competition law or US Antitrust law is facilitated not only by providing for such a right but also by providing for class actions and setting out definitive guidelines and rules to accommodate the procedural implementation of such actions. An additional factor that enhances the opportunity of consumers to group together and institute such actions is the availability of funding and the possibility to enter into contingency fee arrangements.

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid

CHAPTER 4

Results of empirical study and concluding remarks

1. Introduction

This chapter analyzes the response from consumers on a percentage (%) basis. It also lists the common challenges consumers to experience and thus discouraging for them to commence civil claims against the infringers of the Competition Act. More so, it lists the form of assistance consumers including consumer groups require in order for them to sue for civil damages following the finding of a contravention of the Competition Act. In the final instance it contains certain suggestions on how to address the problems experienced by consumers who wish to institute civil damages actions in accordance with section 65 of the Competition Act.

2 Data analysis

As indicated in chapter one, the questionnaire consisted of five questions that are aimed at exploring the effectiveness of section 65 of the Competition Act, the difficulties or challenges consumers face exercise their right in terms of this section and the type of assistance needed to encourage them to exercise the right conferred to them in terms of this section.

The responses to all five questions are reflected and analyzed in detail below under each question.

2.1 Respondents opinions on claims for damages in terms of section 65 of the Competition Act

The respondents' information or views relating to the questions asked in the questionnaire is highlighted below per question.

Question 1: As a consumer, are you aware of your right to claim for damages in terms of the Competition Act? The respondents were required in response to this question to tick **Yes** or **No** answer.

Of the response received from consumers, 100% ticked **Yes** confirming that they are aware of the right conferred to them in terms of section 65 the Competition Act to claim for damages suffered as a result of an infringement of this Act. This finding indicates that the consumers' inactiveness on claim for damages since the inception of the Competition Act has got nothing to do with them being unaware of their right in terms of the section.

Question 1.1: If No, have you heard of the Competition Act and the competition authorities before? Similarly, the respondents were required to answer the question by ticking Yes or No answer.

This question related to question 1 above. Only respondents answered by ticking No, where required to tick Yes or No in response to the question of whether they have heard of the Competition Act or competition authorities before. Since all respondents responded by ticking Yes in question 1, Question 1.1 was not applicable or relevant to them.

Question 2: If aware of your right to claim for damages, what would you do if there was a finding of a contravention of the Competition Act which impact directly on you as a consumer? In this question the respondents were required to choose if they will- lodge a follow up claim with the civil court independently, or mobilize consumers to lodge with the civil courts collectively or do nothing about it.

Despite knowledge of their right to claim for damages, majority of the respondents with **50%** indicated in their response that they will do nothing about it; with **30%** of the respondents indicating that they will mobilize consumers to lodge claims with the civil courts collectively and the last **20%** indicating that they will lodge a follow up claim with the civil courts independently should there be a finding by the competition authorities of an infringement of the Competition Act, which finding impact on them directly as consumers. Only one respondent indicated that he will either mobilize consumers to lodge claims with the civil courts collectively or lodge a follow up claim independently.

Question 3: The Act says a person who has suffered loss or damage as a result of a prohibited if entitled to commence an action 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 the Act;
- ii. stating the date of the Competition Tribunal or Competition Appeal Court finding; and
- iii. setting out the section of this Act in terms of which the Competition Tribunal or the Competition Appeal Court made its finding

Is the process available in terms of this Act effective and encouraging for consumers to commence claims before civil courts? Elaborate in your own words. The majority of respondents indicated that the process is neither effective nor encouraging for consumers to commence civil claims. Amongst the submission received is that the process:

