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Access to Leniency Documents: Should Cartel Leniency Applicants pay the price for Damages?

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
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**Access to Leniency Documents:
Should Cartel Leniency Applicants pay the price for Damages?**

by

Kasturi Moodaliyar^α

I. Introduction

The Corporate Leniency Policy (CLP) is a successful tool for destabilizing cartels by enticing members of cartels to rush to be first to the door to confess their role in a cartel and provide evidence to the Competition Commission (‘Commission’) against the other members of the cartel in exchange for leniency. Whereas their fellow cartelists face penalties running into millions of Euros, leniency applicants are rewarded for their confessions by receiving immunity from those penalties. The CLP does not provide any immunity to applicants who are named as respondents in private claims for damages¹.

It is often difficult to ascertain evidence to prove a damages case, and in particular to demonstrate causation and quantum, even if liability were assumed on the basis of administrative proceedings. In some cases claimants might not even be able to make out a prima facie case on the basis of publicly available information, as the very nature of cartel conduct is itself secretive. The damages claimant has the challenge of asymmetric information whereas the leniency application contains evidence to prove the cartel activity. This information could be used to establish the causal link of the cartel conduct and damages to the claimants. This is why damages claimants wish to exercise their rights to claim damages and request access to documents obtained through the leniency application to make and strengthen their case. The competition authorities are weary of disclosing such information, as they do not want to undermine their leniency policy. Cartelists might hesitate to cooperate with the competition authorities if it is likely that their company information will be disclosed to third parties and used against them in damages claims, which might exceed the administrative penalties that they are able to avoid through leniency.

The main questions addressed in this paper are:

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¹ In South Africa cartelists are penalized up to 10% of their annual turnover. There are no criminal penalties enforced in terms of competition legislation. The CLP does not protect a cartelist from criminal sanctions based on any other legislation or criminal code.

(i) Whether a special dispensation should be given to leniency applicants to protect the integrity of the policy, which competition authorities rely on extensively to uncover cartels or;

(ii) Whether is there an overriding public interest to consider where private damages claimants have an automatic right to the evidence submitted by the leniency applicant?

I give an overview of the South African CLP, the implications for both the leniency applicant and the civil damages plaintiff, draw upon a comparison of jurisdictions with a significant focus on cases in the European Union where these debates took place, and provide a brief analysis of the approach of the authorities in the United States in creating incentives to resolve this issue. This paper addresses the dichotomous role of the competition authorities which on the one hand has to protect the leniency policy while on the other hand has to give due regard to the interest of victims of cartel cases. I will then provide recommendations on where the boundaries should lie in exercising these roles.

II. The need for a Corporate Leniency Policy in Cartel cases.

There is no question that cartels operate in secret and are usually very difficult to detect. Based on the principles of ‘game theory’ or the ‘prisoner’s dilemma’ this policy creates an incentive for firm to break ranks with their fellow cartel members and race to the door of the competition authorities to provide information about the cartel conduct in exchange for leniency. In South Africa where the penalty for cartel conduct is 10% of the firm’s annual turnover, leniency would provide a substantial saving. Many competition jurisdictions around the world, including South Africa, have implemented their versions of the CLP.

1. Requirements and use of the CLP

The first CLP in South Africa was published in 2004 and provided immunity to the first firm that confessed to the conduct, provided that the firm was not the instigator of the cartel.² Although the policy was based on international best practice, this first policy draft had a few drawbacks. The 2004 policy was underutilized due to its lack of clarity and certainty to potential leniency applicants.³ Firms thus took the risk of remaining undetected rather than coming forth to blow the whistle. Between April 2004 and March 2008 there were only 15 leniency applications.⁴ To be fair, it is common that many jurisdictions often have an

² Corporate Leniency Policy, Government Gazette notice 194 of 2004. The policy came into effect on 1 February 2004.

³ Kasturi Moodaliyar 'Are Cartels Skating on thin Ice? An insight into the South African Corporate Leniency Policy' (2008)125 (1) *South African Law Journal* p 175.

⁴ Competition Commission Annual Report 2011/2012, p 21.

ineffective first draft of their leniency policy and it is subsequently improved to become more effective.⁵

The more successful 2008 version of the CLP provided a clearer outline of the immunity process.⁶ Immunity is only given in cartel cases. Conditional immunity is given to the first firm “to the door” of the Commission. The benefit to the Commission is that it would now receive vital information about a cartel it may not have been aware of, or was aware of, but did not have sufficient information available and no investigation was in place, or where there was a pending investigation and the Commission had insufficient evidence to proceed with the case.⁷ The applicant firm must act honestly and provide a complete and full disclosure of information and evidence about the cartel to institute an investigation, cease with the conduct and not alert the other cartel members nor destroy any information.⁸ Immunity can be revoked if the policy and the Commission’s instructions are not complied with.⁹

If there are subsequent firms who wish to come clean to the Competition Commission about its cartel activities, the Commission can consider this as a mitigating factor in that firm’s request to negotiate a lesser fine or ask the Tribunal for favourable treatment for the firm, depending on its level of co-operation and the information it brings.¹⁰

Total immunity is given once the case has been finalized at the Tribunal or after an appeal if there is one and after all the conditions have been met.¹¹ The firm would have to apply for leniency in respect of each cartel transgression, as the CLP does not provide for an overall blanket leniency of all cartel infringements, unless the contraventions cannot be separated.¹² The diagram in Figure 1 below shows the flow of the CLP application process. Immunity is dependent on all the requirements of the policy being met.

⁵ For example, in the USA, when the first CLP policy was enacted in 1978, the Department of Justice had on average 1 application per year. It was also underutilized. Upon revision of the policy the Department of Justice now receives on average about 50 applications per year. See Scott Hammond “The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades” Speech given The 24th Annual National Institute On White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, Florida, 25 February 2010. <http://www.justice.gov/atr/public/speeches/255515.htm>.

⁶ Corporate Leniency Policy, Notice 628 of 2008, Government Gazette No 31064, 23 May 2008.

⁷ CLP 2004, Para 5.5.2 and the same sentiment is expressed in CLP 2008, Para 5.5.

⁸ CLP 2008, para 10.1.

⁹ CLP 2008, para 13.

¹⁰ CLP 2008, para 5.6.

¹¹ CLP 2008, para 9.1.2.

¹² CLP 2008 para 5.4.

