

Public versus Private enforcement of South African competition law

by

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ABSTRACT

This dissertation will discuss the current process and procedure of enforcement of competition law in South Africa. A distinction will be drawn between public enforcement and private enforcement. This distinction will show which is the more predominant enforcement method. For this purpose, a detailed discussion of the provisions in the Competition Act 89 of 1998 will follow.

The focus of the dissertation will thereafter shift to whether private enforcement is reasonably possible and pursuable by members of the public in terms of South African legislation. The rationale for focusing on private enforcement will become clear through a discussion of *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ). By 2016, this case was only the second claim of its kind and the first time a claim for damages based on a finding by the Tribunal had been litigated. The discussion will articulate the process of how the matter reached the High Court and the difficulties encountered in claiming damages.

Thereafter, a brief discussion on comparative law will be included. The chosen foreign law is that of the European Union ("EU"). EU law was chosen as its competition law is well established and has been in practice for longer than the South African equivalent. Emphasis will be placed on the EU's use of private enforcement and any lessons to be learnt in relation thereto.

Finally, a conclusion will be reached on whether private enforcement is reasonably possible and pursuable by a member of the public and whether there are any recommendations on how private enforcement could be strengthened in South African law.

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Chapter 1: Introduction

1. Introduction and background

South Africa has relatively young legislation in the field of competition law. The regulation of competition law in South Africa began in 1923, through the enactment of the Board of Trade and Industries Act.¹ The Board advised the government on competition policy and conducted research into sectors of the economy.² In 1951, the Board released a report after conducting research that led to the enactment of the first piece of South African competition legislation, the Regulation of Monopolistic Conditions Act.³ However, this Act had shortcomings such as being confined to monopolies, and ultimately achieved little success in protecting and promoting competition.⁴ This in turn led to a Commission (the Mouton Commission) being appointed, and the Commission produced a report that recommended the enactment of revised legislation.⁵ In 1979, the Maintenance and Promotion of Competition Act was enacted.⁶

The Maintenance and Promotion of Competition Act, however, had certain shortcomings for the reason that it did not contain any explicit prohibitions and there was no compulsory enforcement action.⁷ After South Africa entered a democratic constitutional dispensation, the Competition Act (“the Act”) was enacted.⁸ The formulation of the Act was influenced by foreign jurisdictions, such as Canada, Australia and Europe. These developed countries’ experience and practice has been incorporated into the Act’s content, application and interpretation. The purpose of the Act, set out in section 2, is to promote and maintain competition⁹ in the Republic of South Africa in order-

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;

¹ Board of Trade and Industries Act 28 of 1923.

² L Kelly *et al Principles of competition law in South Africa* (2016) 8 (Kelly).

³ Regulation of Monopolistic Conditions Act 24 of 1955.

⁴ Kelly (note 2 above) 8.

⁵ As above.

⁶ Maintenance and Promotion of Competition Act 96 of 1979.

⁷ M Neuhoff *et al A Practical Guide to the South African Competition Act* (2006) 12 (Neuhoff).

⁸ Competition Act 89 of 1998 (the Act).

⁹ It is interesting to note that the Act does not define what competition is. Many economists have proposed definitions, but there is no universally accepted meaning for the term. As Neuhoff *et al* state in *A Practical guide to the South African Competition Act* (2006) at page 26, ‘in South Africa, the competition authorities have, with the aid of economists, developed an analytical framework for practically analysing the complexities of the nature and strength of competition in markets’. A core feature of determining competition is to assess where market power lies.

- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

From section 2, it is evident that the Act's main objective can be summed up as aiming to ensure and bolster a market with vigorous and fair competition that will result in the most efficient allocation of economic resources and the production of goods and services at the lowest price for the consumers' benefit.¹⁰ The Act aims to achieve a level playing ground between consumers and firms, including both big and small enterprises competing in the market place. It is relevant to note that the Act applies to all economic activity within or having an effect within the Republic, except to collective bargaining, a collective agreement and concerted conduct designed to achieve a non-commercial socio-economic objective.¹¹

The Act regulates certain kinds of conduct such as restrictive horizontal practices,¹² restrictive vertical practices,¹³ behaviour of firms in the market place (especially those firms with market power),¹⁴ pricing behaviour¹⁵ and mergers¹⁶. Unlike any previous legislation, the

¹⁰ Neuhoff (note 7 above) 12.

¹¹ Section 3 of the Act.

¹² A restrictive horizontal practice is any agreement, co-operative or concerted conduct between competing companies which prevents or lessens competition in a market. This occurs where the competitors in a market act together. The prohibitions falling under this category include: directly or indirectly fixing prices or other trading conditions; division of markets via allocating customers, suppliers, territories and other goods or services; and collusive tendering. VDMA Attorneys 'The Basics of Competition Law in South Africa' <http://www.vdma.co.za/basics-competition-law-south-africa/> (Accessed 29 July 2017) (VDMA).

¹³ A restrictive vertical practice is any agreement between a company and its suppliers, its customers or both which prevents or lessens competition in a market. Thus, this occurs where suppliers down to retailers and customers act together. A specific prohibition falling under this category is the practice of minimum resale price maintenance. VDMA (note 12 above).

¹⁴ Market power is defined in section 1 of the Act and means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

¹⁵ Pricing behaviour can be regarded as a general term that includes conduct by firms where they distort their pricing techniques in a manner that will ultimately benefit themselves and likely have an uncompetitive effect on the rest of the market. Such conduct may include price fixing, predatory pricing, price signaling or price discrimination by a dominant firm.

¹⁶ A merger occurs when one or more firms directly or indirectly acquire or establish control over the whole or part of the business of another firm. This may be achieved in any manner and may include

Act specifically prohibits certain conduct. Completely prohibited conduct is referred to as *per se* prohibitions; these forms of conduct are completely illegal and include price fixing, collusive tendering, market division and minimum resale price maintenance. Once it is established that *per se* prohibited conduct has occurred there can be no justification offered for the conduct. Generally, *per se* prohibitions offer the advantages of certainty and a saving of the enforcer's resources, because once the conduct is established no further resources have to be spent on gathering and presenting evidence. However, the Act does, in some instances, provide for rule of reason prohibitions which allow infringing firms to justify their conduct. Rule of reason provisions cater for the fact that the conduct may contain elements that present a mix of pro-competitive and anticompetitive traits.¹⁷

The Act establishes three institutions¹⁸ that are responsible for its application and enforcement: (i) the Competition Commission ("the Commission");¹⁹ (ii) the Competition Tribunal ("the Tribunal");²⁰ and (iii) the Competition Appeal Court ("The CAC").²¹ These institutions function independently of one another but require each other to cooperate and work closely together. The Commission is the point of departure in initiating competition proceedings and deals with complainants from the very start of the complaints referral process.²² The Commission is responsible to raise public awareness of the Act and to make efforts to increase market transparency. The Commission is tasked with handling and investigating complaints, investigating mergers and acquisitions, handling enforcement and exemptions, ensuring the Act is applied consistently and reviewing and refining the law governing competition. The Commission also has the important role of referring complaints and large mergers to the Tribunal.²³

The Tribunal adjudicates competition matters and is tasked with assessing and adjudicating large mergers referred to it by the Commission. It is also tasked with hearing appeals and reviews referred to it by the Commission, assessing and adjudicating complaints regarding

through the purchase or lease of shares, an interest or assets of the other firm or an amalgamation or other combination with the other firm in question. Section 12(1) of the Act.

¹⁷ P Sutherland & K Kemp *Competition law of South Africa: Service issue 10* (2000) 5-44, 5-45, 5-46, 5-47 & 5-55 (Sutherland & Kemp).

¹⁸ See chapter 4 of the Act, "Competition Commission, Tribunal and Court (ss 19-43)".

¹⁹ See chapter 4 of the Act, Part A, sections 19-25.

²⁰ See chapter 4 of the Act, Part B, sections 26-35.

²¹ See chapter 4 of the Act, Part C, sections 36-39.

²² See section 49B of the Act, which deals with initiating complaints.

²³ See section 21(1) of the Act.

prohibited conduct and imposing remedies. It further has the power to grant interim relief orders, exemptions and orders.²⁴

The CAC reviews decisions of the Tribunal in respect of matters concerning legal error or jurisdiction. It is also tasked with considering the substantive merits of final decisions and any interim decisions for which the Act permits an appeal.²⁵ The CAC is authorised to give judgment, make any order as well as remit a matter to the Tribunal for further hearing.²⁶

For the 2008/2009 financial year, 131 complaints were filed with the Commissioner. Of the 131, only 11 of the complaints were referred to the Competition Tribunal.²⁷ Since the Act had only celebrated ten years of effect, this was considered a success by showing an increase from previous financial years. The Commission's annual report for 2015/2016 has however, revealed telling statistics of the performance of the Commission's functions. The Commission received 160 complaints relating to abuse of dominance and restrictive vertical practices from the public and only initiated 4 complaints out of its own accord. This suggests that the Commission is relying heavily on the public to lodge complaints. Of the 160 complaints, 113 resulted in non-referrals, 33 are being investigated and 9 were withdrawn.²⁸ The annual report further provides statistics dealing with the number of mergers reported and cartel investigations, showing an increase from the ten year mark and indicates that the public has become increasingly aware of conduct that constitutes contraventions of the Act.

It is clear from the Act, that a public enforcement based approach was intended and is favoured over an approach that seeks to balance public and private enforcement. The Act focuses on the public interest and the benefit to all persons affected by competition practices by providing for enforcement actions and remedies at the disposal of the competition authorities. The Commission has at its disposal, comprehensive and intrusive powers that it may exert in its investigations which are usually only available to the criminal law

²⁴ See section 27(1) of the Act.

²⁵ Neuhoff (note 7 above) 21.

²⁶ See section 37(1) & (2) of the Act.

²⁷ K Moodaliyar *et al* 'The Relationship between Public and Private Enforcement in Competition law- a comparative analysis of South African, European Union and Swiss Law' (2010) 127 *South African Law Journal* 141 142 (Moodaliyar).

²⁸ L Granville & R Bain 'Competition by numbers: Statistics from the Competition Commission's 2015/2016 Annual Report' *Competition Alert* 1 https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/competition/competition-alert-9-november-competition-by-numbers-statistics-from-the-competition-commissions-2015_2016-annual-report.html (Accessed 16/03/2017).

authorities.²⁹ Provisions similar to the Criminal Procedure Act (the “CPA”)³⁰ can be found in the Act, such as in section 46, that grants the competition authorities the ability to obtain a warrant to enter and search a premises in a similar fashion to that of Chapter 2 of the CPA. There is a list of public enforcement actions and remedies available to the competition authorities, which includes the imposition of administrative penalties,³¹ criminal sanctions,³² positive measures or orders,³³ interdicts,³⁴ consent orders and informal settlements,³⁵ and declarations.³⁶

In contrast to this, private enforcement remedies provided for in the Act only support individual loss or damage. In terms of private enforcement provided by the Act, there are only three enforcement actions and remedies, being interim relief as per section 49C, declarations as per section 58(1)(a)(v) and damages claims provided for in section 65. Besides the fact that the public enforcement list of remedies is vastly larger than that of the private enforcement remedies list, the private enforcement remedies are more onerous to successfully carry out than that of the public enforcement remedies. It must be kept in mind that public enforcement of a claim is handled by the institutions provided for by the Act. This means that often the Commission, Tribunal and CAC all function in terms of their independent rules and guidelines to implement the necessary punishment. All of these institutions have sufficient staff and resource components to facilitate the carrying out of their statutorily mandated function.

²⁹ Moodaliyar (note 27 above) 142.

³⁰ Criminal Procedure Act 51 of 1977.

³¹ See section 59 of the Act.

³² See chapter 7 of the Act, sections 69-77, which provides for offences. See specifically section 73A of the Act. Section 73A, which has effect from 1 May 2016, was inserted in to the Act by section 12 of the Competition Amendment Act 1 of 2009. The importance of section 73A is that it criminalises cartel conduct and establishes what has been termed as ‘a cartel offence’. Building up to the enactment of this provision, concerns were raised regarding the functioning of the Corporate Leniency Policy and whether the provision would deter whistle blowers from coming forward to seek leniency in fear of facing a criminal sanction. There were further concerns regarding co-operation between the Competition Commission and the National Prosecuting Authority and the ultimate enforcement of competition law. For a discussion on these aspects, see N Manyathi-Jele ‘Criminalisation of cartel conduct’ (2016- July) *De Rebus DR 10* <http://www.derebus.org.za/criminalisation-cartel-conduct/> (Accessed on 4 august 2017). It has been argued in the past that when the Tribunal imposes an administrative penalty under section 59(1) of the Act, that the Tribunal is imposing a criminal penalty. The argument follows that this is inappropriate as the Tribunal does not have the authority to impose such a penalty. These arguments have generally proved unsuccessful. Sutherland & Kemp (note 17 above) 11-33. For case law on this argument, see *Federal-Mogul Aftermarket South Africa v Competition Commission and Minister of Trade and Industry 33/CAC/Sep03*.

³³ See section 58 of the Act as a broad example. Specific examples of positive measures can be found in sections 58(1)(a)(ii), (iv) & (vii).

³⁴ See section 58(1)(a)(i) of the Act.

³⁵ See section 49D of the Act.

³⁶ See section 58(1)(a)(v) of the Act.

If a private person feels prejudiced by conduct that constitutes a contravention of the Competition Act, they must first rely on the Commission, to accept a complaint, investigate it and ultimately make a finding. The finding must then be confirmed by the Tribunal or CAC through a ruling that a contravention of the Act has occurred. Only thereafter may a private person approach a civil court for recourse. This is because the golden rule regarding private enforcement via damages claims is that to claim civil damages, the aggrieved parties will have recourse to the civil courts only after the competition authorities have made their rulings.³⁷ In addition to this, a private person may only approach a civil court provided an official settlement agreement has not been concluded between the contravening firm and Commission that incorporates a damages award to such a person. A further significant problem that private persons face is *locus standi*. This is a problem when pursuing private enforcement as the victims of anticompetitive conduct may be hard to group together, contact or have a fair representation of.³⁸

It is also necessary to mention the aspect of administrative penalties. When a firm is found to have contravened the Act, they are penalised with an administrative penalty. The penalty fine is paid into the National Revenue Fund and does not go into the pockets of persons who suffered damages as a result of the said conduct. Administrative penalties are dealt with in section 59 of the Act that prescribes circumstances when a penalty may be imposed, the size of the penalty, factors in determining the penalty and the process of payment. Section 59(2) provides that an administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year. In private enforcement claims, the issue of quantification arises.³⁹ Unlike merely fining 10% of annual turnover for the preceding year, the private person must be able to quantify their loss and prove such loss.⁴⁰

³⁷ Moodaliyar (note 27 above) 146.

³⁸ Such problems arise in class actions. See Chapter 3, paragraph 2 for a discussion on class actions and the case of *Trustees for the time being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 2 SA 213 (SCA) (the *Children's Resources Centre Trust*). This case examined the difficulties arising out of compensating victims of cartel conduct in the Western Cape. The issues included in the case were how to identify victims who had purchased bread at various outlets over a specific period of time, and how an appropriate award may be awarded that would compensate each individual affected by the conduct.

³⁹ 'The litigant who sues in delict sues to recover the loss suffered in consequence of the wrongful act of the defendant.' The *Children's Resources Centre Trust* (note 38 above) para 81.

⁴⁰ The *Children's Resources Centre Trust* (note 38 above) paras 32 & 81.

This was a central issue in *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (Pty) Ltd* (“*Nationwide v SAA*”), which required the use of expert witnesses in the field of the relevant anticompetitive conduct.⁴¹ In *Nationwide v SAA*, expert aviation economists were utilised and had to argue for what period the anticompetitive conduct caused loss, in what market the loss occurred, in what sector of the market it occurred, what the aggrieved party would have made but for the infringement and other aspects. This is a difficult set of factors to establish and requires great expense to gather the data and find an expert who can interpret that data and produce a realistic monetary amount that represents the damages occasioned by such conduct. The case of *Nationwide v SAA* is one of South Africa’s landmark cases of successful private enforcement of competition law, that resulted in a damages award of R104.625 million. As Nicholls J stated in the first line of the judgment “This is a delictual claim, the first of its kind, arising out of the anti-competitive practices of our national carrier South Africa Airways (SAA)”.⁴² As discussed in more detail later, this case dealt with anticompetitive conduct of South African Airways through incentive schemes with travel agents that caused Nationwide to lose such a large amount of clients that it was ultimately placed in liquidation.

An argument that may be raised, is whether a more prominent approach⁴³ to private enforcement and damages claims in addition to public enforcement and the awarding of administrative penalties, could be more of a deterrent to anticompetitive firms.⁴⁴ To serve as an example of how much infringing firms are willing to pay for their contraventions, in August 2016 the Commission reached a settlement agreement with ArcelorMittal South Africa Limited when it admitted to having been involved in the long steel and scrap metal cartels and agreed to pay an administrative penalty of R1.5 billion.⁴⁵ To most of the firms who pay these administrative penalties, the penalties are a small dent to their profit and they view the penalties as worthy of paying in order to further their company’s interests. However, should

⁴¹ *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ) (*Nationwide v SAA*).

⁴² Ratz, M ‘Flying into new heights - damages claims arising from contraventions of the Competition Act’ (January/February 2017) *De Rebus* 34 36 (Ratz).

⁴³ A more prominent approach to private enforcement could include the competition authorities actively encouraging individuals to pursue private enforcement remedies. This could be achieved by the competition authorities creating further awareness of private enforcement remedies and establishing guidelines and directives of how a complaint can evolve from a public enforcement complaint to a private enforcement delictual claim.

⁴⁴ Creating awareness that private enforcement of competition law is available to victims of anticompetitive conduct may increase the amount of complaints lodged to the Commission which will in turn increase the amount of delictual claims that are brought against the contravening firms.

⁴⁵ L Motaung ‘Outcome of Tribunal Roll for Wednesday 16 November 2016’ *Press Release* <http://www.comptrib.co.za/publications/press-releases/outcome-of-tribunal-roll-for-wednesday-16-november-2016/> (Accessed on 18 March 2017).

private enforcement become more prominent, these companies would face the threat of a very large administrative penalty, sometimes millions or even billions of Rands, in addition to a civil claim that could also result in further large amounts of money to be paid toward a damages award. This additional expense may serve as a deterrent that causes anticompetitive firms to question whether the contravening conduct is ultimately worth it and worth losing a large portion of their turnover.

In order to appropriately engage with this topic, European Union Law (“EU law”) will be looked to as a foreign source since the South African legislation was drafted with the influence of this law.⁴⁶ A comparison will be drawn of the similarities and differences between the legislation. Private enforcement will be focused on to determine whether pursuing a more prominent approach to private enforcement is emphasised in the EU. It will also be determined whether private enforcement has beneficial effects to the overall regulation of competition law. Article 81 of the Treaty establishing the European Community is at the heart of EU competition law.⁴⁷ Article 81(1) of the Treaty, like South African legislation, provides a non-exhaustive list of prohibited practices.⁴⁸ The Treaty further provides for automatically void agreements, similar to South Africa’s *per se* prohibitions. A slight difference from South Africa law is that the EU’s law is not centralized to one piece of legislation, but secondary legislation is utilised to set out the EU’s competition laws. A similarity is that EU’s private enforcement of competition law also allows for damages claims. It would thus be instructive to research the position and developments in EU law relating to private enforcement in order to determine whether it can provide guidance as to possible reform in South Africa in the context of private enforcement relating to competition transgressions.

2. Problem statement

The motive for this research lies in the fact that many firms who contravene the Act seem not to be deterred by the adverse effects of contravention and become repeat offenders. These guilty firms merely pay administrative penalties to the National Revenue Fund and are free to carry on with their business. Little attention is given to the victims of

⁴⁶ European competition law will be discussed in chapter 4 of this dissertation. Foreign law may be considered when reading the Act, owing to section 1(3) of the Act, which provides that ‘any person interpreting or applying *this Act* may consider appropriate foreign and international law’.

⁴⁷ The Treaty of Maastricht on European Union of 1992. This treaty created the European Union and had the European Community as one of its three pillars, as found in Article G.

⁴⁸ Moodaliyar (note 27 above) 150.

anticompetitive conduct. The landmark case of *Nationwide v SAA* has proven that private enforcement of competition law is a possibility in South African law that may be pursued in order to compensate victims who have suffered damages due to the conduct of anticompetitive firms.

Based on the fact that successful private enforcement has rarely been seen in South African law, the question arises whether a more prominent application of private enforcement could further deter firms from participating in anticompetitive conduct. Private enforcement could also see a reform of South African competition law that strengthens this sector of law. An ultimate point of assessment, would be whether private enforcement of competition law could be sufficiently feasible to make the public more aware of their rights in relation to competition contraventions and to compensate such persons who have been prejudiced at the hands of guilty and abusive firms.

In order to conduct such an assessment, it would be necessary to ascertain the nature and scope of the law governing private enforcement of competition law. An analysis of the existing legislation would show whether South African competition law has made sufficient provisions for private enforcement. A comparative study of the EU law, where their competition legislation has long been enacted, may be of use to establish whether South Africa's private enforcement provisions are sufficient or could be supplemented.

3. Research questions

- a. Is there a sufficient legal framework for private enforcement of competition law in South African law?
- b. Is there a possibility that South African law would or could introduce a more prominent application of private enforcement of competition law?
- c. Can private enforcement serve as a further deterrent to persons acting contrary to the Competition Act?

4. Nature and scope

The scope of this text will be limited to activity that has taken place within the South African competition environment within roughly the past ten years and thus in line with the 2009 Amendment of the Competition Act. The Act will serve as a foundation and beginning for the

primary research problems. It follows that legislation relied upon will also be discussed in the context of the Act. As case law is limited in this area, legal journals on this area of South African law will be referred to.

The case of *Nationwide v SAA* currently serves as the first of two case law precedents in this regard and will therefore be afforded a substantial amount of weight in relation to whether private enforcement is plausible in South African competition law. *Nationwide v SAA* will further be a guide in trying to formulate a reasonable likelihood of whether the case could prompt further cases for damages by private enforcement.

The competition law of the EU will be discussed as the chosen foreign law comparison for this text. A brief overview of the EU's competition law will be provided, similarities and differences it may share with South African law will be considered, case law on private enforcement in the EU will briefly be discussed and ultimately it will be indicated whether there are any lessons to be learnt from the EU that South Africa may adopt into its legislation.

5. Research methodology

The research method that will be utilised in this research is that of a comparative method as well as a critical analysis of available sources on private enforcement. The basis of the research will be that of established and available public enforcement tools of South African competition law, thus primary sources of legislation. From this basis, a comparison will be drawn to that of private enforcement tools within South Africa's legislation. Thereafter, an analysis into the available private enforcement sources will be discussed as well as their prevalence and applicability in current law. The difference between public and private enforcement of South African competition law will then be highlighted and compared to the approach adopted by the EU in their enforcement of public and private enforcement of competition law.

6. Chapter layout

The structure of this dissertation will be based on the following headings:

1. Introduction

- The introduction of this dissertation will deal with the general background, the problem statement, nature and scope of the dissertation, the proposed research

methodology and a chapter layout. The purpose of this chapter is to put the research in context and provide for overall purpose and direction of the dissertation.

2. Public enforcement of South African competition law

- Chapter 2 will set out the current procedure of enforcement in South African law. Applicable Acts and Regulations will be discussed as well as which bodies or authorities enforce these laws. A discussion will follow setting out what procedures are followed to enforce competition law, who the current enforcement procedures aim to primarily protect, their effectiveness and accessibility.

3. Private enforcement of South African competition law

- Chapter 3 will essentially follow the same structure as chapter 2, however highlighting the differences in private enforcement. A discussion will ensue on whether there is legislation and regulation specifically aimed at private enforcement or whether such enforcement can be found within public enforcement regulations. The aim and purpose of private enforcement will be explored and the beneficiaries of private enforcement will be identified.
- Within this chapter, South African case law will be analysed and discussed. The principal case in discussion will be that of *Nationwide v SAA*.

4. Comparative foreign law

- Chapter 4 will contain a discussion of comparative foreign law. The chosen foreign law to be used for this purpose will be that of the EU. This chapter will contain a discussion on why this jurisdiction has been chosen, the foundations of this law, the enforcement of their competition law and what position private enforcement holds in this jurisdictional area. An analysis of whether or not this foreign law can influence and/or enhance South African competition law will also be discussed.

5. Conclusion

- Chapter 5 will aim to tie up the text by finally concluding whether South Africa should try to implement a more prominent private enforcement approach in South African law. The discussion will include the pros and cons of such application.
- This chapter will also serve to look at the overall competition law enforcement in South Africa by addressing the aim of South African law, how developed South

African competition law is at present and the possibility of future development and evolution of competition law in South Africa.

- Lastly, it will also be discussed whether or not private enforcement will ever have the scope in South African competition law to be on equal footing with public enforcement.

Chapter 2: Public enforcement of South African competition law

1. The Competition Act and provisions that regulate public enforcement

The long title of the Competition Act sets out the objective of the Act as ‘to provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters’. From this very title, it is clear that a public enforcement approach of the Act was primarily intended. As a point of departure, it is necessary to explain what is meant by the term ‘public enforcement’. The term ‘public enforcement’ refers to enforcement actions and remedies available to the competition authorities as they strive to enforce or remedy circumstances in the market place. The word ‘public’ is further used as the competition authorities operate for the benefit of the whole market and/or public interest.⁴⁹

The Act is the primary legislation and main governing text of competition law in South Africa. Like other South African legislation, there are Rules and Schedules that accompany the Act. There are three sets of Rules and Schedules: the Commission Rules and Schedules, the CAC Rules and the Tribunal Rules and Schedules. In addition to this, certain guidelines have been issued relating to the determination of threshold in terms of part B of Chapter 2 of the Act which deals with the abuse of a dominant position,⁵⁰ determination of merger thresholds and method of calculation, small merger notification and the determination of administrative penalties for prohibited practices. Another important addition to the texts governing competition law is the Corporate Leniency Policy (the “CLP”).⁵¹ Item 2 of the CLP and the introduction, provides that the overriding purpose of the Act is to promote and maintain competition in the economy, and to prevent any form of anticompetitive conduct by

⁴⁹ Neuhoff (note 7 above) 287.

⁵⁰ The ‘determination of threshold’ guideline was published under GenN 253 in GG 22025 of 1 February 2001 as amended by GenN 562 in GG 22128 of 9 March 2001. Part B of Chapter 2 of the Act deals with abuse of a dominant position. The chapter sets out how the threshold of annual turnover, or assets, in the republic are determined; when a firm is considered to be dominant; what conduct of a dominant firm is prohibited; and what is considered to be price discrimination by a dominant firm.

