

The Relationship between Public and Private Enforcement in Competition Law

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A Comparative Analysis of South African, the European Union, and Swiss Law

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This paper presents a brief outlook of the South African, the European Union, and Swiss theory and practice on the relationship between public and private enforcement in competition law. The main point is to verify whether there are any differences between the way the Legislators and the Authorities in these three jurisdictions see the private enforcement of competition law, and how these legislations integrate the need to assess and punish the infringements to the various cartel acts, with the question of how persons who suffered damages are compensated (be it the consumers, or other economic actors). The South African section calls for a greater attention to the issue of private enforcement of competition law. In the EU part, the Commission White Paper's implications are discussed. The Swiss section looks at the Evaluation of the Swiss Cartel Act of 2009, and the opportunities offered by a revision of the 1995 Cartel Act. In all the jurisdiction analyzed below, there is a regrettable lack of legal instruments to enable an easy compensation of damaged parties.

INTRODUCTION

The following article intends to provide a comparative overview on the *status quo* of private enforcement of competition law and its interaction with public enforcement in South Africa, the European Union, and Switzerland. In the three jurisdictions analyzed the same tendencies may be observed: Not only do the number of cartels detected and fined constantly increase, but also the amount of the fines imposed on cartel members has considerably augmented. Until not long ago,

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public enforcement of competition law was clearly the core piece of the three competition law systems. Even though cartels members are severely fined, victims of competition law violations are too often not (fully) compensated for their harms suffered. However, South Africa, the European Union and Switzerland - by some means or other - currently strive to enhance private damage actions which still face severe practical restrictions. This article will reveal that there is some light at the end of the tunnel, even though many issues still remain unsolved.

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I. SOUTH AFRICAN COMPETITION LAW

1. BACKGROUND

In the year 2009, the South African competition authorities celebrate the 10th anniversary of the enactment of Competition Law. The primary purpose of the Competition Act¹ (the "Act") is to promote and maintain competition. The South African competition authorities have seen a number of cases come to light. There had been a wave of merger filings in its initial wake, and most recently a number of cases on prohibited practices have been taken to task. The Commissioner has indicated that in the 2008/2009 financial year alone, 131 complaints were filed with the Commission and of these, 11 were referred for hearing to the Competition Tribunal.² Firms who were found to be contravening the Competition Act had to pay R209 million in settlement claims.³ This is a huge step up and a marked increase from previous financial years where, for example, the settlement claims amounted to R40 425 000 in the financial year 2005/2006, R43 810 600 in 2006/2007 and R99 384 870 in 2007/2008.⁴ This is also an indication of the seriousness with which the Commission perceives these contraventions of the Act and the growing awareness of competition law by the public who are affected by the contraventions.

2. PUBLIC ENFORCEMENT BY THE COMPETITION AUTHORITIES

2.1 Enforcement Tools at the Disposal of the Competition Authorities

The Competition Commission has at its disposal powers to assist in its investigation which are usually available to crime busting authorities.⁵ For example, they may be able to obtain a warrant to enter and search a property where there are reasonable grounds to believe that:

- “(a) a prohibited practice has taken place, is taking place, or is likely to take place on or in those premises; or
- (b) anything connected with an investigation in terms of this Act is in possession of , or under the control of, a person who is on or in those premises”.⁶

This section of the Act sets out specific procedures that the Commission has to follow when embarking on the entry and search. There is also a provision that allows the Commission to enter and search without a warrant if they are able to obtain permission from the occupant or if the Commission

1 Act 89 of 1998 (as amended). The Act came into effect on 1 September 1999.

2 Jacqui Pile “Levelling the playing field” *Financial Mail*. Available at <http://secure.financialmail.co.za/09/0710/fox/dfox.html>. Last consulted: 07.09.2009.

3 Ibid.

4 South African Competition Commission Annual Report 2007/2008 p 33.

5 Criminal Procedure Act 51 of 1977. See chapter 2.

6 Section 46 of Act 89 of 1998 (as amended).

believes on reasonable grounds that the delay in obtaining a warrant would defeat the object of the entry and search.⁷ Some of the powers of the search also include examining, requesting, and copying information from any data source including electronic sources and to remove the evidence from the premises into safe custody if they deem necessary.⁸ The Commission also has the power to issue a summons. This may be to summon a person who is believed to have information, which is necessary to the investigation, and to bring the information to the Commission. The person summoned may also be subjected to answering questions pertaining to the investigation (except those that may be self-incriminating).⁹

In addition to the above public enforcement tools the Commission has also implemented the Corporate Leniency Policy, which has changed the face of cartel investigations. The purpose of the leniency policy is to detect cartel behavior, which is otherwise difficult to find, and grant leniency from prosecution to the first applicant through the Commission's door. The first leniency policy guideline was published in 2004¹⁰ and did not find much application, due to its lack of clarity and uncertainty.¹¹ The policy has since been revised in 2008,¹² which introduced a marker system. The marker system allows the first applicant to stake its claim at first place while it is still gathering evidence for the investigation. The revised policy appears to have been more effective and the Commission has received an increased number of leniency applicants since its revision.¹³ Some of the cartels uncovered were in industries such as the "airline, steel, milk, bread, gas, petroleum and private health care sectors".¹⁴ It is clear that the leniency policy has been one of the most instrumental tools in detecting anti-competitive cartel behavior in South Africa.

The current Competition Act is undergoing amendments and a draft Competition Bill has been published and passed by Parliament, awaiting the signature of the President.¹⁵ This Bill has criminalized cartel behavior, and if found guilty, directors could face a jail sentence. This would create another means to strengthen the public enforcement of Competition Law in South Africa.

2.2 Successful Outcomes of Investigations

After the Commission has conducted its investigation, it may either refer the case to the Tribunal for hearing, or the respondents can sign an order consenting to the fact that they had committed the alleged conduct and pay a fine, which is then confirmed by the Tribunal.¹⁶ The Act empowers the Tribunal to impose an administrative penalty of up to 10% of the firm's annual turnover in South Africa.¹⁷ In some instances the Tribunal has made this determination based on the turnover within the affected markets. The nature of these cases range from implementing a merger without notifying the Commission, to cartels, resale price maintenance, abusing a dominant position, and price discrimination.

7 Section 47.

8 Section 48.

9 Section 49A.

10 Corporate Leniency Policy GN 25963 of 6 February 2004.

11 See Kasturi Moodaliyar 'Are cartels skating on thin ice: An insight into the South African Corporate Leniency Policy' (2008) 125 (1) *SALJ* 157-177.

