

REDRESS FOR VICTIMS OF CARTEL CONDUCT

BY

GOODMAN N VIMBA

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SUPERVISOR: PROF CM VAN HEERDEN

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. It has not been submitted for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

Name: Ntandazo Vimba

Signature: _____

Date:October 2017

SUMMARY

Cartels are the most egregious competition law contraventions and cartel enforcement is a top priority for competition authorities. One would thus expect that the energy and rigour with which cartels are being prosecuted by the competition authorities would be mirrored in the redress available in South Africa to victims of cartel conduct. Sadly that is not the case as no special legislative provisions exist that ease the road to obtaining damages awards by cartel victims. Section 65 of the Competition Act at least paves the way for follow-on civil actions but does not in itself create a comprehensive process to facilitate such actions.

The EU is however progressively working towards enabling victims of anti-competitive conduct to be able to institute damages actions and successfully recover such damages. As pointed out the Antitrust Damages Directive of 2014 has ushered in a new era in protection of victims of competition law contraventions in the EU as it provides comprehensively for aspects such as disclosure of evidence, penalties, limitation periods, joint and several liability, passing-on of overcharges and the right to full compensation. It specifically also provides for the relaxing of the standard of proof in relation to the quantification of damages and also for settlement of damages claims through alternative dispute resolution.

This dissertation interrogates the difficulties facing victims of cartel conduct insofar as civil redress is concerned and looks at the developments in this context in the EU to see whether there are any reforms that South Africa should undertake to address the problems relating to civil redress for victims of cartel conduct.

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1.1 Introduction

Competition law, also known as antitrust law, originated in the United States with the enactment of the Sherman Act in 1890,¹ a statute passed against the backdrop of the industrial revolution and the market-related problems that characterised the era. Since its introduction in the USA many other jurisdictions have adopted laws regulating competition in their domestic markets. As such competition law regulates a range of conduct seen as a threat to efficient competitive markets, namely anti-competitive horizontal and vertical practices, abuse of dominance, certain pricing conduct and also anti-competitive mergers.²

Various theories have developed over the years regarding what the objectives of competition law ought to be. Although these theories differ regarding what they deem to be the role of competition there is some consensus that consumers should be the end beneficiaries of the competitive process as they should benefit from better choices and lower prices brought about by a competitive market.³

In the context of competition law, cartel contraventions are regarded as especially egregious in view of their significant impact on consumer welfare.⁴ Accordingly cartel enforcement is a top priority of competition authorities across the globe.⁵

Cartels generally refer to agreements between rivals to limit production or otherwise impede competition.⁶ The Organization for Economic Co-operation and Development (OECD) uses the term ‘hardcore cartel’ and describes it as follows:⁷

‘A hardcore cartel is an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories or line of commerce...’

¹ 15U.S.C.A. § 1 et seq.

² Whish & Bailey *Competition Law* 4.

³ Neuhoff *A Practical Guide to the South African Competition Act* (2nd ed) 9.

⁴ Scormagdalia ‘Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees’ *The Competition Law Review* (2010) 5. See also the *OECD Report on the nature and Impact of Hard Core Cartels and Sanctions against cartels under National Competition Laws* (2002).

⁵ *Ibid.*

⁶ Cosgun ‘Criminalising Cartels: Theory and Practice in the UK and Australia’ *Global Antitrust Review* (2013) 113 at 116.

⁷ *OECD Recommendation of Council concerning Effective Action against Hard Core Cartels* (1998) 12.

Competition in South Africa is regulated in terms of the Competition Act 89 of 1998. The Competition Act has as its core purpose “promoting and maintaining competition in the Republic in order to provide consumers with competitive prices and product choices”.⁸ The Competition Act comprehensively regulates horizontal and vertical restrictive practices, abuses of dominance and mergers.

Section 4 of the Competition Act regulates the acquisition and abuse of market power through the co-operative acts of competitors, i.e cartel conduct.⁹ These ‘restrictive horizontal practices’ are prohibited by section 4(1) of the Competition Act that provides as follows:

‘4(1) An agreement¹⁰ between, or concerted practice¹¹ by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if:

- (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other precompetitive gain resulting from it outweighs that effect; or
- (b) it involves any of the following restrictive horizontal practices: directly or indirectly fixing a purchase or selling price or any other trading condition;¹² dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;¹³ or collusive tendering.¹⁴

⁸ S 2(c) of the Competition Act .

⁹ Sutherland and Kemp *Competition Law in South Africa* (2000 et seq) 5-3 (hereinafter Sutherland and Kemp).

¹⁰ The term ‘agreement’ in terms of s 1 of the Competition Act, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable. The Competition Tribunal has decided in *Pioneer Foods (Pty) Ltd 15/CR/May08* that a firm will be a party to an agreement even though it has not participated on a daily basis or attended all meetings of the firms involved. In *Netstar (Pty) Ltd v Competition Commission 97/CAC/May 10* the Competition Appeal court confirmed that South Africa, like Europe, could regard consensus as the basis for an agreement in Competition law. See further Sutherland and Kemp at par 5.4.1.

¹¹ The term ‘concerted practice’ is defined in s1 of the Competition Act as “co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement”. See further Sutherland and Kemp par 5.4.3.

¹² S 4(1)(b)(i).Sutherland and Kemp at par 5.7.1 discusses price fixing in detail and point out that price fixing is regarded as the most heinous of anti-competitive practices.

¹³ S 4(1)(b)(ii). Market allocation is the dividing up of markets between competitors for purposes of exercising market power. For a detailed discussion see Sutherland and Kemp at par 5.7.2.

¹⁴ S 4(1)(b)(iii). Also known as ‘bid-rigging’. Sutherland and Kemp at par 5.7.3 explain that collusive tendering is not defined in the Competition Act but that it takes on two main forms, namely:

- a) Parties may agree that they all will submit bids but that one will submit the lowest bid or will submit the only bid that contains acceptable terms (complementary bidding), in exchange for which it will divide the work or proceeds among the colluders (subcontracting) or in exchange for which the successful firm will again have to submit higher or otherwise objectionable bids in future bidding processes (bid rotation).