The Corporate Leniency Policy Process

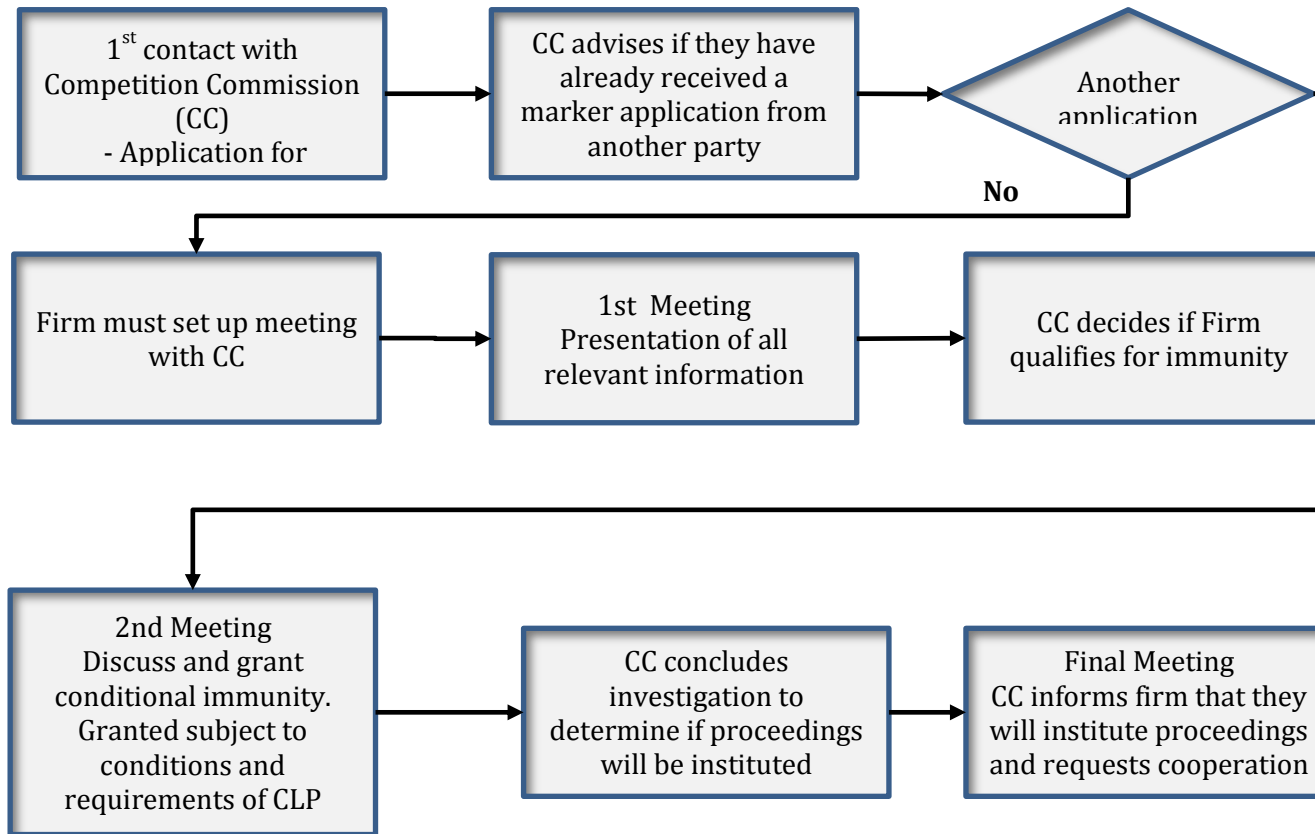


Figure 1: Process of the Leniency application

In comparison with the 2004 policy, the 2008 policy took away the wide discretion of the Commission (which addressed a major criticism of the 2004 policy) and gave greater legal certainty to the leniency applicants about the process. Another change in the 2008 policy is that the instigator of the cartel is no longer excluded from bringing a CLP application¹³. The reason for this is that there may be cases where the cartel has existed for decades, with a turnover of staff and authority and it is thus difficult to identify which firm started the cartel. This amendment puts to rest any dispute that may have arisen in this regard. The 2008 policy

¹³ The 2004 CLP excluded the instigator from applying for leniency in terms of para 5.8 ad 10.1(d) of the policy.

now also provides for the applicant to make their submissions in writing and orally.¹⁴ Some of the applicants are more comfortable giving oral statements, which can be later transcribed.

The most important new development in the 2008 policy was the introduction of the marker system.¹⁵ The marker system allows the firm to approach the Commission, requesting a marker for first place in the queue, whilst providing details of the firm, cartel conduct and the participants. The Commission has the discretion to accept the marker and can provide an assurance to the firm that it is the first in the queue. The firm is then given time to gather evidence of the cartel conduct and provide such evidence to the Commission. While the marker is in place no other firm can take first place during this time. The marker system provides a greater comfort to firms who may not have all the evidence of the conduct available at the time of the application but still wish to apply for immunity.

2. Legal challenge to the 2008 CLP mandate

The Commission's power and authorization of the leniency policy was challenged in the *Agri Wire*¹⁶ case. This case was based on an investigation that the Commission initiated in the steel mill industry involving several companies, including Scaw South Africa (Pty) Ltd ("Scaw"). Scaw has management control of Consolidated Wire Industries ("CWI), which was one of the companies under investigation. Scaw conducted its own internal investigation and uncovered cartel conduct in both its companies. It applied for leniency and the Commission granted it conditional immunity in exchange for information and evidence of the cartel.¹⁷ The Commission subsequently referred the complaint to the Competition Tribunal in which it cited 12 companies being members of the cartel, including Agri Wire, and asked that all of these companies, except CWI, pay the administrative penalty of 10% of their annual turnover.¹⁸

Agri Wire took the case to the High Court challenging immunity that the Commission gave to Consolidated Wire Industries (CWI) in terms of the CLP application. It argued that the Competition Act did not authorize the CLP and therefore any information provided by CWI in terms of the CLP was inadmissible. To the same extent, it argued that the complaint and the referral to the Tribunal were unlawful.¹⁹

¹⁴ CLP 2008 para 15.

¹⁵ CLP 2008 para 12.

¹⁶ *Agri Wire (Pty) Ltd et al v The Competition Commission et al*, North Gauteng High Court, Case No 7585/2010

¹⁷ *Agri Wire*, para 10.

¹⁸ *Agri Wire*, para 11.

¹⁹ *Agri Wire*, para 29-31

Judge Zondo, in his dismissal of the complaint, explained that conditional immunity contemplated in the CLP is not to be interpreted in the normal sense of “immunity” since the Commission does not have the final say on the fate of the leniency applicant.²⁰ It is a mere promise by the Commission to ask the Tribunal not to impose a fine upon the leniency applicant, in exchange for the applicant’s cooperation and assistance in the referral. The Tribunal has the final authority to decide on whether or not a fine can be imposed. There is also nothing in the CLP obliging the Tribunal not to impose a fine on the leniency applicant.²¹

Regarding Agri Wire’s accusation that the Commission was selectively prosecuting companies, Judge Zondo held that the Commission had cited all the wrongdoers in its referral to the Tribunal, it acted well within its authority to seek relief against the selected respondents and to seek leniency for the CWI.²²

On Appeal, the Supreme Court of Appeal (SCA) dismissed the *Agri Wire* case by taking an even more definitive stance that the Competition Act vested power to the Commission to issue the CLP thus allowing it to grant conditional and total immunity to the leniency applicant.²³ The Court further stated that if the Commission decides to refer a case to the Tribunal then “...the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint submitted by the complainant”.²⁴ The SCA also found that the High Court erred in its judgment by stating that where the Commission had granted immunity the Tribunal could still impose an administrative penalty. The SCA made it clear that the Commission is allowed to grant conditional immunity notwithstanding the power vested upon the Tribunal to take the party’s co-operation into consideration in determining the sanction. The SCA held that the leniency applicant will “only be referred to the Tribunal for the purpose of adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity.”²⁵

The SCA reiterated that the CLP is a useful tool to combat cartel behaviour. This Court correctly pointed out that “hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit,

²⁰ *Agri Wire*, para 58.

²¹ *Agri Wire*, para 62.

²² *Agri Wire*, para 72.

²³ *Agri Wire (Pty) Ltd et al v The Competition Commission*, SCA, Case no: 660/2011 [hereafter referred to as *Agri Wire SCA*], para 24.

²⁴ *Agri Wire SCA*, para 24.

²⁵ *Agri Wire SCA*, 7.

before furnishing the co-operation that the Commission seeks from them”.²⁶ To do so otherwise would render the CLP “far less effective, if not entirely useless”.²⁷

3. Successful outcomes of the CLP

Unlike the 2004 policy which had very little use, the 2008 policy stimulated the race for immunity. Lavoie attributes the success of the policy to a number of factors including:

“(i) a growing awareness among the public and business community of the existence of the [Competition] Act and the CLP and the consequences of contravening the Act;

(ii) the Commission’s investigation in certain sectors of the economy creating instability amongst cartel members and a race to apply first for immunity;

(iii) the dismantling of cartels in related sectors of the economy;

(iv) the changing business environment whereby internal compliance investigations are being conducted within corporate ranks and

(v) the forthcoming introduction of criminal sanctions for individuals involved in cartel conduct.”²⁸

These are valid factors, which together with the improvements in the 2008 policy created the environment for companies to come forth and make use of the CLP. The criminal sanctions, which were outlined in the Competition Amendment Act of 2009, have not come into effect as yet.²⁹ The Commissioner, Tembinkosi Bonakele stated in a news report that the Amendment Act will come into effect in stages and that the institutional structures are not in place as yet to manage criminalization. The current CLP does not provide immunity in criminal cases and the Commissioner has is weary that that the threat of criminalization may discourage potential CLP applicants from coming forward to give evidence. This may put the CLP programme at risk.³⁰

The table below gives an indication of the fines received in particular industries from the year 2009 -2013. Many are intermediary products, with fines running into the millions. Cartel pricing in these industries have a knock-on impact on the pricing.

²⁶ SCA Ibid paragraph 9.

²⁷ Ibid.