12 Corporate Leniency Policy GN 31064 of 23 May 2008.

13 Christy van der Merwe 'Tribunal chair concerned about competition in SA economy' *Engineering News* 15 July 2009. Available at www.engineeringnews.co.za/print-version/tribunal-chair-concerned-about-competition-in-sa-economy.html. Last consulted: 03.08.2009.

14 Malose Monama 'Price Fixing cartels face consumer lawsuits' *City Press Business* 1 August 2009. Available at: http://jv.news24.com/City_Press/Finance/0,,186-246_2544284,00.html. Last consulted: 03.08.2009.

15 The Competition Amendment Bill [B31D 2008].

16 Section 49D of the Competition Act.

17 Section 59(2).

In order to provide an illustration of the success of the Commission's investigations, the table below displays details of the consent orders that were signed between January 2008 and August 2009. These fines do not include cases, which had undergone a full hearing by the Tribunal whereby the full course of evidence would have been led.

Table 1: Consent orders negotiated with the Commission and approved by the Tribunal January 2008-August 2009.

Respondent	Industry	Fine amount	Reason
1. Bonheur 50 General Trading (Pty) Ltd & Komatiland Forests (Pty) Ltd ¹⁸	Forestry	R500 000	Implementing a merger without notifying the Competition Commission
2. The New Reclamation Group (Pty) Ltd ¹⁹	Ferrous and non-ferrous scrap metal	R145 972 065 (6% of annual turnover in the affected markets)	Fixing prices for the supply of ferrous and non-ferrous scrap & entering into exclusive arrangements to divide markets by allocating territories and customers
3. Adcock Ingram Critical Care (Pty) Ltd, Tiger Brands Limited ²⁰	Pharmaceuticals	R53 502 800 (8% of Adcock Ingram's turnover for the financial year ending 2007)	Dividing the private hospital market by allocating customers and goods & services and engaging in collusive tendering for the supply of parenterals to State Hospitals from 1999-2007
4. American Natural Soda Ash Corporation and CHC Global (Pty) Ltd ²¹	Soda ash	R9 696 846, 96 (8% of soda ash turnover in South Africa)	Price fixing of export sales of soda ash to South Africa
5. Foodcorp ²²	Bread producers and milling	R45 406 359.82 (6.7% of Foodcorp's turnover of its baking operations in 2006)	Price fixing and market allocation of bread and milling

18 38/CR/Apr08. Cases are available at: <http://www.comptrib.co.za>.

19 37/CR/Apr08.

20 20/CR/Feb08.

21 49/CR/Apr00.

22 50/CR/May08.

6. Lancewood Cheese (Pty) Ltd ²³	Milk production	R100 000	Fixing the procurement prices of milk from producers through information exchange
7. Dismed Criticare ²⁴	Pharmaceuticals	R1 277 057.88	Dividing the private hospital market by allocating customers and goods & services, collusive tendering for the supply of parenterals to State Hospitals from 1999-2007
8. Thusanong Healthcare (Pty) Ltd ²⁵	Pharmaceuticals	R287 415.75	Collusive tendering
9. Sasol Chemical Industries Limited ²⁶	Nitrogenous fertilizer and phosphoric acid	R250 680 000 (8% of Sasol's Nitro Division)	Collusion to co-ordinate business practices, exchange information regarding production supply and demand
10. Aveng (Africa) Limited ²⁷	Concrete pipes and culverts	R 46 277 000	Price fixing, dividing and allocating markets, collusive tendering

All fines were paid to the National Revenue Fund.²⁸

In the SAA case²⁹ the Tribunal devised a percentage weighting to each of the following items listed below in order to determine the appropriate penalty as illustrated in Table 2 below.

Table 2: Weighting percentage for fines:

Elements considered	%
1. "the nature, duration, gravity and extent of the contravention	3
2. any loss or damage suffered as a result of the contravention	1
3. the behavior of the respondent	1
4. the market circumstances in which the contravention took place	1

²³ 103/CR/Dec06.

²⁴ 20/CR/Feb08.

²⁵ 20/CR/Feb08.

²⁶ 31/CR/May05.

²⁷ 24/CR/Feb09.

²⁸ As determined by Section 59(4) of the Act.

²⁹ Competition Commission v South African Airways (Pty) Ltd case no: 27/CR/May01.

Elements considered	%
5. the level of profit derived from the contravention	0.5
6. the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal	1.5
7. whether the respondent has previously been found in contravention of this Act” ³⁰	2
TOTAL	10%

Through the use of these considerations and formula, the Tribunal has imposed fines on a number of firms who have engaged in anti-competitive behavior and contravened the Act. As indicated above, the fines payable contribute towards the national fiscus rather than compensation to victims. In the 10 years that the Act has been in effect, South Africa has not experienced a claim for civil damages that have reached trial stage. There has been some news reports and speculation about affected parties intending to claim damages for recent cases.³¹ It is submitted that the next evolution of competition law in South Africa will be a progression in litigation towards civil damages cases.

3. PRIVATE ENFORCEMENT OF COMPETITION LAW

3.1 Locus standi

To claim civil damages, the parties who have suffered will have recourse to the civil courts only after the competition authorities have ruled on their finding. Damages could be awarded in excess of the 10% turnover of the Respondent as restricted by the Competition Act’s administrative penalty. However, it should be noted that punitive damages are not awarded in South Africa. In terms of the Competition Act “A person who has suffered loss or damage as a result of a prohibited practice-

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form-

- i. certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Act;
- ii. stating the date of the Tribunal or Competition Appeal Court finding; and
- iii. setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.”³²

³⁰ Section 59(3).

³¹ See Malose Monama ‘Price Fixing cartels face consumer lawsuits’ *City Press Business* 1 August 2009. Available at: http://jv.news24.com/City_Press/Finance/0,,186-246_2544284_00.html. Last consulted: 03.08.2009. Florence de Vries ‘Competition authority ‘is a hammer seeking a nail’ *Business Report* 2 August 2009. Available at: <http://www.busrep.co.za/index.php?fArticleId=5109734>. Last consulted: 03.08.09

³² Section 65(6).

