

## **Compensation for victims of cartel conduct**

**By**

**Katlego Mahlase (23128772)**

## **Compensation for victims of cartel conduct**

Submitted in partial fulfilment of the requirement for the LLM (mercantile law) degree by

Katlego Mahlase

231287732

Prepared under the supervision of Professor Corlia Van Heerden at the University of  
Pretoria.

15/11/2013

**UNIVERSITY OF PRETORIA**

**FACULTY OF LAW**

I: Katlego Monnadikotsi Mahlase

Student number: 23128772

Module: RHP803

Declaration

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this RHP803 dissertation is my own, original work. Where someone else's work was used (whether from a printed source, the internet or any other source) due acknowledgement was given and reference was made according to the requirements of the Faculty of Law.
3. I did not make use of another student's previous work and submit it as my own.
4. I did not allow and will not allow anyone to copy my work with the aim of presenting it as his or her own work.

Signature: \_\_\_\_\_

## Table of Contents

### Chapter 1: Introduction

1.1 Background to study	pg 1
1.2 The cartel	pg 2
1.3 The victim	pg 4
1.4 Competition Act procedure for enforcement of civil claims	pg 8
1.5 Conclusion	pg 6

### Chapter 2: Class action suits under South African law

2.1 Introductory remarks	pg 8
2.2 SA Law Reform Commission report on class actions and public interest	pg 9
2.2.1 Numerosity	pg 11
2.2.2 Preliminary merits test	pg 12
2.2.3 In the interests of justice	pg 12
2.2.4 Commonality	pg 12
2.2.5 Suitable representation	pg 13
2.2.6 Appropriate procedure	pg 13
2.3 Case law	pg 14
2.3.1 Factual background	pg 16
2.3.2 High Court application	pg 18
2.3.3 Supreme Court of Appeal	pg 20
2.3.4 Constitutional Court	pg 21
2.4 Conclusion	pg 24

### Chapter 3: European Union developments on redress for antitrust harm

3.1 Introductory remarks	pg 25
3.2 Who may claim?	Pg 27
3.3 Collective redress mechanisms	pg 29

3.4 Full compensation	pg 32
3.5 Disclosure of evidence	pg 32
3.6 Quantification of harm	pg 37
3.7 Joint & several liability	pg 38
3.8 Conclusion	pg 39
Chapter 4: Conclusion & recommendations	
4.1 Conclusions	pg 42
4.2 Recommendation	pg 43

## Chapter One: Introduction

### 1.1 Background to study

The issue of compensation for victims of anti-competitive cartel conduct is one that has caused much consternation and debate all over the world. Certainly within the South African context we have seen over the past few years huge public outcry as the Competition authorities have uncovered and prosecuted anti-competitive cartel behaviour in the bread making<sup>1</sup> and most recently the construction industry.<sup>2</sup>

The Competition authorities need to be commended for the stellar job they have done so far in prosecuting these matters but there remains a need for further development and enhancement of the legal framework especially when it comes to achieving redress for those private interests that have suffered harm as a result of this type of anti-competitive conduct, more so for the indigent class of purchaser whose aggregate loss is usually quite considerable. Recent decisions on class action certification in *Children's Resource Centre Trust & Others v Pioneer Food (Pty) Ltd*<sup>3</sup> and *Mukaddam & Others v Pioneer Food (Pty) Ltd*<sup>4</sup> highlight some of the obstacles faced by plaintiffs seeking collective redress

There clearly is a need for policy and legislative enhancement that will help overcome plaintiffs inertia and the legal hurdles they face when attempting to seek redress of the harm done to them, to reduce the cost of pursuing their claims and where needed provide targeted intervention for compensating scattered low-value damages.

This paper will seek to analyse the current South African legal jurisprudence pertaining to this particular problem, expose the shortcomings and hurdles that plaintiffs typically encounter when attempting to seek redress and juxtapose it against the prevailing

---

<sup>1</sup> *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb 07'50/CR/May 08)[2010] ZACT 9.

<sup>2</sup> *Competition Commission v Murray & Roberts Ltd* (017277) [2013] ZACT 75.

<sup>3</sup> *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) (*Children's Resource Centre*)

<sup>4</sup> *Mukaddam v Pioneer Foods* [2013] ZACC 23

procedure and experience in the European Union. As such the various classes of victim will be delineated and defined. Thereafter various enforcement procedures and provisions in terms of the Competition Act<sup>5</sup> will be interrogated along with related case law. Taking into particular consideration the position of the indigent victim, the South African legal position on class-action suits as a tool for achieving collective redress will be analysed.

The developments in EU are particularly instructive as the European Commission has noted similar concerns when it comes to anti-trust damages claims and has published a White Paper<sup>6</sup> accompanied by a Staff Working Paper<sup>7</sup> and most recently a proposal for a directive<sup>8</sup> with the aim to improve legal mechanisms available to victims of antitrust infringements. Chief recommendations from the aforementioned EU papers around the problem areas of standing of the various victims, damage and its calculation, the “passing-on” defence and collective redress mechanisms *inter alia*, will be unpacked.<sup>9</sup>

In conclusion this paper after summarising areas in South African Competition Law that unreasonably burden and disincentivise victims from prosecuting their claims, will make considered and balanced recommendations.

## 1.2 The cartel

Prohibited practises are explained and enumerated under Chapter 2 of the Competition Act<sup>10</sup>. Of particular relevance to this study is section 4 which regulates restrictive horizontal practices i.e. an agreement between, or concerted practice, by firms or

---

<sup>5</sup> Act 89 of 1998.

<sup>6</sup> White Paper on Damages Action for Breach of EC antitrust law, COM(2008) 165 final available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

<sup>7</sup> Staff Working Paper accompanying the White Paper on Damages actions for breach of EC antitrust rules, SWD (2013) 205, 11.6.2013, [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf).

<sup>8</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013 . <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>9</sup> See Chap 3 of this study pg 25 to 41.

<sup>10</sup> Act 89 of 1998.

decision by an association of firms who are in a horizontal relationship as regards each other. Furthermore the agreement, practice or decision must have the effect of substantially preventing or lessening competition without any appreciable redeeming factors.<sup>11</sup> Price fixing, market allocation or division and collusive tendering are examples of prohibited horizontal practices explicitly prohibited under section 4(1) (b).<sup>12</sup> According to Sutherland, horizontal restrictive practises enable firms to act like a monopolist, where they co-operate rather than compete.<sup>13</sup>

Under the European Commission proposal for a Directive on rules governing actions for damages for infringements of competition law provisions of member states and of the European Union<sup>14</sup>, a cartel is defined as an agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, through practices such as the fixings or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against competitors.<sup>15</sup>

From the above stipulations the salient features of a cartel can be derived and loosely described in short as a situation where two or more competitors collude and conduct themselves in a manner designed to maximise profit and increase market power to their mutual benefit, at the same time stymieing competition between themselves and raising barriers to entry.

---

<sup>11</sup> Section 4 (1) (a).

<sup>12</sup> The Per se provisions.

<sup>13</sup> Sutherland (2000) 5.2.

<sup>14</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>15</sup> See Id at art 4.12.



### 1.3 The victim

The Competition Act<sup>16</sup> does not explicitly define which parties can bring about a civil claim for damages but it sets out the method for pursuing civil claims under Chapter 6, section 65 which is titled “Civil Actions & Jurisdiction”. Sub-section 6 begins with the sentence “a person who has suffered loss or damage as a result of a prohibited practice...” From this the definition and basic requirements of a victim can be inferred. This definition is hardly controversial and is in accord with trite principles of the Law of delict.

A victim of cartel conduct can be a natural or juristic person as long as such person has suffered patrimonial loss as a result of the occurrence of a prohibited practice. However the Competition Law context presents a particular nuance in that an infringer is often an upstream producer of a primary essential input or product.<sup>17</sup> Where the Cartel infringer(s) then sells on to a downstream purchaser who is still to add value before there is a product that is ready to be consumed by the final purchaser, one has a situation where there are two potential victims of an overcharge or some other restrictive practice.<sup>18</sup> Such situation entails a direct purchaser and an indirect purchaser. Both may have suffered harm and therefore have a legitimate claim for compensation. The law then needs to ensure that on the one hand each of these interests is adequately indemnified and on the other hand ensure that the infringer is not subjected to a double liability.

---

<sup>16</sup> 89 of 1998

<sup>17</sup> Such as is the relationship between the bread distributors and bakeries in the case of *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183.

<sup>18</sup> This is the situation that claimants in the cases of *The Trustees for the time being for the Children’s Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others*, *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWHC 102, find themselves in. the distributors and bread consumers are faced with competing interest. The courts will have to make the difficult assessment of how much of the overcharge levied on the distributors was subsequently transferred to the consumers in order to ensure that proper compensation is awarded to the two classes of victims.