²⁸ Chantal Lavoie 'South Africa's Corporate Leniency Policy: A Five-Year Review' World Competition 33, No 1(2010), p 155.

²⁹ Competition Amendment Act No 1 of 2009. The Amendment Act has been signed by the President but has not been given a date for it to become effective.

³⁰ Antoinette Slabbert 'CompCom not ready to criminalise anticompetitive behaviour' Moneyweb, 19 May 2014. [Http://www.moneyweb.co.za/mw/content/en/moneyweb-south-africa/compcom-not-ready-to-criminalise-anticompetitive-b](http://www.moneyweb.co.za/mw/content/en/moneyweb-south-africa/compcom-not-ready-to-criminalise-anticompetitive-b)

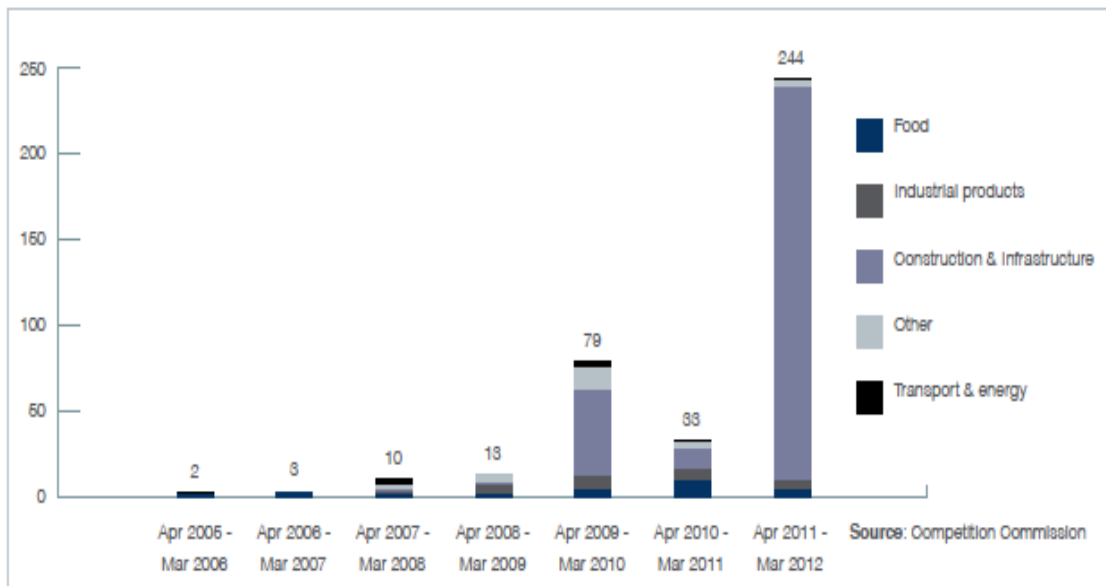
Table: Industries involved in cartel activity uncovered through the CLP process 2009-2013.

Industry	Total Penalties
2009 Decisions	
Phosphoric acid	R250 680 000,00
Health care (private hospitals)	R55 067 273,63
Concrete pipes and culverts	R69 352 054,00
Bread production	R241 124 974,00
2010 Decisions	
Pipes (High density Polyethylene and PVC)	R801 069 086,00
Roof mining bolts	R21 900 000,00
Precast concrete market	R14 157 697,00
2011 Decisions	
Structural concrete reinforcement, construction, welded mesh fabric reinforcement and supply, cutting and bending of rebar (steel reinforcing bars),	R156 104 640
Petroleum and energy, bitumen	R68 559 480
Cement production	R148 724 400
2012 Decisions	
Steel products	R856 383 565
Milling (white maize and wheat)	R595 230 349
Manufacture and supply of generic paving blocks	R132 070 036
Property and rental property,	R27 218 795
Airline	R43 905 984
Petroleum, bitumen and bitumen products	R68 059 480
2013 Decisions	

Construction and civil engineering	R1 519 810 439
Wholesale of glass product, manufacture and distribution	R502 416 855
Gas and Chemicals supply and distribution	R73 591 076
Industrial and specialty gases	R276 297 870
Manufacture and supply of generic paving blocks	R67 256 547
TOTAL	R5 424 215 779

The graph below which tracks the number of CLP applications since the inception of the 2004 policy shows a dramatic increase in applications post 2008 indicating the success of the amended policy.

Figure 3(a): Total number of CLP applications received per year



Source: Competition Commission Annual Report 2011/2012

In the last financial year of the Commission (2011/2012) there was a spiked increase of 244 applications. This can be attributed to the Commission's fast track settlement process in the construction industry, which was launched in February 2011. This was the first time the Commission had invited firms in this industry to engage in a fast track settlement process of this nature. It became apparent that the construction industry was rife with cartel behavior. The Commission settled with 15 construction companies who admitted to collusive tendering and paid fines totaling R 1.46 billion. Annexure A provides a detailed table of the leniency applications from 2008-2013. Those companies who did not receive leniency paid a substantial amount in fines - in total over R5 billion during that period.

III. Should leniency documents be disclosed to third party damages claimants?

1. Issuance of the Certificate by the Competition Tribunal

Not long after the fines in the construction cases were issued there were numerous media reports that the affected Government departments wish to claim damages for the loss suffered as a result of cartel price fixing³¹. Unlike in the United States where damages claimants can approach a court directly to initiate a civil claim without waiting for a finding from the Department of Justice³², damages cases in South Africa can be instituted in a civil court only after the damages claimant has obtained a certificate from the Competition Tribunal once it has made a finding.³³ In most cases the Commission does not cite the leniency applicant as a respondent on the referral papers. This became a contentious issue in the *Premier Foods* case that was heard in the North Gauteng High Court.³⁴

Premier Foods, a leniency applicant, sought to question whether the Chairperson of the Competition Tribunal, or the Tribunal itself had the jurisdiction to issue such a certificate in terms of Section 65(6)(b) against *Premier* as it was not cited as a respondent in the case against the other cartelists which was heard by the Tribunal.³⁵ Without that certificate, a prospective damages claimant would not be able to pursue a civil claim against *Premier*.

³¹ See for example Nthambeleni Gabara 'Salga wants construction firms to pay up' SA News.Gov.ZA, 5-7-2013, <http://www.sanews.gov.za/south-africa/salga-wants-construction-firms-pay>. Roy Cokayne 'Charge colluding individuals' Business Report, 18 July 2013, <http://www.iol.co.za/business/companies/charge-colluding-individuals-1.1548686#Ugfh8hzdI3U>. Lloyd Gedye 'Construction cartel not off the hook yet' City Press, 30 June 2013, <http://www.citypress.co.za/business/construction-cartel-not-off-the-hook-yet/>.

³² Section 4 of the Clayton Act 15 U.S.C. § 15.

³³ Section 65(6)(b) of the Competition Act.

³⁴ *Premier Foods (Pty) Ltd v Norman Maniom N.O and the Competition Tribunal et al*, North Gauteng High Court, Case no38235/2012, date of decision 2 August 2013.

³⁵ *Premier Foods*. See para 9 and 10.

Premier argued that having a certificate issued against it by the Chairperson of the Tribunal when it was not cited as a respondent by the Commission, violated the *audi alterem partem* rule.³⁶ In his deliberation of the case Judge Kollapen held that:

“in as much as the principle of *audi* is inextricably linked to considerations of fairness, even handedness, objectivity and inclusiveness in the decision-making process, it is also both a matter of form and of substance. It may be appropriate in circumstances where form may be said to be wanting, to examine issues of substance in order to determine whether there has been observance of the principle notwithstanding any deficiency in form. Not to do so would run the risk of adopting an overly technical and formal approach to a principle that at the heart of it is about procedural fairness”.³⁷

In dismissing Premier’s contention, Judge Kollapen maintained that *audi* principle was applied to Premier in that it “was represented at the hearing, allowed its staff to participate and to contribute to the proceedings as witnesses and was heard in every sense of the term.”³⁸ In relation to whether the certificate could be issued against Premier it was pointed out by the Court that a certificate is issued based on the fact that the Tribunal has made a finding in that case.³⁹ In terms of section 66 any person can apply for that finding to be amended or set aside the order if it was issued erroneously or granted in the absence of a party.⁴⁰ Premier did not make such an application.