The Competition Act does not define who has locus standi to be a plaintiff. There are many untested questions surrounding this issue. For example, could the above provisions to claim damages extend to an infringed plaintiff who is the direct purchaser, indirect purchaser, supplier, competitor, member of a cartel, or a plaintiff that did not lodge the original claim with the competition authorities? The extent to which the loss has occurred is also in question.³³ These questions are also pertinent to how class actions or public interest groups should be classified and whether or not such entities would also be allowed to claim damages in competition cases.³⁴

In South Africa the plaintiff has 3 years within which to file its civil action suit.³⁵ In the case of a suit for damages arising out of a competition law case, the plaintiff will have to wait for the outcome of the decision by the competition authorities before embarking on a civil action. The lack of interim compensatory relief may impact on the plaintiff's right to due process. If the plaintiff is a complainant in a matter currently investigated by the Commission, it may apply for interim relief to the Tribunal to order the respondent to cease its actions.³⁶ However, the Tribunal cannot award interim relief in the form of damages to the plaintiff.

3.2 Jurisdiction of South African Courts

It is necessary to determine which court has the power to hear a civil claim for damages in a competition law matter. The Competition Act applies to "all economic activity within, or having an effect within the Republic."³⁷ "As long as jurisdiction exists at the start of the proceedings, it will continue to exist until the proceedings end, even should the particular grounds or basis upon which jurisdiction was founded, fall away during the proceedings."³⁸ Considering that a plaintiff can sue in the civil court for damages only after the South African Competition Authorities make their final decision (in terms of the Act), it is presumed that the South African civil courts would thereafter have automatic jurisdiction.

We would need to determine which court has jurisdiction within South Africa. If the amount claimed for is under R100 000 then the Magistrates Court has jurisdiction. A Magistrate Court has jurisdiction in the area where the defendant resides, carries on its business, is employed or where the cause of action took place.³⁹ If the claim is for an amount in excess of R100 000 then the High Court will hear the matter and its jurisdiction is governed by Section 19 of the Supreme Court Act which states inter alia: "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offenses triable within its area of jurisdiction and all other matters of which it may according to law take cognizance..."⁴⁰

Another aspect to consider is cases where extraterritoriality is an issue. If the respondent is resident or domiciled in another country and the cause of action arose in South Africa then the plaintiff has to

33 David Harrison and Rachel Cuff 'Private Damages actions in Competition Law' *The In-House Lawyer*, September 2007 p 52, 55.

34 A report drafted by the South African Law Reform Commission on the 'Public Interest and Class Actions Act' provides a definition for class action and public interest groups and sets out procedure on how to deal with these cases. The Bill drafted by this Commission has not been passed by parliament. See South African Law Commission *Report on the recognition of class actions and public interest actions in South African law*. Project 88, August 1998 http://www.doj.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf. Last consulted: 21.07.09.

35 In terms of the Prescription Act 68 of 1969.

36 Section 49C of the Competition Act.

37 Section 3(1) of Act 89 of 1998.

38 Steve Pete, David Hulme, Max du Plessis and Robin Palmer, 'Civil Procedure: A Practical Guide' (2005) p 42. See also *Drs Prinsloo en Mynhardt v O'Riley* 1991 (3) SA 184 (T) at 186.

39 Section 28(1)(a) of the Magistrates' Court Act 32 of 1944.

40 Section 19(1)(a) of the Supreme Court Act 59 of 1959.

bring an application to confirm jurisdiction,⁴¹ unless the respondent agrees to the jurisdiction of the court.⁴² One should note that in cases where both the respondent and the plaintiff have their domiciles outside South Africa, they cannot agree to jurisdiction in a South African's court if it was not initially conferred upon them.⁴³ To conclude, all one needs to keep in mind at this point is that the cause of action must have an economic effect in South Africa, as specified by Section 3(1) of the Competition Act.

3.3 Barriers

As in many cases, the barriers to bringing a claim for damages would be the time taken to get the case to trial (for example if the case is pending for a lengthy time at the competition courts) and the length of the trial (if the case is not settled at an earlier stage in the proceedings), the cost of litigation (if the plaintiff loses the case it may be liable for the respondents legal costs, usually being the cost of an attorney and two council), and the uncertainty of the decision imposed (if the plaintiff is successful, the damages awarded may not be as favorable as expected).⁴⁴ In South Africa, only single damages are awarded in civil cases, unlike in the USA where triple damages may be claimed, creating a greater incentive for plaintiffs to sue for damages.

It is also problematic trying to organize plaintiffs (aggrieved consumers or competitors) into a group to jointly sue for damages. This burden may fall on consumer organizations who may not have the resources to pursue the matter.

Procedural uncertainty may also be a great barrier for indignant plaintiffs. There are many issues regarding locus standi and the evidence required to prove such a case. There is also uncertainty with respect to the amount of information the competition authorities can exchange with plaintiffs suing for civil damages. This has led to a state of underdevelopment in the claims for damages in competition cases.

4. STRENGTHENING THE RELATIONSHIP BETWEEN PRIVATE AND PUBLIC ENFORCEMENT IN SOUTH AFRICA

In an address in February 2009, the then Deputy Minister of the Department of Trade and Industry ('DTI') emphasized that "the active promotion of a more competitive economic environment is fundamental to our objectives in both industrial policy and the protection of consumers-particularly low income consumers."⁴⁵ He also vowed to "support and encourage an activist stance by the competition authorities."⁴⁶ It is this support that is required to filter from the DTI to the Competition Authorities and down to the plaintiffs claiming damages. In other competition jurisdictions such as in the EU (cf. II infra) and the USA, damages have been perceived as another form of effective private enforcement in competition law cases.⁴⁷ Private enforcement would also act as a greater deterrent to recidivist anti-competitive behavior by the respondents. It should therefore be in the interest of competition authorities to assist plaintiffs in these cases. Public institutions have just a great a role to play in private enforcement of competition cases by providing access to information and also providing

41 Section 19(1)(c) of the Supreme Court Act. See Pete et al p 87.

42 *American Flag plc v Great African T-Shirt Corporation* CC 2000 (1) SA 356 (W) at 377. See also Ellison Kahn (2000): 'Conflict of Laws' *Annual Survey of SA Law*, 871-872.

43 Pistorius, D (1993) Pollack on Jurisdiction (second edition), Juta & co p 9.

44 See David Harrison and Rachel Cuff 'Private Damages actions in Competition Law' *The In-House Lawyer*, September 2007 p 52, 54.

45 Rob Davies 'Address to Competition Commission Public Sector Consultative Forum' 13 February 2009. Available at <http://www.search.gov.za/info/previewDocument.jsp?dk=%Fdata%2Fstatic%2Fs...> Last consulted: 05.07.09.

46 Ibid.

47 See Neelie Kroes 'Enhancing actions for damages for breach of competition rules in Europe' Dinner speech at the Harvard Club, New York, 22 September 2005 SPEECH/05/533. Available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>. Last consulted: 23.05.09.

adequate protection to leniency applicants, thereby safeguarding the leniency process and not undermining the success of this policy.