South African courts have not as of yet had a chance to pronounce on such a set of facts however jurisprudence from the EU will prove instructive especially regarding possible defences to damages claims and the role of representative organisations as plaintiffs.<sup>19</sup>

#### 1.4 Competition Act Procedure for Enforcement of Civil Claims

The Competition Act<sup>20</sup> sets out the method and requirements for bringing a claim for compensation before the High Court or Magistrate Court under Chapter 6, section 65 (1) to (10). The Competition Tribunal itself is not empowered to make determinations as to damages awards.<sup>21</sup>

To summarise, a party (whether a complainant before the Tribunal or not) wishing to approach the civil courts for compensation first has to seek a declaratory order from the Competition Tribunal confirming that the conduct of the respondent was found to be prohibited practice in terms of the Competition Act.<sup>22</sup> In terms of section 65(7) this declaratory certificate constitutes prima facie proof of its contents and is binding on the civil courts.<sup>23</sup> The right to claim damages comes into existence on the date that the Tribunal or Appeal Tribunal would have made its determination.<sup>24</sup> Interest on that claim also starts running from that date of the determination.<sup>25</sup> The plaintiffs right to pursue a

---

<sup>19</sup> White Paper on Damages Actions for Breach of EC antitrust law, COM(2008) 165 final, 2.1.2008. available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

<sup>20</sup> Act 89 of 1998.

<sup>21</sup> This is in terms of s65(5) which states that the Competition Tribunal and Competition Appeal court have no jurisdiction over the assessment and awarding of damages arising from prohibited conduct.

<sup>22</sup> See s65(6)(b), which also excludes persons who have already been awarded damages in terms of s63(1) from pursuing a further damages claim through the civil courts. The party instituting a civil claim would have to file with the Registrar of the civil court a certificate which would certify that the cause of action is a prohibited practice in terms of the act, the date of such finding and also which sections of the act were infringed.

<sup>23</sup> This in effect means that the civil court would not have to evaluate the facts of the matter and determine itself whether a prohibited practice occurred. Essentially the civil court would be tasked with determining whether damage was caused to the claimant as a result of the prohibited practise, then quantify the amount of award.

<sup>24</sup> See s65(9) read with s60(1)(a)(v). This determination would be a finding that a firm engaged in conduct that constitutes a prohibited practice under the chapter 2 provisions.

<sup>25</sup> See s65(6)(b). This means that in quantifying the interest component of the damages award, the civil court would be precluded from including in the award an interest award that would cover the period from

civil claim would however be suspended where the respondent institutes an appeal against the Tribunal's determination.<sup>26</sup>

A complainant may also obtain a damages award through a consent order in terms of section 49D. A consent order which also awards damages to the complainant can only be concluded with the consent of the complainant.<sup>27</sup> The consent order will have to be confirmed by the Tribunal and as soon as such confirmation is obtained the complainant is then barred from pursuing a further claim for damages through the Civil Courts.<sup>28</sup>

## 1.5 Conclusion

To date it does not seem that there has been an instance of a plaintiff who has approached the civil courts for compensation pursuant to a finding of cartel conduct by the tribunal. According to Neuhoff<sup>29</sup> this is due to the difficulty in drawing a link between the loss suffered and the anti-competitive conduct. This reasoning is most plausible when one considers this against a backdrop of similar concerns raised by the EU Commission in its directive proposal<sup>30</sup> wherein it acknowledges that the practical exercise of the right of a plaintiff to claim for compensation is rendered most difficult or almost impossible because of obstacles relating to the obtaining of evidence necessary to prove a case, how to quantify the harm occasioned by anti-competitive conduct and the lack of effective collective redress mechanisms for consumers and SME's.

---

when the prohibited conduct first occurred. It is my submission that this does not fully indemnify the claimant for the full loss he suffered which includes the opportunity cost and devaluation of money from the inception of harm right up until when a finding is made that a prohibited practise occurred.

<sup>26</sup> s65(8).

<sup>27</sup> s49(3).

<sup>28</sup> s65(6)(a).

<sup>29</sup> Neuhoff *et al* (2006) A Practical Guide to the South African Competition Act.

<sup>30</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>. As a proposal the document is non-binding at this stage, only once consensus has been reached by the European council and European parliament to adopt the directive will the various member states be obliged to align their national laws with its provisions.

It would seem therefore that there is a need for legislative action to make conditions more conducive for victims wishing to exercise their rights to compensation. The South African law around damages action is still in the early stages of development a potential claimant is left with great uncertainty as to how the rules and provisions of s65 of the Competition Act<sup>31</sup> will be interpreted and applied by the civil courts. This uncertainty needs to be clarified if justice is to be obtained for victims of cartel infringements.

---

<sup>31</sup> Act 89 of 1998.

## Chapter Two: Class Action Suits under South African Law

### 2.1 Introduction

Class actions have been defined as one where a party brings an action on behalf of a class of persons, each member of which is bound by the action's outcome.<sup>32</sup>

A definition advanced by the South African Law Reform Commission in its 1998 report on class action suits proposes the following definition:-

*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 which action is certified as a class action in terms of the Act.*<sup>33</sup>

According to Hurter, a class action can be described as one where an action is brought by or against a representative on behalf of a group with a view to binding the group to the outcome of the litigation.<sup>34</sup> In her analysis of various foreign jurisdictions she identifies common features of class action primarily being the appointment of a representative to act on behalf of the group, the need for class certification prior to commencement of litigation, the need for class members to be defined and identifiable, the requirement that notice be given to all prospective class members and lastly, that some jurisdictions require court approval for any out of court settlement to be binding.<sup>35</sup>

Essentially the class action mechanism is the procedural pooling of numerous individual claims. As Bulst states, a benefit of a class action mechanism is the possible lessening of the burden of litigation costs for the plaintiffs if they agree to share those costs amongst themselves.<sup>36</sup> They also reduce the burden on the judicial system in that the various individual claims are then rolled into one and adjudicated as a single matter.<sup>37</sup> Often

---

<sup>32</sup> *Children's Resource Centre v Pioneer Food (Pty)Ltd* 2013(2) SA 213 (SCA).

<sup>33</sup> South Africa Law Reform Commission on the recognition of class actions and public interest actions in South African law (1998) report, (VI) par8, [http://www.justice.gov.za/salrc/reports/r\\_prj88\\_classact\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf).

<sup>34</sup> "The class action in South Africa: Quo vadis?" (2008) *De Jure* 293 at fn2.

<sup>35</sup> See *Id* at 2.1 to 2.4.

<sup>36</sup> Bulst (2008), "Of Arms and Amour", 2/2008 *Bucerius Law Journal* pg 83 at I.

<sup>37</sup> See *Id* pg 83 at I.

class action suits provide the only feasible manner for bringing forth damages claims such as where the individual claims are too small in value to warrant their pursuit however when aggregated the total value can make the instigation of a private action for compensation feasible vis-à-vis the costs of litigation.<sup>38</sup>

Where the class of persons who suffered loss as a result of horizontally restrictive practices consists primarily of indigent persons who have neither the resources, knowledge nor inclination to seek compensation, indeed the class action mechanism is arguably the only and most appropriate method whereby they can pursue their claims.<sup>39</sup>

## **2.2 South African Law Reform Commission report on class actions and public interest actions**

In August 1998 the Law Reform Commission (hereinafter “SALRC”) published a report detailing its findings on the need, suitability and proposed method of incorporating collective redress actions into the South African legal regime.<sup>40</sup> From the outset in its introductory paragraph the commission boldly states that there is an urgent need for legislative action to introduce collective redress mechanisms in our law.<sup>41</sup> The two types of collective redress mechanisms identified in the report which would be suitable for introduction into our law being the class action and the other public interest actions.

The report’s definition of class action has already been set out above, the following is the proposed definition of public interest action in terms of the report:-

---

<sup>38</sup> Staff Working Paper accompanying the White Paper on Damages actions for breach of EC antitrust rules, SWP (2013) 205, 11.6.2013, at par 93 to 41.

[http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf)

<sup>39</sup> Such as the situation for consumer case in *The Trustees for the time being for the Children’s Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWHC 102.

<sup>40</sup> South Africa Law Reform Commission on the recognition of class actions and public interest actions in South African law (1998) report, (VI) par8,

[http://www.justice.gov.za/salrc/reports/r\\_prj88\\_classact\\_1998aug.pdf](http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf).

<sup>41</sup> See *Id* at par 3.1.2.

*Public interest means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgement of the court in respect of a public interest action shall not be binding on the persons in whose interest the action is brought.*<sup>42</sup>

The main difference between class action and public interest actions as envisaged by the report is the binding effect of any findings on members represented by the action.<sup>43</sup> With class action suits the judgement obtained following collective action is binding on all the members represented by that action whereas under public interest actions the judgement is non-binding on the people in whose interest that action was brought.<sup>44</sup>

I submit that class action suits as opposed to public interest suits are of particular relevance to this study in light of nature of the remedy sought in damages actions is usually monetary compensation whereas with public interest actions seem more suited to situations where remedies such as declarations of rights or interdicts are sought. Therefore the rest of this discussion will focus on exploring the class action systems as envisioned by the report.

Discussing the characteristics of a class action the report states that it is a means by which a group of litigants faced with the same or similar cause of action pool their resources and conduct a single action under circumstances where joinder of these claims is not feasible or appropriate. This implies that the number of claimants is greater than would be practically reasonable under a joinder of actions.<sup>45</sup> Further the report goes on to state that the class action would need to be certified as such by a court in order to proceed and prosecute the action.<sup>46</sup> After certification the class action would be

---

<sup>42</sup> See Id at par 4.3.4.

<sup>43</sup> See Id at par 2.4.3.

<sup>44</sup> See Id at par 2.4.3.

<sup>45</sup> See Id at par 5.6.5.