Because of the egregious nature of cartel conduct it is visited with severe sanctions. In South Africa large administrative fines are regularly levied on cartels in accordance with section 59 of the Competition Act. Recently the much dreaded cartel offence introduced to the Competition Act as section 73A by the 2009 Competition Amendment Act¹⁵ has also been put into operation in a further attempt to deter cartel conduct. However, the monies raised through administrative and criminal fines are not used specifically to provide redress to consumers that were harmed by the cartel conduct- instead it goes into the National Revenue Fund¹⁶ and are used for a variety of purposes other than alleviating the plight of the victims of cartel conduct. Ironically it is likely, as remarked by Kelly, that firms that were fined for their participation in cartels pass their losses (in terms of the fines that they paid) on to consumers - thus causing damage to those consumers twice and in the process also causing damage to other consumers to whom the costs of the cartel conduct have been passed on in the form of higher prices.¹⁷

This then raises the question regarding the nature of and processes available to provide redress to victims of cartels conduct. Currently the competition authorities, apart from the instance where a firm consents to a damages award in a consent order negotiated in terms of section 49D of the Competition Act¹⁸, do not have jurisdiction to award damages to consumers who were harmed by cartel conduct. This means that once the competition authorities have prosecuted a cartel and have obtained a finding that it has been involved in cartel conduct, consumers are still left out in the cold as they then have to approach the civil courts to institute a follow-on damages action.

The institution of this follow-on damages action is facilitated by section 65(6) and (7) of the Competition Act that provides as follows:

“(6) A person who has suffered loss or damage as a result of a prohibited practice-

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- b) Firms may agree that all but one will refrain from submitting a bid (bid suppression). In exchange for making this sacrifice the parties who refrain from bidding may be given the privilege of making uncontested bids in future bidding processes or an undertaking that the successful bidder will withdraw from bidding for a specified other project.

¹⁵ Competition Amendment Act 1 of 2009.

¹⁶ S 59(4) of the Competition Act states that an administrative fine must be paid into the National Revenue Fund referred to in s213 of the Constitution, 1996.

¹⁷ Kelly “The introduction of a ‘cartel offence’ into South African law” 2010 *Stell LR* 321.

¹⁸ S49D (3) provides that with the consent of a complainant, a consent order may include an award of damages to the complainant.

(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 the Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form-

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

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

(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents and is binding on a civil court.”

Section 65(8) further states that a person’s right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of a matter that affects that person.¹⁹ Where a matter is subject to appeal, the right to bring a claim for damages comes into existence on the date that the appeal process in respect of that matter is concluded.²⁰

1.2. Scope and nature of dissertation

The Competition Act allows for the prosecution of cartels as a prohibited horizontal practice through the provisions of section 4(1). However the prosecution of cartels by the competition authorities generally do not result in direct compensation to victims of cartel conduct as the monies paid by way of administrative fines go to the National Revenue fund and thus ends up in the fiscus and not in the pockets of those victims that suffered damages due to the cartel conduct. Although the Competition Act provides that such victims may on own initiative institute actions in civil courts for damages it does not deal with the issue further. At most it facilitates the bringing of follow-on damages actions by at least stating that a certificate by the

¹⁹ S65(8)(a).

²⁰ S65(8)(b).

Tribunal of a finding that prohibited conduct has occurred constitutes conclusive proof- thus meaning that the victim of cartel conduct who wishes to pursue a damages claim is at least spared the costly agony of having to prove the cartel conduct before the civil court Other than that the Competition Act does not offer much assistance to a person who wishes to claim damages as a result of cartel conduct. No wonder then that since the introduction of the Competition Act in 1999 until 2016 when the *Nationwide* and *Comair* cases²¹ as discussed in Chapter Two were decided, South Africa had not seen a successful civil damages action following upon a finding of anti-competitive conduct by the Competition Authorities.

The purpose of this dissertation is therefore to investigate the problems facing victims of cartel conduct who wish to obtain redress for the damage that they have suffered at the hands of cartelists. In this context special consideration will be given to the possibility of a collective redress mechanism that may assist indigent victims who suffer damages due to cartels but are unable to afford the costs of pursuing the matter in a civil court.

1.3. Methodology

This dissertation will be based on a review of relevant legislation, academic contributions and case law. A comparative study as set out below will be undertaken and the writer will also furnish his own conclusions and recommendations relating to the subject matter.

1.4. Comparative jurisdiction

In terms of section 1(3) of the Competition Act regard may be had to foreign law in interpreting our Act. A comparative investigation will accordingly be undertaken into European competition law in order to determine how the EU has dealt with the challenge of providing redress to victims of anti-competitive conduct.

5. Lay-out of dissertation

The dissertation consists of 4 chapters that will deal with the following:

Chapter One: Background to the study: this chapter sets out the rationale for the study as well as the research questions, methodology, selection of comparative jurisdiction and lay-out of the chapters.

²¹ *Nationwide Airlines (Pty) Ltd (In Liquidation) v South Africa Airways (Pty) Ltd* 2016 (6) SA 19 (GJ) and *Comair Limited v South African Airways (Pty) Ltd* [2017] ZAGPJHC 10.

Chapter Two: Problematic aspects relating to redress for victims of cartel conduct in South Africa. This chapter will interrogate the challenges faced by victims of cartel conduct in South Africa. It will also consider recent developments in case law that may have the effect of alleviating the plight of these consumers. Finally it will look at the mechanism of civil class actions as a means by which access to justice may be facilitated for indigent persons who are the victims of cartel conduct.

Chapter Three: Redress to victims of cartel conduct: the EU approach. This chapter will investigate developments in the EU in order to determine the nature and extent to which victims of cartel conduct receive compensation and whether there are any lessons that South Africa can learn in this regard.

Chapter Four: Conclusions and recommendations. This chapter will conclude the study and propose suggestions for reform.

Chapter 2 Civil redress in South Africa for damages as a result of anti-competitive conduct

2.1 Introduction

As indicated in Chapter One, apart from allowing a damages award to be contained in a consent order in terms of section 49D(3), the Competition Act does not otherwise allow the competition authorities to make civil damages awards to victims of cartel conduct. Damages claims therefore have to be pursued further in the civil courts.