To facilitate the process, there needs to be some drive from the DTI with co-operation from the Commission to engage in discussion with the private sector and to draft policy guidelines and growing advocacy that would assist parties in this process. In many cases, the victims, consumers and small business are so disfranchised by the anticompetitive behavior that clear guidance and assistance would encourage these victims to claim damages. As pointed out by the Chairman of the Office of Fair Trading in the United Kingdom, “a successful competition regime needs public resources to be supplemented or complemented by private resources through actions in the courts.”⁴⁸

5. CONCLUSION

Rather than playing Alphonse and Gaston,⁴⁹ the DTI and the Commission should take the initiative to produce a policy guideline to facilitate private enforcement. With a clear procedural framework, this will also lead to a productive relationship between the public and private enforcers of competition law. Successes of the Competition Authorities will filter down to consumers who claim compensation in the form of private damages. Damages claims will be an effective deterrent of anti-competitive behavior and will contribute positively to the next level of evolution of enforcement in competition matters.

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II. EUROPEAN COMPETITION LAW

Article 81 of the Treaty establishing the European Community (EC Treaty)⁵⁰ is at the heart of the European competition law. Article 81 Section 1 provides that 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 common market are prohibited. Article 81 Section 1 also provides a non-exhaustive list of prohibited practices. Article 81 Section 2 states that agreements prohibited by Article 81 Section 1 are automatically void.

Besides the primary law of the EC Treaty, secondary legislation sets out the legal framework of EC competition law.⁵¹

48 Philip Collins, Chairman Office of Fair Trading ‘Public and private enforcement challenges and opportunities’ Speech to the Law Society’s European Group, 6 June 2006. Available at www.offt.gov.uk/shared_offt/speeches/0306.pdf. Last consulted: 28.06.09.

49 “Alphonse and Gaston were created in a cartoon strip by cartoonist Federick Burr Opper (1857-1937) who treated each other with excessive deference, often to their detriment”. http://wordsmith.org/words/alphonse_and_gaston.html. Last consulted: 02.08.09.

50 The Treaty of Maastricht of 1992, which established the European Union (EU), divided EU policies into three main areas called ‘pillars’. The first pillar consists of the European Community (EC), a successor of the European Economic Community (EEC) founded in 1957. The second and third pillars concern the Common Foreign and Security Policy (CFSP) and the Police and Judicial Cooperation in Criminal Matters (PJCC). Competition rules are embedded in Title VI of the EC Treaty. Based on the EC Treaty, secondary legislation (especially regulations and directives) has been enacted.

51 Reference is made to the particular legal act wherever it becomes relevant. The respective provisions of the EC Treaty and the secondary legislation together will be referred to as the ‘EC competition law’ or the ‘EC competition rules.’

1. BRIEF OVERVIEW ON PUBLIC ENFORCEMENT ON EC COMPETITION LAW

Council Regulation 1/2003⁵² deals with the enforcement of Article 81 of the EC Treaty. The principal enforcement agency is the EU Commission,⁵³ in particular the Directorate General for Competition.⁵⁴ According to Regulation 1/2003, the EU Commission has increased powers to conduct inspections (Article 20 of Regulation 1/2003), including the power to take statements (Article 19 of Regulation 1/2003), and to search private premises (Article 21 of Regulation 1/2003). The EU Commission also has the right to impose fines for breaches of Article 81 of the EC Treaty. Fines have heavily increased in the past years with the largest fine imposed on all members of a single cartel of over 1.3 billion Euros and a record fine per undertaking of 896 million Euros.⁵⁵ Only recently, the EU Commission has fined two members of a gas cartel 553 million Euros each.⁵⁶ Since 2005, the EU Commission has decided almost 30 cartel cases. More and more cases are initiated as a result of leniency applications.⁵⁷

2. PRIVATE ENFORCEMENT OF EC COMPETITION LAW

2.1 Starting Point: Legal Framework

Private enforcement of the EC competition rules via damages claims or applications for injunctive relief has been leading a shadowy existence for a long time in the European Community as well as in the majority of its Member States.⁵⁸

While public enforcement by competition authorities punishes breaches of competition law, compensation of victims can only be obtained via national courts in accordance with national rules on civil liability and civil procedure. The European Court of Justice (ECJ) has consistently stated that, absent Community rules governing the matter, the consequences of the nullity of a contract violating EC competition rules are governed by national law. Member States are obliged under Article 10 of the EC Treaty ('effet utile') to ensure the effectiveness of EC law. The ECJ has held that this applies to Article 81 of the EC Treaty as well. Therefore, Member states must ensure adequate protection for those who have suffered a loss due to a violation of EC competition law.⁵⁹

In two ground-breaking decisions of 2001 and 2006, the ECJ has emphasized that the right of victims to compensation is guaranteed by EC law and has outlined the basic framework for private enforcement of EC competition law in the European Community. In its 2001 judgement in *Courage v. Crehan*,⁶⁰ the ECJ confirmed that victims of an infringement of the EC competition rules have a right to claim damages and that Member States have to provide for a procedural framework allowing for an

52 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty Official Journal L 1 of 4 January 2003, p. 1-25. All legal acts of the European Union are available on <http://eur-lex.europa.eu/en/index.htm>. Last consulted: 21.07.2009.

53 Although the Commission is in fact an organ of the European Community (the first pillar of the European Union) and has only limited powers with regard to the other two pillars of the EU, it calls itself the 'EU Commission.'

54 As part of the modernisation measures introduced by Regulation 1/2003 national competition authorities as well as Member States courts are also required to apply Article 81 EC Treaty.

55 Cf. the statistics of the EU Commission on <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. Last consulted: 21.07.2009.

56 Cf. the press release of 8 July 2009 available on http://ec.europa.eu/competition/cartels/what_is_new/news.html. Last consulted: 21.07.2009.

57 Cf. Guidelines on the method of setting fines, Official Journal C 210 of 1 September 2006, 2-5.

58 Volker Emmerich *Kartellrecht* 11 ed (2008) § 7 p 110.

59 Bellamy & Child *European Community Law of Competition* 6 ed (2008), § 14.110; cf. ECJ, joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619. The case-law of the ECJ is available on http://curia.europa.eu/jcms/jcms/Jo1_6308. Last consulted: 21.07.2009.

60 ECJ, case C-453/99, *Courage and Crehan*, [2001] ECR I-6297.

effective system of redress. In its *Manfredi*⁶¹ judgement of 2006, the ECJ concluded that the principle of invalidity can be relied on by anyone, without having to show a relevant legal interest in the invalidity of an agreement or a practice.