The outcome of this case was that even though Premier being the leniency applicant, was not cited as a respondent by the Commission in the case against the other cartelists, the Tribunal was still allowed to issue a certificate against it as their findings were not contested. There is thus no obligation on the Commission to cite the CLP applicant as a respondent in its referral of a cartel case to the Tribunal. By having a certificate issued against the CLP applicant even if not cited as a respondent, this opens the door for claimants to pursue a follow on damages case against such CLP applicant.

2. A South African Courts view of access to privileged CLP documents.

The CLP does not prevent a plaintiff from instituting damages against the successful leniency applicant.⁴¹ The question posed then is that without the extension of this immunity in civil cases, would the threat of a much higher compensation awarded to plaintiffs in a civil action, deter leniency applicants from coming forward? Should leniency documents receive

³⁶ *Premier Foods*. See para 12.

³⁷ *Premier Foods*. Para 50.

³⁸ *Premier Foods*. Para 51.

³⁹ *Premier Foods*. See para 42-43.

⁴⁰ *Premier Foods*. Para 44.

⁴¹ CLP 2008 para 5.9.

special protection? The CLP has been a major tool in the detection and destabilization of cartels in South Africa. The zero penalty is huge incentive for companies to use the policy. Would a case of damages against the leniency applicant take away that incentive? This begs the question whether ultimate goal is to protect the leniency applicant and maintain the attractiveness of the leniency policy or protect the public interest of the cartel victims and give them access to leniency documents and thus providing greater access to justice.

The privileged documents provided by the leniency applicant were brought into question in the *Arcelor Mittal (AMSA)* case.⁴² AMSA and Cape Gate, who were members of an alleged steel cartel requested access to documents provided by the leniency applicant, Scaw, to address the allegations against them. Cape Gate sought access to the leniency application and annexures of supporting documents relying on Rule 35(12) of the Uniform Rules of Court, which confers a right to inspect and copy any document mentioned in the pleadings or affidavit by any party to the proceedings.⁴³ AMSA, relying on the Commission's rule 15(1) which gives a right to any person whether or not they are being investigated to inspect or copy the Commission's record, sought access to all the Commission's records generated after the investigation.⁴⁴ AMSA also requested access to the leniency application, marker, and discovery of all documents mentioned in the referral affidavit on the basis of Uniform Rule 32(12).⁴⁵ The Commission refused to disclose the documents on the basis that it formed privileged information prepared for litigation purposes. The Tribunal upheld the Commission's argument and dismissed the applications by the respondents, save for an order of limited disclosure of three documents that were referred to in the Commission's referral affidavit.⁴⁶

At the Competition Appeal Court (CAC), AMSA now only sought access to the Commission's record and both AMSA and Cape Gate sought access to the leniency application. The CAC however made no order on the basis that it found it unnecessary to decide on matters already determined by the Tribunal.⁴⁷ The CAC upheld Scaw's contention that the documents were protected from disclosure because it claimed confidentiality under s44(1)(a) of the Competition Act and the CAC was of the view that access to information

⁴²*Competition Commission of SA v Arcerlormittal SA Ltd et al* (680/12) [2013] ZASCA 84 [hereafter known as "AMSA"]

⁴³ *AMSA*, para 15.

⁴⁴ *AMSA*, para 16.

⁴⁵ *Ibid.*

⁴⁶ *AMSA*, para 17.

⁴⁷ *AMSA*, para 18.

over which confidentiality had already been claimed was a matter to be determined by the Tribunal.

The case was then brought before the SCA due to the CAC's failure to either confirm or set aside the Tribunal's order. Before the SCA, the Commission argued that it was entitled to withhold the information from AMSA and Cape Gate because firstly, it was protected by litigation privilege and secondly, it is restricted information. It relied on Commission rule 14(1), which gives discretion to withhold information under 37(1)(b) of the Promotion of Access to Information Act (PAIA).⁴⁸ In relation to disclosure of the Commission record, the Commission argued that Commission Rule 15 finds no application once litigation commences.⁴⁹

The SCA in its analysis indicated that litigation privilege, which protects communication between a litigant or its legal advisor and a third party, exists when two requirements are met. First, "the document must have been obtained or brought into existence for the purpose of the litigant's submission to the legal counsel for advice". Secondly, whether "litigation was pending and contemplated as likely at the time".⁵⁰

The Supreme Court of Appeal (SCA) stressed that whether or not the issue of litigation privilege is attached to the leniency application is dependant on the facts of the case.⁵¹ The Commission intended to use the information provided by Scaw to institute a prosecution and litigate against AMSA and Cape Gate. The SCA held that as a result, the documents held by the Commission were privileged.⁵² However, the SCA stated that the Commission impliedly waived this privilege when it openly referred to the leniency application in its referral affidavit to the Tribunal.⁵³ The referral affidavit contains evidence that the Commission intends leading during the hearing and the Commission was under no obligation to include or make reference to the leniency application.⁵⁴ The SCA also had to rule on the claim by Scaw that some of their documents were confidential. The SCA referred that matter back to the Tribunal for decision.

The implication of this judgment is that any reference to a leniency application in the Commission's referral affidavit can be regarded as a waiver of litigation privilege. Cartel members who may be considering using the CLP may question the protection afforded by the

⁴⁸ Act 2 of 2000.

⁴⁹ AMSA, para 19.

⁵⁰ AMSA, para 20-21.

⁵¹ AMSA, para 28

⁵² AMSA, para 31.

⁵³ AMSA, para 37.

⁵⁴ Ibid.

policy. They may ask for assurance from the Commission so that their information is not unduly exposed.

What does this judgment mean for the private plaintiff who wishes to claim damages? This judgment gives them greater access to the documents provided during process. If an applicant would like their documents to remain confidential the Tribunal will have to decide whether such information relates to “trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others” as defined in the Competition Act.⁵⁵ The Tribunal will protect sensitive trade secrets but any information outside this ambit would be subject to disclosure. Leniency applicants who have submitted their applications prior to this decision will now be concerned about the extent of information that the Commission would be obliged to release publically. They would most likely be careful in how the information is disseminated to the Commission although bearing in mind, that non-cooperation will jeopardize their leniency application.⁵⁶

The question of third parties requesting access to documents submitted during the leniency process has also been dealt with in the European Union.

IV. Lessons from the EU

Courts in the EU have grappled with question of disclosure of leniency documents submitted by the leniency applicant, which could undermine the leniency programme and recognizing the third parties’ rights to claim damages. The three cases below illustrate the development of jurisprudence in this regard. In all three cases, information was requested by a damages claimant, which was submitted as part of a leniency process such as disclosure of documents that were submitted by the cartel members and confidential information from the European Commission’s decision. The Courts in these cases faced a difficult task in dealing with this dichotomy bearing in mind the EU rules and national laws. Before *Pfleiderer* there was not much interest raised on this issue.⁵⁷ *Pfleiderer* was the first case to set the ground rules.

⁵⁵ Definitions. Competition Act 89 of 1998 (as amended).

⁵⁶ See A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 454 and C Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’ (2006) 43(5) *CMLRev* 1390.

⁵⁷ Yves Botteman and Paul Hughes ‘Access to File: Striking the Balance between Leniency and Private Enforcement Tools’ *Global Competition Review: The European Antitrust review*, 2013, www.globalcompetitionreview.com.

1. Pfleiderer⁵⁸

1.1 Background

The German Federal Cartel Office, otherwise known as the Bundeskartellamt (“BkA”), received a leniency application in 2008 from a company involved in a décor paper cartel. Three of Europe’s largest décor companies were subsequently fined approximately 62 million Euros for their involvement in the cartel. A customer of these companies, Pfleiderer AG, claimed that it had purchased over 60 million Euros worth of special décor paper over approximately 3 years whilst the cartel was in operation, and had thus suffered losses as a result of high cartel price and intended to claim damages against the three décor companies.

To strengthen its case for damages, Pfleiderer approached the BkA for full access to these leniency applications, which implicated the cartel. The BkA provided their three decisions where the fines were imposed and removed certain information including a list of evidence recorded which was obtained during the investigation.⁵⁹ The BkA refused to grant Pfleiderer access to the statements and documentary evidence rendered as part of the leniency application process. The BkA reasoned that the cartelists making use of the leniency application assisted them with cracking the cartel in the décor industry. For the BkA to now grant access to leniency files to third parties who would use the information in a civil damages case would jeopardize future cartelist and witnesses from disclosing the cartel activity.⁶⁰ Pfleiderer then applied to the local German court, the Amtsgericht Bonn, making a formal request for the leniency documents and to overturn the BkA decision.

