

**COMPETITION LAW DAMAGES AND THEIR QUANTIFICATION
IN SOUTH AFRICAN LAW**

BY: MALCOLM RATZ (Student Number 04368347)

**SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR THE DOCTORAL DEGREE
IN LAW (LLD)**

**IN THE FACULTY OF LAW,
UNIVERSITY OF PRETORIA**

SEPTEMBER 2016

ACADEMIC SUPERVISOR: PROF H.B. KLOPPER

DECLARATION

I, Malcolm Ratz, hereby declare that this thesis is my own, unaided work. It is being submitted in fulfilment of the requirements for the DOCTORAL DEGREE IN LAW (LLD) at the University of Pretoria. It has not been submitted before for any degree or examination in any other University.

Malcolm Ratz

Date:

ACKNOWLEDGEMENTS

I thank everyone for the support and assistance given to me during the course of this venture, without which the completion of this thesis would not have been possible. It is impossible to thank everyone and for that reason and I specifically offer my sincere gratitude to the following persons:

Professor Hennie Klopper, who showed endless patience, provided constant encouragement and valuable mentorship throughout the completion of this thesis. Many thanks for the discussions over coffee and cake, your invaluable input and meticulous guidance. You afforded me the opportunity to glean and learn from your experience and academic knowledge and for this I am ever grateful.

Professor Andre Boraine (Dean of the Faculty of Law) and The University of Pretoria Faculty of Law, whose assistance, patience and willingness to accommodate my schedule in order to allow me to achieve my ambition of completing this work has been a blessing.

The Faculty of Law Post-Graduate Office, for their assistance and patience in dealing with the constant barrage of questions, always happy to help in a professional and friendly manner, even during times of panic, it is greatly appreciated.

Dr. Stephen Taylor (PHD Economics), for his expert economic input over early morning breakfasts, which proved invaluable and highly educational.

Attorney Andre Pelsler, for his willingness to always discuss and debate the salient issues throughout the course of this thesis proved priceless and was of great assistance.

Ms. Marie Botha, as the most patient housemate in the world, and there when it all started.

Advocate Jonathan de Beer, for his encouragement, interest shown and his continued support provided motivation when needed most.

Robert Kruse and Jaco Roestoff, for their constant encouragement and support during the completion of this thesis, which was unwavering. Thank you for your mentorship and the opportunity you have given me to learn and develop under your tutelage.

Roestoff and Kruse Attorneys, with my thanks to all the individuals at the firm have who assisted and supported me during the course of this thesis.

To my parents, Wolfie and Colleen, the extent of whose unwavering support of everything I tackle in life can never be quantified (no pun intended). Without the best parents in the world, contemplating taking on such a mammoth task would have been inconceivable and completing it would have been impossible. Thank you.

To my wife, Jana (and the dogs - Bagle and Nina), your continued patience and encouragement, despite me spending many late nights typing and the kitchen table seemingly always being full of research material, was absolutely amazing. Thank you.

And, Melody Edwards (Editor) and Prof Genevieve Wood (Editor), whose professional and calm manner in handling the editing of this thesis no doubt saved me many sleepless nights and turned what seemed a proverbial mountain into a manageable molehill.

TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
TABLE OF CONTENTS	iv
LIST OF FIGURES	xiii
LIST OF APPENDICES.....	xiii
ABSTRACT	xiv
CHAPTER 1. INTRODUCTION.....	1
CHAPTER 2. ACTIONS BASED ON UNFAIR COMPETITION.....	4
2.1. Introduction.....	4
2.2. Assessing commercial conduct.....	4
2.3. Goodwill	7
2.4. Common-law: conduct giving rise to unlawful competition.....	9
2.4.1 Examples of recognised unfair competition	10
2.4.1.1 Misleading or deceptive conduct	11
2.4.1.2 Passing off.....	11
2.4.1.3 Piracy.....	12
2.4.1.4 Spreading false rumours about a competing business or product.....	12
2.4.1.5 Direct attacks on a competing enterprise	12
2.4.1.6 Competing in breach of a statute.....	12
2.4.2 Requirements: unfair competition arising from breach of statute.....	15
2.4.2.1 Introduction	15
2.4.2.2 Statute intended to give rise to cause of action.....	15
2.4.2.3 Claimant is a beneficiary of the statutory duty.....	16
2.4.2.4 Damage contemplated by the legislature	16
2.4.2.5 Provisions of statute infringed	17
2.4.2.6 Breach of statutory provisions caused damage	18
2.4.3 Unfair competition arising from breach of statute: requirement of damage to right to attract custom	18
2.4.4 Statutes which may give rise to claims for unlawful competition	20
2.4.4.1 Introduction	20
2.4.4.2 Trade Practices Act of 76 of 1976 (repealed).....	21
2.4.4.3 Harmful Business Practices Act of 71 of 1988 (repealed).....	21
2.4.4.4 Competition Act 89 of 1998	22
2.5. Conclusion	25
CHAPTER 3. DAMAGES ARISING FROM CONTRAVENTIONS OF COMPETITION ACT 89 OF 1998.....	27
3.1. Introduction.....	27

3.1.1	Justice advanced by the Competition Act 89 of 1998	28
3.2.	Section 65 follow-on damages and the South African legal framework	37
3.2.1	Introduction	37
3.2.2	Children’s Resource Centre v Pioneer Food and follow-on damages.....	39
3.2.2.1	Background.....	39
3.2.2.2	Pursuance of a follow-on damages claim.....	41
3.3.	Children’s Resource Centre ruling - Section 65: delictual or statutory?	44
3.3.1	Case law	44
3.3.2	Section 65: delictual action for damages	45
3.3.3	Assessing the elements of a delict	50
3.3.3.1	Conduct.....	50
3.3.3.2	Unlawfulness	51
3.3.3.3	Fault.....	52
3.3.3.4	Damage or harm.....	53
3.3.3.5	Causation.....	54
3.3.3.6	Arguments favouring section 65 damages as delictual action	54
3.3.4	Arguments favouring section 65 being statutory claim.....	55
3.3.5	Assessment of section 65.....	59
3.3.6	Interpretation of s 65 as a cause of action	63
3.3.7	Conclusion: s 65 as a statutory or delictual action	66
3.4.	Conclusion	67
CHAPTER 4.	DAMAGES AND QUANTIFICATION	71
4.1.	Introduction.....	71
4.2.	Types of damages: patrimonial and non-patrimonial loss	71
4.3.	Patrimonial loss	72
4.4.	Forms of patrimonial loss.....	73
4.4.1	Lucrum cessans and damnum emergens	73
4.4.2	Damage to property and pure economic loss.....	73
4.4.3	Direct loss and consequential loss.....	75
4.4.4	General and special damages	75
4.5.	Patrimonial loss arising from contraventions of the Competition Act.....	76
4.6.	Lost profits.....	79
4.6.1	Prospective loss	83
4.6.2	Evaluating prospective loss in cases of unlawful competition.....	87
4.7.	Techniques: assessment of patrimonial delictual damage	89
4.7.1	Introduction.....	89
4.7.2	Comparative method	90
4.7.3	Sum-formula approach.....	91

4.7.4	Concrete assessment of damage.....	94
4.8.	Sum-formula or concrete approach?	95
4.9.	Conclusion	96
CHAPTER 5.	PROVING CAUSATION	98
5.1.	Introduction.....	98
5.2.	Causation in South African law of delict.....	98
5.2.1	Determining factual causation.....	99
5.2.2	Determining legal causation	105
5.2.2.1	<i>Flexible approach</i>	105
5.3.	Causation and unlawful competition.....	107
5.4.	Economics and causal connection.....	109
5.5.	Conclusion	113
CHAPTER 6.	ECONOMIC MODELS AND QUANTIFICATION OF DAMAGES	116
6.1.	Introduction.....	116
6.2.	Methods and economic models of quantification	118
6.3.	Classification of economic models	122
6.3.1	Introduction.....	122
6.3.2	Comparator-based models	125
6.3.3	Financial analysis-based models.....	126
6.3.4	Market structure-based models.....	126
6.4.	Selecting an appropriate model	127
6.4.1	Problems in the use of economic models.....	127
6.4.1.1	<i>Establishing relevant time period</i>	128
6.4.1.2	<i>Reliable data</i>	128
6.5.	Single damages value	129
6.6.	Conclusion	130
6.7.	South African civil courts: where do facts and mathematics meet?.....	130
6.7.1	Introduction.....	130
6.7.2	Proving loss: how much evidence is enough?.....	132
6.7.3	Evaluation of the evidence.....	135
6.7.3.1	<i>Evaluation of chance</i>	136
6.7.3.2	<i>Assessing probabilities</i>	137
6.7.4	Expert evidence: objective element.....	139
6.7.5	Judicial discretion: subjective element.....	140
6.8.	Conclusion	142
CHAPTER 7.	COMPARATOR-BASED METHODS	144
7.1.	Introduction.....	144
7.2.	Cross-sectional comparisons	144

7.2.1	Introduction.....	144
7.2.2	Selecting a comparator.....	147
7.2.3	Advantages of cross-sectional comparisons.....	148
7.2.4	Disadvantages of cross-sectional comparisons.....	149
7.2.5	Techniques for determining counterfactual price using the comparator method.....	150
7.2.5.1	<i>Comparison of averages.....</i>	150
7.2.5.2	<i>Regression analysis.....</i>	153
7.3.	Time series comparator-based method.....	154
7.3.1	Comparisons: before-during and after-during.....	154
7.3.2	Selecting appropriate comparator.....	155
7.3.3	Advantages of time-series comparisons.....	158
7.3.4	Techniques for using time-series comparator method.....	158
7.3.4.1	<i>Comparison of averages.....</i>	158
7.3.4.2	<i>Interpolation.....</i>	159
7.3.4.3	<i>Autoregressive integrated moving average models (ARIMA models).....</i>	161
7.4.	Difference-in-differences comparator-based method.....	163
7.4.1	Advantages of the difference-in-differences method.....	165
7.4.2	Disadvantages of difference-in-difference method.....	165
7.5.	Conclusion.....	166
CHAPTER 8.	FINANCIAL ANALYSIS-BASED METHODS.....	167
8.1.	Relevance and role.....	167
8.2.	Financial analysis methods in determining counterfactual situation.....	168
8.2.1	Financial position of claimant.....	169
8.2.2	Financial position of defendant.....	170
8.3.	Performing a counterfactual profitability analysis.....	172
8.3.1	Introduction.....	172
8.3.2	Cost of capital.....	172
8.3.3	Profitability comparator benchmark.....	173
8.4.	Advantages of financial analysis methods.....	174
8.5.	Disadvantages of financial analysis methods.....	175
8.6.	Methods of financial analysis enabling damages estimation.....	176
8.6.1	Event study analysis.....	176
8.6.2	Bottom-up costing analysis.....	177
8.7.	Conclusion.....	179
CHAPTER 9.	MARKET ANALYSIS METHOD.....	182
9.1.	Introduction.....	182

9.2.	Levels of competitive interaction.....	184
9.2.1	Perfect competition	184
9.2.2	Monopolistic competition	184
9.2.3	Bertrand oligopoly.....	185
9.2.4	Cournot oligopoly.....	185
9.2.5	Bertrand oligopoly versus Cournot oligopoly	185
9.2.6	Monopolised market.....	186
9.2.7	Summary	187
9.3.	Industry organisation models	188
9.4.	Appropriate industry organisation model.....	188
9.5.	Industry organisation models and the counterfactual position.....	191
9.6.	Applying industry organisation models.....	192
9.6.1	Introduction.....	192
9.6.2	Single model approach	192
9.6.3	Two-model approach.....	193
9.7.	Conclusion	194
CHAPTER 10.	ESTABLISHING A WORKABLE COUNTERFACTUAL POSITION.....	195
10.1.	Introduction.....	195
10.2.	Nature of competition law contravention.....	197
10.2.1	Cartel conduct.....	197
10.2.1.1	<i>Increased price fixed and charged by the cartel.....</i>	<i>198</i>
10.2.1.2	<i>Production decrease.....</i>	<i>200</i>
10.2.1.3	<i>Further effects.....</i>	<i>201</i>
10.2.1.4	<i>Passing-on</i>	<i>202</i>
10.2.2	Abuse of dominance.....	205
10.2.3	Exclusionary conduct.....	206
10.3.	Determining the counterfactual	207
10.3.1	Introduction.....	207
10.3.2	Direct customers.....	209
10.3.2.1	<i>Indirect customers acting as distributors.....</i>	<i>209</i>
10.3.2.2	<i>End-consumers.....</i>	<i>209</i>
10.3.2.3	<i>Counterfactual customers.....</i>	<i>210</i>
10.3.2.4	<i>Competitors</i>	<i>210</i>
10.3.2.5	<i>Suppliers.....</i>	<i>211</i>
10.3.2.6	<i>Firms in connected markets.....</i>	<i>211</i>
10.4.	Market characteristics in which the contravention occurred.....	212
10.4.1	Types of markets	212
10.4.1.1	<i>Intermediate goods / consumer goods.....</i>	<i>212</i>

10.4.1.2	<i>Mature markets / new markets</i>	213
10.4.1.3	<i>International markets / local markets</i>	213
10.4.1.4	<i>Bidding markets / traditional markets</i>	213
10.4.2	Examples of market features	214
10.4.2.1	<i>Market structure</i>	214
10.4.2.2	<i>Pricing practices</i>	214
10.4.2.3	<i>Costs</i>	215
10.4.2.4	<i>Financing structures</i>	215
10.5.	Counterfactual to determine final damages	215
10.6.	Conclusion	217
CHAPTER 11.	PASSING-ON DEFENCE	218
11.1.	Introduction	218
11.2.	Policy behind passing-on	218
11.3.	United States	222
11.4.	Europe	226
11.5.	South Africa	228
11.6.	Conclusion	230
CHAPTER 12.	FINAL DAMAGES	231
12.1.	Introduction	231
12.2.	Appropriate method	231
12.2.1	<i>Availability and quality of information</i>	232
12.2.2	<i>Strength and accuracy of counterfactual</i>	233
12.3.	Final damages value	234
12.3.1	<i>Identifying a single preferred method</i>	235
12.3.2	<i>Pool-selection</i>	236
12.4.	Conclusion	237
CHAPTER 13.	PRIVATE COMPETITION DAMAGES: INTERNATIONAL EXPERIENCE.	238
13.1.	Introduction	238
13.2.	Canada	239
13.2.1	<i>Foundation for private competition damages actions</i>	239
13.2.2	<i>Recovery of damages</i>	240
13.2.3	<i>Who can claim?</i>	242
13.2.4	<i>Evidence: What can be used to formulate a private competition damages action?</i>	244
13.2.4.1	<i>Canada</i>	244
13.2.4.2	<i>Easing the burden with expert evidence</i>	245
13.2.5	Australia	247

13.2.5.1	<i>Foundation for competition damages arising from a contravention of the Competition and Consumer Act</i>	247
13.2.5.2	<i>Standing: who can claim?</i>	248
13.2.5.3	<i>Evidence: What evidence may be used to formulate a private competition damages action?</i>	249
13.2.5.4	<i>Expert evidence</i>	249
13.2.6	Japan	250
13.2.6.1	<i>Statutory framework for private competition damages</i>	250
13.2.6.2	<i>Who can claim?</i>	252
13.2.6.3	<i>Evidence available to a claimant</i>	252
13.2.6.4	<i>Benefiting from expert evidence</i>	253
13.2.7	Conclusion	253
13.3.	The European Union and United States: different philosophical sides of the same coin	255
13.4.	European Union	259
13.4.1	Introduction	259
13.4.2	EU recognition of private damages claims	260
13.4.2.1	<i>Crehan Ltd v Courage Brewery</i>	260
13.4.2.2	<i>Manfredi v Lloyd</i>	262
13.4.2.3	<i>Conclusion</i>	263
13.4.3	European Union: Proactive facilitation of private damages actions	263
13.4.3.1	<i>Kone AG: the big umbrella of compensation</i>	267
13.4.4	European Union: Facilitating class actions	269
13.4.5	Summary	270
13.5.	United States of America	272
13.5.1	Introduction	272
13.5.2	Treble Damages	274
13.5.2.1	<i>Conwood Company v US Tobacco</i>	274
13.5.2.2	<i>Treble damages: Criticism</i>	275
13.5.3	The United States: Class actions for anti-trust damages	276
13.5.4	Summary	278
13.6.	Conclusion	279
CHAPTER 14.	PROPOSALS TO FACILITATE PRIVATE DAMAGES ACTIONS ARISING FROM CONTRAVENTIONS OF COMPETITION LEGISLATION	281
14.1.	Introduction	281
14.2.	Proposals by European Union and active steps by Member States	282
14.2.1	Introduction	282
14.2.2	Promoting disclosure	282
14.2.3	Rebuttable presumption of overcharge	286

14.2.4	Rebuttable presumption of passing-on	289
14.2.5	Class actions: acknowledging benefits of opt-out	291
14.2.6	Balancing integrity of corporate leniency programmes and damages ..	295
14.3.	Conclusion	297
CHAPTER 15.	DEVELOPING SOUTH AFRICAN PRIVATE COMPETITION DAMAGES ACTIONS	299
15.1.	Introduction.....	299
15.2.	Access to justice: recognising the plight of the common man	300
15.3.	Potential tools to promote private competition damages prosecution within South Africa	302
15.3.1	Economic models for damage quantification	302
15.3.2	Class actions.....	304
15.3.2.1	<i>Recognition of class actions</i>	304
15.3.2.2	<i>Certification of opt-out class actions: Children’s Resource Centre</i>	306
15.3.2.3	<i>Certification of opt-in class actions: Mukaddam</i>	307
15.3.2.4	<i>Conclusion: class actions in South Africa</i>	308
15.3.3	Punitive damages	309
15.3.4	Rebuttable presumptions.....	310
15.3.5	Disclosure of information and corporate leniency policy.....	311
15.3.6	Legal costs within South Africa	318
15.4.	Conclusion	321
CHAPTER 16.	CONCLUSION AND RECOMMENDATIONS	324
16.1.	Introduction.....	324
16.2.	Unlawful competition within South Africa	328
16.3.	Section 65 damages: infringements of the Competition Act.....	329
16.4.	Quantification of damages	331
16.5.	Developing a culture of private competition damages	334
16.6.	Recommendations	337
16.6.1	Recommendation: advancing claimants’ cause	338
16.6.1.1	<i>Introduction</i>	338
16.6.1.2	<i>Claimants’ lack of information shielding defendants</i>	340
16.6.1.3	<i>Providing for adequate disclosure of information</i>	340
16.6.1.4	<i>Recommendation</i>	341
16.7.	Import of costs.....	342
16.7.1	Introduction	342
16.7.2	Recommendation.....	344
16.3	Conclusion	344
INDEX	346

REFERENCES	349
CASES	363
STATUTES	372
INTERNATIONAL STATUTES.....	372
APPENDICES	373

LIST OF FIGURES

Figure 1:	Classification of models for damages estimations (Source: Oxera Report, December 2009).....	124
Figure 2:	Example of cross-sectional comparison (Source: Oxera Report: December 2009).....	146
Figure 3:	An example of a using a time-series analysis (Source: Oxera Report, December 2009).....	157
Figure 4:	Example of interpolation on a time-series analysis (Oxera Report: December 2009).....	160
Figure 5:	Example of application of ARIMA model for purposes of forecasting the potential price movement and subsequent damage over a period of time (Source: Oxera Report: December 2009).....	162
Figure 6:	Example of how the difference-in-difference model seeks to isolate the damage brought about by the anti-competitive conduct. (Oxera Report: December 2009)	164
Figure 7:	Cross-section depicting the levels of competitive interaction within a market with the most competitive market on the right (perfect competition) and the least competitive market environment to the left (monopoly)	183
Figure 8:	The above illustration serves to show the impact the different market structures may have on the price and volumes within a market (Source: Oxera Report, December 2009).	187
Figure 9:	Illustration of the impact of a price-fixing cartel on a market.....	198
Figure 10:	Example of parties who could be affected by anti-competitive conduct.....	208

LIST OF APPENDICES

Appendix 1:	Hypothetical case study: a practical example of a follow-on competition damages calculation.....	373
Appendix 2:	Variables of main relevance to estimating damages from cartels.....	386
Appendix 3:	Variables of main relevance to estimating damages from exclusionary conduct	387
Appendix 4:	Examples of data sources that can be consulted for purposes of performing a damages estimation.....	389

ABSTRACT

This thesis investigates the question of private competition damages actions arising from contraventions of the South African Competition Act 89 of 1998.

The South African Competition Act has been actively and successfully enforced for almost 15 years. Great success has been achieved by the Competition Commission in uncovering cartel conduct and prosecuting contraventions of the Competition Act. The successful prosecution of contraventions of the Competition Act has resulted in contravening firms being ordered to pay millions of Rand in administrative penalties. Despite the success achieved by the competition authorities in uncovering contraventions and prosecuting contravening firms and gains for the fiscus in administrative penalties, the real victims of the anti-competitive conduct have to date failed to recover any compensation for the loss and damage caused by contraventions of the Competition Act.

Section 65 of the Competition Act expressly acknowledges the right of persons who have suffered loss or damage as a result of a *prohibited practice* to recover private damages in the civil courts. However, the Act is silent on the way in which parties are to institute these actions. In addition, a survey of South African law shows that the South African law of damages remains untested when called upon to assess and quantify complex private competition damages.

This thesis endeavours to contextualise the damages action referred to in section 65 of the Competition Act in order to provide clarity on the nature of the action and how a claimant may recover private damages arising from contraventions of the Competition Act. More developed foreign jurisdictions such as the European Union and United States are investigated in order to shed light on how private damages are dealt with in those jurisdictions, and how salient aspects of these damages regimes might assist with the development of South Africa's approach to private competition damages actions.

From this investigation, it appears that private damages actions arising from a contravention of the Competition Act should be recognised as a civil *delictual* action. Given the powers of discovery within the South African civil procedure, together with the duty of claimants to provide, and the courts' quest to be provided with all relevant information, including expert evidence and opinion, it is submitted that no significant adjustments to South African law are

required for the successful prosecution of private competition damages actions. However, the quantification of private damages continues to present challenges that have to be overcome - albeit that these challenges are not novel to competition law. In order to address the complexities of quantifying competition damages, the use of various economic models that may assist litigants and courts in assessing and estimating the extent of damage caused by a contravention of the Competition Act, are suggested and discussed. It is evident that the South African civil courts allow the leading of expert evidence to assist with the assessment and quantification of damages; however, the retention of the South African judiciary's discretion to assess damages on the available evidence in the most beneficial and appropriate way remains a fundamental feature of civil damages assessment in South Africa.

Existing structures within South African law are investigated, along with the procedural framework that serve as important building-blocks for the development of a successful culture of private competition damages actions and the development of a coincidental ancillary deterrent against contraventions of the Competition in the form of private damages actions. The fundamental requirements already exist within South African law for the enforcement and development of private competition damages actions in terms of section 65 of the Competition Act. These include liberal discovery procedures, favourable provisions pertaining to legal practitioners entering into contingency fee arrangements, and most recently, the acceptance and recognition of class actions for civil damages claims.

In order to facilitate a claimant's access to information and documents necessary for the proper formulation of a private competition damages action, recommendations are made to facilitate easy access to information germane to the bringing about and quantification of private damages actions. This will give further credence to the creation of effective structures for the administration of the provisions of the Competition Act, and facilitate, promote, and strengthen a further disincentive against contraventions of the Act in the form of private damages actions. It is recommended that a costs limitation be imposed on parties litigating for private damages arising from contraventions of section 65 of the Competition Act. Each party should be liable for its own costs, thereby achieving a balance between preventing frivolous and opportunistic litigation and facilitating, promoting and advancing the launching of private competition damages actions by the public. The public are in turn safe-guarded by the fact that large corporations cannot utilise the litigation costs and costs exposure as a tactic to discourage litigation.

CHAPTER 1. INTRODUCTION

*'Capital has its rights, which are as worthy of protection as any other right.'*¹

- Abraham Lincoln

South Africa's economic environment is characterised by a capitalist philosophy and as such, the various industries within the South African economy have been governed in a freely competitive market with relative minimum state intervention² A competitive environment has been described as '*the blood of commerce*', as competition ensures that the customer receives a greater variety of competing products to choose from at a better price.³

It is clear that strenuous competition may result in firms competing on various levels, including product quality, production efficiency, and ultimately with price, in order to win customers and grow their market share. In this competitive struggle, it is conceivable that a firm may grow market share at the expense of another firm. It is commonly accepted that a healthy competitive environment stimulates an economy and promotes consumer welfare, while on the other hand, anti-competitive conduct (unlawful competition) inhibits economic growth and harms the particular market in which the conduct occurs, along with its consumers.⁴

Competition is an essential component of a healthy commercial environment. However, it is important that a framework exists to govern the circumstances under which this competitive

¹ Abraham Lincoln, speech to Congress, Dec. 3, 1861, Available at <http://www.infoplease.com/t/hist/state-of-the-union/73.html>. (Last accessed on 12 May 2014).

² *Payen Components CC v Bovic Gaskets CC and Others* 1994 (2) SA 464 (W) 473G.

³ *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) 421 – 422.

⁴ *Brassey Competition Law* Juta (2002) 1 (*Competition Law*). See Van Heerden & Neethling. *Unlawful Competition* LexisNexis (2008) 3 (*Unlawful Competition*): "From the foregoing discussion it is clear that the competitive relationship brings about a struggle for the favour of the client, a struggle in which the benefit that the one obtains, finds its correlate in the prejudice or potential prejudice that the other suffers". See also Sutherland & Kemp *Competition Law of South Africa* LexisNexis (Issue16, 2012), 1-52 (*Competition Law of South Africa*).

struggle between firms and individuals may be undertaken. This ensures a fair and active competitive environment in which firms are protected from unlawful competition by others and also determines how restitution will be attained in cases where a firm (or individual) has been the victim of unlawful competition.⁵

Unlawful competition between individual competitors may be governed by the common-law, as developed over time or regulated by a statutory framework (such as the South African Competition Act 89 of 1998 (as amended)) specifically established to deal with specified unlawful competitive commercial conduct for the general benefit of the economy and/or the public. Significant damage can be suffered by individuals or firms arising from either a breach of the common-law or the statutory provisions of the Competition Act of 1998 regulating competition. The need for the law to regulate competitive interaction and allow victims of anti-competitive conduct a structure within which to obtain restitution for damages or loss suffered as a result of anti-competitive behaviour, stems from the fact that “free competition carries within itself the seed of its own destruction by creating the possibility of the formation of cartels and monopolies”.⁶ Accordingly, various jurisdictions have accepted that parties may claim compensation for the damage suffered as a result of competitive conduct, however constituted.⁷

While the sources of damages actions arising from unlawful competition will be considered during course of this thesis, these will be predominantly discussed for contextual and background purposes. The primary focus will be the consideration of private follow-on damages actions arising from transgressions of the Competition Act 89 of 1998, and particularly the classification and quantification of such damages. Although the emphasis will be on private damages resulting from contraventions of the Competition Act of 1998, this study will, due to the commonality of the particular damages and the general principles employed in the assessment of damages, have the coincidental beneficial effect of also providing a basis

⁵ Van Heerden & Neethling *Unlawful Competition* (2008) 10.

⁶ *Ibid* 10.

⁷ For comparative purposes, the European Union and United States of America are the two jurisdictions that will receive primary consideration.

for the expansion of knowledge and principles regarding the assessment of damages arising from the breach of common-law rules governing competition.

CHAPTER 2. ACTIONS BASED ON UNFAIR COMPETITION

2.1. Introduction

A clear understanding of the rules of competition are required to enable entrepreneurs and firms to assess the manner in which they may compete and for the public to appreciate the rights afforded them by national competition policy. These rules have long been entrenched in South African common-law and developed by case law and, with regard to competition policy, have been supplemented by legislation.

2.2. Assessing commercial conduct

The vibrant nature of commercial interaction within a capitalist economy invites entrepreneurs and firms to enter and interact with customers and competitors. Although this interaction may have a perceived negative impact on the business of a competing firm, this does not automatically render the competing conduct wrongful or unlawful.¹ It is the very question of assessing when commercial actions affecting individuals and competitors may be considered wrongful that has proven itself to be a difficult question for our courts to answer.²

¹ *Becker and Company (Pty) Ltd v Becker* 1981 3 SA 406 (A) 417. See also *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) 417.

² *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 186 Van Dykhorst J says the following: "I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with the trade of another." See also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 216; *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* 1977 (2) SA 211 (C) 248; *Spur Steak Ranches Ltd v Saddles Steak Ranch*, Claremont 1996 (3) SA 706 (C) 715; *Spinner Communications v Argus Newspaper Ltd* 1996 (4) SA 637 (W) 640.

In *Universiteit van Pretoria v Tommie Meyer Films (Pty) Ltd*³ it was accepted that in South African law, the wrongfulness of an action is found in the infringement of an individual's *subjective rights*.⁴

Subjective rights worthy of protection can take various forms, and have traditionally been recognised as including a parties personality rights,⁵ the right to objects,⁶ the right to acts and performances,⁷ intellectual property rights,⁸ and personality rights.⁹ These traditionally recognised examples of subjective rights are, however, not a closed list of potential subjective rights worthy of protection in South African law. Intellectual property rights, including the right to *goodwill* and *trade secrets* are also readily recognised as subjective rights worthy of protection under South African law.¹⁰

The assessment of the wrongfulness of competitive behaviour on a common-law level has been inextricably linked to the question of whether the conduct receiving complaint

³ *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 387. Van der Walt, JC and Midgely JR, '*Principles of Delict*, Lexis Nexis (2005) 76 (*Principles of Delict*). See also Neethling, Potgieter and Visser PJ *Neethling's Law of Personality*, LexisNexis, 2nd Edition, 2005, 24 (*Law of Personality*).

⁴ Neethling, Potgieter and Visser *Law of Delict* Lexis Nexis (2014) 51 (*Law of Delict*).

⁵ Personality rights include a party's right to his good name, physical integrity, dignity, and privacy.

⁶ Right to objects or other things include tangible objects which the party can own and use.

⁷ Right to acts and performances (personal rights) includes the right to receive services and compliance with obligations from another person.

⁸ Intellectual property rights include a party's right to intangible products developed by intellectual effort, such as a song written or a book or artwork.

⁹ Personal intellectual property includes intangible property of an intellectual nature attached to a party such as creditworthiness and earning capacity.

¹⁰ Neethling *Law of Delict* (2014) 53. See also Van Heerden & Neethling *Unlawful Competition* (2008) 105. *Patz v Greene* 1907 TS 427 at 436-437 Greenburg J explains the protected interest as follows: "I am of the opinion that a legal right of the applicant's has been infringed – the right, viz., to carry on his trade without wrongful interference from others. That is a common-law right, the existence of which has been recognized in many cases, and which, I imagine, does not admit of controversy [...] In the present case the illegality of the conduct of the respondents in carrying on trade cannot be questioned, inasmuch as it is expressly prohibited by law; and if their competition damages the applicant in his business, his right to trade without wrongful interference is infringed, and he has a remedy in law."

has infringed on a party's subjective right, i.e the right to attract custom.¹¹ Van Heerden and Neethling argue that the right to attract custom equates to a competitor's right to goodwill.¹² The courts initially evaluated the unlawfulness of an infringement of a firm's goodwill against the yardstick of honesty and fairness in trade and competition.¹³ Since the first use of this test of honesty and fairness, the courts have moved to, preferred, and applied the more general criterion of the *boni mores* and public policy for judging the wrongfulness of competitive conduct.¹⁴ When assessing competitive conduct and the fairness and honesty of the scrutinised conduct, consideration must consequently be given to the general sense of justice within the community (*boni mores*).¹⁵

¹¹ In *Salusa (Pty) Ltd v Eagle International Traders* 1979 (4) SA 697 (C) 704 Van Zijl J remarks: "passing off is but a form of unlawful competition, i.e. the right to attract custom without unlawful interference". See also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C).

¹² Van Heerden & Neethling *Unlawful Competition* (2008) 106.

¹³ *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 440–441. And see *Combrinck v de Kock*, (1887) 5 SC 409: "fair and honest competition, however active, is open to everyone, but no one has the right to take an undue and improper advantage by means of falsehoods, the effect of which is to benefit himself at the expense of another." See also *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 218-219; *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd, Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd* 1972 (3) SA 152 (C) 161-162; *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* 1977 (2) SA 211 (C) 249-250.

¹⁴ *Schultz v Butt* 1986 (3) SA 667 (A) 679: "while fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria." See also *Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) 1152 – 1153: "questions of public policy may be important in a particular case, for example the importance of a free market and of competition in our economics" and in addition, *Triomed (Pty) Ltd v Beecham Group* 2001 (2) SA 522 (T) 558; *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 (6) SA 350 (CC) 362.

¹⁵ *Schultz v Butt* 1986 (3) SA 667 (A) 668: "In judging of fairness and honesty, regard is to be had to *boni mores* and to the general sense of justice of the community". See also Corbett, *Aspects of the role of policy in the evolution of our common-law*, 1987 SALJ 52: "where unlawful competition is alleged and the case does not fall within one of the recognized [sic] categories of unlawfulness, the court is required to take a policy decision: a decision orientated by considerations of fairness and honesty, but at the same time guided by *boni mores* and the general sense of justice of the community."

2.3. Goodwill

The question as to what constitutes a firm's goodwill, which is worthy of protection within the South African framework of unfair competition, has resulted in various views being advanced:

- a) *Goodwill in the context of attracting customers*: conceptualising goodwill as the ability to draw clientele has long been accepted. As early as 1901 in *The Commissioner of Inland Revenue v Mull & Co.*, Lord Macnaghten favoured a view that goodwill should be viewed as a competitor's ability to attract customers.¹⁶ This position was later also followed in *Moroka Swallows Football Club Limited v The Birds Football Club*.¹⁷
- b) *Goodwill as the positive image harboured by clients*: Callman describes this meaning of goodwill as literally being the image of the business in the eyes of the clientele.¹⁸ This narrow view advanced by Callman does not find favour in

¹⁶ *The Commissioner of Inland Revenue v Mull & Co's Margarine Limited* 1901 AC 217 223-224: "what is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of a good name, reputation, and connection of a business. It is the attractive force which brings custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements [...]" See also *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) 947; *Botha v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) 212; *Moroka Swallows Football Club Limited v The Birds Football Club* 1987 2 SA 511 (W) 523 – 524; *Atlas Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 182; *Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1138 – 1139; *Jacobs v Minister of Agriculture* 1972 (4) SA 609 (W).

¹⁷ *Moroka Swallows Football Club Limited v The Birds Football Club* 1987 2 SA 511 (W) 519-523: "the goodwill consists of the drawing power attached to the reputation which the applicant claims to have built up over many years (spanning careers of many individual soccer players) for regularly entertaining those who attend soccer matches in which its team plays, with a display of skilful, attractive, exciting and often winning soccer [...] there are a number of factors recognized [sic] as contributing to create the magnet that draws greater or smaller crowds who are prepared to pay and watch professional soccer matches."

¹⁸ Callman *Callman on Unfair Competition, Trademarks and Monopolies*. West Thompsons, Vol 1 at 1-60 and 1-63; 4th Edition, edited by Altman L; 2003 revision;

South African common-law. The courts have opted for the wider view as applied in *The Commission of Inland Revenue v Mull & Co.*¹⁹ This concept of goodwill is further supported in *Caterham Car Sales Sales & Coachworks Limited v Birkin Cars (Pty) Ltd*,²⁰ where Harms JA held that: “[g]oodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business”.²¹ It is therefore clear that an understanding of goodwill should not be restricted to a mere subjective consideration of the business’s image harboured by clients, but rather that all the individual traits of the business be taken into consideration when considering a particular business’s goodwill.²²

- c) *Goodwill as the reputation of a firm or business*: Reputation can be vested in the established name of an existing undertaking. A positive business reputation may conceivably enhance a business’s ability to attract customers.²³ While business reputation is no doubt an important and valuable asset to a business, it is only a single (admittedly important) factor to consider when assessing a firm’s goodwill in the context of its ability to attract customers.²⁴

Vol. 1A Chapter 9 2007 revision; Vol 2 Chapter 11 2005 revision; Vol 4 Chapter 22 2004 revision; Spring 2007 Cumulative Supplement by Altman, L. & Pollack, M. (*Unfair Competition*).

¹⁹ *The Commissioner of Inland Revenue v Mull & Co’s Margarine Limited* 1901 AC 217.

²⁰ *Caterham Car Sales & Coachworks Limited v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) 947. See also *Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A) 416 – 417.

²¹ *Ibid*

²² Van Heerden & Neethling *Unlawful Competition* (2008) 108.

²³ *Ibid* 109. See also *Caterham Car Sales & Coachworks Limited v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) 948; *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) 400. *Nino’s Italian Coffee & Sandwich Bar CC v Nino’s Coffee Bar and Restaurant CC* 1998 (3) SA 656 (C) 666-667; *Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) 479. *Truck and Car Co Ltd v Kar-N-Truck Auctions* 1954 (4) SA 552 (A) 559; *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459 464; *O’Kennedy v Smit* 1948 (2) SA 63 (C) 66; *Gous v De Kock, Combrink v De Kock* 1887 (5) SC 405 415, Buchanan remarked that it is the “plaintiffs’ rights to their ‘business reputation’ in referring to the competitive interaction between the parties”.

²⁴ Van Heerden & Neethling *Unlawful Competition* (2008) 110.

The recognition of goodwill as a subjective right deserving of legal protection is accepted by the courts when applying the principles of fairness and honesty in the context of public policy, when determining whether the conduct complained of might be construed as being unfair competition or acceptable commercial practice.²⁵ This has since developed to a position where the wrongfulness of the competitive conduct is assessed against the reasonableness criteria, being a reflection of the sense of justice of the community (*boni mores*).²⁶

2.4. Common-law: Conduct giving rise to unlawful competition

The determination of when an infringement of another's goodwill and concomitant loss will be construed as being unfair competition, and when it will merely be deemed the result of effective and consequently lawful competition, is a vexing question. Essentially, it amounts to the weighing up of interests, particularly the right to attract custom of the one firm against the right to trade of the other firm.²⁷

Harms JA in *Telematrix (Pt) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* adopted the view that, "conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant."²⁸ It is accepted that the wrongful interference with the right to attract custom (being a patrimonial right)

²⁵ Neethling *Law of Delict* (2014) 328.

²⁶ *Schultz v Butt* 1986 (3) SA 667 (A) 679: "in judging of fairness and honesty, regard is to be had to *boni mores* and to the general sense of justice of the community."

²⁷ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty)* 1981 (2) SA 173 (T) at 186.

²⁸ *Telematrix (Pt) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) 468.

manifests itself in any of a variety of different forms and is to be evaluated and dealt with within the scope of the *lex Aquilia*.²⁹

A firm believing itself to be the victim of unfair competition is required to allege and prove all the elements necessary for an Aquilian action in order to succeed with an action for damages. The broad scope of the action does afford a prejudiced party suffering an infringement of his right to attract custom legal recourse, despite the particular conduct complained of not falling within the ambit of recognised conduct giving rise to a claim for damages based on unlawful competition.³⁰

2.4.1 Examples of recognised unfair competition

Despite the seemingly blank canvas regarding what conduct might be construed as being a *direct*³¹ or *indirect*³² unfairly competitive practice, certain precedents have

²⁹ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 186: “the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the *lex Aquilia*”. See also *Geary and Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) 440-441; *Lorimar Productions Incorporated v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) 1138.

³⁰ *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) 218: “the basis of a plaintiff’s action for wrongful interference by a competitor with his rights as a trader is clearly stated to be Aquilian. The significance of this is that it means that, while such an action must satisfy all the requirements of Aquilian liability, the broad and ample basis of the *Lex Aquilia* is available in this field for the recognition of rights of action even where there is no direct precedent in our law.” See also *Schultz v Butt* 1986 2 SA 667 (A); *Spur Steak Ranches and Others v Saddles Steak Ranch, Claremont and Another* 1996 3 SA 706 (C); *Spinner Communications v Argus Newspapers Ltd* 1996 4 SA 637 (W); *Klimax Manufacturing Ltd and Another v Van Rensburg and Another* 2005 (4) SA 445 (O); *Ingelheim Pharmaceuticals (Pty) Ltd v Novartis SA (Pty) Ltd and Another* [2005] 4 All SA 453 (W); *Phumelela Gaming and Leisure Ltd v Grüdling* 2007 (6) SA 350 (CC) 361; See also *William Grant and Sons Ltd v Cape Wine Distillers Ltd* 1990 (3) SA 897 (C) 917, where Justice Berman stated that: “in South Africa unlawful competition is recognised as an “actionable wrong [...] fitting comfortably under the umbrella provided by the *lex Aquilia*”.

³¹ Neethling *Law of Delict* (2014) 334. A direct infringement implies a direct attack on a competitor. The benefit a perpetrator gains by engaging in conduct considered to be a direct infringement, manifests itself in the extent of the damage done to the competitor’s right to attract custom.

³² *Ibid* 288. Indirect infringements arise as a result of a competitor using his own goodwill in an unlawful way, so as to gain an unfair benefit over a competitor.

established the type of conduct considered to be unfair competition. Some of the examples of commercial conduct recognised by the South African courts as conduct giving rise to unfair competition are highlighted below. Particular emphasis is placed on *unfair competition arising from the breach of a statute*. This form of unlawful competition is of particular significance for this thesis in comprehending and dealing with the recognition given to statutory unlawful competitive conduct in the Competition Act and claims for damages arising from the breaches of the provisions of the Competition Act.³³

2.4.1.1 *Misleading or deceptive conduct*

This infringement is laden with *dishonesty*. Perpetrators seek to attract custom by falsely misrepresenting their identity or characteristics of their products to the public.³⁴

2.4.1.2 *Passing off*

A perpetrator copies or imitates a competitor's trade name, trademark or 'get-up' in an attempt to gain a competitive advantage by misleading customers as to the origin of the goods or services being offered, by creating the impression that the goods of one firm are, or are connected to, that offered by another adversary.³⁵

³³ See the Competition Act 89 of 1998.

³⁴ See *Geary and Son (Pty) Ltd v Gove* 1964 (1) SA 434 (AD) 440: "a trader who makes fraudulent misrepresentations about his own business to the detriment of his rival's business is guilty of unlawful interference. In each case the interference is unlawful and actionable; and in each case the conduct is unfair or dishonest." See also *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* 1977 (2) SA 221 (C) in which the respondents were passing off a brand of wine styled 'Monte Carlo Baby Duck' as a sparkling wine, whereas it was in fact a perlé wine.

³⁵ See *Capital Estate and General Agencies v Holiday Inns* 1977 (2) SA 916 (A) 929. See also *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W). The court dismissed the claim of unfair competition based on passing-off due to the applicant failing to show any likelihood of deception or confusion. See also *Die Bergkelder v Delheim Wines (Pty) Ltd* 1980 (3) SA 1171 (C); *Pepsico Inc v United Tobacco Co Ltd* 1988 (2) SA 334 (W) 337-339; *Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd* 2001 (3) SA 884 (SCA) 886-887.

2.4.1.3 Piracy

This infringement arises when a firm makes the performance of a competing firm his own and then competes with its adversary.³⁶

2.4.1.4 Spreading false rumours about a competing business or product

A competitor will seek to taint the right to attract custom of a competing business or product by spreading malicious and false rumours regarding the entrepreneur and/or the qualities of his adversary's product in order to entice customers into business with the perpetrating firm.³⁷

2.4.1.5 Direct attacks on a competing enterprise

A perpetrator may look to infringe a competitor's ability to compete, not by targeting the competitor's right to attract custom, but rather by physically preventing the competitor from competing within the market; for example, by sabotaging a competitor's production facility or advertising material.³⁸

2.4.1.6 Competing in breach of a statute

This infringement of competition arises when the perpetrating firm conducts its business in breach of a statutory prohibition, thereby effectively acting in an unlawful

³⁶ Klopper, Pistorius, Rutherford, Tong, Van der Spuy & Van der Merwe *Law of intellectual property in South Africa* Lexis Nexis (2011) 41 (*Intellectual Property*); *Schultz v Butt* 1986 (3) SA 667 (A). *Gründling v Phumelela Gaming and Leisure Ltd* 2005 (6) SA 502 (SCA). See also Van Heerden & Neethling *Unlawful Competition* (2008) 236.

³⁷ *International Tobacco Company SA Ltd v United Tobacco Company (South) Ltd* 1955 (2) SA 1 (W) 24. See also Neethling *Law of Delict* (2014) 334.

³⁸ *Modimogale v Zweni* 1990 (4) SA 122 (B); *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd* 1997 (4) SA 399 (SCA). See also Neethling *Law of Delict* (2014) 335.

manner, and as a consequence, negatively impacts on a competitor's business (goodwill).³⁹

The question arises as to whether a competitive act in contravention of the provisions of a statute can be considered wrongful by virtue of a breach of the statutory provision and at the same time be considered as being unlawful competition, due to the conduct being *prima facie* unlawful.⁴⁰ The courts have taken a rigid view on competition in contravention of a statute by regarding a competitive act, which contravenes a statutory provision, to be unfair and therefore unlawful competition.⁴¹

Callman⁴² comments thus:

[...] it should be a cardinal principle of fair competition that all competitors owe each other the reciprocal duty of abiding by the 'rules of the game' [...] the obligation of competitors to comply with statutory standards, equally applicable to all, should clearly be one of those 'rules of the game' whether or not the statute involved was intended directly to govern or merely to peripherally affect competitive relationships.

Callman's view is largely echoed (however, possibly overstated) in *Lascon Properties (Pty) Ltd v Wadeville Investment*,⁴³ where the court recognised that the breach of a statutory provision constitutes a delict. While it is accepted that the non-compliance or contravention of a statutory provision may be *per se* wrongful, the element of

³⁹ *Patz v Greene* 1907 TS 427.

⁴⁰ *Klopper et al Intellectual Property* (2011) 47.

⁴¹ *Silver Crystal Trading (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd* 1983 (4) SA 884 (D). See also Van Heerden & Neethling *Unlawful Competition* (2008) 253.

⁴² Callman *Unfair Competition* 16-2.

⁴³ 1997 (4) SA 578 (W)

wrongfulness is merely one of elements that a party will need to properly allege and prove in order to bring a successful delictual claim against a party.⁴⁴

Van Heerden and Neethling comment that the *real competition principle*, which mirrors the philosophy of free enterprise and free competition, is that the competitor who delivers the best performance at the best price should succeed in the battle for custom, and that the competitor who fails to provide an adequate performance at a competitive price, must suffer loss of custom.⁴⁵

It is argued that competition in conflict with statutory provisions should be construed as being unfair competition. Firstly, only lawful legal conduct should be considered as permissible in the realm of the competitive struggle,⁴⁶ and secondly, an advantage gained by a competitor through its breach of a statutory provision affords the perpetrator an unfair advantage over other competitors, and therefore, falls foul of the competition principle, as the parties are no longer competing on an equal footing.⁴⁷

⁴⁴ Neethling *Law of Delict* (2014) 78: “it may happen that the defendant infringes the plaintiff’s interests by his positive conduct in violation of a statutory provision and that breach of a statutory duty indicates that a subjective right of the plaintiff is infringed, in other words that the defendant infringed the legal object of the plaintiff in violation of a norm.”

⁴⁵ Van Heerden & Neethling *Unlawful Competition* (2008) 128.

⁴⁶ *Ibid* 253. See also Van Heerden, *Grondslae van die Mededingingsreg.* H.A.U.M Publishers (1961) 179.

⁴⁷ *Ibid*

2.4.2 Requirements: Unfair competition arising from breach of statute

2.4.2.1 Introduction

In order for a person who has suffered damage as a result of another's breach of a statute to claim damages, Jansen JA in *Da Silva v Coutinho*⁴⁸ found that five elements need to be proven. These elements are:

- the contravened statute was intended to give rise to a cause of action;
- the claimant is a party for whose benefit the statutory duty exists;
- the damage sustained was of the type contemplated by the legislature in the statute;
- the provisions of the statute were in fact infringed; and
- the claimant suffered damage as a result of the statutory infringement.

These requirements require separate analysis and discussion.

2.4.2.2 Statute intended to give rise to cause of action

Some statutes make express reference to a delictual claim should the provisions be infringed.⁴⁹ Often no such reference occurs and the question as to whether the particular infringement gives rise to a damages action will have to be judged by the courts having regard to the wording of the particular statute. This principle was confirmed in *Olitzki Property Holdings v State Tender Board and Another*⁵⁰ where an infringement of the Interim Constitution, although unlawful, was found not to have envisaged a claim for damages by a party affected by such infringement.⁵¹ *Da Silva*

⁴⁸ 1971 (3) SA 123 (A) 140.

⁴⁹ See s 65 of the Competition Act 89 of 1998.

⁵⁰ 2001 (3) SA 1247 (SCA).

⁵¹ In *Olitzki Property Holdings v State Tender Board and Another* (fn 50) Cameron J states that: "this appeal raises two questions. The first is whether the provision regarding procurement administration in the interim Constitution (Constitution of the Republic of

*and Another v Coutinho*⁵² recognised that the absence of any express provision entitling a person who suffered loss as a result of the breach of a statute to institute a claim based on such breach does not necessarily preclude a damages action.

2.4.2.3 *Claimant is a beneficiary of the statutory duty*

Solomon, in *Patz v Greene*⁵³ identified two distinct groups of potential claimants. Firstly, cases where the statute in question expressly grants protection to a specific group of persons, and secondly, where the particular statute protects the interests of the public in general. Despite this distinction, Solomon acknowledges that both these groups are entitled to legal protection:

[E]veryone has, in my opinion, the right to protect himself by appeal to a court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy.⁵⁴

2.4.2.4 *Damage contemplated by the legislature*

Regard must be given to the purpose of the statute, as well as the protection sought to be given to parties against the contravention of the provisions of the statute.⁵⁵ The

South Africa Act 200 of 1993) creates a right to claim damages for lost profit at the instance of a party claiming injury because of its infringement". He concluded in his ruling that, "the lost profit the plaintiff claims would not be an appropriate constitutional remedy".

⁵² 1971 (3) SA 123 (A) 134.

⁵³ 1907 TS 427.

⁵⁴ *Patz v Greene* 1907 TS 427, 433. See also Van Heerden & Neethling *Unlawful Competition* (2008) 258 - 260.

⁵⁵ In *Da Silva v Coutinho* 1971 (3) SA 123 (A) 154 Muller JA states: "...sec. 22 (3) provides for a fine not exceeding R50 for non-compliance with sec. 22 (2). It is the appellant's

English case of *Gorris v Scott*⁵⁶ provides an insightful illustration of this requirement. In this case, the defendant, a ship-owner, transported sheep owned by the plaintiff. During the course of the journey the sheep were washed overboard as a result of the defendant's failure to erect pens, as were required by statutory regulations. The plaintiff sought to claim damages based on the defendant's failure to comply with the statutory regulations. The court held that the defendant was not liable for damages as sought by the plaintiff, because the purpose of the statutory provision was to avoid the spread of sickness and pests between animals and not to prevent animals from being washed overboard, as had occurred in this case. The plaintiff could conceivably have the right to claim damage for the loss suffered as a result of the ship-owner's negligence, resulting in the sheep being washed overboard. This claim would need to be cached and formulated differently, and not presented as a claim for damages arising out of the breach of a statute.

2.4.2.5 Provisions of statute infringed

It is trite that in order for a claim for damages to be made based on the breach of a statute, that a contravening party will have to be shown to have breached the provisions of the relevant statute.⁵⁷ For example, if a damages action arising from a breach of the Competition Act is contemplated, first and foremost, a plaintiff would be

contention that it must have been the intention of the Legislature that, in addition to the penalty provided for in sec. 22(3), a civil action for damages would lie for a breach of sec. 22 (2). Such a contention can hardly be reconciled with the provisions of the Act, which clearly show that, where the Legislature intended that an owner of a motor vehicle would, in his capacity as such, be liable, either directly or indirectly, for compensation such as envisaged in sec. 11 on the ground of non-compliance with a duty imposed by the Act, it so provided in clear and express terms. No such provision was made relative to the obligation imposed by sec. 22 (2). Had the Legislature intended that compensation would be claimable for a breach of sec. 22 (2), it could very easily have made such provision..."

⁵⁶ *Gorris v Scott* (1874) LR 9 Ex 125.

⁵⁷ Essentially when dealing with cases of unfair competition arising from a breach of a statute, a two phase analysis is required, whereby one firstly assesses whether the perpetrator has acted in conflict with the provisions of a statute, and secondly, one that considers whether this wrongful conduct had a negative impact on the victims right to goodwill, thereby rendering the conduct anti-competitive. See *Patz v Greene* 1907 TS 427, 433.

obliged to show that the defendant has contravened the provisions of the Competition Act.⁵⁸

2.4.2.6 *Breach of statutory provisions caused damage*

Damage caused by the contravention is not *per se* a requirement for the contravention of a statute. However, damage together with the necessary proof that the violation of the statute *caused* the resulting damage to be suffered, remains an essential requirement for a claimant to prove in order to succeed with a claim for damages resulting from the perpetrator's contravention of the statute.⁵⁹

2.4.3 *Unfair competition arising from breach of statute: Requirement of damage to right to attract custom*

It is important to note that the determination of whether the breach of a statute constitutes unfair competition requires a two-phase analysis: first, consider whether the statutory provision was contravened and then, second, evaluate whether the contravention of the statute resulted in, or caused, the competitor to suffer loss or damage to its *right to attract custom*.⁶⁰

While it is clear that a contravention of a statute must result in damage to the competitor in order for a claim of unfair competition to be made, there has been some debate regarding the proof of the damage suffered by a competitor.⁶¹ Some clarity was

⁵⁸ See Ch 3 par 3.1 for a discussion on the two-phase adjudication in cases of private competition damages actions.

⁵⁹ The requirement of damage, particularly in the context of unfair competition, will be dealt with separately, see Ch 2 par 2.4.2, Ch 3 par 3.3.3.4, and Ch 4. See also *Da Silva v Coutinho* 1971 (3) SA 123 (A) 147-148, regarding the causal connection between the infringement of the statute and the damage suffered by the claimant.

⁶⁰ *Patz v Greene* 1907 TS 427, 438, "...the applicant has made nothing more than a prima facie case of actual injury, and without proof of injury there is no proof of interference with his trade or of an infringement of his right." See also Van Heerden & Neethling, 254.

⁶¹ *Patz v Greene* 1907 TS 427, 433: "it is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage."

provided in *Kuter v South African Pharmacy Board*,⁶² where the court favoured a more practical approach in assessing the damages requirement for establishing unfair competition, by commenting that a person's right to relief is not excluded if he is unable to show actual patrimonial damages, as well as that the person need merely show with reasonable certainty that he is likely to suffer patrimonial damages arising from the contravention of the statute.⁶³

In *Begemann v Cirota*⁶⁴ the court took the view that damages for competition in conflict with the provisions of a statutory duty can result in a damages award without the need to prove special damages.⁶⁵ The claimant is consequently called upon to show that damages flowing from the competitor's contravention of the particular statute is *probable*. In so doing, the positions which were previously maintained – namely that the damages must be real or that special damages be proven – is avoided. Such a course of action favours a position where a court is bound to find that damage exists if the evidence on a *balance of probabilities* shows that damages will probably be suffered.⁶⁶

It would appear as though Solomon took an unreasonably harsh position in requiring real damage to have been suffered or that special damage be proven in order to succeed with the application for an interdict preventing the unfairly competitive conduct. In fact, proven damages are not a requirement for the granting of an interdict. In addition, a claimant is only required to prove the probability of damage and not actual damage. See in this regard Van Heerden & Neethling, 257.

⁶² 1953 (2) SA 307 (T).

⁶³ See *Kuter v South African Pharmacy Board* 1953 (2) SA 307 (T) 312-314: "the decision in *Patz v Greene & Co.*, however, does not appear to me to exclude from the right to relief a member of the public who, though unable to show that he has actually suffered patrimonial damage, can establish with reasonable certainty that he is likely to suffer damage from the prohibited act [...] The established rules under which our Courts grant or refuse interdicts embody substantive as well as procedural law and it is clear that they afford protection not only when an injury has actually been committed, but also where there is a well-grounded apprehension that such an injury will be committed." See also *Ingelheim Pharmaceuticals (Pty) Ltd v Novartis SA (Pty) Ltd* [2005] 4 All SA 453 (W) 461-462.

⁶⁴ 1923 TPD 270.

⁶⁵ *Begemann v Cirota* 1923 TPD 270, 274. This is better approach conforming to existing law than the position adopted by Solomon J in *Patz v Greene* (*supra*). See in this regard Van Heerden & Neethling *Unlawful Competition* (2008) 257.

⁶⁶ Van Heerden & Neethling *Unlawful Competition* (2008) 258. See also *Shenker Bros v Bester* 1952 (3) SA 655 (C). This was an appeal on a ruling of the Magistrates Court.

2.4.4 Statutes which may give rise to claims for unlawful competition

2.4.4.1 Introduction

Certain statutes contain provisions expressly restricting practices which could amount to unfair competition. The general rule is that the contravention of any statute (even those not specifically aimed at managing competitive relationships) can result in unfair competition, provided that the contravention of the statute has had the required negative impact on a competitor's right to attract custom.⁶⁷ If the necessary elements can be proven, any statute could conceivably be considered to regulate competition in an indirect manner,⁶⁸ and if the contravention of that statute can be shown (with a sufficient connection present)⁶⁹ to have *caused* damage to the claimant's goodwill.⁷⁰ Certain statutes manifestly and actively endeavour to manage the competitive interaction between parties. Three examples of such statutes within South African jurisprudence are the following:⁷¹

- Trade Practices Act 76 of 1976
- Harmful Businesses Act 71 of 1988
- Competition Act 89 of 1998

The court held that the Magistrate had not erred in granting the damages confirming the position that damages need not be proven with absolute precision. This decision was eventually altered on appeal with the court finding in favour of granting an absolution from the instance on grounds differing from those dealt with in the Court a quo. See *Shenker Brothers v Bester* 1952 (3) SA 664 (A).

⁶⁷ Callman *Unfair Competition* 16-2: "...with statutory standards, equally applicable to all, should clearly be one of those 'rules of the game' whether or not the statute involved was intended directly to govern or merely to peripherally affect competitive relationships."

⁶⁸ See discussion on the requirements to claim for breach of statute discussed in par 2.4.1.7 above.

⁶⁹ See Muller AJA's discussion of the causal connection required when assessing the damage suffered as a result of the breach of a statute in *Da Silva v Coutinho* 1971 (3) SA 123 (A) 147-148.

⁷⁰ See the discussion of the requirement of damage to goodwill in par 2.3 and 2.4 above.

⁷¹ Van Heerden & Neethling *Unlawful Competition* (2008) 260-262.

2.4.4.2 *Trade Practices Act of 76 of 1976 (repealed)*

The Trade Practices Act of 1976 (now repealed) expressly prohibited and criminalised the display of misleading advertising material or the making false misrepresentations regarding the characteristics of the goods being sold or marketed.⁷² While the legislature ostensibly attempted to protect the interests of the public with the introduction of this statute, there is no doubt that the statute also sought to effectively manage commercial competitive interactions between rival firms.⁷³

Importantly, despite a contravention of the Trade Practices Act resulting in the imposition of criminal sanctions, the Act does not restrict or inhibit a party who suffered patrimonial loss as a result of a contravention of this Act from pursuing a claim for civil damages against the contravening party.⁷⁴

2.4.4.3 *Harmful Business Practices Act of 71 of 1988 (repealed)*

The Harmful Business Practices Act of 1988 (also known as the Consumer Affairs Act, and now repealed), empowers the Minister of Trade and Industry to declare certain business conduct unlawful if the Minister is of the opinion that it is in the public interest that such unfair business practice be criminalised. The Act describes an unfair business practice as any business practice which, directly or indirectly, has, or is likely to have, the effect of harming the relations between businesses and consumers,

⁷² Act 76 of 1976. The entire Act, excepting ss 1, 9, 13 and 19, was repealed by the Harmful Business Practices Act 71 of 1988.

⁷³ *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd* 1990 (4) SA 136 (D) 149-150: "it seems to me that the label on the product in question does indeed contain an indication (or indications) which is false and misleading to the effect that the product is Scotch whisky. Counsel for respondents has, however, submitted that the object of the Legislature in enacting s 9(b) was to protect members of the public against being misled. Accordingly, any member of the public who has been misled may approach the Court, but not a rival trader who is; it was submitted, not misled. It seems to me that the object of the Legislature was also to protect traders or producers of goods from the actions of other traders who might mislead members of the public to purchase their goods in preference to theirs."

⁷⁴ Van Heerden & Neethling *Unlawful Competition* (2008) 261.

unreasonably prejudicing any consumer, deceiving any consumer, or unfairly affecting any consumer.⁷⁵

While the wording in isolation would appear to be directed at protecting the interests of the consumer, the provisions of the Act are not restricted to the consumer. The protection afforded by the Act is extended to the competitors of those firms seeking to engage in unfair business practices.⁷⁶ The Minister may declare certain behaviour to be an unfair business practice, and may impose criminal penalties for those parties engaging in these unfair practices. Section 19 of this Act expressly entrenches a party's right to pursue civil remedies arising from the unfair business practice of another.⁷⁷

2.4.4.4 *Competition Act 89 of 1998*

It is clear that the South African common-law has developed an extensive set of rules which govern competition and in particular the unlawfulness of competitive interaction between individual competitors. Statutory provisions, which regulate competitive behaviour outside of individual private relationships, and which serve the broader national economic and public interest, are to be found in the Competition Act of 1998.⁷⁸

The Competition Act is the latest initiative by Government to regulate national competitive interaction within the South African economy. The Act provides clear guidance on the nature of conduct prohibited by expressly describing restricted vertical and horizontal practices. It regulates the actions of dominant firms within a particular

⁷⁵ S 1 of the Harmful Business Practices Act 71 of 1988.

⁷⁶ Van Heerden and Neethling *Unlawful Competition* (2008) 262.

⁷⁷ Section 19 (1): No provision of this Act shall be construed as depriving any person of any civil remedy.

⁷⁸ Act 89 of 1998. Various acts preceded the Competition Act. See the Regulation of Monopolistic Conditions Act 24 of 1955 and the Maintenance and Promotion of Competition Act 96 of 1979. International jurisdictions have also sought to promote competition through express statutory intervention. These include Canada (Competition Act 1985); United States (Sherman Act 1890, the Clayton Act 1914 and the Federal Trade Commission Act 1914); United Kingdom (Competition Act 1998); Australia (Competition and Consumer Act 2010).

market through the introduction of prohibitions on the conduct of these dominant firms in order to prevent them from abusing their dominance within their particular market.⁷⁹ The Competition Act furthermore regulates the concentration of economic power, by requiring the competition authorities to assess and approve or decline mergers between parties so as to ensure that the proposed amalgamation of existing business would not have a negative competitive impact on the market within which these firms operate.⁸⁰

The repealed Harmful Business Practices Act primarily sought to protect public interests and the regulation of competitive interactions was a secondary effect of the legislation.⁸¹ The Competition Act has as its primary focus the regulation of the competitive interaction between rival firms in order to achieve certain economic and social objectives.⁸²

⁷⁹ See s 4, 5 and 8 of the Competition Act 89 of 1998.

⁸⁰ See Chapter 3 of the Competition Act 89 of 1998.

⁸¹ See the discussion on the Harmful Business Act above.

⁸² Van Heerden & Neethling *Unlawful Competition* (2008) 27. See also Brassey *Competition Law* (2002) 40: "Competition law is ultimately concerned with the maintenance of the structure of the market, not with the substantive effect of transactions concluded within it." It is, however, important to note that while the primary focus of the Act appears to be the regulation of commercial interaction and behavior by corporates, a further fundamental element of the Act is that it seeks to address socioeconomic aspects within the public sphere. See Sutherland and Kemp *Competition Law of South Africa* 1-52. It acknowledges that the economy should be open to greater ownership by a greater number of South Africans, and that credible competition law and effective structures to administer those laws are necessary for an efficient functioning economy. It stresses that "an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development' will benefit all South Africans". Brassey *Competition Law* (2002) 87: "the fact that the Act includes socioeconomic dimensions is testimony to the fact that this is one of the new generation of competition policy". Also see *Minister of Economic Development v Competition Tribunal* (the Walmart case) 110./CAC/Jun11, 09/03/2012 at par 98: "viewed holistically, there is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue of an embrace of the goals of a free market and effective competition together with an incorporation of uniquely South African elements, including the need to address our exclusionary past, which need is reflected expressly in the preamble together with s 2 of the Act, the legislature imposed ambitious goals upon the competition authorities created in terms of the Act."

The objectives of the Competition Act include the promotion of efficiency amongst firms by encouraging firms to be adaptable and dynamic within their commercial environment, and promoting competitive pricing and increased product offerings by firms to the public.⁸³

While the Competition Act does not detract from the ambit of unlawful competition as established in the common-law, it creates a reasonably comprehensive framework dealing with competition related matters.⁸⁴ The benefits associated with the Competition Act are that competition-related complaints are investigated and adjudicated by specialist bodies⁸⁵ at the cost of the Government. The legal mechanisms dealing with competition issues provided by the Competition Act provide a more attractive option in addressing the possible effects of certain forms of anti-competitive conduct. The provisions of the Act have the advantage of adjudication of defined competition disputes dealt with by the Act, without the risk of considerable legal costs resulting from litigating in the civil courts on matters of unfair competition in terms of the common-law.

⁸³ See the preamble to the Competition Act 89 of 1998: “the people of South Africa recognise: that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans. In order to — provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest: establish independent institutions to monitor economic competition: and give effect to the international law obligations of the Republic.” See also section 2(a) – (f) of the Competition Act 89 of 1998. See also fn 82.

⁸⁴ Van Heerden & Neethling *Unlawful Competition* (2008) 27.

⁸⁵ The Competition Commission, Competition Tribunal and Competition Appeal Court.

The current Act does not allow for criminal sanctions against persons engaging in any of the prohibited practices contained in the Act.⁸⁶ The Act does punish contravening firms by the imposition of administrative penalties against firms contravening the provisions of the Act.⁸⁷ In addition, the Act expressly allows any person who has suffered loss or damage as a result of a *prohibited practice* to additionally institute action against the contravening firm in a civil court for damages arising from the contravention of the provisions of the Act.⁸⁸

2.5. Conclusion

South African law protects the common-law right of a person to his/her right to attract custom and who has suffered damages as a result of unlawful competition to claim such damages from an infringing party. The common-law recognises various manifestations of unlawful competition such as passing off, misrepresentation of own performance, instigation of a boycott, and in particular, unlawful competition resulting from the breach of a legislative provision. Of these manifestations of unlawful competition, competition in contravention of a statute is for purposes of this study of particular importance. This is so mainly because of the advantages of lack of risk and legal costs offered claimants and complainants who have suffered damages as a result

⁸⁶ The Competition Amendment Act 1 of 2009 proposes the introduction of personal criminal liability for infringers of the Act. See clause 12 of the Competition Amendment Act 1 of 2009 published in *Government Gazette* No. 33533 of 28 August 2008.

⁸⁷ See s 59 of Act 89 of 1998.

⁸⁸ See s 65(6) of Act 89 of 1998: “a person who has suffered loss of damage as a result of a *prohibited practice* –

- (a) may not commence action in the 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 s 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.

of a contravention of the Competition Act, by using the mechanisms dealing with illegal competitive conduct found in the Act, in conjunction with the common-law claim for damages resulting from competition in contravention of a statute.⁸⁹

Statutes dealt with in this chapter do not restrict or diminish an individual's right to seek common-law-based recourse for unfair competition in the civil courts, or to pursue damages claims for the loss suffered as a result of unlawful competition in the form of the breach of the provisions of these statutes. The Competition Act expressly affirms the right of a party who has suffered damages as a result of a contravention of the Competition Act to institute a damages claim in the civil courts.⁹⁰

This chapter is centred on the nature of the damages arising from a contravention of the Competition Act, as well as the manner in which a claimant may launch and classify damages action and ultimately quantify the extent of damage suffered as a result of a contravention of the Competition Act. Consequently, the chapters that follow will deal with the requirements and elements that need to be complied with, alleged and proven by a claimant to be successful with a damages action arising from a contravention of specifically the Competition Act.

⁸⁹ Discussed in par 2.4.2 above.

⁹⁰ See s 65 of the Competition Act 89 of 1998.

CHAPTER 3. DAMAGES ARISING FROM CONTRAVENTIONS OF COMPETITION ACT 89 OF 1998

3.1. Introduction

The Chairman of the Office of Fair Trading in the United Kingdom stated that: “a successful competition regime needs public resources to be supplemented or complemented by private resources through actions in the courts.”¹

It is apparent from the wording of the Competition Act that the legislature envisaged the enforcement of both administrative penalties² *as well as* civil damages³ against contravening firms or individuals. However, in order to properly assess the nature of these remedies (and particularly for purposes of the present investigation regarding the remedy of civil damages), it is necessary to consider the underlying philosophical basis of the remedies contained in the Competition Act. To this extent, *corrective justice* and *distributive justice* as an appropriate framework of the respective remedies will be guided by the role and objective of the different judicial bodies, who assess the particular remedy relevant to the proceedings before it. The courts have acknowledged the different objectives sought to be achieved by civil damages and administrative penalties, by accepting that the civil damages are pursued to address private wrongs, whereas administrative penalties imposed by the Tribunal are made in the public interest.⁴

¹ Philip Collins, Chairman Office of Fair Trading public and private enforcement challenges and opportunities, Speech to the Law Society’s European Group, 6 June 2006. Available at www.offt.gov.uk/shared_offt/speeches/0306.pdf. (Last accessed on 8 November 2012.)

² see sec 59 of the Competition Act 89 of 1998

³ see sec 65(6) of the Competition Act 89 of 1998

⁴ *American Natural Soda Corporation v Competition Commissioner* 2003 5 SA 633 (CAC) 639, Malan J states that: “the tribunal is not empowered to make orders for the

3.1.1 Justice advanced by the Competition Act 89 of 1998

Distributive justice accepts the difficulties and limitations of placing victims in the position they would have been in had the contravention not occurred and does not focus solely on the interests of the individual, but rather on achieving greater wellbeing for all parties affected.⁵

In relation to the workings of the Competition Act, the general wellbeing of the public lies in the investigation and prosecution of anti-competitive conduct in contravention of the Competition Act, and the enforcement of the statute in order to achieve the intended social welfare objectives. This engineers an active and fair competitive landscape from which the public (as consumers) can benefit. The imposing of an administrative penalty against a firm found to have contravened the provisions of the Competition Act is tantamount to promoting the distributive justice sought to be achieved by the Act. Firms who engage in these practices will be penalised, not for what damages they may have inflicted on any particular individual, but the administrative penalty will rather be imposed as a remedy to punish contravening conduct with a view to discouraging firms from acting in this manner in future. The greater objectives and interests of society at large are thereby protected.⁶

Corrective justice supports the principle that individual victims should be placed in the position they would have been in but for the contravening conduct.⁷ The right to

payment of damages to any particular person (s 62(5) and s 65(5)). [...] Essentially, as I have said, they are orders of a limited kind to be made in the public interest. They do not seek to vindicate private rights.”

⁵ Vallentyne, P. “Distributive justice” (undated) Available at: http://klinechair.missouri.edu/docs/distributive_justice_handbook.pdf. (Last accessed on 2 March 2015).

⁶ Mbazira *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice* Pretoria University Legal Press (PULP), 2009, 114-115 (*Mbazira 2009*). Chayes, A. “The role of the judge in public law litigation” *Harvard Law*, 1979 (89), 1281, 1294. Rawls *Political Liberalism* Columbia University Press (1993) 16. See also Wellman *Justice*. In Simon, L. (ed.). *The Blackwell guide to social and political philosophy* Wiley-Blackwell (2002) 70.

⁷ Modak-Truran, M. “Corrective justice and the revival of judicial virtue” *Yale Journal of Law & Humanities*, 2000 (12), 250. See also Gardner, J. “What is Tort for? Part 1. The

restitution for victims of contraventions of the Competition Act by way of damages is a right expressly recognized by the Competition Act⁸ and is within the jurisdiction of the civil courts to determine and assess. Despite the restitution of damages being the primary goal of the civil courts,⁹ the role of corrective justice is often a double-edged sword. Its primary objective is to compensate victims, while simultaneously adding deterrent value against prospective unlawful competitive conduct, also regulated by the competition authorities when investigating and handing down administrative penalties.

The theory of distributive justice allows the enforced remedies to be prospective and centred on the needs of society as a whole. Authorities such as the competition authorities are, through the enforcement of penalties, enabled to deter future repetition of the same contravening conduct. In contrast, corrective justice is retrospective in nature, and focuses on the individual claimant in order to address past wrongs.¹⁰

While the primary objective of the damages awards contemplated by the theory of corrective justice is to compensate the victim of the contravening conduct for the monetary loss suffered as a result of the contravention, the awarding of damages consequentially serves to add to the deterrence sought by the competition authorities under the framework of distributive justice.¹¹ The additional consequence of added deterrence occasioned by corrective justice is founded in the arguments that parties

Place of Corrective Justice” *Law and Philosophy*, 2011 (30), Issue 1, 1-50 (*Gardner 2011*).

⁸ See section 65(6) of the Competition Act 89 of 1998.

⁹ Who will strive to achieve the goal advanced by the theory of corrective justice when adjudicating actions for private competition damages.

¹⁰ Roach *Constitutional remedies in Canada* Canada Law Book, (1994) 3-17. The perceived backward looking nature of corrective justice is criticized in Gardner (2011) 14: “a second and perhaps more pernicious misinterpretation of the contrast between corrective and distributive justice would have it that norms of corrective justice are sensitive to the past (they set ‘backward-looking’ grounds of allocation) whereas norms of distributive justice look to the future (they set ‘forward-looking’ grounds of allocation).”

¹¹ Lianos, I “Competition Law Remedies: In search of a Theory” (2011) (*Competition Law Remedies*). Available at http://www.ucl.ac.uk/laws/clge/wp-series/ucl_clge_014_11.pdf (Last accessed on 2 March 2015).

will perform a cost-benefit evaluation before engaging in any potential damaging activity. This particularly applies to any activity that contravenes the Competition Act. The assumption is that, based on a hypothetical position where no penalties would be enforced for engaging in the contravening conduct and given a choice between acting as one pleases and doing what is required by some legal rule, many people will do as they please in order to promote their personal individual gain, including engaging in calculated contraventions of the Competition Act.¹²

A 2008 study performed by Connor and Lande considered and evaluated many examples of cartel overcharges. The authors observe that the median cartel overcharge is approximately twenty-five percent (25%).¹³ A further study undertaken during 2011 by Niels, Jenkins and Kavanagh (which sought to expand and develop the Connor Lande study) concluded that the median overcharge achieved by cartels was approximately eighteen-percent (18%), and the average cartel overcharge was approximately twenty-percent (20%).¹⁴ These respective studies indicate that cartels (save for unsuccessful cartels) stand to gain significant additional profit from anti-competitive behaviour. This additional profit potentially renders the threat and/or risk of the possible imposition of an administrative penalty (capped at ten-percent of the turnover achieved in a single financial year)¹⁵ less of a financial threat, and/or deterrent to firms than the legislature may have hoped. This poses the question: *Does crime pay?*¹⁶ This is of particular significance in view of the fact that South Africa's

¹² Wells & Eaton *Constitutional remedies: A reference guide to the United States Constitution*, Praeger Publishers (2002) 176 (*Constitutional remedies*). See also Mbazira (2009) as well as Lianos *Competition Law Remedies* (2011) 10-17.

¹³ Connor & Lande *Cartel Overcharges and Optimal Cartel Fines*, *Competition Law and Policy* American Bar Association (2008), 2208-2211 (*Cartel Overcharges*).

¹⁴ Niels, Jenkins & Kavanagh *Economics for Competition Lawyers* Oxford Press (2011) 506 (*Niels, Jenkins & Kavanagh 2011*).

¹⁵ See section 59(2) of Act 89 of 1998.

¹⁶ Landes, W.M. "Optimal Sanctions for Antitrust Violations" *University of Chicago Law Review*, 1983, 652, 655: "despite the penalty, it still may be profitable to form the cartel. In our example, a \$50 fine will be too low. Firms would not forgo cartel profits of \$100 to avoid a \$50 fine."

competition law regime has, to date, failed to successfully usher in a culture of private competition damages actions.

Penalties should be of a magnitude that prompts parties to perform a risks and rewards evaluation before it elects to engage in any anti-competitive behaviour. Landes argues that the appropriate penalty should be equal to the net harm caused to society, and cautions against over-penalising firms. Excessive penalties could lead to inefficiencies within the competitive landscape that serve to prejudice society, instead of advancing the interests of society sought to be promoted by the imposition of the penalty.¹⁷

In order to deter the inclination of parties to pursue their own interests, rather than conform to the laws of society, it is necessary to attach sanctions and/or penalties to the contravention of legal rules - including contraventions of the Competition Act. This is because competing firms know that, if they are willingly contravening the Competition Act and do as they please without regard for others, their conduct will have a negative impact on their own financial welfare by the possible incurring of administrative penalties *and* possible civil damages. This will discourage them from engaging in such illegal conduct.¹⁸

This brief discussion of the philosophical aspects pertaining to the remedies advanced by distributive and corrective justice,¹⁹ together with the interaction of both distributive and corrective justice respectively applied by the competition authorities and the civil courts in the imposing of administrative penalties and awarding of damages, shows how these two remedial objectives are both advanced by the Competition Act. The legislature creates a framework for the achievement of both distributive justice and corrective justice through the provisions of the Competition Act. The interaction

¹⁷ *Ibid* See also Lianos *Competition Law Remedies* (2011) sec 3.

¹⁸ Wells & Eaton *Constitutional remedies* (2002) 176.

¹⁹ For more in-depth assessment and discussion of the theoretical and philosophical aspects of distributive and corrective justice within South Africa, see Mbazira (2009) and Liebenberg & Quinot *Law and Poverty: Perspectives from South Africa and Beyond* Cape Town: Juta (2012). See also Lianos *Competition Law Remedies* (2011).

between *distributive justice* and *corrective justice* - particularly in the context of the remedies (administrative penalties and private damages) arising in cases of contraventions of the Competition Act - can clearly be identified. *Distributive justice* applies a remedy that will protect society from similar future infringements (administrative penalties), and *corrective justice* is the compensatory remedy (private damages) of reparation for damage suffered by an individual as a result of the contravening conduct. This phenomenon not only serves to confirm, but importantly, seems to advance the recognition that public resources need to be supplemented with private resources in order to give proper credence to the objectives envisaged by the Competition Act.

3.1.2 Driving justice through private competition damages actions

In jurisdictions such as the European Union and the United States, civil damages claims are viewed as a corollary form of effective private enforcement of national competition policy.²⁰ The European Union holds the view that statutory administrative penalties enforced against contravening parties serve to deter firms from engaging in anti-competitive conduct. Private damages actions fulfil the compensatory²¹ element by seeking to “repair the harm suffered because of the infringement”,²² resulting from a transgression of public law provisions. Recognising that an active culture of private damages actions for anti-competitive conduct will serve to deter would-be infringing

²⁰ Kroes, N “Enhancing actions for damages for breach of competition rules in Europe” *Dinner speech at the Harvard Club*, New York, 22 September 2005. Available at http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm. (Last accessed on 8 November 2012.)

²¹ The United States promotes a punitive element to damages claims arising from anti-competitive conduct by allowing for claims to be made for up to three times the amount of damages proven over and above the actual damage suffered. The treble damages policy applied by the United States will be discussed in more detail in Chapter 13 par 3.4.2. See also Hovenkamp, HJ. “Quantification of Harm in Private Antitrust Actions in the United States” (February 2011) (*Quantification of Harm 2011*). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758751 (Last accessed on 7 April 2014.)

²² *Official Journal of the European Union*. (2013/C 167/07) at 1 par 2. Available at <http://kartellblog.de/wordpress/wp-content/uploads/2013-Communication-from-the-Commission-on-quantifying-harm-in-actions-for-damages.pdf> (Last accessed on 12 May 2014.)

firms and also more adequately punish those firms who contravene competition laws,²³ the United States encourages private damages claims.

The primary objective of South African law (similar to the position adopted by the European Union) when dealing with damages claims is: “to compensate the person who has suffered harm”,²⁴ essentially by placing the victim (claimant) in the position they would have been had the wrongful conduct not been committed by the infringer. Private enforcement consequently serves as an additional (possibly potentially greater) deterrent to firms from engaging in anti-competitive practices. It is consequently in the best interests of the public in general and the competition authorities in particular to create an environment in which private damages claims against firms found to have contravened the Competition Act, are encouraged and facilitated.²⁵

The South African Competition Act applies to all economic activity within or having an effect within the South African territory and grants the competition authorities exclusive jurisdiction to adjudicate competition matters regulated by the Competition Act²⁶ and

²³ Hovenkamp *Quantification of Harm* (2011). See also Van de Walle “Deterrence of Antitrust Violations: Do Actions for Damages Matter in Japan?” (2011) (*Japan*). Available at <http://www.sef.hku.hk/aslea2011/private/paper/19.%20Simon%20Vande%20Walle%20final%20full%20paper.pdf> (last accessed on 17 May 2014) 7 par 5. The author recognises that “private damages actions also contribute to the deterrence of antitrust violations by imposing financial sanctions in the form of damages.” However, the author then proceeds to analyse the Japanese experience and concludes at p 9 par 6 that damages have only contributed to a limited extent to deter competition law infringement; however, the deterrence of competition law infringements is a secondary benefit of private damages, which has as its primacy the restitution to the victims of the anti-competitive conduct.

²⁴ Van der Walt & Midgley *Principles of Delict* (2005) 216.

²⁵ There is clearly important interaction between the imposition of administrative penalties, satisfying the distributive justice objectives of the legislature, and the awarding of damages, which serves a dual function of supplementing the deterrence factor sought to be achieved by the agenda of distributive justice advanced by the imposition of administrative penalties, as well as seeking to remedy the damage suffered by the individuals, by compensating them for the loss suffered as a result of the contravening conduct.

²⁶ S 3(1) of the Competition Act of 89 of 1998. See also s 62(1) of the Competition Act of 89 of 1998.

determine whether conduct can be said to be in contravention of the Competition Act.²⁷

Section 65(6) of the Competition Act states:

(6) 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.

The Competition Act clearly contemplates that a person who has suffered loss or damage as a result of the anti-competitive conduct shall commence any potential damages action in a *civil court*.²⁸

²⁷ S 65(2) of the Competition Act of 1998.

²⁸ S 65(6)(b) of the Competition Act of 1998.

This essentially creates a *two-phased* adjudication process for civil damages actions arising from the contravention of the Competition Act. The Competition Tribunal and the Competition Appeal Court adjudicates the conduct, and the civil courts are called upon to decide and assess damages (if any) arising from the conduct in contravention of the Competition Act.²⁹ Civil damages actions brought subsequent to the findings of the Competition Tribunal or Competition Appeal Court are commonly referred to as *follow-on* damages claims and will have to be based on the common-law action for unlawful competition as the consequence of a contravention of a statutory provision.³⁰

While the primary aim of claims for follow-on damages are to compensate the victims of anti-competitive behaviour, successful private damages claims against firms contravening the Competition Act may serve as an additional deterrent, assisting public enforcement efforts and promoting compliance with the provisions of the Act. Despite the clear gains to be had from private damages actions for compensation of victims of infringements, it is surprising (particularly in a more developed competition regime such as Europe) that in only approximately 25% of findings of contravention by the European Commission have resulted in the 'victims' pursuing civil damages actions against such firms.³¹

²⁹ The only exception to this two-phased adjudication jurisdiction appears to be the authority granted to the Competition Tribunal in terms of s 49D of the Competition Act to confirm consent orders that contain a damages award in favour of the victim(s) of the conduct. Van Heerden and Neethling 58: "the Competition Tribunal and Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising from prohibited practice." See also *American Natural Soda Corporation v Competition Commission* 2003 5 SA 633 (CAC) 639-640.

³⁰ *Brassey Competition Law* (2002) 327. Sutherland & Kemp *Competition Law of South Africa* 12-7. Niels, Jenkins & Kavanagh (2011) 493: "after a competition authority has found an infringement and imposed a remedy (often a fine), parties that have been harmed by the infringement may file a claim for damages against the infringer [...] such 'follow-on' damages claims under competition law are increasingly common in many jurisdictions."

³¹ EC Press Release: "Antitrust: Commission proposes legislation to facilitate damage claims by victims of antitrust violations" (11 June 2013) (*EC Press Release*). Available at http://europa.eu/rapid/press-release_IP-13-525_en.htm. (Last accessed on 25 June 2014.) In South Africa, the number of private damages actions arising from a finding of a contravention of the Competition Act are negligible. No private damages action has to date been either fully or successfully prosecuted in the South African courts.