<sup>46</sup> See Id at par 5.5.7 to 5.5.10. The report is in favour of what is called a two phase approach where a preliminary application is brought before the court requesting leave to proceed on the action on a class basis. Professor De Vos' submission to the commission is also noteworthy. He advocates the preliminary step of certification as a deterrent to unmeritorious claims or fishing expeditions. Also the affidavits prepared in support of a certification application would assist the courts to determine whether there exists evidence to make out a prima facie case as well as issues of the adequacy of representation and whether notice to prospective members is necessary.

pursued by a representative acting on behalf of the members of the class.<sup>47</sup> As to how the action is to be proceeded on, the report recommends that the common issues would have to be determined by the court first and thereafter the court should direct its attention to the individual issues.<sup>48</sup>

The report recommends that where a class action is brought before a court there should be a preliminary application requesting leave to institute and proceed as class action proceedings and asking for directions as to procedure. For certification of a class action to be granted the report recommends that the relevant court should be satisfied that the following factors are present in the application brought before it:<sup>49</sup>

- (a) There is an identifiable class of persons;
- (b) A cause of action is disclosed;
- (c) There are issues of fact or law which are common to the class;
- (d) A suitable representative is available;
- (e) The interests of justice so requires; and
- (f) The class action is the appropriate method of proceeding with the action

The above factors are also described as numerosity, preliminary merits test, commonality, adequacy of representation, interest of justice and superiority respectively.<sup>50</sup>

The factors are ventilated in the report and therefore the salient points of each is summarised as follows.

2.2.1 Numerosity:<sup>51</sup> the overriding consideration here is whether the number of claimants is so large that it would be impractical for them to pursue their claim in a

---

<sup>47</sup> See Id at par 5.6.22.

<sup>48</sup> See Id par 5.12.5.

<sup>49</sup> See Id par 5.6.2.

<sup>50</sup> See Id at par 5.6.2 to 5.6.3. See also Hurter (2008) De Jure 296.

<sup>51</sup> See Id at par 5.6.4.



single conventional action such as a joinder.<sup>52</sup> The report is not in favour of there being a minimum number of claimants but it stands to reason that the more claimants there are the more impractical it becomes to pursue the action in any other manner but as a class action.<sup>53</sup>

2.2.2 Preliminary merits test:<sup>54</sup> the commissioners were not in favour of an interpretation that the applicant needs to show a reasonable prospect of success.<sup>55</sup> According to them the consideration here should be the general suitability of the intended claim to be pursued as a class action.<sup>56</sup> This is a confusing interpretation as already one of the factors to be considered is the appropriateness of the class action as a mechanism to pursue the action.<sup>57</sup>

A more balanced interpretation in-line with the right to access to the courts would be that the applicant for certification should show that he has a prima facie case.<sup>58</sup> Within a context of a class action damages suit based on an infringement of competition law, the asymmetry of information would render it almost impossible for a claimant to successfully demonstrate at such an early stage that it has a reasonable chance of success.

2.2.3 The interests of justice:<sup>59</sup> According to the report, the commissioners held the view that at the very least certification will be in the interests of justice where it is the appropriate method of proceeding with the claim.<sup>60</sup>

2.2.4 Commonality:<sup>61</sup> The commission rejected an interpretation that would mean that legal issues common to the members should predominate over issues affecting only the

---

<sup>52</sup> See Id at par 5.6.5.

<sup>53</sup> See Id at par 5.6.5.

<sup>54</sup> See Id at par 5.6.8.

<sup>55</sup> See Id at par 5.6.9.

<sup>56</sup> See Id at par 5.6.9.

<sup>57</sup> See Id at par 5.6.26.

<sup>58</sup> See Id at par 5.6.9 this approach was eventually followed by the SCA in the *Children's Resources Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 180 at par 88 read with par 75.

<sup>59</sup> Supra fn 40 par 5.6.16.

<sup>60</sup> See Id at par 5.6.16.

<sup>61</sup> See Id par 5.6.19..

individual members.<sup>62</sup> The recommended interpretation is that the class be made up of identifiable group whose claims share common issues of fact or law.<sup>63</sup>

2.2.5 A suitable representative:<sup>64</sup> The interpretation favoured by the commissioners here is that the representative should be under no conflict of interest as against other class members, that he or she will not favour certain member over others, that the representative has the necessary financial resources to conduct the litigation and the determination to pursue it to conclusion.<sup>65</sup>

2.2.6 The appropriate procedure.<sup>66</sup> The view of the commissioners is that the court needs only to consider a class action to likely be the most appropriate method of proceeding with the claim.<sup>67</sup>

When applying for certification it is suggested that the application should be brought to court via a notice of motion supported by the particulars of claim, a statement motivating why certification would be appropriate along with affidavits and other documentary evidence.<sup>68</sup>

Turning to the issue of notice to class members of the intended action the report deems it crucial that potential members of that class be alerted of the intended action so they may decide whether to join the action. The notice would need to be effective but the costs involved in the issuing of that notice should not be disproportionate in relation to the costs of the litigation or the possible benefits of a successful action.<sup>69</sup>

As to how damages in a class action are to be determined the report states that under class actions the question of liability will always be common question amongst

---

<sup>62</sup> See Id at par 5.6.17 read with 5.6.19.

<sup>63</sup> See Id at par 5.6.19.

<sup>64</sup> See Id par 5.6.22.

<sup>65</sup> See Id at par 5.6.22. However the responsibilities of the representative to the class extend only so far as to the common issues affecting the class as a whole.

<sup>66</sup> Id par 5.6.26.

<sup>67</sup> See Id at par 5.6.23 read with par 5.6.23.

<sup>68</sup> Id par 5.8.

<sup>69</sup> Id par 5.10.3.

members.<sup>70</sup> The complexity arises once liability has been determined for then the court is faced with the problem of quantification of harm and the amount of compensation to be made out to individual members of the class.<sup>71</sup>

The solution that is favoured by the report is that the court be empowered to make either an aggregate assessment of the damages amount or individual assessment, depending on which would be appropriate given certain circumstances.<sup>72</sup> Further the court may call on the assistance of a commissioner.<sup>73</sup> Where an aggregate assessment is made the court should also be empowered to give directions as to how the monies are to be distributed to class members.<sup>74</sup>

The SALRC report was completed in august 1998 and then submitted to the Minister of Justice and Constitutional Development during September of that same year. The latest annual report of the SALRC shows that the report is still being considered by the Justice and Constitutional Development Ministry.<sup>75</sup> As of yet the legislature has not enacted the report's findings into law. Instead it has been the courts who have adopted the general recommendations of the report and have lead the incorporation of class action mechanisms into South African law.

The court decisions bearing most relevance to the subject matter of this study will be reviewed in the rest of this chapter.

### 2.3 Case Law

In 2001 the SCA in *Permanent Secretary, Department of Welfare, Eastern Cape v Nqquza & Others*<sup>76</sup> made emphatic pronouncements on class actions and their role within the

---

<sup>70</sup> See Id at par 5.13.1.

<sup>71</sup> See Id at par 5.13.1 to 5.13.2.

<sup>72</sup> See Id at par 5.13.2 read with par 5.13.5.

<sup>73</sup> See Id at par 5.13.4 to 5.13.5.

<sup>74</sup> See Id par 5.13.1.

<sup>75</sup> South African Law Reform Commission annual report, 2010/2011 at pg 10.

<sup>76</sup> 2001 (4) SA 1184 (SCA)

new Constitutional dispensation. The Court confirmed that class actions were foreign to our Common Law i.e. the prevailing legal system before 1994.<sup>77</sup>

However the court noted that now in terms of the Constitution<sup>78</sup> there is provision for class action suits where a right in the bill or rights is being threatened.<sup>79</sup> Such person may claim relief as a member of a class or in the interests of a class of persons.<sup>80</sup>

For certification of a class action, the general requirements according to the court are that:

- (1) The number of individual interests making up the class need to be so numerous that joinder would be impracticable;
- (2) The questions of law and fact should be common to the class;
- (3) The claims of the representative of the class need to be typical of the remainder of the members of that class, and;
- (4) The legal representatives of the class need to fairly and adequately protect the interests of the class.<sup>81</sup>

The court left open the question of the availability of class actions outside the scope of an assertion of constitutional right as that was not an issue argued before it.<sup>82</sup>

Currently before our courts there are two related and very interesting cases where in both the applicant seeks certification in order to pursue class action damages claims against cartel infringers. The first is the Trustees for the time being of the Children's Resource Centre Trust v Pioneer Foods and others<sup>83</sup> (hereinafter "*Children's Resource Centre Trust*") and the second being *Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd*<sup>84</sup> (hereinafter "*Mukaddam*"). The applicants in both cases claim to have suffered

---

<sup>77</sup> See Id at par 6.

<sup>78</sup> Act 108 of 1996.

<sup>79</sup> Supra fn 76 at par 5.

<sup>80</sup> Supra fn 78 at Section 38(c).

<sup>81</sup> Supra fn 76 at par 21.

<sup>82</sup> Supra fn 76 at 119E.

<sup>83</sup> 2013 (2) SA 213 (SCA).