- is costly,
- cumbersome for consumers,

- too complex for an individual consumer to follow and too costly to claim on an individual basis,
- is very demanding for South African consumers
- it doesn't take into account that the majority of consumers in South Africa are uneducated and rural,
- it's unlikely that consumers will understand this procedure,
- it appears like another court case,
- people who are mostly affected are unlikely to know who the above institutions are and where would an individual find them,
- the process puts a lot of burden on the consumer who already suffered damages,
- the Act does not outline the process in simple terms, which means that it will always be difficult for consumers without the assistance of a lawyer to institute a claim on their own. Maybe the reason we have not seen many of these kinds of claims is partly because the process is not simple,
- if we want to encourage consumer activism, we have to develop a simplified consumer guide about the processes so that they are able to understand. Perhaps a simplified court process will not be a bad idea,
- corporates are always ready to frustrate consumers with lesser resources than they do by stretching the process longer than necessary,
- the process is also very long winded and time consuming,
- high technical nature of the claim that must be proved to show that as an individual or consumer groups you suffered damages claimed,
- is of a high court which will entail employing legal teams at a huge cost to the consumer,
- documents required by their very nature will require expertise to understand their context and implications,
- may not be effective if we have regard to the kind of consent orders that the competition authorities have concluded with firms that have infringed the Competition Act and often liability is not conceded,

- is intimidatory and immediately discourages because it gives the impression that only lawyers can proceed.

Only one respondent indicated that the process available is effective and encouraging for consumers to commence claim.

Question 4: In your opinion, what are the difficulties/challenges the consumers face in pursuing their right to civil damages in terms of the Competition Act? List them.

In responding to this question, the respondents responded by listing amongst others, the following as challenges/difficulties consumers face to pursue their claim for damages:

- the lack of knowledge of the Competition Act and consumer rights,
- the popularity of signing consent orders between the Commission and the offenders, which consent orders do not contain an admission of guilty,
- the duration it takes for the Commission to finalize its investigation,
- the lack of precedents under South African law,
- financial difficulties in instituting such actions/ high costs of approaching the courts,
- accessibility of the Competition Commission and Tribunal,
- few funded consumer organizations to assist consumers,
- Competition Act not well known by lay-man/consumers,
- lack of information,
- lack of interest/lack of consumer activism,

Question 5: What form of assistance or support do consumers or their representatives (consumer groups) need to lodge follow up claims with civil courts? Please list

In responding to this question, the respondents responded by listing amongst others, the following:

- the Competition Commission and the Competition Tribunal must always be willing to make the information available to the consumers,
- consumers will need legal representative,
- financial aid,
- education / be informed,
- simplified and practical process,
- establish consumer courts to handle this matters,
- fund more consumer organizations from the fines,
- workshop the Competition Act extensively to ordinary consumers,
- Amendment to the Competition Act,
- Consumer rights advocacy,

3. Conclusion on empirical study

In the Republic of South Africa (RSA), there has not been any development on private enforcement guidelines. Speaking at a conference hosted by the CCSA, CTSA and the Mandela Institute, Kasturi Moodaliyar* said that South Africa should be making it easier for parties to claim damages as there are still a number of practical problems in doing this.²⁶² She points out a number of obstacles that consumers would have to deal with if they want to pursue claim for damages i.e:

- the time taken to get the case to trial (“for example, if the case is pending for a lengthy time at the competition courts”)

²⁶² National Consumer Forum Consumerfair Edition 4, 2009 pg.4 (Consumers want their own back)

- the length of the trial (“if the case is not settled at an earlier stage in the proceedings”)
- the cost of litigation (“if the plaintiff loses the case, it might be liable for the respondent’s legal costs”) and
- the uncertainty of the decision imposed (“if the plaintiff is successful, the damages awarded may not be as favourable as expected”).

“It is also problematic trying to organize plaintiffs (aggrieved consumers or competitors) into a group to jointly sue for damages,” said Moodaliyar. “This burden fall on consumer organizations who may not have the resources to pursue the matter²⁶³.” Such legal action is likely to be prolonged and expensive, however, and the consumer movement in South Africa is not sufficiently resourced to fund this action independently.²⁶⁴ Bolani says the National Consumer Forum (NCF) wants government to use some of the money from price-fixing fines to pay for the lawsuits.²⁶⁵ A reference is made to Brazil, where the law entitles consumer bodies to take class action and the state supports these cases financially so that legal costs are not an inhibiting factor.²⁶⁶

The practicality of this kind of action in South Africa, however, is undermined by the weak and under-resourced state of civil society organizations in general and the consumer rights movement in particular.²⁶⁷ We would therefore like to engage the Department of Finance on the matter of using a portion of the fines levied on guilty companies to fund class actions on behalf of consumers who have been disadvantaged by price fixing activities.²⁶⁸ As a consumer rights NGO, we are keen to explore this avenue as a practical expression of our newly