In a confounding judgment the Amtsgericht Bonn found that Pfleiderer had a ‘legitimate interest’ in requesting the documents, and granted Pfleiderer’s request to access the leniency documents, but also having acknowledged the BkA’s concern in protecting the confidentiality of the leniency files, stayed the implementation of that order.⁶¹ This Court instead referred the case to the European Court of Justice (“ECJ”) to seek further clarity on disclosing information from leniency applications to third parties.⁶²

1.2 ECJ Decision

The ECJ first considered the matter from the point of view of the BkA, finding the leniency policy to be an effective mechanism in uncovering anticompetitive practices like

⁵⁸ *Pfleiderer AG v Bundeskartellamt*, Court of Justice of the European Union, Case C-360/09, 14 June 2011. Available at [www.eur.lex.europa.eu/LexUriServ.do?uri=CELEX: 62009CJ03060:EN:HTML](http://www.eur.lex.europa.eu/LexUriServ.do?uri=CELEX:62009CJ03060:EN:HTML) [hereinafter ‘*Pfleiderer ECJ*’].

⁵⁹ *Pfleiderer ECJ*, para 11.

⁶⁰ 9(22) Albert Geiger ‘The End of the EU Cartel Leniency programme’ www.euractiv.com

⁶¹ *Pfleiderer ECJ*, para 14-16.

⁶² The German leniency policy is based on the European Commission Council regulation 1/2003.

cartels.⁶³ It believed that the effectiveness of the leniency programme could be undermined if documents relating to leniency application were disclosed and subsequently deterred companies from cooperating with the national competition authority.⁶⁴ The ECJ then focused on the equally important right of Pfleiderer to claim damages, a right that it said was already established in the *Courage and Crehan* case⁶⁵ and reiterated the point in *Courage and Crehan* that civil damages also “contributed to the maintenance of effective competition in the European Union”.⁶⁶ The ECJ emphasizing the principles of equivalence and effectiveness held that there is nothing in the leniency programme regulation precluding a third party from gaining access to leniency documents.⁶⁷ To reach a solution, the court would have to weigh “the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency”.⁶⁸ In a disappointing turn, the ECJ decided not to do the weighing exercise itself, but rather left it at the discretion of the national courts to decide on case-by-case.⁶⁹ When making these decisions, ECJ urged the national courts to consider the factors of the case in relation to the national laws, and the conditions and type of evidence submitted under the leniency programme and the rights and interest of the third party who wishes to institute a civil claim for damages.⁷⁰

The weighing exercise raises an interesting debate especially in the consideration of damages claims against non-leniency and leniency applicants. The leniency process has been an overwhelmingly important tool for the competition authorities to detect cartels. It seems that almost all cartels globally would not have been discovered, but for the leniency process. Even total immunity from damages is still “pro-claimant”. However, as noted above, even allowing some penalty against leniency applicants may be regarded as a fair practice and not render the CLP totally ineffective. This will favour a harsher line against leniency applicants.

The Attorney General, Advocate General Mazák provided an accompanying opinion in the Pfleiderer ECJ case.⁷¹ His solution was to provide the leniency documents to the third party and withhold any self-incriminating documents or statements provided by a leniency applicant. He saw the refusal to disclose leniency information to the third party claiming

⁶³ *Pfleiderer ECJ*, para 25.

⁶⁴ *Pfleiderer ECJ*, para 26.

⁶⁵ *Courage and Crehan* [2001] ECR I-6297

⁶⁶ *Pfleiderer ECJ*, para 29, and see *Courage and Crehan*, para 27.

⁶⁷ *Pfleiderer ECJ*, para 30 and 32.

⁶⁸ *Pfleiderer ECJ*, para 30.

⁶⁹ *Pfleiderer ECJ*, para 31.

⁷⁰ *Pfleiderer ECJ*, para 30-31.

⁷¹ AG Mazák, Opinion in Pfleiderer, Case 360/09, www.curia.eu, No 48

damages as a violation of their right to a fair trial especially if those documents (provided it does not contain confidential business information) could help the claimant establish the causal link between the harm caused and the anticompetitive conduct.⁷² This also gives leniency applicants, or even a non-lenieny carteliser for that matter, an opportunity to raise the “defence” of confidential business information. As it is in South Africa, it would be up to the courts to decide whether the evidence does actually contain information that would unduly prejudice the business. Although the ECJ did not heed to the opinion expressed by Advocate General Mazák, it is one that appears to provide for a clearer solution.

1.3 Back to the local German court

Following the ECJ’s decision, the *Pfleiderer* case was referred back to the local German Amstgericht Bonn. This is the court that initially granted *Pfleiderer*’s request for access to leniency documents. Following this guidance and weighing the factors outlined by the ECJ, the Amstgericht Bonn reversed its initial decision and denied *Pfleiderer* access to the leniency documents held by BkA.⁷³

The Amstgericht Bonn considered the value of the information given in a leniency programme where the leniency applicant provided self-incriminating evidence and had the expectation that the information would remain confidential, and the applicant’s constitutional right in terms of German law, to have a say regarding the information it submitted and how much of it could be disseminated to third parties. The leniency programme has been very successful in uncovering cartel activity in the EU. Reneging on these principles would jeopardize the attractiveness of the leniency programme.⁷⁴

The Amstgericht Bonn, in its deliberations, also considered that the many of the civil damages claims were followed on after the competition authorities had uncovered the cartel. Subverting a successful leniency tool and thus hampering cartel investigations, would also impact negatively on future damages cases.⁷⁵ The competition authorities’ decision in itself should be useful enough to show the causal link between the cartel conduct and the damages to the third party. The court thus asserted that information gleaned from a leniency application would not be useful in quantifying those damages and normal civil procedure rules could be used to assess the loss suffered by the third party.⁷⁶

⁷² *Ibid.*

⁷³ *Pfleiderer v Bundeskartellamt*, 51 Gs 53/09 AG Bonn, 18 January 2012.

⁷⁴ Caroline Cauffman ‘The Interaction of Leniency Programmes and Actions for Damages’ *The Competition Law Review*, Vol 7, Issue 2, 2011 pg 3-4.

⁷⁵ *Ibid* at 4.

⁷⁶ *Ibid.*

1.4 Implications of *Pfleiderer*.

The ECJ decision in *Pfleiderer* has been plagued with criticisms from the private bar.⁷⁷ Instead of providing clarity that the parties sought, it introduced new problems. It could have set an EU wide standard of applicability in dealing with requests for information from leniency applications. It left this decision in the hands of the each member state to deal with. The Amstgericht Bonn decision, which was welcomed by the BkA and the European Community, had a detrimental impact on the third party claimant seeking damages. Confidentiality is a distinctive characteristic of the leniency programme, and these decisions do not provide much comfort to a future leniency applicant nor to the third party requiring the information for their damages claim.

4.2. *Donau Chemie*⁷⁸

2.1 Background

On 6 June 2013 the Court of Justice of the European Union (“CJEU”)⁷⁹ published a judgment in the *Donau Chemie* case. This matter originated in Austria in 2010 where the Austrian competition authority, the Bundeswettberbsbehörde (“BWB”), through their leniency programme, uncovered a cartel in the wholesale distribution of printing chemicals and imposed a fine of 1.5 million Euros on Donau Chemie and the other companies who were involved.⁸⁰ The trade association, Verband Druck and Medientechnik, placed a request with BWB to obtain access to the leniency documents to use in their follow-on damages case against the cartel. The cartelist refused to grant the trade association access to the leniency file.