2.2 Commission White Paper

The EU Commission is actively encouraging private enforcement of Article 81 of the EC Treaty. On 2 April 2008, a White Paper on Damages Actions for Breach of the EC Antitrust Rules⁶² ('White Paper') has been published. The White Paper puts forward proposals for policy choices and specific measures to ensure that all victims of infringements of EC competition law have access to effective redress mechanisms. Securing full compensation for victims is a primary objective of the paper. It is designed to create 'an effective system of private enforcement ... that complements, but does not jeopardize, public enforcement.'

The White Paper enumerates specific measures to reinforce private enforcement of EC competition law, such as the introduction of representative actions and opt-in collective actions. Such measures should enable individuals and small businesses who have suffered relatively low-value damage to sue. The EU Commission further suggests that across the EU a minimum level of disclosure inter partes for EC competition damages cases should be ensured. Final decisions of the EU Commission or national competition authorities should have a binding effect for national courts. Member States that require fault to be proven should introduce a refutable presumption of fault if an infringement of EC competition law has been proven. Rebuttal should only be allowed if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition. 'Passing-on defence' should be admitted. In order to give victims more time to prepare a claim, a limitation period of at least two years should start once the competition authority's decision on which the claimant relies has become final. The EU Commission intends to prepare a paper to facilitate the quantification of damages. Member States are encouraged to design procedural rules fostering settlements and to set court fees in an appropriate manner. For instance, national courts should be given the possibility to issue cost orders derogating from the normal cost rules (i.e., the 'loser pays' rule).

In order to ensure the attractiveness of the leniency programme, adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant. The White Paper suggests that the possibility of limiting the consequent civil liability of recipients of immunity with regard to claims by direct and indirect contractual partners should be further considered. More precise recommendations regarding the difficult interrelation between leniency and private enforcement are not being made.

The White Paper is still being discussed and neither the Member States nor the EU Commission have taken concrete steps to implement the EU Commission's proposals. The EU Commission itself is for the first time in its history seeking damages as a private party from members of the elevator cartel⁶³ that had been fined in February 2007. Critics fear that the EU Commission might use information gathered during the public enforcement proceedings for its private enforcement case. One may hope that business secrets of the companies concerned will not be used inappropriately.

61 ECJ, joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619.

62 COM (2008) 165 final. It is to be read in conjunction with a Commission staff working paper, cf. SEC (2008) 404, and an Impact Assessment Report, SEC (2008) 405. The White Paper is based on a Green Paper of 2005, cf. COM (2005) 672.

63 Case COMP/E-1/38.823 - PO/Elevators and Escalators; summary decision in Official Journal C 75 of 26 March 2008, p. 19 - 24.

2.3 Recent Developments in the Member States

In 2004, the EU Commission published the Ashurst Study,⁶⁴ which comprises a comparative analysis of the procedural rules and case law of each of the Member States. In its Executive Summary, the study points out that 'the picture that emerges from the present study [...] is one of astonishing diversity and total underdevelopment.'

However, due to the efforts of ECJ and EU Commission, some signs of improvement in certain Member States can be detected. For example, the Belgian company 'Cartel Damage Claims,' which has specialized in the field of private cartel enforcement, has acquired damage claims of victims of the German Cement cartel⁶⁵ by way of purchase and assignment and has brought an action for damages before the Regional Court of Duesseldorf. The Higher Regional Court of Duesseldorf as well as the Federal Court of Justice of Germany have confirmed the admissibility of the damages action. The case is still pending.

In France, the consumer association 'UFC- Que choisir' has taken legal action for approximately 12'000 clients of a market sharing cartel on the mobile phone market. According to Articles L421-1 and L422-1 of the French Consumer Code, collective and representative actions are permitted.

Article 47B of the UK Competition Act also allows recognized consumer associations to file opt-in damage claims as follow-on actions to proceedings of the Office of Fair Trading. In March 2007, the 'Consumers' Association' for the first time brought a claim against JJB Sports under Article 47B of the Act on behalf of consumers who bought football shirts between certain periods in 2000 and 2001.⁶⁶ The claimant indicated that the claim arose as a result of the findings made by the Office of Fair Trading in respect of three price-fixing arrangements involving the defendant concerning the sale of replica football kit in 2000 and 2001. In January 2008, Consumers' Association and JJB announced that they had reached an agreement to settle the damages action. Consumers who had joined the action against JJB Sports and paid up to £39.99 for certain England and Manchester United football shirts during specific periods in 2000 or 2001 received a payment of £20 each. Furthermore, JJB Sports also agreed to compensate customers who bought one of the relevant shirts but did not join the claim.

In Hungary, taking their lead from the EC's "White Paper" leniency applicants are given increased protection whereby they can refuse to pay damages if the damages can be recovered from other members of the cartel.⁶⁷ "The provisions adopted by Hungary's amended Competition Law seek to encourage private damages actions while at the same time not tipping the balance too far in claimant's favor."⁶⁸

3. ANALYSIS AND OUTLOOK

Private enforcement as such is not an isolated issue; it is an integral part of the whole EC competition law system and needs to be viewed in its interaction with public EC competition law enforcement. Although public and private enforcement of Article 81 of the EC Treaty, in principle, serve the same

64 Available on http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf. Last consulted: 21.07.2009.

65 In 2003 the cartel members have been fined a total of 702 million Euros by the Federal Cartel Office. On 29 June 2009 the Higher Regional Court of Düsseldorf reduced the fines imposed but confirmed the cartel infringements of the cement producers.

66 <http://www.catribunal.org.uk/files/Note1078Consumers050307.pdf>. Last consulted: 21.07.2009.

67 'Private enforcement: Hungary's amended Competition Act offers some innovative options' *Competition Bulletin*, June 2009. Available at www.salans.com. Last consulted: 23.07.09.

68 Ibid.

aims, only private damages actions provide a direct and immediate remedy for victims.⁶⁹ The fact that there is an obligation to pay damages also has a non-negligible deterring effect. A 'first hand experience'⁷⁰ can contribute considerably to the observance of competition rules. Private enforcement serves a dual purpose of (a) allowing victims of infringements of EC competition law to obtain compensation and (b) creating an additional incentive for undertakings to respect EC competition rules.⁷¹ Private enforcement of EC competition rules thus becomes an important tool to broaden the scope of enforcement of Article 81 of the EC Treaty.