Section 65 of the Competition Act indicates that it is competent for a person who has suffered damages as a result of cartel conduct to approach a civil court with a follow-on damages action.²² Section 65 even alleviates the plaintiff's evidentiary burden by providing that a certificate by the Tribunal certifying that certain conduct has been found to be prohibited conduct in terms of the Competition Act constitutes conclusive proof of its contents thus making an enquiry into and a finding by the court to determine whether the conduct that allegedly gave rise to the damages claim, is indeed prohibited conduct as contemplated in the Competition Act unnecessary. In this regard it should be noted that section 65(6) states that 'a person who has suffered loss or damage as a result of a prohibited practice may not commence an action in a civil court *for the assessment of the amount or awarding of damages*'.²³ This

²² In *Trustees for the time being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others*, the Western Cape High Court found that s 65 of the Competition Act does not create such a cause of action. On appeal, in *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*, the Supreme Court of Appeal endorsed this view, and held (par 66 to 68) that s 65 does not establish an exclusive statutory claim but that it merely contemplates the possibility of a claim for damages at the instance of a person who suffered loss or damage in consequence of a prohibited practice'. As indicated below in the *Nationwide* case the South Gauteng High Court has however held that s65 indeed allows for a damages action in respect of conduct that has been found to constitute prohibited conduct in terms of the Competition Act.

²³ My emphasis.

confirms that the court is tasked only with assessing damages and not with establishing whether the defendant's conduct is prohibited conduct in terms of the Competition Act.

However, that this alleviation of the evidentiary burden of the consumer is not by itself sufficient to guarantee the successful civil pursuit of damages claims as a result of cartel conduct is clear from the fact, as pointed out in Chapter One, that despite being in operation since 1999, no successful damages claim based on prohibited anti-competitive conduct has served before our courts until 2016. The reason for this can be largely attributed to the notoriously prohibitive costs of such civil litigation and the complexity of proving that the plaintiff suffered damages as well as the extent of those damages. To pursue a damages claim based on cartel conduct would be a very costly exercise, involving the services of expensive experts such as economists and even actuaries to calculate the exact amount of the damages suffered by the plaintiff. Given the complexities that may arise in this regard it is also possible that another impediment may be visited upon the plaintiff namely that of long delays or an otherwise protracted court case, which in itself may cause legal costs to escalate. Also, given the complexity of these matters it is clear that consumers will generally not be able to pursue these competition damages cases without the services of lawyers and advocates- thus making it very costly, if not impossible to pursue a civil claim- especially where the victim is an indigent person who suffered at the hands of cartels that fixed prices for household necessities like bread and milk.

It has been remarked by Brassey that "it must be questioned whether the civil courts are the appropriate bodies to assess and award damages for competition law claims".²⁴ He states that while civil courts are experienced in determining delictual claims generally "it is arguable that competition law raise special problems relating to the causation and quantification of competition law injury".²⁵ This reinforces the argument that damages litigation rooted in competition law contraventions will be very costly as the civil courts will have to receive extensive guidance from experts in order to properly assess damages claims.

2.2 Some assistance from the law of Civil Procedure

²⁴ Brassey at all n 3 above 328.

²⁵ *Ibid.*

2.2.1 Introduction

The processes of the Law of Civil Procedure are complex and not easily accessible to ordinary persons and less much so to indigent illiterate persons who are victims of anti-competitive conduct. However the Law of Civil Procedure has at least one mechanism that attempts to alleviate the plight of indigent persons who wish to seek civil damages for cartel conduct, namely the opportunity for litigants to group themselves together in a class to institute class action litigation against a cartel whose activities caused damage to the group (class) of litigants. In such instances a representative is appointed for the group and pro bono lawyers generally drive the process before the courts.

2.2.2 Class actions

A class action is a mechanism devised in the law of civil procedure to facilitate collective redress. The South African Law Reform Commission in its 1998 report on class action suits proposed the following definition:-

*“class action means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action”*²⁶

Class actions have various advantageous features: Class actions lessen the burden of litigation costs for the plaintiffs because the costs are between the plaintiffs. They also reduce the burden on the judicial system in that the various individual claims are consolidated and adjudicated as a single matter. It also enables the institution of legal claims where the individual claims are too small in value to warrant their pursuit.²⁷

However the drawback of the class action procedure is that it is a rather complex procedure which requires that the first stage, namely that of “certification” by the court that the matter may proceed as a class action, constitutes a procedural threshold that has to be met before the class action litigation may proceed. For certification of a class action to be granted the South African Law Reform Commission Report recommended that the court should be satisfied that the following factors are present in the application brought before it:-²⁸

²⁶ South African Law Reform Commission on the recognition of class actions and public interest actions in South African law (1998) report, (VI) par8, available at http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf accessed on 8 September 2017.

²⁷ Theophilopoulos et al Fundamental Principles of Civil Procedure (3rd edition) 111.

²⁸ Id par 5.6.2.

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

Section 38 of the Constitution²⁹ subsequently introduced the notion of a civil class action in respect of an infringement of a right contained in the Bill of Rights in Chapter 2 of the Constitution. The question however arose whether section 38 also allows for class actions to be instituted in respect of causes of action that do not entail an infringement of the plaintiffs' human rights.³⁰ It should also be noted that there is no general legislation which sets out the procedure that litigants must follow in the event that they wish to institute class action litigation. The South African Law Reform Commission has investigated the introduction of a class action procedure into South African law and delivered a Report in 1998.³¹ However no general class action legislation has been enacted pursuant to the projects undertaken by the Law Reform Commission. In order to deal with this problem the courts have consequently endeavoured to provide guidelines in case law to govern the institution and conduct of class actions.³²

²⁹ Constitution of the Republic of South Africa, 1996. See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA).

³⁰ See Kok "Has the Supreme Court of Appeal recognized a general class action in South African law? *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Department v Ngxuzza* 2001 BCLR 1039 (SCA)" 2003 THRHR 158; Hurter "Some thoughts on current developments relating to the development of class actions in South African law as viewed against leading jurisdictions" 2006 CILSA 485; Hurter "The class action in South Africa: Quo vadis?" 2008 De Jure 293 and De Vos "Is the class action a classy act to implement outside the ambit of the Constitution?" 2012 TSAR 737; *Firtstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008(2) SA 592 (SCA) and Hurter "Class action: failure to comply with guidelines laid down by courts ruled fatal" 2010 TSAR 409.