<sup>84</sup> [2013] ZACC 23.

damages as a result of the same findings of cartel infringements. Both applications were initially heard by the Western Cape High Court on the same day.<sup>85</sup>

### 2.3.1 Factual background:

The respondents under both actions are the same, namely Pioneer Foods (hereinafter “Pioneer”), Tiger Consumer Brands (hereinafter “Tiger”) and Premier Foods Ltd (hereinafter “Premier”). The respondents are all in the business of the manufacture and sale of bread throughout the country.<sup>86</sup> The three of them together control between 50% - 60% of the bread producer market.<sup>87</sup> And their customer base consists of large national retail groups, general traders such as cafes and spaza shops and independent wholesalers of bread.<sup>88</sup> The respondents along with Foodcorp would generally set their prices nationally.<sup>89</sup> They would however negotiate with the retail groups and wholesalers discounts to be granted against the nationally set price.<sup>90</sup> Factors determine the amount of discount would be considerations such as the location and delivery costs to such location and average daily sales volumes.<sup>91</sup>

In December 2006 the Competition Commission received a complaint about alleged bread cartel activity in the Western Cape.<sup>92</sup> Subsequently the commission concluded an investigation into the allegations and initiated a complaint against the respondents.<sup>93</sup> Premier then applied for leniency with the commission and disclosed that it together with Pioneer and Tiger formed a bread cartel in the Western Cape that fixed the selling price of bread and other trading conditions.<sup>94</sup> Premier also informed the competition commission that the bread cartel operated in various regions throughout the country.<sup>95</sup>

---

<sup>85</sup> *The Trustees for the time being for the Children’s Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others (25302/10, 25353/10) [2011] ZAWHC 102.*

<sup>86</sup> See Id at par 8.

<sup>87</sup> See Id at par 8.

<sup>88</sup> See Id at par 9.

<sup>89</sup> See Id at par 10.

<sup>90</sup> See Id at par 11.

<sup>91</sup> See Id at par11.

<sup>92</sup> See Id at par 12.

<sup>93</sup> See id at par 12.

<sup>94</sup> See Id at par 12.

<sup>95</sup> See Id at par 13.

A second complaint was then initiated by the competition commission.<sup>96</sup> Premier was granted corporate leniency by the commission in respect of both the Western Cape complaint and the national complaint.<sup>97</sup>

In February 2007 the competition commission then referred the Western Cape complaint against Tiger & pioneer to the competition tribunal.<sup>98</sup> Subsequently Tiger negotiated a consent agreement with the commission covering both complaints.<sup>99</sup> In terms of the consent agreement Tiger admitted that it along with Premier and Pioneer entered into an agreement in December 2006 setting bread prices and discounts to independent distributors in the Western Cape, which constituted an infringement of section 4(1)(b)(i) of the Competition Act.<sup>100</sup> Tiger also admitted to discussing with its competitors at a national level and in various regions the fixing of bread prices in the period 1994 – 2006 which is also an infringement of section 4(1)(b)(i) of the Competition Act.<sup>101</sup> Tiger disclosed that discussions were also held with its competitors regarding the closure of bakeries during the period 1999 – 2001 which is an infringement of section 4(1)(b)(ii) of the Competition Act.<sup>102</sup> Thereafter in November 2007 the Competition Tribunal made a consent order in terms of section 49D of the Competition Act and levied an administrative penalty on Tiger of R98 million.<sup>103</sup>

The complaint against Pioneer was then heard by the Competition Tribunal<sup>104</sup> in February 2010 with regard to the Western Cape complaint the tribunal found that during December 2006 Pioneer had contravened section 4(1)(b)(i) of the Act in that it colluded with Premier and Tiger to increase the price of various bread types by fixed amounts and to cap discounts given to bread wholesalers in Paarl and the Peninsula.

With regard to the national complaint Pioneer was found to have contravened section 4(1)(b)(i)&(ii) of the Act in that during 1999 it agreed with Tiger and Premier to divide

---

<sup>96</sup> See *Id* at par 13.

<sup>97</sup> See *Id* at par 14.

<sup>98</sup> See *Id* at par 15.

<sup>99</sup> See *Id* at par 16.

<sup>100</sup> Act 89 of 1998.

<sup>101</sup> Act 89 of 1998.

<sup>102</sup> Act 89 of 1998.

<sup>103</sup> *Supra* fn 85 at par 16 to 17.

<sup>104</sup> *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May 08) [2010] ZACT 9 (3 February 2010).

markets in South Gauteng, Free State, North West and Mpumalanga amongst themselves. That during 2003 & 2004 they fixed the selling price of bread.<sup>105</sup> That they would not allow customers to switch suppliers during the period of price increases in order to benefit from any differences in prices between suppliers.<sup>106</sup> During November 2006 they fixed the selling price of bread by agreeing on an increase of 30c per loaf in Gauteng with effect from 18 December 2006.<sup>107</sup> Pioneer was then ordered to pay an administrative penalty of R195 million covering both the national and Western Cape complaints.<sup>108</sup>

### 2.3.2 The High Court action:<sup>109</sup>

As a result of the above findings of there having been collusive prohibited practices the applicants under *Children's Resources Trust* and *Mukaddam* sought certification to bring class action damages claims against the respondents. Both actions were heard by the same court of first instance on the same days. The *Children's Resources Trust* action was brought on behalf of consumers of bread and in that regard constitutes an indirect purchaser action in that there was no contractual relationship between the victims and the respondents. The *Mukaddam* decision was brought on behalf of wholesale distributors of bread and therefore constitutes a direct purchaser claim in that a contractual relationship exists between the claimants and the respondents.

The court asserted the view that the class action mechanism is available under s38 of the Constitution<sup>110</sup> where a constitutionally protected<sup>110</sup> right is directly infringed or threatened however the question of whether the class action mechanism is available where Constitutional rights are not directly infringed remains unanswered.<sup>111</sup> In the opinion of the Court the mechanism should be extended beyond the Constitutional scope of application.<sup>112</sup> In support of this contention it turned to the views expressed in

---

<sup>105</sup> Supra fn 85 at par 19.2.

<sup>106</sup> See Id at par 19 and 19.2.

<sup>107</sup> See Id at par 19.5.

<sup>108</sup> See Id at par 20.

<sup>109</sup> *The Trustees for the time being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWHC 102.

<sup>110</sup> See Id at par

<sup>111</sup> See Id at par 39.

<sup>112</sup> See Id at par 38.

the South African Law Reform Commission report on class actions and various decisions in support of incorporation of class actions into South African law.<sup>113</sup> As to the procedure to be followed and requirements that are to be met by an applicant for certification of a class action the court adopted the approach recommended in the SALRC report.<sup>114</sup>

Both applicants sought to couch their claims in terms of constitutional rights being compromised by the cartel conduct.<sup>115</sup> The applicant in the *Children's Resources Trust* action claimed that the cartel infringement violated their class member's rights to sufficient food in terms of section 27(1)(b) of the Constitution.<sup>116</sup> The applicant under the *Mukaddam* action claimed that the cartel infringements presented a violation of their rights in terms of section 22 of the Constitution which provides the freedom to citizens to choose their trade, occupation and profession freely.<sup>117</sup> The court dismissed both applications for certification.

With regard to the *Children's Resources Trust* application the court was of the view that the applicant failed to sufficiently identify the class that is to be represented<sup>118</sup> and also failed to disclose a cause of action.<sup>119</sup> In its supporting affidavit the applicant described the class to be represented as all bread consumers in the western cape province who were prejudicially affected by bread prices as a consequence of the cartel infringements.<sup>120</sup> The court felt that the class description was too broad and the parameters of the intended action not sufficiently described so as to allow for identification of possible class members.<sup>121</sup> With regard to the cause of action the applicant referred to the cause of action relied upon as an action for damages based on unlawful actions of the respondent in contravention of the Competition Act.<sup>122</sup> The court

---

<sup>113</sup> See Id at par 34, 35 and 38.

<sup>114</sup> See Id at par 41 read with par 43 to 45.

<sup>115</sup> See Id at par 47 and 110.

<sup>116</sup> See Id at par 68 and 70.

<sup>117</sup> See Id at par 110.

<sup>118</sup> See Id at par 84.

<sup>119</sup> See Id at par 92 and 94.

<sup>120</sup> See Id at par 47.

<sup>121</sup> See Id at par 83.

<sup>122</sup> See Id at par 87.



held that such action is unavailable under SA law and that it is not provided for by section 65 of the Competition Act.<sup>123</sup>

Under the *Mukaddam* action the court dismissed the application based on a lack of a clear cause of action and insufficient commonality as to facts and legal issues. Firstly, the court held section 22 of the Constitution provides protection to individual citizens and not juristic persons.<sup>124</sup> Some of the claimants were juristic persons.<sup>125</sup> As a result the court concluded that there was no basis for the applicant to allege that the class member's section 22 rights were infringed by the cartel conduct.<sup>126</sup> With regard to common issues the court was of the opinion that the fact that not all class members had dealings with each and every one of the respondents, and vice versa, meant that there was insufficient commonality with regards to questions of law or fact.<sup>127</sup>

### 2.3.3 On appeal to the Supreme Court of Appeal<sup>128</sup>

Both of the applications were taken upon appeal in the Supreme Court of Appeal. In both cases the appeal was against the High Court's refusal to grant class action certification. For the Children's Resource Centre the appeal was against the refusal to certify firstly in respect of the national complaint and secondly in respect of the Western Cape complaint. The Children's Resource Centre Trust appeal<sup>129</sup> was upheld in so far as it related to the Western Cape consumer class action. The appellant modified its cause of action to a delictual action flowing from a breach of a statutory duty.<sup>130</sup> Premier's counter argument was that section 65 of the Competition act provides for a follow on claim and that this remedy constitutes an exclusive statutory claim that precludes a common law delictual action, therefore rendering Children's Trust's cause of action a nullity.<sup>131</sup> The court held that in view of the complexity, novelty and the fact that these

---

<sup>123</sup> See Id at par 87.