Upon its analysis, the local Austrian court, the Oberlandesgericht Wien (the Vienna Higher Regional Court) found that a national Austrian law, applicable only in cartel cases, protected information submitted in cartel cases, and such information could only be divulged to third parties if all the parties consent to this waiver.⁸¹ Parties can refuse to provide access to the information without furnishing reasons. This blanket restriction does not leave much room

⁷⁷ See Scott Campbell and Tristan Feunteun 'Article on developments in English Cartel and enforcement' *Stewarts law*, 2012. www.stewartslaw.com; 9(22) Albert Geiger 'The End of the EU Cartel Leniency programme' www.euractiv.com; 9(24) Yves Botteman and Paul Hughes 'Access to File: Striking the Balance between Leniency and Private Enforcement Tools' *Global Competition Review: The European Antitrust review*, 2013, www.globalcompetitionreview.com;

⁷⁸ *Bundeswettberbsbehörde v Donau Chemie AG and others*, Case C 536/11, European Court of Justice. Available at www.eurlex.europa/LexUriServ.do?uri=CELEX:62011CJ0536:EN:HTML.

⁷⁹ The name of the ECJ court changed to the CJEU when the Treaty of Lisbon came into force in 2009.

⁸⁰ *Donau Chemie* CJEU, para 5.

⁸¹ Austrian Federal Law of 2005 of Cartels and Other Restrictions of Competition, Paragraph 39(2) which states “Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties”.

for the national competition authorities to consider the interest of the third party. The Vienna Regional Court was in doubt as to the compatibility of the local legislation with the EU rules, especially in light of the *Pfleiderer* ruling, and thus approached the CJEU for guidance.

2.2 CJEU Ruling

Drawing on the *Pfleiderer* dicta and its principle of effectiveness, the CJEU reiterated that a balancing exercise must be performed to weigh the interests of the third party who would like access to the documents to help enforce its rights to claim damages balanced with the right to protect the leniency application information (such as the rights to protect personal or business secrets⁸²) and not compromise the leniency programme.⁸³

In its appraisal of the law the CJEU found that:

- The blanket restriction denying access to leniency information imposed by the national Austrian law should not result in making it virtually impossible for a third party to exercise its rights claim damages.⁸⁴

- National courts must weigh the interests of the parties who wish to have access to the documents and those who do not want to disclose the information, because “any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application” of the legislation, and “the rights that provision confers on individuals”.⁸⁵

- The national courts on a case-by-case basis can conduct this balancing exercise.⁸⁶

- To say that the mere risk that access to documents from a leniency file would in itself undermine the leniency programme cannot be justified.⁸⁷

- The fact that such refusal by a leniency applicant may circumvent a damages action “to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused”.⁸⁸

- The only exception is if there is a risk that the document may “undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.”⁸⁹

⁸² *Donau Chemie* CJEU para 33.

⁸³ *Pfleiderer* ECJ, paras 30 and 31, and reiterated in *Donau Chemie* CJEU, para 9.

⁸⁴ *Donau Chemie* CJEU para 27.

⁸⁵ *Donau Chemie* CJEU para 31.

⁸⁶ *Donau Chemie* CJEU para 47.

⁸⁷ *Donau Chemie* CJEU para 46.

⁸⁸ *Donau Chemie* CJEU para 47.

⁸⁹ *Donau Chemie* CJEU para 48.

2.3 Implications of the judgment.

The CJEU's judgment in *Donau Chemie* can be seen as a victory for potential damages claimants especially there are laws providing a blanket restriction to access leniency documents. However the Court in this case did not stray any further away from the judgment in *Pfleiderer* and merely reiterated the weighing of interests test to be decided on a case-by-case basis and in some respects, on a document-by-document basis.⁹⁰ The *Donau Chemie* court has not properly defined the criterion in this weighing exercise. Measuring the public interest in relation to principle of effectiveness of the leniency also requires a proper standard of assessment, which was not addressed in this case. It also appears that the competition authorities bear the burden of proving this public interest test. There is also no guarantee to prospective leniency applicants regarding the certainty of confidentiality of their documents. The court in *Donau Chemie*, just like *Pfleiderer* provided a broad approach without the comfort of clarity to either the leniency applicant or the damages claimant. This case does show that it is becoming more accessible for damages claimants to obtain these leniency documents, and that the competition authorities cannot provide a leniency applicant the absolute assurance that their information will be protected.

3 National Grid⁹¹

3.1 Background

This case was brought to the Chancery Division of the English High Court, where the Court had to evaluate the whether confidential documents given to the European Commission (EC) could be disclosed to a potential damages claimant. The National Grid Electricity and Transmission company ("NGET") wished to bring damages against companies⁹² who were involved in the Gas Insulated Switchgear cartel. A 750million Euro fine was imposed upon the cartel members. NGET requested these documents arguing that it was needed so that it could collect as much information as possible in preparation of its follow on damages claim. The documents in question comprised of the confidential version of the EC's report. Some of the documents were disclosed to NGET but it argued that it still required more information.⁹³

3.2 High Court ruling

Justice Roth of the English High Court invited the EC to make oral submissions on the following points:

⁹⁰ *Donau Chemie* CJEU para 47.

⁹¹ *National Grid Electricity Transmission Plc v ABB Ltd*, Chancery Division, [2012] EWHC 869 (Ch).

⁹² Some of the parent companies involved in the cartel were ABB, Siemens, Alstom and Areva. ABB was granted immunity from the fine in terms of the Commission's 2002 Leniency Notice.

⁹³ See para 7 citing the High Courts judgment [2009] EWHC 1326 (Ch) rejecting the defendant cartels' application to stay the proceedings.

(1) Whether *Pfleiderer* applies to the disclosure of leniency documents in the context of the EC's decision?

(2) Whether National Courts have the jurisdiction to hear matters related to the disclosure of leniency documents or whether this request could only be made to the Commission in relation to Article 15(1) of Regulation 1/2003, OJ 2003 L1/1?⁹⁴

(3) If a national court does have such jurisdiction, what factors should they take into account to weigh the interests of the parties as indicated in the *Pfleiderer* case paragraphs 30-31?⁹⁵

After hearing arguments, Justice Roth's response was that:

(1) *Pfleiderer* had a broad appeal, which was not limited to national leniency programmes only. He also emphasized that it was not the EC who suggested that there was any policy reason to give *Pfleiderer* a more restricted interpretation. He found that the ECJ's judgment did not allow for any qualification. Consequently, *Pfleiderer* applies with equal force to both the Commission's leniency programme and that of the national competition authorities'.⁹⁶

(2) Justice Roth made it clear that national courts did have the jurisdiction to rule on the application for disclosure. It said "there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents".⁹⁷ He agreed with the Commission that there is nothing precluding member states from adopting their own rules relating to the disclosure of leniency materials. He added that to rule otherwise would create a huge burden on the Commission if every application for disclosure of leniency documents had to be referred to it, and if there were potential appeals, it could lead to substantial delays in finalizing these cases.⁹⁸

(3) It considered the weighing exercise proposed by the *Pfleiderer* judgment, by taking note of the fact that this is not a simple exercise "because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where a claim to public interest immunity is raised."⁹⁹ In its application, the Justice Roth took several factors into account:

⁹⁴ Article 15(3) gives the national competition authorities and the European Commission the right to submit written submissions to the local/national courts of the member states for matters in relation to Article 81 and 82 (now Article 101 and 102) of the European Treaty.

⁹⁵ *National Grid*, para 18.

⁹⁶ *National Grid*, para 26.

⁹⁷ *National Grid*, para 28.

⁹⁸ *National Grid*, para 29.

⁹⁹ *National Grid*, para 30.

(a) Consideration must be given to the actual documents sought. In this case NGET requested access to certain extracts that were incorporated into the Commission’s decision and certain replies and requests for information and explanations. It did not ask for the all the documents related to the leniency application.¹⁰⁰

(b) Some of the defendants argued that leniency applicants have a legitimate expectation that their documents would be protected. He stressed that the leniency programme did not offer any legitimate expectation to the leniency applicant that their documents would not be protected from disclosure to third parties.¹⁰¹

(c) All parties to the cartel are equally liable for the wrongdoing. Therefore, disclosing the leniency documents would not increase the leniency applicant’s legal liability to a greater extent than those parties who were not granted leniency.¹⁰²

(d) He considered factors such as the amount of the fine that the leniency applicant avoided by applying for leniency, the duration for which the cartel had been in operation, the gain realised by the cartel members, the alleged loss suffered by NGET, and the difficulty for the damages claimant to access evidence required to substantiate its claim or to establish causation between the prohibited practice, the damage and the quantification of damages.¹⁰³ These factors were weighed against the “potential effect of a disclosure order” in this case and the deterrent effect it may have on potential leniency applicants involved in other cartels which are yet to be uncovered. If this is the company’s main concern for not racing to the door to apply for leniency, it is a huge risk to take. Another cartel member could come forth and apply for leniency, thus uncovering the cartel and the company who decided not to apply for leniency will be exposed to higher fines and potential civil damages claims.¹⁰⁴ He assessed the proportionality of these factors in the following terms: “(a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case.”¹⁰⁵

(e) Justice Roth qualified that even if the claimant could obtain the requested documents from other sources, there is no guarantee that it will be able to use those documents because cartel documents are usually known to be “opaque or literally, cryptic.”¹⁰⁶ It is thus better to rely on information given to the Commission, which is probably more

¹⁰⁰ *National Grid*, para 31.