³¹ South African Law Reform Commission on the recognition of class actions and public interest actions in South African law (1998) report, (VI) par8, available at

http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf accessed on 8 September 2017.

³² Theophilopoulos *et al Fundamental Principles of Civil Procedure* (3rd edition) 112.

Despite some initial uncertainty the Supreme Court of Appeal in *Trustees For The Time Being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*³³ accepted that the class action may be utilised in ordinary litigation and where the claims are not based on the infringement of a basic human right as per the Bill of rights. The court gave some guidance on the procedure that had to be followed in such a matter to obtain certification of the class action in order to proceed further with the litigation. The court thus further developed this form of litigation in South African law.³⁴

The court considered the constitutional right of the litigants to have access to courts, as embodied in section 34 of the Constitution.³⁵ In this regard the court stated that where a group of claimants have relatively small claims of any nature, but they are unable to pursue these claims by ordinary means due to the cost of litigation, their section 34 rights would be infringed if they are not allowed to use a class action in terms of section 38(c) of the Constitution to prove and enforce their rights.

In the case of *Mukkadam*³⁶ the Constitutional Court indicated that although the courts must embrace class actions as one of the tools available to litigants, it remains appropriate for courts to retain control over the class action, and the use of it must, by implication, advance and serve the interests of justice.

Although the above cases have paved the way for class action litigation in respect of competition law transgressions it should however be pointed out that the parties in the said cases were not successful in the pursuit of damages claims via the class action mechanism. This is mainly because of failure to comply with the requirements for the certification of the class action which must be obtained from the court in order to proceed with class action litigation. In the *Mukaddam* case the Constitutional Court listed the following factors that will have to be considered by the court in order to decide whether to grant certification of a class action:³⁷

(a) There must be a cause of action raising a triable issue, which cause of action and relief must be set out in draft particulars of claim to accompany the certification application;

³³ 2013 (2) SA 213 (SCA).

³⁴ Theophilopoulos *et al Fundamental Principles of Civil Procedure* (3rd edition) 112.

³⁵ S34 of the Constitution provides for the right to a fair civil trial.

³⁶ *Mukkadam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23.

³⁷ *Mukaddam* par 35; Theophilopoulos *et al Fundamental Principles of Civil Procedure* (3rd ed) 113.

(b) The right to relief depends upon the determination of issues of fact or law, or both, common to all members of the class:

(c) The relief sought, or damages claimed, must flow from the cause of action and are ascertainable and capable of determination;

(d) Where the claim is for damages there must be an appropriate procedure for allocating the damages to the members of the class

(e) The proposed representative must be suitable to be allowed to conduct the action and represent the class

(f) It must be determined whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

From the aforementioned factors it is clear that obtaining certification may be a considerably difficult stage to pass and in the *Children's Resources Centre Trust* case and the *Mukaddam* case it proved to be a considerable obstacle as the class litigants were unable to obtain certification of their class action. Thus although the class action procedure may provide some reprieve to indigent consumers due to its objective to facilitate collective redress the evidentiary burden of passing the certification stage may foreclose the opportunity to proceed with a class action if the claimants are unable to meet the requirements for such certification.

3. Recent cases where damages actions were successfully pursued

After a dearth in the civil prosecution of damages actions based on competition law contraventions two cases where civil damages in this context was granted eventually served before the courts: *Nationwide Airlines (Pty) Ltd (In Liquidation) v South Africa Airways (Pty) Ltd*³⁸.and *Comair Limited v South African Airways (Pty) Ltd*.³⁹ These were the first ever competition law damages cases in South Africa to be decided on their merits and where damages was actually awarded.⁴⁰

³⁸ 2016 (6) SA 19 (GJ); 2016 4 All SA 153 (GJ).

³⁹ (2008/23443; 2011/34079) [2017] ZAGPJHC 10.

⁴⁰ See also Oxenham, Currie and Van Der Merwe "Follow-on Damages for Anti-Competitive Conduct: A Need for legislative intervention?" paper presented at the 11th Annual Competition (2017) available at <https://www.competitionpolicyinternational.com/follow-on--damages-for--anti-competitive-conduct.html> accessed on 21 November 2017.

Both *Nationwide* and *Comair* arose substantially from the same facts but in the *Comair* the damages period was wider than that covered in the *Nationwide* case.⁴¹ The facts of these two matters were that between October 1999 and March 2005, Nationwide Airlines (Pty) Ltd (“Nationwide”), Comair Limited (“Comair”) and South Africa Airways (Pty) Ltd (“SAA”) competed in the market for scheduled domestic air travel where travel agents services to airlines for the sale of airline tickets were a critical factor. During this time, SAA introduced different incentive schemes with travel agents for the sale of its domestic airline tickets, the purpose and effect of which was to use travel agents to divert passengers from rival airlines to SAA against payment by SAA of substantial rewards or commission to travel agents.⁴²

The matters were eventually referred to the Competition Tribunal in *Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd*.⁴³ The main complainants in this matter were Nationwide Airlines (Pty) Ltd and Comair Limited, who had referred separate complaints to the competition authorities against the same incentive scheme conduct by SAA. The complaints were subsequently consolidated by an order of the Tribunal. On 17 February 2010 the Competition Tribunal gave judgment declaring that SAA's conduct constituted a prohibited practice in terms of section 8(d)(i) of the Competition Act which prohibits a dominant firm from requiring or inducing a supplier or customer not to deal with a competitor.⁴⁴ SAA appealed against the Tribunal's decision but the Tribunal's findings were upheld by the Competition Appeal Court.⁴⁵

Subsequently Nationwide obtained a certificate from the Competition Tribunal certifying that SAA's incentive schemes with travel agents were found to be prohibited practices in terms of the Competition Act and instituted a claim for damages against SAA in the South Gauteng High Court. Accepting generally the findings of the competition authorities on questions of facts and law, the High Court in *Nationwide* observed that the central focus of the case before it was the quantification of the damages, if any, to be awarded to Nationwide.⁴⁶ Nationwide and SAA submitted reports prepared by their own expert economists to assist the Court in the

⁴¹ The Comair claim covered two time periods: October 1999 to 31 May 2001 and 1 June 2001 to 31 March 2005, whereas the Nationwide claim only covered one time period: 1 June 2001 to 31 March 2005.