Like the European Union, South Africa has not yet actively created a conducive environment to follow-on damages actions as contemplated by the Competition Act.³² To date, no award for follow-on damages arising from a contravention of the Competition Act has been made by the South African courts.³³ However, there have been attempts by parties to claim damages in terms of section 65 of the Competition Act.³⁴ The slow development within South Africa of private competition damages actions can be ascribed to a variety of reasons. The primary problems are the complexities of quantifying damage inflicted as a result of the anti-competitive conduct and the high cost of litigation in South Africa. This is all the more so in cases where an individual consumer has a insignificant claim or where the majority of consumers lack

³² See s 65 of the Competition Act of 1998.

³³ This is not taking into account any damages awards that may have been granted by the Competition Tribunal or Competition Appeal Court in terms of s 49D of the Competition Act and exclusively refers to the civil damages as contemplated in s 65(6)(b) of the Competition Act.

³⁴ See *Nationwide Airlines v South African Airways* 80CRSep06. Nationwide Airlines (Pty) Ltd sought to bring the first follow-on damages action in South Africa against South African Airways (Pty) Ltd. SAA were found to have contravened the Competition Act by offering incentives to travel agents to promote the sale of SAA tickets above those of its competitors. Given SAA's dominance in the market, the Tribunal found this to be abusive behaviour by SAA, who were inducing the travel agents not to deal with the SAA competitors. Nationwide's damages claim is based on the loss of ticket sales suffered as a result of SAA's contravening conduct. Nationwide was liquidated and the matter has to date not been pursued. However, British Airways has also instituted a damages action against SAA in light of the contravention of the Competition Act by SAA. See *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways* (South Gauteng High Court case number 12026/2012). This matter has only very recently been heard and judgment handed down on 8 August 2016). Distributors and customers (as represented by a class) have attempted to recover follow-on damages claims against the firms found to have contravened the Competition Act by fixing bread prices. See *Children's Resource Centre and others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) and *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (2) SA 254 (SCA). Damages actions against the construction cartel are gathering support. See Competition Commission Case numbers: 2009 Feb4279 / 2009 Sep4641 in which the following firms were implicated in the prohibited conduct in contravention of the Competition Act, Aveng (Africa) Ltd; Basil Read Holdings (Pty) Ltd; Esorfranki Ltd; G Liviero & Son Building (Pty) Ltd; Guiricich Bros Construction (Pty) Ltd; Haw & Inglis Civil Engineering (Pty) Ltd; Hochtief Construction AG; Murray & Roberts; Norvo Construction (Pty) Ltd; Raubex (Pty) Ltd; Rumdel Construction Cape (Pty) Ltd; Stefanutti Stock Holdings Ltd; Tubular Technical Construction (Pty) Ltd; Vlaming (Pty) Ltd; WBHO Construction (Pty) Ltd. See also Business Day Article by Visser & Allix "Plans to sue construction companies are gaining momentum" (16 January 2014). Available at <http://www.bdlive.co.za/business/industrials/2014/01/16/plans-to-sue-construction-companies-are-gaining-momentum>. (Last accessed on 10 May 2014.)

the financial resources to bring a complex civil damages action against a large corporate firm.

At present, the South African law relating to follow-on damages within the realm of competition law and contraventions of the Competition Act is underdeveloped. Recent events provide some insight as to how these civil damages actions may be facilitated in South Africa on both a legal and practical basis. These include the recent Supreme Court of Appeal findings on the bringing of class actions, as well the views expressed on the nature of the damages action arising from contraventions of the Competition Act.³⁵

In order to examine how follow-on damages actions might be assessed and dealt with by the South African civil courts in future, it is necessary to determine where actions arising out of the Competition Act fit into the existing legal framework, and the way in which the civil courts might approach such claims. In this regard, section 65 of the Competition Act is of particular significance.

3.2. Section 65 follow-on damages and the South African legal framework

3.2.1 Introduction

The Competition Tribunal and Competition Appeal Court have exclusive jurisdiction to adjudicate whether conduct is in contravention of the provisions of the Competition Act. Section 65(6)(b) of the Competition Act states that a party pursuing an action for damages requires a certificate from the Chairman of the Competition Tribunal or the President of the Competition Appeal Court certifying that the conduct forming the basis of the damages claim has been found to be a prohibited practice in terms of the

³⁵ See Ch 3 par 3.2.2.

Competition Act.³⁶ The section 65 certificate serves as irrefutable confirmation of the contravention of the Competition Act by the cited party. The civil courts will consequently not need to consider the conduct and whether such conduct was in fact a contravention of the Competition Act.³⁷ Rather, it will only be required to assess the remaining elements necessary for a successful damages action. These are the elements of *causation* and the extent of *damages* caused by the contravening conduct.³⁸

The provisions of section 65 of the Competition Act clearly require that when follow-on damages arising from contraventions of the Competition Act are sought to be claimed, a *two-phased* approach has to be adopted. First, the Competition Tribunal and/or Competition Appeal Court is responsible for determining whether the conduct was within the ambit of the Competition Act and contravened the Competition Act, and second, the civil courts are tasked with adjudicating and assessing the remaining elements of causation and damages.³⁹ The question that this raises is whether claims

³⁶ This means that a plaintiff in such a damages claim is essentially relieved of not only showing conduct, but also unlawfulness in a damages claim resulting from an infringement of the Competition Act. These elements would have been predetermined by the relevant Competition Act Tribunal and is then evidenced by the sec 65(6)(b) certificate.

³⁷ In fact, the civil courts are prohibited from considering the merits of the conduct said to be in contravention of the Competition Act, by virtue of this being within the exclusive jurisdiction of the Competition Authorities. Section 65(2) of the Competition Act states the following: “65(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and – if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or (a) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that – (i) the issue has not been raised in a frivolous or vexatious manner; and (ii) the resolution of that issue is required to determine the final outcome of the action.”

³⁸ Scallan, Mbikiwa & Blignaut “Compensating for harm arising from anti-competitive conduct” *Seventh Annual Competition Law Economics and Policy Conference*, (5 & 6 September 2013) (Scallan Mbikiwa & Blignaut 2013). Available at: <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2A/Conference-Paper-Final-21-08-2013.pdf>. (Last accessed on 14 April 2014).

³⁹ Refer to Ch 3 par 3.3.3 for a discussion on all the elements necessary for a delictual damages action to be brought before the civil courts. Importantly, for purposes of s 65 damages actions, the contravention verdict by the Competition Tribunal would mean that certain of the requirements for common law civil liability, notably conduct,

for follow-on damages sanctioned by section 65 of the Competition Act are to be viewed as common-law delictual or statutory damages claims.⁴⁰

This question of the nature of section 65 damages actions was examined by the Supreme Court of Appeal in *Children's Resources Centre and others v Pioneer Foods and others*.⁴¹ In the course of hearing, the respective parties, each offered differing interpretations of section 65.⁴² The arguments presented in this case require some further thought and discussion and will be more fully dealt with below.⁴³

3.2.2 Children's Resource Centre v Pioneer Food and follow-on damages

3.2.2.1 Background

In December 2006 the Competition Commission was alerted as to the possible existence of a cartel consisting of three major bread producers in the Western Cape. The suspected participants were Tiger Brands, Pioneer Food and Premier Foods. Information obtained suggested that these firms engaged in coordinated conduct in order to achieve higher prices for their product from their customers, where the large

unlawfulness and fault, have already been established and need not, and in fact cannot, be reconsidered by the civil courts. See fn 39 above.

⁴⁰ The debate as to the categorisation of competition damages actions is not unique to South Africa. The English courts are also faced with the issue of the type of damages claim that arises from statutory contraventions. See *WH Newson Holding Ltd v IMI Plc* [2013] EWCA Civ 1377 where the court found that section 47A damages is not limited to claims of breach of a statutory duty. See also *WH Newson Holding Ltd v IMI Plc* [2012] EWHC 3680, 29, where Roth J in reference to the scope of section 47A damages states that such a claim is not restricted to one arising from a statutory duty, but rather, that one is to consider "the factual nature of the claim, not the cause of action with which it is clothed".

⁴¹ *Children's Resource Centre and others v Pioneer Food and Others* 2013 (2) SA 213 (SCA).

⁴² The appellants (Children's Resource Centre) argued an interpretation in favour of s 65 creating a delictual claim upon which the subsequent damages action is to be based. The respondent (Pioneer) argued that the claim referred to in s 65 is solely based on statute.

⁴³ See Ch 3 par 3.3.4 and par 3.3.5.

national supermarket retailers, smaller general traders, and small informal sector general traders, all being resellers of bread to the general public.⁴⁴ The Commission investigated the allegations and following its findings initiated a complaint against the bread producers participating in the cartel activity in the Western Cape. Premier Foods subsequently approached the Competition Commission in terms of the Commission's Corporate Leniency Policy ('CLP')⁴⁵ for leniency in respect of its participation in the cartel conduct and providing the Commission with additional information relating to the extent of the cartel conduct in which it had participated. The Commission discovered further cartel conduct, over and above that contained in the first complaint, in the information provided by Premier in its CLP application (*Western Cape Complaint*)⁴⁶

⁴⁴ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) 217.

⁴⁵ The Corporate Leniency Policy (CLP) is a policy document adopted by the Competition Commission setting out a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity. In order to obtain immunity, the cartel member must fulfil specific requirements and conditions set out in the CLP. These conditions include providing the Commission with information and documentation so as to allow the Commission to prosecute the remaining cartel members. The validity of the Commission's Corporate Leniency Policy was confirmed by the Supreme Court of Appeal in *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* [2012] 4 All SA 365 (SCA). Despite the SCA finding that the CLP is a valid and enforceable policy adopted and implemented within the scope of the Competition Commission's functions, the judgment is not without any criticism. Wallis JA elected to give an overly liberal interpretation to section 21 of the Competition Act relating to the Commission's functions holding that the CLP was valid in light of the Commission being responsible for the implementation of measures to increase market transparency. This interpretation opened a proverbial Pandora's Box. The Commission, which is a creature of statute and has limited powers as provided by the empowering Act, is now effectively given autonomy to implement any measure it considers necessary for the increasing of market transparency. This seemingly blanket ability to regulate the extent of its own powers could not have been the legislatures' intention - particularly where it concerns granting cartel participants immunity from prosecution for their participation in the cartel. Importantly, the Competition Act makes no mention of immunity being granted to any firm found to have contravened the provisions of the Act. S 59(3) of the Competition Act merely suggests the possible lenient treatment of firms by the Competition Tribunal when determining an appropriate administrative penalty. The finding by Wallis JA that the Competition Commission has the autonomous ability to grant infringing parties absolute immunity from prosecution therefore appears flawed. Despite these reservations and criticism, the Constitutional Court (Constitutional Court Case number 102/2012) dismissed the application for leave to appeal made by Agri Wire, and therewith entrenched the findings of the SCA as current law.

⁴⁶ *Competition Commission v Pioneer Foods* 15/CR/Feb07.

and initiated a second complaint against the bread producers for their participation in a national cartel (*National Complaint*).⁴⁷

The Competition Commission referred the two complaints against the bread producers to the Competition Tribunal. Tiger Brands settled both the complaints with the Commission and this settlement was confirmed by the Competition Tribunal during November 2007.⁴⁸ With Pioneer effectively absolved from censure for its participation in the cartel conduct by virtue of its successful application for corporate leniency in terms of the CLP, and Tiger Brands settling the complaints with the Competition Commission, the only remaining party of the cartel defending the referral of the complaint was Pioneer Foods. The complaints against Pioneer Foods were heard before the Competition Tribunal. During February 2010 the Competition Tribunal ruled that Pioneer had contravened section 4(1)(b)(i) and 4(1)(b)(ii)⁴⁹ of the Competition Act relating to price-fixing and market allocation and ordered that Pioneer Foods pay an administrative penalty of approximately R195 million.⁵⁰

3.2.2.2 *Follow-on damages claim*

During November 2010, representatives respectively acting on behalf of consumers⁵¹ and distributors,⁵² brought an application for the certification of a class action for

⁴⁷ *Ibid*

⁴⁸ The consent order confirmed that Tiger Brands be ordered to pay an administrative penalty of approximately R98 million.

⁴⁹ The relevant section and subsections read as follows: “4. Restrictive horizontal practices prohibited.—(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if — (a) [...] (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or [...]”

⁵⁰ See order by *Competition Tribunal in Competition Commission v Pioneer Foods* 15/CR/Feb 07, 61. Available at http://www.comtrib.co.za/cases/complaint/retrieve_case/1120. (Last accessed on 10 May 2014.)

⁵¹ *The Trustees for the time being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd* 2011 JDR 0498 (WCC) (unreported).

⁵² *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

damages suffered by the respective groups arising from the increase in bread prices manipulated by the cartel. The Western Cape High Court dismissed both the applications and the parties applied for leave to appeal to the Supreme Court of Appeal.⁵³ The distributors' application for certification was dismissed on appeal by Nugent JA.⁵⁴ The decision of the Supreme Court of Appeal was subsequently taken on appeal to the Constitutional Court. The Constitutional Court held that the matter should be referred back to the Western Cape High Court for the filing of further affidavits, in accordance with the requirements set out in the judgment of the Supreme Court of Appeal ruling in *Children's Resource Centre and others v Pioneer Food and others*.⁵⁵

The consumers' application (*Children's Resource Centre*) was more favourably received by the Supreme Court of Appeal. This acceptance augurs well for significant developments in the South African law pertaining to class actions and subsequent follow-on damages claims. The setting out of requirements by the Supreme Court of Appeal for the certification of a class for the purposes of instituting a class action is a step in the right direction. Consequently, the consumer's appeal was upheld and the Supreme Court of Appeal ordered that the matter be referred back to the Western Cape High Court for the filing of further affidavits.⁵⁶ In the appeal to the Constitutional

⁵³ *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd* 2011 JDR 0498 (WCC) (unreported). See also *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd* 2013 (2) SA 213 (SCA); *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

⁵⁴ *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

⁵⁵ *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

⁵⁶ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA). Importantly, the consumer's certification application was sought in terms of both the complaints; first, in respect of the Western Cape complaint and second, with regard to the national complaint against the bread producers. The SCA only upheld the consumer's application insofar as it related to the Western Cape complaint and dismissed the appeal relating to certification of the class for the national complaint.

Court the ruling by the Supreme Court of Appeal in the *Children's Resource Centre* was well received.⁵⁷

For the present, it is only necessary to mention that one of the requirements to be met by parties seeking certification as a class, is that there must be evidence concerning the impact of the conduct (in this case the contravention of the Competition Act) on the group. Wallis JA notes that this claim is said to be one for damages.⁵⁸ The development and assessment of class actions in the South African context will be more fully dealt with later.⁵⁹

A fundamental question to be answered (not only for would-be claimants, but also for the purposes of making an application for certification as a class for purposes of bringing a damages claim) as a consequence of the judgment in *Children's Resource Centre and others v Pioneer Food and others*,⁶⁰ is the basis of the damages assessment. The assessment of the nature of the harm (essentially the nature of the damages claim) was not a direct question faced by the Supreme Court of Appeal. However, Wallis JA, in *Children's Resource Centre and others v Pioneer Food and others*,⁶¹ dealt to a limited degree with this question, before remitting the matter back to the High Court for the amplification of the affidavits filed by the respective parties to the application.⁶² The actual nature of the damages envisioned by section 65 of the

⁵⁷ See *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

⁵⁸ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 59 (241). Wallis states that: "lastly it is necessary to mention that the absence of any evidence concerning the impact of this anti-competitive conduct on consumers also precludes certification. Without such evidence the requirement of commonality among members of the class is not satisfied. The claim is said to be one for damages. The assessment of whether damages have been suffered arising from anti-competitive conduct is a complex issue."

⁵⁹ Ch 15 par 15.3.2.

⁶⁰ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA); *Mukaddam and Others v Pioneer Food and Others* 2013 (2) SA 254 (SCA).

⁶¹ 2013 (2) SA 213 (SCA).

⁶² *Children's Resource Centre and others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 75 (247). Wallis JA states: "in summary the claim that the appellants seek to advance has a potentially plausible basis, but it is premature at the stage of this appeal for this court to determine questions raised by these arguments in view of their novelty, complexity and the fact that they are raised for the first time in this court. The

Competition Act and the ensuing debate raised during the course of the hearing before the Supreme Court of Appeal⁶³ is dealt with below.

3.3. Children’s Resource Centre ruling: Section 65 - delictual or statutory?

3.3.1 Case law

Wallis JA, in *Children’s Resource Centre and Others v Pioneer Foods (Pty) Ltd and others*,⁶⁴ was faced with two conflicting interpretations of section 65 of the Competition Act. The consumers argued that a claim for damages in the current context should be assessed as a *delictual action* flowing from a breach of statutory duty, and Premier (the third respondent), contended that section 65 of the Competition Act creates a *statutory claim* to the complete exclusion of a delictual or any other common-law remedy.⁶⁵

Wallis JA recognised the importance of this debate and that finding clarity on this point is vital to section 65 follow-on claims. He noted that if Premier was correct in its assertion that the Competition Act provides for an exclusive follow-on statutory claim, then there was no recognised legal duty attaching to the breach and the consumer’s argument that damages were claimed by delictual action could not succeed. However, Wallis JA, conceded that if Premier’s submission of strict statutory liability was incorrect, then the argument by the consumers was strengthened. Section 65(6) of the Competition Act recognises the right to claim damages for harm suffered as a result of

appellants should not be non-suited on these grounds, which would be the effect of dismissing their appeal, but equally the respondents’ arguments cannot be rejected at this stage. That indicates that it is desirable to refer the present application back to the high court, with appropriate directions for the delivery of further affidavits [...]

⁶³ *Children’s Resource Centre and others v Pioneer Food and Others* 2013 (2) SA 213 (SCA).

⁶⁴ *Ibid* par 62-68, (242–244).

⁶⁵ *Ibid*

contraventions of the Competition Act. The absence of a specific statutory claim would mean that there must be a delictual remedy available to the injured parties.⁶⁶

While the nature of the claim is undoubtedly of fundamental importance in the future development of follow-on damages claims arising from contraventions of the Competition Act, Wallis JA states:

[...] it is premature at the stage of this appeal for this court to determine the questions raised by these arguments in view of their novelty, complexity and the fact that they are raised for the first time in this court.⁶⁷

3.3.2 Section 65: Delictual action for damages

In South African law, common-law actions for damages are either brought terms of the *actio legis Aquiliae* or the *actio injuriarum*. Where loss due to the unlawful and culpable damage to a patrimonial interest occurs, damages are claimed using the *actio legis Aquiliae*.⁶⁸ If a non-patrimonial interest (e.g. the physical or mental integrity of a person)

⁶⁶ *Ibid* par 67, (244): “the legal arguments about the existence of a legal duty and the existence of an exclusive statutory claim in terms of s 65 of the Act are linked. If Premier is correct that the Act provides an exclusive follow-on claim then the legal duty on which the appellants rely does not exist. However, if it is incorrect, that strengthens the appellants' hand considerably, because S 65(6) recognises the possibility of claims arising from prohibited anti-competitive conduct, so that the absence of a specific statutory claim would suggest that there must be a delictual claim available to at least some persons injured by such conduct.”

⁶⁷ *Ibid* par 75, (247).

⁶⁸ Visser & Potgier *Law of Damages*, Juta (2012) 6 (*Law of Damages*). In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) 377 Booysen states: “in essence the Aquilian action lies for patrimonial loss caused by wrongfully (or unlawfully) and culpably.” See also *Perlman v Zoutendyk* 1934 CPD 151 at 155; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N); *Franschoekse Wynkelder (Ko-op) Bpk v SAR & H* 1981 (3) SA 421 (SCA) 430; *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd* 1985 (1) SA 475 (A).

is compromised by unlawful and intentional conduct, non-patrimonial damages (injury to personality rights) using the *actio iniuriarum* is claimed.⁶⁹

Damages that affect a patrimonial interest clearly result in patrimonial damages. The result of an interest compromised by a contravention of the provisions of the Competition Act will invariably and predominantly be loss of custom and turnover, which indisputably has distinct patrimonial content, and are consequently patrimonial damages.⁷⁰ It is impossible to postulate a contravention of the Competition Act that could infringe rights of personality, as the provisions of the Act, particularly those constituting prohibited practices triggering section 65 private damages actions, do not contemplate or recognise such infringements as a contravention of the Act. Where a damages claim is instituted for a contravention of the Competition Act, the nature of the damage will consequently be patrimonial loss suffered by the claimant. Accordingly, such damage must be claimed using the *actio legis Aquiliae*.⁷¹

⁶⁹ Van Heerden & Neethling *Unlawful Competition* (2008) 68. The distinction between a claim for patrimonial and non-patrimonial loss is discussed in *Matthews v Young* 1922 AD 492. See also *Bredell v Pienaar* 1924 CPD 203 213; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 385; *Moaki v Reckitt and Colman (Africa) Ltd* 1988 (4) SA 63 (D) 65; *Brenner v Botha* 1956 (3) SA 257 (T) 260.

⁷⁰ Ch 2 par 2.3 discusses the concept of goodwill and its protection. See Van Heerden & Neethling *Unlawful Competition* (2008) 105, where the authors state that: “in so far as goodwill is capable of functioning as legal property and as the object of an immaterial property right, the recognition of goodwill is, in the final instance, a matter of positive law.” See also *Patz v Green*, 437 where Greenberg J states that he is “of the opinion that a legal right of the applicants has been infringed – the right, viz., to carry on his trade without wrongful interference from others. This is a common-law right, the existence of which has been recognized [sic] in many cases, and which, I imagine, does not admit of controversy [...] In the present case the illegality of the conduct of the respondents in carrying on trade cannot be questioned, inasmuch as it is expressly prohibited by law; and if their competition damages the applicant in his business, his right to trade without wrongful interference is infringed, and he has a remedy at law.” *Slims (Pty) Ltd v Morris* 1988 (1) SA 715 (A) 727-729; *Nino’s Coffee Bar & Restaurant CC v Nino’s Italian Coffee & Sandwich Bar CC, Nino’s Italian Coffee & Sandwich Bar CC v Nino’s Coffee Bar & Restaurant CC* 1998 (3) SA 656 (C) 668.

⁷¹ *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) 441A. Justice Steyn states that “I do not propose to attempt a definition of the limits set to competition in trade by Aquilian liability, but whatever those limitations are, it seems clear that interference of the nature indicated is recognised as an infringement of a trader’s rights and therefore a delict in our law.” See also *William Grant and Sons Ltd v Cape Wine Distillers Ltd* 1990 (3) SA 897 (C) 915, where Justice Berman stated: “in South Africa unlawful competition is

The *actio legis Aquiliae* has, in South Africa, developed into a far more encompassing action than its rigid Roman law genesis, and subsequent Roman-Dutch law evolution.⁷² South African courts have progressively developed the scope of the *actio legis Aquiliae* from the Roman-Dutch position. De Villiers states in *The Cape Good Hope Bank* that: “the *action in factum* was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person as a consequence of the wrongful acts of another”.⁷³ The current Aquilian action, as developed by the South African courts, is a modern South African adaptation and application of the classical Aquilian action. Aquilian liability may now result from every culpable and wrongful act that results in patrimonial loss being suffered.⁷⁴

The development of the Aquilian action within the South Africa context has arguably reached its logical conclusion and is today readily and consistently applied by the South African courts.⁷⁵ It is currently a well established principle that such an action no longer requires physical damage or injury,⁷⁶ but that an action for recovery of pure

recognised as an actionable wrong ... fitting comfortably under the umbrella provided by the *lex Aquilia*.”

⁷² Traditionally, Roman law restricted the action to corporeal damage (i.e. damage to property or assets). See Van der Heever, *Aquilian Damages in South African Law*. Juta, (1944) 8-14. The application of the action was later extended by Roman-Dutch law. It appears that there was a move away from the requirement of physical impairment of property. See *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368. Further, the Aquilian action could be used to claim damages for injury to personality, see Neethling *Law of Personality* (2005) 48. See Van Heerden & Neethling *Unlawful Competition* (2008) 70-71. See also Neethling *Law of Delict* (2014) 8-16.

⁷³ *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 376. See also *Matthews v Young* 1922 AD 492 504; *Bester v Commercial Union Versekeringsmaatskapy van SA Bpk* 1973 1 SA 769 (A) 776-777.

⁷⁴ *Perlman v Zoutendyk* 1934 CPD 151 155, where Watermeyer states that: “Roman-Dutch Law approaches a new problem in the continental rather than English way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).” See also fn 79 below.

⁷⁵ Van Heerden & Neethling *Unlawful Competition* (2008) 71.

⁷⁶ See also *Combrink Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T) 191-192.

economic loss and negligent interference with a contractual relationship also fall within the scope of the *actio legis Aquiliae*.⁷⁷

Within the context of damages arising from unlawful competition, the courts have long accepted that such loss should be recovered by way of the *actio legis Aquiliae*.⁷⁸

⁷⁷ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377, Booysen J states that: “in essence the Aquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably. Although the contrary view had long been held by many authorities, it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.” See also Van Heerden and Neethling *Unlawful Competition* 59 ff; *Perlman v Zoutendyk* 1934 CPD 151 155; *Greenfield Engineering Works (Pty) Ltd v NKR Construction* 1978 (4) SA 901 (N); *Shell and BP SA Refineries v Osborne Panama SA* 1980 (3) SA 653 (D); *Osborne Panama SA v Shell and BP South African Petroleum Refineries (Pty) Ltd* 1982 (4) SA 890 (A); *Franschhoekse Wynkelder (Ko-op) v SAR & H* 1981 (3) SA 36 (E); *Hefer v Van Greuning* 1979 (4) SA 952 (A); *Coronation Brick v Strachan Construction Co* 1982 (4) SA 372 (D); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 664–665; *Barlow Rand v Lebos* 1985 (4) SA 341 (T); *Zimbabwe Banking Corporation v Pyramid Motor Corporation* 1985 (4) SA 553 (ZH); *UDC Ltd v Bank of Credit and Commerce Zimbabwe* 1990 (3) SA 529 (ZH); *Witham v Minister of Home Affairs* 1989 (1) SA 116 (ZH); *Worcester Advice Office v First National Bank* 1990 (4) SA 811 (E); *Siman and Co v Barclays National Bank* 1984 (2) SA 888 (A); *Lillicrap, Wassenaar and Partners v Pilkington Bros* 1985 (1) SA 475 (A); *Crede v Standard Bank* 1988 (4) SA 786 (E); *Bayer South Africa v Viljoen* 1990 (2) SA 647 (A); *Dantex Investment Holdings v Brenner* 1989 (1) SA 390 (A); Neethling and Van Aswegen: “aspekte van aanspreeklikheid weens suiwer ekonomiese verlies: Bemoeiing met ’n kontraktuele verhouding en die rol van beleidsoorwegings” (aspects of liability based on liability for pure economic loss) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law*, 1989, 607–611; O’Brien: “deliktuele eis weens bemoeiing met ’n kontraktuele verhouding” (delictual claim based on interference with a contractual relationship) *TSAR*, 1992, 134.

⁷⁸ *Matthew v Young* 1922 AD 492 507: “all a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such interference would constitute an *injuria* for which an action under the *lex Aquilia* lies if it has directly resulted in loss.” See also *Geary and Son (Pty) Ltd v Grove* 1964 1 SA 434 (A) 440–441, where Steyn recognises that the Aquilian action is available to persons suffering loss as a result of unlawful competition and who elects to sue in delict. See also *inter alia* *Geary & Son v Gove* 1964 (1) SA 434 (A); *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 (2) SA 173 (T); *Lorimar Productions Incorporated v Sterling Clothing Manufacturers (Pty) Limited*; *Lorimar Productions Incorporated v OK Hyperama Limited*; *Lorimar Productions Incorporated v Dallas Restaurant* 1981 (3) SA 1129 (T); *Dun and Bradstreet v SA Merchants Combined Credit Bureau (Cape)* 1968 (1) SA 209 (E); *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 697 (E); *Victor Products (SA) (Pty) Ltd v Lataleure Manufacturing* 1975 (1) SA 961 (W); *Stellenbosch Wine Trust v Oude Meester Group* 1977 (2) SA 221 (C) and 1972 (3) SA 152 (C); *Prok Africa (Pty) Ltd v NTH (Pty) Ltd* 1980 (3) SA 687 (W); *Silver Crystal Trading v Namibia Diamond*

South African law therefore accepts that matters relating to unlawful competition fall within the ambit of the law of delict and consequently within the extended field of application of the *actio legis Aquiliae*.⁷⁹ While the South African Aquilian action may allow for a far more liberal application than that originally envisaged by the Romans, its application is somewhat tempered in the context of damages actions arising from a contravention of a statute (in the present case, the contravention of the Competition Act). The extent of damage in this instance will be limited to the type of damage the legislature contemplated when enacting the statute for the benefit of a particular person or group of persons. This is discussed within the context of the Competition Act in Chapter 4.⁸⁰

In order to successfully bring an action in terms of the *actio legis Aquilia* the claimant is required to prove the following elements:

- Conduct (in the form of a positive act or a failure to act) by the defendant;
- Unlawfulness;
- Fault;
- Damage (Harm) suffered by the claimant; and
- Causation (legal and factual). A sufficient causal connection between the conduct and the harm suffered.⁸¹

Corporation 1983 (4) SA 884 (D); *Sea Harvest Corporation v Irvin & Johnson* 1985 (2) SA 355 (E); *Schultz v Butt* 1986 (3) SA 667 (A); *Moroka Swallows Football Club v The Birds Football Club* 1988 (2) SA 350 (W); *Sibex Construction v Injectaseal* 1988 (2) SA 54 (T); *Elida Gibbs v Colgate Palmolive* 1988 (2) SA 350 (W); *Pepsico Inc v United Tobacco Co Ltd* 1988 (2) SA 334 (W); *William Grant and Sons v Cape Wine and Distillers* 1990 (3) SA 897 (C); *Long John International v Stellenbosch Wine Trust* 1990 (4) SA 136 (D); *Tie Rack plc v Tie Rack Stores* 1989 (4) SA 427 (T); *Sage Holdings v Financial Mail* 1991 (2) SA 117 (W); *Times Media v SABC* 1990 (4) SA 604 (W).

⁷⁹ In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 186 it is stated that: "the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the *lex Aquilia*". See also *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) 441A; as well as *Evins v Shield Insurance Company Limited* 1980 (2) SA 814 (A) 841H.

⁸⁰ See Ch 2 section 2.4.2 and Ch 4 section 4.5. The scope of potential liability will be further tempered by the principles determining causation.

⁸¹ Neethling *Law of Delict* (2014) 8.

These elements must all be simultaneously present before any conduct complained of can be classified as a delict and the delictual remedy for damages becomes available to a claimant. As part of the damage element, the claimant is required to prove the extent of the damage alleged to have been suffered as a result of the defendant's conduct.⁸²

3.3.3 Assessing the elements of a delict

3.3.3.1 Conduct

In order to bring a delictual action as contemplated by the consumers in *Children's Resource Centre and others v Pioneer Food and Others*,⁸³ it is necessary for the claimant to show that the defendant had acted in a specific manner, or failed to act when there was a legal duty on him to do so.⁸⁴

It is clear that a finding by any of the competition tribunals that the Competition Act was contravened will not be possible without *conduct* by the defendant, which was illegal in terms of the Act. When dealing with the question of damages arising from a contravention of the Competition Act, the claimant will consequently *not* have to prove this element in a claim for damages brought in a civil court. The Competition Tribunal would already have made a finding as to whether the defendant had indeed acted illegally and issued a certificate confirming the illegality of the defendant's conduct.⁸⁵

⁸² *Ibid* 8.

⁸³ 2013 (2) SA 213 (SCA)

⁸⁴ Neethling *Law of Delict* (2014) 25–31. The authors define the concept of conduct as having three basic requirements for purposes of delictual liability. These are: (i) that the conduct must a human or juristic person who acts; (ii) the act must have been voluntary; and (iii) the conduct can occur in the form of either a positive action, or in the form of an omission to act. Liability for an omission will only arise in cases where there can be said to have been a legal duty on a party to act positively.

⁸⁵ See s 65(2)(b) of the Competition Act 89 of 1998.

The adjudication of whether a contravention of the Competition Act has occurred lies exclusively with the Competition Tribunal and the Competition Appeal Court. When faced with an issue relating to the defendant's anti-competitive conduct falling in the ambit of the Competition Act, a civil court is bound by the determination of the Competition Tribunal or the Competition Appeal Court in this regard.⁸⁶

3.3.3.2 *Unlawfulness*

The question relating to the *unlawfulness* of a competitive act is not always easy to answer.⁸⁷ In assessing the unlawfulness of an act, it is not simply a matter of establishing whether or not the particular conduct has factually infringed the rights of others. Rather, the conduct must be deemed legally reprehensible, based on the convictions of the community (*boni mores*).⁸⁸

Essentially, the application of the *boni mores* does not simply entail consideration of the social or moral feelings of the community. It pertains rather to whether the community at large would consider the particular conduct unreasonable under the circumstances, and therefore delictually wrongful.⁸⁹ Although this may ring true in cases of common law, delictual claims for unlawful competition, the claimant suing for damages against a party found to be in contravention of the Competition Act, is spared the burden of having to prove the wrongfulness of anti-competitive conduct governed by the Competition Act. The Competition Tribunal or Competition Appeal Court would have adjudicated and ruled on the conduct. If the conduct of the firm is found to be

⁸⁶ S 65(2) of the Competition Act of 1998.

⁸⁷ In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 186 Van Dykhorst J expressed: "I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with the trade of another." See also Neethling *Law of Delict* (2014) 328-329.

⁸⁸ *Bester v Calitz* 1982 3 SA 864 (O) 879. *Universiteit van Pretoria v Tommie Meyer Films (Pty) Ltd* 1977 4 SA 376.

⁸⁹ Neethling *Law of Delict* (2014) 48. See also *Van Eeden v Minister of Safety and Security (Women's legal centre Trust as amicus curiae)* 2003 (1) SA 398 (SCA) 395-396: "in applying the concepts of legal convictions of the community the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrong."

illegal (being in contravention of the Competition Act) then such conduct can be deemed wrongful as it affects a recognised legal interest in an unreasonable manner.⁹⁰

3.3.3.3 *Fault*

A claim for damage suffered as a result of wrongful conduct can only properly be made if the perpetrator can be shown to have acted with the necessary *intent* or *negligence*.⁹¹ Without detracting from the fact that both intentional and negligent unlawful competition may give rise to delictual liability, most examples of unlawful competition are committed intentionally. The courts have not yet been asked to assess the requirement of negligence in cases of unlawful competition.⁹² In the context of unlawful competition based on a contravention of the Competition Act, the lack of instances of negligent contravention which may give rise to liability may be the result of the phenomenon that, in practice, in the majority of cases where the Competition Act is alleged to be contravened, it must be shown that the contravening party purposefully

⁹⁰ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 SA 461 (SCA), 468, where Harms deals with and develops the element of wrongfulness, by allowing for a liberal test for wrongfulness: “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission.” See also *Patz v Greene* 1907 TS 427, 433: “everyone has the right [...] to protect himself by appeal to a court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy.” See *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) 1968 (1) SA 209 at 216: Corbett has noted: “examples of unlawfulness in this sphere are trading in contravention of an express statutory prohibition (see *Patz v Greene* 1907 TS 427).”

⁹¹ Van Heerden & Neethling *Unlawful Competition* (2008) 79. *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 2 SA 276 (E) 281: “seeing that passing-off is a delict and that the action to which it gives rise is Aquilian-based (*Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 216 - 221), the appellant was not bound, in order to succeed, to prove *dolus* on the respondent's part [...]” See also *William Grant & Sons Ltd v Cape Wine & Distillers Ltd* 1990 2 SA 897 (C) 915; *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd* 1990 4 SA 136 (D) 143.

⁹² Van Heerden & Neethling *Unlawful Competition* (2008) 81.

acted contrary to the provisions of the Competition Act in order to sustain a finding that the respondent contravened the Act.⁹³

3.3.3.4 *Damage or harm*

Damage is an essential element of any delictual claim. Without proof of damage, the plaintiff cannot succeed with a claim for damages.⁹⁴ The fundamental reason for a delictual action is a claimant desiring to obtain adequate compensation for the loss suffered as a result of the defendant's wrongful conduct. Without damage being suffered there is no action. The concept of damage and the quantification of damages are of fundamental importance for purposes of bringing a follow-on damages action before the civil courts based on a contravention of the Competition Act and will be specifically discussed in Chapter 4.

⁹³ Klopper *et al Intellectual Property* (2011) 17: "generally, all acts of unlawful competition are premeditated." See also Van Heerden & Neethling 253: "competition in conflict with a statutory provision is considered to be unlawful in principle because it disturbs the so-called equality principle of the law of competition: the *par conditio concurrentium*." See in this regard for example the wording of s 4 of the Competition Act dealing with horizontal restrictive practices: "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship...", and s 8 (Abuse of dominant position): "it is prohibited for a dominant *firm* to—(a) charge an *excessive price* to the detriment of consumers; (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so; (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or (d) engages in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act..." It is extremely difficult, if not impossible, to postulate circumstances where any of these actions can occur negligently.

⁹⁴ See *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 24H: "when damages are claimed for an injurious falsehood in our law, whether they are claimed by the *actio injuriarum* as was said to be the case in *Fichardt v The Friend Newspaper Ltd* 1916 A.D 1, or are claimed by the action under the *Lex Aquilia* based on *dolus*, see McKerron, *Law of Delict*, 4th ed. p 250 note 30 at p 256 note 60 and cases there cited, there is a wrongful act. Damages are an essential part of the claim in the sense that without proof of damage the plaintiff cannot succeed."

3.3.3.5 Causation

The claimant, having shown that damage has been suffered and that the defendant has acted wrongfully, will be required to show that the damage suffered was *caused* by the defendant's wrongful conduct. Van der Walt and Midgley state that a causal *nexus* between the defendant's conduct and the detrimental consequences sustained by the plaintiff must be proven.⁹⁵ A claimant *must* prove the fundamental elements of *damage* (as previously stated above) and *causation* in order to bring a successful follow-on civil damages claim.⁹⁶

3.3.3.6 Arguments favouring section 65 damages as delictual action

The essence of the argument by the consumers in *Children's Resource Centre and others v Pioneer Food and others*⁹⁷ is that once either the Competition Tribunal or the Competition Appeal Court has made a finding that the conduct of the defendant contravened the Competition Act, then a party that has suffered loss or damage as a result of the contravention must allege and prove all five essential elements of a delict in order to successfully pursue a claim for civil damages. The consumers (appellants in the Supreme Court of Appeal) argued that the Competition Act prohibits anti-competitive conduct in the interests of promoting competition and benefitting the interests of consumer.⁹⁸ The prohibitions contained in the Competition Act are essential to achieving the objectives of the Act and to creating a fair environment within

⁹⁵ Van der Walt & Midgley *Principles of Delict* (2005) 196-197. See also *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) 1134, 1140; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) 914; *Smit v Abrahams* 1992 (3) SA 158 (C) 162 (1994 (4) SA 1 (A) 13); *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) 39; *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) 327-328; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 448-449; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) 239-240; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) 531-532.

⁹⁶ The topic of causation in competition law damages actions is discussed in Ch 5 sec 5.2.

⁹⁷ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA)

⁹⁸ *Ibid* par 64, (243).

which consumers are not exploited, and receive a variety of quality products at competitive prices.⁹⁹

The weight of South African case law lends support to the proposition that the existence of a statutory duty not to act in a certain way results in a legal duty not to cause financial loss.¹⁰⁰ This submission was made by the appellants (the consumers) in *Children's Resource Centre and others v Pioneer Food and Others* in the context of the Competition Act of 1998. The bread producers were under a legal duty not to cause financial loss and their deliberate contravention of the provisions of the Competition Act was in breach of this legal duty. Ultimately, the breach by the bread producers resulted in the consumers paying higher prices for their bread and consequently suffering financial harm.¹⁰¹ Essentially: "the appellants have now nailed their colours to the mast of a delictual action flowing from a breach of a statutory duty."¹⁰²

3.3.4 Arguments favouring section 65 being statutory claim

The Respondents in *Children's Resource Centre and others v Pioneer Food and Others*¹⁰³ challenged the proposition advanced by the appellants that section 65 damages can be claimed by way of a delictual action instituted by a class.

⁹⁹ See s 2(b) of the Competition Act 89 of 1998.

¹⁰⁰ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA); *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); The ruling given in *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* 1998 (4) SA 578 (W) erroneously suggested that the breach of a statutory duty automatically implies that a delict has been committed. This is incorrect, as in order for a claimant to successfully institute a delictual claim all the elements of a delict must be proven (i.e. conduct, damage and causation). See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) par 42, (139).

¹⁰¹ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 64, (243).

¹⁰² *Ibid* par 63, (242).

¹⁰³ *Ibid*

Pioneer (First Respondent) advanced the argument that section 38(c) of the Constitution¹⁰⁴ recognises proceedings for appropriate relief on the grounds of an infringement of any right in the Bill of Rights by “anyone acting as a member, or in the interests of, a group or class of persons”. Although the instituting of class actions is recognised insofar as the enforcement of a constitutional claim and claims relating to the Bill of Rights is concerned, the recognition of class actions in the Constitution does not confer standing in relation to a delictual claim.¹⁰⁵ This argument was, however, dismissed by Wallis JA.¹⁰⁶

Premier (Third Respondent) argued that the appellants’ delictual action should be dismissed because the Competition Act was not enacted for the benefit of the parties who have sought to institute the damages claim, and therefore the necessary legal duty giving rise to potential delictual liability was never established.¹⁰⁷ It was further argued that the fundamental elements of the delictual action, of *damages* and the *necessary causal* connection between the alleged conduct and damage suffered, had not been proven by the appellants.

Premier adopted the view that section 65 of the Competition Act provides for a follow-on damages claim, based on the finding by the Competition Tribunal that the firm had engaged in anti-competitive conduct in contravention of the Competition Act. A proper construction of the Act, insofar as Premier was concerned, is that the damages claim

¹⁰⁴ The Constitution of South Africa, Act 108 of 1996.

¹⁰⁵ Heads of Argument filed by the First Respondent, par 4, *Children’s Resource Centre and Others v Pioneer Food and Others*, Supreme Court of Appeal case number 050/2012. Essentially Premier argue that in order for a delictual remedy for a breach of a statute to be relied upon, the necessary evidentiary requirements have to be met, including showing that the applicable statute allows the particular party to bring such a claim.

¹⁰⁶ *Children’s Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 21-22. The recognition of class actions for delictual claims is dealt with in par 15.3.2 *infra*.

¹⁰⁷ *Ibid* par 65, (243).

is exclusive to section 65, that section 65 prohibits a common-law delictual action¹⁰⁸ and consequently, excludes any possibility of any further delictual action.¹⁰⁹

Premier acknowledges, in support of its proposition, that consideration must be given to the applicable statutory provisions, the scope of the Act as well as the object of the Act.

Firstly, Premier argues that the Competition Act creates a specialist regime for dealing with competition law issues (including the determination of whether a party has engaged in prohibited practices) and if a contravention occurs, how it should be penalised.¹¹⁰ The bifurcation of jurisdiction created by the Competition Act means that ordinary civil courts are afforded an extremely limited role in relation to the cause of action arising from the Act. This is restricted to the assessment of the amount or the awarding of damages. Accordingly, the ordinary civil courts do not have the power to freely determine whether a delict has been proved and what the appropriate damages in the given situation should be.

Secondly, Premier contends that a proper interpretation of the Competition Act restricts the circumstances in which civil damages will be available. This will be only *after* the Competition Tribunal or Competition Appeal Court has made a final ruling on the matter, and only if the *injured party* has not been awarded damages in terms of a consent order.¹¹¹ This, Premier submits, is an extraordinary limitation, not generally associated with normal delictual claims. This lends support to the position that section

¹⁰⁸ *Ibid* par 66, (243).

¹⁰⁹ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) par 22: "one has to concede that our case law is not clear when it comes to drawing the boundary between liability due to the breach of a statutory duty and that of a common-law one. It appears to me that if the breach of a statutory duty, on a conspectus of the statute, can give rise to a damages claim, a common-law legal duty cannot arise."

¹¹⁰ *Competition Commission of South Africa v Telkom SA Ltd and Another* [2010] All SA 433 (SCA) par 27 and 36.

¹¹¹ Section 65(6)(a) of the Competition Act 89 of 1998.

65 damages actions are to be managed within the auspices of the Competition Act, and not as normal delictual actions.

Finally, Premier argues that the Competition Act provides for strict liability.¹¹² A claimant seeking to pursue a damages action against a party that has engaged in (and been found guilty of) a prohibited practice, is absolved from having to prove fault (either negligence or intent) on the part of the contravening firm. A claimant cannot now simultaneously benefit from a regime of strict liability imposed by the statute, while endeavouring to avoid the other statutory requirements and limitations imposed on civil damages claims by the self-same statute, i.e. the Competition Act, in order to advance its common-law claim. To this extent, one of the ostensible limitations imposed is that the Competition Act allows a *person* (or injured party) who has suffered loss or damage to pursue a damages action before the civil court for the assessment of the amount or the awarding of damages. The present matter has seen an action being instituted by a class (to date still uncertified class) for damages incurred by the contravention of the Competition Act. It would appear that a damages action brought by a class falls outside the scope of the statutory action envisaged by the Competition Act and accordingly should not be entertained by the courts.

If one has regard to the remedial philosophy of the respective remedies¹¹³ (administrative penalties and the civil damages actions) then Premier's argument that class actions are not contemplated by the legislature for purposes of pursuing private competition damages seems to carry some weight. The damages claim by way of a class action appears not to serve the remedial purpose advanced by corrective justice. It does not rectify the wrong to the private individual. The damages (on the appellants own version) would be used to benefit a general group of people, and not to vindicate the damage suffered by a particular private individual.¹¹⁴

¹¹² Heads of Argument filed by the Third Respondent, *Children's Resource Centre and Others v Pioneer Food and Others*, Supreme Court of Appeal case number 050/2012, par 22.4.

¹¹³ See Ch 3 par 3.1.

¹¹⁴ Heads of Argument filed by the Appellants, *Children's Resource Centre and Others v Pioneer Food and Others*, Supreme Court of Appeal case number 050/2012, par 6.2:

Premier's arguments that the Competition Act envisages a rigid statutory damages regime and as such a party (and the courts) will be obliged to follow the action as directed by the applicable statute, may be credible if, by way of analogy, regard is had to the position expressed by the Constitutional Court in the matter of *Phillips and Others v National Director of Public Prosecutions*.¹¹⁵ In this case, the court was required to decide whether the High Court was permitted to rescind an order on grounds other than those specified in the Prevention of Organised Crime Act 121 of 1998. The Constitutional Court took a very narrow view, with Skweyiya stating that: "I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common-law."¹¹⁶

Should Premier's interpretation be attributed to section 65 of the Competition Act, then parties and the courts will be bound by the provisions of the Competition Act, including the statutory limitations sought to be imposed on these damages actions by the wording of the empowering statute.

3.3.5 Assessment of section 65

Despite entertaining the discussion as to the nature of the action arising from section 65 of the Competition Act, the Supreme Court of Appeal did not make a finding as to whether the follow-on damages action arising from section 65 should be considered as a delictual action or a statutory action. It highlighted the lack of evidence before the

"the payment of damages to each individual member of the classes would not be feasible. Even were it possible to determine how much of the respondents' bread each individual consumer bought during the relevant periods, the damage suffered by each individual are relatively small and the cost of distributing these sum prohibitive. Accordingly, the damages will not be distributed to individual members of the classes [...]".

¹¹⁵ 2006 (1) SA 505 (CC)

¹¹⁶ *Ibid* par 50 – 51.

court to adjudicate this fundamental question and remitted the matter back to the High Court for the filing of further affidavits in amplification of the arguments.¹¹⁷

It is apparent from the arguments made before the Supreme Court of Appeal that both the appellants and respondents recognise that the Competition Act provides for an injured party to pursue a damages action against a contravening firm. However, the fundamental difference between a delictual action (as advanced by the appellants) and statutory action (as advanced by Premier), hinges on the elements that need to be proven for a claimant to succeed with the claim. In a statutory damages action, based on strict liability (the claimant need not allege and prove fault), a breach of a statute is *prima facie* wrongful and fault is not a requirement.¹¹⁸ Should a strict statutory regime be followed for the recovery of private competition damages in terms of section 65 of the Competition Act, then these actions are equally restricted by the provisions of the Act.

A delictual action requires the claimant to allege and prove the elements of wrongfulness and fault to succeed with the claim together with all the other elements of a delictual action. Ultimately, the question is as to whether a proper reading of

¹¹⁷ *Ibid* par 75, (247): “in summary the claim that the appellants seek to advance has a potentially plausible basis, but it is premature at the stage of this appeal for this court to determine questions raised by these arguments in view of their novelty, complexity and the fact that they are raised for the first time in this court. The appellants should not be non-suited on these grounds, which would be the effect of dismissing their appeal, but equally the respondents’ arguments cannot be rejected at this stage. That indicates that it is desirable to refer the present application back to the high court, with appropriate directions for the delivery of further affidavits...”

¹¹⁸ Neethling *Law of Delict* (2014) 78; Van Heerden & Neethling *Unlawful Competition* (2008) 253. While the distinction between statutory claims and delictual claims can be seen in the elements required to be alleged and proven in each case, this is not the only difference between these actions, as statutory actions also provide a more comprehensive description of the extent of damage which can be claimed, thereby creating a damages system separate to the normal common-law delictual damages actions and assessment of damages. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COID 1993) is an example of a statute creating a statutory damages regime. S 47(1)(a) of the Act reads as follows: “compensation for temporary total disablement shall be calculated on the basis set out in item 1 of Schedule 4 subject to the minimum and maximum amounts.” Schedule 4 then specifies the manner in which damage will be calculated in various instances.

section 65 in the context of the entire Competition Act allows for the interpretation of a statutory damages action to the exclusion of a common-law delictual damages action.

The wording of section 65(6) of the Competition Act, which reads: “a person who has suffered loss or damage as a result of a prohibited practice...”, clearly envisages that any person who has suffered loss or damage as a result of a contravention of Chapter 2 of the Competition Act may claim such loss.¹¹⁹ Despite recognising the potential of a damages claim being brought, section 65 does not provide any detail or requirements for such an action. Rather, section 65 appears to merely regulate the practical jurisdictional aspects pertaining to the adjudication of potential contraventions of the Competition Act on the one hand, and the adjudication and assessment of follow-on damages action arising from a contravention of the Competition Act on the other hand.

Section 65(2) confirms that the Competition Tribunal and Competition Appeal Court adjudicate the conduct and sections 65(6) and 65(7) confirms that the civil courts assess and award civil damages. Thus, the *two-phased* approach to follow-on damages in the context of contraventions of Chapter 2 of the Competition Act is established. Premier argued that it is the very fact that a two-phased procedure has been created which supports the notion of strict statutory liability.¹²⁰ The Competition

¹¹⁹ S 65(6) of the Competition Act 89 of 1998.

¹²⁰ Sutherland & Kemp *Competition Law of South Africa* 12-8: “if a party seeks damages in respect of a prohibited practice it must seek a declaration from the Tribunal that the conduct of the respondent is a prohibited practice in terms of the Act, for the purpose of section 65. A person who has suffered loss or damage as a result of the prohibited practice may rely on such a declaration to bring an action in the Magistrate’s Court or the High Court to recover damages in this respect.” See also the following cases, which lend strong support that the provisions of s 65 create a two-tiered adjudication process for the assessment and awarding of damages, with a regulated procedural interaction between the various competition authorities and the civil courts, each responsible for a specific limited part of the adjudication process. See *Premier Foods (Pty) Ltd v Manoim NO and Others* 2016 (1) SA 445 (SCA); *Seagram Africa (Pty) Ltd v Stellenbosch Farmers’ Winery* 2001 2 SA 1129 (C) 1142; *SAD Holdings v South African Raisins* 2000 3 SA 766 (T); *South African Raisins (Pty) Ltd and Another v SAD Holdings Ltd and Another* (case No 176/2000) [unreported judgment 20 September 2000]; *American Natural Soda Corporation v Competition Commissioner* 2003 5 SA 633 (CAC) 639, where Malan states that: “the tribunal is not empowered to make orders for the payment of damages to any particular person (s 62(5) and s 65(5)) [...] Essentially, as I have said, they are orders of a limited kind to be made in the public interest. They do not seek to vindicate private rights.”

Act creates a specialist tribunal with exclusive jurisdiction to determine whether a prohibited practice has been committed and the civil courts' involvement is limited to the assessment and determination of follow-on damages.¹²¹

In assessing the respective arguments regarding the nature of the follow-on damages action, Wallis JA acknowledged that certain aspects of section 65 lend support to the interpretation advanced by Premier, highlighting sections 65(6)(a) and 49D(4) as examples. Section 65(6)(a) refers to a person who has suffered loss or damage as a result of a prohibited practice commencing an action in the civil court for the assessment of the amount or awarding of damages. Wallis JA refers to the wording of section 65(6)(a) of the Competition Act that could indicate that the action pursued before the civil court concerns *only* the quantification of the damage suffered and nothing more.¹²² Furthermore, Wallis JA refers to section 49D(4) of the Competition Act, which deals with a complainant applying for an award of civil damages. He acknowledges that this section appears to support the notion advanced by Premier that the damages award is a rigid mechanical process, in which the civil court is tasked *only* with the assessment of the damage, and not required to consider any other element other than quantification.¹²³

It must be noted that section 49D(4) reads:

A consent order does not preclude a complainant from applying for –

- (a) a declaration in terms of section 58(1)(a) (v) or (vi); or
- (b) an award of civil damages in terms of section 65, unless the consent order includes an award for damages to the complainant.

If regard is had to the wording of section 49D(4), then it is entirely unclear how Wallis JA considers section 49D(4) as lending support to the argument that the damages claim is one found in statute. Section 49D(4) (other than to suggest that should the

¹²¹ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 70, (245).

¹²² *Ibid* par 72, (246).

¹²³ *Ibid*

parties not include a damages amount in a consent order) does not provide a mechanism for establishing or dealing with damages. It is only when a *settlement inclusive of damages* is reached, and it is ordered that a claim for damages as provided for in section 65 is excluded. Section 65(6) states that such a damages action will commence in the civil courts for the assessment and awarding of damages. Contrary to what Wallis JA states, a conjunctive reading of section 65 and section 49D(4) does not support the conclusion that the Competition Act has created a statutory damages claim, but rather confirms that the civil courts are responsible for the assessment and awarding of damages.

3.3.6 Interpretation of s 65 as a cause of action

The Supreme Court of Appeal was reluctant to take a firm position regarding the question of whether section 65 of the Competition Act creates a statutory or delictual damages claim for victims of anti-competitive conduct in contravention of the Act. While the Supreme Court of Appeal steered away from making any conclusive remarks on the subject, an evaluation and interpretation of the relevant statutory provisions is nonetheless required.

When interpreting a statutory provision, regard must be had for the intention of the legislature. In order to do this, the words of the statute under consideration must be given their normal grammatical meaning, unless this would lead to an entirely untenable meaning being attributed thereto¹²⁴ In cases where the words conceivably

¹²⁴ *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) 942-944. Smalberger J states: “the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well-established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring the Legislature could not have contemplated it. See also *Standard Bank Investment Corporation Ltd v Competition Commission & Others*; *Liberty Life Association of Africa Ltd v Competition Commission & Others* 2000 (2) SA 797 (SCA), Schultz J states: “our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, 543. But the passage also reflects that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.”

are not restricted to a single grammatical meaning or interpretation, then regard has to be had for the context within which these words are used within the statute being interpreted, and the purpose being promoted by the particular statute.¹²⁵

Applying the primary rule of interpretation of statutory provisions and giving the words used in section 65 their normal grammatical meaning, it appears that the legislature intended to remove the assessment and awarding of damages from the powers conferred upon the Competition Tribunal and Competition Appeal Court by the Competition Act, by expressly stating in section 65 that damages actions are to be commenced in the civil court for the assessment and awarding thereof (provided damages have not been settled in a section 49D consent order).¹²⁶

The legislature's intention to remove the assessment of damages from the jurisdiction of the Competition Tribunal and the Competition Appeal Court is further confirmed by the wording of section 62(5) of the Competition Act, which reads:

¹²⁵ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) 10; *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) 941; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) par 89; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) 600. Marais, Farlam and Brand JJA (concurring with Nienaber JA) stated that "the days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning."

¹²⁶ S 65(6)(a) Competition Act 89 of 1998. The fact that s 49D contemplates a damages award between parties which would extinguish a potential s 65(6) damages action should not be seen to lead support to the notion that such damages are to be considered statutory damages. When dealing with s 49D, damages included in a consent order agreed to between the infringing party, the Competition Commission and the injured party, it is important to note that neither the Competition Tribunal or Competition Commission are required to assess a victim's damages or determine a damages quantum. These damages agreed to in terms of s 49D are equivalent to a settlement agreement between the parties. This therefore strengthens the regulatory nature of the Competition Act, with certain functions falling within the scope and jurisdiction of the Competition Commission, Competition Tribunal and Competition Appeal Court, and the assessment and quantification of damages in terms of s 65 falling within the jurisdiction of the civil courts.

62(5) For greater certainty, the Competition Tribunal and Competition Appeal Court have *no jurisdiction over the assessment of the amount, and awarding, of damages* arising out of a prohibited practice. [emphasis added]

It is further important to note that not all contraventions of the Competition Act are classified as *prohibited practices*. Section 65(6) of the Act deals expressly with a damages action by a person who has suffered loss or damage as a result of a *prohibited practice*.¹²⁷ The Act may, however, be contravened in manners other than those contemplated in Chapter 2, for example, Chapter 3 of the Act deals with mergers and notification of mergers to the competition authorities.¹²⁸ It is a contravention of the Act to implement a merger without the required notification and subsequent approval thereof by the competition authorities. Such a contravention of the Act could equally result in a party suffering damages and seeking recourse against the contravening parties before the civil courts. This would, however, fall outside the ambit of section 65(6) of the Act.

The suggested interpretation is further supported when examples of statutes which expressly create statutory damages actions are considered. These statutes include the Aviation Act 74 of 1962, the National Nuclear Regulator Act 47 of 1999, and the Post Office Act 44 of 1958. These statutes allow for damages to be dealt with in a manner other than through the normal principles associated with damages actions before the civil courts. As illustration, the Aviation Act, section 11(2) reads:

Where material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person in such aircraft, or by any

¹²⁷ Prohibited Practice is defined in the Competition Act as a practice prohibited in terms of Chapter 2.

¹²⁸ Sec 13A(3) of Act 89 of 1998 reads: “the parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16 (2) or the Competition Appeal Court in terms of section 17.” The Act further imposes a potential penalty against firms contravening the merger notification requirements prescribed by Chapter 3 of the Act, to this extent see sec 59(1)(d) of the Act.

article falling from any such aircraft, to any person on land or water, damages may be recovered from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his wilful act, neglect or default.

It is clear that the Aviation Act has expressly done away with the need of a claimant to prove the elements of a delictual action in order to claim damages in terms of the Act.

The Competition Act 89 of 1998, section 65(6), has not expressly sought to stipulate a different means of establishing and assessing damages, other than the application of the normal principles of damages as applied by the civil courts. All section 65(6) has done is regulate which forum will be authorised to assess damages, and by implication, which of the elements are required to be alleged and proven in order to be successful with a civil damages action for follow-on damages arising from a breach of the Competition Act.

3.3.7 Conclusion: s 65 as a statutory or delictual action

While no ruling was made, and despite recognising the plausibility of the argument advanced by Premier, the court remarked that section 65 of the Competition Act appears not to contain the necessary elements for establishing an exclusive statutory remedy such as contended by Premier in their argument.¹²⁹ Ostensibly, Section 65 merely confirms the procedure and directs the forum for the follow-on damages claim and is not an independent action creating provision. The regulatory nature of section 65 supports the notion that the follow-on damages claim is a claim based on a delict. In the absence of an expressly-worded liability creating provision and formula for the

¹²⁹ *Ibid* par 67 - 68, 244. Wallis states: "I am not convinced that s65 of the Act provides for the type of exclusive follow on remedy for which Premier contends."

determination of damages in the particular statute, the common-law principles of assessment of damages applies.¹³⁰

The reluctance of the Supreme Court of Appeal to entertain the argument that section 65 sanctions a statutory damages action may stem from the fact that the court appeared open to the idea of allowing class actions to be pursued in the case of section 65 damages claims in order to properly vindicate the rights of prejudiced consumers.¹³¹ The liberal interpretation given by Wallis to the notion of *a person who has suffered loss or damage* being entitled to commence an action for delictual damages, in order to include class actions, seemingly puts an end to the argument that the extent of the potential damages action being narrowly and rigidly regulated by the provisions of the Competition Act, favouring an interpretation that section 65 damages actions before the civil courts ought to be commenced as delictual actions recognised at common-law.

3.4. Conclusion

A strong presumption exists that the legislature does not intend to alter the common-law, save where such an intention appears expressly from the applicable legislation.¹³² If the legislature intends for the statute to vary the operation of the common-law by

¹³⁰ *Ibid* par 69, (245). See also Neethling *Law of Delict* (2014) 399-402, and Visser & Potgieter *Law of Damages* (2012) 452.

¹³¹ *Ibid* par 21. Wallis JA states: "in my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation."

¹³² *Fedlife Assurance Ltd v Wolfaardt* (2002) SA 49 SA (SCA) par 16. See also Steyn *Uitleg van Wette Juta* (1981) 97, 153.

introducing strict liability, then the statute must make express reference to the remedies sought to be introduced and implemented for purposes of the statute.¹³³

For this reason, it is concluded that the nature of the damages action arising in terms of section 65 of the Competition Act is to be pursued as a delictual action, and not a statutory action, as suggested by Premier. A delictual action (unshackled by a restrictive statutory interpretation) would give proper effect to the legislative objective to promote a dualistic enforcement regime, whereby the interests of society at large *and* individual parties who have suffered private damages, are adequately protected and advanced.

It can be argued that a statutory damages action based on strict liability would facilitate a more accessible system of follow-on damages, because claimants will be freed from the burden of having to allege and prove the elements to succeed with a delictual action.¹³⁴ It must nonetheless be borne in mind that the Competition Tribunal (or Competition Appeal Court) would have made a finding on certain elements required for purposes of a delictual action, and a claimant's evidentiary burden is already significantly eased. The delictual elements of *conduct* and the *unlawfulness* of the conduct would have been considered and determined by the Competition Tribunal (or Competition Appeal Court). The claimant will only be required to show that it is entitled to claim damages arising from the breach of statute,¹³⁵ together with the remaining delictual elements of *damage* (and the extent of the damages) and *causation*.

It is submitted that precisely because of the involved nature of damages determination and the fact that not all breaches necessarily cause damages to individuals or the public, that the legislator opted for the dual approach rather than to attempt to enact an action creating and damages quantifying formula. This conclusion is supported by

¹³³ See the Compensation of Occupational Diseases Injuries Act 130 of 1993, s 47.

¹³⁴ Scallan, Mbikiwa and Blignaut (2013) 10.

¹³⁵ See Ch 2 par 2.4.2. The requirements are: (i) contravened statute was intended to give rise to a cause of action; (ii) claimant is a party for whose benefit the statutory duty exists; (iii) damage sustained was of the type contemplated by the legislature in the statute; (iv) provisions of the statute were in fact infringed; and (v) the claimant suffered damage as a result of the statutory infringement.

the wording of section 65, read in conjunction with section 49D(4). These sections are the only sections in which damages are dealt with. Their wording confirms a prejudiced party's entitlement to damages, and makes it clear that damages are only excluded where damages are awarded as part of a consent order in pursuance of a settlement. In conclusion, the Competition Act of 1998 does not define damages. This being the case, it follows that when the legislator uses the concept of 'damages' in the Act, it can only refer to common law damages.¹³⁶

Proving the elements of conduct, wrongfulness and fault could never be a serious stumbling block for follow-on damages arising from a breach of the Competition Act, because this is covered by a finding of a contravention by the Competition Tribunal or Competition Appeal Court.¹³⁷

Once the claimant has established that the provision of the statute allowing a damages action was enacted for the benefit of the claimant, together with the fact that the type of damage suffered by the claimant was the type of damage contemplated by the legislature when enacting the statutory provision, then this will form the basis for establishing the wrongfulness of the conduct and the right to pursue the damages action.¹³⁸

¹³⁶ See Ch 16, par 6.1.1 dealing briefly with the recent judgment in *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (Pty) Ltd* (case number 12026/2012), judgment dated 8 August 2016. In her judgment, Nicholls J finds the s65 damages action is delictual in nature.

¹³⁷ The positive conduct and subsequent intentional nature of the infringements referred to in the Competition Act is clear from the wording describing the prohibited conduct. These examples include: s 4(1) An agreement between firms...; s 4(1)(b)(i) directly or indirectly fixing a purchase price or selling price or any trading condition; s 4(1)(b)(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; s 4(1)(b)(iii) collusive tendering; s 8(a) charging an excessive price; s 8(b) refusing to give a competitor access to an essential facility... The Competition Act makes no reference to negligent or accidental contraventions of the Act and all the examples of prohibited conduct refer to positive actions taken by competitors (in the case of s 4 contraventions) and dominant firms (in the case of s 8 or s 9 contraventions). It is clear that the conduct described and prohibited by the Act is positive conduct and can subsequently be considered intentional conduct.

¹³⁸ See Ch 2 par 2.4.2.3 and par 2.4.2.4

The Competition Act contemplates a broad range of claimants, allowing *any person who has suffered loss or damage* as a result of a contravention of the Competition Act to bring an action for damages, essentially identifying a group of persons who could be considered the beneficiaries of the statutory provision.¹³⁹

With the element of fault and wrongfulness being (for all practical purposes) essentially moot, the primary burden on a claimant seeking to enforce the right to claim damages, as provided for in section 65 of the Competition Act, is to *quantify* the extent of the damage suffered as a result of the contravention of the Competition Act and to prove that the defendants conduct *caused* the damage suffered.¹⁴⁰ The elements of damages and causation will be discussed in more detail in the following chapters.¹⁴¹

¹³⁹ S 65(6)(a) of the Competition Act 89 of 1998.

¹⁴⁰ While the Supreme Court of Appeal in the *Children's Resource Centre* matter did not make a ruling on whether a claim for follow-on damages in terms of section 65(6) of the Competition Act is to be classified as a statutory claim or a delictual claim, it is this author's opinion that based upon a proper interpretation of the relevant provisions of the Competition Act, together with the understanding that the common-law is not to be amended unless the Legislature expressly does so (*Fedlife Assurance Ltd v Wolfaardt*), that damages actions arising from contraventions of the Competition Act must be dealt with as delictual actions. See the discussion regarding the interpretation of section 65 in Ch 3 par 3.3.4 and par 3.3.5.

¹⁴¹ Ch 4 and Ch 5.

CHAPTER 4. DAMAGES AND QUANTIFICATION

4.1. Introduction

Without proof of damage the plaintiff cannot succeed with a damages action.¹ This chapter will consider the type of damage that might arise from unlawful competition, whilst the following chapters provide some guidance as to how a plaintiff may attempt to *quantify* the extent of damage suffered as a result of a contravention of the Competition Act.

4.2. Types of damages: Patrimonial and non-patrimonial loss

The law of damages recognises *patrimonial damage* and *non-patrimonial damage* as two broad categories of damage that can be suffered by a plaintiff. Patrimonial damage is the monetary value of the decrease in patrimony caused by a wrongful act.² Non-patrimonial loss is brought about by a wrongful act resulting in the diminution of an individual's legally recognised personal interests or rights, but which does not affect the individual's patrimony.³

Visser describes non-patrimonial loss as the negative change caused by an event on the highly personal interests of the claimant, which does not affect his patrimonial

¹ *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 24H: "when damages are claimed for an injurious falsehood in our law, whether they are claimed by the *actio injuriarum* as was said to be the case in *Fichardt v The Friend Newspaper Ltd* 1916 A.D 1, or are claimed by the action under the *Lex Aquilia* based on *dolus*, see McKerron *Law of Delict*, 4th ed. P 250 note 30 at p 256 note 60 and cases there cited, there is a wrongful act. Damages are an essential part of the claim in the sense that without proof of damage the plaintiff cannot succeed."

² *Santam Vesekeringsmaatskapy (Ltd) v Byleveldt* 1973 (2) SA 146 (A) 150.

³ *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253. *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 386. See also Visser "*Kompensasie van Nie-vermoenskade*" *THRHR* 1983 (46) 43 (*Kompensasie*).

position.⁴ If this definition is accepted, then it becomes clear that in the case of damage arising out of anti-competitive conduct in contravention of the Competition Act, it is unlikely that non-patrimonial loss will be in issue.⁵ As discussed in Chapter 2, the interest affected in instances of unfair competition is the right to attract custom, which is patrimonial in nature. For purposes of this study, the discussion on the nature of the damages arising from anti-competitive conduct (based on common-law or a contravention of the provisions of the Competition Act) will therefore be confined to the potential patrimonial loss suffered by a claimant.⁶

4.3. Patrimonial loss

South African law has accepted the fundamental principle that the only aim of a damages claim is to compensate the plaintiff and not to punish the defendant.⁷ In this regard, Kirk-Cohen J in *Jones v Krok*⁸ states: “the award of punitive damages in such instances, in which category falls the award in this case, is alien to our legal system”, confirming that an injured party claiming damages under the *lex Aquilia* is not entitled to anything more than compensation for the damage actually suffered.⁹ The awarding

⁴ Visser *Kompensasie* (1983) 43. See also *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 386.

⁵ Ch 3 par 3.2.2.

⁶ The distinction between patrimonial loss (monetary loss) and non-patrimonial loss (an infringement of a personal right) has been highlighted par 4.2 of this chapter. While it is not completely impossible for a breach of statute to infringe a person’s non-patrimonial interests, it is virtually inconceivable that a non-patrimonial interest can be affected by an infringement of the Competition Act. The damages action brought by a claimant (in terms of the Competition Act based on common-law unfair competition) is essentially to recover the financial loss suffered as a result of the anti-competitive conduct of the defendant. The recovery of financial loss equates to a monetary (patrimonial) loss suffered by the claimant. See, however, *Caxton Ltd and Others v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A), where an unlawful competitive act infringed upon a non-patrimonial interest.

⁷ *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 152H. See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 12, 195 -197.

⁸ *Jones v Krok* 1996 (1) SA 504 (T) 515G-H.

⁹ Van der Walt & Midgley *Principles of Delict* (2005) 216. Visser & Potegieter *Law of Damages* (2012) 4 and 196: “in the Acquilian action there is no room for any primary function other than compensating a plaintiff’s patrimonial loss [...] it is no longer possible to recover or award an amount to punish someone by means of an action for damages.” Where a damages action is brought based on a breach of a statute, the extent of

of punitive damages, recognised in some other jurisdictions, is not possible in South African law.¹⁰

A potential damages claim for unlawful competition, in whatever form, will be restricted to real and actual damage suffered and proven. In addition, in order for the damages to be compensated, there must be both a sufficiently close factual and legal link between the conduct and the damage suffered.¹¹

4.4. Forms of patrimonial loss

Patrimonial loss can be divided into the following categories:

4.4.1 *Lucrum cessans and damnum emergens*

Lucrum cessans means the loss of past or future profit, or loss of any legally recognised expectation of a patrimonial increase, whereas *damnum emergens* can be described as being a patrimonial loss suffered up to the date of the action for damages being prosecuted.¹²

4.4.2 *Damage to property and pure economic loss*

Damage in this context has two distinct and separate meanings: *Damage to property* describes the physical damage to an object and *damnum* describes the patrimonial

damages claimable in terms of the Aquilian action is limited to the type of damage contemplated by the legislature in the statute. See Ch 2 sec 2.4.2. See *Da Silva v Coutinho* 1971 3 SA 123 (A) 140.

¹⁰ For example, the United States. Ch 13 par 13.4.2.

¹¹ Causation is discussed in Ch 5.

¹² *Bloembergen AR, Schadevergoeding bij Onrechtmatige Daad*, NV Kluwer-Deventer 1965, 28. See also Neethling *Law of Delict* (2014) 231.

loss suffered as a result of physical damage.¹³ Physical damage and resulting loss is contrasted with pure economic loss, which does not arise as a consequence of physical damage to property or an infringement of a person's personality rights.¹⁴

The South African Aquilian action allows for the recovery of *pure economic loss*. Neethling identifies circumstances under which a claimant in delict might pursue an action for pure economic loss.¹⁵ Firstly, such an action is contemplated where the damage in question did not result from damage to property or impairment of personality (such as damage flowing from unlawful competition).¹⁶ Secondly, pure economic loss may manifest in financial loss incurred as a result of damage to property or impairment of personality, but which does not involve the property or personality of the claimant.¹⁷ Finally, pure economic loss may arise where damage was caused to the plaintiff's property or person, but was not caused directly by the defendant.¹⁸

¹³ *Oslo Land Company v Union Government* 1938 (AD) 584, 590: "by the word damage is not meant the injury to the property injured, but the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act."

¹⁴ Such damage in the form of pure economic loss could occur in cases of misrepresentation and unlawful competition. See *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty)* 1978 (4) SA 901 (N) 914. The loss or frustration of an expectation to make a reasonable profit on an investment. See *Kellerman v South African Transport Services* 1993 (4) SA 872 (C); *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA). Van Heerden & Neethling *Unlawful Competition* (2008) 220.

¹⁵ Neethling *Law of Delict* (2014) 305-307.

¹⁶ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v ASA of SA* 2006 SA 461 (SCA) 465, where Harms J describes pure economic loss: "'pure economic loss' in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as loss of profit, being put to extra expenses or the diminution in the value of property."

¹⁷ *Coronation Brick (Pty) Ltd v Strachen Construction (Pty) Ltd* 1982 4 SA 371 (D); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR & H* 1981 3 SA 36 (C).

¹⁸ *Kadir v Minister of Law and Order* 1992 3 SA 737 (C). The claimant was involved in a motor vehicle accident. The police arriving on the scene failed to take the particulars and identity of the other driver, who subsequently left the scene. The claimant, losing the opportunity to recover damages against the MMF, instituted an action against the police to recover the pure economic loss suffered by the claimant as a result of the police failing to properly do their duty. The claim was granted in the court *a quo*. The decision was, however, overturned on appeal (*Minister of Law and Order v Kadir* 1995

In the context of pursuing a delictual action for the recovery of pure economic loss, the South African courts have experienced difficulties in establishing the necessary elements of wrongfulness and unlawfulness in such actions. A measure of clarity to this vexing question was provided in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*. In this case, the Supreme Court of Appeal held that “conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission.”¹⁹

4.4.3 Direct loss and consequential loss

Direct loss is the damage arising as a direct consequence of the damage-causing conduct. McGregor describes it as being: “that loss which every plaintiff in a like situation will suffer”.²⁰ Consequential loss can briefly be described as the additional damage flowing from the direct loss.²¹ The distinction between direct loss and consequential loss is vital in order to establish the extent of damage for which a defendant may be held liable. Consequential loss is often irrecoverable by a plaintiff when the nature of the loss is regarded as too remote.²²

4.4.4 General and special damages

General damages and special damages are concepts originating in English law. South African law (a Roman-Dutch based legal system with some English law influence), does not make the same hard and fast distinction between these concepts²³ and

1 303 (A)). The Appeal court took a narrower view of the extent of the legal duty owed by the police.

¹⁹ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v ASA of SA* (fn 16) 468.

²⁰ McGregor *McGregor on Damages* Sweet and Maxwell (1997) updated by Third Supplement to the 16th edition [2001] par 26.

²¹ *Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A).

²² Visser & Potgieter *Law of Damages* (2012) 65-66.

²³ Joubert *Law of South Africa* LexisNexis, (2005), volume 7, 17 (*Law of South Africa*). *Botha v Pretoria Printing Works Ltd* 1906 TS 710 713.

accordingly references and distinctions between *general* and *special* damages should within the South Africa context be treated with some circumspection.²⁴ *General damage* is similar to direct loss and is the damage one presumes to naturally arise as a consequence of the damage-causing event. *Special damage* is similar to consequential damage and is often considered as being too remote to allow for a claim and therefore requires specific proof and evidence in order to be awarded.²⁵ While the distinction between *general* and *special* damages has solicited much academic discussion, the distinction between these concepts has been noted to be largely irrelevant within the South African damages framework.²⁶

4.5. Patrimonial loss arising from contraventions of the Competition Act

Importantly, for purposes of section 65, damages actions a potential claimant will be required to firstly show that the provisions of the Competition Act have been enacted for his benefit (or the particular class of person seeking to bring the action) and that when providing for a civil damages action in the Competition Act, the nature of the

²⁴ *Klopper v Maloko* 1930 TPD 860 863. See also *Botha v Road Accident Fund* 2015 (2) SA 108 (GP), where the English law distinction was not followed with regard to earning capacity.

²⁵ *Durban Picture Frame Co (Pty) Ltd v Jeena* 1976 1 SA 329 (D). The claimant sought to recover damages arising from a tenant's failure to return the property in good condition; *Margau v King* 1948 1 SA 124 (W). The claimant sought to recover damages arising from the defendant's failure to sell shares when instructed. Whereas *special damages* require specific evidence in the context of a delictual claim, in the context of a contractual claim, it is envisaged that such *special damage* had to have been contemplated at the conclusion of the contract. See *Shatz Investments (Pty) Ltd v Kalovyrmnas* 1976 (2) SA 545 (A) 550: "not only must there have been common knowledge that such a loss would ensue on breach of the contract, but the parties must have entered into the contract 'on the basis' of such knowledge". See also *North and Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A) 215, where Van Blerk JA relied not only on the contemplation principle, but also on the requirement that the contract must be entered into 'on the basis' of or 'with a view' to the parties' common knowledge of the special facts.

²⁶ See *Durban Picture Frame v Jeena* at 335-336. See also De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (South African Contract and Mercantile Law), Butterworths Durban, (1992) (Ed 5:1) 227, who describe the distinction between general and special damages as useless for practical purposes. See also *Botha v RAF* (fn 24).

damages sought to be recovered are in fact the same as that contemplated by the legislature.

To this extent,²⁷ the claimant is required to show the required five elements in order to succeed with a damages claim arising from the contravention of a statute.²⁸ For ease of reference, these elements are repeated here:

- a) the contravened statute was intended to give rise to a cause of action;
- b) the claimant is a party for whose benefit the statutory duty exists;
- c) the damage sustained was of the type contemplated by the legislature in the statute;
- d) the provisions of the statute were in fact infringed; and
- e) the claimant suffered damage as a result of the statutory infringement.

Elements (a) and (b) were dealt with in the previous chapter,²⁹ in the discussion of the arguments raised by Premier regarding the ability of a class of person to bring a damages action for contraventions of the Competition Act. The remark by the Supreme Court of Appeal, suggesting the Act creates a basis for delictual liability and that class actions should not be excluded from instituting such damages actions, supports a very liberal interpretation of who will qualify as a *person* for whose benefit the Competition Act has been enacted. This is furthermore consistent with the interpretation of the wording of the Act, which advances the interests of society as a whole.

The element listed in (d) is essentially dealt with by the competition authorities. They will be called upon to investigate, prosecute and adjudicate the conduct complained of. Should the Competition Tribunal or Competition Appeal Court find that a firm has

²⁷ See ch 2 section 2.4.2 dealing with the requirements for a delictual claim arising from a breach of a statutory provision.

²⁸ *Da Silva v Coutinho* 1971 (3) SA 123 (A) 140.

²⁹ Ch 3 par 3.3.3.1 to 3.3.3.5 above.

contravened the Act, then the element in (d), requiring contravention of the statute, would be satisfied.

The elements listed in (c) and (e), remain (to this point) unanswered and a potential claimant will therefore have to show that the nature of the damage suffered and sought to be recovered is in fact the *type* of damage envisaged by the legislature in terms of section 65(6) the Competition Act.³⁰ Furthermore, crucially, the party seeking to recover damages arising from a contravention of statute (in this case the Competition Act) will have to show that the damage suffered was as a result of the contravention of the relevant statutory provisions. This is in essence an inquiry into factual and legal causation.

The next section will give consideration to the *type* of damage arising from contraventions of the Competition Act as envisaged by the legislature. Chapter 5 will consider the final element of *causation* required for a claim based on a contravention of a statute.³¹

Participants in the market in which a contravention of the Competition Act occurs (for example cartel conduct or an abuse of dominance contraventions) are likely to suffer financial loss, and will potentially be entitled to claim damages. Depending on the nature of the contravention and where the plaintiff may be situated within the supply-chain, the loss suffered by a plaintiff can take on a variety of forms.³² In these cases, the assessment of damages could require an evaluation of the profits that the claimant (victim of the anti-competitive conduct) would have generated had the contravention

³⁰ See Chapter 3 section 3.3.2 for a brief discussion on the Aquilian action as applied by the South African courts.

³¹ The questions of damages and causation are clearly inextricably intertwined. The extent of the damages claimable will be tempered by the extent to which causation can be proved.

³² Examples of possible damages are where an upstream resource has been subject to a price-fixing cartel, resulting in downstream retailers paying too much for the item. This decreases the profits generated on the item. Alternatively, a cartel may limit the volume of a certain item sold into the market, thereby maintaining an artificially high price, precluding buyers from buying additional items that could have resulted in additional revenue.

not occurred. In keeping with the classification of damages discussed above and recognised within the South African framework of civil damages, such a claim is essentially to be classified as a claim for *pure economic loss*,³³ manifesting as lost profits (*lucrum cessans*).

4.6. Lost profits

Lost profit experienced before the damages action is instituted is clearly not prospective loss. However, essential elements of the assessment of loss of profit and prospective loss mirror one another.³⁴

The debate as to whether a follow-on damages claim arising from infringements of the Competition Act are to be considered a statutory or delictual claim has not yet been resolved by our courts. The question as to whether lost profits can be recovered in delictual actions has been decided.³⁵ In *Trotman v Edwick*³⁶ the court took the position that a claimant in delict is only entitled to *negative interesse* and not to *positive*

³³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 SA 461 (SCA) 465

³⁴ These elements are the consideration of hypothetical positions and comparators when seeking to assess damages of this nature. Models to assist with developing hypothetical positions and comparators are discussed in chapters 6 to 9 *infra*. See also Visser & Potgieter *Law of Damages* (2012) 134 fn 46. See *Caxton Limited v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A); Joubert *Law of South Africa* par 23. See also the comprehensive work by Loubser, & Midgley, *Law of Delict in South Africa* Oxford University Press (2012). See also Neethling *Law of Delict* (2014) 233.

³⁵ See Ch 3 par 3.3 for a discussion on whether section 65 damages actions are to be considered a statutory damages claim or a delictual damages claim. See *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) where Howie JA confirms that damages for lost profits can be recovered with a delictual action.

³⁶ 1955 (1) SA 443 (A) 449B-C. Van Heerden JA states that: “a litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.”

interesse.³⁷ In *Transnet Ltd v Sechaba Photoscan*,³⁸ this position is fundamentally altered, with the court finding no historical basis for excluding a claim for lost profits from the realm of delictual actions.³⁹ Furthermore, the court recognised that similar actions are permitted in cases of personal injury claims.⁴⁰ Howie accordingly concluded that nothing prohibits a claim for loss of profits being brought by way of a delictual action.⁴¹ A claim for lost profits following unlawful competition was considered in *International Tobacco v United Tobacco Company Limited*.⁴² This principle was applied in *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman*,⁴³ where the claim for loss of profits was not only recognised, but the judgment also confirms that

³⁷ The distinction between negative and positive *interesse* was discussed in *Probert v Baker* 1983 (3) SA 229 (D) at 234, with the court remarking that: “perhaps, for example, he has suffered no loss of profit at all (a form of positive *interesse*) because he entered into a bad bargain, although he had extensive out of pocket expenses (a form of negative *interesse*).”

³⁸ *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA).

³⁹ *Ibid* 304, par 16: “the idea that loss of profit is not recoverable in delict is not historically founded.” See also Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta (1990) at 972.

⁴⁰ *Ibid* 304 par 16: “moreover, it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity? Take the example of the owner of a taxi that is negligently damaged. He has a claim for the profit lost while the vehicle is out of action. Can it make any difference if, subject to quantification, the delict is committed when he has just bought the vehicle, before commencing business? I think not. Nor can it matter if the loss were caused by fraudulent conduct, not negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference.” Also, see *Mossel Bay Divisional Council v Oosthuizen* 1933 CPD 509, 511, where the court recognised an individual’s claim for loss of income.

⁴¹ *Ibid* 305, par 17: “accordingly, in my view there is nothing in principle or the facts which bars recovery of damages by way of loss of profits in this case”.

⁴² *International Tobacco Company Limited v United Tobacco Company Limited* SA 1955 (2) SA 1 (W) 22A: “I am of the opinion that the plaintiff is in law entitled to recover damages based on loss of profits.” A position echoed by the European Court of Justice. In *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 it was held that national legal systems should not look to exclude the possibility of allowing a victim to claim for pure economic loss such as a claim for lost profits.

