

# Private Antitrust Litigation

in 27 jurisdictions worldwide

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# South Africa

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## Legislation and jurisdiction

- 1 How would you summarise the development of private antitrust litigation?

By way of introduction, South African competition law is regulated by the Competition Act 89 of 1998, as amended (the Competition Act). Section 3 of the Competition Act provides that it applies to all economic activity occurring within or having an effect within South Africa.

The Competition Act establishes three competition authorities: the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the CAC).

The Commission's role is both investigative and prosecutorial, while the Tribunal's role is adjudicative. The CAC's role is primarily to hear appeals against, and reviews of, decisions made by the Tribunal. However, in *American Natural Soda Ash Corporation and another v Botswana Ash (Pty) Ltd and others* [2005], the Supreme Court of Appeal (the SCA) held that the CAC did not have final jurisdiction in relation to competition law matters because its decisions were capable of being taken on appeal to the SCA.

Private antitrust litigation in South Africa is essentially a two-stage process – while the Competition Act makes provision for the participation by private litigants in complaint and merger proceedings before the competition authorities, such litigants must pursue any actions for damages suffered as a result of anti-competitive conduct before the civil courts (either the High Court or the Magistrates' Court).

Competition law jurisprudence in South Africa abounds with examples of vigorous participation by private litigants in proceedings before the competition authorities in the context of both complaint and merger proceedings. To illustrate, ArcelorMittal South Africa's recent appearance before the CAC on charges of excessive pricing was at the hands of private litigants (after the Commission's investigation concluded with a finding of no anti-competitive conduct). The prohibited merger between Sasol and Engen was opposed before the Tribunal by the Commission and five private litigants.

In stark contrast, there is a marked absence of precedent insofar as the second stage of private antitrust litigation in South Africa is concerned. In the *Commission v South African Airways* [2005], the Tribunal upheld the complaint lodged with the Commission by Nationwide Airlines that the national carrier had engaged in an abuse of its dominant position. Upon receipt of the Tribunal's decision, Nationwide indicated that it would pursue a civil action for damages, thereby pioneering previously uncharted legal waters. The parties have since settled the matter out of court, and in so doing, deprived competition law practitioners of a precedent-setting judgment on how to engage in the second stage of private antitrust litigation in South Africa.

To date, no private litigant in South Africa has invoked those provisions of the Competition Act aimed at commencing an action in the civil courts for damages suffered as a result of anti-competitive practices.

- 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Yes, the express mandate for private antitrust actions, both before the competition authorities and the civil courts, is set out in the provisions of the Competition Act.

- 3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Insofar as complaint proceedings are concerned, section 51 of the Competition Act provides that a complainant may refer a complaint to the Tribunal for adjudication in circumstances where the Commission elects not to pursue such complaint. Where the Commission prosecutes a complaint before the Tribunal, section 53 of the Competition Act provides for the participation by private litigants in such proceedings, but only to the extent required for the interests of such party to be adequately represented. Section 37 of the Competition Act provides for unsuccessful private litigants before the Tribunal to launch appeal or review proceedings, or both, before the CAC. In the event of an unfavourable decision from the CAC, private litigants may seek to prosecute an appeal or review, or both, before the SCA.

Section 53 of the Competition Act, read with rule 46 of the regulations relating to the functions of the Tribunal provides for the participation by private litigants in merger proceedings before the Tribunal, once again, only to the extent required for the interests of such party to be adequately represented. While private litigants may not launch an appeal against an unfavourable decision of the Tribunal in such circumstances, section 61 of the Competition Act affords them a right of review to the CAC.

Civil actions for damages arising from anti-competitive behaviour are provided for in section 65 of the Competition Act. In terms of this section, the assessment of the quantum or awarding of damages resulting from 'prohibited practices', or both, lies within the domain of the civil courts. Prior to instituting a civil action for damages in the civil courts, the plaintiff must obtain a certificate from the Tribunal or the CAC certifying, inter alia, that the conduct upon which the civil action for damages is based was found to be a prohibited practice in terms of the Competition Act. Thus, the civil courts are proscribed from considering the competition law merits of any damages claim brought under and in terms of section 65 of the Competition Act.