⁴² Ibid.

⁴³ Case No: 80/CR/SEPT06.

⁴⁴ See *Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd* Case No: 80/CR/SEPT06 par 8.

⁴⁵ *South African Airways v Comair and Another* 2012 (1) SA 20 (CAC) par 142.

⁴⁶ Ibid.

assessment of damages, if any, due to Nationwide. The Court considered the submissions by these experts. It eventually held in favour of Nationwide and awarded damages amounting to R104 625 million plus interest at the rate of 10.25 % from the date of judgment until date of payment.

The *Comair* damages action arose from basically the same facts as the *Nationwide* claim but covered two time periods: October 1999 to May 2001 and June 2001 to March 2005.⁴⁷ With regard to the conduct of SAA in the period October 1999 to May 2001, the Competition Tribunal had made an earlier decision against SAA also declaring SAA's incentive schemes with travel agents in this period to be a practice prohibited in terms of section 8(d)(i) of the Competition Act.⁴⁸ Section 8(d)(i) specifically makes it a contravention for a dominant firm to induce its suppliers or customers not to deal with a competitor of the dominant firm.

Subsequent to this decision, *Nationwide* instituted a damages claim against SAA in the High Court. However the matter was never heard by the court because SAA and Nationwide reached an out of court settlement that apparently contained a damages award. Comair was not a party to this settlement agreement and did not receive any payment of damages from SAA.⁴⁹

Pursuant to the Tribunal's 2005⁵⁰ and 2010⁵¹ decisions against SAA, Comair obtained a section 65 –certificate from the Tribunal and instated a claim for damages against SAA in the Gauteng South High Court. The High Court stated that it regarded itself bound by the findings of the competition authorities that SAA's incentive schemes were prohibited under the Competition Act and has caused Comair to suffer loss of profit in respect of tickets that would otherwise have been sold on domestic Comair flights to passengers.⁵² After hearing all the expert evidence the Court found that Comair indeed suffered damages as a result of SAA's incentive schemes. Comair was therefore awarded damages amounting to R104.2 million (plus interest at a rate of 15.5%) in respect of the period October 1999 to May 2001 and R450 million (plus interest at a rate of 15.5%) in respect of the period June 2001 to March 2005, respectively.⁵³

⁴⁷ The *Nationwide* claim only covered the time period from June 2001 to March 2005.

⁴⁸ *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01).

⁴⁹ *Ibid.*

⁵⁰ *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01).

⁵¹ See *Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd* Case No: 80/CR/SEPT06 par 8.

⁵² *Comair* par 17 and 18.

⁵³ Par 101.

2.4 Final remarks

Although the *Nationwide* and *Comair* cases have confirmed that section 65 of the Competition Act enables the institution of damages actions for anti-competitive conduct, which development is to be welcomed, obtaining redress for indigent victims of cartel conduct is still problematic. Some assistance is provided by the mechanism of civil class actions but it appears that complex requirements that have to be met for purposes of certification and allowing the class action to proceed may constitute an impediment to access to justice for indigent persons. Also, even though the *Nationwide* and *Comair* cases have introduced a new era into South African law insofar as redress for victims of anti-competitive conduct is concerned, it should be borne in mind that these cases did not deal with cartel conduct and also that the victims were companies and not indigent persons who are unable to fund litigation of this nature. Thus, although the class action procedure may come to the assistance of indigent persons in enabling them to institute civil damages actions for damages suffered at the hands of cartels, it is submitted that consideration should be given to other measures by means of which damages redress can be afforded to victims of cartel conduct, which may or may not, involve a court process.

It should also be noted that Oxenham , Currie and De Waal raise a valid aspect that should be kept in mind in the context of cartels, namely that in light of the per se nature of cartel conduct and the principle of joint and several liability of delictual wrongdoers, there is also a risk that defendants may be held liable for damages that they did not in fact cause.⁵⁴ So it has to be ensured that redress to victims of anti-competitive conduct is based on actual harm caused.

In order to generate some ideas in this context Chapter Three will look at recent developments in the EU to see whether there are any insights to be gained from EU law.

⁵⁴ Oxenham, Currie and Van Der Merwe “Follow-on Damages for Anti-Competitive Conduct: A Need for legislative intervention?” paper presented at the 11th Annual Competition (2017) available at <https://www.competitionpolicyinternational.com/follow-on--damages-for--anti-competitive-conduct.html> accessed on 21 November 2017.

Chapter 3: European Union developments on redress for anti-competitive conduct

3.1 Introduction

The EU law governing anti-competitive practices is contained in articles 101 and 102 of the Treaty on the Functioning of the EU (hereinafter “TFEU”).⁵⁵ Article 101 deals with horizontal anti-competitive conduct and provides as follows:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

⁵⁵ Treaty on the functioning of the EU, 1958 http://europa.eu/pol/pdf/qc3209190enc_002.pdf#page=92.

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

In 2001 the European Court of Justice established in the case of *Courage Ltd v Bernard Crehan* that European Member States have an obligation to provide a remedy in damages where harm has been inflicted by means of an infringement of competition law. Subsequently in 2006 in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* the European Court recognized the compensation function of private enforcement.⁵⁶

The European Commission (hereinafter “EC”) has been investigating ways in which to assist victims of anti-competitive conduct for quite some time. It was especially concerned with instances where the victims comprised of large numbers of persons.

The EC subsequently issued a white paper on damages actions for breach of EC antitrust law of 2008⁵⁷ accompanied by a staff working paper⁵⁸ and a directive proposal⁵⁹ calling for a directive of the European Parliament and Council on certain rules governing actions for damages under law for infringement of the competition law provisions of member states and of the European Union which was published on the 11th July 2013.