⁴³ 1983 (3) SA 390 (T).

lost profits can (depending on the circumstances of the particular case) be considered to be either general damages or special damages.⁴⁴

In a claim for lost profits, the courts require that the necessary proof to be adduced by the claimant suing for lost profits. In *Modern Engineering Works v Jacobs*,⁴⁵ Clayden dealt with an appeal from the magistrate's court, based on the assessment of a claim for lost profits. The court acknowledged the possibility of a claim for loss of profits and confirmed that the plaintiff must not merely prove that: "...his boring machine was unworkable for a certain time. He had to show that work which would have been done in that time was lost, with the profit which would have flowed from it."⁴⁶ The evidentiary burden on the claimant is not only to show that the defendant's conduct caused initial damage, but also that the loss of profit was a result of the defendant's conduct.

This duty to adduce satisfactory evidence is also clear from the facts of *International Tobacco v United Tobacco Company Limited*.⁴⁷ The claimant had to prove that the defendant had acted in a wrongful manner by spreading false rumours about the claimant's product. In addition, the claimant had to show the impact of the wrongful rumours on the profitability of the claimant's product in order to succeed with its claim for lost profits.⁴⁸ The court was satisfied that the plaintiff provided sufficiently detailed evidence and information⁴⁹ and awarded the plaintiff damages for lost profits.⁵⁰ This is in stark contrast with what the claimant managed to prove in *Patz v Greene*.⁵¹ The court held that if the applicant proved that loss (damage) was suffered as a result of the unlawful competition of the respondent, then the court should not hesitate to award

⁴⁴ *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (T) 393.

⁴⁵ 1949 (3) SA 191 (T).

⁴⁶ *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T) 192.

⁴⁷ 1955 (2) SA 1 (W).

⁴⁸ *International Tobacco Company Limited v United Tobacco Company Limited* 1955 (2) SA 1 (W).

⁴⁹ *Ibid* par 22G: "since the plaintiff has put forward evidence on which damages can be assessed it should not fail in its claim in my view because there might have been still more evidence which might or might not have assisted."

⁵⁰ *Ibid* par 23.

⁵¹ *Patz v Greene* 1907 TS 427.

damages to the applicant. However, the court raised concerns relating to the difficulty facing the applicant who must show that the unlawful competition had a direct influence on the income (profits) of the applicant:

... it may be shown that even if the respondents' business were closed, the trade which they are now doing would flow in another direction and would not substantially benefit the applicant. I am of the opinion that the applicant has made out nothing more than a prima facie case of actual injury, and without proof of injury there is no proof of interference with his trade or of an infringement of his right.⁵²

The relief sought by the applicant was consequently denied, due to the applicant failing to provide sufficient evidence of the profits lost as a result of unlawful competition by the respondent.

It is trite law that the court has a duty to assess damages in the best possible way on the evidence available to it.⁵³ Where it is clearly within the power of the claimant to present sufficient evidence to allow for a more detailed evaluation and assessment of the damages to be made, the courts have been reluctant to allow a claimant to tar-brush over essential requirements of the claim and then to rely on the court's discretion to assess damages.⁵⁴

⁵² *Ibid* 438 – 439.

⁵³ *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 18H: "it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude, one must form one's opinion as a juryman would of damage due upon the whole circumstances of the case and make the best reasonable estimate that one can." See also *Turkstra Ltd v Richards* 1926 (TPD) 276, 282: "[...] if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible".

⁵⁴ *Turkstra Ltd v Richards* 1926 TPD 276; *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T) 193.

In the context of the Competition Act, save to the extent that the scope of the damage may be restricted to the extent that causation can properly be proven, loss of profit would most certainly be a type of recoverable damage contemplated by the legislature in terms of a section 65 damages action.

In view of the compensatory nature of delictual damages in South Africa, the claimant will only be permitted to claim damages *actually* suffered as a result of the contravening conduct. The retrospective nature of assessments of lost profits will allow a claimant to assess, quantify and prove the extent of its alleged damages in an attempt to recover damage suffered and accordingly be *compensated* for this loss. A claim for lost profits easily fits into the mould of compensatory damages envisaged within the South African damages regime. However, the claiming of prospective loss (therefore prospective future profits) may not (merely from an evidentiary perspective) only raise potential hurdles for a claimant, but will also raise the following questions:

- whether these future damages (prospective loss) are properly recoverable in South African law of delict;
- whether prospective loss is a *type* of damage envisaged by the legislature when enacting section 65 of the Competition Act; and
- whether prospective damages serve to properly compensate a victim for loss or rather serves as a punitive function (not readily recognised within the South African law of damages) of 'compensating' a victim for loss it *may* incur in future.

4.6.1 Prospective loss

A claim for lost profits compensates a claimant for the loss suffered up to the date of the damages award, whereas a claim for *prospective loss* compensates the claimant for that loss which will arise at a later future date, as a result of the damage-causing event.⁵⁵ The right to claim prospective loss of profit is recognised in South African

⁵⁵ Visser & Potgieter *Law of Damages* (2012) 131. Prospective loss is therefore loss that has not yet occurred, but which will arise in future as a result of the wrongful conduct.

law.⁵⁶ Despite the recognition of prospective loss, it has been viewed as an ancillary form of damage incapable of being an independent action.⁵⁷

The position expressed in *Coetzee v SAR & H*⁵⁸ that damages actions for prospective loss is an ancillary form of damages and one that would not be available independently, raises the question whether the intention of the legislature when enacting the Competition Act was to allow a claim as a result of the contravening conduct for prospective damages in addition to a claim for lost profits. Furthermore, whether the context of actions arising from a contravention of the Competition Act these damages can properly be claimed.⁵⁹ The South African courts have in the context of a claim founded on common-law unfair competition allowed such damages.⁶⁰ Admittedly, the courts have not yet considered and determined the *type* of damages envisaged by the legislature in the context of the Competition Act. In view of the proposition adopted by the Supreme Court of Appeal in the *Children's Resource Centre* matter, that the Competition Act has not amended or altered the common-law insofar as civil damages actions in terms of the Act are concerned, the type of damages recoverable in terms of section 65 of the Competition Act is in principle the self-same common-law damages recoverable in terms of a claim based on common-law unlawful competition.⁶¹ It follows that the type of damages envisaged to be recoverable by a claimant in terms of the

See *SA Eagle Insurance Co Limited v Hartley* 1990 4 SA 833 (A) at 838; *Presidents Insurance Co Limited v Mathews* 1992 1 SA 1 (A) 5.

⁵⁶ *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304.

⁵⁷ *Coetzee v SAR & H* 1933 CPD 595: “[...] if a person sues for accrued damages he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future [...] Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action.” See also *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 287.

⁵⁸ See fn 57.

⁵⁹ See the requirements for a damages claim arising from the contravention of a statute discussed in Ch 2 par 2.4.2.

⁶⁰ *International Tobacco Company (SA) Ltd v United Tobacco Company (South) Ltd* 1995 (2) SA 1 (W) 17; *Caxton Ltd v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A) 573; *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd* 1997 (4) SA 399 (SCA) 412-413.

⁶¹ A claim for both lost profits as well as prospective loss was entertained by the courts in *International Tobacco Company Ltd v United Tobacco Company Ltd* 1955 (2) SA 1 (W).

Competition Act includes not only a claim for lost profits, but also a claim for prospective loss of profits.⁶²

A claimant's right to claim damages for lost profits in South African law of delict is not in question. Because of the uncertainties involved in quantifying future damage, the courts are required to do a certain amount of guesswork when assessing loss of prospective profits. In *Goodall v President Insurance Company Limited*⁶³ the court acknowledged the difficulties associated with determining prospective loss by stating that: "the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers [...] is not numbered amongst the qualifications for judicial office." Van der Walt argues that guesswork should not be permitted when assessing damages, and proposes a system in which the claimant only claims damages for loss already sustained and later for the further damage suffered when this damage manifests itself.⁶⁴ Van der Walt's position is not current law, and is subject to some criticism. It is impractical to postpone judgment on all prospective loss until all damages have manifested. The position advanced by Van der Walt would lead to an untenable situation, where a new cause of action will continually arise as and when the respective future losses finally manifests. Also, the lack of finality, where a claimant would be required to continually reinstitute action in order to recover new profits lost, would be in direct conflict with the principle of the *once and for all rule* which is an established rule in the South African law of damages.⁶⁵ Essentially, the principle of *once and for all* requires a claimant to claim for all the damages and losses incurred or expected to arise in future in a single cause of action.⁶⁶ This principle was confirmed in *Custom Credit Corporation v Shembe*,⁶⁷ where it was noted: "the law requires a party with a

⁶² *Ibid*

⁶³ *Goodall v President Insurance Company Limited* 1978 (1) SA 389 (W) 392 – 393H.

⁶⁴ Van Der Walt, *Die Sommeskadeleer en die 'Once and for All' Reël*, unpublished LLD thesis Unisa (1977) 498 (*Sommeskadeleer*).

⁶⁵ See Visser & Potgieter *Law of Damages* (2012) Chapter 7 for a detailed expose on the principle of the once and for all rule within the South African law of damages.

⁶⁶ See Visser & Potgieter *Law of Damages* (2012) 153. See also *Custom Credit Corporation v Shembe* 1972 (3) SA 462 (A) 472: "the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause."

⁶⁷ 1972 (3) SA 462 (A).

single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause.”⁶⁸ Furthermore, the difficulties associated with performing evaluations of prospective loss are not unique to the legal field, and in many branches of science, account has to be taken of probable future events. The law can (and should not) be an exception.⁶⁹

The South African law of delict, in contradistinction to English law, does not rely on the classification or labelling of various forms of claims in order to provide a delictual remedy. Provided all the necessary elements or requirements for liability can be proven, all patrimonial loss arising from a damage-causing event may be recovered with the Aquilian action. Despite the difficulties, complexities and uncertainties associated with assessing future damages, the *once and for all* principle has necessitated that prospective damages be recognised within the South African delictual damages framework. While a potential action will not be limited to the following specific cases, the courts have recognised prospective loss in cases of:

- a) the incurring of future expenses as a result of the damage-causing event,⁷⁰
- b) the loss of future income,⁷¹
- c) the loss of business or profit,⁷²
- d) the loss of prospective support,⁷³ and
- e) the loss of a chance.⁷⁴

⁶⁸ *Ibid* 472. While Van der Walt has criticised the application of the once and for all rule, particularly in the context of dealing with claims for prospective loss, to date the legislature has not reacted to Van der Walt’s suggestion. The position and applicability of the once and for all rule within the context of damages claims in South African remains unchanged.

⁶⁹ See Visser & Potgieter *Law of Damages* (2012) 140.

⁷⁰ *Swart v Van der Vyver* 1970 1 SA 633 (A) 647.

⁷¹ *General Accident Insurance Co SA Ltd v Summers* 1987 3 SA 577 (A).

⁷² *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA) 304-305.

⁷³ *General Accident Insurance Co SA Ltd v Summers* 1987 3 SA 577 (A).

⁷⁴ *De Klerk v ABSA Bank Ltd* 2003 4 SA 315 (SCA). A claim for a loss of a chance is conceivably the most speculative of the examples highlighted. The question of remoteness of probability makes such actions difficult to establish. The court in *SDR*

Claims for prospective loss in damages actions arising from unfair competition are recognised in South African law. It is submitted that the recovery of lost profits *and* prospective loss are damages contemplated by the legislature to be the type of damage recoverable for contraventions of the Competition Act. It is the assessment of this loss, particularly of prospective loss, which raises difficulties – given that the claimant is called upon to predict the future in order to assess its potential damages. When performing an assessment of prospective loss, it is accepted that it is required to compare the actual position of the claimant with the hypothetical position the claimant would have been in had the infringing conduct not occurred.⁷⁵ The construction of a viable hypothetical position for purposes of performing a comparison is in itself fraught with difficulties and uncertainty - particularly when seeking to do so with in the complex field of competition law, the variables of changing market circumstances and unpredictable consumer conduct.⁷⁶

4.6.2 Evaluating prospective loss in unlawful competition

In *Internation Tobacco Company v United Tobacco Company*,⁷⁷ damages were awarded for lost profits for the years 1950 to 1952. In addition (based on the argument that the total sales that should have been made would have increased by 2.21% had it not been for the wrongful conduct of the defendant's rumour), prospective damages were claimed for the years 1953 to 1962.⁷⁸ The defendant opposed the awarding of prospective damages claimed by the claimant, arguing that the prospective damage should not be claimable and that given the speculative (and optimistic) nature of the

Investment Holdings (Pty) Ltd v Nedcor Bank Ltd 2007 4 SA 190 (C) recognised the claim for a loss of chance arising from the loss of selling a single farm as opposed to selling all three farms. While the ruling of the court *a quo* was overturned on appeal (*Nedcor Bank Ltd v SDR Investment Holdings (Pty) Ltd* 2008 3 SA 544 (SCA)), the claim was dismissed based on contractual aspects.

⁷⁵ Visser & Potgieter *Law of Damages* (2012) 132. See also section of Ch 4, par 4.7.2.1 for a discussion on the sum-formula approach to the assessment of damages.

⁷⁶ The use of expert econometric evidence and models in order to alleviate some of the market uncertainties in order to estimate the impact of the anti-competitive conduct will be dealt with in Ch 6 – 9.

⁷⁷ 1955 (2) SA 1 (W).

⁷⁸ *Ibid* 23.

claim, the court should decline awarding prospective damages.⁷⁹ Clayden J, citing the Appellate Division ruling in *Oslo Land Company*,⁸⁰ which allowed all damages to be recovered, including prospective damages,⁸¹ found that the present claim indeed allows for the recovery of prospective loss. The court adopted the stance that prospective damages are recoverable. It then turned to considering *how* such damages are to be assessed. In this regard, Clayden J considered a variety of factors prevalent within the particular market in which the firms operated, as well as the individual products and market shares of the claimant and defendant.⁸² In dealing with the issue of prospective damages, Clayden J states: ‘ The tests I propose to apply are that if the plaintiff proves damages from 1953 onwards to be probable he is entitled to be awarded some amount; the damages need not be proved with accuracy because in the nature of the enquiry as to the future they cannot be; I must do my best to determine them *in some way or other* because all that can guide me is before me; but the determination must be based on probabilities, and must make some allowances for uncertainties in those probabilities.’⁸³ After considering the relevant market factors, he continues: “since I have made many assumptions against the plaintiff in arriving at these figures, and since what I am trying to arrive at is a fair estimate of the probable loss after 1952, not with mathematical accuracy, I think the proper order to make is that damages after 1952 be fixed at £250 000.00.”⁸⁴

While it is apparent that the courts will entertain a claim for lost profits and even the loss of prospective profits, from a practical perspective, parties will not always be able to prove the exact quantum of damages or the causal link between the anti-competitive conduct and the lost profit. Due to the complexities associated with establishing

⁷⁹ *Ibid* 24.

⁸⁰ *Oslo Land Company Ltd v Union Government* 1938 (AD) 584 at 592: “in negligence cases the cause of action is an unlawful act plus damages, and as soon as damage has occurred all the damages flowing from the unlawful act can be recovered, including prospective damage [...]”

⁸¹ *Ibid* 25: “I consider therefore that the principles laid down in the *Oslo Land Co. Ltd* case for the action for damages for negligence are the ones which here apply, and that prospective damages can be recovered.”

⁸² *Ibid* 25 – 26.

⁸³ *Ibid* 26.

⁸⁴ *Ibid* 27.

whether the loss is a result of the anti-competitive conduct or whether there are other extraneous factors that contributed, or may well in future contribute, the proving of lost profits and particularly the loss of prospective future profits arising from such conduct may prove to be problematic.⁸⁵

4.7. Techniques: Assessment of patrimonial delictual damage

4.7.1 Introduction

This chapter introduced the concepts of claims for *patrimonial* and *non-patrimonial* damages. Particular discussion was devoted to claims for patrimonial loss in the form of lost profits and the types of claims that might conceivably arise when dealing with damage suffered as a result of anti-competitive behaviour arising from contraventions of the Competition Act. This section deals with methods applied within the South African law of delict when assessing the extent of the damage suffered and being claimed.

Road Accident Fund v Geudes 2006 (5) SA 583 (SCA) 586 – 587: “the calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate. The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right.”

4.7.2 Comparative method⁸⁶

It is generally accepted that in order to assess damage one is required to use a comparative method.⁸⁷ This principle was confirmed in *Santam Versekeringsmaatskappy Bpk v Byleveldt*,⁸⁸ where the court stated that patrimonial damage means the difference between the patrimonial position of the injured party *before* the wrongful conduct and *thereafter*.⁸⁹ It is clear that an assessment of damages requires some form of comparison. Less clarity exists regarding the position as to what exactly should be compared when performing the damages assessment. Establishing a viable comparator is therefore fundamental for the purposes of arriving at a reliable estimation of the damages. To this extent, particularly in the sphere of competition damages assessments, a growing reliance has been placed on the use of economic models and techniques for damages assessment. These techniques strive to account for the variables and constants occurring within a damage-causing event, in an attempt to establish a comparator against which a claimant's damages can be measured and assessed. Some of these methods are given consideration in Chapters 6 to 9 below.

⁸⁶ The comparative method for assessing damages can be described as being a comparison of the claimant's actual patrimonial position, with the hypothetical position the claimant would have been in, had it not been for the damage-causing event. See Neethling *Law of Delict* (2014) 231. See also *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *De Vos v Eagle Versekeringsmaatskappy Bpk* 1985 (3) SA 447 (A); *Janeke v Ras* 1965 (4) SA 583 (E); *Dippenaar v Shield Insurance Company Ltd* 1979 (2) SA 904 (A) 917; *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) 240. The use of a comparative method for assessing damages by the South African courts allows for a position where the South African courts may well embrace the use of economic models (particularly the comparator methods) discussed in Ch 6 - 9.

⁸⁷ Neethling *Law of Delict* (2014) 231. See also Reinecke, *Die elemente van die begrip skade*, 1976 TSAR 26, where the author criticises the comparative method, arguing that damage should not be assessed based upon a consideration of a hypothetical position the claimant might have been in had the damage-causing event not occurred. Instead, he favours a position whereby damage is assessed, based purely upon a consideration of the actual consequences of the damage-causing event.

⁸⁸ 1973 (2) SA 146 (A).

⁸⁹ *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 150A-C; This was further placed beyond doubt in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304: "specifically with regard to delict, this court has referred to the difference between the patrimonial position of the plaintiff before and after the delict, being the unfavourable difference caused by the delict. It is now beyond doubt that damages in delict (and contract) are assessed according to the comparative method."

It is important to note that given their comparative nature, it is to be anticipated that the South African courts may readily welcome the assistance afforded to them by these models for the performing of a comparative analysis.

Two techniques for performing the comparison required for assessing patrimonial damages have been proposed within the existing South African damages regime. They are *the sum-formula approach* and *a concrete concept of damage*.⁹⁰

4.7.3 *Sum-formula approach*

The *sum-formula approach* compares the position of the injured party after the damage-causing event with the hypothetical position the injured party would have been in, had the damage-causing event not occurred.⁹¹ The sum-formula enquiry requires an assessment of the factual position the claimant finds itself in after the wrongful conduct, whereafter one is required to determine the claimant's hypothetical position, which would have existed had the wrongful conduct not occurred. The difference between the claimant's actual and hypothetical positions then forms the basis of the extent of damage caused by the wrongful conduct.⁹² The *sum-formula* approach appears sound in its reasoning, but difficulties exist with its application, particularly with regards to how one is to determine the claimant's hypothetical position.

⁹⁰ Neethling *Law of Delict* (2014) 231.

⁹¹ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) 9-10. See also *Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal* 1991 (1) SA 321 (T) 329B-G. See also Van der Walt, "Die voordeeltorekeningsreël- knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" *THRHR*, 1980(43), 1; Visser & Potgieter *Law of Damages* (2012) 72: "this means that an actual current patrimonial sum is compared with a hypothetical current patrimonial sum. This explains the concept sum-formula approach." The establishing of a hypothetical comparator and possible ways in which economic models may assist in this regard in cases of competition law contraventions is further discussed in Chapters 6 to 9, in establishing the hypothetical position.

⁹² *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304 (fn 89). See also *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) 150A-C.

Neethling argues that the only workable approach to determining the hypothetical position required by the sum-formula technique would be to remove the damage-causing event from the equation. Thereafter, all the information regarding the actual or probable course of events are retained and utilised to assess the most probable course of events and the affect this would have on the plaintiff's patrimonial position.⁹³

While some authors have expressed the view that the sum-formula doctrine has no foundation in Roman law, and therefore should not find application within the South African common-law,⁹⁴ the doctrine, despite the doubts raised regarding its heritage, has for many years gained universal acceptance and is therefore considered to be firmly entrenched within the South African framework.⁹⁵ Despite the acceptance of the sum-formula approach,⁹⁶ there has been hesitancy in venturing into the field of fortune telling. Consequently, in some instances, lip service is paid to the doctrine, without actually following it.⁹⁷

While the concerns associated with *fortune telling* and the risks of engaging in a speculative process when attempting to perform an assessment of damages remain and are noted, it appears that this would remain a necessary exercise for claimants, defendants and the courts when assessing damages. To this extent, great strides have been made in the use of expert evidence to alleviate much of the uncertainty and

⁹³ Neethling *Law of Delict* 2014) 228, 232. Visser & Potgieter *Law of Damages* (2012) 75-76.

⁹⁴ Van der Walt *Sommeskadeleer* (1977)148-152.

⁹⁵ See *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-Operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T): "the English doctrine of estoppel by representation migrated to this country on the authority of a passport that it approximated the *exceptio doli mali* of Roman Law. However doubtful the validity of that passport might originally have been the doctrine has now become naturalised and domiciled here as part of our law." Visser Potgieter *Law of Damages* (2012) 75-76 support this migration argument arguing that this equally applies to the sum-formula doctrine.

⁹⁶ *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304: "it is now beyond question that damages in delict (and contract) are assessed according to the comparative method [...] The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure."

⁹⁷ Visser & Potgieter *Law of Damages* (2012) 79.

speculation from these assessments.⁹⁸ The court, while retaining its discretion to consider all the relevant information presented to it when evaluating damages, has readily accepted the evidence of experts, such as economists and actuaries, for the purposes of providing evidence of the damages incurred. This allows for the court's assessment to be done with more insight and understanding by having the benefit of the experts' evaluations available. The competition authorities have also readily embraced the use of expert economic evidence during merger and complaint proceedings, in order to evaluate the impact of the anti-competitive conduct.⁹⁹

⁹⁸ The use of economic models to create a workable and realistic hypothetical position for purposes of performing a comparator exercise necessary for damages evaluations will be discussed in more detail in Chapters 6 – 9.

⁹⁹ *Road Accident Fund v Geudes* 2006 (5) SA 583 (SCA) 587: “courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages.” See also *The Competition Commission v South African Breweries Ltd and Others* 2015 (3) SA 329 (CAC), where the Competition Appeal Court considered a contravention of the Competition Act by South African Breweries and various distributors. The Court evaluated the agreement between South African Breweries and the distributors for purposes of classification of the agreement as establishing a vertical agreement, or horizontal relationship between the parties, as this would have a direct bearing on the assessment of the allegations leveled against the firms. In tackling this assessment, the Competition Appeal Court was acutely aware of the significance of both the legal interpretation and economic evaluation for purposes of properly contextualising the nature of the agreement between the firms. The CAC stated at par 37 on page 341 of its judgment: “however, since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have.” See also the ruling by the Competition Tribunal during the merger proceedings between *Anglo American Holdings Ltd and Kumba Resources Ltd* (45/LM/Jun02 & 46/LM/Jun02), in which the Tribunal addressed the importance of economic evidence in the context of competition law by quoting the foreword of the work by Jeremy Lever Q.C, in his comprehensive work on competition economics: “there has never been a greater need for economists with a proper understanding of the issues raised by competition law and the related, thought distinct, area of the legal regulation of utilities. Although we speak of these areas as law, they are really the application of economics in a legally regular way.” See Bishop and Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* Sweet & Maxwell (2010). See also *The Competition Commission v Senwes* (CT 110/CR/Dec06), where the Competition Tribunal assessed and adjudicated on an allegation of margin squeeze brought against Senwes. During the course of this hearing, expert evidence was heard regarding whether Senwes could be deemed dominant in the market and whether Senwes were leveraging this dominance to squeeze competitors in the downstream market. See also the matter of *The Competition Commission v Sasol Chemical Industries Limited* (CT 48/CR/Aug10),

The comparator methods advanced by econometric evidence also, to an extent, negates much of the uncertainties, by advancing more concrete comparators than the mere conjecture and speculation often relied upon by claimants *guessing* the extent of possible future loss they may incur.

Of fundamental importance for a proper application of the sum-formula approach is undoubtedly the claimant's ability to establish a viable hypothetical position to serve as an appropriate comparator in the particular damages assessment.

4.7.4 Concrete assessment of damage

Those who are adversaries of the sum-formula doctrine are particularly opposed to the abstract nature of the hypothetical position required to be determined in order to make the damages assessment. It is this criticism of the hypothetical aspect of the assessment that forms the basis for the formulation of a more concrete technique for assessing damages. A concrete assessment of damage is supported by Van der Walt.¹⁰⁰ He proposes a comparative based method free from the uncertainties of a hypothetical position be employed, by comparing the position before the delict (damage-causing event) with the position after the delict (damage-causing event). The difficulties regarding the determination of a hypothetical position for purposes of performing a comparison are therefore circumvented.¹⁰¹

The concrete approach has been recognised and applied¹⁰² in *Holscher v ABSA Bank*:

where expert evidence was considered during the assessment of an excessive pricing allegation brought against Sasol.

¹⁰⁰ Van der Walt *Sommeskadeleer* (1977) 284.

¹⁰¹ *Ibid*

¹⁰² *Santam Vesekeringsmaatskapy (Ltd) v Byleveldt* 1973 (2) SA 146 (A) 150: damage means the difference between the patrimonial position of the disadvantaged party before the unlawful act and thereafter. (Own translation).

Dit is werklike geldelike verlies wat ter sprake is onder die *lex Aquilia* en ten einde dit te bepaal word gevra wat was die stand van die eiser se boedel voor die gewraakte daad en wat is dit daarna.¹⁰³

The concrete assessment of damages may appear robust, lacking the frills and excitement of the sum-formula's crystal ball-gazing, and the extravagance often associated with econometric models of damages assessment. In reality, the concrete assessment of damages resembles the difference-in-difference comparator model often applied by economists when evaluating damages.¹⁰⁴ This robust method is appealing insofar as it is based on an application of actual positions, providing a comforting level of certainty to the assessment. However, the concrete approach often fails to properly deal with and consider the relevant market variables, ascribing the difference to the event in a linear fashion, as opposed to the multifaceted considerations allowed for when applying the sum-formula approach.

4.8. Sum-formula or concrete approach?

Each of the approaches display advantages and disadvantages when assessing damages. In order to temper the disadvantages of the techniques described above, Visser appears to favour a *hybrid approach*. They suggest that the more concrete analysis proves useful in cases where the damage has already been suffered and the use of a hypothetical analysis is not necessary. A comparator-based method with a hypothetical element may prove to be of more assistance in cases where the extent of prospective loss and loss of profit has to be determined as the evaluation of loss of

¹⁰³ *Holscher v ABSA Bank* 1994 (2) SA 667 (T) 673H: "it is the real patrimonial loss which is to be assessed when applying the *lex Aquilia* and to determine this loss, the question which needs to be asked and answered is regarding what the claimant's position was before the damage-causing event and thereafter" (own translation). Essentially the concrete approach seeks to compare *what is* and *what was*. See also Visser & Potgieter *Law of Damages* (2012) 79.

¹⁰⁴ The difference-in-difference technique compares the market tainted by the infringement with a market untainted by the infringement in order to assess the effect of the contravening conduct. The information relied upon is therefore not speculative or generated to establish a hypothetical position. Rather, the technique will use real, existing information to make its conclusions and assessments. See Ch 7 par 7.4.

profit and prospective loss inherently require some form of hypothetical analysis to be undertaken.¹⁰⁵

Due to the nature of the potential loss (being loss of profit and prospective loss) suffered as a result of contraventions of the Competition Act, the hybrid-system proposed by Visser and Potgieter may find favour with claimants and the courts. Lost profits already suffered can be assessed in a concrete manner, while the advantages of the sum-formula approach and the hypothetical assessment of damages might be useful when proving the extent of the prospective loss suffered as a result of the wrongful conduct.¹⁰⁶

4.9. Conclusion

The existing South African damages framework recognises that a claim for damages can arise for parties who have fallen victim to anti-competitive behaviour. These damages can arise from either the common-law competition rules regulating unlawful competition or a breach of the statutory provisions of the Competition Act. While the nature of the damages as being delictual or statutory has not as yet been settled by the courts, the arguments presented in Chapter 3 support the view that such damages claims fall properly within the scope of South Africa's existing delictual framework and within the ambit of the *lex Aquilia*. Recoverable damages are restricted to all real loss suffered as well as prospective loss (without limiting the nature of the prospective loss) in cases where sufficient evidence can be adduced by the claimant to support such a claim in delict (i.e. that all the necessary elements required for a delictual action can be proven). It is clear that punitive damages are not part of South Africa's legal framework, and cannot be claimed.¹⁰⁷

¹⁰⁵ Visser & Potgieter *Law of Damages* (2012) 80 - 81.

¹⁰⁶ *Ibid* 72-79.

¹⁰⁷ *Jones v Krok* 1996 (1) SA 504 (T) 515G-H.

While techniques and doctrines have been proposed in assessing the quantum of the damage suffered, the courts have been reluctant to adopt techniques requiring abstract assessment of damages. In contrast, the very nature of the damage suffered as a result of anti-competitive behaviour may require the courts to re-assess their conservative inclination, and favour a more abstract approach when computing damages for lost profits and particularly prospective loss. This may herald a greater reliance on the hybrid approach advocated by Visser and Neethling, with existing damages are assessed with a concrete method, and the future potential damages assessed in a more abstract manner.¹⁰⁸

Anti-competitive practices by a firm may have substantial effects within a given market. Not only are the competitors within the affected market and the consumers of that particular product affected, but also other parties such as suppliers to potential competitors, who will suffer a loss in sales because firms are excluded from the market by the dominant firm or exploited by the cartel.¹⁰⁹ An affected party suffers damage resulting from a loss in the revenue generated (both in the form of lost profits already suffered and prospective loss of profits in future) resulting from the anti-competitive conduct. Claims for this type of damage are recognised by the South African law of damages. Through the course of the following chapters, this study will endeavour to provide some insight into how a claimant and the courts may establish a viable hypothetical position by means of which to assist the claimant and the court in determining the most accurate estimate of the claimant's damages (particularly the prospective future damages) suffered.

¹⁰⁸ Visser & Potgieter *Law of Damages* (2012) 79-80.

¹⁰⁹ The parties potentially affected by anti-competitive conduct are identified and briefly discussed in Ch 10 par 10.3.

CHAPTER 5. PROVING CAUSATION

5.1. Introduction

In order to succeed with a damages claim, a claimant will be required to prove all the essential elements of the delict. In the case of a claim for damages based on a contravention of the Competition Act, the claimant is released from the burden of proving the conduct of the contravening party and the unlawfulness of the conduct. The relevant competition tribunal would already have confirmed the existence of required conduct in its ruling, in which it found the contravening party guilty of a prohibited practice in terms of the Competition Act. What a claimant for civil damages based on a contravention of the Competition Act is still required to prove is that the statute was enacted for the benefit of the claimant and that the damage suffered and claimed was contemplated by the legislature. Once this is established, then the claimant will have to further prove a sufficient *causal connection* exists between the contravening firm's wrongful conduct and the *amount of damage* suffered by the claimant.¹

This chapter provides a basic insight into how the South African courts determine sufficient *causal connection* in civil damages claims. In addition, the establishment of the necessary causal connection in cases when dealing with claims instituted for infringements of the Competition Act will be discussed.

5.2. Causation in South African law of delict

A distinction is made between *factual* and *legal* causation. Both have to be proven by a claimant in order to succeed with a claim based on Aquilian liability.² *Factual*

¹ See of Ch 3 par 3.1.2 for a discussion of the two-phased adjudication of the follow-on competition damages actions.

² Van Heerden & Neethling *Unlawful Competition* (2008) 81.

causation is a determination of whether factually the act (conduct) concerned caused the subsequent result (damage).³ *Legal causation* limits the extent of the damage arising from the conduct to that which is considered sufficiently closely, or directly arising from the conduct and worthy of a claim by the claimant.⁴

5.2.1 Determining factual causation

The 'but-for' test⁵ has and continues to be employed by the South African courts when assessing factual causation.⁶ This test is aimed at establishing whether the specific

³ *Siman and Company (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) 915: "a straightforward example of this would be where the driver of a vehicle is alleged to have negligently driven at an excessive speed and thereby caused a collision. In order to determine whether there was factually a causal connection between the driving of the vehicle at an excessive speed and the collision it would be necessary to ask the question whether the collision would have been avoided if the driver had been driving at a speed which was reasonable in the circumstances. In other words, in order to apply the but-for test one would have to substitute a hypothetical positive course of conduct for the actual positive course of conduct."

⁴ *Clarke v Hurst* 1992 (4) SA 630 (D) 660: "the question is whether the result can fairly be said to be imputable to the defendant." See also *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747 (A) 764: "It is still necessary to determine legal causation, i.e. whether the furnishing of the untrue report was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote." In *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) 332 Harms JA considered legal causation as whether: "the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part." See further *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34: "causation in the law of delict gives rise to two rather distinct problems. The first is the factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to [...] the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem, in which considerations of policy may play a part." See also *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700: "demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry, viz. whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

⁵ Also referred to as the *conditio sine qua non* test.

⁶ For the application and criticism of the *conditio sine qua non* test, see Neethling *Law of Delict* (2014) 186–197.

conduct can be said to be the cause of the arising damage. The practical application of the but-for test was discussed in *International Shipping Company (Pty) Ltd v Bentley*.⁷ In order to apply the test, a hypothetical evaluation is made of the situation that would possibly have arisen *but-for* the wrongful conduct of the defendant. If the defendant's wrongful conduct is removed and replaced with lawful conduct, and the claimant's damage would in any event have occurred, then the deduction will be that the defendant's wrongful conduct was not the cause of the claimant's loss.⁸

The *but-for test* and its application by the South African courts for purposes of assessing factual causation is not without criticism.⁹ This criticism is largely academic

⁷ 1990 (1) SA 680 (A).

⁸ *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700: "as has previously been pointed out by this Court, the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz. whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

⁹ Stapleton, "Factual Causation" *Federal Law Review*, 2010 (38), 467, where the author, with reference to multiple sufficient factors of causation, states that: "the but-for test of factual causation is notoriously inadequate." See also Wright, "Causation in Tort Law", *California Law Review*, 1985 (73), Issue 6, 1735 (*Causation*). The criticism of the but-for test for assessing factual causation is not limited to the South African context, with Wright favouring the more comprehensive assessment of factual causation provided by NESS test (*Necessary Element of Sufficient Set*), which allows the user to properly consider the factual causation in cases, where there are multiple factors which could have caused the damaging result.

and South African courts continue to apply and refer to the but-for test when assessing factual causation.

Arguably the most prominent criticism stems from the inability of the but-for test to deal with multiple causes of the damage (*cumulative causation*).¹⁰ The elimination of the one would still bring about the damaging result, which essentially means that a rigid application of the test results in the absurd conclusion that neither cause is considered the damage-causing action.¹¹

The inability of the but-for causation test to deal with a case of multiple causes can be overcome by application of the NESS test in determining causation. The NESS test allows consideration for a variety of different factors that culminated in the causing a specific consequence.¹² The NESS test controls for cases with multiple varying factors and potential causes of the damage.¹³ The NESS evaluation considers whether a particular act is *sufficient* to have caused the consequence, thereby tempering the harsh rigidity of the notion of necessity associated when evaluating conduct in the context of the but-for test.¹⁴

¹⁰ Neethling *Law of Delict* (2014) 188. Cumulative causation occurs when more than one particular act causes the outcome.

¹¹ Neethling *Law of Delict* (2014) 187. Lianos describes this failure of the but-for test as the ‘under-inclusiveness issue’. He provides a very useful practical example of the potential absurdity arising from a rigid application of the but-for test for causation within the context of competition law infringements. He highlights the situation where one is dealing with multiple cartelists, it may be argued that in certain cases the participation (or non-participation) by a certain cartel member would not have had any effect on the market price and subsequent loss incurred by a claimant, resulting in the position that the firm’s conduct resulted in no damage. See for a detailed exposé on causation within the context of competition law contraventions in Lianos “Causal uncertainty and damages claims for infringement of competition law in Europe” (2015) 12 (*Causal uncertainty*). Available at <http://dx.doi.org/10.2139/ssrn.2564329>. (Last accessed on 8 October 2015). See also Broadbent, A “Fact and Law in Causal Inquiry”, 2009 (15(3)) *Legal Theory*, 173-191.

¹² Wright *Causation* (1985) 1790.

¹³ Wright *Causation* (1985) 1735. See also Lianos *Causal uncertainty* (2015) 13.

¹⁴ Lianos *Causal uncertainty* (2015) 13: “by introducing the concept of the set of sufficient conditions, the NESS test disassociates necessity from sufficiency.”

The NESS test allows for the tempering of the rigidity of the but-for test, but it creates the potential for too many sufficient causes to be identified, all of which cannot properly be said to have contributed to the damage suffered. This potential pit-fall creates the problem of *over-inclusiveness*.¹⁵

The concern of over-inclusiveness would appear to be the lesser of two evils. Under-inclusiveness (associated with the but-for test) results in no causation being proven and accordingly denying a claimant from prosecuting a damages claim, whereas over-inclusiveness (associated with the NESS test) does not unfairly hamper the rights and ability of a claimant to formulate, or prosecute, a damages action, while simultaneously still affording a defendant an opportunity to manage the concerns of over-inclusiveness by leading evidence of the amount of damage (if any) which resulted from the conduct.

The problem of multiple causes and the shortcomings of the but-for test in dealing with the cases of multiple causes is not foreign to the South African judicial framework. It was considered and addressed by the court in *Portwood v Samvur* where the court stated that a logical approach is to be followed when faced with multiple causes of damage, by applying the “direct common-sense approach of the man on the street”.¹⁶

¹⁵ *Ibid*

¹⁶ 1970 4 SA 8 (RA) 15. The common sense approach for assessing factual causation in cases of multiple causes was applied in *Ncoyo v Commissioner of Police, Ciskei* 1998 1 SA 128 (CK) 137; *Silver v Premier, Gauteng Provincial Government* 1998 4 SA 569 (W) 575. The Australian courts have also used the common-sense approach when tasked with assessing factual causation (see *Allianz Australia Insurance Ltd v GSF Australia (Pty) Ltd* 2005 221 CLR 568, 581 at par 41: “the inquiry into the question of causation under the Act does not differ materially from the ‘common sense’ test for causation at common law.” The application of a common-sense test to factual causation was fuelled by the publication of the work by Hart and Honore (Hart, H.L.A and Honoré, T (1985) *Causation in Law*, 2nd Edition, Oxford University Press). The use of a common-sense approach to factual causation is, however, not without its critics. The UK has been disapproving of the use of a common-sense approach to determine factual causation. See *Stone & Rolls (in Liquidation) v Moore Stephens (a firm)* [2009] 3 WLR 455, 460 par 5, where Lord Phillips of Worth Matravers states: “in a lecture to the Chancery Bar Association entitled ‘Common Sense and Causing Loss’ given on 15 June 1999 Lord Hoffmann commented adversely on the practice of those judges who justify their decisions by reference to ‘common sense’. He suggested that this was far too often an unsatisfactory alternative to the identification of the relevant principles.” Stapleton (2010) *Factual Causation* 469: “recent judgments in the High Court such as *Roads and Traffic Authority v Royal* helpfully highlight the danger in such ‘common sense’: namely that a court will elide proof of breach (which increased

It is argued that despite the South African courts seemingly clinging to the application of the but-for test when determining factual causation, the reality is that the courts are regularly applying a more common-sense approach to the determination of factual causation, and merely continue to reference the but-for test (*conditio sine qua non*) as the test applied in reaching their conclusion (despite the fact that the but-for test in its traditional sense is not really being applied).¹⁷

It would therefore seem that although the South African courts continue to proclaim the application of the but-for test when dealing with factual causation, the practical reality is that the courts have long been approaching the issue of factual causation in a more pragmatic fashion by applying a logical *common-sense* assessment of the facts and various causes contributing to the consequence in order to attribute factual causation to a particular action and consequence.¹⁸

While the common-sense approach to factual causation allows the courts to deal with multiple causes, it is quite obvious that damage might not only be caused by a single

the risk of a certain outcome) and foreseeable result (of the same type of outcome) with proof that the breach was a factual cause of that result in the specific case at hand, and fail adequately to consider whether there was, on the evidence, 'any sufficient reason to the contrary'." See *Roads and Traffic Authority v Royal* (2008) 245 ALR 653; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; *Commissioner of Main Roads v Jones* (2005) 215 ALR 418, 437. See also Stapleton "Choosing hat we mean by 'Causation' in the Law", *Missouri Law Review*, 2008 (73) 433, 458-465, in which the author discusses the difficulties and complexities of the approach advanced by Hart and Honoré.

¹⁷ *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 697 the court refers to test for factual causation as being the *but-for* test. However, it reaches its conclusion on causation without removing the wrongful conduct or replacing the wrongful conduct with lawful conduct. The resulting conclusion by the court is cached as arising from the application of the but-for test for factual causation but in reality the but-for test was not applied. See also *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 6 SA 180 (C) 199; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 448 – 449; *Road Accident Fund v Odendaal* 2004 1 SA 515 (W) 592; *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) 228.

¹⁸ The South African courts have managed the problem of cumulative causation by steering away from rigid doctrines or theories of causation, rather favouring a fluid common-sense approach in which the court can use its judicial discretion when assessing factual causation. See *S v Mokgethi and Others*; [1990] 1 All SA 320 (A); 1990 (1) SA 32 (A).

wrongdoer and that situations may arise where there is more than one party, or firm contributing to the damage-causing event. To this extent, the common-law distinguished between *joint wrongdoers* (i.e. a group of parties all contributing to a single damage-causing event) and *concurrent wrongdoers* (i.e. separate independent wrongdoers).¹⁹

The promulgation of the Apportionment of Damages Act 34 of 1956 abolished the common-law distinction between joint wrongdoers and concurrent wrongdoers, creating a position where persons who are liable in delict for the *same damage* shall be jointly and severally liable for that damage.^{20, 21} Joint wrongdoers in turn have a right of recourse against each other, where, depending on what the fair degree of fault attributable to each of the joint wrongdoers is, can be recovered from the other.²²

The common-sense approach taken by the courts certainly assists a claimant. It allows the courts to take cognisance of all available factors in arriving at an evaluation of whether the conduct was sufficient to cause the damage. Furthermore, the Apportionment of Damages Act creates a favourable environment for the claimant to join a group of wrongdoers and to hold them jointly liable for the damage. This not only negates the need of the claimant to attribute individual responsibility and liability to each of the defendants, but further allows the claimant to recover the damage from

¹⁹ Neethling *Law of Delict* (2014) 279. Where persons co-operated consciously to commit a delict, they are considered joint wrongdoers, whereas, where more than one person acted independently in a wrongful manner, which contributed causally to the same damage-causing consequence, these parties will be concurrent wrongdoers.

²⁰ *Same damage* would constitute all the damage arising from the wrongful conduct. In cases where separate damage was caused by separate persons, then these parties would not be considered joint wrongdoers, but rather an action would have to be instituted against each one as per the normal delictual principles with each party only liable for the damage it caused.

²¹ Section 2(1) of Act 34 of 1956 reads: where it is alleged that two or more persons are jointly or severally liable in delict to a third person (herein after referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.

²² Neethling *Law of Delict* (2014) 281.

any one (or any combination) of the defendants, mitigating the risk to the claimant of certain defendants possibly not having the resources to pay damages.

Wrongful conduct is very often not difficult to prove or demonstrate.²³ The 'but-for' test (albeit in a more liberal common-sense fashion recognised by the South African courts) is readily applied without much difficulty by the courts when assessing factual causation. The common-sense approach will therefore allow the court to determine what conduct it considers factually sufficient to have caused the ensuing damage, it is very often the *legal causation* that calls for clear evidence to be presented by the claimant in order to establish the extent of the liability to be attributed to a defendant's wrongful conduct.

5.2.2 Determining legal causation

Various theories have been developed and applied to assist with the determining of the extent of damage that should be attributed to the wrongful conduct.²⁴ Recently, the courts favoured a *flexible approach* when assessing legal causation.²⁵

5.2.2.1 Flexible approach

*S v Mokgethi*²⁶ is the leading South African case in which the flexible approach was formulated and adopted to determine legal causation. Van Heerden JA recognised the importance of the *condictio sine qua non* test, when dealing with factual causation. He expressed the view that the second step in evaluating causation (the assessment of legal causation) requires a series of criteria, and cannot simply rely on a single

²³ Such as, for example, in cases such as those currently being considered in this study where the Competition Tribunal has already ruled upon the conduct and the wrongfulness thereof.

²⁴ Neethling *Law of Delict* (2014) 197.

²⁵ The application of the flexible approach to the assessment of legal causation will be discussed in Ch 5 par 5.3 below.

²⁶ *S v Mokgethi* [1990] 1 All SA 320 (A); 1990 (1) SA 32 (A) 39-40.

theory, for example, the theories of reasonable foreseeability²⁷ or the theory of direct consequence.²⁸ The employment of a series of approaches to determine *legal causation* is supported by Van der Walt and Midgley:

The adoption of a single formula would clearly represent too dogmatic and oversimplified an approach to the complex and practical problems relating to legal causality. The flexible approach which the Appellate Division has adopted accommodates both approaches represented in the formulae contained in the major theories [direct consequence and reasonable foreseeability], and therefore strikes a fair and equitable balance between the causally relevant and irrelevant consequences of the wrongful conduct.²⁹

This flexible approach has been confirmed in *Standard Chartered Bank of Canada v Nedperm Bank Limited*, in which it was noted that “the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy reasonability, fairness and justice all play their part”.³⁰

²⁷ Van der Walt & Midgley *Principles of Delict* (2005) 208, describe the reasonable foreseeability test as being limiting “liability to those factual consequences which a reasonable person in the position of the defendant would reasonably have foreseen”.

²⁸ *Ibid* 206 describes the direct consequences of a defendant’s conduct as being “those which follow in sequence from the effect of the defendant’s act upon existing conditions and forces already in operation at the time, without the intervention of any external forces which come into operation after the act has been committed”.

²⁹ *Ibid* 203. Neethling *Law of Delict* (2014) 200-203. Van Heerden & Neethling *Unlawful Competition* (2008) 82.

³⁰ *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747 (A) at 765.

5.3. Causation and unlawful competition

It has been established that civil damages actions arising from unlawful competition are to be based on the principles of the *lex Aquilia*.³¹ Causation has consequently always been a vital element to be proven by the claimant and for determination by the courts when adjudicating a claim for damages based on unlawful competition. In *Dun v SA Merchants*³² Corbett JA highlighted the importance of the claimant showing the necessary causal connection when he declined a claim for damages:

I have already pointed out that the plaintiff has nowhere alleged in its pleadings that the parties traded in competition or that the defendant used information culled from 'Credit Records' in a competing business; nor is it clearly stated what damage plaintiff sustained as a result of the conduct or how it was caused.³³

It is clear that the courts place an emphasis on the claimant showing the necessary causal connection between the conduct and the alleged damage suffered as a result of this conduct, in order to bring damages actions for unlawful competition.³⁴ The courts have further recognised the burden placed on claimants to show the causal connection between the unlawful competition and the subsequent loss suffered by the claimant. The very nature of commercial enterprise allows for a variety of variables to influence a firm's success or failure. In this regard, the view has been adopted that if the plaintiff "proves it *to be probable* that some portion of his total loss of business was due to the cause assigned [the court] can see no reason why he should not recover that portion".³⁵ This principle will of course, also apply undiminished to anti-competitive

³¹ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 186.

³² *Dun v S.A Merchants Combined Credit Bureau (Pty) Ltd* 1968 1 SA 209 (C).

³³ *Ibid*

³⁴ *Ibid* 221-222: "bearing in mind the Aquilian character of a claim upon such conduct, it seems to me that the suffering of damage in this form and its causal connection with acts of unlawful competition are essential ingredients of the claimant's cause of action."

³⁵ *International Tobacco Company v United Tobacco Company* 1955 (2) SA 1 (W) 19.

behaviour. The claimant must prove on a balance of probabilities that the defendant's conduct has resulted in damage being suffered.³⁶ In *Geary and Son (Pty) Ltd v Gove*, it was stated that a claimant must prove that: "he has lost or will lose customers" and that "the false representation is the cause thereof".³⁷

Due to the range of variables that potentially influence a firm's commercial performance, it may prove difficult for a claimant to show with sufficient probability the extent of the damage caused by the contravening conduct of the defendant. The common-sense approach taken by the courts when evaluating the various factors will allow the court to isolate the wrongful conduct, and the extent to which it can be deemed sufficient enough (or not) to have caused the damage. The isolation of the effect of the wrongful conduct is not an easy exercise. Claimants, and ultimately the courts, may be compelled to resort to the application of other disciplines other than law (such as the principles of economics) in order to ameliorate the uncertainty of the causation and arrive at a justifiable conclusion of the damage suffered.³⁸ Application of the principles of these non-legal disciplines can serve to assist in isolating the probable cause of damage and ultimately establish what loss or damage can be attributed to prevailing market conditions and what loss or damage can be ascribed to the anti-competitive conduct of the defendant.³⁹

³⁶ Van Heerden & Neethling *Unlawful Competition* (2008) 81.

³⁷ *Geary and Son (Pty) Ltd v Gove* 1964 1 SA 434 (A) 441. (Author's emphasis).

³⁸ By granting the courts a broad discretion when applying its mind to the facts of the particular claim before it, the existing framework of factual causation applied by the South African courts addresses the issue of multiple causes and causal uncertainty upfront.

³⁹ See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) 587, in which the courts have acknowledged the benefit of using experts to assist with the quantification of damages.

5.4. Economics and causal connection

The establishing of sufficient *factual* and *legal causation* is paramount for a successful damages claim, and will be dealt with by using the appropriate existing tests for factual and legal causation discussed above.

Proving factual and legal causation when dealing with cases of competition law infringements may prove slightly more complex and challenging than is the case with ordinary delictual actions.⁴⁰ The difficulty of establishing the necessary causal basis for the damages claim is created by the need to prove that the loss suffered by the claimant can be attributed to the defendant's conduct. In the commercial environment (independently from any conduct of a wrongdoer) markets are exposed to a variety of factors that could conceivably result in a claimant suffering ostensible loss. The claimant must consequently effectively isolate damage that has arisen as a result of the defendant's conduct from loss that can be attributable to commercial market factors.⁴¹

Despite the quantification of damage and the causal connection between damage and the contravention being two separate and distinct inquiries in a damages action, these two elements of a damages enquiry are often closely linked. It follows that economic quantification models⁴² may prove to be of considerable assistance to claimants when proving the causal connection between the unlawful competition and the damage suffered.⁴³

⁴⁰ Van Heerden & Neethling *Unlawful Competition* (2008) 81.

⁴¹ *International Tobacco Company v United Tobacco Company* 1955 (2) SA 1 (W) 19. Clayden J states: "I can only say that if the plaintiff proves it to be probable that some portion of his total loss of business was due to the cause assigned I can see no reason why he should not recover that portion". See also *Ratcliffe v Evans* (1892) 2 Q.B. 524: "...so it seems to me that he can prove that his business has fallen as a whole, that for part of that fall the defendant may not be responsible, but for part of it the defendant probably is responsible."

⁴² Dealt with in Ch 6-9.

⁴³ Niels, Jenkins & Kavanagh (2011) 519. While economic analysis does not by itself prove causality, a model may show that a competitor's sales have fallen during the

In the United States,⁴⁴ courts have rejected expert economic evidence based on the fact that the evidence failed to properly account and consider other explanations other than the anti-competitive conduct that could have caused the damage.⁴⁵ In *Conwood v US Tobacco*,⁴⁶ the court accepted that the expert evidence allowed for a consideration of all the alternative plausible explanations. This allowed the court to isolate the effect of the defendant's contravening conduct and effectively establish the extent to which the defendant's conduct can be said to have *caused* the claimant's harm.⁴⁷

5.5 Expert evidence in the South African civil courts

The Competition Tribunal and Competition Appeal Court have recognised the need of expert economic evidence when judging the effect of conduct or a proposed merger will have on the market, and have embraced the use of such evidence during the

period of an exclusionary abuse, but fail to address other possible explanations for that fall in sales, such as a general drop in sales in the market during the period, the entry of a new competitor, or managerial incompetence. A good econometric model will incorporate controls for those other possibilities as much as possible, by attempting to include these factors into the model as additional explanatory variables. In this way, the various effects of the individual factors can be isolated from one another, allowing the model to show that if some of the other factors explain some of the losses in sales, the remainder of the loss can be safely attributed to the competition infringement.

⁴⁴ Arguably the jurisdiction where the use of econometric models is most common.

⁴⁵ *Stelwagon Mfg Company v Tarmac Roofing* 63 F 3d 1267 (3d Cir. 1995).

⁴⁶ *Conwood Company v US Tobacco Company* 290 F 3d 768 (6th Cir 2002).

⁴⁷ In dealing with an interlocutory application, the Competition Tribunal in the matter between the *Industrial Development Corporation of South Africa Limited and Anglo-American Holdings Limited* (CT 45/LM/Jun02 & 46/LM/Jun02) confirmed the importance of expert economic evidence when assessing competition matters. In this case, the merging parties and the Commission had filed independent economic expert reports. However, unsatisfied with the reports, the Tribunal instructed a further economic expert to prepare a report. The Tribunal stated that: "Economics is central to the consideration of any merger", further noting that "economic ideas in this area are neither static nor are they settled or uncontroversial. Economists too, bring different tools to their assessments ranging from mathematical and statistical models to more exotic theories of how firms might behave in the market." The Tribunal, in further justifying the benefit of economic expert evidence, highlighted that such evidence "helps sharpen the function< and that the Tribunal "cannot but benefit from such a contribution".

course of its proceedings.⁴⁸ The legislature was acutely aware of the important role expert evidence may play within a dynamic environment, such as the one within which the competition authorities operate. The Rules for the Conduct of Proceedings before the Competition Tribunal makes express provision for the filing of expert witness statements.⁴⁹

While the importance of expert evidence (particularly economic expert evidence) is undisputed in the context of the deliberations of the competition authorities, the assessment and quantification of damages arising from a contravention of the Competition Act must be adjudicated by the civil courts, and accordingly, the ordinary rules pertaining to evidence in the civil courts will be applicable to private competition damages actions.⁵⁰ The South African civil courts view the evidence and opinions expressed by experts as an exception to the general rule. Generally, witnesses are not permitted to provide *opinions* and are restricted to testifying about those factual events of which they have personal knowledge and experience.⁵¹ However, expert opinion is admissible and encouraged by the courts if the expert is better equipped than the court to make qualified assumptions and express an expert opinion based on the factual evidence presented to the court.⁵²

While the courts appreciate the benefits offered by expert opinions, the courts have been alert to the fact that expert evidence should be properly substantiated and relevant to the facts of the case when assessing the weight to be attributed to expert evidence. In *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk*,⁵³

⁴⁸ See fn 47 above.

⁴⁹ Rule 22 of the Rules for the Conduct of Proceedings before the Competition Tribunal.

⁵⁰ Civil Proceedings Evidence Act 25 of 1965.

⁵¹ Schmidt & Rademeyer *Bewysreg*. Durban: Butterworths, (2000), 456-457.

⁵² *Ibid* 463, 468. *Ruto Flour Mills v Adelson* 1958 4 SA 235 (T) 237B: “an expert’s opinion is received because and whenever his skill is greater than the Court’s.” See also *Gentruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 616H: “the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive ‘appreciable help’ from that witness on the particular issue.”

⁵³ 1982 4 SA 458 (O) 466-467.

the court noted the interest rates, inflation and salary increases given to black persons over the relevant time when performing the damages calculation. An application for the evidence of an actuary to be heard was, in this case, dismissed by the court, as the actuary could not offer anything new to the proceedings that the court itself could not easily handle. While it is clear that expert evidence is not always necessary, in *Trimmel v Williams* the court identified the complexity of the particular damages computation, and requested that an actuarial report be prepared to assist in the Court in the proceedings.⁵⁴

The Courts are well aware of the benefits of having expert evidence presented during the hearing, but judicial discretion is retained as to what method of calculation is most appropriate in the given situation, and ultimately, what damages will be awarded to a claimant.⁵⁵

⁵⁴ 1952 3 SA 786 (C) 792-793. See also *Arendse v Maher* 1936 TPD 162 162-163: “no actuarial or expert evidence has been put before us, and in my opinion evidence of this kind is of great assistance to the Court. The Court is not bound by this evidence. Its discretion and its assessment of certain contingencies is still necessary. But in a fundamental question such as assessing how much capital must be paid to a person at this stage to enable that person to have a fixed sum per month for life, the evidence of an expert is invaluable.” It is conceivable that various experts will offer contrasting views and models in the substantiation of their damages estimation. The methodology and theoretical assumptions used will no doubt result in debate as to what the most appropriate and accurate method might be for assessing the cause and subsequent effect. Granger, “Investigating Causal Relations by Econometric Models and Cross-spectral Methods”, *Econometrica* 1969 (37(3)), 424–438. *Granger causality* seeks to determine whether one time series is useful in forecasting another. It must be noted that the prediction of how a comparator time-series may react by relying on the movements experienced by another time-series is not without problems. Essentially, this adds to the applicability and strength of the model being applied by an economist during a hearing. Granger’s theory for evaluating data is only one possible method economists may use, others include *Information Theory* (See Schreiber, T “Measuring Information transfer” *Physical Review Letters* 2000(85), 461-4.) and *Maximum likelihood models* (See Chornoboy, E. S., Schramm, L. P. and Karr, A. F. “Maximum likelihood identification of neural point process systems”, *Biological Cybernetics* 1988 (59), 265-75).

⁵⁵ See *Hulley v Cox* 1923 AD 234 243-245. The Court was faced with either using the actuarial method and its calculations, or to rather use its discretion and apply a rough estimate of damages. The Court elected to rather use a rough estimate of the damages, as this allowed the Court more freedom to take into account the particular circumstances of the case. See also *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113-114.

The South African courts retain discretion as to how they will assess and determine damages. To date, the South African courts have not assessed and quantified damages arising from a contravention of the Competition Act. The courts have recognised the need for and benefit of expert evidence being presented when facing complex damages calculations, such as those often associated with competition law contraventions. It is therefore expected, based on the use of expert economic evidence in the determination of contraventions of the Competition Act of 1998, that the South African courts will be open to receiving expert opinion on the effect this would have had on the particular firm or individual within the affected market, the extent to which competition contravention would have *caused* the damage, and the quantum of the damage resulting from the contravention.⁵⁶

5.5. Conclusion

Generally, a claimant instituting a normal delictual damages action will be required to allege and prove all the required elements: *conduct, unlawfulness, harm (damage)* suffered by the claimant and the *causal connection* between the wrongful conduct and the harm.

In damages actions arising from contraventions of the Competition Act, some of the elements of a delictual liability are somewhat differently established.⁵⁷ In such instances, the Competition Tribunal (or Competition Appeal Court) will make a ruling on conduct of the defendant, and whether the conduct is in contravention of the Competition Act and is consequently unlawful. The finding of a contravention by the Tribunal in terms of the Competition Act effectively encompasses and simultaneously disposes of the question of conduct, unlawfulness and fault. These requirements are

⁵⁶ *Road Accident Fund v Guedes* 2006 5 SA (SCA) 587: “the court necessarily exercises a wide discretion when it assesses the *quantum* of damages due to the loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the *quantum* of damages. Even then, the trial court has a wide discretion to award what it believes just.”

⁵⁷ See Ch 3.

in essence inherent in the Competition Tribunal's finding, by virtue of the fact that there must either have been willful (or negligent) conduct that has contravened a statute before such finding can be made. The contravention finding at the same time establishes unlawfulness, in that it was held that a statutory provision was unlawfully contravened.

Once the conduct element has been established by virtue of the Competition Tribunal ruling, the claimant will need to show that the unlawful conduct has caused the subsequent damage sustained. This would require the claimant to show both *factual causation*, as well as *legal causation*.

The common-sense approach taken by the courts in establishing factual causation will allow the claimant (and defendant) to present evidence on the probabilities of the conduct having caused the subsequent damage. Furthermore, in cases for damages arising from a contravention of a statute (as is the case with a damages action arising from a contravention of the Competition Act), the claimant will further be required to establish that the Competition Act contemplates allowing for a damages action by the claimant for the recovery of the *type* of damages alleged to have been suffered by the claimant. Finally, the claimant will have to prove of the remaining elements of *damage or loss* suffered and the *causal connection* between the defendant's conduct and the resulting harm.

The aspects a potential claimant will have to consider when attempting to prove the necessary causal connection required for a successful damages claim have been described in this chapter. While the theory behind how factual causation ought to be assessed appears reasonably well established in the South African law, the courts have steered away from a rigid, dogmatic approach when assessing legal causation, favouring a flexible approach, as advocated by the Supreme Court of Appeal. It is the embracing of a common-sense approach to factual causation and the flexible approach to legal causation that will allow claimants to provide the courts with plausible arguments on both the factual and legal causation, thereby unhinging them from the confines of restricted theories. Once a claimant has sufficiently proven the necessary causal connection between the defendant's conduct and the damage-causing

consequences of the conduct, the remaining element is *damage*, specifically the quantum of the damage caused by the defendant's conduct.

Chapter 4 considered possible types of damages likely to arise in cases of anti-competitive conduct, and the difficulties often associated with enquiries and assessments of this nature, particularly due to the fact that the courts are often called on to perform a speculative assessment based on hypothetical value evaluations. While venturing with some trepidation into the complex realm of econometrics, the next chapters will go where lawyers fear to tread, and explore some of the potential economic models available to parties and the courts to assist with the performing this complex enquiry.

CHAPTER 6. ECONOMIC MODELS AND QUANTIFICATION OF DAMAGES

6.1. Introduction

Whether damage has been suffered arising from anti-competitive behaviour is a rather complex question, and the quantification of damage suffered as a result of unlawful competition has long troubled the courts.¹ In South Africa, the court is yet to be called upon to assess damages arising from unlawful competition arising from a contravention of the Competition Act. It is trite that a damages claim arising from contraventions of the Competition Act is to be assessed and adjudicated by the civil courts. It is submitted here that these claims will be adjudicated as normal delictual actions brought under the Aquilian action. As such, claimants are required to prove such damages *on a balance of probabilities*.²

Tribunals have grappled with the issue of quantifying damages arising from anti-competitive conduct for more than a century. In the first private follow-on damages action for anti-competitive conduct³ to be heard in the United States, the court determined the extent of the damages by “multiplying the quantity the plaintiff purchased by the estimated difference between the just and fair market price of the goods and the price actually paid”.⁴ Despite the bold step taken by the courts more than a century ago, the courts are unfortunately currently still no closer to achieving a

¹ *Children’s Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 59, (241).

² See the debate in Ch 3 sec 3.3 regarding the classification of section 65 damages as delictual or statutory.

³ The anti-competitive conduct was that of overcharging. Essentially this is acting in an anti-competitive manner in order to achieve a position whereby the customer is charged a price higher than that which would have been achieved had the anti-competitive conduct not occurred.

⁴ *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 101 F. 900 (C.C.E.D. Tenn. 1900), *aff’d*, 203 U.S. 390 (1906).

clear perspective on what method to use to determine the extent of damages arising from anti-competitive behaviour.

The European Union has recognised the need to deal with this complex aspect within the ambit of competition law and has sought to take proactive steps in order to develop a better understanding of how the courts may deal with private damages arising from competition law contraventions. This endeavour by the European Union has resulted in the publication of a Green Paper in 2005,⁵ the White Paper in 2008,⁶ the Draft Guidance Paper in 2011,⁷ and the Commission Staff Working Document in 2013.⁸

The European Union acknowledges the complexities associated with the assessment of damages in cases of competition law contraventions, and understands that there is no clear single formula for purposes of performing judicial damages assessments of this nature by the courts. The formulation of policy documents published by the EU attempts to: “place at the disposal of the courts and parties to damages actions economic and practical insights that may be of use when national rules and practices are applied”.⁹ The endeavours of the European Union, while not providing a single clear answer as to the judicial quantification of follow-on damages claims arising from

⁵ *Green Paper: Damages actions for breach of EC antitrust rules*. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0672>. (Last accessed on 23 April 2014.) (*European Commission Green Paper*)

⁶ *White Paper: Damages action for breach of EC antitrust rules*. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. Last accessed on 23 April 2014. (*European Commission White Paper*)

⁷ *European Commission: Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union*. (June 2011). Available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf. (Last accessed on 23 April 2014.) (*European Commission Guidance Paper*)

⁸ *European Commission: Staff working document – practical guide – quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union*. (June 2013). Available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (Last accessed on 23 April 2014.) (*European Commission Staff Working paper Practical Guide*)

⁹ *Ibid* par 6.

competition law contraventions, at least assist the courts and the parties in a damages action in their approach to this complex matter.¹⁰

South African courts have traditionally taken a very liberal approach to the type of evidence permitted, maintaining that the courts should be presented with the best possible evidence (factual or expert), in order to put the court in the best possible position to evaluate the delictual action and perform the subsequent damages computation.¹¹

The models proposed below are certainly not the only models available, but nonetheless represent models that have been considered by the courts and tribunals when assessing competition damages actions and may be useful to litigants, practitioners and the South African courts when evaluating competition damages actions in South Africa. From a practical perspective, the use of economic models, (for example those briefly discussed in the below), and conceivably any model that would be appropriate to a particular claim, might be used by litigants presenting their case to the civil courts.

6.2. Methods and economic models of quantification

In view of the complexities associated with this field of competition law and the range of conceivable variables to be considered when performing an assessment of the damage brought about by a contravention of the competition law, economists have

¹⁰ A comprehensive work on EU position and policy development insofar as private enforcement of competition legislation is concerned can be found in the work by David Ashton and David Henry (Ashton, D and Henry, D *Competition Damages Actions in the EU: Law and Practice*, Edward Elgar Publishers, (2013) (*Competition Damages*)).

¹¹ See Ch 5 sec 5.5. *Arendse v Maher* 1936 TPD 162 162-163: “no actuarial or expert evidence has been put before us, and in my opinion evidence of this kind is of great assistance to the Court.”

developed different methods for the quantification of damages to deal with the complex question of computation of damages arising from anti-competitive conduct.¹²

In the European Union (as well as South Africa) the aim of a damages action is to *compensate* the victim of the wrongful act and not to punish the party who acted in a wrongful manner.¹³ This position is juxtaposed with the punitive approach found in the United States. The Clayton Act¹⁴ allows for treble damages to be claimed by a successful claimant, resulting in a function of both compensatory and punitive damages.

In essence, quantification of damages requires an assessment of the actual position of the claimant and the position the claimant would have been in had the anti-competitive conduct not occurred. It is accepted that the quantification of damage suffered as a result of anti-competitive conduct involves two stages: first, the

¹² Huida Qiu, Yan Liu and Niranjana Subrahmanya, Weichang Li “Granger Causality for Time-Series Anomaly Detection” (undated). Available at <http://www-bcf.usc.edu/~liu32/icdm2012.pdf> (Last accessed 19 October 2015): “the common practice for anomaly detection is to build a statistical model that captures the generation process of the normal data, then estimate the likelihood of a new observation based on this model and predict the data as an ‘anomaly’ [...]” See also Lianos & Genakos, “Econometric Evidence in EU competition law: an empirical and theoretical analysis” (2012) (*Econometric Evidence 2012*) Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184563 (last Accessed on 17 June 2015). See also work by Ashton and Henry *Competition Damages* (2013); Models for assessment of damages are also discussed in Davis and Garcés *Quantitative Techniques for Competition and Antitrust Analysis*, Princeton University Press, 2009, 347 – 381.

¹³ Van der Walt & Midgley *Principles of Delict* (2005) 216. Visser & Potgieter *Law of Damages* (2012) 4 and 196: “in the Acquilian action there is no room for any primary function other than compensating a plaintiff’s patrimonial loss [...] It is no longer possible to recover or award an amount to punish someone by means of an action for damages.” See also *Jones v Krok* 1996 (1) SA 504 (A) 515-517.

¹⁴ S 4 of the Clayton Act states: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” Available at <http://gwcllc.com/Library/America/USA/The%20Clayton%20Act.pdf>. (Last accessed on 23 April 2014.)

determination of a workable and valid counterfactual¹⁵ (hypothetical) postulation, and second, moving from the hypothetical postulation to the actual (factual) position.¹⁶

The use of a hypothetical position to compare to a factual position when attempting to quantify the extent of damage suffered, is not a novel notion within the South African context. It closely resembles the sum-formula approach acknowledged and applied in the South African law of damages.¹⁷ Furthermore, the courts, in the assessment of prospective damage (notably claims for loss of profit), have recognised the need to establish a counterfactual position when required to assess damages claims. However, there are reservations regarding the difficulties associated with the attempt to create a valid and viable counterfactual position.¹⁸

Despite the development of various economic models to assist with quantification of damages, precise mathematical determination of damages is virtually impossible. This is a consequence of the complex variables prevalent when attempting to assess the

¹⁵ The counterfactual position is the position in which the party would hypothetically have been in had the anti-competitive conduct not occurred.

¹⁶ European Commission *Staff Working Paper Practical Guide* (2013) 14. Oxera Report “Quantifying antitrust damages – Towards non-binding guidance for courts – study prepared for the European Commission by OXERA” (December 2009) (*Oxera Report*). Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf. (Last accessed on 24 April 2014). See also *Reference Manual on Scientific Evidence* US Federal Judicial Commission, (2011) 432 (*Reference Manual on Scientific Evidence*). Available at: [http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/\\$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf) (last accessed on 28 April 2015). See also Lianos & Genakos *Econometric Evidence* (2012) 52.

¹⁷ See Ch 4 par 4.7.2.1.

¹⁸ See *Pitt v Economic Insurance Company (Ltd)* 1957 (3) SA 284 (D & C.L.D) 287D-E. Holmes J states that: “the Court’s task in estimating damages is always a difficult one. Basically, one has evidence as to the plaintiff’s affairs, but when, in addition, the future has to be scanned, the Court is virtually called upon to ponder the imponderable. However, no better system for assessing damages has yet to be evolved, and the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess.”

ramifications resulting from anti-competitive conduct and subsequent damage.¹⁹ The reality of imprecise damages quantification is not novel. Impreciseness has seemingly been tolerated when determining prospective damages in an endeavour to assess damages in the best possible way.²⁰ This feature is acknowledged by the European Union in the Draft Guidance Paper. The Draft Guidance Paper states that:

[Q]uantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single ‘true’ value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations.²¹

In their report to the Director-General for Competition of the European Community, Oxera²² highlights three prominent categories of economic models for the quantification of damages.²³ These models are: (i) comparator-based; (ii) financial-analysis-based; and (iii) market-structure based methods, and will be considered in more detail in subsequent chapters. These models and similar models have been

¹⁹ The variables can comprise an indefinite list and could include for example prices, sales volumes, input cost movements, fuel prices, currency fluctuations and even the nature of the anti-competitive conduct. Any variety of combinations of any of the potential variables within the particular market can have a significant impact on the establishment of a workable hypothetical scenario for purposes of quantifying damages.

²⁰ *Turkstra Ltd v Richards* 1926 (TPD) 276, 282 and confirmed in *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 17C. Stratford J expressed the view (later confirmed in the *International Tobacco Company* case) that: “if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible.” See also *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 17B, where Clayden recognised that: “in a case such as this damages need not be proved with mathematical precision.”

²¹ *Ibid* See also European Commission *Draft Guidance Paper* (2011).

²² A reputable economic consultancy firm with head office at 200 Aldersgate, 14th Floor, London, EC1A 4HD, United Kingdom, and with branches in Oxford, Brussels and Berlin.

²³ Oxera Report (2009); See also the website of *Cartel Damages Claims (CDC)*, a Europe-based entity specialising in providing solutions to victims of anti-competitive conduct in the quest to bring and prosecute private damages claims. Website available at <http://www.carteldamageclaims.com/cdc-damage-analysis/> (Last accessed on 27 April 2015).

applied and/or considered in other jurisdictions to assess and/or quantify damages arising from contraventions of competition legislation in both the European Union²⁴ and the United States.²⁵

While the econometric models highlighted by Oxera (2009) and the European Commission Staff Working Paper (2013) are arguably those that have solicited the most discussion and consideration for purposes of assessing competition law damages, these models are by no means the only methods available for purposes of quantifying competition damages. In jurisdictions where courts are afforded more discretion to assess and ultimately estimate damages, courts have been more reliant on practical means to assess damage, rather than resorting to complex econometric models and evidence.²⁶

6.3. Classification of economic models

6.3.1 Introduction

The Ashurst²⁷ study provided the European Commission with five economic models to consider when assessing damages claims. These are: before-and-after, yardstick,

²⁴ The European Union has relied on economic models to assist with assessing damages claims arising from infringements of the competition legislation. Ashurst Report “Study on the conditions of claims for damages in case of infringement of EC competition rules: analysis of economic models for the calculation of damages” (2004) (*Ashurst Report*). A report prepared for the European Commission, 31 August 2004. http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf. Last accessed on 24 April 2014.

²⁵ The United States has an established history of damages actions for damage arising from anti-competitive conduct. The courts applied economic principles and models in assessing the damage in *Conwood Co LP v US Tobacco Co* 90 F 3rd 768, 793 (6th Cir 2002).

²⁶ European Commission *Staff Working Paper Practical Guide* (2013) 38. See *Hojesteret* (Danish Supreme Court), judgment of 20 April 2005, case UFR 2005.217H (*GT Linen A/S v De Danske Statsbaner DSB and Scandlines A/S*), where the court used a business plan to assess and estimate the damages of the claimant.

²⁷ Ashurst Report (2004). See also Rubinfeld, D.L., *Quantitative Methods in Antitrust, Issues in Competition Law and Policy*, American Bar Association (2008) 723. Available at:

cost-based, price prediction using regression analysis and theoretical modelling of an oligopoly.²⁸ In the United States three prominent models have been identified by the courts. They are the before-and-after approach, the yardstick or benchmark approach, and the regressions analysis.^{29, 30}

Figure 1 below sets out the three broad model categories, the considerations applied as the basis for establishing the counterfactual position in each case and damages estimation technique recommended for each model.³¹

http://www.law.berkeley.edu/faculty/rubinfeldd/Profile/publications/QM_Antitrust.pdf.
(Last accessed on 27 April 2015)

²⁸ A market form in which a market or industry is dominated by a small number of sellers.

²⁹ *Conwood Co LP v US Tobacco Co* 90 F 3rd 768, 793 (6th Cir 2002). See also Niels, Jenkins & Kavanagh (2011) 514-515.

³⁰ There are various econometric methods and models for assessing competition damages. At their most fundamental, the models attempt to create a comparison by either establishing a factual comparator position (for example a comparator geographic or product market). Alternatively, the econometric model will try to create a viable hypothetical position to serve as a comparator. Baker and Rubinfeld "Empirical Methods in Antitrust Litigation: Review and critique", *American Law and Economics Review* 1999(1) 386-435. Lianos & Genakos *Econometric Evidence* (2012) 52 recognise the interaction between economic models and the assistance such models can provide to assessing civil damages.

³¹ *Ibid*

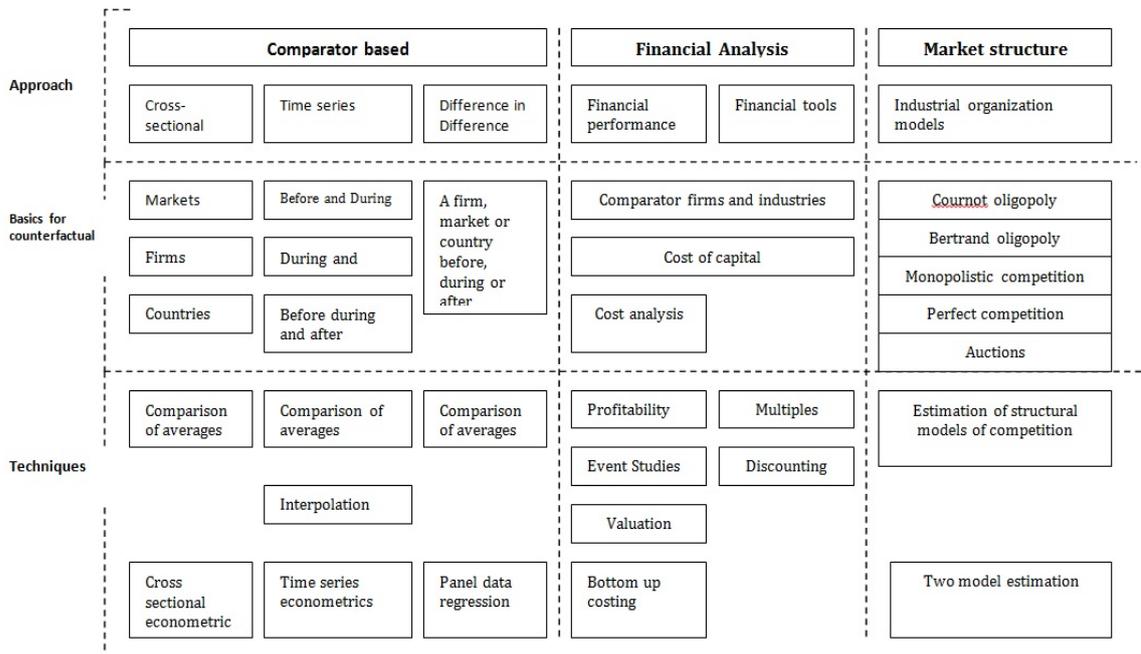


Figure 1: Classification of models for damages estimations (Source: Oxera Report, December 2009)

Any of the methods listed above can in principle be used for damages estimation resulting from any type of anti-competitive conduct.³² None of these methods can be said to be preferable to the other. The choice of method will generally be guided by the nature and quality of the information available to calibrate the method and determine a workable counterfactual position.³³ In many cases more than one model will be available for application by a claimant. This allows for the use of a combination of

³² Such as cartel conduct, abuse of dominance or restricted vertical practices.

³³ Report for the European Commission “Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios” (21 December 2007) 441. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf (Last accessed on 27 April 2015). (Report for the European Commission 2007)

complementary models affording the court assessing the damage a more complete framework to award the most accurate award of damages possible.³⁴

6.3.2 Comparator-based models

When determining the counterfactual position, comparator-based approaches rely on information and data from sources untainted by the anti-competitive conduct.³⁵ These methods include:

- *Cross-sectional comparisons* (also referred to as the *yard-stick* approach), where different yet similar geographic markets or product markets are compared;³⁶
- *Time-series comparisons* (also referred to as the *before-and-after* method), which consists of a comparison of prices before, during and/or after an infringement;³⁷ and
- *A difference-in-difference approach*, where the change in price for a cartelised market over time is compared to the change in price in a non-cartelised market over the same time period is analysed.³⁸

³⁴ European Commission *Staff Working Paper Practical Guide* (2013) 39. Niels, Jenkins & Kavanagh (2011) 515. See also Ashurst Report (2004) 28, par 3.35.

³⁵ European Commission *Staff Working Paper Practical Guide* (2013) 15.

³⁶ Ashurst Report (2004) 19. European Commission *Staff Working Paper Practical Guide* (2013) 19. See also De Coninck “Quantifying Antitrust Damages in Civil Proceedings: A Pragmatic Approach” *New Frontiers of Antitrust Conference*, Paris, (11 February 2011), 6 (*Quantifying Antitrust Damages*). Available at: http://ec.europa.eu/dgs/competition/economist/deconinck_at_damages.pdf. (Last accessed on 29 April 2014). See also Van Dijk & Verboven “Quantification of Damages” (30 June 2005) par 3.1 (*Quantification of Damages*). Available at: http://www.appliedantitrust.com/03_private_actions/damages/van_dijk_verboven_quantification2008.pdf. (Last accessed on 12 May 2014.) See also Report for European Commission (2007) 443.

³⁷ Ashurst Report (2004) 17. European Commission *Staff Working Paper Practical Guide* (2013) 15. See also Report for European Commission (2007) 442.

³⁸ Oxera Report (2009) 46-59. Niels, Jenkins & Kavanagh (2011) 524-534. Ashurst Report (2004) 19-20. De Coninck *Quantifying Antitrust Damages* (2011) 7. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.2.1. European Commission *Staff Working Paper Practical Guide* (2013) 12. Report for the European Commission (2007)

6.3.3 Financial analysis-based models

Financial analysis-based approaches use financial information on comparator companies, benchmark rates of return, and cost information of firms, to estimate the counterfactual position. The techniques available when assessing the counterfactual element by way of a financial-analysis, are to consider the financial performance such as the profitability of the claimant and defendant firms, comparing this to a benchmark firm. Alternatively, a bottom-up costing analysis of the products is performed to determine a workable counterfactual price for the firms.³⁹

6.3.4 Market structure-based models

Market structure-based approaches rely on the use of theoretical models, assumptions, and estimations to determine the counterfactual position of a claimant. The models essentially focus on identifying a competitive model reflective of the position within the market in which the anti-competitive behaviour occurred. Then, using the insight and theory on the type of competitive market structure, an estimate

442. See also Howard, J and Kaserman “Proof of damages in bid-rigging cases” *Antitrust Bulletin*, 1989 (34), 359. While the difference-in-difference model addresses some of the shortcomings of the single comparator based methods, the difference-in-difference method is not without its flaws. These flaws are highlighted in the article of Bertrand M, Duflo, E and Mullainathan “How much should we trust differences-in-differences estimates?” *Quarterly Journal of Economics*, 2004(119) 249. See also Baker, and Rubinfeld, “Empirical Methods in Antitrust Litigation: Review and critique” *American Law and Economics Review* 1999(1) 386-435. These methods are also recognised by Lianos & Genakos *Econometric Evidence* (2012) 52-53; Ashton and Henry *Competition Damages* (2013) 236.

³⁹ European Commission *Staff Working Paper Practical Guide* (2013) 35. Niels, Jenkins & Kavanagh (2011) 517. See also Ashurst Report (2004) 19. Report for European Commission (2007) 444. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.2. Ashton and Henry *Competition Damages* (2013) 243.

is made of the prices (and pricing practices) and volumes which would be expected to manifest itself in such a market had the anti-competitive conduct not occurred.⁴⁰

6.4. Selecting an appropriate model

The choice of model is essentially driven by two factors: first, the availability and quality of the data and information, and second, the accuracy and credibility of the counterfactual position determined by the selected model.⁴¹ The sources of information range from public information, such as interest rates and published financial results and performance figures, to confidential firm-specific information, such as volumes purchased and produced and cost of production.

The essence of a damages calculation is the determination of a counterfactual position that can be substantiated as being a credible reflection of the position the claimant would have experienced had the anti-competitive conduct not occurred. It is therefore vital that the selected model allows for the determination of a workable counterfactual position.

6.4.1 Problems in the use of economic models

Expert evidence and economic modelling will undoubtedly assist litigants and the courts in their endeavours to estimate damages arising from contraventions of the Competition Act. However, the use of such models are not without problems which have to be kept in mind when selecting an appropriate model for a particular matter.⁴²

⁴⁰ European Commission *Staff Working Paper Practical Guide* (2013) 33. See also Ashurst Report (2004) 24. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.2.3. Ashton and Henry *Competition Damages* (2013) 242.

⁴¹ Niels, Jenkins & Kavanagh (2011) 520; Oxera Report (2009) 129-130.

⁴² See par 6.7 *infra* for a discussion on how the South African courts retain a judicial discretion insofar as the assessment of damages is concerned. This allows the court to have the benefit of expert evidence and economic modelling, but to use its discretion

6.4.1.1 *Establishing relevant time period*

Determining the period of a competition law contravention is often difficult, particularly given the secretive nature of hardcore cartel activity. Little (if no) evidence is available to the competition authorities and subsequent claimants attempting to establish a damages action.

The difficulty of establishing a time period for the contravention creates significant problems, insofar as determining a counterfactual position for a claimant to evaluate the scope of its damages. The contravention could have impacted on the market long before the competition authorities investigated and prosecuted the conduct and furthermore, the contravention may have an effect on the market long after the competition tribunals have adjudicated and found a contravention to have occurred.