⁵¹ Items 2.5 and 2.6 of the CLP set out the reasoning behind the policy and its objectives as, ‘In the Commission’s endeavours to detect, stop, and prevent cartel behavior, the Commission has, in line with other international jurisdictions, developed the CLP to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution. The CLP sets out the benefits, procedures and requirements for co-operating with the Commission in exchange for immunity.’

a firm or group of firms arising from agreements. Case law is equally important in competition law as it is in any other field of law. The competition authorities must apply the Act consistently and fairly, hence using previous cases as a yardstick is useful in achieving these objectives. According to section 1(2), the Act should be interpreted in a manner that is consistent with the Constitution of the Republic of South Africa⁵² (the “Constitution”) and gives effect to the purposes of the Act while also complying with international law obligations.⁵³ Any person interpreting or applying the Act may also consider appropriate foreign and international law.⁵⁴

As mentioned in Chapter 1 of this text, the competition authorities can regulate the enforcement of the Act through the following actions and remedies: the imposition of administrative penalties, criminal sanctions, positive measures or orders, interdicts, consent orders and informal settlements, and declarators. The nature of the legislation is manifestly socio-economic. This means that the remedies available to the competition authorities should be viewed in the same light, and should be used to provide equitable relief rather than to punish transgressors of the Act.⁵⁵ Chapter 5 of the Act provides for investigation and adjudication procedures, which will be discussed more fully later in this chapter. The Act provides that the Tribunal must conduct its hearings in public and in a speedy manner in accordance with the principles of natural justice, and may conduct its hearings informally or in an inquisitorial manner.⁵⁶ There are similar elements in the Tribunal’s procedure to that of ordinary civil courts. The standard of proof for proceedings under the Act is determined in section 68. The section provides that in any proceedings in terms of the Act, other than proceedings in terms of section 49C (interim relief proceedings), the standard of proof is on a balance of probabilities. The Act enhances its goal of objectivity by providing that written reasons for the decisions by the competition authorities must be publicly issued. To ensure further procedural fairness, the Act provides for judicial review of the Tribunal’s decisions by the CAC.⁵⁷

⁵² The Constitution of the Republic of South Africa, 1996 (the Constitution).

⁵³ D Prins & P Koornhoff ‘Assessing the nature of competition law enforcement in South Africa’ (2014) 18 *Law, Democracy & Development* 136 141 (Prins & Koornhoff).

⁵⁴ Section 1(3) of the Act.

⁵⁵ Prins & Koornhoff (note 53 above) 142.

⁵⁶ Section 52(2) of the Act.

⁵⁷ Prins & Koornhoff (note 53 above) 142.

Chapter 6 of the Act provides for enforcement of the Act. Section 64 sets out the status and enforcement of orders made by the competition authorities. Section 64 specifically mentions that any decision, judgment or order of the Commission, Tribunal or CAC may be served, executed and enforced as if it were an order of the High Court.⁵⁸ For purposes of public enforcement, the competition authorities or bodies can be seen as the equivalent of the High Court for purposes of 'prosecuting' competition matters. It is worth noting that the Commission may institute proceedings in the High Court on its own behalf for recovery of the administrative penalty imposed by the Tribunal.⁵⁹ In such a case, the normal principles of prescription apply, and the proceedings may not be initiated more than three years after the imposition of the administrative penalty.⁶⁰ It is clear from these provisions that regardless of whether a complaint originates from a public or private objective, the competition authorities may not be bypassed. Only once some form of finding is made or a penalty is imposed by the competition authorities, will the High Court have jurisdiction in certain limited circumstances. The competition authorities are creatures of the Competition Act and their powers are therefore derived from the Act.

Chapter 7 of the Competition Act provides for offences in terms of the Act. Within this chapter, separate criminal offences can be found in sections 69 to 73. These 'criminal offences' are punishable by a fine, imprisonment or both of the aforementioned. The Act refers to these offences as falling under criminal proceedings and jurisdiction vests in the Magistrates Court to prosecute these offences. The intention of the drafters of the Act was to make proceedings (specifically proceedings before the tribunal)⁶¹ more informal and of an inquisitorial nature that would aid in the efficient administration of the Act.⁶² Due to the fact that the Act does contain criminal offences, it appears that the proceedings of the Commission and the Tribunal are of a *sui generis* nature when compared to civil and criminal proceedings.⁶³

⁵⁸ Section 64(1) of the Act.

⁵⁹ Section 64(2) of the Act.

⁶⁰ Section 64(3) of the Act.

⁶¹ Section 52(2)(b) of the Act. See also Sutherland & Kemp (note 17 above) 11-21.

⁶² It is clear that the Commission operates in a fashion that is also rather informal and attempts to aid in the efficient administration of the Act. The Commission's webpage (<http://www.compcom.co.za>) is a clear indication of this, as it sets out steps of how to lodge a complaint, file a merger, apply for leniency, apply for an exemption and request an advisory opinion. It is user friendly, informative and grants individuals easy access to all the information required to comply with the Commission's procedural requirements.

⁶³ Prins & Koornhoff (note 53 above) 143.

2. The application of the legislation: functions and process of the competition institutions

2.1 The Commission

The Commission is an independent and impartial body with specialist knowledge in the field of competition law. The Commission is subject only to the Constitution and the law. It must be impartial and must perform its functions without fear, favor or prejudice.⁶⁴ It plays the role of investigator and prosecutor.⁶⁵ The Commission's main function is investigative in nature. The Commission must implement measures to increase market transparency and public awareness of the Act.⁶⁶ It is submitted that the Commission would be supportive of private enforcement given its function of making citizens in the Republic aware of the Act and what purpose it serves them.

Section 49B of the Act provides for initiation of complaints. This section provides that either the Commissioner may initiate a complaint against an alleged prohibited practice or that any person may submit information or a complaint concerning an alleged prohibited practice to the Commission in the prescribed manner and form.⁶⁷ Should such a person wish to lodge a complaint, they must complete Form CC1 as provided for in the Commission Rules. The form is readily available and simple to fill out. The form essentially requires the complainant's name, the name of the firm that is possibly contravening the Act, the possible prohibited practice and the time periods that the said firm was engaged in such conduct. Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as possible.

The Commission's website⁶⁸ sums up its investigation and litigation process as follows:

'The Commission investigates contraventions to the Act on the basis of complaints received from the public or through its own initiation on the basis of its experience or on outcomes of its market studies. Once a complaint has been received and recorded by its Registry department, it is screened by the Screening Unit within the Enforcement and Exemptions division for an assessment of its merit, in order to determine whether a full investigation should occur. The screening process is a crucial step in the process, as it is a prima facie test of the case- thus enabling the Commission to determine whether to allocate further

⁶⁴ Section 20(1)(a) and (b).

⁶⁵ Prins & Koornhoff (note 53 above) 143.

⁶⁶ Neuhoff (note 7 above) 19.

⁶⁷ Sections 49B(1) and (2).

⁶⁸ www.compcom.co.za.

resources through a detailed investigation or to curtail the investigation. The Commission may require a complainant to provide further information in order to establish whether the matter should be further investigated. Once a case has been screened, the Commissioner may decide to 'non-refer' the matter- that is, not to investigate further. Alternatively, the case can be allocated to the relevant enforcement division (Enforcement & Exemptions or Cartels) for further investigation. The statutory time-frames for investigating enforcement cases based on complaints from the public is 12 months. There is no statutory time-frame provided for the completion of investigations initiated by the Commission. Once an investigation is completed, the relevant division will forward it the Commission's litigators in the Legal Services Division. The Policy & Research division can also partake in case investigation and litigation where complex economic analysis is required. The Legal Services division is responsible for preparing the case file and representing the Commission before the Tribunal or other relevant courts.⁶⁹

The Commission has five operating divisions: Mergers and Acquisitions ("M&A"); Enforcement and Exemptions Divisions ("E&E"); Policy and Research Division; Compliance Division; and Legal Division.

The M&A Division is tasked with investigating the impact of mergers and acquisitions on competition.⁷⁰ While all mergers and acquisitions must be reported to the Commission, it is only the principal decider for small and intermediate mergers. Small mergers entail merger transactions that do not meet the criteria for an intermediate or large merger. Intermediate mergers occur when the value of the proposed merger equals or exceeds R600 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R100 million.⁷¹ Large mergers are merger transactions where the combined annual turnover or assets of both the acquiring and transferred/target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred/target firm is at least R190 million.⁷²

⁶⁹ <http://www.compcom.co.za/about-enforcement/> (Accessed on 26 March 2017). See the following listed cases for a discussion on the Commission's procedures, the controversy in relation thereto and the findings made in respect of the controversy's: *Woodlands Diary (Pty) Ltd v Competition Commission* 2011 3 ALL SA 192 (SCA); *Competition Commission v Senwes Ltd* 2012 7 BCLR 667 (CC); *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 6 ALL SA 404 (SCA) and *Competition Commission v South African Breweries Ltd* 2013 2 CLPR 391 (CAC). See also Sutherland & Kemp (note 17 above) 11-47.

⁷⁰ Neuhoff (note 7 above) 19. See also note 16 above for a definition of a merger.

⁷¹ Competition Commission South Africa 'Merger Thresholds' para 1 <http://www.compcom.co.za/merger-thresholds/> (Accessed on 1 April 2017) (Commission 'Merger Thresholds').

⁷² Commission 'Merger Thresholds' (note 71 above) para 2.

Recommendations regarding large mergers are made by the Commission to the Tribunal for final adjudication.

The E&E Division is tasked with investigating and evaluating alleged restrictive practices and applications for exemptions. It is further required to negotiate and conclude consent orders under this Division.⁷³ The Commission also fulfills the role of ensuring that the Act is consistently applied and facilitating interaction with other regulatory authorities. The Policy and Research Division is made up of economists who assist with economic evaluations and drafting policy documents relating to the implementation of the Act. The Compliance Division of the Commission is dedicated to assisting businesses and stakeholders with compliance with the Act through education programs, publications and the media. The Compliance Division further drafts advisory opinions.⁷⁴ Lastly, the Legal Division is tasked with reviewing and refining the law while providing legal support on cases and assisting in litigation of matters.⁷⁵

Section 50 of the Act provides that any time after a complaint is initiated, the Commission may refer the complaint to the Tribunal. The Commission is obliged to either refer the complaint to the Tribunal or issue a non-referral to the complainant within twelve months after receiving the complaint. The Commission will only issue a referral to the Tribunal if it determines that a prohibited practice has been established.⁷⁶ The Commission and the complainant may agree to extend the period of twelve months within which to refer the complaint or issue a non-referral.⁷⁷ This provision allows the Commission to put the necessary amount of time and resources into concluding a full investigation into the alleged prohibited practice as well as to collect the necessary information for a case. If the Commission has not referred a complaint to the Tribunal, issued a notice of non-referral, or extended the period by agreement with the complainant within the twelve months, the Commission must be regarded as having issued a notice of non-referral on the expiry of the 12 months.⁷⁸ A non-referral by the Commission is not, however, the end of the road of the complaint. The complainant whose complaint has been non-referred by the Commission

⁷³ Neuhoff (note 7 above) 19.

⁷⁴ As above.

⁷⁵ Competition Commission South Africa 'About Enforcement' <http://www.compcom.co.za/about-enforcement/> (Accessed on 9 August 2017).

⁷⁶ Section 50(2) of the Act.

⁷⁷ Section 50(4) of the Act.

⁷⁸ Section 50(5) of the Act.

may in terms of section 51 of the Act, refer the complaint directly to the Tribunal subject to its rules of procedure.⁷⁹

2.2 The Tribunal

The Tribunal is independent of the Commission and is a specialist adjudicative body with the power to impose certain remedies and penalties if prohibited practices were established.⁸⁰ The Tribunal must adjudicate matters in accordance with the Act and is subject to the Constitution and the law.⁸¹ Once a complaint is referred to the Tribunal, it must, by notice in the Gazette, publish each referral made to it. The notice must include the name of the respondent and the nature of the conduct that is the subject of the referral.⁸² Once a matter is referred to the Tribunal, it must conduct a hearing into such matter. These hearings must be conducted in public, as expeditiously as possible and in accordance with the principles of natural justice. The Tribunal is also afforded the power to conduct these hearings informally and in an inquisitorial manner.⁸³ Despite the aforementioned, section 52(3) provides that the Tribunal may exclude members of the public, or specific persons or categories of persons from attending the proceedings. It may do so if evidence to be presented is confidential information, proper conduct requires it or any other reason that would be justifiable in civil proceedings in a High Court. At the conclusion of the hearing, the Tribunal must make an order as provided for in the Act and must issue written reasons for its decision.⁸⁴ The written reasons of the order must be made available to the public subject to any ruling to protect confidential information.⁸⁵

The Tribunal is primarily tasked with assessing and adjudicating complaints regarding any conduct prohibited under the Act. It must determine whether prohibited conduct has occurred, and if it has, impose a remedy that is provided for by the Act.⁸⁶ It is also tasked with aspects such as assessing and adjudicating large mergers referred to it by the Commission. It has the power to hear appeals from, or review any decision of the

⁷⁹ 'The referral rule protects public interest, by preventing the complainant from bypassing the Commission who is the guardian of public interest and has the power to first decide whether it wants to refer the complaint to the Tribunal.' I Meissner & P Sutherland 'The complaint procedure recognized after *Competition Commission v Yara*' (2016) 28 *South African Mercantile Law Journal* 311 334 (Meissner & Sutherland).

⁸⁰ Prins & Koornhoff (note 53 above) 143.

⁸¹ Neuhoff (note 7 above) 20.

⁸² Section 51(3) and (4) of the Act.

⁸³ Section 52(1) and (2) of the Act.

⁸⁴ Section 52(4) of the Act.

⁸⁵ Section 52(5) of the Act.

⁸⁶ Neuhoff (note 7 above) 20.

Commission that are referred to it. It is also tasked with the granting of interim relief orders, granting exemptions from the provisions of the Act and granting orders.⁸⁷

Section 53 of the Act sets out which parties have the right to participate in a hearing. Only certain persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing. A further limitation to persons who may participate in the proceedings is included in section 53, as each subsection is applicable to different parts of the Act. In terms of hearings relating to Part C (the complaints procedure section of chapter 5), the Commissioner and the complainant who referred the matter to the Tribunal or the complainant whose interests will not be adequately represented will be allowed to participate in the hearing. The respondent and any other person who has a material interest in the hearing may also appear. In terms of hearings related to section 10 of the Act (exemptions), the applicant for exemption, the Commission, the appellant, the Minister or member of the Executive Council and interested persons contemplated in section 10(8) may participate. In terms of hearings related to Chapter 3 (Merger control), any party to the merger, the Commission, any person entitled to receive notice in terms of section 13A(2), the Minister and any other person whom the Tribunal recognises as a participant may participate in the hearing. In terms of hearings related to Part A of Chapter 5 (confidential information), the person who owns the information that is subject of the hearing, any person who sought disclosure of the information that is subject of the hearing, the Commission and any other person who the Tribunal recognises as a participant may participate.

As a general rule, the Act provides that each party that participates in a hearing must bear its own costs.⁸⁸ However, the Tribunal member presiding at a hearing may award costs in favour of one of the parties. If the Tribunal has not made a finding against the respondent, the Tribunal member presiding at the hearing may award costs to the respondent, and against the complainant who referred the complaint to the Commission in terms of section 51(1).⁸⁹ Alternatively, if the Tribunal makes a finding against the respondent, it may award costs against the respondent, and to the complainant who referred the complaint in terms of section 51(1).⁹⁰

⁸⁷ Neuhoff (note 7 above) 20.

⁸⁸ Section 57(1) of the Act. See also Sutherland & Kemp (note 17 above) 11-35. It should be noted that the Tribunal has no power to make an order for costs against the Commission. This was decided in the case of *Competition Commission v Sasol Chemical Industries (Pty) Ltd* 31/CR/May05.

⁸⁹ Section 57(2)(a) of the Act.

⁹⁰ Section 57(2)(b) of the Act.

2.2.1 Orders available to the Tribunal

Section 58 of the Act provides for orders of the tribunal and states at section 58(1) that it may:

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

2.2.1.1 Interdicts

As mentioned in section 58(1)(a)(i) above, the Tribunal is empowered to make an order interdicting any prohibited practice. Once the Tribunal has found that a practice is contravening the Act, this order constitutes an immediate form of relief to cease the conduct of this nature. Interim interdicts can also be granted and such an order is not intended to be final in its effect.

2.2.1.2 Positive measures

Subsections (1)(a)(ii), (1)(a)(iv) and (1)(a)(vii) of section 58 can be described as positive measures. These provisions provide for an order to supply or distribute goods or services to another party, to order access to an essential facility and an order of divestiture respectively. These orders often arise when goods, resources or supplies are unreasonably being withheld from competitors in the market and may have the effect of foreclosing those competitors. However, with all of these orders, the order is normally made on terms reasonably required to terminate the prohibited practice. Thus, the intention of the Tribunal

is not to completely level the playing field. The reason for this qualification is to try and limit, as far as possible, interference with the principle of freedom of contract.⁹¹

In the instance of a complainant seeking access to an essential facility, this party will have to demonstrate that it is economically feasible for the dominant firm to give access and that the complainant cannot practically duplicate such infrastructure.⁹² This is not an easy order to justify and the Tribunal does not readily grant such an order.

Divestiture is often applied in the context of a merger or prohibited practice. A good example of divestiture can be found in the case of *Nampak Ltd v Malbak Ltd*.⁹³ The Commission was concerned that an effective competitor would be removed from the thermal roofing market and recommended to the Tribunal that the merged entity divest itself of an asset that would allow some form of competition with the dominant firm.⁹⁴ The Tribunal upheld the Commission's recommendation and order the divestiture of an insulation machine. From this example, it is clear that divestiture is likely to be made when parties have merged. Divesting of certain assets of the merged parties will assist in preventing or limiting the anti-competitive conduct of the merged and now more dominant firm in the relevant market.

2.2.1.3 Administrative penalties

Administrative penalties are dealt with in section 59 of the Act. This section regulates under which circumstances such a penalty may be imposed, the size of the penalty, the factors to consider in determining an appropriate penalty and the process for the payment of the penalty. The Tribunal is specifically empowered to impose an administrative penalty.⁹⁵ The circumstances that warrant the implementation of an administrative penalty is conduct that contravenes outright prohibited conduct under the Act, such as *per se* restrictive horizontal practices and *per se* restrictive vertical practices.⁹⁶ Such conduct includes price fixing, market decision, collusive tendering, minimum resale price maintenance, excessive pricing and refusal to grant access to an essential facility. The Tribunal may also impose this penalty when a firm is a repeat offender of conduct that does not constitute outright prohibited conduct and that firm has previously been found to have contravened the Act.⁹⁷

⁹¹ Neuhoff (note 7 above) 297.

⁹² Neuhoff (note 7 above) 298.

⁹³ *Nampak Ltd v Malbak Ltd* 29/IR/JUN00.

⁹⁴ Neuhoff (note 7 above) 298.

⁹⁵ Sutherland & Kemp (note 17 above) 12-11.

⁹⁶ Section 59(1)(a) of the Act.

⁹⁷ Section 59(1)(b) of the Act.

An administrative penalty may also be imposed for aspects such as merging parties failing to give notice of the merger to the competition authorities, implementing mergers without the approval of the competition authorities, implementing a merger in contravention of a decision by the competition authorities and failing to comply with an interim or final order of the Tribunal of CAC.⁹⁸ The maximum penalty that may be imposed on a firm is up to 10% of the offending party's annual turnover in the Republic, including exports from the Republic, during the preceding financial year.⁹⁹

Quantifying an administrative penalty can be challenging. While the Tribunal has a wide discretion, it must consider certain factors to aid in this determination. The Tribunal has two main constraints in determining the penalty. The first is the fact that there is a maximum penalty amount and the second is that it must consider the following factors:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Commission and the Tribunal; and
- (g) whether the respondent has previously been found in contravention of this Act.¹⁰⁰

While the Act attempts to ensure consistency in granting administrative penalties, despite the wide discretion granted to the Tribunal, it is likely that there will be great disparity between the fines imposed. However, in an effort to be consistent, the Tribunal has set out certain guiding principles in its decisions to assist in the determination of an appropriate penalty.¹⁰¹ The penalties paid do not benefit the competition authorities, but are paid into

⁹⁸ Section 59(1)(d) of the Act.

⁹⁹ Section 59(2) of the Act. See the seminal case on the tribunal's approach to determining an administration penalty: *Competition Commission v Southern Pipeline Contractors & Conrite Walls (Pty) Ltd* 23/CR/Feb09 (*Commission v Southern Pipeline*). *Southern Pipeline* was the first firm to face the statutory maximum penalty of 10% turnover.

¹⁰⁰ Section 59(3) of the Act.

¹⁰¹ Neuhoff (note 7 above) 290. See *Commission v Southern Pipeline* (note 99 above). See paras 19-26 & 40-50 of *Commission v Southern Pipeline* for a discussion on the difficulties of calculating a penalty. In this case, the Tribunal chose not to use a single approach to determine the penalty, but elected to

the National Revenue Fund referred to in section 213 of the Constitution.¹⁰² There are mixed feelings regarding who receives payment of competition penalties. Some authors support that the penalties are paid to the National Revenue Fund, and justify this support with the argument that it avoids the potential inappropriate incentive of issuing larger fines in order to ensure increased funding.¹⁰³ On the other hand, there is a general view by authors that question the beneficiary of the penalty payments and argue that consumers who have suffered as a result of the contravening firms conduct seldom reap benefits of the compensation directly.¹⁰⁴ The latter group of authors believe that the penalty awards could be used towards redress to victims of anticompetitive conduct if they were not paid into the National Revenue Fund.¹⁰⁵

It is sometimes questioned whether an administrative penalty is not in fact a criminal sanction.¹⁰⁶ However, this is not strictly correct. Administrative penalties are imposed for contraventions of the substantive provisions of the Act, whereas criminal sanctions are imposed for certain offences which hinder the enforcement and administration of the Act.¹⁰⁷ Another difference is that criminal offence penalties are imposed by Magistrate Courts as opposed to the competition authorities. Further, criminal investigations are initiated by the competition authorities, investigated by the police and prosecuted by the National Prosecuting Authority.¹⁰⁸ Criminal sanctions can be found in Chapter 7 of the Act.

use two approaches, the arithmetic approach and the broad brush approach. See paras 75-81 and 82-93 respectively for a discussion on these approaches.

¹⁰² Section 59(4) of the Act.

¹⁰³ M Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) *Centre for Environmental Rights* 23 <https://cer.org.za/?s=how+civil+and+administrative+> (Accessed on 9 August 2017) (Fourie). Fourie further mentions that 'the reason for payment of fines into the Revenue fund is that most national treasuries oppose ring-fenced funds, and prefer a free hand allocation of revenue received by the fiscus'.

¹⁰⁴ See M Cardo 'Test of independence for Competition Tribunal' (2017) *fin24* <http://www.fin24.com/Finweek/Opinion/test-of-independence-for-competition-tribunal-20170223> (Accessed on 9 August 2017) (Cardo). See also N Mokoena 'Who gets revenue from competition fines?' (2015) *Moneyweb* <https://www.moneyweb.co.za/news/companies-and-deals/who-gets-revenue-from-competition-fines/> (Accessed on 9 August 2017) (Mokoena).

¹⁰⁵ See Cardo and Mokoena (note 104 above).

¹⁰⁶ See Sutherland & Kemp (note 17 above) 12-10.

¹⁰⁷ Neuhoff (note 7 above) 294.

¹⁰⁸ Neuhoff (note 7 above) 295.

2.2.1.5 Declaration

A declarator is an interest or right that is sought to be judicially declared,¹⁰⁹ this is provided for by subsections (1)(a)(v) and (vi) of section 58. In terms of subsection (1)(a)(v), the Tribunal is empowered to declare that conduct of a firm constitutes a prohibited practice under the Act for the purpose of commencing an action for the awarding of damages in a civil court. It is clear that this provision is vital in private enforcement claims to allow a private party to pursue its claim in a civil court. However, a declaration is not strictly ordered for private enforcement purposes. Declarations appear in most orders made by the Tribunal, regardless of whether the complaint was referred by the Commission out of its own accord or if the complaint was lodged by a member of the public with the intention to eventually pursue a civil damages claim. In terms of subsection (1)(a)(vi), the whole or part of an agreement may be declared void.

There are two main circumstances where a declaratory order will be sought. The first circumstance deals with a private party who has suffered damage as a result of the infringement of the Act. The party must apply to the Tribunal for a declaratory order declaring the conduct of the respondent as a prohibited practice. The Tribunal will issue a certificate recording its findings, and this certificate then serves as conclusive proof of its contents.¹¹⁰ It should be remembered that the Tribunal can only issue such a certificate if no damages have been awarded in a settlement agreement that has been confirmed by the Tribunal. The second instance deals with the presence of prohibited restrictive provisions in an agreement. This subsection is necessary because under section 65(1) of the Act, no provision of an agreement is prohibited or declared void unless the Tribunal or CAC declares that provision to be void. Thus, parties can continue to rely on and enforce their agreements until such time as they are declared void.

2.2.1.6 Settlement agreements and consent orders

Sections 49D and 58(1)(b) deal with the powers of the competition authorities to enter into settlement agreements that are confirmed to be consent orders. The Commission may make an agreement with the respondent to settle a matter, however, the Tribunal must confirm the agreement to make it a formal consent order.¹¹¹ These agreements must be entered into

¹⁰⁹ Neuhoff (note 7 above) 308.

¹¹⁰ 'Conclusive proof of a fact connotes proof which a court is obliged to accept, to the exclusion of all countervailing evidence, as establishing such fact' (*S v Moroney* 1978 (4) SA 389 (A)).

¹¹¹ Section 49D of the Act.

any time before the Tribunal hands down its final order on the merits of the matter.¹¹² Informal settlements are not provided for in the Act, as it is strictly required that the Tribunal confirms the agreement to make it an order.¹¹³ A consent order may include an award of damages to the complainant.¹¹⁴ If an award for damages is granted in the consent order, the complainant is precluded from commencing action in a civil court for damages. It is interesting to note that the consent of a complainant is not required for a settlement agreement between the Commission and the respondent. The Commission is, however, obliged to notify the complainant in writing of the possible order and invite the complainant to inform the Commission whether it is prepared to accept damages under such an order and the amount he is prepared to accept.¹¹⁵

The requirement of admission of liability as part of the content of a consent order has caused some controversy. It would seem logical to request an admission of liability by a respondent to procure a consent order, however, an admission of liability is not required. This position is contrary to the position under the CLP, where the policy specifically requires an admission of liability.¹¹⁶ While the Commission Rules and Tribunal Rules require a draft order to set out the section that has been contravened,¹¹⁷ this is not a requirement in terms of the Act.¹¹⁸ The reasoning for this is most likely to encourage respondents to come forward to settle their matters. However, in practice, the Commission rarely settles without insisting on an admission of liability.¹¹⁹

The settlement agreement usually includes terms such as: a background section where the Commission records its findings; the respondent states its version of events; provisions of

¹¹² Sutherland & Kemp (note 17 above) 11-50. See the case of *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO and Others* (62/CAC/APR06) 2006 ZACAC 6 for a discussion on the importance of adhering to the time limits of entering a settlement agreement with the Commission and having it confirmed by the Tribunal.