Directive 2014/104/EU on Antitrust Damages actions was eventually signed into law on 26 November 2014 and published in the official journal of the European Union on 5 December 2014. The deadline for transposing the Directive on Antitrust Damages into Member States domestic legal systems expired on 27 December 2016. The Directive removes practical obstacles to compensation for all victims of infringements of EU competition law. It applies to all damages actions, whether individual or collective, which are available in the Member States.⁶⁰

⁵⁶ Pakamanis “The role of class actions in ensuring effective enforcement of competition law infringements in the European Union.” (2016) *International Comparative Jurisprudence* 122.

⁵⁷ COM(2008) 165 final, 2.4. 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT>.

⁵⁸ SWD (2013) 205, 11.6.2013, http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

⁵⁹ COM (2013) 404 final. 11.6.2013. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>.

⁶⁰ Explanatory memorandum available at ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

3.2 The EU Antitrust Damages Directive

Article 3 of the Directive provides that Member States must ensure that any natural or legal person who has suffered harm caused by an infringement of competition law will be able to claim and to obtain full compensation for that harm. It is stated that “full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.”⁶¹

The Directive further provides that in accordance with the principle of effectiveness, Member States must ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render the exercise of the right to full compensation for harm caused by anti-competitive conduct practically impossible or excessively difficult. It also states that in accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU must not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from national law infringements.⁶²

Chapter II of the Directive deals with disclosure of evidence. In this regard it provides that Member States must ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of a claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in Chapter II.⁶³

Article 5(2) obliges Member States to ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification. Member States must further ensure that national courts limit the disclosure of evidence to that which is proportionate. For purposes of determining whether any disclosure by a party is proportionate, national courts must consider the legitimate interests of all parties and third parties concerned. In particular they must consider:⁶⁴

accessed on 27 October 2017.

⁶¹ Article 3(1) and 3(2).

⁶² Article 4.

⁶³ Article 5(1).

⁶⁴ Article 5(3).

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for third parties, including preventing non-specific searches for information which is likely to be of relevance for the parties in the procedure;

(c) whether the evidence of which disclosure is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

It is required by Article 5(4) that Member States must ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the damages action. It is further stated in Article 5(5) that “the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.”

Member States must also ensure that national courts give full effect to legal professional privilege under the EU or national law when ordering the disclosure of evidence.⁶⁵ They must also ensure that those persons from whom disclosure is sought are afforded an opportunity to be heard before a national court orders such disclosure.⁶⁶ However Member States are allowed to maintain or introduce rules which would lead to wider disclosure of evidence.⁶⁷

Article 6 applies in addition to Article 5 and deals with the disclosure of evidence included in the file of a competition authority. It is stated that when assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts must in addition consider the following:

(a) where the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

⁶⁵ Article 5(6).

⁶⁶ Article 5(7).

⁶⁷ Article 5(8).

(c) the need to safeguard the effectiveness of the public enforcement of competition law.

In terms of Article 6(5) National Courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural nor legal person spesifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

The Directive also requires Member States to ensure that national courts may not order the disclosure of leniency statements and settlement submissions.⁶⁸

A claimant may present a reasoned request that a national court access leniency statements and settlement submissions for the sole purpose of ascertaining that their contents correspond with the definitions in Article 2(16) and (18) of the Directive.⁶⁹ The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in Article 6 may be ordered in actions for damages at any time⁷⁰. Member States must ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.⁷¹ To the extent that a competition authority is willing to state its view on the proportionality of disclosure requests it may, in terms of Article 6(11), on its own initiative submit observations to the relevant national court.

Article 7 deals with limits on the use of evidence obtained solely through access to a file of a competition authority. It provides that Member States must ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural person or legal person solely through access to a file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6. Member States must

⁶⁸ Article 5(6).

⁶⁹ Article 6(7). Article 6(8) states that if only parts of the evidence requested are covered by Article 6(6) the n the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant parts of Article 6.

⁷⁰ Article 6(9).

⁷¹ Article 6(10).

further ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.⁷² In terms of Article 7(3) Member States must ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition Authority and which does not fall under Article 7(1) or (2) , can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

Article 8 provides for penalties. It states that Member States must ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the following instances:

- (a) their failure or refusal to comply with the disclosure order of any national court;
- (b) their destruction of relevant evidence;
- (c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
- (d) their breach of the limits on the use of the evidence provided for in Chapter II.⁷³

Member States must ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts must include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order payment of costs.⁷⁴

Article 10 of the Directive provides for rules relating to limitation periods for bringing damages actions that may be set by Member States. Such rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.⁷⁵ In accordance with Article 10(2) limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can

⁷² Article 6(2).

⁷³ Article 8(1).

⁷⁴ Article 8(2).

⁷⁵ Article 10(1).

reasonably be expected to know: of the behaviour and the fact that it constitutes an infringement of competition law; of the fact that the infringement of competition law caused harm to it: and the identity of the infringer. Member States are further obliged to ensure that the limitation periods for bringing actions for damages are at least five years. Additionally Member States must ensure that a limitation period is suspended or interrupted if a competition authority takes action for the purpose of investigation or its proceedings in respect of an infringement to which the action for damages relates. The suspension must end at the earliest one year after the infringement has become final or after the proceedings are otherwise terminated.⁷⁶

Article 12 of the Directive provides for passing-on of overcharges and the right to full compensation. It provides that Member States must ensure that compensation for harm can be claimed by anyone who suffered harm, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused to the claimant by the infringement of competition law, as well as the absence of liability, are avoided.⁷⁷ In order to avoid overcompensation Member States are obliged to lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level. This Chapter applies without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.⁷⁸

Article 13 provides for a passing-on defence. It requires Member States to ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from an infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant.⁷⁹

Article 14 deals with “indirect purchasers”. It requires member states to ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to

⁷⁶ Article 10(3) and (4).

⁷⁷ Article 12(1).

⁷⁸ Article 12(2) to (5).