Establishing the appropriate period of the contravention may therefore in many cases prove difficult, and will undoubtedly materially impact on the application and population of an economic model to assist with the estimation of the damages.

6.4.1.2 *Reliable data*

Econometric modelling (particularly the more complex models such as regression analysis) requires data, with the efficacy and benefit of the model directly linked to the quality and quantity of the data available to serve as inputs into the applied model.

Data collection is often difficult, and given that competition matters often prove protracted, would-be claimants may find that following the competition proceedings, much of the data useful to performing a damages calculation may be impossible to secure in that it might no longer exist.

to attribute probative value to the evidence, so as to account for the possible shortcomings of the theoretical proposition presented by the expert.

The availability of information and data (or lack thereof) will have a direct impact on the application of economic models to assist with the estimation of damages. Without such data (or with no significant data), any calculation will be unreliable.

6.5. Single damages value

It is conceivable that more than one economic approach could be available when assessing the damage suffered as a result of anti-competitive conduct. Furthermore, it is possible that the claimant and defendant will provide the court with different economic models, which they believe best reflect the counterfactual and supply different estimates of the damages in the particular case. It will then ultimately be for the court to assess the damage in the best possible way.⁴³

It has been suggested that two options exist when faced with a range of economic models in order to arrive at a single estimate. A preferred approach may be easily identifiable; for example, if the other models fail to use authoritative industry information when estimating the damages,⁴⁴ or alternatively, one could ‘pool’ a set of outcomes by different approaches and arrive at an average estimate.⁴⁵ While the use of a single, preferred model holds advantages, in that the court will only have to consider a single assessment of the counterfactual and damages assessment and choose between the interpretation of the claimant and the defendant, there is the risk that the court is not given the benefit of additional explanatory considerations which

⁴³ *Turkstra Ltd v Richards* 1926 (TPD) 276, 282

⁴⁴ *Vernon Walden, Inc v Lipoid GmbH* (Civ No 01-4826) (DRD) United States Court for the District of New Jersey, 15 November 2005. The case dealt with alleged price discrimination which resulted in damage to a downstream competitor. The court dismissed the damages calculation by the claimant’s expert due to the information relied upon to calculate the damage was not based on authoritative industry data or recognised financial data.

⁴⁵ Timmerman, *Forecast Combinations*, in Granger & Timmerman, *Handbook of Economics*, Vol. 1, *Forecasting*, Elsevier (2006), Ch 4 (*Forecast Combinations*). See also Hendry & Clements, “Pooling of Forecasts” *Econometrics Journal* 2002 (5), 1-26; and Timmermann, *Forecast Combinations*, (21 July 2005) (*Forecast*). Available at: <http://www.econ.duke.edu/~brossi/timmermannHb.pdf> (Last accessed on 10 May 2014.)

may be provided by some of the other techniques.⁴⁶ The pooling of models attempts to combine the applied models into a single damages estimate. The clear benefit of this is that the court will be presented with a wide range of information covered by the different econometric models presented.

6.6. Conclusion

While the use of a single economic model for the assessment of damage is appealing, the concern is that a single model is very rarely capable of providing the court with all the information it may require to best assess the damages to award to a claimant. It is suggested that the pooling of damages estimates will empower the court to either estimate the damages by utilising an average of the approaches it considers appropriate for the best assessment of the damage value, or to choose a single damages value after a consideration of all the additional explanatory input provided by a range of models. It has been submitted that “the combination of individual forecasts of the same event has often been found to outperform the individual forecasts.”⁴⁷

6.7. South African civil courts: where do facts and mathematics meet?

6.7.1 Introduction

When assessing and quantifying delictual damages, the South African courts strive to compensate the claimant for the loss occasioned by the damage-causing event.⁴⁸ In

⁴⁶ Niels, Jenkins & Kavanagh (2011) 522; Ashurst Report (2004) 28 par 3.35; Oxera Report (2009) 131-132.

⁴⁷ Hendry & Clements “Pooling of Forecasts” *Econometrics Journal* June 2004(1), Vol 7, 1 (*Pooling*).

⁴⁸ Van der Walt & Midgley *Principles of Delict* (2005) 216. Visser & Potgieter *Law of Damages* (2012) 4 and 196. *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973

order for a claimant to sufficiently prove its loss in civil damages claims, it is required that such damages be proven on a balance of probabilities.⁴⁹ Essentially, this means that the claimant must prove that the damages claimed have more likely than not been suffered as a result of the wrongful conduct *and* the amount (quantum) of the damages that must be awarded to compensate the claimant for the loss suffered.⁵⁰ In South Africa, civil damages actions are subject to the legal rules pertaining to *prescription* and the *once-and-for-all rule*.⁵¹ The Prescription Act 68 of 1969 provides that generally a delictual debt prescribes three years after the debt originated. A private damages action arising from a firm having been found to have committed a prohibited practice in terms of the Competition Act must be consequently prosecuted within *three years* of the firm being held to have contravened the Act.⁵²

While the application of a prescription period and the once-and-for-all rule will not be covered in any great detail in this study, their impact is significant when determining the nature of the inquiry when a court considers civil damages arising from contraventions of the Competition Act.

(2) SA 146 (A) 152H; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 12, 195 -197.

⁴⁹ See Visser & Potgieter *Law of Damages* (2012) 564 for a discussion of proof on a balance of probabilities.

⁵⁰ Visser & Potgieter *Law of Damages* (2012) 563. *Erasmus v Dais* 1969 2 SA 1 (A) 9: “the onus rests on the plaintiff of proving, not only that he has suffered damage, but also the quantum thereof.” *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 784; *Hendricks v President Insurance Company Limited* 1993 3 SA 158 (C) 163.

⁵¹ See Ch 4 par 4.6.1 regarding the once-and-for-all rule. Also note, that there are exceptions to the working of the three-year prescription period, where statute expressly limits the time period. See for example section 23 of The Road Accident Fund Act 56 of 1996.

⁵² Section 65(9) of Act 89 of 1998, which confirms that a party's right to claim civil damages comes into existence upon the date when the Tribunal made its determination on the *prohibited practice* having been committed, or in the case of an appeal, on the date that the appeal process in respect of that matter has been concluded.

The once-and-for-all rule requires a claimant to claim compensation for *all* losses arising from a particular damage-causing event in one single action.⁵³ Effectively, the once-and-for-all rule forces a claimant to institute an action not only for those losses already suffered, *but also* for the future reasonable losses still to be suffered. Having regard for the interaction between prescription (three years) and the once-and-for-all rule, a claimant is faced with the unenviable burden of proving future loss which has not yet manifest and may only manifest at a future stage *before* the claim prescribes.⁵⁴ In the complex assessment of future loss, reliance is often placed on mathematical calculations and techniques to assist with the proving of the loss, especially where the future loss may be uncertain. The assessment of damages, particularly with future loss, can never be a perfect science. Expert opinions, such as actuarial calculations and the use of econometric modelling,⁵⁵ offer a valuable potential perspective on the factors to be evaluated and considered when establishing an equitable assessment of the loss suffered and future loss to be suffered.⁵⁶

6.7.2 Proving loss: How much evidence is enough?

A claimant must prove the amount of damages that should be awarded. However, South African courts accept that in cases where the damages are very difficult to prove with precision, the onus of proof of damage resting on the claimant should be relaxed. The Appeal Court in *Esso Standard SA (Pty) Ltd v Katz* states:⁵⁷

⁵³ See Ch 4 par 4.6.1. See Visser & Potgieter *Law of Damages* (2012) Chapter 7 for a detailed expose on the principle of the once-and-for-all rule within the South African law of damages.

⁵⁴ Steynberg “‘Fair’ Mathematics in assessing delictual damages”, *PER (Potchefstroom Electronic Law Journal)*, 2011(14), No 2, 1, (*Fair Mathematics*).

⁵⁵ Examples of econometric models have briefly been highlighted in this chapter. Chapters 7, 8 and 9 deal with these econometric models in more detail.

⁵⁶ Klopper, H.B. “The widow's portion” *THRHR (Tydskrif vir Hedendaagse Romeins-Hollandse Reg)*, 2007(70), 440, 446.

⁵⁷ 1981 1 SA 964 (A) 969-970; *Klopper v Maloko* 1930 TPD 860 865: “now it has been laid down that where damage has been suffered which can be measure in money, the mere fact that precise assessment is impractical is not a justification for refusing to give the plaintiff any damage at all.”

It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty.

This statement suggests that, where the loss is very difficult to prove, a claimant's evidentiary burden should be eased. Boberg describes the burden to prove damages on a claimant as follows:⁵⁸

The element of patrimonial loss, like other elements of Aquilian liability, must be proved by the plaintiff on a balance of probabilities. This requirement relates to the fact of damage; its quantum, particularly where it is prospective, may depend on various imponderables, some of which have a less than 50 per cent chance of materialising. They are not ignored on that account, but are properly represented by a contingency allowance of the same percentage as the chance of the events occurring. Moreover, a plaintiff who has laid the best available evidence before the court should not be not-suited merely because his loss is difficult to quantify: the courts must do the best it can with the materials to hand.

It is clear that Boberg advocates a position where a claimant (particularly in cases where damages may be difficult to assess, such as a future loss), should be required to at least provide the court with the *best available evidence* in support of the claim for the damages allegedly suffered.⁵⁹ Evidence relating to damage already suffered is

⁵⁸ Boberg *Law of Delict, Volume 1, Aquilian Liability*, Juta, Cape Town, 1984, 477-478 (*Delict*).

⁵⁹ *Hersman v Shapiro and Company* 1926 TPD 367, 379: "monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation fo

relatively simple. The court is presented with factual evidence upon which it assesses and determines damages. Insofar as the assessment of future loss is concerned, in the absence of factual evidence to assess, the court will rely on the consideration of probabilities of future circumstances, and this will have a bearing on the weight attributable to the future damage. This is required in order to balance the element of uncertainty associated with such predictions of future damage.⁶⁰ The weight given to the occurrence of possible future circumstances essentially equates to a *contingency* allowance being made by the courts⁶¹ in an effort to achieve an equitable outcome that does not unduly benefit the claimant, or prejudice the defendant.⁶²

the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.” See also *Klopper v Maloko* 1930 TPD 860, 866; *Esso Standard SA (Pty) Ltd v Katz* 1981 1 SA 964 (A) 970.

⁶⁰ Koch “Aquilian Damages for Personal Injury and Death”, *THRHR*, 1989(52), 66-80 (*Aquilian Damages*).

⁶¹ Contingency allowances essentially mean that they will assess the degree of probability of the loss arising and accordingly temper the potential damages by contingency allowances. For example, if the court determines that the probability of the future uncertain circumstance arising is high, then a lesser contingency amount will be deducted. However, if the circumstances show a lower likelihood, then the court will deduct a greater contingency amount from the damages in order to adequately allow for the uncertainty. See in this regard *Road Accident Fund v Guedes* 2006 5 SA 583 (SCA), where the parties debated the extent of contingency allowances to be made arising from Ms Guedes’ partial incapacity following a motor-vehicle accident. See also *Milns v Protea Assurance Company Ltd* 1978 3 SA 1006 (C) 1014, where the court, assessed damages for loss of future maintenance suffered by a widow and the contingency allowance to be made to the damages, having regard to the widow and her chances to remarry. Here the court considered the facts that the widow was a young lady, with no attachments and accordingly had a high possibility of remarriage in future. These facts resulted in the court concluding that a seventy per cent contingency allowance being made and deducted off the damages award, as the chances of her suffering loss of future maintenance was somewhat tempered by the facts and therefore less likely to manifest. In *Shield Insurance Company Ltd v Booysen* 1979 3 SA 953 (A) 966, the court (faced with a similar claim to that in *Milns*) distinguished the facts from those of *Milns* in determining a contingency allowance for the loss of future maintenance. Here the facts related to an older widow with three children, and accordingly the court concluded that in the circumstances only a fifty percent contingency allowance should be made. See *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297, 300, where it was stated that a damages claim will be subject to contingencies, insofar as these can be estimated.

⁶² *Burger v Union National South British Insurance Company* 1975 4 SA 72 (W) 75: “even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind.”

It is trite that the South African courts require delictual damages to be proven on a balance of probabilities. When facing complicated damages assessments, such as that relating to the assessment and quantification of future loss, the courts have taken a decidedly more relaxed view, encouraging claimants to provide the best possible evidence to the court to allow the court to assess the *probabilities* of the future circumstances occurring and to make an accordingly appropriate contingency allowance (positive or negative) to the ultimate damages awarded.

6.7.3 Evaluation of the evidence

Following an assessment of the evidence evaluate, the court must evaluate the degree of probabilities. It is advocated that such evaluations of probability not be left to the realm of a subjective adjudicator, but rather that the courts are encouraged to use techniques when assessing and evaluating the degree of probability in order to bring objectivity and consistency to the evaluation. The court will therefore apply the facts and evidence to assess past damages, but will resort to a reliance on an assessment of probabilities⁶³ in respect of assessing future damages.⁶⁴

It is this consideration of probabilities that stimulates an interaction between law and mathematics. Keynes describes the process of assessing probabilities as an evaluation of the evidence.⁶⁵ Steynberg evaluates Keynes's position and adds that

⁶³ See the doctoral thesis of Dr. ADJ Van Rensburg where he explains the difference between the concepts *possibility* and *probability*, remarking that a probability is something greater than a possibility. He further observes that a possibility is an absolute concept (albeit an uncertain one), whereas probabilities have various degrees, as somethings might be more probable than others. See Van Rensburg "Juridiese Kousaliteit en Aspekte van Aanspreeklikheidsbeperking on Onregmatige Daad" (*LLD-Thesis, Unisa*), 1970, 70.

⁶⁴ Eggleston *Evidence, Proof and Probability*, Weidenfeld and Nicolson, London, 1983, 25-26 (*Proof*).

⁶⁵ Keynes *Treatise on Probability*, MacMillan and Co, London, 1921, 71 (*Probability*): "as the relevant evidence at our disposal increases, the magnitude of the probability of the argument may either decrease or increase, according as the new knowledge strenghtend the unfavourable or the favourable evidence; but something seems to have increased. In either case we have a more substantial basis upon which to rest our conclusion. I express this by saying that an accession of new evidence increases the weight of an argument."

evidence in this context includes expert evidence, proven factual evidence and evidence regarding the constancy and likelihood of the occurring of future circumstances.⁶⁶

While experts may venture to offer views and opinions on the various probabilities of future damage occurring, the degree of probability of the future event materialising remains to be determined by the court. The court will base its findings in this regard on an evaluation of all the evidence. Expert evidence, including econometric modelling and actuarial calculations, will be but one of the aspects of evidence considered by the court.

6.7.3.1 *Evaluation of chance*

Koch advances the use of the *valuation of a chance* as one such technique the courts may use in order to assess the degree of probability in a more objective and mathematical manner.⁶⁷ While objectivity (and possibly consistency) is promoted, Koch acknowledges that every evaluation will inherently carry with it an element of subjectivity.⁶⁸ Koch's *valuation of a chance* approach, strives to merge the scientific mathematical world of the expert actuary or economist with the subjective assessment of the adjudicator. The Appellate division in *Hulley v Cox*⁶⁹ noted that the assessments presented by experts should be tested against the facts of the case in order to achieve an equitable outcome.

⁶⁶ Steynberg *Fair Mathematics* (2011) 12.

⁶⁷ Koch *Aquilian Damages* (1989) 77: "in general, commentators are in agreement that the principle of valuation of chance, as a method for assessing damages, is essential to achieving fairness man and man and man and state."

⁶⁸ Koch *Damages for Personal Injury and Death*, THRHR (49), 1986, 217: "this principle requires that the value of the expected loss of financial advantage be determined as a certainty and then this certain value reduced by a percentage reflecting the change that the contingent event may not have arisen at all. The determination of a suitable percentage by which to discount for the risk will often be a somewhat unscientific estimate based upon the expectations of the reasonable man."

⁶⁹ 1923 AD 234, 244: "it is desirable to test the result of an actuarial calculation by a consideration of the general equities of the case."

While the merging of the objective and subjective assessments might allow for a *fair* evaluation of the damages, the unfettered and potentially broad subjectivity afforded adjudicators may create a conflict that entirely undermines the certainty and consistency sought to be advanced by the use of scientific modeling and expert evaluations. In order to temper the subjective assessment, a clearer understanding of the assessment of probability may assist both experts and the courts in achieving a consistent balance when performing complex damages assessments.⁷⁰

6.7.3.2 Assessing probabilities

Probability theory requires that an assessment of the degree of probability of a future event occurring be based on rationale and logic based on the factual evidence in the particular circumstances and not simply left to be assessed entirely by a subjective individual, as an overly subjective approach may result in conflicting, inconsistent and illogical conclusions.⁷¹ The difficulties of assessing the probability of a future event

⁷⁰ Steynberg *Fair Mathematics* (2011) 14.

⁷¹ Keynes *Probabilities* (1921) 4: “what particular propositions we select as the premises of our argument naturally depends on subjective factors peculiar to ourselves; but the relations, in which other propositions stand to these, and which entitle us to probable beliefs, are objective and logical.” See also *De Klerk v Absa Bank Ltd and others* 2003 (4) SA 315 (SCA) 328: “proceeding further, it seems to me important to draw attention to differing standards of proof which may apply, depending upon whether the issue is one of causation or one of quantification.” In this connection particularly, the judgment of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* [1995] 1 WLR 1602 (CA) is instructive. The plaintiff’s case was that because the defendant, a firm of solicitors, had been negligent in drawing an agreement for the acquisition of certain department stores by the plaintiff, the plaintiff had lost the chance of obtaining appropriate warranties from the sellers that there were no contingent liabilities, which it later appeared that there were. The trial Judge had held that there was a real and not merely a speculative chance that had the solicitors advised the plaintiff correctly it would have obtained the warranties, so that it was entitled to substantial damages. See also *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA). See *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) 1201: “Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event’s occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty percent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the

arising and the impact this may (or may not) have on a particular party is clearly difficult to predict with any certainty. The South African courts have long exercised judicial discretion in reaching rounded-off degrees of probabilities. Steynberg favours this approach as it advances positive law, by not overburdening the courts and litigants with the impossible task of determining exact degrees of probabilities.⁷² Steynberg proposes the following test for the assessment of probabilities in order to account for the chance of the future event arising or not arising to achieve an *equitable* assessment of damages:⁷³

The probability that a relevant contingency will realise in future is determined by the court in view of objective measures in the form of a percentage chance expressed in a degree of probability, on the basis of factual averments and logical suppositions or assumptions from the totality of the expert and other evidence presented to court.

warning given at 89D - E that: “one cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.” See also *Minister of Finance v Gore NO 2007 (1) SA 111 (SCA)* 125: The legal mind enquires: What is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification. The question of percentages does not arise (see to this effect Baroness Hale in *Gregg v Scott*). Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences. Or, as was pointed out in similar vein by Nugent JA in *Minister of Safety and Security v Van Duivenboden*: “a plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.” Percentages often confuse causation with quantification. Contrary to the judgments in *Geldenhuys*, *Gore* and *Absa Bank*, Visser & Potgieter *Law of Damages* (2012) 140, hold that probabilities are determined on a percentage basis.

⁷² *Clair v Port Elizabeth Harbour Board* 1886 EDC 311, 317-318; *Waring & Gillow Ltd v Sherborne* 1904 TS 340, 349-350; *Chisholm v ERPM* 1909 TH 297, 302; *Union Government v Clay* 1913 AD 385, 389; *Hulley v Cox* 1923 AD 234, 246. See also Steynberg *Fair Mathematics* (2011) 15.

⁷³ *Ibid*

The probability test proposed by Steynberg allows for the subjective and objective elements to work together. This closely resembles the proposition that the evaluation of probabilities requires an interaction between law and mathematics as propagated by Keynes.⁷⁴

6.7.4 Expert evidence: Objective element

South African civil courts allow the leading of expert evidence for purposes of assessing and calculating civil damages, provided that such evidence is relevant to the claim being prosecuted and properly substantiated by the expert.⁷⁵ Koch describes the expert's function as not being a valuator, but rather as a tool, or calculator used by the court to assist in reaching an equitable damages assessment.⁷⁶

The expert's skills assist with the evaluation and calculation of loss and damages, in particular future uncertain loss. Given the inherent uncertainty associated with assessing future loss, experts rely on assumptions and presumptions made on the factual information presented and available in the particular matter.⁷⁷ The use of econometric model⁷⁸ are examples of models experts may use in reaching conclusions on the assessment of future competition follow-on damages and contingencies.

⁷⁴ Keynes *Probabilities* (1921) 71.

⁷⁵ See Ch 5 sec 5.5 dealing with expert evidence in South Africa. See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A) 616: "the true and practical test of admissibility of the opinion of a skilled witness is whether or not the Court can receive appreciable help from that witness on the particular issue."

⁷⁶ Koch, *Damages for Lost Income*, Juta, Cape Town, 1984, 7.

⁷⁷ *AA Mutual Insurance Association Ltd v Maqula* 1978 1 SA 805 (A) 812: "for purposes of his calculations he relied on certain assumptions such as that owing to the accident the plaintiff would no longer be able to work and that the plaintiff's life expectancy had not been influenced by the accident."

⁷⁸ Such as those highlighted in this chapter and discussed in more detail in Chapters 7 – 9.

While econometric models, actuarial calculations and theoretical assumptions may not provide a perfect answer in solving the question of uncertain future damages, it serves as an objective yardstick for the to evaluation of a fair and equitable damages award.⁷⁹

6.7.5 Judicial discretion: Subjective element

The South African civil courts, while appreciating the importance of having the best available information presented during the hearing, retains a judicial discretion to assess damages in the manner the court deems most appropriate.⁸⁰

In *Hulley v Cox* the court was faced with two possible methods to determine damages, one being an annuity method and the other merely requiring a rough estimate of the damages. While the annuity method is far more complex and scientific, requiring expert actuarial calculation, the court in *Hulley* opted to simply use a rough estimate of the damages, in order to give the court more freedom in exercising its discretion in estimating the damages.⁸¹

The use of a rough estimate was, however, criticised in *Southern Insurance Association Ltd v Bailey* where the court described this assessment method as being a 'blind guess' by the trial judge. The use of expert calculations on the other hand,

⁷⁹ Eggleston *Proof* (1983) 228: "where there are available statistics on which an expert witness can found an opinion, he should not be prevented from applying acceptable methods of calculating probabilities and presenting the results to the court." The author continues to highlight that despite the benefit the courts may derive from expert evidence, the English courts have been cautious not to allow expert evidence to usurp the traditional function of the court and judges to investigate the particular case and assess the damages. See also Anderson *Actuarial Evidence Valuing Past and Future Income*, Carswell Torono, 1986, 59-60.

⁸⁰ This is the consequence of the retention of Roman-Dutch principles applicable to the assessment of damages. See Visser & Potgieter *Law of Damages* (2012) 9-16.

⁸¹ *Hulley v Cox* 1923 AD 234.

while by no means perfect, at least provided the advantage of being an ‘informed guess’ arrived at on a logical basis.⁸²

It is clear that the South African civil courts allow expert evidence for purposes of assessing and calculating civil damages, provided that it is relevant to the claim being prosecuted and properly substantiated by the expert.⁸³ However, it is also clear that the courts place a premium on retaining judicial discretion insofar as the final damages award is concerned. To this effect, the court may elect to disregard the expert evidence on quantification of the damages entirely, or possibly glean from the expert evidence when evaluating the factors and exercising its discretion when quantifying the damages.

Importantly, expert-presented evidence is not binding on the court, and will merely serve as information and a potential source for the evaluation of the facts to assist the court in reaching a final damages award.⁸⁴ Despite the fact that expert evidence does not bind the presiding judge, the courts encourage expert evidence, particularly in complex cases such as private competition damages actions. Expert evidence presents an alternative interpretations of the facts and allows for assessment of damages in the best possible way.⁸⁵

Steynberg cautions that the court is the custodian of the damages assessment process, and should take care not to abuse its judicial discretion to such an extent so as to simply overrule all expert opinions, and abrogate to itself the whole process as if

⁸² *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A).

⁸³ See Ch 5 sec 5.5 dealing with expert evidence in South Africa.

⁸⁴ *Burger v National South British Insurance Company* 1975 4 SA 72 (W) 75-76: “I am not bound to accept, and I do not accept in their entirety, the views of any one of the experts. I take from their testimony and from the probabilities as I see them, such help as I can get towards an assessment of damages. Doing the best I can with the evidence and probabilities, I reach findings between the two extremes I have mentioned.”

⁸⁵ In *Nochomowitz v Santam Insurance Co Ltd* 1972 1 SA 718 (T) 728, the court gave additional instructions to the experts and asked that they perform a new evaluation and calculation of the damages. It is therefore clear that the court acknowledges the benefits of having experts evaluate the facts and factors for the court to be placed in the best possible position.

it were the exclusive domain of the court. The court has a duty to ensure that proper weight is given to both the subjective and objective factors so as to ensure a fair and equitable outcome.⁸⁶

6.8. Conclusion

The econometric models highlighted in this chapter (and explained in more detail in the following chapters) exhibit simulation and comparative methodology. It is clear that while the South African courts may entertain various theories, expert opinions and economic models in the course of assessing civil damages, fundamentally, the courts will favour the use of the comparator-based models over the simulation models for the estimating of damages. Traditionally, the South African courts have been reluctant to venture into the realm of abstract damages assessments. The use of comparator-based economic models would therefore fit comfortably into the existing damages assessment framework applied by the South African civil courts, (be it in the form of the concrete approach or the sum-formula approach).⁸⁷

Given the complexities of competition damages assessments, the simulation models may be met by some resistance in view of the current approach to the assessment of damages favoured by the South African courts. Nonetheless, with the wide discretion of the civil court, it is anticipated that simulation models may prove useful insofar as it may provide insight as to potential future damages (*prospective loss*). To this extent, the simulation models may fit into the *hybrid* approach to damages assessment (as advocated by Visser), where a comparator-based model is used to determine and

⁸⁶ Steynberg *Fair Mathematics* (2011) 28.

⁸⁷ See Ch 4 sec 4.7.2 for a synopsis on the comparative method adopted by the South African civil courts. See also the discussion on the sum-formula approach (Ch 4 sec 4.7.2.3) and the concrete approach (Ch 4 sec 4.7.2.4).

assess damages already incurred and a more abstract model (relying on the use of a hypothetical comparator position) is used to determine the prospective loss.⁸⁸

While econometrics is undoubtedly best left to the economic experts, this study will endeavour to provide a basic and brief insight into some of the different models and techniques that can possibly be presented to the courts for estimating follow-on damages arising from anti-competitive conduct in contravention of the Competition Act. These models and the econometric evidence presented during the course of a damages hearing will be evaluated and considered by the court, when exercising its judicial discretion of determining the extent of the damages in the best way possible.

⁸⁸ See Ch 4 sec 4.8 for a discussion on the hybrid system to damages assessment. See Neethling *Law of Delict* (2014) 80–81.

CHAPTER 7. COMPARATOR-BASED METHODS

7.1. Introduction

Comparator-based methods call for a comparison to be made between various positions. Broadly speaking these are:

- *Cross-sectional comparisons*, where different geographical or product markets are compared;
- *Time-line comparisons*, consisting of a comparison of price movements before, during and after the competition contravention; and
- A combination of these two approaches into a single model referred to as the *difference-in-difference model*. Here the changes and differences in price manifesting in the cartel, or infringed-upon market are compared to the changes and movements in prices as having occurred in a non-cartelised market over the same time period.

7.2. Cross-sectional comparisons

7.2.1 Introduction

Cross-sectional methods aim to estimate the effect of the contravention by comparing data in the relevant market with the data from other markets that have not been affected by the contravention.¹

¹¹ Oxera Report (2009) 46. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.1. See also Reference Manual on Scientific Evidence (2011) 443. See also Report for the European Commission (2007) 443: “this approach is based on the availability of time series data on the allegedly cartelized market (so-called treatment group) and on a similar market where collusion did not take place (control group).” See also European Commission *Staff Working Paper Practical Guide* (2013) 20. The cross-

Comparator methods are attractive because they determine the counterfactual by relying on actual information from markets which are similar to that of the market that has been distorted by anti-competitive conduct, but which has been unaffected by the competition law transgression.² A potential concern with the comparator models is that they allow for the flawed assumption that all of the difference between the factual and the estimated counterfactual is a result of the existence of a competition law contravention.³ Other studies have shown that this flawed assumption can be avoided by having regard for any other factors that exist within the markets and coincide with the contravention.⁴

As previously shown, pure cross-sectional comparisons assume that the differences that manifest themselves are due to the contravention within the market.⁵ In order to

sectional comparator method over different geographical regions has been applied by the EU courts in various cases, when tasked with assessing the impact of the competition contravention on the affected market. See for example Cour d'Appel de Paris (Court of Appeal, Paris), decision of 23 June 2003 (Lescarcelle-De Memoris v OGF); Juzgado Mercantil numero 5 de Madrid (Commercial Court, Madrid), decision of 11 November 2005, case No 85/2005 (Conduit-Europe, S.A. v Telefónica de España S.A.), confirmed by Audiencia Provincial de Madrid (Court of Appeal, Madrid), decision of 25 May 2006, case No 73/2006; Bundesgerichtshof (Federal Court of Justice, Germany), decision of 19 June 2007, case No KBR 12/07 (Paper Wholesale Cartel).

² Niels, Jenkins & Kavanagh (2011) 524. Report for European Commission (2007) 444. See also Van Niekerk "Calculating Cartel Follow-on Damages: General considerations as well as application to South African construction sector", *A Paper prepared for the First Annual Competition and Economic Regulation (Acer) Week*, (20-21 March 2015). Available at http://www.competition.org.za/s/Albertus_van_Niekerk_CCRED_submission_updated.pdf. (Last accessed on 28 July 2015).

³ Some of the flaws with the comparator-based approach are discussed in the article by Bertrand, Duflo, and Mullainathan, *How much should we trust differences-in-differences estimates?* 249.

⁴ Oxera Report (2009) 46. De Conick *Quantifying Antitrust Damages* (2011) 6-7. See also European Commission *Staff Working Paper Practical Guide* (2013) 17: "an advantage of all methods comparing, over time, data from the *same* geographic and product market is that market characteristics such as degree of competition, market structure, costs and demand characteristics may be more comparable than in a comparison with different product or geographic markets."

⁵ This is due to the fact that cross-sectional comparisons do not always allow for provision for unique variables that may exist between the tainted market in which the anti-competitive behaviour occurred and the comparator market serving as the hypothetical comparator. This means that any difference between the tainted market

obtain an as accurate as possible estimation of the damage suffered, it is vital that the cross-section comparison be performed between the markets over the same period. For example, using the same year(s) or season. This decreases the risk of inclusion of factors unrelated to the anti-competitive conduct, which may possibly compromise the accuracy of the damages estimation.⁶

Once the comparator markets have been identified, then a comparison can be made between the factual market (the one distorted by the anti-competitive conduct) and the counterfactual market(s) (those not affected by the anti-competitive conduct and used as a comparator). An illustration of a basic comparison is provided in Figure 2.

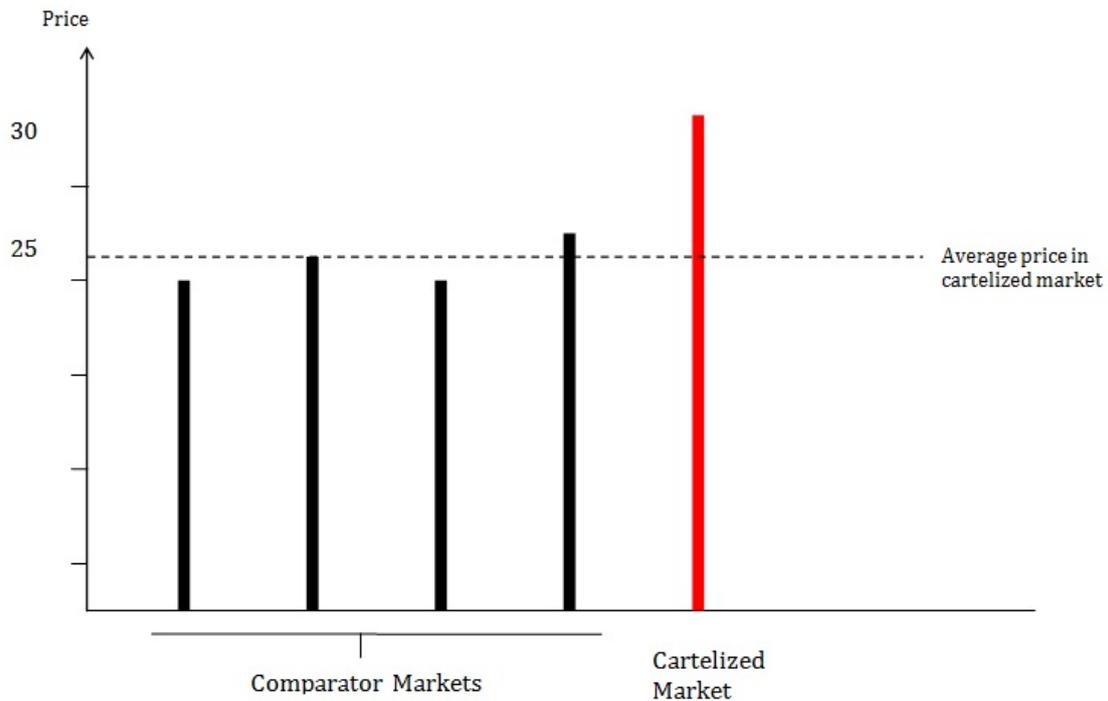


Figure 2: Example of cross-sectional comparison (Source: Oxera Report: December 2009)

and the comparator market is assumed to have been caused by the anti-competitive behaviour. See Report for European Commission (2007) 444.

⁶ Report for European Commission (2007) 444.

If the average price in the comparator markets is determined to be R25 and the price experienced in the market affected by the anti-competitive conduct is R30, then the overcharge caused by the cartel can be said to be R5.

7.2.2 *Selecting a comparator*

The comparison can be made using a similar firm, product market or geographical area.⁷ The ultimate decision as to which particular comparator is most appropriate in a given situation will be guided by the nature of the particular contravention, as well as the available information in order to allow for a successful comparison to be made.⁸ The case of *Conwood Co LP v US Tobacco*⁹ is an example of the use of a good comparator. The expert witness relied upon the facts prevalent in a different geographical market in relation to the same product, as well as a market of a closely related product as comparators in his evaluation of the counterfactual. The German courts have echoed the importance of ensuring that the comparator applied in the estimation of damages is unaffected by the anti-competitive conduct.¹⁰

⁷ Report for the European Commission (2007) 450. Niels, Jenkins & Kavanagh (2011) 524. See also Reference Manual to Scientific Evidence (2011) 443. Maier-Rigaud and Schwalbe, *Quantification of Antitrust Damages* (3 March 2013), 23, (*Quantification*) for publication in Ashton and Henry, *Competition Damages Actions in the EU: Law and Practice*, Edward Elgar 2013. Available at <http://ssrn.com/abstract=2227627> (Last accessed on 29 April 2015).

⁸ European Commission *Staff Working Paper Practical Guide* (2013) 20: “the choice of a geographic comparator market may also be influenced by uncertainties about the geographic scope of an infringement. Geographic markets on which the same or a similar infringement occurred are, in principle, not good candidates for being used as comparator markets.” See also Oxera Report (2009) 48.

⁹ *Conwood Co LP v US Tobacco Co* 290 F.3d 768 (6th Cir 2002). See Ch 13 par 13.4.2.1 for a brief discussion of the facts of this case.

¹⁰ Oberlandesgericht Dusseldorf (Higher Regional Court of Dusseldorf), VI-Kart 3/05, Judgment of March 27th 2006, Judgment of the German Federal Court of Justice (BGH) June 19th 2007. KRB 12/07. In this case, the court felt that they were unable to use the comparator-based model with any certainty due to the existence of cartel activity in the other regional markets, resulting in the risk that the use of contaminated markets as a comparator would fail to provide an accurate damages estimation. See also Niels, Jenkins & Kavanagh (2011) 526: “the ideal cross-sectional comparison includes data from only the relevant market and data from unaffected groups that are otherwise similar.” See also European Commission *Staff Working Paper Practical Guide* (2013) 19: “the more a geographic market is similar (except for the infringement

Ideally, in a cross-section, comparison data and information from the affected market is collected and then compared to data and information collected from an unaffected market or product range.¹¹ The selection of an appropriate comparator is therefore vital as it has a significant bearing on the accuracy of the resulting evaluation. For example, if a contravention took place within a specific region and the effect of this contravention was to increase the prices of this particular product on a national level, then a comparison of different regional markets within the same national framework would lead to an inaccurate reflection of the real impact of the infringement. This is because the comparator market is a 'contaminated' market affected by the contravention.¹² In such a case, a comparison with an unaffected market within a different national framework may prove more reliable.¹³

7.2.3 Advantages of cross-sectional comparisons

The main advantage of cross-section comparisons is that they rely on the use of actual information of the market as experienced by the firms (both within the affected market and the unaffected comparator market),¹⁴ such comparisons allow for a hypothetical overview of how the affected market may have developed and how the participants would have been affected had the competition law transgression not occurred. A

effects) to the market affected by the infringement, the more it is likely suitable as a comparator market.”

¹¹ Niels, Jenkins & Kavanagh (2011) 526. See also Report for European Commission (2007) 443: “this approach is based on the availability of time series data on the allegedly cartelized market (so-called treatment group) and on a similar market where collusion did not take place (control group).” See also European Commission *Staff Working Paper Practical Guide* (2013) 20.

¹² *Ibid*

¹³ Ashurst Report (2004) 19, par 3.9: “the benchmark market would ideally have similar competitive characteristics as the allegedly collusive market [...] yet lie outside the influence of the cartel’s activities.” See also Report for European Commission (2007) 443.

¹⁴ European Commission *Staff Working Paper Practical Guide* (2013) 16. See the German case of *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 19 June 2007, case No KRB 12/07 (*Paper Wholesaler Cartel*), par 19, where the advantage of real life comparisons advanced by these techniques is emphasised, with the court favouring a comparison between affected and unaffected markets in terms of time or region.

comparator ‘untainted’ by anti-competitive conduct will be used in making the assessment.¹⁵ Further, the simplicity of the comparator method allows for an easy, user-friendly way of performing a damages evaluation (albeit that the very simplicity of the technique may also at times prove a disadvantage), as any difference will be attributed to the impact of the competition contravention.¹⁶

In the end, the persuasiveness and ultimate value of the comparison will be based on the degree of similarity between the markets forming part of the comparison, where the higher the degree of similarity, the more accurate the comparison. The Spanish case *Conduit Europe S.A. v Telefonica de Espana S.A.U*¹⁷ dealt with the question of damage suffered from an abuse of dominance within the telecommunication market. In this case, the court considered it an accurate enough comparison to use the United Kingdom market, due the similarities which existed between the relevant markets.

7.2.4 Disadvantages of cross-sectional comparisons

The point of concern with, and criticism of, the comparison-based method is that the method draws on the assumption that any difference between the compared markets is due to the anti-competitive conduct.¹⁸ This method does not always allow for a consideration of the other factors prevalent within the market, which may have impacted on price at the time that the comparison is made.¹⁹

¹⁵ Oxera Report (2009) 48. Ashurst Report (2004) 19. Report for the European Commission (2007) 443.

¹⁶ Ashurst Report (2004) 17.

¹⁷ *Juzgado de lo Mercantil Madrid (Madrid Commercial Court), Conduit Europe S.A. v Telefonica de Espana S.A.U.* (11 November 2005).

¹⁸ Maier-Rigaud and Schwalbe *Quantification* (2013) 26: “the underlying assumption in a cross-sectional analysis is that the comparator geographic or product market have been chosen in such a way that all differences identified in a comparison will be due to the cartel.”

¹⁹ De Conick *Quantifying Antitrust Damages* (2011) 6-7. Report for the European Commission (2007) 451: “the simplicity of the method, however, entails some loss of accuracy. For example, variable that may have affected the chosen comparator are normally not taken into account, with a risk of over- or under estimating certain effects.”

7.2.5 Techniques for determining counterfactual price using the comparator method

7.2.5.1 Comparison of averages

This technique requires that the price in a series of comparator markets be compared and that an average for these markets be determined. For example, if four markets A, B, C and D were used in the comparison and the prices of these markets were found to be A=9, B=10, C=10 and D=11, then the average price would be 10.²⁰ This average price would then be considered to be the estimated price, which would have existed in the market in which the anti-competitive conduct occurred, had it not been for the contravention.²¹ If the market influenced by the anti-competitive conduct has a price of 12 and the counterfactual price based upon a consideration of the average price, is determined at 10, then the price increase due to the anti-competitive conduct can be said to be 2, assuming that it can be argued that other factors were not responsible for this difference.²²

Price comparisons between various markets within the comparison group can be done using one of three different methods. The *arithmetic mean*, which is the basic formula

See also Reference Manual to Scientific Evidence (2011) 440. The failure of the cross-sectional technique to properly account for and consider the differences in the comparators can be overcome by using a more sophisticated econometric technique such as regression techniques, see Maier-Rigaud and Schwalbe *Quantification* (2013) 7: “the advantage of a regression approach is that it will allow controlling for identified differences between the comparators.” See also Connor J, “Archer Daniels Midland: Price-Fixer of the World”, *Staff Working Paper 00-11*, Department of Agricultural Economics, Purdue University, 2000, 34: “the before-and-after approach is particularly prone to errors of estimation if no additional market information is available to confirm the height of overcharge and the duration of the conspiracy’s effects.” Available at: ageconsearch.umn.edu/bitstream/28680/1/sp98-10.pdf (Last Accessed on 2 May 2015).

²⁰ $A(9)+B(10)+C(10)+D(11) = 40. 40 \div 4 = 10.$

²¹ European Commission *Staff Working Paper Practical Guide* (2013) 23.

²² This confirms the concern of the simplistic method of a comparator failing to properly account for certain variables affecting the price in the comparator group. Caution therefore needs to be taken to give proper consideration to all plausible variables when applying a comparator method.

as described above, is one method. The price of a number of firms will be taken, added together and divided by that same number of firms in order to obtain an average. The *arithmetic median* is considered to be the middle point of pricing by the comparator firms. Consequently, the prices charged by the firms and the comparator price will be the point where half the firms charge more and half the firms charge less. Finally, the *arithmetic mode* considers all the prices charged and considers what price is charged by most of the firms. The result is then the “most common market price”, and this price will be taken as the counterfactual price.²³

Although none of these metric techniques can be preferred above the other, the arithmetic median and the arithmetic mode have the advantage of not being affected by potentially distorted market prices (such as the price charged in a cartelised market). When attempting to determine a workable counterfactual, these two methods are consequently more appealing than the arithmetic mean.²⁴ The factors prevalent within the market will serve as a guide as to which arithmetic method will offer the most accurate estimation of a counterfactual price. The counterfactual price can then be compared to the price charged in the tainted market in order to determine the extent of the price increase created by the anti-competitive conduct.²⁵

A statistical test can be performed if there is sufficient information available on prices in order to establish whether the counterfactual price is significantly different (in a statistical sense) from the actual price being charged. Testing for statistical significance is a good practice in economics and statistics, because it assists in appreciating the uncertainties surrounding estimation, and thereby allows for the determination of how much weight must be attached to a particular analysis. A statistical test accounts for variation in the prices in the comparator groups and

²³ Oxera Report (2009) 50.

²⁴ Niels, Jenkins & Kavanagh (2011) 527.

²⁵ The same principles can be applied if one was looking to establish for example, the volume reduction created by an anti-competitive practice, by comparing the volumes in comparator markets and then seeing how the volumes in the tainted market were affected over that period. See Oxera Report (2009) 50.

simultaneously indicates whether the actual price in the market in which the contravention occurred is similar to the average price in the comparator group.²⁶

The use of statistical significance to assess the strength of the conclusions reached by reference to the economic model applied can be explained by the following example:

If the factual price in the market affected by an anti-competitive practice is 15 and the average as gauged from the comparator markets²⁷ is 12, then the price increase caused by the anti-competitive practice is estimated to be 3. The weight attached to this finding will depend on a consideration of the factors within the comparator group. If the prices used in the comparator group ranged between 10 and 18, then less weight will be placed on the comparator price. Should the comparator group have had a price range of between 11 and 13, then the comparator price average of 12 will carry a lot more weight.

The comparator method is a simple and effective method, making it an attractive option for the courts when performing damages assessments.²⁸ However, its accuracy and

²⁶ Maier-Rigaud and Schwalbe *Quantification* (2013) 36. See also Oxera Report (2009) 50.

²⁷ The comparator market could be a market for a similar product in a different geographic area or a similar product in the same geographic area or a different product in a market with similar characteristics to that of the affected market. An uncomplicated desktop comparison of the comparator markets with the affected market can be done on the assumption that the difference in prices is not a result of other factors, which caused price movements in a particular market. This is something economic experts evaluate and argue in court.

²⁸ European Commission *Staff Working Paper Practical Guide* (2013) 32: “courts in the EU have mainly used straightforward implementations of comparator-based methods without regression analysis, often on the basis of averages.” The courts in *Langericht Dortmund* (Regional Court, Dortmund), decision of 1 April 2004, Case No 13 O 55/02 Kart (*Vitaminpreise*) where the court readily applied the use of averages when assessing damages.

value is dependent on finding a market that is similar enough to allow for a realistic and significant comparison to be made.²⁹

7.2.5.2 Regression analysis

The limitations of several methods used for quantification cause economists to generally recognise the value of a more complex method, provided the available information is sufficient to facilitate and justify the application of a more complex technique.³⁰ A method allowing for a more refined estimation of damages is a regression analysis.³¹ The regression analysis allows the user to predict prices by not merely considering only the historical prices and price movements (like many of the other less complicated methods), but by also allowing for various other variables to be included when performing the estimation.³² This price prediction approach for establishing a counterfactual representation of the price had the anti-competitive conduct not occurred requires econometric modelling, as well as additional information to predict prices prevalent within the market.³³

The major advantage of using a regression technique is that the user can isolate the effect on the price movement brought about by the anti-competitive conduct by

²⁹ *El Aguila Food Products v Gurma Corporation* No. 04-20125 United States Court of Appeals for the Fifth Circuit was a case involving exclusionary practices where the claimant's expert was criticised for not attempting to demonstrate reasonable similarity of the plaintiff's, firm and the business whose earnings information upon which he relied.

³⁰ Ashurst Report (2004) 18 par 3.7 view the comparator techniques discussed in par 7.2.5 above as a simple tool to check the results achieved by more sophisticated econometric techniques.

³¹ Maier-Rigaud and Schwalbe *Quantification* (2013) 28.

³² Ashurst Report (2004) 21. Maier-Rigaud and Schwalbe *Quantification* (2013) 28: "the advantage of a regression approach is that it will allow controlling for identified differences between the comparators." See also Lianos and Genakos *Econometric Evidence* (2012) 7: "typically the key output of a price regression exercise is to construct a price index (having control for quality, time and input effects) that would describe, for example, the evolution of average prices over time."

³³ *Ibid*

eliminating the other non-competition related factors, such as, for example, an increase in input costs (fuel) or a drop in supply resulting in an increase in prices.³⁴

In essence, the regression analysis, although far more sophisticated, is similar to the comparison techniques, but has the single advantage, in that it allows the isolation of the element of the difference in price, which can be attributed to the anti-competitive practice. An accurate regression analysis requires significant data collection but when feasible, generally provides a more accurate estimate than what would generally be achieved with simple price comparisons.³⁵

7.3. Time series comparator-based method

7.3.1 Comparisons: Before-during and after-during

The time-series comparator approach makes a comparison by analysing the position before the contravention and/or after the contravention and then comparing these findings with the position as it was during the period of the contravention.³⁶ Typically the position of the contravening firm is taken and the price charged by the firm prior to the anti-competitive conduct is considered and compared to the price charged by the same firm during the period of competition law contravention.

A practical illustration of how the time series comparator method can be applied is to be found in the Austrian case of *Bundesarbeitskammer v Powerdrive Fahrschule*

³⁴ European Commission *Staff Working Paper Practical Guide* (2013) 24: “regression analysis is a statistical technique which helps to investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest [...] is influenced by the infringement [...]” See also Ashurst Report (2004) 22. Maier-Rigaud and Schwalbe *Quantification* (2013) 28.

³⁵ Niels, Jenkins & Kavanagh (2011) 529.

³⁶ *Ibid* Van Dijk & Verboven *Quantification of Damages* (2005) par 3.1.1. Ashurst Report (2004)17 par 3.4. Maier-Rigaud and Schwalbe *Quantification* (2013) 24. See the comprehensive work on economic forecasting by Diebold, F *Elements of Forecasting*, South Western, 2008 (*Elements of Forecasting*).

Andritz GmbH.³⁷ In this case, the *Bundesarbeitskammer* argued that the anti-competitive conduct resulted in the consumers suffering a loss of 22 percent. This was the difference in the price charged by the firms during the period of cartel activity and the price charged by the firms in the period after the cartel activity had ended. This approach was upheld on appeal. German courts have used the price charged by a firm after the cartel activity had ceased as a basis for the estimation of the damage caused by the cartel.³⁸

7.3.2 Selecting appropriate comparator

Time-series comparisons can rely on information for the period *during, before or after* a period affected by the transgression. Ideally the user would gather information for all the periods, particularly before and after the contravention, in order to provide a more complete picture and a more accurate assessment of the impact the contravention had on the respective market and consumers.³⁹ The benefits of pre-contravention information is that it will always be unaffected by the cartel or other anti-competitive conduct,⁴⁰ further, the technique holds the advantage that the companies forming part of the time-series comparison are generally the same, allowing the counterfactual to at least serve as a good comparator in that respect.⁴¹

³⁷ *Bundesarbeitskammer v Powerdrive Fahrschule Andritz GmbH*, Landesgericht für Zivilrechtssachen Graz (regional civil court of Graz), judgment dated 17 August 2007. See also Corte d'Appello di Milano (Court of Appeal of Milan), *INAZ Paghe srl v. Associazione Nazionale dei Consulenti del Lavoro*, judgment of 10 December 2004, where the court heard evidence of the rate of the businesses growth experience prior to the contravention and the decrease in growth experienced after the contravention. The court, however, rejected the argument, stating that the maintaining of a 10% growth rate is too unsure to allow for such growth (or lack of growth) to be included in the damages estimation.

³⁸ LG Dortmund 0 55/02 *Kart Vitaminkartell III*, 1 April 2004, and also see Oberlandsgericht Dusseldorf, *Berliner Transportbeton I*, KRB 2/05, 28 June 2005.

³⁹ European Commission *Staff Working Paper Practical Guide* (2013) 17.

⁴⁰ Niels, Jenkins & Kavanagh (2011) 530. European Commission *Staff Working Paper Practical Guide* (2013) 17: “comparison of the prices [...] *before* the infringement had effects [...]”

⁴¹ Maier-Rigaud and Schwalbe *Quantification* (2013) 24.

A concern with the comparator technique, particularly insofar as reliance is sought to be placed on the pricing information *after* the cartel has ceased, is that post-contravention information could potentially still be affected by the preceding anti-competitive conduct because, despite the conduct having come to an end, the effects of this conduct could still be felt within the market.⁴² A cautionary approach to *post-cartel* pricing should be adopted because, *firstly* cartel participants may elect to maintain inflated prices (unrelated to a competitive market) in order to manipulate any assessment into arriving at a lower damages quantum, and *secondly*, a break in the cartel could result in rigorous price competition ensuing, where prices are significantly lower than the prices expected within a normal competitive market, as firms jockey to establish market share within the market post-cartel; this would therefore result in an overestimation of any damages valuation.⁴³

⁴² European Commission *Staff Working Paper Practical Guide* (2013) 18: “the ending of an infringement and its effects may be more easily established that its beginning, but here too uncertainties could arise as to whether the period immediately after the infringement’s end is unaffected by the anti-competitive behaviour.” See also Maier-Rigaud and Schwalbe *Quantification* (2013) 25. Oxera Report (2009) 54. See also *Oberlandesgericht* (Higher Regional Court, Karlsruhe) of 11 June 2010, case No 6 U 118/05, where the court found that the price charged by firms five months after the end of the infringement were still tainted by the anti-competitive pricing implemented during the cartel period.

⁴³ Maier-Rigaud and Schwalbe *Quantification* (2013) 26. See also European Commission *Staff Working Paper Practical Guide* (2013) 18.

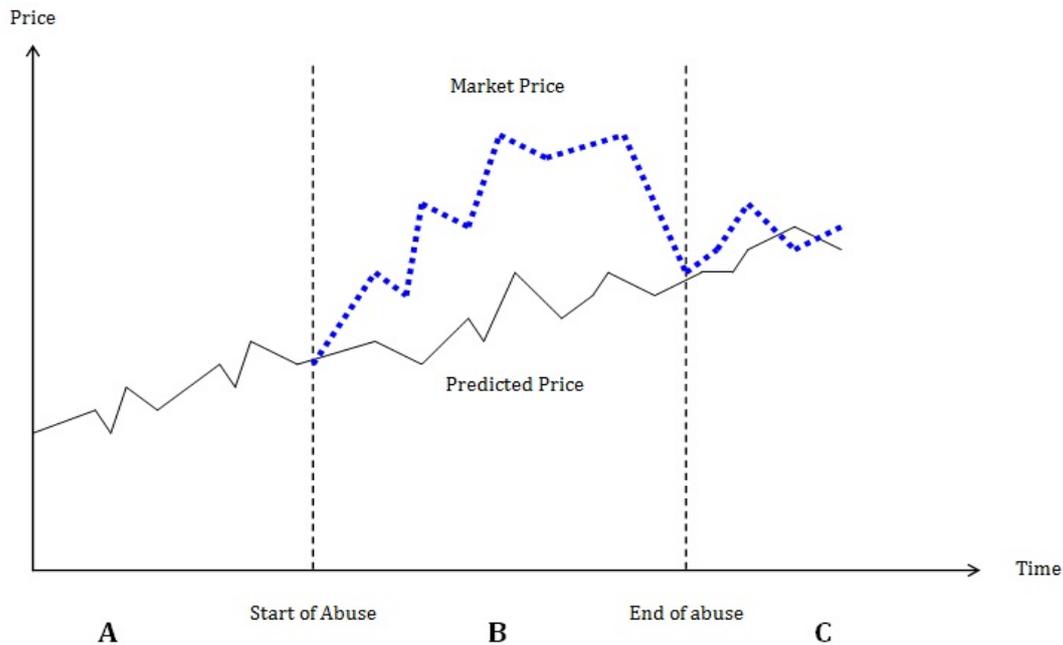


Figure 3: An example of a using a time-series analysis (Source: Oxera Report, December 2009)

Figure 3 (above) provides a graphic illustration of the price movements by a firm before, during, and after the cartel. The dotted blue line rises sharply in Column B, which shows a significant price increase brought about by the cartel conduct. However, it is important to note that following the cartel conduct, the dotted blue line in Column C is still above the predicted price, resulting in a tainted comparison if the period following the cartel is used.

By assessing the periods before and after the contravention (Column A and C in Figure 3), a more realistic prediction is achieved of how price movements would have occurred, had there not been any anti-competitive conduct and comparing that to the price movements, which occurred as a result of the contravention (Column B).

7.3.3 Advantages of time-series comparisons

Time-series comparisons have the benefit of comparing similar firms on a similar playing field by comparing these firms factually.⁴⁴ The factors employed are the periods before, during, and after the contravention. This also permits an assessment of these firms on the counterfactual level over these periods. By comparing information over time, characteristics within the market that would be impossible to determine with simple cross-sectional comparisons, for example seasonal trends, are optimally considered.⁴⁵

7.3.4 Techniques for using time-series comparator method

7.3.4.1 Comparison of averages

This technique is similar to cross-sectional comparisons. It seeks to compare different participants and considers the average price charged by these firms during the period preceding the contravention and then for the period in which the contravention

⁴⁴ Maier-Rigaud and Schwalbe *Quantification* (2013) 24. European Commission *Staff Working Paper Practical Guide* (2013)16.

⁴⁵ Oxera Report (2009) 55. Ashurst Report (2004) 17 par 3.7. Niels, Jenkins & Kavanagh (2011) 530. European Commission *Staff Working Paper Practical Guide* (2013) 17. Time-series models may assume that all of the unexplained differences (for example the differences in price or volume not explained by the time-series model) between the time periods forming part of the comparison, can be attributed to the competition contravention. The model may therefore fail to account for other events that occurred at the same time as the contravention and which could have materially impacted on the variable sought to be established (for example the price or a firm's change in market share). This change in price or market share may have occurred irrespective of the contravention of the competition legislation. Care therefore needs to be taken to properly account for the variables and market conditions in order to ensure an accurate application of the time series comparator. See C.W.J Granger and Newbold (1974) *Spurious Regressions in Econometrics*, *Journal of Econometrics* 2 (1974), 111-120, where the authors highlight the pitfalls of ignoring autocorrelation in time series models. *Autocorrelation* is caused by unmeasured variables that have similar values from period to period.

occurred.⁴⁶ The counterfactual price is estimated by considering the average price as calculated before the contravention occurred or after the contravening conduct had ceased.⁴⁷

7.3.4.2 *Interpolation*

This technique builds on a comparison of averages by using prices from before and after the contravention to estimate the counterfactual price. Interpolation requires joining the price points before and after the relevant period to indicate what the prices would have been during the period of contravention (had the contravention not occurred).⁴⁸ Interpolation, in its most basic form, will manifest itself as a straight line. Market characteristics such as seasonal movements within a market in which such movements are a salient feature can also be included.⁴⁹

⁴⁶ European Commission *Staff Working Paper Practical Guide* (2013) 23.

⁴⁷ See *Hubbards v Simpson*, 41 ALR 509, Federal Court of Australia, Full Court General Division, 1982. In this case the claimant calculated its damages by comparing the price of its goods during the period of the contravention with the price of the goods in the year preceding the contravention. The extent of lost sales was then multiplied by the average price of the goods over the entire period (i.e including the period of the contravention) to determine the value of lost profits experienced over this period. See also Niels, Jenkins & Kavanagh (2011) 532.

⁴⁸ *Ibid* See also European Commission *Staff Working Paper Practical Guide* (2013) 23-24.

⁴⁹ *Ibid*

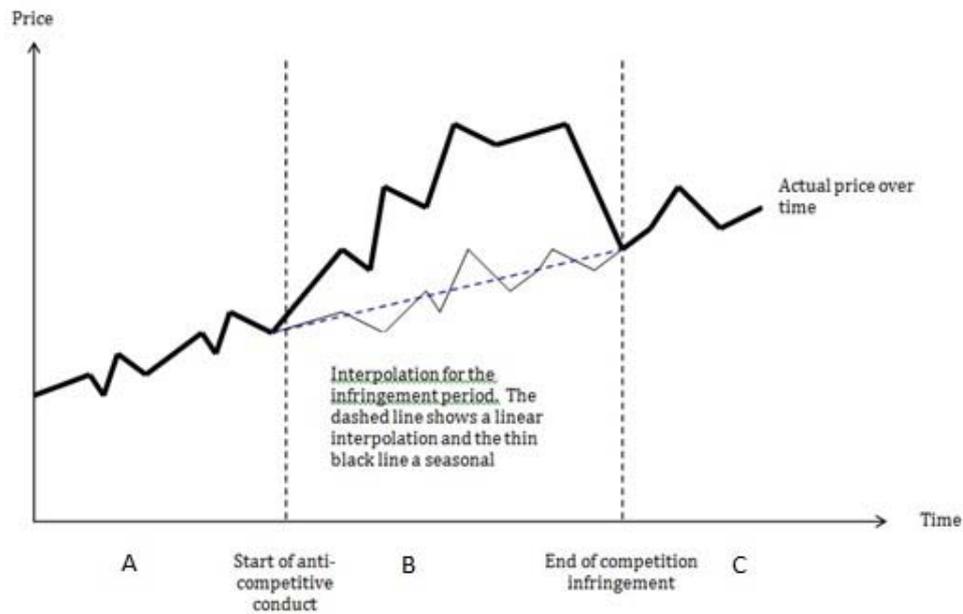


Figure 4: Example of interpolation on a time-series analysis (Oxera Report: December 2009)

Figure 4 provides an example of how interpolation can be represented. The illustration contains both the simple straight-line interpolation represented in the figure by the blue dashed line, as well as an interpolation that has considered a market with seasonal changes that could have occurred during the contravening period represented by the staggered thin grey line in the centre column.

The practical reality of ‘sticky prices’⁵⁰ is a disadvantage in the use of the interpolation method.⁵¹ This creates a position where the market will suffer inertia from the

⁵⁰ The resistance of a price (or set of prices) to change, despite changes in the broad economy that suggest a different price is optimal. Commission Staff Working Paper (2013) 18.

⁵¹ ‘Sticky prices’ can be explained by way of a simple example – the price of a food is R10 (being cost price plus profit R8 + fuel costs R2). The fuel price goes up to R5, so food prices move to R13 (being R8 + R5). The fuel price then drops back to R2, but retailers keep their prices at R13, despite cost price being at R8 and fuel now being R2. The terms ‘sticky prices’ shows how prices are quick to move up in times of input cost increases, but slow, or sticky, to move down in times of input cost decreases. See Maier-Rigaud and Schwalbe *Quantification* (2013) 25. See also Report for European Commission (2007) 442. Harrington “Cartel Pricing during Litigation” prepared for *Global Competition Litigation Review*, 2004, 14: “the time-series or ‘before and after’

contravention on post-contravention pricing resulting in a potentially skewed market for purposes of assessing the damage caused by the anti-competitive conduct.⁵²

7.3.4.3 Autoregressive integrated moving average models (ARIMA models)

ARIMA is a pure time-based technique and uses the pattern of past values of the variable under investigation to forecast the future values.⁵³ The forecast created by ARIMA will serve as the counterfactual for that period and the counterfactual can then be compared with the factual price in the market in order to determine the magnitude of the damage caused by the contravening conduct.⁵⁴ ARIMA techniques tend to require high levels of information.⁵⁵ An accurate depiction of the movements can only be realistically assessed by considering information over a significant period of time.

approach for estimating the but for price is potentially biased when it uses post-cartel price data. Even if firms are no longer colluding, post-cartel price data is distorted above the competitive level by the machinations of the price-fixing defendants during the litigation phase". Available at: http://assets.wharton.upenn.edu/~harrij/pdf/GCLR_2011.pdf. (Last Accessed on 28 July 2015).

⁵² Oxera Report (2009) 54.

⁵³ The use of a regression analysis requires a detailed and highly populated forecast model. To this effect, the courts have criticised the use of such a model where the expert has failed to properly consider all the other factors that could impact on a firm's performance. See Juzgado de lo Mercantil Madrid (Madrid Commercial Court), *Conduit Europe, S.A v Telefónica de España S.U.A*, judgment of 11 November 2005. See also *Sunlight Saunas Inc v Sundance Sauna Inc* 427 F. Supp. 2d 1022 (D.Kan. 2006); *Craftsmen Limousine Inc v Ford Motor Company* 363 F. 3d 761 (8th Cir. 2004); The regression analysis was applied and found to properly account for all relevant market factors in *Conwood Co v U.S Tobacco Co* 290 F. 3d 768 (6th Cir. 2006). For a detailed analysis of econometric techniques, see Dougherty *Introduction to Econometrics*, 4th Edition, Oxford University Press, (2011). See also the work by Diebold *Elements of Forecasting* (2008) (Ch 7 fn 36).

⁵⁴ *Ibid* See also European Commission *Staff Working Paper Practical Guide* (2013) 25: "regression analysis therefore makes it possible to assess whether, and by how much, observable factors other than the infringement have contributed to the difference between the value of the variable of interest observed on the infringement market during the infringement period and the value observed in a comparator market or during a comparator time period."

⁵⁵ European Commission *Staff Working Paper Practical Guide* (2013) 25.

This will allow a more workable forecast to be made of movements during the contravention period.⁵⁶

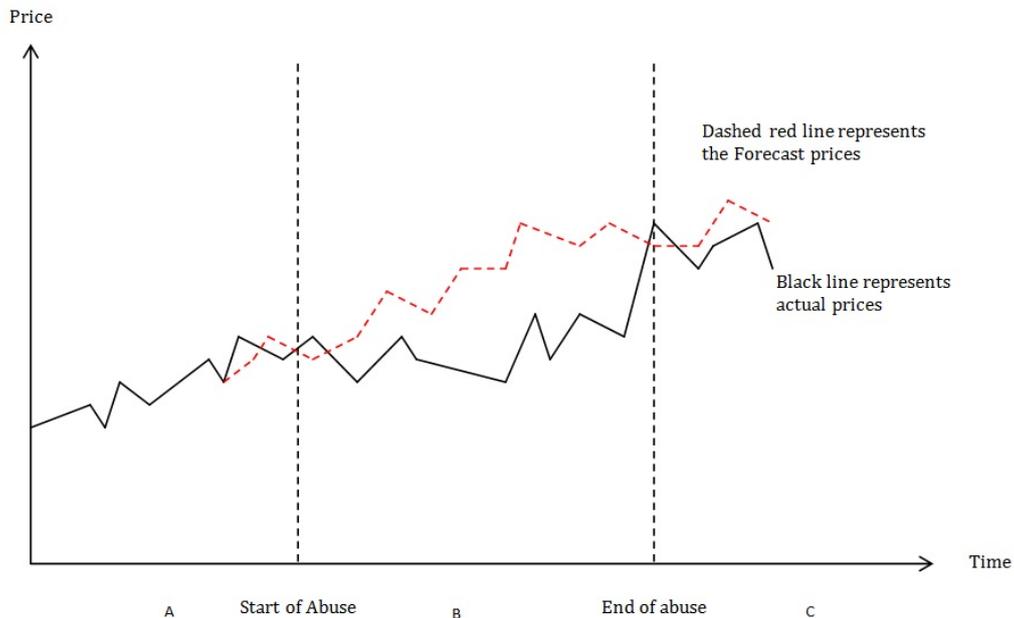


Figure 5: Example of application of ARIMA model for purposes of forecasting the potential price movement and subsequent damage over a period of time (Source: Oxera Report: December 2009)

As can be seen in Figure 5, historical figures pertaining to the prices in a particular market are modelled using an ARIMA technique, and this is then used to forecast the movement of price or volume during the period of contravention (column B).

⁵⁶ For a more detailed discussion of the application of regression techniques for purposes of determining the effect of anti-competitive conduct, see Finkelstein and Levenbach “Regression Estimates of Damages in Price-Fixing Cases”, *Law and Contemporary Problems*, 1983 (46), 145. See also Fisher “Multiple Regression in Legal Proceedings”, *Columbia Law Review*, 1980 (80), 720; as well as Rubinfeld and Steiner “Quantitative Methods in Antitrust Litigation”, *Law and Contemporary Problems*, 1983 (46), 69.

7.4. Difference-in-difference comparator-based method

The difference-in-difference technique attempts to negate the shortcomings of the cross-sectional and time-series methods. The major flaw of the aforementioned techniques is that they work with the assumption that any unexplained difference is the result of the anti-competitive conduct.⁵⁷ Difference-in-difference methods will look at what would have happened in a particular market had the contravention not occurred, by investigating what changes occurred in the affected market and the comparator markets free of anti-competitive conduct, and then compare the differences between the findings.⁵⁸

Conceptually, the difference-in-difference approach provides a better assessment than singular cross-sectional or time-series comparisons. The difference-in-difference allows for factors that stretch over a series of time as well as a series of comparator firms to be considered. The increased information ensures better assessment of the impact that the anti-competitive conduct had on the market and how it might have affected prices; ultimately, allowing for more precise damages estimation.⁵⁹

Using Figure 6 as an illustration, in order to establish the difference in price brought about by the contravention in the market, the infringed market will therefore use the equation of (B-A). However, this difference might not be solely attributable to anti-competitive conduct. There can be various underlying factors that may have affected the price over this period. The difference in price in the comparator market where the competition law contravention did not occur, (D-C) is then used. The assumption may be made that any underlying factors, other than the competition law contravention which may have increased the price, will be the same in the infringed and non-infringed markets and the extent of the influence of the competition law contravention by

⁵⁷ Niels, Jenkins & Kavanagh (2011) 534. Maier-Rigaud and Schwalbe *Quantification* (2013) 26. Report for the European Commission (2007) 443.

⁵⁸ Oxera Report (2009) 59. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.1.2. European Commission *Staff Working Paper Practical Guide* (2013) 21.

⁵⁹ Niels, Jenkins & Kavanagh (2011) 535. Report for the European Commission (2007) 444.

calculating the difference-in-differences in the average price is isolated by the equation as: $[(B-A) - (D-C)]$.⁶⁰

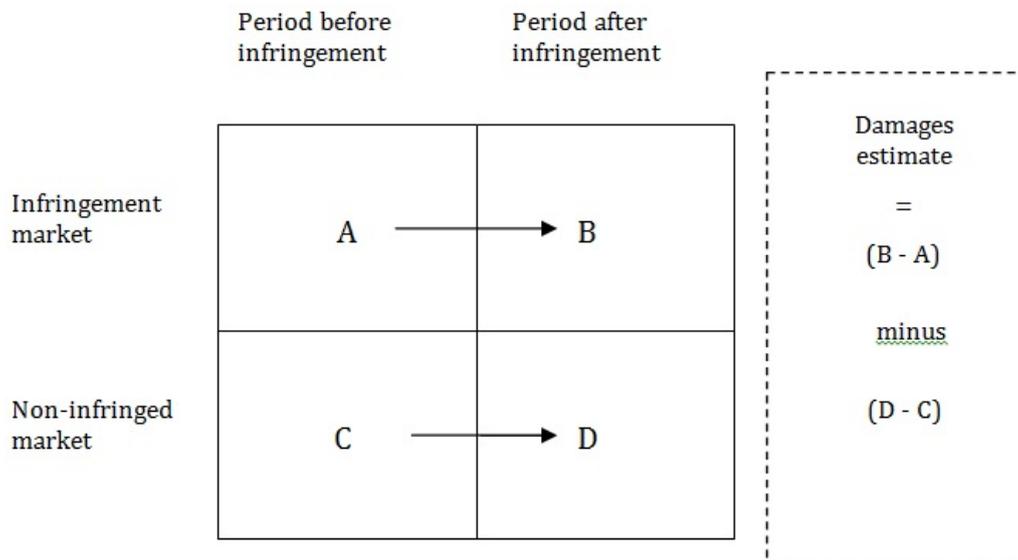


Figure 6: Example of how the difference-in-difference model seeks to isolate the damage brought about by the anti-competitive conduct (Oxera Report: December 2009)

This figure simplistically shows us how the difference-in-difference comparator technique can be applied. The technique uses the average price in the infringed market, where A represents the period before the contravention and B the period during the contravention. The comparator market averages, where the contravention did not occur, are represented by C for the period before the contravention and by D, being the average price for the period during which the contravention occurred. It is clear that this technique is most effective when a combination of information for the period before, during, and after the contravention is used to calibrate the particular method.

⁶⁰ Reference Manual on Scientific Evidence (2011) 430.

7.4.1 Advantages of the difference-in-difference method

The benefit of a difference-in-difference method is that it allows for a comparison to be made on multiple levels over a certain period of time and between a number of firms. This is an improvement on the cross-sectional and time-series methods that focus purely on one of these aspects.⁶¹ The additional information used in the comparison will allow a more accurate estimation of the effect the particular contravention had in the market, as the difference-in-difference technique allows the user to filter out and eliminate certain market characteristics unrelated to the evaluation of the effect of the anti-competitive conduct.⁶²

7.4.2 Disadvantages of difference-in-difference method

Although the difference-in-difference method provides a potentially more accurate estimation of the effect of the anti-competitive conduct, the method still fails to adequately provide for factors other than the anti-competitive conduct that may have had an effect on the market. For example, if a cartel was formed in response to a downturn in demand within the market, then the method will (possibly incorrectly) attribute the entire difference between the market findings and the markets counterfactual position to the anti-competitive conduct that occurred within the market.⁶³ It is precisely for this reason that the selection of comparator markets will be crucial. If no comparator firms in the affected market can be identified (for example, if all the firms in the market were part of the cartel) then the affected market price movements with the CPI over that period, or with other industries, may be compared – while controlling for industry specific characteristics – or a comparison can be done

⁶¹ For a more detailed overview and analyses of the difference-in-difference model, see Meyer “*Natural and Quasi-Natural Experiments in Economics*,” *Journal of Business and Economic Statistics*, 1995 (XII), 151-162

⁶² European Commission *Staff Working Paper Practical Guide* (2013) 21. Niels, Jenkins & Kavanagh (2011) 535.

⁶³ European Commission *Staff Working Paper Practical Guide* (2013) 21: “it rests, however, to a large extent on the assumption that these other changes affected both markets similarly.”

with other geographic markets, unaffected by the anti-competitive practice. In doing so, specific characteristics experienced in that geographical market are taken into consideration and controlled for when the comparison is done.⁶⁴

The difference-in-difference method, when compared to the cross-sectional or time-series method, is the most data intensive method for assessing the market position and potential damage suffered by the parties. This is due to the difference-in-difference method practically combining the two approaches.

7.5. Conclusion

The comparator-based methods are ostensibly the most appealing of the estimation techniques. These methods rely on information from actual market transactions in markets where there has been no competition law transgression and compares these untainted markets with the affected market, thus relying (to a large extent) on factual information for purposes of making an assessment.

Despite their apparent appeal, these simplistic techniques often fail to account for outside factors that might have influenced prices and price movements and function on the simplistic (and possibly naïve) assumption that any difference between the infringed market and comparator market is entirely caused by the anti-competitive conduct. While this simplistic (and conceivably practical and logical) method of damages quantification will no doubt be appealing, this simple approach may not always be possible, particularly if a viable comparator market cannot be established.

⁶⁴ Oxera Report (2009) 61.

CHAPTER 8. FINANCIAL ANALYSIS-BASED METHODS

8.1. Relevance and role

The most prominent feature of a financial analysis method is the type of information analysed. The comparator-based methods discussed in Chapter 7 strive to provide the user with a counterfactual framework on the movements of variables such as price, volume or market share within a particular market.¹ The financial analysis methods are more centred on considering, evaluating and estimating factors that might potentially influence the variables within the market, such as the profitability of a firm or group of firms, and/or the share price movement of a firm in an affected market. The evaluation of the fluctuation of these financial aspects of individual firms can then be used to estimate the extent of damage incurred by a party as a result of anti-competitive conduct within a market.² Financial analyses methods also allow for a more detailed counterfactual estimation, particularly with regard to the ascertaining of counterfactual prices or profits. These methods take into account such aspects as production costs, costs of capital, and profit margins of firms participating in the assessed market.³

A significant difference between the application of the financial analysis and the comparator methods discussed earlier is that the comparator methods look to compare similar markets (affected and unaffected by anti-competitive conduct) and evaluate the differences between these markets as experienced over a particular time. The financial analysis method, on the other hand, rather concentrates on the particular market in which the anti-competitive conduct occurred. It uses economic and statistical theory

¹ Maier-Rigaud and Schwalbe *Quantification* (2013) 28; Report of the European Commission (2007) 444.

² Niels, Jenkins & Kavanagh (2011) 536.

³ See Oxera Report (2009) 62. European Commission *Staff Working Paper Practical Guide* (2013) 36.

and the empirical information available on the particular market to create a counterfactual situation for that specific market.⁴

The various approaches discussed in this chapter are generally very similar. They compare the real, existing position in the affected market to the counterfactual position, which would have existed in the market had it not been for the anti-competitive conduct.⁵ However, the financial analysis methods may prove more useful when the damage being assessed is the result of the anti-competitive conduct and is suffered by a company rather than a private individual. This is due to the fact that when dealing with a private individual's claim for damages, the use of terms such as profitability, share valuation, and production costs are probably not aspects that would be considered relevant or possibly even determinable. These are aspects which, instead, may have more bearing on a corporate entity's day-to-day activity.⁶

8.2. Financial analysis methods in determining the counterfactual situation

There are a variety of ways in which financial analysis methods may be used to determine the extent of damage suffered by a party falling victim to anti-competitive practices. These include consideration of:

- The deterioration of the financial performance of the party claiming to have suffered damage can prove to be a useful guide to obtaining an estimation of the extent of the damage suffered;⁷ and conversely

⁴ *Ibid* Report for the European Commission (2007) 444-445. Ashurst Report (2004) 20: "typically, average costs will be calculated using accounting data or data from internal management reports for the main production costs."

⁵ European Commission *Staff Working Paper Practical Guide* (2013) 37.

⁶ Ashurst Report (2004) 20.

⁷ See par 8.2.1 *infra*, where this is fully dealt with, and Niels, Jenkins & Kavanagh (2011) 537. Ashurst Report (2004) 10.

- A consideration of the improved financial position of the party found guilty of anti-competitive practices, may provide an estimate of the benefit gained by the contravening party;⁸ and
- A profitability analysis using the information available and assumptions made on the counterfactual profit margins, where a counterfactual price level is estimated by considering the production costs to be incurred by the parties participating in the anti-competitive practice (e.g. a cartel), and then merging the findings on the cost of production level. This approach generates a counterfactual price per unit by estimating the costs that a firm operating in the counterfactual market would incur and adding to this a return that reflects the degree of competition in the counterfactual market.⁹

8.2.1 Financial position of claimant

Damage suffered by a party as a result of an anti-competitive practices will in many cases and particularly in the case of a company, be seen mirrored in the negative effect thereof on the financial performance of the claimant. For example, if a company was subjected to a competition law contravention in the form of an overcharge by its suppliers or a form of exclusionary conduct by a competitor in the market, then the damage incurred can be estimated by considering and comparing the actual financial performance of the claimant against the financial performance the claimant would have expected to have had experienced had the competition law contravention not occurred.¹⁰

⁸ Dealt with in par 8.2.2. See Niels, Jenkins & Kavanagh (2011) 537. Ashurst Report (2004) 10.

⁹ Dealt with in par 8.3 *infra*. See Niels, Jenkins & Kavanagh (2011) 537. Maier-Rigaud and Schwalbe *Quantification* (2013) 29.

¹⁰ This econometric model advocates the comparison of the claimant's actual financial position with a hypothetical position the claimant would have been in had the anti-competitive conduct not occurred and resembles the sum-formula approach recognised by the South African delictual damages law. See Ch 4 par 4.7.2.1. Oxera Report (2009) 63. See also Niels, Jenkins & Kavanagh (2011) 537. Ashurst Report (2004) 10. European Commission *Staff Working Paper Practical Guide* (2013) 38. See also Højesteret (Danish Supreme Court), Case UFR 2005. 2171H, *GT Linien A/S (under bankruptcy – subsequently GT Link A/S) v De Danske Statsbaner DSB and*

In *Verimedia v SA Mediametrie, SA Secodip, GIE Audipup*¹¹ the French court was required to assess the damage suffered by *Verimedia* as a result of the barriers to entry imposed on it by the defendants. *Verimedia* sought claimed damages for:

- the loss of clientele;
- the difference between the projected business returns and the actual financial results; and
- damage to its commercial reputation.

The tribunal considered all the various arguments raised, and in short, decided that the negative effect on the claimant's financial position was a basis for estimating the extent of the damage suffered. In this case, the tribunal ruled that the loss of expected profits and the loss of clientele are one and the same and therefore, that the quantum be adjusted accordingly to avoid a duplication of damages. Furthermore, the tribunal also attached a small nominal value to the claimant's reputation within the market as they were still a novice firm.

8.2.2 Financial position of defendant

The benefits gained by the contravening party from the anti-competitive conduct will similarly be reflected in the positive increase of the defendant's financial performance and position.¹² For example, if the defendant was exploiting the claimant by charging a higher price for the goods (e.g. as participant in a cartel), then the financial performance of the defendant can be expected to be better than the counterfactual financial performance which would have existed had the defendant not had the illegal benefit of the cartel price which was being charged to the claimant. The difference in the financial performance between the real performance (which includes the benefit from the anti-competitive conduct) and the counterfactual performance (which

Scandlines A/S (formerly DSB Rederi A/S) judgment 20 April 2005, where the court based the damages award on the claimant's reconstructed financial accounts.

¹¹ Cour d'Appel de Versailles, 12eme chambre, section 2, arret no 319, 24 June 2004.

¹² Niels, Jenkins & Kavanagh (2011) 539. Ashurst Report (2004) 10.

determines the position, which would have existed had the anti-competitive conduct not occurred) of the defendant will provide some assistance with the estimation of the extent of damage suffered by the claimant.

The above example is not without difficulties. The difference in the defendant's financial position may provide some indication or estimation of the damage suffered within the market as a whole, but may fail to provide an indication of the individual damage suffered by a particular market participant. Ultimately the calculation of the individual damage sustained will require further analysis and calculation.

In cases where there are single victims of the anti-competitive conduct, the analysis of the difference in the defendant's real and counterfactual financial position may prove to be highly accurate. An example where the courts considered the defendant's financial position in achieving a damages estimation can be found in the Danish case of *GT Linien A/S (under bankruptcy – subsequently GT Link A/S) v De Danske Statsbaner DSB and Scandlines A/Sn*.¹³ De Danske Statsbaner (DSB) is the state owned ferry and train operator that owns Gedser Harbour. As the owner of the harbour, DSB collected fees from other ferry operators (including GT Linien) for the use of the harbour, but did not collect any fees from its own ferries. The Danish Supreme Court of Appeal upheld the finding that DSB was abusing its dominant position in the market for ferry transport between Denmark and Germany by collecting fees from competing ferry operators and not charging the same fees to its own ferries. The court performed a detailed analysis of the financial evidence in assessing the extent of damage suffered by GT Linien. GT Linien claimed damages of €3.3 million. The court considered the depreciations, the reserves set aside for improvements to the port, and interest on DSB's invested capital, and found that the claimant failed to adequately differentiate the various revenues and expenses in the reconstructed accounts. It eventually arrived at a damages estimation of €1.3 million for the abuse of dominance by DSB.

¹³ *GT Linien A/S (under bankruptcy – subsequently GT Link A/S) v De Danske Statsbaner DSB and Scandlines A/Sn (formerly DSB Rederi A/S)* UFR 2005.217H (Danish Supreme Court). See also the United States case of *Fishman v Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

8.3. Performing a counterfactual profitability analysis

8.3.1 Introduction

If the estimation of the sustained damage is made by an analysis of the claimant's profitability, then an effective counterfactual return which the claimant would have generated in order to establish what the effect of the anti-competitive conduct was on the claimant's profitability has to be established. The potential benchmarks are cost of capital and profitability.

8.3.2 Cost of capital

To establish the counterfactual return, economists advocate the cost of capital benchmark for the assessment of a potential counterfactual position.¹⁴ The cost of capital benchmark can be described as being the rate of return that a firm would be required to generate in a competitive market. Investors would be highly unlikely to commit to investing capital in the firm, if the firm generates a rate of return below this rate. Cost of capital can consequently be equated to a minimum profit level a firm would be expected to generate.¹⁵

This theory postulates that if the firm is performing below the cost of capital, because of the defendant's proven anti-competitive conduct, then it follows that the claimant would have gained profit at least at a rate equal to cost of capital. The damage can then be estimated as the difference between the real returns generated by the firm and

¹⁴ Oxera Report (2009) 66.

¹⁵ Maier-Rigaud and Schwalbe *Quantification* (2013) 29. Reference Manual on Scientific Evidence (2011) 459. Ashurst Report (2004) 20: "ideally, the margin used should reflect the cost of capital for the company which captures the return required by investors to invest in the company's activities rather than elsewhere [...]"

the returns which would have been generated had the firm performed at cost of capital.¹⁶

It must be remembered that the rate of return at the level of cost to capital is most likely to represent the position prevalent in a highly competitive market, where the expected rate of return is not much higher than, for example, the interest rate which investors are likely to receive from a financial institution.¹⁷ If the market in which the firms participate is one in which firms generally expect and are expected to generate higher returns than the cost of capital, then the application of the theory must be adjusted in order to make provision for the higher expectations.¹⁸

8.3.3 Profitability comparator benchmark

A further benchmark, which could be used in order to ascertain the counterfactual profitability of a firm in a particular market, is to consider the rates of return generated by comparator firms.¹⁹ The comparator firms can be firms participating in the same market as the claimant and defendant.²⁰

¹⁶ Oxera Report (2009) 66; see Van Dijk & Verboven *Quantification of Damages* (2005) par 3.2.1. See also Niels, Jenkins & Kavanagh (2011) 541. Ashurst Report (2004) 20. Maier-Rigaud and Schwalbe *Quantification* (2013) 29: “to measure profitability, two general concepts can be used. On the one hand an accounting approach focusing on the profitability of the firm based on the return on capital employed (ROCE) can be used or, on the other hand, a finance approach can be used that drawing on the capital asset pricing model (CAPM) is based on net present value (NPV) and the internal rate of return (IRR).”