Despite the efforts of the EU Commission, the current legal framework for private enforcement of EC competition law is still ineffective. There are major difficulties for victims of breaches of competition law to receive compensation. In practice, victims of competition breaches still only rarely seek reparation of the damages suffered. As the EU Commission has estimated in its Impact Assessment Report⁷² of 2008, the amount of compensation that these victims are forgoing ranges from 5.7 billion Euros (on the most conservative assumptions) to 23.3 billion Euros (on the least conservative assumptions) a year across the whole EU. These estimations relate to all types of infringements. The Impact Assessment Report estimates that the total annual cost to consumers and other victims in the EU ranges from 25 billion Euros (on the most conservative assumptions) to over 69 billion Euros (on the least conservative). The detection rate for hardcore cartels is generally assumed to be no more than between 10% and 20%. The size of the uncompensated harm and the problems encountered are significant. This is mainly linked to a number of particular characteristics of actions for damages for competition infringements. These include the frequent inaccessibility and concealment of crucial evidence in the hands of defendants, the complex factual and economic analysis required, and the often unfavourable risk/reward balance for claimants.

* *

III. SWISS COMPETITION LAW

1. GENERAL BACKGROUND OF PRIVATE ENFORCEMENT IN SWITZERLAND

On the European side of the Atlantic, the competition authorities are vested with enforcing antitrust regulation; private parties do not play a significant role. Switzerland's policies and its Cartel Act do not differ from this general rule, but this was not always the case.

Switzerland enacted its first Cartel Act in 1962. The purpose of the Act was to enable private actions in competition matters to be filed before civil courts, either by a party not member of a cartel who was unable to enter a market, or by a member of a cartel who objected to overly rigid rules.⁷³ The inconsistencies of the 1962 Cartel Act became evident, and consequently the 1985 Cartel Act focused on administrative measures in order to preserve competition as an institution of a market-based

69 Bellamy & Child *European Community Law of Competition* 6 ed (2008), § 14.108.

70 EU Commission, 2005 Report on Competition Policy, note 31; available on http://ec.europa.eu/competition/annual_reports. Last consulted: 21.07.2009.

71 EU Commission, 2005 Report on Competition Policy, note 31; available on http://ec.europa.eu/competition/annual_reports. Last consulted: 21.07.2009.

72 Section 2.2 of the Impact Assessment Report of April 2, 2008, SEC (2008) 405.

73 Message concernant la loi fédérale sur les cartels et autres restrictions de la concurrence (Loi sur les cartels, LCart), du 23 novembre 1994 (hereinafter: Message LCart), Feuille fédérale 1995 I 472 p 480. Available on the Federal Administration's website: <http://www.amtsdruckschriften.bar.admin.ch/showDoc.do>. Last consulted: 16.07.2009.

The private enforcement of the Cartel Act is mentioned in particular in pages 480-481, 524-525, and 580-586.

economy,⁷⁴ and not solely as a means to protect the economic personality of the plaintiff.⁷⁵ Private actions significantly declined. This evolution was reflected in the Message of the Federal Council during the revision of the 1985 Cartel Act. The Federal Council highlighted that the 1985 Cartel Act had resulted in very few private party cases before civil courts in comparison with the number and importance of the investigations and subsequent enforcement measures by the competition authorities.⁷⁶ The focus of the Cartel Act had thus shifted from protecting the economic personality of private parties to protecting competition as an institution of a market economy based on liberal principles.

Although the Federal Council clearly indicated that it wished to give a 'new orientation' to private actions in the revisions resulting in the 1995 Cartel Act,⁷⁷ it will become clear that the measures adopted have failed to revive the use of private actions in competition law in Switzerland.

In 2003, a revision of the 1995 Cartel Act granted broader powers to Switzerland's competition authorities (Competition Commission and its Secretariat, hereinafter referred to as 'Comco') to safeguard competition. Indeed, the 1995 Cartel Act and its partial revision in 2003 have enabled Comco to promote and maintain a healthy level of competition in Switzerland.⁷⁸ The 2003 revision empowered Comco to impose direct sanctions and provided Comco with new enforcement measures (leniency program, opposition proceedings, and raids).⁷⁹ Private actions in competition law were not addressed at all in the 2003 revision of the 1995 Cartel Act.⁸⁰

2. BRIEF DESCRIPTION OF THE CIVIL PROCEDURE PROVISIONS IN THE 1995 CARTEL ACT

In the 1995 Cartel Act, the procedural rules are set forth in articles 12 to 17 under the heading 'Provisions relating to Civil Procedure' (chapter 3). This heading must be interpreted liberally since chapter 3 also includes substantive rules.⁸¹

Article 12 of the 1995 Cartel Act lists the possible actions available to the plaintiff. These actions have their origin in other areas of Swiss law, such as provisions of civil law (article 12 § 1(a): article 28a of the Swiss Civil Code), tort law (article 12 § 1(b): damages and reparations according to article 41 et seq. of the Swiss Code of Obligations), and contract law (article 12 § 1(c): conducting business without mandate⁸² according to article 423 of the Swiss Code of Obligations). Article 13 of the 1995 Cartel Act provides remedies for cases brought under article 12 § 1(a) (removal or the cessation of the obstacle).⁸³ Article 14 of the 1995 Cartel Act forces each canton to designate a single Court as the

74 Message LCart p 481.

75 Anne-Catherine Hahn in: *Kartellgesetz – Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen* Baker & McKenzie (eds) Bern 2007 § 1 p 146.

76 Message LCart p 481.

77 Message LCart p 580.

78 Synthesis Report in Brief, available on Comco's website: <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>. Last consulted: 16.07.2009.

79 Synthesis Report in Brief, available on Comco's website: <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>. Last consulted: 16.07.2009.

80 A contrario cf. Synthesis Report in Brief supra note 8 and equally a contrario cf. Message relatif à la révision de la loi sur les cartels, du 7 novembre 2001, Feuille fédérale 2002 1911 & 5128.

Available on the Federal Administration's website: <http://www.admin.ch/ch/ff/2002/1911.pdf> & <http://www.admin.ch/ch/ff/2002/5128.pdf>. Last consulted: 16.07.2009.