⁷⁹ Article 13. The defendant may reasonably require disclosure from the claimant or from third parties.

be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant. In this regard the claimant may reasonably require disclosure from the defendant or from third parties. In terms of Article 14(2) the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

- (a) the defendant has committed an infringement of competition law;
- (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
- (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

Article 14(2) will however not apply where the defendant can demonstrate credibly to the satisfaction of the court was not, or was not entirely, passed on to the indirect purchaser. The Commission is further obliged to issue guidelines for national courts on how to estimate the share of overcharge which was passed on to the direct purchaser.⁸⁰

The Directive also provides for actions for damages by claimants from different levels of the supply chain. In order to avoid that actions for damages by claimants from different levels in the supply chain lead to multiple liability or to an absence of liability of the infringer, Member States are required to ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 are satisfied, national courts must take due account of any of the following:

- (a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; (b) judgments resulting from actions as referred to in (a);
- (c) relevant information in the public domain resulting from the public enforcement of competition law.⁸¹

⁸⁰ Article 16.

⁸¹ Article 15(1) and (2).

Article 17 of the Directive deals with the quantification of harm. It requires Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States have to ensure that the national courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.⁸²

Similarly as a Commission infringement decision, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State before which the infringement occurred. Before courts of other Member States it will at least constitute prima facie proof of the infringement. Insofar as cartel infringements are concerned a presumption is created that they cause harm. The infringer has the right to rebut this presumption.⁸³ Member States are further required to ensure that, in proceedings for damages, a national competition authority may, upon request of a national court, assist the court with respect to the determination of the quantum of damages where that national authority considers such assistance to be appropriate.⁸⁴

The Directive also provides for consensual dispute resolution. Article 18 deals with the suspensive and other effects of consensual dispute resolution and requires Member States to ensure that the limitation period for bringing a damages action is suspended during any consensual dispute resolution process.⁸⁵ It is further provided that, without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized with damages actions may suspend their proceedings for up to two years when the parties thereto are involved in consensual dispute resolution concerning the claim covered by that damages action.⁸⁶ A competition authority may consider compensation paid a result of consensual settlement and prior to its decision imposing a fine to be a mitigating factor.⁸⁷

The effect of consensual settlements on subsequent actions for damages are set out in Article 19. It requires Member States to ensure that, following a consensual settlement, the claim of the settling party is reduced by the settling co-infringer's share of the harm that infringement

⁸² Article 17(1).

⁸³ Article 17(2).

⁸⁴ Article 17(3).

⁸⁵ Article 18(1). The suspension of the limitation period shall apply only to those parties that are or were involved or represented in the consensual dispute resolution.

⁸⁶ Article 18(2).

⁸⁷ Article 18(3).

of competition law inflicted upon the injured party. Any remaining claim of the settling injured party must be exercised only against non-settling co-infringers and non-settling co-infringers are not permitted to recover contribution for the remaining claim from the settling co-infringer.⁸⁸ By way of derogation from Article 19(2) Member States must ensure that when the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.⁸⁹ When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts must take due regard of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.⁹⁰

Finally Article 20 obliges the European Commission to review the Directive and submit a report thereon to the European Parliament and the Council by 27 December 2020. That must inter alia include information on:

- (a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;
- (b) the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;
- (c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.⁹¹

3.3 Discussion

⁸⁸ Article 19(1) and (2).

⁸⁹ Article 19(3). This derogation may be expressly excluded under the terms of the consensual settlement.

⁹⁰ Article 19(4).

⁹¹ Article 20(2).

The EU Antitrust Directive aims to harmonize the conditions for effective antitrust damages. It is accompanied by further (non-binding) guidance namely the EU Commission Staff Working Paper entitled “Practical Guide on Quantifying Harm”.⁹²

Main changes brought about by the Directive are the following:⁹³

Parties will have easier access to evidence they need for damages actions based on harm caused by anti-competitive conduct. In particular, if a party needs documents that are in the hands of other parties or third parties to prove a claim or defence, it may obtain a court order for the disclosure of those documents. Disclosure of categories of evidence, described as precisely and narrowly as possible can also be obtained. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.

Clear limitation period rules are established so that victims have sufficient time to bring actions. In particular, victims will have at least five years to bring damages claims, starting from the moment they had the possibility to discover that they suffered harm from an infringement. This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to wait until the public proceedings are over. Once a competition authority’s infringement decision becomes final, victims will have at least one year to bring damages claims.

The Directive clarifies the legal consequences of “passing on”. Direct consumers of an infringer sometimes offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers who in the end suffered from the price increase. However, since it is difficult for indirect customers to prove that they suffered the passing on, the Directive facilitates their claims by establishing a rebuttable presumption that they suffered some level of overcharge harm, to be estimated by the judge. The Directive contains provisions to avoid that claims by both direct and indirect purchasers

⁹² Practical Guide on Quantifying Harm. See further Alvarez and Marsal “Spotlight on antitrust damages in Europe” available at <https://www.alvarezandmarsal.com/files> accessed on 27 October 2017 (hereinafter Alvarez and Marsal).

⁹³ Clarification provided by the European Commission available at <http://www.ec.europa.eu> accessed on 20 October 2017.

lead to overcompensation. Claims concerning harm resulting from loss of profit are not affected by the Directive's passing on rules.

The Directive further clarifies that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until the time that the compensation is paid.

The Directive also establishes a rebuttable presumption that cartels cause harm. According to the European Commission this will facilitate compensation in view thereof that victims often have difficulty in proving the harm that they have suffered.⁹⁴ In the very rare cases where a cartel does not cause a price increase, infringers can still prove that their cartel did not cause harm. Any participant in an infringement incurs responsibility (jointly and severally) towards the victims for the whole harm caused by the infringement. They have a possibility of obtaining a contribution from other infringers in respect of their share of responsibility. However to safeguard the effectiveness of leniency programmes⁹⁵, this will not apply to those infringers who obtained immunity from fines in return for their voluntary cooperation with the competition authorities during a cartel investigation. Such immunity recipients will normally be obliged to compensate only their (direct and indirect) customers. Also, a narrow exception from joint and several liability is foreseen under restrictive conditions for SMEs that would become insolvent as a consequence of the normal rules on joint and several liability.