¹⁷ *Ibid*

¹⁸ In markets that generate significantly high returns, other firms will be encouraged to enter the market, and thereby increase the competition and lower the price, where eventually the returns will in all likelihood be closer to the cost of capital level of returns.

¹⁹ European Commission *Staff Working Paper Practical Guide* (2013) 37: “...an estimate for the profit margin that could reasonably be expected in a non-infringement scenario may be derived from the profit margins made by similar undertakings in a comparable geographic market not affected by the infringement...”

²⁰ This does not necessarily have to be in the same geographic market, where information from a market located in a different geographic area might prove useful, as the results and findings will not have been tainted by the anti-competitive conduct of the defendant; or data and information from a similar market or industry, which has the

The financial position of the claimant firm and defendant firm could also be used as a benchmark when assessing the impact that the anti-competitive conduct had on the respective firms.²¹ This can be done by looking at the level of profit achieved before the anti-competitive conduct or after the anti-competitive conduct. When comparing firms in this manner, provision must be made for external factors (other than the anti-competitive conduct) such as economic or market cycles, which might have influenced profitability during these periods.²²

8.4. Advantages of financial analysis methods

A major advantage of the financial analysis method is the easy accessibility of the required financial information. Financial information is used on a day-to-day basis by companies and investors when making their business decisions and therefore an abundance of financial information is conceivably freely available.²³ The accuracy of the postulated counterfactual position will inevitably be directly influenced by the quality and quantity of the data available.

same inherent risks and characteristics as the market in which the claimant suffered damage might prove useful for the determination of a counterfactual profitability level which the claimant could have been expected to enjoy had it not been for the anti-competitive action. See Oxera Report (2009) 66. See also Maier-Rigaud and Schwalbe *Quantification* (2013) 28: “the mark-up could be estimated using information on margins in comparable competitive markets [...] these methods can also be considered as comparator-based approaches.” See also Ashurst Report (2004) 20.

²¹ European Commission *Staff Working Paper Practical Guide* (2013) 37.

²² See Oxera Report (2009) 66. See also Maier-Rigaud and Schwalbe *Quantification* (2013) 29.

²³ Examples of easy accessible information for these purposes are data contained in audited financial statements and share price movements on stock exchanges. Companies that are listed on the stock exchange are required to produce regular financial reports. These reports are generally audited and published, making the factual accuracy of the figures difficult to challenge. Financial markets generate large amounts of information on companies relating to share prices and other pricing aspects, which may be relevant for a financial analysis of damages. See Oxera Report (2009) 67. See also Niels, Jenkins & Kavanagh (2011) 536. See also Reference Manual on Scientific Evidence (2011) 459-460 and European Commission *Staff Working Paper Practical Guide* (2013) 38.

8.5. Disadvantages of financial analysis methods

Financial-analysis methods have some disadvantages. The most salient problem is the difficulty associated with distinguishing between the impact that the anti-competitive conduct had on the financial performance of the respective companies and the impact which may be attributable to other external market-related factors.²⁴ This is similar to that experienced in the comparator-based methods discussed in the previous chapter.

In addition to the difficulties of finding a reliable working counterfactual, financial analysis-based methods often have the added difficulty of establishing the factual financial performance of the firm. This requires significant firm-specific information and data to be processed and analysed. This is a far a more difficult and potentially less accurate exercise than, for example, merely doing a direct price comparison based on objectively determinable prices charged by the different firms. It may be difficult to isolate the extent of profit derived by a company if the company is split into a variety of divisions from an accounting perspective, where only a single division was a party to the anti-competitive conduct.²⁵ Similarly, the extent of profit derived may also prove difficult to determine if the contravention relates to a single product. Due consideration must be given to common costs, such as general overheads (e.g. rent of the building), which are shared by divisions/products not engaged in contravening conduct and the contravening division/product.²⁶

²⁴ Ashurst Report (2004) 21. See also Maier-Rigaud and Schwalbe *Quantification* (2013) 28: “the use of variable costs raises some questions as cartelized [sic] firms may have inflated costs due to X-inefficiencies and/or may simply face higher variable costs due to the reduced cartel output and economies of scale.”

²⁵ Maier-Rigaud and Schwalbe *Quantification* (2013) 29: “with multiproduct firms there is the additional problem of common cost allocation.”

²⁶ Oxera Report (2009) 67. See also Report for the European Commission (2007) 442-443.

8.6. Methods of financial analysis enabling damages estimation

8.6.1 Event study analysis

This method of financial analysis will only hold true for listed public companies. It requires an analysis of the difference in the actual share price of the various companies (the contravening company and the companies which were the victims of the competition law contravention) and the share price performance these companies would have been expected to show had there not been any anti-competitive conduct within the market.²⁷

A key aspect of this technique that may hamper its implementation is the fact that it requires a clear event to have occurred in order to pin-point the difference in the share price from the period before, during, and after that event. The secretive nature of many competition law contraventions makes it very difficult to ascertain exactly when the anti-competitive conduct started and ended.²⁸ A further difficulty is the effect that subjective investors have on the share price of a particular market. For example, the announcement by the Competition Commission that it would be investigating widespread cartel activity within the construction industry may have led to many investors electing to invest in other sectors, causing a negative impact on the share price of all the construction companies, whether or not they were involved in the alleged conduct and whether or not the alleged conduct will ever be proven to have existed.

²⁷ See Oxera Report (2009) 70. For further discussion on the use of event studies as a technique for assessing competition damages, see Bizjak and Coles, "The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm", *American Economic Review*, 1995, (85:3) 436-61. For a discussion on the use of event studies in the context of evaluating the effects and nature of a merger, see Lianos and Genakos *Econometric Evidence* (2012) 22-23.

²⁸ *Ibid*

The share price analysis is, in many ways, similar to the difference-in-difference comparator method discussed in Chapter 7. Comparative information running over a series of time and firms is compared with a predetermined benchmark position (the counterfactual position).

8.6.2 Bottom-up costing analysis

The application of this method to determine the counterfactual position is probably limited to cases where the nature of the competition law contravention is that of excessive pricing by a very dominant firm or well-orchestrated cartel.²⁹ The extent of the damage is calculated by establishing what the counterfactual mark-up would be on a particular product, then comparing this with the mark-up which the contravening firm was able to charge due to the abuse of its dominant position.³⁰

The following simple example illustrates the application of the bottom-up analysis:

A firm sells 1000 of a particular item in a specific year and the firm's total costs for that year was R500 000. The unit cost can then be said to be R500. The gross margins charged on items in a similar (comparator) market is ascertained and added to the unit price. If the comparator margin is for example 10%, then the unit price is R550. This price (the counterfactual price) will then be compared with the real price charged by the abusing firm, for example R650. The

²⁹ For abuse of dominance provisions – see s 7 and 8 of the South African Competition Act 98 of 1998. Horizontal agreements are a contravention of s 4 of the Competition Act of 1998.

³⁰ Maier-Rigaud and Schwalbe *Quantification* (2013) 28. See also Konings, Jozef, Patrick van Cayseele and Frederic Warzynski "The Dynamics of Industrial Mark-ups in Two Small Open Economies: Does National Competition Policy Matter?" *International Journal of Industrial Organization*, 2001 (19), 841-859; European Commission *Staff Working Paper Practical Guide* (2013) 36; as well as *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 19 June 2007, case No KRB 12/07 (*Paper Wholesaler Cartel*).

difference (R100 per unit) will represent the effect of the anti-competitive conduct.

The Superior Court of Düsseldorf, Germany, had to assess damages suffered by a competitor arising from the abuse of dominance by a firm.³¹ A damages claim was brought, together with an application for an interdict prohibiting the defendant (the firm alleged to have committed the anti-competitive conduct) from linking its heating price with its prices for gas and electricity. The parties were involved in a bid for the supply of gas to a specific client. The claimant (the firm who was the victim of the anti-competitive conduct) offered the lowest price for the supply of the gas but still lost the bid. The defendant threatened the client with an increase in heating and electricity prices if the client sourced its gas from another supplier. The court ruled that this conduct constituted an abuse of dominance by the defendant and awarded damages to the claimant. The damages were calculated as representing 5% profit on the supply costs. The court felt that the claimant had provided sufficiently detailed evidence regarding its own supply costs and that the claimant further proved that had it received the contract at the time, and that a 5% margin would have been expected.

The fact that the costs experienced by the contravening firm may differ from the costs determined on a counterfactual level and the issue of cost allocation in companies, which produce multiple products, could make cost determination difficult, and should be considered when using this method.

There are a variety of factors that could lead to a discrepancy between the counterfactual costs and the costs of the contravening firm. These include:

³¹ OLG Düsseldorf, urteil vom 16.04.2008 VI-2 U(Kart) 8/06-Stadtwerke. Available at http://www.energieverbraucher.de/files_db/1310984811_2652__12.pdf (Last accessed on 25 April 2014.)

- The contravening firm is, due to the lack of competition in the market, never required to become more efficient with its costing;³²
- Cartel participants, for example, will not benefit from any of the economies of scale due the cartel restricting output of the product in order to increase/maintain the existing price of the product. The average unit production costs will decrease if production was increased and the fixed costs could be divided by the increased units.

It may consequently be necessary to adjust the cost structure and information provided by the defendant in order to address some of the problems that may exist as a result of the competition law contravention. This could be done by:

- Assessing the cost structures of comparator firms in order to ascertain the level of inefficiency prevalent within the defendant's organisation.
- An evaluation of the output estimates within the industry benefiting from economies of scale and then adjusting the defendant's figures to reflect a position that may have existed had the defendant exploited the benefits associated with producing at this cost efficient level.

The final difficulty relates to the allocation of costs. This problem only arises when a firm produces a variety of products and one of these products is subjected to anti-competitive conduct. Then the allocation of costs related to this specific product becomes problematic.³³

8.7. Conclusion

Financial analysis allows for a detailed analysis of the estimated damage to be done. A proper analysis requires reliable information from the contravening firm, the possible

³² European Commission *Staff Working Paper Practical Guide* (2013) 36: "companies which due to their collusive behavior [...] may operate less efficiently and therefore generate higher production costs than under competitive pressure."

³³ Ashurst Report (2004) 21.

comparator firms, and the claimant firm, albeit that such information may at times be difficult to collect.³⁴

The use of financial analysis by experts in their assessment of damage and subsequent estimation of the damages brought about by the anti-competitive conduct would be embraced by the civil courts evaluating a damages claim. The comparative nature of the proposed technique complies favourably with the position set out by the Appeal Court in *Santam v Byleveldt*³⁵ and will conceivably be readily applied by the courts. This may occur in the form of a concrete assessment of the position before and after the contravening conduct³⁶ or by application of the sum-formula approach by establishing the hypothetical position of the firm within the market based on an evaluation of the claimant's position, had the conduct not occurred.³⁷

The mantra 'figures do not lie' applies. When sufficient and reliable financial information is available, a court will be able to more accurately estimate the extent of damage sustained and to be awarded to the claimant based on financial facts than when relying on theoretical modelling to assess damages. The concerns, however, as

³⁴ See Ch 6 par 6.4 and Ch 8 par 8.5

³⁵ *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A).

³⁶ For example, a consideration of the firm's share price before and after the anti-competitive conduct. See Ch 5 par 5.5 for a discussion on the use and acceptance of expert evidence by the South African courts.

³⁷ See Ch 4 par 4.7 *infra* for a discussion on the comparator techniques used by the South African courts when assessing delictual damages. See *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C) 257, where the court was presented with expert evidence relating to the lost profit suffered by a shop owner. The expert calculated the damages by using a calculation based on the floor space of the store and the shops turnover before the defendant's wrongful conduct. While the court was reluctant to accept that a nexus necessarily exists between floor space and turnover, the court did indicate that in view of the fact that no contrary evidence was presented, the expert's opinion and evidence would be considered as part of the evidence placed before the court. See also *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd and Others* 1997 (4) SA 399 (SCA), where the court was faced with various proposed methods of computation, including a sales forecast and a consideration of actual contracts lost during the period of contravention. The court, however, criticised the claimant's calculations for, firstly, failing to have regard for all the relevant factors when seeking to forecast the loss of future sales, and secondly, for not providing any evidence of actual contract lost. The court did, however, acknowledge that the defendants had acted wrongfully and that the claimant had suffered damages, and accordingly resorted to the rough and ready method of an educated guess.

highlighted above, are that a financial analysis may hold pitfalls and complexities for the experts and the courts quantifying damages. Numerous potential input variables (some prevalent within the market and others unique to a particular firm) may serve to significantly complicate the attempts and establishing a damages estimation, and solicit potentially complex, drawn out debates between the experts. This may potentially negate the advantages of a factual analysis envisaged by the financial analysis models.³⁸

³⁸ See Ch 8 par 8.5 above.

CHAPTER 9. MARKET ANALYSIS METHOD

9.1. Introduction

Industrial organisation theory has facilitated the development of a variety of different models that assist in predicting a firm's behaviour based on the varying degree of competitiveness within a relevant market.¹ These models range from those depicting a monopolistic market, with very little or possibly no competition, to those representing perfect competition or a highly competitive market.² The parameters of competitive interaction can be gleaned from Figure 7 below.

¹ European Commission *Staff Working Paper Practical Guide* (2013) 33. See Lianos and Genakos *Econometric Evidence* (2012) 25: "here a case-specific theoretical or empirical model is detailed with the aim to prove a particular point. Such models are frequently employed when severe data limitations make any of the previous approaches difficult to implement and particular assumptions related to the industry structure and competition have to be made."

² Niels, Jenkins & Kavanagh (2011) 546. Van Dijk & Verboven *Quantification of Damages* (2005) par 3.2.3. Ashurst Report (2004) 24. See also the discussion in relation to the use of industry organisation models in the context of merger evaluations in Epstein, and Rubinfeld "Merger Simulation: A simplified Approach with New Applications", *Antitrust Law Journal*, 2001, 883-919 (*Merger Simulation*). Available at: http://www.google.co.za/url?url=http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article%3D2362%26context%3Dfacpubs&rct=j&q=&esrc=s&sa=U&ei=BLFQVdXzJ8H5Uoj1gNAC&ved=0CBMQFjAA&sig2=XHy1ZGgxJGhnDq_vMxgTNg&usg=AFQjCNGKMSibd7I8Vvk8f5biC9Ne9FzCY8Q (Last Accessed on 11 May 2015).

homogeneous products, Bertrand oligopoly with differentiated products, Cournot oligopoly, and monopoly.

9.2. Levels of competitive interaction

9.2.1 Perfect competition

In a perfect competition market, there is a significant number of participating firms producing a product of the same/similar characteristics and quality. Such a market will have little or no barriers preventing additional firms from entering the market.⁵ The buyers in such a market will generally be able to move freely between the competing firms and their movement will be dictated by the lowest price. Firms in such an environment face stiff competitive pressure, need to maintain high levels of efficiency, and operate at an optimal level of output. Inefficient firms will fail to compete and ultimately have to exit the market.⁶

9.2.2 Monopolistic competition

The concept of 'monopolistic competition' may at first glance appear to be somewhat contradictory and misleading. Monopolistic competition will exist where there is a significant number of participating firms producing a product with different product characteristics and of differing quality. These firms then compete with each other based not solely on price (similar to a perfectly competitive market), but also based on individual product characteristics. The differing product characteristics afford producers some ability to move their price above the marginal cost.⁷ Markets operating

⁵ See Niels, Jenkins & Kavanagh (2011) 13.

⁶ Brassey *Competition Law* (2002) 91.

⁷ This why the term 'monopolistic' is used to describe this type of competitive market.

as monopolistic competitive markets tend to balance out over the long run, and prices eventually equalise and stabilise at a competitive level.⁸

9.2.3 Bertrand oligopoly

In this type of market, there will be a number of competing firms producing an identical or similar product. These competing firms cannot differentiate themselves from each other based on the characteristics of the product being produced, and therefore can only secure or possibly increase their individual market share by price competition. This market theory assumes that consumers will always purchase the product with the lowest price.⁹

9.2.4 Cournot oligopoly

These markets are described as having limited producers, who each set their output capacity before determining their individual prices. The producers assume that the output of each firm will remain constant, and that each firm can set its quantity as a monopolist of the residual demand.¹⁰

9.2.5 Bertrand oligopoly versus Cournot oligopoly

Bertrand's oligopoly theory postulates that even a duopoly¹¹ is sufficient to push prices down to a point where they reach marginal cost. A duopoly will ultimately result in an

⁸ See Oxera Report (2009) 76. Niels, Jenkins & Kavanagh (2011) 13.

⁹ *Ibid* 77. Sutherland & Kemp *Competition Law of South Africa* 5-11. See also Shapiro, *Theories of Oligopoly Behaviour*, in Schmalensee, and Willig (eds), *Handbook of Industrial Organisation: Volume 1*, Elsevier Science Publishers (1989) (*Oligopoly Behaviour*).

¹⁰ *Ibid* Sutherland & Kemp *Competition Law of South Africa* 5-10. See also Shapiro, *Theories of Oligopoly Behaviour* (1989).

¹¹ An oligopoly where only two producers exist in the market.

outcome, which will be exactly the same as to that which exists under perfect competition.

Neither the Bertrand nor Cournot model can necessarily be said to be superior to the other. The accuracy of the predictions generated by each of these models will vary from industry to industry, and will depend on the closeness of each model to the relative industry situation. If, for example, the capacity and output levels can be easily changed, then the Bertrand model will generally be a better model to use. Should output and capacity be difficult to adjust in the particular industry, then the Cournot model might prove to be superior.

Cournot's model is based on quantity competition between firms, rather than price competition. While the naive behaviour suggested by Cournot might seem plausible in a static market environment, it is difficult to postulate that firms do not learn from their mistakes and decisions over a period of time and adjust their output and pricing accordingly. Bertrand's model differs significantly from the Cournot model in that it assumes that firms choose to set their own prices, rather than quantities, in order to actively participate within a competitive environment.

9.2.6 Monopolised market

In a monopolised market there is a single supplier of a particular product and the supplier has absolute control over the market price. Monopolists are not inhibited by price competition or output maximising practices. The monopolist simply sets its output level at the point where the demand for the product allows for a maximisation of profits.¹²

¹² Brassey *Competition Law* (2002) 91. Niels, Jenkins & Kavanagh (2011) 13.

9.2.7 Summary

The outcomes prevalent in these different industrial organisational models are illustrated in Figure 8. In a monopolistic market, the supplier achieves the highest price for the products despite supplying the lowest quantity of product to the market. This is in direct contrast to the position achieved in the market, which has perfect competition, where the market is provided with the maximum output of goods at the lowest price.¹³

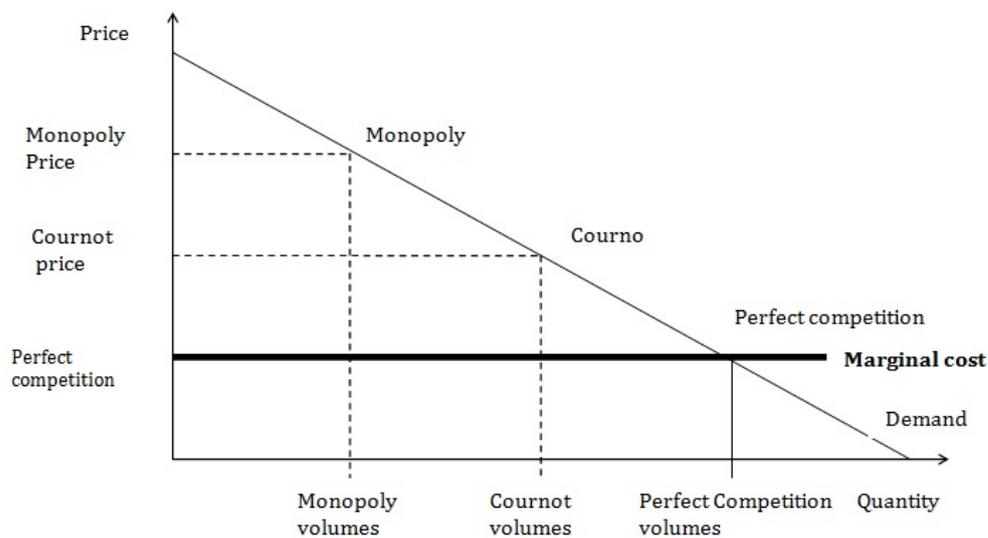


Figure 8: The above illustration serves to show the impact the different market structures may have on the price and volumes within a market (Source: Oxera Report, December 2009).

Understanding the nature of the competitive interaction prevalent within a particular market will assist in establishing a 'realistic' hypothetical position for purposes of performing the damages estimation.

¹³ Oxera Report (2009) 77. See Niels, Jenkins & Kavanagh (2011) 41, figure 2.4 illustrating profit maximisation by a monopolist.

9.3. Industry organisation models

The models discussed above provide some additional insights as to how the extent of any potential damages incurred due to the competition law contravention might be quantified. By understanding the relevant market characteristics and the nature of the competition within that market, a more accurate counterfactual position can be reconstructed.¹⁴ For example, if the market in which a cartel occurred was one associated with a Cournot model of competition, then the counterfactual price will be higher than it might have been in a market where perfect competition was the order of the day. A higher counterfactual price would mean that potential overcharge that could be claimed as the damage suffered, would be lower.¹⁵

9.4. Appropriate industry organisation model

In an analysis of what the consequences in a particular market were, following anti-competitive conduct by one of the market participants, a variety of different industry organisation models can be used. The different models allow for different assumptions to be made. The outcomes generated by the different models may range from the counterfactual price being equal to that of marginal cost, or potentially providing for a substantial mark-up in price, should the market be of a more monopolistic nature.

The selection of a particular model is guided by how closely the particular market characteristics relate to the assumptions underlying each of the industry organisation

¹⁴ Rubinfeld, D.L., *Quantitative Methods in Antitrust. Competition law and Policy* American Bar Association, (2008) (*Quantitative Methods*) highlights the usefulness of structural models to predict and simulate how conduct might affect a relevant market.

¹⁵ Oxera Report (2009) 78.

models.¹⁶ Some of the factors to be considered when making the selection of which will be the most appropriate industry organisation model to use, include:

- *Pricing*: In markets where firms are in competition-based predominantly on pricing, then the most appropriate model representing the type of competition may be the model of perfect competition, Bertrand oligopoly or monopolistic competition. If the firms competed based on a predetermined volume or output level, then the Cournot model may prove more useful when determining the counterfactual situation.¹⁷
- *Nature of the product market (homogenous versus differentiated goods)*: the nature of the product will also assist in selecting an appropriate model to represent the type of competitive relationship which exists within a particular market. For example, where one is dealing with a homogeneous product, the model of perfect competition or either of the Bertrand or Cournot models may be appropriate. On the other hand, if the goods are differentiated, then the model of perfect monopoly may be more relevant.¹⁸
- *Market structure (number of market participants)*: If the market has many participating firms, the models of perfect competition and monopolistic competition are apposite when determining the counterfactual position. In cases where there are only a few firms participating, then the models of Bertrand and Cournot oligopoly are of more assistance.¹⁹

*Concord Boat Corporation v Brunswick Corporation*²⁰ highlights not only how an industrial organisation model can be applied when determining damages for competition law contraventions, but also indicates how important it is that the appropriate model be used to determine the damages. In this case, the expert for the claimant applied the Cournot model and simulated the position where there are only

¹⁶ A comprehensive assessment of the most prominent industrial organisation models applicable within the context of competition law is discussed in Harrington, *Detecting Cartels*, in Buccrossi (ed), *Handbook of Antitrust Economics*, MIT Press (2008).

¹⁷ Oxera Report (2009) 81.

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ 207 F.3d 1039 (8th Circuit 2000) judgment 24 March 2000.

two competing firms in the market. The Cournot model predicts that each firm will have a 50% market share. The expert then proceeded to quantify the damages incurred by the claimant during periods, where the respondent had a market share of more than 50 percent. The Court criticised the expert's use of the Cournot model, citing the fact that the model neglects to take into consideration the difference in quality of the products and other external factors, which may have led to the fluctuation in the two firms' respective market shares at different points in time. This difference should have been reflected in the counterfactual position being created.

It is clear that the use of models assist in creating an accurate counterfactual position. The model must always be adjusted to accommodate each specific situation so as to best reflect the real market conditions. This allows for a more accurate prediction to the amount of damage suffered as a result of the anti-competitive conduct.

In cases of cartel activity, it may be possible to use a monopoly model when selecting an industry organisation model to assist with the determination of the damages suffered by a party. A functioning cartel will act in much the same way as a monopolist. Where conduct is coordinated in such a way as to maximise profits, this could be construed as being 'monopoly profits'.²¹ This feature potentially makes the monopoly model appropriate in assessing cartel damages.

A cartel may not always result in a monopolistic position within the market or a maximisation of profits by the participants. A cartel may consist of various individual firms and many variables. This may result in the cartel not being as effective as a monopoly consisting of a single firm with a single decision maker driving the interest of a single entity. Members who cheat within the cartel, causing higher production levels and consequent lower prices within the market, may be one of the reasons which could lead to a cartel not achieving a profit maximising monopoly.²²

²¹ Niels, Jenkins & Kavanagh (2011) 550.

²² Oxera Report (2009) 82.

9.5. Industry organisation models and the counterfactual position

Industry organisation models can be applied to estimate the counterfactual position, and thereby to assist with the estimation of the overcharge and/or the extent of lost volume which occurred in the market.²³ This allows for an estimation of the damage suffered due to the anti-competitive conduct. These models can be combined with factual market information to gain a better comprehension and determine the levels of demand and supply within the market - ultimately assisting with the determination of the position within the counterfactual situation.²⁴ Industry organisation models can be calibrated in different ways when applied to generate an estimate of the damage suffered. The two poles of calibration are:

- reliance on theoretical models to simulate the particular market and predict the extent of the overcharge or effect on market volumes; and
- the utilisation of actual market information.

The risk associated with a predominantly theory-based application of the industry organisation models is that the picture presented by the model might not accurately depict the reality within the market. A more consistently accurate outcome will be achieved through the use of as much real market information as possible.²⁵

In keeping with the above, a reasonably accurate supply and demand curve for the market can be made if the real values of the prices, volumes and any additional market information are taken into consideration. Once sufficient information on the real market

²³ Rubinfeld *Quantitative Methods* (2008) 739: "if there is sufficient data to allow one to estimate a structural model for the period in which there was no violation, a useful approach to damages is to estimate the structural model and to use the model to forecast what prices and quantities would be in the but-for world." See also Harrington "Post-Cartel Pricing During Litigation", 52 *Journal of Industrial Economics* 517 (2004).

²⁴ Oxera Report (2009) 83.

²⁵ *Ibid*

position exists, the counterfactual price and volume can be determined by combining the real market position and an industry organisation model (see Figure 8 above).

It is clear that the choice of which industry organisation model to use will potentially influence the extent of the damages. The different models will have a different impact on the counterfactual supply and demand curve for the particular market. A clear example of this is that the more competitive the nature of the industry organisation model selected to determine the counterfactual, the further apart the counterfactual position will be from the factual position (which has been distorted by the anti-competitive conduct), and therefore the greater the extent of the estimated damage suffered.²⁶

9.6. Applying industry organisation models

9.6.1 Introduction

There are two prominent methods of using industry organisation models when quantifying damages arising from anti-competitive conduct. These are the:

- Single model approach; and the
- Two-model approach.

9.6.2 Single model approach

The single-model approach requires the making of an assumption regarding the particular market structure prevalent within the particular market, as well as the other factors that might influence supply in the counterfactual situation. Through the use of

²⁶ See Oxera Report (2009) 83.

econometric estimations,²⁷ the hypothetical price that would have been charged in the market for the particular good had the anti-competitive behaviour not occurred can be estimated.²⁸

This method arrives at a counterfactual position, by using factual data within the market as inputs for the selected industry organisation model. In order to create the counterfactual position, an estimation of the supply and demand features within the industry will be made, based on the available information regarding costs and the market structure. The counterfactual will then be established, applying the available facts, or should there be a lack of available information, then based on the assumptions that can be made by considering the type of market and the nature of the competition prevalent within the particular market.²⁹

9.6.3 Two-model approach

The two-model approach uses industry organisation models for determining both the factual position within the market, as well as the counterfactual position for the particular market, by linking the factual position to a specific industry organisation model. For example, in the monopoly model, characteristics of the demand curve can be assumed based on an easy consideration of the market factors such as the price of the product, the demand for the product, and the costs associated with producing the product.³⁰

²⁷ See the discussion of the cross sectional, time series and difference-in-difference approaches in Ch 7.

²⁸ Oxera Report (2009) 84.

²⁹ *Ibid* 84.

³⁰ *Ibid* 84.

9.7. Conclusion

The different industry organisation models each have their own principles and characteristics required for ascertaining the factual and counterfactual position. The undoubted advantage of the two-model approach over the single-model approach is that it often places less onerous demands on the volume of the information required to derive the factual and counterfactual positions and is also less reliant on the extent of econometric modelling required. This makes the two-model approach a far more appealing option, where a lack of available information makes the use of a fully calibrated single model impossible.³¹

Industrial organisation models certainly assist parties and the court to better understand the nature and impact of the damage resulting from the anti-competitive conduct. It is, however, unlikely that these models can be successfully applied without consideration of financial factors,³² or a comparison of some sort being performed.³³ In all likelihood, it serve to rather assist and enhance the arguments in an estimation of damages made in terms of a comparator-based model or a financial analysis of the firms and market.

³¹ *Ibid* 86.

³² See Ch 8.

³³ See Ch 7.

CHAPTER 10. ESTABLISHING A WORKABLE COUNTERFACTUAL POSITION

10.1. Introduction

In order to assess the extent of damage suffered as a result of the anti-competitive conduct, use of a hypothetical (referred to as a *counterfactual*) analysis is required.¹ The South African courts have recognised the need for establishing a counterfactual situation when required to assess damages claims,² especially when assessing prospective damages or a claim for loss of profit. However, the courts have expressed their reservations regarding the difficulties associated in attempting to create a viable counterfactual position.³

In order to perform a complicated prospective loss assessment, a counterfactual position the claimant would have been in and experienced within the market (had the competition law contravention not occurred) will first be determined.⁴ Once a viable

¹ Oxera Report (2009) 11-12: “calculating the damage arising from an antitrust infringement requires an assessment of what would have happened in a hypothetical scenario where the infringement had not taken place—this is commonly referred to as the ‘but for’ or counterfactual scenario.” See also European Commission *Staff Working Paper Practical Guide* (2013) 10. See also Davis and Garcés *Quantitative Techniques for Competition and Antitrust Analysis* Princeton University Press (2010) 380.

² See *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304: “it is now beyond question that damages in delict (and contract) are assessed according to the comparative method [...] The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure.”

³ *Pitt v Economic Insurance Company (Ltd)* 1957 (3) SA 284 (D) 287D-E: “the Court’s task in estimating damages is always a difficult one. Basically, one has evidence as to the plaintiff’s affairs, but when, in addition, the future has to be scanned, the Court is virtually called upon to ponder the imponderable. However, no better system for assessing damages has yet to be evolved, and the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess.”

⁴ This is, in essence, the same as the sum-formula approach applied by the South African courts in civil delictual claims.

counterfactual position has been established, then an evaluation of the factual position experienced by the claimant within the market tainted by the competition contravention can be ascertained. Finally, a comparison between the hypothetical and factual position of the claimant will be done in order to establish the extent of the damage suffered by the claimant as a result of the contravention of the Competition Act by the defendant.⁵

Creating a counterfactual prediction on how the market and its players may (or may not) have performed over a given period is rife with uncertainties and variables, all of which could impact on the counterfactual position to be used as a comparator, which in turn will directly impact on the extent of the damages estimated to have resulted from the anti-competitive conduct.⁶

Given the difficulties and uncertainties of the ‘crystal-ball gazing’ often required when establishing a counterfactual comparator,⁷ this chapter deals with the key factors that a party may have to consider when seeking to determine a workable counterfactual position for purposes of assessing the extent of the damage suffered as a result of the competition law contravention. These factors are:

- the nature of the competition law contravention;
- who has suffered harm as a result of the contravention; and
- the characteristics of the market in which the contravention occurred.

⁵ European Commission *Staff Working Paper Practical Guide* (2013) 9-10: “...the actual position of the injured party has to be compared with the position in which this party would have been but for the infringement.”

⁶ *Ibid*

⁷ See the discussion in Ch 4, sec 4.7.2.1 on the sum-formula technique for assessing delictual damages applied by the South African courts.

10.2. Nature of competition law contravention

The nature of anti-competitive conduct, which forms the basis of the damages claim, will have a significant bearing on the identity of the parties incurring damage as a result of the conduct. The various categories of competition law contraventions determine the parties who are affected by a particular type of anti-competitive conduct.

10.2.1 *Cartel conduct*⁸

The primary aim of most cartels is to, by various means (including fixing of prices or division of markets), raise the price of the product forming the substance of the cartel members' business and to ultimately increase their profit. Possibly the most striking example of cartel behaviour is where firms form a cartel and the members of the cartel collectively fix the price charged for their products at a higher price than may have been the case had these firms competed in a fully competitive market. The result of this behaviour is that consumers lower down in the supply chain ultimately pay more for the product than they would have, had it not been for the cartel. The higher price charged by the cartel results in consumers purchasing less of the product and possibly even electing not to purchase the product at all. It is for this reason that price increases and production decreases often manifest simultaneously within a market (see Figure 9).⁹

⁸ See s 4 of the Competition Act of 1998. See also discussion on the effects of cartels on the market in European Commission *Staff Working Paper Practical Guide* (2013) 43-51.

⁹ Ashurst Report (2004) 14; Niels, Jenkins & Kavanagh (2011) 500; Oxera Report (2009) 14. Maier-Rigaud and Schwalbe *Quantification* (2013) 18-19.

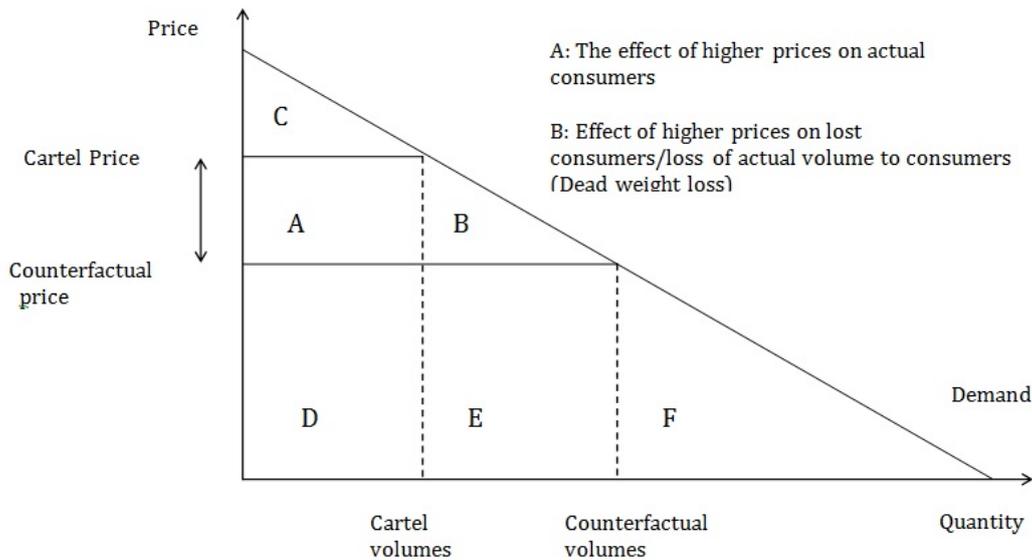


Figure 9: Illustration of the impact of a price-fixing cartel on a market¹⁰

The damage caused by the higher price charged by the cartel harms a variety of participants lower down in the market supply chain: from the retailers who would have been customers at the non-cartel price and now elect not to purchase the goods at the cartel price; to the general consumer who now purchases the same goods at a higher price. In many instances, it is difficult to identify the actual parties who suffered real harm from the cartel conduct.

10.2.1.1 Increased price fixed and charged by the cartel

The increased price (represented by Block A in Figure 9) is calculated as the number of the particular product sold by the cartel, multiplied by the difference between the price charged by the cartel and the price determined as the counterfactual price.¹¹

¹⁰ Maier-Rigaud and Schwalbe *Quantification* (2013) 18-19; Niels, Jenkins & Kavanagh (2011) 501; Oxera Report (2009) 14; Brassey *Competition Law* (2002) 89.

¹¹ European Commission *Staff Working Paper Practical Guide* (2013) 46.

The following example illustrates the harm caused by cartel price fixing:

If the cartel price (the increased price) is R125, but the counterfactual has determined that were it not for the cartel conduct, then the price would have been R100, then the cartel's effect on the price of that particular product would be R25, or it could be expressed as having a price increase effect of 20% (being the R25 as a percentage of the cartel price of R125). Therefore, if the buyer purchased a single product at R125, and the counterfactual indicates that there is a cartel increase of 20% within that market, then the damage suffered by that buyer due to the cartel would be calculated as: $R125^{12} \times 20\%^{13} = R25$.¹⁴

As further illustration, if the cartel participant sold one million of the products on which the price fixing occurred, then the total sales would be R125 million. As stated above in this example, the counterfactual indicated an increase of 20% in the price due to the cartel activity. Consequently, the party claiming damages will have to prove how much of that particular product was purchased. If, for example, the party can prove that R15 million worth of the product was purchased, the damage is calculated as being R3 million being: $R15 \text{ million}^{15} \times 20\%^{16} = R3 \text{ million}$.¹⁷

¹² Represents the purchase price within the cartelised market.

¹³ Represents the extent of the harm caused by the cartel based on the counterfactual.

¹⁴ Represents the damage caused by the cartel.

¹⁵ Total amount of purchases by the claimant.

¹⁶ Extent of harm caused by the cartel based on the counterfactual.

¹⁷ Damage caused by the cartel activity to the claimant.

10.2.1.2 *Production decrease*

A price increase by cartels inevitably leads to a production decrease. Decrease in production results in what is known as deadweight loss,¹⁸ and represents inefficiency within the economy. The inefficiency is created by the cartelised market failing to meet the needs of the consumers, who would have participated more readily in the market under competitive conditions and prices. This inefficiency is represented by Triangle B in Figure 9.¹⁹

The counterfactual price highlights the inefficient market created by the cartel. It is clear that the cartel market does not serve the customers, who would have participated in the market for that product, had it not been for the cartel activity raising the price and decreasing the production. This price will be closer to a price which would be prevalent in a perfectly competitive market, or at least represent a price dictated by some form of a competitive market.

From a practical perspective, damages claims in competition law are more likely to be instituted by parties who actually purchased the product (direct purchasers) and who were forced to pay a higher price due to the cartel activity.²⁰ The example above typically illustrates this situation. Claims for the volume reduction and the possible negative consequences associated with a decrease in customer choice and quality, as well as the possible effects these might have on a particular party, are very difficult to

¹⁸ A loss of economic efficiency that can occur when equilibrium for goods or services is not Pareto optimal, i.e. it is impossible to advantage any one individual without causing at least one individual disadvantage.

¹⁹ Brassey *Competition Law* (2002) 89-90. Also Niels, Jenkins & Kavanagh (2011) 116: “pricing above competitive levels leads to a dead-weight welfare loss – lost opportunities for consumers and producers...” See also Maier-Rigaud and Schwalbe *Quantification* (2013) 18: ‘The deadweight loss ...is the damages due to the reduction in quantity [...]’ The deadweight loss can be described as the diminished value enjoyed and achieved by consumers, but not passed onto the producers, as a consequence of a price increase.

²⁰ Niels, Jenkins & Kavanagh (2011) 502.

prove, and will in all likelihood be nearly impossible to quantify with any mathematical precision.

Parties who have suffered as a result of a decrease in available products in the market, due to the cartel price increase, may attempt to establish a direct link between the cartel and the fact that the higher prices and less available volume resulted in the purchaser buying less of the product, which subsequently caused a decrease in the volumes of the claimant's sales.²¹ This manifests in decreased profits for the parties in the market downstream of the cartel. To show a loss as a result of a decrease in available products involves a complex exercise. It requires a significant amount of information regarding, for example, the production output figures and downstream purchase and sales figures. Information from the cartel, the claimants, and in turn their customers, will have to be obtained in order to attempt an assessment of the potential impact the resultant decrease in volume may have had on a claimant.

10.2.1.3 *Further effects*

Cartel activity undoubtedly and almost invariably affect the price and quantity of the product forming part of the cartel activity. The market effects of this activity is not merely limited to price and quantity, as cartels can have a significant long-term effect on the market. This is particularly due to the fact that cartel activity promotes cooperation among competitors and this cooperation can seriously hamper the speed and degree of innovation for the improvement of overall efficiency and production, where the agreement between members of a cartel makes the expenditure of time and money in improving these aspects of their business unnecessary.

The long-term market effect may quite possibly also be a factor that will have to be considered when estimating the amount of damage suffered by a party and may have a significant impact on the counterfactual value which is to be determined. The situation may conceivably arise where the calculated counterfactual price could have

²¹ Maier-Rigaud and Schwalbe *Quantification* (2013) 18. European Commission *Staff Working Paper Practical Guide* (2013) 52.

been even lower had the customers enjoyed the benefits of having the competitors within the market constantly implement cost-saving and efficiency increasing initiatives and innovations.²²

Factors such as the longer-term harm within the market caused by the cartel should only be considered in cases of damages claims where a clear causal link can be established between the anti-competitive conduct and the longer term harm which a party alleges to have suffered. For practical purposes, the damages analysis must not be overcomplicated, making it less appealing to parties who have suffered harm to institute claims.

10.2.1.4 *Passing-on*²³

The cartel price increase can be calculated with the use of a workable counterfactual position. Figure 9 indicates the effect of the cartel price increase on the parties who purchase the product directly from the cartel. This may include distributors, retailers or end-consumers. All of these parties will be faced with the price increase initiated by the cartel. The difference, though, is that at various levels in the market supply chain, the extent of the loss suffered as a result of the cartel's price increase will differ, depending on the extent to which that initial price increase is passed-on down the supply chain from distributor, to retailer and finally to the end consumer.

When dealing with damages claims for competition law contraventions, the passing-on of a price increase is a significant and often complex question. Although the matter of passing-on will have no effect on the calculation of the total harm caused by the

²² Niels, Jenkins & Kavanagh (2011) 503. Oxera Report (2009) 16. European Commission *Staff Working Paper Practical Guide* (2013) 18.

²³ The passing-on defence entails that purchasers or competitors who have suffered as victims of the anti-competitive conduct and been exposed to the higher prices resulting from the anti-competitive conduct are not entitled to claim the damages to the extent that such price increase (overcharge) was passed-on by these parties to their own customers. South Africa's damages regime is a compensatory regime and a claimant will only be entitled to claim for the loss or damage actually suffered, lending support to the inclusion of the passing-on defence within the South African damages framework. The passing-on defence is discussed in Ch 11.

price increase initiated by the cartel, it will have a considerable impact when determining which parties have suffered harm, and how the damages should be distributed amongst those parties within the supply chain.

In the United States, the view that assessing the actual impact of the passing-on represents an 'insurmountable task' is a major contributing factor for denying defendants the passing-on defence.²⁴ A defence of passing-on and the calculation of the various rates of passing-on experienced throughout the affected supply chain could eventually result in firms who committed anti-competitive conduct being favoured. The participants lower down in the supply chain (including the end users) are less likely to institute actions for damages caused by anti-competitive conduct.²⁵ The failure of these parties (the indirect purchasers) to efficiently enforce competition law and their right to claim damages ultimately results in defendants not paying full compensation for the extent of the damage caused by their conduct.²⁶

A situation where the defendant is not liable for the full extent of the damages caused as a result of passing-on appears to be unsatisfactory for purposes of the total compensation which damages actions provide. Furthermore, the inclusion of the passing-on defence significantly increases the evidentiary burden. This makes damages actions less attractive, and serves to decrease the deterrence value of the threat of civil law damages claims.²⁷ South African law restricts a claimant's right to claim damages to only those damages which have actually been suffered by the

²⁴ Ashurst Report (2004) 31. See also *Hanover Shoe v United Shoe Machinery Corporation* 392 U.S. 481 (1968), where it was submitted that the calculating of the extent of the passing-on to indirect purchasers would render the claim so difficult to prove for indirect purchasers and that the defendant would benefit from the fact that many of these claims would not be actively pursued.

²⁵ This is primarily due to direct purchasers being best placed to bring damages actions and show the necessary causal connection between the anti-competitive conduct and the resultant damage. Also, the parties higher up the supply chain may have more resources available than an individual member of the public to pursue a damages action. See Niels, Jenkins & Kavanagh (2011) 554. See also Ch 10 par 10.3.3 and par 10.3.4 below regarding indirect distributors and end-consumers (indirect victims) and their claims arising from a competition law infringement.

²⁶ See Ashurst Report (2004) 31.

²⁷ *Ibid*

claimant. The passing-on defence is for this reason likely to play a significant role in the South African legal system.²⁸

The question of whether or not to permit the passing-on defence is not an issue that affects the quantification of the harm caused by the anti-competitive conduct. Rather, it deals with the distribution of such damage between the parties affected by the conduct.²⁹ The debate surrounding whether the passing-on defence should be permitted has been long considered by the United States and European Union. The defence has as yet not found favour in the United States. However, the European Union considers the inclusion of this defence fundamental to the compensatory nature of its damages regime.³⁰

²⁸ *Pitt v Economic Insurance Company (Ltd)* 1957 (3) SA 284 (D & C.L.D) 287A-B: “it seems to me that in a case of this kind the object of awarding compensation for loss of income is to put the plaintiff financially in the position in which he would have been but for his injuries. If the Court, in making the award, takes no account of evidence relating to income tax, the plaintiff might, in the result, be better off than he would have been if he had not been injured - and at the defendant's expense.” See also Boberg *Delict* (1984) 498.

²⁹ Niels, Jenkins & Kavanagh (2011) 502. The passing-on defence essentially allows that “a defendant to dispute a damages claim by a direct purchaser on the basis that the latter has passed on any cost increase further downstream.”

³⁰ Antitrust Modernization Commission (2007) for an overview of the recent debates in the USA. Available at: http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDIQFjAB&url=http%3A%2F%2Fgovinfo.library.unt.edu%2Famc%2Freport_recommendation%2Famc_final_report.pdf&ei=RxlaU5rAEqia7QafiICABg&usg=AFQjCNE0L3C7RCCD_NDxQJqhydsQ6CEFYA&bvm=bv.65397613,d.ZGU. (Last accessed 25 April 2014.) See also European Commission *White Paper* (2008) 165. See also Ch 11.

10.2.2 Abuse of dominance³¹

An abusive practice by a firm having sufficient market power to be considered dominant³² within that market can cause the same damage to a specific market as a price-fixing cartel. This is primarily because a firm that is dominant can (in keeping with the principle of supply and demand) restrict the output of the product in the market and thereby raise the prices.³³

In cases of a cartel within the market, the fact that a number of firms are cooperating together to form the cartel and compete with various other firms in the market who might not be part of the cartel, has to be considered. The intensity of this competition will depend on the prevailing circumstances in each case and each different market. However, the fact that there are competitive prices within the market will assist in the determining of a workable counterfactual. An abuse of dominance contravention, due to a single firm having such control within the market, may prove that the market is not

³¹ S 8 of the Competition Act 1998. The following are examples of matters where the Competition Tribunal dealt with abuse of dominance contraventions. *Competition Commission v Senwes Ltd*, Case no: 110/CR/Dec06; *Patensie Sitrus Beherend Beperk v Competition Commission*, Case no: 16/CAC/Arp02; *Competition Commission v British American Tobacco (South Africa)*, Case no: 05/CR/Feb05; *National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Limited*, Case no: 68/IR/JUN 00; *Harmony Gold Mining Company Ltd and Durban Roodepoort Deep Ltd v Mittal Steel South Africa Ltd and Macsteel International Holdings BV*, Case no: 13/CR/Feb04; *Competition Commission v South African Airways (Pty) Ltd*, Case no: 18/CR/Mar01.

³² A dominant firm is defined in s 7 of the South African Competition Act 1998. A firm is dominant in a market if: (a) it has at least a 45% share of the market; (b) it has at least 35%, but less than 45% share of the market, unless it can be shown that it does not have market power; or (c) it has less than 35% share of the market, but has market power.

³³ Niels, Jenkins & Kavanagh (2011) 508. Brassey *Competition Law* (2002) 180. Sutherland and Kemp *Competition Law in South Africa* 7.1; Klopper *Intellectual Property* (2011) 411.

particularly competitive and it may be difficult to calculate what an appropriate counterfactual value to impose on the dominant firm.³⁴

10.2.3 Exclusionary conduct³⁵

The South African Competition Act prohibits certain conduct by a dominant firm. This prohibition includes:

- the refusal to grant an essential facility or scarce goods to a competitor when it would be economically feasible to do so;
- requiring or inducing a supplier or customer not to deal with a competitor;
- tying and bundling goods or services;
- predatory pricing; or
- buying-up scarce and rare resources required by a competitor.

The prohibited exclusionary conduct by a dominant firm serves to protect firms from unfairly being excluded from participating in the market or from having their market shares unfairly reduced as a result of the abusive behaviour by a dominant firm.³⁶ South Africa's Competition Commission has investigated various complaints of abuse of dominance in contravention of section 8 of the Competition Act.³⁷ The most relevant

³⁴ See the insightful article by Maier-Rigaud and Schwalbe "Private enforcement under EU Law: Abuse of Dominance and the Quantification of *Lucrum Cessans*" *CPI Antitrust Chronicle*, November 2013 (2). Available at: http://www.nera.com/content/dam/nera/publications/archive2/PUB_CPI_Private_Enforcement_1113.pdf (Last Accessed on 21 October 2015). See also Oxera Report (2009) 16.

³⁵ See s 8 of the Competition Act of 1998. See also *Patensie Sitrus Beherend Beperk v Competition Commission*, Case no: 16/CAC/Arp02. Patensie required farmers who were members or shareholders to sell all their output to Patensie. The Competition Tribunal and Competition Appeal Court held this to be restrictive on the farmer's right to deal with other competitors of Patensie and accordingly contravened the Competition Act.

³⁶ See European Commission *Staff Working Paper Practical Guide* (2013) 54, where the effect of exclusionary conduct and the assessment of the effects of such conduct on the market and market participants are discussed.

³⁷ See inter alia *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) (s 8(b) and 8(d)(i)); *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* (80/CR/Sep06)

complaint for this study is the investigation against South African Airways ('SAA'), subsequent to a complaint by Nationwide Airlines (Pty) Ltd that SAA was abusing its dominance.³⁸ The finding by the Competition Tribunal that SAA was guilty of abuse of dominance, resulted in a civil damages action being brought by Nationwide Airlines (Pty) Ltd (in liquidation) against SAA.³⁹ This is a positive step in the development of the South African competition law. It displays a growing awareness of follow-on damages for contraventions of the Competition Act and enhances the objective of achieving restitution for the victims of anti-competitive conduct.

10.3. Determining the counterfactual

10.3.1 Introduction

Various permutations of the type of harm which can be suffered as a result of competition law contraventions were considered in Chapter 4. The question of which parties have suffered harm or damage as a result of the anti-competitive conduct, and which parties will therefore ultimately have a claim for damages must now be investigated. Section 65 of the Act⁴⁰ is framed in such a manner that it leaves a potential claim for civil damages open to *any party* who has suffered loss or damage as a result of a prohibited practice.⁴¹ The figure below is a basic representation of the

(s 8(d)(i)); *Mittal Steel South Africa Limited and Others v Harmony Gold Company Ltd and Another* (before the Competition Appeal Court 70/CAC/Apr07) (s 8(a) and 8(d)).

³⁸ *Ibid* and especially *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* (80/CR/Sep06) [2001] ZACT 1 (5 January 2001)

³⁹ Summons was issued out of the South Gauteng High Court, Johannesburg, under case number 12026/2012 and the matter was heard during the course of 2016, with judgment delivered on 8 August 2016. See Ch16, par 16.1.1 for a brief discussion of the judgment.

⁴⁰ South African Competition Act 89 of 1998. For a full discussion of s 65 see Ch 3.

⁴¹ See s 65(6): "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 63(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 from the Judge President of the Competition Appeal Court, in the prescribed form— (i) certifying that the conduct constituting the basis for the action has

various participants in a supply chain who might be affected by anti-competitive conduct.⁴²

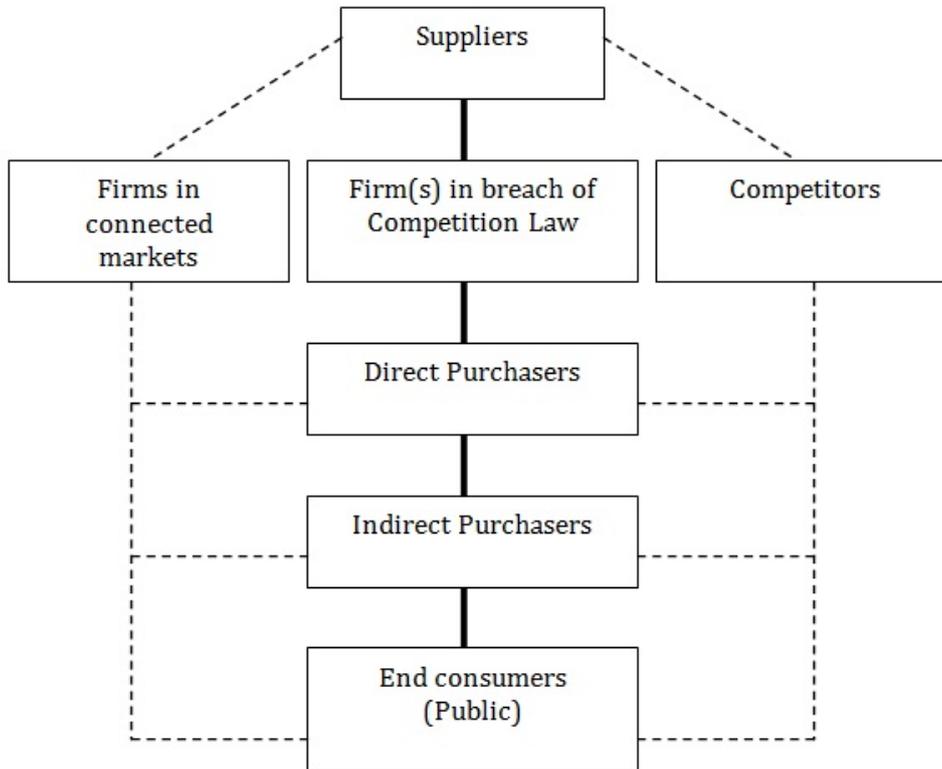


Figure 10: Parties who could be affected by anti-competitive conduct⁴³

From Figure 10 the following potential plaintiffs can be identified:

- direct customers;
- indirect customers acting as distributors;
- end-consumers;
- counterfactual (potential) customers;

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.”

⁴² See also Ashurst Report (2004) 13, Diagram 1.

⁴³ Ashurst Report (2004) 13; Oxera Report (2009) 26.

- competitors;
- suppliers; and
- firms in connected markets;

10.3.2 Direct customers

These parties purchase the goods or services directly from the firm or cartel of firms acting in an anti-competitive manner. Although it may appear that these parties are directly exploited by the high price resulting from decreased volumes or other abusive conduct by the contravening firm(s), and will no doubt have suffered harm or damage, the practical extent of harm they suffered must be considered by determining whether the harm suffered was passed-on to the downstream customers in the supply chain.⁴⁴

10.3.2.1 Indirect customers acting as distributors

Unless harm or damage is absorbed by the direct customer and not passed on downstream, indirect customers purchase the goods or services from direct customers and suffer harm as a result of the anti-competitive conduct.⁴⁵

10.3.2.2 End-consumers

The end-consumers are ultimately the parties who suffer harm when firms act in an anti-competitive and abusive manner. Unlike the parties upstream of the end-consumer, there is no possibility of passing-on of the harm or damage. An end-consumer therefore has to absorb this extra cost, or deal with the decreased volume or quality, which has been brought about as a result of the anti-competitive conduct. Identifying these end-consumers who have suffered as a result of the competition law

⁴⁴ The passing-on is discussed in more detail in Ch 11, where the policy considerations of allowing or declining the use of the passing-on defence as well as whether this defense would be recognised by the South African courts when assessing private competition damages actions are considered. See also Ashurst Report (2004) 13.

⁴⁵ Oxera Report (2009) 6 and 26, and Ashurst Report (2004) 13.

contravention may not prove too difficult. A slightly more complex matter will be the question of quantifying the extent of the harm incurred, as well as establishing a causal connection between the:

- anti-competitive conduct;
- extent of the harm suffered; and
- amount of damages which are claimable by the injured party.⁴⁶

10.3.2.3 *Counterfactual customers*

Counterfactual (potential) customers are customers who would have purchased goods had it not been for the anti-competitive conduct within the market. This group represents the customers who would have participated at the counterfactual price. Due to the price being manipulated by the anti-competitive conduct, these parties are not served and are therefore either excluded from participating or are limited to other alternative products.⁴⁷

In theory, counterfactual (potential) customers will have a claim for damage suffered as a result of the anti-competitive conduct of the contravening firm. However, a practical problem which may make these claims virtually impossible is the difficulty in proving the causal connection between the anti-competitive conduct and the damage the parties are alleged to have suffered.

10.3.2.4 *Competitors*

This group of potential claimants include parties who are in competition with the contravening firm, as well as those competitors who are potential competitors but have been prevented from competing due to exclusionary conduct on the part of the contravening firm. Competitors are most likely to fall victim to exclusionary conduct

⁴⁶ *Ibid* 26.

⁴⁷ *Ibid* 27 and Ashurst Report (2004) 15.

than in cases of price increases, as they will more likely benefit from a price increase in the market even though they themselves did not drive the increase and are not part of the anti-competitive conduct.⁴⁸

10.3.2.5 Suppliers

Suppliers of the firms in the market affected by anti-competitive activity (for example, cartel activity) may also suffer as a result of the anti-competitive conduct. The firms may be producing less of the product, and therefore, may require less inputs from the suppliers, due to a lower output being generated within the contaminated market. The lower inputs required means that the anti-competitive conduct results in the suppliers selling less and subsequently attaining lower profits than would have been the case had the market not been tainted by anti-competitive conduct.⁴⁹

10.3.2.6 Firms in connected markets

This group of firms are those harmed by anti-competitive conduct within a market in which they do not directly participate. This is especially the case when dealing with one product that is dependent on the other product (complementary product). An increase in price of the one product will result in a decrease of sales of the other product, leading to a consequential decrease in sales of the complementary product.⁵⁰

The consequence of the existence of a brick cartel is an example of the consequences of cartel activity in a connected market. If the brick cartel raises the price of bricks it could decrease activity in the construction industry. Suppliers of other construction

⁴⁸ European Commission *Staff Working Paper Practical Guide* (2013) 55–63 for a discussion on the impact of anti-competitive conduct on competitors. Ashurst Report (2004) 16. Oxera Report (2009) 27. Examples of cases where competitors have claimed for harm suffered are *Cour d'Appel de Paris (Paris Court of Appeal) SA Mors v SA Labinal*, 30 September 1998; *Oberlandesgericht Dusseldorf (OLG) (Dusseldorf higher regional court) VI-2U(Kart) 8/06 (Stadtwerke Dusseldorf)* judgment April 16, 2008.

⁴⁹ Oxera Report (2009) 27; Ashurst Report (2004) 15.

⁵⁰ *Ibid*

materials may also suffer as a result of the decreased construction activity caused by the brick cartel conduct.⁵¹

10.4. Market characteristics in which the contravention occurred

In order to understand who, and to what extent, they were potentially harmed, a clear comprehension of the relevant market and the nature of the industry in which the harm took place is required. Due consideration will have to be given to the type of market, as well as the unique characteristics of a particular market in order to effectively evaluate the extent of the damage caused by the anti-competitive conduct.

10.4.1 Types of markets

10.4.1.1 Intermediate goods / consumer goods

Intermediate goods are generally those goods forming part of a supply chain, to which value is added as the product moves downstream. When dealing with a product forming part of the intermediate products, consideration will have to be given to the passing-on of costs to the downstream participants.⁵² This will restrict a party's right to claim damages. In reality no damage, or significantly less damage, may have been inflicted. In the case of a finished product being sold to the end consumers, the passing-on defence will not require consideration as the end consumer is unable to pass any of the price increase on to the next participant. By understanding the market and the nature of the product, the factors to be considered will be accordingly tailored.

⁵¹ *Ibid* Ashurst Report (2004) 14 and 16.

⁵² The matter of passing-on is discussed in Ch 11.

10.4.1.2 *Mature markets / new markets*

This consideration will play a significant role when evaluating the duration of the anti-competitive conduct and its long term effects. In a new market the duration may be minimal. It could be that the anti-competitive conduct is of an exclusionary nature. Firms may be excluded from technological benefits enjoyed by other firms, and may suffer long-term losses as they are prevented from effectively competing.⁵³

10.4.1.3 *International markets / local markets*

The geographic scope of the market will play a major role, as different regions and countries may have different levels of competition and unique market characteristics that warrant consideration.⁵⁴

10.4.1.4 *Bidding markets / traditional markets*

The competition element in bidding markets is often considered to be ‘for the market’ rather than ‘in the market’, and competition for the market often takes place infrequently. An example of a bidding market is where parties bid for the rights to a long-term franchise. Anti-competitive conduct may have long-term effects in the bidding market rather than the more traditional market, which suffers shorter-term effects which can be rectified. An appreciation of the type of market (bidding versus traditional) will assist in creating a counterfactual. The bidding (or auction) markets often have a more predictable outcome and can be more accurately modelled than those in the traditional markets.⁵⁵

⁵³ Oxera Report Report (2009) 28.

⁵⁴ *Ibid*

⁵⁵ *Ibid* 29.

10.4.2 Examples of market features

When considering the markets and industries that may form part of the evaluation of potential damages sustained, the following aspects of that particular market or industry will require attention:

10.4.2.1 Market structure

Here the size of the market, the number of participants and competitors, and the rate of entry and exit of competitors within the market is considered. By understanding the structure of the market, a clearer picture can be gained of the magnitude of the harm suffered by the relevant party(ies). Similarly, any substitute products available within the market, and whether the market has any complementary goods from other markets, will also play a major role in establishing the extent of the harm and which parties may potentially have suffered harm as a result of the competition contravention.⁵⁶

10.4.2.2 Pricing practices

The price charged by the contravening firm may be driven by factors other than purely anti-competitive motives. Consideration will have to be given to the common pricing practices and trends within the industry. Furthermore, the fact that pricing was done off a predetermined price list, or whether prices are negotiated on an individual basis, is relevant. Pricing using a predetermined price list results in a single formula probably sufficing to establish the extent of damage suffered by all the customers of the infringing firm. If prices were negotiated on an individual basis, then each customer's situation will have to be individually considered. Another interesting point is the question of volume rebates that are often given as incentives to customers. If the

⁵⁶ *Ibid* See also Ch 9 on Industrial Organization models for assessment of damages. This provides a more detailed overview of the considerations and impact a particular market structure may have on a damages action, and also how a particular market player may be affected by the anti-competitive conduct.

increased price resulted in customers now being forced to purchase a decreased volume, they may now not qualify for their volume rebate, and therefore have suffered a further loss due to the anti-competitive conduct of the contravening firm. All these factors play a role when performing a damages investigation.⁵⁷

10.4.2.3 Costs

This enquiry requires that not only the costs (price) charged to the downstream firms be taken into account, but also what factors may have influenced the costs of production for those downstream firms.⁵⁸

10.4.2.4 Financing structures

In certain industries, working capital is considered to be an important commodity. A good example of this phenomenon is the construction industry. Large amounts of working capital are required in order to tender for projects and to secure business. If the anti-competitive conduct has an adverse effect on a firm's working capital and business was lost, or could not be sourced, because of such behaviour, then this loss may well be recoverable by the injured firm.⁵⁹

10.5. Counterfactual to determine final damages

The determination of damage suffered by using a counterfactual model was considered. A closer look was taken at the parties who would potentially suffer loss and institute a claim for damages, and then certain market and industry characteristics

⁵⁷ Oxera Report (2009) 29; Ashurst (2004) 21. See also the discussion in Ch 8 regarding Financial Analysis techniques for assessing the impact of the anti-competitive conduct within the particular market and on the various market participants. The importance of isolating the effect of the anti-competitive conduct is also discussed as well as the techniques which can be considered in order to isolate the anti-competitive effect.

⁵⁸ *Ibid* Ashurst Report (2004) 20.

⁵⁹ *Ibid* Oxera Report (2009) 29.

and aspects, which may warrant consideration when considering the extent of damage these parties might have incurred were discussed. The next step is to utilise the preceding aspects, and to calculate a final amount or value which will form the basis of the damages claim.

In order to calculate the damages amount, the results from the counterfactual position has to be taken and fed it into a financial valuation model.⁶⁰ To perform a damages calculation by determining a working counterfactual and final damages analysis, a variety of variables have to have values assigned to them in order to reach a particular damages value. These values will be deciphered and estimated by using the models as discussed in earlier chapters.⁶¹

Input data of varying types is required for all of the models discussed. The concept of input data is a wide one, and includes detailed inputs on the actual prices charged for the particular goods or service and also on the volumes of the goods produced. The input data calibrated into the various models will also include relevant market characteristics, such as the number of firms and their different market share.⁶²

Sources of required input data are potentially very broad and include information readily available and within the public domain. Information such as interest rates and prices being charged to the consumers, and also information such as revenues which have been generated, costs and volumes sold for a particular product line, which are firm specific and in the possession of the various parties, may assist.⁶³ The tables, included as Appendix 3 and 4, serve to illustrate examples of variables to which one may be required to establish a descriptor or assign a value, when performing a damages estimation for competition law infringements.

⁶⁰ Chapter 12 will use the determining of a counterfactual position and application of the various econometric theories to illustrate the estimation of a final damages award.

⁶¹ See Ch 6 – 9 above.

⁶² Oxera Report (2009) 35.

⁶³ European Union *Staff Working Paper Practical Guide* (2013) 10.

10.6. Conclusion

The use of a hypothetical position in order to allow parties to more accurately predict the extent of damage brought about by the wrongful conduct is a notion recognised by the South Africa courts.⁶⁴ Within the complex environment of competition law, economists have sought to create models which will serve to alleviate some of the concerns harboured by the courts regarding the unpredictability and element of 'fortune-telling'⁶⁵ associated with creating a hypothetical position to assess damages, particularly prospective damage.

This chapter has sought to clarify some of the aspects pertaining to developing a workable and credible counterfactual position when assessing the impact anti-competitive conduct may have had on a particular party. Previous chapters have introduced various economic models that may be used to assist with establishing the counterfactual and factual position necessary for a damages estimation. These models may eventually provide a basis for assessment of the damage caused by the competition law contravention and allow for a final damages amount to be quantified.

⁶⁴ See *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304.

⁶⁵ Visser & Potgieter *Law of Damages* (2012) 80.

CHAPTER 11. PASSING-ON DEFENCE

11.1. Introduction

The passing-on defence essentially refers to a party claiming to have been a victim of an overcharge, who then passes on the overcharge, or a portion thereof, to its own customer base, where as a consequence, the claimant suffered no, or less damage.¹ This defence does not dispute the existence of damage, but rather relates to the *quantum* of damage actually suffered by a particular claimant.

The United States and European Union jurisdictions have different approaches to the applicability of the passing-on defence. In particular, they differ on whether or not the passing-on should be admissible in claims for damage suffered as a result of a competition law contravention. This chapter will consider the various positions adopted as to the applicability of the passing-on defence and whether or not the South African courts would (and should) embrace such a defence when assessing damages flowing from contraventions of the Competition Act.

11.2. Policy behind passing-on

In order to properly consider whether the South African courts will allow or reject the passing-on defence by a defendant to private competition damages actions, it is useful

¹ Verboven & Van Dijk “Cartel damage claims and the passing-on defense” *Journal of Industrial Economics (JIE)* 2009 (57) (3) 457–491. See also Van Dijk & Verboven, *Quantification of Damages* (2005) par 4 for a discussion on the passing-on defence and the quantification of the extent of the passing-on. See also Niels, Jenkins, Kavanagh (2011) 551. Ashurst Report (2004) 30, and Cengiz *Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against Violations of Competition Law: What can the EC learn from the US?* (2007) 6-7. Available at <http://competitionpolicy.ac.uk/documents/8158338/8256114/CCP+Working+Paper+07-21.pdf> (Last Accessed on 15 May 2015). See Ashton and Henry *Competition Damages* (2013) 36 - 69 for a discussion on indirect purchasers and the passing-on defense.

to first consider the policy objective of private competition damages within South Africa's legal environment.

Cengiz argues that the passing-on defence and the reason for its inclusion or exclusion should be considered against the goals of *fairness*, *effectiveness* and *efficiency*. The interaction between these goals, together with the priority sought to be promoted by the individual regime, will dictate the extent to which the passing-on defence will be included within the particular damages framework.²

Consideration was given to the policy objectives of the Competition Act insofar as the needs of society as a whole and individuals are concerned. Arguably the Competition Act aptly provides for both distributive justice and corrective justice to be served.³

The passing-on defence and its recognition (or not) within a damages system further refines the policy as to the extent to which the particular legal system will attempt to advance its *distributive* and *corrective justice* goals. This may be by either promoting a rigid focus on *efficiency* in order to advance the goal of *deterrence* or, alternatively, promoting *fairness* of the action. This achieved by allowing all potential parties a right of recourse for the *actual damage* suffered as a result of the contravening conduct.

The balancing and trade-off between achieving the objectives of *fairness* and *efficiency* (to promote deterrence) is inevitable. A regime whereby actions by all victims limited to actual damage suffered will no doubt result in potentially numerous actions being brought requiring complex economic damages assessments. While this would no doubt lead to a *fair* system, because victims are afforded the opportunity to recover compensation for the damage they have suffered, and defendants will only be liable for the *actual damage* proven to have been caused. The concern is that a multitude of actions will result in less effective actions being launched, a decrease in the incentive

² Cengiz *Passing-on Defense* 4, 8.

³ See Ch 3, par 3.1 *infra* for a discussion of distributive and corrective justice in the context of the Competition Act 89 of 1998.

to bring actions, and ultimately result in a less efficient competition damages system.⁴ The tension between achieving *fairness* and *efficiency* has prompted academic debate and discussion. Landes and Posner argue that decision-makers should promote *efficiency* of the private competition damages regime as deterrence should be the primary goal advanced by the awarding of damages. Consequently, the notion of *fairness* should be considered secondary as to the promotion of the greater good achieved by an efficient system.⁵ They submit that the promotion of deterrence achieved by an *efficient* regime requires that the claim by the *direct purchasers* should be the focal point, and that these claims take precedence over the interests and claims of the indirect purchasers. Their reason for adopting this view is that direct purchasers will inevitably have better access to information and evidence regarding the anti-competitive conduct, and therefore, have greater prospects of successfully prosecuting a damages action.⁶ According to them, the granting of a damages action to direct purchasers would be to the exclusion of indirect purchasers and further will exclude the passing-on defence. They submit that the claims by indirect purchasers would be highly complex, serves to further complicate an already difficult damages action, and result in ineffective and inefficient prosecution of competition damages.⁷

⁴ Cengiz *Passing-on Defense* 8-9.

⁵ Landes and Posner "Should indirect Purchasers have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick" *University of Chicago Law Review*, 1979 (46), 602.

⁶ *Ibid* 609 and 605, where Landes and Posner (unconvincingly) argue that the non-recognition of indirect purchaser claims does not off-set the notion of fairness. Indirect purchasers would benefit from the compensation achieved by the upstream direct purchasers. In view of the benefit of a damages claim accruing to them as direct purchasers, they will not change their buying or pricing model during the cartel and indirect purchasers will therefore benefit from lower unaffected downstream prices. This buffer given to the indirect purchasers serves as the compensation to the indirect purchasers. This argument neglects to adequately achieve the goal of damages within the South African context, which is to allow injured parties claim compensation for actual damage suffered. The position of Landes and Posner would serve to deny indirect purchasers their right to recourse, rather leaving these purchasers with the mere hope that the benefit afforded the direct purchasers will filter down to them. It is uncertain whether any benefit will filter down to the indirect purchasers and whether, if any, such benefit is sufficient to compensate the indirect purchasers for the damage suffered.

⁷ *Ibid* 615: "in addition, the implementation of a passing-on defense, that is, the apportionment of damages among the various tiers in the distribution chain, would involve extremely difficult problems of economic analysis and measurement. Efforts to

Harris and Sullivan argue against the allocation of a monopoly claim to a single category of claimant. They submit that the promotion and achieving of *fairness* as the primary objective of a competition damages regime would require a detailed analysis of the particular market in order to assess the impact of the conduct on indirect purchasers, and whether the passing-on defence would be fair to apply in the particular situation.⁸ Harris and Sullivan consequently favour recognising the claims of all victims, and accordingly, support the use of the passing-on defence in cases of competition damages awards being made.

While the theories behind the various goals sought to be achieved by following a particular policy objective makes for interesting academic debate, the reality insofar as incentives for parties to bring damages actions and/or blow the whistle on anti-competitive conduct is far more dynamic than the academic debates between whether a particular system should be structured in such a way so as to advance the promotion of an *efficient* damages regime on the one hand, or a *fair* damages regime on the other.

In reality, the objective of efficiency could be significantly curtailed if the direct purchasers (who Landes and Posner argue should have a monopoly claim for competition damages) have less incentive to bring a damages action against a supplier. The concern may well exist that a damages action against a supplier may hold a short-term incentive (i.e. the benefit of receiving a damages award). However, such an action by a direct purchaser to institute a damages action against its supplier may be considered commercially unviable over the long run. Furthermore, upstream

solve these problems would make antitrust litigation even more cumbersome that it is already and thereby directly reduce the efficiency of the enforcement process.” See also Werden, G and Schwartz, M “Illinois Brick and the Deterrence of Antitrust Violations – An Economic Analysis” *Hastings Law Journal* 1984 (35), 629, where the authors support the view that an exclusive claim given to one of the parties (i.e. either the direct or indirect purchasers) would lead to a more effective damages regime. The authors favouring the granting of this monopoly damages action to direct purchasers, as they have access to the information necessary for the formulation of the complex quantifications often necessary in competition litigation.

⁸ Harris and Sullivan “Passing on the Monopoly Overcharge: A Comprehensive Analysis” *University of Pennsylvania Law Review* 1980 (128), 269. A monopoly right granted to a single category of claimant is favoured by Landes and Posner (1979) 609 and also see Werden and Schwartz (1984) 652.

players (particularly dominant upstream players) could structure the downstream business in such a way so as to incorporate its direct purchasers into the anti-competitive practice. This will be a serious disincentive for the direct purchaser to lodge a complaint against the supplier or to claim damages from the supplier.⁹

It is apparent that achieving or promoting a system of *fairness* or *efficiency* may force policy makers into certain trade-offs. The ultimate objective of the particular national competition regime will prescribe which policy goal is preferred over the other.

Before assessing the passing-on defence within the context of the South African damages framework, the passing-on defence will be briefly considered in the context the United States and the European Union. In the United States, its inclusion has met with resistance. The European Union accepts the passing-on defence as a necessary part of a compensatory damages regime.

11.3. United States

The development of the defence within the United States has been significantly influenced by decisions taken by the Supreme Court and subsequent legislation adopted by certain states. In *Hanover Shoe v United Shoe Machinery Corporation*¹⁰ the argument by the defendant was that the claimant had passed-on the entire overcharge and therefore suffered no damage at all as a result of the cartel conduct. The court rejected this argument, citing the difficulties in proving the extent of the

⁹ See Cengiz *Passing-on Defense* 12-13. In South Africa the incorporation by upstream dominant players of its downstream customers in an anti-competitive web has been pleaded before the Competition Tribunal in the steel cartel investigations. See *The Competition Commission vs Aveng (Africa) Ltd t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (84/CR/DEC09)*. It was argued by Vulcania, a downstream steel product manufacturer, that the only reason for its participation in meetings was due to the fact that it felt vulnerable that its supplier, the upstream steel mills who also competed in the downstream with Vulcania, would refuse to supply Vulcania with the necessary steel rods, should Vulcania not attend the meetings when requested to do so.

¹⁰ *Hanover Shoe Incorporated v United Shoe Machinery Corporation*, 392 U.S 481 (1968).

overcharge passed-on and the effect that the increase price may (or may not) have had on the volume of sales made by the claimant.

Furthermore, (and more importantly from a policy point of view), the court considered the indirect purchasers to be too far removed from the offending conduct to allow for a meaningful claim to be made against the defendant. The fragmented and conceivably diluted claims of indirect purchasers, which may potentially exist, would possibly result in a situation where indirect purchasers do not pursue a claim for damages against the defendant (the cartel participant) - given the difficulty of the action and the (possibly) relative small financial compensation to which these purchasers would be entitled. This ultimately results in a position where contravening firms could get the benefit of using the passing-on defence without the indirect purchasers ever pursuing their claim. The contravening firm will then not be fully compensating the damage caused by the anti-competitive conduct.¹¹

In the case of *Illinois Brick v Illinois*,¹² the court persisted with the position that indirect purchasers are too far removed to allow for an effective claim and denied indirect purchasers the right to claim damages. This resulted in the defendant being liable for the full extent of the damages to the direct purchasers. The seemingly dismissive attitude adopted by the court in *Illinois Brick* was a result of the policy goals identified by the court. The court was avoiding the anticipated complex litigation which would arise, should indirect purchasers be permitted to claim damages. By allowing direct purchasers the right to claim the full extent of the damage, it would be encouraging these direct purchasers to bring damages actions (particularly as the Clayton Act in the United States permits parties to claim treble damages).¹³ Finally, by disallowing follow-on damages by indirect purchasers, the courts ensure that defendants are not subjected to multiple and potentially overlapping damages actions.

¹¹ *Hanover Shoe Incorporated* *Ibid* at 494. Ashurst Report (2004) 30-31. See also Niels, Jenkins & Kavanagh (2011) 554.

¹² *Illinois Brick Company v Illinois*, 431 U.S 720 [1977].

¹³ The United States' punitive treble damages will be discussed in Ch 13 par 13.4.2.

The decision in *Illinois Brick*, clearly made with specific policy objectives in mind, is not without potential for criticism. Direct purchasers are potentially unduly enriched in cases where a portion of the overcharge was passed-on and the full extent of the overcharge can be claimed by the direct purchasers. Potentially, proper restitution is therefore not achieved. Indirect purchasers who have suffered damage are denied a claim against the contravening firm.¹⁴

This criticism was somewhat tempered in the Supreme Court decision *California v ARC America*.¹⁵ The court had to decide whether the earlier rulings of the Supreme Court limiting claims for damages resulting from contraventions of anti-trust legislation to direct purchasers also prevented indirect purchasers from claiming damages resulting from a contravention of state law, where state law was expressly adopted to recognise the rights of indirect purchasers to claim damages. The court found that the ruling in *Illinois Brick* interpreted the federal anti-trust laws, and did not rule on the nature of the relationship between the federal anti-trust laws and state anti-trust laws. *ARC America* held that *Illinois Brick* provides no basis to suggest that the federal anti-trust laws should be read in such a way as to override the state statutes that permit indirect purchasers to claim damages against parties for a breach of state anti-trust laws.

The piece-meal approach adopted in the United States has created a proverbial monster for defendants to vanquish. The position of the Supreme Court in *ARC America* (permitting the claim by both direct and indirect purchasers against the defendant, where the state statute permits such a claim) could result in a position (in some states, where the problem has not been properly dealt with via legislative intervention) that direct purchasers claim the full extent of the overcharge, and indirect

¹⁴ Landes and Posner (1979) 605 attempt to argue that indirect purchasers will inevitably benefit from the stronger claim afforded direct purchasers as the direct purchasers will temper the effects of the anti-competitive conduct to which indirect purchasers might be exposed.

¹⁵ *California v ARC America Corporation* 490 U.S 93 (1989).

purchasers claim their pound of flesh as well; resulting in the overburdening of the defendant.¹⁶

The lack of clarity on the applicability of the passing-on defence and the respective rights of direct and indirect purchasers to claim damages has been identified as a concern by the Antitrust Modernization Commission.¹⁷ The Commission published a report in 2007 recommending that the damages actions by direct and indirect purchasers should reflect the lost profits actually suffered by direct and indirect purchasers as a result of the competition law violation. This ostensibly paves the way for a position where the passing-on defence may be available against both direct and indirect purchasers.¹⁸

¹⁶ *Ibid* In Canada the British Columbia Court of Appeal in *Sun-Rype Products Ltd v Archer Daniels Midlands Company* (2011), BCCA 187 (CanLII) ruled that the passing-on defence is not available in Canada. A defendant is denied the opportunity to rely on argument that the overcharge was passed on to other parties. This would seemingly create a position where either indirect claimants are denied the opportunity to claim damages, or alternatively, where the defendant (should he be exposed to a claim by the indirect claimants) may face an overly burdensome position. Despite the risk of exposing defendants to full claims by the direct and indirect claimants, the Quebec courts have allowed an action by indirect claimants, despite denying the defendant the opportunity to use the passing-on defence. It justified this view by stating that it would be inappropriate to dismiss the claim of an indirect claimant simply because of the evidentiary burdens associated with these claims. See Jull, Latella, Gates & Gadsden, *Global Guide to Competition Litigation Canada*, 2012, 5. Available at <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/Canada.pdf>. (Last accessed on 12 May 2014.)

¹⁷ The Antitrust Modernization Commission (United States) was created pursuant to the Antitrust Modernization Commission Act of 2002. The Commission consists of 12 members, four of whom were appointed by the President, four of whom were appointed by the leadership of the Senate, and four of whom were appointed by the leadership of the House of Representatives. The Commission must: (1) examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) solicit views of all parties concerned with the operation of the antitrust laws; (3) evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) prepare and submit to Congress and the President a report.

¹⁸ Antitrust Modernization Commission Report (2007) vi and chapter III.B, 265.

11.4. Europe

The European jurisdictions (as well as South Africa) have not seen the extensive competition litigation experienced in the United States. European courts are generally less experienced in dealing with private damages claims arising from anti-competitive conduct and the question of whether or not the passing-on defence should be permitted in such claims. Europe and South Africa can benefit from the discussions pertaining to the inclusion or exclusion of the passing-on defence in the United States, by gleaning from these discussions when considering the possible development, introduction, and application of the passing-on defence in their jurisdictions.

In *Courage v Crehan* the European Court of Justice (EUCJ) recognised the possibility of private damages actions,¹⁹ citing the decision of the US Supreme Court in *Penna Life Mufflers Incorporated v International Parts Corporation*.²⁰ The EUCJ concluded that if a party to an anti-competitive agreement is in an economically weaker position, he may sue the other contracting party for damages. There should not be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.²¹ This judgment led to the European Commission prioritising the development of private damages claims and the passing-on defence.²²

The 2005, European Commission Green Paper, failed to take a clear position on the manner in which the passing-on defence should be recognised and applied. Rather, the Green Paper provided various policy options on how the passing-on defence and

¹⁹ C-453/99 *Courage v Crehan* 2001 ECR I-6297 CJ.

²⁰ 392 U.S. 134 (1968).

²¹ See par 13 and 28 of the judgment by the *European Court of Justice in Courage v Crehan* C-453/99 (2001) ECR I-6297 CJ.

²² Verboven & Van Dijk *Cartel Damages claims and the passing-on defense* (2009) 457–491.

the standing of indirect purchasers might be accommodated within the European regime for private competition damages.²³

The Green Paper proposed the following options on the recognition of indirect purchasers and to what extent the passing-on defence should be permitted. The proposed options were:

Option 21: The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.

Option 22: The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option, direct purchasers will be in a better position, as the difficulties associated with the passing-on defence will not burden the proceedings.

Option 23: The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

Option 24: A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim, and, in a second

²³ European Commission *Green Paper* (2005) options 21–24 listed in the Green Paper.

step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult, but has the advantage of providing fair compensation for all victims.

The 2008 White Paper finally provided the necessary clarity on the position of indirect purchasers and the recognition of the passing-on defence. The Commission accepted that defendants are permitted to raise the passing-on defence against parties who institute a damages claim against them. The rights of indirect purchasers to institute damages claims for competition law contraventions were thus acknowledged.²⁴ This position is in line with the policy and principles associated with a *compensatory* damages regime focused on achieving *fairness* with the additional deterrence viewed as a peripheral benefit achieved by the promotion of private competition damages actions.

The European Commission has clearly opted for the promotion of *fairness* as the policy objective to be advanced by the European private competition damages system. The rights of *all* parties who have suffered damages as well as the defendant's right to only be exposed to the actual damage caused are recognised and advanced by the compensatory nature of the European damages system.