Importantly, section 65 excludes the possibility of a civil claim for damages in relation to persons that have already been compensated for damages flowing from the anti-competitive behaviour in question by way of a consent order in terms of section 49D(1) of the Competition Act (a negotiated settlement agreement).

- 4 In what types of antitrust matters are private actions available?

As set out above, private antitrust litigants are permitted to participate in complaint and merger proceedings before the competition

authorities (the first stage of private antitrust litigation in South Africa). This includes complaints in terms of:

- section 4 of the Competition Act which pertains to prohibited restrictive practices engaged in between competitors (such as price-fixing, bid-rigging, market division and the like);
- section 5 of the Competition Act, which pertains to prohibited restrictive practices engaged in between parties in a vertical relationship (such as minimum resale price maintenance); and
- sections 8 and 9 of the Competition Act, which pertain to abuse of dominance.

A civil action for damages (the second stage of private antitrust litigation in South Africa) is available to a private litigant where such party suffers damages or loss as result of a prohibited practice (as defined in the Competition Act).

5 What nexus with the jurisdiction is required to found a private action?

In terms of section 3 thereof, the Competition Act applies to all economic activity occurring within or having an effect within South Africa. Predicated on this foundation, section 49B(2)(b) of the Competition Act provides that any person may initiate a complaint against an alleged prohibited practice with the Commission.

As set out in question 3, the complainant may prosecute a complaint before the Tribunal where the Commission decides not to pursue the matter. If the Commission does prosecute a complaint before the Tribunal, the complainant may participate to the extent required for the interests of such party to be adequately represented.

As civil actions for damages arising from anti-competitive behaviour are adjudicated by the civil courts, the issue of jurisdiction will be determined by the relevant high court or magistrates' court rules (as the case may be). In the first instance, the civil court exercising jurisdiction where the defendant is ordinarily resident or principally carries on business will have jurisdiction to hear the matter. Furthermore, the court exercising jurisdiction where the wrongful conduct was committed or where its effects were felt, would also have jurisdiction. It further bears mention that the quantum claimed will determine whether the matter falls within the jurisdiction of a high court or a magistrates' court. Should the quantum exceed the threshold (set from time to time by the minister of justice) the matter will fall within the jurisdiction of the relevant high court. Should the quantum fall below such threshold, the matter will fall within the jurisdiction of the relevant magistrates' court. For more detail in this regard, please see question 7.

In circumstances where the defendant is not resident or carrying on business in South Africa, the relevant court rules make provision for the service of court processes outside of South Africa and, in certain circumstances, the courts may found jurisdiction to hear the matter.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

The prohibited practice provisions of the Competition Act refer to anti-competitive conduct engaged in by 'firms', which include persons, partnerships or trusts. Accordingly, private antitrust litigation is capable of being brought against individuals. In practice, however, the subjects of complaints tend more towards legal entities such as companies and the like. To the best of our knowledge, no individual has been successfully prosecuted for anti-competitive activities in South Africa.

The South African competition authorities and courts will have jurisdiction over corporations or individuals from other jurisdictions provided that the anti-competitive behaviour resulting in damages or loss, or both, occurs within, or has an effect within, South Africa (as per section 3(1)(a) of the Competition Act).

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

No. Under the Competition Act, the competition authorities (comprising the Commission, the Tribunal and the CAC) are seized with enforcing the South African antitrust regime on a national basis. Furthermore, the discreet roles fulfilled by each arm of the competition authorities in South Africa make it impossible for simultaneous private actions to be brought in respect of the same matter.

The above position is further reinforced by the fact that private litigants are only entitled to pursue a damages claim before the civil courts once the competition authorities have finally adjudicated a matter and issued a certificate certifying the perpetration of a prohibited practice.

Private action procedure

8 May litigation be funded by third parties? Are contingency fees available?

There is no statutory impediment in the Competition Act to third parties funding litigation.

Legal practitioners are also permitted to enter into contingency fee agreements with their clients. The contingency fee ultimately passed is the subject of negotiation between the parties.