<sup>124</sup> See Id at par 113 and 114.

<sup>125</sup> See Id at par 114.

<sup>126</sup> See Id at par 116.

<sup>127</sup> See Id at par 116 read with par 113 to 115.

<sup>128</sup> *Children's Resource Centre Trust v Pioneer Food* (50/2012)[2012] ZASCA 189, *Imraahn Ismail Mukaddam and others v Pioneer Foods (Pty) Ltd* (49/12)[2012] ZASCA 183.

<sup>129</sup> [2012] ZASCA 189.

<sup>130</sup> Id at par 63.

<sup>131</sup> Id at par 66 and 67.

arguments were raised for the first time before it, it would be premature to consider whether the consumer claim was good in law or presented a prima facie case.<sup>132</sup> The matter was remitted back to the High Court for reconsideration once the parties had supplemented their papers as necessary.

With regard to the *Mukaddam* appeal,<sup>133</sup> the appellant persisted with basing its claim on a violation of its constitutional right to freedom of trade and profession. The court stated that for certification applications based on a novel cause of action, the claim needs to be at least legally tenable although the court is not called upon to make a final determination as to the merits of the claim.<sup>134</sup> The applicant would also have to show the class action of the most appropriate means for the claims to be pursued.<sup>135</sup>

The Court held that there were considerable hurdles to be overcome with the appellant basing its claim on section 22 of the Constitution, namely that that right is guaranteed only for citizens, that on the face of it applies only to natural persons and most importantly it does not guarantee success for the individual once he has entered into his chosen profession or trade.<sup>136</sup> The *Mukaddam* appeal was therefore dismissed.

### 2.3.4 Constitutional Court

The *Mukaddam* matter was taken on further appeal at the Constitutional Court which appeal was upheld.<sup>137</sup> In its main judgment the Constitutional Court held that the correct standard for adjudicating applications for certification is whether the interests of justice require certification of the class action.<sup>138</sup> The court indicated that the requirements as set out in the SCA decision in the *Children's Resource Centre Trust* are merely factors that a court would take into consideration when making a determination as to where the interests of justice lie.<sup>139</sup> This in light of section 173 of the Constitution<sup>140</sup> which grants the Constitutional Court, Supreme Court and High Court inherent power to

---

<sup>132</sup> Id at par 75.

<sup>133</sup> *Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183.

<sup>134</sup> Id at par 4.

<sup>135</sup> Id at par 4.

<sup>136</sup> Id at par 7 and 8.

<sup>137</sup> *Mukaddam v Pioneer Food* CCT 131/12 [2013] ZACC 23.

<sup>138</sup> Id at par 33 to 35.

<sup>139</sup> Id at par 35.

<sup>140</sup> Act 108 of 1996.

protect and regulate their own process, and to develop the common law taking into account the interests of justice.<sup>141</sup>

The court found inconsistencies with how the Supreme Court of Appeal dealt with the two matters before it.<sup>142</sup> It questioned why under the *Children's Resource Centre Trust* appeal the Supreme Court of Appeal declined to make a determination on the merits of the matter yet under the *Mukaddam* case it adopted a different approach when it stated that when confronted with an application for certification based on a novel cause of action the applicant needs to demonstrate that its claim is at least legally tenable.

Further the Court found that the Supreme Court of Appeal erred in not finding that the *Mukaddam* claim was also legally tenable in light of the provisions of section 65 of the Competition Act.<sup>143</sup>

Finally the court rejected the position of the Supreme Court of Appeal that for certification in an opt-in class action an applicant would have to show the presence of exceptional circumstances.<sup>144</sup> The matter was therefore remitted back to the High Court for adjudication in terms of the standards set out in the Constitutional Court judgment.

## 2.4 Conclusion

As a result of the principle of judicial precedent, law and procedure governing the determination of a certification application has somewhat been clarified to some extent. The High Court and Supreme Court of Appeal are now bound by the Constitutional Court judgment in the *Mukaddam* appeal. The result of this is that the overriding consideration when the courts make determinations on whether to certify a class-action is whether such certification would serve the interests of justice.

In arriving at a determination the courts may be guided by the presence of the factors of numerosity, commonality, superiority, the preliminary merits test and the suitability of proposed representation. The applicant for certification of an opt-in class action need

---

<sup>141</sup> Supra fn 133 at par 33 to 35.

<sup>142</sup> Supra fn 133 at par 50 to 55.

<sup>143</sup> Supra fn 133 at par 54.

<sup>144</sup> Supra fn 133 at par 55.

not show the presence of exceptional circumstances for the court to grant certification such certification.

The *Mukaddam* and *Children's Resource Centre Trust* cases thus highlight some problem areas that an applicant for certification would need to consider when applying for certification. What is the requisite degree of commonality in issues of law and fact between class members? Also to what extent or specificity do the class members need to be identifiable?

An interesting issue raised in argument between counsels in the *Children's Resource Centre Trust* SCA appeal is what is the nature of the cause of action in follow-on action for damages based on a finding of there having been an infringement of the prohibited practices provisions of the Competition Act. In other words does section 65 of the Competition Act constitute an exclusive statutory claim or would the claimant still need to prove the delictual elements in order to be awarded compensation. The SCA was not willing to decide on this point however it conceded that the language of section 65 seems to indicate that the civil courts are called upon only to make an assessment on the quantum of the damages award.<sup>145</sup> The Constitutional Court also seems to be in favour of an interpretation of section 65 that affords the victim of an infringement, a right of action for civil damages.<sup>146</sup>

Mongalo and Nyembezi<sup>147</sup> in their case note on the initial certification applications in the High Court are of the opinion that section 65 of the Competition Act does indeed create a cause of action for which damages may be claimed. The writers base this assertion on the language of section 65(6)-(9) and state that even on a cursory reading of those provisions it is clear that the provisions give rise to a civil remedy.<sup>148</sup>

Another potential problem is that was highlighted relates to how the courts are going to deal with the competing interests of the direct and indirect purchasers claiming

---

<sup>145</sup> Supra fn 129 at par 72.

<sup>146</sup> Supra fn 133 at par 54

<sup>147</sup> "The Court refuses to grant a certification order in the bread – cartel class action cases: A closer examination of the Western Cape Judgment", 2012 *Obiter* pg 373 to 375.

<sup>148</sup> Supra fn 147 at 374 par 3.1.

damages against the same infringer or group of infringers.<sup>149</sup> This will depend to a large extent on whether the passing-on defence will be accepted by our courts.

---

<sup>149</sup> Supra fn 68 at par 10.

## Chapter 3: European Union developments on redress for antitrust harm

### 3.1 Introductory remarks

The law governing anti competitive practices which is deserving of sanction, on a community wide basis, is to be found under articles 101 and 102 of the Treaty on the functioning of the EU (hereinafter “TFEU”).<sup>150</sup>

Of particular relevance here is article 101 which deals with horizontal anti-competitive conduct and reads as follows:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or

---

<sup>150</sup> Treaty on the functioning of the EU, 1958 [http://europa.eu/pol/pdf/qc3209190enc\\_002.pdf#page=92](http://europa.eu/pol/pdf/qc3209190enc_002.pdf#page=92).

distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

The problem of how to aid victims of antitrust harm where their claims are numerous, scattered and of relatively low individual value is one that the European Union (herein after “EU”) and more specifically the European Commission (hereinafter “EC”) has been investigating for quite some time. The result of EC’s deliberations has been a series of documents outlining suggested rules, procedure and policy amendments which should be enacted into EU and national laws of the member states. The most important for purposes of this study is the White Paper on Damages Actions for Breach of EC antitrust law of 2008 (hereinafter “WP”)<sup>151</sup> which is accompanied by a staff working paper (hereinafter “SWP”)<sup>152</sup> and most recently a proposal<sup>153</sup> (hereinafter “Directive proposal”) by EC staff researchers calling for a directive of the European parliament and council on certain rules governing actions for damages under law for infringement of the competition law provisions of member states and of the European Union which was published on the 11<sup>th</sup> July 2013.

The directive proposal is currently under consideration by the EU Council body and the European parliament.<sup>154</sup> This is in accordance with the legislative procedure set out under article 294 read with article 297 of the TFEU. Once adopted the various member

---

<sup>151</sup>White Paper on Damages Actions for Breach of EC antitrust law, COM(2008) 165 final, 2.4. 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT>.

<sup>152</sup> Commission Staff working paper, SEC (2008) 404, 2.4.2006. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0404:FIN:EN:PDF>.

<sup>153</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>154</sup> See European parliament legislative observatory procedure file. <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0185%28COD%29&l=en#tab-0>.

states will be under an obligation to align their domestic legal rules with the suggestions and objects contained in the directive proposal.<sup>155</sup>

The main aim of the proposal is described in the document as being mainly to set out the rules necessary to ensure that anyone that has suffered harm as a result of an infringement of the competition rules under the TFEU can effectively exercise his or her right to full compensation.<sup>156</sup> It is interesting to note that the EC proposal does not include any recommendations for legislative action on collective redress (class actions) even though that issue was canvassed in the WP. In that regard the recommendations found in the WP are still of theoretical value and will be discussed below along with the explanatory notes found in the SWP.