²⁶³ Ibid

²⁶⁴ National Consumer Forum Consumerfair Edition 4, 2009 pg.1 (Price-fixers face consumer backlash)

²⁶⁵ Ibid

²⁶⁶ Ibid

²⁶⁷ National Consumer Forum Consumerfair Edition 4, 2009 pg.2 (NCF’s letter to the Minister of Finance)

²⁶⁸ Ibid

enhanced consumer protection environment, and as a powerful strategy in driving the apparent culture of price-fixing from our economy.²⁶⁹

Unfortunately, the Ministry of Finance replied quite promptly, confirming that the fines did indeed go back to the Treasury, but ignoring the National Consumer Forum (NCF) request for a meeting to further discuss the matter of funding consumer groups from portion of the penalties levied on companies found to have engaged in cartel activities for the consumer groups to pursue civil claims in terms of section 65.²⁷⁰

In the face of all these obstacles, however, there is still a huge value in private enforcement as a way of discouraging firms from breaking competition laws, Moodaliyar said, and government should be pro-active about helping make this happen. “The DTI and the Commission should take the initiative to produce a policy guideline to facilitate private enforcement,” she said. Success of the competition authorities will filter down to consumers who claim compensation in the form of private damages.²⁷¹

Generally the concerns raised by the respondents appear to be more similar especially on the issues around the complexity of the current process in claiming for damages in terms of section 65, the lack of knowledge of the consumer rights in terms of the Competition Act, the litigation costs, the financial aid and the duration of the competition law cases. All these appear to be the most discouraging factors in so far as claim for damages is concerned.

²⁶⁹ Ibid

²⁷⁰ Ibid

²⁷¹ National Consumer Forum Consumerfair Edition 4, 2009 pg.4 (Consumers want their own back)

CHAPTER 5 Concluding remarks and suggestions

1 Introduction

This chapter looks at the response by the respondents as highlighted above as well as the research findings and pertinent issues evident from the comparative study.

2 Research Findings

While the findings in this research study reveals a number of issues, the most dominant issues suggest as a first step the pro-activeness on the competition authorities to simplify the available process to claim for damages and educate the consumers about their right in terms of section 65. Indeed the consumers' submission is very true, this is also substantiated by the fact that for eleven years of existence, only one practice note²⁷² relating to consumers was issued. However, the practice note does not relate to the claim for civil damages under section 65. It relates to trade union notifications under mergers and acquisitions, which is a different subject all together.

For those consumers with knowledge on their right to claim for damages, it will mean that they have no option but to engage the services of a lawyer who will interpret the law and lodge such claims for them. This will simply mean additional expenses on their part when they are not even sure if they will succeed before the civil courts.

The second dominant issue related to the consumer financial aid. One can just imagine taking big corporates to the court on a monthly salary especially with the

²⁷² Notification of merger transactions to Trade Unions as required in terms of Section 13(2) of the Competition Act of 1998 as amended. <http://www.compcom.co.za/practice-notes/>

court delay tactics often taken by the companies. Chances of the consumer succeeding are very slim. It just doesn't worth pursuing the matter to the courts looking at the financial damages suffered by an individual consumer. For this reason, it is indeed true that some form of financial assistance to support the consumer litigation (paying lawyers to represent consumers before the courts) will be helpful if we really want the private damage claim to be effective in South Africa.

The third one related to the popularity of the Commission signing consent orders with the Competition Act offenders, which consent orders do not contain an admission of guilt. In fact one respondent provided in the response to the questionnaire that *"I submit that the process is not completely encouraging for consumers to commence claims before civil courts and may not be effective if we have regard to the kind of consent orders that the competition authorities have concluded with firms that have infringed the Competition Act. Often, liability is not conceded. If the certificate was automatically issued regardless of the settlement reached and be kept on the file to be uplifted at a nominal fee (e.g. R50 a copy) by all affected members, that would be encouraging enough. But clearly, Competition Act is narrowly designed to curb anti-competitive conduct and is least concerned with civil damages occasioned by such conduct"*.