¹¹³ The value of a settlement agreement that is not confirmed by the Tribunal is debatable. However, there have been a few informal settlements that the Commission has entered into with respondents. An example of such an informal settlement can be seen in the case of *Mainstream 2 (Pty) Ltd t/a New United Pharmaceutical Distributors and others v Novartis South Africa (Pty) Ltd and Others 25/IR/Dec99 (Mainstream 2/ Novartis South Africa)*. (M Neuhoff *et al* *A Practical Guide to the South African Competition Act* (2017) 477 (Neuhoff 2017)).

¹¹⁴ Section 49D(3) of the Act. See para 2.2.1.5 on Declarations. If damages have been awarded in a consent order, this means that the complainant may not pursue a civil damages claim by using a declaration. However, according to section 49D(4)(a) of the Act, a consent order does not preclude a complainant from applying for a declaration in terms of section 58(1)(a)(v) or (vi).

¹¹⁵ Neuhoff (note 7 above) 305.

¹¹⁶ CLP items 3.1, 3.9, and 5.6

¹¹⁷ See Commission Rule 18(2)(b)(i)(aa) and Tribunal Rule 24(4).

¹¹⁸ See Sutherland & Kemp (note 17 above) 11-55.

¹¹⁹ Neuhoff 2017 (note 113 above) 476. See also Sutherland & Kemp (note 17 above) 11-55.

the Act which have been contravened; admission or denial of liability; positive obligations that the respondent is required to engage in to minimise the risk of repeat offences; the agreed administrative penalty; and an agreement by the respondent to pay the complainant's damages.¹²⁰

2.3 The Competition Appeal Court

The CAC has the status of a High Court and must consist of at least three judges.¹²¹ The selection of members to sit in this Court is similar to that of normal civil courts. The members are appointed by the President on the advice of the Judicial Services Commission and each of the members must be a High Court Judge. The CAC is tasked with reviewing decisions of the Tribunal concerning legal error or jurisdiction, as well as considering the substantive merits of any final decision and any interim decision for which the Act allows appeal.¹²² While the CAC may consider an appeal arising from the Tribunal, it may only consider appeals in respect of any of the Tribunal's final decisions other than a consent order made in terms of section 49D(1).

The CAC, like the Tribunal, may also give judgments or make orders. The orders it may make include an order to confirm, amend or set aside a decision or order of the Tribunal. The CAC further has the power to remit a matter to the Tribunal for a further hearing on appropriate terms. While matters are normally heard by three judges, a single judge may decide certain matters. These matters include: appeals against the decision of an interlocutory nature; applications for the determination or use of confidential information; applications for leave to appeal; applications to suspend the operation and execution of an order that is subject of a review or appeal; and applications for procedural directions.¹²³

3. The recipients and effect of the legislation

It is very clear from the Act that public enforcement is envisaged as the primary enforcement method of controlling competition in markets in the Republic. Public enforcement objectives make up a majority of the sections in the Act. The reason for this, is that the markets that the Act regulates directly relate to the South African economy. Thus it follows that the public interest is a priority, and rightly so. The competition authorities strive to protect the various

¹²⁰ Neuhoff (note 7 above) 304.
¹²¹ Section 36(2) of the Act.
¹²² Neuhoff (note 7 above) 21.
¹²³ As above.

divisions of markets. Within these markets they attempt to artificially level the playing field without causing too much interference to the markets. By protecting the markets, they protect medium and small size businesses. This in turn protects the job market, availability of resources, options available to consumers as well as competitive pricing. Indirectly, every citizen of South Africa ultimately benefits from the competition authorities public enforcement. Some of these benefits includes prices that are determined by competitive markets, various product options and numerous competitors entering the market providing innovative products and challenging existing market players business models.

It is also evident that while the competition authorities are all independent of one another, they rely heavily on the functions of each other and are interconnected. They all serve an important function in the overall process in regulating competition in the markets. Missing a step or process in the enforcement of a complaint, whether it is in terms of the Commission or the Tribunal, would be fatal to the complaint. The authorities hold the ultimate power in determining whether conduct is anticompetitive or not. They cannot be bypassed, and if a complainant was to try and bypass their procedure, they would lack *locus standi* by virtue of the provisions contained in section 65 of the Act. It is also clear that the authorities rely heavily on the public to refer complaints to them and to make the authorities aware of any anticompetitive behaviour in the market. There is thus a clear relationship between the competition authorities and the public.

Chapter 3: Private enforcement of South African competition law

1. The Act and provisions that regulate private enforcement

From the previous chapter on public enforcement, it is clear that the Act provides a step-by-step guide on how it is to be applied and enforced by the competition authorities. However, when referring to the Act for private enforcement, there is far less clarity and guidelines regarding how an individual should implement the process of enforcing the Act for their private purposes. Reference in this dissertation to private enforcement refers to private competition enforcement by individuals, groups of individuals, single firms or a group of firms (hereinafter this group of complainants will be referred to as “the private body”) who wish to stop anticompetitive practices and claim redress for damages occasioned by such practices. This enforcement differs from public enforcement in that the initiator/complainant is a private body who submits a complaint to the Commission with the ultimate intention of obtaining a private gain¹²⁴ after the public enforcement procedure is completed.¹²⁵ The private body seeks further redress beyond merely making the competition authorities aware of the fact that prohibited conduct is occurring in the market. The private body seeks to achieve awareness of the prohibited conduct, with the additional aim of having the prohibited conduct halted and receiving some form of retribution for the loss it has suffered as a result of the conduct through a civil court.

As previously mentioned,¹²⁶ a complainant will not have *locus standi* to take a complaint straight to the civil courts. It must follow the complaint procedure provided for in the Act,¹²⁷

¹²⁴ The Tribunal made a statement in support of private enforcement of competition law (and the personal motives behind such enforcement) in the reasons handed down in the case of *Caxton and CTP Publishers and Printers Limited & Another v The Natal Witness Printing and Publishing Company (Pty) Ltd & Others* FTN190Dec15/OTH135Sep16 at para 102: ‘Private enforcement should not be chilled despite the fact it may be brought about for motives other than a concern about anticompetitive effects. That notwithstanding, the system benefits from the actions of a private policeman whatever its motives.’

¹²⁵ Regardless of whether a public or private enforcement procedure is intended, the procedure from lodging the complaint to the Commission, having the Commission investigate and either issue a referral or non-referral to the Tribunal (who ultimately makes a finding), can be regarded as public enforcement as evidenced in Chapter 2. Making use of the private enforcement procedure mainly occurs after the Commission and Tribunal have played their role in the public enforcement sphere. A complainant may approach the Tribunal and request that a declaration is made by the Tribunal that a prohibition of the Act has occurred (this is assuming that the Tribunal does not include a declaration of an infringement of the Act in its orders), which after the Tribunal has handed down its orders, will allow the private body to exercise private enforcement of competition law through the civil courts via a damages claim.

¹²⁶ See Chapter 2, paragraph 2.1 above for a discussion on initiating complaints.

¹²⁷ Which, as mentioned in note 125 above, can be regarded as the public enforcement procedure.

as set out in section 49B(2). For private initiation purposes as opposed to the Commission initiating a complaint, section 49B(2) is directly applicable. This section provides two options to report prohibited conduct. Either that any person may *submit information* concerning an alleged prohibited practice to the Commission, or in any manner or form;¹²⁸ or the person may *submit a complaint* against an alleged prohibited practice to the Commission, in the prescribed form.¹²⁹ From there on, the normal procedure of the Commission commences, such as the duration for investigation and referral or non-referral of the matter to the Tribunal. After lodging a complaint with the Commission, a private body has no further provisions available to it during the Commission's investigation. This is due to the fact that the Commission thereafter has a twelve-month period to conduct their investigation and ultimately issue a notice in accordance with their decision as to whether they are going to refer the matter to the Tribunal or not. The private body therefore, cannot make any progress on their complaint until such time as the Commission issues a notice of referral or non-referral to the Tribunal.¹³⁰

Once the private body has duly followed the procedure of initiation of the complaint and the subsequent investigation period, the private body now has three possibilities and two of these depend on whether a notice of referral or non-referral has been issued. Firstly, a consent order may be entered into between the Commission and respondent and confirmed by the Tribunal. Secondly, the Commission may issue a notice of non-referral. Thirdly, the Commission may elect to refer to the Tribunal all the particulars of the complaint, only some of the particulars of the complaint or it may add particulars to the complaint as submitted by the complainant.¹³¹ The Tribunal must then conduct a hearing, subject to its rules, in accordance with the Act.¹³² It must conclude the hearing and make any order permitted in terms of the Act and issue written reasons for its decisions.¹³³ The possible private enforcement actions and remedies include interim relief, a declaration and damages claims.

¹²⁸ Section 49B(2)(a) of the Act.

¹²⁹ Section 49B(2)(b) of the Act.

¹³⁰ See para '1.2 Non-referral to the Tribunal' below for a discussion on further provisions that a private body may utilise after a non-referral by the Commission.

¹³¹ Section 50(3)(a) of the Act.

¹³² Section 52(1) of the Act.

¹³³ Section 52(4) of the Act.

1.1 Settlement agreements and consent orders

In terms of the Act,¹³⁴ before the Commission refers a matter to the Tribunal, a settlement agreement may be entered into between the Commission and respondent and confirmed as a consent order by the Tribunal. This agreement may be reached during or after the completion of the investigation concluded by the Commission, but before the Tribunal hands down its final order on the merits.¹³⁵ The agreement is reached between the Commission and the respondent. In order to be confirmed as a consent order, the agreement must be confirmed by the Tribunal as a consent order in terms of section 58(1)(b). There have been instances where the Commission has concluded an informal settlement agreement with a respondent that has not been confirmed by the Tribunal.¹³⁶ As discussed in Chapter 2, paragraph 2.2.1.6, the Act does not make provision for informal settlement agreements of this nature. The value of these informal settlements is debatable and the Act makes it clear that settlement agreements must be confirmed by the Tribunal in order to become a valid and enforceable consent order.¹³⁷

After hearing a motion for a consent order, the Tribunal has three options regarding the confirmation of the order. It may make the order as agreed to by the Commission and respondent,¹³⁸ it may indicate changes that must be made in the draft order before it will make the order,¹³⁹ or it must refuse to make the order.¹⁴⁰ The settlement agreements usually comprise of certain terms.¹⁴¹ These terms include aspects such as: a background section in which the Commission records its findings by way of a summary; a section allowing the respondent to state its version of the events culminating in the settlement; the Commission records the provisions of the Act that it has found the respondent has contravened; a section placing the respondent under a positive obligation to engage in certain conduct to try and minimise the risk of a repeat offence; whether an administrative penalty is agreed to or not; and a section dealing with a damages award.¹⁴²

¹³⁴ Section 49D of the Act.

¹³⁵ Section 49D(1) of the Act. See also Sutherland & Kemp (note 17 above) 11-50 and footnote 114 above.

¹³⁶ Neuhoff (note 7 above) 307. See Chapter 2, paragraph 2.2.1.6 'Settlement Agreements and Consent Orders' for a discussion on this topic.

¹³⁷ Neuhoff (note 7 above) 307.

¹³⁸ Section 49D(a) of the Act.

¹³⁹ Section 49D(b) of the Act.

¹⁴⁰ Section 49D(c) of the Act.

¹⁴¹ Sutherland & Kemp (note 17 above) 11-55.

¹⁴² Neuhoff (note 7 above) 304.

The provision dealing with a damages award is dependent on the parties.¹⁴³ It should be noted that damages may be waived by the complainant, but if such waiver is concluded, it must be incorporated in the consent order.¹⁴⁴ The settlement agreements may also include an admission or denial of liability by the complainant.¹⁴⁵ See Chapter 2, paragraph 2.2.1.6 'Settlement Agreements and Consent orders' for a full discussion on the aspect of admitting liability. As mentioned in Chapter 2, in practice the Commission insists on an admission of liability. This is despite the fact that from an academic reading of the Act and Rules of the Tribunal and Commission, an admission of guilt is not required to conclude a consent order.¹⁴⁶ There is a benefit in not requiring an admission of liability, as it provides incentive for respondents to come forward and settle a matter which ultimately benefits the market place.¹⁴⁷ This is not however, beneficial to the complainant as it means a further burden of proof is placed on the complainant. The complainant must then prove its claim which may be difficult, if not impossible, without the assistance of the Commission.

Section 49D further makes provision for a consent order to include an award of damages to the complainant, with the consent of the complainant.¹⁴⁸ However, such a consent order does not preclude a complainant from applying for a declaration in terms of section 58(1)(a)(v) or (vi);¹⁴⁹ or an award of civil damages in terms of section 65, unless the consent order does include an award of damages to the complainant.¹⁵⁰ The provisions in sections 49D(3) and 49D(4) are primarily private enforcement actions and remedies.

As indicated in Chapter 2 the consent of the complainant is not required for a settlement agreement to be concluded.¹⁵¹ As a rule, however, the Commission should inform the complainant that such an agreement is being concluded.¹⁵² Rule 18(1) of the Commission Rules provides that the Commission must notify the complainant, in writing, that a consent order may be recommended to the Tribunal.¹⁵³ The Commission must further invite the complainant to inform the Commission in writing in ten business days after receiving that

¹⁴³ See Sutherland & Kemp (note 17 above) 11-53.

¹⁴⁴ Neuhoff (note 7 above) 304.

¹⁴⁵ Sutherland & Kemp (note 17 above) 11-56.

¹⁴⁶ See notes 116-119 above.

¹⁴⁷ Neuhoff (note 7 above) 305.

¹⁴⁸ Section 49D(3) of the Act.

¹⁴⁹ Section 49D(4)(a) of the Act.

¹⁵⁰ Section 49D(4)(b) of the Act.

¹⁵¹ Sutherland & Kemp (note 17 above) 11-56. See also Neuhoff (note 7 above) 305.

¹⁵² Neuhoff (note 7 above) 305.

¹⁵³ Rules 18(1)(a) of the Rules of the Competition Commission, 2001 (the "Commission Rules").

notice whether it is prepared to accept damages under such an order, and if so, the amount.¹⁵⁴ It is advisable that the complainant should after receiving such notice, call for a meeting with the Commission and Tribunal. The purpose of such a meeting would be to try and determine settlement terms which could aid in avoiding the need to pursue the merits of the matter before the Tribunal, or to prove damages before a civil court.¹⁵⁵ However, the Commission and respondent are not obliged to incorporate such terms into the agreement. The Tribunal considers any competition and other public-interest concerns when making its decision to grant a consent order and does not take the suggestions of the complainant into consideration, unless they have been incorporated as terms in the agreement.

1.2 Non-referral to the Tribunal

In terms of section 50(2), within one year after a complaint has been submitted to the Commission, it must issue a notice of referral or non-referral.¹⁵⁶ The Commission may decide to refer all particulars or only some of the particulars of the complaint. If it decides to only submit some of the particulars to the Tribunal, it must issue a notice of non-referral in respect of the particulars of the complaint not being referred to the Tribunal. Non-referral by the Commission is however, not the end of the line for a complainant. If the Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Tribunal.¹⁵⁷ To refer such a complaint, it must be in the prescribed form and be subject to the rules of procedure of the Tribunal.¹⁵⁸ In terms of the Tribunal Rules,¹⁵⁹ a complaint referral may be filed by a complainant in accordance with section 51(1). The referral must be in the form of a Form CT1(2) and referred within twenty business days after the Commission has issued, or has been deemed to have issued, a notice of non-referral to that complainant.¹⁶⁰ The complaint proceedings in the Tribunal may only be initiated by filing the correct complaint referral form.¹⁶¹ The complaint referral must be supported by an affidavit, setting out in numbered paragraphs a concise statement of the grounds of the complaint and material facts or points of law relevant to the complaint and

¹⁵⁴ Rule 18(1)(b) of the Commission Rules.

¹⁵⁵ Neuhoff (note 7 above) 305.

¹⁵⁶ It is vitally important that a complaint is formally submitted to the Commission, and that the complainant does not merely provide the Commission with information on a contravening firm. Meissner & Sutherland (note 79 above) 321.

¹⁵⁷ Section 51(1) of the Act. See also Sutherland & Kemp (note 17 above) 11-65.

¹⁵⁸ Section 51(1) of the Act.

¹⁵⁹ Rules for the conduct of proceedings in the Competition Tribunal, 2001 (the Tribunal Rules).

¹⁶⁰ Rule 14 of the Tribunal Rules.

¹⁶¹ Rule 15(1) of the Tribunal Rules.

relied on by the complainant.¹⁶² The complainant making the referral in terms of section 51(1), can only refer the particulars of conduct in its original complaint to the Commission to the Tribunal, and may not add particulars of conduct to its original complaint.¹⁶³

1.3 Referral to the Tribunal

This subheading presupposes the fact that the Commission refers the complaint to the Tribunal. The same formalities mentioned above must be followed for the Commission to refer a matter to the Tribunal. The Chairperson of the Tribunal must, by notice in the Gazette, publish each referral made to the Tribunal.¹⁶⁴ The notice published must include the name of the respondent and the nature of the conduct that is the subject of the referral.¹⁶⁵ Chapter 2, paragraph 2.2 sets out aspects relating to hearings before the Tribunal and other aspects, and for this reason will not be repeated in this chapter. In terms of section 52(4), at the conclusion of a hearing, the Tribunal must make any order permitted in terms of this Act, and must issue written reasons for its decisions. The three actions and remedies available in private enforcement will now be discussed in more detail.

1.3.1 Interim relief

Interim relief is an important remedy in South African competition law that has not always been available. The provisions governing interim relief can be found in section 49C of the Act and in Rules 26 to 28 of the Tribunal Rules. The rationale for granting an application for interim relief was precisely stated in the introductory paragraph of the case of *SAR (Pty) Ltd and Another v SAD Holdings and Another*¹⁶⁶ as:

“Aggrieved parties in competition litigation generally claim that they are incurring considerable economic harm in consequence of the alleged transgression of competition law. This harm, it is alleged, continues unabated during the invariably lengthy investigations that are necessary in order to bring competition matters to full trial, thus frequently killing the patient before the cure can be administered. For this reason, the right to appear before the competition authorities and petition for an interim order that, if successful, temporarily

¹⁶² Rule 15(2) of the Tribunal Rules.

¹⁶³ Sutherland & Kemp (note 17 above) 11-66. See *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 6 ALL SA 404 (SCA) (“Yara”). In *Yara*, the SCA mentioned at paragraph 18 that ‘the private complainant is not allowed to bypass the Commission by keeping part of the complaint in its pocket, as it were, then to introduce it for the first time after a non-referral.’

¹⁶⁴ Section 51(3) of the Act.

¹⁶⁵ Section 51(4) of the Act.

¹⁶⁶ *SAR (Pty) Ltd and Another v SAD Holdings and Another* Case 16/IR/Dec99, para 1.

interdicts the perpetrator from continuing the allegedly transgressive behaviour is generally accepted as an important remedy under competition law.”

Therefore, interim orders are necessary to put a temporary hold on the conduct of the respondent which is causing the complainant irreparable harm.¹⁶⁷ A complainant will generally apply for interim relief if it cannot afford to wait for the Commission to complete its investigation. Interim relief will normally be applied for at the same time as lodging a complaint.¹⁶⁸ The main requirement to apply for interim relief is that a party must have already lodged a complaint with the Commission. A complainant may make application at any time, whether or not a hearing has commenced for an interim order.¹⁶⁹ However, the complainant should not delay for too long in making an application, as the legislature intends that interim orders should serve only to ameliorate an urgent situation and to be of limited duration.¹⁷⁰

In terms of section 49C(4) of the Act, an interim order may not extend beyond the earlier of the conclusion of a hearing into the alleged prohibited practice; or a date that is six months after the date of issue of the interim order.¹⁷¹ The Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months if the main hearing has not been concluded within six months.¹⁷² An application for interim relief automatically lapses if the Commission issues a notice of non-referral and the complainant does not institute its own referral to the Tribunal. The form of relief applied for in most instances is of an interdictory nature. However, the relief is not limited to interdictory relief and the Tribunal may order most of the remedies provided for in section 58(1)(a). These orders may include ordering the distribution of goods or services to another party, administrative penalties, divestiture, a declaration, declaring agreements to be void, or ordering access to an essential facility.

¹⁶⁷ Neuhoff (note 7 above) 337.

¹⁶⁸ Sutherland & Kemp (note 17 above) 11-48(12).

¹⁶⁹ Section 49C(1) of the Act. See also Sutherland & Kemp (note 17 above) 11-48(12): ‘While the Act does not contain any limitation on the period within which a complainant must apply for interim relief, the application should be lodged without undue delay and within a reasonable time, having regard to the nature of the alleged prohibited practice.’

¹⁷⁰ Neuhoff (note 7 above) 336.

¹⁷¹ See also Sutherland & Kemp (note 17 above) 11-48(16).

¹⁷² Section 49C(5) of the Act.

There are certain substantive factors that the Tribunal will consider when granting interim relief.¹⁷³ As a point of departure, the complainant must persuade the Tribunal that it would be just and reasonable to grant an interim order. The Tribunal would have to consider aspects such as evidence relating to the prohibited practice and whether it has been shown that a *prima facie* right to the relief can be claimed.¹⁷⁴ In relation to this, the same standard of proof is used as in a common law application for an interim interdict.¹⁷⁵ It must consider that the interim relief is required in order to prevent serious or irreparable harm to the applicant.¹⁷⁶ Lastly, it should consider that the balance of convenience favours the granting of interim relief.¹⁷⁷ To act fairly to both parties, the Tribunal must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings.¹⁷⁸ Ultimately the Tribunal is not obliged to grant an interim order, section 49C(2)(b) clearly states that the Tribunal may grant an interim order.¹⁷⁹

Subsections 49C(6) to 49C(8) apply to instances where review and appeals are allowed. Any party to the application may apply to the CAC to review a decision by the Tribunal in terms of the section.¹⁸⁰ The applicant may appeal to the CAC against a refusal by the Tribunal to grant an interim order in terms of the section.¹⁸¹ Lastly, the respondent may appeal to the CAC against any order of the Tribunal that has a final or irreversible effect.¹⁸² Thus all parties involved in an interim relief application have some form of review or appeal process available to them.

This is one of the few remedies provided by the Act that could be labelled as a private remedy, as it can serve the purpose of aiding a personal body from preventing further harm

¹⁷³ Sutherland & Kemp (note 17 above) 11-48(13).

¹⁷⁴ Section 49C(2)(b)(i) of the Act.

¹⁷⁵ Section 49C(3) of the Act. See also Sutherland & Kemp (note 17 above) 11-48(14).

¹⁷⁶ Section 49C(2)(b)(ii) of the Act.

¹⁷⁷ Section 49C(2)(b)(iii) of the Act.

¹⁷⁸ Section 49C(2)(a) of the Act.

¹⁷⁹ According to Sutherland & Kemp, the Tribunal has only granted two interim orders in complaint proceedings in over eight years, of which one was overturned on appeal. See Sutherland & Kemp (note 17 above) 11-48(14). According to Kelly, 'this may be due to the fact that from the outset, the Tribunal has been cautious to ensure that it does not pre-judge the merits of a complaint by granting interim relief'. Kelly (note 2 above) 255.

¹⁸⁰ Section 49C(6) of the Act.

¹⁸¹ Section 49C(7) of the Act.

¹⁸² Section 49C(8) of the Act.

by the infringing firm.¹⁸³ While interim relief can be useful, it is however, only interim. It is unfortunate that one of the three private remedies is of a short duration.

1.3.2 Declaration

Declaration orders have been discussed in Chapter 2, paragraph 2.2.1.5 and for this reason will not be discussed at length again. Declarations in a private enforcement sense are specifically dealt with in section 58(1)(a)(v) of the Act. This provision regulates the power of the Tribunal to declare conduct of a firm to be a prohibited practice under the Act, for the purposes of commencing an action for the awarding of damages in a civil court.

Declarations are one of the three options available as a private enforcement action and remedy. They are very important as a private enforcement remedy as this is the avenue required in order to pursue a damages claim. A declaration is a finding by the Tribunal that previous or current conduct of a firm constitutes a prohibited practice.¹⁸⁴ There are three reasons why a declaration should be obtained. Firstly, it is necessary if a private party wishes to pursue a damages claim in a civil court. Secondly, in circumstances where the prohibited practice does cease to occur, it creates the possibility of an administrative penalty being ordered against the firm in the event of a repeat offence. These first two reasons therefore serve as a deterrent to the firm to engage further in prohibited practices. Thirdly, a declaration may serve to clarify the legal position and in so doing, act as a deterrent against engaging in prohibited practices.¹⁸⁵

A declaration is required by a private party who wishes to pursue a damages claim as the competition authorities do not have the jurisdiction to award damages.¹⁸⁶ This jurisdiction falls solely with the civil courts.¹⁸⁷ However, as previously mentioned, the civil courts are generally not empowered to consider the merits of a competition matter.¹⁸⁸ This is why a

¹⁸³ Authors such as Kelly (note 2 above) 254, Neuhoff (note 7 above) 333 and Sutherland & Kemp (note 17 above) 11-48(12), discuss interim relief in relation to a complainant and for the sole benefit of the complainant. It follows that such an action can be regarded as a private enforcement action and remedy, as it does not benefit the general public and is restricted to an individual's interests.

¹⁸⁴ Neuhoff (note 7 above) 342.

¹⁸⁵ Neuhoff (note 7 above) 343.

¹⁸⁶ 'The competition authorities are not empowered to award damages to persons who claim that they have been prejudiced by anti-competitive conduct.' M Brassey (editor) *et al Competition Law* (2002) 327 (Brassey).

¹⁸⁷ It is presumed that the South African civil courts would have automatic jurisdiction to hear a damages claim only after the competition authorities make their final decision in terms of the Act. Moodaliyar (note 27 above) 7.

¹⁸⁸ Section 65 sets out civil actions and jurisdiction. According to section 65(2), if in a civil court, a party raises an issue concerning prohibited conduct in terms of the Act, that court must not consider the

declaration must first be obtained from the Tribunal declaring that the conduct complained of is a prohibited practice before a civil court may use such a declaration to make a damages finding. Thus, the only issue for a civil court to determine is whether an award of damages is appropriate and the amount thereof.¹⁸⁹ This occurred in the case of *Competition Commission v South African Airways (Pty) Ltd* (“*Commission v SAA*”) pursuant to a complaint brought by Nationwide against South African Airways.¹⁹⁰ The Tribunal imposed a R45 million administrative penalty on SAA for abusing its position as the dominant domestic airline.¹⁹¹ In its prayers, the Commission had also sought that the Tribunal issue a declaration that the conduct constituted a prohibited practice.¹⁹² The Tribunal at paragraph (b) of its order, granted this relief. Thereafter Nationwide pursued a damages claim in a civil court against SAA.