11.5. South Africa

Contrary to the position in the United States where treble damages is permitted for claimants suffering due to a contravention of competition law, South African law

²⁴ European Commission *White Paper* (2008) sec 2.6: "the Commission recalls the Court's emphasis on the compensatory principle and its premise that damages should be available to any injured person who can show a sufficient causal link with the infringement. Against this background, infringers should be allowed to invoke the possibility that the overcharge might have been passed on."

(similar to the position in Europe) does not allow for the awarding of punitive damages and only compensates the claimant for actual loss suffered.²⁵

In *Media24 v SA Taxi Securitization* the following *dictum* appears:

... the Aquilian action requires a plaintiff to quantify and prove the money value of the loss and will award no more than that money value, because it is a compensatory action.²⁶

With the pure compensatory basis of the Aquilian action as a premise, it is highly probable that South African law will favour the inclusion of the passing-on defence. The exclusion of the defence creates the risk of overcompensation of damages. This is one of the criticisms against the United States Supreme Court ruling in *Illinois Brick*.²⁷

The inclusion of this defence will provide the defendant the opportunity to curb the risk of overexposure to a damages action, and will also assist the courts in determining the extent of the *real* damage suffered by a claimant as a result of the competition law contravention. This is also in accordance with the overall object of an award of Aquilian damages.²⁸

Given the compensatory principle fundamental to the South African law of damages, it is anticipated that from a policy perspective, the goal of *fairness* of the action will take precedence over the goal of promoting *effectiveness*. The promotion of the objective of *fairness* will encourage the recognition of indirect purchasers in private competition

²⁵ See Ch 4 par 4.3 where it is confirmed that a claim for patrimonial loss excludes a punitive element within the South African damages framework.

²⁶ *Media 24 v SA Taxi Securitization* 2011 (5) (SA) 329 (SCA).

²⁷ See Ch 11 par 11.3 *supra*.

²⁸ Boberg *Delict* (1984) 489: “the object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed, redressing the diminution in his patrimony that the defendant has caused.”

damages actions, and accordingly, allow defendants to rely on the passing-on defence.

11.6. Conclusion

The debate and uncertainty regarding the position of the passing-on defence in the United States remains unresolved. Europe and South Africa can benefit from the American experience and debates, by considering the benefits and implications of the passing-on defence. Given the compensatory nature of the South African damages system, it is likely that South Africa, like the European Union, will accept the application of the passing-on defence in private competition damages actions. The assessment of the extent of the value passed-on (an aspect not dealt in this study)²⁹ will be an important aspect for the defendant, claimant and ultimately the court when performing an exercise for the estimation of damage suffered by a claimant in cases of competition law contraventions.

²⁹ See Ashurst Report (2004) 31, where an overview of the various determinants of the extent of passed-on damage is discussed.

CHAPTER 12. FINAL DAMAGES

12.1. Introduction

Previous chapters introduced theoretical models that may be employed in the estimation of damage suffered as a result of an anti-competitive practice.¹ This chapter will consider how these methods and models can be applied in practice to determine a final award of damages. This entails the selection of the most appropriate methods of quantification in a particular case and the determination of a particular method to be adopted in establishing a final damages award.²

12.2. Appropriate method

The various economic methods that can be used in quantifying damages resulting from competition law contraventions were discussed in previous chapters.³ These methods each have their own unique characteristics and no one method can be preferred over the other. Rather, the uniqueness of each method makes it possible that in a particular situation, the application of a certain method is more appropriate due to a particular set of facts.

When an individual case is considered, two elements act as a guide when selecting the most appropriate method for the quantification of damages. These are the following:

- Availability and quality of information; and

¹ See Ch 6 – 9.

² This is important, as different methods of quantification will invariably lead to different values, and a claimant has to arrive at a single value of damage suffered.

³ See Ch 6 – 9.

- Strength and accuracy with which a counterfactual position for the particular case can be established.

12.2.1 Availability and quality of information

The accuracy and ultimate success of any method used for the quantification of damages relies fully on the quality of available information used to calibrate the selected method. A higher volume of information and data will not only facilitate a variety of quantification methods and techniques to a particular case, but also serve to increase the reliability, accuracy and credibility of the damages assessment.

Many of the methods⁴ are highly complex (for example, the regression method) and require a significant amount of accurate data in order to be applied in an estimation of damages. There are methods that require very limited information to enable a workable estimation of damages (for example, the difference-in-difference approach which relies on a comparison of averages). The accuracy of an estimation applying any particular method is reliant on the quality and/or accuracy of available information, where the higher the quality and/or accuracy of information, the more accurate the estimation. The volume of information will never substitute for the quality of the information. The economic methods, no matter how intricate and complex, will not transform or improve poor quality information into something more workable or credible.⁵

A premium must therefore be placed on sourcing quality information to calibrate economic methods and therefore specific consideration will be given to how claimants are presently able to gain access to information necessary to properly pursue civil damages actions in South Africa. In addition, consideration must be given as to whether the existing rules are sufficient enough to allow claimants to properly pursue these actions before the courts. The promotion of a *fair* system will be seriously jeopardised if claimants are so rigidly inhibited from properly formulating their claims

⁴ As discussed in Ch 7 – 9.

⁵ *Ibid*

that making successful private competition damages actions become virtually impossible.⁶

12.2.2 Strength and accuracy of counterfactual

All available methods postulate the creation of a hypothetical position (the counterfactual) against which the anti-competitive conduct must be judged. The evaluation of the factual and counterfactual position will ultimately provide the claimant with a value in order to estimate the damage suffered. The more information available on which the counterfactual position may be postulated, the more accurate the eventual damages estimation will prove to be. The following are practical examples of factors that ought to be considered when determining the counterfactual position as the first step on the damages estimation:⁷

- whether the comparator market (industry or geographical area) was affected by cartel conduct during the comparator period;
- the extent of similarity between the comparator market and the affected market based on the similarity of the product compared or market structures; and
- the similarity (if any) between the external factors that influenced the prices or output levels within the comparator and affected markets.

The abovementioned factors are merely examples of some of the factors that may require consideration. These three factors are not a closed list of considerations when creating a workable counterfactual position.

Simple comparator techniques (such as a comparison of averages) are easy to apply and may prove useful when the comparator market or industry closely resembles the affected industry. When there are major factors prevalent in one of the markets (either

⁶ See Ch 14, par 14.2.2; Ch 15, par 15.3.5; Ch 16, par 16.6.1.

⁷ See Ch 10 *supra* for a more detailed discussion on the factors to consider when seeking to establish a counterfactual.

the comparator or affected market), then the application of these simple comparison techniques may be difficult, because it could provide a distorted, counterfactual position and ultimately a skewed perception of the damage which may, or may not have been suffered.

Factors which could lead to a distortion include a significant difference in the size of the respective markets, different levels of growth or inflation experienced by the markets, and different national laws which affect the individual markets (such as government policies or tax laws). These considerations need to be factored into a determination of the counterfactual position and will require the use of far more complex techniques than a mere comparison of averages. This allows for a more accurate determination of the counterfactual situation, and ultimately a better assessment of damages.

12.3. Final damages value

It is conceivable that more than one method of damages estimation can be applied in a particular case.⁸ Furthermore, it is quite possible that the claimant and defendant will arrive at different damages estimations by applying different methods.

Despite the applicability of various methods, it is still required of the court to determine whether the claimant has sufficiently proven its claim for damages and to then arrive at a single and final damages award.⁹ The different methods cannot be ranked. Each method will find application depending on the availability and quality of available information to calibrate the method. A variety of methods could quite plausibly be used in any particular case. It is for the court to establish and evaluate whether a particular method has been sufficiently accurately calibrated by the claimant or defendant to

⁸ See Ch 7 – 9 for a discussion of various economic methods of damages calculation.

⁹ Visser & Potgieter *Law of Damages* (2012) 188. See also *General Accident Insurance Co SA Ltd v Summers* 1987 (3) SA 577 (A) 608; *Waring and Gillow Ltd v Sherborne* 1904 TS 340; *Chisholm v ERPM Ltd* 1909 TH 297; *Hulley v Cox* 1923 AD 234; *Smart v SAR & H* 1928 NLR 361.

allow for an accurate and reliable assessment of the damages, or whether such information was applied in a haphazard manner, leaving doubt as to the accuracy with which the damages can be estimated.¹⁰

Economists argue that when different estimates of the same variable (being the damages award) exist, there are two main solutions available when attempting to select a single value. These two solutions are:

- identifying a preferred approach; or
- pool-selection of viable approaches.¹¹

12.3.1 Identifying a single preferred method

An evaluation of the nature and the quality of the available information is required in order to select a single quantification method to a factual position, i.e. in order to assess which single method of damages estimation would be the most appropriate in the particular case. Where both the claimant and defendant individually select a single method for determining damages, the main benefit is that the trial court hears arguments regarding the construction of the counterfactual position and the subsequent damages estimation based on two methods. This simplifies the selection of the method and subsequent damages estimation it considers the most plausible and appropriate.¹²

As previously stated, the selection of the most appropriate method to apply in a particular case is often complicated by the fact that the different methods available for the estimation of damages cannot be ranked. All the available methods rely to a degree of conjecture and assumption when attempting to construct the counterfactual position.

¹⁰ *Ibid* See also *Vernon Walden Inc v Lpiod GmbH* (Civ No 01-4826) (DRD) United States Court for the District of New Jersey, 15 November 2005.

¹¹ Timmerman, *Forecast Combinations* (2006). See also Hendry & Clements *Pooling* (2004).

¹² Oxera Report (2009) 131.

Assessment of the nature and reliability of the information used to calibrate the method is required when determining which method will mirror the most accurate market conditions, and allow for the most accurate damages estimation; for example, where the parties to a dispute employ similar methods in the estimation of the damages. The one party takes into consideration a particular factor (such as the pricing patterns on alternative goods), while the other party fails to include this factor in its evaluation and estimation of the damages. In such a case, the first method including a particular factor constitutes a more appropriate method to follow. This factor was considered when making the estimate and consequently allows for a more accurate estimation of the movement within the market and ultimately the extent of the damage suffered.¹³

12.3.2 Pool-selection

The pooling of various methods requires the combination of results achieved by two or more of the methods and then arriving at a single damages value. Economists argue that the use of the average of a variety of methods is practically, on average and over time, more accurate than the use of individual methods.¹⁴

An example of how the pooling-selection would work in practice, is where three methods are used. Each of the methods rely on slightly different information, require its own assumptions to be made, and each provides its own differing estimation of the damages in the particular case. The first method estimates the damages at R10 million, the second indicates damages of R11.5 million, and the third finds them at R12.7 million. The pooling of these methods requires that the findings of the three methods be added together (10 million + 11.5 million + 12.7 million). The total is then divided by the number of methods. In this example, the result is divided by three. The pool-selection damages estimate would then be R11.4 million. Although the use of averages, as in this example, is a useful approach, it may not always be the best. This is the case particularly when there are clear external factors that allow for the

¹³ *Ibid*

¹⁴ Zarnowitz, V "The Accuracy of Individual and Group Forecasts from Business Outlook Surveys" *Journal of Forecasting* January 1984, 23.

estimation provided by a particular method to be favoured above another. However, the pooling of methods allows for the negation of some of the individual weakness associated with each of the estimation methods.¹⁵ The major advantage associated with the estimation based on the pooling of viable methods is that by combining these methods, there is the assurance that more of the available information is considered when reaching a final estimation value than would have been the case when relying on a single method of estimation.

12.4. Conclusion

A variety of methods can be used when attempting to arrive at single damages quantum. The choice of which method (or methods) to use and the approach to be adopted (single method or pooling) will, to a large extent, be guided by the quantity, nature and accuracy of the available information. This will ultimately place the court in a position to assess the merits of the claim and to estimate the damage in the best possible way.¹⁶

¹⁵ See Chapters 7 – 9 for a discussion of the different economic methods and their individual merit.

¹⁶ *Turkstra Ltd v Richards* 1926 (TPD) 276, 282: “[...] if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible.”

CHAPTER 13. PRIVATE COMPETITION DAMAGES: INTERNATIONAL EXPERIENCE

13.1. Introduction

In South Africa, private damages actions arising from contraventions of the Competition Act remain largely untested. The previous chapters provided some insight into the theoretical aspects of private competition damages actions, the classification and evaluation of these actions within the existing South African damages framework. Also, the economic models may be used to facilitate the quantification of the damage caused by the contravention of the Competition Act were reviewed.

The focus of this investigation is primarily to determine the philosophical and theoretical nuances of private competition damages actions in a South African context. In addition, there is a need to practically evaluate whether the existing structures of South African civil damages litigation will allow these damages actions to be adequately prosecuted, or whether policy and judicial development may be required to achieve an effective regime of South African private competition damages actions.

South Africa is not alone in having to deal with the complexities of enforcement of competition policy by statutory intervention. The experience gained in other jurisdictions may be valuable in the development and interpretation of South Africa's competition policy, as well as the implementation of competition policy and legislation.¹

The European Union and the United States are arguably the most developed, and may serve as useful comparative jurisdictions, particularly given the differing approach

¹ *Patensie Sitrus Beherend v Competition Commission and Others* [2003] 2 CPLR 247 (CAC) (7 July 2003). Selikowitz JA gave consideration to the United States legislation, the European Community Treaty and policy documents, as well as the United Kingdom Office of Fair Trading Market Definition Guideline (see pages 14 – 17 of the CAC ruling).

adopted by these jurisdictions to certain aspects of private competition law enforcement. Other (arguably less developed) jurisdictions are equally in the throes of the development of an effective and efficient private competition damages regime, and offer interesting perspectives on how certain aspects of private competition law might be approached. Some of these jurisdictions and their respective approach to some of the key aspects of private competition enforcement are highlighted below.

13.2. Canada

Canada, like South Africa, recognises a competition law victim's right to pursue a private competition damages action for loss suffered as a result of a contravention of the Competition Act. Certain policy approaches have been adopted within the Canadian jurisdiction, in order to promote private competition damages actions and achieve a synergy between public and private enforcement. To date, the Canadian courts (like the South African courts) have not adjudicated private competition damages actions.

13.2.1 Foundation for private competition damages actions

Canada permits private competition damages actions for contraventions of the Canadian Competition Act.² These actions are restricted only in cases where the criminal provisions of the Act have been contravened.³

² R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19 at <http://laws-lois.justice.gc.ca/eng/acts/C-34/FullText.html>.

³ See section 45 (which criminalizes price fixing, market allocation and output manipulation). See section 47 (which criminalizes bid rigging) and see section 52 which criminalizes false advertising. In South Africa, private damages as contemplated in section 65(6) of the Competition Act 89 of 1998 are also somewhat restricted. Such actions are only contemplated for conduct falling within the definition of *prohibited practice* (contravention of Chapter 2 of the Act).

Private competition damages are expressly provided for in section 36 of the Canadian Competition Act.

13.2.2 Recovery of damages

Section 36 of the Canadian Competition Act reads as follows:

36. (1) Any person who has suffered loss or damage as a result of
- (a) conduct that is contrary to any provision of Part VI, or
 - (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

A claimant relying on section 36 in order to recover competition damages will have the onus of proving that the defendant has contravened the criminalised section of the Act. Given that the Competition Authorities will undoubtedly have to assess, evaluate and adjudicate the contravening conduct, a claimant's burden will be easily dispensed with. In the absence of any proof to the contrary, a conviction by the Competition Authorities will be sufficient to establish that the defendant has contravened the Competition Act, and more importantly, contravened one of the criminal provisions of the Act.⁴

⁴ Osborne, Binette, Booth, Vaillancourt, Campbell *The Private Competition Enforcement Review*, 8th Edition, Editor: Gotts, I.K, Law Business Research Limited, London, (2015), 97 (*Competition Enforcement*): "moreover, rules against collateral attacks on the result

With the burden of proof thus significantly eased (the civil court adjudicating the damages action will be bound by the finding of the competition action) a claimant is still required to show *actual* damages suffered, as well as prove that the damages were *caused* by the contravening conduct of the defendant.⁵

This position closely reflects that of South Africa. The South African civil courts are bound by the findings of the Competition Tribunal (or Competition Appeal Court) regarding the evaluation of the conduct contravening the Competition Act 89 of 1998.⁶

Section 36 of the Canadian Competition Act not only contemplates the recovery of private damages, but also makes express reference to the recovery of costs incurred by the claimant instituting a private competition damages action.

The Canadian legislature recognises the importance of encouraging private competition damages actions, facilitating such actions by easing the burden of proof of the claimant insofar as the conduct is concerned, and also expressly permitting a claimant to recover the full costs of the investigation and legal proceedings undertaken to recover private competition damages.

Presently the South African legislature has not provided any direction insofar as protecting claimants or any incentive for the recovery of their costs. Given South Africa's divergent socio-economic environment, direction by the legislature may assist

of proceedings that are concluded would likely bar any attempt by a person convicted of a criminal offence under the Act to establish that no offence was, in fact, committed."

⁵ *Chadha v Bayer Incorporated* [2001] OJ No. 1844 (Div Ct) at par 69.

⁶ See South African Competition Act 89 of 1998 section 65(2): "if, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on the merits, and – (a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court on the issue [...]"

claimants with the vindication of their rights to private competition damages against contravening firms.⁷

13.2.3 Who can claim?

Canada has adopted a liberal approach regarding who is permitted to claim private competition damages in terms of the section 36 of the Canadian Competition Act. Section 36 permits *any person* who has suffered loss or damage as a result of the contravention of one of the criminal provisions of the Act to recover such damages from the contravening party.

The Canadian Supreme Court has confirmed the broad scope of potential claimants created by section 36, by accepting that indirect purchasers are included in section 36, *provided* that the indirect purchasers can sufficiently prove their loss and satisfy the necessary element of *causation*.⁸

Switzerland has adopted a more rigid stance of who may proceed with a civil damages action arising from contraventions of the Swiss Competition Act.⁹ Civil damages are limited to those parties, who as a result of the contravening conduct, have been hindered from entering a market or competing within a market. Chapter 3, article 12 of the Swiss Competition Act states:

⁷ See Ch 15, par 15.3.6 and Ch 16, par 16.6.2 dealing with legal costs within South Africa and a recommendation on cost liability in civil actions arising from a contravention of the Competition Act 89 of 1998.

⁸ *Pro-Sys Consultants Limited v Microsoft Corporation*, 2013 SCC 57 at par 131. The issue of causation was further highlighted by the court, within the context of class actions and the members of a particular class, with the court confirming that a party cannot simply rely on the fact that there was a contravention and that at some point in the distribution chain the member was exposed to a fixed price, the member seeking to recover damage will still have to show that actual damage was suffered and satisfy the causation element, showing that the damage was caused by the contravening conduct.

⁹ Act on Cartels and other Restraints of Competition Act, 251 Federal Act, 1995 (as amended).

Chapter 3: Civil Procedure

Art. 12 Rights arising from a hindrance of competition

- 1 A person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request:
 - a. the elimination of or desistance from the hindrance;
 - b. damages and satisfaction in accordance with the Code of Obligations

While Canada and South Africa have a broad description of potential claimants, Switzerland restricts the standing to bring civil damages actions to only persons who are hindered by an unlawful restraint of competition from either entering or competing in the affected market.¹⁰ Parties not falling within the limited scope of claimants acknowledged by the Swiss Competition Act will have to rely on the ordinary delictual actions available in order to recover damages.¹¹

The South African Competition Act 89 of 1998, like the Canadian Act, creates a broad framework for potential claimants. A *person* who has suffered loss or damages as a result of a contravention of Chapter 2 of the South African Competition Act of 1998 may pursue a civil damages action.¹²

¹⁰ Lauterburg, and Zurkinden *The Private Competition Enforcement Review*, 7th Edition, Editor: Gotts Law Business Research Limited, London, 2014, 363 (*Enforcement Review*)

¹¹ *Ibid* 362.

¹² See section 65(6) of Act 89 of 1998.

13.2.4 Evidence: What can be used to formulate a private competition damages action?

13.2.4.1 Canada

The Canadian discovery process essentially requires discovery of documentary evidence. This is followed by an oral discovery process.¹³ The disclosure of documentary evidence is a fundamental part of any damages action and arguably even more so when dealing with an inherently secretive contravention such as a cartel. The Canadian Courts have recognised the importance of facilitating discovery for a claimant in order to allow the right to pursue a private competition action to be properly vindicated. The Supreme Court in *Imperial Oil v Jacques*, allowed a claimant in a price-fixing case to have access to a wire tap obtained by the Competition Bureau during the scope of its investigation.¹⁴ Canada further requires a representative to *be made available* or purposes of a deposition by the other party.¹⁵ Canada has clearly acknowledged the importance of equipping claimant's with information as fundamental to promoting an effective private damages regime.¹⁶

¹³ The discovery of evidence within the South African context is dealt with in Ch 15 par 15.3.5.

¹⁴ *Imperial Oil v Jacques*, 2014 SCC, 66.

¹⁵ See Osborne *Competition Enforcement* (2015) 102. In Canada, a party is required to make a single representative available for deposition. Some jurisdictions in Canada, such as Alberta, require multiple representatives to be made available for deposition. In South Africa, oral evidence from a representative is not provided for. Witnesses may be subpoenaed to appear before court. This requires formal application procedures and needs to be balanced against the defendant's constitutional rights to remain silent and not provide self incriminating testimony. The South African position, save for legislative intervention, would be therefore not be as prescriptive pertaining to the discovery of oral evidence.

¹⁶ The South African competition legislation is not as prescriptive on the availability of information to a claimant. The Act also does not add any additional limitations on access to information - generally permitting, a would-be claimant to gain access to documents and information by way of application. This is similar to the position in Switzerland. See Lauterburg *Enforcement Review* (2014) 361: "US-style discovery is not available in Switzerland and parties must rely primarily on the evidence available to them when filing the lawsuit. However, parties to a court proceeding as well as third parties are under a duty to assist the court to establish the facts of the matter at issue once the trial has commenced, if ordered to do so by the court. While this may not

13.2.4.2 *Easing the burden with expert evidence*

Expert evidence is readily used in Canadian competition matters and subsequent private damages actions. The use of experts not only serves to assist the Competition Authorities with the investigation and prosecution of contraventions, but also assists claimants with the quantification and proving of private competition damages. In the case of class actions, an expert may be useful for purposes of certifying a class to instituting an action, and to demonstrating that the class as a collective has suffered damage as a result of the competition law contravention.

As highlighted above, section 36 Canadian damages are compensatory in nature. A claimant is allowed to recover actual loss or damage suffered. While the damages

as of right appear to deny a claimant's right to access, it is submitted that it does hamper a claimant and serve to impede its prosecution of a civil damages action. (See Ch 15, par 15.3.5 and Ch 16, par 16.6.2 for a discussion on the disclosure of documents and information in a South African civil framework as well as a recommendation for statutory amendment to advance a claimant's right to access to information for purposes of pursuing a civil damages action for contraventions of the Competition Act 89 of 1998). Switzerland, like South Africa, leaves the discovery of documents in civil competition damages actions to the rules regulating discovery in the civil courts. Switzerland has acknowledged the need for a claimant to have access to the information submitted by a leniency applicant. This is an important stance taken by the Swiss authorities, particularly given the position adopted by Premier Foods in the South African High Court hearing, of Premier (a leniency recipient), who has sought to escape civil liability. It is submitted that in the South African framework a leniency applicant already receives the benefit of not being subjected to an administrative penalty and should not be further shielded from civil litigation (see Ch 15, par 15.3.5 and Ch 16, par 16.6.1). The concern that whistle-blowing may be discouraged should the information submitted be made freely available to follow-on litigants is addressed within the Swiss regime by allowing potential litigants access to the information submitted in terms of a leniency application, but, prohibiting copying or reproductions of the documents (see Lauterburg *Enforcement Review* (2014) 363-364: "evidence obtained in an administrative proceeding carried out by the competition authorities may be used in a civil proceeding without limitation. Note, however, that documents relating to a leniency application with the competition authorities may not be copied or otherwise reproduced or duplicated. Access to those documents is restricted to the premises of the competition authorities and the documents may only be manually transcribed.") Balancing the benefits of a corporate leniency programme with a victim's rights to prosecute its civil damages action is a necessary aspect in the advancement of both an effective detection and prosecution of anti-competitive conduct, and facilitation of private competition damages actions.

contemplated by the statute are compensatory, Canadian tort law allows a claimant to recover punitive damages based on the contravention of a statute.¹⁷

A *shot-gun* approach to the recovery of damages arising from contraventions of the Act was curbed by the British Columbia Supreme Court. The court held that the Act is a complete code and was intended by the legislature to be the exhaustive remedies available to a claimant for contraventions of the Act.¹⁸ This approach attempts to put an end to the situation where a claimant can utilise different bases of claims in order to squeeze as much compensation as possible (be it compensatory or punitive) from the particular action. While the finding of the British Columbia Supreme Court is not binding on the other Canadian jurisdictions, it may serve as compelling argument to a restricted interpretation of the remedies available to a claimant recovering damages in terms of section 36 of the Competition Act.¹⁹

Despite the Act permitting private competition damages actions, to date, no *contested* actions based on section 36 of the Act have required adjudication by the courts. The manner in which the courts will therefore approach such actions remains uncertain, however, the most common approach expected to be applied by the courts in assessing damages is anticipated to be the difference-in-difference approach, whereby an analysis will be performed of the difference between the cartel price and the *competitive price* that would have been realised absent the cartel conduct. The *competitive price* is generally determined by experts undertaking a regression analysis

¹⁷ *Ibid* 105.

¹⁸ *Watson v Bank of American Corporation*, 2014 BCSC 532.

¹⁹ *Wong v Sony of Canada Ltd* [2001] 9 C.P.C. (5th) 122 (Ont. S.C.J.). While statutory punitive damages are not contemplated in the Canadian Competition Act, the Canadian common law does allow punitive damages to be recovered in cases of certain economic torts - including common law competition infringements. This could mean that claimants may recover their damage in terms of s 36 of the Competition Act and then claim punitive damages. An example of this is in the *Alberta Ltd v ExxonMobil Canada Ltd* 2011 ABQB 292 (CanLII) case, where the court awarded an additional \$500 000.00 punitive damages against each defendant.

in order to estimate the over-charge and the pass-on of damages so as to arrive at a final damages estimate.²⁰

The passing-on defence was initially rejected by the Canadian Courts.²¹ More recently the courts have acknowledged the passing-on of cartel over-charges and the rights of indirect purchasers to bring private damages actions under the auspices of section 36 of the Competition Act.²²

13.2.5 Australia

13.2.5.1 Foundation for competition damages arising from a contravention of the Competition and Consumer Act 51 of 1975 (as amended)

Australia's competition regime is regulated by the Competition and Consumer Act, 2010.²³ Despite section 82 of the Act expressly allowing private damages actions for contraventions of the Act,²⁴ such damages actions (much like in South Africa) have not been readily pursued in Australia. Public prosecution by the authorities far exceeds private actions.²⁵

²⁰ See Osborne *Competition Enforcement* (2015) 105.

²¹ *British Columbia v Canadian Forest Products Limited*, 2004 2 SCR 74; *Kingstreet Investments v New Brunswick (Department of Finance)* 2007, SCC 1.

²² *Pro-Sys Consultants Limited v Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Limited v Archer Daniels Midlands Company*, 2013 SCC 58; *Infineon Technologies AG v Option Consommateurs*, 2013 SCC 59.

²³ Competition and Consumer Act 2010, Act 51 of 1975 (as amended).

²⁴ S 82 of the Competition and Consumer Act 2010 - Actions for damages:

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

²⁵ Beaton-Wells, C and Tomasic, K "Private enforcement of competition law: Time for an Australian debate" *UNSW Law Journal*, 2012 (35:3) 648 (*Australian Debate*): "despite statutory provision for private actions since the enactment of the Trade Practices Act 1974 (Cth) ('TPA') (now the Competition and Consumer Act 2010 (Cth) ('CCA')), the public enforcement by the Australian Competition and Consumer

Despite the lack of legal precedent regarding section 82 private damages actions, Australia's civil damages regime is compensatory in nature, and accordingly damages available to a claimant will be restricted to the actual loss suffered.²⁶

13.2.5.2 *Standing: who can claim?*

In Australia the debate regarding the standing of indirect purchasers and the passing-on defence remains open. To date, the courts have not been required to make any finding on this question.²⁷ The wording of section 82 and its reference to *a person who has suffered loss or damage*, lends support to the anticipation that Australia will, like Canada and South Africa, take a liberal approach where parties are given the right to bring section 82 damages actions.²⁸ The anticipated recognition of indirect purchasers and their right to claim damages, together with the compensatory nature of Australian civil damages, will necessitate the recognition of the passing-on defence within the Australia private competition damages framework.

Commission ('ACCC') has dominated. Proceedings brought by the ACCC in respect of breaches of the competition provisions of the CCA have far outnumbered proceedings by private parties."

²⁶ Guirguis, McCowan, and Mortensen *The Cartels and Leniency Review*, Ed Varney, Law Business Research, London, (2015), 22. See *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494, where the Australian courts determined that loss referred to in the Trade Practice Act 1974 was limited to actual loss suffered, thereby confirming the compensatory nature of the damages contemplated by the legislature. This position is further confirmed if regard is had to the ruling made in *Musca v Astle Corporation (Pty) Ltd* (1988) 80 ALR 251, 262, where the court confirmed that punitive and exemplary damages are not available to a claimant seeking to recover damages for an infringement of the Competition and Consumer Act 2010.

²⁷ *Ibid* 23.

²⁸ See par 13.1.1.2 above. Note the position in Switzerland where the legislature has expressly provided for parties who may pursue damages actions for contravention of the competition legislation.

13.2.5.3 *Evidence: What evidence may be used to formulate a private competition damages action?*

The Australian civil procedure allows for an applicant to require discovery of documents from another party.²⁹ Essentially, the rules of civil procedure govern a litigant's access to information, and is unchanged by proceedings before the competition authorities and by competition legislation. This closely resembles the position in South Africa and Switzerland.

Despite the Competition and Consumer Act not regulating disclosure (or restricted disclosure) of information, the Australian competition authorities have denied claimant's access to the information pertaining to a leniency application. This has solicited much debate regarding public interest and private enforcement objectives. The courts have promoted the rights of private individuals to claim damages, by allowing the disclosure of information received by the Commission in the course of its investigations and leniency application proceedings.³⁰

13.2.5.4 *Expert evidence*

The Evidence Act 2 of 1995 governs the admissibility of evidence in civil proceedings. Much like South African law on evidence and the admissibility thereof, Australian civil procedure generally disregards evidence if it is merely a person's opinion on a matter. The Evidence Act does however expressly allow for opinions to be admitted into evidence if they are based on a person's specialised knowledge.³¹

Australia's compensatory damages objective and the anticipated recognition of the passing-on defence in private competition damages actions, experts are bound to play

²⁹ See division 7.3 and division 20.2 of the Australian Federal Court Rules.

³⁰ See Ch 14 par 14.2.2. See *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, at 146 [32]; See also *Cadbury Schweppes Pty Ltd v Amcor Limited* [2009] FCA 442; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 7)* [2014] FCA 5.

³¹ See section 79 of the Evidence Act, No.2 of 1995.

an important role in assisting the courts with the estimation of the actual damages suffered by a claimant.

13.2.6 Japan

13.2.6.1 Statutory framework for private competition damages

Japan, whilst innovative and advanced in many various sectors, has not experienced great development insofar as the pursuing of private competition actions are concerned, although momentum is being gained in this regard.

Japan recognises potential private competition damages actions on a statutory level,³² as well as on a delictual level provided for in the Japan Civil Code.³³

Section 25 of the Antimonopoly Law of Japan³⁴ expressly recognises the right of parties who have suffered damages arising from the contraventions contemplated in the Act, to recover such damages from the contravening enterprise.

Article 25

(1) A enterprise that has committed an act in violation of the provisions of Articles 3, 6 or 19 (for enterprises that have committed acts in violation of the provisions of Article 6, limited to enterprises that have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the

³² Private Monopolization and Maintenance of Fair Trade, Law 54 of 1947 (as amended) (herein after referred to as the Antimonopoly Law of Japan).

³³ Article 709 of the Japan Civil Code. A delictual action for competition damages can be brought regardless of whether the JFTC has made a finding on the contravening conduct or not. The benefit of having a JFTC finding is that the claimant's burden of proof is eased.

³⁴ Antimonopoly Law of Japan, Act 54 of 1947.

provisions of Article 8 is liable for damages suffered by another party.

(2) No enterprise or trade association may be exempted from the liability provided in the preceding paragraph by proving the non-existence of intention or negligence on its part.

Before a section 25 damages action can be initiated, the Japan Fair Trade Commission (JFTC) investigate and adjudicate the alleged contravening conduct and make a finding.³⁵ Should a contravention be established,³⁶ then the factual findings of the JFTC will be binding on the civil court. Effectively, this releases the claimant from the burden of proving the elements of conduct and intent.³⁷ A claimant will still have to prove the extent of damages it has suffered as a result of the contravening conduct.³⁸

The Japanese regulatory provisions closely resemble that of the South African statutory framework for private damages actions arising from a contravention of the Competition Act. The Japanese civil courts are equally bound by the factual findings of the competition courts. The claimant is required to prove the remaining elements of causation and damage. This eased evidentiary burden created by section 26 of the Antimonopoly Law of Japan, promotes and facilitates private competition damages actions.

³⁵ Article 26 of the Antimonopoly Law of Japan, 54 of 1947.

³⁶ See article 3 and article 6 of the Antimonopoly Law of Japan, dealing with prohibiting private monopolisation or unreasonable restraints on trade. See also article 19 of the Antimonopoly Law of Japan prohibiting firms from engaging in unfair trade practices.

³⁷ Van de Walle "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis", *The Competition Law Review*, 2011 (8:1) 9.

³⁸ Kawai, Shimanda, and Heike *The Private Competition Enforcement Review*, 5th Edition, Editor: Gotts, Law Business Research Limited, London, 2012, 249 (*Private Competition*).

13.2.6.2 *Who can claim?*

The Japanese legislation recognises a broad range of potential claimants. It essentially permits an action by any party who can establish requisite causal connection between the contravening conduct and the damages suffered.

This broad inclusive approach clearly recognises the right of *indirect purchasers* to pursue an action for damages arising from a contravention of the competition legislation.³⁹ The recognition of indirect purchasers' claims, together with the compensatory nature of civil damages in Japan⁴⁰ inevitably means that the Japanese courts would have to consider the passing-on of anti-competitive prices to downstream customers.

13.2.6.3 *Evidence available to a claimant*

Japan does not have a mandatory discovery process for competition damages actions such as that highlighted in Canada. Rather, the discovery and production of documents are governed by the rules of civil procedure under the Japanese Civil Litigation Code. The managing of discovery through rules of civil procedure is similar to the position in Australia and South Africa.

A claimant will have to apply to the civil court to gain discovery of documents of third party documents, including documents in the possession of the JFTC.⁴¹

³⁹ The wide scope of potential claimants has been recognised by the Japanese Courts. See *Matsushita Electric*, Tokyo High Court, 19 September 1977; *Tsuruoka Toya*, Supreme Court, 8 December 1988.

⁴⁰ *Kawai Private Competition* (2012) 254: "under Japanese law, no punitive damages are available."

⁴¹ See *Goyo Kensetsu*, Tokyo High Court, 16 February 2007, where the applicant requested documents from the JFTC, including interview records from the JFCT investigation.

13.2.6.4 *Benefiting from expert evidence*

While expert evidence is recognised by the Japanese civil courts, expert evidence dealing with Japanese competition law has been restricted to the establishment of the existence of anti-competitive conduct, and not applied for purposes of proving the scope of competition damages.⁴²

The apparent lack of reliance on expert testimony for purposes of quantifying private competition damages may be due to the fact that prior to 2009, the Japanese civil court was required to acquire an opinion from the JFTC on the scope of damage arising from the contravening conduct. This somewhat negated the need for civil courts to delve into these complex damages assessments. Currently, the civil courts have the discretion to assess and quantify section 25 damages actions.⁴³

The fact that the assessment of competition damages presently (post-2009) lies within the domain of the civil courts, would undoubtedly see greater reliance by the Japanese civil courts on the input from economists and industry experts to assist with the damages estimation. It is noteworthy that although Japan may not have a long history of reliance on experts for assessing competition damages in the civil courts, the fact that the JFTC played a significant role in assessing competition damages advances the position that expert testimony is required in complex competition damages cases.

13.2.7 Conclusion

Like many other jurisdictions, the jurisdictions considered continue to grapple with the development of a regime of private competition damages and the facilitation of such actions by the victims of contravening conduct.

⁴² *Kawai Private Competition* (2012) 254.

⁴³ See article 248 of the Japanese Civil Litigation Code.

To this extent, Canada advances such actions by easing the evidentiary burden of proof on the claimant, as well as allowing claimants generous discovery rights. While the other jurisdictions are not as liberal as Canada regarding discovery procedures, all the jurisdictions discussed acknowledge the importance of an effective discovery procedure for the promotion of private competition damages actions, generally leaving the discovery of documents to the rules of civil procedure. In Switzerland and Australia, the courts have further confirmed the importance of an effective discovery procedure in complex cases such as private competition damages actions, by granting a claimant access to highly sensitive information contained in leniency applications.

While none of the discussed jurisdictions have created a rebuttable presumption of damage,⁴⁴ and regulate the extent of damage incurred as a result of contraventions of the competition legislation, the use of experts is encouraged for the quantification of damages.

Litigation is often prohibitively expensive. The position adopted by Canada expressly allowing a claimant bringing an action in terms of section 36 of the Act to recover full costs of the investigation and the action for damages from the defendant serves to somewhat curb the cost concern for a would-be claimant. It is a significant measure to promote and facilitate private competition damages litigation. This is a policy consideration that may prove significant and valuable within a South African context.

The encouraging of class actions in the reviewed jurisdictions further serve to promote access to the courts by individuals who have suffered damages. This allows large group of prejudiced claimants to share the risks and costs of litigation.⁴⁵

The experience of foreign jurisdictions (while not necessarily providing clear-cut answers for South African development) may undoubtedly assist the South African

⁴⁴ See Ch 14 par 14.2.3 where consideration is given to the inclusion of a rebuttable presumption of damage, such as that included in the Hungarian Competition Act.

⁴⁵ Japan has been reluctant to introduce class actions. This may prove to be a serious hinderance to the development and promotion of private competition damages as costs of litigation are a serious stumbling block in any jurisdiction.

legislature and policymakers to achieve the objective of promoting and facilitating private competition damages actions. The reviewed jurisdictions display similarities to South Africa in many respects, and present interesting policy and legislative features for the promotion of private competition damages actions in South Africa. Some of the solutions found in the discussed jurisdictions (including their policy and legislative attempts) remain largely untested.

The European Union and the United States of America are relatively well advanced. They have and display significant policy developments and debates on promoting private competition damages actions. More importantly, the courts in these jurisdictions assessed damages actions and have had to evaluate the methods and factors submitted for the quantification of such actions. Given the often divergent approaches and objectives of the European Union and United States respectively, these jurisdictions may serve as two key case studies from which valuable policy guidance may be gleaned for consideration of how to promote and facilitate private competition actions within the South African environment.⁴⁶

13.3. European Union and United States: Different philosophical sides of the same coin

Policies and proposals to be considered and adopted in an attempt to facilitate private competition damages actions will be determined by the ultimate objectives of a particular jurisdiction with its system of private competition damages actions.⁴⁷

⁴⁶ Sutherland & Kemp *Competition Law of South Africa* 2-34(6). Foster “While America slept: the harmonization of competition laws based upon the European Model”, *Emory International Law Journal*, 2001, 467.

⁴⁷ See Ch 3 *infra* for a discussion on the theories of corrective and distributive justice. See also Ch 11 *infra* for a discussion on damages objectives and the balancing of fairness and effectiveness in the context of the debate regarding the recognising (or not) of private damages actions for indirect purchasers and the application of the passing-on defence.

This section explores some of the policy developments in the United States and European Union, which may benefit the development of private competition damages in South Africa. In order to better understand the rationale of certain proposals and the manner in which the European Union and United States have approached private competition damages, the philosophical foundation of private competition damages must be taken into account. This will facilitate their proper evaluation and will allow the establishment of proposals and policies aligned with South African competition policies and objectives.

The original objective of private competition damages of the United States *Sherman Act 1890* has been rigorously debated by academics.⁴⁸ Weak public enforcement of competition laws led to the promulgation of the *Clayton Act 1914*, where the legislature recognised private competition damages (which by their very nature are compensatory) as an important advancement of the *deterrence* objective striven for by the legislature.⁴⁹ This emphasis on deterrence was further confirmed by the Supreme Court in *Perma Life Mufflers*, where the Court stated that “the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws.”⁵⁰

In order to advance private competition damages, and thereby to deter would-be transgressors, the United States has created a climate conducive to private

⁴⁸ First “Lost in Conversation: The Compensatory Function of Antitrust Law” *New York University Law and Economics Working Paper* No 10–14, April 2010, 5–16, where it is argued that the original reason for promoting private competition damages actions was to ensure that the Sherman Act provided an effective remedy for the compensation of victims of competition law contraventions. A contrasting view is adopted by Page ‘Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury’ *University of Chicago Law Review* 1980(47) 467, where it is argued that the facilitation of private competition damages supports a deterrence objective sought to be entrenched by the legislature.

⁴⁹ Buxbaum *Private Enforcement of Competition Law in the United States – Of Optimal Deterrence and Social Costs*, in Basedow (ed), *Private Enforcement of EC Competition Law*, Kluwer Law International, (2007) 41, 44.

⁵⁰ *Perma Life Mufflers v International Parts Corp* 392 US 134, 139 (1968). See also *Fortner Enterprises v United States Steel* 394 US 495, 502 (1969); *Zenith Radio Corp v Hazeltine Research* 395 US 100, 130–1 (1969); *Pfizer v Government of India* 434 US 308, 315 (1978).

competition litigation. This has included (but is not limited to) the introduction of *treble damages* for victims⁵¹ an effective recognition of class action,⁵² and a comprehensive system of discovery for the benefit of claimants. The effectiveness of the mechanisms to promote private competition damages and proposals on how to make these claims more effective in United States, continues to attract academic discussion.⁵³ However, following the 2007 report by the Antitrust Modernization Commission, the Commission concluded that the current state of affairs “appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensate victims”. In contrast, Europe has not experienced the same exposure to private competition damages actions, but has nonetheless recognised the importance of private competition damages, and the need for guidance to be given to the various member states in order to promote the effectiveness of the EU competition rules. The lack of momentum in private competition enforcement in the European Union can be (partially) attributed to the fragmentation between member states in respect of class actions proceedings for the recovery of damages are concerned (with each member state applying its own laws and policies) and the limited incentive brought about by the rigid recognition of single compensatory damages (i.e no punitive element).⁵⁴

The European Union embarked on an extensive exercise to review the promotion of private competition damages actions.⁵⁵ In particular, the White Paper advances the

⁵¹ Treble Damages are allowed for in sec 4 of the Clayton Act 1914 and are also discussed in this Ch 13, par 13.5.2.

⁵² See Jones “Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market”, *Loyola Consumer Law Review* 2004(16) 409, 427. The United States has also introduced legislation dealing specifically with class actions, *Class Action Fairness Act of 2005*, which creates some semblance of uniformity of class action rules in federal jurisdictions to prevent classes from forum shopping for the most favorable class action conditions.

⁵³ Kolasky ‘Reinvigorating Antitrust Enforcement in the United States: A Proposal’ *Antitrust*, 2008, Vol 22(2) 85; as well as Ginsburg and Brannon “Determinants of Private Antitrust Enforcement in the United States” *Competition Policy International*, 2005, Vol 1(2) 29.

⁵⁴ Sweeney ‘The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the US, Europe and Australia’ *Melbourne University Law Review* 2006(30) 864-865.

⁵⁵ See Ch 6 *infra* for a discussion on the various policy papers and proposals discussed with in the European Union.

EU's objective to ensure that a victim has an effective right to *compensation* for a contravention of EU competition laws.⁵⁶ The White Paper clearly confirms the EU's policy objective of compensation of victims to be achieved by an effective private competition damages system. On the other hand, the EU also acknowledges that an effective system of private competition damages will have the added benefit of deterring would-be infringers from contravening EU competition rules.⁵⁷

The European Commission, while recognising the importance of private competition damages, strives to achieve *compensate* for victims and has steered away from the more dramatic Americanised policies of *opt-out class actions*⁵⁸ and *punitive damages*, displaying the EU's aversion to the promotion of a US-style litigation culture.

The United States and European Union clearly have different objectives insofar as the promotion of private competition damages actions are concerned. The United States views these actions as promoting *deterrence*. The European Union promotes private damages in order to give effective *compensation* to the victims of anti-competitive conduct.⁵⁹

Despite these differences in the objective advanced by private competition damages actions, both the United States and European Union have experienced difficulties in creating uniformity of private competition damages enforcement among its various states. The development of private competition damages and the nature of damages claimable within the European Union and United States, as well as the recognition of class actions in the European Union and United States, will be briefly considered

⁵⁶ This is discussed in the context of the ECJ ruling in *Crehan* - Case C-453/99 [2001] ECR I-6297, [2001] 5 CMLR 1058, discussed in more detail in this Chapter.

⁵⁷ European Commission *White Paper* (2008) 3. See also Peyer 'Myths and Untold Stories – Private Antitrust Enforcement in Germany' *Working Paper No 10–12, Centre for Competition Policy, University of East Anglia*, 1 July 2010. Available at <http://ssrn.com/abstract=1672695> (Last Accessed on 7 June 2015).

⁵⁸ See Ch 14 *infra* for EU proposals on class actions and the United Kingdom bucking the trend by acknowledging the benefits of opt-out class actions.

⁵⁹ See also the different objectives of corrective and distributive justice highlighted in Ch 3 par 3.1.

below. In addition, the South African policy objective will be considered in order to determine what policies and proposals may be useful in South Africa in developing a culture of private competition damages enforcement.

13.4. European Union⁶⁰

13.4.1 Introduction

The European Union has taken proactive steps to facilitate private damages actions in cases of contravention of competition rules.⁶¹ Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) contain certain practices that are considered anti-competitive and prohibited. Article 101 prohibits agreements or

⁶⁰ Comprehensive works and studies have been done on EU Competition policy and development. To this extent see Milutinovic, V *The Right to Damages under EU Competition Law - From Courage v. Crehan to the White Paper and Beyond*, Kluwer Law International, (2010). The work explores the development of EU competition policy and the proposals and initiatives to create a more homogenous system across all member states, in an attempt to make damages actions in the EU more accessible to individual claimants; See also Ashton and Henry *Competition Damages* (2013). This work provides insight to the EU competition regime and balancing the established legal frameworks of the independent member states with the objectives of EU competition policy. The EU, much like the US with its federal system, has experienced significant stumbling blocks for the creation of a uniform approach to various practical aspects of facilitating private competition damages actions, as each member state (or State in the context of the US) has its own laws and procedures governing aspects of its civil prosecution. South Africa does not have the same problem facing the development of a regime of private competition damages.

⁶¹ See Treaty on the Functioning of the European Union (TFEU). Available at: http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEYQFjAE&url=http%3A%2F%2Fwww.eudemocrats.org%2Ffileadmin%2Fuser_upload%2FFDocuments%2FD-Reader_friendly_latest%2520version.pdf&ei=1wp-U6JRs_TsBrqpgNAP&usg=AFQjCNFNmUHtHeGcVDMwrfWknOq2zd5BUw&bvm=bv.67229260,d.ZGU. (Last accessed on 22 May 2014). See also the policy documents discussed in Ch 6 par 6.1.

practices between firms in a horizontal relationship that might have the effect of restricting competition.⁶²

Article 102 essentially deals with the prohibitions placed on firms considered to be in a dominant position.⁶³

13.4.2 EU recognition of private damages claims

Article 101 and 102 of the TFEU are applicable to all the member states forming part of the European Union. National courts of each member state are required to enforce these prohibitions. The question whether member states are obliged to recognise private damages claims arising from contraventions of article 101 and 102 remains unclear.⁶⁴ Two prominent EU cases confirming that private damages actions arising from contraventions of the competition rules are available to injured parties, may provide the necessary guidance on this issue.

13.4.2.1 *Crehan Ltd v Courage Brewery*

*Courage Ltd v Crehan*⁶⁵ was the first case in the United Kingdom where an action for damages resulting from anti-competitive conduct was instituted. In this case, *Courage*, a brewery with approximately 20% market share of beer sales within the United Kingdom, brought a claim against Mr. Crehan for his failure to comply with the exclusive purchase agreement with Courage for all beer purchases for his pub.

Mr. Crehan instituted a counter-claim against Courage, stating that the beer tie clause contained in the contract was anti-competitive and contrary to the articles of the

⁶² Article 101 of the TFEU is similar to s 4 of the South African Competition Act 89 of 1998.

⁶³ Article 102 of the TFEU is similar to s 8 of the South African Competition Act 89 of 1998.

⁶⁴ Whish and Bailey *Competition Law*, Oxford University Press (2012) 297-298.

⁶⁵ Case C-453/99 [2001] ECR I-6297, [2001] 5 CMLR 1058.

TFEU.⁶⁶ The beer tie agreement forced Crehan to purchase beer from *Inntrepreneur* (or its nominees) at prices higher than the prices charged for the same beer to pubs that were not tied into these agreements. The tie agreement meant that Crehan was forced to charge his patrons more for his beer than his competitors needed to charge. The increased price of his beer meant that he sold less beer than he otherwise would have. This caused losses in the operation of Crehan's two pubs and ultimately, the loss of the leases. The High Court dismissed Crehan's counterclaim and held that the beer tie agreement did not infringe Article 81(1).⁶⁷

Mr Crehan took the matter on appeal. The Court of Appeal in the United Kingdom had difficulty with the counter-claim instituted by Mr. Crehan, due to the fact that in English law, a party to an illegal contract is barred from the right to claim damages that may have arisen as a result of the illegal contract.⁶⁸ This effectively prevents a court from recognising Mr. Crehan's damages claim, even if he could prove that the contract was a contravention of the competition rules set out in the articles of the TFEU. Uncertain

⁶⁶ Mr. Crehan relied on art 85 of the TFEU. This article has since been amended and is now a 101.

⁶⁷ *Crehan v Inntrepreneur* [2003] EWHC 1510 (Judgment of the High Court on 26 June 2003). (Article 81 referred to at the time of this trial is now Article 101 of TFEU).

⁶⁸ *Bernard Crehan v Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637. The Court of Appeal reversed the High Court decision that beer ties imposed on a pub tenant had not infringed Article 81, and held that the High Court judge should have followed the European Commission's findings in a similar case. It was the first time that the Court of Appeal awarded damages for breach of competition law. In its judgment on 19 July 2006, the House of Lords overturned this decision (*Inntrepreneur Pub Company and others v Crehan* [2006] UKHL 38), holding that the High Court judge's decision should be restored. The reasoning for the position adopted by the House of Lords was based on the assessment of a position where there are conflicting views held by the national courts and those of the community, In this case Lord Hoffman noted that: "community law prohibits the making by national courts of decisions, which contradict decisions of Community institutions on the same subject matter between the same parties, and strongly discourages the making by national courts of decisions which may be inconsistent with decisions which may yet be made by Community institutions on the same subject matter between the same parties. *But it does not* [...] go the length of requiring national courts to accept the factual basis of a decision reached by a Community institution when considering an issue arising between different parties in respect of a different subject matter (original emphasis). Accordingly, the House of Lords found that the Appeal Court had erred in its consideration of previous findings by the Community Institution and therefore restored the High Court ruling. While damages are in principle still awardable for infringing restrictions of competition law, the overall result is that the judge is entitled to conduct the full assessment of the facts in the absence of an EU decision on the same facts.

as to how to proceed, the Appeal Court stayed the hearing of the matter and referred it to the European Court of Justice for determination.⁶⁹ The European Court of Justice confirmed that in order to give the full effect to Article 101 of the TFEU, it is necessary for the courts to recognise the rights of an individual to bring a private damages claim against those firms contravening the TFEU rules of competition.⁷⁰ This effectively means that the national courts of EU member states are called upon to recognise the rights of individuals to claim private damages for contraventions of the rules of competition stipulated in the TFEU.

13.4.2.2 *Manfredi v Lloyd*

The Italian competition authority found that various insurance companies contravened the competition rules by entering into an agreement in contravention of Article 81 of the TFEU to exchange information for purposes of engaging in a price fixing practice.⁷¹ This resulted in an artificially maintained price increase on vehicle insurance of 20 percent. The clients of the insurance companies affected by the anti-competitive conduct subsequently lodged a claim in order to recover the damage suffered, as a result of the price increase applied by the insurance company cartel. The Italian Court referred the matter to the European Court of Justice, which confirmed its earlier ruling in *Crehan*. Individuals who have suffered loss as a result of a contravention of the competition rules ought to be able to claim damages from the contravening parties insofar as a causal connection can be established between the prohibited conduct and subsequent damage.⁷²

⁶⁹ *Bernard Crehan v Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637.

⁷⁰ Case C-435/99 [2001] ECR I-6297. [2001] 5 CMLR 1058. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999CJ0453:EN:PDF>. (Last accessed on 29 April 2014).

⁷¹ Article 81 (as referred to at the time of this trial) is now part of Article 101 of the TFEU.

⁷² Joined Cases C-295/04 to C-298/04; *Vincenzo Manfredi and Others v Lloyd Adriatic Assicurazioni SpA and Others* (ECJ ruling dated 13 July 2006).

13.4.2.3 Conclusion

The approach adopted by the European Court of Justice in *Crehan* and *Manfredi* not only confirmed the existence of private competition damages for contraventions of EU competition rules, but further confirmed that the national courts of individual Member States retain the discretion to determine and apply the procedural rules that will govern such damages actions (provided these rules comply with the EU's fundamental principles of fairness and effectiveness).

While the European Court of Justice certainly advanced the recognition of private competition damages actions within the European Union, the flaw which at this stage remained unaddressed was that by granting discretion to individual Member States regarding the procedural management of private competition damages actions, the extent to which such actions were practically facilitated remained unresolved. This resulted in lack of uniform application and facilitation of such actions throughout the Member States.⁷³

13.4.3 European Union: Proactive facilitation of private damages actions

The European Court of Justice has firmly entrenched the principle that contravention of EC competition rules will give rise to the right of affected individuals and firms to bring a damages action against the contravening party. However, the procedural and practical aspects associated with such claims are unregulated. The European Court of Justice indicated that:

...in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate courts and tribunals having jurisdiction and to lay down the detailed

⁷³ Ashurst Report (2004) revealed the lack of procedural uniformity between Member States.

procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by the Community law (principle of effectiveness).⁷⁴

The lack of uniformity between member states regarding damages assessment has resulted in a potential patch-work of approaches developing, and being applied throughout the European Community.⁷⁵ Conceivably, a situation could now develop where claimants will 'forum shop' in an attempt to gain access to the jurisdiction of that member state which adopts the most favourable methodology and approach to damages assessments arising from the contravention of competition rules. The European Union attempted to allay some of the potential concerns by introducing the principle that individual member states may deal with damages actions in a discretionary manner. Despite the EU attempts, there is no semblance of consistency or uniformity in the performing of damages assessments by the different member states. This culminated in the publishing of various policy documents for consideration by member states when dealing with private damages actions arising from a breach of competition rules.⁷⁶

The first policy document was the Green Paper. The objective of the Green Paper was to ascertain the main obstacles to establishing a more effective damages system in cases of contravention of competition rules. Some of the primary difficulties highlighted

⁷⁴ *Manfredi* (ECJ Ruling) par 62, 64. See also *Crehan* ECJ ruling par 29.

⁷⁵ Ashurst Report (2004) 43.

⁷⁶ Ch 6 for a discussion on these policy documents. These documents include (i) Green Paper: Damages actions for breach of EC antitrust rules; (ii) White Paper: Damages action for breach of EC antitrust rules; (iii) European Commission: Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union (June 2011); (iv) European Commission: Staff working document – practical guide – quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union (June 2013); and Directive on Antitrust Damages Actions 2014/104/EU (November 2014).

by the Green Paper included issues regarding access to information,⁷⁷ the proving of the element of fault (competition law contravention),⁷⁸ the assessment of damages, and whether an element of punitive damages would serve to facilitate these claims (for example, the inclusion of double damages to claimants in cases of cartel conduct)⁷⁹ and whether the passing-on defence should be permitted or excluded when dealing with damages in cases of a contravention of the competition rules.

The White Paper, published three years after the Green Paper, stated that its primary objective and guiding principle was to allow for full compensation of parties who have suffered as a result of a breach of the EC competition rules.⁸⁰ Where the Green Paper identified areas of difficulty and provided options to the member states on how these difficulties could be dealt with, the White Paper proposed certain measures for adoption by member states and was more rigid in its approach.⁸¹ These measures included proposals regarding the legal standing of indirect purchasers and the recognition of class actions (referred to as “collective redress” in the White Paper).⁸²

The current European Union position is that any individual who has suffered harm is entitled to recoup that harm through a damages action. It advances the notion of creating a system which strives to recognise the claim (or potential claim) of all claimants.⁸³ This supports the compensatory objective of damages actions and accordingly lends support for the recognition of damages actions by indirect purchasers. The White Paper further provided some guidance to a party instituting an action for damages arising from anti-competitive conduct regarding the aspect of fault and the onus of proof. The proposed measure was to make a contravening party liable

⁷⁷ European Commission Green Paper (2005) 5.

⁷⁸ *Ibid* 6.

⁷⁹ European Commission Green Paper (2005) 7.

⁸⁰ European Commission White Paper (2008) 2.

⁸¹ *Ibid* 3.

⁸² *Ibid*

⁸³ See the discussion in Ch 11 *infra* of the policy goals sought to be achieved by competition damages in the context of whether these policy goals are advanced by the recognition of the claims by indirect purchasers or not.

for damage, unless he can demonstrate that the contravention was the result of a genuinely excusable error (a form of strict liability).⁸⁴

The *Proposal for a Directive of the European Parliament and of the Council (PDEUC)*⁸⁵ proposed rules specifically geared towards damages actions arising from anti-competitive conduct. The PDEUC was a response to the difficulties associated with the diverse national legislations and rules applicable in various member states. This caused the unwanted position that some member states may prove more 'suitable' for bringing damages actions based on anti-competitive conduct than others. The proposals promoting the facilitation of competition damages actions were formally adopted by the European Union during November 2014 (*the EU Damages Directive 2014*).⁸⁶

To ensure a more level playing field and to improve the conditions for victims of anti-competitive behaviour to bring damages actions, the European Union considers it of paramount importance to increase legal certainty and reduce differences between member states when dealing with damages actions arising from a breach of the competition rules.⁸⁷ Two significant aspects dealt with in PDEUC (later adopted in the EU Damages Directive 2014) relate to the disclosure of information and the probative value of the findings made by national competition authorities. While the European Court of Justice has left the national courts to their own devices (including applying

⁸⁴ European Commission *White Paper* (2008) 7. The White Paper explains that an excusable error is where a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

⁸⁵ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (11 June 2013). Available at http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf (Last accessed on 31 May 2015).

⁸⁶ European Directive 2014/104/EU, dated 26 November 2014. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG (Last Accessed on 31 May 2015).

⁸⁷ *Ibid* par 9: "it is appropriate to increase legal certainty and to reduce the differences between Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law."

their own rules of evidence and access to information) in dealing with the determination of these damages actions, the European Union aims to ensure that all member states provide a minimum level of effective access to the evidence required by a party to an anti-trust damages action.⁸⁸ The proposal is that decisions taken by the European Commission regarding contraventions of articles 101 or 102 (competition rules) has probative value in damages actions brought before the national courts, and accordingly, national courts cannot make findings regarding the anti-competitive conduct, contrary to the decision made by the European Commission.

13.4.3.1 *Kone AG: the big umbrella of compensation*

With the notion of private competition damages now firmly entrenched within the European Union following the *Crehan* and *Manfredi* rulings, and a concerted drive by the EU to homogenise (to some extent) the procedural aspects of these actions amongst Member States, the extent of this right to compensation was significantly tested in case the of *Kone AG v ÖBB-Infrastruktur*.⁸⁹

Here, the question was no longer as to whether an individual may claim damage suffered at the hands of a cartel, but rather, as to whether a claimant can hold a cartel liable for the pricing effects the cartel may have had within the market. The effect manifested through pricing of substitute products and/or the pricing by non-cartel members. These *additional* price effects are referred to as *umbrella effects* within the market tainted by the anti-competitive conduct.⁹⁰

⁸⁸ *Ibid* par 15: “evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim [...]”.

⁸⁹ Case C-557/12, *Kone AG and others v ÖBB-Infrastruktur AG*, Court of Justice (5th Chamber), 5 June 2014.

⁹⁰ See Inderst, Maier-Rigaud, and Schwalbe “Umbrella Effects” *Journal of Competition Law and Economics* 2014 (10), 739.

The claim for umbrella effects was rejected by the Austrian Courts when confronted with the question in *Kone*. The court cited as reason the lack of sufficient causal connection between the cartel (anti-competitive) conduct and the subsequent umbrella effects within the market to warrant the awarding of these damages.⁹¹ The matter was referred by the Austrian High Court (*Oberster Gerichtshof*) to the European Court of Justice for consideration. The Austrian High Court was concerned that the Austrian procedural rules might fall short of the principles of effectiveness and fairness required by the European Union.

The European Court of Justice took a fundamental stance on the aspect of umbrella effects and the recoverability of these damages by claimants. The very core of article 101 of the TFEU (and in keeping with the principles laid down in *Crehan* and *Manfredi*) was to allow for the *effective* recovery of damages by victims of anti-competitive behaviour and declining the recognition of umbrella effects would constitute a failure by a member state to recognise the rules of the European Union.⁹² Despite the European Court of Justice recognising the right to recover umbrella effects and precluding Member States from summarily prohibiting such damages, the national courts will still evaluate and assess umbrella effects and the extent of damage claimable according to the ordinary principles of civil damages within that particular regime, i.e the tests of causation and foreseeability.⁹³

⁹¹ Article 1295 of the Austrian General Civil Code.

⁹² *Kone* judgment par 37: “[...] Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions”.

⁹³ The claim for *umbrella effects* in the South Africa would fall within the wide ambit contemplated by the Aquilian action as applied with the South African courts. The type of damage may, in theory, be recovered by a claimant. The type of damages will have to be considered against ordinary requirements for such a delictual action to succeed - including causation and whether the damage is the damage contemplated by the legislature to be recoverable for contraventions of the Competition Act. It is anticipated that the South African courts will not readily award such damages following the view of expressed in the US that such damage is too remote and not reasonably foreseeable. (See fn 94, 95 below).

The United States, interestingly, has not accepted the theory of umbrella effects when determining private competition damages. They hold the view that such damages are too far removed, speculative and subject to independent pricing decisions by other firms, resulting in a break of the chain of causation.⁹⁴ In her opinion, Attorney General Kokott argues that umbrella effects and the subsequent damage to victims should be reasonably foreseeable by the contravening firms and hence claimants should be entitled to recover these damages.⁹⁵

The European Court of Justice's recognition of umbrella damages may prove to be of no practical significance. The *Kone* ruling does nothing to alter, limit or change the rules applied by individual Member States insofar as the assessment of private competition damages are concerned. It is anticipated that claimants will have great difficulty – at least on a national level – of convincingly formulating arguments for the inclusion of umbrella effects within the scope of a damages claim.

13.4.4 European Union: Facilitating class actions

The White Paper expressly deals with class actions and the need for member states to facilitate such actions. Individuals and even small businesses are often deterred from instituting private damages actions due to the costs and other difficulties associated with litigation.⁹⁶ The proposal contained in the White Paper is that private actions by individuals and class actions by a group are managed in a complementary

⁹⁴ *Antoine Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1167-68 (C.D. Cal. 2000).

⁹⁵ Opinion of AG Kokott, Case C-557/12 (January 2014) at par 41-52.

⁹⁶ European Commission *White Paper* (2008) 4. France have only as recently as February 2014 adopted legislation regulating class actions, the French Consumer Protection Act, law number 2014-344 (referred to as the 'Hamon Law'). See article by Eversheds Attorneys, *France: Introduction of Antitrust Class Actions by the French Law on Consumer Protection*, published 25 March 2014. Available at http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/France_Introduction_of_Antitrust_Class_Actions (Last accessed on 21 May 2014).

manner.⁹⁷ Insofar as class actions are concerned, the White Paper identifies the following class action mechanisms:

- *Representative Actions*, which are brought by recognised, qualified entities, for example consumer associations, state bodies or trade associations, on behalf of an identified, or identifiable group of victims. Such entities are officially designated by a Member State in advance, or alternatively, certified on an *ad hoc* basis for a particular matter.⁹⁸
- *Opt-in Collective Actions*, which are those actions requiring victims to expressly decide to join the group and thereby combine their individual claim for damages into a single action against the infringing firm(s).⁹⁹

Despite the success these types of actions achieved in many of the EU Member States, the White Paper fails to propose the use of *opt-out* class actions.¹⁰⁰

13.4.5 Summary

The European Union has acknowledged that the enforcement of competition rules is best achieved through complementary public enforcement (by the competition authorities) and private enforcement (through private damages actions).¹⁰¹

The European Court of Justice has ruled that national courts of Member States are empowered to consider and adjudicate private damages actions brought by parties

⁹⁷ *Ibid*

⁹⁸ *Ibid*

⁹⁹ *Ibid*

¹⁰⁰ Delatre “Beyond the White Paper: Rethinking the Commission’s Proposal on Private Antitrust Litigation” *The Competition Law Review (CLR)*, 2011 (8), 39. See also the discussion in Ch 14 par 14.2.5 for a discussion on opt-out class actions proposed by the United Kingdom.

¹⁰¹ PDEUC (2013) 3.

prejudiced as a result of conduct in contravention of the EU competition rules. These actions are paramount in order to give proper effect to the EU competition rules.

The European Commission has published various policy documents aimed at facilitating and homologating damages actions within Member States, in an as uniform a manner as possible, to create legal certainty and consistency for potential claimants.

An effective and efficient private damages regime will advance the goal of full compensation being achieved to victims of anti-competitive conduct and further promote the enforcement of European Union competition rules by acting as an additional deterrent for would-be contravenors.¹⁰² Despite the efforts by the European Union to promote private damages actions, it is significant that since 2006, only approximately 25% percent of findings of anti-competitive conduct made by the European Union Commission have resulted in the injured parties pursuing a damages action against the contravening firm.¹⁰³

Although the number of private damages actions instituted by individuals might be less than the EU Commission may have hoped for, significant research has been done and proposals have been developed and debated by the European Union. These efforts may offer valuable assistance to South African policy makers for the purposes of the development, facilitation and increased accessibility of damages actions for contraventions of the Competition Act in South Africa.¹⁰⁴

¹⁰² A study by Van de Walle on the Japanese system argues that despite private damages actions being brought, the number of competition contraventions in Japan have not decreased, however, he goes on to note that deterrence is only a secondary aim of by private damages actions, with the primary aim being to promote redress of the victims. See Van de Walle *Do Damages Actions Matter in Japan* (Ch 3 fn 23).

¹⁰³ EC Press Release (2013) (Ch 3 fn 31).

¹⁰⁴ See Ch 14 *infra* for a discussion on some proposals within the European Union for the promotion of private competition damages actions, which may be useful for consideration as to whether South Africa can learn from these proposals in order to develop and promote its private competition damages system.

13.5. United States of America

13.5.1 Introduction

Private damages claims for competition law contraventions in the United States are far more developed and more common than in most other jurisdictions. This is largely due to the United States emphasising the role and importance of a strong culture of civil claims plays in supplementing the enforcement efforts of its national antitrust agencies.¹⁰⁵ The US Federal Rules of Civil Procedure are geared towards facilitating private damages actions, by granting plaintiffs broad discovery rights, and allowing small numbers of plaintiffs to pursue class action lawsuits.¹⁰⁶ In addition, a party who can prove damage suffered as a result of anti-competitive conduct, can recover up to three times the amount of the actual damage suffered. The allure of treble damages has, to a large degree, encouraged civil actions by the victims of anti-competitive conduct, and these actions have been further promoted by attorneys who work on a contingency fee basis.¹⁰⁷

¹⁰⁵ McCarthy, Maltas, Bay & Ruiz-Calzado: "Litigation culture versus enforcement culture: A comparison of the US and EU plaintiff recovery actions in antitrust cases" *Antitrust Review of the Americas* (2007) 38 (*Litigation Culture*). Available at: http://lw.com/upload/pubContent/_pdf/pub1675_1.pdf. (Last accessed on 29 April 2014). See also the United States ruling in *Reiter v Sonotone Corp*, 442 US 340, 344 (1979) where the court acknowledged that the legislature created the treble-damages remedy for the very purpose of encouraging private challenges to antitrust violations, thereby enhancing the enforcement of antitrust legislation.

¹⁰⁶ *Ibid* and see McCarthy *Litigation Culture* (2007) 38. Class action law suits will also be considered in the South African context, where these actions are not as easily permitted, and potentially restrict the bringing of private damages actions for competition law infringements. See Ch 15 par 15.2.2.

¹⁰⁷ Canadian common-law recognises punitive damages for cases of certain economic delicts, including cases of common-law competition infringements. Section 36 of the Canadian Competition Act 1985 recognising damages actions, has been held by the Canadian Courts to be compensatory in nature (see *Wong v Sony of Canada Ltd* [2001] 9 C.P.C (5th) 122 (Ont. S.C.J) The recognition of both statutory compensatory and common-law punitive damages has resulted in the courts awarding compensatory damages in terms of the statutory objectives, while awarding additional damages against the defendants as allowed for by the common-law, see 321665 *Alberta Ltd v ExxonMobil Canada Ltd* 2011 ABQB 292 (CanLII).

The European Union is unique in the sense that it has to consider the interests and requirements of various independent member states when applying EU competition policy within the European Community. The United States has, to a lesser degree, a similar difficulty. Individual states have their own anti-trust laws, which exist collaterally with the United States federal anti-trust legislation. The Clayton Act passed by US Congress in 1914 is arguably the most prominent piece of anti-trust legislation in the United States. It created specific anti-trust violations and remedies and refined the provisions and impact of the Sherman Act (1890).¹⁰⁸

Section 4 of the Clayton Act expressly deals with private damages by stating that:

...any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained...

A claimant will be required to not only to prove that the anti-competitive conduct caused the harm, but is further required to establish the necessary *locus standi* for purposes of bringing an application for anti-trust damages (and subsequent treble damages).

The treble damages permitted by the Clayton Act not only serves to deter parties from contravening the provisions of the US anti-trust legislation, but equally serves as an incentive. It encourages private parties to bring anti-trust damages actions and ultimately assists with the promotion of compliance with anti-trust legislation.

¹⁰⁸ The Sherman Act (1890) was the first federal anti-trust legislation in the United States and was geared at protecting consumers from big business entities forming monopolies or cartels. Accessible at http://www.linco.org/sherman_txt.html. (Last accessed on 25 June 2014).

13.5.2 Treble Damages

13.5.2.1 *Conwood Company v US Tobacco*¹⁰⁹

This case is a prime example of how potentially large jury damages awards encourage victims of anti-competitive behaviour to institute civil actions against parties who have infringed competition law.

Conwood (a manufacturer of moist smokeless tobacco) claimed damages from US Tobacco (a competitor) for various contraventions of the Sherman Act.¹¹⁰ For years US Tobacco was the only participant in the market for moist smokeless tobacco. In the late 1970s, two new firms entered the market (including Conwood), and by 1990, US Tobacco's market share had fallen to approximately 87% as the two new market participants slowly started growing. During the 1990s US Tobacco's market share continued to fall, and by 1998 it stood at approximately 77 percent. Conwood alleged that this drop in market share experienced by US Tobacco would have been even greater had it not been for the anti-competitive tactics employed by US Tobacco during the 1990s. The most blatant of these tactics alleged by Conwood to be have been used by the defendant was that, when the sales representatives of US Tobacco restocked and rearranged their display shelves in the various retail outlets, they routinely discarded the Conwood displays, resulting in the Conwood product being hidden at the bottom of the US Tobacco display racks. Conwood alleged that its sales representatives spent most of their time repairing and restocking displays destroyed by the US Tobacco representatives, ultimately resulting in lost sales because there were times when months would pass before the racks were repaired, replaced and restocked.¹¹¹

¹⁰⁹ *Conwood v US Tobacco Company*, 290 F3d 768 (6th Cir 2002).

¹¹⁰ The Act governing antitrust laws in the United States.

¹¹¹ *Conwood v US Tobacco Company*, par 27.

Conwood's damages expert testified using a regression analysis,¹¹² which allowed for an estimation of the growth which Conwood would have realised had it not been subject to the anti-competitive tactics of US Tobacco. The expert estimated damage suffered by Conwood between \$313 million and \$488 million. The jury awarded Conwood \$350 million in damages. This verdict was upheld on appeal. In terms of the Clayton Act, this amount is trebled and resulted in an award of approximately \$1 billion in damages. This is possibly the highest known damages award granted in a case of competition law contravention.

13.5.2.2 *Treble damages: Criticism*

The *treble damages* for antitrust violations permitted by the Clayton Act, while clearly serving a purpose to encourage private competition damages actions, has been criticised. Trebling damages creates too large an incentive for private litigation, as it creates an attractive proposition for litigants to pursue an action with the hope of gaining the treble damages benefit (or conceivably a favourable out of court settlement), even when the merits of the case are not particularly strong.¹¹³ Furthermore, treble damages could disadvantage the public. The threat of treble damage liability could deter companies (for fear of falling foul of the competition rules and incurring punitive damages), from engaging in conduct that may prove pro-competitive and efficiency enhancing. An argument can also be made that the significant penalties and risk of criminal prosecution (including prison sentences) serve as sufficiently effective deterrents against competition law contraventions without the need for an award of treble damages.¹¹⁴

¹¹² See *Conwood v US Tobacco Company*, par 36.

¹¹³ Comments of the section of antitrust Law and the section of international law of the American bar Association in response to the request for public comment of the commission of the European communities on damage actions for breaches of EU antitrust rules, 25 April 2006. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf, 26, 27. (Last accessed on 29 April 2014).

¹¹⁴ *Ibid*

13.5.3 The United States: Class actions for anti-trust damages

The United States has a history of recognising class action lawsuits. The United States Federal Rules of Civil Procedure expressly governs the rules pertaining to these actions.¹¹⁵ Rule 23(a) dealing with the certification of a class for purposes of litigation confirms that in order to qualify it must be shown that:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;
- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

In addition to the certification prerequisites set out in Rule 23(a), a class is further required to show that it complies with one of the criteria set out in Rule 23(b). In terms of this rule a class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other

¹¹⁵ Rule 23(a) United States federal rules of civil procedure. Available at <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>. (Last accessed on 10 May 2014).

members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

The rules of civil procedure for class actions in the United States have limited the class action procedure to accommodate only 'opt-out' class actions. Opt-in class actions are excluded.¹¹⁶ Rule 23(c)(2) requires that the class receive "the best notice practicable

¹¹⁶ Rule 23(2)(c) of the rules of civil procedure (United States). See also Alexander, *An introduction to class action procedure in the United States*. 2000, 8 (*Class Actions*). Available at <http://law.duke.edu/grouplit/papers/classactionalexander.pdf> (Last accessed on 29 April 2014).

under the circumstances.” In cases where the class is not too large, or the potential parties to the class action are easily identifiable, the notice of a class action can be easily served on the individual potential members. Alternatively, should personal notice not be practical, notice may be done by publication in a newspaper, television and radio advertisements, product package inserts, websites, and other methods likely to reach class members.

The Rule further requires that the notice informing class members of the pending action must also inform the parties that they have the right to elect not to be part of the class (to opt-out of the class) and if they do not opt-out, then they will be included in the class, and any judgment, whether favourable or unfavourable to the class, will bind them and they will not be allowed to bring their own action later. If potential class members elect to opt-out of the action, they will be entitled to bring their own action and enforce their own rights separately from the class.¹¹⁷

13.5.4 Summary

The United States has a well-established history of competition law legislation and litigation. The courts nonetheless still have problems in effectively dealing with competition law related litigation – particularly regarding the complex topic of private damages actions.

It is clear that the United States has a policy which includes private damages as an additional means to enforce anti-trust legislative compliance. The awarding of treble damages exceeds the ordinary compensatory role of damages, and serves as a further punitive measure against contravening firms.

Class action law suits are encouraged by the relative ease with which a class can be established in order to further facilitate private anti-trust actions. Individuals are considered part of a class unless they expressly opt-out. This makes class action

¹¹⁷ Alexander *Class Actions* (2000) 9.

litigation particularly attractive, as the proverbial ‘strength in numbers’ is relatively easy to achieve.

13.6. Conclusion

The approaches of *distributive* and *corrective* justice in relation to the South African Competition Act and the objectives advanced by administrative penalties and private competition damages actions was discussed. Insofar as private competition damages are concerned, South Africa advances *corrective justice* (much like the European Union) with increased deterrence merely considered as a positive spin-off of a successful private competition damages culture.¹¹⁸

The European Union and South Africa are in the fortunate position to glean from the experiences of the United States in the facilitation of private damages actions in cases of a contravention of competition rules. The manner in which a particular jurisdiction may allow private damages actions will be driven by the fundamental objective of private damages actions within that particular jurisdiction. The fundamental aim of damages actions in the United States is to deter and punish (hence the treble damages recognised within the United States), whereas in the European Union and South Africa the underlying philosophy driving private competition damages is purely compensatory, without any punitive damages element.¹¹⁹ This will have a significant impact – not only on the mechanisms different jurisdictions put in place – but also on how the individual jurisdictions may implement these mechanisms to facilitate private damages actions.

South Africa is a single jurisdiction. Unlike the European Union with its various Member States and the United States with its federal system, creating a uniform system for the

¹¹⁸ See Ch 3 par 3.1 *infra* for a discussion of corrective and distributive justice within the context of the South African Competition Act.

¹¹⁹ Punitive damages are not available for a contravention of the Competition and Australian Consumer Act 2010. A compensatory damages regime like that of South Africa and the European Union. *Musca v Astle Corporation (Pty) Ltd* (1988) ARL 251, 262.

recognition of private competition damages and developing policies and procedures geared at advancing private competition damages within South Africa should not prove as difficult as in the European Union and the United States. This does not mean that South Africa cannot learn from the lessons and experiences of these vastly more developed competition law regimes.

The next chapter considers possible options for the promotion and facilitation of private competition damages actions and how these might serve to advance private competition damages in South Africa.

CHAPTER 14. PROPOSALS TO FACILITATE PRIVATE DAMAGES ACTIONS ARISING FROM CONTRAVENTIONS OF COMPETITION LEGISLATION

14.1. Introduction

The quantification of damages has often proven a difficult hurdle for claimants to surmount; none more so than when dealing with the quantification of damages arising within the already complex field of competition law. Developed jurisdictions such as the United States and the European Union have grappled with this problem. These jurisdictions have taken different approaches in an attempt to solve the problem, where a clear-cut solution has yet been found. The object of the awarding of damages is of primary importance to the development of a private competition damages actions regime within a particular jurisdiction.

Private damages claims in the United States contain a punitive element, which is constituted by a claimant's statutory right to claim *treble* damages for contravention of the United States antitrust laws.¹ The European Union is a compensatory jurisdiction.² Damages awards are designed to compensate the victims of wrongful contraventions of the competition laws. South Africa, like the European Union, utilises a compensatory damages regime.³ The lessons and debates within the European Union may therefore prove more helpful in South Africa's development of an effective system for facilitating private damages claims arising from contraventions of its Competition Act.

¹ See Ch 13 par 13.4.2.

² See Ch 13 for a discussion on the objective of private competition damages advanced by the European Union and United States respectively.

³ *Media 24 v SA Taxi Securitization* (437/2010) [2011] ZASCA 117 (5 July 2011); 2011 (5) SA 329 (SCA); [2011] 4 All SA 9 (SCA) par 85.

14.2. Proposals by European Union and active steps by Member States

14.2.1 Introduction

The European Union has made various proposals in order to facilitate private competition damages actions in the member states.⁴ Significant proposals relate to:

- promoting access to information for claimants;
- the introduction of a rebuttable presumptions regarding overcharge and passing-on;
- the facilitation of class actions; and
- achieving a balance between the promotion of damages and the encouragement of whistleblowing.

14.2.2 Promoting disclosure

In order to develop a culture of private litigation for competition damages, the EU Green Paper (2005) recognised access to evidence as one of the main issues in need of scrutiny.⁵ The EU Green Paper was merely a commentary document. In contrast, the EU White Paper (2008) sought to add more weight to the debate by making suggestions to Member States on how private competition damages actions could be facilitated through the disclosure of information by proposing that a *minimum level of disclosure* be ensured between the parties.⁶

⁴ European Commission *Green Paper* (2005) and European Commission *White Paper* (2008). See also discussion in Ch 14 par 14.2.

⁵ European Commission *Green Paper* (2005) par 2.1, 5.

⁶ European Commission *White Paper* (2008) par 4, 6.

Effective rules pertaining to the disclosure of information are essential to the promotion of an efficient culture of private competition damages actions. Much of the evidence required by a claimant to properly prove its damages before a court would, in the case of competition contraventions (particularly in the case of cartels), be concealed and difficult for private individuals to access.⁷ In addition, access to sufficient information is a prerequisite in order for a party to be able to formulate its claim, particularly information regarding the quantification. In view of the fragmented procedural system in the European Union (different member states have different procedural rules governing access to, and disclosure of information in civil proceedings),⁸ the European Commission has recognised the need for a more uniform system of information disclosure in cases of damages actions conducted in the European Community. The Proposal for Directive (2013) and EU Directive of Damages (2014) can, in many ways, be seen as the EU Commission's attempt to formulate a more uniform procedure of information disclosure. The aim of this directive is to ensure that there is a "minimum level of effective access to information" required by parties (both claimants and defendants) to prove their claim or defence in competition damages actions.⁹

While access to information is a fundamental building-block in the formulation of private damages actions, the EU Commission is alert to the fact that an overly burdensome disclosure regime could impede public enforcement of competition rules. Without an effective system of public enforcement by the competition authorities, a system of private damages actions will be impossible to sustain. In order to enable a balancing of public and private enforcement of competition rules, the European Union curbed the disclosure of certain evidence. This included: (i) corporate leniency statements and settlement submissions,¹⁰ and (ii) temporary protection of documents

⁷ *Ibid*

⁸ PDEUC (2013) 14, art 16.

⁹ *Ibid*

¹⁰ *Ibid* The disclosure of information and achieving the necessary balance with the Competition Commission's Corporate Leniency Policy will be discussed in more detail at Ch 14 par 14.2.6 *infra*. See also EU *Directive on Damages* (2014) par 26.

prepared by parties in enforcement proceedings (for example replies to information requests submitted to the competition authorities).¹¹

The drive for a uniform European Union practice pertaining to the disclosure of information in cases of damages actions for contravention of the EU competition rules appears to be gathering momentum. Whether it will be welcomed by all the member states, such as was the case with the enforcement of intellectual property rights, remains to be seen.¹²

The tension between maintaining the integrity of the leniency policy and promoting private damages actions has seen debates regarding the disclosure of information develop in various jurisdictions. The Australian Competition and Consumer Commission (ACCC) denied potential claimants access information received in terms of its leniency policy. Despite the ACCC's views, the Federal Court of Australia has to date not accepted that it is in the public interest to protect an informant (i.e. a leniency applicant), Gordon remarks:

there is at least an equal, if not more compelling, public interest in allowing private litigants to rely on the output of regulatory investigations, which are undertaken by public regulators at least in part on their behalf. The ACCC should be 'motivated by a desire to do its duty, both towards the public and towards individual investors'. It is not motivated by corporate profit motives or competitive concerns. Indeed, the ACCC often justifies requests for

¹¹ *Ibid* See also EU *Directive on Damages* (2014) par 25.

¹² Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004, page 45. Available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Feur-lex.europa.eu%2FLEXUriServ%2FLEXUriServ.do%3Furi%3DOJ%3AL%3A2004%3A195%3A0016%3A0025%3Aen%3APDF&ei=0OSqU9jsHKKw7Abpn4GIAg&usg=AFQjCNG7AsvZSUIxdwbg6ImOuYgT8UNb0A&bvm=bv.69620078,d.ZGU>. (Last accessed on 25 June 2014).

findings of fact, declarations and injunctions that may be of little or no importance in the matter before the court on the grounds that they will be useful to follow-on private litigants.¹³

Canadian litigants have also been faced with the question as to whether information provided by leniency applicants can be disclosed by the Canadian Competition Bureau. The right of private litigants¹⁴ to gain access to information held by the Competition Bureau is not clear, particularly if consideration is had to the relevant provision of the Canadian Competition Act governing the disclosure of information. Section 29 of the Canadian Competition Act 1985 appears contradictory and unclear. It prevents the disclosure of information collected by the Competition Bureau. For example, to a private damages litigant, *unless* such information is already publically available or such disclosure is consented to by the person providing the information.¹⁵ Despite this, the courts appear to have acknowledged the need to facilitate private damages actions by promoting accessibility to information allowing claimants access to evidence uncovered during the course of the investigation undertaken by the Competition Bureau.¹⁶ While the Canadian Courts have dealt with the disclosure of

¹³ See *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, at 146 [32]; See also *Cadbury Schweppes Pty Ltd v Amcor Limited* [2009] FCA 442; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* (No 7) [2014] FCA 5. See also Australia – Cartels: Enforcement, Appeals & Damages Actions, 20 February 2014. Available at <http://www.conventuslaw.com/australia-cartels-enforcement-appeals-damages-actions/>. (Last accessed on 17 May 2014).