81 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 50. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

82 In German: die Geschäftsführung ohne Auftrag. In French: la gestion d'affaires sans mandat.

83 Anne-Catherine Hahn in: *Kartellgesetz – Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen* Baker & McKenzie (eds) Bern 2007 § 1 p 169.

sole jurisdiction competent to hear cases in competition matters at the cantonal level (this represents a notable federal intrusion into the cantonal procedural system).⁸⁴ Article 15 of the 1995 Cartel Act requires the civil court to seek Comco's (non-binding) opinion in cases alleging restraint of competition. Article 16 of the 1995 Cartel Act provides for the protection of professional and trade secrets, and article 17 of the 1995 Cartel Act refers to the provisional remedies.⁸⁵

3. EVALUATION OF PRIVATE ENFORCEMENT OF THE 1995 CARTEL ACT

3.1 General Remarks

Article 59a § 2 of the revised 1995 Cartel Act requires the Federal Council to evaluate the efficiency and conformity of any proposed measure under the 1995 Cartel Act before submitting a report and recommendation to Parliament concerning said measure.⁸⁶ A Synthesis Report from the 'Task Force Cartel Act' was based on 15 reports and studies. The Synthesis Report evaluated the ongoing effects and functioning of the 1995 Cartel Act, mentioned necessary modifications, and concluded with a series of proposals intended for the consideration of Parliament and the executive authorities (Federal Council, Federal Department of Economic Affairs, and Comco).⁸⁷ The Synthesis Report concluded that the importance of individual civil actions regarding antitrust matters is minimal, and recommended that such procedure should be enhanced so as to enable economic players to more easily denounce anticompetitive behavior. In this respect, the main measures recommended by the Synthesis Report would consist in improving the administration of evidence, expanding *locus standi*, and increasing damages.⁸⁸ The Synthesis Report emphasized that civil law does not impede administrative law, and that civil law constitutes a complement in enforcing antitrust regulations.⁸⁹

The number of cases brought before the competent civil courts during the last eleven years has been very small, i.e. 45 in total^{90,91}. This figure demonstrates why the impact of private enforcement of competition law is minimal as very few plaintiffs appear to believe that this is the 'right' way to conduct a competition procedure.

3.2 Discussion Concerning the Administration of Evidence

A brief analysis regarding the administration of evidence will be provided, as one of the key limitations relating to private enforcement of competition law in Switzerland.

Article 8 of the Swiss Civil Code states that unless otherwise provided for by law, a person deriving his rights from the existence of an alleged fact shall prove the same. This is the general rule of the

84 One must indicate however that this provision will be repealed with the coming into force of the Federal Code of Civil Procedure in 2011.

85 Article 16 and 17 of the Cartel Act will be repealed with the coming into force of the Federal Code of Civil Procedure in 2011.

86 Information available on Comco's website: <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>. Last consulted: 13.07.2009.

87 Information available on Comco's website: <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>. Last consulted: 13.07.2009.

88 Synthesis Report in Brief, available on Comco's website: <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>. Last consulted: 17.07.2009.

89 Task Force Cartel Act *Evaluation gemäss Art. 59Aa KG – Synthesebericht der Evaluationsgruppe Kartellgesetz § 292 p 83*. Available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 15.07.2009.

90 As Switzerland has 26 Cantons, the number of cases amounts to a little less than 2 per Canton in eleven years, so less than one case in every five years per court!

91 Task Force Cartel Act *Evaluation gemäss Art. 59Aa KG – Zivilrechtliche Kartellverfahren – Statistik Projektbericht P7 § 7 p 6*. Available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_29. Last consulted: 20.07.2009.

administration of evidence in Switzerland.⁹² The main consequence of this general rule in competition matters is quite straightforward: the more complex the case is, the less likely the plaintiff will attempt to prove the infringement of the Cartel Act.⁹³ In some cases, the general rule is eased.⁹⁴

In his expert opinion provided to the Task Force Cartel Act,⁹⁵ Professor Heinemann indicates five possible improvements (with possible variance as to their combination and degree of application) to facilitate the administration of evidence, while not weakening the rights of the defendant. These improvements are (1) the introduction of the inquisitorial principle in the private enforcement of the Cartel Act, (2) pre-trial discovery, (3) the (automatic) use of the investigative powers of the competition authorities, (4) specific rights of inquiry, and (5) facilitating the administration of evidence. Option five would enable the plaintiff to offer a credible explanation of the facts (contrary to proving the facts), thereby forcing the defendant to rebut the presumption.⁹⁶

The second improvement (pre-trial discovery) combined with the fifth improvement (facilitating of the administration of evidence) appear to be the most promising to the expert. This combination would loosely follow the European Commission's White Paper on Damages for Breach of the EC Antitrust Rules⁹⁷ which indicates that the plaintiff must present all facts and means of evidence which are of importance to the case before the court. If there are reasonable grounds to believe that the plaintiff has suffered from a violation of the Cartel Act, and that the plaintiff cannot reasonably bring before the court the proof of the infringement, then the court may require, within the framework of, among other principles, proportionality, that the defender provides the necessary elements to prove the allegations of the plaintiff.⁹⁸ The Task Force Cartel Act decided to follow Professor Heinemann's advice, stating that the fear of any resulting *fishing expeditions* would be very limited.⁹⁹

4. RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT OF THE 1995 CARTEL ACT

Article 1 of the 1995 Cartel Act states that the purpose of the Act is to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in

92 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 54. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

93 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 54s. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

94 For example, article 42 § 2 of the Swiss Code of Obligations provides that if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party.

95 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 95s. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

96 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 97. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

97 The EU Commission's White Paper does not follow the American-style pre-trial discovery.

98 Andreas Heinemann *Die privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage – Evaluation des Kartellgesetzes, Studie für das Staatssekretariat für Wirtschaft* 10 September 2008 p 96 et sequ. The evaluation is available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 30.03.2009.

99 Task Force Cartel Act *Evaluation gemäss Art. 59a KG – Synthesebericht der Evaluationsgruppe Kartellgesetz* § 275 p 80. Available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 15.07.2009.

the interests of a market economy based on liberal principles.

As we have seen, the focus shifted during the last decades from civil actions brought by individual plaintiffs to public-led actions, underscoring the increasing attention to competition as an institution of the market economy based on liberal principles. The relationship between public and private enforcement of competition law is complex and much debated in Switzerland and in the rest of the world.¹⁰⁰ For example, one frequent debate in Switzerland revolves around the question as to whether the 1995 Cartel Act protects competition as an institution and/or whether it guarantees the liberty of each and every economic player.¹⁰¹ Even if the specific wording of the 1995 Cartel Act seems to only protect competition as an institution, one may argue that the philosophy behind competition law should protect competition as an institution as well as the *economic players within the sphere of influence of the State*. The principle of protection of competition as an institution is only desirable if actual competitors and consumers are not harmed by infringements of the 1995 Cartel Act and are compensated for any eventual losses resulting from a violation of the Act. Indeed, the State does not fully guarantee economic freedom – as required by the preamble of the 1995 Cartel Act¹⁰² - if competitors and/or consumers see their economic power diminished as a result of inaction by the State, or suffer a loss due to inadequate compensatory mechanisms, once the State has determined an infringement of the 1995 Cartel Act.

