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COMPETITION

How to compensate the victims of collusion

2 March 2016 *4 min read*

In the sphere of competition law, anti-competitive practices can have a detrimental effect on an economy and the performances of markets. It is accepted that practices found to be anti-competitive and in contravention of the Competition Act ("the Act") cause harm to individual consumers, competitors and the overall economy and this is supported by the World Bank Report "*South Africa Economic Update, Promoting Faster Growth and Poverty Alleviation Through Competition, World Bank Group, Edition 8, February 2016*".

INTRODUCTION

Therefore, the Act provides for the victims of anti-competitive practices to claim compensation or damages for the harm they have suffered as a consequence of these practices and this is a further deterrent to companies and motivation not to engage in cartel behaviour or collusion.

When considering how to compensate the victims of collusion one must consider the purpose of the Act. Section 2 of the Act sets out the purposes of the Act and *inter alia* provides for the development of the South African economy, competitive prices and product choices for consumers and the overall achievement of social and economic welfare of South Africa.

It is accepted by competition authorities that the purpose of a cartel and inevitably collusion, is to illegally maximise profit and market power and prevent or limit competition.

WHO ARE THE VICTIMS OF COLLUSION?

The South African Competition Act, 1998 has not explicitly stated who a victim of collusion is and the difficulty lies in the fact that a vast group of consumers could suffer harm from cartel behaviour. It's important not to prevent any person (natural or juristic) from a claim to compensation when there has been harm suffered, but it is equally important for there not to be double liability on a party to a cartel.

To date there has not been a formal civil damages award pursuant to the Competition Tribunal finding a firm guilty of cartel conduct in South Africa. There are several difficulties that a party wishing to claim civil damages as a result of cartel behaviour, for example, price fixing or bid-rigging, could potentially face. These difficulties amongst others, relate to the difficulty victims experience to draw a sufficiently close link to the harm suffered and the anti-competitive conduct; the difficulty victims experience to obtain the necessary evidence required to support their claim; the difficulty of quantifying cartel behaviour; and the lack of funds or mechanisms available to consumers and small medium enterprises in seeking redress.

In order to make it easier for alleged victims of anti-competitive conduct to claim civil damages, the European Union ("EU") has recently announced certain reforms in competition law.

These recent EU reforms bring about considerable changes with regards to compensation for victims of collusion.

The reforms include collective redress mechanisms aimed at enabling individual victims of collusion to claim collectively to circumvent the usual risks, costs and delays that are involved in civil litigation. In this regard, the two redress mechanisms

provided for are the representative action, and the opt-in collective action where individual victims of anti-competitive behaviour could decide to combine their claims together into one action.

CONCLUSION

Disclosure of evidence is a major issue most victims of collusion struggle with when considering claims for damages. This could be seen as the reason why the EU reforms also provide for an obligation on defendants to disclose hard-to-find evidence which also includes giving victims of cartels more time in preparing their case.

A further reform relates to quantification of harm, which relieves victims of the previously heavy evidentiary burden, as it places a rebuttable presumption in favour of the victim that harm has occurred.

Indeed the EU reforms lowered the hurdle in relation to parties wanting to claim damages and it needs to be seen whether these reforms would increase the number of civil damages claims as well as class actions that follow investigations and successful prosecutions for cartel behaviour in the EU.



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