The Contingency Fees Act provides that a contingency fee agreement cannot permit a legal practitioner to charge a contingency fee in excess of 25 per cent of the capital amount awarded. Furthermore, if the action proves ultimately to be unsuccessful, the legal practitioner shall not be entitled to recover any fees or disbursements whatsoever.

9 Are jury trials available?

Jury trials are not a feature of the South African legal system.

10 What pre-trial discovery procedures are available?

Pre-trial discovery procedures apply to both stages of private antitrust litigation in South Africa: proceedings before the competition authorities and damages actions before the civil courts.

Section 27 of the Competition Act, read with rule 22(1)(c)(v) of the regulations relating to the functions of the Tribunal provides that the Tribunal may give directions in respect of the production and discovery of documents (whether formal or informal) at a pre-hearing conference. For completeness, it bears mention that private litigants are entitled to attend such pre-hearing conferences in relation to those matters in which they are eligible to participate (qua complainant or intervener). The protocol is for such discovery procedures to follow those employed in the civil courts, although rigid adherence to the formalities of the civil courts does not occur. Furthermore, given the more informal nature of proceedings before the competition authorities, orders relating to the ad hoc production of relevant documents are not uncommon at appropriate times during the course of the proceedings.

Discovery procedures in all civil actions instituted in the High Court are determined by rule 35 of the High Court rules. Parties to a civil action are obliged to disclose to the other party all documents tapes or recordings in their possession or under their control that either serve to advance their case or adversely affect their case, or advance the case of the other party to the proceedings.

A party's failure to discover any document will result in that party not being able to rely upon such document in the action. Failure to discover documentation relevant to the action may result in the party desiring such discovery instituting an application compelling the recalcitrant party to make discovery of the documentation in its possession and this may give rise to adverse cost implications for

the party against whom such an application is made. A failure to make discovery pursuant to an application to compel may result in the recalcitrant party's claim or defence (as the case may be) being dismissed.

A party can also request the other party to make further and better discovery of any documentation that they have discovered, failing which the same procedures adopted above would also apply.

Either party can call on the other to provide copies of its discovered documents or to make same available for inspection.

Any documentation that is subject to legal privilege is not discoverable. These documents, however, must be listed in a separate schedule to be furnished to the other side, stating that same are privileged.

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11 What evidence is admissible?

The stringent rules of evidence that apply in the civil courts (for instance, the rules that apply to the admissibility of hearsay evidence) are not followed before the competition authorities. As with discovery procedures, a more informal approach to evidentiary matters is adopted before the competition authorities.

Section 55(3) of the Competition Act addresses the nature of evidence that is admissible before the Tribunal. In this regard, the Tribunal may accept as evidence any relevant oral testimony, document or other thing, whether or not it is given or proven under oath or affirmation or would be admissible in court.

Since the civil courts are precluded from considering the competition law merits of any damages claim brought under and in terms of section 65 of the Competition Act, the more important evidentiary matters are determined by the competition authorities. To the extent that evidence is required for the assessment of the amount or awarding of damages, the traditional rules of evidence that pertain in the civil courts will apply.

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12 What evidence is protected by legal privilege?

As a general principle of South African law (which applies equally within the context of South African competition law) communications between a legal adviser and his or her client will be legally privileged if:

- the legal adviser was acting in a professional capacity at the time the communication is made. In this regard, the payment of a fee by the client is a good but not conclusive indication that the legal adviser was acting in a professional capacity;
- the legal adviser was consulted in confidence. It is typically inferred that if the legal adviser was consulted in a professional capacity, and that the communication related to the transaction upon which the client seeks advice, such communication was intended to be confidential. This inference may however be rebutted;
- the communication was made for the purposes of obtaining legal advice. There is no need for the legal advice to have been concerned with litigation, actual or contemplated. However, for legal privilege to attach to the statements of agents or third parties, the communication must have been concerned with litigation; and
- the advice does not facilitate the commission of a crime or fraud.