1.3.3 Damages claim

Section 65 of the Act deals with civil actions and jurisdiction. Section 65(2) focuses on the issue of jurisdiction of civil courts and the competition authorities. If a party in a civil case raises an issue concerning conduct that is prohibited in terms of the Act, the court must not consider the issue on its merits.¹⁹³ This is considered to be the sole jurisdiction of the competition authorities. If an issue raised is one in respect of which the Tribunal or CAC has made an order, the court must apply that determination.¹⁹⁴ Otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that the issue has not been raised in a frivolous or vexatious manner and the resolution of that issue is required to determine the final outcome of the action.¹⁹⁵

issue on the merits. If the issue raised is one in respect of which the Tribunal or Competition Appeal Court have made an order, the civil court must apply the determination of the Tribunal or the Competition Appeal Court. Alternatively, the civil court must refer the issue to the Tribunal to be considered on its merits. This provision is most likely in place to prevent civil courts having to waste time in dealing with the merits where the Tribunal (with the aid of the Commission) have the resources and specialised skills in the area of competition law and had to have considered the matter’s merits from the time that the complaint was first lodged. For exclusive jurisdiction matters see Section 62(1), which sets out the exclusive jurisdiction of the Tribunal and CAC. It should be noted that civil courts do have jurisdiction over certain competition matters, such as in section 62(4), which vests the Supreme Court of Appeal with jurisdiction to hear appeals from the Competition Appeal Court.

¹⁸⁹ Neuhoff (note 7 above) 309.

¹⁹⁰ *Competition Commission v South African Airways (Pty) Ltd (SAA) Case 18/CR/Mar01 (Commission v SAA)*.

¹⁹¹ *Commission v SAA* (note 190 above) page 79.

¹⁹² *Commission v SAA* (note 190 above) para 260.

¹⁹³ Section 65(2) of the Act. See note 188 above.

¹⁹⁴ Section 65(2)(a) of the Act.

¹⁹⁵ Section 65(2)(b)(i) & (ii) of the Act.

Subsections 65(6) to 65(10) can be viewed as the damages provisions. Subsection 65(6) regulates who is entitled to be awarded damages. The provision states that a person who has suffered loss or damage as a result of a prohibited practice, may not commence action in a civil court if that person has been awarded damages in a consent order confirmed in terms of section 49D(1).¹⁹⁶ From this it is evident that a prohibited practice must have occurred and have been recorded in a declaration by the Tribunal. If the complainant has not been awarded damages in a consent order, they must file with the Registrar of the Court a notice from the Chairperson of the Tribunal or the Judge President of the CAC.¹⁹⁷ This notice must be in the prescribed form and it must certify that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Act.¹⁹⁸ In addition, it must also state the date of the Tribunal or CAC finding¹⁹⁹ and it must set out the section of the Act in terms of which the order was made.²⁰⁰ The certificate mentioned above is conclusive proof²⁰¹ of its contents and is binding on a civil court.²⁰²

A complainant's right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of the complaint.²⁰³ In the case of an appeal, the right to bring a claim arises on the date that the appeal process in respect of that matter is concluded.²⁰⁴ Appeals and reviews of the main action impact a complainant's right to apply for damages. An appeal or review against an order made by the Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.²⁰⁵ In terms of interest applicable to a damages claim, interest on a debt in relation to a claim for damages in terms of the Act will commence on the date of issue of the certificate referred to it.²⁰⁶

It should be noted that damages claims are not often pursued and this could be attributable to the difficulty in establishing the link between the loss suffered and the anti-competitive conduct.²⁰⁷ However, South Africa is not the only country with a limited amount of damages

¹⁹⁶ Section 65(6)(a) of the Act.

¹⁹⁷ Section 65(6)(b) of the Act.

¹⁹⁸ Section 65(6)(b)(i) of the Act.

¹⁹⁹ Section 65(6)(b)(ii) of the Act.

²⁰⁰ Section 65(6)(b)(iii) of the Act.

²⁰¹ See note 110 above for an explanation of 'conclusive proof'.

²⁰² Section 65(7) of the Act.

²⁰³ Section 65(9)(a) of the Act.

²⁰⁴ Section 65(9)(b) of the Act.

²⁰⁵ Section 65(8) of the Act.

²⁰⁶ Section 65(10) of the Act.

²⁰⁷ Neuhoff (note 7 above) 345.

claims. EU competition law has not seen many damages awards either, and their law has been in place far longer than that of South African competition law.²⁰⁸ In this respect, a further deterrent to private awards could be the difficulties with instituting a class action. As discussed below, a class action is a collective remedy instituted by a group or class of persons to recover damages where otherwise the size of their individual claims and the cost of obtaining redress would have been prohibitive.

2. Class actions

Section 38 of the Constitution introduced the notion of a class action in general litigation and public interest action into South African law.²⁰⁹ In terms of section 38(c) of the Constitution, a class action or a representative action allows a single person to institute an action on behalf of and in the interest of a group, or class of persons, all having the same cause of action. In a published research report, the South African Law Reform Commission (“the Law Reform Commission”) defines a class action as “a device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter or the suit”.²¹⁰ Whereas class actions in terms of section 38 were primarily intended for the breach of the Bill of Rights,²¹¹ in the landmark case of *Trustees for the time being of the Children’s Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*²¹² (the “*Children’s Resources Centre Trust*”) the Supreme Court of Appeal ruled that the class action may be utilised in ordinary litigation.²¹³

²⁰⁸ See Moodaliyar (note 27 above) 151. See also D Woods, A Sinclair and D Ashton ‘Private enforcement of Community competition law: modernization and the road ahead’ European Commission; Publications; Directorate General Competition, unit A-1 No 2 (2004) *III- Successful private action in Europe to date* Available at: http://ec.europa.eu/competition/publications/cpn/2004_2_31.pdf (Accessed on 15 August 2017). See also V Wahlqvist *Private enforcement in EU competition law- The victim becomes the victor?* (2014) Graduate Thesis, Lund University page 5 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=4451087&fileId=4463461> (Accessed on 15 August 2017). Private enforcement in EU law will be discussed fully in Chapter 4.

²⁰⁹ E Hurter ‘Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure’ (2000) 33 *Comparative and International Law Journal of Southern Africa* 42 42 (Hurter).

²¹⁰ The South African Law Reform Commission *The Recognition of Class Actions and Public Interest Action in South African Law*, August 1998, para 2.3.1.

²¹¹ W Le R. De Vos ‘Is a class action a “classy act” to implement outside the ambit of the constitution?’ (2012) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 737 747.

²¹² *The Children’s Resources Centre Trust* (note 38 above).

²¹³ C Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2015) 112. It is worth mentioning the three major goals of instituting a class action that may be regarded as justification for why class actions are now available in ordinary litigation as well. The first goal being to achieve ‘judicial economy’, by having issues common to numerous members of a group heard in a single action which saves costs and ensures efficiency of process. The second goal is increased access to justice and courts where litigants would normally have faced social or psychological barriers that would have prevented them from litigating. The third goal is ‘behaviour modification’ to deter wrongful behavior on the part of

This case is particularly relevant in the context of this dissertation, as the case originated as a complaint that was referred to the Tribunal. An order by the Tribunal was eventually made in the case of *The Competition Commission v Pioneer Foods (Pty) Ltd.*²¹⁴ The background to this matter was that a complaint was received by the Commission in 2006 which alleged that a bread cartel had been operating in the Western Cape. The Commission subsequently initiated a complaint against Premier foods, Tiger Brands and Pioneer Foods. During the Commission's investigations, two of the respondent's came forward to provide the Commission with information in exchange for leniency and to enter consent orders with the Commission respectively. Pioneer Foods was the only respondent not to co-operate with the Commission or make any attempt to enter into a consent order. During the investigation, Premier foods revealed that all of the firms had been operating a bread cartel in the Western Cape by fixing selling prices and other trading conditions. Premier foods further disclosed that the bread cartel had operated in other parts of the country and that they had also entered into agreements which involved the division of markets by allocating territories.²¹⁵ Based on the information provided, the Commission initiated a second investigation into the allegation that a bread cartel operated in other parts of the country.

In 2007, the Western Cape complaint and in 2008, the national complaint were referred to the Tribunal. The Tribunal found and ordered in the Western Cape and the national complaint that the respondents had acted in contravention of section 4(1)(b)(i) and (ii) of the Act in that they concluded an agreement, or engaged in a concerted practice in terms of which they divided markets amongst themselves.²¹⁶ They were found to have fixed prices, trading conditions, agreed not to poach one another's customers, agreed on discount amounts and to whom discounts may be given and to have determined price increases to be implemented on certain dates, for certain duration amongst other factors.²¹⁷ The total penalty imposed on Pioneer Foods was R195,718,614.00.²¹⁸ In terms of fines imposed on the other respondent's, the Tribunal imposed a fine of R 98,874,869.90²¹⁹ on Tiger Brands and R45,406,359.82²²⁰ on Foodcorp for their roles in the bread cartel.

defendants. E Hurter 'Opting in or opting out in class action proceedings: from principles to pragmatism?' (2017) 50 *De Jure* 60 75 (Hurter 2).

²¹⁴ *The Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/FEB07 ("*Pioneer Foods*").

²¹⁵ *Pioneer Foods* (note 214 above) para 4.

²¹⁶ *Pioneer Foods* (note 214 above) para 174.

²¹⁷ *Pioneer Foods* (note 214 above) para 173 & 174.

²¹⁸ *Pioneer Foods* (note 214 above) para 175.

²¹⁹ *Pioneer Foods* (note 214 above) para 6.

²²⁰ *Pioneer Foods* (note 214 above) para 7.

In respect of the loss of damage sustained as result of the contravention, the Tribunal stated the impact of this contravention as -

“We have already indicated that the damage to competition by Pioneer’s conduct caused harm to consumers in the form of higher prices, less choice and inferior services. Furthermore one must have regard to the fact that the product market pertains to a staple food for millions of South Africans, especially the poorest of the poor and any increases in prices would have a disproportionate impact on this sector. While we cannot determine the total or quantify the extent of the damage accurately, the result of this was that the poorest of all South Africans paid more for their bread than any other person.”²²¹

This aspect of the case then led to a damages action being instituted against the respondent. This was dealt with in the *Children’s Resources Centre Trust* case.²²² As mentioned above, this case dealt with the legal concept and application of class actions in South African law specifically related to a competition complaint. The judgment set out the requirements for a class action. It stated that a party seeking to represent a class must apply to a court for it to certify the action as a class action.²²³ Once the court has done this the party may issue summons. The court that receives such an application must consider and be satisfied of the presence of certain factors before certifying the action. These factors are:

- a) the existence of a class identifiable by objective criteria;
- b) a cause of action raising a triable issue;
- c) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;
- d) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- e) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;
- f) that the proposed representative is suitable to conduct the action and to represent the class;

²²¹ *Pioneer Foods* (note 214 above) para 160.

²²² *The Children’s Resources Centre Trust* (note 38 above).

²²³ See also Hurter (note 209 above) 47.

- g) 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.²²⁴

In defining the class in terms of the requirements, it is not necessary to identify all the members of the class.²²⁵ It is, however, necessary that the class be defined with sufficient precision that a particular individual's membership can be objectively determined by examining their situation in the light of the class definition.²²⁶ Three of the appellants in this case were Non-Governmental Organizations (NGOs) that aid children, the poor and the disadvantaged.²²⁷ The fourth respondent was COSATU and the other five respondents were individuals who were consumers of bread in the Western Cape.²²⁸ The Applicants divided the application for a class action into two classes. Class 1 represented the Western Cape complaint and Class 2 represented the national complaint.²²⁹

The court elected to deal with Class 2 first, as it felt that this Class had not been given an equal amount of attention as Class 1. The court mentioned that the applicants had not originally sought certification in respect of the national claim which comprised of a class consisting of purchasers of bread in Gauteng, Free State, North West and Mpumalanga, where the events giving rise to that complaint occurred. The court stated that there was a lack of evidence with regards to the very diverse class. The court had only the Tribunal's determination in the *Pioneer* case of the conduct that gave rise to the findings of the complaint.²³⁰ Thus there was no evidence as to the effect of that conduct in the marketplace and its impact on the price of bread for consumers. The court mentioned that a sweeping statement of "every consumer who bought their products during the period in question suffered damages", cannot be justified or sufficient in terms of the Tribunal's analysis of the conduct to award damages.²³¹ The court held in terms of Class 2 that: -

²²⁴ *Children's Resources Centre Trust* (note 38 above) page 214, para A.

²²⁵ It should be kept in mind that a class definition is of utmost importance, as it determines class membership. It is vital to define the class correctly as not only will the class action judgment be binding on all the individuals who have been described as members, but it will also determine how the notice to potential members should be framed to inform them of the class action and allow them to remain in the class or to opt out. Hurter 2 (note 213 above) 60.

²²⁶ *Children's Resources Centre Trust* (note 38 above) page 229, para 29.

²²⁷ See note 213 above for the goals of instituting a class action and why such NGO's would likely pursue a class action.

²²⁸ *Children's Resources Centre Trust* (note 38 above) page 219, para 6.

²²⁹ *Children's Resources Centre Trust* (note 38 above) page 221, para 12.

²³⁰ *Children's Resources Centre Trust* (note 38 above) page 238, para 50.

²³¹ *Children's Resources Centre Trust* (note 38 above) page 242, para 60.

“...there was no common issue of fact or law shared by all the members of the class. Consumers who suffered damages as a result of any of the anti-competitive conduct constituting the national complaint did so for varying reasons arising from different conduct in different areas at different times. The cause, nature and extent of those damages are not common to the proposed class. The claim for certification in respect of Class 2 must therefore fail.”²³²

The court subsequently discussed the findings in relation to Class 1 in depth. It identified that Class 1 was the class that caused the application to be brought. The proposed action arose from the coordinated implemented price increases in in the Western Cape by the respondents from December 2006, which formed the cause of action of the consumers.²³³ The appellants in the alternative relied on section 27(1)(b) of the Constitution, in alleging that there had been a breach of a negative obligation not to interfere with the right to sufficient food. The ultimate claim and focus of the case, was that consumers of bread in the Western Cape were obliged to pay more for bread than they would otherwise have done if the bread producers had not engaged in prohibited anti-competitive conduct. One of the respondents challenges to the claim was that there was no evidence of loss suffered by the consumer arising out of the anti-competitive conduct.²³⁴

While considering the parties arguments, the court acknowledged that there were two possible reasons why it should not make the order requested.²³⁵ Firstly, the courts concern’s over the definition of the potential class and secondly, the proposed remedy. The court mentioned that the class had been stated too broadly to include all consumers of bread in the Western Cape. It further stated that institutions such as schools, prisons and hotels would have to be excluded from the proposed class.²³⁶ Wallis JA stated that ‘if one takes all these factors into consideration I do not think that it is necessarily impossible for the appellants to define the class they wish to represent with the degree of clarity that is required’.²³⁷ In the present matter an initial argument for bringing the case was because the poorest of the poor had been exploited. For this reason, income bands used by economists

²³² *Children’s Resources Centre Trust* (note 38 above) page 242, para 61.

²³³ *Children’s Resources Centre Trust* (note 38 above) page 242, para 62.

²³⁴ *Children’s Resources Centre Trust* (note 38 above) page 243, para 65.

²³⁵ *Children’s Resources Centre Trust* (note 38 above) page 247, para 76.

²³⁶ *Children’s Resources Centre Trust* (note 38 above) page 247, para 77.

²³⁷ *Children’s Resources Centre Trust* (note 38 above) page 247, para 79.

and statistics could have been used to determine which consumers were likely to have bought standard brown or white bread during the period.²³⁸

The court then went on to discuss a remedy. The appellants put forward that they would put the money received from the award into a trust that would be used to benefit bread consumers through feeding schemes. However, it was pointed out that such action could ultimately not benefit those who suffered at all.²³⁹ The appellants proposed to prove the claim and not pay the damages to the members of the class as it would be impractical to distribute to the members of the class. Thus the damages should be awarded *cy-près*,²⁴⁰ in a manner that is as near as possible to a direct distribution. The court stated that this was an impermissible remedy in its opinion.²⁴¹ The court proposed to extend existing principles of law governing damages along the lines suggested in a paper published by the Law Commission.²⁴²

The court proceeded to state that the action in this matter was based on a claim to recover damages suffered by the members of the class. So where the damages are all of the same nature, which was the case in this matter as consumers were unlawfully forced to pay more for bread, the damages can be computed on an aggregate basis using established statistical methods.²⁴³ Once an aggregate damages amount is calculated, the next step would be for the appellants to identify the mode of distribution that will serve as a surrogate for the distribution directly to individuals of the amount of their loss. Such methods suggested by the court included a method of a targeted price reduction for a period, or by way of distribution that can be shown to benefit, directly or indirectly the members of the class.²⁴⁴

²³⁸ *Children's Resources Centre Trust* (note 38 above) page 247, para 78.

²³⁹ *Children's Resources Centre Trust* (note 38 above) page 248, para 80.

²⁴⁰ 'The doctrine of *cy-près*, meaning "as near as", originated in the law of wills and charitable trusts to give effect to a testator's or settlor's intent in making charitable gifts. When a fund dedicated to a charitable purpose becomes impossible or impractical to be applied, *cy-près* permits the court to direct the funds to be applied instead to another charitable purpose that approximates "as nearly as possible" the settlor's original intent. *Cy-près* therefore comes to class actions by analogy. The equitable doctrine is now permitted by statute in all Canadian jurisdictions and is frequently applied in the settlement of class actions where the identification of eligible class members or distribution of damages would be prohibitively expensive relative to the sums being distributed.' J Kalajdzic 'The "illusion of compensation": *cy près* distributions in Canadian class actions' (2013) 92 *The Canadian Bar Review* 173 176. Wallis JA, at paragraph 81, mentioned that distribution by a *cy-près* award would be a novel development in our law. He further added that the doctrine had been applied only to a limited extent in other jurisdictions, such as the USA and Canada. (W Le R. De Vos 'Judicial activism gives recognition to a general class action in South Africa' (2013) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 370 379).

²⁴¹ *Children's Resources Centre Trust* (note 38 above) page 250, para 85.

²⁴² The Law Reform Commission *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) para 5.38.

²⁴³ *Children's Resources Centre Trust* (note 38 above) page 251, para 86.

²⁴⁴ *Children's Resources Centre Trust* (note 38 above) page 251, para 87.

The court then concluded its finding in respect of Class 1. It held that the appellants had shown that there is a potentially viable claim for delictual damages vested in a class of consumers. The claim was not regarded as good in law or having sufficient evidence to prove a *prima facie* case. However, the claim was not legally untenable. The claim was defined in an over broad manner but was capable of a more precise definition.²⁴⁵ Finally it was held that the appeal must succeed in relation to Class 1 and that the matter be referred back to the High Court to be dealt with in accordance with the requirements of the current judgment.²⁴⁶

This landmark case²⁴⁷ thus indicated that class actions are permissible in our law outside of the parameters of a Bill of Rights infringement, if the steps and certification procedures set out in the above case are followed. However, a class action in a competition matter as above, may be a challenging case to prove as a certain amount of clarity is required in firstly defining the class who suffered damages and secondly on how these individuals will be compensated.

3. Barriers to private enforcement

There appear to be far more barriers to bringing a successful complaint via the mechanisms of private enforcement than there are to public enforcement remedies. This is partly attributable to the fact that the Act's main objective is to protect the public interest as a whole and South Africa's competitive markets. An individual's claim, brought to the Commission for its own personalised motives, will logically come second to the overall purpose of the Act. It may be argued that the purpose of the Act does aim to protect and promote consumer welfare, however, this protection is aimed at all South Africans. It may happen that private enforcement remedies and actions will only benefit a limited amount of South African citizens. From the Act, it is clear that the overall purpose and intention of the Act is to benefit the citizens of South Africa as a whole. The Act provides substantially less actions and

²⁴⁵ *Children's Resources Centre Trust* (note 38 above) page 252, para 88.

²⁴⁶ *Children's Resources Centre Trust* (note 38 above) page 253, para 91.

²⁴⁷ Authors such as De Vos have remarked on the importance of this case and the findings made therein and have stated that 'the unanimous judgment of the court in this case must be lauded as a major breakthrough in the development of our procedural law... Wallis JA enunciated a clear set of principles, which constitutes a comprehensive framework within which class actions are to be conducted in future. It is generally accepted that class actions are an important means of providing access to justice for people who are incapable of asserting their own rights, due to ignorance and/or impecuniousness.' W Le R. De Vos 'Judicial activism gives recognition to a general class action in South Africa' (2013) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 370 380.

remedies to be used in private enforcement and how to pursue a damages claim is summed up in a single section, section 65. There is also scant case law that sets precedent, making private enforcement more appealing to pursue.

Other barriers relate to aspects such as obtaining a section 65 certificate and consent orders that do not include an award of damages or an acknowledgment of liability. As mentioned above,²⁴⁸ when the Commission and a respondent intend to enter into a settlement agreement, as a rule,²⁴⁹ the Commission informs the complainant of the settlement agreement. The complainant may then consent to the order including a damages award. The complainant is also allowed to meet with the Commission and Tribunal to put forward its propositions for the amount of damages it seeks.²⁵⁰ However, the Commission and Tribunal are not bound by such representations and the Tribunal is vested with the final decisions of what terms are confirmed. Thus, through consent orders the complainant has very little bargaining power relating to quantum of the amount. In addition to this, it has been shown that consent orders do not have to include an admission of liability.²⁵¹ This in turn means that if an award of damages is not confirmed in a consent order and there is no admission of liability, the complainant must still go through the process of obtaining a section 65 declaration from the Tribunal in order to approach a civil court for a damages award. It could be argued that a requirement of consent orders should be the inclusion of an admission of liability, as this would allow the Tribunal to automatically issue a section 65 declaration when confirming the consent order.²⁵²

In addition to this, there are further challenges related to the damages aspect of private enforcement. These include the normal challenges of pursuing litigation in South African civil courts, such as the costs related to instituting and running a trial, as well as the uncertainty of whether the final decision will be in the plaintiff's favour or not. Bringing a claim for damages and obtaining a court date is time consuming and litigants are often deterred by the fact that a set down matter may not be heard due to a lack of availability of Judges on the date of hearing. As was illustrated above, organising a class of plaintiffs can

²⁴⁸ See paragraph 1.1 Settlement agreements and consent orders above.

²⁴⁹ Rule 18(1) of the Commission Rules.

²⁵⁰ See paragraph 1.1 Settlement agreements and consent orders above.

²⁵¹ As above. However, as discussed above, in practice it is common for the Commission and Tribunal to insist on an admission of liability. See Sutherland & Kemp (note 17 above) pages 11-58 to 11-60 for a discussion on the consequences of an admission and non-admission of liability in a consent order.

²⁵² However, as mentioned above, the Commission and Tribunal normally insist on an admission of liability. In addition to this, most consent orders made by the Tribunal seem to already include an admission of liability and a declaration of what sections of the Act have been contravened.

be problematic and the requirements of class actions must be met. The consumers who suffer a loss are often indigent persons who cannot afford litigation and further do not understand the procedure of bringing a claim. In fact, it would seem as if the general public is unaware of the potential private enforcement action and remedies available to them in terms of the Act and that they can in principle pursue a further damages claim.

4. The possibility of strengthening the relationship between private and public enforcement

It seems that the active promotion of a more competitive economic environment is fundamental to protect and develop industries, markets and consumers exposed to these industries and markets. It is however, submitted that private enforcement can help to achieve such an objective. In countries such as the EU and the USA, damages claims have been perceived as another form of effective private enforcement in competition law cases.²⁵³ These claims can serve as a greater deterrent to offenders of anti-competitive behavior who will not only have to fear administrative penalties but also the likelihood of damages awards.

5. Case law: *Nationwide v SAA*

The first two competition damages claims to be heard in South African civil courts, were the claims against SAA by Nationwide Airlines and Comair Limited. Both Nationwide and Comair claimed damage suffered as a result of abuse of dominance by SAA.²⁵⁴ The case of Nationwide is the first time in South African competition law history that a damages claim based on a finding of the Tribunal has been litigated.²⁵⁵ In order to discuss the *Nationwide v SAA* damages case as heard by the High Court Gauteng Local Division, it is necessary to first provide a background and information relating to the Tribunal's findings and order.

²⁵³ Moodaliyar (note 27 above) 149.

²⁵⁴ Neuhoff 2017 (note 113 above) 520.

²⁵⁵ Competition Annual Review *A focus on competition law developments in South Africa and the rest of Africa- reflecting on the year that was, and considering the year ahead* (2016) (Competition Annual Review) 3.

5.1 The Tribunal's findings and order

5.1.1 Introduction and background

In the introduction of the *Commission v SAA* case heard by the Tribunal,²⁵⁶ the Tribunal stated that the case concerned the legality of two incentive schemes, which SAA (the largest domestic airline in the country), had with travel agents. On 13 October 2000 Nationwide lodged a complaint with the Commission against SAA. Nationwide was one of SAA's domestic rivals and the complaint was confined to the domestic market. Nationwide alleged in its complaint that SAA was trying to exclude competitors from the domestic market by engaging in a number of prohibited practices specifically prohibited under the Act. Nationwide alleged that four anti-competitive practices were being conducted: firstly that SAA was engaged in predatory pricing;²⁵⁷ secondly SAA was poaching key staff from Nationwide; thirdly that SAA had concluded agreements with travel agents in terms of which the travel agents would receive commission on an incremental basis that had an exclusionary effect; and fourthly, SAA had a reward scheme for employees of travel agents known as 'Explorer', which also had an exclusionary effect.²⁵⁸

These four claims formed the subject matter of an interim relief application. This application was however, unsuccessful. Although the reasons for the unsuccessful interim application are fully discussed in the Tribunal's decision in *Nationwide Airlines (Pty) Ltd and Others v South African Airways (Pty) Ltd and Others*,²⁵⁹ the main reason for the application being unsuccessful was because the incentive schemes, which are at the heart of the application, were only alluded to in passing.²⁶⁰ The Tribunal held that assumptions and suppositions were not sufficient to justify a finding in favour of Nationwide against SAA.²⁶¹ The Tribunal required a proper market analysis to be conducted by the Commission in this regard.

The Commission thereafter concluded its investigation and referred the complaint to the Tribunal on the 18th of May 2001. The Commission only elected to rely on two of the alleged

²⁵⁶ *Commission v SAA* (see note 190 above) para 1.