¹⁴ Private damages actions are permitted in terms of sec 36 of the Canadian Competition Act 1985.

¹⁵ S 29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act – (a) the identity of any person from whom information was obtained pursuant to this Act; (b) any information obtained pursuant to section 11, 15, 16 or 114; (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; (d) any information obtained from a person requesting a certificate under section 102; or (e) any information provided voluntarily pursuant to this Act. (2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized [sic] by the person who provided the information.

¹⁶ See Ch 13 par 13.2.4.1. *Imperial Oil v Jacques*.

information prior to an action being brought, the extent of this information has been limited to the information received from non-parties. This leaves the question unanswered as to whether information received by a leniency applicant will be disclosed for purposes of a private damages action.¹⁷

14.2.3 Rebuttable presumption of overcharge

Jurisdictions within the United States have encouraged private damages actions arising from competition contraventions by individual persons or firms, with the allure of a potential *treble* award of any damage proven by the claimant.

The European Union does not allow for punitive damages awards in an effort to promote private actions. Instead, damages actions are brought within the existing compensatory regime, and in addition, bridges some of the onerous hurdles a claimant faces when instituting a claim for competition damages. One such proposal is the introduction of a rebuttable presumption of damage in the case of competition contraventions, particularly in the case of hard-core and serious cartel contraventions.¹⁸

The EU White Paper (2008) identified the difficulties a claimant may encounter when quantifying damage suffered as a result of a competition contravention. In order to facilitate damages actions and the calculation of damage, the European Commission intends to establish a framework of non-binding guidance to the courts of the member

¹⁷ *GEA Group AG v Venruta Group Co* [2009] 307 D.L.R (4th) 329 (Ont S.C.J); *York University v Bell Canada Enterprises and Rogers Communications Inc* [2009] 46447 Ont. S.C.,J (CanLII). See also *Global Guide to Competition Litigation Canada* 2012 6.

¹⁸ Oxera Article: *The EU draft Damages Actions Directive: another rebuttable presumption to rebut?* Available at: <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/The-EU-draft-Damages-Action-Directive.pdf?ext=.pdf>. July 2013. (Last accessed on 29 April 2014).

states. This guidance will contain information on approximate methods of calculation of damages or some simplified rules to assist the courts in estimating damages.¹⁹

The Proposal for a Directive (2013) appears to have simplified the European Commission's approach. It deviates slightly from the provision of guidelines on the quantification of damages and rather proposes the introduction of a rebuttable presumption of damage in cases of cartel activity:

Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.²⁰

The rebuttable presumption of damage was introduced in its competition regime by Hungary into its Competition Act during 2009. Article 88/C of the Hungarian Competition Act 1996 states:

In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 81 of the EC Treaty, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, *it shall be presumed*, unless the opposite is proved, that the infringement influenced the price to an extent of ten percent.²¹

¹⁹ European Commission *White Paper* (2008) sec 2.5.

²⁰ PDCEUC (2013) art 16, 39. See also EU *Directive on Damages* (2014) par 47.

²¹ Original emphasis.

In 2013, the United Kingdom debated the inclusion of a 20% damage presumption to facilitate claims for private competition damages.²² This proposal was widely debated and commented on by industry roleplayers. The main benefits highlighted by the arguments were that a presumption of damage would serve as an incentive for parties to bring damages actions, and also lead to the quicker resolution of claims facilitating an out of court settlement at an early stage.²³ The major *concerns* raised against the introduction of a rebuttable presumption of damage, were: (i) the question as to whether the presumption makes sufficient provision for the damage caused by a cartel; and (ii) how such a presumption would be managed in relation to the passing-on defence.

A study by Connor and Lande conducted in 2008 observes that the median cartel overcharge would be approximately 25 percent.²⁴ A later study by Niels, Jenkins and Kavanagh in 2011 reached the conclusion that the median overcharge achieved by cartels was 18% and the average cartel overcharge was approximately 20 percent.²⁵

The 20% overcharge proposed by the United Kingdom would appear to have considered the *average* overcharge achieved by a cartel. However, the criticism is that despite the presumption, both parties will no doubt still lead evidence on the extent of the harm *actually* caused by the anti-competitive conduct. The defendant will attempt to rebut the presumed extent of the damage and argue that it should be lower. On the other hand, claimants will in many cases want to adduce evidence showing that the loss suffered is greater than the presumed percentage. It is argued that the presumption does not facilitate competition law-based damages claims as, despite the

²² Organisation: UK Department for Business, Innovation & Skills, *Private actions in competition law: a consultation on options for reform – Government Response* (2013) 24 (Organisation: UK Department for Business). Available at <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> (Last accessed on 29 April 2014).

²³ Organisation: UK Department for Business (2013) 23.

²⁴ Connor & Lande *Cartel Overcharges* (2008).

²⁵ Niels, Jenkins & Kavanagh (2011) 506.

inclusion of a presumption, evidence regarding the quantification is in all likelihood going to be led and damages argued.²⁶

In addition to the accuracy and efficacy of the presumption, a further concern is the facilitation of a presumption of damages and the passing-on defence. The presumption should only be available to direct purchasers. Indirect purchasers should be excluded from a presumption of damage.²⁷ This creates a difficulty in that the compensatory nature of the European damages regime implies a proper recognition of the claims of indirect purchasers. It appears that the merits of the introduction of a rebuttable presumption of damages arising from competition law contraventions can only properly be considered once it becomes clear how the indirect purchasers and passing-on defence will be dealt with.²⁸ In view of the concerns raised, the UK Government did not to pursue the introduction of a presumption of damages.²⁹

14.2.4 Rebuttable presumption of passing-on

The European Commission proposed the introduction of a rebuttable presumption in favour of indirect purchasers (EU White Paper 2008). The EU Commission recognised the difficulties associated with bringing an action as in indirect purchaser. Firstly, the individual claims might be too small for an individual to consider pursuing a damages

²⁶ Organisation: UK Department for Business (2013) 23, par 4.31.

²⁷ *Ibid* par 4.33, 24: “[...] Hausfeld LLP, who said that ‘We believe there should be a rebuttable presumption of loss but that this should be available to direct purchasers only [...]’”

²⁸ *Ibid* par 4.33, 24: The City of London Law Society: “it is not clear how such a presumption can be introduced without resolution of whether the passing-on defence is to be permitted.”

²⁹ *Ibid* par 4.36: “the Government recognises the strong arguments, both principled and pragmatic, presented against introducing a rebuttable presumption of loss. In particular it appreciates that to introduce such a presumption would be a departure from one of the basic principles of English law, that in many cases substantial economic evidence would still be required as the defendant would seek to rebut the presumption and that there are significant difficulties in introducing such a presumption in cases where there may be more than one layer of purchaser.”

action.³⁰ Secondly, the difficulties and complexities associated with quantifying the damage of indirect purchasers who are further removed from the contravention may be overwhelming.³¹ Should these indirect purchasers not actively pursue their damages claim, contravening parties would not be properly accounting to the victims of the anti-competitive conduct, and be effectively unjustly enriched after using the passing-on defence against a claimant.³²

In order to give effect to the compensatory nature of the damages actions and encourage indirect purchasers to exercise their rights to claim damage, the EU Commission proposed that a rebuttable presumption be introduced that all the damage caused by the anti-competitive behaviour was indeed passed on to the indirect purchasers.³³ The Proposal for Directive (2013) further confirmed the EU Commission's desire to include indirect purchasers in private damages actions. Article 12 and 13 of the Proposal for Directive encourages member states to allow the passing-on defence, but also to ensure that the burden to prove that the extent of the overcharge *actually* passed-on to the indirect purchaser rests with the defendant.³⁴

Discussions were held in the United Kingdom regarding the inclusion of a rebuttable presumption relating to the extent of overcharge passed-on to indirect purchasers, and whether legislation should specifically be drafted to cater for the passing-on defence.³⁵ One of the comments received to the proposal by Consumer Focus (a group commenting to the proposals) is that "there should be a presumption that end consumers have borne the overcharges generated by the unlawful practices."³⁶ This

³⁰ The use of class actions to address this concern will be discussed at a later point in this chapter.

³¹ European Commission *White Paper* (2008) art 2.6.

³² *Ibid*

³³ *Ibid* art 2.6: "...the Commission therefore proposes to lighten the victim's burden and suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety."

³⁴ PDEUC (2013) art 12 and art 13.

³⁵ Organisation: UK Department for Business (2013).

³⁶ *Ibid*, 24.

comment clearly supports the view that Government should actively intervene by providing legislative guidance and create a statutory presumption of damage in favour of the indirect purchasers. The Competition Law Association held different views and commented that: “the passing-on ‘defence’ is not a defence properly so-called: it is simply a reflection of the principle that a claimant must prove that he has suffered loss as a result of a tort.”³⁷ This particular view suggests that the passing-on defence need not be governed by statutory intervention, but rather that it is an inherent and already established principle of the law of damages.

The UK Government did not introduce a statutory rebuttable presumption of loss for indirect purchasers in cases of competition law contraventions. The reason for this is that this would be a departure from the established rules governing damages actions, and also that such a presumption would not facilitate or expedite private damages actions. The defendant would most certainly still lead economic evidence in an attempt to rebut the presumption. Furthermore, the practical application of such a presumption would also prove difficult in cases where the extent of the potential passing-on could have extended beyond simply a direct purchaser and indirect purchaser. It may have various tiers of indirect purchasers, adding significant complications to the application of the presumption and the extent of the passing-on at each of the various levels.³⁸

14.2.5 Class actions: acknowledging benefits of opt-out

The European Commission recognises the need to promote a class action culture to facilitate private competition damages actions. This appears not only to be the most practical way to accommodate the claims of indirect purchasers. The accommodation

³⁷ *Ibid*

³⁸ *Ibid* par 4.36. The Government recognises the strong arguments, both principled and pragmatic, presented against introducing a rebuttable presumption of loss. In particular, it appreciates that to introduce such a presumption would be a departure from one of the basic principles of English law, that in many cases substantial economic evidence would still be required as the defendant would seek to rebut the presumption and that there are significant difficulties in introducing such a presumption in cases where there may be more than one layer of purchaser.

of claims by indirect purchasers is of fundamental importance in order to achieve the goal of sustaining a fully compensatory system.³⁹ The need for an aggregation of individual claims (particularly in the case of indirect purchasers) was identified in the EU White Paper.⁴⁰ The White Paper essentially proposed two mechanisms for member states to consider in facilitating private damages claims by a class of victims to the anti-competitive conduct, namely: (i) representative actions; and (ii) opt-in collective actions.⁴¹

The EU White Paper recognises the need for collective redress (class actions) in order to properly ensure the rights of indirect purchasers to claim damages are catered for,⁴² but, the European Commission fails to take the matter any further in the Proposal for Directive (2013). The Proposal for Directive expressly acknowledges that many of the vexing problems since the EU Green Paper (2005) and before currently still exist. These problems include the lack of effective collective redress mechanisms (especially for customers and SMEs).⁴³ The EU Commission did not to take this matter any further than the White Paper, which requires that Member States are *not* compelled to introduce class action mechanisms for private competitive damages claims.⁴⁴

During the consultation process run by the UK Department for Business, Innovation & Skills, the United Kingdom proposed the introduction of an opt-out collective actions regime for competition law to allow businesses and consumers to obtain redress.⁴⁵ Strong arguments for and against the introduction of an opt-out system of class actions

³⁹ PDEUC (2013) art 2(3): "Member States shall ensure that injured parties can effectively exercise their claims for damages."

⁴⁰ European Commission *White Paper* (2008) par 2.1, 5.

⁴¹ The proposals by the European Commission in the White Paper (2008) were discussed in more detail in Ch 13.

⁴² European Commission *White Paper* (2008) par 2.1.

⁴³ PDEUC (2013) 4. The reference to customers would include the indirect purchasers who will benefit from an effective class action regime.

⁴⁴ *Ibid* par 11, 23. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.

⁴⁵ Organisation: UK Department for Business (2013) 27.

were put forward in comments to the proposal by the UK Government. The Law Society of England and Wales argued that: “the ability to bring opt-out collective actions is essential for consumer cases to be successfully brought.”⁴⁶ There were contrary views which argued against the introduction of an opt-out class action system arguing that introducing opt-out class actions carries unacceptable avoidable risks. The risks include the promotion of frivolous litigation in a hope of achieving a favourable settlement from corporates. This in turn would result in a situation where companies are faced with exaggerated and opportunistic claims that serve to damage their reputation and financial standing.⁴⁷ Despite the arguments against the introduction of an opt-out class action, the UK Government introduced an opt-out system of class action damages in cases of competition damages claims.⁴⁸

The decision to propose an opt-out regime (as opposed to the opt-in regime as suggested by the EU Commission in the White Paper (2008)) can be justified by the concern that opt-in class actions might not have the desired effect of large classes coming forward. In order to facilitate these actions and the development of a class action regime, an opt-out system could prove more effective. However, the introduction of the opt-out class action system within the UK is not unconditional. In recognising the importance of ensuring the class action system does not become an abused litigation

⁴⁶ *Ibid* 29. See also the argument raised by Which? stating that the collective action reform: “could have a hugely positive impact but only if such a system could operate, where appropriate, on an opt-out basis.” Which? is a company which acted as a respondent to the questions raised by the UK Government during the consultation process.

⁴⁷ *Ibid* 30: “Some respondents also expressed doubt about the benefits of an opt-out model as well as concern over the risks: the International Chamber of Commerce, for example, said it ‘is unclear why a greater number of claimants would claim their share from an opt-out fund post-quantification than had opted-in to the claim.’ Some of these respondents suggested strengthening the existing opt-in system, for example by increasing the number of bodies that could bring cases, or supported the introduction of pre-damages opt-in. Eversheds, for example, stated that this ‘seems to be an acceptable ‘half-way house’.” Eversheds is an international law firm, who acted as a respondent to the questions raised by the UK Government during the consultation process.

⁴⁸ *Ibid* 31. The UK Government also recognised that opt-out regimes have been introduced into a range of countries such as Canada, Australia, Spain, Portugal, Poland and Norway, where they have not led to widespread abuses, and that an effective and proportionate opt-out regime can be of benefit for both UK businesses and consumers.

process, the UK Government has undertaken to ensure that the necessary safeguards are in place. The class action will consequently be “a limited opt-out collective actions regime, with safeguards, for competition law, with cases to be heard only in the Competition Appeal Tribunal.”⁴⁹

Despite its support of the introduction of an opt-out class action system, the UK Government has strived to achieve a degree of compromise. It acknowledges that in certain cases an opt-in class action may be more appropriate, for example, where the class were to consist of a small number of easily identifiable claimants.⁵⁰ In order to manage the class actions in the scope of private competition damages, and more particularly, the classification of a particular claimant class and the nature of the class action (be it opt-in or opt-out), the UK Government has authorised the Competition Appeal Tribunal to hear applications for the certification of a particular class, and will have the authority to determine whether the class action will proceed on an *opt-out* or *opt-in* basis.⁵¹

The United Kingdom strived to strike a balance between the uses of the opt-in and opt-out class action systems. It chose not to discard the benefits of each system. It reached a compromise where, for the time-being, both the opt-in and opt-out class action system (depending on the appropriateness and applicability of each of the different actions to a particular situation) are available. The empowerment of the Competition Appeal Tribunal to evaluate the certification of a class would appear to have been the easy (and practical) option. The other possibility would have led to it being burdened with drafting legislation in order to expressly manage the newly proposed opt-out regime of class actions. This legislation may potentially have resulted in further litigation and in the delay of actions from being resolved. Currently, the Appeal Tribunal

⁴⁹ *Ibid* par 5.14.

⁵⁰ *Ibid* par 5.15

⁵¹ *Ibid* par 5.16. It has therefore decided that the CAT will be required to certify whether a collective action brought in the new regime is suitable for collective action and whether it should proceed under an opt-in or an opt-out basis.

manages the certification of a class and simultaneously assesses the merits as to what system of class action may be most appropriate.

The benefit of the proposal adopted by the UK Government is that the Competition Appeal Tribunal is a specialist body aware of the nuances and complexities associated with competition law contraventions. The Competition Appeal Tribunal is well placed to assess which of the opt-in or opt-out systems would be the most suitable in a particular matter.

14.2.6 Balancing integrity of corporate leniency programmes and damages

The European Union has recognised the need to promote a uniform system regarding access to information required by parties to private competition damages actions. Nonetheless, the EU Commission was quick to acknowledge the importance of not detracting from the integrity of the policy of leniency to whistle-blowers.⁵² Leniency Policies are an essential tool used by competition authorities. Such policies encourage whistleblowing by parties contravening competition rules. This is of particular importance in the case of cartels that are by their very nature concealed and secretive.

United States legislation strikes a balance between the integrity of its leniency policy and promoting a culture of private damages for anti-competitive conduct. This is done by removing the punitive element of treble damages claimable against leniency recipients and only allowing single damages to be claimed.⁵³

⁵² See Ch 14 par 14.2.2 of this chapter.

⁵³ *International Competition Network, Interaction of Public and Private Enforcement in Cartel Cases*. Report to the ICN Annual Conference, Moscow, May 2007. At <http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf>. 42. (Last accessed on 29 April 2014).

The EU White Paper proposes that the submissions made by a leniency applicant must be protected in order to ensure that such an applicant is not in a worse position than its co-conspirators. This serves to discourage firms from disclosing all relevant information to the Commission for fear of being exposed to a damages claim.⁵⁴ All submissions received in the course of a leniency application, whether successful or unsuccessful, should consequently not be disclosed to would-be claimants for purposes of private litigation.⁵⁵ In addition to the non-disclosure of information filed in support of a leniency application, the EU Commission proposes that a successful leniency applicant only be exposed to civil damages claims by its direct and indirect customers.⁵⁶

The United Kingdom resolves the complexities of achieving the necessary balance between public enforcement and private damages claims through its consultation process. The conclusion was that:

A leniency programme is an essential tool in the investigation of cartels. The possibility of leniency significantly increases the likelihood of detection – and ultimately prevention – of cartel conduct. This can also directly benefit private claimants; as follow-on actions rely on the detection of anti-competitive behaviour by the competition authorities in order to proceed. The Government therefore considers it important that the reforms to private actions do not inadvertently undermine the leniency regime.⁵⁷

With the above as a background, the UK Government has proposed legislative intervention to entrench the rights of leniency recipients to achieve the balance of retaining an effective leniency programme, while simultaneously promoting private

⁵⁴ European Commission *White Paper* (2008) 10 par 2.9.

⁵⁵ *Ibid*

⁵⁶ *Ibid*

⁵⁷ Organisation: UK Department for Business (2013) 57.

damages actions for contraventions of competition rules. The legislative interventions proposed within the United Kingdom are, briefly, that:

- no leniency documents can be required to be disclosed without the consent of the leniency applicant;
- a party may not rely on leniency documents during the civil proceedings without the consent of the leniency applicant; and
- a successful immunity applicant (i.e. immunity recipient) will not be jointly and severally liable for the damages awarded in the civil courts.

A successful public enforcement regime is of utmost importance in establishing a successful private enforcement of competition damages. Any jurisdiction developing its field of competition law by promoting private enforcement will no doubt have to ensure that the necessary legislative steps or policy decisions are taken to ensure the integrity of the leniency programme to whistle-blowers, while simultaneously promoting private damages actions.

14.3. Conclusion

The United Kingdom has actively pursued the introduction of amendments to its damages system in order to incorporate the proposals mooted by the EU Commission regarding the facilitation of private competition damages actions. The introduction of rebuttable presumptions and the promotion of class actions are some of the innovations the UK Government has debated, in order to achieve a more active system of private competition damages actions.

What remains clear is that the use of presumptions of damage and passing-on of damages, as well as the facilitation of class actions, are all commendable attempts to establish a private damages regime. It is inescapable that the complex world of competition damages will always go hand-in-hand with an economic assessment of the extent of damage *actually* suffered as a result of the anti-competitive conduct. The claimant will be required to lead such evidence, should there not be a presumption of

damage, or alternatively, the defendant will adduce such evidence in an attempt to rebut the extent of damage presumed to have been caused by the infringing conduct.⁵⁸ The economic methods for assessing damage consequently remain vitally important tools where courts assess damage. These methods and theories will (either in support of establishing the extent of damage, or in support of rebutting the damage presumed to have been caused) no doubt add value to the court's evaluation of damages.

⁵⁸ *Ibid* par 4.36, 25: "that in many cases substantial economic evidence would still be required as the defendant seeks to rebut the presumption [...]"

CHAPTER 15. DEVELOPING SOUTH AFRICAN PRIVATE COMPETITION DAMAGES ACTIONS

15.1. Introduction

The rebuttable presumptions regarding damage and the passing-on of damage, the introduction of punitive damages, as well as the development of class actions specifically geared towards assisting claimants in cases of competition damages, are all potentially effective and laudable principles, aimed at cultivating and promoting a private damages regime. However, due consideration will have to be given to how South Africa might facilitate the progress of the next phase of its competition law development. It is submitted that this entails the creation of an accessible working environment empowering victims of anti-competitive conduct to institute private damages actions. The object of the creation of such an environment should be the recovery of desired compensation for the damage suffered as a result of anti-competitive behaviour and the aiding of public enforcement of competition policy and rules - additionally serving as a further deterrent to the contravention of the Competition Act.

Various policy and statutory interventions may be introduced in order to add more cogency to the public enforcement of competition rules and laws. Interventions could include the increasing of administrative penalties, the penalising of individuals facilitating anti-competitive behaviour by firms, and seeking to criminalise contraventions of the competition rules and laws with the sanction of imprisonment of individuals found guilty of conduct in breach of the relevant statutory provisions. These measures may be useful to the policing of anti-competitive behaviour and address and enhance the deterrence aspect of competition policy. However, they fail to address the compensatory element sought by private competition damages.

The establishment of a more favourable climate for the prosecution of private competition damages actions within South Africa and possible policy options for South Africa to consider will be addressed below.

15.2. Access to justice: Recognising the plight of the common man

Before considering the existing or potential remedies available in the South African law of civil damages or measures that may have to be adopted in order to give proper effect to an individual's right to claim civil damages for the loss suffered as a result of a contravention of the Competition Act, it may be useful to briefly consider the environment which South African citizens may find themselves when enforcing this right. The plight facing many potential litigants in South Africa was aptly described in *Soombramoney v Minister of Health*¹ where the court highlighted the disparity existing within South Africa by stating that:

we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted, and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.

¹ *Soombramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC) par 8.

The inequality in respect of basic resources will inevitably result in inequality in the ability to achieve parity before the courts.² While various barriers to access to justice exist in South Africa,³ the most prevalent of these is undoubtedly the vast poverty experienced by many common South Africans. The lack of litigation funding is a primary barrier for South Africans to properly prosecute their legal rights. In addition to the bridging of the lack of funding, procedural rules need to be in place to promote the enforcement of substantive rights afforded to individuals; in this instance, the right to claim civil damages from parties found to have contravened the Competition Act. Without sufficient funding and procedural rules, proper effect cannot be given to the right to claim damages.⁴

The imbalance often experienced between litigants insofar as financial resources are concerned, the vast geographical area of South Africa which makes physical access to legal expertise and courts difficult, as well as whether existing procedural rules adequately promote the prosecution of private competition damages actions, will require careful evaluation when considering the measures South Africa may or may not consider in order to promote the rights of victims to damages resulting from of contraventions of the Competition Act.

² United Nations Development Programme “Access to Justice” (March 2004), 3. Available at http://www.unrol.org/files/Access%20to%20Justice_Practice%20Note.pdf (Last Accessed on 9 June 2015).

³ A discussion of barriers experienced within South Africa insofar as access to the social security system is concerned is available in the article by Nyenti “Access to justice in the South African social security system: Towards a conceptual approach” *De Jure* 2013 (46) Volume 4, 901.

⁴ Anderson “Access to justice and legal process: making legal institutions responsive to poor people in LDCs” *IDS Working Paper 178, Institute of Development Studies*, February 2003, 15: “a substantive right on paper is on no use unless it is harnessed to an effective procedural remedy which allows th litigant to actually bring the case before the court in good time and without excessive cost” Available at: <https://www.ids.ac.uk/files/dmfile/Wp178.pdf> (Last Accessed on 9 June 2015).

15.3. Potential tools in the promotion of private competition damages in South Africa

The Legislature will have to promote and advance the deterrence of contraventions of the Competition Act (See Competition Amendment Act 1 of 2009) by introducing increased investigative powers for the Competition Commission, and stronger sanctions against contravening firms and individuals. The potential measures for the advancement and betterment of the compensation objective promoted by private competition damages will be considered below.

15.3.1 Economic models for damage quantification

The complexity of competition damages will almost always require an economic assessment of the extent of damage *actually* suffered as a result of the anti-competitive conduct. This is because the claimant will, in the absence of presumption of damage, be compelled to lead evidence proving his/her damages. If presumption of damage applies, the defendant will invariably attempt to disprove the extent of damage presumed to have been caused by the contravening conduct by using economic evidence.⁵ The economic methods for assessing damage remain a vitally important tool for the judicial assessment of the quantum of damage caused by anti-competitive conduct. These methods and theories will undoubtedly be presented, either in support of establishing the extent of damage, or in support of rebutting the damage presumed to have been caused.

The European Union and United States have actively applied economic models to assist the parties and courts embroiled in private actions in obtaining competition damage, to achieve a viable estimate of the damage caused by the anti-competitive

⁵ Organisation: UK Department for Business (2013) 25 par 4.36, “that in many cases substantial economic evidence would still be required, as the defendant would seek to rebut the presumption [...]”

conduct.⁶ The use and application of economic methods to determine damages certainly appears to be a positive step towards encouraging damages actions based on anti-competitive behaviour. However, these models are not without any difficulties. One of the primary concerns with the use of all economic models in order to establish the quantum of damage caused by anti-competitive conduct is the availability of necessary and reliable information required to populate and implement the applicable econometric model.

The *Children's Resource Centre* case⁷ illustrates the difficulties and complexities of sourcing sufficient reliable information to provide an accurate econometric estimation of the damage sustained. The certification of the class has been remitted to the High Court for the filing of additional affidavits insofar as the application by *class 1* is concerned. The facts of this matter will no doubt present serious difficulties for the claimants and the court regarding the quantification of damages, should the matter ever reach the point where damages have to be quantified.⁸

While the use of economic models may not provide exact answers as to the extent of damage caused by the contravening conduct, the proposed approach accepts that a balance is struck between the accuracy striven for by the economic model and the ease with which the facts and available information will allow the parties to apply the model.⁹ This practical approach to the assessment of competition damages is further supported by the notion that the evidentiary burden placed on claimants should not be so excessively burdensome that it in effect obstructs private competition damages

⁶ Some of these economic models were discussed in Chapters 7 to 9 of this thesis.

⁷ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA).

⁸ The certification application was based on two claims, class 1 being the claimants in the case of the Western Cape Complaint, and class 2 being the claimants for the National Complaint (See Ch 3 par 3.2.2.1 of this thesis). These difficulties were particularly apparent in the case of class 2. Justice Wallis declined to certify as the facts did not support a *prima facie* commonality within the facts upon which the damages action would be based, as the result of the anti-competitive behaviour would dramatically vary *from place to place, time to time and person to person*. See *Children's Resource Centre* par 56 (240).

⁹ De Conick *Quantifying Antitrust Damages* (2011) 5-12.

actions. Requiring a claimant to prove the extent of damages with a high degree of certainty, hampers the promotion of the compensatory object of private damages actions. The damages estimation will of necessity be linked to the postulating of a hypothetical comparator position, which by its very nature contains an element of uncertainty.¹⁰

The South African courts recognise that the exact quantification of damages in claims based on unlawful competition will potentially prove to be overly onerous and that: “in a case such as this damages need not be proved with mathematical precision”.¹¹ Economic models may not provide exact answers regarding the quantum of damages, but it is submitted that they can greatly assist in more reliably estimating the impact of the anti-competitive conduct on a particular situation, by considering all the facts and factors to in the best way possible assess the damage sustained.¹²

15.3.2 Class actions

15.3.2.1 Recognition of class actions

Section 38 of the South African Constitution expressly recognises the right of a group or class of persons to approach a competent court. Section 38 appears to restrict such actions purely to cases, where there may be an infringement of a party’s rights contained in the Bill of Rights. This restrictive application of class actions was rejected by Wallis JA in *Children’s Resource Centre and Others v Pioneer Food and Others*.¹³ The learned judge concluded that in circumstances where a class action may be

¹⁰ *Ibid* 10.

¹¹ *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 17.

¹² *Turkstra Ltd v Richards* 1926 (TPD) 276 at p 282 and confirmed in *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 17: “if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible.”

¹³ 2013 (2) SA 213 (SCA).

necessary to bring a claim for commercial purposes (such as a damages action), failure to permit such a class would infringe an individual's constitutional right of access to the courts in terms of section 34 of the Constitution. Wallis JA further recognised that it would be irrational for a class to be recognised simply because a right in the Bill of Rights can be identified, but in equally compelling circumstances, to deny a class their right to bring an action purely because the Bill of Rights could not be said to have been infringed.¹⁴

The reliance on class actions in private competition damages claims will undoubtedly be of crucial importance. This is due to the fact that many, if not most, South Africans do not have the financial resources to bring such actions on an individual basis. Failure to grant them the opportunity to vindicate their rights in the form of a class action would deprive them of the opportunity to exercise their rights. The notion of a number or group of plaintiffs joining together to pursue a particular claim against a defendant based on common facts between the claims is not novel to the South African judicial system.¹⁵ While a collective action is not a novel concept, the bringing of an action by a representative on behalf of individuals who have not expressly authorised such a representative to act on their behalf, is a new direction in the development of class actions in South Africa.¹⁶

The Constitution expressly recognises class actions. Statutory guidance as to the exact mechanisms of these actions have been long awaited. Despite the early steps taken by the South African Law Commission to prepare recommendations pertaining to class actions as far back as August 1998, Parliament is yet to develop these

¹⁴ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) 226, par 21. Wallis states: "in my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimant's inability to point to the infringement of a right protected under the Bill of Rights."

¹⁵ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) 222, par 14. Wallis refers to Uniform Rule 10 and Admiralty Rule 2(3) in fn 7 of his judgment highlighting that it is expressly permitted to bring proceedings under a collective title.

¹⁶ *Children's Resource Centre* par 14 (222).

recommendations or adopt a statute to regulate class actions.¹⁷ The lack of statutory intervention and guidance, together with the fact that the Constitution expressly recognises class actions, have forced the courts to develop class actions through the exercise of its inherent powers to regulate its own proceedings and power to develop the common-law.¹⁸

The recent rulings in *Children's Resources Centre* and *Mukaddam*¹⁹ resulting in significant progress in dealing with class actions are of considerable importance. The Supreme Court of Appeal considered and entertained both the opt-out and opt-in class action systems. This results in what appears to be a dual approach – similar to that which is proposed in the United Kingdom following the U.K. Government's decision to specifically include opt-out class actions in competition law damages claims.²⁰

15.3.2.2 Certification of opt-out class actions: *Children's Resource Centre*

In *Children's Resource Centre*, it was held that class actions include claims wider than simply infringements of the Bill of Rights.²¹ The applicants represented a class of consumers, and sought the certification of an *opt-out* class. The appeal before the Supreme Court dealt exclusively with the matter of certification of the class and particularly, the certification for an opt-out class action. In the court's ruling, the following necessary elements were required in order for the applicant to succeed with the certification of the class:²²

¹⁷ South African Law Commission Project 88, *Recognition of Class Actions and Public Interest Actions in South African Law*, August 1998. See also *Children's Resource Centre* par 15 (222).

¹⁸ *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E). Froneman stated that: "our common-law was poorer for not allowing the development of representative or class actions."

¹⁹ *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

²⁰ Ch 14 par 14.2.5.

²¹ *Children's Resource Centre and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA) par 21 (226).

²² *Ibid* par 25-27.

- a class which is easily identifiable by using objective criteria;
- a *prima facie* case on the evidence presented;
- the claims of the members of the class must be common to the class, and based on the same facts;
- the damage claimed on behalf of the class arose from the stated cause of action and the extent thereof is determinable;
- an appropriate system for the allocation of damages (should any be awarded) to the members of the class must be indicated;
- the representative is suitable for purposes of bringing the action and representing the class; and
- the nature of the claim and the circumstances of the members render a class action the most appropriate course of action for determining the damages.

15.3.2.3 Certification of opt-in class actions: *Mukaddam*

In *Mukaddam and Others v Pioneer Food and Others*,²³ Nugent JA dealt with the certification of a class consisting of bread distributors. In this case, the court was asked to certify an *opt-in* class action. The appeal court declined to recognise the opt-in class as requested by the applicant, holding that such a class can only be certified where *exceptional circumstances* are present.²⁴ The applicants lodged an appeal against the judgment of the Supreme Court of Appeal with the Constitutional Court. The Constitutional Court ruled that the certification of the class on behalf of the distributors should not be summarily dismissed, but rather (as with the class in the *Children's Resource Centre* case) be remitted to the High Court for the filing of further affidavits.²⁵

The Constitutional Court, by favouring the position adopted by Wallis JA in the *Children's Resource Centre* matter, developed the position relating to class actions in two significant respects. Firstly, the Constitutional Court moved away from a rigid set of rules or requirements for the certification of a class. It rather considered these as

²³ 2013 (2) SA 213 (SCA).

²⁴ *Ibid* par 14.

²⁵ *Mukaddam and Others v Pioneer Foods and Others* 2013 (5) SA 89 (CC) par 56.

guidelines to be taken into account when determining if the interests of justice are best served by the certification,²⁶ and secondly, the Constitutional Court dismissed the notion that the certification of an opt-in style class action required “exceptional circumstances”.²⁷

15.3.2.4 Conclusion: Class actions in South Africa

Since the 1998 recommendations regarding class actions published by the Law Commission, there was a hiatus in any further legislative development of these actions. While legislative intervention would no doubt have aided certainty in the development of class actions in South Africa, the recent rulings by the Supreme Court of Appeal and Constitutional Court have paved the way for more accessibility to class actions in South Africa, particularly in the case of private damages actions arising from contraventions of the Competition Act of 1998. The Courts have seemingly accepted the possibility of the recognition of both *opt-in* and *opt-out* class. Given the significantly large percentage of poor persons comprising the consumer base within South Africa,²⁸ class actions will probably tend to be opt-out. Opt-out class actions ensure that a significantly large class is easily represented, without the need to require opt-in by each affected individual, which results in insurmountable logistical difficulties for the representative. The recognition of opt-out class actions by the Supreme Court of Appeal certainly levels the playing field in respect of financial imbalance between the common man on the street and the contravening firm. Through collective redress of this nature, individuals (who of their own accord would not have been in a position to vindicate their right to claim damages), can vindicate their rights. A further feature of opt-out

²⁶ *Ibid* par 35. See also the requirements for certification as set out by Wallis in *Children's Resource Centre v Pioneer Foods* 2013 (2) SA 213 (SA) par 26.

²⁷ *Mukaddam and Others v Pioneer Food and Others* 2013 (5) SA 89 (CC) par 55. See also *Mukaddam v Pioneer Foods* 2013 (2) SA 254 SCA par 14.

²⁸ South Africa's population experiences significant poverty, with 26% of the population surviving on as little as R305.00 a month. See Advocacy Aid article, *Statistics show 26% of South Africans living on less than R305*. Available at <http://www.advocacyaid.com/index.php/cross-cutting-issues/153-statistics-show-26-of-south-africans-living-on-less-than-r305> (Last accessed on 25 June 2014). See also Report by Stats SA, *Living Conditions of Households in SA 2008/2009*, available at www.statssa.gov.za/publications/P0310/P03102008.pdf. (Last accessed on 25 June 2014).

class actions within the South African context (as opposed to opt-in class actions) is the fact that, given the large geographical area over which victims (and in the case of South Africa financially poor victims) have to travel, an opt-out class action system will further allow many potential claimants to be recognised in a centralised location, without time and costs having to be incurred in securing the confirmation of whether they would like to opt-in with the class action suit.

15.3.3 Punitive damages

In the United States of America, *treble* damages may be claimed by the victims of anti-competitive conduct.²⁹ In contrast, the European Union acknowledges and allows only compensatory and no punitive damages.

The introduction of punitive damages has yielded mixed success in the United States. The allure of treble damages stimulated the institution of private competition damages actions. However, the attraction of a potentially large payday has been exploited by using class actions and by attorneys working for large contingency fees, resulting in frivolous and opportunistic litigation against corporates. Furthermore, the fear of treble damages and competitors being punished with an administrative penalty, together with punitive damages, also raises concerns that it might stifle corporates for actively pursuing business for fear of inadvertently contravening competition legislation.³⁰

Despite the European Union's compensatory damages regime, the Green Paper (2005) listed one of its options the introduction of double damages for claimants victim to horizontal anti-competitive conduct (i.e. cartel conduct).³¹

²⁹ See Ch 13 par 13.4.2.

³⁰ See Ch 13 par 13.4.2.2 for criticism of the treble damages approach applied in the United States.

³¹ European Commission *Green Paper* (2005) sec 2.3, 7: "...doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements'. The addition of punitive damages for victims of cartel conduct was not further developed by the European Union.

In the South African legal system (as in the European Union), damages are viewed as being compensatory in nature and punitive damages are not recognised.³² The policy decision to include punitive damages in order to properly compensate the victims of anti-competitive conduct and to properly facilitate the enforcement of the Competition Act would require legislative intervention. South African courts are not empowered to introduce this foreign concept into the existing damages framework.³³

15.3.4 Rebuttable presumptions

The European Union proposed the inclusion of a rebuttable presumption of damages in order to ease the burden on a party claiming damages for a contravention of the competition rules. Hungary has enacted a rebuttable presumption into legislation.³⁴

The United Kingdom has considered whether the proposed introduction of a 20% rebuttable presumption of damage in the case of cartel contraventions would serve to facilitate the introduction of private competition damages actions. Following comment and debate, the UK Government eventually elected not to introduce presumptions of damage.³⁵

Should the South African legislature decide to proactively promote private competition damages, it will have to consider whether the inclusion of rebuttable presumptions of

³² Ch 4 par 4.3; Ch 11 par 11.4. See also *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 152H; *Jones v Krok* 1996 (1) SA 504 (T) 515G-H; *Media 24 v SA Taxi Securitization* (437/2010) [2011] ZASCA 117 (5 July 2011); 2011 (5) SA 329 (SCA); [2011] 4 All SA 9 (SCA) par 85. See also Visser & Potgieter *Law of Damages* (2012) 30.

³³ *Jones v Krok* 1996 (1) SA 504 (T) 515G-H: "...the award of punitive damages is such instances, in which category falls the award in this case, is alien to our legal system." See also Visser *et al.*, 15 – 19 for a discussion on the influence of English law and the eventual exclusion of punitive damages from the application of the Lex Aquilia and 196: "it is no longer possible to recover or award an amount to punish someone by means of an action for damages." See also *Minister of Defence v Jackson* 1991 (4) SA (ZS) 27.

³⁴ See Ch 14 par 14.2.3.

³⁵ *Ibid*

damage or concerning passing-on³⁶ is an attractive option to promote damages actions by parties falling victim to contraventions of the Competition Act. The legislature, in its consideration, should be aware that a presumption of damage, together with a developed class action system, may create an ideal platform for abusive and vexatious litigation, by parties who may easily form a class (as the loss is already presumed) and with a very limited costs risk due to the collaborate effort of the members. Class actions could also potentially be used to harass corporates by threatening litigation.

While a rebuttable presumption of damage would certainly serve the purpose of promoting the bringing of private competition damages actions, the inclusion of a rebuttable presumption would *not* effectively facilitate the resolution of these claims from a practical perspective. The courts will still be required to consider economic evidence in relation to the either the rebutting of the presumption by the defendant or economic evidence by the claimant, showing that damage has occurred beyond that presumed to have arisen.³⁷ The position adopted by the UK Government is supported and it is submitted that the inclusion of a rebuttable presumption of damage should not be introduced to facilitate private competition damages actions in South Africa.

15.3.5 Disclosure of information and corporate leniency policy

In view of the submission that a rebuttable presumption of damage should *not* be introduced in the South African law of damages, access to information by claimants for purposes of formulating their damages claim becomes of vital importance. In order to succeed with a claim for damages, the onus falls squarely on a claimant to prove the necessary delictual elements as well as the quantum of the damage suffered. It is commonly accepted that leniency programmes encouraging whistleblowing by cartel members has become an effective (and arguably necessary) tool for competition

³⁶ See Ch 14 par 14.2.2.

³⁷ Organisation: UK Department for Business (2013) 23, par 4.31.

authorities to properly expose, uncover, investigate and prosecute anti-competitive conduct, particularly in light of the secrecy surrounding cartel contraventions.³⁸

In keeping with the international trend, South Africa's Competition Commission adopted a Corporate Leniency Policy (CLP).³⁹ The CLP has proven an invaluable tool for the South African Competition Commission in uncovering anti-competitive conduct that might otherwise have gone undetected.⁴⁰ The protection of the efficacy of this tool and the promotion and facilitation of private competition damages actions require careful balancing. On the one hand, claimants will require information from a contravening firm in order to properly formulate and calculate the extent of damage caused by the contravening conduct. On the other hand, unrestricted access by a would-be claimant to all the information of a leniency applicant can potentially curb the enthusiasm of a cartel member from coming forward and confessing its participation in the cartel as the information provided could conceivably expose such a confessing firm to a private damages action.

The United States strikes a balance between facilitating the individual's right to claim private competition damages and assisting the competition authorities to maintain the integrity of its leniency programme, by removing the punitive element of treble damages and restricting the damages claimable from a leniency recipient to normal damages.⁴¹ This ensures that the claimant's claim is not significantly curtailed and still

³⁸ See paragraph 2.4 of the South African Corporate Leniency Policy. Available at <http://www.compcom.co.za/corporate-leniency-policy/>. (Last accessed on 29 April 2014).

³⁹ *Competition Commission Corporate Leniency Policy Notice 628/2008* published in Government Gazette 31064 of 23 May 2008 as amended from time to time.

⁴⁰ See Ch 3 par 3.2.2.1, fn 47 for a note of the South African Corporate Leniency Policy.

⁴¹ In the United States, a successful leniency applicant will only be exposed to a claim for normal damages, not the punitive treble damages. See the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 section 213: "(a) IN GENERAL- Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation." Available at

is a significant incentive for cartel participants to blow the whistle and apply for leniency for its participation in the anti-competitive behaviour.

The European Union (including the United Kingdom) does not have a similar waiver of punitive damages in order to encourage whistleblowing on anti-competitive behaviour and leniency applications. Therefore, there is a need to balance the benefit and incentive envisaged by the leniency programme with the ability of the victims to properly pursue their rights to damages before the civil courts. The European Union and United Kingdom have attempted to achieve this by restricting access to the documents submitted by a firm applying leniency for its participation in anti-competitive conduct and also limiting the damage claimable against a successful leniency applicant to the real damage caused to such firm's direct or indirect customers. The leniency recipient is consequently exempted from joint and several liability with the other cartel members.⁴²

Policy and legislative intervention in South Africa may be required in order to achieve the necessary balance between a claimant's right (and need) to access to information necessary for the formulation of its damages claim and the need to maintain the integrity the Corporate Leniency Policy as a valuable competition control tool. Statutory guidance (much as in the case of class actions) has not been forthcoming and it has been left to the South African courts to deal with the difficulties of this dynamic branch of the law. In *Premier Foods (Pty) Ltd v Norman Manoim N.O and Others*,⁴³ Kolapen J was faced with the argument by Premier that a section 65 certificate could not properly be awarded against it as it had not been properly cited as a respondent before the Tribunal as it was the successful leniency applicant in terms of the Corporate Leniency Policy.⁴⁴ In dismissing the application, the court held that the leniency

<https://www.govtrack.us/congress/bills/108/hr1086/text>. (Last accessed on 25 June 2014).

⁴² See Ch 14 par 14.2.6.

⁴³ *Premier Foods (Pty) Ltd v Manoim NO and Others* 2013 JDR 1666 (GNP) (unreported judgment).

⁴⁴ Ch 3 par 3.2.2.1, fn 47. The certificate is issued by the Competition Tribunal or Competition Appeal Court. The certificate will confirm that the infringing firm has been found to have contravened the Competition Act, as well as which provision of the Competition Act has been contravened. See also Section 65 of the Competition Act 89

applicant cannot escape civil liability as argued by Premier. A section 65 certificate can, according to the High Court, properly be issued against a leniency recipient and such a recipient can be held liable for civil damages.⁴⁵ This would appear to be the correct approach. An untenable position will arise if the rights of potential claimants to claim damages against a particular firm for its anti-competitive behaviour, were effectively negated by the decision of the Competition Commission to grant leniency from prosecution to such a firm. The possible objection that the retention of a potential damages claim against a leniency recipient may discourage whistle-blowing, is, to a certain extent, countered by the fact that a firm will still want to escape payment of an administrative penalty which can be awarded against a contravening party by the Competition Tribunal.⁴⁶

of 1998, which states: “65(6) 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.

⁴⁵ *Premier Foods (Pty) Ltd v Manojm NO and Others* 2013 JDR 1666 (GNP) (unreported). On appeal the Supreme Court of Appeal found in favour of Premier, that no section 65 declaratory certificate (fundamental for a section 65 damages action) could be issued against Premier. The Supreme Court of Appeal did note that the reason for upholding the appeal was based on the fact that no relief was sought against Premier in the complaint proceedings and therefore the Competition Tribunal was not empowered to make a finding against Premier. The Supreme Court of Appeal did confirm that the CLP does not absolve an applicant from civil liability, rather, that no relief was sought against Premier and therefore no certificate could be issued against it. See *Premier Foods (Pty) Ltd v Manojm NO and others* 2016 (1) SA 445 (SCA).

⁴⁶ See s 59(2) of the Competition Act 89 of 1998. First time offences of the prohibitions contained in sections 4(1)(a); 5(1); 8(c) or 9(1) do not carry the sanction of an administrative penalty, however, the lack of administrative sanction does not limit or restrict the ability of an individual who has suffered loss from seeking to recover such loss through a claim for civil damages before the civil courts. In its media statement dated 24 June 2013, the Competition Commission notes that 15 of the firms have agreed to the settlement of the matter, with the agreed penalties collectively totalling nearly R1.5 billion. A copy of the media statement released by the Competition Commission is available at: <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Constructio>

It is submitted that balancing the claimant's right to bring a private damages action and the Commission's need for maintaining a viable leniency programme is provided by the successful leniency applicant not being exempt from facing civil liability, but having the benefit of being exempted from paying an administrative penalty.

While it is submitted that the required balance exists within the existing South African competition framework, the practical question regarding access to the information supplied by a leniency applicant remains uncertain, and unresolved. The Competition Commission is currently experiencing increasing pressure from parties and firms requiring access to information relating to the recently settled construction-cartel investigation.⁴⁷ Since the settlement, the Commission is allegedly still sorting through the information in order to assess which information may be released to the public for purposes of pursuing private damages actions.⁴⁸ Mr. Theo Botha, a shareholder activist who owns shares in the construction companies implicated in the cartel conduct, complained in this regard: "the Commission promotes civil claims, but it doesn't enable [them]. It should in fact make all the information available on its website. Why does one first have to apply for it?"⁴⁹

The South African Competition Commission's cautious approach to the disclosure of information submitted during the course of its investigations and leniency applications, supports the submission that intervention by the formulation of clear policy or appropriate amendment of legislation is required to clarify the position regarding

n-Fast-Track-Settlement-Process-Media-Release.pdf. (Last accessed on 25 June 2014).

⁴⁷ The construction cartel was investigated by the Competition Commission under case numbers 2009Feb4279 & 2009Sep4641. See Ch 3 par 3.1, fn 15 for a list of the firms investigated and engaged in the settlement of the complaint investigation. See media statements referred to above for a list of the settlement amounts agreed to by the individual firms.

⁴⁸ Article published on Moneyweb on 27 January 2014, *Competition Commission in pickle about construction info*. Available at <http://www.moneyweb.co.za/moneyweb-south-africa/competition-commission-in-pickle-about-constructio> (last accessed on 29 April 2014).

⁴⁹ *Ibid*

access to this information; including the position pertaining to leniency applications, and even the facilitation of access to such information.

The Competition Act expressly deals with the disclosure of information,⁵⁰ and the restriction of access to information submitted to the Competition Commission during the course of its investigations.⁵¹ The Act permits parties to claim confidentiality over information submitted to the Competition Commission or Competition Tribunal.⁵² The Act allows a party seeking access to such information (be it subject to a confidentiality claim or falling within the ambit of restricted information) to make application to the Competition Tribunal to allow this confidential information to be accessed in the appropriate manner⁵³ The legislature clearly envisaged a transparent and accessible system of disclosure in competition litigation.

Aside from the express provisions of the Competition Act regulating the disclosure of information, South African law and civil rules of procedure also encourage the disclosure of information necessary for litigation. The Promotion of Access to Information Act ('PAIA'),⁵⁴ together with the Uniform Rules of Court,⁵⁵ provides clarification as to what documents and information litigants are entitled. The Uniform Rules of Court govern access to information and discovery of documents in

⁵⁰ S 45 of Act 89 of 1998.

⁵¹ S 45A of Act 89 of 1998 read together with Rule 14 of the Rules for the Conduct of Proceedings in the Competition Commission.

⁵² S 44 of Act 89 of 1998.

⁵³ S 45(1)(a) and (b): A person who seeks access to information subject to a claim that it is confidential information may apply to the Competition Tribunal in the prescribed form, and the Competition Tribunal may - (a) determine whether or not the information is confidential information; and (b) if it finds that the information is confidential, may make any appropriate order concerning access to that confidential information.

⁵⁴ Act 2 of 2000.

⁵⁵ See Erasmus, *Superior Court Practice*, Juta (2013), B1-247. Rule 35 deals expressly with the discovery, inspection and production of documents.

preparation for trial.⁵⁶ Discovery in terms of the Uniform Rules of Court would therefore only be available to a litigant once the legal disputes have crystallised.⁵⁷

Section 50 of PAIA expressly deals with the right to access of information.⁵⁸ This right is, unlike the High Court Rules regarding discovery, not limited to preparation for trial, and can be used by a potential litigant requiring access to information; provided such the litigant who relies on the provision of PAIA can show that there is an element of need or substantial advantage to be gained by having access to the relevant information at a pre-action stage.⁵⁹ Documents and information in the control of the State or any of its organs at any level may be obtained under section 23 of the Constitution.⁶⁰ Conceivably, this could include the information held by the Competition

⁵⁶ *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083, where the objective of discovery was described as being ‘to ensure that before trial both parties are made aware of all the documentary evidence that is available’.

⁵⁷ *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276C-D. Lamont J states: “the essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.”

⁵⁸ PAIA section 50: “right of access to records of private bodies (1) A requester must be given access to any record of a private body if - (a) that record is required for the exercise or protection of any rights; (b) that person complies with the procedural requirements in this, Act relating to a request for access to that record: and (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part. (2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a) or (b) (i) of the definition of 'public body' in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest. (3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.”

⁵⁹ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) 492A; *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) 445I-446A.

⁶⁰ The Constitution of the Republic of South Africa Act 108 of 1996 and see *Khala v Minister of Safety and Security* 1994 (3) SA 625 (E) 642E-F. Myburgh J states: “a person is entitled to access to information held by the State only in so far as such information is required for the exercise or protection of any of his or her rights.” See also *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) 642E-F. Froneman J ruled: “section 23 is therefore, in my view, something more than a mere constitutional right to discovery, but is also a necessary adjunct to an open democratic society committed to the principles of openness and accountability. Its application need therefore not be restricted to the exercise or protection of rights by way of litigation, but would extend also to non-judicial remedies aimed at the exercise or protection of such

Commission required by a claimant to enforce its rights to institute a civil action against the contravening firm.

There is no valid reason why access should be or would be curtailed in cases where one is dealing with the confessions of a cartel member. The claimant could probably gain access to this information necessary for the exercise of its right to claim damages by making application in terms of PAIA prior to instituting action against the firm found to have contravened the Act. Alternatively, the claimant could obtain the information during the proceedings by way of discovery in terms of the Uniform Rules of Court. Furthermore, the benefit of being exonerated from a potentially crippling administrative penalty usually levied against contravening firms is sufficient incentive for cartel participants to continue to expose cartels and make use of the leniency policy.

15.3.6 Legal costs within South Africa

The general rule in South Africa is that costs follow the result, subject to the principle that the awarding of the costs lies within the discretion of the judicial officer.⁶¹

rights. In the present case the contents of the docket relate to the criminal investigation following upon the applicant's arrest and detention. It is highly likely that it contains statements and information relevant to the subsequent civil case."

⁶¹ *Ferreira v Levin; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) 624 Ackermann J states: "the Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants, and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation."

As highlighted above,⁶² a vast proportion of South Africans do not have access to the finances required to even contemplate launching a complex competition damages action for the recovery of private losses suffered as a result of contravention of the Competition Act. For this reason, the majority of South Africans can only ever gain access to the civil courts in an attempt to realise their right to pursue private competition damages by concluding a *contingency fee* agreement.

Prior to 1994, contingency fee arrangements (*pactum de quota litis*)⁶³ were prohibited and considered illegal. With the advent of the Constitutional era in South Africa, guaranteeing citizens equality before the law and access to the courts,⁶⁴ the blank prohibition on contingency fee arrangements had to be reconsidered in order to give effect to the constitutional rights afforded individuals. The first progressive step taken by the South African legislature resulted in the passing of the Contingency Fees Act 66 of 1997. This Act essentially allows legal practitioners to conclude contingency fee arrangements with clients and, more importantly, seeks to cap the extent of the fees to which a legal practitioner will be entitled to in terms of the contingency agreement.⁶⁵ The fact that South Africa recognises and allows contingency fee agreements certainly creates a potentially beneficial environment for individuals (or classes) to pursue private competition damages against large corporate entities.⁶⁶ Legal practitioners may be incentivised to represent individuals (or a class) on a contingency basis, with the hope of achieving a large recovery of fees should the claim prove successful.

Contingency fee agreements, insofar as they may assist indigent litigants and incentivise legal practitioners to fund litigation in the hope of recovering substantial fees, are not without their concern. One of the serious pitfalls in the South African

⁶² See par 15.2 *infra*.

⁶³ A *pactum de quota litis* is an agreement where the claimant would promise to pay the attorney a portion of the amount recovered.

⁶⁴ Constitution of South Africa Act 108 of 1996, s 34.

⁶⁵ See s 2(1) of the Contingency Fees Act 66 of 1997, which provides for a success fee to be capped at double the normal fee charged, subject to such amount not exceeding 25% of the recovered value.

⁶⁶ See the recent judgment on contingency fees in South Africa, *Masango v Road Accident Fund* (case number 2012/21359) 2016 ZAGPJHC 227 (31 August 2016).

judicial system is the time it takes to finalise civil litigation. A civil case could take years to conclude, resulting in a legal practitioner working on a contingency basis effectively financing the client's litigation costs. This delay, together with the uncertainty of receiving payment (due to the inherent risks of litigation), has often resulted in legal practitioners steering away from contingency fee arrangements. A further drawback of the contingency fee agreement is that the legal costs are eventually fully or partially recovered from the capital (in this case the damages) recovered by the claimant.⁶⁷ This problem has manifested itself in the claims brought against the Road Accident Fund (RAF). The RAF was established in South Africa to compensate persons injured as a result of the negligent driving of a motor vehicle. The funds contributed to the RAF are collected from a levy raised on fuel purchases by the general public. Legal practitioners specialising in RAF claims have abused the contingency agreement system. This abuse resulted in large portions of the recovered monies being filtered away to cover the legal costs and therefore not achieving the intended compensatory goal of the RAF.

The problem of high litigation costs experienced in South Africa is somewhat tempered by the recognition of class actions and the permissibility for legal practitioners to work on a contingency fee basis. While legal costs do not necessarily go to the heart of the merits of a particular private competition damages action, the practical reality is that legal practitioners will only risk engaging on a contingency fee basis if they consider the merits to be sound enough and the potential recoverable quantum sufficiently substantial to warrant the risk. For this reason, any attempted amendment of the legal costs regime in order to promote private competition damages actions will, by itself, not serve to achieve the desired result. The mantra of 'money talks' will no doubt ring true in this case, and a realistic evaluation of the risks can only be done should the necessary interventions to allow proper access to information.

⁶⁷ Generally, cost wards are granted on a party-and-party scale, which is a predetermined statutory scale and usually results in a successful litigant recovering approximately 50% of the legal costs incurred. A litigant, even if successful, will therefore still be liable to pay the remaining portion of the legal costs due to the representing attorney.

15.4. Conclusion

The legislature has not shied away from taking proactive steps in developing the statutory regulation of competition within South Africa. This is clear from the express steps taken to expand the Commission's investigative powers and provide express reference to the Commission's leniency programme⁶⁸ in the Competition Amendment Act 2009.⁶⁹ These are just two examples confirming that the legislature is more than willing to intervene in order to promote the development of South African competition policy and add proverbial bite to the efforts of the Competition Commission, by enhancing the detection of anti-competitive conduct so as to increase deterrence of such conduct.

In order to give effect to the right to seek compensation, the various potential tools canvassed above would suggest that South Africa is well placed to advance the development of private competition damages and give effect to achieving the goal of compensation.

The South African courts acknowledge the difficulties and complexities often associated with the assessing and quantification of damages, and have therefore steered away from following a single rigid approach in such assessments; rather favouring a position whereby damages are quantified in the best way possible.⁷⁰ The

⁶⁸ See sections 1(c) and 43B of Act 1 of 2009.

⁶⁹ Act 1 of 2009, Competition Amendment Act 1 of 2009, published in Government Gazette No 32533, August 2009.

⁷⁰ See *Turkstra Ltd v Richards* 1926 (TPD) 276, 282 and confirmed in *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 17C: "if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible"; *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 25 E: "the damages need not be proved with accuracy because in the nature of the enquiry as to the future they cannot be; I must do the best that I can to determine them 'in some way or other' because all that can guide me is before me; the determination must be based on probabilities, and must make some allowance for uncertainties in those probabilities." See also Clerk J in *Ledger Sons & Co v James Munro & Son Ltd* 33 R.P.C 53: "...it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude, one must form

use of economic methods to quantify the damage suffered as a result of anti-competitive behaviour in contravention of the Competition Act, would conceivably be entertained by the courts if such evidence can be of assistance for purposes of making suitable damages assessment.

With the acknowledgement by the Supreme Court of Appeal and the Constitutional Court that both opt-in and opt-out class actions exist, significant strides have been made in developing a class action regime that will facilitate the bringing of private competition damages.⁷¹ This is particularly beneficial within the social context and environment many South Africans find themselves. The recognition of an opt-out class action regime, as advanced by the Supreme Court of Appeal, will allow individuals their day in court.

The expense of litigation is not a concern unique to South Africa. However, the recognition of contingency fee agreements does mean that individuals (or a class) could still gain access to legal representation, despite not having the financial ability to prosecute the damages action. It is, however, not anticipated that the benefit of contingency fees on their own will serve the purpose of promoting and facilitating private competition damages actions.

The importance of allowing a claimant access to necessary information, while maintaining the integrity of the corporate leniency programme, is not at issue in South Africa. The leniency recipient is already assured of the benefit of not having an administrative penalty imposed against it. The Competition Commission appears to harbour concerns regarding the releasing of leniency documents to potential claimants. However, it would create an untenable position if a leniency recipient in terms of the corporate leniency policy can essentially be shielded from a private competition damages action before the civil courts, by restricting a claimant from gaining access to the documents submitted as part of the leniency application,

one's opinion as a jurymen would, of damage due upon the whole circumstances of the case and make the best reasonable estimate that one can."

⁷¹ Ch 15 par 15.3.2 above.

particularly in view of the wording of the CLP which expressly states that: “nothing in the CLP shall limit the rights of any person who has been injured by cartel activity in respect of which the Commission has granted immunity under the CLP to seek civil or criminal remedies.”⁷²

The current South African damages environment provides claimants with sufficient incentive to bring private competition damages actions, without any need for policy makers or the legislature to intervene by introducing a foreign concept such as punitive damages, or even the use of rebuttable presumptions. As prosecution of anti-competitive behaviour becomes more regular, and private individuals and firms become more aware of the rights afforded them to claim private competition damages, it is expected that the South African courts will, with increasing regularity, be approached with claims for private damages by victims of anti-competitive behaviour.

⁷² Clause 6.4 of the Corporate Leniency Policy of the Competition Commission of South Africa.

CHAPTER 16. CONCLUSION AND RECOMMENDATIONS

16.1. Introduction

The Competition Act 89 of 1998 allows the Competition Tribunals to impose an administrative penalty on parties found to have contravened the provisions of the Act.¹ This penalty is capped at 10% of the contravening firm's total annual turnover² and accrues to the National Revenue Fund.³ The harsh reality facing the victims of contravening conduct is that the administrative penalty imposed by the Competition Tribunal against a contravening firm accrues to the *fiscus* and does not compensate for the actual and real damage suffered as a result of their exposure to anti-competitive behaviour.

This thesis attempts to contextualise the right to claim private damages afforded to victims of unfair competition. Particular attention was given to the rights of persons to claim damages in terms of section 65 of the Competition Act for loss or damage suffered as a result of a prohibited practice committed in contravention of the Competition Act.⁴ The prosecution of private competition damages actions in South Africa remains largely uncharted territory. Recent developments⁵ show a growing awareness and willingness by the victims of contraventions of the Competition Act to use recourse through the civil courts to recover damages suffered as a result of such anti-competitive behaviour. Despite the growing awareness of private competition damages and eagerness shown by firms and individuals to prosecute such damages

¹ Sec 59 of the Competition Act 89 of 1998.

² Sec 59(2) of the Competition Act 89 of 1998.

³ Sec 59(4) of the Competition Act 89 of 1998.

⁴ Sec 65 of the Competition Act 89 of 1998.

⁵ See Ch 3, par 3.1.2

actions, the uncertainty regarding the procedural aspects and complexities pertaining to the quantification of civil damages within a competition law environment still serves as a limiting factor. In a mooted settlement, within the bread cartel, an amount of R2 million was proposed as a possible settlement sum. This is in stark contrast with the amount of R460 million originally claimed by the victims of the cartel conduct.⁶ This disparity pointedly illustrates the difficulties and uncertainties (both from a procedural and quantification perspective) that claimants face when contemplating an action for this type of damage.⁷

It is submitted that the classification of the nature of the action and the proposals regarding the promotion of access to information and rigidity of the cost implications in section 65 damages actions, as well as the discussions on the methods assisting with the final quantification of damages as dealt with in this thesis, will have a significant influence on the development of section 65 private competition damages within South Africa.⁸

⁶ The damages actions being brought as class actions, *Children's Resource Centre v Pioneer Foods* 2013 (2) SA 213 (SCA) and *Mukaddam v Pioneer Foods* 2013 (2) SA 254 (SCA); 2013 (5) SA 89 (CC). See Business Day article by Visser & Allix, *Class action seeks paltry R2.1m over bread pricing*, published on 6 March 2014. Available at <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=a8e1868a-01a7-4e48-a9ba-0b7da7291977&key=jh5IGDU5MB969OBE7BR7rQ%3d%3d&issue=1106201403060000000001001> (Last Accessed on 28 May 2014).

⁷ *The Trustees for the time being of the Children's Resource Centre Trust and Others v Premier Foods* 2011 JDR 0498 (WCC) (unreported).

⁸ Ch 3, par 3.2 to par 3.4 See also Ch 4, for a discussion of the quantification of damages within South Africa and Ch 6 for a summary of the economic models that can assist with the quantification of competition damages.

16.1.1 Nationwide Airlines: One small step by South African courts, but a decidedly qualitative and progressive advancement of the law on private competition damages

On 8 August 2016, the High Court, Gauteng Local Division, Johannesburg, gave judgment in the first competition damages action in South Africa.⁹ Justice Nicholls confirmed the novelty¹⁰ of the case and the assessment to be undertaken, while also providing some insightful confirmation of how section 65 damages actions are to be dealt with and evaluated in South Africa.

Not only did the court confirm the nature of the action as being delictual,¹¹ but also spent significant time evaluating the expert evidence presented by Robin Noble of Oxera Consulting LPP (acting as expert witness for Nationwide) and Luisa Affuso of PricewaterhouseCoopers (acting as expert witness for SAA). Insofar as the consideration of expert evidence is concerned, the court confirmed that: “The numerous variables to be taken into consideration make it an impossible exercise to quantify damages with any precision. However, this is not an unprecedented situation in delictual claims. Our courts have previously referred to future loss of earnings in personal injury matters, as being the preserve of future tellers and soothsayers because predictions as to the future are required which are, by their very nature speculative. A court is enjoined to do the best it can on the material available, even if it is merely an estimation. However, a plaintiff is obliged to produce all evidence at its

⁹ *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd* (case number 12026/2012), judgment dated 8 August 2016. (“*Nationwide Airlines*”)

¹⁰ *Ibid* par 1: “This is a delictual claim, the first of its kind, arising out of the anti-competitive practices of our national carrier South African Airways (“SAA”).”

¹¹ See discussion in Ch 3, par 3.3 to 3.7 regarding the debate in *Children’s Resource Centre* as to whether a section 65 damages claim should be classified as a statutory or delictual action.

disposal to assist the court in making as accurate a decision as possible.”¹² In assisting the court with the estimation of damages, various economic models were placed before the court by the litigants. The experts agreed (and the court accepted) that the linear interpolation model is the most appropriate for assessing the damages in the present case.¹³

While the factors considered in arriving at the eventual damages award need not be canvassed for purposes of this thesis, it is important to note that the court has now confirmed the nature of the action as being delictual and acknowledged the benefit of expert witnesses and econometric modelling for purposes of estimating the damages arriving from contraventions of the Competition Act.

It is unfortunate that the court neglected to give a more detailed analysis of the steps required to be proven and assessed for purposes of a delictual action. It rather chose to focus on the aspect of quantification of damages and provided less detail regarding the legal aspects relevant to such claims. While a detailed analysis of the legal aspects may strictly speaking not have been necessary, given that courts view that SAA had admitted delictual liability and the only issue remaining was quantifying the damages, a more detailed legal assessment may have served to provide a valuable foundation and guidance from which these actions could develop - particularly as this was the first action of its kind in South Africa to be adjudicated by the courts.

Aside from the criticism that the legal aspects may have been tar-brushed by Nicholls J, a further criticism is directed at the order insofar as it relates to interest. It is submitted that Nicholls J erred in the awarding of interest on the damages sum. The order provides for interest on the damages sum as from date of judgment. However,

¹² Nationwide Airlines *ibid* par 51.

¹³ The linear interpolation model seeks to compare periods *before* and *after* as comparators to establish a hypothetical position of the position that would have existed but for the contravening conduct. This is discussed within the context of the time series comparator based method in Ch 7, par 7.3.

the Competition Act expressly entitles a claimant to interest as from the date upon which the section 65(6) certificate is issued.¹⁴

The judgment of Nicholls J will undoubtedly shape the future of private competition damages actions in South Africa. While offering some insight and answers (subject to a possible appeal), the issues of discovery and access to information, the costs of litigation and the questions relating to class action suits, remain important aspects still to be canvassed in South African law. This judgment is a first step in the fundamental advancement and facilitation of actions of this nature. It allows for a more comprehensive vindication of the rights of victims by the prosecution of private competition damages actions.¹⁵

16.2. Unlawful competition in South Africa

Through the course of this investigation, it was shown that South African law recognises and protects the common-law right of a person to his or her right to attract custom. In cases where damage has been suffered as a result of an infringement of this right, damages can be claimed from an infringing party.¹⁶ The South African courts accept that unlawful competition may manifest itself in any one of a variety of different forms.¹⁷ This includes passing off, misrepresentation of own performance, instigation

¹⁴ See s 65(10) of the Competition Act 89 of 1998

¹⁵ Comair have also brought a damages action against South African Airways for damages suffered as a result of SAA's conduct in contravention of the Competition Act. While argument in this case has only just started, following the judgment in *Nationwide* it appears that the courts are ready willing and able to deal with these claims, with early indications being that the simple question to deal with is how much damages should be awarded against SAA. See the City Press article (27 August 2016) titled 'SAA tries to dodge R898 Comair claim'. Available at <http://city-press.news24.com/Business/saa-tries-to-dodge-r898m-comair-claim-20160826>.

¹⁶ Ch 2, par 2.4.

¹⁷ *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) 218: "the basis of a plaintiff's action for wrongful interference by a competitor with his rights as a trader is clearly stated to be Aquilian. The significance of this is that it means that, while such an action must satisfy all the requirements of Aquilian liability, the broad and ample basis of the Lex Aquilia is

of a boycott, and in particular, unlawful competition resulting from the contravention of a statute.¹⁸ Of these manifestations, particular emphasis was placed on competition in breach of a statute. An understanding of the requirements essential to bringing an action for competition in breach of a statute is of fundamental importance when clarifying the legal basis for the practical application of the right to recover civil damages as referred to in section 65 of the Competition Act.¹⁹

16.3. Section 65 damages: Contraventions of the Competition Act

The Competition Act expressly affirms the right of a party who has suffered damages as a result of a prohibited practice in contravention of the Competition Act to institute a damages claim in the civil courts.²⁰ Despite the express affirmation of a victim's right to claim damages, the Competition Act and the South African courts have to date not clarified on which particular basis and *how* claimants might go about instituting such an action and ultimately quantify the damages believed to have been suffered as a result of the contravening conduct.

In order to properly answer this question, consideration was given to whether a damages action being instituted in terms of section 65 of the Competition Act should

available in this field for the recognition of rights of action even where there is no direct precedent in our law.”

¹⁸ See Ch 2, par 2.4.1.1 to par 2.4.1.6, which highlights examples of conduct constituting common-law unfair competition.

¹⁹ See Ch 2, par 2.4.2.

²⁰ See s 65 of the Competition Act 89 of 1998. This also in turn means that the main requirements that have to be shown where a claim is based on unlawful competition arising from the breach of a statute (i.e. that the legislator intends a prejudiced party to have a civil remedy and that the statute is for the benefit of the of the aggrieved party) is affirmed by section 65(2). All that remains for a claimant is to show in this regard is that the actions of the transgressor has caused damage and the damage resulted from the transgressing behaviour of the transgressor.

be classified as a *delictual* action or a *statutory* action.²¹ In light of the strong presumption against the legislature altering the common-law (save where such an intention is expressly clear from the applicable legislation) and the absence of a statutory definition of competition damages, presumptions relating to damage and provisions determining how damages are calculated, the damages action provided for by the Competition Act is *not* a statutory action. The section 65 action falls within the ambit of a delictual action to be brought in terms of the *actio legis Aquiliae*, more particularly, within the common law unfair competition action of competition in contravention of a statute.²² As a consequence, a claimant seeking to bring a section 65 damages action will have to allege and prove all the elements necessary for a successful delictual claim. These elements are: the conduct, unlawfulness, fault, damage and causation.²³ In the context of South African law of delict, such action falls within the ambit of competition in contravention of a statute with its attendant requirements.²⁴

Consideration was given to the two-tiered adjudication process created by the Competition Act for purposes of adjudicating the essential elements of the delict. The conclusion was that the elements of *conduct*, *fault*²⁵ and the *unlawfulness* are adjudicated and determined by the Competition Tribunals during the assessment of the conduct in the context of being a contravention of the Competition Act. The

²¹ See discussions in Ch 3, par 3.3.4, par 3.3.5 and par 3.3.6. This was addressed in the recent order by Nicholls J in *Nationwide Airlines* where the court found that this is to be classified as a delictual action.

²² See Ch 3, par 3.3.6.

²³ See Ch 3, par 3.3.3.

²⁴ See Ch 2, par 2.4.2.

²⁵ See Ch 3, par 3.3.3.3 for a discussion of the element of fault in the context of infringements of the Competition Act, where the conclusion is made that the contravention of the Competition Act is difficult to envisage without the necessary element of intent on the part of the contravening party.

remaining elements of *damage*, *causation* and *quantification* would subsequently be determined by the appropriate civil court adjudicating the damages action.²⁶

It is submitted that the two-phased adjudication process promotes the integrity of private competition damages in South Africa. Specialist bodies (i.e. the Competition Tribunal and Competition Appeal Court) assess various elements of the damages claim (conduct, fault and unlawfulness) in which they are essentially specialist forums. The Civil Court will apply the civil principles of law relating to private damages, i.e. the establishing of causation and quantum. The very nature of follow-on damages actions in terms of section 65 of the Competition Act means that civil actions for the recovery of private competition damages will only be brought *after* the assessment of the *conduct* and *unlawfulness* of the conduct (and by implication, also fault) by the competition authorities. Therefore, for purposes of this thesis, the focus was on a claimant's action following a finding by the competition authorities that the provisions of the Competition Act had been contravened. This makes the assessment of the elements of *damage*, *causation* and *quantification of damages* of primary importance when considering an action for damages brought in terms of section 65 of the Competition Act.

16.4. Quantification of damages

The South African courts have acknowledged the difficulties of quantifying damages and have highlighted particular difficulties in cases of competition law contraventions and the abstract nature often associated with the assessment of damages within a complex commercial environment.²⁷ Various techniques for assessing delictual

²⁶ The element of fault in the context of contraventions of the Competition Act is not anticipated to be difficult or place any significant burden on the claimant as it is not envisaged that a contravention of the Competition Act can occur without at least the necessary degree of intent on the part of the infringing party.

²⁷ *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 18H: "it is not easy to make a safe calculation of the exact damage, but that is just what occurs in a great many cases. It must be estimated in a reasonable way. If it cannot be estimated with exactitude, one must form one's opinion as a

damages were considered. This included the comparative method,²⁸ the sum-formula approach,²⁹ and the concrete assessment of damages.³⁰ After considering the approaches and the complexities associated with competition law damages actions, the *hybrid-approach* for determining damages arising from unfair competition is advocated.³¹ The hybrid-approach balances the benefits of the concrete approach for purposes of assessing the damage already suffered, while still allowing the courts to apply the sum-formula approach (with its hypothetical element) for purposes of assessing damage that may be suffered in future (i.e. assessing the prospective loss and the loss of profit). Such a balanced assessment, as advanced by the hybrid-approach, supports the courts in assessing delictual damages *in the best way possible*.³²

Economic models have often been employed by courts in an attempt to placate some of the concerns raised regarding the unpredictability and element of *fortune-telling* associated with creating a hypothetical position required for the assessment of damages arising from unlawful competition.³³ South African courts are open to any

juryman would of damage due upon the whole circumstances of the case and make the best reasonable estimate that one can'. See also *Turkstra Ltd v Richards* 1926 (TPD) 276, 282: 'if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible'.

²⁸ Ch 4, par 4.7.2.

²⁹ Ch 4, par 4.7.2.1.

³⁰ Ch 4, par 4.7.2.2.

³¹ See Ch 4, par 4.8. See also Neethling *Law of Delict* (2014) 79 - 80.

³² *Turkstra Ltd v Richards* 1926 (TPD) 276, 282.

³³ *International Tobacco Company Limited v United Tobacco Company Limited* (1) 1955 (2) SA 1 (W) 25; *Turkstra Ltd v Richards* 1926 (TPD) 276. The South African courts clearly accept that damages need to be calculated in the best possible way. However, the courts have considered the notion of having delictual damages assessed in a forum outside the structures of the court so as to allow for a more informed assessment of the damages by an enquiry into damages. The position regarding an enquiry for damages has resulted in debate within the judicial system with Seligson J noting in *Montres Rolex SA v Kleynhans* 1985 1 SA 55 (C) 68-70 that an enquiry into damages 'can serve a useful purpose and is not inconsistent with any fundamental tenet of our legal system'. However, in *Harvey Tiling Company (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 328 the court took the view that the appointment of an enquiry into the damages (where the court does not assess the damage but rather appoints an outside

method of quantification which assists the court to make the most reasonable and accurate estimation of damage suffered. South African courts have, to date, rejected the notion of a *damages enquiry* for purposes of assessing delictual damages in terms of the *lex Aquilia*.³⁴ It is, accordingly, more than likely that the use of economic models will find acceptance within the South African judicial system when assessing and quantifying competition damages. Acceptance of the use of economic models could assist the courts in making the best possible assessment. Three categories of economic model were discussed during this investigation: (i) comparator based methods;³⁵ (ii) financial analysis based methods;³⁶ and (iii) industry organisation models.³⁷

Guided by the particular circumstances prevalent to the particular case being prosecuted before the civil courts, each of these models approach the assessment of damages in a unique way. Due to the various benefits achieved from the application of each individual model, it is submitted that the pooling of the outcomes achieved by different economic assessments may lead to a more accurate estimation of the damage caused by the contravening conduct. The applicability of a particular economic model and the accuracy of such a model will ultimately be determined by the nature of the contravening conduct, and well as the quantity and quality of the information available to the parties.³⁸

The compensatory nature of the South African damages regime means that a claimant can only properly recover the *actual* damage suffered. This will require parties and the

party to do so) is contrary to the South African law of procedure as ‘the trial Judge alone decides all the issues in the action’.

³⁴ Van Heerden & Neethling *Unlawful Competition* (2008) 84. See also *Rectifier Communication Systems (Pty) Ltd v Harrison* 1981 2 SA 283 (C) 286; *Klimax Manufacturing Ltd v Van Rensburg* 2005 4 SA 445 (O) 459.

³⁵ See Ch 7 for a discussion of the comparator based methods.

³⁶ See Ch 8 for a discussion of the financial analysis methods.

³⁷ See Ch 9 for a discussion of the industry organisation models.

³⁸ See Ch 12, par 12.2.1. See also Hendry & Clements *Pooling* (2004).

courts to specially consider the extent to which any damage caused by the contravention of the Competition Act may have been *passed-on* by the claimant to any downstream parties.³⁹ The United States does not currently recognise the passing-on defence in the context of antitrust damages actions (although there is growing support for this to change).⁴⁰ It is concluded that given the established compensatory nature of the South African damages action, it is likely that the South African courts will recognise and apply the passing-on defence when quantifying section 65 competition damages.

16.5. Developing a culture of private competition damages

Other jurisdictions, such as Canada, Japan, Australia, the European Union and United States, have incorporated and facilitated private competition damages. These jurisdictions were examined in order to assess how South African law may accommodate private competition damages actions and what amendments may be necessary (if any) in order to further facilitate and promote private competition damages.⁴¹

While the United States boasts a history and an established system of private competition damages, the strong reliance on a well-developed system of class actions, the punitive element of treble damages afforded to claimants in cases of antitrust damages, and the federal legal system (whereby each state has its own antitrust legislation and rules of procedure), makes United States law an interesting case study from which a jurisdiction still developing a system of private competition damages such as South Africa may learn. Given the fundamental differences between the United States damages system and that of South Africa, adapting reconciling the United States approach in a South African context appears undesirable and highly unlikely.

³⁹ See Ch 11 for a discussion of the passing-on defence.

⁴⁰ See Ch 11 par 11.3.

⁴¹ See Ch 13.

For this reason, the European Union (and to a lesser extent the United Kingdom) provides far more assistance for developing and facilitating private competition damages actions in South Africa. The suitability of these jurisdictions as models for the development of a private competition damages regime in South Africa is particularly based on the current debates regarding the development of these claims within the European Union and the United Kingdom.⁴² A further consideration is that the European Union shares with South Africa the *compensatory* objective sought to be of private damages claims.

The use of economic models to assist with the quantification of damages is but one small step in promoting the development of a private competition damages system. From a practical and procedural perspective, important aspects of the damages system need to be geared to facilitate such actions in order to develop a successful and active culture of private competition damages. Proposals being mooted in various jurisdictions aimed at promoting and facilitating private competition include: (a) the promotion of access to information;⁴³ (b) the introduction of rebuttable presumptions to ease evidentiary burdens;⁴⁴ (c) the facilitation of class action;⁴⁵ and (d) striking a favourable balance between protecting the Commission's corporate leniency policy and growing private competition damages actions.⁴⁶

Current South African law contains all the fundamental elements necessary for the development of a successful private competition damages system. These elements include:

- (a) The principle that the courts are open to assessing damages in the best way possible. This allows for embracing the use of economic models best suited to

⁴² See Ch 13 and Ch 14.

⁴³ See Ch 14 par 14.2.2.

⁴⁴ See Ch 14 par 14.2.3.

⁴⁵ See Ch 14 par 14.2.5.

⁴⁶ See Ch 14 par 14.2.6.

assist litigants and the courts to quantify competition damages in the most accurate way possible.⁴⁷

- (b) The courts have recently taken significant strides towards developing class actions within the South African legal system, making damages actions more accessible to victims of contraventions of the Competition Act.⁴⁸
- (c) Statutes and the Uniform Rules of Court relating to the discovery of documents and furnishing of information are significant and promote access to essential information required for a possible private damages action. This facilitates the formulation of private damages actions.⁴⁹
- (d) The compensatory nature of the South African damages regime strikes an equitable balance between the protection of the Commission's Corporate Leniency Policy and the facilitation of a victim's right to claim damages. A successful leniency applicant (whistleblower) within South Africa will not be exposed to an administrative penalty and the risk of a punitive damages award. This creates sufficient incentive for whistle blowing by cartel members. On the other hand, the victim of the anti-competitive conduct (the claimant in the damages action) will still be afforded the opportunity to be compensated for the real damage suffered as a result of the contravention of the Competition Act.
- (e) The recognition of contingency fee arrangements greatly assists potential claimants without the financial ability to prosecute complex damages actions. This is particularly useful within the South African context. This will only serve

⁴⁷ *Turkstra Ltd v Richards* 1926 (TPD) 276, 282: "if we arrive at the conclusion that some loss of custom must have resulted because of the nuisance, it is the duty of the Court to assess the damage in the best way possible".

⁴⁸ Ch 15 par 15.3.2. See also *Children's Resource Centre v Pioneer Foods* 2013 (2) SA 213 (SCA) and *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC).

⁴⁹ Ch 15 par 15.3.5.

as a real benefit if litigants are granted sufficient access to information so as to allow legal representatives to properly assess the merits of the case.⁵⁰

16.6. Recommendations

It is clear that the South African legal system not only recognises the rights of victims of contraventions of the Competition Act to claim private (*delictual*) damages as provided for in section 65 of the Competition Act, but also that South African law recognises and can accommodate damages actions of this nature.

In South Africa, the emphasis is on consumer welfare and the recognition that the Competition Act strives to promote *credible competition law, and effective structures to administer that law*.⁵¹ In view of this, the legislature should be encouraged to promote and develop the structures necessary to enhance the ability of victims of contraventions of the Competition Act to properly and effectively exercise the rights afforded them by the Competition Act. The South African government has in the past not shied away from taking proactive steps in developing the statutory regulation of competition. This is clear from the express steps taken to expand the Competition Commission's investigative powers and provide express reference to the Competition Commission's leniency programme⁵² in the Competition Amendment Act 2009.⁵³ These are just two examples confirming the proposition that the legislature has in the past been willing to intervene in order to promote the development of competition and the rights and scope of the Competition Act in order to enhance enforcement. To this

⁵⁰ Ch 15 par 15.3.6.

⁵¹ Extract from preamble of the Competition Act 89 of 1998 (author's emphasis).

⁵² Competition Act 89, 1998 (as amended by Act 1 of 2009) see s 1(c) and s 43B of Act 1 of 2009.

⁵³ Competition Amendment Act, 1 of 2009 published in *Government Gazette* No 32533, 28 August 2009.

extent, South Africa is well placed to advance the development of private competition damages.

Various aspects of development were discussed and considered.⁵⁴ Ultimately it was concluded that the structures currently in place in South Africa bode well for the successful development of a private competition damages regime.⁵⁵ In view of the glaring disparity between the wealthy corporate firms who contravene the provisions of the Competition Act and the victims of such conduct who predominantly do not have the financial resources to litigate against corporate giants, it is recommended that necessary legislative structures are created for the proper administration of the Competition Act in order to protect and promote the rights of the victims of anti-competitive conduct and to give further credence to the objectives of the Competition Act as stated in the preamble to the Act.⁵⁶

A: Improving access to relevant information

16.6.1 Recommendation: Advancing claimants' cause

16.6.1.1 Introduction

The first obstacle that a claimant faces is the gathering of information to found and substantiate a claim for private damages. This pertains to both information to establish whether there was prejudice and the extent of the damages caused by the contravention of the relevant legislative provision.