¹⁰¹ *National Grid*, para 34.

¹⁰² *National Grid*, para 35.

¹⁰³ *National Grid*, para 37 and 40.

¹⁰⁴ *National Grid*, para 37.

¹⁰⁵ *National Grid*, para 39.

¹⁰⁶ *National Grid*, para 50.

reliable.¹⁰⁷ However, this does not mean that all information requests should be granted without considering the “countervailing factor[s] to be weighed against disclosure”.¹⁰⁸ “It is necessary to ascertain whether the particular documents or parts of the documents are of such potential relevance that specific disclosure should be ordered.”¹⁰⁹ Not all documents requested are relevant for the claimant’s purpose. Accordingly it would be wrong to order disclosure of all leniency materials without proper examination of each of them.¹¹⁰

After inspecting the documents Justice Roth observed that the Commission’s Decision could be distinguished from the other documents that were sought. Some of the information that was redacted in the Decision’s non-confidential version related to confidential commercial information obtained from company statements. This would not have any effect on the leniency applicant’s defence to the damages claim as the “confidentiality ring” already covered it.¹¹¹ He concluded that only a partial disclosure of the documents should be allowed.¹¹²

3.3. Implications of the judgment.

This judgment shed more light regarding the factors to consider when conducting the weighing exercise. However, it is noted that the weighing exercise was based on the facts peculiar to this case and should not be used as a definitive template. The weighing exercise as said in *Pfleiderer*, should be done on a case-by-case basis.

4 CDC Hydrogen Peroxide¹¹³

4.1 Background

The applicant, CDC Hydrogen Peroxide Cartel Damages Claims, was formed with the purpose of instituting damages against a cartel in the hydrogen peroxide industry. The European Commission fined 9 companies 338million Euro for price fixing.¹¹⁴ In its quest to recover damages CDC ask the Commission for “full access to the statement of contents of the case file in the hydrogen peroxide decision”.¹¹⁵ CDC requested the non-confidential version of the index to this file relying on Article 4(2) of the Transparency Regulation.¹¹⁶ This

¹⁰⁷ *National Grid*, para 43.

¹⁰⁸ *National Grid*, para 52.

¹⁰⁹ *Ibid*.

¹¹⁰ *National Grid*, para 52 and 55.

¹¹¹ *National Grid*, para 57.

¹¹² *National Grid*, para 58.

¹¹³ *CDC Hydrogen Peroxide Cartel Damages Claims (CDC Hydrogen Peroxide) v European Commission* [2011] ECR Case T- 437/08. (hereafter referred to as “CDC”). CDC is a company called Cartel Damages Claims that brings actions on behalf of cartel victims.

¹¹⁴ Commission Decision C(2006) 1766. Case COMP/F/C.38.620 (‘The hydrogen peroxide decision’).

¹¹⁵ *CDC Hydrogen Peroxide*, para 1.

¹¹⁶ Regulation (EC) No.1049/2001, which allows the public access to European Parliament, Council and

information would have helped CDC in the discovery process to identify the documents that the cartelists held, which could be used to strengthen their civil case. The Commission raised exceptions to the Transparency Regulation and denied CDC access to the documents on the grounds that it could not disclose the companies' confidential commercial information and to do so would undermine the leniency process and investigation. The CDC turned to the General Court asking for disclosure of the documents

4.2 The General Court outcome

The General Court dismissed the exceptions raised by the Commission. The Court considered whether the index to the file, which was requested by the damages claimant constituted protected commercial interest information. The Court held that index to the file itself was not submitted by the leniency applicant, and does not contain any information that could prejudice the commercial interests of the leniency applicant.¹¹⁷ It could also not be construed that the documents listed in the index, even if it were documents relating to commercial interest, the damages claimant would not necessarily use it. The usefulness of that information to further the claimant's case is a question that would be raised during the discovery process in the civil case.¹¹⁸ Protecting the commercial interest of documents should not allow for the leniency applicant to avoid facing civil damages claims.¹¹⁹

The Commission submitted that the case may be appealed and thus disclosure would not be appropriate at this stage. The court found that the Commission's investigation was complete and said that even if the case went on appeal, does not mean that access to the index should be denied¹²⁰.

The Commission submitted that the case may be appealed and thus disclosure would not be appropriate at this stage. The court found that the Commission's investigation was complete and said that even if the case went on appeal it does not mean that access to the index should be denied.

The Commission' raised concerns that disclosure would undermine the leniency programme as potential applicants would not cooperate. The Court dismissed the Commission's argument saying that the leniency policy did not deserve any higher level of protection than a damages claim as both private and public enforcement contributed to deterring cartel conduct.

European Commission documents ([2001] OJ L145/43) ("Transparency Regulation").

¹¹⁷ CDC para 45 and 70.

¹¹⁸ CDC para 47.

¹¹⁹ CDC para 49.

¹²⁰ CDC para 65.

4.3 Implication of CDC Hydrogen Peroxide.

Although the Commission jealously guarded every piece of information relating to the leniency case, including the index to its case file, this case raises further issues of uncertainty of leniency document protection. Perhaps the request in this case for the index may not have been the ideal point for the Commission to make in protecting access to documents. The index could clearly not be regarded confidential commercial interest information that would be used at a later stage. This case, like the others, emphasized the fact that the damages claimants have just as big a role to play in enforcement of cartels as leniency programs. Their requests should not be easily disregarded and dismissed.

V. The USA approach

In the United States a successful damages claimant, who has been harmed by cartel conduct, is awarded treble damages. Being awarded three times what you have quantified in your claim is a great incentive to sue for damages. Leniency applicants could thus easily become target respondents for damages cases and the US competition authorities were therefore also concerned about protecting their leniency policy especially since they have also had immense success with the policy uncovering cartels.¹²¹ In order to still incentivize use of the leniency policy the US authorities enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which de-trebles the damages award. This means that a claimant is only entitled to single damages from a leniency applicant if successful (and is not jointly and severally liable, e.g. in the case of bankruptcy of a co-conspirator, which is very important, given the prevalence of “crisis cartels”), and can sue the other members of the cartel, who remain jointly and severally liable for treble damages.¹²² A company who is sued cannot recover his compensation from fellow co-conspirators.¹²³ The ACPERA incentive works well in the United States because of the treble damages incentive. It also provides the leniency applicant some relief from civil damages in exchange for satisfactory and timely co-operation with the damages claimant¹²⁴. Considering that we do not have the triple damages

¹²¹ Scott Hammond “The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades” Speech given The 24th Annual National Institute On White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, Florida, 25 February 2010. <http://www.justice.gov/atr/public/speeches/255515.htm>.

¹²² J Green and I McCall, ‘Leniency and civil claims’, (2009) Competition Law Insight, 3-5, SW Waller, ‘Towards a Constructive Public-Private Partnership to Enforce Competition Law’, (2006) *World Competition* 367-381.

¹²³ *Texas Indus., Inc v Radcliff Materials, Inc.* 451 U.S. 630 (1981).

¹²⁴ ACPERA § 201-215. See also 2010 amendment to ACPERA Pub. L.No. 111-190 § 3 which added the “timeous” requirement.

incentive in South Africa, it would not be possible to incorporate directly into our law. However, it is worth considering.