²⁵⁷ "Predatory pricing is the practice where a dominant firm charges below cost or very low prices for its products, with the aim of excluding or weakening competitors or deterring new entrants from entering the market." (N Mackenzie & N Harten 'Is uber's price predatory?' (2015) 15 *Without prejudice* 6).

²⁵⁸ *Commission v SAA* (see note 190 above) para 2.

²⁵⁹ *Nationwide Airlines (Pty) Ltd and Others v South African Airways (Pty) Ltd and Others* 92/IR/Oct00 (*Nationwide & Others v SAA*).

²⁶⁰ *Commission v SAA* (see note 190 above) para 3.

²⁶¹ *Nationwide & Others v SAA* (note 259 above) page 16.

practices. These practices related to the incentive schemes for travel agents and the Explorer Scheme.²⁶² The Tribunal stated that while the case was associated with Nationwide, it was not confined to it. The Commission amended its complaint to the alleged exclusionary effects of the scheme on the complainant and “other competitors”. The only other competition at the time was Comair Limited.²⁶³

According to the Commission’s investigation, the abuse commenced in April 1999 and by December 2004 (at the end of the hearing), the practice was still believed to be continuing. However, there was no consistent evidence throughout any period of the practice. Information was collected at different times during the long life of the case and earlier information was not updated.²⁶⁴ The Tribunal elected to focus on the nature of the schemes, which changed over time, and confined the period to October 1999 to May 2001 (“the relevant period”).

5.1.2 Synopsis of the Tribunals approach

The Tribunal provided that its approach to the case was that it would first examine the operation of the two schemes at issue. It would then examine the theory provided by the Commission and SAA’s response to it. Following this, the Tribunal would discuss the elements required to prove a contravention. Such elements included analysing the relevant markets, considering SAA’s dominance in the market and the abuse in the market. Thereafter, a remedy would be decided on.

5.1.3 The merits

5.1.3.1 The incentive schemes

The airlines competing in the domestic market at the time all made use of travel agents’ services to sell domestic tickets, for which they paid by way of commission. Travel agents received a standard basic commission. At a certain stage prior to the relevant period, airlines began introducing an override incentive scheme for paying commission.²⁶⁵ SAA’s override scheme operated so that agents received a flat basic commission for sales up to a target figure. If they exceeded the target figure, they became eligible for two further types of

²⁶² *Commission v SAA* (see note 190 above) para 4.

²⁶³ *Commission v SAA* (see note 190 above) para 5.

²⁶⁴ *Commission v SAA* (see note 190 above) para 7.

²⁶⁵ *Commission v SAA* (see note 190 above) para 13.

commission, override commission and incremental commission. Override commission was an additional commission paid if the agent met and exceeded its target.²⁶⁶ Incremental commission became relevant if the travel agent earned a certain percentage of sales above target.²⁶⁷ In October 1999, SAA adopted a more aggressive approach to the override scheme. SAA wanted more than generic growth that came about by inflation, as opposed to an increase in sales.²⁶⁸ To achieve this goal, SAA reduced agent's basic commission from 9% to 7%. It thereafter made the attainment of override and incremental commission more challenging by raising targets and the point at which incremental commission became payable. SAA further increased the rate of the incremental and override commission. To retain their profitability, the agents would have to exceed their targets, but also exceed them by a margin to take advantage of the commission schemes.²⁶⁹

5.1.3.2 The Explorer Scheme

The Explorer Scheme rewarded individual agents with free international tickets based on them achieving SAA's sales targets.²⁷⁰ This scheme can be distinguished from the override scheme in that the Explorer Scheme was directly targeted at the employees of the agencies. SAA was the only domestic airline offering this kind of incentive to agents.²⁷¹ A further aspect of the Explorer Scheme was that there was a bonus pool that allocated points to an agency as a whole, based on its sales.²⁷²

5.1.3.3 The Commission's case

The Commission identified two relevant markets. Firstly, the market for domestic scheduled airline travel and secondly, the market for South African travel agency sales of domestic scheduled air travel in South Africa. SAA was dominant in both of these markets.²⁷³ The effect of SAA's incentive schemes was that it induced travel agents to sell more SAA tickets when they had the opportunity to, in order to receive more commission for the agency as a whole and on a personal employee level. The travel agents were in a position of power to influence customers to purchase SAA tickets as ticket prices are so volatile that they are not transparent to customers and hence the customers were more willing to rely on the agents'

²⁶⁶ *Commission v SAA* (see note 190 above) para 15.

²⁶⁷ *Commission v SAA* (see note 190 above) para 16.

²⁶⁸ *Commission v SAA* (see note 190 above) para 20.

²⁶⁹ As above.

²⁷⁰ *Commission v SAA* (see note 190 above) para 21.

²⁷¹ *Commission v SAA* (see note 190 above) para 22.

²⁷² *Commission v SAA* (see note 190 above) para 23.

²⁷³ *Commission v SAA* (see note 190 above) para 25.

advice.²⁷⁴ SAA's competitors could not compete with these incentive schemes and thus the agents had no incentive to promote any other domestic airline. This led to two competitive harms. Firstly, consumers could have unknowingly been buying more expensive tickets and flying at less preferable times. Secondly, SAA was able to perpetuate its dominance and to restrict new entry into the market while inhibiting its existing competitors from expanding.

SAA attempted to wear down the Commission's case. SAA disputed almost every finding that the Commission made. SAA disputed the defined market, denied it was the dominant firm, contested the notion that travel agents have the inclination or ability to move passengers away from competitors and disputed the effect of its benefit schemes. Ultimately SAA alleged that the Commission had proved no causal nexus between the schemes and the expansion of SAA in the market and that there was a failure to show any harm to consumers.²⁷⁵

5.1.3.4 Findings on the merits

In terms of the relevant market, the Tribunal pointed out that the case dealt with the relationship between two possible relevant markets. It stated that the fact that more than one market can be implicated in an abuse case is not novel to competition law, as cases in the EU have articulated these possibilities.²⁷⁶ The first relevant market was found to be the market for the purchase of domestic airline ticket sales services from travel agents in South Africa.²⁷⁷ From the sales statistics of the domestic airlines competing between July 2000 to June 2001, SAA was clearly dominant as it accounted for 65,7% of the sales, of which 69% of sales were through travel agents.²⁷⁸

The second relevant market was held to be the market for domestic scheduled airline travel.²⁷⁹ The dominance of SAA in the second relevant market was the most contested aspect of this case. The Commission sought to establish the fact that SAA was presumptively dominant in the market for domestic airline travel by making use of data on ticket sales revenue.²⁸⁰ The Tribunal felt that the Commission had sufficiently demonstrated

²⁷⁴ *Commission v SAA* (see note 190 above) para 26.

²⁷⁵ *Commission v SAA* (see note 190 above) para 30.

²⁷⁶ *Commission v SAA* (see note 190 above) para 35.

²⁷⁷ *Commission v SAA* (see note 190 above) para 44.

²⁷⁸ *Commission v SAA* (see note 190 above) para 45-46.

²⁷⁹ *Commission v SAA* (see note 190 above) para 56.

²⁸⁰ *Commission v SAA* (see note 190 above) para 59.

that SAA's market share was well over 45% in this market, thus making SAA presumptively dominant. The Tribunal noted that despite SAA raising evidence to dispute their dominance in this market, once a firm's market share exceeds the 45% threshold it is presumed to be dominant in terms of section 7(a), which states categorically that a firm is presumed dominant if it has 45% of the market.²⁸¹

Having found that SAA was dominant in the two markets, the Tribunal then turned to whether the Commission had established that SAA had abused its dominant position.²⁸² The Commission alleged that SAA's Explorer Scheme was a contravention of section 8(d)(i) or in the alternative, section 8(c). These sub-sections both refer to 'exclusionary acts', which are defined as 'an act that impedes or prevents a firm from entering into, or expanding within, a market'.²⁸³ One of the main differences between the sections is that section 8(d) places the onus of proof of the efficiency justification on the respondent, while section 8(c) places the onus to negate the efficiency justification on the complainant. Therefore, section 8(c) places a greater evidentiary burden on the complainant.²⁸⁴ Another difference that has an effect on the remedy imposed is that section 8(d) is regarded as a *per se* contravention, while section 8(c) is treated in the same way as other rule of reason contraventions.²⁸⁵ The Tribunal held that on a balance of probabilities, the practical effect of the schemes was that they induced suppliers not to deal with SAA's competitors and therefore, constituted an exclusionary act in terms of section 8(d)(i).²⁸⁶ Further, it was held that the Explorer Scheme contributed to the anti-competitive effects of the scheme.²⁸⁷

5.1.4 The remedy

The Commission initially sought four remedies: a behavioural remedy, an administrative penalty, a declaration that the conduct constituted a prohibited practice and an order declaring the relevant provision of the explorer or override schemes to be declared void.²⁸⁸

²⁸¹ *Commission v SAA* (see note 190 above) para 87. Section 7 of the Act provides as follows 'A firm is dominant in a market if- (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can be shown that it does not have *market power*, or (c) it has less than 35% of that market, but has *market power*.'

²⁸² *Commission v SAA* (see note 190 above) para 95.

²⁸³ Section 1(1) of the Act.

²⁸⁴ *Commission v SAA* (see note 190 above) para 99.

²⁸⁵ As above.

²⁸⁶ *Commission v SAA* (see note 190 above) para 218.

²⁸⁷ *Commission v SAA* (see note 190 above) para 258.

²⁸⁸ *Commission v SAA* (see note 190 above) para 260. The Commission later abandoned its proposal for a behavioural remedy.

The Tribunal held that it was not appropriate to void specific clauses in the Explorer Scheme and the override scheme.²⁸⁹ The reason behind this was that the Commission failed to give any particulars regarding the clauses of the schemes and what specific provisions should be declared void. The Tribunal further supported its finding by stating that it did not know who the agreements were concluded with, no other parties had been joined and if such an agreement was to be declare void, other parties with an interest should be heard.²⁹⁰

In terms of the administrative fine, because SAA was found guilty of contravening section 8(d)(i) of the Act, the Tribunal was competent to impose an administrative penalty on them. In terms of section 59 of the Competition Act an administrative penalty may not exceed 10% of the annual turnover in the Republic for the firm's preceding financial year.²⁹¹ The Tribunal elected to use the base year of June 2000 to May 2001.²⁹² The Commission relied on SAA's turnover in the affected market for the duration. This amount came to R2,022,124,775.00. The Tribunal eventually imposed a final administrative penalty of R45 million.

The Tribunal also made a declaration that the conduct of SAA was a prohibited practice in contravention of section 8(d)(i) of the Act.

5.2. Damages claim in the High Court

5.2.1 Introduction

By virtue of the declaration made by the Tribunal, Nationwide received a certificate in terms of section 65(6)(b) of the Act from the Chairperson of the Tribunal.²⁹³ This certificate certified that the conduct forming the basis of the damages claim has been found to be a prohibited practice in terms of the Act.²⁹⁴ With this irrefutable confirmation of the contravention of the

²⁸⁹ *Commission v SAA* (see note 190 above) para 269.

²⁹⁰ As above.

²⁹¹ *Commission v SAA* (see note 190 above) para 270.

²⁹² *Commission v SAA* (see note 190 above) para 271.

²⁹³ Section 65(6) provides as follows 'A person who has suffered loss or damage as a result of a *prohibited practice*- (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed form*- (i) certifying that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *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.'

²⁹⁴ Ratz (note 42 above) 34.

Act, Nationwide was able to pursue a damages claim in the High Court of South Africa. As an introduction to the case, it is mentioned that this matter dealt with a delictual claim,²⁹⁵ the first of its kind, arising out of the anti-competitive practices of SAA.²⁹⁶ The High Court laid its basis by setting out the complaints which formed the subject matter of the case, and culminated in the decision of the Tribunal as handed down on 17 February 2010.²⁹⁷ The decision being, that SAA's conduct constituted a prohibited practice in terms of section 8(d)(i) of the Act, SAA was dominant in the market and that SAA's incentive schemes had an anti-competitive effect in the market.²⁹⁸ Nationwide claimed that SAA's conduct caused it a loss in profit amounting to R170 million.²⁹⁹ SAA disputed that any loss was caused at all, but pleaded that if it was found that its conduct caused loss to Nationwide, the maximum amount payable for the loss should amount to R20 million.³⁰⁰ The High Court went on to fully discuss the findings of the Tribunal.³⁰¹ It indicated that the findings of the Tribunal were upheld by the CAC, and that the High Court was bound to regard the certificate issued by the Tribunal as conclusive proof of its contents.³⁰²

5.2.2 Issues before the High Court

An agreement was reached that the relevant period of the damages claim was 1 June 2001 to 31 March 2005, and for all intents and purposes delictual liability had been admitted.³⁰³ While SAA disputed causation, its dispute was not related to the merits of the case, but rather to the quantum of the loss. SAA's view was that if any loss was sustained, it was unrelated to SAA's uncompetitive conduct.³⁰⁴ SAA alleges that Nationwide suffered a loss due to how their company was perceived to be operated and managed.³⁰⁵ Thus the central focus of the case was the quantification of the damages, if any, to be awarded to

²⁹⁵ A delict can be defined as "the act of a person that in a wrongful and culpable way causes harm to another" (J Neethling *et al* (ed) *Law of Delict* (2010) (6th Edition) page 4).

²⁹⁶ While the introductory statement made by Nicholls J may seem insignificant, it is relevant to note that this statement puts to rest a debate of whether such a claim would be delictual or statutory in nature. The debate regarding whether the nature of the damages action would be delictual or statutory was raised in the *Children's Resources Centre Trust* (note 38 above) case. The debate has now been settled by Nicholls J, and the nature of this damages claim is that of a delictual claim (Ratz (note 42 above) 34).

²⁹⁷ *Nationwide v SAA* (note 41 above) para 4.

²⁹⁸ As above.

²⁹⁹ *Nationwide v SAA* (note 41 above) para 2.

³⁰⁰ As above.

³⁰¹ *Nationwide v SAA* (note 41 above) paras 5 - 11. For a discussion on the findings of the Tribunal, see paragraph 5.1 above.

³⁰² *Nationwide v SAA* (note 41 above) para 10.

³⁰³ *Nationwide v SAA* (note 41 above) para 12.

³⁰⁴ As above.

³⁰⁵ *Nationwide v SAA* (note 41 above) para 13.

Nationwide.³⁰⁶ In order to properly quantify the potential loss suffered by Nationwide, expert witnesses in aviation economics were required to assist the court and to prepare reports. Nationwide sought the services of Robin Noble (“Noble”), from Oxera Consulting LPP (“Oxera”) and SAA sought the services of Luisa Affuso (“Affuso”), from PricewaterhouseCoopers (“PwC”).³⁰⁷

5.2.3 Background of SAA’s incentive schemes

As indicated above, SAA introduced an incentive scheme in the 1990s whereby travel agents were paid a standard commission of 7% for each ticket sold.³⁰⁸ The Tribunal referred to these agreements as ‘the first-generation agreements’. The commission was a flat-rate commission deducted by the travel agent and the remainder of the value of the ticket revenue was forwarded to the airline through the Billing and Settlement Plan (“BSP”) of International Air Transport Association (“IATA”). BSP is differentiated from ‘flown revenue’ which is the revenue received once a passenger has flown opposed to having merely bought a ticket.³⁰⁹ BSP represents the revenue of tickets sold through travel agents while flown revenue is the rand value of revenue generated from all tickets.³¹⁰ Historically, the standard commission received by travel agents constituted a major portion of their remuneration.

SAA further introduced new incentive agreements, ‘second-generation agreements’, in October 1999. This new agreement applied across all of its domestic flights in the country between October 1999 to May 2001.³¹¹ These second-generation agreements consisted of override incentive agreements coupled with the Explorer Scheme that rewarded individual travel agents with free international tickets and the allocation of bonus points to their agency for tickets sold.³¹² The override commission included conditions relating to the first sale made by the agent and incremental commission based on sales above target.³¹³ Nationwide’s first complaint was made in July 2005, against SAA’s conduct as aforementioned. As pointed out above, the Tribunal found that SAA’s second-generation agreements contravened section 8(d)(i) of the Competition Act due to the effect that the

³⁰⁶ *Nationwide v SAA* (note 41 above) para 14.

³⁰⁷ As above.

³⁰⁸ *Nationwide v SAA* (note 41 above) para 15.

³⁰⁹ *Nationwide v SAA* (note 41 above) para 16.

³¹⁰ As above.

³¹¹ *Nationwide v SAA* (note 41 above) para 17.

³¹² As above.

³¹³ *Nationwide v SAA* (note 41 above) para 18. For further detail on the override commission, see paragraph 18.

scheme was diverting passengers from rival airlines to SAA.³¹⁴ The Tribunal found that the scheme constituted an abuse of dominance that was foreclosing competitors from the market and reinforcing its own dominance.³¹⁵

The 'third-generation agreements', which are the subject matter of this case, were introduced on 1 June 2001 and were enforced until 31 March 2005.³¹⁶ The third-generation agreements were similar to the second-generation agreements and consisted of override agreements and TRUST payments.³¹⁷ Travel agents were compensated at the flat-rate commission until the target revenues were reached, once the target was reached they received a commission calculated on a 'back to rand one' basis in addition to the basic commission.³¹⁸ The main difference from the previous agreements was that the incremental commission was flattened so that the incentive rate remained the same for all sales exceeding the base.³¹⁹ This agreement induced travel agents to exceed their targets in order to be rewarded, which ultimately increased SAA's number of passengers. The computation of achieved targets was on the basis of flown revenue rather than BSP figures.³²⁰ The commission paid by SAA in accordance with the second- and third-generation agreements were paid over and above BSP commission paid for each ticket sold.³²¹

In 1997, SAA formed an alliance with South African Airline ("SAL") and South African Express ("SAX").³²² SAA's incentive and TRUST agreements were also subject to the routes of these two airlines. TRUST payments were made in addition to the domestic-override incentives and were intended to compensate travel agents for the flat commission after reaching their targets. TRUST payments were lump-sum payments to travel agents for achieving their objectives.³²³ In November 2004, SAA announced that travel agents would receive no commission, no overrides and no corporate deals as from 1 April 2005. This decision saw an immediate diversion of passengers away from SAA.³²⁴ After the

³¹⁴ *Nationwide v SAA* (note 41 above) para 19.

³¹⁵ As above.

³¹⁶ *Nationwide v SAA* (note 41 above) para 20.

³¹⁷ As above. 'TRUST' was an acronym introduced by SAA that stood for 'True partnership; Respect rules; United focus; Support; Training.'

³¹⁸ *Nationwide v SAA* (note 41 above) para 21.

³¹⁹ As above.

³²⁰ *Nationwide v SAA* (note 41 above) para 24.

³²¹ *Nationwide v SAA* (note 41 above) para 25.

³²² *Nationwide v SAA* (note 41 above) para 24.

³²³ *Nationwide v SAA* (note 41 above) para 26.

³²⁴ *Nationwide v SAA* (note 41 above) para 27.

announcement and the travel agents decision to move their discretionary bookings to other airlines, there was also an exponential growth in the use of low-cost carriers (“LCCs”).³²⁵

5.2.4 Background on Nationwide Airlines

After the court gave a history of SAA’s incentive agreements,³²⁶ it gave a background on what it called the ‘rise and fall of Nationwide Airlines’.³²⁷ Nationwide flew its maiden flight on 5 December 1995.³²⁸ Nationwide had a single shareholder and CEO, Vernon Bricknell (“Bricknell”).³²⁹ Bricknell established a charter business in the mid-70s which became known as Nationwide Air Charter (“Charter”), and eventually funded Nationwide Airlines.³³⁰ Nationwide’s aircrafts were purchased by Charter, which leased the aircraft to Nationwide.³³¹ Nationwide had its own ground-handling service and did its own maintenance. As Nationwide grew, more routes were included into its flight plan. From 2001 to 2003, the airline was flying Durban to Cape Town, Johannesburg to Port Elizabeth and Port Elizabeth to Durban.³³² Nationwide’s golden routes and most profitable flights, were the flights between Johannesburg and George; Johannesburg to Cape Town and Johannesburg to Durban.³³³ Like most domestic airlines, Nationwide provided for leisure and business class passengers, time and non-time sensitive passengers.³³⁴ Nationwide strove to achieve a unique onboard customer experience and put emphasis on the training of its staff. For this reason Nationwide hired Roger Whittle (“Whittle”), a Canadian who specialised in cabin safety and was pivotal in drawing up the Canadian safety regulations and applying them in South Africa at a time when there was little regulation.³³⁵ Whittle climbed the ranks and eventually ran Nationwide alongside Bricknell and the head of finance, Peter Griffiths (“Griffiths”).³³⁶

After SAA terminated its override incentive in 2004, there was a surge in passenger numbers away from SAA to Nationwide as travel agents shifted their discretionary business to

³²⁵ *Nationwide v SAA* (note 41 above) para 29. The LCCs made their entry into the South African airline industry in the early 2000s. Examples of these LCCs are Kulula and 1Time. See paragraph 30 of the judgment for further details on these LCCs.

³²⁶ *Nationwide v SAA* (note 41 above) para 15-30.

³²⁷ *Nationwide v SAA* (note 41 above) para 30.

³²⁸ *Nationwide v SAA* (note 41 above) para 31.

³²⁹ As above.

³³⁰ *Nationwide v SAA* (note 41 above) para 32.

³³¹ *Nationwide v SAA* (note 41 above) para 33.

³³² *Nationwide v SAA* (note 41 above) para 34.

³³³ As above.

³³⁴ *Nationwide v SAA* (note 41 above) para 35.

³³⁵ *Nationwide v SAA* (note 41 above) para 36.

³³⁶ *Nationwide v SAA* (note 41 above) para 37.

Nationwide.³³⁷ This resulted in a significant improvement to Nationwide's fortunes. The court pointed out that it should be kept in mind that the passenger numbers moving over to Nationwide only accounted for 2% of SAA's passengers.³³⁸ The increase of passengers was sustained through to 2005, with a decline in 2006.³³⁹ The court stated that it is worth noting that during this period, Nationwide made no substantial changes such as adding new routes and no new airline entered the market. Based on this, Nationwide submitted that the reason for growth was due to the shift in discretionary business as a result of SAA terminating its override agreements.³⁴⁰ From early-2005, Nationwide's passenger numbers grew. Nationwide eventually entered into its own override agreements with travel agents, but decided to lower the commission rate from 7% to 1% in late-2005 after it was discovered that travel agents were charging a booking fee when receiving their override commission.³⁴¹ Unbeknown to Nationwide, SAA implemented an amended override scheme at the time, which ultimately further caused a decrease in Nationwide's passenger numbers.³⁴²

After its successful raise in passenger numbers, Nationwide won awards in 2005 and 2006 for best domestic airline as well as successfully completing an International Air Transport Association ("IATA") Operational Safety Audit ("IOSA")³⁴³ in July 2006.³⁴⁴ Notwithstanding its achievements, the separation of an engine from one of its Boeing's on take-off from Cape Town saw the decline of Nationwide's business. There was dispute to the reason for the engine separation from the wing, Nationwide's mechanics alleging it occurred due to an unforeseeable once-off event while the Civil Aviation Authority ("CAA") alleged it was due to poor maintenance.³⁴⁵ Subsequent to an investigation to the cause of the separation, an emergency airworthiness directive ("AD") was issued to ground all Boeing 737s to investigate whether the fault existing in Nationwide's aircraft existed in other models.³⁴⁶ From the CM investigation, serious maintenance problems were identified in Nationwide's

³³⁷ *Nationwide v SAA* (note 41 above) para 38.

³³⁸ *Nationwide v SAA* (note 41 above) para 39.

³³⁹ *Nationwide v SAA* (note 41 above) para 38.

³⁴⁰ *Nationwide v SAA* (note 41 above) para 39.

³⁴¹ *Nationwide v SAA* (note 41 above) para 40.

³⁴² As above.

³⁴³ IATA is an association that requires that its members conduct and successfully complete an Operational Safety Audit (IOSA). The IOSA program is an internationally recognised and accepted evaluation system designed to assess the operational management and control systems of an airline (www.iata.org, (2017) IOSA). Completing the IOSA safety audit is a prerequisite for IATA membership and is globally accepted as the benchmark for airline safety (*Nationwide v SAA* (note 41 above) para 41).

³⁴⁴ *Nationwide v SAA* (note 41 above) para 41.

³⁴⁵ *Nationwide v SAA* (note 41 above) para 42.

³⁴⁶ *Nationwide v SAA* (note 41 above) para 43.

aircraft in mid-to-late 2007 which caused the CM to ground Nationwide's entire fleet on 30 November 2007.³⁴⁷ On 29 April 2008, Nationwide went into liquidation.³⁴⁸ The court heard evidence from employees in the industry at the time when Nationwide's fleet was questioned as being an ageing fleet. However, from the evidence, the witnesses said that while Nationwide may have been perceived to have an ageing fleet, the same perception existed regarding SAA's fleet and Nationwide was still regarded as a fierce competitor in the market.³⁴⁹ Following this, the court remarked that the public perception of Nationwide's fleet and maintenance would not have had an impact on its passenger numbers. In fact, the engine separation occurred eighteen months after the end of the abuse period.³⁵⁰

It must be noted that both the Tribunal and the CAC acknowledged that Nationwide's safety record and financial difficulties may have been to blame for its drop in market share during the relevant period. However, SAA's abusive conduct was the major cause of the decrease in volume of Nationwide's passenger volume.³⁵¹

5.2.5 Damages

The court indicated that any damage that Nationwide may have suffered would amount to its lost profit over the relevant period. It stated that it is common cause that to calculate the damages, a comparison would need to be made of the actual situation in the relevant markets with the hypothetical position/counterfactual scenario in the same market without the abuse of dominance.³⁵² Put simply, the lost profit is the difference between what Nationwide would have earned but for SAA's abusive conduct and what Nationwide earned during the relevant period.³⁵³ However the court indicated that to quantify the damages with exact precision would be impossible, owing to all of the relevant variables of the matter.³⁵⁴ However, this did not mean that a claim was impossible. The court pointed out that South African law allows claims for future loss of earnings in personal-injury matters for example, where predictions must be made to the future and are complex speculative predictions.³⁵⁵ The court must do its best to come to a damages amount that it can gather from the material

³⁴⁷ *Nationwide v SAA* (note 41 above) para 43.

³⁴⁸ As above.

³⁴⁹ *Nationwide v SAA* (note 41 above) para 46.

³⁵⁰ *Nationwide v SAA* (note 41 above) para 47.

³⁵¹ *Nationwide v SAA* (note 41 above) para 48.

³⁵² *Nationwide v SAA* (note 41 above) para 50.

³⁵³ As above.

³⁵⁴ *Nationwide v SAA* (note 41 above) para 51.