There are two principal forms of legal privilege. Firstly, there is litigation privilege which arises once litigation has commenced or is contemplated. It attaches to all documents produced for the dominant purpose of litigation and not only protects all communications between legal adviser and client, but also those between a legal adviser and third parties such as witnesses or experts in the litigation.

Secondly and more broadly, there is legal advice privilege which protects all communications between client and legal adviser, provided they are confidential and are for the purposes of seeking or giving

legal advice. The essential difference between these two forms of legal privilege is that litigation privilege attaches additionally to relevant third party communications, whereas legal advice privilege does not.

As regards advice obtained from in-house counsel, South African law recognises that legal privilege applies not only to practising attorneys and advocates, but also to in-house counsel operating in alternative roles. For example, the high courts have held that a qualified advocate not practising as such but working as in-house counsel in an international auditing firm giving tax and legal advice and a salaried in-house counsel in government, giving advice to a member of Cabinet, both operate within the sphere of legal privilege. In the latter case, a distinction was made between the in-house counsel's advisory functions and any other functions he may have as part of his employment, which would not be protected by legal privilege.

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13 Are private actions available where there has been a criminal conviction in respect of the same matter?

At present, criminal liability does not attach to conduct in contravention of the provisions of the Competition Act. It is worth mentioning, however, that the Competition Amendment Act 1 of 2009 (the Amendment Act) proposes to impose criminal liability on directors or officials of firms that are found to have engaged in cartel activities. The Amendment Act is not yet of force and effect and will come into operation on a date fixed by the president by proclamation in the Government Gazette.

In any event, one would not ordinarily be precluded from instituting a civil action for damages where a criminal conviction based on the same facts has been handed down. As a general proposition, civil liability is entirely divorced from criminal liability under South African law, which recognises the existence of civil liability as being a separate and distinct cause of action from criminal liability.

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14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

Not applicable for the reasons set out in question 13.

However, the immunity granted to leniency applicants in terms of the Commission's Corporate Leniency Policy (the CLP) applies only to prosecution under the Competition Act for participation in classic cartel activities.

Thus the granting of immunity under the CLP does not shield the successful applicant from any criminal or civil action that may arise from the cartel conduct in question.

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15 What is the applicable standard of proof for claimants and defendants?

In all civil actions (including those before the competition authorities), the standard of proof required is a 'balance of probabilities' for all parties involved in the proceedings. For completeness, section 68 of the Competition Act provides that the 'balance of probabilities' is the standard of proof that applies to any proceedings brought in terms of the Competition Act.

The burden of proving a contravention of the Competition Act usually lies with the complainant, whether private litigant or Commission. In certain instances, however, once a complainant has discharged the requisite onus, the respondent bears the onus of successfully invoking one or more of the defences that may be available (again, subject to the 'balance of probabilities' standard).

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16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Since the Competition Act does not make provision for collective proceedings, all actions initiated thereunder are subject to the same timing considerations.

## Update and trends

The competition authorities' widely publicised 'cartel busting' successes have begun to mobilise consumer rights groups into seeking additional compensation from cartel participants. These consumer rights groups believe that the administrative penalties imposed by the competition authorities on cartelists do not adequately redress the harm suffered by consumers as a result of the anti-competitive conduct in question – hence an attraction to the civil remedies contained in the Competition Act (as opposed to the penalties, behavioural and structural remedies set out therein).

By way of example, in the wake of the competition authorities' successful prosecution of bread manufacturers Tiger Brands, Foodcorp and Premier Foods for fixing the price of bread, the Conscious Consumer Initiative (the CCI) indicated that it is investigating the possibility of instituting a class action on behalf of members of the public at whose expense the bread manufacturers

profited due to their participation in the bread cartel. The CCI is seeking legal advice in the interim while awaiting the Tribunal's decision on the last alleged participant in the bread cartel, Pioneer Foods. The National Consumer Forum has added its support to this cause and undertaken to lobby the South African government to provide financial support for the proposed class action.

The Commission's recent initiation of an investigation into South Africa's major supermarket and wholesale retail chains has caused the CCI to announce that it will also consider instituting a class action in this regard should the Commission uncover any cartel behaviour during the course of its investigation.