⁵⁴ See Ch 15.

⁵⁵ See par 16.5 above.

⁵⁶ Preamble of the Competition Act 89 of 1998.

A claimant's existing rights to the disclosure of information in the South African legal procedure was discussed.⁵⁷ It appears that claimants have two options regarding the acquisition of information pertinent to a private damages claim: they can either launch an application for the furnishing of the required information⁵⁸ or issue summons and ultimately obtain disclosure by making use of the discovery procedure provided for by the Uniform Rules of Court.⁵⁹ Both these avenues expose a potential private damages claimant to the risk of substantial cost and allow a defendant to employ delaying tactics.

Although the Competition Act contains provisions that facilitate the dissemination of crucial information,⁶⁰ it is silent as far as establishing the rights of a party to information to which a party is rightfully entitled, in order to properly enforce the rights afforded by the Competition Act. It is recommended that the legislature expressly promotes the disclosure of information necessary for purposes of formulating a private competition damages action as referred to in section 65 of the Competition Act of 1998.

This objective can be achieved by appropriately amending section 45 and 45A of the Act which deal with the *disclosure of information* and *restricted use of information*. Such an amendment must allow an interested party to gain unfettered access to information necessary for purposes of formulating and substantiating a damages claim as referred to in section 65 of the Competition Act. This should include the information submitted during the course of proceedings before the competition authorities, where a finding of contravention has been handed down.

⁵⁷ See Ch 15 par 15.3.5.

⁵⁸ Ch 15 par 15.3.5. Despite the provisions of the Competition Act, gaining access to information creates its own difficulties for potential claimants, as is clear from the difficulties being experienced by the parties seeking information in the construction cartel.

⁵⁹ *Ibid*

⁶⁰ See s 45 and s 45A of the Competition Act 89 of 1998.

16.6.1.2 *Claimants' lack of information shielding defendants*

The present difficulties facing victims of contraventions of the Competition Act to gain access to information necessary for the enforcement of their right to claim damages, in terms of section 65 of the Competition Act, severely prejudices victims of anti-competitive behaviour and hampers the bringing of civil damages actions contemplated by the Act.

Procedures for forcing disclosure of information are available to claimants. However, these self-same procedures are open to abuse by defending parties hiding behind the rules of procedure to delay and complicate the formulation of private damages claims. This abuse may force a claimant to bring an application for the disclosure of information, which may result in a legal battle for the disclosure of information. This causes unnecessary expenditure of additional time and money by the claimant and simply delays the ability of the claimant to exercise the right to claim compensation for the damage suffered. It is in addition, a consideration that may dissuade an affected party to pursue a private damages claim.

16.6.1.3 *Providing for adequate disclosure of information*

It is suggested that the legislature provides express statutory intervention to facilitate the disclosure of information necessary for establishing and quantifying a claim, which was already disclosed during proceedings in terms of the Competition Act and resulted in a finding of a contravention of the Act. This is in order to facilitate the administration of the victim's right to claim private damages, and negate the need of a potential claimant being compelled to launch an application for discovery and disclosure of information in order to exercise the right to claim damages.

Legislative facilitation of information will *firstly* protect the information of firms participating in proceedings before the Competition Tribunals that have been found *not* to have contravened the provisions of the Competition Act, against private competition damages. *Secondly*, it will allow victims of contraventions of the Competition Act to gain quick, inexpensive and unfettered access to information filed during the course of

the competition proceedings of firms found to have contravened the provisions of the Competition Act.

Legislative facilitation of access to information should include access to information included in a leniency recipient's application for leniency. A leniency recipient is *not* absolved from liability for private damages resulting from contravention of the Competition Act.⁶¹ Such a proactive step on the part of the legislature will significantly add to the necessary structures required for the proper administration of the provisions of the Competition Act, and allow the victims of contraventions of the Competition Act to recover the loss and damage suffered as a result of the contravention of the Competition Act. It will furthermore enhance the attainment of the object of the Act by promoting (in addition to the administrative penalties and agreed damages already provided for in the Act) claims for private damages as an ancillary secondary deterrent against contraventions of the Competition Act.

16.6.1.4 Recommendation

In view of the foregoing, and in order to promote the disclosure of information to claimants, it is suggested that the following further section be inserted in the Competition Act after section 45A:

45B. Access to information where firms have been found to have contravened the provisions of Chapter 2 of the Act.

(1) All *confidential information* filed as part of a *complaint, application for corporate leniency or consent agreement* resulting in an order by the Competition Tribunal that a *firm* has engaged in a *prohibited practice* shall, subject to the provisions of section 65(6)(b), section 65(8) and section 65(9), form part of the public record.

⁶¹ See Ch 15 par 15.3.5. See also *Premier Foods (Pty) Ltd v Manoim NO and Others* 2013 JDR 1666 (GNP)(unreported). See *Premier Foods (Pty) Ltd v Manoim NO and Others* 2016 (1) SA 445 (SCA). See Ch 15 fn 45.

(2) A person who requires access to information referred to in section 45B(1) must apply in writing to the Competition Commission for copies of the record.

(3) The Competition Commission shall be obliged to provide such information within 14 days from date of application to such person provided that such person shows that he has a reasonable interest in the matter.

The objective of the proposed new provision is to facilitate a claimant's access to the necessary required information. It dispenses with the need to bring a separate application or first issue summons and rely on the discovery procedures in order to determine the merits of the claim and quantify the damages. The publication of *confidential information* is limited to firms found to have *contravened* the provisions of the Competition Act and does not infringe unfairly on the interests of firms subjected to complaint proceedings before the competition authorities and found not to have contravened the provisions of the Competition Act.

B Defendants liable for the legal costs

16.7. Importance of costs

16.7.1 Introduction

Improved disclosure of information will greatly assist claimants to consider the merits and quantum of a particular damages action. The benefits brought about by the recognition of class actions (particularly *opt-out* class actions) in South Africa and the permissibility of contingency fee arrangements are advantages that favour the general public when contemplating a private damages action. The benefits of a contingency fee arrangement can only be fully realised if legal practitioners are given the opportunity of fully evaluating the merits of a claim when instructed. This predicates access to information as a vital cog in the promotion of private competition damages. The recognition of contingency fee agreements does little to assist with the evaluation of the merits and subsequent risks of litigation, and therefore, will not by itself (and have not up to now) driven a system of private competition damages.

The general principle in South African law is that costs follow the result of the action with the adjudicating officer given a final discretion in the awarding of costs. The concomitant risk with any litigation is that should the action prove unsuccessful; the unsuccessful party will be liable for the costs of the successful party. This is a sound principle, which undoubtedly restricts meritless and vexatious litigation by making an unsuccessful litigant liable not only for its own costs but also the costs of the opposing party.

Private competition damages provided for in section 65 of the Competition Act differs slightly from normal damages actions. This is the case because of the two-tiered adjudication process, where the competition authorities rule on the fault and unlawfulness of the conduct and the civil courts determine causality and assess the damages aspect of the claim. In light of the nature of the action being different to the normal action for damages, it is recommended that the legislature intervene to allow a deviation from the general rule pertaining to the awarding of costs by exonerating claimants from paying the defendants costs. The reason for this is two-fold: firstly, the fact that a claimant is still liable for its own costs means that this will discourage frivolous litigation; and secondly, the comfort afforded claimants and legal practitioners that the cost risk can be managed and budgeted will serve to lower the hurdle of litigation costs and the risks of litigation. Importantly, litigants are not exposed to costs awards in that part of the action before the Competition Tribunal.⁶² Furthermore, private follow-on 65 damages actions are a consequence of a finding of wrongdoing against the defendant before the competition tribunals. To this extent, a defendant in private competition damages actions has therefore been found potentially liable and insofar as *fault* and *conduct* is concerned, the claimant's private damages action has been partially successful. The only question is as to whether the claimant can prove a causal link between the conduct found to be unlawful and its damages as well as the extent of the damages. The discretion of a court not to award costs against a claimant (even where quantum and damages cannot be sufficiently proven), would therefore

⁶² Save where private complaint proceedings are instituted before the Competition Tribunal.

not be entirely in conflict with the general rule for the awarding of costs as set out in *Levin*⁶³ due to the nominal partial success in showing the unlawful conduct.

16.7.2 Recommendation

In order to promote the bringing of private competition damages actions and ease the risk of costs on a claimant, it is proposed that the following section after section 65(9) be inserted in the Competition Act:

65(10) A *person* who is a party to an action in a *civil court* for damages contemplated in section 65 shall each bear its own costs, including expert fees, attorneys' fees and other fees incurred in connection and related to the claim or defense of a damages action arising from a *prohibited practice*.

16.8 Conclusion

The current South African damages environment provides claimants with sufficient incentive to bring private competition damages actions without policy makers or the legislature having to intervene by the introduction of a foreign concept such as punitive damages or even rebuttable presumptions. Rather, proper credence and affect can be given to a claimant's right to damages for contraventions of the Competition Act by the legislature simply by enhancing and entrenching a claimant's right to gain access to information required for the formulation of a section 65 damages action.

Enhanced disclosure of information will greatly assist claimants and the courts to properly assess the effect of the anti-competitive behaviour and properly utilise economic models in order to estimate the extent of the damage caused. The quantity and quality of the information available determines the accuracy of the estimation. The effective use of economic modelling to quantify private competition damages actions

⁶³ *Ferreira v Levin; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC).

is largely dependant on an effective system ensuring disclosure and availability of information to a claimant.

As soon as private firms and individuals become increasingly aware of their rights to sue for private competition damages, victims of anti-competitive conduct found to have contravened the Competition Act, will with more regularity institute actions for private competition damages and require that the quantum of their damages be assessed by the courts in the best way possible.

INDEX

A

abuse of dominance, 59, 88, 97, 116, 121, 143, 145, 146

actio iniuriarum, 37

anti-competitive, 1, 2, 14, 20, 21, 24, 25, 26, 27, 28, 30, 39, 40, 42, 43, 49, 53, 56, 57, 59, 66, 71, 72, 78, 80, 81, 82, 84, 85, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 129, 131, 132, 133, 134, 136, 137, 142, 143, 144, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 158, 161, 164, 165, 174, 175, 176, 178, 180, 181, 183, 184, 185, 186, 187, 191, 199, 201, 203, 206, 207, 209, 210, 211, 212, 217, 218, 220, 221, 222, 227, 228, 230, 241, 243, 245, 246

assessment of damages, 2, 44, 52, 65, 67, 71, 83, 167, 179, 183, 235, 236

attract custom, 4, 7, 8, 9, 10, 15, 17, 22, 40, 57, 232

B

before-and-after, 87

bottom-up costing, 89

C

Canadian Competition Act, 173, 196

cartel conduct, 32, 59, 88, 103, **138**, 139, 151, 157, 166, 179, 207, 218, 224

causal connection, 15, 17, 38, 73, 74, 77, 78, 79, 80, 81, 143, 149, 150, 178

causation, 30, 42, 43, 53, 55, 73, 74, 75, 76, **79**, 81, 233, 234

civil courts, 21, 22, 26, 29, 30, 41, 47, 48, 50, 51, 208, 221, 223, 228, 230, 232, 236

class action, 33, 34, 182, 184, 188, 189, 190, 202, 203, 204, 205, 213, 214, 215, 216, 219, 228, 238

Clayton Act, 19, 84, 158, 185, 187

comparative method, 67, 68, 69, 70, 136, 235

compensation, 2, 14, 27, 41, 57, 143, 144, 158, 180, 183, 210, 243

compensatory nature, 144, 163, 174, 200, 201, 236, 239

competition, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 19, 20, 21, 22, 24, 25, 27, 28, 37, 38, 39, 40, 41, 42, 47, 56, 57, 58, 59, 61, 63, 65, 70, 71, 73, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 93, 94, 97, 101, 108, 110, 114, 117, 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 134, 136, 137, 140, 142, 143, 145, 146, 149, 150, 152, 153, 155, 156, 157, 160, 161, 162, 163, 164, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 217, 218, 219, 220, 221, 222, 223, 224, 227, 228, 230, 231, 232, 233, 234, 235, 237, 238, 239, 240, 241, 242, 243, 245, 246

Competition Act 89 of 1998, 2, 8, 12, 17, 19, 20, 22, 39, 43, 47, 50, 51, 54, 146, 175, 222, 223, 230, 232, 240, 241, 242

Competition and Consumer Act 2010, 19, 171, 172

competition principle, 11

competitive struggle, 1, 11

concrete assessment, **69**, 235

consequential loss, 59
corporate leniency policy, **31**, 194, 220, 228, 238
cost of capital, 116, 117
counterfactual, 85, 87, 88, 89, 90, 91, 93, 94, 96, 98,
99, 100, 104, 106, 110, 112, 113, 115, 116, 117,
118, 119, 120, 121, 122, 124, 129, 130, 131, 132,
133, 134, **136**, 137, 139, 140, 141, 142, 145, 146,
149, 152, 154, 155, 156, 164, 165, 166, 168
cross-sectional, 94, 95, 96, 97, 104, 107, 108, 109,
110

D

damage, 2, 8, 12, 13, 14, 15, 16, 17, 21, 22, 24, 26,
27, 28, 30, 36, 37, 38, 41, 42, 43, 44, 45, 47, 48,
51, 53, 54, 56, 57, 58, 59, 62, 63, 64, 66, 67, 68,
69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82,
84, 85, 86, 87, 88, 91, 102, 106, 107, 109, 112,
113, 114, 115, 116, 117, 118, 121, 123, 124, 129,
133, 134, 136, 137, 138, 139, 141, 142, 143, 144,
146, 147, 148, 149, 150, 151, 153, 154, 156, 157,
158, 159, 163, 164, 166, 170, 172, 173, 178, 180,
183, 184, 187, 197, 198, 199, 200, 201, 202, 204,
209, 210, 211, 212, 215, 219, 220, 221, 222, 227,
230, 232, 233, 234, 235, 236, 239, 243, 244, 245
damage to property, 58
damnum emergens, 58
deadweight loss, 140
deterrence, 24, 25, 143, 183
difference-in-difference, 89, 93, **107**, 108, 109, 110,
120, 133, 165
direct loss, 59
disclosure of information, 181, 193, 194, 195, 196,
207, 224, 225, 241, 242, 243, 244, 245

E

economic models, 81, 84, 85, 86, 87, 90, 91, 156,
211, 212, 231, 236, 238, 245
economics, 4, 78, 99

exclusionary conduct, 114, **145**, 150

F

factual causation, **72**, 75, 76
fault, 44, 53, 179, 180, 233, 234
flexible approach, **76**, 77, 81

G

goodwill, 4, **5**, 6, 7, 8, 10, 14, 17, 37

H

hybrid approach, **70**, 235

I

indirect claimant, 160
indirect purchaser, 200, 201, 202

L

legal causation, 74, 75, **76**, 79, 81
lost profit, 12, **60**, 66, 70
lucrum cessans, 60

M

market structure, 90, **124**, 133
monopolistic competition, **125**, 130
monopoly, **124**, 125, 130, 131, 134

O

opt-in, **182**, 203, 204, 205, 206, 214, 215, 216, 217,
228
opt-out, 182, 189, **190**, 202, 203, 204, 205, 206,
214, 215, 217, 228

P

passing off, 4, **9**, 22, 232

passing-on, 142, 143, 144, 148, 149, 151, **157**, 158,
160, 161, 162, 163, 179, 193, 199, 200, 201, 202,
209, 210, 219, 236

patrimonial loss, 18, 36, 37, **56**, 57, 58, 66, 70, 84,
162

perfect competition, **124**, 129

pooling, 91, 92, **169**, 170, 236

pool-selection, 169

private competition damages, 172, 173, 174, 192,
193, 209, 212, 219, 227, 228, 230, 237, 238, 240

profitability analysis, 113, 116

prohibited practice, 21, 26, 29, 45, 46, 47, 48, 73,
147, 222, 230, 244

prospective loss, 60, 64, 65, 66, 70, 71, 136, 235

punitive damages, 57, 71, 84, 162, 172, 173, 174,
179, 187, 191, 197, 210, **217**, 218, 221, 228, 239,
245

pure economic loss, 58, 61

Q

quantification, 2, 41, 48, 50, 55, 61, 79, 82, 83, 84,
85, 86, 100, 111, 124, 144, 157, 164, 165, 168,
192, 194, 197, 199, 204, 210, 211, 212, 227, 231,
234, 235, 238

quantify, 22, 54, 56, 64, 83, 85, 86, 130, 141, 162,
227, 233, 239, 245

quantum, 50, 66, 71, 81, 115, 157, 170, 172, 211,
212, 220, 234

R

regression analysis, 87, **100**, 101, 187

S

section 65, 28, 29, 30, 35, 42, 43, 44, 47, 48, 49, 50,
51, 52, 54, 60, 222, 230, 231, 232, 233, 234, 237,
240, 242, 244, 245

special damage, 15, 16

sum-formula, 65, **67**, 68, 69, 70, 85, 235

T

time-series, 101, 103, 104, 105, 107, 108, 109, 110

treble damages, 24, 84, 158, 162, 184, 185, **187**, 190,
192, 207, 217, 221, 237

two-phased, 26, 27, 30, 47, 234

U

unfair competition, 8, 11, 15, 17, 21, 235

unlawful competition, 1, 2, 8, 11, 22, 37, 41, 63, 71,
77, 78, 82, 232

US Federal Rules of Civil Procedure, 184

REFERENCES

- Advocacy Aid. (n.d.). *Statistics show 26% of South Africans living on less than R305*. Available at <http://www.advocacyaid.com/index.php/cross-cutting-issues/153-statistics-show-26-of-south-africans-living-on-less-than-r305>. (Last accessed on 25 June 2014).
- Alexander, J.C. An introduction to class action procedure in the United States. 2000. (*Class Actions*). Available at <http://law.duke.edu/grouplit/papers/classactionalexander.pdf> (Last accessed on 4 May 2016).
- Anderson, D.R. *Actuarial Evidence Valuing Past and Future Income*, 2nd Edition. Toronto: Carswell, (1986).
- Anderson, M., "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" *IDS Working Paper 178, Institute of Development Studies*, February 2003. Available at: <https://www.ids.ac.uk/files/dmfile/Wp178.pdf> (Last Accessed on 13 May 2016).
- Ashton, D. & Henry, D. (2013). *Competition Damages Actions in the EU: Law and Practice*. USA: Edward Elgar Publishers (*Competition Damages*).
- Ashurst Report. *Study on the conditions of claims for damages in case of infringement of EC competition rules: analysis of economic models for the calculation of damages*. A report prepared for the European Commission, 31 August 2004. (*Ashurst Report*) Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf (Last accessed on 4 May 2016).
- Australia. (2014). *Cartels: Enforcement, Appeals & Damages Actions*. Available at: <http://www.conventuslaw.com/australia-cartels-enforcement-appeals-damages-actions/>. (Last accessed on 13 May 2016).
- Baker, J. & Rubinfeld, D.L. (1999). Empirical Methods in Antitrust Litigation: Review and critique, *American Law and Economics Review*, 1, 386-435.
- Beaton-Wells, C. & Tomasic, K. (2012). "Private enforcement of competition law: Time for an Australian debate" *UNSW Law Journal*, Volume 35(3). Available at <http://www.unswlawjournal.unsw.edu.au/sites/all/themes/unsw/images/Caron-Beaton-Wells-and-Kathryn-Tomasic.pdf>. (Last accessed on 13 May 2016).
- Bertrand M, Duflo, E. & Mullainathan, S. (2004). "How much should we trust differences-in-differences estimates?" *Quarterly Journal of Economics*, 119, 249.

Bishop, S. & Walker, M. (2010). *The Economics of EC Competition Law: Concepts, Application and Measurement*. 3rd Edition, Sweet & Maxwell, United Kingdom.

Bizjak, J. & Coles, J. (1995). "The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm" *American Economic Review*, 85(3), 436-61.

Bloembergen, A.R. (1965). *Schadevergoeding bij Onrechtmatige Daad*. Deventer: Kluwer

Boberg, P.Q.R. (1984) *The Law of Delict. Vol. 1: Aquilian Liability*. Cape Town: Juta.

Brassy, M. (2002) *Competition Law*. 1st Ed. Cape Town: Juta.

Broadbent, A. (2009). "Fact and Law in Causal Inquiry" *Legal Theory*, Volume 15(3)

Buxbaum, H.L. (2007). *Private Enforcement of Competition Law in the United States – Of Optimal Deterrence and Social Costs*, in Jürgen Basedow (ed), *Private Enforcement of EC Competition Law*, Deventer: Kluwer Law International.

Callman, R. *Callman on Unfair Competition, Trademarks and Monopolies*. West Thompsons. Vol. 1 at 1-60 and 1-63; 4th Ed. Edited by Altman, L. 2003 revision; Vol. 1A Chapter 9 2007 revision; Vol. 2 Chapter 11 2005 revision; Vol. 4 Chapter 22 2004 revision; Spring 2007 Cumulative Supplement by Altman, L. & Pollack, M.

Cengiz, F. (2007). "Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against Violations of Competition Law: What can the EC learn from the US?" *ESRC Centre for Competition Policy and School of Law, University of East Anglia*. Available at: <http://competitionpolicy.ac.uk/documents/8158338/8256114/CCP+Working+Paper+07-21.pdf> (Last accessed on 13 May 2016).

Chayes, A. (1979). "The role of the judge in public law litigation" *Harvard Law Review*, Volume 89.

Chornoboy, E. S., Schramm, L. P. and Karr, A. F. (1988) "Maximum likelihood identification of neural point process systems", *Biological Cybernetics*, Volume 59.

Collins, P. (2006) *Public and private enforcement challenges and opportunities*. Chairman Office of Fair Trading. Speech to the Law Society's European Group, 6 June 2006. Available at www.offt.gov.uk/shared_offt/speeches/0306.pdf. (Last accessed on 8 November 2012).

Competition Commission. (2013). *Media statement: Competition Commission: Construction firms settle collusive tendering cases with R1.5 billion in penalties*. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-Media-Release.pdf>. (Last accessed on 25 June 2014).

Connor, J. (1998). "Archer Daniels Midland: Price-Fixer of the World." *Staff Working Paper 00-11, Department of Agricultural Economics, Purdue University* Available at: ageconsearch.umn.edu/bitstream/28680/1/sp98-10.pdf. (Last accessed on 13 May 2016).

Connor, J.M. & Lande, R.H. (2008). *Cartel Overcharges and Optimal Cartel Fines*, chapter 88, pp. 2203–18. In S.W. Waller (Ed.). *Issues in Competition Law and Policy*, volume 3, American Bar Association, Section of Antitrust Law.

Davis, P. & Garcés, E. (2009). *Quantitative Techniques for Competition and Antitrust Analysis*. Princeton University Press.

De Coninck, R. (2011) "Quantifying Antitrust Damages in Civil Proceedings: A Pragmatic Approach" *New Frontiers of Antitrust Conference, Paris*, 11 February 2011. (*Quantifying Antitrust Damages*). Available at: http://ec.europa.eu/dgs/competition/economist/deconinck_at_damages.pdf. (Last accessed on 13 May 2016).

Delatre, J.G. (2011). "Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation" *The Competition Law Review (CLR)*, Volume 8, Dec Issue.

De Wet, J.C. & Van Wyk, A.H. *Die Suid-Afrikaanse Kontraktereg en Handelsreg*. 1(5). Durban: Butterworths, (1992).

Diebold, F. *Elements of Forecasting*. (2008). 4th Edition. South Western, United States.

Dougherty, C *Introduction to Econometrics*, (2011). 4th Edition. Oxford: Oxford University Press.

Eggleston, R. (1983) *Evidence, Proof and Probability*, London: Weidenfeld and Nicolson.

Eichler, M. (2013) "Causal inference with multiple time series: principles and problems" *Philosophical Transactions of the Royal Society*, 2013, Vol 371. Available at: <http://rsta.royalsocietypublishing.org/content/371/1997/20110613> (Last accessed on 13 May 2016).

Epstein, R.J. & Rubinfeld, D. (2001). "Merger Simulation: A simplified Approach with New Applications" *Antitrust Law Journal*, 883-919.
Available at: <http://scholarship.law.berkeley.edu/facpubs/1362>

Erasmus, (2013). *Superior Court Practice*. Cape Town: Juta.

European Commission. (2005). *Green Paper: Damages actions for breach of EC antitrust rules*. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0672>. (Last accessed on 23 April 2014).

European Commission. (2006). *Comments of the section of antitrust law and the section of international law of the American Bar Association in response to the request for public comment of the Commission of the European communities on damage actions for breaches of EU antitrust rules*.

Available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf. (Last accessed on 29 April 2014).

European Commission. (2008). *White Paper: Damages action from breach of EC antitrust rules*. Available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. (Last accessed on 23 April 2014).

European Commission (2007) Report for the European Commission Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios.

Available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf. (Last accessed on 27 April 2015).

European Commission. (2011). *Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union*. Available at:

http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf. (Last accessed on 23 April 2014).

European Commission. (2013). *Press Release: Antitrust: Commission proposes legislation to facilitate damage claims by victims of antitrust violations*.

Available at: http://europa.eu/rapid/press-release_IP-13-525_en.htm. (Last accessed on 25 June 2014).

European Commission. (2013). *Staff working document – practical guide – quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union*. Available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (Last accessed on 23 April 2014).

European Union. (2004). *Treaty on the Functioning of the European Union*.

Available at:

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEYQFjAE&url=http%3A%2F%2Fwww.eudemocrats.org%2Ffileadmin%2Fuser_upload%2FDocuments%2FD-Reader_friendly_latest%2520version.pdf&ei=1wp-U6JR_sTsBrqpgNAP&usg=AFQjCNFNmUHtHeGcVDMwrfWknOq2zd5BUw&bvm=bv.67229260,d.ZGU. (Last accessed on 22 May 2014).

European Union. (2013). *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (11 June 2013)*.

Available

at: http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf European Directive 2014/104/EU, dated 26 November 2014. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

European Union. (2013). *Official Journal of the European Union (2013/C 167/07)*.

Available at: <http://kartellblog.de/wordpress/wp-content/uploads/2013-Communication-from-the-Commission-on-quantifying-harm-in-actions-for-damages.pdf>. (Last accessed on 12 May 2014).

European Union. (2014). *Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (26 November 2014)*.

Available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

Eversheds Attorneys (France). (2014). *Introduction of Antitrust Class Actions by the French Law on Consumer Protection*.

Available at:

http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/France_Introduction_of_Antitrust_Class_Actions. (Last accessed on 21 May 2014).

Finkelstein, M.O. & Levenbach, H. (1983). "Regression Estimates of Damages in Price-Fixing Cases" *Law and Contemporary Problems*, Volume 46.

First, H. (2010). *Lost in Conversation: The Compensatory Function of Antitrust Law*. (New York University Law and Economics, Working Paper No 10–14, April 2010).

Fisher, F.M. (1980). "Multiple Regression in Legal Proceedings" *Columbia Law Review*, 80, 720.

Foster, G. (2012). *Global Guide to Competition Litigation Australia 2012*.

Available at:

<http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Comp>

etition/Guide%20to%20Competition%20Litigation/Australia.pdf. (Last accessed on 13 May 2016).

Foster, S.E. (2001). "While America slept: the harmonization of competition laws based upon the European Model" *Emory International Law Journal*, Volume 467.

Gardner, J. (2011). "What is Tort for? Part 1. The Place of Corrective Justice" *Law and Philosophy*, Volume 30(1).

Garner, B. (1999). *Black's Law Dictionary*, 7th Edition, West Group, United States.

Ginsburg, D. & Brannon, L. (2005) "Determinants of Private Antitrust Enforcement in the United States" *Competition Policy International Journal*, Volume 1(2).

Granger, C.W.J. (1969). "Investigating Causal Relations by Econometric Models and Cross-spectral Methods", *Econometrica*, Volume 37(3).

Guirguis, A., McCowan, M. & Mortensen, J. (2015). *The Cartels and Leniency Review*. 3rd Edition, Editor Varney, C.A. London: Law Business Research.

Harrington, J.E. (2004) "Post-Cartel Pricing During Litigation". *Journal of Industrial Economics*, Volume 52.

Harrington, J.E. (2008). *Detecting Cartels*. In P Buccirossi (ed), *Handbook of Antitrust Economics*. USA: MIT Press.

Harris, R.G. & Sullivan, L.A. (1980). Passing on the Monopoly Overcharge: A Comprehensive Analysis. *University of Pennsylvania Law Review*, Volume 128.

Hart, H.L.A. & Honoré, T. (1985) *Causation in Law*, 2nd Edition. UK: Oxford University Press.

Hendry D.F. & Clements, M.P. (2004). Pooling of Forecasts. *Econometrics Journal*, Volume 7(1).

Hovenkamp, H.J. (2011). *Quantification of Harm in Private Antitrust Actions in the United States*. February 2011. Available at: http://www.academia.edu/21043023/Quantification_of_Harm_in_Private_Antitrust_Actions_in_the_United_States (Last accessed on 13 May 2016).

Howard, J.H. & Kaserman, D. (1989). "Proof of damages in bid-rigging cases" *Antitrust Bulletin*, Volume 34.

Huida Qiu, Yan Liu, Subrahmanya, N.A. & Weichang Li. (n.d.). *Granger Causality for Time-Series Anomaly Detection*. Available at: <http://www-bcf.usc.edu/~liu32/icdm2012.pdf>. (Last accessed 13 May 2016).

Inderst, R., Maier-Rigaud, F. & Schwalbe, U. (2014). "Umbrella Effects". *Journal of Competition Law and Economics*, 2014, Volume 10.

International Competition Network. (2007). *Interaction of Public and Private Enforcement in Cartel Cases*. Report to the ICN annual conference, Moscow, May 2007. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf>. (Last accessed on 29 April 2014).

Jones, C. (2004). "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market". *Loyola Consumer Law Review*, Volume 16.

Joubert, W.A. (2005). *Law of South Africa*. 2nd Edition. Durban: LexisNexis.

Jull, K., Latella, M., Gates, A. & Gadsden, D. (2012). *Global Guide to Competition Litigation Canada 2012*. Available at: <http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20%20Competition/Guide%20to%20Competition%20Litigation/Canada.pdf>. (Last accessed on 12 May 2014).

Kawai, K, Shimanda, M. & Heike, M. (2012). *The Private Competition Enforcement Review*. 5th Edition, Editor: Gotts, I.K. London: Law Business Research Limited, (2012).

Keynes, J.M. *A Treatise on Probability*. London: MacMillan and Co, (1921)

Koch, R.J. (1984). *Damages for lost Income*. Cape Town: Juta, (1984).

Koch, R.J. "Damages for Personal Injury and Death" *THRHR*, 1986.

Koch, R.J. "Aquilian Damages for Personal Injury and Death" *THRHR*, 1989.

Klopper, H.B. "The widow's portion" *THRHR (Tydskrif vir Hedendaagse Romeins-Hollandse Reg)*, 2007, Volume 70.

Klopper, H.B., Pistorius, T., Rutherford, B.R., Tong, L., Van der Spuy, P. & Van der Merwe, A. (Eds.) (2011). *Law of intellectual property in South Africa*. Durban: Lexis Nexis.

Kockett (2014). Opinion of AG Kokott, Case C-557/12 (January 2014).
Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CC0557>

Kolasky, W. (2008) "Reinvigorating Antitrust Enforcement in the United States: A Proposal".
Antitrust Magazine, Volume 22(2).

Konings, J., Van Cayseele, P. & Warzynski, F. (2001). "The Dynamics of Industrial Mark-ups in Two Small Open Economies: Does National Competition Policy Matter?" *International Journal of Industrial Organization*, 19, 841-859.

Kroes, N. (2005). *Enhancing actions for damages for breach of competition rules in Europe*.
Dinner Speech at the Harvard Club, New York, 22 September 2005.
Available at: http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm. (Last accessed on 8 November 2012).

Landes, W.M. & Posner, R.A. (1979). "Should indirect Purchasers have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick" *University of Chicago Law Review*, Volume 46.

Landes, W.M. (1983). "Optimal Sanctions for Antitrust Violations" *University of Chicago Law Review*, Volume 50.

Lauterburg, B.C. & Zurkinder, P.E. (2014). *The Private Competition Enforcement Review*. 7th Edition, Editor: Gotts, I.K. London: Law Business Research Limited.

Lianos, I. (2011). *Competition Law Remedies: In search of a Theory*.
Available at: http://www.ucl.ac.uk/laws/clge/wp-series/ucl_clge_014_11.pdf. (Last accessed on 2 March 2015).

Lianos, I. & Genakos, C. (2012). *Econometric Evidence in EU competition law: an empirical and theoretical analysis*.
Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184563. (Last accessed on 17 June 2015).

Lianos, I. (2015). *Causal uncertainty and damages claims for infringement of competition law in Europe*.
Available at: <http://dx.doi.org/10.2139/ssrn.2564329>. (Last accessed on 8 October 2015).

Liebenberg, S. & Quinot, G. (2012). *Law and Poverty: Perspectives from South Africa and Beyond Cape Town*: Juta.

Lincoln, A. (1861). *Speech to Congress, Dec. 3*. Available at:
<http://www.infoplease.com/t/hist/state-of-the-union/73.html>. (Last accessed on 12 May 2014).

Loubser, M. & Midgley, R. (2012). *Law of Delict in South Africa*. 2nd Edition, Oxford: Oxford University Press.

Maier-Rigaud F.P. & Schwalbe, U. "Quantification of Antitrust Damages" For publication in David Ashton and David Henry, *Competition Damages Actions in the EU: Law and Practice*, Edward Elgar, (2013).

Available at: <http://ssrn.com/abstract=2227627>. (Last accessed on 29 April 2015).

Maier-Rigaud, F. & Schwalbe, U. (2013). "Private enforcement under EU Law: Abuse of Dominance and the Quantification of *Lucrum Cessans*" *CPI Antitrust Chronicle*, November 2013, Volume 2.

Available at:

http://www.nera.com/content/dam/nera/publications/archive2/PUB_CPI_Private_Enforcement_1113.pdf .(Last accessed on 21 October 2015).

Mbazira, C. (2009). *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice*. The Pretoria University Law Press (PULP).

McCarthy, E., Maltas, A., Bay, M. & Ruiz-Calzado, J. (2007). "Litigation culture versus enforcement culture: A comparison of the US and EU plaintiff recovery actions in antitrust cases" *Antitrust Review of the Americas*. Available at:

http://lw.com/upload/pubContent/_pdf/pub1675_1.pdf. (Last accessed on 29 April 2014).

McGregor, H. (1997). *McGregor on Damages*. Sweet and Maxwell. updated by Third Supplement to the 16th edition (2001).

Meyer, B. (1995). "Natural and Quasi-Natural Experiments in Economics," *Journal of Business and Economic Statistics*, Volume XII.

Milutinovic, V. (2010). *The Right to Damages under EU Competition Law - From Courage v. Crehan to the White Paper and Beyond*, Kluwer Law International, (2010).

Modak-Truran, M. (2000). "Corrective justice and the revival of judicial virtue" *Yale Journal of Law & Humanities*, Volume 12.

Moneyweb. (2014). *Competition Commission in pickle about construction info*.

Available at: <http://www.moneyweb.co.za/moneyweb-south-africa/competition-commission-in-pickle-about-construction>. (Last accessed on 29 April 2014).

Neethling, J. & Van Aswegen, A. (1989). "Aspekte van aanspreeklikheid weens suiwer ekonomiese verlies: Bemoeiing met 'n kontraktuele verhouding en die rol van beleidsoorwegings" *Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law*. ('Aspects of liability based on liability for pure economic loss').

- Neethling, J., Potgieter, P.M. & Visser, P.J. (2005). *Neethling's Law of Personality*, 2nd Edition. Durban: LexisNexis.
- Neethling, J., Potgieter, J.M. & Visser, P.J. (2014). *Law of Delict*. 7th Ed. J.C. Knobel (Editor.). Durban: Lexis Nexis.
- Niels, G., Jenkins, H. & Kavanagh, J. (2011). *Economics for Competition Lawyers*. Oxford: Oxford University Press.
- Nyenti, M. (2013). "Access to justice in the South African social security system: Towards a conceptual approach" *De Jure*, Volume 46(4).
- O'Brien, P.H. (1992). "Deliktuele eis weens bemoeiing met 'n kontraktuele verhouding" *TSAR*. ('Delictual claim based on interference with a contractual relationship').
- Osborne, W.M., Binette, M., Booth, M.E., Vaillancourt, D. & Campbell, F. *The Private Competition Enforcement Review*. 8th Edition. Editor: Gotts, I.K. London: Law Business Research Limited, (2015).
- Oxera Report. (2009). *Quantifying antitrust damages – Towards non-binding guidance for courts*. Study prepared for the European Commission by OXERA, December 2009. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf. (Last accessed on 13 May 2016).
- Oxera. (2013). The EU draft Damages Actions Directive: Another rebuttable presumption to rebut? Available at: <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/The-EU-draft-Damages-Action-Directive.pdf?ext=.pdf>. (Last accessed on 29 April 2014).
- Page, W. (1980) "Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury" *University of Chicago Law Review*, Volume 47.
- Peyer, S. (2010). *Myths and Untold Stories – Private Antitrust Enforcement in Germany*. (Working Paper No 10–12, Centre for Competition Policy, University of East Anglia, 1 July 2010). Available at: <http://ssrn.com/abstract=1672695>. (Last accessed on 7 June 2015).
- Rawls, J. (1993). *Political Liberalism*. New York: Columbia University Press.
- Reinecke, M.F.B. "Die elemente van die begrip skade" *TSAR*, 1976.
- Roach, K. (1994). *Constitutional remedies in Canada* Canada Law Book Ontario.

Rubinfeld, D.L. & Steiner, P.O. (1983). "Quantitative Methods in Antitrust Litigation" *Law and Contemporary Problems*, Volume 46.

Rubinfeld, D.L. (2008). *Quantitative Methods in Antitrust*. Competition Law and Policy, American Bar Association, Section of Antitrust Law.

Scallan, A. Mbikiwa, M. & Blignaut, L. "Compensating for harm arising from anti-competitive conduct" *Seventh Annual Competition Law Economics and Policy Conference*, (5 & 6 September 2013).
Available at: <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2A/Conference-Paper-Final-21-08-2013.pdf>. (Last accessed on 14 April 2014).

Schmidt, C.W.H. & Rademeyer, H. (2000). *Bewysreg*. 4th Edition. Durban: Butterworths.

Schreiber, T. (2000). "Measuring Information transfer". *Physical Review Letters*, Volume 85(2).

Shapiro, C. (1989) *Theories of Oligopoly Behaviour*. In R. Schmalensee & R.D. Willig (eds). *Handbook of Industrial Organisation: Volume 1*, Elsevier Science Publishers, Amsterdam.

South Africa. (2008). *South Africa Corporate Leniency Policy*.
Available at: <http://www.compcom.co.za/corporate-leniency-policy/>. (Last accessed on 13 May 2016).

South African Law Commission Project 88. (1998). *Recognition of Class Actions and Public Interest Actions in South African Law*. August 1998. Available at:
http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf

Stapleton, J. (2008). "Choosing what we mean by 'Causation' in the Law" *Missouri Law Review*, Volume 73.

Stapleton, J. (2010). "Factual Causation" *Federal Law Review*, Volume 38.

Statistics South Africa. (2004). *Living Conditions of Households in SA 2008/2009*.
Available at: www.statssa.gov.za/publications/P0310/P03102008.pdf. (Last accessed on 25 June 2014).

Steyn, J.C. (1981). *Uitleg van wette*. Cape Town: Juta.

Steynberg, L. (2011). "'Fair' Mathematics in assessing delictual damages", *PER (Potchefstroom Electronic Law Journal)*, Volume 14(2).

Sutherland, P. & Kemp, K. (2012). *Competition Law of South Africa*. Issue 15. Durban: LexisNexis.

Sweeney, B. (2006). "The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the US, Europe and Australia". *Melbourne University Law Review*, Volume 30.

Timmerman, A. (2001). "Forecast combinations" In Elliot, Granger and Timmerman, *Handbook of Economics*, Volume 1, Forecasting. Atlanta: Elsevier.

Timmermann, A. (2005). Forecast Combinations.
Available at: <http://www.econ.duke.edu/~brossi/timmermannHb.pdf>. (Last accessed on 25 June 2014)

UK Department for Business, Innovation & Skills. (2013). *Private actions in competition law: a consultation on options for reform – Government Response*. (UK Department for Business). Available at: <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>. (Last accessed on 29 April 2014).

United Nations Development Programme "Access to Justice" (March 2004), 3. Available at http://www.unrol.org/files/Access%20to%20Justice_Practice%20Note.pdf (Last Accessed on 9 June 2015).

United States of America *The Sherman Act, 1890*.
Available at: http://www.linco.org/sherman_txt.html. (Last accessed on 25 June 2014).

United States of America. (2004). *Antitrust Criminal Penalty Enhancement and Reform Act of 2004, section 213*.
Available at: <https://www.govtrack.us/congress/bills/108/hr1086/text>. (Last accessed on 25 June 2014).

United States of America (2007) Antitrust Modernization Commission.
Available at: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (Last accessed on 4 May 2016).

United States of America (2011) *Reference Manual on Scientific Evidence*, 3rd Edition, published by the US Federal Judicial Commission. (*Reference Manual on Scientific Evidence*). Available at: [http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/\\$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf). (Last accessed on 28 April 2015).

United States of America. (2013). Federal rules of civil procedure.
Available at: <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>. (Last accessed on 10 May 2014).

- Vallentyne, P. (undated). *Distributive Justice*. Available at: http://klinechair.missouri.edu/docs/distributive_justice_handbook.pdf. (Last accessed on 2 March 2015).
- Van der Heever, F.P. (1944). *Aquilian Damages in South African Law*. Cape Town: Juta, Volume 1.
- Van der Walt, C.F.C. (1977). *Sommeskadeleer en die once and for all reël*. Unpublished LLD thesis. Pretoria: Unisa. (*Sommeskadeleer*).
- Van der Walt, C.F.C. "Die voordeeltorekeningsreël- knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" *THRHR*, 1980, 43, 1.
- Van der Walt, J.C. & Midgley, J.R. (1997) *Delict: Principles and Cases*. 2nd Ed. Durban: Butterworths.
- Van der Walt, J.C. & Midgley, J.R. (2005) *Principles of Delict*. 3rd Ed. Durban: LexisNexis Butterworths.
- Van Dijk, T. & Verboven, F. (2005). *Quantification of Damages*. 30 June 2005. Available at: http://www.appliedantitrust.com/03_private_actions/damages/van_dijk_verboven_quantificatio n2008.pdf. (Last accessed on 12 May 2014).
- Van Heerden, H.J.O. & Neethling, J. (2008). *Unlawful Competition*, 2nd Ed. Durban: LexisNexis.
- Van Heerden, H.J.O. (1961). *Grondslae van Mededingingsreg*. Walmer: H.A.U.M Publishers.
- Vande Walle, S. (2011) "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis" *The Competition Law Review*, Volume 8(7).
- Vande Walle, S. (2011). *Deterrence of Antitrust Violations: Do Actions for Damages Matter in Japan? (Japan)*. Available at: <http://www.sef.hku.hk/aslea2011/private/paper/19.%20Simon%20Vande%20Walle%20final%20full%20paper.pdf>. (Last accessed on 17 May 2014).
- Van Niekerk, A. (2015). *Calculating Cartel Follow-on Damages: General considerations as well as application to South African construction sector*. A Paper prepared for the First Annual Competition and Economic Regulation (Acer) Week, 20-21 March 2015. Available at: http://www.competition.org.za/s/Albertus_van_Niekerk_CCRED_submission_updated.pdf. (Last accessed on 13 May 2016).

- Van Rensburg, A.D.J. (1970). *Juridiese Kousaliteit en Aspekte van Aanspreeklikheidsbeperking on Onregmatige Daad*. (Unpublished LLD-Thesis, Unisa).
- Verboven, F. & Van Dijk, T. (2009). "Cartel damage claims and the passing-on defense" *Journal of Industrial Economics (JIE)*, Volume 57(3).
- Visser, A. & Allix, M. (2014). *Class action seeks paltry R2.1m over bread pricing*. Published on 6 March 2014, Business Day.
Available at:
<http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=a8e1868a-01a7-4e48-a9ba-0b7da7291977&key=jh5IGDU5MB969OBE7BR7rQ%3d%3d&issue=1106201403060000000001001>. (Last Accessed on 28 May 2014).
- Visser, A. (2014). *Plans to sue construction companies are gaining momentum*. Business Day Article dated 16 January 2014.
Available at: <http://www.bdlive.co.za/business/industrials/2014/01/16/plans-to-sue-construction-companies-are-gaining-momentum>. (Last accessed on 10 May 2014).
- Visser, P.J. "Kompensasie van nie-vermoënskade" *THRHR*, 1983, 43.
- Visser, P.J., Potgieter, J.M., Steynberg, L. & Floyd, T.B. (2012) *Law of Damages*. 3rd Ed. Cape Town: Juta.
- Wellman C. (2002) *Justice*. In Simon, L. (Ed). *The Blackwell guide to social and political philosophy*. USA: Wiley-Blackwell.
- Wells, M. & Eaton, T. (2002) *Constitutional Remedies: A reference book for the United States Constitution*. USA: Praeger Publishers.
- Werden, G & Schwartz, M. (1984). "Illinois Brick and the Deterrence of Antitrust Violations – An Economic Analysis" *Hastings Law Journal*, Volume 35.
- Whish, R. & Bailey, D. *Competition Law*. (2012). 7th Edition. Oxford: Oxford University Press.
- Wright, R.W. (1985). "Causation in Tort Law" *California Law Review*, Volume 73(6).
- Zarnowitz, V. (1984). "The Accuracy of Individual and Group Forecasts from Business Outlook Surveys" *Journal of Forecasting*, Volume 3(1).
- Zimmerman, R. (1990). *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town: Juta.

CASES

A

Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W)
Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420
AgriWire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others [2012] 4 All SA 365 (SCA)
Alberta Ltd v ExxonMobil Canada Ltd 2011 ABQB 292 (CanLII)
Allianz Australia Insurance Ltd v GSF Australia (Pty) Ltd 2005 221 CLR 568
American Natural Soda Corporation v Competition Commissioner 2003 5 SA 633 (CAC)
Arendse v Maher 1936 TPD 162
Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T)
Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 7) [2014] FCA 5

B

Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008 (5) SA 1 (SCA)
Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC)
Becker and Company (Pty) Ltd v Becker 1981 3 SA 406 (A)
Begemann v Ciota 1923 TPD 270
Bernard Crehan v Inntrepreneur Pub Company CPC [2004] EWCA Civ 637
Bester v Calitz 1982 3 SA 864 (O)
Bester v Commercial Union Verseekeringsmaatskapy van SA Bpk 1973 1 SA 769 (A)
Blue Lion Manufacturing (Pty) Ltd v National Brands Ltd 2001 (3) SA 884 (SCA)
Botha v Carapax Shadeports (Pty) Ltd 1992 (1) SA 202 (A)
Botha v Pretoria Printing Works Ltd 1906 TS 710
Bredell v Pienaar 1924 CPD 203
Brenner v Botha 1956 (3) SA 257 (T) 260
Brian Boswell Circus (Pty) Ltd v Boswell-Wilkie Circus (Pty) Ltd 1985 (4) SA 466 (A)
Bundesgerichtshof (Federal Court of Justice, Germany), decision of 19 June 2007, case No KRB 12/07 (*Paper Wholesaler Cartel*)
Bundesarbeitskammer v Powerdrive Fahrschule Andritz GmbH, Landesgericht für Zivilrechtssachen Graz (regional civil court of Graz), judgment dated 17 August 2007
Burger v National South British Insurance Company 1975 4 SA 72 (W)

C

Cadbury Schweppes Pty Ltd v Amcor Limited [2009] FCA 442
California v ARC America Corporation 490 U.S 93 (1989).
Cape of Good Hope Bank v Fischer (1886) 4 SC 368
Capital Estate and General Agencies v Holiday Inns 1977 (2) SA 916 (A)
Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd 1998 (3) SA 938 (SCA)
Caxton Limited v Reeve Forman (Pty) Ltd 1990 (3) SA 547 (A)
Children's Resource Centre and Others v Pioneer Food and Others 2013 (2) SA 213 (SCA)
Chisholm v ERPM Ltd 1909 TH 297
City of Atlanta v. Chattanooga Foundry & Pipe Works 101 F. 900 (C.C.E.D. Tenn. 1900),
aff'd, 203 U.S. 390 (1906)
City of Cape Town v Helderberg Park Development (Pty) Ltd 2007 (1) SA 1 (SCA)
Clair v Port Elizabeth Harbour Board 1886 EDC 311
Clarke v Hurst 1992 (4) SA 630 (D)
Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA)
Coetzee v SAR & H 1933 CPD 595
Combrink Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd
1972 4 SA 185 (T)
Competition Commission v Pioneer Foods 15/CR/Feb07
Competition Commission v South African Breweries Ltd and Others 2015 (3) SA 329 (CAC)
Competition Commission v Telkom SA Ltd (11/CR/Feb04)
Conduit Europe, S.A v Telefónica de España S.U.A, Juzgado de lo Mercantil Madrid (Madrid
Commercial Court), judgment of 11 November 2005
Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-Operatiewe Maatskappy Bpk 1964 (2)
SA 47 (T)
Commissioner of Main Roads v Jones (2005) 215 ALR 418
Conwood Company v US Tobacco Company 290 F 3d 768 (6th Cir 2002)
Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D)
Courage v Crehan 2001 ECR I-6297 CJ. C-453/99
Craftsmen Limousine Inc v Ford Motor Company 363 F. 3d 761 (8th Cir. 2004)
Crehan v Inntrepreneur [2003] EWHC 1510 (Judgment of the High Court on 26 June 2003).
Custom Credit Corporation v Shembe 1972 (3) SA 462 (A)

D

Da Silva v Coutinho 1971 (3) SA 123 (A)
De Klerk v ABSA Bank Ltd 2003 (4) SA 315 (SCA)
De Vos v Eagle Versekeringsmaatskappy Bpk 1985 (3) SA 447 (A)
Die Bergkelder v Delheim Wines (Pty) Ltd 1980 (3) SA 1171 (C)

Dippenaar v Shield Insurance Company Ltd 1979 (2) SA 904 (A)
Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968
1 SA 209 (C)
Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR)
Durban Picture Frame Co (Pty) Ltd v Jeena 1976 1 SA 329 (D)

E

Edouard v Administrator, Natal 1989 (2) SA 368 (D)
El Aguila Food Products v Gurma Corporation No. 04-20125 United States Court of Appeals
for the Fifth Circuit
Erasmus v Davis 1969 2 SA 1 (A)
Esso Standard SA (Pty) Ltd v Katz 1981 1 SA 964 (A)
Evins v Shield Insurance Company Limited 1980 (2) SA 814 (A)

F

Faircape Property Developers (Pty) Ltd v Premier, Western Cape 2002 6 SA 180 (C)
Fedlife Assurance Ltd v Wolfaardt (2002) SA 49 SA (SCA)
Fichardt v The Friend Newspaper Ltd 1916 A.D 1
Fishman v Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)
Fortner Enterprises v United States Steel 394 US 495, 502 (1969)
Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)
Franschoekse Wynkelder (Ko-op) Bpk v SAR & H 1981 (3) SA 421 (SCA)

G

GEA Group AG v Venruta Group Co [2009] 307 D.L.R. (4th) 329 (Ont S.C.J)
Geary & Son (Pty) Ltd v Gove 1964 (1) SA 434 (A)
General Accident Insurance Co SA Ltd v Summers 1987 (3) SA 577 (A)
Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A)
Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman 1983 (3) SA 390 (T)
Goodall v President Insurance Company Limited 1978 (1) SA 389 (W)
Gorris v Scott (1874) LR 9 Ex 125
Gous v De Kock, Combrink v De Kock 1887 (5) SC 405
Goyo Kensetsu, Tokyo High Court, 16 February 2007
Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901 (N)
*GT Linien A/S (under bankruptcy – subsequently GT Link A/S) v De Danske Statsbaner DSB
and Scandlines A/Sn (formerly DSB Rederi A/S)* UFR 2005.217H (Danish Supreme Court)

H

Hanover Shoe v United Shoe Machinery Corporation 392 U.S 481 (1968)
Harvey Tiling Company (Pty) Ltd v Rodomac (Pty) Ltd 1977 1 SA 316 (T)
Hersman v Shapiro and Company 1926 TPD 367
Holmdene Brickworks v Roberts Construction 1977 (3) SA 670 (A)
Holscher v ABSA Bank 1994 (2) SA 667 (T)
Hulley v Cox 1923 AD 234
Hubbards v Simpson, 41 ALR 509, Federal Court of Australia, Full Court General Division, 1982
Hushon SA (Pty) Ltd v Pictech (Pty) Ltd 1997 (4) SA 399 (SCA)

I

INAZ Paghe srl v. Associazione Nazionale dei Consulenti del Lavoro, Corte d'Appello di Milano (Court of Appeal of Milan), judgment of 10 December 2004
Ingelheim Pharmaceuticals (Pty) Ltd v Novartis SA (Pty) Ltd and Another [2005] 4 All SA 453 (W)
Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal 1991 (1) SA 321 (T)
Inntrepreneur Pub Company and others v Crehan [2006] UKHL 38
International Shipping Company (Pty) Ltd v Bentley 1990 (1) SA 680 (A)
International Tobacco Company SA Ltd v United Tobacco Company (South) Ltd 1955 (2) SA 1 (W)

J

Jacobs v Minister of Agriculture 1972 (4) SA 608 (W)
Janeke v Ras 1965 (4) SA 583 (E)
Jones v Krok 1996 (1) SA 504 (T)
Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA)
Juzgade de lo Mercantil Madrid (Madrid Commercial Court), Conduit Europe S.A. v Telefonica de Espana S.A.U (11 November 2005)

K

Kellerman v South African Transport Services 1993 (4) SA 872 (C)
Khala v Minister of Safety and Security 1994 (3) SA 625 (E)
Klimax Manufacturing Ltd and Another v Van Rensburg and Another 2005 (4) SA 445 (O)
Klopper v Maloko 1930 TPD 860
Kone AG and others v ÖBB-Infrastruktur AG, Court of Justice (5th Chamber), Case C-557/12, 5 June 2014.
Kotwane v Unie Nasionaal Suid-Britse Verseekeringsmaatskapy Bpk 1982 4 SA 458 (O)
Kuter v South African Pharmacy Board 1953 (2) SA 307 (T)

L

Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd 1998 (4) SA 578 (W)
Ledger Sons & Co v James Munro & Son Ltd 33 R.P.C 53
LG Dortmund 0 55/02 Kart Vitaminkartell III, 1 April 2004
Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd 1985 (1) SA 475 (A)
Lorimar Productions Inc and Others v Dallas Restaurant 1981 (3) SA 1129 (T)
Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd 1990 (4) SA 136 (D)

M

Margau v King 1948 1 SA 124 (W)
Maritime Travel Incorporated v Go Travel Direct.com Incorporated 2008 NSSC 163 (CanLII), affirmed on appeal, 2009 NSCA 42 (CanLII).
Marks v GIO Australia Holdings Limited (1998) 196 CLR 494
Matsushita Electric, Tokyo High Court, 19 September 1977
Matthews v Young 1922 AD 492
Media 24 v SA Taxi Securitization (437/2010) [2011] ZASCA 117 (5 July 2011); 2011 (5) SA 329 (SCA); [2011] 4 All SA 9 (SCA)
Milns v Protea Assurance Company Ltd 1978 3 SA 1006 (C)
Minister of Defence v Jackson 1991 (4) SA (ZS)
Minister of Police v Skosana 1977 (1) SA 31 (A)
Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA)
Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA)
Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)
Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA)
Mittal Steel South Africa Limited and Others v Harmony Gold Company Limited and Another (before the Competition Appeal Court 70/CAC/Apr07)
Moaki v Reckitt and Colman (Africa) Ltd 1988 (4) SA 63 (D)
Modern Engineering Works v Jacobs 1949 (3) SA 191 (T)
Modimogale v Zweni 1990 (4) SA 122 (B)
Moroka Swallows Football Club Limited v The Birds Football Club 1987 2 SA 511 (W)
Mossel Bay Divisional Council v Oosthuizen 1933 CPD 509
Montres Rolex SA v Kleynhans 1985 1 SA 55 (C)
Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others 2013 (2) SA 254 (SCA)
Musca v Astle Corporation (Pty) Ltd (1988) 80 ALR 251, 262.

N

Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd (80/CR/Sep06)

Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (South Gauteng High Court case number 12026/2012)

New Media Publishing (Pty) Ltd v Eating Out Web Services CC 2005 (5) SA 388 (C)

Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E)

Nino's Coffee Bar & Restaurant CC v Nino's Italian Coffee & Sandwich Bar CC, Nino's Italian Coffee & Sandwich Bar CC v Nino's Coffee Bar & Restaurant CC 1998 (3) SA 656 (C)

Nochomowitz v Santam Insurance Co Ltd 1972 1 SA 718 (T)

North and Son (Pty) Ltd v Albertyn 1962 (2) SA 212 (A)

O

Oberlandsgericht Dusseldorf, *Berliner Transportbeton I*, KRB 2/05, 28 June 2005.

Oberlandesgericht Dusseldorf (Higher Regional Court of Dusseldorf), VI-Kart 3/05, Judgment of March 27th 2006, Judgment of the German Federal Court of Justice (BGH) June 19th 2007. KRB 12/07

OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd 2002 3 SA 688 (SCA)

O'Kennedy v Smith 1948 (2) SA 511 (W) 519

OLG Düsseldorf, urteil vom 16.04.2008 VI-2 U(Kart) 8/06-*Stadtwerke*. Available at http://www.energieverbraucher.de/files_db/1310984811_2652__12.pdf. Last accessed on 25 April 2014

Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA)

Oslo Land Company v Union Government 1938 (AD)

P

Patensie Sitrus Beherend v Competition Commission and Others [2003] 2 CPLR 247 (CAC) (7 July 2003)

Patz v Greene 1907 TS 427

Payen Components CC v Bovic Gaskets CC and Others 1994 (2) SA 464 (W)

Pepsico Inc v United Tobacco Co Ltd 1988 (2) SA 334 (W)

Perlman v Zoutendyk 1934 CPD 151

Perma Life Mufflers v International Parts Corp 392 US 134, 139 (1968)

Pfizer v Government of India 434 US 308, 315 (1978)

Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC)

Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd 1955 3 SA 249 (C)

Phumelela Gaming and Leisure Ltd v Gründlingh 2007 (6) SA 350 (CC) 362.

Pitt v Economic Insurance Company (Ltd) 1957 (3) SA 284 (D & C.L.D)

Portwood v Samvur 1970 4 SA 8 (RA)

Premier Foods (Pty) Ltd v Manoim NO and Others 2013 JDR 1666 (GNP) (unreported)

Premier Foods (Pty) Ltd v Manoim NO and Others 2016 (1) SA 445 (SCA)

Presidents Insurance Co Limited v Mathews 1992 1 SA 1 (A)

Probert v Baker 1983 (3) SA 229 (D)

Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others
1990 (1) SA 925 (A)

Q

Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E)

R

Ratcliffe v Evans (1892) 2 Q.B. 524

Receiver of Revenue, Cape v Cavanagh 1912 AD 459

Rectifier Communication Systems (Pty) Ltd v Harrison 1981 2 SA 283 (C) 286

Reiter v Sonotone Corp, 442 US 340, 344 (1979)

Road Accident Fund v Russell 2001 (2) SA 34 (SCA)

Road Accident Fund v Geudes 2006 (5) SA 583 (SCA)

Road Accident Fund v Odendaal 2004 1 SA 515 (W)

Roads and Traffic Authority v Royal (2008) 245 ALR 653

Rosebach & Co (Pty) Ltd v Dalmonte 1964 (2) SA 195 (N)

Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)

Ruto Flour Mills v Adelson 1958 4 SA 235 (T)

S

S v Mokgethi 1990 (1) SA 32 (A)

SA Eagle Insurance Co Limited v Hartley 1990 4 SA 833 (A)

SAD Holdings v South African Raisins 2000 3 SA 766 (T)

Salusa (Pty) Ltd v Eagle International Traders 1979 (4) SA 697 (C)

Santam Vesekeringsmaatskapy (Ltd) v Byleveldt 1973 (2) SA 146 (A)

Shield Insurance Company Ltd v Booysen 1979 3 SA 953 (A)

Schultz v Butt 1986 (3) SA 667 (A)

Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery 2001 2 SA 1129 (C)

Shatz Investments (Pty) Ltd v Kalovyrrnas 1976 (2) SA 545 (A)

Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA 1980 3 SA 653 (D)

Shenker Bros v Bester 1952 (3) SA 655 (C)

Shenker Brothers v Bester 1952 (3) SA 664 (A)

Silver Crystal Trading (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd 1983 (4) SA 884 (D)

Siman and Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A)

Slims (Pty) Ltd v Morris 1988 (1) SA 715 (A)

Smart v SAR & H 1928 NLR 361

Smit v Abrahams 1992 (3) SA 158 (C) 162 (1994 (4) SA 1 (A))

Spinner Communications v Argus Newspaper Ltd 1996 (4) SA 637 (W)
Spur Steak Ranches Ltd v Saddles Steak Ranch, Claremont 1996 (3) SA 706 (C)
Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others 2000 (2) SA 797 (SCA)
Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A)
Standard Chartered Bank of Canada v Nedperm Bank Limited 1994 (4) SA 747 (A)
Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA)
Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd, Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd 1972 (3) SA 152 (C)
Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd 1977 (2) SA 211 (C)
Stelwagon Mfg Company v Tarmac Roofing 63 F 3d 1267 (3d Cir. 1995).
Stone & Rolls (in Liquidation) v Moore Stephens (a firm) [2009] 3 WLR 455
STT Sales (Pty) Ltd v Fourie 2010 (6) SA 272 (GSJ)
South African Raisins (Pty) Ltd and Another v SAD Holdings Ltd and Another (case No 176/2000) [unreported judgment 20 September 2000]
Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A)
Sunlight Saunas Inc v Sundance Sauna Inc 427 F. Supp. 2d 1022 (D.Kan. 2006)
Sun-Rype Products Ltd v Archer Daniels Midlands Company (2011), BCCA 187 (CanLII)
Swart v Van der Vyver 1970 1 SA 633 (A)

T

Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A)
Telematrix (Pt) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)
The Commissioner of Inland Revenue v Mull & Co's Margarine Limited 1901 AC 217
The Trustees for the Time Being of the Children's Resource Center Trust and Others v Tiger Consumer Brands Limited (Western Cape High Court, case number 25833/2010)
Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)
Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA)
Trimmel v Williams 1952 3 SA 786 (C)
Triomed (Pty) Ltd v Beecham Group 2001 (2) SA 522 (T) 558
Truck and Car Co Ltd v Kar-N-Truck Auctions 1954 (4) SA 552 (A)
Tsuruoka Toya, Supreme Court, 8 December 1988
Turkstra Ltd v Richards 1926 (TPD) 276

U

Unitas Hospital v Van Wyk 2006 (4) SA 436 (SCA)
Union Government v Clay 1913 AD 385
Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 4 SA 376 (T)
University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A)

V

Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)
2003 (1) SA 398 (SCA)

Vernon Walden, Inc v Lipoid GmbH (Civ No 01-4826) (DRD) United States Court for the
District of New Jersey, 15 November 2005.

Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others [2006] ECR I-
6619

W

Waring and Gillow Ltd v Sherborne 1904 TS 340

WH Newson Holding Ltd v IMI Plc [2013] EWCA Civ 1377

WH Newson Holding Ltd v IMI Plc [2012] EWHC 3680

William Grant and Sons Ltd v Cape Wine Distillers Ltd 1990 (3) SA 897 (C)

Wong v Sony of Canada Ltd [2001] 9 C.P.C. (5th) 122 (Ont. S.C.J.).

Y

York University v Bell Canada Enterprises and Rogers Communications Inc [2009] 46447
Ont. S.C.,J (CanLII)

Z

Zenith Radio Corp v Hazeltine Research 395 US 100, 130–1 (1969)

STATUTES

South African Statutes

Apportionment of Damages Act 34 of 1956
Compensation of Occupational Diseases Injuries Act 130 of 1993
Competition Act 89 of 1998
Competition Amendment Act 1 of 2009
Competition Amendment Bill 2008
Harmful Business Practices Act 71 of 1988
Maintenance and Promotion of Competition Act 96 of 1979
Prescription Act 68 of 1969
Promotion of Access to Information Act 2 of 2000
Regulation of Monopolistic Conditions Act 24 of 1955
Road Accident Fund Act 56 of 1996
The Constitution of the Republic of South Africa Act 108 of 1996
Trade Practices Act 76 of 1976

INTERNATIONAL STATUTES

Australia (Competition and Consumer Act 2010)
Australian Evidence Act, 1995
Canada (Competition Act 1985)
Hungarian Competition Act 1996
Japan Private Monopolization and Maintenance of Fair Trade, Law 54 of 1947
Switzerland (Act on Cartels and other Restraints of Competition 1995)
United Kingdom (Competition Act 1998)
United States (Sherman Act 1890)
United States (the Clayton Act 1914)
United States (Federal Trade Commission Act 1914)

APPENDICES

Appendix 1: Hypothetical case study: A practical example of a follow-on competition damages calculation

1. Introduction and background

The hypothetical case considered is a private civil damages action arising from the finding by the Competition Tribunal ('Tribunal') that a price-fixing cartel had operated within the market for the supply of fresh meat. The Tribunal imposed administrative penalties against the cartel members and confirmed in its finding that the cartel had operated from December 2006 to February 2009 and had been orchestrated through the industry body, Fresh Meat Producers South Africa ('FMPSA') and that all the members of FMPSA had been part of the price-fixing cartel.

In light of the Tribunal's findings, a restaurant group, MeatEat, applied to the Tribunal for a section 65 certificate¹ and instituted a private damages action against all the FMPSA members for whom MeatEat purchased fresh meat during the period of the cartel.

2. The market for fresh meat

The fresh meat purchased by MeatEat is a perishable product in a local market, meaning that customers purchase the product within the country in which it is produced, in this example, South Africa. The South African fresh meat supply includes five major producers, all of whom are members of FMPSA and are accordingly

¹ s 65 of the Competition Act 89 of 1998.

members of the cartel and sell the vast majority of their individual meat supply within the South African market.

The types of products supplied by the meat producers to various restaurants are similar and also, given the price-fixing cartel, the prices charged by the producers to the restaurants have been the same during the period of the cartel. To the strong restaurant chains, with well-established national brands, product would be ordered and delivered daily; this includes MeatEat. Smaller, less established local restaurants would order on an *ad hoc* basis.

Market studies have indicated that the South African fresh meat market is constrained from imports, as meat producers located abroad find it commercially too expensive to import fresh meat into the South African market. Effectively, the pricing practices of local meat producers are not inhibited by the threat of import competition. The nature of the product makes it susceptible to volatility, as industry factors such as disease and drought could have a material impact on the availability of fresh meat.

3. The Competition Law Contravention and the claim by MeatEat

The meat producers engaged in a price-fixing cartel,² which has the effect of increasing the price of fresh meat. Fresh meat is an important input cost of the meals prepared and sold by MeatEat.³ The increase in the price of fresh meat could also have an indirect effect on the business of MeatEat, if less volume was purchased and subsequently sold by MeatEat, culminating in further loss being suffered.

² In contravention of s 4(1)(b)(i) of the Competition Act 89 of 1998.

³ Conceivably the price-fixing cartel could have had other peripheral effects on the market, including the stifling of the quality of product delivered, as well as the improvement of business and production efficiencies by the cartel members.

MeatEat, upon consideration of the facts, has instituted action to recover damages under the following two headings:

(a) Actual loss suffered as a result of the increased meat price. This constitutes the reduced profits generated from the meat purchased by MeatEat due to it having to pay the increased price for the fresh meat input.

(b) Loss of profit suffered as a result of the lower volume of meat purchased due to the high price of the input. This constitutes the lost profits, which would have been generated by MeatEat based on the additional meals it would have been able to sell and generate an income (profit) on had the input price of the fresh meat been lower.

4. Value chain of the relevant market(s)

Figure 1 Appendix 1 below serves to graphically illustrate the relevant markets affected (and potentially affected) by the cartel.

MeatEat is a direct purchaser from the price-fixing cartel and was accordingly exposed to the direct harm occasioned by the anti-competitive behaviour. Other entities may conceivably also have suffered harm, despite not being a direct purchaser of the cartel. For example, the restaurant customers may have suffered harm by paying increased prices for their meat dishes in restaurants, should some of the price increase have been passed-on by the restaurant to the end customer.

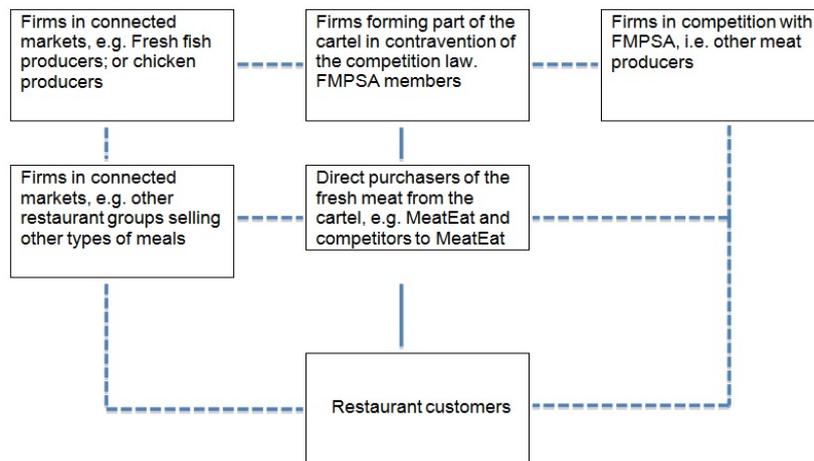


Figure 1 Appendix 1: Value Chain in fresh meat market

5 Restaurant Pricing and the elasticity of demand in the fresh meat market

MeatEat has provided pricing for its meat dishes in its various outlets for the period of the infringement. These price lists indicate that the average price charged by MeatEat for a meat dish is R120.00. Given the efflux of time, MeatEat cannot provide a detailed information of its pricing prior to the cartel period; however, from the available pre-cartel information, it is possible to deduce that the most popular meat dishes during the pre-cartel period (i.e. prior to December 2006) were sold at an average price of R117.00. MeatEat has indicated that during the pre-cartel period, a profit of approximately R50.00 was made per customer per meal. MeatEat estimates that an average dish contains approximately 250g of fresh meat.

During the contravention period, the records show that approximately 1 million meat dishes were sold by MeatEat, equating the MeatEat having ordered 250 000

kilogrammes of meat during the period in which the cartel engaged in its price-fixing conduct.⁴

An academic study performed on consumer behaviour indicated that the average person's willingness to pay for meat dishes in a restaurant was highly sensitive. The study indicated that a 10% increase in the price of meat dishes at a restaurant would result in a 7% decrease in the demand by customers. The market can therefore be described as having an own-price elasticity of -0.7.⁵

6 Estimating the cartel overcharge and potential passing-on by MeatEat

6.1 Overcharge

Not much information is available on comparator restaurants for the pre-cartel period, making the use of sophisticated econometric techniques such as the regression analysis and difference-in-difference comparator-based methods difficult to apply.⁶ In these circumstances, MeatEat has used two more simple techniques for calculating

⁴ This is calculated by considering that on average the 1 million meals each contained approximately 250g of fresh meat. It is expected that the actual purchases could have been more than 250 000kg, as there is undoubtedly going to be losses and waste in the preparation of the meal between the purchased fresh meat and the meat actually served to customers for each meal.

⁵ Price elasticity can be explained as being the percentage change in quantity divided by the percentage change in price. For example, if the price increased by 10% and the demand for the product decreased by 20%, then the elasticity is -2. If a market experienced an increase in price of 10%, but negligible or no decrease in demand, then the market would be considered inelastic; effectively meaning that a price setter has a degree of autonomy in setting a price for the good, without the fear of decreasing its existing customer base. See also Niels, Jenkins and Kavanagh 34-35; as well as Brasey 94.

⁶ See Ch 7 par 7.4 for a discussion of the difference-in-difference method to damage estimation and see the ARIMA models (regression analysis) discussed in Ch 7 par 7.3.4.3.

the estimated overcharge for the pre-cartel period and the period of the cartel price. These techniques are:

(a) Time series comparator: Which will be used to calculate the difference in the price paid by MeatEat for fresh meat before the cartel and during the cartel; and

(b) Cross-sectional comparator: Which will consider the price paid for fresh meat in other geographical markets, with similar characteristics to the South African market in which MeatEat operates. For purposes of the cross-sectional comparator, MeatEat has identified BeefHouse a national restaurant chain, operating in Botswana, and The Steak Grill, a single restaurant operating in Namibia.

Upon consideration of the information obtained, the two methods proposed by MeatEat provided two overcharge estimates as set out in **Table 1 Appendix 1**.

The time-series comparator⁷ indicated that the price charged by the producers pre-cartel was R56/kg. During the cartel period the price increased to R78/kg. This meant that the cartel had increased the price charged for fresh meat by R22/kg.

The cross-sectional comparison⁸ considered the prices paid by restaurants for fresh meat in other markets. This showed that the average price paid by these comparator restaurants was R52/kg. This indicated a difference of R28/kg in the price paid in the comparator markets, which have been untainted by the price-fixing cartel, and the cartel price of R78/kg for fresh meat.

⁷ See Ch 7 par 7.3.

⁸ See Ch 7 par 7.2.

	Time-series comparison: Overcharge	Cross-sectional comparison: Overcharge
Overcharge (R/kg)	22	26
Average price of fresh meat during cartel period (R/kg)	78	78
Overcharge as a percentage of the cartel price	28%	33%

Table 1 Appendix 1: Estimated overcharge by the cartel. Importantly, this estimated overcharge only applies to the meat portion of each dish and does not mean that the price of the meal has increased by the overcharged rate.

6.2 Passing-on of the cartel overcharge

The parties to the damages action, being the cartel members and MeatEat, have differing interpretations and calculations of the extent of the overcharge passed-on by MeatEat to its customers. The cartel members argue that the entire overcharge was passed on by MeatEat, citing economic studies on the agricultural and fuel markets which suggest that in the medium to long run, any overcharge is passed on by the intermediary to the end-consumer. MeatEat argues that the extent of the pass-on is not the entire overcharge and that it could at most be a portion of the overcharge experienced. MeatEat argues that the lowest pass-on would be approximately 50% of the overcharge experienced as a result of the price-fixing.

		Estimated Overcharge using the Time-series comparison (28%)	Estimated Overcharge using the Cross-sectional comparison (33%)
Passing-on rate			
Low	50%		
Medium	75%		
High	100%		
Estimated Overcharge passed-on (R/kg)			
Low		11.00	13.00
Medium		16.50	19.50
High		22.00	26.00
Retained income after passing-on (R/kg)			
Low		11.00	13.00
Medium		5.50	6.50
High		0.00	0.00

Table 2: Appendix 1: The extent to which the overcharge was passed on will have a significant impact on the actual damages claimable by MeatEat. In this case the cartel members argue that the pass-on rate is high (100%) and that the claimant has therefore suffered no loss. The claimant, MeatEat, acknowledges that some of the overcharge was passed-on; however, suggests that this is low and represents as little as half the overcharge (50%).

The analysis above highlights the effect the pass-on rate will have on the extent of the damage suffered and for purposes of this hypothetical example the mid-point of a medium pass-on rate (75%) is also used in the analysis.⁹

7 Lost volumes resulting from the price-fixing cartel

Besides the lost profits, MeatEat also claims to have suffered a loss of customers caused by the higher prices charged for the meals by MeatEat.

The first step of calculating the lost-volume harm is to estimate the lost volumes experience by MeatEat. For purposes of this illustration, the low pass-on scenario in the time-series comparison will be explained; however, consideration will be given to each of the potential pass on rates in Table 2 Appendix 1. The overcharge was calculated to be R22/kg.¹⁰ Various pass-on rates were considered in Table 2 Appendix 2, for this explanation the low pass-on rate of 50% is discussed. The value passed-on to customers is therefore R11/kg. Each dish requires on average around 0.25kg of fresh meat,¹¹ this results in an increase of R2.75 per dish.¹² The average price of meat dishes sold at MeatEat during the cartel period was estimated to be R120.00. Therefore, R2.75 of the R120, or 2.29%, represents the overcharge passed-on to the customer.

⁹ See Ch 11 for a discussion of the passing-on defence.

¹⁰ See Table 1.

¹¹ See par 5 above.

¹² Calculated as being 0.25 of R11. The R11 is the extent of the overcharge per kilogram and must therefore be divided by 0.25 (representing an individual meal) to establish the effect of the overcharge on the volume of meals sold.

Table 3 Appendix 1: In order to estimate the reduction in volume the effect of the

	Estimated Overcharge using the Time-series comparison (28%)	Estimated Overcharge using the Cross-sectional comparison (33%)
Estimated price per dish before the cartel (R)		
Low (50% pass-on)	117.25	116.80
Medium (75% pass-on)	115.90	115.10
High (100% pass-on)	114.50	113.50
Average price per meal during cartel period (R)	120.00	
Estimated price increase caused by the cartel		
Low (50% pass-on)	2.29%	2.71%
Medium (75% pass-on)	3.44%	4.06%
High (100% pass-on)	4.58%	5.42%

price-fixing practice on the price of the dish and the subsequent consumer behaviour will have to be considered. The table above provides estimates of the increase in average price per dish resulting from the cartel conduct.

It was indicated in paragraph 5 that a market study estimated a price elasticity of -0.7 (meaning that a 10% price increase would lead to a 7% fall in demand). MeatEat specialises in meat dishes, and therefore, any loss in volume would mean the loss of a customer. This means that a price increase of R2.75 per dish resulted in a decrease in customer volume of 1.6%.¹³

The 1.6% volume loss, along with the number of customers during the infringement, could be used to identify how many more customers MeatEat may have had if the

¹³ Calculated as being $2.29\% \times -0.7 = -1.6\%$.

contravention had not taken place. MeatEat estimates that it had 1 million customers during the period of the contravention.

	Estimated Overcharge using the Time-series comparison	Estimated Overcharge using the Cross-sectional comparison
Lost volume of customers¹⁴		
Low (50% pass-on)	1.60%	1.90%
Medium (75% pass-on)	2.41%	2.84%
High (100% pass-on)	3.21%	3.79%
Counterfactual customer¹⁵ volumes		
Low (50% pass-on)	1 016 000	1 019 000
Medium (75% pass-on)	1 024 100	1 028 400
High (100% pass-on)	1 032 100	1 037 900
Lost customers		
Low (50% pass-on)	16 000	19 000
Medium (75% pass-on)	24 100	28 400
High (100% pass-on)	32 100	37 900

¹⁴ See explanation above on the calculation of the reduction in customer volume based on an increase in price of the product.

¹⁵ This is calculated as being the additional MeatEat customers had it not been for the price increase caused by the cartel. Calculated as being 1 million customers multiplied by the percentage volume loss, for example $1\,000\,000 \times 1.6\% = 1\,016\,000$.

Table 4 Appendix 1: This illustrates the loss of customers which MeatEat believes it would have serviced had it not been exposed to the price-fixing cartel. For purposes of illustration, the values have all been rounded off.

8. Lost Profits

The full extent of the loss suffered by MeatEat will be the combination of the loss occasioned by the overcharge and the loss in customer volumes caused by the increase in price.

	Estimated Overcharge using the Time-series comparison	Estimated Overcharge using the Cross-sectional comparison	Average loss: Pooling the outcomes of the two models¹⁶
Lost profits from overcharge¹⁷			
Low (50% pass-on)	2 750 000	3 250 000	3 000 000
Medium (75% pass-on)	1 375 000	1 625 000	1 500 000
High (100% pass-on)	0	0	0
Lost Profits from decreased volumes¹⁸			

¹⁶ See Ch 12 par 12.3.2 for a discussion on the pooling of findings by different economic models.

¹⁷ See the discussion in par 7 above on how the decrease in profits per meal is calculated. The decrease in profit per meal is then multiplied by the number of meals sold in order to reach a damages estimation.

¹⁸ The average profit per meal was estimated as being R50, see par 5 above. Based in the calculation as to the extent of the lost volumes suffered by MeatEat, these volumes

Low (50% pass-on)	800 000	950 000	875 000
Medium (75% pass-on)	1 205 000	1 420 000	1 312 500
High (100% pass-on)	1 605 000	1 895 830	1 750 000
Total loss of profit			
Low (50% pass-on)	3 552 080	4 197 920	3 875 000
Medium (75% pass-on)	2 578 125	3 046 875	2 812 500
High (100% pass-on)	1 064 170	1 895 000	1 750 000

Table 5 Appendix 1: This serves to summarise the damages estimations for the different permutations considered by the two models used by MeatEat to estimate the extent of its damages caused by the price-fixing cartel.

9 Conclusion

The example above serves as a simplified case study of how a potential claimant might go about quantifying the extent of the loss caused by a price-fixing cartel. In the context of bringing a civil damages action against a firm found to have contravened the Competition Act, the claimant will have to allege and prove all the necessary elements of the delictual action.¹⁹

It is argued that the elements of conduct and wrongfulness may be dealt with by the finding made by the Competition Tribunal, or Competition Appeal Court; however, the

are multiplied by the estimated lost profit to achieve an estimation of the damage suffered.

¹⁹ The elements of a delictual action are discussed in Ch 3 par 3.3.3.

claimant will still be faced with having to prove the remaining elements of causation and the extent of damage suffered.²⁰ The civil courts will therefore be tasked to assess whether the anti-competitive conduct has *caused* damage to the claimant and also *quantify* the extent of such damage.

The example above does not purport to solve the difficulties of quantifying damages, but rather serves to provide a short insight into the difficulties associated with performing damages estimations in cases of competition law contraventions and offer the courts another way to best determine the damage suffered.

Appendix 2: Variables of main relevance to estimating damages from cartels

Variables of main relevance to estimating damages from cartels			
Variable representing the harm	Other relevant variables when claimant is direct purchaser and intermediate seller	Other relevant variables when claimant is indirect purchaser and intermediate seller	Other relevant variables when claimant is end-consumer
Overcharge paid on units that are purchased	Factual and counterfactual prices charged by the cartelists, or value of overcharge Factual volumes purchased Discount rate Pass-on rate for that stage of the supply chain Financial parameters	Factual and counterfactual prices charged by the cartelists, or value of the overcharge Pass-on rate for each stage of the supply chain above Factual volumes of the cartelised good purchased Discount rate Pass-on rate for that stage of the supply chain Financial parameters	Factual and counterfactual prices charged by the cartelists, or value of the overcharge Pass-on rate for each stage of the supply chain above Factual volumes of the cartelised good purchased Discount rate

²⁰ See Ch 3.

Harm caused by a reduction in the volume of units being purchased	Factual and counterfactual volumes purchased, or lost/reduced volume of units purchased Profit margin per unit Discount rate Financial parameters	Factual and counterfactual volumes purchased, or lost/reduced volume of units purchased Profit margin per unit Discount rate Financial parameters	Factual and counterfactual volumes purchased, or lost/reduced volume of units purchased Difference in consumer benefit caused by not purchasing units (and instead purchasing an alternative good) Discount rate
---	--	--	--

Note: These variables are identified in the conceptual framework discussed in this section.

Appendix 3: Variables of main relevance to estimating damages from exclusionary conduct

The next step is to assign values to them, based on certain data sources (see text below), by estimation using various methods and models, possibly aided by further insights from economics and finance (source: Oxera).

Variables of main relevance to estimating damages from exclusionary conduct	
Variable representing the harm	Other relevant variables when claimant is competitor
Fall in profits	Factual and counterfactual volumes sold by the competitor Factual and counterfactual prices charged by the competitor Avoided costs if volumes are reduced

	Discount rate
	Financial parameters

Appendix 4: Examples of data sources that can be consulted for purposes of performing a damages estimation

Typical source	Typical data	Typical documents
Competition authority	Dates for the infringement, which parties were involved, how the infringement operated	Press releases, official decision document
Public domain	Public domain pricing information, observable counterfactual market, demand elasticity estimates, ¹ inflation rate	Industry studies, industry/government statistical publications, price comparison websites, commercial databases specific to an industry, statutory accounts ²
Claimants	Intermediate producer: payments, volumes purchased, cost structure (eg, proportions of fixed and variable costs) End-consumers: payments, volumes purchased, willingness to pay/elasticity (eg, via survey)	Management accounts, invoices Invoices, surveys, sworn statements
Defendants	Revenue, volumes, market share, prices, input costs, cost structure	Management accounts, sales databases, customer relationship management systems
Other parties in the supply chain	Payments, volumes purchased, cost structure	Management accounts
Statutory sources	Statutory interest rates, corporate tax rates and rules, sales tax rates and rules, other taxes	Government departments or courts that determine the statutory rates, tax authorities