³⁵⁵ As above.

made available to it. To make this possible, the plaintiff is obliged to produce all evidence at its disposal to assist the court to make an accurate decision based on the material provided to it.³⁵⁶

The problem of quantification of damages is not foreign to the civil courts, and there are various methods to quantify damages arising out of the anticompetitive conduct. The court made reference to an EU source for quantifying damages,³⁵⁷ ‘The Practical Guide on Quantifying Harm and Actions for Damages in the European Union’ which provides as follows:³⁵⁸

‘It should be stressed that it is only possible to estimate, not measure with any certainty and precision, what the hypothetical non-infringement scenario would have looked like. There is no method that could be singled out as the one that would in all cases be more appropriate than others. Each of the methods described above has particular features, strengths and weaknesses that may make it more-or-less suitable to estimate the harm suffered in a given set of circumstances. In particular, the methods differ in the degree to which they are simple to apply, in the degree to which they rely on data that is the outcomes of actual market interactions or on assumptions based on economic theory and the extent to which they take into account factors other than the infringement that may have affected the situation of the parties.’

The court indicated that it ultimately had to assess Nationwide’s performance before and after the period of abuse and try to reach an estimation of how Nationwide would have performed absent the abuse (thus it had to imagine the counterfactual).³⁵⁹ SAA contended that Nationwide performed worse after the abuse ended and that no damages could therefore flow from the period of abuse as there seems to have been a steady decline in Nationwide’s business. Affuso on behalf of SAA, however, contended that if any damages should be awarded, the interpolation approach is a reasonable method to estimate the upper limit of the damages.³⁶⁰ Noble on behalf of Nationwide proposed four economic models, the linear trend and linear interpolation, both using passenger numbers and market shares. Various methodologies were placed before the court and described in connection with what

³⁵⁶ *Nationwide v SAA* (note 41 above) para 51.

³⁵⁷ *Nationwide v SAA* (note 41 above) para 52.

³⁵⁸ The Practical Guide on Quantifying Harm and Actions for Damages in the European Union para 123.

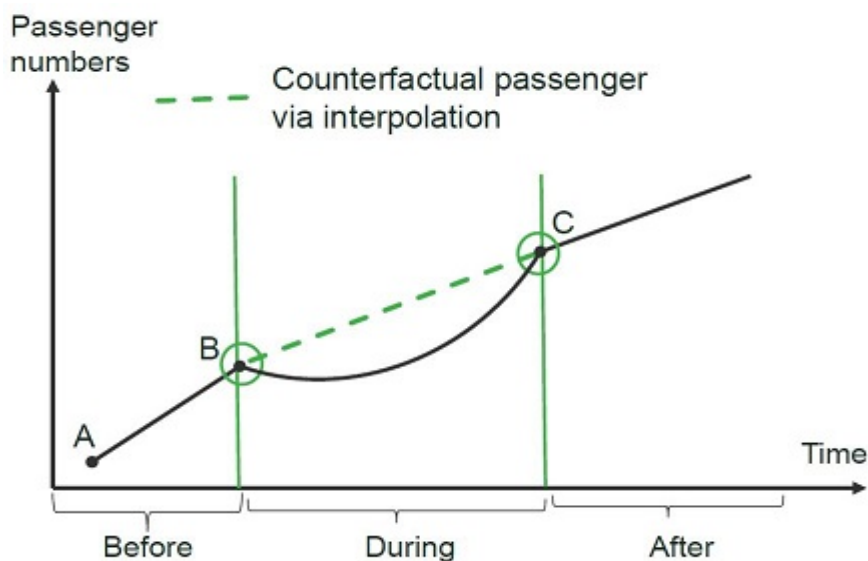
³⁵⁹ *Nationwide v SAA* (note 41 above) para 53.

³⁶⁰ As above.

variables they would use. The method of linear interpolation was the one model agreed upon by the parties.³⁶¹

5.2.6 Linear interpolation method

This method places two points on a graph, the first point represents the 'before period' and the second point represents the 'after period'. A straight line drawn between these points indicates what the growth would have been "but for the abuse". It can be used to estimate the counterfactual passenger numbers or the counterfactual market share.³⁶² The diagram below, taken from the judgment at paragraph 132, serves as a demonstration of the lost passengers as being the difference between the actual passengers (the solid black line) and the counterfactual passengers, which is shown on the area between the solid line and the dotted green line between points B and C.³⁶³



Nationwide's interpolation method applied to market share. Due to space and page limitations, not all of the relevant graphs provided in the judgment will be included in this dissertation, however, they may be found in paragraphs 133 to 137 in order to graphically explain the methodology used.

³⁶¹ *Nationwide v SAA* (note 41 above) para 54.

³⁶² *Nationwide v SAA* (note 41 above) para 132.

³⁶³ As above.

The linear interpolation method involves comparing the pre-infringement value to the post-infringement value, and an important factor to arrive at the final damages is where these two periods should begin and end.³⁶⁴ Both of the experts agreed that the calculation should be made at a time period unaffected by the abuse. This approach is also in line with the EU Commission approach.³⁶⁵ The experts agreed that a 12-month averaging period should be used to account for seasonal variation in the airline industry.³⁶⁶ However, there was a debate on when the periods should begin and end. After both experts put their versions and approaches to the court, the court found that the approach of Noble was more appropriate and the end-point averaging period should run from October 2004 until September 2005.³⁶⁷

5.2.7 Oxera's approach

Nobel elected to use a three-step approach to determine the final damages amount. Step one required an estimation of the passengers Nationwide would have carried absent the abuse. Since the actual passengers were known, the lost passengers amount to the counterfactual passengers minus the actual passengers.³⁶⁸ Step two was to ascertain the lost revenue as a result of the lost passengers. This is Nationwide's counterfactual revenue minus its actual revenue.³⁶⁹ The counterfactual revenue is estimated by multiplying the number of lost passengers by the ticket price Nationwide would have obtained for the sale of tickets to the lost passengers. To calculate the revenue, Noble used the average revenue per passenger that flew on Nationwide over the relevant period. Affuso contested these steps and said it was unnecessary to calculate lost passenger numbers and that the only indicator needed was to be found in the BSP data.³⁷⁰ The third and final step was to ascertain the lost profit. This was calculated by using the lost revenue and multiplying it by the profit margin Nationwide would have obtained on each ticket. Thus this amounted to lost revenues multiplied by the profit margin less avoided costs.³⁷¹ Affuso relied on the same methodology as Noble to calculate the lost profit from the lost revenues.³⁷²

³⁶⁴ *Nationwide v SAA* (note 41 above) para 134.

³⁶⁵ As above.

³⁶⁶ *Nationwide v SAA* (note 41 above) para 135.

³⁶⁷ *Nationwide v SAA* (note 41 above) para 140. For a full discussion on the approaches put forward by the experts, see paragraphs 135 - 140.

³⁶⁸ *Nationwide v SAA* (note 41 above) para 56.

³⁶⁹ *Nationwide v SAA* (note 41 above) para 57.

³⁷⁰ As above.

³⁷¹ *Nationwide v SAA* (note 41 above) para 58.

³⁷² *Nationwide v SAA* (note 41 above) para 59.

The court thereafter had to consider various aspects such as how the extra passengers would have been carried. This included considering whether they would have filled existing flights or caused new flights which in turn could have required additional planes to be leased or purchased.³⁷³ These factors led to further questions relating to costs per additional passengers and the amount of profit that could have been yielded from the additional passengers.³⁷⁴ Ultimately Noble contended that the additional flights would have been accommodated on existing aircrafts and no further aircrafts would have been purchased. Affuso disputed this based on Oxera's analysis relying on load factors and the fact that different flights experience varying load factors depending on the time of day.³⁷⁵ These issues are known as the 'avoided cost framework' which became an issue during the course of the trial.³⁷⁶ This analysis essentially allowed an estimation of the costs that have not been incurred because of the infringement instead of having to evaluate the entire financial situation of the company.³⁷⁷ Thus there was an estimation of the costs that would have been incurred by Nationwide had the extra passengers been carried but for the abuse.³⁷⁸

5.2.8 PwC's approach

As previously mentioned, Affuso alleged that Nationwide had suffered no damages.³⁷⁹ Affuso only relied on the sales generated by travel agents which are recorded in the BSP revenue data provided by IATA and stated that in her opinion, the incentive agreements could not have had any impact other than in sales by travel agents.³⁸⁰ Affuso further narrowed the market by only using data from routes on which Nationwide competed with SAA. Affuso used the period unaffected by the infringement by SAA to compare Nationwide's market share. From this she concluded that Nationwide suffered no damage.³⁸¹ The crux of Affuso's argument was that if Nationwide's market share was significantly reduced by SAA's override agreements then one would expect Nationwide's market share to decline in the infringement period, coupled with a corresponding increase in the period unaffected by the infringement. However, she alleges the exact opposite effect

³⁷³ *Nationwide v SAA* (note 41 above) para 60.

³⁷⁴ *Nationwide v SAA* (note 41 above) para 61.

³⁷⁵ *Nationwide v SAA* (note 41 above) para 62.

³⁷⁶ *Nationwide v SAA* (note 41 above) para 67. For a full discussion on the avoided-costs dispute with respect to SAA arguing that Nationwide had failed to provide any admissible evidence of its costs, see paragraphs 67 - 89.

³⁷⁷ *Nationwide v SAA* (note 41 above) para 63.

³⁷⁸ As above.

³⁷⁹ *Nationwide v SAA* (note 41 above) para 90.

³⁸⁰ As above.

³⁸¹ *Nationwide v SAA* (note 41 above) para 91.

occurred, as Nationwide's market share increased during the infringement period and declined after the infringement period.³⁸²

Affuso relied on the BSP markets share data that did not appear to register any increase after the abusive conduct had ended. Instead, the data showed that there was a decrease following SAA removing their override agreement.³⁸³ However, the court noted that there was a fundamental problem with Affuso's hypothesis. It was established that the BSP data for the period after the infringement was corrupted.³⁸⁴ Affuso also criticised Oxera for inflating lost revenue by accounting for other distribution channels and domestic routes unaffected by SAA's overrides and making no adjustment to counterfactual passenger numbers to account for factors such as LCCs.³⁸⁵ The court contended that Affuso's criticism against Oxera essentially revealed the flaws in her analysis of the period after the infringement, namely that she ignored that the period was not a valid comparator.³⁸⁶ Thus the court mentioned that the surrounding circumstances and period that she placed emphasis on, was not in fact the correct target area and period.³⁸⁷ In light of the fact that the ex-post period BSP data was incorrect and that Affuso advanced an inappropriate comparator period, the court concluded that Affuso's analysis that there had been zero damages was not sustainable.³⁸⁸

However, Affuso's alternative analysis was based on the interpolation method to show that Nationwide's damages were minimal.³⁸⁹ The court specifically noted that it was hard to marry Affuso's two methods which seemed to produce contradictory results.³⁹⁰ Based on the comparison of the interpolation method as used by the experts, Oxera's figures showed a much higher value of damages, while PwC's figures showed a much lower value of damages.³⁹¹ The reason for this was because PwC used BSP data in the relevant routes while Oxera used passenger numbers for all routes.³⁹² Based on the divergence of the

³⁸² *Nationwide v SAA* (note 41 above) para 91.

³⁸³ *Nationwide v SAA* (note 41 above) para 92.

³⁸⁴ *Nationwide v SAA* (note 41 above) para 93.

³⁸⁵ *Nationwide v SAA* (note 41 above) para 94.

³⁸⁶ *Nationwide v SAA* (note 41 above) para 95.

³⁸⁷ As above.

³⁸⁸ *Nationwide v SAA* (note 41 above) para 99.

³⁸⁹ As above.

³⁹⁰ *Nationwide v SAA* (note 41 above) para 99.

³⁹¹ *Nationwide v SAA* (note 41 above) para 102.

³⁹² As above.

results, the court first had to make certain determinations regarding the correct data set to use and the appropriate averaging methods to apply.³⁹³

5.2.9 The appropriate data set

The first difference that the court had to decide on was whether to use data from only the routes that SAA and Nationwide competed on or from the entire domestic market.³⁹⁴ The court turned to the order and reasons provided by the Tribunal wherein the Tribunal stated that:³⁹⁵

‘While the foreclosing effects of its conduct were greater in this segment of the market, competition in the overall domestic airline travel market was reduced by SAA’s incentive scheme.’³⁹⁶

Once the above was settled, the court had to consider the interrelated issue of whether the total passenger data or BSP data should be used in the calculation of damages.³⁹⁷ Because BSP data records all sales made via travel agents, Affuso contended this approach was in line with the findings of the Tribunal.³⁹⁸ Noble contended for the use of actual passenger numbers as this method relies on data regarding Nationwide and not other airlines.³⁹⁹ It was contended that Affuso’s criticism of using passenger numbers ignored the fact that revenue depends on both price and passenger numbers.⁴⁰⁰ Nobel, however, provided several reasons why the use of BSP data is incorrect.⁴⁰¹ These arguments included aspects such as: the data was impractical owing to the lack of data available before 2001; it is not on a route-by-route basis;⁴⁰² it assumed a relationship between BSP and flown revenue for travel agents; and it assumed flown revenue across all routes flown by all airlines is consistent and there is no BSP data on passenger numbers.⁴⁰³ The court’s most compelling criticism against the use of BSP data was regarding the discrepancies of the data in relation to the anomalies for SAA, SAX and SAL.⁴⁰⁴ From July 2004 to March 2008, the SAL and SAX BSP

³⁹³ *Nationwide v SAA* (note 41 above) para 103.

³⁹⁴ *Nationwide v SAA* (note 41 above) para 104.

³⁹⁵ *Nationwide v SAA* (note 41 above) para 105.

³⁹⁶ *Commission v SAA* (see note 190 above) para 247.

³⁹⁷ *Nationwide v SAA* (note 41 above) para 107.

³⁹⁸ *Nationwide v SAA* (note 41 above) para 108.

³⁹⁹ *Nationwide v SAA* (note 41 above) para 109.

⁴⁰⁰ *Nationwide v SAA* (note 41 above) para 110.

⁴⁰¹ *Nationwide v SAA* (note 41 above) para 111.

⁴⁰² As above.

⁴⁰³ *Nationwide v SAA* (note 41 above) para 112.

⁴⁰⁴ *Nationwide v SAA* (note 41 above) para 114.

revenues were lower than the flown the revenue.⁴⁰⁵ Nationwide therefore successfully made out a case that the SAA BSP data was corrupt and therefore the BSP data was too unreliable to use as the appropriate data set.⁴⁰⁶ The court further stated that the use of BSP data on the relevant route failed, as to give effect to the findings of the Tribunal, the conduct had the effect of reducing competition in the total domestic-airline market.⁴⁰⁷ The court referred to the Tribunal's findings that the effect of the override agreements were to shift passengers to SAA. It indicated that this directly deals with passenger numbers, and passenger-number data best reflects the Tribunal's finding that the total domestic market was affected.⁴⁰⁸

Noble also provided an alternative method, which happened to be supported by SAA. It involved estimating Nationwide's counterfactual share by focusing on the split in the total passenger volumes between the three main airlines than the actual passenger numbers.⁴⁰⁹ Thereafter, Nationwide's counterfactual market share is converted into counterfactual passenger numbers.⁴¹⁰ It would require looking at the entire airline's domestic market, including SAA, Nationwide and Comair.⁴¹¹ An advantage of this method was that it captured the impact of changes taking place in the market as a whole.⁴¹² The court found that Nationwide's market share would be a more appropriate data set to utilise rather than passenger numbers. The interpolation was therefore based on market-share data on all routes.⁴¹³

5.2.10 Lost-revenue dispute

A further issue of dispute between the experts was how to calculate lost revenues. Oxera proposed to determine lost revenue in two steps.⁴¹⁴ Firstly to use actual passenger-number data to estimate counterfactual passenger numbers, which are then converted to counterfactual revenues by multiplying them by Nationwide's actual average revenue per passenger.⁴¹⁵ Affuso disputed Nobel's approach and proposed a one-step approach, namely to use actual revenue to estimate the counterfactual revenues. The court however,

⁴⁰⁵ *Nationwide v SAA* (note 41 above) para 114.

⁴⁰⁶ *Nationwide v SAA* (note 41 above) para 119.

⁴⁰⁷ As above.

⁴⁰⁸ *Nationwide v SAA* (note 41 above) para 121.

⁴⁰⁹ *Nationwide v SAA* (note 41 above) para 122.

⁴¹⁰ As above.

⁴¹¹ *Nationwide v SAA* (note 41 above) para 122.

⁴¹² *Nationwide v SAA* (note 41 above) para 124.

⁴¹³ *Nationwide v SAA* (note 41 above) para 125.

⁴¹⁴ *Nationwide v SAA* (note 41 above) para 126.

⁴¹⁵ As above.

decided that it would be correct to utilise a three stage approach further suggested by Noble and to interpolate on the market share of Nationwide.

5.2.11 Contingencies

The issue of contingencies was not raised by either of the parties, but the court felt it was necessary to conduct a contingency deduction to account for the fact that any damages must take into consideration the whole market.⁴¹⁶ Noble testified that SAA's conduct had an effect beyond the travel-agent sector and that the override schemes would negatively affect Nationwide's brand.⁴¹⁷ The court acknowledged that once a passenger is repeatedly persuaded by travel agents that SAA is a superior airline, it will create a bias in favour of SAA.⁴¹⁸ It stated that SAA's loyalty programmes could also not be disregarded, as there is a likelihood that once business travel is diverted to SAA, the passengers would remain with SAA to accumulate further voyager miles.⁴¹⁹

The court stated that in making a damages finding it had to be kept in mind that the effect of SAA's conduct was felt predominantly, but not exclusively, in the travel agent industry.⁴²⁰ The court relied on the Tribunal's finding that the travel-agent sector accounted for 70% of the total domestic air-travel market at the time.⁴²¹ The court decided that a 25% contingency deduction was appropriate to account for the non-travel-agent sector unaffected by the anticompetitive conduct.⁴²² It mentioned that it thereafter had two of SAA's defences to decide on. These defences related to the settlement of the civil claim arising from the anticompetitive conduct from September 1999 to May 2001 and considering whether Nationwide's loss of profit can be as a result of their poor management.⁴²³

5.2.12 Settlement of the first action and Nationwide's 'poor management'

SAA raised the point that Nationwide had issued summons for payment of damages after the first Tribunal order.⁴²⁴ This action was settled for a fraction of the asked price without going to trial. SAA believed that Nationwide had calculated their damages claim for the

⁴¹⁶ *Nationwide v SAA* (note 41 above) para 145.

⁴¹⁷ *Nationwide v SAA* (note 41 above) para 141.

⁴¹⁸ As above.

⁴¹⁹ *Nationwide v SAA* (note 41 above) para 142.

⁴²⁰ It is necessary to bear this in mind when making a damages finding. *Nationwide v SAA* (note 41 above) para 143.

⁴²¹ *Nationwide v SAA* (note 41 above) para 144.

⁴²² *Nationwide v SAA* (note 41 above) para 147.

⁴²³ *Nationwide v SAA* (note 41 above) para 148.

⁴²⁴ *Nationwide v SAA* (note 41 above) para 149.

subsequent anticompetitive conduct including the previous conduct that had been settled. This was not accepted by the court. Noble made it clear that the counterfactual was calculated for the entire period of the anticompetitive conduct from October 1999 to March 2005, and that the damages values relate only to the second period. Only the lost passengers for the period of 1 June 2001 to March 2005 were included in the calculations. Thus the court held that there was no duplication in claim as alleged by SAA.⁴²⁵

SAA further alleged that Nationwide's loss of profit was as a result of poor business management. SAA, however, led no direct evidence on this matter but rather argued that Nationwide's liabilities exceeded its assets each year of its existence.⁴²⁶ Affuso however, failed to lead any proper evidence on this aspect and the court held that financials alone were not sufficient to make a finding on this issue.⁴²⁷

5.2.13 Conclusion

The court commenced its conclusion by summarising the key factors to assessing the damages suffered by Nationwide as a result of SAA's abusive conduct. This included that the appropriate data set was passenger numbers rather than BSP data;⁴²⁸ the appropriate data set was that of passenger numbers in the entire domestic market;⁴²⁹ the market share data was preferable to passenger numbers in this analysis;⁴³⁰ the linear interpolation model using market share on all routes was the appropriate methodology and the start and end points of the interpolation were the periods determined by Oxera.⁴³¹

The court emphasised the fact that a 25% contingency deduction must be deducted from any figure arrived at to make allowance for passengers that were unaffected by the overrides and any brand loyalty.⁴³² SAA was ordered to pay Nationwide damages in the sum of R104,625 million and interest at 10,25% as from the date of judgment until payment.

⁴²⁵ *Nationwide v SAA* (note 41 above) para 150.

⁴²⁶ *Nationwide v SAA* (note 41 above) para 154.

⁴²⁷ *Nationwide v SAA* (note 41 above) para 157.

⁴²⁸ *Nationwide v SAA* (note 41 above) para 158.

⁴²⁹ As above.

⁴³⁰ *Nationwide v SAA* (note 41 above) para 159.

⁴³¹ *Nationwide v SAA* (note 41 above) para 160.

⁴³² *Nationwide v SAA* (note 41 above) para 161.

Chapter 4: Comparative foreign law- European Union law

1. Rationale for discussing European Union law

The United States of America (“USA”) pioneered modern day antitrust law, more commonly known as competition law in South Africa.⁴³³ In 1890, the Sherman Antitrust Act⁴³⁴ was enacted in the USA.⁴³⁵ While it would seem logical to draw a distinction to the law of the USA, this law has never been copied into South African law.⁴³⁶ There are certain distinctive features of South African competition law that differ from American competition law.⁴³⁷ Such a difference includes that South African competition law has a plurality of objectives of which consumer welfare is just one. Secondly, American statutes provide the framework in which their courts have developed a common law of competition, whereas the South African lawmakers have examined the common law and sought to create out of it a new code.⁴³⁸ Many of the borrowed substantive provisions found in South African law are taken from European Union and Canadian law. These two legal systems were also influenced by USA antitrust law.⁴³⁹ The EU began developing its notions of competition law closely in time to

⁴³³ Sutherland & Kemp (note 17 above) 2-10.

⁴³⁴ Sherman Antitrust Act of 1890.

⁴³⁵ Kelly (note 2 above). The Sherman Antitrust Act was the first federal statute that articulated a general government policy toward monopolies (BZ Khan ‘Antitrust and Innovation before the Sherman Act’ (2011) 77 *Antitrust Law Journal* 757 783). This law banned business arrangements in restraint of trade (as per section 1) and prohibited attempts to monopolise (as per section 2) (RL Jr Bradley ‘On the Origins of the Sherman Antitrust Act’ (1990) 9 *Cato Journal* 737 737(Bradley)). In addition to this, it also prohibited trusts. An example of a trust in this context can be explained as ‘an arrangement by which stockholders in several companies transferred their shares to a single set of trustees. In exchange, the stockholders received a certificate entitling them to a specified share of the consolidated earnings of the jointly managed companies. These kinds of trusts came to dominate a number of major industries, destroying competition.’ (Act of July 2, 1890 (Sherman Anti-Trust Act), July 2, 1890; Enrolled Acts and Resolutions of Congress, 1789-1992; General Records of the United States Government; Record Group 11; National Archives. Available at <https://www.ourdocuments.gov/doc.php?flash=true&doc=51> (Accessed 22 August 2017) para 1 (National Archives)). ‘Congress adopted the Sherman Antitrust Act at a time when the laissez-faire orthodoxy, a form of the evolutionary vision, was under challenge from collectivist reform movements that expressed the intentional vision of the warring ideologies. The result was a legislative accommodation through the Sherman Act (WH Page ‘Ideological Conflict and the Origins of Antitrust Policy’ (1991-1992) 66 *Tulane Law Review* 68 23). Several states had already passed antitrust statutes similar to the Sherman Antitrust Act before its enactment, but these were limited to intrastate businesses (Bradley, 738). The Sherman Antitrust Act was based on the constitutional power of Congress to regulate interstate commerce (Act of July 2, 1890 (National Archives para 2). Through this power, the Sherman Antitrust Act declared illegal every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of interstate and foreign trade (AS Jr Zito ‘Refusals to Deal: The Sherman Antitrust Act and the Right to Customer Selection’ (1981) 14 *John Marshall Law Review* 353 353).

⁴³⁶ Sutherland & Kemp (note 17 above) 2-10.

⁴³⁷ Brassey (note 186 above) 19.

⁴³⁸ Brassey (note 186 above) 20.

⁴³⁹ Sutherland & Kemp (note 17 above) 2-10.

when the Sherman Antitrust Act was enacted.⁴⁴⁰ Owing to the fact EU law is well established and developed, that a number of South African substantive provisions of competition law are borrowed from EU law, and the structure of South African competition law is similar to that of EU law, EU law was chosen as the comparative law for purposes of this dissertation.

Section 1(3) of the Competition Act, provides that 'any person interpreting or applying *this Act* may consider appropriate foreign and international law'. References to section 1(3) of the Act are not often seen, but when they do appear, they seem to attempt to restrict the use of foreign law.⁴⁴¹ Foreign law is not binding on any of the laws of South Africa, but, as pointed out by Sutherland and Kemp with regards to competition law, there is a general body of international competition law that cannot be ignored in interpreting the Act.⁴⁴²

2. The background of the European Union and the foundations of European Union law

After World War II, the continent of Europe was divided into Eastern and Western Europe. Only the Western part of Europe was willing to accept financial assistance from the USA under the Marshall Plan.⁴⁴³ In response to this Plan, a body was set up called the Organisation for European Economic Cooperation ("OEEC").⁴⁴⁴ In 1951, Germany, France, Italy, the Netherlands, Belgium and Luxembourg signed the Treaty of Paris.⁴⁴⁵ This Treaty established the European Coal and Steel Community (the "ECSC Treaty"), of which its essential features were the creation of a new entity ("the Community") with international legal status and separate and autonomous institutions.⁴⁴⁶ The idea behind establishing a European Community was that countries who trade with one another become economically

⁴⁴⁰ Kelly (note 2 above) 6.

⁴⁴¹ Sutherland & Kemp (note 17 above) 2-3.

⁴⁴² Sutherland & Kemp (note 17 above) 2-3.

⁴⁴³ J Hanlon *European Community Law* (2000) 2nd ed 1 (Hanlon). In the post-World War II period, Europe was ravaged by war and was susceptible to exploitation by Communists threat from within and outside of Europe. The Secretary of State, George C Marshall, issued a call for a comprehensive program to rebuild Europe. Congress passed the Economic Cooperation Act in March 1948, that would eventually raise enough funds to rebuild western Europe. The Marshall Plan generated a resurgence of European industrialisation and brought investment into the region. (Office of the Historian 'Milestones- 1945-1952 - Marshall Plan,1948' <https://history.state.gov/milestones/1945-1952/marshall-plan>).