If any one of the proposed class action suits mentioned above yields a positive result for the claimants, this will undoubtedly serve to galvanise South African consumers into taking a more activist stance against perceived anti-competitive conduct by businesses.

## 17 What are the relevant limitation periods?

Section 67(1) of the Competition Act provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

Insofar as civil claims for damages arising from anti-competitive activities are concerned, such actions must be instituted within three years of the date on which a final determination of the matter was made by the competition authorities.

## 18 What appeals are available? Is appeal available on the facts or on the law?

A decision of the Tribunal may be taken on appeal or subject to review by the CAC. Similarly, a decision of the CAC may be taken on appeal or subject to review by the SCA (provided that the requisite leave is granted). Finally, should the matter in question raise issues under the Constitution of South Africa, leave to prosecute a further appeal or review, or both, before the Constitutional Court may be granted.

A civil action for damages will be heard by a single judge of the High Court. If leave to appeal or review this judgment is granted, such appeal or review will be heard by three judges (a full bench) of the High Court. The decision of the full bench of the High Court may be appealed to the SCA and will be heard by a bench of five judges. Should the requisite leave be refused by the full bench of the High Court, it is possible to petition the SCA to hear the appeal or review. Appeals focus on the merits of the judgment itself. As such, appeals may be brought either on the law, or on the facts, or on both the law and the facts.

## Collective actions

## 19 Are collective proceedings available in respect of antitrust claims?

Collective proceedings or class actions are a relatively new and unlegislated concept in South African law, having first been recognised as recently as 1994. They are provided for in section 38(c) of the Constitution of South Africa (the Constitution). Notwithstanding the foregoing, the Law Commission of South Africa is only now drafting legislation aimed at regulating class and public interest actions. As such, it is premature, at this juncture, to comment further on this aspect of legal practice in South Africa.

Furthermore, as set out previously, the Competition Act does not make any specific provision for these actions.

## 20 Are collective proceedings mandated by legislation?

Section 38(c) of the Constitution provides for collective proceedings as one of the rights contained in the Bill of Rights.

The Competition Act however, does not make any specific provision for such proceedings.

## 21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable for the reasons set out in question 19.

## 22 Have courts certified collective proceedings in antitrust matters?

Not applicable for the reasons set out in question 19.

## 23 Are 'indirect claims' permissible in collective and single party proceedings?

Not applicable for the reasons set out in question 19.

## 24 Can plaintiffs opt out or opt in?

Not applicable for the reasons set out in question 19.

## 25 Do collective settlements require judicial authorisation?

While in the ordinary course of antitrust and civil litigation in South Africa, settlements between parties may be made with or without judicial authorisation, we are not in a position to provide insight in relation to collective settlements (for the reasons set out in question 19).

## 26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable for the reasons set out in question 19.

## 27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable for the reasons set out in question 19.

## Remedies

## 28 What forms of compensation are available and on what basis are they allowed?

In civil actions for compensation pursuant to a finding by the competition authorities of anti-competitive conduct, claims are limited to the actual loss or damage suffered by the plaintiff as a result of the anti-competitive conduct in question.

For the reasons set out in question 1, the civil courts in South Africa have yet to consider a claim for damages in terms of section 65 of the Competition Act. Predicated on existing jurisprudence in

relation to damages claims, however, the amount claimed must be capable of being quantified in monetary terms and seek to restore the plaintiff to the position he was in before the wrongful conduct causing the damage took place. It is possible to claim for consequential loss (loss of profit) and prospective losses (future loss of business or profit) resulting from the damage caused by the wrongful conduct. The onus is on the plaintiff to quantify and prove the damages sought and the court will determine the amount of damages to be awarded, although these will not exceed the actual amount claimed by the plaintiff.

**29** What other forms of remedy are available?

The remedies contemplated in this question fall within the first stage of private antitrust proceedings in South Africa identified in question 1 above (within the remit of the competition authorities as opposed to the civil courts).