Alvarez and Marsal explain that the Guidance Document the proposed approaches to quantifying harm into two broad categories, namely comparator-based and model –based approaches.⁹⁶ The comparator-based approach is used most in practice and usually requires the use of econometric methods involving mathematical-statistical knowledge. The Guidance document however does not express a preference for either of the two approaches.⁹⁷

They further indicate that the structure of follow-on claims follows a very clear path: The first step always involves calculation of the overcharge and the determination of the affected commerce. This leads to a nominal amount that needs to be uplifted or discounted to a present value. Some jurisdictions prescribe a statutory interest whereas others do not.⁹⁸

⁹⁴ It is mentioned that the presumption is based on the finding by a study that more than 90% of cartels cause a price increase. See further the study entitled "Towards non-binding guidance for courts: Study prepared for the European Commission" <https://www.ec.europa.eu> accessed on 26 October 2017 .

⁹⁵ The EU has a well-developed competition leniency program.

⁹⁶ Alvarez and Marsal 1.

⁹⁷ Alvarez and Marsal 2.

⁹⁸ Ibid.

Lande also regards the developments introduced by the Antitrust Damages Directive as beneficial.⁹⁹ He states that it is very unlikely that the Directive would lead to overcompensation of victims of antitrust transgressions and that although he does not think it will lead to all victims being compensated it is at least a step in the right direction.

3.4 Collective redress in the EU

Pakamanis indicates that in many instances competition law transgressions affect large groups of persons. However he states that the lack of an effective uniform class action procedure in the EU has impeded private enforcement of competition law infringements.¹⁰⁰

The European Commission published documents on collective redress in 2013. The main document was a (non-binding) recommendation on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under union law, referred to as Recommendation 2013/396/EU. This document was accompanied by Communication to the European Parliament and the Council entitled “Towards a European Horizontal Framework for Collective Redress.”¹⁰¹ In these documents the application was suggested of an opt-in principle in national collective redress procedures stating that the claimant party should be formed on the basis of an express consent of the natural or legal persons claiming to have been harmed.¹⁰²

Stefaan Voet points out that although the Recommendation is of a non-binding declaratory nature it seeks to oblige the member states to implement the principles set out in it in national collective redress systems. The Recommendation applies to injunctive and compensatory collective redress. Injunctive redress is “a legal mechanism that ensures the possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action. Compensatory collective redress is “a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action.”¹⁰³

⁹⁹ Lande “The Proposed Damages Legislation: Don’t Believe the Critics: (2014) *Journal of European Competition Law & Practice* 123-124.

¹⁰⁰ Pakamanis “The role of class actions in ensuring effective enforcement of competition law infringements in the European Union” (2016) *International Comparative Jurisprudence* 122-130 (hereinafter Pakamanis).

¹⁰¹ Pakamanis 122

¹⁰² Recommendation 2013/396/EU section V par 21.

¹⁰³ Voet “Where the wild things are: Reflections on the state and future of European Collective Redress” available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id_2913010 accessed on 29 November 2017.

On their website the EU Commission explain that some member states, for example Portugal and Switzerland, have their own class action procedures and that the objective with the recommendation is to get all member states to introduce collective redress mechanisms to facilitate enforcement of rights that all EU citizens have under EU law- and this also applies in the context of the right to claim damages as a result of anti-competitive conduct.

Chapter Four: Conclusions and recommendations

4.1 Conclusions

Cartels are the most egregious competition law contraventions and cartel enforcement is a top priority for competition authorities. One would thus expect that the energy and rigour with which cartels are being prosecuted by the competition authorities would be mirrored in the redress available in South Africa to victims of cartel conduct. Sadly that is not the case as no special legislative provisions exist that eases the road to obtaining damages awards by cartel victims. Section 65 of the Competition Act at least paves the way for follow-on civil actions but does not in itself create a comprehensive process to facilitate such actions. At least it alleviates the victim's burden of proof before the civil court by providing for a certificate by the Tribunal regarding a finding of prohibited conduct against the cartel to constitute sufficient proof of such conduct. The *Nationwide* and *Comair* cases that has recently successfully been brought to recover damages suffered as a result of competition law contraventions brings a glimmer of hope to victims of cartel conduct albeit that those decisions related to abuse of dominance contraventions. Also the possibility of being able to obtain collective redress via a class action is a step forward in the right direction even though it appears that getting a class action certified may be difficult to achieve.

From the comparative study it appears that the EU is however progressively working towards enabling victims of anti-competitive conduct to be able to institute damages actions and successfully recover such damages. As pointed out the Antitrust Damages Directive of 2014 has ushered in a new era in protection of victims of competition law contraventions in the EU as it provides comprehensively for aspects such as disclosure of evidence, penalties, limitation periods, joint and several liability, passing-on of overcharges and the right to full compensation. It specifically also provides for the relaxing of the standard of proof in relation to the quantification of damages and also for settlement of damages claims through alternative dispute resolution.

In addition many EU member states already have class action procedures in their national laws and the *Recommendation on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under EU law* will

foster harmonization of these collective redress procedures. It is submitted that it is not unlikely that the EU may in future even issue a binding Directive on collective redress.

4.2 Recommendations

It is submitted that South Africa should take a more pro-active approach to redress for victims of cartels. South Africa can learn a lot from the EU insofar as relaxing of the evidentiary burden in relation to quantification of damages when it comes to civil follow-on damages actions by cartel victims is concerned. Like in the EU it is also recommended that courts be empowered to ask the competition authorities for assistance in quantifying the amounts of such damages.

It is also recommended that the competition authorities draft a set of binding guidelines to be consulted by the courts when considering the amount of damages to be awarded to cartel victims. These guidelines can also incorporate provisions similar to the provisions of the EU Antitrust Damages Directive insofar as quantification of such damages is concerned.

Insofar as the class action procedure is concerned, it is the most appropriate procedural mechanism to facilitate redress for indigent victims of cartel conduct. The certification requirement however seems difficult to meet and it is suggested that consideration should be given to relaxing this requirement where indigent persons are concerned and maybe rather taking guidance from what would be in the best interest of justice instead of stringently demanding exact compliance with the requirements for certification.

Finally, given that court procedures are costly it is submitted that it should be considered whether it would not be better to totally move away from judicial procedures and rather establish a tribunal with inquisitorial processes and comprising of retired experts in various areas to sit on an ad hoc basis to hear damages actions arising out of legislation such as the Competition Act, National Credit Act 34 of 2005 and Consumer Protection Act 68 of 2008.

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