⁴⁴⁴ Hanlon (note 443 above) 2. This body became known as the Organisation for Economic Cooperation and Development ("OECD") in 1961.

⁴⁴⁵ Hanlon (note 443 above) 3.

⁴⁴⁶ As above.

interdependent and more likely to avoid conflict.⁴⁴⁷ In 1957, two Treaties of Rome were signed and established the European Atomic Energy Community Treaty (“Euratom”) and the European Economic Community Treaty⁴⁴⁸ (“EEC”) respectively.⁴⁴⁹ The existence of the European Council was officially recognised in the Single European Act 1986 and was thereafter reaffirmed by the Treaty on European Union 1992.⁴⁵⁰ The Treaty on European Union created the “European Union”, which consists of three pillars. The middle pillar is made up of the three communities that existed at the time, the ECSC, Euratom and EC.⁴⁵¹ These communities collectively became known as the European Communities. On either side of the central pillars are the Common Foreign and Security Policy (“CFSP”) and Cooperation in Justice and Home Affairs (“JHA”).⁴⁵²

Currently the EU is made up of 28 member countries, who are all sovereign states. Every sovereign state has a prescribed method of decision making that is part of the legislative process. The EC may not be a ‘sovereign state’, but it does make legislation which has to be transposed into the domestic laws of the various member states. However, unlike a single country, the EU has many processes or systems of decision making.⁴⁵³ The reason that there are so many different procedures to make legislation is due to negotiations between member states. Each member had their own agenda and view as to when qualified majority voting should be used in the council of Ministers and opinions on influence to be granted to the European Parliament.⁴⁵⁴ The result was that a whole series of procedures have developed, reflecting the needs of the different members.⁴⁵⁵ However, it is now possible to state that there are four main procedures in EU law: the consultation procedure, the co-

⁴⁴⁷ European Union ‘The EU in brief’ https://europa.eu/european-union/about-eu/eu-in-brief_en (Accessed 18 June 2017).

⁴⁴⁸ It is necessary to have regard to the several Community institutions that were created by the EEC Treaty. Firstly, an Assembly was established that called itself the European Parliament and aimed to represent the people of the Community. Secondly, a Council was created that consisted of representatives from the governments of each member state and accordingly represents member states on a community level. Thirdly, a Commission was entrusted with ensuring that the provisions and measures of the Treaty were applied. The Commission was intended to be a major executive organ of the Community that was charged with enforcing and administering the European Competition law system amongst other powers. Fourthly, the Judicial supervision in the Community was entrusted to the Court of Justice. Two of the most important powers of the court in a competition law perspective was its power to review legality of acts of the Commission and Council as well as interpretation of legislation. Sutherland & Kemp (note 17 above) 2-26 to 2-27.

⁴⁴⁹ Hanlon (note 443 above) 4.

⁴⁵⁰ Hanlon (note 443 above) 6.

⁴⁵¹ Hanlon (note 443 above) 9.

⁴⁵² As above.

⁴⁵³ Hanlon (note 443 above) 17.

⁴⁵⁴ As above.

⁴⁵⁵ Hanlon (note 443 above) 18.

operation procedure, the co-decision procedure and the assent procedure.⁴⁵⁶ The EU's standard decision-making procedure is known as 'Ordinary Legislative Procedure', and means that the directly elected European Parliament has to approve EU legislation together with the Council which consists of the governments of the 28 member states.⁴⁵⁷ EU law is divided into primary and secondary legislation. The primary legislation comprises of treaties and these are the basis or ground rules for all EU action.⁴⁵⁸ Secondary legislation includes regulations, directives and decisions. The secondary legislation is derived from the principles and objectives set out in the treaties.⁴⁵⁹

3. Competition law in European Union law

As was previously stated, Europe began to develop their competition law around the same time as the USA enacted the Sherman Antitrust Act. However, it was after the Cold War, and the emergence of a unified Europe that European competition law was fully developed.⁴⁶⁰ Europe's first competition laws took the form of Articles 65 and 66 of the Treaty of Paris, and thereafter the Treaty of Rome ("the Treaty") established the EEC, with competition rules enforced four years later pursuant to Regulation 17.⁴⁶¹ The preamble to the EEC Treaty stated that 'the signatories attempted to establish a foundation for an even closer union among the peoples of Europe'.⁴⁶² Article 2 of the Treaty of the EEC provided that the Treaty would establish a common market.⁴⁶³ The origins of Community competition law lie in Article 81 and 82 of the Treaty.⁴⁶⁴ Articles 81 and 82 of the Treaty provide as follows:

⁴⁵⁶ Hanlon (note 443 above) 18.

⁴⁵⁷ European Union 'How EU decisions are made' https://europa.eu/european-union/eu-law/decision-making/procedures_en (Accessed 19 June 2017).

⁴⁵⁸ European Union 'EU law' https://europa.eu/european-union/eu-law_en (Accessed 19 June 2017).

⁴⁵⁹ As above.

⁴⁶⁰ Kelly (note 2 above) 3.

⁴⁶¹ HT Hefti 'European Union Competition Law' (1994) 16 *Seton Hall Legislative Journal* 613-654 613. See also Kelly (note 2 above) 6.

⁴⁶² Sutherland & Kemp (note 17 above) 2-24.

⁴⁶³ As above.

⁴⁶⁴ Hanlon (note 443 above) 216. It should be noted that these article numbers have been renumbered throughout the years. In the Treaty of Rome, these articles were originally articles 85 and 86. In the amending Treaty to the Treaty of Rome, the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 1997 ("Treaty of Amsterdam"), renumbered the articles to 81 and 82. The revised Treaty of the Functioning of the European Union then renumbered the articles to 101 and 102. For this reason, it is common to see different sources referring to either three of these article references. For purposes of this dissertation, reference will be made to articles 81 and 82. (Technology and IP law Glossary 'Article 101,102 (formerly articles 81 and 82 and before that 85 and 86)' <http://www.ipglossary.com/glossary/article-101-102-formerly-articles-81-and-82-and-before-that-85-86/#.WVKStDN7FsN> (Accessed 27 June 2017)).

“81(1) The following shall be prohibited as incompatible with the common 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 common 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:

- (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.”

“82 Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making 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.⁴⁶⁵

A fundamental element found in the Treaty is the concept of free competition, and that restriction on free competition is reprehensible but some form of state intervention is necessary to control fair competition in a common market.⁴⁶⁶ This is a balancing act that requires the Community to intervene to prevent abuses of industry which would act to the detriment of the market and consumers, while the Community also has to be careful to avoid intervention that hinders growth and results in inefficient business practices.⁴⁶⁷ As mentioned in Chapter 1 of this dissertation, Article 81(1) of the EC Treaty contains provisions that are similar to South African law, such as containing a non-exhaustive list of prohibited practices. This Article also prohibits agreements between undertakings,⁴⁶⁸ decisions by associations of undertakings and concerted practices which could potentially affect trade between various member states, and which have as their object or effect the prevention, restriction or distortion of competition within the common market.⁴⁶⁹

Article 2 of the Treaty sets out the task of the Community law which refers to ‘the promotion of the harmonious development of economic activities by the creation of a common market and the progressive approximation of the economic policies of the Member state’.⁴⁷⁰ The main objectives of European competition policy can be summarised as:

⁴⁶⁵ European Union, *Treaty Establishing the European Community (Consolidated Version)*, Rome Treaty, 25 March 1957, <http://www.refworld.org/docid/3ae6b39c0.html> (Accessed 27 June 2017).

⁴⁶⁶ Hanlon (note 443 above) 216.

⁴⁶⁷ As above.

⁴⁶⁸ The term undertaking in EU competition law is not defined in the Treaty, but has been interpreted by the European Court of Justice (ECJ). In the ECJ Case C-41/90 *Höfner and Elser v Macrotron GmbH* (23/04/1991) ECR I-1979, para 21, the ECJ held that “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed”. To understand this explanation, the term ‘economic activity’ must also be described. The characteristic features of an ‘economic activity’ is firstly, the offering of goods or services on the market and secondly, where the activity could at least in principle be carried on by a private undertaking in order to make profits. (P Lliopoulos *et al* ‘Art. 101 para.1 TFEU – undertakings’ (2012) *Freie Universität Berlin* Available at <http://wikis.fu-berlin.de/display/oncomment/Art.+101+para.+1+TFEU+-+Undertaking#Footnote4> (Accessed 26 August 2017)).

⁴⁶⁹ Moodaliyar (note 27 above) 150.

⁴⁷⁰ Hanlon (note 443 above) 217.

- 'a) to create and maintain a single market for the benefit of producers and consumers. This concept of market interaction is the primary objective of competition policy.
- b) quality of competition and the prevention of power- the "level playing field" concept.
- c) the promotion of efficiency to ensure firms rationalise their production and distribution and keep up to date with technical progress.⁴⁷¹

Article 3 of the Treaty listed activities that had to be performed to achieve these goals.⁴⁷²

Article 3(g) sets out the legal framework for competition law in the Community and requires the institution of a system ensuring that competition is not distorted.⁴⁷³ According to Hanlon there are three kinds of economic activity that competition law is directed at:

- (i) Article 81 provides for the restriction on trading agreements between otherwise independent business undertakings which may affect trade between the Member states and which distort competition within the common market.
- (ii) Article 82 which provides for the restriction of the abuse of a dominant market position by large undertaking.
- (iii) Regulation 4064/89⁴⁷⁴ which provides for attempts to control mergers of undertaking which may result in the abuse of a dominant position.⁴⁷⁵

The Single European Act of 1986 ("SEA") substantially amended the EEC Treaty.⁴⁷⁶ The single market was established with effect from 1 January 1993. The Treaty of the European Union (the Maastricht Treaty or TEU before Lisbon) was signed in February 1992 and was in force from 1 November 1993.⁴⁷⁷ This Treaty changed the name of the European Economic Community to that of the European Community ("EC").⁴⁷⁸ In 1999, the Treaty of Amsterdam came into force on 1 May. This was essentially an amending treaty and from a competition law perspective, the most important changes were that it renumbered the provisions of the EC Treaty that concerned competition law.⁴⁷⁹ A single set of institutions

⁴⁷¹ Hanlon (note 443 above) 217.

⁴⁷² Sutherland & Kemp (note 17 above) 2-24.

⁴⁷³ Hanlon (note 443 above) 217.

⁴⁷⁴ Council Regulation (EEC) No 4064/89 of 21 December 1989.

⁴⁷⁵ Hanlon (note 443 above) 217.

⁴⁷⁶ SA Riesenfeld 'The single European Act' (1990) 13 *Hastings International and comparative Law Review* 371-382 371. See also Sutherland & Kemp (note 17 above) 2-29.

⁴⁷⁷ Sutherland & Kemp (note 17 above) 2-29.

⁴⁷⁸ As above.

⁴⁷⁹ Sutherland & Kemp (note 17 above) 2-29. See footnote 464 above for an explanation on the renumbering of the Articles. As mentioned above, for purposes of this dissertation, reference will be made to articles 81 and 82.

existed after this Treaty for the Union and its Communities.⁴⁸⁰ There have been many developments to EU law and particularly competition law since the SEA. From the 2000's the European Commission commenced with a program to modernise competition law.⁴⁸¹ One of the developments was that the system of enforcement of competition rules was substantially overhauled,⁴⁸² and the general enforcement system also experienced considerable changes.⁴⁸³ The Treaty of Lisbon was signed in December 2007 and came into effect on 1 December 2009.⁴⁸⁴ This Treaty amended the EU and EC Treaties and renamed the EC Treaty to the 'Treaty on the Functioning of the European Union ("TFEU").⁴⁸⁵ However, the Treaty of Lisbon had few effects on the substantive competition law provisions. The Treaty of the European Union now determines that 'a highly competitive social market economy' is one of the goals of the European Union.⁴⁸⁶ Competition law in Europe is moving towards an approach that focuses more on the protection of consumers and economic efficiency.⁴⁸⁷

4. Public enforcement of competition law in European Union law

A Council Regulation, Council Regulation 1/2003⁴⁸⁸ ("the Regulation"), provides for enforcement of Article 81 of the EC Treaty.⁴⁸⁹ This Regulation provides, that:

'in order to ensure effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Article 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States'.⁴⁹⁰

⁴⁸⁰ Sutherland & Kemp (note 17 above) 2-29.

⁴⁸¹ Sutherland & Kemp (note 17 above) 2-31.

⁴⁸² White Paper on the Modernisation of Rules implementing arts 81 and 82 of the EC Treaty O.J. 1999 (C132/1).

⁴⁸³ Sutherland & Kemp (note 17 above) 2-32.

⁴⁸⁴ CH Church & D Phinnemore 'Understanding the Treaty of Lisbon' (2010) 10 *Romanian Journal of European Affairs* 5-29 5 (Church & Phinnemore). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007.

⁴⁸⁵ Sutherland & Kemp (note 17 above) 2-33.

⁴⁸⁶ Church & Phinnemore (note 484 above) 15. See also Sutherland & Kemp (note 17 above) 2-34(2).

⁴⁸⁷ Sutherland & Kemp (note 17 above) 2-34(2).

⁴⁸⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 ("Council Regulation").

⁴⁸⁹ Moodaliyar (note 27 above) 150. Access to EU law sources can be found at 'Eur-lex' <http://eur-lex.europa.eu/homepage.html> (Accessed 25 June 2017).

⁴⁹⁰ Council Regulation (note 488 above) introductory paragraph 8.

The principal enforcing agency of competition law is the EU Commission.⁴⁹¹ In particular, the Directorate General for Competition is tasked with enforcement.⁴⁹² Public enforcement of EU competition law is enforced through administrative public enforcement by public agencies and fine proceedings.⁴⁹³ Public enforcement through these administrative authorities can be described as an inquisitorial system.⁴⁹⁴

Article 81 cases can originate in four possible ways: via complaint, opening an own-initiative investigation, information reported by individuals via the whistleblower tool⁴⁹⁵ or a leniency application⁴⁹⁶ from a participant in a cartel.⁴⁹⁷ The EU Commission thereafter will conduct an investigation and has various powers available to it to conduct such an investigation. The Regulation sets out the powers and capacities of the EU Commission in enforcing competition law and conducting its investigation. Such powers include the power to conduct inspections,⁴⁹⁸ the power to take statements,⁴⁹⁹ the power to search private premises,⁵⁰⁰ the power to order interim measures,⁵⁰¹ and send information requests to companies.⁵⁰² After the initial investigation phase, the EU Commission can take the decision to pursue the case as a matter of priority and conduct a further more in-depth investigation or it may close the matter.⁵⁰³ In cartel cases, if the EU Commission elects that a case must be pursued, it must further decide whether or not the case is suitable for the settlement procedure.⁵⁰⁴ After an

⁴⁹¹ Moodaliyar (note 27 above) 150.

⁴⁹² Moodaliyar (note 27 above) 151.

⁴⁹³ RT Wieser *Private v Public Enforcement of European Competition Law? : Relationship between effective enforcement of the law and individual justice* (2016) Durham theses, Durham University <http://etheses.dur.ac.uk/11641/> (Accessed 25 June 2017) page iii (“Wieser”).

⁴⁹⁴ Wieser (note 493 above) page 30.

⁴⁹⁵ The Whistleblower tool provides that persons may come forward to report cartels and other anti-competitive practices. The EU Commission encourages whistleblowers to come forward openly and provide any information that may be useful in an investigation. However, the EU Commission makes provision for persons to report conduct and reveal their identity, to remain anonymous or to represent a company. More information on this topic can be found on the EU Commissions website at <http://ec.europa.eu/competition/cartels/whistleblower/index.html> (Accessed 27 June 2017).

⁴⁹⁶ The EU Commission’s leniency programme is an investigation tool that aims to discover cartel cases and collect evidence to discharge the EU Commission’s burden of proof. (European Commission ‘Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions’ http://europa.eu/rapid/press-release_MEMO-08-458_en.htm (Accessed 26 August 2017) ‘Legislation – Settlements’).

⁴⁹⁷ European Commission ‘Procedure in anticompetitive agreements (Article 101 TFEU cases)’ http://ec.europa.eu/competition/antitrust/procedures_101_en.html (Accessed 27 June 2017) ‘How a case starts’ (“EU Commission ‘Procedure in anticompetitive agreements’”).

⁴⁹⁸ Council Regulation (note 488 above) introductory paragraph 20.

⁴⁹⁹ Council Regulation (note 488 above) introductory paragraph 19.

⁵⁰⁰ Council Regulation (note 488 above) introductory paragraph 21.

⁵⁰¹ Council Regulation (note 488 above) introductory paragraph 11.

⁵⁰² EU Commission ‘Procedure in anticompetitive agreements’ (note 497 above) ‘investigation’.

⁵⁰³ As above.

⁵⁰⁴ EU Commission ‘Procedure in anticompetitive agreements’ (note 497 above) ‘investigation’. In these settlement cases, either the EU Commission or the parties may propose a settlement. In such a

in-depth investigation is concluded, a statement of objections is sent to the companies containing the EU Commission's concerns. The parties' rights of defence come into play in this instance. The parties may access the file from the investigation and reply to the EU Commission in writing or may request an oral hearing.⁵⁰⁵ After reviewing the submissions, the EU Commission may decide to abandon part of its objections or even close the case.

If however, its objections are not satisfactorily rebutted, the EU Commission drafts a decision prohibiting the identified infringement and submits it to the Advisory Committee.⁵⁰⁶ After the Advisory Committee checks the draft, it is submitted to the College of Commissioners which adopts the decision.⁵⁰⁷ An alternative available to the EU Commission is that it may take a commitment decision under article 9 of the Council Regulation. In this instance the EU Commission does not have to conclude on the existence of an infringement and impose a fine. It rather voices its concerns and the implicated parties may propose commitments to

case, the parties to the cartel acknowledge their participation which can result in a 10% reduction in the fines. The EU Commission presents these parties with evidence and its conclusions as to duration, seriousness, liability and fines. The parties are then afforded an opportunity to make an oral or written submission acknowledging their liability and whether they accept the EU Commission's statement. The settlement procedure was established in order to optimise the enforcement of anti-cartel rules by making the handling of cartel cases faster and more efficient, to free up the EU Commission's resources to enable it to deal with more cartel cases (F Laina & E Laurinen 'The EU cartel Settlement Procedure: Current Status and Challenges' (2013) *Journal of European Competition Law and Practice* 1 1 (Laina & Laurinen)). The EU Commission retains a broad margin of discretion to determine which cases are suitable for settlement. Settlement is neither a right nor an obligation for the companies and the ultimate choice to settle lies with the EU Commission (Laina & Laurinen 2). Because cartel cases are vastly different from each other, some cases are not suitable for settlement and others are. In cases where the EU Commission feels the matter is not suitable for settlement, the standard procedure is followed, including a full statement of objections and decision (Laina & Laurinen 6). Certain elements can be identified which make it more probable that a successful settlement will be reached (Laina & Laurinen 6). For a discussion on these elements, see Laina & Laurinen at page 6, paragraph 'F. What makes a successful settlement case'.

505 EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'statement of objections and prohibition decision'.

506 As above. This Committee is comprised of representatives of the Member States' competition authorities.

507 EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'statement of objections and prohibition decision'. By the time the draft decision reaches the College of Commissioners, it is 'vetted' by the Hearing Officer and the EU Commission. The Hearing Officer's final report is presented to the EU Commission with the draft to ensure that when it reaches a decision on a case, that the EU Commission is fully apprised of all relevant information as to the course of the procedure and that the effective exercise of procedural rights has been respected throughout proceedings (Decision of the President of the European Commission of 13 October 2011 (2011/695/EU) Article 17). The College of Commissioners is comprised of 28 Commissioners. Each of the 28 Commissioners carries the same weight within the decision-making process and they are equally responsible for the decision made. The College can also decide on issues by voting on them. In such a case, a majority of members of the College (15 of 28) needs to vote in favour of the decision in order for it to be adopted (European Commission 'Decision-making during weekly meetings' https://ec.europa.eu/info/strategy/decision-making/decision-making-during-weekly-meetings_en (Accessed 27 August 2017) 'Collective decision making').

address the concerns. If the EU Commission finds the commitments sufficient, it can decide to make them legally binding.⁵⁰⁸

The Regulation makes reference to the Commission's power to impose any remedy, whether it is a behavioural or structural remedy,⁵⁰⁹ that may be required to bring the infringement to an end.⁵¹⁰ Accordingly, structural remedies are only to be imposed either where there is no equally effective behavioural remedy or where an equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.⁵¹¹ The Regulation also makes provision for declaratory findings.⁵¹²

The EU Commission has the power and right to impose fines and periodical penalty payments for breaches of article 81 and 82 of the EC Treaty.⁵¹³ The EU Commission's fining policy is aimed at punishment and deterrence.⁵¹⁴ Guidelines are provided in terms of fines

⁵⁰⁸ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'Article 9 commitment decisions'. The EU Commission accepts commitments offered by a company that appropriately address the EU Commission's concerns as formally communicated to the company, offer sound solutions and achieve real change in the markets. When the EU Commission adopts a decision, it obliges the company to implement the commitments as offered. If the company breaches the legally binding commitments it has entered into, the EU Commission may impose a fine on that company. To impose a fine, the EU Commission need not establish a breach of Article 81 or 82 of the TFEU, but it simply has to show that the company did not comply with its commitments that were made legally binding. Discussion paper by the Competition Directorate-General of the European Commission 'To commit or not to commit? Deciding between prohibition and commitments' (2014) 3 *Competition policy brief 2* Available at http://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf (Accessed 27 August 2017).

⁵⁰⁹ The EU Commission may impose any behavioural or structural remedies necessary to effectively bring an infringement to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy (P Hellström *et al* 'Remedies in European Antitrust Law' (2009) 76 *Antitrust Law Journal* 43-63 46 (Hellström)). There does not seem to be a generally accepted definition of structural remedies in the literature on EU competition law. However, some authors propose that 'a structural remedy is one that neither requires ongoing monitoring by the enforcement authority nor establishes ongoing links between firms. A structural remedy can be regarded as characterised as a once-off measure, as opposed to a measure creating an ongoing relationship between a firm and a regulator or with other firms' (FP Maier-Rigaud 'Behavioural versus Structural Remedies in EU Competition Law' in P Lowe, M Marquis & G Monti (eds) (2016) *European Competition Law Annual 2013, Effective and legitimate Enforcement of Competition Law* Chapter 7, 207-224 209). Remedies that may be included within the behavioural remedy category spans from general commitments to behave or not to behave in a certain manner or to provide access to infrastructure or key assets (A Ezrachi 'Under (and Over) Prescribing of behavioural Remedies' Working Paper (L) 13/05 *The University of Oxford Centre for Competition Law and Policy* 1). Behavioural remedies try to redress specific conduct in a context where incentives remain essentially unchanged (Hellström page 47).

⁵¹⁰ Council Regulation (note 488 above) introductory paragraph 12.

⁵¹¹ As above.

⁵¹² Council Regulation (note 488 above) introductory paragraph 14.

⁵¹³ Moodaliyar (note 27 above) 151.

⁵¹⁴ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'fines'.

to be imposed and the fines reflect the gravity and duration of the infringement.⁵¹⁵ The starting point is the percentage of a company's annual sales of the product concerned in the infringement (up to 30%), which is multiplied by the number of years that the infringement lasted.⁵¹⁶ Aggravating and attenuating factors are considered and may increase or decrease the fine.⁵¹⁷ The maximum level of fines is capped at 10% of the overall annual turnover of a company.⁵¹⁸ The parties fined have a right to appeal to the EU General Court,⁵¹⁹ to amend or annul the decision. These decisions may further be appealed before the European Court of Justice.⁵²⁰

Article 82 deals with abuse of dominance and the procedural steps are essentially the same. However, this kind of case can originate upon receipt of a complaint or through the opening of an own-initiative investigation.⁵²¹ The EU Commission's first investigative step is to assess whether the undertaking concerned is dominant or not. This involves defining the relevant market, defining the product and geographical market and determining the market share of the firm.⁵²² The EU Commission also considers what exactly the abuse is, and focuses on whether the dominant firm has distorted competition.⁵²³

Article 2 of the Regulation makes provision for the burden of proof under Articles 81 and 82 of the Treaty. It provides that it should be for the party or authority alleging an infringement of Article 81(1) and 82 of the Treaty to prove the existence thereof to the required legal standard.⁵²⁴ Throughout the Regulation, the overlap of the Community law and national legislation is discussed. The Regulation intends that the Commission and the competition authorities of the member states should form together a network of public authorities

⁵¹⁵ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'fines'.
⁵¹⁶ As above. In cartel cases as an additional deterrent, the fine is increased by a one-time amount equivalent to 15-25% of the value of one year's sales.
⁵¹⁷ An aggravating circumstance may be that the participant is a repeat offender and an attenuating circumstance may be that the participant had limited involvement.
⁵¹⁸ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'fines'.
⁵¹⁹ The EU General Court is made up of at least one judge from each Member State. As at 8 June 2017, there are 45 judges. (CVRIA 'General Court' https://curia.europa.eu/jcms/jcms/Jo2_7033/ (Accessed 27 June 2017)).
⁵²⁰ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'right of appeal'.
⁵²¹ European Commission 'Antitrust procedures in abuse of dominance (Article 102 TFEU cases)' http://ec.europa.eu/competition/antitrust/procedures_102_en.html (Accessed 27 June 2017) 'overview' ("EU Commission 'Antitrust procedures in abuse of dominance'").
⁵²² EU Commission 'Antitrust procedures in abuse of dominance' (note 521 above) 'Assessing dominance'. If a company has a market share of less than 40%, it is unlikely to be dominant.
⁵²³ As above. Behaviour that may amount to abuse includes: requiring that buyers purchase all units of a particular product only from the dominant company; charging excessive prices; refusing to supply input indispensable for competition in an ancillary market; and predatory pricing.
⁵²⁴ Council Regulation (note 488 above) article 2.

applying the Community competition rules in close cooperation. It is interesting to note that the competition authorities of a member state lose their competence with respect to a matter where the EU Commission initiates its own proceedings.⁵²⁵

5. Private enforcement of competition law in European Union law

Although public and private enforcement of article 81 of the EC Treaty in essence serve the same aim, only private damages actions provide a direct and immediate remedy for victims.⁵²⁶ The private enforcement of EU competition rules has led a shadowy existence for a long time in the EU Community as well as in the majority of its Member States.⁵²⁷ Private enforcement of EU competition rules can be in the form of damages claims or applications for injunctive relief.⁵²⁸ One of the first major differences between public and private enforcement of EU competition law is that private enforcement can only be pursued in national courts in accordance with national rules on civil liability and civil procedure.⁵²⁹ For this reason, the EU Commission does not set out 'procedural steps' to pursuing such a claim, as the various national courts of the member states will each have their individual processes and steps to instituting these actions.⁵³⁰

In the 'Procedure in anticompetitive agreements' as set out by the EU Commission,⁵³¹ reference is specifically made to 'victims' claims for damages'. This provides that any citizen or business that has suffered a harm as a result of a breach of the EU competition rules is entitled to claim compensation from the party who caused it. Thus victims of competition law infringements can bring an action for damages before a national court. When the EU Commission has taken a prohibition decision, the decision can be used before national

⁵²⁵ Council Regulation (note 488 above) introductory paragraph 17. See Article 3 for more information on this aspect.