The last key dominant issue related to the establishment of the special consumer courts to handle these matters. However, as an alternative, the amendment to the Competition Act may be necessary to empower the competition authorities to deal with consumer claim for damages in relation to the Act. The amendment should be made in such a way that the Competition Tribunal have jurisdiction to hear and decide on claim for damages suffered as a result of an infringement of the Act with the Competition Appeal Court as the final court on such matters. The current high court process is very complex and costly for consumers in that an

advice from a lawyer would certainly be a necessity if one is to pursue the provisions of section 65.

In fact one of the respondents submit in responding to the questionnaire that - *“the process is very demanding for South African consumers. It does not take into account that the majority of consumers in South Africa are uneducated and rural. It’s unlikely that they will understand this procedure; it appears like another court case. The process puts a lot of burden on the consumer who already suffered damages”*. Therefore, for this reason the consumer court process should be easy and simple to also accommodate the majority of illiterate and rural communities thereby encouraging them to exercise the right conferred to them in terms of section 65 of the Competition Act.

3 Research Recommendations

Instead of making the claiming process in terms of section 65 simple, non-complicated and encouraging enough for ordinary consumers who have suffered financial loss by introducing amendments that would procedurally facilitate such claims, the DTI chose to introduce amendments providing for personal criminal liability for individuals or employees who are involved in cartel activities or causing and/or permitting their firms to engage in anti-competitive practices.²⁷³ Thus, any individual if found guilty of causing the firm to engage in cartel activities could face a jail sentence. A firm to the conduct may not directly or indirectly pay any fine that may be imposed on a person convicted of an offence in terms of this section;²⁷⁴ or indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending against a prosecution in

²⁷³ Section 73A Competition Amendment Act No. 1 of 2009

²⁷⁴ Section 73A (6)(a)

terms of this section, unless the prosecution is abandoned or the person is acquitted.”²⁷⁵.

These criminal liability provisions has not yet been put into effect and it is doubtful whether they will ever be put into effect. Thus it is not certain at this stage if the introduction of criminal liability provisions on individuals coupled with the imposition of the high administrative penalties which may be imposed in terms of the Act will serve as a preventative measure for future contraventions of the CA of 1998 although one may conclude that it has the potential to do so²⁷⁶. It should however be realized that even if these criminal liability provisions are put into effect their deterrent , effect coupled with that of imposition of high administrative fines , may prevent cartel activity to a large extent. However it will not serve to alleviate the plight of those consumers who suffers damages in those instances where cartel activity still occurs and who wishes to recover such damages in civil courts.

It is also a concern that some of these penalties came as a result of a negotiated process between the competition authorities and the CA of 1998 infringers in a form of the Corporate Leniency Programme (CLP) or consent orders. The problem with these models of settlement is that the alleged contraveners of the CA of 1998 may argue that they did not contravene the Act but find it necessary to negotiate settlement to avoid possible legal costs which may be far more expensive if they chose the litigation route. This becomes a huge challenge for

²⁷⁵ Section 73A (6)(b)

²⁷⁶ Russel (at 145) remarks that the logic of anti-competitive deterrence rests on the assumption that potential violators will engage in a cost /benefit analysis before deciding whether to break the law. If the costs exceed the benefits, the potential violator will refrain from illegal activity.

consumers to take on the infringers in terms of claims for financial losses as there was no finding or a judgment that the firms involved have indeed contravened the CA of 1998.

While a provision is made in the CA of 1998 for consumers to lodge a claim with the high court for financial damages suffered as a result of an infringement of the CA of 1998, neither the CA of 1998 itself nor the competition authorities help consumers to get their financial losses back for the extra expenditures incurred as a result of excessively manipulated prices. Therefore, the responsibility for such claims remains with the individual consumers or consumer associations/groups such as the National Consumer Forum (NCF) in the RSA.

The CA of 1998 and the Competition authorities of South Africa have only been in existence for little more than a decade now and there has only been a few publications, mostly in a form of articles and parliamentary discussion, on the question of consumer recourse or benefit from the findings of a contravention of the Competition Act by the competition authorities²⁷⁷. The competition authorities of South Africa have unfortunately not been pro-active in developing educational guidelines or frameworks to create awareness by South African consumers or consumer organizations of their right in terms of section 65 of the Competition Act to pursue civil claims for damages they have suffered as a result of anti-competitive behavior or practices within the economic sectors of the country. In fact the last practice note²⁷⁸ relevant to consumers related to the notification of trade unions or employees representatives (in the absence of a trade union) of a merger transaction. The notice was published in 2000 just less than a year after

²⁷⁷ Most of these articles emanated from law firms and attorneys specializing in the field of competition law in South Africa.