Currently, the 1995 Cartel Act is enforced by Comco. Comco chooses which cases it investigates, based on largely subjective criteria. Five positive criteria and four negative criteria have been established.¹⁰³ The positive criteria include (1) the magnitude of the restraint, (2) the gravity of the restraint, (3) the presence of a question of principle, (4) the establishment of “leading cases”, and (5) the vulnerability of the victims of the restraint. The negative criteria include (1) exclusively private interests at stake, (2) the realistic and effective possibility for the plaintiff(s) to file a lawsuit before a civil court, (3) minor cases, and (4) Comco's limited resources. Comco enjoys a large degree of subjective appreciation in deciding whether or not to commence an investigation.¹⁰⁴

This degree of subjectivity adversely impacts the level of certainty for victims of anticompetitive behavior that Comco will act to guarantee their economic freedom. This lack of certainty and predictability is compounded by the de facto inability of individual third parties (competitors and/or consumers) to assert their rights under the 1995 Cartel Act through private enforcement. A further consequence of this high degree of subjectivity, coupled with the applicable statute of limitations, may result in an injured party losing its rights to file a suit before a civil court.¹⁰⁵

100For an interesting example of international analysis of this problematic, cf. OECD Policy Roundtables # 73 – Private Remedies 2007 available on the following website: <http://www.oecd.org/dataoecd/24/62/39892177.pdf>. Last consulted: 16.09.2009.

101Vincent Martenet 'Les autorités de la concurrence et la liberté économique' (8/2008) *Aktuelle Juristische Praxis* p 965. See article for an extensive bibliography on this matter.

102The Federal Assembly of the Swiss Confederation having regard to Articles 27 § 1, 96, 97 § 2 and 122 of the Federal Constitution [...].

Article 27 § 1 of the Federal Constitution states that economic freedom is guaranteed.

103For a complete explanation of the various criteria, cf. Vincent Martenet 'Les autorités de la concurrence et la liberté économique' (8/2008) *Aktuelle Juristische Praxis* p 969-975.

104One should not paint a too bleak picture of the situation in Switzerland. Comco has successfully assisted many parties in their search for common ground. One example is the successful ETA amicable settlement cf. *Comco Recht und Politik des Wettbewerbs* (RPW) 2005/1, p 128-145. Available on Comco's website: <http://www.weko.admin.ch/dokumentation/00157/index.html?lang=de>. Last consulted: 15.07.2009.

105Indeed, article 60 § 1 of the Swiss Code of Obligations states that the claim for damages or reparations is barred by the statute of limitations [article 127 of the Swiss Code of Obligations] after one year from the date when the damaged person has received knowledge of the damage and of the identity of the person who is liable, but, in any event, after ten years from the date when the act causing the damage took place. This statute of limitations clearly applies to the case of article 12 § 1(b) of the Cartel Act.

One way to provide greater predictability and certainty to competitors and consumers alike would be to enable follow-on lawsuits, as mentioned in the evaluation of the 1995 Cartel Act.¹⁰⁶ One may also consider alternative dispute resolution mechanisms, such as 'follow-on mediations,' under the supervision of Comco. Such supervisory monitoring by Comco should enable it to use its expertise in a cost effective manner to assist in finding a satisfactory settlement between the parties.

Article 15 § 1 of the 1995 Cartel Act states that if the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion. This paragraph enables Comco to submit to civil courts non-binding legal opinions.¹⁰⁷ Comco does not, however, comment on the facts, nor does it investigate the case for the civil court. The Task Force Cartel Act is in favor of a more active role for Comco; wherein Comco would assume a greater role in civil litigation and be able to give opinions on all aspects of the case (and not solely on the restraint of competition).¹⁰⁸

5. CONCLUSION

In conclusion, one may underline two aspects of this review:

- Switzerland needs a more vibrant private enforcement of its 1995 Cartel Act. Indeed, the main issue at stake is not to determine whether the 1995 Cartel Act focuses more on competition as an institution rather than protecting the economic freedom of the competitors and of the consumers. In principle, a healthy institution must have a dynamic competition and consumers should not bear the financial consequences of infringements of the 1995 Cartel Act. Therefore, strong consideration should be given to revising the current system by 'merging' the public with the private enforcement of the 1995 Cartel Act. Comco should play a pivotal role in this revision, by protecting competition as an institution as well as the private interest of the victims of infringements of the 1995 Cartel Act.
- The evaluation of the 1995 Cartel Act has brought to light the limits of the current enforcement system. Bold and numerous propositions arose from this evaluation. With respect to the private enforcement aspect of the evaluation, most, if not all, of the propositions go in the right direction. Regarding specifically the administration of evidence, we believe that the option proposed by the Task Force Cartel Act is the right one.

It is to be hoped that the Swiss Parliament will adopt the necessary reforms in a timely manner.

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IV. GENERAL CONCLUSION

The public authorities in the three jurisdictions analyzed above currently seem keen to focus on the

106Task Force Cartel Act *Evaluation gemäss Art. 59a KG – Synthesebericht der Evaluationsgruppe Kartellgesetz* § 288 p 83. Available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 15.07.2009.

107Jean-Marc Reymond in: Pierre Tercier/Christian Bovet (eds) *Commentaire Romand – Droit de la concurrence* 2002 § 87 p 676.

108Task Force Cartel Act *Evaluation gemäss Art. 59a KG – Synthesebericht der Evaluationsgruppe Kartellgesetz* § 289 p 83. Available on Comco's website: http://www.weko.admin.ch/dokumentation/00216/index.html?lang=de#sprungmarke0_39. Last consulted: 15.07.2009.

enhancement of private enforcement of competition law. Such interest is welcomed and encouraging.

However, there still appear to be fears - most notably within the competition authorities - that private enforcement could weaken or even take over the role of the public enforcement of competition law. These fears, however, are unfounded. Private enforcement of competition law serves other purposes and will never have the same firepower as public enforcement. Moreover, partly due to a lack of experience but also because of the separation of powers, it is not to be expected that civil courts will obtain a position comparable to that of a competition authority in the foreseeable future. A modern and efficient legal system needs to compensate those who have been harmed from a competition restraint while respecting the constitutional guarantees of each party. At present, the three systems still demonstrate a general lack in such a way to redress. However, innovative ways exist to promote compensation for the victims of competition restraints; now is the time to act.

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