Empirical evidence shows that since the enactment of ACPERA has had minimal change to the number of cartelists who applied for leniency.¹²⁵ Looking at a six-year period before ACPERA was enacted in 2004 there were 78 leniency applications and during the six-year period after the enactment there were 81 applications.¹²⁶ For those who did apply there was a 6% increase of successful applications especially in cases where the Department of Justice did not know about the existence of the cartel conduct.¹²⁷ Although there is a slight shift of applications, ACPERA may have brought a slight relief to leniency applications. The threat of criminal penalties still remains a greater incentive for these applicants to come forward to blow the whistle on the cartel.¹²⁸

Most importantly, in the US Government Accountability office report, it was found that the information the damages claimant obtained through the co-operation in the ACPERA process helped to “streamline their cases by reducing the burden of long and costly civil discovery because leniency applicants provided a roadmap to the conspiracy”.¹²⁹

Through ACPERA, the US authorities appear to have found a way to maintain the integrity of their leniency policy and destabilize cartels. Damages claimants can strengthen their case through the co-operation of the leniency applicant in exchange for a de-trebled damages award.

VI Finding The Balance

There are a number of factors which can guide us in finding the balance in weighing up the rights of damages claimants to access documents with the imperative to protect the evidence gained through public enforcement. It should be noted that unlike in the EU or the US, the damages claimants in South Africa have to wait for the outcome of the administrative decision and be issued with a certificate by the Competition Tribunal before proceeding with the damages action. This might affect the balance.

The European Commission (EC) has consulted the public on how to encourage damages cases and proposed procedure in the 2005 Green Paper and later in the 2008 White Paper. In

¹²⁵ United States Government Accountability Office (GAO), “Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection”, Report to Congressional Committees, July 2011, GAO-11-619 pg 15. (otherwise known as the “GAO report”).

¹²⁶ GAO report pg 16. “These data include both corporate and individual applications though the vast majority of applications submitted both before and after ACPERA were corporate leniency applications”. Fn 40 GAO report.

¹²⁷ GAO report pg 16.

¹²⁸ GAO report pg 20.

¹²⁹ GAO report pg 29.

June 2013, it issued a proposed directive.¹³⁰ With regard to the disclosure of evidence the EC calls for the full protection of leniency documents, which cannot be discovered (even once the case has been finalized). This would apply to corporate statements, replies to request for information and other settlement submissions.¹³¹ These documents are completely off limits and cannot be disclosed to third party damages claimants. This was also confirmed recently in the *Gas Switchgear Cartel* case where the CJEU held that there was no overriding public interest on the part of a damages claimant to have access and use of the leniency documents.¹³²

The Proposed Directive gives some reprieve to the damages claimant if it would like a precise disclosure of documents, which would be substantively relevant to its case. These documents can only be disclosed after the competition authorities have finalized their case. National Courts are now given the discretion to determine the scope and cost of the request for disclosure, whilst still protecting confidential and privileged information.

The EC Directive also proposes that a damages claimant can claim from the co-conspirators who will be liable jointly and severally for their conduct. The incentive to the leniency applicant is that it won't be liable for the entire compensatory amount, but rather, only liable for its own responsibility or share of the harm. Only if the claimant cannot recover the damages from the other cartel members, can the leniency applicant then be liable jointly and severally, although it seems this would only be allowed under exceptional circumstances.¹³³

VII Conclusion

The South African competition authorities place considerable value on the CLP and indeed it has proven very effective in detecting cartel conduct.¹³⁴ It is therefore in their interest to protect the integrity of the policy. This becomes difficult when there is a paramount public interest for third parties claiming damages to gain access to this information which may help in establishing causation and quantum of harm, in order to exercise their right to recover their losses. Private and public enforcement should be complementary components

¹³⁰ European Commission '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' C(2013)3539/3.

¹³¹ Ibid at 4.2.

¹³² *Commission v Siemens Österreich and Others, Siemens Transmission & Distribution v Commission, Siemens Transmission and Distribution and Nouva Magrini Galileo v Commission, Areva v Commission and Alstom and Others v Commission*, Joined Cases C-231/11P, C-232/11P and C-233/11P and in Joined cases C-247/11P and C-253/11P (also known as the "Gas Switchgear Cartel" Case).

¹³³ Ibid at 4.3.

¹³⁴ Annexure A is a list of cases, which have been successfully prosecuted as a result of the CLP.

to eradicating cartel conduct. However, this often results in a battle over access to the leniency information.

One outcome would be to find a perfect balance between suing the leniency applicant for damages (ability for follow on claims), versus partial leniency (such as in the US under ACPERA, where leniency applicants are still liable for single, not treble damages), versus full leniency (where there are no follow on claims). The empirical evidence on ACPERA, which allows for some penalty, is still quite an encouraging incentive.

The South African courts have not had the opportunity to deal comprehensively with this dilemma. Although some of these issues did come to the fore in the *AMSA* case. In this case the SCA did find an interest in protecting litigation privilege but did not have much choice regarding the disclosure of leniency information considering that the leniency applicant was mentioned in the referral document. This opened the door to disclosure, with *AMSA* and *Cape Gate* requesting information so that they could properly answer the Commission's allegations. However, the case did not deal with the challenges facing a damages claimant.

We therefore look to the EU for guidance on this. *Pfleiderer's* introduction of the principle of the weighing of interests and its consideration of the principle of equivalence and effectiveness, introduced a new dimension to this debate. It could be argued that the ECJ could have taken the matter further by identifying the factors the national court should consider when conducting this exercise, rather than leaving it in the discretion of the national courts to decide on a case-by-case bases. This case should be lauded for entertaining the possibility that a damages claimant could show that their interest in obtaining the documents to strengthen the case is worth serious consideration. The CJEU in *Donau Chemie* case agreed with *Pfleiderer's* weighing exercise, and guarded against local laws that imposed blanket restrictions on access to documents. *National Grid* went ahead to outline certain factors to consider, but keeping in mind that it was fact-based.

These cases appear to be leaning in favour of disclosing certain leniency documents to the damages claimant, and not shutting them out completely. They have emphasized that private enforcement has just as big a role to play as public enforcement in eradicating cartel behaviour. The potential effect of the application of the leniency policy came into question and all the courts were quite adamant that the leniency programme did not offer a legitimate expectation that all evidence submitted would not be disclosed to third parties.

The court in *National Grid* emphasized the point that there is a greater risk in not applying for the leniency (i.e. a greater financial risk being fined by the competition

authorities and the possibility of losing a damages case) than using the leniency policy to obtain immunity from the fine. *National Grid* was also an important case post *Pfleiderer* by providing more guidance at the national level.

The *CDC* case illustrated that the competition authorities could be very conservative when it comes to protection leniency information. The authorities in CDC even tried to extend this protection to an index in a referral file. It remains to be seen whether companies would risk having their information being exposed to third parties and whether the national courts would permit a full disclosure to third parties without revealing business secrets and confidential company information.

In finding a balance, the US does not offer us much help because the legal incentives differ greatly. De-trebling damages would be very encouraging to a potential leniency applicant. The EU and US appear to be on the same page regarding joint and several liability of the co-conspirators of the cartel. The EU does take a step further with its exception allowing for a joining of liability of the leniency applicant. This addition unfortunately allows for uncertainty to creep in.

The EC Proposed directives are worth considering for the South African context. The national court rules may not apply because of our different legal structure. However, the provisions could still be considered. It does seem as though these directives were in direct response to the *Pfleiderer* decision. The EC is attempting to take a decisive stance and it would be interesting to see if it holds up in court. The directives closely protect information given during the leniency process, which is a step back from the courts in *Pfleiderer*, *Donau Chemie*, *National Grid* and *CDC*, who all employ a balancing test, and understand the position of damages claimants having asymmetrical information and the need to access leniency documents to strengthen their case. This is disquieting especially since the motivation behind the EC Green and White paper and now the proposed directive was to encourage more damages actions. The access to information that is available to damages claimants is quite limited in terms of the Proposed Directive.

At this stage is uncertain whether South African courts would support the denial of access to leniency documents to uphold the integrity of the Commission's leniency policy. It would be worrisome to think that they would have such a one sided view, especially when damages cases in competition law are lacking and claimants need to be incentivized and encouraged in South Africa so that they can get some reprieve. Hopefully any recommendation issued by the Courts will seek to provide a balance between strengthening

public enforcement and allowing the damages claimant access to justice in private enforcement cases.