²⁷⁸ Notification of merger transactions to Trade Unions as required in terms of Section 13(2) of the Competition Act of 1998 as amended. <http://www.compcom.co.za/practice-notes/>

the commencement of “restrictive horizontal practices prohibited²⁷⁹”, “restrictive vertical practices prohibited²⁸⁰”, “dominant firms²⁸¹”, “abuse of dominance prohibited²⁸²”, “price discrimination by dominant firm prohibited²⁸³”, “exemptions²⁸⁴” and most importantly “civil actions and jurisdiction²⁸⁵”.

It is submitted that the focus and prioritization for our competition authorities seem to be more on enforcing compliance with the Competition Act. The issue of education or awareness be it in the form of guidelines, practice notes or compliance frameworks for consumers consequently appears to be taking the rear bench. Thus, the responsibility of creating awareness seems to be left to consumer protection groups as well as consumers who need to educate themselves about the Competition Act and the recourse available to them for companies’ failure to comply with the law.

Consumers and/or consumer representatives’ active involvement on follow on claims for civil damages subsequent to findings by the competition authorities on anti-competitive practices will undoubtedly play an important role by deterring companies to further engage in such practices. As stated above, administrative penalties imposed by the competition authorities of South Africa alone are not sufficient enough. The companies’ fear of reimbursing all additional monies obtained through price fixing to consumers, consumer representative organizations or any other scheme established for such purpose will also add to the existing control mechanism available to enforce compliance with the Competition Act. In other words, companies engaging in anti-competitive behavior should know that they will go through the legal process with the

²⁷⁹ Section 4

²⁸⁰ Section 5

²⁸¹ Section 7

²⁸² Section 8

²⁸³ Section 9

²⁸⁴ Section 10

²⁸⁵ Section 65

competition authorities of South Africa in order to deal with their contravention of the Competition Act, and that they will have to pay their legal costs and administrative penalties in connection with the processes before the competition authorities and that thereafter they will have to face the litigation process instituted in terms of section 65 before the civil courts, and be liable for legal costs and civil damages.

The current competition law system in the Republic of South Africa especially with consumer's inactive involvement in pursuing their right to civil claim damages in terms of section 65 of the Competition Act is such that the infringers would pay the administrative penalties imposed by the competition authorities and their legal costs from the profits made illegal by charging the agreed or fixed excessive prices for their goods or services. As a result, they do not feel a financial pinch or a risk of operational financial difficulties. In addition, as pointed out in chapter one, the imposed administrative penalties do not benefit consumers; instead they go to the Department of Finance coffers.

With all these in mind, one can only ask if the competition authorities of South Africa and/or the government of the Republic of South Africa are failing consumers or not. It cannot be contested though that consumers are trying their best to organize themselves through consumer representative organizations as seen in the case involving Children's Resources Centre, Black Sash, Cosatu & NCF / Pioneer Foods, Tiger Brands and Premier Foods to exercise the right to pursue civil claims for damages suffered as a result of anti-competitive practices. But will they exercise this right as enshrined in terms of section 65 of the Competition Act effectively without any form of a legal support, financial support and aggressive educational awareness in the form of consumer guidelines on civil claim for damages emanating from contravention of the Competition Act?

A lesson can be learned from the European Union Community and the United States which are better ahead of us in terms of private damage claims on anti-trust infringements. It is therefore, recommended that the following be considered to ease the burden and/or challenges that consumers and their representative organizations face to pursuing the private damages claim from companies found to have engaged in anticompetitive behavior.

3.3.1 Class action

It is recommended that a class action be formally adopted in the Republic of South Africa, like it happened in its counterparts such as the European Union Community and the United States of America. A need for a class action has emerged in this country as seen recently in case involving consumer organizations such as Cosatu, NCF and Blacksash against the bread cartel involving companies such as Tiger Brands, Premier Foods, Foodcorp and Pioneer Foods.