Section 58 of the Competition Act affords the Tribunal a wide discretion in making appropriate orders including:

- interdicting any prohibited practice;
- ordering parties to engage in specific conduct so as to end a prohibited practice;
- ordering divestiture of any shares, interests or assets;
- declaratory relief;
- declaring the whole or part of an agreement to be void; and
- ordering access to an essential facility on terms reasonably required.

Importantly, the list of remedies set out in section 58 is not exhaustive.

**30** Are punitive or exemplary damages available?

The philosophy employed by South African courts in awarding damages is restorative as opposed to punitive. As such, it is unlikely that punitive or exemplary damages will be awarded pursuant to civil actions under section 65 of the Competition Act.

**31** Is there provision for interest on damages awards?

Yes, all damages awards made by a court will attract interest at the prescribed rate of 15.5 per cent per annum. This will commence on the date of issue of the certificate from the competition authorities certifying, inter alia, that the conduct upon which the civil action for damages is based was found to be a prohibited practice in terms of the Competition Act.

**32** Are the fines imposed by competition authorities taken into account when settling damages?

While there is currently no precedent addressing this issue in terms of South African competition law, it is submitted that the answer is likely to be no. Administrative penalties imposed on a firm by the competition authorities are paid directly into the National Revenue Fund and, accordingly, do nothing to compensate a firm for damages or loss, or both, suffered as a result of anti-competitive conduct.

**33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

In the context of private antitrust litigation, a decision of the competition authorities is usually accompanied by an order as to legal costs. As a general rule, it is the unsuccessful party who must bear their own legal costs as well as those of the successful party, including the costs of the successful party's counsel. The legal costs recoverable are limited to the High Court tariff that awards legal costs on a 'party and party basis'. That is to say, only those costs reasonably necessary to be incurred by a party in order to attain justice will be awarded. In exceptional circumstances, punitive costs orders may also be granted as a means of expressing the authorities' displeasure at the conduct of one of the litigants.

**34** Is liability imposed on a joint and several basis?

While there is currently no precedent addressing this issue in terms of South African competition law, it is common (in ordinary civil proceedings) for two or more defendants who have been found liable for wrongful conduct to be held jointly and severally liable for damage caused by such wrongful conduct in terms of the Apportionment of Damages Act.

A defendant facing a claim for damages may join to the proceedings any party that is jointly liable for the damage and as such, can claim a contribution from such party for the satisfaction of the damages amount awarded.

**35** Is there a possibility for contribution and indemnity among defendants?

While there is currently no precedent addressing this issue in terms of South African competition law, a defendant (in ordinary civil proceedings) who has satisfied the full amount claimed in damages by the plaintiff has a right of recourse against a joint wrongdoer for a contribution towards the amount paid in satisfaction of the damages awarded to the plaintiff.

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**36** Is the 'passing-on' defence allowed?

The 'passing-on' defence has not been addressed by the competition authorities and its application to South African competition law is uncertain. In civil proceedings, however, there does not appear to be a legal impediment preventing a defendant from arguing this point in mitigation of damages claimed by a plaintiff.

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**37** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Save for the prohibited horizontal practices of fixing prices or trading terms, or both, dividing markets and bid-rigging, all other anti-competitive conduct engaged in between competitors is capable of being justified on the basis of a 'rule of reason' type analysis (a balancing of the anti-competitive effects of particular conduct against the pro-competitive gains arising from such conduct) (section 4 of the Competition Act).

Except for the prohibited vertical practices of minimum resale price maintenance, all other anti-competitive conduct engaged in

between firms in a vertical relationship is capable of being justified on the basis of the aforementioned 'rule of reason' type analysis (section 5 of the Competition Act). Certain conduct engaged in by a dominant firm that constitutes an abuse of dominance is capable of being justified on the basis of the aforementioned 'rule of reason' type analysis (section 8 of the Competition Act). Furthermore, price discrimination on the part of a dominant firm may be justified on the basis of:

- objective cost differentials;
- meeting the prices or benefits offered by a competitor; or
- changing conditions affecting the markets concerned (section 9 of the Competition Act).

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**38** Is alternative dispute resolution available?

Not in the context of competition law litigation, although litigants may invoke alternative dispute resolution as a means of resolving damages claims instead of approaching the civil courts.