### **3.2 Who may claim?**

The question of who is entitled to claim for damages is one of the first determinations that a court would have to make when confronted with a antitrust damages claim. In this regard article 2.1 of the EC proposal confers a right to compensation on anyone who has suffered harm as a consequence of an infringement of EU or national competition laws and that person is entitled to full compensation.<sup>157</sup>

Furthermore standing is conferred to indirect purchasers when article 2.1 is read with articles 13 and 15. An indirect purchaser can be described as purchaser of a good or product, who is or was not in a direct contractual relationship with the infringing party.<sup>158</sup> Typically this would be the end consumer or user of a good where that good or product was purchased from an intermediary such as a wholesaler, retailer or even supplier, where the relevant product or good is a component or essential input in the manufacture of a final product. The wholesaler having purchased the good or product from a manufacturer or supplier who committed an infringement of antitrust law and passed on some or the entire overcharge onto the end consumer.

---

<sup>155</sup> Supra fn 74 at Art 288.

<sup>156</sup> Supra fn 82 at Art 1.1.

<sup>157</sup> Supra fn 82 at Art 2.

<sup>158</sup> Bulst (2008), "Of Arms and Amour " 2/2008 Bucerius Law Journal at 83.



The standing of indirect purchasers is closely related and contingent on the availability of the “passing on defence”. The proposals pertaining to the “passing on defence” and the standing of indirect purchasers are found under Articles 12, 13 ad 15 of the EC proposal.

Article 12 expressly makes available to the defendant in an action for damages the “passing on” defence<sup>159</sup> however the defence is not available to that defendant where he wishes to invoke it against an indirect purchaser.<sup>160</sup>

Article 13 then deals with the question of legal standing for the indirect purchaser. The indirect purchaser who wishes to claim damages against the infringer will have to prove that there was a passing on of the overcharge onto himself.<sup>161</sup> The indirect purchaser would have to prove the existence of three elements in order to discharge the onus of proof, namely that:

- a) The defendant has committed an infringing act;
- b) The infringement resulted in an overcharge for the direct purchaser or intermediary, and that;
- c) That he or she purchased the goods or products that were subject to the overcharge.<sup>162</sup>

The practical effect of articles 12, 13 and 15 is thus firstly to provide a shield or defence on the one hand to a defendant faced with a claim from the direct purchaser to at least ensure reduction of a damages award to that direct purchaser based on a passing on of the overcharge by the latter to its own customers.

Secondly, the provisions enable the indirect purchaser to bring forth a claim by granting him or her standing before the court. Essentially the indirect purchaser only has to

---

<sup>159</sup> Supra fn 81 at Art 12(1).

<sup>160</sup> Supra fn 81 at Art 12(2).

<sup>161</sup> Supra fn 81 at Art 13(1).

<sup>162</sup> Supra fn 81 at Art 13(2).

provide evidence that the defendant committed an act that infringes the competition laws of the European Union, that the infringement resulted in a price increase for the direct purchaser and that he/she purchased those goods that were subject to the infringement or goods derived from them.<sup>163</sup> The indirect purchaser is also freed from having to procure evidence as to the precise amount of overcharge that was passed on him/her as the courts would be empowered to estimate the amount of overcharge passed on of their accord.<sup>164</sup> Another aid to the indirect purchaser (and direct purchaser) is to be found under Article 15, the provision requires that the court takes into consideration any other actions for damages that arise from the same infringement but where the claimant in that action is situated at a different level in the supply chain, for purposes of determining whether there was an overcharge passed on to the indirect purchaser.<sup>165</sup> This ensures that appropriate amount compensation is paid out to the correct claimant and also that the infringer isn't made to over-compensate or compensate twice for the same harm.

### **3.3 Collective Redress Mechanisms**

The EC acknowledges in the WP that there is a clear need for mechanisms that allow for the aggregation of the individual claims of victims of antitrust infringements. That individuals and small business especially those with scattered low-value damage are often disinclined to pursue those claims because of the costs, delays and risk burdens involved.<sup>166</sup>

To aid in the facilitation of those claims the Commission SWP then proposes two mechanisms for collective redress, namely, the representative action and opt-in collective action.

---

<sup>163</sup>Supra fn 81 at Art 13(1) read with 13(2).

<sup>164</sup>Supra fn 81 at Art 13(2).

<sup>165</sup>Supra fn 81 at Art 15.

<sup>166</sup>Supra fn 80 par 30.

**Representative actions**<sup>167</sup> are described in the SWP as those brought by qualified entities such as consumer associations, state bodies or trade associations, on behalf of identified or identifiable victims. Further, these entities would have to be either a) officially designated in advance or b) certified on an ad hoc basis by member states (or their courts) for a particular antitrust infringement to pursue the actions.

**Opt-in collective action**<sup>168</sup> is then described as action in which victims of antitrust infringements expressly decide to combine their individual claims for harm suffered into one single action.

Representative actions, according to the SWP, are appropriate in antitrust cases because the types of bodies envisioned i.e. consumer bodies or trade associations would ordinarily have as their object the protection and promotion of specified interests in relation to their members.<sup>169</sup> They would therefore be less reluctant to start actions against infringers.<sup>170</sup> This is because an action for damages against an infringer would be related to their core activity whereas individual consumers or small business would be reluctant to re-direct their time and resources away from their normal day to day responsibilities.<sup>171</sup>

Also small business may be reluctant to start an action against a supplier or commercial partner with whom they do regular business and against whom they stand at a distinct power and resource disadvantage.<sup>172</sup>

With reference to representative actions, the ideal representative would need to meet specific criteria set in law and give sufficient assurance that abusive litigation is avoided.<sup>173</sup> Appropriate law would need to be enacted that would determine appropriate rules and procedure for certification to determine eligibility to sue in a

---

<sup>167</sup> Supra fn 80 par 48 to 56.

<sup>168</sup> Id at par 57 to 59.

<sup>169</sup> Id at par 50.

<sup>170</sup> Id at par 50.

<sup>171</sup> Id at par 50.

<sup>172</sup> Id at par 50.

<sup>173</sup> Id at par 52.

representative capacity. Eligibility would be limited to entities whose primary task is the protection of their member's interest, other than by pursuing damages claims. They would also need to give sufficient assurance that abusive litigation would be avoided.<sup>174</sup>

Turning to the collective action mechanism the SWP makes the following pronouncements. Firstly in a collective action, as opposed to a representative action, the claimant acting on behalf of the class members would also need to have suffered harm as result of the anti-trust infringement.<sup>175</sup> The collective action mechanism is beneficial in that it improves the position of the victims by rendering the cost to benefit analysis of the action more attractive as they would apportion the costs amongst themselves and share in the evidence obtained.<sup>176</sup>

The commission is in favour of a collective action system where victims have to expressly state their intention to be included in the action even though there exists some theoretic disadvantages.<sup>177</sup> An opt-in system would normally result in a smaller number of claimant victims than an opt-out system, thereby limiting the corrective justice element of the claim. A possible consequence of this would be that in the end the infringer would retain some of its illicit profits (as some victims may end up not pursuing their claims at all) thereby limiting the deterrent element of the damages claim.<sup>178</sup>

However the commission feels that as a whole, an opt-in system of collective action is preferable to opt-out actions based on experience from other jurisdictions where the opt-out system leads to abusive litigation. Also in the opinion of the commission opt-out systems tend to increase the risk of conflicting interest arising on the part of the agent pursuing the claim as he or she may end up placing his own interest above those of the victims in pursuing the action for damages.<sup>179</sup> Another benefit of the opt-in system is that when it comes to the distribution of the damages awarded, the victims would have

---

<sup>174</sup> Supra fn 80 at par 57.

<sup>175</sup> Id at par 57.

<sup>176</sup> Supra fn 79 at par 2.1.

<sup>177</sup> Supra fn 80 at par 58.

<sup>178</sup> Id at par 58.

<sup>179</sup> Id at par 58.

already been individually identified.<sup>180</sup> Qualified entities must then be under legal obligation to bring notice to the victims they represent of the intended action so that individual victims are not deprived of their right to enforce their claim either individually or through an opt-in collective action.<sup>181</sup>

### 3.4 Full compensation

The phrase “full compensation” is found under article 2 of the EC proposal.<sup>182</sup> Although not defined under the schedule of definitions in article 4 some content is given to its meaning by article 2.2. “Full compensation” requires that the sufferer of harm be placed in the hypothetical position he/she would be in were it not for the infringement occurring.<sup>183</sup> Secondly full compensation in terms of the article includes not only actual loss suffered but also loss of profit arising from the infringement.<sup>184</sup> Lastly interest would be calculated with reference to the period from when the harm first occurred until the date of compensation.<sup>185</sup>

### 3.5 Disclosure of evidence

One of the chief challenges that a claimant for antitrust damages faces when pursuing such a claim before a court is the asymmetry of information. Usually key evidence necessary to demonstrate the amount of an overcharge or how much of that overcharge was passed on would be in the hands of the infringer or other third parties.

The EC acknowledges this problem in the SWP<sup>186</sup> when it states that national rules on evidence often make it excessively difficult if not impossible for a victim to be successful in an antitrust damages action. However it goes on to say that any rules concerning

---

<sup>180</sup> Id at par 59.