⁵²⁶ Moodaliyar (note 27 above) 154.

⁵²⁷ Moodaliyar (note 27 above) 151.

⁵²⁸ As above. The EU Commission defines an 'injunction' as an order granted by a court or an administrative body whereby someone is required to perform or to refrain from performing a specific action.

⁵²⁹ Moodaliyar (note 27 above) 151.

⁵³⁰ Paragraph 4 of Directive 2014/104/EU on Antitrust Damages Actions ("Directive on Antitrust Damages Actions") provides that 'the right to compensation for harm resulting from infringements of the EU and national competition law requires each member state to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of article 19(1) of the Treaty of the EU...'. This Directive will be discussed further below.

⁵³¹ EU Commission 'Procedure in anticompetitive agreements' (note 497 above) 'victims' claim for damages'.

courts to prove that the behaviour was illegal.⁵³² In respect of which laws the national courts are to follow, the European Court of Justice (“ECJ”) has stated that only if the EU Community rules do not govern a specific competition matter, then competition rules are governed by the national law.⁵³³ However, member states are obliged under article 10 of the EC Treaty to ensure the effectiveness of the EC law. This in turn means that member states must ensure that there is adequate protection for those who have suffered a loss due to a violation of the EC competition law.⁵³⁴

Some authors describe the use of articles 81 and 82 of the EC Treaty in litigation as being used as either a “shield” or a “sword” depending on how the individual wishes to utilise the articles in private enforcement.⁵³⁵ The EU competition law provisions can be used as a “shield” when they are invoked in defence against a contractual claim for performance or for damages for non-performance.⁵³⁶ The provisions are said to be used as a “sword” if there are used proactively by parties as a basis for claiming damages or injunctive relief.⁵³⁷ In practice, it appears that the use of the articles as a “sword” to claim damages in private litigation has been rare.⁵³⁸

Article 7 of the Regulation provides that any natural or legal person who can show a legitimate interest is entitled to lodge a complaint with the EU Commission, requesting the EU Commission to take action against a violation of Articles 81 or 82 of the EC Treaty.⁵³⁹ Many of the EU Commission actions begin this way and if the EU Commission does not intend to act upon the complaint, it has to take a reasoned decision rejecting the complaint. Such a decision can thereafter be subjected to judicial review by the Court of First Instance.⁵⁴⁰

⁵³² EU Commission ‘Procedure in anticompetitive agreements’ (note 497 above) ‘victims’ claim for damages’.

⁵³³ Moodaliyar (note 27 above) 151.

⁵³⁴ As above.

⁵³⁵ WPJ Wils ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26, No 3 *World Competition: Law and Economics Review* (Available at SSRN: <https://ssrn.com/abstract=1540006> (Accessed 2 July 2017)) 4 (Wils).

⁵³⁶ Wils (note 535 above) 4. An example of when the provisions are used as a shield are in instances of an intellectual property infringement action.

⁵³⁷ Wils (note 535 above) 4.

⁵³⁸ Wils (note 535 above) 5.

⁵³⁹ Wils (note 535 above) 6.

⁵⁴⁰ As above.

Another distinguishing factor between public and private enforcement of EU competition law is that private enforcement can be pursued via “standalone” or “follow-on” litigation of civil claims.⁵⁴¹ With “standalone” actions, the plaintiff to the damages claim will have to prove an infringement of the EU competition laws and rules without the benefit of a prior decision taken by the EU Commission.⁵⁴² “Follow-on” litigation occurs when the EU Commission or a National Competition Authority has previously issued a decision establishing a breach of competition law.⁵⁴³ It is far easier to pursue “follow-on” litigation as the burden of proof imposed on the plaintiff is eased by the EU Commission’s findings.⁵⁴⁴ This ultimately means that potential plaintiff’s to a civil matter need not wait for condemnation of anti-competitive practice in a public enforcement action before they may appear before a civil court.⁵⁴⁵

The EU Commission has actively been encouraging private enforcement of article 81 of the Treaty. In 2005, the EU Commission published a Green Paper that identified the main obstacles to a more efficient system of bringing damages claims for EU competition law infringements.⁵⁴⁶ This Green Paper proposed measures encouraging the right to compensation by victims of such infringements.⁵⁴⁷ Thereafter, in April 2008, the White Paper on damages actions for Breach of the EC Antitrust Rules⁵⁴⁸ was published. The White Paper put forward proposals of policy choices and specific measures to safeguard victims of infringement of the EC Competition law.⁵⁴⁹ One of the primary objectives of the paper was to secure full compensation for victims and to create an effective system of private enforcement that compliments public enforcement.⁵⁵⁰ The Directive on antitrust damages actions was signed into law on 26 November 2014.⁵⁵¹

⁵⁴¹ A Piechota *Private enforcement of EU competition law: recent developments, problems and prospects* (2011) Jagiellonian University theses available at http://www.ipwi.uj.edu.pl/pliki/prace/Praca%20magisterska%20-%20Anna%20Piechota_1317147471.pdf (Accessed 2 June 2017) 12 (Piechota).

⁵⁴² Piechota (note 541 above) 12.

⁵⁴³ Piechota (note 541 above) 13.

⁵⁴⁴ As above.

⁵⁴⁵ Piechota (note 541 above) 14.

⁵⁴⁶ EU Commission ‘Actions for Damages- Key Documents’ <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> (Accessed 2 July 2017) ‘Green Paper’ (EU Commission ‘Actions for Damages- Key Documents’).

⁵⁴⁷ EU Commission ‘Actions for Damages- Key Documents’ (note 546 above) ‘Green Paper’.

⁵⁴⁸ White paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406} /* COM/2008/0165 final */.

⁵⁴⁹ MG Lendermann ‘The European Commission’s White Paper on damages actions for breach of the EC antitrust rules – some unsettled questions’ (2008) 4 *Freilaw: Freiburg Law Students Journal* 1 1. See also Moodaliyar (note 27 above) 152.

⁵⁵⁰ Moodaliyar (note 27 above) 152.

⁵⁵¹ EU Commission ‘Actions for Damages- Key Documents’ (note 546 above) ‘Directive on Antitrust Damages Actions’ (Directive on Antitrust Damages Actions).

The Directive on antitrust damages actions sets out rules to ensure that any person who suffers damages can effectively exercise their right to claim full compensation for that harm from that undertaking or association.⁵⁵² It provides guidance to national courts as to how the EU competition laws should be enforced and the minimum rights that should be afforded to citizens and businesses. The Directive on antitrust damages actions also provides that damages claims are only one of the options available via private enforcement and that alternatives such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation are also available.⁵⁵³ The Regulation further provides for disclosure of evidence;⁵⁵⁴ the effect of national decisions, limitation periods, joint and several liability;⁵⁵⁵ quantification of harm;⁵⁵⁶ consensual dispute resolution;⁵⁵⁷ and final provisions.⁵⁵⁸

6. Lessons to be learnt from European Union law

The ECJ has established that any citizen or business has a right to full compensation for the harm caused to them by an infringement of the EU competition laws.⁵⁵⁹ However, the EU Commission has acknowledged that in practice most victims rarely obtain compensation, despite the fact that the right to compensation is an EU right that is governed by national rules.

Two ground-breaking decisions were handed down in 2001 and 2006 respectively, where the ECJ emphasised that the right of victims to compensation is guaranteed by EU competition law.⁵⁶⁰ The 2001 case was the case of *Courage Ltd v Bernard Crehan* (“*Courage v Crehan*”).⁵⁶¹ In this case, the ECJ confirmed that victims of an infringement of the EC competition laws have a right to claim damages and that member states have to provide for a procedural framework effecting these rights.⁵⁶² Before the *Courage v Crehan* case, the ECJ had not had the opportunity to make findings on the liability for and the basis

⁵⁵² Directive on Antitrust Damages Actions (note 551 above) article 1.

⁵⁵³ Directive on Antitrust Damages Actions (note 551 above) paragraph 6.

⁵⁵⁴ Directive on Antitrust Damages Actions (note 551 above) chapter II.

⁵⁵⁵ Directive on Antitrust Damages Actions (note 551 above) chapter III.

⁵⁵⁶ Directive on Antitrust Damages Actions (note 551 above) chapter V.

⁵⁵⁷ Directive on Antitrust Damages Actions (note 551 above) chapter VI.

⁵⁵⁸ Directive on Antitrust Damages Actions (note 551 above) chapter VII.

⁵⁵⁹ EU Commission ‘Actions for Damages- Key Documents’ (note 546 above) ‘Overview’.

⁵⁶⁰ Moodaliyar (note 27 above) 151.

⁵⁶¹ *Courage Ltd v Bernard Crehan* [2001] ECR I-6297 (*Courage v Crehan*).

⁵⁶² Moodaliyar (note 27 above) 152.

of an EU civil damages claim in competition law.⁵⁶³ The ECJ had previously only referred to the possibility of claiming damages under national law but without fully examining the legal requirements in depth.⁵⁶⁴ The 2006 case was the case of *Manfredi* (“*Manfredi*”).⁵⁶⁵ The ECJ used subsequent cases such as *Manfredi* to develop a legal framework for damages claims.⁵⁶⁶ In *Manfredi*, the ECJ concluded that the principle of invalidity can be relied on by anyone, without that person having to show a relevant legal interest in the invalidity of an agreement or practice.⁵⁶⁷ The *Manfredi* case also stressed the principle that as long as no EU Regulation existed regarding procedure, the procedural enforcement of the EU right was ceded to the member states and had to be fleshed out by them.⁵⁶⁸

Private enforcement actions are difficult and costly to bring. However, this is why the EU Commission proposed in 2013, that a new directive would be introduced to remove the main obstacles to effective compensation and to guarantee minimum protection for citizens and businesses.⁵⁶⁹ This indicates that EU competition authorities were aware that private enforcement avenues of EU competition law were underdeveloped,⁵⁷⁰ and elected to take steps to make this form of enforcement more readily available.⁵⁷¹ This acknowledgement has created awareness and has caused some authors to comment on the state of private enforcement and why private enforcement is underdeveloped⁵⁷² and why it is necessary to further develop it.⁵⁷³ Despite the fact that private enforcement of EU competition law mainly fulfils a compensatory function, it does have various benefits. Such benefits include

⁵⁶³ Wieser (note 493 above) page 60.

⁵⁶⁴ As above.

⁵⁶⁵ ECJ joined cases C-295/04 to C-298/04: *Manfredi* [2006] ECR I-6619 (*Manfredi*).

⁵⁶⁶ Wieser (note 493 above) page 66.

⁵⁶⁷ Moodaliyar (note 27 above) 152.

⁵⁶⁸ Wieser (note 493 above) page 67.

⁵⁶⁹ EU Commission ‘Actions for Damages- Key Documents’ (note 546 above) ‘Overview’.

⁵⁷⁰ The EU Commission, most specifically the Directorate General for Competition, acknowledged that there has been underdevelopment of private enforcement of EU competition law, especially in damage claims in a statement given on the reasons for the European Directive on Cartel Damages Claims 2014/104/EU. (Wieser (note 493 above) page 16).

⁵⁷¹ Wieser (note 493 above) page iii.

⁵⁷² Wieser discusses that this underdevelopment may have a historical reason. Competition law is traditionally ‘public enforced’ in Europe, which means public enforcement is well established and could develop an efficient structure. However, having strong public structure could also be the reason for a weak private structure of enforcement. An example of the latter is that leniency regimes are often only structured in terms of public enforcement, thus protection from a private enforcement perspective is limited. Wieser (note 493 above) page 23.

⁵⁷³ See the articles of Wieser (note 493 above) and Piechota (note 541 above) for examples of authors who write on the subject of underdevelopment of private enforcement of EU competition law.

increased corrective justice,⁵⁷⁴ enhanced deterrence,⁵⁷⁵ closing the gaps that exist in the enforcement systems,⁵⁷⁶ bringing competition law closer to the citizens that it aims to protect,⁵⁷⁷ strengthening the overall competition enforcement structure,⁵⁷⁸ and certain macroeconomic benefits.⁵⁷⁹

⁵⁷⁴ Piechota (note 541 above) 22. 'Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another. This idea received its classic formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V.' EJ Weinrib 'Corrective Justice in a Nutshell' (2002) 42 No 4 *The University of Toronto Law Journal* 349 349.

⁵⁷⁵ Piechota (note 541 above) 23.

⁵⁷⁶ Piechota (note 541 above) 25.

⁵⁷⁷ Piechota (note 541 above) 26.

⁵⁷⁸ Piechota (note 541 above) 27.

⁵⁷⁹ As above. These macroeconomic benefits may include contributions to social welfare by ensuring greater allocative efficiency and an impact on productivity and growth.

Chapter 5: Conclusion and recommendations

The South African competition laws have a well-established foundation based on foreign law that has developed in accordance with the pioneering principles of competition law. South Africa's competition laws have gone through various developmental stages and are in various respects similar in form to that of EU law. It is evident that public enforcement of the Act occurs on a regular basis by the competition institutions of South Africa and that the South African market is successfully regulated by these institutions.⁵⁸⁰ Although the Commission's annual report for 2015/2016 showed that a majority of complaints initiated by the Commission were complaints lodged by the public, these complaints were only followed up with public enforcement. This indicates that there is public awareness that competition law exists and is accessible to the public to lodge complaints regarding practices in markets that they perceive as anticompetitive. However, it appears that this awareness does not yet seem to reach to the extent that the public is confident that a complaint may be further pursued in a civil court for a damages claim.

The competition authorities should therefore seek to make the South African public more aware that such possibilities and claims exist and are pursuable. It is submitted that they should educate the public that private enforcement is in addition to and an alternative to solely public enforcement in certain circumstances.⁵⁸¹ They should assist plaintiffs to understand the process of how their complaint goes from a public enforcement matter to a private enforcement matter.

In this regard, it is submitted that policy guidelines could be implemented to assist the competition authorities in how to guide plaintiffs seeking to pursue private enforcement remedies. Guidance and clarity on the process of enforcement that clearly distinguishes public and private enforcement could encourage victims to claim damages. Thus, if the competition authorities conduct a thorough investigation and conclude their proceedings by ordering an administrative fine,⁵⁸² and are willing to guide private enforcement plaintiffs,

⁵⁸⁰ See note 28 above.

⁵⁸¹ Awareness should be created that the process begins by reporting a complaint to the Commission. If the matter is thereafter referred to the Tribunal, then a damages claim may be pursued after a declarator that prohibited conduct was found to have occurred, has been issued. If the Commission does not refer the complaint to the Tribunal, then complainants should know that they have the option to approach the Tribunal in terms of section 51 of the Act.

⁵⁸² Coupled with a declarator setting out the details and facts of what infringement occurred.

there will be a further deterrent to conducting anticompetitive practices.⁵⁸³ If such guidelines were implemented, it could see the relationship and progression from public enforcement to private enforcement become seamless and readily available.

Guidance on the approach of implementing policy guidelines and recommendations on how to handle private enforcement matters can be taken from EU competition law. There is a clear movement towards encouraging plaintiffs to seek damages claims in national courts of the member states. The Directive on antitrust damages actions of 2014,⁵⁸⁴ is proof of such a movement. This directive had been developed over nine years before finally being signed into law on 26 November 2014. It is submitted that EU competition law is the ideal foreign law that South African legislators should observe. This is partly owing to the fact that South African law is based on EU law, but also because EU law is in a position where it is developing its private enforcement of competition law. South Africa should observe EU law and learn from the mistakes and advances that EU law has made in this regard. EU law is however, at a further stage in its development of private enforcement of competition law as their ground-breaking cases in this respect occurred in 2001 and 2006 respectively. This is as opposed to South African law where the ground-breaking case of *Nationwide* was only decided on in 2016. It would be advantageous from a South African competition law perspective to become acquainted with various issues related to private enforcement via articles, publications, commentary to Regulations and Directives that have been published by EU authors.

There are clear advantages and disadvantages that can be associated with private enforcement. From the commentary on private enforcement of EU competition law, a clear advantage is the aspect of increased corrective justice. As was mentioned in chapter 4, advantages of private enforcement can include: increased corrective justice; enhanced deterrence; closing the gaps that exist in the enforcement systems; bringing competition law closer to the citizens that it aims to protect; strengthening the overall competition enforcement structure; and certain macroeconomic benefits.⁵⁸⁵ As pointed out by Piechota, a further advantage of the global growing interest for private enforcement can be seen as a

⁵⁸³ The probability of paying a damages claim in addition to an administrative penalty will logically have a higher financial impact on the firm contravening the competition Act. This should serve as a deterrent, as the damages claim is not limited to 10% of the firm's annual turnover, and should have the effect of making the contravening firms think twice of whether their conduct is worth the reward.

⁵⁸⁴ See chapter 4, paragraph 4.5 for a discussion on this directive.

⁵⁸⁵ See chapter 4, paragraph 4.6.

sign of maturity of the competition law systems of the various countries and as a result of the general view that the preservation of competition as a process is beneficial for free market economies.⁵⁸⁶ With maturity of the competition law systems and with the increased recognition of competition law in general, it could be benefited by more private litigation. Private enforcement can complement public enforcement as private enforcement requires those closest to the anticompetitive infringements to partake in the process. This in turn can relieve pressure on the public authorities and open up their resources to more complaints.⁵⁸⁷

It is conceded that there is also some criticism that has been levelled against private enforcement. One of the main points of criticism levelled against private enforcement of competition law, is that the purpose of competition law is to benefit the public, all consumers and the shared economy of a country.⁵⁸⁸ However, the main consideration that drives private enforcement is the private gains and expenses of the different potential plaintiffs.⁵⁸⁹ Wils foresees that these private gains could lead to problems such as inadequate investment,⁵⁹⁰ unmeritorious suits and undesirable suits.⁵⁹¹ These problems could also possibly be experienced in a South African context. The problems of unmeritorious suits and undesirable suits could specifically be experienced in South Africa as an individual may approach the Tribunal even if the Commission has elected to issue a non-referral of the complaint.⁵⁹² This means unmeritorious matters may slip through to the Tribunal and potentially waste the Tribunal's time.⁵⁹³

⁵⁸⁶ Piechota (note 541 above) 90.

⁵⁸⁷ As above.

⁵⁸⁸ See section 2 of the Competition Act which sets out the purpose of the Act. It is clear from the wording that the Act aims to protect and promote the economy, consumers and small and medium-sized enterprises while also promoting employment and advancing social and economic welfare in the country.

⁵⁸⁹ Wils (note 535 above) 13.

⁵⁹⁰ Wils describes the problem of 'inadequate investment' by comparing the incentive in public versus private enforcement. He states at page 13 that 'for many of the most meritorious antitrust enforcement actions, the social benefit (in terms of the deterrence, education and clarification of the law) of successfully bringing the action far exceeds the damages award a potential plaintiff can hope for. Private plaintiffs will thus have insufficient incentives to invest in detecting and litigating meritorious cases.' Thus, in public law enforcement, there is a collective incentive of a group of consumers to correct a wrong, apply the law and impose penalties. This is as opposed to an individual private enforcer who has limited resources and only has their singular incentive backing the enforcement. Wils (note 535 above) 13.

⁵⁹¹ Wils (note 535 above) 13.

⁵⁹² Sutherland & Kemp (note 17 above) 11.6.5.2.

⁵⁹³ As previously mentioned, in terms of section 51(1), if the Commission issues a non-referral in response to a complaint, the complainant may refer the complaint directly to the Tribunal. The Tribunal Rules do provide for a form of 'screening process'. Rule 15(1) provides that the complaint proceeding referred to the Tribunal may only be initiated by filing a complaint in the prescribed form. In addition to this, Rule 15(1) requires that the complaint referral must be supported by an affidavit setting out in

Included in the disadvantages are a few obstacles that litigants face at trial. According to Piechota these obstacles include aspects such as: uncertainty over who may actually sue; the need to establish a causal link between the loss suffered and the infringement as well as proving fault; the difficulty of gathering evidence not utilised by the competition authorities; the complex economic analysis which is required to assess the damages in a quantum amount as caused in the relevant market; and finding a suitable remedy to compensate all the victims who suffered a loss.⁵⁹⁴ Further general obstacles to litigation include the fact that litigation and pursuing a damages claim is time consuming and costly. Unlike the public enforcement procedure, the individual pursuing this claim will have to use their own resources to prove their case. This is in stark contrast to the fact that the competition institutions were created for the sole purpose of investigating and ruling on competition matters and to this effect they are well equipped and have numerous departments dealing with every aspect of a complaint.

Some of these disadvantages and obstacles have already been experienced in case law. The issue of identifying the victims and deciding on an appropriate remedy to compensate all of the identified victims was experienced in *Children's Resources Centre Trust*. The problems of quantification of a claim was experienced in the *Nationwide v SAA* case. However, the *Nationwide* case saw expert evidence utilised by both parties to argue what the damages should amount to. Ultimately the court was able to look at the evidence provided by the experts and find a middle ground that seemed appropriate, fair and reasonable based on both sets of evidence.⁵⁹⁵

The *Nationwide v SAA* case has set a promising precedent in South Africa's competition law for a successful private enforcement claim. *Nationwide v SAA* was only the second claim of its kind and the first time that a damages claim based on a finding by the Tribunal was

numbered paragraphs a concise statement of the grounds of the complaint and the material facts or points of law relevant to the complaint and relied on by the Commission or complainant.

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Piechota (note 541 above) 91.

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Although the difficulty of quantification of a damages award was overcome in the *Nationwide v SAA* case, it should be kept in mind that the parties to this matter had the necessary means to employ experts. Other complainants (such as natural persons or small entities) may not have the equivalent means necessary to obtain the services of an expert. In addition to this, it is likely that the complainant will be seeking damages from a juristic person who has deep pockets that will enable it to employ as many experts as it may need to succeed in its case against the complainant. This disadvantage may be detrimental to the case of any party who attempts to pursue a damages claim against the contravening firm. Unfortunately, this disadvantage cannot easily be remedied. A possible remedy could be that the Competition authorities make available experts when they are needed in private enforcement matters. This may link public and private enforcement and make private enforcement more accessible to complainants.

litigated on.⁵⁹⁶ This judgment will likely bring about a new phase of competition law in South Africa, that moves away from a system characterised by only public prosecutions, to an environment where the victims seek to assert their civil rights through a damages claim.⁵⁹⁷ This judgment evidences the full competition process. It serves as the perfect example of where a market competitor lodged a complaint of anticompetitive conduct to the Commission. The Commission referred the complaint to the Tribunal, who issued a declarator and ordered SAA to pay an administrative penalty of R45 million. Thereafter the complainant instituted action in the High Court Gauteng Local Division. This civil court used the findings of the Tribunal and weighed up expert evidence put forward by the parties to establish whether a damages claim was justified and if so, what quantum was to be awarded. The High Court ultimately found that a damages claim in the amount of R104,625 million was justified. This shows a willingness by the civil courts to adjudicate on these matters and that the barriers of specialised knowledge in competition law, economics and markets are possible to overcome with the necessary expert evidence at hand.

During the time of writing this dissertation, a further relevant judgment has been handed down. On 16 February 2017, Webber Wentzel as the appointed attorneys of Comair Limited (“Comair”), announced that Comair had been successful in their damages claim against South African Airways (“SAA”).⁵⁹⁸ The judgment⁵⁹⁹ was handed down in the High Court Gauteng Local Division, pursuant to long contested proceedings between the parties. Prior to reaching the High Court, this matter also engaged the Tribunal and CAC. This means that the High Court was able to rely on findings made by these competition institutions. In particular, the High Court relied on the findings that:⁶⁰⁰

“the effect of the anti-competitive conduct on the structure of the market was to inhibit the rivals from expanding the market whilst at the same time reinforcing the dominant position of SAA”⁶⁰¹ and that “SAA’s conduct substantially foreclosed the relevant market to its rivals and such conduct accordingly had the requisite anti-competitive effect for purposes of establishing a contravention of section 8(d)(i) of the Act.”⁶⁰²

⁵⁹⁶ Competition Annual Review (note 255 above) 3.

⁵⁹⁷ Ratz (note 42 above) 34.

⁵⁹⁸ Webber Wentzel e-mail alerts: Webber Wentzel E-Alert: Comair soars to new heights with momentous victory, 16 February 2017 (Accessed 16 February 2017) (Webber Wentzel E-Alert).
⁵⁹⁹ *Comair Ltd v South African Airways (Pty) Ltd* 2017 2 ALL SA 78 (GJ) (*Comair v SAA*).

⁶⁰⁰ Webber Wentzel E-Alert (note 598 above) para 3.

⁶⁰¹ *Comair v SAA* (note 599 above) para 38.

⁶⁰² *Comair v SAA* (note 599 above) para 48.

Webber Wentzel stated that “this case has taken approximately 14 years to prosecute and now represents only the second successful damages claim brought pursuant to a breach of the Competition Act”.⁶⁰³ SAA was ordered to pay Comair a damages claim of R554,2 million, interest at a rate of 15.5% and costs for damages arising out of SAA’s anticompetitive practices.⁶⁰⁴ The total sum to be paid by SAA, inclusive of interest as at February 2017, amounted to R1,15 billion.⁶⁰⁵ This judgment is significant for two reasons: firstly the enormity of the quantum and secondly, this case will serve as further precedent for future damages claims arising from a breach of the competition Act.⁶⁰⁶

In conclusion, South Africa’s competition law is well established and properly enforced via public enforcement. The competition laws are constantly being developed. Due to the ever-developing nature of the markets that competition law governs, it will always cause the law to develop with the complaints that are lodged. Despite the fact that the legislation is primarily intended for and favours public enforcement, this does not mean that private enforcement is impossible to achieve. The *Nationwide* and *Comair* cases are proof that private enforcement is possible and has been utilised. Pursuing private enforcement merely faces more obstacles than public enforcement, and requires that complainants have the necessary funding and time to take on the private enforcement. However, victims of anticompetitive conduct could be made more aware of this avenue of redress. Further, the competition authorities and legislators could aid this development by establishing guidelines and regulations that better equip the competition authorities to promote and assist victims in their pursuit of private enforcement claims.

(Words: 40,240)

⁶⁰³ Webber Wentzel E-Alert (note 598 above) para 2.
⁶⁰⁴ *Comair v SAA* (note 599 above) page 121.
⁶⁰⁵ Webber Wentzel E-Alert (note 598 above) para 1.
⁶⁰⁶ Webber Wentzel E-Alert (note 598 above) para 2.

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