3.3.2 Development of private damages procedural policy or guidelines

The competition authorities must be pro-active in promoting and encouraging the effectiveness of section 65 of the Competition Act. They must do so by developing simplified private damages procedural guidelines that consumers and/or consumer organizations can use as a guide to pursue their claims than having to read the Competition Act which might be complex for the majority of consumers to interpret and understand the process.

Educational or awareness programmes will also be necessary in order for the competition authorities to address the respondents' response on the questionnaire that consumers' lack knowledge of the provisions of section 65 of the Competition Act.

3.3.3 Consent Orders

It is recommended that the company by negotiating and signing consent order with the competition authorities must automatically be conceding that a provision of the Competition Act has been infringed and consequently liability in terms of the Act. Therefore, the certificate must be automatically issued regardless of the settlement reached and the certificate must be kept on the file to be uplifted at a nominal fee.

3.3.4 Creation of the private damage claims funds

It is recommended here that the fund be established wherein a certain percentage of the administrative penalty levied by the competition authorities to companies that have infringed the Competition Act is transferred into. Such monies should be used to finance consumer private damage claims and the fund itself should be managed and administered by the Department of Finance (“National Treasury”). Consumer organizations should be mandated to approach the Treasury of their intention to pursue private damage claims on behalf of the consumers following findings of an infringement of the Competition Act by the competition authorities.

The National Treasury should in turn commit to pay the legal fees incurred by attorneys during litigation. If the consumers through consumer organizations succeed in claiming for private damages before civil courts, such monies should be deposited into the same fund for distribution to consumers. It is also advisable that a notice be made to the media i.e. television and radio announcement and newspaper notices calling upon the public willing to claim what they have lost due to the companies engagement in anticompetitive behavior to enlist their names for registration with the manager and administrator of the fund, the National treasury in this case.

To encourage pro-activeness on the part of consumer organizations, the National Treasury should also consider funding them so that they are able to sustain themselves and continue enforcing the rights and interests of consumers at the ground. Thus, there should be some form of coordination in terms of the different responsibilities between the fund manager/administrator and consumer organizations. The National Treasury who should also be the fund manager/administrator's role should be to manage the fund, issue notices on the media inviting consumers wishing to partake in recovering the financial losses to register with them, pay litigation fees from the fund, receive monies from successful claims and distribute the same to registered consumers. Consumer organizations responsibility should be to inform the National Treasury of their intention to sue for private damages and collectively as consumer organizations engage the services of one law firm to litigate before civil courts on behalf of consumers

3.3.5 The use of State Attorney's Office within the Department of Justice

It is recommended that the State Attorney's office be used as an alternative to litigate before civil courts on behalf of and in the interests of consumers and/or consumer groups. This may save the state litigation fees that might be payable to private law firms. It will then mean that the Department of Constitutional Development and Justice should be brought in and where possible a Committee consisting of the two departments (National Treasury and the Department of Constitutional Development and Justice) and consumer organization representatives should be formed to enforce the provisions of section 65 of the Competition Act on behalf of consumers.

3.3.6 Establishment of Consumer Courts

It is also recommended that amendments to the Competition Act be made to create specialized consumer courts with simple process than the civil courts. Alternatively, the Competition Tribunal and the Competition Appeal Court should be given sole jurisdiction to deal with consumer claim for private damages arising from the anticompetitive behavior. This will mean that upon a finding of an infringement of the Competition Act, the consumer or consumer organizations can approach the competition authorities to sue for financial losses.

4. Conclusion

It would appear from this research study that the general consumer's perception on section 65 of the Competition Act is that it is ineffective. It is ineffective for a number of reasons including the complexity of the process to claim for damages, the legal fees consumers should bear for litigation costs, the lack of financial assistance from government etc. It is thus submitted that section 65 should be enhanced by introducing amendments relating to the various aspects stated in paragraph 5.3 above. By equipping consumers with the procedure and funds to enforce their claims, the competition authorities will also be adding force to the attempts by the CA 1998 to combat cartel activity, as the knowledge that the consumer masses will actually be able to recover cartel losses by means of civil litigation will, in addition to administrative fines and criminalization of cartel activity, serve as a serious deterrent to cartel contraventions.

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