<sup>181</sup> Id at par 61.

<sup>182</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>183</sup> Id at art 2.2.

<sup>184</sup> Id at art 2.2.

<sup>185</sup> Id at art 2.2.

<sup>186</sup> Supra fn 80 par 87.

improved access to evidence should be formulated in a manner that avoids unwelcome externalities such as “fishing expeditions”,<sup>187</sup> “discovery blackmail”,<sup>188</sup> procedural abuses and excessive cost for the potential defendant(s). To mitigate against these unwelcome externalities rules would have to be put in place to ensure sufficient judicial control over the scope, manner and relevance of disclosure.<sup>189</sup>

It narrows the problem down to mainly three factors:

- a) The fact intensive nature of competition cases;
- b) The information asymmetry that typically exists in competition cases and;
- c) The fact that some member states have strict rules of procedure requiring claimants to assert in detail all the facts corroborating their claim and present specified evidence in support of those assertions.<sup>190</sup> The over-all effect of these factors is the frustration of efforts to achieve effective redress of antitrust harm.

In addressing the first and second factors, the SWP explains that actions for antitrust damages often require unusually complex assessments of economic interrelations and effects.<sup>191</sup> Even where a finding of infringement of competition rules has been established, the claimant still has to demonstrate in detail the causation and quantification of damages.<sup>192</sup> To demonstrate damage the claimant is required to compare the anti-competitive situation against a hypothetical situation which would have existed but for the infringement. The claimant will then have to rely on information that is in the hands of the defendant or its partners in the cartel.<sup>193</sup>

Further, reconstruction of a hypothetical competitive market environment would require knowledge of facts on the commercial activities of the infringer.<sup>194</sup> The EC then states that in order to achieve an effective framework for the pursuit of antitrust

---

<sup>187</sup> Id at par 70.

<sup>188</sup> Id at par 87.

<sup>189</sup> Id at par 72.

<sup>190</sup> Id at par 6.

<sup>191</sup> Id at par 88.

<sup>192</sup> Id at par 89.

<sup>193</sup> Id at par 89.

<sup>194</sup> Id at par 89.

compensation claims, measures designed for improved access to evidence in the hands of the defendant or other third parties is necessary.<sup>195</sup>

Even with follow-on actions (such as those prescribed under the competition regime in South Africa) evidence in the files of the competition authority would be insufficient to corroborate a claim for damages as public enforcement investigation would not usually collect the detailed information necessary to show the exact quantification of individual harm and the causal link to some victims.<sup>196</sup> The EC then proposes a framework for *inter-partes* disclosure based on a minimum level of disclosure based on fact pleading, combined with judicial control over relevance and proportionality.<sup>197</sup> To this end the EC proposal presents a model for such framework under articles 5, 6, 7 and 8.<sup>198</sup>

Under the above proposed provisions the requirements for a claimant to discharge when applying for disclosure of evidence are three-fold, namely that:<sup>199</sup>

- a) He or she must show that there has *a prima facie* case;
- b) The evidence he seeks from the defendant or third party is relevant and in support of his claim;
- c) He or she is required to specify such evidence or category of evidence as narrowly as possible.

The requirements represent a balanced approach that aids the claimant especially in the case of follow-on actions. Once a competition authority has made finding of an infringement of competition rules the claimant would only need to show that the

---

<sup>195</sup> Supra fn 80 at par 66 and 67.

<sup>196</sup> Supra fn 79 at par 4.2.

<sup>197</sup> Supra fn 79 at par 4.2.

<sup>198</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>199</sup> Supra fn 79 at Art 5(1) and Art 5(2).

evidence he seeks is relevant to his case and then specify the category of evidence sought.<sup>200</sup>

This position is even more beneficial for the indirect purchaser given that article 13<sup>201</sup> creates a rebuttable presumption that there was an overcharge passed onto the indirect purchaser as long as the claimant can show that the defendant committed an infringement of competition law which resulted in an overcharge falling on the direct purchaser.<sup>202</sup>

The indirect purchaser in a follow-on action is in an even better position as a finding of an infringement having occurred would also determine that an overcharge occurred. That claimant needs only to show that he purchased the goods subject to the overcharge from the direct purchaser for the rebuttable presumption to kick in.<sup>203</sup> That presumption would constitute a prima facie case for purposes of the disclosure application under article 5.<sup>204</sup>

Thereafter, that claimant then only has to show that the evidence sought is under the control of the infringer or direct purchaser.<sup>205</sup> This in itself is not an onerous burden on the claimant given that in most cases the evidence needed to show the amount of overcharge and what portion of it was subsequently passed-onto the indirect purchaser would be in the hands on the defendant and indirect purchaser.

The requirement that the claimant need to specify the evidence or category of evidence narrowly is necessary in order to avoid the unwelcome externalities the commission warns about. Once the claimant has sufficiently met the requirements the court must then conduct a proportionality test in evaluating the disclosure application. This is important so as to not unduly prejudice the defendant or expose it to fishing

---

<sup>200</sup> See Id at Art 5(1) and Art 5(2).

<sup>201</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>202</sup> Supra fn 81 at Art 13(1) and 13(2).

<sup>203</sup> Supra fn 81 at Art 13(2)(c)

<sup>204</sup> Supra fn 84 at Art 5(2), COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

<sup>205</sup> Supra fn 84 at Art 5(2), COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>



expeditions. With regard to be considered by the court under article 5(3)(d) this seems to be designed to support the court in evaluating whether, in a follow on action, the applicant for disclosure has specified the evidence sought as narrowly as possible.

It is submitted that the limits on disclosure of evidence imposed by the provisions of the above article seem to be designed with two objectives in mind. Firstly by placing a ban on disclosure of evidence falling under the categories of leniency corporate statements and settlement submissions the Commission seemingly wants to maintain the effectiveness and attractiveness of leniency programmes. It is crucial that the leniency programmes remain attractive in order to incentivise cartel members to come forward and provide evidence as to the existence, structure and activities of the cartel. A cartel member would think twice about coming forward and giving evidence if it cannot be sure that its evidence won't be used against it should any follow on damages action occur.

The second limitation on disclosure is a temporary ban on disclosure of evidence submitted to a competition authority during the subsistence of investigation proceedings.<sup>206</sup> This ban is so as to not compromise the investigative activities of a competition authority while it is still building up to a determination.<sup>207</sup> Evidence contained in the files of a competition authority which does not fall into either of the two protected categories above would remain discoverable.<sup>208</sup>

The provisions of article 7 pertain to persons who were subject to an investigation or prosecution by a competition authority prior to there being a damages claim instituted against themselves or another member of a cartel.<sup>209</sup> Essentially those persons who as a result of them being under investigation or prosecution had access to evidence contained in the file of the competition authority are barred from using evidence that they may be privy to which falls into the protected categories of either leniency

---

<sup>206</sup> Supra fn 81 at Art 6.2.

<sup>207</sup> Supra fn 81 at par 4.2.

<sup>208</sup> Supra fn 81 at Art 6.3.

<sup>209</sup> Supra fn 81 at Art 7.

corporate statements or settlement submissions.<sup>210</sup> A temporary ban is then placed on those persons presenting evidence as described under article 6(2) during the subsistence of a competition authority's investigations.

Lastly where a person is privy to evidence as a result of having been under investigation by a competition authority and such evidence is not inadmissible in terms of article 7(1) or (2) then that person in an action for damages by that very person.

Article 8<sup>211</sup> then provides for sanctions for non-compliance with disclosure orders and any obligations imposed by a court for the protection of confidential information, as follows:-

The provisions of article 8 above are clearly meant to act as a deterrent and ensure cooperation by parties with any disclosure orders made by a court. Specifically the threat of an adverse inference in the event of a refusal to produce evidence or destruction of such evidence should be an effective measure to ensure that parties to indeed cooperate as such inference would negate any possible benefit that could come from not cooperating

### **3.6 Quantification of harm**

The EC proposal under article 16 provides for measures for the establishment and quantification of harm brought about by an infringement of the competition rules. Although it does not expressly set out methods through which a court is required to actually quantify that harm, in the main it serves to alleviate some of the evidentiary burden on a victim of cartel infringements when it comes to establishing the causation of harm.

Firstly it provides for a rebuttable presumption in favour of a victim of a cartel infringement establishing the existence of harm.<sup>212</sup> This presumption is created on the basis of research conducted by commission that shows that in 90% of instances of cartel

---

<sup>210</sup> Supra fn 81 at Art 6(1).

<sup>211</sup> Supra fn 81 at Art 8.

<sup>212</sup> Supra fn 81 at Art 16(1).

activity an illegal overcharge is occasioned.<sup>213</sup> The burden is thereby shifted onto the infringer to adduce evidence that shows that there was no harm brought about by the cartel activity.<sup>214</sup>

With regard to the actual quantification of harm the provisions furthers aid the victim of cartel infringement in that it requires that the rules and evidentiary burden that the victim would be subjected to should not be so onerous as to make it excessively difficult or impossible for that victim to achieve redress. Furthermore the court is empowered of its own accord, to aid the victim by estimating the amount of harm.

The Commission has published a non-binding communication on quantification of harm in actions for damages based on antitrust infringement. This communication is meant to be a guide providing the various methods of quantification and setting out the particular strengths and weaknesses of each.<sup>215</sup>

### **3.7. Joint and several liability**

Where there is an infringement of competition rules by a number of parties acting in concert such as in cartel cases the Commission feels that there is a need to establish rules that on the one hand maintain the attractiveness of leniency programmes and on the other hand secure full compensation for victims by holding infringing parties jointly liable for the damage caused.<sup>216</sup>

First the provision seeks to re-affirm the position that the infringing parties are liable to compensate victims of their conduct on a basis of joint and several liability. However in order to maintain the attractiveness of leniency programmes the provision seeks to protect the leniency recipient.<sup>217</sup> Such leniency recipient shall be liable to its direct and indirect purchasers (and providers) only where those victims have been unable to

---

<sup>213</sup> Supra fn 81 at p18.

<sup>214</sup> Supra fn 81 at Art 16(1).

<sup>215</sup> Quantifying antitrust damages — Towards non-binding guidance for courts', accessible at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf), p. 91.

<sup>216</sup> Supra fn 81 at pg16 par 4.3.3.

<sup>217</sup> Supra fn 81 at Art 11(2).

achieve compensation from the other members of the infringing group.<sup>218</sup> Also the amount of contribution it shall be liable for is capped at an amount equal to the harm it caused to its own direct or indirect purchasers and providers.<sup>219</sup>

The protection afforded to the leniency recipient is appropriate given that during the normal course of antitrust investigations and operation of leniency programmes the leniency recipient would be the first member of the cartel to admit to or be found guilty of having engaged in infringing practises.<sup>220</sup> Therefore they would be the first identifiable culprit in the eyes of the victims and actions for damages directed against them. The commission deems it important to rescue the leniency recipient from that disadvantageous position if the attractiveness of leniency programmes is to be maintained.

It is my submission that this precaution is reasonable when one considers that without the evidence brought forward by the leniency recipient a cartel's existence and its activities might not be uncovered. In a sense the leniency recipient is the genesis of the victims claim.

### **3.8 Conclusion**

The aim behind the directive proposal read with the White Paper and Staff Working Paper is to improve the legal conditions for victims of antitrust infringements to exercise their right to compensation for all damage suffered. The foremost guiding principle being the achievement of full compensation for victims including compensation for loss of profit.

The Staff Working Paper goes on to state that in general traditional tort rules of member states, whether legal or procedural in nature, are often inadequate given the specificities and nuances of actions under antitrust law.<sup>221</sup>

Factors which influence the decision making by victims on whether to bring damages claims relate to the difficulties in proving the claim and the uncertainty of outcome and

---

<sup>218</sup> See Id at Art 11(2).

<sup>219</sup> Supra fn 81 at Art 11(3).

<sup>220</sup> Supra fn 81 at pg 16 par 4.3.3.

<sup>221</sup> See Id at par 5.

associated risks.<sup>222</sup> As illustrated above, the main challenges to victims effectively prosecuting their claims are the rules on access to evidence, the fault requirement, the definition of damage, the availability of the passing on defence, the question of standing of indirect purchasers and the question of collective redress mechanisms.

Enhancing the effectiveness of damages actions would also have wider benefits in that those companies who abide by the law would not suffer from a competitive disadvantage brought about by the injustice of the infringing parties retaining some or most of their ill-gotten gains as a result of victims not being able to successfully prosecute their claims.<sup>223</sup> Further, an enhanced level of actions for damages would have a deterrent effect on potential infringers by increasing the risks associated with committing infringements of antitrust law.<sup>224</sup>

The proposed measures of the directive proposal present a balanced and considered approach meant to incentivise victims to pursue their claims but without compromising the attractiveness of corporate leniency programmes of national competition authorities. The complex of rebuttable presumptions combined with provisions that lessen the evidentiary burden on the victim and rules on discovery of evidence would be hugely beneficial to the victims in that the net result would be lower associated costs of obtaining vital evidence and a levelling of playing fields when compared against the financial clout of the typical infringing corporation.

A glaring omission from the directive proposal is the lack of measures on collective redress mechanisms. Such mechanisms are essential if compensation is to be achieved for victims who suffered low value individual damage such as the consumers under the Children's Resource Centre Trust case. The EC missed an excellent opportunity to not only present a model for an effective collective redress mechanism but also to instigate debate around alternative methods of compensation especially circumstances such as

---

<sup>222</sup> See *Id* at par 6.

<sup>223</sup> *Supra* fn 80 at par 14.

<sup>224</sup> *Supra* fn 80 at par 15.

the *Children's Resource Centre Trust* where the claimants are not intending to distribute the cash award to the victims at all.

Given that in SA, our law around damages claims that arise from antitrust infringements is still in its infancy, the deliberation taking place in the EU right now offers lessons for us too. The fact of the EU being a community made up of over 20 member states each with its own peculiar legal systems, history and nuances means that these proposals and discussion papers have to factor in that diversity and come to recommendations that are flexible enough to be incorporated in any member state's laws without offending the member states legal institutions.

Therefore it is submitted that that much of these recommendations could quite easily be incorporated into South African jurisprudence without causing huge upset. Competition Law because it is such a specialised area of law that draws inferences from global economic theory, lends itself to a high degree of internationalization, therefore more than in any other area of our domestic law we should be willing to embrace suggestions and lessons from leading global antitrust jurisdictions.

## Chapter 4: Conclusion and Recommendations

### 4.1 Conclusion

The purpose of this study is to highlight and analyse the challenges faced by victims of antitrust infringements under SA law. In light of the two recent actions of *Children's Resource Centre Trust & Mukaddam* it would seem that the position under our law is far from satisfactory and certain.

The Constitutional Court judgement in the *Mukkaddam* action in particular should be welcomed. The class action as a mechanism for collective redress is now available under our law even outside the context of an action to assert or protect a constitutional right. The overriding principle being whether such a class action would serve the interest of justice having consideration to the stated factors above. It is not necessary that the common issues should predominate over individual issues for certification to be granted as the individual issues may be determined separately once the common issues have been settled.

A very important question raised is how the cause of action is to be framed, especially in situations such as the consumer case. It can be argued that the legislature's intention behind section 65 of the Competition Act was to create a statutory right to claim for civil damages. This interpretation would be the most in-line with the interest of justice as surely justice demands that compensation be granted wherever and whenever harm is occasioned unlawfully.

Furthermore there is nothing in the wording of section 65 which suggests that the legislature did not intend to provide a civil right of action through its enactment. It also seems the courts had no issue with granting standing to the indirect purchasers in the *Children's Resource Centre Trust* matter which is also to be welcomed. However there is some confusion around the co-existence of both claims by direct purchasers and indirect purchasers. The SCA seemed to suggest by way of obiter remarks that the competing interests of these two categories of victim could render them mutually exclusive. This is

where the question of the availability of the passing-on defence comes into play. Both categories of victim suffered harm as a result of the same antitrust infringements and as such they are both entitled to relief. In my view the defence should be recognised by the courts so as to allow for full compensation of harm where it has been occasioned.

Another issue that could become a problem is the quantification of harm under class action suits for damages. The directive proposal does not go much further than to create a rebuttable presumption that harm was caused. Under the SALRC Report a 2 phase mechanism is proposed whereby the court merely determines the aggregate amount of the damages to be awarded, thereafter a court appointed commissioner sees to the collating of evidence and the determination of individual damages awards.

If it is accepted that it is in the interests of justice that victims of antitrust infringements should be compensated then surely a legal system that is conducive to such actions and incentivises the victims to prosecute those claims is ideal.

To that end the EC's deliberation and recommendations as found in the WP and directive proposal (supported by the SWP) should be taken into serious consideration by both the courts and the legislature as they purport to prescribe the minimum that is necessary to obtain a legal system that allows victims to effectively exercise their rights to compensation.

#### **4.2 Recommendation**

As stated above, although there has been encouraging development of the law pertaining to claims for civil damages brought about by antitrust infringements lately especially when it comes to class actions, there remains still much uncertainty.

Legislative action is sorely needed. The courts have done an admirable job in incorporating the class action mechanism in to our law in spite of legislative tardiness.



However the task should not be left to the courts alone to determine and develop the necessary jurisprudence. The problem with that judicial development is that it would inevitably be slow and occur on a piece meal basis. Legal uncertainty would prevail, further disincentivising victims and ultimately the interests of justice would suffer as infringing parties would retain a considerable portion of the ill-gotten gains.

Legislative clarification is needed that would confirm that s65 does indeed provide an exclusive right to claim. Further, amendments to the Competition Act incorporating the passing on defence and creating a system of rebuttable presumptions (with regard to the existence of harm and the passing on of an overcharge to indirect purchasers) in favour of the plaintiff, similar to those proposed by the EC under the directive proposal and similar rules pertaining to the discovery of crucial evidence held by the infringing party and or third party would be essential.

Legislative action is also needed to settle the legal position around the class action mechanism and public interest actions along with provisions prescribing methods of alternative compensation for cases like *Children's Resource Centre Trust* where the damages claimed are not to be paid out to the victims directly. Provisions allowing for the monetary awards to be put towards social upliftment projects should be introduced. Hypothetically speaking, should the Children's Resource Centre Trust action result in a damages award and the claimants be required to distribute that award to the various individual class members the value of that individual pay out would be too small to make a meaningful impact on the lives of the individuals. However the aggregate award could be so large as to enable the class members to uplift empower themselves a group which would be more beneficial.

**Word count: 14 101**